

Competing Imperatives: The Paradox of Determining Military Necessity in
Counterinsurgency Operations

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Introduction

The concept of military necessity is central to international humanitarian law (IHL), because it determines permissible conduct towards civilians during times of war. Although defined under international statute, military necessity remains an essentially subjective determination of what is ‘necessary’ to a given party in a given conflict. This allows for reinterpretations and alternative understandings to become contested in the legal domain, and permits understandings of necessity to change in accordance with the changing realities of war and the needs of state and military parties to a conflict. Thus, while the concept is central to examinations of legality in warfare, and is the touchstone for justification of legitimate military action in contemporary combat operations, it remains subject to differing claims of its appropriate interpretation and application by modern militaries.

Applied to contemporary modes of military engagement, military necessity can lead to paradoxical understandings of international humanitarian law and the conduct of war. In particular, the context of counterinsurgency (COIN) operations may require new interpretations of military necessity, given that COIN’s strategic particularities defy the ability of existing instruments of international humanitarian law to effectively address. Whereas classical warfare and early IHL were premised upon clear distinctions between combatants and civilians, counterinsurgency defies such a clear typology. Military and civilian actors equally contribute to the success of COIN operations, and enemy combatants, namely insurgents, cannot be distinguished from the general population by a particular uniform. Such blurry distinctions in counterinsurgency cause numerous challenges for combatants and their adherence to international humanitarian law.

Counterinsurgency operations invert many classical aspects of the conduct of war, including the respective valuation of one's own soldiers and enemy civilians. To succeed, counterinsurgency doctrine requires that the provision of security for enemy civilians be the guiding objective of all military operations. Without ensuring civilians' safety from harm, insurgents cannot be defeated. COIN doctrine is thus congruent with IHL, which requires that parties to a conflict provide maximum consideration to the safety of civilians. Under COIN doctrine, however, operational success is but one requirement for successful counterinsurgency. The SWORD model, for example, perceives seven different 'wars within wars' or strategic dimensions that must be won in order for a counterinsurgency to be successful.¹ One of these dimensions is "the war to stay the course and maintain commitment," which can also be conceived as the 'war at home', namely the requirement of maintaining domestic popular support for the foreign deployment of troops in a counterinsurgency operation.²

The paradox explored in this paper is this: placing the security of civilians at the centre of military determination requires exposing intervening soldiers to greater risk. This heightened risk – specifically the friendly casualties that it is likely to incur – results in a reduction of domestic popular support for the military mission. This loss of support at home can have grave consequences for the ultimate prospect of the mission's success, particularly for liberal-democratic counterinsurgencies because of the responsiveness of policy-makers to changing public opinion. The greater risk assumed by the counterinsurgents, therefore, has negative potential implications for the likelihood of a

¹ Max G. Manwaring and John T. Fishel, "Insurgency and Counterinsurgency: Toward a New Analytical Approach," *Small Wars and Insurgencies* 3, no. 3 (Winter 1992).

² Nils French, "Learning from the Seven Soviet Wars: Lessons for Canada in Afghanistan," *The Canadian Army Journal* 10, no. 4 (Winter 2008): 36

successful mission outcome, given that relatively small numbers of counterinsurgents casualties can translate into significant changes in domestic popular support. The maintenance of that support, therefore, seemingly becomes a necessary military objective itself, given that it is an essential element for the continued conduct of military operations. This paper explores the possible interpretation of domestic popular support as a legitimate object of military necessity in counterinsurgency operations by examining the implications of the competing imperatives of minimizing civilian and soldier casualties for counterinsurgency operations.

Military Necessity and International Humanitarian Law

At its root, international humanitarian law attempts to “reconcile the competing demands of security and humanity, of principle and pragmatism.”³ It is not an attempt to prevent war, but an effort to curb war’s worst excesses, and moderate the conduct of parties to a conflict such that they conform to a recognized standard of civilized warfare. As a body of treaties and agreements, IHL’s origins stretch back to the 1800s, when observers of that century’s wars sought to reconcile humanity’s proclivity for violence with its increasing technological capacity to inflict human suffering. Commenting on the American Civil War, Francis Lieber noted: “the principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”⁴ The principle to which he referred was the same principle of humanity espoused by Henri Dunant in 1859 after witnessing the Battle of Solferino. Dunant’s pursuit of principled and humane conduct in war led to the

³ David Bosco, “Moral Principle vs. Military Necessity,” *The American Scholar* 77, no.1 (Winter 2008). Accessed at <http://www.theamericanscholar.org/moral-principle-vs-military-necessity/>.

⁴ Quoted in *ibid.*

establishment of the International Committee of the Red Cross, which would become the custodian of international humanitarian law and the chief proponent of its practice. From the mid-19th century until the outbreak of the First World War, IHL saw a profusion of documents promulgating its basic tenets. International agreements such as the First Geneva Convention of 1864, the St. Petersburg Declaration of 1868, and the Hague Conventions of 1899 and 1907 marked major advances for the principles of limitation and humanity in war. They also employed the concept of military necessity as a major component of their determination of acceptable conduct in war.

For instance, the St. Petersburg Declaration sought to prohibit the use of certain types of weapons, excluding from legitimate use those considered to cause unnecessary suffering to combatants. It asserted 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; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; [and] that the employment of such arms would, therefore, be contrary to the laws of humanity⁵

Consequently, weaponry that did more than just kill or disable soldiers, such as the innovation of soft-nosed and explosive projectiles, was superfluous to the principal military objective of war. Put differently, they were not militarily *necessary*, thus the pain and suffering they inflicted were indefensible and subject to proscription. That such armaments were banned as being unnecessary, and the ban was justified by reference to ‘the laws of humanity’, speaks to the clear situation of military necessity in the moral realm. More significantly, it established the crucial precedent that there are restrictions

⁵ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* (St. Petersburg: November 29-December 11, 1868).

upon the conduct of war, as defined by the recognized objectives of the military action and generally agreed upon standards for the conduct of war.

Such an attitude marks a departure from the classical, Clausewitzian conception of warfare, wherein “a good war is one in which every act is ‘militarily necessary’ - that is, executed professionally and with the optimal resource mobilisation, and directed towards a clearly defined, strategically sound and reasonably attainable military goal.”⁶ The modern conception of military necessity draws meaning not from material determinations of what it takes to win a war, but from moral justifications of which actions are acceptable in the pursuit of victory. It is, in effect, a question of legitimacy: are the military methods employed legitimate given the objective that they are used to pursue? Military necessity, thus, governs the legitimate use of force in the pursuit of a legitimate military objective; the legitimacy of the goal must be presumed in order for the legitimacy of the conduct to be recognized. In this way, ‘necessary’ is euphemistic for ‘permissible’, and ‘unnecessary’ for ‘impermissible’, based on prior determinations by a belligerent of the significance of a military objective. Thus, in modern warfare, “matters of rational conduct transform themselves into matters of normative imperative - ‘that which *can* be done without *must* be done without’.”⁷ This moral conception of what is militarily permissible is, in many ways, the essence of international humanitarian law, given that IHL seeks only to moderate the conduct of belligerents to a conflict. Much like IHL itself, military necessity is not an absolutist concept, but one based on certain principles that are adaptable to the changing circumstances of warfare.

⁶ Nobuo Hayashi, “Military Necessity,” PhD Application Project Description (Oslo: International Peace Research Institute, 2008): 6. Accessed at <http://www.prio.no> (October 12, 2009).

⁷ *Ibid*, 7. Emphasis in original.

In contemporary practice, the difficulty rests in the necessarily subjective determinations of which actions qualify as militarily necessary, and are thus permissible, and which do not. The Geneva Conventions, the cornerstones of IHL and the laws of war, do not precisely define ‘military necessity’, but offer instead a two-part explication that has led to the contemporary state of practice. Military objectives – those which may be legitimately pursued by parties to a conflict – are identified as “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.”⁸ While explicitly stating that attacks which deliberately target civilians are prohibited,⁹ the Geneva Conventions also state that civilian casualties do not constitute a violation of international law so long as the number is not “excessive in relation to the concrete and direct military advantage anticipated”¹⁰ from the use of force. Military necessity, therefore, is the reasonable determination of the strategic importance of an objective and the calculation of an acceptable rate of civilian casualties relative to its accomplishment. Consequently, it defines the threshold for the determination of proportionality in combat, and distinguishes legitimate military actions from the commission of war crimes.

Because of the subjectivity involved in its determination, and the high stakes involved for the individual soldiers present at the time of action, military necessity has, at times, been interpreted very widely. Policy-makers, senior officers, and entire militaries have extended what is militarily ‘necessary’ to include their preferred objectives, often by

⁸ ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, of 8 June 1977 (Geneva: International Committee of the Red Cross, 1996), section 52.2.

⁹ Ibid, 51.2.

¹⁰ Ibid, 51.5b.

employing the rhetorical technique of referring to broad strategic goals rather than discrete tactical ones.¹¹ For instance, Benvenisti argues that: “armies interpret the law as granting them wide discretion . . . In applying the test of proportionality, they stipulate that the means used should be measured against the overall aim of winning a specific battle. And the overall aim is defined subjectively.”¹² This subjectivity has, from a certain perspective, allowed for the conceptual stretching of ‘military necessity’ to include under its aegis a wide variety of military action directed against innumerable desired objectives.¹³ However, from another point of view, it also enables the adaptation of the concept to account for stark and important changes in the nature of combat, the legality and culpability of military and civilian officials, and the distinct imperatives of fighting a counterinsurgency war.

Contemporary COIN Doctrine

Contemporary counterinsurgency doctrine has largely embraced the necessity of placing civilians at the centre of military operations. Perhaps the most striking example is that of the United States, which has developed a new COIN doctrine incorporating the lessons learned in both Afghanistan and Iraq. Published in 2007, the *U.S. Army/Marine Corps Counterinsurgency Field Manual* unequivocally states: “the cornerstone of any COIN effort is establishing security for the civilian populace. Without a secure

¹¹ Thomas W. Smith, “Protecting Civilians, or Soldiers? Humanitarian Law and the Economy of Risk in Iraq,” *International Studies Perspectives* 9, no.2 (2008): 147.

¹² Eyal Benvenisti, “Human Dignity in Combat: The Duty to Spare Enemy Civilians,” *Israel Law Review* 39, no. 2 (2006): 95-96.

¹³ See, for example, Aaron Belkin, “Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?” *Parameters* 33, no. 2 (2003).

environment, no permanent reforms can be implemented and disorder spreads.”¹⁴ Although as yet unpublished, the Canadian Forces have also written a counterinsurgency manual drawing upon lessons learned in the Afghan theatre.¹⁵ Although more equivocal than the American manual, it too indicates: “the overall effect sought in a counterinsurgency is not the death or capture of insurgents, but more importantly, the provision of security to the population.”¹⁶ These documents underline the degree to which success in counterinsurgency operations rests, not with kinetic operations, but with the provision of a measure of human security for the population. By contrast, prosecuting an enemy-centric counterinsurgency risks obscuring the fact that “the civilian population is the center of gravity – the deciding factor in the struggle . . . The real battle is for civilian support for, or acquiescence to, the counterinsurgents and host nation government.”¹⁷ Any action, therefore, which alienates or angers the local population is counterproductive to the counterinsurgents’ long-term goals, no matter how many enemy fighters are killed in the process.

Consequently, insurgents profit from *all* civilian casualties, regardless of how or by whom those civilians are killed: if they are killed by intervening troops, it alienates support among the local population, if by the insurgency, it shows the inability of the counterinsurgents to protect the civilian population. However, insurgents clearly gain the most when civilian casualties occur as a result of counterinsurgent military operations,

¹⁴ United States Department of the Army, *The U.S. Army/Marine Corps Counterinsurgency Field Manual* (Chicago: University of Chicago Press), 42.

¹⁵ Commissioned in 2005 by then-CDS Gen. Rick Hillier, a draft version of the ‘counter-insurgency operations manual’ was released to the public in 2007. However, DND has since announced that it does not intend to release the document for publication or use by the Canadian Forces.

¹⁶ DND, *DRAFT: Counter-insurgency Operations Manual* (Ottawa: Department of National Defence, 2007), 12.

¹⁷ Sarah Sewall, “Introduction to the University of Chicago Press Edition: A Radical Field Manual,” *The U.S. Army/Marine Corps Counterinsurgency Field Manual* (Chicago: University of Chicago Press, 2007), xxv.

for such incidents simultaneously discredit the counterinsurgents and insulate the insurgents from direct responsibility for harming the population. This reality delegitimizes the conventional military notion of ‘acceptable civilian casualties’ because any civilian casualties are detrimental to the counterinsurgents’ objectives. The onus to minimize civilian casualties, thus, rests squarely upon the counterinsurgents, whose credibility with the local population is linked to the prevention of violence. For any contemporary counterinsurgency operation whose operational focus remains enemies, rather than civilians, civilian casualties incurred during tactical successes will continue to confound the prospect of strategic victory.

A tactical consequence of this valuation of civilian life, however, is that casualty-aversion and force protection for counterinsurgents cannot be given priority over the protection of civilians. Principled military intervention may expressly mandate that “force protection cannot become the principal objective,”¹⁸ but political realities and war-resistant publics have encouraged this practice nonetheless. Force protection has become a bedrock principle of Western combat operations, but it is theoretically and practically counterproductive to the counterinsurgency effort to ‘win hearts and minds’. Though intended to minimize troop casualties, “if military forces remain in their compounds, they lose touch with the people, appear to be running scared, and cede the initiative to the insurgents.”¹⁹ This not only means that counterinsurgents are less able to combat the presence of insurgents amongst the population, it suggests to the receiving populace that the counterinsurgents are unprepared to expose themselves to the same dangers that they, the people, have no choice but to face. Effective counterinsurgency points to the futility

¹⁸ ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), viii.

¹⁹ United States Department of the Army, 48.

of force protection as a guiding operational principle: “sometimes, the more you protect your force, the less secure you may be.”²⁰ In this way, the provision of human security for the civilian population requires that counterinsurgents accept greater danger to themselves by engaging in activities such as foot patrols, establishing forward operating and listening posts, interacting with communities, and maintaining a visible public presence. The first paradox of counterinsurgency, then, lies in telling “troops something they may not want to hear: in order to win, they must assume more risk.”²¹

Counterinsurgency doctrine thus seeks to remedy the imbalance between the relative risk to which soldiers and civilians have become exposed in contemporary warfare. In particular, it challenges the inherent practice of “risk transfer” which, “defying virtually every theory of counterinsurgency, military officials have pursued [through] force protection even at the expense of mission accomplishment.”²² The relationship between risk to soldiers and risk to civilians is a zero-sum equation: less risk to one group entails more risk to the other. Given official preference for the kind of “immaculate war” that allows for the realization of military objectives with minimal risk of friendly casualties, dominant military practice to date has clearly preferred the safety of soldiers to that of civilians.²³ This practice is, of course, severely detrimental to the ultimate prospect of success in counterinsurgency, but is neither a naturalized nor inevitable aspect of combat. On the contrary, “to a large degree, modern strategists fix the levels of risk that combatants and non-combatants face. Civilian casualties flow from

²⁰ Ibid.

²¹ Sewall, xxvi.

²² Smith, 145.

²³ Ibid, 146. See also Echevarria 2004, Reisman 2007, and Shaw 2005.

policy preferences in predictable ways.”²⁴ Thus, it is possible to more evenly distribute the risks faced by counterinsurgents and civilians in such a way that both groups face certain levels of risk, but the ultimate goal of winning popular support is encouraged through a visible sharing of the dangers of war.

Although the importance of human security for effective counterinsurgency is clear, this doctrine poses serious challenges for democratic states engaged in counterinsurgencies. In particular, it raises the question off how to define an acceptable balance between protection of foreign civilians and risk to one’s own soldiers. Effective COIN, as shown through history and enunciated in the new *American Field Manual*, contradicts the tactics by which Western states have fought wars for decades. In particular, an aversion to taking casualties has meant that most democratic states avoid conflicts likely to result in fatalities, unwilling to incur the political costs of body bags returning home. This is exemplified by the United States in its post-Vietnam military engagements, which “reflected a decided aversion to casualties, typified by a greater preference for precision bombing and greater standoff.”²⁵ This style of warfare was conducive to the pursuit of military objectives which were non-essential to the maintenance of national security, a description that applies to Western states’ military engagements throughout the 1990s.²⁶ The post-9/11 invasions of Afghanistan and Iraq altered this way of war by committing many Western states – including those with the most capable and significant militaries – to the extensive use of ground forces for close combat and COIN operations. However, despite engaging in a new form of warfare that

²⁴ Ibid, 145.

²⁵ Antulio J. Echevarria, *Towards an American Way of War* (Carlisle: Strategic Studies Institute, US Army War College, 2004), 9.

²⁶ Ibid.

requires a higher tolerance for casualties and political forbearance in order to achieve success, states engaged in counterinsurgency have remained guided by political considerations and a resilient casualty-aversion reflected in conduct on the ground.

Contemporary counterinsurgency operations effectively invert the traditional military calculus of valuing most the lives of one's own soldiers and pursuing enemy fighters as the primary objective of military operations. This calculus does not – indeed, cannot – apply in COIN because the enemy, insurgents, is not easily distinguishable from the general population. Even if they were, the principal objective of counterinsurgency operations is not 'defeating' a conventional enemy; precisely because the enemy can readily draw reinforcements and material support from the civilian population, securing public support through the provision of human security must be the primary objective. This imposes numerous operational, legal and political challenges upon states engaged in counterinsurgency, and alters considerations of which actions are most likely to result in strategic success.

However, counterinsurgency is further complicated by the fact that success requires more than just tactical success on the ground, even if such success includes winning the support of the local population. COIN doctrine may require soldiers to assume a certain degree of risk in order to minimize the transfer of risk to civilians, but this conflicts with a competing imperative for successful counterinsurgency. The SWORD model, to date the most empirically valid model for predicting the effectiveness of a COIN operation, identifies seven dimensions of counterinsurgency that must be addressed to maximize the likelihood of success.²⁷ One of these dimensions is “supporting actions of the intervening power”, which includes the variables of “perceived

²⁷ Manwaring and Fishel, 281.

strength of commitment” and “perceived length of commitment.”²⁸ In the case of democratic societies conducting counterinsurgency, these variables are directly subject to the popular political opinion of the home, or domestic, population. Because elected officials are responsive to this popular opinion, and elected officials ultimately take the decision to sustain or abandon a military deployment, the maintenance of domestic support is equally important to the long-term prospects of success in a counterinsurgency as the achievement of popular support in the receiving country.

Problematically, however, this domestic popular support can be undermined by the so-called ‘body-bag syndrome’, a form of casualty-aversion present in the general public. Although it is methodologically and conceptually challenging to determine the influence of casualties upon democratic foreign and military policy-making, casualties can certainly awaken voting publics to the human costs of a military effort, and incite resistance to the foreign deployment of national troops.²⁹ In particular, casualties are shown to have a greater influence upon military engagements popularly perceived as being non-essential: “the further a particular war or military operation is removed from core national interests, the more the populace will be averse to casualties and the more decision-makers will seek to avoid them.”³⁰ While circumstances vary over time and context, the long duration and electiveness of intervening powers’ decisions commitment to intervene renders most counterinsurgencies more susceptible to the influence of public opinion than other types of military involvement. The consequence is that decision-makers are confronted with the necessity of minimizing their casualties in order not to

²⁸ Ibid, 284.

²⁹ Hugh Smith, “What Cost Will Democracies Bear? A Review of Popular Theories of Casualty Aversion,” *Armed Forces and Society* 31, no. 4 (Summer 2005).

³⁰ Ibid, 492.

motivate or fuel domestic opposition to the deployment of troops abroad.

The result of these competing imperatives is a paradox for the prosecution of effective counterinsurgency strategy. On the one hand, COIN doctrine requires that the intervening power accept a greater number of casualties in order to minimize the cost to civilians and maintain popular support in the receiving country. Higher numbers of friendly casualties, however, result in decreased domestic support for the mission, which is transmitted to democratic policy-makers and can result in a greater likelihood of withdrawal from the mission prior to the accomplishment of its strategic objectives. Such a condition must be considered a failure, and constitutes an undesirable outcome for the counterinsurgents. On the other hand, the alternative is an emphasis on force protection in order to satisfy domestic casualty aversion. Such a strategy, however, comes at the cost of civilian lives, resulting in a decrease in support for the mission among the receiving public, opposition to the counterinsurgents' presence and a reversion to support for the insurgency. Given the calculus of counterinsurgency doctrine, the loss of the civilian 'centre of gravity' has dire implications for the prospects of success, and must also be considered likely to result in strategic failure. In both cases, it appears that this paradox confronts democracies with significant constraints on their ability to succeed in counterinsurgency operations.

Domestic Support as Military Necessity?

Based on the previous analysis, the practice of counterinsurgency entails a determination of military necessity in order to establish a balance between the protection of civilian life to satisfy one aspect of COIN doctrine and the protection of one's own

soldiers to satisfy another. Moreover, military and political policy-makers, including commanders in the field, render their determination of the relative safety of soldiers and civilians on a subjective basis determined by the composition, needs, and values of the intervening state, and the importance of success to the national interest. The subjectivity of this determination allows for significant variation in the weight given to various military objectives. One question that arises from the paradox between the competing imperatives needed to win a counterinsurgency is whether the legal concept of military necessity can be applied to the maintenance of domestic popular support for a military engagement. Effectively, since electorates possess the capacity to end a military action through their power at the ballot box, does maintaining domestic support constitute ‘an effective contribution to military action’ given that casualty aversion can translate the risk to individual soldiers into a risk to the mission itself? If so, can military necessity be expanded to encompass the requirement of minimizing the risk to counterinsurgents, thus justifying an increase in risk to civilians in the receiving society?

Initially, this suggestion is morally alarming, and invites criticism as a calculating and legalistic attempt to justify risk transfer from Western soldiers to the unfortunate civilians of the countries where they operate. However, such an interpretation of military necessity also speaks to the fundamental need to justify under international law the practices that may, in fact, prove necessary for the effective prosecution of COIN operations. It stands to reason that if securing the civilian is necessary for success in counterinsurgency, then whatever is needed to achieve their security satisfies the *prima facie* criteria of military necessity. It further stands that the physical deployment of troops from an intervening power to a receiving country is a necessary prerequisite for

those counterinsurgents to have any effectiveness in securing a civilian population against an enemy. There can be no “effective contribution to military action”³¹ if the troops are not even deployed to the country experiencing the insurgency. Finally, given that successful COIN is contingent upon a *sustained* commitment of troops and resources from the intervening power, any factor that compromises the required extent of that commitment endangers the very likelihood of the mission’s success. If the presence of the counterinsurgents is a military necessity, and their presence can only be secured through a higher valuation of their safety such that it avoids the democratic tendency towards casualty-aversion, it would appear that a level of force protection for counterinsurgents meets the standard of military necessity under international law.

This interpretation of international law also conforms to the required conduct of soldiers for the protection of civilians. Under IHL, particularly the Geneva Conventions and their Additional Protocols, the principles of distinction and proportionality are specified with respect to the appropriate conduct of soldiers towards civilians in times of war. Proportionality has already been discussed, but is the legitimate degree of force employed in combat according to the military necessity of a particular objective. Distinction refers to the requirement that parties to a conflict distinguish between combatants and noncombatants, based on an understanding that noncombatants may not be the legitimate targets of violence in war. This imposes a number of negative obligations upon combatants, based on the central premise that “the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations . . . The civilian population as such, as well as individual civilians,

³¹ ICRC, 52.2.

shall not be the object of attack.”³² IHL thus clearly stipulates that soldiers are legally and morally proscribed from making civilians the object of an attack.

The principle of distinction, however, and the incumbent negative obligation of soldiers vis-à-vis civilians, is separate from the positive obligation of actively *protecting* civilian life implied by effective counterinsurgency doctrine. Though the protection of civilian life may be both normatively desirable and strategically sound conduct for COIN operations, it is a separate realm from the negative legal duty to simply not kill civilians. Accordingly, if the maintenance of domestic popular support is essential for the long-term prospect of counterinsurgency success, and such support requires minimizing casualties among one’s own soldiers even if this necessitates exposing civilians to a greater level of risk from insurgent attack, then doing so does not appear to violate the legal obligation of soldiers to refrain from targeting civilian objects. That civilians will likely remain the object of insurgent attacks, and that counterinsurgents may refrain from taking upon themselves a greater degree of risk in order to minimize the exposure of civilians to danger, is a deplorable but perhaps unavoidable consequence of the need to balance civilians’ and soldiers’ respective security when democracies engage in counterinsurgency. International humanitarian law, though it imposes restrictions on what soldiers may do, leaves open to determinations of ‘military necessity’ acts of omission that might transfer risk from soldiers to civilians. For such conduct to be morally defensible, however, it must be taken to protect the integrity of the military mission such that it can contribute towards the long-term security of the civilian population.

³² Ibid, 51.1-51.2.

The Limitations of IHL in COIN

Ultimately, this study of the concept of military necessity suggests that international humanitarian law does not provide an adequate set of tools to inform satisfactory military practice in counterinsurgency. In part, this is due the limitations of the existent instruments of IHL, since “the legal framework for regulating war does not contemplate asymmetric warfare waged by non-state actors and thus fails to regulate perhaps the dominant form of warfare for the 21st century.”³³ It is also due, however, to the nature of counterinsurgency warfare itself, and the dual objectives that it identifies for counterinsurgents. The provision of human security for civilians is the ultimate objective of counterinsurgency, since it is this security that will garner the legitimacy that Manwaring and Fishel identify as “the single most important internal dimension of a war against subversion.”³⁴ But successful counterinsurgency does require the conduct of conventional military activities against an enemy, and contemporary examples of COIN operations involve major deployment of intervening troops into hostile areas. This exposes intervening troops to a risk of casualties that has the potential to undermine the efficacy of the entire counterinsurgency operation by weakening domestic support for the mission and prompting a premature withdrawal or compromise of the mission objectives. The paradox thus exists at the highest level of contemporary counterinsurgency operations, and the competing imperatives of success must be reconciled through recourse to some outside frame of reference.

Although an imperfect instrument, and highly constrained by the limitations of IHL, the concept of military necessity provides one means of reconciling the competing

³³ William C. Banks, quoted in Bosco 2008.

³⁴ Manwaring and Fishel, 285.

demands of successful counterinsurgency. Civilians and soldiers exist at opposing poles of a spectrum of risk in combat, wherein greater protection for one necessitates greater risk for the other. International law specifies acceptable thresholds of risk for civilians according to military necessity; if the protection of soldiers constitutes a military necessity due to the adverse effects of casualties upon domestic support for the mission, then such a weighting of risk towards civilians falls within the bounds of IHL, and can be justified in terms of the long-term success of the mission. In the words of General Sir Rupert Smith, modern combat is “war amongst the people . . . Military engagements can take place anywhere: in the presence of civilians, against civilians, in defence of civilians. Civilians are the targets, objectives to be won, as much as an opposing force.”³⁵ In being the objects of combat, civilians enter into calculations of risk and necessity that alter the conventional determination of legitimate exposure to violence. Ultimately, if the presence of counterinsurgents is necessary to prevent greater casualties than would be incurred by civilians in the course of an insurgency, civilian casualties, though deplorable, may be justifiable in the interests of maintaining the presence of the counterinsurgents and ultimately providing for the human security of the civilian population.

³⁵ Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (London: Penguin, 2005), 3-4.

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