



## Is Military Necessity Always Opposed to Humanity?

A seminar organized by the

Forum for International Criminal and Humanitarian Law

in co-operation with the Norwegian Centre for Human Rights (University of Oslo)  
and the Peace Research Institute Oslo (PRIO)

on Tuesday 9 November 2010 14:00-15:45, at NCHR, Cort Adelers gate 30, 0254 Oslo.

That military necessity is diametrically opposed to humanity is a powerful notion in international humanitarian law (IHL). In connection with the 60th anniversary of the 1949 Geneva Conventions last year, numerous commentators reiterated the commonly held view according to which the law reconciles these rival sets of considerations. Also, the International Committee of the Red Cross recently averred that the military non-necessity of an act renders it unlawful even if it is otherwise not prohibited under validly posited IHL rules.

The keynote speaker at this FICHL seminar will challenge both positions. He will argue that the former position over-simplifies the intricacy and nuances surrounding the process of IHL norm creation, whereas the latter exemplifies an over-reaction to the discredited *Kriegsräson* doctrine.

It is not true that military necessity always encourages what humanity abhors and military necessity always spurns what humanity demands. On the contrary, given conduct can be both effective and humane (*e.g.*, fighting insurgents in a way that earns the support of local civilians), or both pointless and cruel (*e.g.*, destroying a detainee's cognitive faculties through harsh intelligence interrogations). IHL rules on these matters represent a convergence between military and humanitarian considerations. Even where they do not coincide, military necessity merely resists prohibiting conduct consistent with it and obligating conduct inconsistent with it; humanity, in contrast, gravitates towards obligating humane conduct and prohibiting inhumane conduct. What we have here is not a conflict (*e.g.*, "one must perform X" *v.* "one must forbear X") but a contradiction (*e.g.*, "one may perform Y" *v.* "one must forbear Y") of norms. Where contradictions occur, military necessity may trump humanity or *vice versa* (resulting in unqualified liberties or duties); a compromise may be struck (resulting in principal rules to which clauses exceptionally permitting deviation on account of and to the extent of either set of interests may be attached); no final compromise may be reached (resulting in no rules or open-textured ones leaving the equilibrium to be found by their addressees); and so on. There are also IHL rules that do not involve any military-humanity interplay at all.

Military necessity embodies the two-fold truism that it is in one's strictly *amoral*, military interest to perform what is materially conducive to the attainment of a legitimate goal in war and to forbear what is not so conducive. For the purposes of IHL norm creation, military necessity itself does not make conduct consistent with it the object of mandatory performance. Nor – and more importantly – does it make conduct inconsis-

tent with it the object of mandatory forbearance. *Kriegsräson* is unacceptable because it purports to justify all that is militarily necessary even if it is an evil that has already been outlawed by validly posited IHL rules. But there is no basis for suggesting *a contrario* that all that is militarily unnecessary should be unlawful even if it is a harmless vice that contravenes no validly posited IHL rules (e.g., wasteful expenditure of military resources, blunders and self-inflicted tactical losses, etc., to which humanity remains normatively indifferent). Plainly, although the necessity or non-necessity of *an evil* may be one of its lawful-unlawfulness modifiers, the necessity or non-necessity of *an act* is not one of its lawful-unlawfulness modifiers.

Seminar participation is free. To register, please send an e-mail message to [info@fichl.org](mailto:info@fichl.org) by 5 November 2010. For more information about the Forum, please see [www.fichl.org](http://www.fichl.org).

### Programme:

- 14:00 **Introduction**, by Professor Nils A. Butenschøn<sup>1</sup> (Director, Norwegian Centre for Human Rights).
- 14:05 **Is Military Necessity Always Opposed to Humanity?**, by Nobuo Hayashi<sup>2</sup> (Researcher, PRIO).
- 15:00 **Comments by** Arne Willy Dahl<sup>3</sup> (Judge Advocate General, Norway; President, International Society for Military Law and Law of War) and Simon O'Connor<sup>4</sup> (Legal Adviser, Norwegian Red Cross), followed by discussion.

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<sup>1</sup> **Nils A. Butenschøn** is Director of the Norwegian Centre for Human Rights at the Law Faculty of the University of Oslo. He is also a Professor of Political Science at the University of Oslo and one of the leading experts on the Middle East in the Nordic countries. He has published extensively in his field. For more information, see <http://www.jus.uio.no/smr/english/people/aca/stvnbl/index.html>.

<sup>2</sup> **Nobuo Hayashi** is a Researcher at the Peace Research Institute Oslo (2008-present), where he is preparing a monograph on military necessity. Also, as a Visiting Professor at the International University of Japan (2005-present), he teaches semester-length courses on general public international law, the international law on recourse to force and the law of armed conflict. Previously, he was a Legal Advisor at the Norwegian Centre for Human Rights, University of Oslo Law Faculty (2006-2008); a Legal Officer in the Prosecutions Division, Office of the Prosecutor (OTP), International Criminal Tribunal for the Former Yugoslavia (ICTY)(2004-2006); and an Associate Legal Officer in the ICTY OTP Legal Advisory Section (2000-2003). He holds a B.Sc. in Foreign Service in international relations, law and organisation from Georgetown University (1995); a *Diplôme d'études supérieures*, an M.Phil. equivalent, in international law from the *Institut universitaire de hautes études internationales* (HEI) in Geneva (1998); and an LL.M. from the University of Cambridge (1999). He was also enrolled in the post-graduate School of International and Public Affairs at Columbia University (1995-96), the Hague Academy of International Law (1999) and the doctoral programme at HEI (1998-2004).

<sup>3</sup> **Arne Willy Dahl** is Judge Advocate General for the Norwegian Armed Forces, and in that capacity responsible for penal prosecution in military cases and for legal advice in summary punishment cases. Since 1982, he has been lecturer at the Army Academy, Judge Advocate for Eastern Norway, District Attorney (Public Prosecutor) in Oslo, Head of the Legal Services of the Norwegian Armed Forces, and Prosecutor at the Office of the Director for Public Prosecutions with special responsibility for war crimes. He has written a handbook on military international law and is currently President of the International Society for Military Law and the Law of War.

<sup>4</sup> **Simon O'Connor** is Legal Adviser, Norwegian Red Cross. He has served a legal adviser in armed forces and co-teaches the Masters course in international humanitarian law at the University of Oslo.