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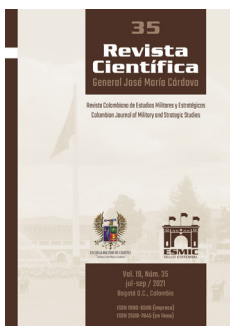
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Miles Doctus

The resort to military force in the COVID-19 health emergency: a justification

El recurso a la fuerza militar en la emergencia sanitaria de COVID-19: una justificación

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ABSTRACT. The COVID-19 pandemic has been mobilizing the full capacities of societies worldwide to respond to unprecedented threats to national and human security. In many cases, emergency measures have involved military support to civil institutions, including law enforcement operations. This paper aims to better understand the legality and legitimacy of these military operations, using hermeneutic, comparative, and survey methodology. It is based on the assumptions that international human rights standards crucially determine moral requirements for domestic use of military force and that just war theory can be equally helpful in the decision-making on domestic military operations in such circumstances. This study assesses the justification of current military enforcement and recommends criteria for future emergencies.

KEYWORDS: COVID-19; ethics; human rights; public health emergency; use of force

RESUMEN. La pandemia de COVID-19 ha movilizado la entera capacidad de las sociedades de todo el mundo para responder a amenazas sin precedentes para la seguridad nacional y humana. En muchos casos, las medidas de emergencia han implicado el apoyo militar a las instituciones civiles, incluyendo las operaciones de orden público. Este documento intenta contribuir a una mejor comprensión de la legalidad y la legitimidad de estas operaciones militares, utilizando una metodología hermenéutica, comparativa y de encuesta. Se basa en el supuesto de que las normas internacionales de derechos humanos determinan de manera decisiva los requisitos morales para el uso doméstico de la fuerza militar y que la teoría de la guerra justa puede ser igualmente útil en la toma de decisiones sobre operaciones militares domésticas en tales circunstancias. Este estudio evalúa la justificación de las actuales aplicaciones militares y recomienda criterios para futuras emergencias.

PALABRAS CLAVE: COVID-19; derechos humanos; emergencia de salud pública; ética; uso de la fuerza

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Introduction

The COVID-19 global outbreak has prompted governments worldwide to take various emergency measures to protect public health. Some of these measures have involved interventions in the enjoyment of human rights, such as freedoms of movement, privacy, peaceful assembly, and expression. Many governments have engaged armed forces to support civilian institutions in a wide range of activities, from humanitarian assistance to coercive measures.

Probably more than ever before, military personnel worldwide have been tasked to conduct domestic law enforcement operations, contributing to public health. Some have no experience in this kind of operation; others have already been deployed, either in emergencies or routinely. Notwithstanding the circumstances, the Rule of Law entails the justification of every domestic use of military force to avoid misgivings of militaristic abuses and human rights violations; the COVID-19 spread should not be an exception. Despite the different social, political, and legal backgrounds of states that resorted to military force, the globally-emerging human security paradigm demands a harmonized approach in a declaration of war against this *invisible enemy*.

This study examines to what extent a resort to military force in homeland public health emergencies could and should be theoretically and practically justified.

The justification criteria's theoretical framework is constructed from two sets of rules, the legal and the moral. The moral rules are derived from the just war theory, which summarizes a two millennia-long Western tradition of *ad bellum* decision-making. The criteria of just war are analogously applied to law enforcement in homeland health emergencies. This moral narrative is met with pertinent international human rights law rules, assuming that states' sovereign prerogatives to deal with such exigencies are limited by their obligation to respect, protect, and fulfill human rights.

The study combines methods of scientific jurisprudence and philosophical thought with empirical qualitative and quantitative research. It is divided into three parts. The purpose of the *lege lata* interpretations in the first part and theoretical contemplations in the second is to determine whether governments could and should resort to domestic military coercion in health emergencies, respectively. In the third part, the pertinent legal norms on interference with human rights are harmonized with ethical requirements to define the common justification criteria and empirically applied in the survey at the end.

The legality of military enforcement in a health emergency: a framework of international law

Under the rule of law, the domestic and international legal framework defines the basis and limits of every government's action. This study aspires to a universal approach and

focuses only on international norms determining when a government can resort to military coercion.

Before the interpretation of pertinent rules, this study must solve the applicability of the international law conundrum. Indeed, one could argue that the domestic use of military force in a health emergency does not belong to the realm of International Law. Item 7 of Article 2 of the United Nations (UN) Charter prohibits “the UN to intervene in matters which are essentially within the domestic jurisdiction,” without prejudice, “the application of enforcement measures under Chapter VII” (United Nations, 1945, Art. 2). However, the UN Security Council (SC) has not introduced any such measure because the COVID-19 crisis does not fall under “the existence of any threat to peace, breach of peace, or act of aggression” (United Nations, 1945, Art. 39), despite having provoked uncorroborated accusations against China (Niblett, 2020). Arguably, the SC will continue to be paralyzed in this matter due to notorious discords among its permanent members (Times of Israel, 2020). Besides, so far, there is no indication that the coercive military measures in response to the COVID-19 crisis sparked any organized armed resistance or deteriorated internal unrests surpassing the threshold of non-international armed conflict.¹ Therefore, International Humanitarian Law (IHL) cannot apply to domestic military enforcement in peacetime.

Although these findings on the non-applicability of International Law seem well-founded, they must be refuted for two reasons. First, the suppression of a pandemic entails a universal approach and the development of universal standards. Secondly, the ancient wisdom of Cicero expressed in the maxim, *inter arma, silent leges*, warns that every use of military force in the homeland affects the Rule of Law, a value of international concern.

International Law has not set universal standards of military enforcement that would apply to a domestic constitutional and administrative framework in such circumstances. The issues of homeland military deployments are traditionally situated within the sovereign jurisdiction of states, and states enjoy broad discretion in the implementation of internationally recognized human rights. Moreover, the extant UN policies have not bridged this gap. The paralyzed SC, the World Health Organization’s (WHO) declaration of the “public health emergency of international concern,” and the General Assembly Resolutions that call for global solidarity (UN General Assembly, 2020) have not drawn red lines in this respect. Only the High Commissioner for Human Rights, Michelle Bachelet, criticized certain governments’ unlimited powers and warned that this crisis is not a *carte blanche* that justifies the domestic negligence of internationally recognized

1 The Geneva Convention’s Common Article 3 and Protocol II prescribe the following two requirements for the legal qualification of non-international armed conflict: a minimum level of hostility and an organized adversary.

human rights (Voanews, 2020). This statement indicates human rights law as a solution; this is thoroughly examined in the following discussion.

The conditions of international human rights law

Among all the branches of International Law, only the human rights law offers a framework for justification of military coercion in public health emergencies. This international body of law establishes the globally recognized state obligations to respect, protect, and fulfill human rights. It promotes the Rule of Law, which states that “(...) it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,” limiting the governments’ sovereign prerogatives by the citizens’ individual rights. The COVID-19 pandemic has been affecting human rights to life and health (UN General Assembly, 1948, pmbl., Art. 25; 1966, Art. 6; 1966, Art. 12), and governments’ emergency responses have arguably interfered with the enjoyment of other rights. In some states, these responses have involved militaries in law enforcement maintaining or restoring public order and security, preventing, detecting, and investigating crime, and aiding and assisting populations. Typical coercive measures carried out by armed forces include guarding, cordoning, searching, arresting, and detaining activities, setting up roadblocks, securing routes, controlling crowds and riots, and enforcing curfews (International Committee of the Red Cross, 2013, p.p. 419-420). The military personnel performing these extraordinary missions must adhere to IHL while implementing domestic and human rights law (International Committee of the Red Cross, 2013, p.p. 420-421) and international law enforcement standards for police forces, which according to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, “(...) In countries where police powers are exercised by military authorities (...) the definition of law enforcement officials shall be regarded as including officers of such services” (UN Office of the High Commissioner, 1990, Fn.1). Therefore, the set of human rights rules that define the limits of infringement –especially concerning individual privacy and liberties (Gostin et al., 2020, p. 4)– construct a framework for the legality of homeland military operations against COVID-19.

Worldwide, the benchmark for government prerogatives’ limitation is the International Covenant on Civil and Political Rights (ICCPR); it offers the most developed, universally accepted, and justiciable set of rules. Moreover, depending on the severity of exigencies, it distinguishes the derogation rules during a public emergency from the rules on human rights restrictions applicable to the routine regime of public order. The latter rules are prescribed in paragraph 2 of Article 29 of the Universal Declaration of Human Rights (UDHR).

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and

respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (UN General Assembly, 1948)

Also, they are prescribed in accessory provisions of the ICCPR Articles recognizing specific individual rights. They allow governments to lawfully restrict pertinent rights on distinct grounds, when necessary, in pursuit of a legitimate and proportionate aim (The American Association for the International Commission of Jurists, 1985, p. 6). On the other hand, in the ICCPR (1966), the proclamation of the “public emergency that threatens the life of the nation” (Art. 4) augments the powers of governments. It authorizes them to derogate from their obligation to respect certain individual rights. These regimes of public order are considered below.

Military enforcement in different emergency regimes.

Human rights restrictions or derogations?

In reiteration, International Human Rights Law norms distinguish a state of public emergency that permits governments a broader intervention than in ordinary circumstances in which a response to specific necessities entails human rights restrictions. These legal regimes are analyzed here in the context of the current COVID-19 crisis.

First, if a government has not proclaimed an emergency, military coercion must meet all the conditions for restrictions given in the ICCPR Articles 5, 9, 12, 13, 14, 18, 19, 21, and 22. These include: provided by law, non-impairing society’s democratic functioning, under public order, and protecting either public health, public morals, national security, public safety, or rights and freedoms of others. The need for restriction must also meet the following criteria: be based on one of the grounds that justify restrictions prescribed in the relevant ICCPR article, respond to a pressing public or social need, pursue a legitimate aim, and be proportional to that aim (Moeller, 2012, p.p. 711-716). This legal regime is conducive to mild and moderate threats. It is less restrictive to human rights but more stringent to governments’ prerogatives, including the military freedom of action.

The second option is the proclamation of “public emergency which threatens the life of the nation.” This situation can be recommended as a constitutional standard for domestic use of military force because only extraordinary circumstances should entail extraordinary measures. In this case, ICCPR Article 4 entitles governments to derogate from some of their obligations to the extent strictly required by the exigencies of the situation if they are in accord with international law and are non-discriminatory. According to Joseph & Castan (2013), “The severity, duration, and geographic scope of derogation in such circumstances must be, strictly necessary to deal with the threat to the life of the nation and proportionate to its nature and extent” (p. 912). Paragraph 2 limits the scope of derogation, by excluding absolute rights to life, legal personality, liberty and security, and fair trial, and freedoms from torture, slavery, and servitude of thought, conscience,

and religion, among others (UN General Assembly, 1966a, Art. 6-7, 8 [Par. 1-2], 11, 15-16, 18; American Association for the International Commission of Jurists, 1985, Art. 11-13). Moreover, it is prohibited to derogate from a discrimination ban, from the rights of minorities, families, and children, from the right to a name and nationality, and from the right to remedy (The International Law Association, 1984, Sec. C). This regime is suitable for more severe exigencies because it enables a robust military response, which is necessary if all other means are exhausted. On the other side, such a regime posits serious jeopardy to civil society, as military personnel is predestined and designed for missions other than law enforcement.

However, most governments opted for the third option, to promulgate a public health emergency analogous to the WHO's (2005a) formulation. This public order regime is not determined by the pertinent human rights provisions but by a homeland public-sector crisis management. This legal regime is a middle ground between a routine government's authority and the power to impose extraordinary measures, including coercive military operations. This option is so popular because many governments arguably appraised that the COVID-19 crisis has not amounted to an imminent and serious threat to be qualified to a supreme emergency *per se*. These criteria are set by Walzer (2006).

Though its use is often ideological, the meaning of the phrase is a matter of common sense. It is defined by two criteria, which correspond to the two levels on which the concept of necessity works: the first has to do with the imminence of the danger and the second with its nature. The two criteria must both be applied. Neither one by itself is sufficient as an account of extremity or as a defense of the extraordinary measure's extremity is thought to require. Close but not serious, serious but not close-neither one makes for a supreme emergency. (p. 252)

Such a legal regime enables a governments' flexible response to unpredictable developments and freedom of action that is not limited by obligations imposed by human rights treaties. This mixed legal regime might place the use of military force in a grey zone that blurs the distinction between routine human rights restrictions and derogations in exigencies, especially in states that lack the rule of law tradition. Even at the cost of response efficacy, a strict interpretation of public emergency conditions is advised to prevent such risks. There is no obligation under International Law to take any coercive measure because the WHO Director-General's promulgation of the global public health emergency is a technical statement that cannot oblige states.² Moreover, the relevant literature insists on strict interpretation and cumulative fulfillment of conditions prescribed for a public emergency. In short, the robust intervention of a government cannot be legal without fulfillment of all of these conditions: an official proclamation that enumerates derogated rights and freedoms and includes the justification under domestic laws, duration, reasons

2 The WHO promulgation is based on information of states and advice of the Emergency Committee of experts. (World Health Organization, 2005b, Art.12, Annx. II)

for derogation, and anticipated effects of imposed measures; domestic legal rules for the public emergency prescribed in advance; a notification of other states through the UN (American Association for the International Commission of Jurists (1985), p.p. 10-11).

Summarizing legal conditions for military enforcement in a homeland health emergency

As demonstrated above, the legality of homeland military enforcement depends on the government's evaluation and response to a health crisis. Regardless of the type of proclaimed legal regime, the government's responses must epitomize a striking balance between public health and civil liberties and diligence in determining how far an interference with human rights should go. (Gostin et al., 2020, p.p. 4-5)

In sum, the principles of human rights law are sufficiently specific to constitute the legal framework for justification of domestic use of military force in a health crisis. Military enforcement cannot be legal if it affects absolute human rights. However, if a resort to military coercion complies with the previous, it can be legal, if internationally and domestically lawful, necessary, and proportional to the legitimate aim. In this case, this legitimate aim is a contribution to public health.

The criteria of the legitimacy of military enforcement in a health emergency

The emergence of a threat to public health subsumed under the above analyzed legal framework is not sufficient reason to trigger homeland military enforcement. A government's mere legal authority to take such measures must be underpinned by relevant moral arguments, outlining ethical criteria concerning under what conditions a government should take such measures and how (employed ways and means). The premise is to utilize and adjust the traditional requirements for just warfare to derive criteria for the legitimization of military coercion in a health emergency.

The conceptual framework of ethics: an analogous application of the just war theory

The just war theory traditionally determines the legitimacy of the resort to military force. This theory was developed in the Western culture for the *ius ad bellum* decision-making to solve the dilemma between realism and pacifism through a pragmatic compromise (Whetham, 2010, p. 65). The contemporary applicability of this perennial school of thought is compromised by the compelling argument that a resort to war cannot be justified, given that decisions with unpredictable consequences cannot be justified in advance (Babic, 2019, p.p. 12, 28). However, this theory is the only one that enables a sort of ethical scrutiny of government decisions *ex-ante* and provides political and military

leaders with useful narratives for legitimizing military deployments. The last word in this matter belongs to the respective states' constitutional courts and international human rights institutions, which will undoubtedly consider all consequences.

The other objection to the application of the just war theory would be that the circumstances of war are quite different from a homeland health crisis. While the conduct of war usually implies transnational use of force against a concrete adversary to protect national security, the use of force in this kind of emergency is confined to the homeland; there is no enemy to fight against (Babic, 2019, p. 20). National security is not threatened, only human lives.

Considering the recent developments in International Relations, relevant literature, and international legal and policy framework, these differences are not persuasive enough to limit the just war theory on its traditional scope of *bellum gerrere*. The application of this theory can go further and include any use of military force, notwithstanding the territory (foreign or domestic), the existence of an enemy (human beings or abstract notions), the object of protection (national or human security). Here are some arguments in this respect.

First, the recent conflicts in Kosovo and Syria illustrate how the governments' resort to war in a homeland can be internationally perceived as ethically dubious. Excluding the self-defense prescribed in Article 51 of the UN Charter, all other coercive operations in a homeland seem prone to international concern and scrutiny, especially if they involve claims of national liberation, self-determination, or resistance against human rights violations. Here, human rights violations are at stake in considering the resort to military force as a health emergency measure.

Furthermore, the literature of international relations after the Cold War shifted the security paradigm from a confrontation with concrete enemies threatening national security to the eradication of threats constituting sources of human insecurity. The aspiration to justify the use of the military in emergencies other than war is obvious in the political narrative on *war against an invisible enemy*, and such an analogy begs for plausible criteria for justification. In a similar vein, the COVID-19 virus became an *invented enemy* that must be suppressed by military means. This extended analogy is brilliantly elaborated by Umberto Eco (2012):

So, when there is no enemy, we have to invent one (...) the image of an enemy is simply shifted from a human object to a natural and a social force that in some way threatens us and has to be defeated. (p.p. 7, 17)

Finally, the emerging securitization theory and the UN policy of human security expand the traditional security scope on all issues that affect human well-being. The securitization theory shifted the national security paradigm towards comprehensive human security, which includes general health conditions as one of its environmental aspects

(Buzan et al., 1998, 74-75). Moreover, the UN placed health insecurity among the other six main types of threats to human security (United Nations, 2016, p. 7). In this more expansive environment, a notion of warfare operation is just one piece in the puzzle of contemporary military operations.

To sum up, the just war criteria still make sense for an *ex-ante* evaluation of the justness of every military operation and, thus, may be equally applicable for military enforcement in peacetime. The absence of an enemy can be supplemented by the abstract notion of a threat to public health. Furthermore, the UN policy of human security and the literature on securitization qualify threats to public health as legitimate military targets. These analogies between warfare and peacetime military enforcement are plausible reasons to apply, with reasonable precautions, the just war criteria beyond its traditional purpose and scope.

The application of the just war conceptual framework to a public health emergency

The contemporary meaning of just war encompasses six *ius ad bellum* criteria: just cause, right intention, legitimate authority, goal proportional to the offense, reasonable prospect of success, and last resort, and two *ius in bello* criteria: discrimination and proportionality of means to the expected military advantage (Whetham, 2010, p.p. 75-85). In this section, each of them is analyzed and adjusted to the circumstances of a health emergency.

The first *ius ad bellum* criterion for the legitimate use of military force is a just cause. It stems from St. Augustin's sixteen-century-old reasoning of the defense of the innocent and temporary concepts including self-defense, national security protection, and human rights (Whetham, 2010, p.p. 76-77). In the human security framework, the COVID-19 emergency arguably involves all of these. National security is intertwined with global health security (Weir, 2014, p.p. 18, 27), and global infectious diseases are already recognized as a global and national security threat (Chen & Narasimhan, 2003, p.p. 186-190). Moreover, this pandemic attacks innocent populations worldwide, and the right to the "highest attainable standard of physical and mental health" (UN General Assembly, 1966b, Art. 12) underpins the theoretical and policy arguments on emerging international human rights to health. (Buchanan, 2013, p. 74; UN Office of the High Commissioner for Human Rights, 2008) Lastly, invoking self-defense seems to be conducive to a health crisis because citizens' disobedience or resistance to the governments' measures might jeopardize the organized life of the community (The International Law Association, 1984, Sec. A, Art. 1). The analogy of an enemy conducting an unlawful threat, triggering the right of self-defense, is obvious and suitable to the law enforcement context. However, one must be cautious in invoking self-defense in a health crisis. The just war theory is not persuasive in broadening this concept (Babic, 2019, p. 28), and military operations blur the limits of self-defense

with mission accomplishment (Bourgeois & Perrin, 2018, p.p. 14-19). Therefore, the just cause criterion should be applied after the adjustment: A health emergency should be a just cause for domestic use of military force against disobedient citizens only if a whole community's life is at stake.

The second criterion, right intention, implies that only morally acceptable reasons should motivate a government to resort to military force. This criterion seems vague because it would be too naive to assume that any action could have a single, pure motivation. Moreover, the intentions of a state can hardly be identified, and good motivations are often mixed up with those of another kind (Whetham, 2010, p. 78). Apart from the enigma of governments' intentions, there is another source of uncertainty: the lack of scientific knowledge, which amounts to a global governance gap. (Weiss, 2013, p.p. 45-50). Indeed, findings of the global medical technocracy have been contested before (Huang, 2014). Thus, the current global public health crisis might eventually be labeled as a new case of dubious securitization. However, the military engagements in a health crisis should not provoke suspicion *per se*; they have already become a routine part of the health and relief contributions to human security across the globe (Chen & Narasimhan, 2003, p.p. 186). Also, there is no evidence so far that governments have had motives other than the protection of public health in the current crisis. The right intention in a health emergency should thus be tested by assessing the pursuit of aims: military enforcement is just only if it aims strictly at the protection of human lives.

Thirdly, the requirement that military force should be triggered only by a legitimate authority implies evaluating its justness by the states' constitutional mechanisms and popular support (Whetham, 2010, 78-79). Regarding International Law, the UN Charter bans the use of force against other states and "in any other manner inconsistent with the purposes of the UN" (United Nations, 1945, Art. 2, Para. 4). The purposes of the UN in the Preamble contain "promoting and encouraging respect for human rights" (United Nations, 1945, Para. 3). Thus, human rights should be a good reason for the use of force. Because governments are entitled to resort to military enforcement in an internal health emergency, the only question is how far they should go with intrusions in internationally recognized human rights. The realist and liberalist proponents would surely offer disparate answers, and space for morally loaded interpretations is wide open. Therefore, the refined criteria in this context would be: A resort to military force is justified if it is not beyond the government's power to interfere with human rights.

The fourth *ius ad bellum* criterion of the contemporary just war approach is the proportionality between a goal and the offense. In other words, the use of force can be legitimate only if "the overall harm likely to be caused by the war is less than that caused by the wrong that is being righted" (Whetham, 2010, p. 79). Contemplations have been developed from Cicero and Grotius on the balance between good and evil in the desired object of intended warfare. In Grotius' (2001) words,

it is the height of folly and presumption unnecessarily to expose ourselves to dangers. In encountering calamities, we must imitate the conduct of physicians who use gentle remedies with weak [sic] constitutions. But in constitutions of a stronger cast, especially in virulent disorders, they must have recourse to more powerful, though more dangerous expedients. In the same manner, a skillful pilot would not attempt to face the wind directly, but would tack about in order to avoid its fury. (p. 241)

Such a judgment must be rather subjective due to inevitable uncertainties and deep disagreements about the outcome of every war (Babic, 2019, p. 19). Furthermore, strategic military objectives and a caused societal harm are hardly commensurable. Thus, perceptions of the balance between them must differ vastly. In short, there is no common ground when we contemplate on a type of wrong and its extent that is sufficient to die and to kill for. To apply this criterion to a health emergency, the concepts that should be balanced must be identified. In this context, a goal that justifies military coercion must be public health protection, and the resort to military force should exemplify an offense against a routine functioning of society. A resort to military coercion can be legitimate only if the protection of public health has the preponderancy. In other words, military enforcement must contribute to the protection of public health more than producing societal harm.

The next benchmark is a reasonable prospect of success. It denotes a prudential calculation of probabilities to achieve a political purpose and operational objectives (Whetham, 2010, p.p. 78-79). In contrast to the previous criterion, which requires a preponderance of an intended goal to means employed, this box can be ticked after a confirmation that the employed means should accomplish an intended goal in a whole or at least to a certain extent. This requirement seems equally subjective due to the harsh difference between what should and will happen in warfare (Babic, 2019, p. 18). In the context of a health emergency, uncertainties of military deployments seem less severe. The main difficulty here is merely the gap in scientific knowledge because adversaries who directly confront and deliberately exploit our weaknesses are missing. Nevertheless, military personnel should be considered competent actors in this field. Military expertise in research of tropical diseases and contributions to health security in fragile states have granted them the status of a major participant in global health security (Rockefeller, 2005, p. xvii; Chretien, 2011, p. 9). Therefore, such military deployments make sense, and coercive measures should be just if there is a reasonable chance to contribute to the pandemic's prevention and confinement.

The sixth and last *ad bellum* requirement for legitimate military enforcement is last resort, which implies that all other "practical options that might achieve success have been exhausted before military action is initiated" (Whetham, 2010, p. 80). In other words, military force should only take place if all other means could not yield the desired effects. In internal affairs, the other means refer to internal security services, including the police and paramilitary forces. This criterion is not easy to apply uniformly because of the huge

differences in civil-military traditions that determine each state's various levels of militarization. Besides, some states have resorted to military coercion before the COVID-19 outbreak due to other threats, such as organized crime, terrorism, illegal migrations, and internal disturbances. In short, the COVID-19 has not emerged in the security vacuum. It merely posits a new issue in the constellation of threats that deteriorate national security and provokes different responses of states, including military ones. Such a robust and highly effective use of force should be justified solely after all non-coercive and less coercive alternatives have been exhausted.

The application of the *ius ad bellum* criteria of the just war tradition that define the conditions that legitimize the resort to military force do not provide sufficient grounds. Its justification is equally reliant on the ways and means of execution. The military force must meet *ius in bello* requirements of discrimination and proportionality because of the inevitability of undesired effects. Notwithstanding the justness of the resort to it, any military operation can be legitimate only if good prevails the bad in its execution (Whetham, 2010, p.p. 82-83). These requirements are situated in the context of the health emergency and adjusted accordingly.

The discrimination between combatants and civilians is the first rule of IHL (Henckaerts & Doswald-Beck, 2009, p.p. 3-8). This principle of warfare seemingly sits ill with a health crisis regime; there are no hostile combatants to distinguish from civilians. However, if the scope of this rule extends on military enforcement in a health emergency, the notion of a combatant may be adjusted to a general notion of human beings and things that jeopardize human security—in this case, public health. Therefore, military coercion should be justified if it is aimed only at human and national security threats.

The second condition *in bello* is also a basic IHL rule of proportionality of means employed and expected military advantage. It resembles the above-mentioned criteria of proportionality *ad bellum*, but the context of the application is different. "Just as the war itself must be a proportional response to the injury suffered, the means employed to pursue war must also be proportionate" (Whetham, 2010, p. 81). In this sense, the ends must justify means not merely in resorting to war but also to ways of conducting warfare to eliminate unnecessary suffering. In other words, they should not be excessive in relation to the expected military advantage (Whetham, 2010, p. 81). In the health emergency environment, the application of this criterion entails an analogy and generalization again. Because the use of military force inevitably produces unwanted collateral harms to human rights, the value of military objectives—in this case, incarnated in public health protection—must have an ethical preponderance. On the other hand, means and ways of military enforcement should not excessively affect human rights.

In conclusion, just war ethical requirements can be adjusted and applied to other kinds of military coercion with reasonable precautions. If it is motivated by public health protection, the resort to military force can be justified by cumulative fulfillment of the following requirements: the need to deal with defiance that threatens the organized life of

society; the exclusive aim of human lives protection; legitimization of government to limit human rights; a preponderance of benefits to public health; suitability of enforcement to contribute to public health; exhaustion of other alternatives; and the execution, aiming only at threats to public health and not affecting human rights excessively.

The justification of military enforcement in the COVID-19 public health emergency

In this part, the justification criteria adjusted to a health emergency in the second part are empirically applied to test the legality and legitimacy of current military enforcements worldwide in the COVID-19 crisis. However, before the empirical application of these theoretical criteria, they must be confronted and harmonized with the legal framework explained in the first part.

Defining a common ground for legal and ethical criteria for justification

The purpose of the theoretical considerations here is to harmonize the criteria for the justification of military enforcement with the conditions of International Law. They must be conducive to the subsequent empirical assessment.

The common ground is not difficult to identify. Theories of human rights law and the just war converge and permeate because both have common philosophical Greco-Roman, and Christian roots. Indeed, the founding fathers of the just war theory: Plato, Aristotle, Cicero, Augustine, Aquinas, Vitoria, Suarez, and Grotius (Whetham, 2010, p. 65), have equal merits in the development of the natural law theory. This school of legal thought integrates ethical values and *lege lata* and constitutes the fundaments of human rights law. Moreover, the just war approach is becoming legalized internationally through the UN's "Responsibility to Protect" policy (UN General Assembly, 2005, Para. 138, 139). It attempts to bridge a gap between the legal shortcomings of transnational humanitarian interventions and a moral necessity to protect human rights against serious violations when a government fails to do so.

There is considerable grounds for a harmonized interpretation of rules on infringement with human rights (legality, necessity, and proportionality) and the contemporary just war criteria (just cause, right intention, legitimate authority, reasonable prospect of success, *ad bellum* and *in bello* proportionality, last resort, and discrimination). This common ground cannot be surprising; these legal concepts are so broad and vague that the ethical content is necessary for their interpretation. Furthermore, the application of human rights law norms in the context of military enforcement could be confirmed by the International Court of Justice's notorious judgment that *ius in bello* is *lex specialis* to human rights law (International Court of Justice, 2004).

The just war criteria could be seen as a longer and somewhat more detailed list of conditions prescribed by human rights law. First, the human rights condition of legality

is epitomized by just war's requirement that war can be commenced only by a *legitimate authority*. Secondly, the counterpart for the condition of necessity that entails human rights infringements is the requirement that a resort to the use of military force must be founded on *just cause*. Finally, the rest of the just war criteria are conducive to the human rights framework of proportionality. It consists of conditions of suitability and optimality of means employed to accomplish a legitimate aim and a proper balance between these means and legitimate aims (Rasevic, 2014, p. 137). Indeed, the just war's *reasonable prospect of success* is analogous to the human rights' suitability of means. Furthermore, requirements are based on the test of the feasibility of measures to accomplish a legitimate aim, resembling the just war's *right intention*. The condition of human rights law to choose means that optimally benefit to an intended aim resembles the just war's requirements to use military force as a *last resort* and *discriminate* objects that pose a threat from the other ones. Finally, the human rights criterion of a proper balance between an aim and means seems analogous to the just war's *proportionality ad bellum* and *in bello*.

In sum, the criteria of just war adjusted for military enforcement in a public health emergency in the second, interpreted within the human rights law framework, constitute a reliable benchmark for justification. They surely deserve further theoretical refinement. However, they must be of some immediate practical use; they are empirically applied in the remainder to test the legitimacy of the use of military force in the current health crisis across the globe.

The global justification of military enforcements: the empirical research

The empirical part of this study describes how far governments worldwide go regarding the domestic use of military force against COVID-19 and assesses the global perception of such measures. A qualitative methodology was used to collect and compare various governments' responses, and a quantitative methodology to appraise the global perception of these measures.

To this end, the sample of military professionals, including more than 40 respondents-Alumni of the Defence Academy of the UK and King's College London from different continents and major global cultures³, provided information on their respective government's responses to the COVID-19 threat and the applied legal and ethical criteria developed above to evaluate the justness of domestic use of military force. Despite its small size, this sample should be considered representative because it comprises the professionals of distinguished military experts worldwide and reflects the pertinent global opinion.

The survey, conducted between April 20 and May 3, 2020, of the emergency measures, human rights limitations, and military enforcements worldwide (Table 1) illustrates

3 At least 30 different states, including (in alphabetical order): Australia, Austria, Bangladesh, Bosnia and Herzegovina, Brazil, Cameroon, Canada, Chile, Columbia, Denmark, Germany, India, Indonesia, Italy, Japan, Jordan, Kuwait, Nepal, Netherlands, New Zealand, Nigeria, Rwanda, Saudi Arabia, Serbia, Spain, Sri Lanka, Ukraine, United Kingdom, USA.

differences in cultural and legal traditions, civil-military relations, and respective states' securitization levels, generally. The states belonging to the Western legal tradition, or aspiring to it, generally seemed reluctant to limit human rights and augment the role of militaries in internal affairs. Some of them resorted to military coercion, arguably, coinciding with other threats, such as organized crime, illegal migrations, terrorism, or social unrest. The developing countries seemingly tried to follow the good practices of developed democracies. However, their different constellations of necessities entailed a more restrictive approach to the enjoyment of human rights and a more proactive role of armed forces in internal affairs. The prevailing tendency across the globe appears to be the promulgation of a public health emergency and the resort to restrictions of human freedoms of movement, assembly, and even expression. The regime of "public emergency that threatens the life of the nation" (UN General Assembly, 1966a, Art. 1) and the military enforcements seem to be exceptions that are not solely motivated by the COVID-19 spread. Arguably, this survey demonstrates that such measures have been designed to minimize affecting human rights and the Rule of Law.

Table 1.

| State | Did the government declare a public emergency? If yes, what type of emergency? | What restrictions and derogations of human rights are applied due to the COVID-19 crisis? | Are the Armed Forces engaged in law enforcement? If yes, what are their extraordinary authorizations to use force in the homeland? |
|--------------|---|--|---|
| Japan | Health emergency | No | No (only assistance) |
| Netherlands | No | No. Social distancing measures | No (only support) |
| Bangladesh | Health emergency | Freedom of movement | Yes (in the presence of a Judicial magistrate) |
| Canada | Health emergency (some provinces) | Freedoms of movement, assembly, and enterprise | No (only support and standby) |
| Ukraine | Situation of emergency | Freedoms of privacy, movement, assembly, expression, and property | No (Only military police patrols with the civ. police) |
| Denmark | No. National crisis | Freedoms of assembly and movement | No (only support) |
| Germany | No | Freedoms of movement and assembly | No (only support) |
| Italy | Health emergency | Freedoms of movement and assembly | Yes. Routine support to the police, involving guarding, roadblocks, checkpoints, public order, and border control |

Table continues...

| State | Did the government declare a public emergency? If yes, what type of emergency? | What restrictions and derogations of human rights are applied due to the COVID-19 crisis? | Are the Armed Forces engaged in law enforcement? If yes, what are their extraordinary authorizations to use force in the homeland? |
|------------------------|---|--|--|
| Sri Lanka | Public emergency | Freedoms of movement, assembly, expression, religious minority practices, and right to information | Yes. Guarding, cordoning and conducting searches, arrests, crowd and riot controls, securing routes, and roadblocks. |
| Serbia | Public emergency | Freedoms of movement (curfew) and assembly, suspension of public services and production, mandatory isolation of suspected cases | Yes. Guards at medical facilities, geriatric, and illegal migrant centers, participation in border control. The use of lethal force in self-defense |
| Australia | Health emergency | Freedom of movement. In some territories, quarantine, self-isolation, freedoms of assembly and enterprise | No. Only routine support to Coastguard operations |
| Jordan | Public emergency | Freedoms of movement, assembly, and enterprise, suspension of public services | Yes. Guarding and cordoning, conducting searches, arrests. Participation in securing roadblocks and routes, crowd and riot control, curfew, border control, and public order |
| Cameroon | Health emergency | Freedoms of movement, assembly, enterprise, and suspension of public services | No. Gendarmerie routinely engaged in law enforcement |
| Spain | Public emergency | Freedoms of movement, assembly, enterprise, and restrictions of public services | Yes. Unauthorized patrols to arrest/detain |
| Chile | Catastrophe | Freedoms of movement, assembly, and right to property | Yes. Only for a mission accomplishment and in self-defense |
| United Kingdom | Health emergency | No. Social distancing measures | No |
| Rwanda | Health emergency | Freedom of movement (lockdown) | No |
| Brazil | Health emergency | No. Social distancing measures | No (only assistance) |
| Bosnia and Herzegovina | Health emergency. Public emergency in one of two entities | Freedoms of movement, assembly, and expression (the last repealed before applied) | No. The foreign troops deployed in peace enforcement authorized to use lethal force |
| India | No. National crisis | Freedoms of assembly and movement | No |

Source: Created by the author.

Finally, to answer the question of whether military enforcement could or should be justified in the COVID-19 emergency, the ethical criteria developed in the second section are empirically applied in the quantitative survey and summarized in Table 2.⁴ This question has proven to be hypothetical for almost two-thirds of responders because 62.5% of the states under evaluation did not authorize military personnel to use force to support the government's emergency measures. Nevertheless, their opinions are equally relevant; they reflect the military professionals' cognitive moral reasoning, which may be beneficial in inevitable future emergencies of this kind.

Table 2.

| The just war criterion | The criterion applied to the health emergency in a homeland | The evaluation of the criteria fulfilment (%) | | |
|--|--|---|---------|-------------|
| | | Negative | Neutral | Affirmative |
| Just cause | The COVID-19 crisis is a just cause for the domestic use of military force against noncompliant citizens | 47.5 | 17.5 | 35 |
| Right intention | Military enforcement is strictly aimed at the protection of human lives | 25 | 20 | 55 |
| Legitimate authority | A government is authorized to restrict and/or derogate human rights | 25 | 42.5 | 32.5 |
| Proportionality between a goal and the offense | Military enforcement measures result in less harm to society than contributing to COVID-19 suppression | 28.21 | 25.64 | 46.16 |
| A reasonable prospect of success | A reasonable chance that military enforcement will contribute to COVID-19 suppression | 15 | 35 | 50 |
| Last resort | All non-coercive alternatives have been exhausted before the use of military force | 20 | 25 | 55 |
| Discrimination | A military force is aimed only at the threats to human and national security | 7.50 | 25 | 67.5 |
| Proportionality between means and an advantage | Means and ways of military enforcement do not affect human rights excessively | 2.56 | 23.08 | 74.36 |
| AVERAGE | | 21.35 | 26.72 | 51.94 |

Source: Created by the author.

⁴ Accessible at: <https://www.surveymonkey.com/results/SM-TN8XJG5X7/>

The average rate of evaluations that confirm justification of military coercion in the COVID-19 emergency prevails. However, such a quantitative evaluation cannot be conclusive because the specific weight of the respective criteria cannot be empirically measured. It would be imprudent to assume that they have equal value. Nonetheless, this survey suggests that global perception of the legitimacy of military enforcement in the current COVID-19 crisis is generally affirmative, assuming that the organized life of society is at stake, that military operations are under the Rule of Law, and there is not excessive societal harm.

Conclusion

The various worldwide responses to the global health emergency actualized the issue of the legality and legitimacy of the resort to military force in a homeland. Despite the enormous comparative differences in cultural and legal traditions, level of securitization, and civil-military relations, contemporary standards for the justification of states' responses can be refined and applied in future global emergencies.

International human rights law defines a legal framework of restrictions and derogations in emergencies. It determines the ethical criteria for the justification of military enforcement. If they are confined and determined by the Rule of Law, the just war criteria can be successfully adjusted and applied beyond its usual scope of armed conflict. In case of a health emergency, these adjusted criteria are the need to deal with defiance that threatens the organized life of society; the exclusive aim of human lives protection; the legitimization of government to limit human rights; a preponderance of benefits to public health; the suitability of enforcement to contribute to public health; the exhaustion of other alternatives; and the execution aiming only at threats to public health and not affecting human rights excessively. The ethical criteria converge and permeate with human rights conditions of legality, necessity, and proportionality. These criteria should be strictly interpreted and diligently applied to minimize militarization risks, which is the inevitable collateral damage of every domestic military deployment.

The empirical research that employs these criteria has demonstrated that the extant domestic use of military force in the COVID-19 emergency can be justified. However, this appraisal is of provisional value because the justness of military operations depends on their unpredictable and often unwanted consequences.

Therefore, it cannot be claimed that such use of the military should always be justified. After this emergency, the respective countries' constitutional courts and international human rights institutions will have the last word in determining their legality and legitimacy. Until then, the criteria developed here may be a useful tool in *ex-ante* political and military decision-making. They contain the morally loaded, ambiguous, and vague narrative used by the respective constitutional courts and international institutions for the *ex-post* scrutiny of the governments' pertinent decisions.

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