

HILAC Lecture “Military Necessity”

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I. Introduction

- Military necessity (MN) as part of the Humanitarian Law of Armed Conflict (HLAC): MN as one of the five basic principles upon which the entire corpus of HLAC is based: MN, humanity, distinction, proportionality & honourable conduct
- Misunderstandings surrounding MN and its place in HLAC
 - a.) MN overemphasized: “*Kriegsraison geht vor Kriegsmanier*” (German military doctrine 1871-1914 Lueder/ von Moltke)
 - b.) MN underplayed or ignored: eg. *Nuclear Weapons Advisory Opinion* 1996, with no reference to MN whatsoever and statement in Para.95 that IHL has “humanity as its overriding consideration”(but see dissenting opinion Higgins).
- MN as possible escape clause from obligations/mitigation of responsibility (but in modern definition of MN this is strictly limited as we will see; NEVER in relation to prohibitions contained in HLAC = ius cogens)
- Structure of presentation

II. MN as Part of HLAC

- Definition: (UK. Manual LOAC 2004)
“*Military necessity permits a State (party) engaged in an armed conflict to use only that degree and kind of force ,not otherwise prohibited by the LOAC, 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*”
- 2. Definition: (Lieber Code 1863) is more succinct and to the point: MN =
“*those measures which are indispensable for securing the ends of war and which are lawful according to the modern laws and usages of war*”
- 3. References to MN in *inter alia*:
 - i. Preamble to St. Petersburg Decl. 1868
 - ii. Preamble to Hague Regulations 1907
 - iii. Post-WW II War Crimes Trials eg. (*Hostages Case: U.S .v .von List et al.*)
 - iv. And in all military manuals on LOAC
- 4. Relationship of MN to the other basic principles (MN/ humanity as “core equation” within HLAC),but also in re to the other principles.
- 5.Relationship of MN to factual context (“in the circumstances prevailing at the time”).

- Hence, MN is a basic underlying principle which forms **part** of the HLAC and which must remain within its limits .It must be viewed in context with the other basic principles (equation) and with the prevailing factual circumstances (contextual reasoning) to be properly understood and applied.

III. Contents and Elements of Military Necessity

Four basic elements of MN (USAF Manual 1976) :

- that force is controlled/regulated
- that force may be used to achieve submission of adversary and military aims
- that the force used (degree & duration) is no greater than is necessary to achieve this end ASAP. (this in turn will depend to a great extent on how great an obstacle must be overcome; a determined, well- trained, equipped and well- led adversary requires (much) more effort than would be necessary to overcome a weak(er) adversary etc.).
- that the action undertaken is not otherwise prohibited

Threefold Significance (Rogers 2004):

- i. First and foremost: no action may be undertaken which is not militarily necessary
 - ii. HLAC allows for a certain amount of leeway/exceptions within its rules for good military reasons
 - iii. MN is together with distinction/humanity an element of proportionality *in bello*
- Schmitt sees distinction between MN as a “fact” and as a legal principle (Rogers p.6) – as a fact in re to (ii) and (iii); as a legal principle only in re to (i.)
In my view, MN works both as an enabler (allows for necessary force to achieve war goal) and as a limitation (prohibits all force which is not necessary and limits degree/type of force to that which is not otherwise prohibited.

IV. Military Necessity Applied within the Humanitarian Law of Armed Conflict

Conduct of Hostilities:

- Art. 22 HR “Right of belligerents to adopt measures to injure the enemy not unlimited”
- Art 25 HR “The attack or bombardment ,by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited. (idem in re prohibition of denial of quarter; no MN in killing rather than accepting surrender)
- Art.24 HR “Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible”

Concept of Military Objective:

- (Art.48, 52:2 AP I and customary int'l law (CIL)) : is linked to MN "effective contribution to military action"
- Art. 52:3 AP I is an example of where in equation between MN & Humanity ;the latter (in this case) prevails
- Art. 56:2 AP I is an example where enhanced protection of works & installations containing dangerous forces can be overridden by "*imperative* military necessity"
 - a. dams, dykes etc. when used other than for normal functions and in regular, significant and direct support of mil. ops.
 - b. nuclear power plants –only when used to provide electrical power in regular, direct & significant support of mil.ops. and no other option is available
 - c. other mil. obj. located in close proximity only when..... and no other option is available

Hence in such cases of *imperative* MN HLAC allows for MN to prevail over other considerations, subject to proportionality

Similar situation in re to CPC 1954:

- a. Art 4:2 CPC *imperative* MN prevails over regular protection of CP
- b. Art.11:2 CPC *imperative and overriding* MN prevails over special protection of CP subject to strict conditions

-MN and Distinction: allowance for use of (deadly) force against civilians directly participating in hostilities (Art.51:3 AP I)

-Idem in naval warfare: 7 exceptions allowed under CIL/San Remo Manual in re prohibition of attack on enemy merchant vessels (Dinstein 2004,p.102): direct participation in hostilities, when acting as an auxiliary, when engaged in intelligence/reconnaissance, when it resists order to stop/attempts to avoid capture, when armed beyond mere personal self-defence, when under convoy, when making effective contribution to military action

-MN and Precautions in Attack/ Proportionality: Art. 57 AP I

"feasible measures, advance warning *unless* circumstances do not permit, proportionality (art.57:2:iii) are all references to MN

-MN and Treatment of Protected Persons/Occupied Territory:

- Art.41:3 AP I release of POW's captured under unusual conditions of combat is a reference to MN
- Art. 5 GC 4 individual protected person (PP) is detained as spy, saboteur or definite suspect of hostile activity v Occupying Power, such person shall where *absolute military security* (MN) requires be regarded as having forfeited right of communication

- Art. 17 GC 4 pp, shall endeavour (to the extent feasible) to conclude local agreements for besieged/ encircled areas...
- Art. 49 GC 4 population transfers prohibited except if their security *or imperative military necessity* requires it.
- Art. 27 GC 4 PP's are **always** entitled to humane treatment, respect for personal honour, integrity; no mistreatment, sexual assault etc. are ever allowed, *but ..* parties may take such measures of control and security *as may be necessary* as a result of war.

-MN and Means & Methods of Combat:

- Protocol III Conventional Weapons Convention; Art.2:4 prohibition to attack forests with incendiary weapons *except* when forest is used to camouflage, cover or conceal combatants or military objectives, or the forest itself is a MO
- Reference by ICJ in *Nuclear Weapons* Advisory Opinion to an “extreme case of self-defence when the life of the nation is at threat” is a sort of controversial (in my view at least) reference to MN (controversial because it confuses *ius ad bellum* and *ius in bello* considerations)

V. Conclusions

- War is about winning, but not at any cost: MN is not a *carte blanche* to do whatever is expedient to secure victory
- MN is not to be confused with “just cause”, nor is it dependent upon the virtue of the adversary or the lack thereof; it never excuses violations of humanitarian or human rights law (eg. torture or maltreatment of prisoners, persons who are *hors de combat* etc, even if they are ‘terrorists’, ‘aggressors’ ,or war criminals.
- MN is **part** of HLAC: neither MN nor humanity as two cardinal principles are overriding in the abstract. Which one will prevail in a given situation depends upon a *balance* between them and the factual circumstances, taking into account that MN must always operate within the law.
- The law of war cannot be “all MN or all humanity *tout court*”; it must be humane enough to serve its purpose in preventing unnecessary loss of life and destruction and alleviating suffering and it must realistic enough to be operable and capable of being adhered to. Overemphasizing the one over the other as a matter of principle only risks having the law become either redundant or unworkable.