



Regulatory Framework for Activating Military Necessity: Balancing Legal Obligations and Options for Review and Amendment

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Abstract:

This study examines a critical issue concerning the regulatory framework for activating military necessity—whether it is a normative principle requiring mandatory activation or an exceptional measure necessitating revision. To address this issue, the study is structured into two sections, each comprising two sub-sections: the concept and regulations of military necessity, the need to activate the legal framework, and the options for reviewing and amending the rules governing military necessity. The research employs a descriptive approach to define the concept of necessity and outline its regulations, while an analytical approach is used to explore the dimensions of these regulatory controls. The study concludes with key findings and recommendations, the most significant being that assessing military necessity is highly complex. Its regulations require both the activation of the legal framework and a selective approach to reviewing the rules governing its application. This ensures the enforcement of the general framework while allowing amendments to accommodate evolving practices in the use of this crucial principle during international armed conflicts.

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Introduction:

International humanitarian law consists of a set of rules aimed at limiting the effects of armed conflicts. It protects individuals who do not participate or who cease to participate in hostilities, as well as civilian, cultural, and religious properties and sites. This body of law seeks to regulate armed conflicts to minimize their impact on civilians and their property by restricting the means and methods of warfare.

The issue of activating military necessity within the framework of legal obligations and the options for its review and amendment during armed conflicts plays a crucial role, particularly concerning international accountability for the motives behind invoking the principle of military necessity. From this perspective, the study poses the following research question:

What are the legal regulations governing the activation of the principle of military necessity in terms of its legal commitment and the options for its revision or repeal?

To reach significant research findings, the descriptive and analytical methodology was employed to examine the regulations of military necessity and highlight the options for their review or repeal. This is explored through two main sections:

Section One: The Concept and Regulations of Military Necessity

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Military necessity is one of the most precise, sensitive, and critical topics in international humanitarian law, given its definition, scope, and impact. This section clarifies the concept of military necessity from the perspective of international humanitarian law (**Subsection One**) and identifies its regulations concerning the means, methods, and consequences of warfare (**Subsection Two**).

Subsection One: Defining the Regulations of Military Necessity

The judgment of an issue is derived from its proper understanding, and it is essential to clarify the concept of military necessity regulations in international humanitarian law to establish a clear conceptual framework before addressing its practical applications. This will be achieved by defining the regulations governing the use of the principle of military necessity (**Subdivision One**).

Subdivision One: The Meaning of Military Necessity Regulations

The principle of military necessity is one of the fundamental principles of international humanitarian law (law of armed conflicts). It is used to justify certain military actions deemed necessary to achieve legitimate military objectives. However, this principle is not absolute; it is subject to strict limitations to ensure that civilian rights and international humanitarian law norms are not violated.

The principle of military necessity emerged within the framework of international humanitarian law and was explicitly codified in the Geneva Conventions of 1949 and their Additional Protocols of 1977. It was developed to balance the requirements of warfare with the protection of civilians and civilian property. Some examples include:

- **Destruction of a strategic bridge:** If destroying a bridge is necessary to prevent the advance of enemy forces, this would be considered an application of military necessity, provided that civilian damage is minimized.
- **Use of specific weapons:** Conventional weapons may be used if necessary to achieve a military objective, but weapons causing unnecessary suffering (such as chemical weapons) are prohibited.

Subdivision Two: The Relationship Between Military Necessity and Other Principles of International Humanitarian Law

The limits of the principle of military necessity become evident through its relationship with other principles of international humanitarian law, which can be identified as follows:

- **The Principle of Proportionality:** Civilian harm must be proportionate to military gains. A key example is the *Nicaragua v. United States* case (1986), in which the International Court of Justice emphasized the importance of proportionality in the use of military force.
- **The Principle of Distinction:** A clear distinction must be made between military targets and civilians in all military operations. A notable example is the *Tadić Case* (1997) before the International Criminal Tribunal for the Former Yugoslavia, which addressed the limits of military necessity in armed conflicts.
- **The Principle of Humanity:** Fundamental human rights must be respected even in times of armed conflict.

The standard by which military necessity is measured lies in its objective, which is limited to weakening the enemy forces through military action and targeting military objectives, as these objectives encompass the adversary's strength. Examining the rules of international humanitarian law as a whole, contemporary challenges create a legal obligation to amend this body of law, particularly in cases involving:

- **The use of modern technology:** Such as drones and autonomous weapons, which raise questions about the application of military necessity.
- **Cyber warfare:** How this principle applies to cyberattacks that may affect civilian infrastructure.

- **Non-international conflicts:** The application of the principle in internal conflicts involving non-state armed groups.

Subsection Two: Regulations of Military Necessity Concerning Means, Methods, and Consequences of Combat

International law imposes restrictions on methods of warfare and the means used to conduct it. These restrictions apply to the types of weapons used, their deployment, and the general conduct of all parties involved in armed conflict. The principle of distinction requires belligerents to differentiate at all times between combatants and military objectives on the one hand and civilians and civilian objects on the other (1), ensuring that military operations are directed solely at legitimate targets. In international humanitarian law, military necessity is considered an exception that allows military forces to deviate from its principles under specific conditions. However, this exception is not absolute and must be applied strictly according to necessity (2).

Subdivision One: Regulations Governing the Means and Methods of Warfare

Several key regulations govern the means and methods of warfare, including:

1. **Limiting Hostile Actions to Legitimate Military Targets:** One of the primary legal constraints on military necessity is that it must be restricted to lawful military objectives. Even if military action results in collateral damage affecting civilians and civilian objects, this must occur within the framework of the principles of distinction and proportionality, balancing expected military advantages against potential harm (4).
2. **Prohibition of Certain Weapons and Warfare Methods:** The means and methods of combat must not involve prohibited, restricted, or internationally banned weapons. Military forces often develop strategies aimed at achieving victory, but these methods must not violate the principle of necessity. Numerous international treaties prohibit or limit the use of certain conventional and modern weapons directly related to military necessity.

Subdivision Two: Regulations Governing the Consequences of Warfare Methods and Means

Several regulations govern the consequences of military means and methods, including:

1. **Prohibition of Weapons and Methods Causing Excessive Injury or Unnecessary Suffering:** This principle requires combatants to avoid means and methods that cause superfluous injury or excessive suffering. Military advantages must be balanced with humanitarian considerations during combat operations. If an enemy combatant can be neutralized through capture rather than injury, it is preferable to do so. Similarly, if two military strategies achieve the same objective but one results in fewer casualties, the less harmful option must be chosen.
2. **Prohibition of Indiscriminate Attacks:** International humanitarian law forbids indiscriminate attacks that cannot be confined to specific targets and where the attacker fails to take necessary precautions to avoid striking non-military objectives.
3. **Prohibition of Severe Environmental Damage:** Combatants must refrain from launching attacks that cause severe or long-term environmental destruction. Any attack that inflicts extensive harm on civilian life, property, or the natural environment must be avoided.

Section Two: The Standard of Military Necessity and Options for Review and Amendment

One of the greatest challenges faced by a military commander in the field is establishing and assessing the standard of military necessity while ensuring the enforcement of its regulations regarding the means, methods, and consequences of combat. Additionally, certain circumstances may require amendments to these regulations. Therefore, this section will address the topic by examining the standard for the establishment and assessment of military necessity in the first subsection and the necessity of enforcing the legal framework alongside the options for reviewing the rules governing military necessity in the second subsection.

Subsection One: The Standard for the Establishment and Assessment of Military Necessity

Scholars of international law classify its sources into two categories: primary sources and subsidiary sources. Primary sources include treaties, international customs, and general principles of law—essentially, all expressions of state will, whether explicit or implicit. Given that international humanitarian law is a relatively modern branch of public international law, it derives from two primary sources: international custom and international treaties. These sources take precedence in regulating international legal relations. Accordingly, the discussion in this section will focus on the standard for the establishment of military necessity (First Part) and the assessment of military necessity (Second Part).

First Part: The Standard for the Establishment of Military Necessity

The standard by which military necessity is measured is based on its objective—namely, to weaken enemy forces through military force and to target military objectives, as these objectives encompass the adversary's strength. A closer look at the rules of international humanitarian law reveals the frequent use of the term "concrete" when describing the military advantage sought by an attack. The word "concrete" refers to something specific and tangible, perceivable by the senses. Therefore, attacks that fail to achieve a tangible military advantage or that only provide an abstract advantage must be excluded.

Second Part: Assessment of the Principle of Military Necessity

Assessing military necessity is a highly complex task due to the circumstances that influence its determination in armed conflict situations. Furthermore, military necessity is frequently invoked to justify actions that constitute grave violations, thereby undermining humanitarian considerations and the values that international humanitarian law seeks to uphold during wartime.

The assessment of military necessity also raises doubts about the ability to accurately adhere to its boundaries, regulations, and conditions. International legal scholars argue that military necessity weakens the humanitarian protections established by international humanitarian law (5). For this reason, some experts contend that an indefinite legal principle of military necessity cannot be supported (6). If accepted without legitimate legal constraints, military necessity could reduce the laws of war to mere guidelines that militaries may follow only when convenient and disregard when deemed advantageous.

To address these gaps in legal protection, some international humanitarian law scholars propose integrating the concept of military necessity into the definition of a military objective. The existence of a clear and simple legal provision would enhance the protection of cultural property, as a well-defined rule is far more effective than the ambiguity surrounding military necessity (7).

From the above discussion, it follows that military necessity is not legitimate if it threatens international peace and security, violates peremptory norms of international law, or infringes upon the fundamental rights enshrined in international humanitarian law treaties—rights that have been widely accepted by the international community through treaty accession, signature, and ratification.

Subsection Two: The Necessity of Enforcing Legal Obligations and Reviewing the Rules Governing Military Necessity

It is crucial to correct the theoretical shortcomings of international humanitarian law by strengthening its practical applications. This subsection will address the necessity of enforcing the legal framework governing military necessity in the first part and the options for reviewing the rules related to military necessity in the second part.

First Part: The Necessity of Enforcing the Legal Obligations Governing Military Necessity

Military necessity can never justify military actions that violate peremptory norms of international law. As previously discussed, military necessity is subject to strict limitations and constraints; it is merely an exceptional and temporary principle that can only be invoked in a highly restricted scope. To illustrate, the necessity of using a particular weapon may manifest as a military application of the principle of excessive or unjustified suffering. However, causing such suffering cannot be legally accepted unless justified by a

genuine military necessity, which itself cannot be invoked in absolute terms, as it is subject to restrictions that prevent its misuse, in consideration of humanitarian principles (8).

Humanitarian challenges often cast doubt on the effectiveness of the legal framework governing armed conflicts. The primary factor blamed for such shortcomings is the legal texts themselves, regardless of the real circumstances surrounding violations. However, law exists to align human conduct with its intended objectives rather than to exert complete control over it. Failures in compliance should not lead to the immediate abolition or modification of legal provisions. A violation does not indicate a weakness in the rule itself but rather a failure in its enforcement. A closer examination of the rules governing the conduct of hostilities reveals that most of these provisions remain highly relevant and enforceable. The real challenges arise in their implementation and enforcement, which are often more political than legal in nature (9).

International humanitarian law regulates the conduct of hostilities by limiting the means and methods of warfare used by parties to a conflict. Its primary objective is to strike a balance between legitimate military action and the humanitarian imperative to alleviate suffering, particularly among civilians (10).

The legal framework governing the conduct of hostilities is firmly established through treaty-based and customary legal provisions. The nature of these rules ensures their status as binding and peremptory norms. This legal system includes provisions that prohibit or restrict certain means and methods of warfare while also recognizing universally accepted general principles, whether in the form of widely ratified international treaties or well-established customary norms. From a legal standpoint, the evaluation of the rules governing hostilities can be approached in two ways:

1. Recognizing the adequacy of existing legal principles and rules while emphasizing the need for their reinforcement and implementation.
2. Acknowledging deficiencies in certain detailed provisions and discretionary matters, which require supplementary legal measures to address any gaps (11).

The primary function of a legal norm is to prescribe correct and lawful behavior or prohibit conduct that constitutes a grave violation. This should align with the fundamental principles of international humanitarian law. A legal rule must also outline its practical application and establish mechanisms for ensuring its enforcement. If a legal norm is clearly articulated, substantively sound, and enforceable, then any violation is likely due to deficiencies in its implementation rather than in the rule itself. This applies particularly to the rules governing the conduct of hostilities (12).

Thus, to effectively enforce the legal framework governing military necessity, international humanitarian law mechanisms must be fully activated to fulfill their designated role. These mechanisms, whether national or international, serve various preventive, monitoring, and punitive functions. However, given the increasing scale of violations, it is necessary to reassess the effectiveness of these mechanisms and evaluate their success or failure. This task is not straightforward, as the assessment process is complex. Furthermore, addressing shortcomings does not necessarily mean discarding ineffective mechanisms but rather identifying and addressing the external factors that hinder their proper functioning.

Enforcing the legal framework governing military necessity affirms the standardization of this principle. During armed conflicts, all situations and conditions are exceptional by nature, as war represents a departure from the normal state of peace. However, such exceptional circumstances can never justify the disregard for international humanitarian law and its general rules, which were specifically designed to regulate these very situations and their severe consequences.

Establishing a standard for military necessity is of utmost importance, yet it remains a complex and ambiguous issue. It relies on military commanders' assessments in combat, their strategic expertise, intelligence on the enemy, available combat methods, and numerous related factors. The sole legitimate objective of warfare is to weaken the enemy's military capabilities, which is achieved by targeting military objectives. Consequently, the standard for measuring military necessity is grounded in its ultimate purpose—namely, weakening the adversary's forces through military force and targeting military

objectives. These objectives encapsulate the enemy's strength. A thorough review of international humanitarian law reveals the frequent use of the term "concrete" when describing the military advantage sought by an attack. The term "concrete" refers to something specific and tangible, perceptible to the senses. Therefore, attacks must exclude targets that fail to yield a tangible military advantage.

1. **Does not provide a military advantage.**

2. **Provides an intangible military advantage.** A military advantage typically consists of gaining territory or weakening the enemy's armed forces. The phrase "concrete and direct" is intended to clarify that the advantage in question must be significant and relatively immediate, thereby excluding advantages that are difficult to perceive or that only manifest over the long term.

Second Part: Options for Reviewing the Rules Governing Military Necessity

The process of reviewing and amending the principle of military necessity begins with an assessment of its application—a task fraught with difficulty due to the circumstances surrounding military necessity in the theater of armed conflict. Additionally, military necessity is often invoked to justify actions that constitute blatant violations of humanitarian considerations and values, which international humanitarian law aims to uphold during armed conflicts. Assessing military necessity raises concerns about the ability to strictly adhere to its limits, conditions, and regulations. In legal scholarship, military necessity is often viewed as a factor that undermines the humanitarian protections established by international humanitarian law.

For this reason, some argue that an undefined legal framework for military necessity cannot be endorsed. Accepting military necessity without clear legal constraints risks reducing all laws of war to mere guidelines that military systems follow only when compliance is not overly restrictive and discard whenever it seems advantageous or necessary.

To address these gaps in legal protection, some scholars in international humanitarian law propose integrating the concept of military necessity into the definition of a military objective. A simple and clear legal text that facilitates interpretation and strengthens protection—particularly for cultural property—would be far more effective than an ambiguous concept of military necessity.

From the above discussion, it is evident that military necessity lacks legitimacy if it threatens international peace and security, violates peremptory norms of international law, or infringes upon fundamental rights established by international humanitarian law treaties, which have been widely accepted and ratified by the international community. This raises a crucial question: Does military necessity constitute a deviation from the principle of legality?

The answer to this question is not as straightforward as it might seem. However, in the context of domestic laws, all authorities must be subject to the rule of law. A state that upholds this principle is considered a legal state, ensuring compliance with the rule of law. In such a system, exceptional circumstances do not justify deviations from legal norms, particularly constitutional rules, unless grounded in a strong legal justification—such as the doctrine of necessity.

Thus, while necessity may represent a deviation from the principle of legality in some domestic legal systems, in international law, it can serve as an extension of legality in exceptional and temporary situations. The assessment of military necessity depends on its outcomes: If its results align with the conditions of necessity and do not violate the laws of war or international humanitarian law, then it is considered lawful. If military necessity is the only available means for a state or commander to weaken or destroy the enemy's armed forces, then its validity should be assessed within the specific circumstances of the armed conflict. However, it is essential to uphold fundamental legal protections for victims of armed conflicts.

Ultimately, the key consideration in evaluating military necessity is ensuring that it does not contravene international humanitarian law. In light of these observations, many existing legal provisions that no longer fulfill their intended purpose should be reviewed and revised. Amendments should be introduced to ensure

clarity and eliminate ambiguity, making these rules adaptable to the evolving role of military technologies and modern weapons development.

For example, Article 51 of the 1977 Additional Protocol I, which pertains to the protection of civilians, particularly paragraphs (4) and (5) on indiscriminate attacks, outlines certain cases as examples and others as exhaustive classifications of indiscriminate attacks. However, it would have been more effective to establish an exhaustive list of cases to prevent legal loopholes in Additional Protocol I (1977). These provisions should be subject to continuous revision and amendment to address the advancement of weaponry and the diversification of attack strategies over time (14).

Conclusion:

From the discussion above, we can derive several findings and recommendations:

First – Findings:

1. The principle of military necessity refers to the use of force and severity to the extent necessary to achieve the objective of the conflict—namely, exhausting the enemy, weakening its resistance, and compelling its surrender as quickly as possible.
2. A comparison between Islamic legislation and international humanitarian law regarding military necessity reveals a general consensus that it is a temporary and exceptional state with a subjective criterion. It relies on the knowledge or prevailing assumption among the parties to the conflict that there is no alternative for survival except by following this course of action. However, this concept is not absolute; it must be subject to accompanying restrictions.
3. Military necessity is governed by numerous regulations, including those related to means and methods of warfare. The most important of these is that hostile actions must be limited to legitimate military targets and that prohibited, restricted, or internationally banned means and methods must not be used. Additionally, regulations pertain to the consequences of these means and methods, such as prohibiting those that cause excessive injury or unnecessary suffering, banning indiscriminate attacks, and avoiding means and methods that inflict severe environmental damage.
4. Strengthening the legal framework for military necessity affirms its normative nature, and reviewing and amending this principle helps assess and clarify any ambiguities surrounding it.

Second – Recommendations:

1. Conducting in-depth studies and research on military necessity and its limitations to prevent excessive reliance on it by military commanders in the field.
2. Revising and reformulating many international humanitarian law treaties to align with modern developments, including advances in technology, cyber warfare, and non-international conflicts.
3. Strengthening international efforts to restrict the use of prohibited weapons in accordance with the principles of international humanitarian law in general, and military necessity in particular.

References:

1. Amer Al-Dulaimi, *The Military Necessity in International and Internal Armed Conflicts*, Academics for Publishing and Distribution, 1st ed., Jordan, 2015, p. 48.
2. See the website of the International Committee of the Red Cross: <https://www.icrc.org/ar/doc/war-and-law/conduct-hostilities/methods-means-warfare/overview-methods-and-means-of-warfare.htm>, accessed on 09/06/2019.
3. Haidar Mousa Mankhi Al-Qurashi, *The Impact of Military Intervention on International Relations: A Study of Iraq and Libya as a Model*, The Arab Center for Publishing and Distribution, 1st ed., Egypt, 2018, p. 7.
4. Khaled Rosho, *Military Necessity in the Scope of International Humanitarian Law*, Doctoral Thesis, Abou Bekr Belkaid University, Tlemcen, 2013, p. 131.

5. Jean Pictet, *Lectures on International Humanitarian Law*, previously cited reference, p. 66.
6. Gerhard van Glahn, *Law Among Nations: An Introduction to Public International Law*, translated by Abbas Al-Omar, Publications of Dar Al-Afaq Al-Jadida, Vol. 3, Beirut, 1990, p. 37.
7. Jean-Marie Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, *International Review of the Red Cross*, 1999, No. 835, p. 601.
8. Nouman Atta Allah Al-Hayiti, *International Humanitarian Law*, Vol. 1, Dar Raslan for Printing, Publishing, and Distribution, 1st ed., Damascus, 2008, pp. 273.
9. Saad Al-Aqoun, *Regulations on the Conduct of Hostilities*, Doctoral Thesis in Legal Sciences, Hadj Lakhdar University, Batna, 2015, p. 381.
10. See: International Committee of the Red Cross website, *International Law and the Conduct of Hostilities*, article published on 09/04/2010, <https://www.icrc.org/ar/doc/war-and-law/conduct-hostilities/overview-conduct-of-hostilities.htm>, accessed on 22/02/2019.
11. Saad Al-Aqoun, *Regulations on the Conduct of Hostilities*, previously cited reference, p. 380.
12. Nizar Al-Anbaki, *International Humanitarian Law*, Dar Wael for Printing and Publishing, 1st ed., Jordan, 2001, p. 409.
13. Saad Al-Aqoun, *Regulations on the Conduct of Hostilities*, previously cited reference, p. 382.
14. Silwan Jaber Hashim, *The State of Military Necessity in International Humanitarian Law*, previously cited reference, p. 193.