

# RETHINKING THE REQUIREMENT OF MILITARY NECESSITY

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There is another type of war, new in its intensity, ancient in its origin –war by guerrillas, subversives, insurgents, assassins, war by ambush instead of by combat [...] it requires [...] where we must counter it [...] a whole new kind of strategy, a wholly different kind of force and therefore a new and wholly different kind of military training.

-President Kennedy 1962

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## MILITARY NECESSITY

**United Kingdom Joint Service Manual (2014):** Military necessity permits a state engaged in armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, **that is required in order to achieve the legitimate purpose of the conflict**, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.

## MILITARY NECESSITY AS A RESTRAINT

Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity  
Author(s): Burrus M. Carnahan  
Source: *The American Journal of International Law*, Vol. 92, No. 2 (Apr., 1998), pp. 213-231  
Published by: American Society of International Law  
1998] LINCOLN, LIEBER AND THE LAWS OF WAR 217

Although not readily apparent today, recognition of military necessity as a legal precondition for destruction represented an enlightened advance in the laws of war in the nineteenth century. In the first half of that century, the law of nations permitted the capture or destruction of any and all property belonging to any person owing allegiance to an enemy government, whether or not these measures were linked to military needs.

## EXPECTATIONS VS. REALITY

- **Material Military Necessity:** What is actually necessary on the battlefield (in the eyes of the belligerents)
- **Normative Military Necessity:** What the drafters of IHL presumed would be militarily necessary during war.

Nobuo Hayashi, “Contextualizing Military Necessity”, *Emory International Law Review* Vol.27, (2013).

## HAS WAR CHANGED?

IHL is Predicated on Wars of Attrition:

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

**This assumption is embedded into IHL.**

Hence 'Combatants' are presumed to be open to summary killing because their status equates the military necessity to use lethal force

## ATTRITION TO 'EFFECT-BASED' OPERATIONS

### *The 21st-Century Belligerent's Trilemma*

Janina Dill\*

In defiance of sequencing, EBO is **most successfully executed if belligerents achieve their ultimate political goal while not having to destroy the enemy's military forces.**<sup>35</sup>

The doctrine recommends that those targets are to be selected that 'contribute *directly* to the achievement of strategic objectives'.<sup>36</sup> 'Strategic' is defined as 'the highest level of an enemy system that, if affected, will contribute most directly to the achievement of our national security objectives'.<sup>37</sup> Hence, the doctrine advocates choosing objects as targets that are linked not to generic military victory but, rather, to the specific strategic [read political] goals of a war. Accordingly, 'offensive action [is allowed and welcomed] against a target – whether [it is] military, political, economic, or other'.<sup>38</sup>

## THE CHANGING NOTION OF 'VICTORY'

- **Victory is rarely framed in purely military terms**

### *The Fog of Victory*

Gabriella Blum\*

The proactive action could not be limited, the US doctrine held, to foiling individual attacks and disabling individual attackers. Rather, the conditions that allowed for attacks and attackers to threaten the US had to be changed, possibly by comprehensive overhaul of the domestic structures of territorial states.<sup>35</sup> While the Iraqi invasion

- **In asymmetric conflicts, especially between a state and a non-state armed group, a generic military victory is futile**

## IMPLICATIONS OF EFFECT BASED OPERATIONS AND ASYMMETRY

- 1) Systemic Violations of IHL (Failure of the restrictive function of military necessity)
- 2) 'Political necessity' finds its way into what should be purely military considerations
- 3) IHL permits an excess of violence towards the military (combatants in IAC and fighters in NIAC)

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## POLITICAL NECESSITY AND 'HUMAN TARGETS'

### *The Fog of Victory*

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Even more controversially (not to say paradoxically), if 'winning hearts and minds' is the goal, amorphous as it is, of some modern wars, this may push in the direction of the removal (that is, the killing) **not of combatants but of those who are in a position to sway popular opinion in adverse ways: political, religious, and even prominent cultural figures.** If the rationale of the principle of the distinction in previous wars was that combatants had the right to bear arms and were therefore by definition threatening to the adversary, bearing arms may no longer be as threatening as a religious address to followers, encouraging them violently to oppose the adversary and providing support.<sup>103</sup>

## POLITICAL NECESSITY AND 'OBJECTS'

**Additional Protocol I Article 52(2):** Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

→if political goals serve as a reference point for success, the types of targets that fall under 'military objectives' changes.

## POLITICAL NECESSITY AND PROPORTIONALITY

- **Additional Protocol I Article 51(5)(b):** An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and **direct military advantage**.

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## IMPLICATIONS OF EFFECT BASED OPERATIONS AND ASYMMETRY

*The Krupp Trial, Nuremberg Tribunal, Case No.58 in Law Reports of Trials of War Criminals Volume X*

over the world repudiate and abhor aggressive war. It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.”

→thus, conduct permitted under IHL is simply the bottom line which no belligerent may cross under any circumstances

## IMPLICATIONS OF EFFECT BASED OPERATIONS AND ASYMMETRY

If the intensity of the conflict and the relative strength of the enemy fluctuates, then so should the severity of military necessity and the degrees of violence that are justified.

## CAPTURE BEFORE KILL

ICRC, Interpretive Guidance on the Notion of Direct Participation In Hostilities under International Humanitarian Law (2009):

### IX. RESTRAINTS ON THE USE OF FORCE IN DIRECT ATTACK

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

## RELEVANCE TO HUMAN RIGHTS LAW

Yearbook of the International Law Commission Vol. II, 1980, pp.34-35.

necessity. In other words, "necessity of war" then constitutes the *ratio*, the *raison d'être*, of certain fundamental rules of the law of war and neutrality, namely, those which, in derogation of principles of peacetime law, confer on a belligerent State the legal right to resort, as against the enemy and its nationals or—which is even more important for our purposes—as against neutral States and their nationals, to acts which peacetime law would forbid.<sup>100</sup> The situation is

Need CASE-BY-CASE Determinations of the Necessity to use lethal force based on the 'legitimate aim' of the conflict

→ the *lex specialis* approach, whereby IHL standards prevail over human rights, fails to grasp this function of necessity

That being so, what is involved is not, of course, "necessity" as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather "non-necessity" as a circumstance precluding the lawfulness of conduct which that rule normally allows. It is only when, in a particular case, the "necessity of war" whose existence constitutes the basis of the rule and of its applicability is clearly seen to be absent that this rule of the special law of war and neutrality does not apply and the general rule of peacetime law prohibiting certain acts resumes its ascendancy.

## MOVING FORWARD

- Need to define the 'legitimate aims' of a conflict on a case-by-case basis
- Especially difficult in NIAC
- Human Rights Law as a potential reference point

## SOCIETAL NECESSITY

The 'Right to Life' under Human Rights Law (Societal Necessity):

Legitimate Aims	Societal Necessity (ECHR)	Societal Necessity (ICCPR)	Military Necessity	Military Necessity (ICRC)
	Article 2(2): a) in defense of any person from unlawful violence  b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained  c) in action lawfully taken for the purpose of quelling a riot or insurrection.  *the potential target must be a threat to the life of others or at least serious bodily injury.	Protect life, or prevent serious injury.	complete or partial submission of the enemy by weakening their military apparatus.	SAME

## ECHR CASE LAW AS A MODEL

Finogenov and Others v. Russia (2011) para.211:

211. That being said, the Court may occasionally depart from that rigorous standard of "absolute necessity". As the cases of *Osman*, *Makaratzis*, and *Maiorano and Others* (all cited above) show, its application may be simply impossible where certain aspects of the situation lie far beyond the Court's expertise and where the authorities had to act under tremendous time pressure and where their control of the situation was minimal.

## ECHR CASE LAW AS A MODEL

Isayeva, Yusupova, and Bazyeva v. Russia (2005), para.178:

178. The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to **regain control over the Republic and to suppress the illegal armed insurgency**. These measures could presumably include employment of military aviation equipped with heavy combat weapons. The Court is also prepared to accept that if the planes were attacked by illegal armed groups, that could have justified use of lethal force, thus falling within paragraph 2 of Article 2.

## CHALLENGES

- Referencing Human Rights Standards only impact States
- Limited to conflicts where human rights standards apply. i.e. occupation and internal NIAC

Thank you

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