

THE LAWS OF WAR AND THE “LESSER EVIL”

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ABSTRACT

One of the fundamental principles of international humanitarian law (IHL) is that it recognizes no lesser-evil justification for breaking its rules. Those violating the laws of war will thus be viewed as war criminals even when their conduct was intended to—and in fact did—prevent much greater harm. This Article argues that this deep-rooted absolutist stance undermines the humanitarian drive of the laws of war, and offers, in its place, a lesser-evil defense.

The argument begins with the obvious analogy to the necessity defense in domestic criminal law, emphasizing the adaptations that are necessary in order to transpose the domestic concept onto the international plane. It then proceeds to test possible first-order accounts—deontological, consequential, and institutional—for why IHL might nonetheless prefer a more absolutist stance than domestic law. It finds that not one of these accounts offers a compelling explanation for the exclusion of any lesser-evil justification from IHL.

*The Article then proceeds to develop a blueprint for the concept of a **humanitarian necessity justification** that would exculpate an actor who violated the laws of war in the name of a greater humanitarian good under certain conditions. A central component of the justification is a condition that the greater humanitarian good would benefit the enemy, rather than the actor’s own people.*

Three concrete case studies are employed to demonstrate the implications of IHL’s absolutism: the “Early Warning Procedure” employed by the IDF in the West Bank, the paradigmatic case of interrogational torture, and the atomic bombings of Hiroshima and Nagasaki. Under the paradigm of a humanitarian necessity suggested here, the Early Warning Procedure and perhaps even the atomic bombing of Hiroshima (but not Nagasaki) might be justified, depending on our factual understanding of them; but the paradigmatic case of interrogational torture cannot.