

PART I

Introduction

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Excerpt
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Introduction

It is often said that international humanitarian law (IHL)¹ is developed with a view to striking a realistic and meaningful balance between military necessity and humanity, and that the law therefore ‘accounts for’ military necessity. What it really means to say so, however, remains obscure. This obscurity has given rise to different opinions.

Kriegsräson,² as well as its more recent variations, holds that the military necessity of a given act ‘rights’ or ‘repairs’ its unlawfulness that positive IHL rules may otherwise establish. Although the law

¹ In principle, this book uses the expressions ‘international humanitarian law’ and ‘IHL’ throughout. For our purposes, the discipline’s other monikers, such as the ‘law of armed conflict’, the ‘laws and customs of war’ and the like, should be considered essentially synonymous.

² This doctrine is named after the German maxim ‘*Kriegsräson geht vor Kriegsmanier*’ (‘Necessities of war override rules of war’). In essence, *Kriegsräson* asserts that military necessity permits any belligerent conduct conducive to success and overrides unqualified rules of positive IHL that obligate contrary action. Isabel V Hull, ‘“Military Necessity” and the Laws of War in Imperial Germany’ in Stathis N Kalyvas, Ian Shapiro and Tarek Masoud (eds), *Order, Conflict, and Violence* (Cambridge: Cambridge University Press, 2008) 352, pp. 359–74; Coleman Phillipson, *International Law and the Great War* (London: T. Fisher Unwin, 1915), pp. 133–38; James Wilford Garner, *International Law and the World War*, 2 vols. (London: Longmans, Green and Co., 1920), vol. I, pp. 278–82; *ibid.*, vol. II, pp. 195–98; NCH Dunbar, ‘The Significance of Military Necessity in the Law of War’ (1955) 67 *Juridical Review* 201, at 203–04, 207–08; William V O’Brien, ‘The Meaning of “Military Necessity” in International Law’ (1957) 1 *World Polity* 109, at 119–37; Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (New York: Columbia University Press, 1983), pp. 172–79; Mika Nishimura Hayashi, ‘The Martens Clause and Military Necessity’ in Howard M Hensel (ed), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Hampshire, Burlington: Ashgate, 2008) 135, pp. 137–38; Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010), pp. 265–68; Etienne Henry, *Le Principe de nécessité militaire: Histoire et actualité d’une norme fondamentale du droit international humanitaire* (Paris: Pedone, 2016), pp. 286–354.

accounts for military necessity, its rules cannot be construed so that the belligerent³ is denied the option to do what it needs to succeed. On this view, where an IHL rule is formulated without military necessity exceptions, it merely indicates that the rule's framers⁴ deemed its prescriptions generally consistent with considerations of military necessity. Whenever the rule collides with the actual military necessity of an act, the latter trumps the former. Consequently, positive IHL admits military necessity pleas even in defence of conduct that deviates from its unqualified rules. *Kriegsräson* found support in Germany during the late nineteenth century. It remained influential among German military and international lawyers until the end of World War II. Since its rejection at post-war trials,⁵ *Kriegsräson* has been thoroughly discredited.⁶

³ In this book, the term 'belligerent' refers not only to a party to an armed conflict but also to a combatant member of its armed forces.

⁴ The expression 'framers' refers primarily to states that validly posit IHL rules by forming custom and concluding treaties. On the role allegedly played by judges at international criminal tribunals in 'supplanting' the pre-eminence that states have traditionally enjoyed in this regard, see Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 *Virginia Journal of International Law* 795, at 816.

⁵ *In re Rauter*, in 16 *Annual Digest and Reports of Public International Law Cases* [1955] 526, p. 543; *In re Burghoff* in 16 *Annual Digest and Reports of Public International Law Cases* [1955] 551, pp. 554–57; *United States of America v Wilhelm von List et al.*, Judgment, *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, 15 vols. (Washington, DC: United States Government Printing Office, 1950), vol. XI, 1230 (hereinafter *Hostage*), pp. 1255–56, 1272–73, 1296; *In re von Lewinski (called Manstein)* in 16 *Annual Digest and Reports of Public International Law Cases* [1955] 509, pp. 512–13; *United States of America v Alfred Felix Alwyn Krupp von Bohlen und Halbach et al.*, Judgment, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 15 vols. (Washington, DC: United States Government Printing Office, 1950), vol. IX, 1327 (hereinafter *Krupp*), p. 1340; *United States of America v Wilhelm von Leeb et al.*, Judgment, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 15 vols. (Washington, DC: United States Government Printing Office, 1951), vol. XI, 462 (hereinafter *High Command*), p. 541.

⁶ Office of the Judge Advocate General, Canadian Forces, *Law of Armed Conflict at the Operational and Tactical Levels* (2000), p. 2-1; UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), p. 23; Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict*, 4 vols. (London: Stevenson and Sons, 1968), vol. II, p. 136; Christopher Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, 2nd edn (Oxford: Oxford University Press, 2008) 1, pp. 38; Solis, *Law of Armed Conflict*, pp. 265–68.

1.1 Towards a New Theory of Military Necessity

Most modern theories take *Kriegsräson*'s fallacy as a common point of departure.⁷ They agree that IHL accounts for military necessity, and that this entails the inadmissibility of military necessity pleas *vis-à-vis* the law's unqualified prescriptions.

One widely held view takes the matter further. Not only does IHL refuse to let the military necessity of an act remedy its unlawfulness. More importantly, the law also affirmatively 'wrongs' or 'vitiates' an otherwise IHL-compliant act should it prove militarily unnecessary. The fact that the law accounts for military necessity does not leave the belligerent at liberty to do what is, after all, lacking in military necessity. Where positive IHL rules authorise action, it only means that whatever they authorise is generally considered militarily necessary. In the event of a collision between an act being militarily unnecessary, on the one hand, and it being lawful according to positive IHL rules, on the other, the former defeats the latter. A militarily unnecessary act breaches IHL, all things considered, whether it is consistent with the law's positive rules or not.

This view is predicated on two central assertions. To begin with, military necessity creates directives, especially of a restrictive or prohibitive character. Implicit in this construal is the notion that it is illegitimate to perform militarily unnecessary acts. In other words, 'that which *can* be done without *must* be done without'. Furthermore, the restrictive or prohibitive property of military necessity remains intact through the process of IHL norm-creation. This property now operates as an independent, free-floating layer of normative restraint over and above positive IHL rules.

Another view also shapes today's military necessity discourse. According to that view's proponents, military necessity may not be pleaded anew with a view to defending conduct in breach of unqualified IHL rules. Nor, for that matter, may humanity be invoked as a justification for such conduct either. The underlying idea here is that military necessity and humanity are inevitably in conflict with each other. Every IHL rule embodies their compromise struck during its creation. Where the rule is unqualified, neither pleas are admissible.

⁷ This is also true of some influential pronouncements on the matter – such as, for example, the 1863 Lieber Code – that were just ahead of, or contemporaneous with, *Kriegsräson*'s emergence in Germany. Articles 14–16, Instructions for the Government of Armies of the United States in the Field, 24 April 1863 (hereinafter Lieber Code); Hull, "Military Necessity" and the Laws of War'.

In order for this theory to work, the following propositions need to be true. First, what is militarily necessary is always inhumane, whereas what is humane is always militarily unnecessary. Second, both military necessity and humanity are considerations that generate imperatives. In other words, the framers of IHL rules have reason to obligate militarily necessary acts and forbid militarily unnecessary acts. Similarly, IHL framers have reason to obligate humane acts and forbid inhumane acts. Third, both military necessity and humanity are involved in the process through which every IHL rule is created.

These contemporary theories all treat military necessity as a reason for belligerent conduct's normative regulation in one way or the other. For the most part, however, they appear to be somewhat casual suppositions – rather than the products of vigorous reflections – or, in any event, obstinate dogmas from which their adherents are often unwilling to depart. One may question whether a given act's military non-necessity really makes it appropriate for prohibition, or whether an act's military necessity really makes it obligatory, under IHL. Military necessity's normative characteristics, including how it interacts with other notions such as humanity, have yet to be properly investigated.

Modern theories also conflate the three distinct contexts in which military necessity appears.⁸ In a material context, it is important to ask whether behaving in a particular way on a specific occasion constitutes a military necessity or non-necessity in view of its stated military purpose. At issue in the context of IHL norm-creation is what the law's framers should do about a given kind of conduct, once it has been agreed that the kind of conduct in question is militarily necessary or unnecessary in the sense just described. There are two key questions in the juridical context of positive IHL. First, should an act in breach of unqualified IHL rules nevertheless be deemed lawful if it was militarily necessary? Second, should an act lacking in military necessity be deemed unlawful even if it otherwise complied with the letter of the law?

No existing theory systematically probes military necessity's normative properties or accounts for its various contexts. This book develops and defends such a theory.

⁸ Gabriella Blum, "The Laws of War and the "Lesser Evil"" (2010) 35 *Yale Journal of International Law* 1; Diane A Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Leiden and Boston: Martinus Nijhoff Publishers, 2012), pp. 333–47 (criticising Blum).

1.2 Structure

We will consider two principal questions. First, what does it mean to say that IHL accounts for military necessity? Answering this question involves, among other things, clarifying what military necessity means. Admittedly, military necessity can mean different things to different people. It seems nevertheless instructive to begin by specifying whose understanding of the notion matters, and for what reason. Second, to what normative consequences does IHL accounting for military necessity give rise?

This book is organised as follows. There are eleven chapters in total. The book's nine substantive chapters, excluding this introductory chapter and a concluding chapter at the end, are grouped into three parts (Parts II, III and IV). Each part deals, respectively, with: (a) military necessity as fitness of the means taken vis-à-vis the ends sought in war-fighting; (b) military necessity as a set of reason-giving considerations behind how the framers of IHL create its rules; and (c) military necessity as it appears in positive provisions of IHL and international criminal law (ICL).

Chapters 2 and 3 (Part II) briefly discuss military necessity in its material context. This, it may be said, is the context most familiar to planners and commanders tasked with tactical, operational and strategic decisions, as well as military historians assessing their efficacy.

In Chapter 2, I endeavour to illustrate what it means for a given belligerent act to be militarily necessary or militarily unnecessary in its most elementary, practical sense.⁹ This chapter will offer answers to questions such as when an act is amenable to military necessity assessment; how similarly competent assessors may reasonably disagree about an act's military necessity; whether an act must cause the fulfilment of its objective in order to be considered militarily necessary; what factors help assess whether an act constitutes a military necessity or a non-necessity; and whether military necessity assessments of specific acts can be meaningfully generalised.

Chapter 3 addresses itself to three major objections against the idea that we can consider military necessity in its material sense.¹⁰ First, by assessing an act's material necessity or non-necessity, one may already be passing judgment on its quality as something desirable or undesirable,

⁹ For an earlier version of Chapter 2, see Nobuo Hayashi, 'Contextualizing Military Necessity' (2013) 27 *Emory International Law Review* 189, at 195–211.

¹⁰ For an earlier version of Chapter 3, see *ibid.*, at 211–22.

what a competent soldier should or should not do. In other words, it is possible that necessity assessments are by definition normative assessments. Second, pursuing military necessities and avoiding non-necessities may mark not only a belligerent's competence *qua* member of an occupational group, but also a person's competence *qua* moral agent. To put it differently, the very point of fighting competently may well be a normative one. Third, it is arguable that soldiers should refuse to deem unethical acts militarily necessary, all things considered. Consequently, only ethically competent fighting should count as truly vocationally competent fighting.

This part shows that, in its material sense, military necessity reflects a two-fold truism. It is in each belligerent's self-interest to do what is necessary, and to avoid what is unnecessary. Together, Chapters 2 and 3 prepare the conceptual foundation on which to build Part III's examination of normative military necessity, which shifts our perspective from that of military practitioners and historians concerned with whether an act is militarily necessary, to that of law-givers concerned with how a kind of action should be regulated *once* it is deemed consistent or inconsistent with military necessity.

Part III (Chapters 4–7) reflects on military necessity in its normative context. This is also the context in which I endeavour to elucidate what it means to say that IHL accounts for military necessity. Here, the military necessity or non-necessity of a belligerent act provides the framers of IHL rules with reason to decide whether it should be obligated, permitted, restricted or prohibited.

Chapter 4 considers whether military necessity helps modify the legitimacy of a given type of belligerent act.¹¹ In so doing, it engages several key questions regarding the relationship between the act's military necessity or non-necessity, on the one hand, and the evil or non-evil it may be deemed to entail, on the other.¹² One may ask, for example, whether an act deemed to be lacking in military necessity becomes illegitimate *for that reason alone*. We look into the possibility that, while

¹¹ For an earlier version of Chapter 4, see *ibid.*, at 223–54.

¹² Recall here that the preamble of Hague Convention IV (1907) expresses the drafters' 'desire to diminish the evils of war, as far as military requirements permit'. Preamble, Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, in force 26 January 1910 (hereinafter Hague Convention IV [1907]). War-related evils may include, *inter alia*, death; injury and attack on the bodily, mental or moral integrity of persons; property destruction and damage, adverse change of ownership or control; and detrimental change in social institutions or procedures.

the legitimacy of an evil act does depend to some extent on its status as a military necessity, the legitimacy of an un-evil act does not.

Chapter 5 summarises a major theory on the contemporary significance of military necessity.¹³ We will call this theory the ‘inevitable conflict thesis’. Its primary concern is to ensure that IHL framers resolve the irreconcilable demands of military necessity and humanity, devise a workable compromise between them, and prevent the belligerent from being bound by conflicting IHL rules. The theory’s proponents find it important to preclude military necessity pleas vis-à-vis unqualified prohibitions. We will witness how they treat military necessity as inevitably in conflict with humanity. It becomes necessary for them to establish that both military necessity and humanity demand some acts and condemn the others. They endeavour to show how, with respect to any given belligerent act, the framers allow humanity to trump military necessity, allow military necessity to trump humanity, or find some middle ground between them, and posit an IHL rule accordingly. This, according to the theory’s adherents, is what accounting for military necessity and humanity really means. They insist that the entire *corpus juris* of positive IHL embodies this compromise and that neither military necessity nor humanity pleas are consequently admissible vis-à-vis unqualified rules.

In Chapter 6, we question this theory on two grounds.¹⁴ First, is what is militarily necessary always inhumane, and is what is humane always militarily unnecessary? Is it not true that some belligerent acts are both humane and consistent with military necessity – or both inhumane and lacking in military necessity, as the case may be? Second, do military necessity and humanity always generate imperatives? Is it really of any concern to IHL framers that the belligerent perform militarily necessary acts and avoid militarily unnecessary ones? Would it not be more likely that military necessity considerations are normatively indifferent? Could the same not be said of at least some humanitarian considerations?

Chapter 7 reappraises the inevitable conflict thesis’s two further grounds.¹⁵ Does what military necessity indifferently permits or tolerates always conflict with considerations of humanity? Where humanity demands what military necessity permits, or where humanity condemns what military necessity merely tolerates, would the belligerent not satisfy

¹³ For an earlier version of Chapter 5, see Nobuo Hayashi, ‘Military Necessity as Normative Indifference’ (2013) 44 *Georgetown Journal of International Law* 675, at 688–703.

¹⁴ For an earlier version of Chapter 6, see *ibid.*, at 703–26.

¹⁵ For an earlier version of Chapter 7, see *ibid.*, at 726–49.

them both by acting as directed by humanity? The question, then, is how the framers of IHL rules approach behaviour that jointly satisfies military necessity and humanity – more specifically, when the framers elect to obligate such behaviour without qualification, and what explains situations where they decline or fail to do so.

Chapter 7 also considers acts that humanity condemns yet military necessity permits, and those that humanity demands yet military necessity merely tolerates. Despite their appearance to the contrary, we have reason to wonder whether these acts are still capable of joint satisfaction. Our objective here is to discover how IHL framers capture such possibilities in the rules they posit. Chapters 6 and 7 give us what may be termed the ‘joint satisfaction thesis’, in contradistinction to the inevitable conflict thesis introduced earlier.

Part III shows how military necessity functions as a set of normatively indifferent considerations in IHL norm-creation. For IHL framers to posit an unqualified rule is for them to exclude all contrary liberties that belligerents would otherwise wish to pursue on account of military necessity. Elsewhere, the framers permit such liberties exceptionally, indeterminately, principally or unrestrictedly. The combination of these eventualities is what it means to say that the law accounts for military necessity.

Chapters 8–10 (Part IV) bring us to military necessity in its juridical context. Here, we consider three normative consequences to which IHL accounting for military necessity gives rise. First, juridical military necessity may manifest itself through exclusion. Second, it may take the form of an exceptional clause. Third, it may appear as a negative element of crimes. These consequences primarily affect belligerents claiming or disputing compliance with the law’s applicable rules, as well as those called upon to determine if a given act constituted an IHL violation or a punishable offence under ICL.

Chapter 8 deals with exclusion.¹⁶ At issue is whether normatively indifferent considerations such as military necessity may be invoked in defence of acts inconsistent with unqualified IHL rules. It might be asked whether the inevitable conflict thesis is correct in asserting that all positive IHL rules, including those that are unqualified, involve military necessity and humanity in their norm-creation. If it were shown that not all positive IHL rules do so, would the thesis’s adherents not be compelled to acknowledge that military necessity or humanity might be

¹⁶ For an earlier version of Chapter 8, see *ibid.*, at 749–78; N Hayashi, ‘Contextualizing Military Necessity’, at 262–79.