

## Military Necessity From A Humanitarian Law Perspective

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**Abstract.** Military necessity is a legal concept used in international humanitarian law (IHL) as part of the legal justification for attacks on legitimate military targets that may cause harm, even worse conditions affecting civilians and civilian objects. Thus, the principle of military necessity means that military forces in planning their military operations are allowed to take into account the practical needs of the military situation at a certain moment and the necessity to win the war. This study aims to limit the application of military necessity principles by focusing on the Lieber Code focused as an appropriate limitation called the "greatest theoretical contribution to the modern law of war" so as prevent war victims. This qualitative research used a descriptive approach to collect data systematically, factually, and quickly according to the situation when the research is carried out. The results of this study showed that the Lieber Code does not limit all military necessities but only to some necessary elements for obtaining military objectives. Therefore, military necessity is not an exception to the law of armed conflict but rather explicitly states the restrictions that have been regulated in the law of armed conflict.

**Keywords:** Military necessity, Humanitarian Law, Lieber Code, Human Rights.

### INTRODUCTION

There are three principles always underlined the rules in humanitarian law. The principle of military necessity is generated from a basic conception to balance military necessities with the protection of war victims. Therefore, every pre-established rule of humanitarian law has gone through consideration between the principle of humanity and military necessity. The principle of military necessity does not aim to limit or prevent the emergence of armed conflicts but to limit violence by still accommodating military necessity. Thus, the principle of military necessity can be categorized as a complement to the principles of war strategy that have been adopted by armed forces around the world. The principles include the principle of objective, concentration, surprise, security, and the economy of force. International Humanitarian Law has a short but eventful history.

The application of unregulated military necessity causes extraordinary suffering due to war because the warring parties do things beyond the limits of humanity to achieve victory. Only in the mid-19th century, did the countries agree on international rules in a convention to avoid suffering due to war. Since then, the changing nature of armed conflict and the destructive power of modern weaponry has recognized the need for much improvement and expansion of humanitarian law through long negotiations that

require patience. The development of International Humanitarian Law relating to the protection of war victims and the law of war was greatly influenced by the development of human rights protection law after the Second World War. The adoption of important international instruments in the field of human rights such as the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950), and the International Covenant on Civil and Political Rights (1966) contributed to strengthening the perspective that everyone has the right to get Human Rights, both in times of war and peace. The law of war which is often referred to as International Humanitarian Law, or the law of armed conflict has a history as old as human civilization, or as old as war itself.

### **RESEARCH METHODOLOGY**

This research was conducted using a normative juridical research method by carrying out a comprehensive study based on legislation and empirical juridical research, namely conducting an assessment based on observations of the handling of respect and protection of human dignity in emergencies, especially during armed conflicts.

This study was legal research that employed various approaches to answer the research questions, namely: 1) statute approach, 2) conceptual approach, 3) comparison approach and 4) historical and philosophical approach.

Data analysis was carried out qualitatively. The written legal materials that have been collected were systematized according to the research problems. Furthermore, the legal material was studied and described using the relevant theoretical basis. To answer the research problem, the legal material that has been systematized was assessed so that it can correctly reveal the meaning, position, and implications of international law (formed by the international community consisting of countries).

### **RESULTS AND DISCUSSION**

Mochtar Kusumaatmadja stated that it is a tragic fact that humanity has only known 250 years of peace out of 3400 years of history. The instinct for self-defense realized that this method of war without boundaries is very detrimental to humans, so people began to impose restrictions and establish provisions governing war between nations. Furthermore, Mochtar Kusumaatmadja also argued that it is not surprising that the development of modern international law as an independent legal system began with writings on the law of war. In its history, international humanitarian law can be found in

religious and cultural rules around the world. The modern development of humanitarian law only began in the 19th century. Since then, countries have agreed to draft rules of thumb based on the bad experiences of modern warfare.

Humanitarian law represents equity between the humanitarian needs and the military needs of states. As the international community has grown, several countries around the world have contributed to the development of international humanitarian law. Nowadays, international humanitarian law is recognized as a truly universal legal system. In general, the rules about war are stated in the rules of behavior, morals, and religion. Laws for the protection of certain groups of people during armed conflict can be traced back through history in almost every country or civilization in the world. In Roman civilization, it is known the concept of a just war. This particular group of people includes civilians, children, women, combatants who laid down arms, and prisoners of war.

### **Definition of Military Necessity**

The term military necessity was first discovered during the civil war in the United States. On May 9, 1862, Major General David Hunter, a military commander for Georgia and the Carolinas, ordered the release of slaves in Georgia, South Carolina, and Florida. According to President Abraham Lincoln, the act of releasing slaves by Major General Hunter was not in the context of emancipation, but rather a right possessed by military commanders in the field to issue orders in every situation called "necessity indispensable to the maintenance of the government". The term military necessity was first published in General Orders No. 100, known as the "Lieber Code", and was legitimated by President A. Lincoln on April 23, 1863, as an important document in the development of International Humanitarian Law. The Lieber Code itself was more influenced by the teachings of Immanuel Kant in the United States developing in the 19th century.

The Lieber Code presents a developmental application of Kant's principles related to armed conflict. In the Kantian system, the state and the military are expected to continuously compare the use of military tactics related to the number of victims or errors resulting from these tactics. A tactic is only used if the analysis showed that the benefits obtained are greater than the losses or damage caused. Kantian views the importance of protecting the civilian population as an absolute right; on the other hand, the belligerent must be able to follow the rights of the civilian population. The perspective or concepts of Carl Clausewitz can also influence the concept of the Lieber Code. Clausewitz's concept of military necessity as a rule of war resulted from a plausible

reason regarding military and political object. It is in line with Von Kriege's statement that "War is nothing but a continuation of political intercourse, with a mixture of other means", as a view on the military necessity from the Clausewitzian or known as kregraison which justifies or prioritizes military methods, including military methods that are contrary to the law of armed conflict.

Lieber recognizes and appreciates Clausewitz's perspective with his kregraison, but his moral philosophy views kregraison as a rule, not as an exception to the law of armed conflict. The concept of military necessity in the Lieber Code is focused on a limitation. An appropriate restriction is surely called the "greatest theoretical contribution to the modern law of war".Lieber did not limit all military necessities but only to the necessary aspects to obtain military objectives. Military necessity is not an exception to the law of armed conflict but rather explicitly states the limitations set out in the law of armed conflict. Clausewitz approach never connects to the moral philosophy of war or describes the history of legal norms related to the philosophy of war. Lieber codified the law of armed conflict and did not accept the view that military necessity was a transcendent rule. Military necessity must be following the system and under other laws, it is a fundamental point and binding. Lieber's third limitation is found in Article 15 of the Lieber Code, as a general concept of military necessity which does not allow the violation of a treaty or under existing appropriate values. Lieber argued that military necessity must rely on two concepts, namely humanity, and proportionality.

Humanitarian considerations are always taken into consideration in the implementation of military necessity, as well as the use of tactics that must be faced between military advantages that will be obtained by guiding the values of humanity.

### **The Principle of Military Necessity in Humanitarian Law**

The military principle is the most basic in humanitarian law. It is notably said that there is no humanitarian law if there is no principle of military necessity because most of the substance of the convention on humanitarian law is an attempt to limit the problem of applying the principle of military necessity in a war or armed conflict. A fundamental and broad interpretation of the military necessity is about the armed forces being able to freely take the necessary action as long as it does not violate the law. Violations of the law are matters formulated in Humanitarian Law to achieve legitimate military objectives in a war or military operation.

Military necessity is a legal concept used in international Humanitarian Law (IHL) as part of the legal justification for attacks on legitimate military targets that may result in harm, even worse conditions, to civilians and civilian objects. It implies that military forces in planning their military operations are allowed to take into account the practical needs of the military situation at any given moment and the necessity to win the war.

The concept of military necessity influenced the concept of the Lieber Code. Clausewitz's concept of military necessity, as a rule, resulted from a plausible rationale related to the military and political object. It recognizes that under the laws of war, winning a war or battle is a legitimate consideration, although it must become an additional consideration to humanitarian law. However, it might be simply stated that the military necessity facilitates the armed forces a free hand to take actions that would otherwise be permissible, for it is always in balance with the requirements or other humanitarian considerations of Humanitarian Law. Three aspects must be considered in the application of the military necessity principle.

Firstly, every attack must be aimed and tend toward defeating the enemy's military, however, such attacks may not be justified by military necessity because they have no military purpose.

Secondly, the attack is aimed at weakening the enemy's military power but does not have to cause excessive damage to civilians or civilian objects in terms of direct military advantage.

Thirdly, military necessities are not justified in violating the rules of Humanitarian Law.

It becomes acceptable in a war where one party wants to conquer the other party in the shortest possible time and with the smallest possible cost. Thus, the belligerent party is justified in using all kinds of means and forms of violence but they must pay attention to the second (humanity) and third (chivalry) principles.

Regarding the principle of military necessity, it was stated in the Preamble of the Hague Convention 1907 that this principle had been taken into account in compiling the Hague Rules. Therefore, this principle does not need to be taken into account in applying the articles of the Hague Rules. However, there is another issue regarding the principle of military necessity due to a different perception in the 1907 German Manual of Landwarfare. This manual recognizes the term *Kreigsraison* or the necessity of war.

According to this manual, *Kreigsrason* can abolish the laws of war, if deemed necessary to avoid situations of military danger or to achieve the goal of military success.

### **The Principle of Military Necessity in International Law**

The principle of military necessity is described by Forrest's jurists as "a basic principle of the law of war, so basic, indeed, that without it there could be no law of war". It implies that international treaties on Humanitarian Law largely regulate the principle of military necessities application (limitation) in an armed conflict. Thus, it can be assumed that without the principle of military necessity, there is no law of war. The principle of military necessity was first used in the Lieber Code of 1863. Furthermore, it was discussed and stated in international treaties on Humanitarian Law during its development.

First of all in the Declaration, St. Petersburg, 1868: The military necessity is also expressed in the only legitimate purpose which states should endeavor to accomplish during war is to weaken the military forces of the enemy; This statement explains that only legitimate military objects can be attacked in a war.... "the only legitimate object which states endeavor to accomplish during war is to weaken the military forces of the enemy".

The second outstanding problem is the prohibition of small caliber projectiles use that can explode (*dum dum* bullets). It projected how a military necessity must obey the humanitarian principle "the necessities of war ought to yield to the requirements of humanity".It means that the application of the military necessity principle also considers the humanitarian aspect, namely the use of armed violence which does not cause excessive suffering.

#### **1. The Principle of Military Necessity in The Hague Convention IV 1907**

The Hague Conventions of 1899 and 1907 were the first international treaty on Humanitarian Law to examine the implementation of military necessity in a limited manner under applicable rules.

In the preamble of the Hague Convention 1907, it was stated that this convention was an inspiration for how war crimes could be reduced during the application of military necessity, and this convention is generally used as a general rule of thumb. These provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct,....Article 23 has detailed the limits on the application of the military necessity

principle in an armed conflict, including the procedures for using weapons, for example not using poison weapons, projectiles, or weapons that cause unnecessary or excessive suffering.

Secondly, this Article has provided limitations on the procedures for using armed violence in a battle such as violently attacking the enemy, attacking a defenseless enemy, or declaring that there are no prisoners of war and involving the civilian population in battle.

Thirdly, this article also prohibits perfidy actions such as misusing protective signs or using enemy attributes or uniforms in a battle. An illustration of how the application of the principle of military necessity is applied in a war or armed conflict is contained in Article 54, which states that submarine cables located in occupied territories or neutral areas can be confiscated or destroyed if possible, or if left unchecked will provide benefits to the enemy. However, there is a consequence that states that in times of peace it needs to be repaired or compensated.

## **2. The Principle of Military Necessity in the Hague Convention V 1907**

The Hague Convention V also stipulates that if military necessity requires railway facilities and infrastructure from a neutral country, whether it belongs to the state or private, it is permissible. However, there is a requirement that the use of railway facilities and infrastructure is absolute (from the aspect of military necessity) and must be returned with proportional compensation to the utilization.

## **3. The Principle of Military Necessity in the Hague Convention VIII 1907**

Military authorities in a state of war can take security measures against mining ships anchored as regulated in Article 3, to take security measures and ensure that the delivery of mining materials is intended for peaceful purposes. This is understandable considering that mining materials are the basic ingredients of the weapon system so that for the sake of the military, the military authorities can investigate mining materials and notify the government of mining materials owners through existing diplomatic channels.

Furthermore, Article 6 states that military authorities in the context of military necessities can transform mining materials in other forms into safer forms.

## **4. The Principle of Military Necessity in the Hague Convention IX 1907**

In the context of military necessity, a commander can attack with artillery aimed at military or naval bases, depots of weapons or other military material, workshops, or places that can be used for hostilities, including warships in port after a sufficient period

of notification of the attack. This means that a military commander before carrying out an attack has taken sufficient steps to avoid or reduce excessive damage and losses.

A naval commander in deciding to carry out a bombardment must consider protected places such as hospitals or evacuation places for those who are sick or injured, places of worship, and historical monuments as long as these places are not used for military purposes (the enemy) or change its protection status. On the other hand, residents are given the obligation to provide signs (symbols) of protection that can be seen from afar.

Before carrying out a bombardment of a place, a naval commander must give a warning to the authorities in advance.

#### **5. The Principle of Military Necessity in the Hague Convention XI 1907**

In principle, postal ships are neutral in terms of the laws and customs of war at sea as well as for merchant ships, however, this exemption status does not last forever when there is absolute interest and only considerations and possible voyages.

#### **6. The Principle of Military Necessity in the Hague Convention XIII 1907**

Ports of neutral countries and warship bases can only be used for the repair of warships from the belligerent party so that the ships are returned to seaworthiness not to increase the combat power of the warships. The local neutral country authorities will determine what repairs are needed and this must be done even if it will result in a time delay (repairs).

#### **7. Principles of Military necessity in the Declarations concerning the Laws of Naval War, London 1909**

The London 1909 Declaration was the product of an international conference due to the emergence of several interpretations of the application of the rules of war at sea which need to be connected or shared, including the rules against civilian (trade) ships in the event of war. Article 29 states that it will not be treated as infiltration in war:

- (1) untuk kegiatan yang secara khusus untuk kegiatan kemanusiaan seperti membantu mereka yang sakit dan luka, dalam keadaan kepentingan militer yang mendesak apabila hal itu dilanggar maka dapat dikenakan kompensasi;
- (2) the use of ships carrying crews and passengers during the voyage.



Therefore, a warship from a belligerent party can stop a ship because the ship is carrying contraband and neither party claims responsibility for the goods (contraband) on the ship. Then the ship will be allowed to continue its journey if it releases the contraband, then the release of the goods is carried out with proof of submission.

The contraband catchers are free to destroy the contraband. In principle, a belligerent party can capture a ship from a neutral country and bring (detain) it to the port for investigation (Article 48), but if the neutral country ship endangers the safety of the warship or will hinder the military operations carried out (will provide benefits to the enemy) then the ship can be destroyed (Article 49).

The warship that destroys ships of neutral countries in their consideration only because of an extraordinary situation and a necessity of a situation, if it turns out that the situation is not acceptable for such destruction then they must be compensated regardless of whether the arrest is legal or not.

#### **8. The Principle of Military Necessity in the Oxford Manual of Naval War, 1913**

In article 114, it is stated that the destruction of a neutral state ship by a warship needed to be compensated unless it can be proven that the destruction was a justifiable exception to carry out the destruction. These provisions apply to illegal confiscations and if the confiscated goods are destroyed, the owner of the goods is entitled to compensation. If the catcher uses the ship or the catch and his actions are declared illegal, then the interested party pays compensation fairly as stated in the document when the ship or the catch was used.

#### **9. The Principle of Military Necessity in The Hague Rules of Air Warfare 1923**

In war, the flight crew of a neutral country who are detained will be released unconditionally, unless they are crew members of an enemy country or crew of a neutral country aircraft that helps the enemy, and then they will be taken as prisoners' war. Passengers will be released unless they are assisting the enemy or the enemy military then they will be taken as prisoners of war. Release (crew and passengers) can be suspended if there is a necessary military necessity. Private aircraft found visiting and conducting searches for enemy aircraft can be destroyed if the military commander finds it necessary to do so (considering military necessity), for the personnel on board are secured and aircraft legal documents are retained.

#### **10. The Principle of Military Necessity in the Roerich Pact Washington 1935**

The Roerich Pact 1935 was an international agreement that substantially neutralized places such as historical monuments, museums, scientific institutions, art centers, and educational and cultural institutions which in principle have the right to protect these places when there is war. This means that these places and their personnel are protected from attack or may not be used as combat targets (Article 1). However, if the place is used for military purposes or necessities, the protection status will be lost or it can be used as a military target or combat target (Article 5).

#### **11. The Principle of Military Necessity in the Geneva Conventions I of 1949**

The protecting state of the conflicting parties shall appoint or elect a representative as agreed by the parties who in carrying out their duties may not exceed the authority stipulated in the convention. They must take into account the urgent security interests of the parties, exception actions outside the limits of their authority are only allowed because of very urgent military necessities (Article 8).

Acts of intentional killing, torture or inhuman treatment, biological experiments, causing excessive suffering or serious bodily injury, widespread destruction, and seizure of property, all of which are prohibited by military necessity and carried out in unlawful ways and arbitrarily are all Included as grave violations in this convention (Article 50).

#### **12. The Principle of Military necessity in the Geneva Conventions II of 1949**

The Geneva Convention II 1949 is about improving the condition of members of the Armed Forces at the sea who are wounded, sick, and victims of shipwrecks. Several of its articles contain arrangements relating to issues of military necessity, although textually several articles are the same as the Geneva Convention I. For example, article 8 which regulates issues beyond the authority of the protective state is the same as article 8 of the Geneva Convention I.

#### **13. The Principle of Military Necessity in the Geneva Conventions III of 1949**

Geneva Convention III 1949 is about the Treatment of Prisoners of War and the application of the principle of military necessities. First, Article 8 regulates the authority of the protective state, especially for representatives who are not allowed to take actions that exceed the limits of their authority, this provision is textually identical to Article 8 of the Geneva Convention I. Prisoners of war should not be placed in areas that may be affected by war or made as a shield against military attacks. Prisoners of war must be given the same protection as the civilians and if the military considerations permit,

prisoner of war camps shall be marked with the letters PW or PG which can be seen from the air (Article 23).

#### **14. The Principle of Military Necessity in the Geneva Conventions IV of 1949**

In the Geneva Convention IV of 1949 concerning the Protection of Civilians in Time of War, several articles are substantially related to the application of the principle of military necessity. For example, Article 5 states that if a protected person is taken into custody as a spy or a saboteur, or is suspected of carrying out acts contrary to state security, in circumstances where military security requires him to do so, he will be deemed to have lost his rights according to the convention. As long as military considerations allow the parties to the dispute to provide identification (differentiating) for civilian hospitals, these marks can be seen by the enemy's armed forces from land, air, and sea to avoid possible enemy attacks (Article 18).

All protected persons who wish to leave their territory during the conflict are permitted unless their departure is contrary to the national interests of the country (Article 35). Internment or places designated for sheltered persons can only be held in the security of the detaining state that requires it (Article 42).

In principle, the forced transfer or deportation of protected persons to other areas or other countries is prohibited, however, for reasons of security or urgent military reasons, the occupying power may evacuate completely or partially to a certain area. Such transfer shall not result in the persons being protected leaving the borders unless the evacuation is due to unavoidable reasons, and at the end of hostilities, such persons are transferred back to their place of residence (Article 49).

Destruction by disputing parties of movable or immovable property belonging to an individual or collective, state property, humanitarian organization, or property of other general authorities is prohibited in principle unless such destruction is necessary by military operations (Article 53).

The criminal law in the occupied territory remains in effect with the exception that the law can be revoked or suspended by the occupying power if the law is a threat to security and hinders the convention (Article 64).

#### **15. The Principle of Military Necessity in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954**

The parties to a dispute are always obliged to respect cultural wealth both in their territory and in other (opponent) territories. However, this obligation can be revoked

only in circumstances where military necessities imperatively require a waiver of that obligation (Article 4).

Special protection can be given to protect cultural objects in an armed conflict such as monuments and other cultural objects of great importance, and these places or objects are not used for military purposes (Article 8).

Immunities of special protection against cultural objects may be revoked in exceptional circumstances of unavoidable military importance, and only for a necessary time. The revocation of immunity can only be carried out by a commander at the division level or above, and if possible the revocation is notified to the opposing party (Article 11).

#### **16. The Principle of Military Necessity in the Protocols Additional to the Geneva Convention, 1977 (Geneva Protocol I, 1977)**

In principle, all injured, sick, or shipwrecked victims must be respected and protected. They should be treated with humanity, and receive health care and full attention without delay in all circumstances (Article 10).

It is forbidden to attack, destroy or abandon objects that are necessary for the civilian population (food warehouses, agricultural land, and products, drinking water installations), the exception is if the place, the building, or installation in the area is used as a support and has an important value from the operation military (providing a military advantage to the opponent) and an attack on the place is the only way (Article 54).

Buildings and installations that contain hazardous energy, such as dams, and nuclear power plants, may not be the object of a military attack. Protection of the building or installation will end if:

- a. Dams are used outside of their functions, used as support for military operations, and attacks are needed as the only way.
- b. Nuclear power plants are used outside their functions, are used as a support for military operations, and attack is needed as the only means.
- c. Buildings or other installations in the vicinity that are used to support military operations and attacks are required as the only way.

In buildings or installations and other places around them, the necessary defensive measures can be taken to repel attacks by placing weapons that are only to fend off or deter attacks against them or not to place offensive weapons (Article 56).

Civilian defense organizations can carry out their functions except in cases of very urgent military necessity (Article 62).

Members of the armed forces and military units assigned to civil defense organizations must be respected and protected. Materials and buildings from military units assigned to civil defense organizations and specifically for civil defense tasks, if they fall to the opposing party will still be subject to the laws of war. Goods may not be diverted from the purpose of civil defense unless there is an urgent military necessity (Article 67).

### **17. Geneva Protocol II, 1977**

The issue of military necessity in Protocol II 1977 is only found in one article because this protocol has the aim of not influencing or intervening either directly or indirectly on a state party to the convention to maintain or restore law and order in that country (Article 3).

An order for the transfer of the civilian for reasons of dispute may not be issued, unless security for the civilian is concerned or there are military reasons that are very urgent (Article 17).

### **18. The principle of military necessity in the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and Protocols. (GCW), 1980**

Convention for the Prohibition or Restriction of the Use of Conventional Weapons that may excessively injure or have indiscriminate effects aims to limit the excessive use of weapons or use that result in excessive harm or suffering and cannot distinguish between targets. In principle, the use of weapons in a war or armed conflict is not unlimited with the measure that its use does not result in excessive injury or unnecessary suffering, causing widespread and long-term damage (destruction) to the environment.

Protocol II provides for restrictions on the use of booby traps and other military devices where appropriate precautions must be taken to protect civilians from the effects of the weapons used. Appropriate preventive measures practically take into account all aspects of the situation or circumstances prevailing at that time including humanitarian aspects and military considerations (Article 3).

Booby traps and other weapons are prohibited from being used in cities, villages, or areas of concentration of civilians outside or near the battlefield unless placed on or around military objects owned or under the control of the opposing party (Article 4).

In general, Article 5 regulates the prohibition of the use of long-range booby traps unless those are used to be planted in their territory or around military objects for military purposes (as a defense tactic). The placement or deployment of such booby traps must be given a warning acceptable to the civilian unless circumstances permit. The parties must ensure the recording of the location (mapping) of minefields, and planting of booby traps that they place (Article 7).

After the cessation of hostilities the parties are required to agree with any party in terms of providing information, technical assistance, joint operations aimed at removing (destroying) mines placed or deactivating minefields or booby traps placed during the conflict (Article 9).

Protocol III substantially regulates the issue of limiting or prohibiting the use of incendiary weapons. Incendiary weapons (including those fired from the air) are prohibited from being used as a means of attack aimed at places of the civilian and civilian objects unless the civilian objects are separated from the civilian population and measures have been taken to prevent or limit the consequences from military objects is carried out, and actions to minimize secondary damage to the lives of the civilian population, losses to civilians and the widespread damage to military objects (Article 2).

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