

The three meanings of military necessity in contemporary IHL

The most fundamental and arguably hardest-won consensus underlying International Humanitarian Law in the 21st century is that appeals to military necessity no longer justify violations of acknowledged rules.¹ The ‘Hague notion of military necessity’ has ousted the ‘Lieber Code understanding’ of it. While the latter avers that necessity ‘admits of all direct destruction incidentally unavoidable in the armed contests of the war’, the former orders belligerents to ‘abstain from destruction not imperatively demanded by the necessities of war’.

Rather than solving all problems, the agreement that necessity is the bottom line of permissibility rather than a licence for violence has brought into sharp relief multiple interpretive controversies. Is the necessity of expected collateral damage a condition of proportionality or a principle in its own right? What does the command to avoid unnecessary combatant suffering imply exactly? How does the principle of distinction relate to considerations of necessity?

Moreover, necessity judgements on the battlefield face two distinct practical challenges. It is arguably impossible to ever satisfactorily prove that a certain course of action is really the *only* way to achieve a certain aim. While one could address this evidentiary problem with a standard of reasonableness as to the length any actor can be expected to go to in order to rule out alternatives, necessity also raises a substantive question. It is open to debate whether the

¹ This was the *ratio decidendi* of the Nuremberg Military Tribunal in the Hostages Case. (*USA v. List et al.*, American Military Tribunal Nuremberg, 1948, 11 NMT, 1230 at 1253ff and 1256) The British Manual on the laws of war is likewise unequivocal that ‘necessity cannot excuse a departure from that law’. UK, Ministry of Defence (2005) 2.2.1 b

availability of an alternative B with a somewhat lower probability of success, but the same anticipated military advantage and fewer expected collateral casualties, means alternative A is no longer militarily necessary. This question underlies the notorious issue of force protection and the controversy around whether a reduction in risk to friendly forces may be traded for an increase in risk to civilians – and if so at what terms.

To solve the interpretive controversies the paper will propose a taxonomy of military necessity. I will argue that IHL contains three ‘incarnations’ of the command to do only what is necessary during the conduct of hostilities. I will show that they differ both regarding their ‘strictness’ as well as with a view to *what* indispensability has to obtain. The clarification afforded by the proposed taxonomy does not solve the evidentiary and substantive problems of the commander on the battlefield. However, the taxonomy uncovers the roots of the intractability of necessity judgements in war.

Necessity is a binary concept. The coexistence of three different incarnations therefore gives us reason to pause. I will argue that ‘necessity as a bottom line of permissibility’ is the key to modern IHL’s endeavour to compromise between military and humanitarian imperatives in the regulation of hostilities. By the same token, a society’s understanding of military necessity is the graduator of how that society at any given time judges the respective urgency of protecting human life and achieving political goals with force. The coexistence of differentially strict incarnations of necessity in IHL is indicative of how contentious this most important of value judgements is in the international society of the 21st century.