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BOOK REVIEW

Review of Jens David Ohlin and Larry May, *Necessity in International Law*

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This valuable volume is written by two authors who have both JDs and PhDs in philosophy. The deep interdisciplinarity of the authors bears fruit in analyses that carefully distinguish international law, especially International Humanitarian Law (IHL), as it is from international law as it ought to be—and *lex lata* from *lex ferenda*, a distinction "zealously guarded in IHL" (248). They also resist the wishful thinking of both some progressive lawyers, who are tempted to think the law is already more restrictive than it is, and revisionist philosophers, who dream that law can be made more individualistic than is possible inside "a forced contest of violence" (276) between belligerent collectives. Nevertheless, in the end, they insist that an omnipresent principle of necessity must always be balanced by a principle of humanity, and they urge what they consider "modest" revisions in existing international law intended to make war less inhumane for those in every status, including the human beings who are the combatants. What they guard against most strenuously is the seemingly easy route of simply proposing to re-interpret existing law to mean what from a moral point of view one wishes it meant when that is not in fact what it means, according to normal legal criteria. Where the law is morally unacceptable, one must argue and fight politically to change it, not merely insist ineffectually that it does not really mean what it does currently mean.

The conceptual acuity of the authors shines most brightly in their distinction among three significantly different senses of necessity: the dangerous version of necessity as a ground for an *exception* to generally applicable rules, the permissive version as a *license* for reciprocal killing by persons in the law-governed role of combatants, and the moderating version as a *constraint* on needless killing, including needless resort to war. They strongly emphasise, and clearly demonstrate, the importance of the fact that 'necessity' has different senses in "*jus ad bellum*, *jus in bello*, human rights, and criminal law" (273) (and, as they note elsewhere, everyday

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language). A central analytic contribution shows that attempts to argue by analogy across areas of life—for example, from cops and robbers to combatants—become conceptual muddles if the different meanings of 'necessity,' which are effectively terms of legal art specific to particular branches of law like International Human Rights Law (IHRL) and IHL, are not taken into account. Among their normative contributions, the authors argue on moral grounds that the use of necessity as an exception should and can be further restrained (especially in criminal law), the use of necessity as a constraint should and can be strengthened, and the use of necessity as a broad license in the conduct of war cannot be directly replaced, as revisionist philosophers have hoped, but can be indirectly restricted somewhat.

1 Humanity/Humane Treatment

The authors plainly want to advocate that some principle of humanity should be granted more weight than it usually is, but their discussions of this family of principles is especially unclear. Some of the lack of clarity results from the structure of the book, but most arises simply from unpersuasive statements about the role of the principle of humane treatment and the obscurity of the relation of the 'principle of humane treatment' to the 'principle of humanity.' Their own formulation of the principle of humanity is not clearly and explicitly stated until Chapter 7: "the principle of humanity is the principle that all humans are deserving of respect because of the dignity that is found in each member of humanity" (168). It had been indicated earlier, and is repeated later, that the principle of humanity is closely connected to Kant's version "of the categorical imperative as the 'formula of the end in itself' or 'the principle of humanity' …. To respect the dignity in each person, we must treat each person as an end in itself, not simply as a means to our own ends" (9–10; also 183). And the fundamental question is often said to be how to balance necessity and humanity: "it is also part of the more modern understanding of necessity that this principle is to be balanced against what international lawyers call the principle of humanity" (for example, 10; also 183).

But before reaching the discussion of the humanity principle in Chapter 7, readers will have encountered a short section on "necessity and humane treatment" in the crucial Chapter 3 on the conduct of war, which opens with the startlingly implausible claim: "it is our contention that the philosophical principles of discrimination and necessity are both grounded in the principle of humane treatment" (74). To keep focus, I leave aside for now the principle of discrimination and concentrate on the part of this claim that says that the principle of necessity is grounded in the principle of humane treatment. While Chapter 3 fails to explain the following, it emerges in Chapter 7 that 'humane treatment' and 'humanity' are two different, although closely related, principles: "humaneness is the idea that people should act toward one another with restraint, especially with the restraint that would come from being compassionate or having sympathy for another person's plight" (169). So basically humanity requires treating people with respect, and humaneness requires treating people with restraint, and especially with compassion or sympathy. This seems to me to mean that the principle of humane treatment is considerably

more demanding than the principle of humanity: I can treat someone with respect (requirement of humanity) without showing her sympathy or compassion or being restrained in any further way beyond the requirements of respect. This makes especially implausible the opening claim that the principle of necessity—at least, necessity as license, which is central to the conduct of war—is grounded in the principle of humane treatment.

The section on "necessity and humane treatment" in Chapter 3 is further confused by the fact that, like the principle of humane treatment, the principle of necessity operative in the conduct of war has also not yet been fully discussed. Chapter 4 contains a fine and very convincing argument that, although from a moral point of view this may be initially unappealing, the concept of necessity currently in IHL is a permissive concept derived from the Lieber Code: necessity as license for reciprocal killing by those in the rule-governed roles of combatants. Most importantly, I cannot imagine how a legal privilege of role-based reciprocal killing could be "grounded in the principle of humane treatment" that especially requires "the restraint that would come from being compassionate or having sympathy for another person's plight"!

And the section contains a very odd discussion of torture (76) as if necessity might provide the ground for an exception to the prohibition on torture. The discussion of exceptions for torture leads to the conclusion "that there will not be a huge number of cases where military necessity will trump humane treatment considerations" (76), but this is fundamentally because—we do not learn until the next chapter—it is not the role of necessity in IHL to trump anything because necessity does not function as a ground for exceptions to rules for the conduct of war. Necessity licenses killing of combatants and other destructive actions leading to military advantage that are not subject to specific prohibitions, like the specific prohibition of all torture in all circumstances and the specific prohibition on attacking civilians (principle of distinction). Necessity does not allow exceptions to any of those specific prohibitions. And it certainly does not follow from anything in this discussion of possible exceptions for torture that "indeed, it is better to see the principle of necessity as grounded in the principle of humane treatment" (76).

One might be tempted to dismiss the little section on "necessity and humane treatment" as simply bedevilled by careless wording, but the same claim that the principle of humane treatment is the ground of all principles of war is announced once again, after Chapter 4's discussion of necessity as license (not as ground for exceptions) in the conduct of war and in the midst of the main discussion of humanity and humane treatment. The authors say that they will "develop a minimalist conception of the principle of humane treatment" (175) that "*requires* compassion and mercy, but only in certain circumstances" (175), but then they make the somewhat maximalist claim: "to say that the principle of humane treatment is the cornerstone of humanitarian law is to place it over the more traditionally recognized principles of discrimination, necessity, and proportionality" (176). Once again, to maintain some focus, I leave aside everything except the claim that, besides supporting discrimination and proportionality, the principle of humane treatment is the cornerstone supporting (one or all of) the (three) principle(s) of necessity. At least four problems with this are immediately apparent. First, the authors cite in their support Douglas P. Lackey's utilitarian classic, *The Ethics of War and Peace*, but Lackey's

position is entirely different: "the principles of necessity and military proportionality, and all the rules of war derived from these principles, obtain their moral content from the utilitarian conception that it is wrongful to destroy the good things of the world, even good things belonging to enemies that are waging unjust wars."[1] Lackey's claim is far wider than the principle of humane treatment, and it certainly is not Kantian, granting no special place to human beings among other good things.

Second, the tightly connected claims (a) that there is a unifying cornerstone and (b) that this cornerstone is not humanity, but humane treatment, are both separately and together in contradiction to the approach taken throughout the remainder of the book apart from Chapter 7. Otherwise, the book assumes throughout, not that there is unity, but that the principle of necessity and the principle of humanity (and not specifically the principle of humane treatment) are in tension, and that necessity and humanity each must be given its due in some kind of uneasy compromise, or, as the cliché has it, the two must be balanced (for example, 10, 183, 226, 230, 240, 274), not one subordinated to the other.

Third, leading scholars generally view IHL as a compromise outcome of a tension between two competing kinds of considerations, military and humane, rather than a unified position grounded in a single cornerstone; and the authors later quote, for example, Michael Schmitt's image of "delicate balance" between necessity and humanity with apparent approval (183). It would take powerful arguments to overcome this wide consensus.

Fourth, the arguments offered against the consensus on opposing-considerations-in-tension are brief and weak. To support this cornerstone claim, they appeal exclusively, and abruptly, to Common Article III of the Geneva Conventions (176–177), completely ignoring the central elements of IHL found in sources like the much-cited formulation of necessity at Nuremberg and Additional Protocol I (API), which are the focus in most of their other discussions of humanitarian law and are the embodiment of much of the "delicate balance." Since Common Article III of the Geneva Conventions concerns "persons taking no active part in the hostilities," it is appropriately about humane treatment. But since API and the rest of the laws of war provide the rules for those who are directly participating in the hostilities, one cannot settle whether humane treatment has been "place[d] over … discrimination, necessity, proportionality" while looking only at Common Article III or even only at the Geneva Conventions.

I do not think the case for the supremacy of the principle of humane treatment is made. And the literature contains foundational formulations in which the principle of humanity is treated as parasitic upon the principle of necessity, for example: "complementing the principle of necessity and implicitly contained within it is the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes."[2]

[1] Douglas P. Lackey, *The Ethics of War and Peace* (Englewood Cliffs, N.J.: Prentice-Hall, 1989), p. 64.

[2] United States, Department of the Air Force, International Law—The Conduct of Armed Conflict and Air Operations, Air Force Pamphlet 110–131 (Washington: Headquarters, USAF, 19 November 1976), p. 1–6.

(This 'principle of humanity' is very close to what Ohlin and May label 'necessity as constraint.')

2 Necessity

Chapters 4, 5, and 6 analyse the concepts of necessity in, respectively, IHL, IHRL, and criminal law. I think they establish convincingly and valuably that the dominant concept of necessity in each of these branches of law is different from the dominant concept in each of the other two and that concentrating only on the family resemblances and ignoring the distinctive features is a formula for confusion. That IHL and IHRL, for example, have different concepts of necessity does not, by itself, show that human rights and conduct of war cannot to some extent be integrated, but only that any integration must bear in mind the differences about necessity, not try to ignore them. Here, I focus only on Chapter 4 on IHL and, very briefly, on a couple of the applications of IHL to four specific issues in contemporary conflict discussed in Chapters 8–11.

The fundamental thesis about necessity in the conduct of war is that it is derived from the Lieber Code via the famous formulation of necessity in the *Hostages Case* at Nuremberg. The animating spirit of the understanding of necessity in IHL remains Lieber's, however much one might wish otherwise: "the principle of necessity has largely remained unchanged since Lieber. Rather, it is *specific* prohibitions that have changed in IHL" (109).

Within the rules for the conduct of war, necessity functions in two of the three main senses that the authors distinguish. One sometimes encounters necessity as constraint: "the principle of military necessity prohibits acts that are gratuitous or superfluous in the sense that they do not confer a military advantage—that is, they are based in pure cruelty without practical advantage" (93). (Note the similarity to the quotation two paragraphs above from AFP 110–131.) But in IHL necessity is primarily license: "the real prohibitory work in IHL is done by the specific prohibitions regarding outlawed methods of warfare, not the general principle of necessity, which allows prosecution of the war effort with maximum speed" (96). Within the specific prohibitions necessity is, in the words of John Fabian Witt, "a robust license to destroy" (97). "Necessity *permits* killing and destruction of enemy forces, whereas the specific prohibitions (distinction, proportionality, restrictions on various weapons, the prohibition on unnecessary suffering, perfidy, etc.) *restrict* the use of force. But it is important not to confuse the two, and one certainly cannot use the specific prohibitions as a rationale for reading the general principle of necessity in a wider fashion" (99).

What is essentially Lieber's position was re-affirmed after World War Two at Nuremberg in the *Hostages Case* in a formulation widely invoked today with little modification by current military manuals, such as the British:

> military necessity is now defined as 'the principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws

> of war'. Put another way, a state engaged in an armed conflict may use that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.[3]

This formulation may appear to allow almost maximum efficiency in pursuit of military success, so it is essential to note that Additional Protocol I of 1972 includes three "efficiency-defying" specific prohibitions, including proportionality.[4]

This is basically the position that in war only what is specifically prohibited is forbidden and everything else that can be reasonably expected to serve military advantage is allowed. Now, this is an extremely permissive position toward deaths, wounds, and destruction, and most decent human beings, especially those committed, like the authors, to respecting human dignity, are likely to recoil from an activity structured by this degree of license. Surely, one thinks, war could be constrained by rules that are closer to the rules for all the rest of life outside war. In recent years, two groups of scholars—revisionist philosophers and progressive lawyers—have each made independent arguments for less permissive rules for the conduct of war. One of the most interesting and valuable contributions of this book is its elaboration of the same argument against the practical possibility of both of these morally appealing proposals, showing that, as morally attractive as they are, they cannot be "operationalized in institutional form" (118).

The authors note that Janina Dill and I have been defending "an intermediate position between the traditional Walzerian approach and the revisionist approach championed by McMahan" (113).[5] And they correctly give the thrust of our argument against revisionism in moral philosophy: "the revisionist program requires a level of individual analysis that is simply unworkable in practice; soldiers would need to determine whether their enemy has contributed sufficiently to an unjust war cause to become liable to attack" (115–116). Understandably, revisionists wish that moral judgements in war could be individualised, with individual adversary fighters assessed on the extent of their own personal moral responsibility, but such extensive but necessary information about the bases of moral responsibility, like the intentions, motives, effort, and excuses of each individual opponent, are simply not accessible

[3] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), paragraph 2.2, as amended by Joint Services Publication 383—*The Manual of the Law of Armed Conflict Amendment 3* (September 2010), p. 5 (footnotes omitted).

[4] Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge: Cambridge University Press, 2015), pp. 126–127.

[5] The earliest formulations of the argument were in Henry Shue, "Do We Need a 'Morality of War'?" in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008), pp. 87–111. The most cited version is Janina Dill and Henry Shue, "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption," *Ethics & International Affairs* 26(3) (2012): pp. 311–333, at 313. The argument was developed further in Janina Dill, "Should International Law Ensure the Moral Acceptability of War?," *Leiden Journal of International Law* 26(2) (2013): pp. 253–270; and Henry Shue, "Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits," *Leiden Journal of International Law* 26(2) (2013): pp. 271–292.

in the circumstances of war. Dill is quoted as characterising fighters deciding whom to target as facing "an epistemically cloaked forced choice" (114).[6]

Ohlin and May perceptively extend this objection to the proposal by some progressive international lawyers that the concept of necessity in the conduct of war should be interpreted as requiring use of 'the least-harmful-means' in each case. Just as Dill and I argue that philosophical revisionists yearn for hopelessly individualised moral assessments, they suggest that advocates of the least-harmful-means yearn for hopelessly individualised threat assessments:

> similarly, the least-harmful-means test requires that attacking soldiers engage in a threat analysis of their individual target to determine whether capture is feasible and whether killing as a last resort is justifiable. This requires complex assessment of the individual's capacity to engage in defensive force – a fraught analysis well known to any criminal lawyer. Instead of making lethal attack hinge on the military-status of the target, the least-harmful-means would require an individualized analysis much closer to the individual analysis required by the criminal law … judgments that even juries struggle with. (116; also 209)

The practical impossibility of both individualised moral assessment and individualised threat assessment are imaginatively brought together in conclusion: the argument "does more than simply show that the deep morality suggested by revisionist Just War theory cannot be operationalised because it would undermine the modern principle of distinction. It also provides a rationale for rejecting attempts to radically redefine the principle of necessity …" (118). Dill's 'epistemic cloaking' is not to be celebrated or even welcomed—on the contrary, it is the regrettable source of countless tragically unjustifiable wounds and deaths "where ignorant armies clash by night"[7]—but it is also not to be erased from our understanding of war simply because we wish it were not true. We must assess war while unflinchingly facing the obstacles to our capacity to limit it and while strenuously limiting it in every way we actually can, as these two authors stoutly maintain.

3 Selected Proposals

As a practicable alternative to the "more expansive principle" of the least harmful means, the authors "propose that soldiers be not only afforded the right not to suffer unnecessarily but also the right not to be killed unnecessarily," which they view as a "modest proposal": "less than lethal force when it is not necessary to use lethal force" (184; also 164). Richard W. Miller and I each have made proposals in a similar spirit but in different terms.[8] Ohlin and May's proposal is not, for example, "to

[6] Dill, "Should International Law Ensure the Moral Acceptability of War?" p. 266.

[7] Matthew Arnold, "Dover Beach."

[8] Richard W. Miller, "Civilian Deaths and American Power: Three Lessons from Iraq and Afghanistan," in Matthew Evangelista and Henry Shue (eds.), *The American Way of Bombing: Changing Ethical and Legal Norms, from Flying Fortresses to Drones* (London and Ithaca: Cornell University Press, 2014), pp.

codify a strict prohibition against killing enemy soldiers when disabling them would be possible" (226), which they believe "may actually make things worse" (226) because it would, once again, demand that soldiers make an individuated "epistemically cloaked forced choice": which individuals are the ones who can safely be only disabled? Instead, the approach should be indirect: "adopting other legal rules that might reduce the number of unnecessarily lethal attacks during battles" (226). Indirection is a wise suggestion here and will be especially appealing if one is not a captive of what Allen Buchanan has called the "mirroring view" of the relation of morality and law.[9]

Ohlin and May suggest two indirect approaches. "First, the law could strengthen the prohibition against causing disproportionate damages in the case of civilian collateral damage …. The number of deaths will diminish in war—not just for civilians but for combatants as well" (227). I certainly agree wholeheartedly that proportionality needs to be taken far more seriously for the sake of civilians. Contrary to democratic principles, the US military refuses to explain to US citizens by what standards it calculates excessive damage, and it usually keeps secret even its conclusions about numbers of excessive deaths caused by its operations. No one is ever prosecuted for violation of the principle of proportionality. However, it is unclear to what extent this would also spare combatants. Second, "another way to close the gap between law and morality might be to further restrict the type of weapons that can be used in battle. One good example is cluster munitions …" (228). To me, this seems more promising, and it would save the lives of many civilians as well as combatants.

On the other hand, their treatment of force protection is somewhat worrying because there is no good reason to transfer risk from combatants to civilians, as arguably much contemporary warfare already tends to do.[10] Their definition of 'force protection' tendentiously builds in the moral acceptability of protecting civilians less in order to protect combatants more: "Force protection is the idea that commanders can legitimately design strategy and make decisions that protect their own troops, even if this means that other important goals such as protecting civilians is given less weight" (259). This begs the question against those who think force protection must be compatible with combatants' duty to take risks to protect civilians. And Ohlin and May give inordinate attention to a wildly nationalistic proposal by Asa Kasher and Amos Yadlin that Israeli soldiers ought to give priority to all Israeli citizens, including Israeli combatants, over everyone else in the world, including all civilians (except Israeli civilians) (267–272). Ohlin and May do finally come down on the side of universal rights for all civilians: "states may still be *required*, as we think they are, to protect foreign civilians and ask their own soldiers to take risks so as to protect those civilians' lives. Just because the civilians are foreign, or enemy, should not make a difference here" (269). But they immediately add, without much

Footnote 8 (continued)
158–171 and 278–281; and Henry Shue, "Force Protection, Military Advantage, and 'Constant Care' for Civilians: The 1991 Bombing of Iraq," in Evangelista and Shue, *American Way of Bombing*, pp. 145–157 and 273–278, at 148; reprinted in Henry Shue, *Fighting Hurt: Rule and Exception in Torture and War* (Oxford: Oxford University Press, 2016), pp. 330–347, at 333.

[9] Allen Buchanan, *The Heart of Human Rights* (New York: Oxford University Press, 2013).

[10] Martin Shaw, *The New Western Way of War* (Cambridge: Polity Press, 2005).

explanation, a proposal for a radical transformation of the current concept of proportionality: "in any event, it seems to us that proportionality should in many cases take into account the lives of soldiers, not merely the lives of civilians" (269). Perhaps, but one would first need to know a great deal more about how decisions about proportionality would be made under this new conception that puts soldiers' lives on the same side of the scales as military advantage.[11]

The book could have used one more re-write—here are a few sample problems in addition to the structural issues noted above. The Introduction says the term 'military necessity' is more confusing than illuminating (4), but the term is used throughout. The same two paragraphs appear twice *verbatim* (9–10; also 183). The text presents a passage from the British Manual as "in the words of Article 14" of the Lieber Code (93). A Grotian conception of necessity is appealed to long after we have been repeatedly told that the operative conception is Lieber's (232–233). 'Moral individualism' in war is discussed superficially on 246–247 as if it had not already been brilliantly undercut in 113-118. But for the alert reader this volume contains valuable insights and provocative proposals that consistently take into account integrated legal and moral considerations. Ohlin and May leave the tangled cluster of meanings of 'necessity' far clearer than they were—a major accomplishment.

[11] Compare Shue, "Force Protection, Military Advantage, and 'Constant Care' for Civilians".