Military necessity

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Chapter 1

Introduction

It is often said that international humanitarian law (IHL)[1] is developed with a view to striking a realistic and meaningful balance between military necessity and humanity. The law therefore "accounts for" military necessity. What it really means to say so, however, remains obscure. This obscurity has given rise to different opinions.

One highly controversial strand of thought echoes an earlier doctrine known as *Kriegsräson*.[2] *Kriegsräson*, as well as its more recent variations, holds that the military necessity of a given act "rights" or "repairs" its unlawfulness otherwise conclusively established by positive IHL rules. Although the law accounts for military necessity, its rules cannot be construed so that the belligerent[3] is denied the option to do what it needs to succeed. On this view, where an IHL rule is formulated without military necessity exceptions, it merely indicates that the rule's framers[4] deemed its prescriptions generally consistent with considerations of military necessity. Whenever the rule collides with the actual military necessity of an act, the latter trumps the former. It follows that military necessity pleas are admissible *de novo*, even in favour of conduct deviating from unqualified IHL rules. *Kriegsräson* found support in Germany during the late 19th century. It remained influential among German military and international lawyers until the end of World War II. Since its rejection at post-war trials,[5] *Kriegsräson* has been thoroughly discredited.[6]

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[1] In principle, this thesis uses the expression "international humanitarian law" and "IHL" throughout. For our purposes, the discipline's other monikers, such as the "law of armed conflict", the "laws and customs of war" and the like, should be considered essentially synonymous.

[2] So named after the German maxim "Kriegsräson geht vor Kriegsmanier" ("Necessities of war override rules of war"). In essence, *Kriegsräson* asserts that military necessity permits any belligerent conduct conducive to success and overrides unqualified rules of positive international humanitarian law that obligate contrary action. For further discussions, see, e.g., Isabel V. Hull, "'Military Necessity' and the Laws of War in Imperial Germany", in Stathis N. Kalyvas, Ian Schapiro and Tarek Masoud (eds.), *Order, Conflict, and Violence* (2008) 352, at 359-374; Coleman Phillipson, *International Law and the Great War* (1915), at 133-138; James Wilford Garner, 1 *International Law and the World War* (1920), at 278-282; James Wilford Garner, 2 *International Law and the World War* (1920), at 195-198; N.C.H. Dunbar, "The Significance of Military Necessity in the Law of War", 67 *Juridical Review* 201 (1955), at 203-204, 207-208; William V. O'Brien, "The Meaning of 'Military Necessity' in International Law", 1 *World Polity* 109 (1957), at 119-137; Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1983), 172-179; Mika Nishimura Hayashi, "The Martens Clause and Military Necessity", in Howard M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (2008) 135, at 137-138; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), at 265-268.

[3] In this thesis, the term "belligerent" refers not only to a party to an armed conflict but also to a combatant member of its armed forces.

[4] The expression "framers" refers primarily to states that validly posit IHL rules by forming custom and concluding treaties. On the role allegedly played by judges at international criminal tribunals in "supplanting" the pre-eminence that states have traditionally enjoyed in this regard, see Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", 50 *Virginia Journal of International Law* (2010) 795, at 816.

[5] See, e.g., *In re Rauter*, 16 *Annual Digest and Reports of Public International Law Cases* 526 (1949), at 543; *In re Burghoff*, 15 *Annual Digest and Reports of Public International Law Cases* 551 (1949), at 554-557; *United States of America v. Wilhelm von List et al.*, *Judgment*, 11 *Trials of War Criminals Before the Nuermberg Military Tribunals Under Control Council Law No. 10* (1950) 757, at 1255-1256, 1272-1273, 1296; *In re von Lewinski (called von Manstein)*, 16 *Annual Digest and Reports of Public International Law Cases* 509 (1949), at 512-513; *United States of America v. Alfred Felix Alwyn Krupp von Bohlem und Halbach et al.*, *Judgment*, 9 *Trials of of War Criminals Before the Nuermberg Military Tribunals Under Control Council Law No. 10* (1950) 1327, at 1340; *United States of America v. Wilhelm von Leeb et al.*, *Judgment*, 11 *Trials of War Criminals Before the Nuermberg Military Tribunals Under Control Council Law No. 10* (1951) 1, at 541.

[6] See, e.g., Office of the Judge Advocate General, Canadian Forces, *Law of Armed Conflict at the Operational and Tactical Levels* (2000), at 2-1; U.K. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 23; Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1968), at 136; Christopher Greenwood, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 2d ed. (2008) 1, at 38; Solis, *supra* note 2, at 265-268.

Most modern theories take *Kriegsräson*'s fallacy as a common point of departure.[7] They agree that international humanitarian law accounts for military necessity. They also agree that this entails the inadmissibility of *de novo* military necessity pleas *vis-à-vis* the law's unqualified prescriptions.

One widely held view takes the matter further. Not only does international humanitarian law refuse to let the military necessity of an act remedy its unlawfulness; but, and more importantly, the law also affirmatively "wrongs" or "vitiates" an otherwise IHL-compliant act should it prove militarily unnecessary. The fact that the law accounts for military necessity does not leave the belligerent at liberty to do what is, after all, lacking in military necessity. Where positive IHL rules authorise action, it only means that whatever they authorise is generally considered militarily necessary. In the event of a collision between an act being militarily unnecessary, on the one hand, and it being lawful according to positive IHL rules, on the other, the former defeats the latter. A militarily unnecessary act breaches international humanitarian law, all things considered, whether it is consistent with positive IHL rules or not.

This view is predicated on two central assertions. To begin with, military necessity creates directives, especially of a restrictive or prohibitive character. Implicit in this construal is the notion that it is illegitimate to perform militarily unnecessary acts. In other words, "that which *can* be done without *must* be done without". Furthermore, the restrictive or prohibitive property of military necessity survives the process of IHL norm-creation. This property now operates as an independent, free-floating layer of normative restraint additional to that imposed by positive IHL rules.

Today's discussion of military necessity also features another perspective. This perspective agrees that unqualified rules of international humanitarian law exclude *de novo* military necessity pleas. Crucially, however, it finds that these rules exclude *de novo* humanity pleas as well. The underlying idea here is that military necessity and humanity are diametrically opposed considerations inevitably in conflict with each other. Every IHL rule embodies their dialectical compromise struck during its norm-creation. Thus, where the rule is unqualified, neither military necessity nor humanity pleas are admissible *de novo*.

In order for this theory to work, the following propositions need to be true. First, what is military necessary is always inhumane; and what is humane is always militarily unnecessary. Second, both military necessity and humanity are considerations that generate imperatives. In other words, the framers of IHL rules have reason to demand militarily necessary acts and condemn militarily unnecessary acts. Similarly, IHL framers have reason to obligate humane acts and forbid inhumane acts. Third, both military necessity and humanity are involved in the process through which every IHL rule is created.

These contemporary theories all treat military necessity as a reason for belligerent conduct's normative regulation in one way or the other. It appears, however, that this is a somewhat casual supposition, rather than the product of vigorous reflections. In particular, one may question whether it is true under international humanitarian law that a given act's military non-necessity makes it appropriate for prohibition, or that an act's military necessity renders its performance obligatory. Military necessity's normative characteristics, including how it interacts with other notions such as humanity, have yet to be properly investigated.

Modern theories also seem to conflate the multiple contexts in which military necessity appears. It is one thing to ask if behaving in a particular way on a specific occasion constitutes a military necessity or non-necessity, in view of its stated military purpose. It is quite another, however, to consider what IHL framers should do about a given kind of conduct, once it has been agreed that it is militarily necessary or unnecessary in the sense just described. Whether a given act's military necessity should render it lawful despite its general IHL prohibition, or whether its military non-necessity should render it unlawful despite its general IHL authorisation, is yet another question.

No existing theory of military necessity systematically probes the notion's normative property or accounts for its various contexts. It is this thesis's aim to develop and defend such a theory.

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[7] This is also true of some influential pronouncements on the matter – such as, for example, the 1863 Lieber Code – that were just ahead of, or contemporaneous with, *Kriegsräson*'s emergence in Germany. See Articles 14-16, Instructions for the Government of Armies of the United States in the Field (24 April 1863). See also Hull, *supra* note 2.

1. Research Questions

This thesis is guided by two principal research questions. First, what does it mean to say that international humanitarian law "accounts for" military necessity? Answering this question involves, among other things, clarifying what military necessity means. Admittedly, military necessity can mean different things to different people. It seems nevertheless instructive to begin by specifying whose understanding of the notion matters, and for what reason.

Second, to what normative consequences does international humanitarian law "accounting for" military necessity give rise? That the law "accounts for" military necessity is an observation typically made by those who go on to discuss whether it is permissible to deviate from unqualified rules of positive international humanitarian law on account of military necessity; whether militarily unnecessary acts should be considered unlawful despite the absence of a specific IHL prohibition; or whether military necessity can be a valid defence *vis-à-vis* war crimes and crimes against humanity charges. It stands to reason that our persistent disagreements about these issues have their roots, *inter alia*, in what meanings we ascribe to the notion that the law "accounts for" military necessity.

1.1 International Humanitarian Law "Accounting for" Military Necessity?

In order to understand what it means to say that international humanitarian law "accounts for" military necessity, one must first carry out inquiries into various subsidiary matters. They may be grouped under two major headings. One deals with when an act may be said to be militarily necessary or unnecessary. The other deals with how international humanitarian law should regulate such an act given its status as a military necessity or non-necessity. Thus, we may ask ourselves the following questions:

- When is a belligerent act militarily necessary or unnecessary?
  - What does it mean for a given act of the belligerent to be "militarily necessary" or "militarily unnecessary"?
  - What factors are to be taken into consideration when assessing the military necessity or non-necessity of a belligerent act?
  - Is there some uniquely correct understanding of when an act constitutes a military necessity, such that anyone thinking rationally and processing a given kind and amount of information competently should arrive at one and the same correct conclusion?
  - Is the military necessity of a belligerent act amenable to assessment without reference to its moral or ethical status?
- How are the framers of positive IHL rules to regulate a belligerent act that is deemed militarily necessary – or unnecessary, as the case may be?
  - How, if at all, are the legitimacy of a military purpose and the military necessity of an act taken for its fulfilment related to each other?
  - Does the legitimacy of a belligerent act depend on whether it is militarily necessary or unnecessary?
  - Does it matter whether the act in question is evil or not evil? Does it matter whether it is necessary yet evil, necessary and non-evil, unnecessary and evil, or unnecessary and non-evil?
  - What does it mean to say that "IHL rules embody a compromise between military necessity and humanitarian considerations"?
  - Are considerations of military necessity and humanity inevitably in conflict with each other?
  - Is what is militarily necessary always inhumane? Is what is humane always militarily unnecessary?

- Does the military necessity of an act provide reasons for which IHL framers should obligate it?
- Does the military non-necessity of an act provide reasons for which IHL framers should restrict or prohibit it?
- Does the humanity of an act provide reasons for which IHL framers should obligate it?
- Does the inhumanity of an act provide reasons for which IHL framers should restrict or prohibit it?
- Can acts consistent with military necessity considerations also satisfy humanitarian considerations and, if so, when and under what circumstances can they do so?
- Do military necessity and humanitarian considerations appear in the process through which every positive IHL rule is created?

1.2 Normative Consequences?

What meaning we ascribe to "accounting for" military necessity affects where we place military necessity claims within the frameworks of positive international humanitarian law and international criminal law (ICL). Accordingly, we may inquire:

- What solutions to the various modes of military necessity-humanity interplay in the process of their norm-creation do positive IHL rules embody?
  - Does the military necessity of a belligerent act "right" or "repair" its unlawfulness otherwise established by unqualified IHL rules?
  - Does the military non-necessity of a belligerent act "wrong" or "vitiate" its compliance with applicable rules of positive international humanitarian law?
  - Does the humanity of a belligerent act "right" or "repair" its unlawfulness otherwise established by unqualified IHL rules?
  - Does the inhumanity of a belligerent act "wrong" or "vitiate" its compliance with applicable rules of positive international humanitarian law?
  - What can be said of other potentially relevant normative considerations, such as chivalry?
- When are military necessity pleas admissible under international humanitarian law?
  - How should one apply unqualified rules of positive international humanitarian law to situations where the rule's addressee invokes military necessity while engaging in deviant behaviour?
  - How is one to understand the relationship between military necessity as an exception, on the one hand, and the state of necessity as a circumstance precluding the wrongfulness of an act, on the other?
  - Where a positive IHL rule contains an express military necessity clause, how should one interpret it in relation to the facts at hand?
  - In order for an act to fall within the scope of a military necessity clause, what requirements must be fulfilled? How do such requirements compare with factors used to assess an act's material military necessity?
- May a person accused of war crimes and crimes against humanity plead military necessity as an exception, justification, or excuse and, if so, when and under what circumstances may he or she plead it?
  - What explains the inclusion of military non-necessity as an element of some war crimes and crimes against humanity but not the others?
  - How is one to understand the relationship between military necessity and necessity as criminal law defences?
  - How have the various international criminal courts and tribunals handled this element to date? What kind of conceptual and evidentiary challenges have they encountered?

2. Organisation

Three tasks lie ahead. One is to identify the various contexts in which military necessity appears. Then, within each context, military necessity must be given its proper meaning. The last step involves illuminating the manner in which the meaning given in one context influences that given in another.

This thesis is organised as follows. There are eleven chapters in total. The thesis' nine substantive chapters, excluding this introductory chapter and a concluding one at the end, are grouped into three parts. Each part deals, respectively, with (a) military necessity in its strictly material context of war-fighting; (b) military necessity as a set of reason-giving considerations behind how the framers of international humanitarian law create its rules; and (c) military necessity as it appears in positive IHL and ICL provisions.

2.1 Military Necessity in Its Material Context

Part I's two chapters (Chapters 2-3) briefly discuss military necessity in its strictly material context. This, it may be said, is the context most familiar to planners and commanders tasked with tactical, operational and strategic decisions, as well as military historians assessing their efficacy.

Chapter 2 endeavours to illustrate what it means for a given belligerent act to be "militarily necessary" or "militarily unnecessary" in its most elementary, practical sense. This chapter will offer answers to questions such as when an act is amenable to military necessity assessment; how similarly competent assessors may reasonably disagree about an act's military necessity; whether an act must cause the fulfilment of its objective in order to be considered militarily necessary; what factors help assess whether an act constitutes a military necessity or a non-necessity; and whether military necessity assessments of specific acts can be meaningfully generalised.

Chapter 3 addresses itself to three major objections that may be raised against the idea that we can consider military necessity in its strictly material sense. First, by assessing an act's material necessity or non-necessity, one may already be passing judgment on its quality as something desirable or undesirable, what a competent soldier should or should not do. In other words, it is possible that necessity assessments are by definition normative assessments. Second, pursuing military necessities and avoiding non-necessities may mark not only a belligerent's competence *qua* member of an occupational group, but also a person's competence *qua* moral agent. To put it differently, the very point of fighting competently may well be a normative one. Third, it is arguable that soldiers should refuse to deem unethical acts militarily necessary, all things considered. Consequently, only ethically competent fighting should count as truly vocationally competent fighting.

This part will show that, in its material sense, military necessity reflects a two-fold truism according to which it is in the strategic self-interest of each belligerent to do what is necessary and to avoid what is unnecessary. Together, Chapters 2 and 3 prepare the conceptual foundation on which to build Part II's examination of normative military necessity. We will shift our perspective from that of military practitioners and historians concerned with whether an act is militarily necessary, to that of law-givers concerned with how a kind of action should be regulated *once* it is deemed consistent or inconsistent with military necessity.

2.2 Military Necessity in Its Normative Context

Part II (Chapters 4-7) will reflect on military necessity in its normative context. This is also the context in which this thesis endeavours to elucidate what it means to say that international humanitarian law "accounts for" military necessity. Here, the military necessity or non-necessity of a belligerent act provides the framers of IHL rules with reason to decide whether it should be obligated, permitted, restricted or prohibited.

Chapter 4 considers what role, if any, military necessity may play in the legitimacy modification of a given kind of belligerent act. In so doing, it engages several key questions regarding the relationship between the act's military necessity or non-necessity, on the one hand, and the evil or non-evil that it may be deemed to entail, on the other. It may be asked, for example, whether an act deemed lacking in military necessity becomes illegitimate *for that reason alone*. We will look into the possibility that, while the legitimacy of an evil act does depend to some extent on its status as a military necessity, the legitimacy of a non-evil act does not.

Chapter 5 synopsises a major theory on the contemporary significance of military necessity. This theory's primary concern is to ensure that IHL framers resolve the irreconcilable demands of military necessity and humanity, devise a workable compromise between them, and prevent the belligerent from being bound by conflicting IHL rules. It also matters to the theory's proponents that *de novo* military necessity pleas be inadmissible *vis-à-vis* unqualified prohibitions. We will witness how they seek to treat military necessity as inevitably in conflict with humanity. It will become necessary for them to establish that both military necessity and humanity demand some acts and condemn the others. They will then endeavour to show how, with respect to any given belligerent act, the framers let humanity trump military necessity, let military necessity trump humanity, or find some middle ground between them, and posit an IHL rule accordingly. This, according to the theory's adherents, is what "accounting for" military necessity and humanity really means. They will insist that the entire *corpus juris* of positive international humanitarian law embodies this compromise and that neither *de novo* military necessity pleas nor *de novo* humanity pleas are consequently admissible *vis-à-vis* unqualified rules.

In Chapter 6, we will question this theory on two grounds. First, is it really true that what is militarily necessary is always inhumane and what is humane is always militarily unnecessary? On the contrary, some belligerent acts are both humane and consistent with military necessity – or both inhumane and lacking in military necessity as the case may be – , are they not? Second, do military necessity and humanity always generate imperatives? Is it really of any concern to IHL framers that militarily necessary acts be performed, or that militarily unnecessary ones be avoided? Would it not be more likely that military necessity considerations are normatively indifferent? Could the same not be said of at least some humanitarian considerations?

Chapter 7 continues with the reappraisal of the impugned theory's two further grounds. Is it really so clear that what military necessity indifferently permits or tolerates always conflicts with considerations of humanity? Where humanity demanded what military necessity permitted, or where humanity condemned what military necessity merely tolerated, would the belligerent not satisfy them both by acting as directed by humanity? The question, then, is how the framers of IHL rules approach jointly satisfactory behaviour – more specifically, when the framers elect to obligate such behaviour without qualification, and what explains situations where they decline or fail to do so.

Chapter 7 also considers acts that may be condemned by humanity yet permitted by military necessity, or demanded by humanity yet merely tolerated by military necessity. Despite their appearance to the contrary, we have reason to wonder whether these acts are still capable of joint satisfaction. Our objective here will be to discover how IHL framers capture such possibilities in the rules they posit.

Part II shows how military necessity functions as a set of normatively indifferent considerations in IHL norm-creation. For IHL framers to posit an unqualified rule is for them to exclude all contrary liberties that belligerents would otherwise wish to pursue on account of military necessity. Elsewhere, the framers permit such liberties exceptionally, indeterminately, principally or unrestrictedly. The combination of these eventualities is what it means to say that the law "accounts for" military necessity.

2.3 Military Necessity in Its Juridical Context

Part III's three chapters (Chapters 8-10) bring us to military necessity in its juridical context. Here, we will consider three normative consequences to which international humanitarian law "accounting for" military necessity gives rise. Thus, juridical military necessity may manifest itself through exclusion; it may take the form of an exceptional clause; or it may appear as a negative element of crimes. These consequences primarily affect belligerents claiming or disputing compliance with the law's applicable rules, as well as those called upon to determine if a given act constituted an IHL violation or a punishable offence under international criminal law.

Chapter 8 deals with exclusion. At issue is whether *de novo* pleas emanating from normatively indifferent considerations such as military necessity would be admissible *vis-à-vis* unqualified IHL rules. It might be asked whether the aforementioned theory is correct in asserting that all positive IHL rules, including those that are unqualified, involve military necessity and humanity in their norm-creation. Should this assertion prove erroneous, would the theory's adherents not be compelled to acknowledge that *de novo* military necessity or humanity pleas might be admissible *vis-à-vis* at least some unqualified rules? Instead, we will query whether the adoption of an unqualified IHL rule *ipso facto* excludes all *de novo* pleas purporting to justify contrary behaviour that military necessity or humanity merely permits or tolerates.

Our discussion on juridical military necessity's exclusionary effects also raises intriguing questions about what kind of normative consequences non-indifferent considerations can generate. Thus, in Chapter 8, we will contemplate possibilities where acting as demanded by humanity may arguably become lawful despite the law's unqualified obligation to the contrary. Conversely, it may be asked whether an act's compliance with the letter of positive international humanitarian law can be vitiated if humanity condemns that act.

Chapter 9 delves into juridical military necessity as an exception. First, we will consider what military necessity clauses signify and how they modify the content of the primary rules to which they are attached. This will help us distinguish juridical military necessity from the state of necessity, a circumstance precluding the wrongfulness of an act under the international law of state responsibility.

Chapter 9 will also examine what requirements military necessity clauses impose. For what kind of purposes must the act in question be taken in order to be eligible? Does it matter whether the course of action taken compares favourably to some alternative course or courses of action and, if so, in what way? Is proportionality one of the requirements? How should we approach matters of available information, contemporaneous knowledge and retrospection? A key question here will be whether and, if so, how, the requirements of juridical military necessity differ from those factors used to assess material military necessity.

Chapter 10 looks into juridical military necessity as a negative element of war crimes and crimes against humanity. This chapter seeks to clarify the mechanics through which the absence of military necessity appears as an element of some offences. We will consider its definitional, procedural and evidentiary ramifications, as well as its relationship to necessity as a criminal law defence.

Chapter 10 will also review in detail how the International Criminal Tribunal for the Former Yugoslavia (ICTY) has dealt with the matter. What does the tribunal's voluminous case law on property destruction and population displacement reveal? Is it in line with the requirements of military necessity clauses discussed in Chapter 9? To what extent can the military necessity of property destructions be meaningfully assessed by reference to the notion of military objectives? On what basis do judges find forcible displacements militarily necessary or unnecessary? The same question *mutatis mutandis* will be asked of the nascent jurisprudence of the International Criminal Court (ICC).

3. Principal Findings

This thesis' most important finding is that military necessity is indifferently permissive. It is so, regardless of the context – be it material, normative or juridical – in which the notion appears. Materially, military necessity signifies the degree to which a specific belligerent act is conducive *vis-à-vis* the attainment of its military purpose under a given set of circumstances. Conversely, material non-

necessity signifies the degree to which it is not so conducive. Normatively, the notion prompts the framers of IHL rules to leave the belligerent at liberty not only to pursue military necessities and avoid non-necessities, but also to forgo what is materially necessary and encumber itself with what is unnecessary. It follows that military necessity never conflicts with what humanity demands or condemns. Juridically, military necessity serves as an exceptional ground for deviation from principal IHL rules, but only where its admissibility is envisaged expressly and in advance. If not, or no longer, militarily necessary, the deviant act reverts to being a non-exempted instance now bound by the principal rule.

We can now appreciate in greater detail what it really means to say that international humanitarian law "accounts for" military necessity, as well as the normative consequences to which the answer to this question gives rise.

3.1 International Humanitarian Law "Accounting for" Military Necessity

This thesis finds that to agree or disagree that a specific act is militarily necessary is, first and foremost, to assess how fit the act is as a means towards what the belligerent seeks to accomplish. International humanitarian law "accounts for" military necessity when the law's framers decide what to do about a given kind of belligerent act, in view of its capacity or tendency to constitute a material necessity or non-necessity. The belligerent always has the option to behave in a manner that jointly satisfies both military necessity and humanitarian considerations by acting as directed by humanity. This means that the framers are to decide whether to obligate such behaviour and, if so, whether to do so unqualifiedly, principally, indeterminately or exceptionally.

3.1.1 Material Military Necessity as Fitness of Means and Vocational Competence

Material military necessity evaluates the cogency between the means taken or considered *vis-à-vis* the ends sought under the circumstances prevailing or anticipated at the time. It is also a relational concept. The military necessity of a particular course of action is in part a function of the availability of alternative courses of action, military ends and sets of circumstances. A given act can be a military necessity compared to some alternatives, yet a non-necessity compared to some other alternatives. With a sufficient amount of information, the material military necessity of this or that act can be reasonably assessed. It does not follow, however, that all similarly competent assessors in possession of the same information necessarily arrive at the same conclusion. Nor can the military necessity assessment of particular action be meaningfully generalised or seen outside of its factual context.

Material military necessity distinguishes between fighting militarily well *qua* soldier, on the one hand, and behaving ethically well *qua* person, on the other. While the question of fighting well may acquire an ethical dimension, this possibility does not negate the idea that the two notions are conceptually separable. Furthermore, whether only a soldier's ethically competent behaviour should count as his or her truly militarily competent behaviour depends on why we are asking the question. At this stage, we are concerned with that narrow part of fighting's vocational competence which does not involve ethics.

3.1.2 Military Necessity as Normative Indifference

The framers of IHL rules have no reason to obligate acts deemed militarily necessary, or to prohibit those deemed militarily unnecessary.

A military purpose's illegitimacy clearly "taints" the legitimacy of any measure taken therefor; the measure is illegitimate, whether it is materially necessary or not. Where the purpose sought is

legitimate, however, the measure taken is not necessarily legitimate. The latter's legitimacy must be assessed by reference to its evil or non-evil, as well as its military necessity or non-necessity. Accordingly, should an act be considered evil and devoid of military necessity, it would likely be deemed illegitimate and appropriate for restriction or prohibition. Whether an act seen as evil yet militarily necessary becomes legitimate or illegitimate will depend on how IHL framers weigh (i) the general value harmed by the act's evil *vis-à-vis* (ii) its legitimate purpose. In other words, where the act in question is evil, its legitimacy depends, at least in part, on its military necessity status.

The situation is quite different for an act that entails no evil. Whether the act is militarily necessary or unnecessary is immaterial to its legitimacy. It would be perfectly legitimate to perform, or to refrain from performing, an act that entails no evil and accords with military necessity. The same would be true of an act that is neither evil nor militarily unnecessary.

Military necessity's normative indifference refutes that theory of IHL norm-creation – let us call it the "inevitable conflict" thesis – according to which military necessity and humanity are fundamentally irreconcilable with each other. First, the theory erroneously asserts that what is militarily necessary is always inhumane and what is humane is always militarily unnecessary. Second, the inevitable conflict thesis mistakenly holds that both considerations of military necessity and those of humanity generate imperatives. On this view, military necessity demands that one perform military necessities and refrain from non-necessities; similarly, humanitarian considerations demand humane acts and condemn inhumane acts. Third, the inevitable conflict thesis incorrectly suggests that every positive IHL rule embodies a "dialectic" compromise between the "diametrically" opposed imperatives of military necessity and humanity.

In fact, military necessity's normative indifference means that it is never truly in conflict with humanity. This position may be styled the "joint satisfaction" thesis, in contradistinction to the inevitable conflict thesis. To begin with, belligerent conduct is often both humane and consistent with military necessity, or both inhumane and contrary to military necessity. Moreover, military necessity never generates imperatives. While humanity does frequently demand humane action and condemn inhumane action, it sometimes merely praises the former and tolerates the latter.

Besides, there are numerous situations where humanity demands militarily necessary conduct, and where humanity condemns militarily unnecessary conduct. IHL framers "account for" these situations when they posit unqualified obligations to act in a manner that jointly satisfies military necessity and humanity. This remains true, despite the fact that *third* considerations, especially sovereign interests, limit the number of positive IHL rules that contain such obligations.

Furthermore, joint satisfaction is possible even when humanity condemns what military necessity simply permits, or when humanity demands what military necessity merely tolerates. Where this occurs, what the belligerent experiences is a norm contradiction (e.g., "You may decline to do *X*" v. "You must do *X*"), rather than a norm conflict (e.g., "You must not do *Y*" v. "You must do *Y*"). The belligerent therefore satisfies both military necessity and humanity by acting as directed by humanity. A wide variety of positive IHL rules indicate instances where their framers made the pursuit of such joint satisfaction:

- *Unqualifiedly* obligatory, thereby eliminating all of the belligerent's indifferent liberties arising from military necessity to act otherwise;
- *Principally* obligatory, thereby limiting contrary liberties to situations where they in fact prove militarily necessary;
- *Indeterminately* obligatory, thereby authorising non-pursuit to the extent indifferently permitted by military necessity and obligating pursuit to the extent demanded by humanity, yet without determining the point at which the former gives way to the latter;
- *Exceptionally* obligatory, while conferring a broad discretion upon the belligerent to act otherwise; or
- *Entirely* discretionary, whereby declining or failing to obligate the pursuit of joint satisfaction at all.

3.2 Normative Consequences

This thesis notes three major normative consequences that arise from international humanitarian law "accounting for" military necessity.

First, having "accounted for" military necessity, international humanitarian law precludes all pleas that are derived from it except where their admissibility is envisaged expressly and in advance. Second, as an exception attached to specific IHL rules, military necessity authorises deviant behaviour from the rules' principal prescriptions to the extent that it is required for the attainment of a primarily military purpose, provided that both the behaviour and purpose otherwise remain in conformity with the law. Third, where violations of these qualified rules constitute war crimes and/or crimes against humanity, the absence of military necessity is an element that must be proved by the prosecution.

3.2.1 Exclusionary and Non-Exclusionary Effects

Where military necessity and humanity are at stake, "accounting for" them can mean two things. It can mean that IHL framers posit rules obligating the pursuit of jointly satisfactory behaviour unqualifiedly, principally, indeterminately or exceptionally. Alternatively, it can mean IHL framers declining or failing to posit such rules. *De novo* military necessity pleas are inadmissible *vis-à-vis* unqualified IHL obligations, because these obligations have *ipso facto* accounted for, and extinguished, all divergent indifferent considerations.

Accordingly, despite *Kriegsräson*'s insistence to the contrary, the military necessity of a belligerent act does not "right" or "repair" its unlawfulness otherwise established by unqualified IHL rules. The material military necessity of a given act may furnish IHL framers with weighty reasons to consider authorising it. Such reasons have all been set aside, however, where positive international humanitarian law unqualifiedly prohibits it. This also indicates that military necessity does not survive IHL norm-creation where the process posits unqualified rules. *De novo* military necessity pleas are therefore inadmissible *vis-à-vis* them.

Nor, for that matter, does the military non-necessity of a belligerent act "wrong" or "vitiate" its compliance with applicable rules of positive international humanitarian law. A large number of IHL authorities maintain that it does. What may be termed "counter-*Kriegsräson*" presents us with two problems. On the one hand, it requires military non-necessity to possess a normative property that is non-indifferently restrictive or prohibitive. However, nowhere does the theory in fact locate the origin of such a property. Counter-*Kriegsräson* misattributes this property to military necessity, although certain non-indifferent aspects of humanity and/or some other IHL precept such as chivalry would more likely be its sources. On the other hand, counter-*Kriegsräson* relies on the very construal of IHL norm-creation with which it faults *Kriegsräson*. It fails to explain why those aspects of normative military necessity that would validate *Kriegsräson* should be considered "accounted for" and extinguished but those that would validate counter-*Kriegsräson* should not.

Whether the humanity of a belligerent act "rights" or "repairs" its illegality established by unqualified IHL rules depends, in part, on whether the underlying considerations are normatively indifferent. If they are, then the act's humanity does not "right" or "repair" its illegality. Holding otherwise would amount to advocating what might be styled "*Humanitätsräson*",[8] a doctrinal position as untenable as *Kriegsräson*. If the underlying considerations are not indifferent, however, we have reason to wonder whether we should seriously consider the possibility of the act's illegality being "righted" or "repaired". The latter possibility is what this thesis proposes to call "*Humanitätsgebot*",[9] and it is

[8] "Humanitätsräson geht vor Kriegsmanier" ("Humanitarian necessities override rules of war"), in other words. This author is grateful to Mareille Kaufmann for her help with the German language.

[9] Similarly, "Humänitätsgebot geht vor Kriegsmanier" ("Humanitarian imperatives override rules of war"). Special thanks go to Stephanie Schmölzer.

on this possibility that the joint satisfaction thesis departs most radically from the inevitable conflict thesis.

Whether the inhumanity of a belligerent act "wrongs" or "vitiates" its compliance with positive international humanitarian law also depends partly on whether the underlying considerations are normatively indifferent. If indifferent, then the act's inhumanity does not "wrong" or "vitiate" its lawfulness; to hold otherwise would be tantamount to acknowledging the existence of a "counter-*Humanitätsräson*". If the underlying considerations are not indifferent, perhaps the possibility of counter-*Humanitätsgebot* should not be too easily dismissed.

Where the underlying considerations of chivalry are normatively indifferent, an act's chivalrousness does not "right" or "repair" its unlawfulness; we should reject any doctrinal suggestion that might be called "*Ritterlichkeitsräson*".[10] Nor, for the same reason, does the unchivalrous character of an act "wrong" or "vitiate" its lawfulness. No "counter-*Ritterlichkeitsräson*" exists, in other words. Where the underlying considerations of chivalry are not indifferent, however, there may be room for a "*Ritterlichkeitsgebot*"[11] and a "counter-*Ritterlichkeitsgebot*".

3.2.2 Juridical Military Necessity as an Exception

International humanitarian law admits military necessity pleas only where its rules envisage their admissibility expressly and in advance through exceptional clauses. These clauses also reveal instances where IHL framers have specifically elected to let military necessity considerations survive the process through which the rules were posited.

As an exception, juridical military necessity modifies the content of the principal rule to which it is attached. Where a positive IHL rule stipulates that the belligerent may not do *Z* unless it is required by military necessity, those specific cases of *Z* that fulfil the requirements of juridical military necessity are exempted from the rule's principal prohibition and become lawful. Conversely, if not, or no longer in fulfilment, these cases revert to being governed by the prohibition of which they now constitute non-exempted instances and become unlawful.

Understood thus, juridical military necessity *qua* exception is distinct from the state of necessity *qua* circumstance precluding the wrongfulness of an act under the international law of state responsibility. The former forms part of a primary rule that determines the content of a substantive obligation; conduct in fulfilment of juridical military necessity's requirements comports with the primary rule and does not constitute an internationally wrongful act *in the first place*. In contrast, the latter concerns conduct that is *prima facie* internationally wrongful yet whose wrongfulness is remedially precluded because it satisfies the circumstance's own set of conditions.

Interpreting military necessity clauses yields the following results. These clauses authorise conduct in deviation from the principal prescriptions of those IHL rules to which they are attached, insofar as that conduct is required for the attainment of a military purpose and otherwise in conformity with the law. There are four requirements that the act must cumulatively satisfy. First, it must be taken primarily for some specific military purpose. Second, the act must be "required" for the purpose's attainment. In order to be considered "required", the act must (a) be materially relevant to the purpose; (b) constitute the least evil among those options that are materially relevant and reasonably available; and (c) remain within an acceptable injury-benefit ratio. Third, the purpose sought must be in conformity with international humanitarian law. Fourth, the act itself must otherwise be in conformity with that law.

These requirements also show that military necessity in its juridical context is narrower in scope than military necessity in its material context. Conduct that is materially necessary yet not in fulfilment of the four requirements may be branded mere military advantage or convenience ineligible for military necessity exception.

[10] Similarly, "Ritterlichkeitsräson geht vor Kriegsmanier" ("Chivalrous necessities override rules of war").
[11] Similarly, "Ritterlichkeitsgebot geht vor Kriegsmanier" ("Chivalrous imperatives override rules of war").

3.2.3 Military Non-Necessity as an Element of War Crimes and Crimes Against Humanity

Where a substantive rule envisages an exception and the rule's violation constitutes a punishable offence, the absence of circumstances satisfying the exception's requirements is itself an element of that offence. Several property- and displacement-related war crimes and crimes against humanity are derived from substantive IHL rules to which military necessity clauses are attached. It follows that each of these crimes contains an element according to which the act must have been committed without military necessity. Since the absence of military necessity is an element to be proven, its onus rests with the prosecution.

There is a voluminous amount of military necessity material in the ICTY jurisprudence. Numerous judgments consider allegations of militarily unnecessary property destruction and, on the whole, they do so quite competently. A key distinction that has emerged is one between property destroyed during combat and property destruction committed outside of combat. Some rulings unhelpfully conflate the act of destroying property with that of attacking property, and the notion of military necessity with that of military objective. It appears, however, that the judges by and large identified appropriate factors for consideration – such as the property's status as a civilian object, and the possibility that a civilian object may be destroyed without being attacked – and came to reasonable conclusions as to whether a given instance of property destruction had been militarily necessary or unnecessary. Outside the context of combat, many decisions correctly regarded ethnically driven property destruction as lacking in military necessity and therefore unlawful. The tribunal's treatment of exceptional military necessity with respect to forcible displacements is considerably less elaborate.

The ICC, in contrast, is still at a relatively early stage of its jurisprudential development. Its rulings on military necessity as an element of crimes remain too superficial and perfunctory to merit a detailed commentary.

Juridical military necessity has no role to play where the underlying IHL rules are unqualified and their violations constitute war crimes or both war crimes and crimes against humanity. The prosecution need not prove that the act in question was militarily unnecessary. Nor would the defence help itself by pleading military necessity *vis-à-vis* such charges. Here, Article 31(1)(c) of the Rome Statute that excludes individual criminal responsibility on account of acts performed in defence of property "essential for accomplishing a military mission" is somewhat of a concern. On the one hand, the provision is so narrow that it is unlikely to broaden the scope of the military necessity exception that already appears as a negative element of some Rome Statute offences. On the other hand, Article 31(1)(c) introduces a hitherto unknown defence that might be seen as inviting *de novo* military necessity pleas as a justification or excuse *vis-à-vis* the other Rome Statute offences.

3.3 Summary

This thesis' principal findings may be summarised in the following schematic table:

Context	Principal assessors	What military necessity means	Act assessed	Nature of assessment	Typical question asked	Criteria
Material	Those concerned with effective fighting, e.g.: • Commanders • Planners • Historians	Military necessity: • Degrees of conduciveness to military purpose's achievement Military non-necessity: • Relative absence of such conduciveness	Specific acts	Evaluative	"Does [did, would, etc.] this or that act help the belligerent achieve military success and avoid failure?"	• Purpose • Act • Circumstances
Normative • IHL "accounting for" military necessity occurs here	Those concerned with articulating legal standard of belligerent behaviour, e.g.: • State representatives • Military manual writers • Legal scholars	Military necessity: • Indifferently permissive reason to leave belligerent at liberty to do what is materially necessary and avoid what is unnecessary Military non-necessity: • Indifferently permissive reason to leave belligerent at liberty to forgo what is materially necessary and encumber itself with what is unnecessary	Kind of acts	Stipulative	"Should IHL obligate, permit, restrict or prohibit this or that kind of acts depending on whether they are deemed militarily necessary or unnecessary?"	N/A
Juridical • Normative consequences appear here	Those concerned with IHL compliance, e.g.: • IHL duty-holders • Critics and observers • Prosecutors • Defence counsel • Judges	Military necessity: • Exceptional ground for deviation from principal IHL rules where admissibility is envisaged expressly and in advance • No such ground elsewhere Military non-necessity: • No independent ground for act's unlawfulness if it is otherwise in compliance with positive IHL • Element of several war crimes and crimes against humanity	Specific acts	Interpretive	"Did this or that act fulfil requirements of exceptional military necessity clauses envisaged under IHL?"	• Primarily military purpose • "Required" for purpose's achievement o Pertinence o Least evil o Proportionality • Purpose's conformity with IHL • Act's conformity with IHL

3.4 Implications Beyond the Immediate Scope of This Thesis

This is an IHL thesis. Needless to say, however, international humanitarian law is not an isolated discipline. It neighbours various fields of public international law, including, in particular, *jus ad bellum*, international human rights law (IHRL), and international criminal law.

Scholars have scrutinised the relationship between international humanitarian law, on the one hand, and each of these other fields, on the other, in detail. Military necessity itself also engages elements of *jus ad bellum*, international human rights law and international criminal law.

3.4.1 *Vis-à-vis Jus Ad Bellum*

Whether *jus ad bellum* and *jus in bello* exist separately is a question that has animated numerous commentators.[12] At one end stand those in favour of maintaining the two disciplines' traditional separation[13]; those at the other end question its veracity or wisdom.[14] There are also disagreements as to whether, once armed force has been resorted to, *jus ad bellum* continues to apply alongside *jus in bello*.[15]

Jus ad bellum appears three times in this thesis. First, *jus ad bellum*'s contentious interplay with *jus in bello* forms part of the general framework within which we examine military necessity's normativity. Thus, Chapter 4 considers how the legitimacy of a purpose sought may or may not legitimise an act taken for its accomplishment. It will be argued that espousing thoroughgoing utilitarianism would ultimately amount to abandoning the *jus ad bellum-jus in bello* distinction. This would be the

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[12] See, e.g., J.H.H. Weiler and Abby Deshman, "Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction Between *Jus Ad Bellum* and *Jus In Bello*", 24 *European Journal of International Law* 25 (2013); Marko Milanović, "A Non-Response to Weiler and Deshman", 24 *European Journal of International Law* 63 (2013); Terry D. Gill, "Some Considerations Concerning the Role of the *Ius ad Bellum* in Targeting", in Paul A.L. Ducheine, Michael N. Schmitt and Frans P.B. Osinga (eds.), *Targeting: The Challenges of Modern Warfare* (2016) 101.

[13] See, e.g., Jasmine Moussa, "Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law", 90 *International Review of the Red Cross* 963 (2008); Jasmine Moussa, "Nuclear Weapons and the Separation of *Jus Ad Bellum* and *Jus In Bello*", in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds.), *Nuclear Weapons Under International Law* (2014) 59; Robert Kolb and Richard Hyle, *An Introduction to the International Law of Armed Conflict* (2008), at 21-27; Adam Roberts, "The Equal Application of the Laws of war: A Principle Under Pressure", 90 *International Review of the Red Cross* 931 (2008); Adam Roberts, "The Principle of Equal Application of the Laws of War", in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 226; Robert D. Sloane, "The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War", 34 *Yale Journal of International Law* 74 (2009); Laurie Blank, "A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities", 43 *Case Western Reserve Journal of International Law* 707 (2010-2011).

[14] See, e.g., Jeff McMahan, *Killing in War* (2009); Anthony Coates, "Is the Independent Application of *Jus in Bello* the Way to Limit War?", in Rodin and Shue (eds.), *supra* note 13, 176; Christopher Kutz, "Fearful Symmetry", in *ibid.*, 69; Jeff McMahan, "The Morality of War and the Law of War", in *ibid.*, 44; Rotem M. Giladi, "Reflections on Proportionality, Military Necessity and the Clausewitzian War", 45 *Israel Law Review* 323 (2012).

[15] See generally Nobuo Hayashi, "Using Force by Means of Nuclear Weapons and Requirements of Necessity and Proportionality *Ad Bellum*", in Nystuen, Casey-Maslen and Golden Bersagel (eds.), *supra* note 12, 15. Some argue that *jus ad bellum* and *jus in bello* do not share an overlapping scope of application *ratione temporis*. See, e.g., Norman G. Printer, Jr., "The Use of Force against Non-State Actors under International Law: An Analysis of the US Predator Strike in Yemen", 8 *UCLA Journal of International Law and Foreign Affairs* 331 (2003), at 343; David Rodin, *War and Self-Defence* (2003), at 112; Yaël Ronen, "Israel, Hizbollah, and the Second Lebanon War", 9 *Yearbook of International Humanitarian Law* 362 (2006), at 362; Yoram Dinstein, *War, Aggression and Self-Defence* 5th ed. (2011), at 262. Others insist that *jus ad bellum* applies not only as a matter of armed force's incidence, but also as a matter of its continuity. See, e.g., Judith Gail Gardam, "Proportionality and Force in International Law", 87 *American Journal of International Law* 391 (1993), at 404; Judith Gardam, "Necessity and Proportionality in *Jus Ad Bellum* and *Jus In Bello*", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 275, at 277 n.9, 280-281; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 167-168; Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (2005), at 143, 146-147; Gill, *supra* note 12.

case, insofar as that version of utilitarianism would render *any* belligerent conduct that is materially necessary for victory in a just war *ipso facto* legitimate and, conversely, *any* belligerent conduct that is materially unnecessary therefor *ipso facto* illegitimate.

Second, Chapter 8 recasts *jus ad bellum* (a) as an impermissible extension of *Kriegsräson* and (b) as a potential source of norm conflict. That self-preservation *qua Kriegsräson*'s more radical variety does not entitle belligerents to act in breach of unqualified IHL rules is uncontroversial. In its 1996 *Nuclear Weapons* Advisory Opinion, the International Court of Justice (ICJ) conceded its inability definitively to determine whether the threat or use of nuclear weapons would be lawful or unlawful in extreme circumstances.[16] If it were lawful, say, according to *jus ad bellum*, then these weapons' lawful threat or use might be frustrated by certain unqualified IHL prohibitions, such as those against launching an indiscriminate attack on cities. This thesis leaves room for the possibility that the process of IHL norm-creation does not resolve genuine norm conflicts between unqualified rules it posits, on the one hand, and independently valid rules that belong to another, un-integrated field of public international law, on the other.

Finally, Chapter 9 identifies proportionality as an element of one of juridical military necessity's four requirements. We will briefly contrast how that proportionality is assessed, with the proportionality principle typically associated with the use of force in self-defence under *jus ad bellum*.

3.4.2 *Vis-à-vis* International Human Rights Law

The relationship between international humanitarian law and international human rights law has long been the subject of extensive commentary and debate.[17] The ICJ's *Nuclear Weapons* Advisory Opinion – in which the court famously stated that what constitutes an arbitrary deprivation of one's life, a fundamental human right, "falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict"[18] – ushered in a new era of heightened interest in the two disciplines' interplay. Rival accounts have since been given of the proper levels at which international humanitarian law and international human rights law would interact with each other,[19] as well as the precise manners in which IHL and IHRL rules in conflict should be resolved.[20] Critics note that meta

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[16] See *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *I.C.J. Reports 1996*, p. 226, paras. 96-97, 105(2)(E).

[17] See, e.g., General Assembly Resolution 2444 (XXIII), 19 December 1968; General Assembly Resolution 2597 (XXIV), 16 December 1969; General Assembly Resolution 2675 (XXV), 9 December 1970; Francoise Hampson, "Human Rights and Humanitarian Law in Internal Conflicts", in Michael A. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (1989) 55; Centre for Human Rights, *Bulletin of Human Rights 91/1 I. Human Rights and Humanitarian Law II. Human Rights and Refugee Law* (1992).

[18] *Nuclear Weapons* Advisory Opinion, para. 25.

[19] Those authorities for whom priorities are set between the two disciplines arguably include *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004*, p. 136, para. 106; Michael J. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Operations", 99 *American Journal of International Law* 119 (2005); Françoise J. Hampson, "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body", 90 *International Review of the Red Cross* 549 (2008); Oona A. Hathaway et al., "Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law", 96 *Minnesota Law Review* 1883 (2011-2012). Those for whom priorities are set between specific IHL and IHRL rules, rather than between the two disciplines, include Vaios Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?", 94 *International Review of the Red Cross* 165 (2009); Marco Sassòli, "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflict", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 34; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* (2002), para. 141; International Committee of the Red Cross, *31st Conference of the Red Cross and Red Crescent: International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2011), at 17.

[20] See, e.g., Seyed-Ali Sadat-Akavi, *Methods of Resolving Conflicts Between Treaties* (2003), at 213-232; Anne-Laurence Graf-Brugère, "A *Lex Favorabilis*? Resolving Norm Conflicts Between Human Rights Law and Humanitarian Law", in Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (2013) 251.

rules such as *lex specialis* are neither uniformly understood[21] nor really helpful when resolving norm conflicts.[22] Detention, the conduct of hostilities, and belligerent occupation are among those areas where today's complex IHL-IHRL interaction is most acutely felt.

At first sight, it might appear as though military necessity would have little directly to do with human rights. Nevertheless, this thesis highlights two specific ways in which human rights – or notions that are arguably analogous, at any rate – enter our military necessity discussion. In one, we will juxtapose a given act's military necessity or non-necessity *vis-à-vis* the evil or non-evil it entails. Recall here that the preamble of 1907 Hague Convention IV expresses the drafters' "desire to diminish the evils of war, as far as military requirements permit".[23] War-related evils may include, *inter alia*, death, injury and attack on the bodily, mental, or moral integrity of persons; property destruction and damage, adverse change of ownership or control; and detrimental change in social institutions or procedures.

The legitimacy of a necessary evil depends on the relative weight of its necessity and the harm it is likely to occasion. Unnecessary evil is evil *simpliciter* and invariably illegitimate. The legitimacy of a belligerent act that is non-evil is less obvious. Chapter 4 reflects critically on the popular notion that the lack of material necessity is sufficient to de-legitimise an even evil-less act. For the purposes of IHL norm-creation, disutilities are not *per se* illegitimate in war. What this thesis' Chapter 8 calls "counter-*Kriegsräson*" is problematic for the same reason. Counter-*Kriegsräson* errs where it assumes that positive IHL rules are but necessity-based derogations from their more restrictive IHRL counterparts applicable in peace time. If this assumption were correct, an act's mere lack of necessity would indeed lead to its removal from the ambit of international humanitarian law and render it unlawful according to international human rights law.

The second way through which international human rights law comes into play is through our treatment of humanitarian considerations in IHL norm-creation. Chapter 8 of this thesis rejects *Humanitätsräson*, a position whereby an act's indifferent humanitarian permission "rights" or "repairs" its unlawfulness otherwise established by unqualified IHL rules. Nor is counter-*Humanitätsräson* tenable, insofar as it brands as unlawful a mere failure to do what humanity indifferently permits even if that failure otherwise remains lawful according to positive IHL rules.

Rights and obligations that are already valid under international human rights law raise different matters. They come close to what this thesis calls *Humanitätsgebot* and counter-*Humanitätsgebot*, respectively. The process of norm-creation that has posited unqualified IHL rules may not have fully accounted for humanity's contrary demands or condemnations. Accordingly, it cannot be excluded that acting consistently with the latter considerations may "right" or "repair" its deviation from the former. For instance, Article 118 of Geneva Convention III appears to bind a detaining power in an unqualified obligation to repatriate its prisoners of war (POWs). Nevertheless, it might not be a breach

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[21] See, e.g., Christopher J. Borgen, "Resolving Treaty Conflicts", 37 *The George Washington International Law Review* 573 (2005); William A. Schabas, "*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus Ad Bellum*", 40 *Israel Law Review* 592 (2007); Noam Lubell, "Parallel Application of International Humanitarian La and International Human Rights Law: An Examination of the Debate", 40 *Israel Law Review* (2007) 648; Marco Sassòli and Laura M. Olsen, "The Relationship Between International Humanitarian Law and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts", 90 *International Review of the Red Cross* 599 (2008); Orna Ben-Naftali, "Introduction: International Humanitarian Law and International Human Rights Law – *Pas de Deux*", in Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, *supra* note 19, 3; Yuval Shany, "Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror", in *ibid.*, 13.

[22] See, e.g., Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal Order: The Doctrine of *Lex Specialis*", 74 *Nordic Journal of International Law* 27 (2005); Marko Milanović, "A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights Law", 14 *Journal of Conflict & Security Law* 459 (2010); Nancie Prud'homme, "*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?", 40 *Israel Law Review* 356 (2007); Kenneth Watkin, "Use of Force During Occupation: Law Enforcement and Conduct of Hostilities", 94 *International Review of the Red Cross* 267 (2012); Nobuo Hayashi, "Do the Good Intentions of European Human Rights Law Really Pave the Road to IHL Hell for Civilian Detainees in Occupied Territory?", 20 *Journal of Conflict & Security Law* 133 (2015).

[23] Preamble, Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907.

of international humanitarian law, all things considered, should a detaining power decline to repatriate some of its POWs on account of their safety concerns. Here, the advent of international human rights – together with international refugee law, including, in particular, its *non-refoulement* principle – has strengthened the case for humanity demanding non-repatriation in appropriate circumstances. Another example involves the IHRL prohibition against the use of excessive force. If counter-*Humanitätsgebot* were true, then failing to "capture rather than kill" one's adversary where both forms of disablement are reasonably available might be unlawful under international humanitarian law, despite the arguable absence of an affirmative IHL obligation to do so.

3.4.3 *Vis-à-vis* International Criminal Law

Some commentators complain that international criminal courts and tribunals have unduly recalibrated the delicate balance between military necessity and humanity in the latter's favour and that, in so doing, these courts and tribunals have supplanted state prerogatives in IHL development.[24] For many others, the IHL-ICL interplay is more complex than international humanitarian law setting forth substantive standards of belligerent behaviour and international criminal law enforcing them.[25] This author has also noted that ICL judges must interpret IHL with care, lest they alienate otherwise reasonable and law-abiding combatants or, conversely, undermine the confidence of those who depend critically on the law's protection.[26] This, as has been pointed out in the literature, is easier said than done.[27]

Military necessity is one point where the two bodies of international law meet. Chapters 9 and 10 of this thesis show their encounter to be a generally coherent one. To begin with, in positive international humanitarian law, military necessity appears exclusively as an exceptional clause attached to certain principal rules. Military necessity also appears, explicitly or implicitly, as a negative element of war crimes and crimes against humanity that are derived from these rules. Moreover, when interpreting this element, the ICTY has often found military non-necessity where the facts on the ground indeed fail to fulfil the notion's IHL requirements.

Military necessity's main ICL challenges are two-fold. First, ICL adjudicators may sew confusion into the notion by conflating it with similar-sounding yet distinct IHL concepts (e.g., military

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[24] See, e.g., Schmitt, *supra* note 4, at 816-822; Shane R. Reeves and Jeffrey S. Thurnher, "Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance", *Harvard National Security Journal Features* 1 (2014). But see Nobuo Hayashi, "Is the Yugoslav Tribunal Guilty of Hyper-Humanising International Humanitarian Law?", in Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (forthcoming 2016); Nobuo Hayashi, "Performance of International Criminal Courts and Tribunals", in Theresa Squatrito, Oran R. Young, Andreas Føllesdal and Geir Ulfstein (eds.), *The Performance of International Courts and Tribunals* (forthcoming 2017).

[25] See, e.g., Yves Sandoz, "The Dynamic But Complex Relationship Between International Penal Law and Humanitarian Law", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the ICC: Essays in Honour of Professor Igor Pavlovich Blishchenko* (2009) 1049; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (2012), at 77-83; Carsten Stahn, "Between Constructive Engagement, Collusion and Critical Distance: The ICRC and the Development of International Criminal Law", 15 *Chinese Journal of International Law* 139 (2016), at 164-165.

[26] See Nobuo Hayashi, "The Role of Judges in Identifying the Status of Combatants", 2 *Acta Societatis Martensis* 69 (2006).

[27] See, e.g., Shane Darcy, "Bridging the Gap in the Law of Armed Conflict? International Criminal Tribunals and the Development of Humanitarian Law", in Noëlle Quénivet and Shilan Shah-Davis (eds.), *International Law and Armed Conflict: Challenges in the 21st Century* (2010), 319; Laurie R. Blank, "Operational Law Experts Roundtable on the *Gotovina* Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law", *Public Law & Legal Theory Research Paper Series Research Paper No. 12-186* (2012); Walter B. Huffman, "Margin of Error: Potential Pitfalls of the Ruling in *The Prosecutor v. Ante Gotovina*", 211 *Military Law Review* 1 (2012); Rogier Bartels, "Discrepancies Between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law During International Crimes Trials", in Mariëlle Matthee, Brigit Teobes and Marcel Brus (eds.), *Armed Conflict and International Law: In Search of the Human Face:* Liber Amicorum *in Memory of Avril McDonald* (2013) 341; Gary D. Solis, "The *Gotovina* Acquittal: A Sound Appellate Course Correction", 215 *Military Law Review* 78 (2013).

objectives), or by failing to consider pertinent facts (e.g., destroying objects without attacking them). Second, the troublesome prospect that *de novo* military necessity pleas as a justification or excuse for breaches of unqualified IHL rules may return via Article 31 of the Rome Statute remains a source of concern.

4. Methodology

This thesis may be thought of as a "*grundnorm*" study of international humanitarian law. It is not so in the strictly Kelsenian sense of the term,[28] of course, but in a more colloquial sense that military necessity and humanity are often seen as the two pillars upon which the entire IHL regime rests.

This is a "basic norm" thesis, insofar as it focuses primarily on elucidating the meanings and normative functions of military necessity in international humanitarian law. Consequently, this thesis prioritises depth over breadth in the selection of its discussions. That it does so is also apparent from the fact that its nine substantive chapters are, in essence, a chain of practical, logical, normative and juridical reasoning. Of paramount interest to this thesis is the careful and comprehensive treatment of major conceptual arguments and supporting authorities that underlie representative instances.

Thoroughness is therefore not sought in the mere coverage of all moments in military history where military necessity was debated; all processes of IHL norm-creation in which military necessity has played a role; all positive IHL rules that envisage military necessity exceptions; or all points at which military necessity comes into contact with other concepts of international humanitarian law and related disciplines.

4.1 Theoretical Underpinnings

Through his 1958 article "Positivism and the Separation of Law and Morals",[29] followed by his seminal *The Concept of Law*[30] three years later, H.L.A. Hart developed his theory on soft positivism (also known as inclusive positivism) and defended its tenets against formalism, rule-scepticism and natural law.[31] He did so chiefly by identifying three main flaws in the command theory of legal positivism that John Austin had championed,[32] and then proposing three corresponding remedies therefor.[33]

This thesis draws inspirations from Hartian jurisprudence in more ways than one. First, it follows Hart's argumentative techniques. Put simply, Austin's classic positivism is to Hart's inclusive positivism what the inevitable conflict thesis is to the joint satisfaction thesis. As noted earlier, the idea that military necessity and humanity inevitably conflict with each other entails six major assertions, namely:

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[28] That is, as a "transcendental-logical presupposition" that objectively validates a positive legal order. See Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans., 1949), at 115-117, 395-396. See also Hans Kelsen, *Pure Theory of Law* (Max Knight trans., 1967), at 201-205; Joseph Raz, "Kelsen's Theory of the Basic Norm", in Stanley L. Paulson and Bonnie Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998) 47; Tony Honoré, "The Basic Norm of a Society", in *ibid.*, 89.

[29] See H.L.A. Hart, "Positivism and the Separation of Law and Morals", 71 *Harvard Law Review* 593 (1958).

[30] See H.L.A. Hart, *The Concept of Law* (1961).

[31] As well as Ronald M. Dworkin's interpretive theory of law, if one counts Hart's "Postscript" at the end of *The Concept of Law*'s second edition.

[32] These flaws are, respectively, the uncertainty of substantive legal rules, their static character, and the inefficiency of the social pressure through which they are maintained. See H.L.A. Hart, *The Concept of Law* 2d ed. (1997), at 91-94.

[33] These remedies consist of three types of secondary rules, i.e., a "rule of recognition" (to rectify the primary rules' uncertainty), "rules of change" (to rectify the primary rules' static character), and "rules of adjudication" (to rectify the inefficient social pressure used to maintain the regime of primary rules). See *ibid*., at 94-98.

i. That what is militarily necessary is always inhumane, and what is humane is always militarily unnecessary;
ii. That both military necessity and humanitarian considerations generate imperatives;
iii. That compliance with military necessity imperatives precludes compliance with humanitarian imperatives;
iv. That "accounting for" military necessity and humanity is about pre-empting conflicting considerations of military necessity and humanity leading to the adoption of conflicting IHL rules;
v. That every positive IHL rule embodies a compromise between irreconcilable demands of military necessity and humanity; and
vi. That neither *de novo* military necessity pleas nor *de novo* humanity pleas are admissible *vis-à-vis* unqualified IHL rules.

This thesis exposes flaws in each of these assertions. It is also from their revisions that the joint satisfaction thesis, with military necessity's normative indifference as its centrepiece, emerges. Thus, it shows:

i. That some belligerent acts may be both militarily necessary and humane, or both militarily unnecessary and inhumane;
ii. That all military necessity considerations are normatively indifferent, as are some humanitarian considerations;
iii. That the belligerent always has the option to act in a manner that simultaneously satisfies both sets of considerations;
iv. That "accounting for" military necessity and humanity is about failing, declining or electing to obligate jointly satisfactory behaviour and, if electing to do so, about obligating such behaviour unqualifiedly, principally, indeterminately, or exceptionally;
v. That not every positive IHL embodies the military necessity-humanity interplay; and
vi. That unqualified IHL rules *ipso facto* exclude *de novo* military necessity pleas, but it is not clear whether they also exclude *de novo* pleas emanating from humanitarian imperatives.

Hart also deployed elements of inclusive positivism in his critique of other jurisprudential theories. Similarly, the joint satisfaction thesis helps explain why counter-*Kriegsräson* is conceptually indefensible. Military necessity's normative indifference means that, even if it survives the process of IHL norm-creation (which it does not), international humanitarian law still has no reason to restrict or prohibit a militarily unnecessary act *for that reason alone*. Where commentators advocate an IHL ban on a particular act ostensibly on account of the act's lack of military necessity, they often invoke what is, in substance, humanity's contrary demand.

Second, this author identifies himself broadly as a legal positivist of a conceptual[34] and descriptive[35] cast. Specifically, he embraces inclusive legal positivism ("[i]t is conceptually possible, but not necessary, that determinations of law can be a function of moral considerations"[36]) and agrees with its descriptive variant ("[a]s a matter of observable fact, there are systems of law in which determinations of law are a function of moral considerations"[37]).

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[34] See, e.g., W.J. Waluchow, "The Many Faces of Legal Positivism", 48 *University of Toronto Law Journal* 387 (1998), at 392-395.
[35] See *ibid*., at 395-396.
[36] *Ibid.*, at 394. See also *ibid.*, at 395 (emphasis in original): "According to Inclusive Positivism, our concept of law, as revealed (partly) in a conceptual analysis of our linguistic and legal practices, includes morality as a possible, though by no means necessary, basis for determinations of law. According to modern versions of Inclusive Positivism, it is the accepted rule of recognition that determines which, if any, moral considerations figure in determinations of law. So *whether* morality counts in determinations of law is not itself a matter of morality. Rather, it depends on which criteria of validity exist as a matter of accepted social practice within a legal system's rule of recognition. But there is nothing to prevent these criteria from being moral in nature".
[37] *Ibid.*, at 396. See also *ibid.* (footnote omitted; emphasis added): "Inclusive Positivism, in both its conceptual and descriptive forms, is supported by the existence of [legal systems in which determinations of law sometimes depend on moral factors]. It is perhaps worth noting that even if it were true that there were no such systems, this would not invalidate

This thesis consciously approaches international humanitarian law from this angle. It is not an integral part of the joint satisfaction thesis that a norm's inconsistency with humanitarian considerations prevents it from becoming a valid IHL rule. On the contrary, the thesis acknowledges instances where the law's framers leave the belligerent at liberty to do what humanity condemns and refrain from doing what humanity demands. The idea of joint satisfaction also entails the possibility of *Humaniätsgebot* and counter-*Humanitätsgebot*, however. These would effectively render an otherwise valid IHL rule inapplicable wherever compliance with it contravenes humanitarian imperatives. Moreover, although no more than a hypothesis at this point, a regime of international humanitarian law whose rule of recognition includes conformity with humanitarian imperatives is not inconceivable. The same may even be said of *Ritterlichkeitsgebot* and counter-*Ritterlichkeitsgebot*, and hence the possibility of an IHL rule of recognition requiring conformity with chivalrous imperatives.

Third, the joint satisfaction thesis seeks to describe how the actual process of IHL norm-creation, as well as its actual legal consequences, can be most accurately understood. In this sense, the theory's primary strength lies in its explanatory power. Nevertheless, the idea of joint satisfaction itself does not instruct IHL framers to promote any given normative outcome. In other words, joint satisfaction is not a substantive thesis about what belligerent behaviour international humanitarian law should obligate or prohibit. Rather, it is a theory that studies international humanitarian law from what Hart called an "external point of view".[38]

4.2 Material Used

This thesis draws much of its material from four pieces of research performed by its author over the past few years. They are:

a. "Basic Principles", a chapter in the *Routledge Handbook of the Law of Armed Conflict* published in 2016[39];
b. "Contextualizing Military Necessity", an *Emory International Law Review* article published in 2013[40];
c. "Military Necessity as Normative Indifference", a *Georgetown Journal of International Law* article published in 2013[41]; and
d. "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", a *Boston University International Law Journal* published in 2010.[42]

This thesis revises, updates, streamlines and consolidates these works into one monograph. It also contains additional sources, explanations and arguments as appropriate. Whenever possible, it offers real-life examples or, at a minimum, real-life examples with minor factual modifications, in order to illustrate its points. The manuscript indicates where this author has changed his positions and offers explanations therefor.

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or falsify the conceptual version of Inclusive Positivism. As Jules Coleman observes, this version is vindicated so long as we can conceive of at least one *possible* world in which such a system exists".

[38] Hart, *The Concept of Law* 2d ed., *supra* note 32, at 88-91, 242, 255-256, 291. Or, to be more precise, simply "from a point of view" – as Joseph Raz puts it. Legal statements are made "from a point of view" when, for example, a practicing lawyer advises his or her client, a legal scholar expresses his or her professional assessment, or a Catholic specialist in Rabbinical law offers his or her Jewish friend expert counsel. See Joseph Raz, *The Authority of Law* 2d ed. (2009), at 153-157. See also *ibid.*, *Practical Reason and Norms* (1999), at 170-177.

[39] See Nobuo Hayashi, "Basic Principles", in Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (2016) 89.

[40] See Nobuo Hayashi, "Contextualizing Military Necessity", 27 *Emory International Law Review* 189 (2013).

[41] See Nobuo Hayashi, "Military Necessity as Normative Indifference", 44 *Georgetown Journal of International Law* 675 (2013).

[42] See Nobuo Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 28 *Boston University International Law Journal* 39 (2010).

This is, first and foremost, a thesis of public international law, and international humanitarian law in particular. As such, it has primarily examined material specific to that discipline. This tendency is particularly evident in the range and volume of standard public international law sources considered in Part III. Examples include:

- Treaties, whether in force or strictly of historical interest;
- Derivative instruments, such as the Elements of Crimes document within the ICC framework;
- Treaty-like instruments, such as United Nations Security Council resolutions and the ICTY Statute;
- Preparatory works of these treaties and instruments, as well as relevant declarations, reservations and subsequent practices;
- Authoritative commentaries, especially those prepared by the International Committee of the Red Cross on the four 1949 Geneva Conventions and the two 1977 Additional Protocols;
- Instances of state practice, as reported publicly in the news media, acknowledged in national military manuals or discussed in academia;
- Expressions of *opinio juris*, including official statements and national military manuals;
- International as well as domestic judicial decisions; and
- Scholarly output,[43] of which some manuals, draft instruments and treatises are considered particularly authoritative.

This author has not limited himself to strictly international law sources, however. Thus, our discussion draws not only on international law but also on techniques and authorities widely accepted in military history, military strategy, normative reasoning including deontic logic and legal theory, and ethics.

As regards military history, this thesis refers to the works of several leading scholars. They include Martin Blumenson for his detailed and authoritative description of Monte Cassino,[44] the activities of General Lloyd Fredendall during the Kasserine Pass campaign,[45] and the tactics used by Allied combat engineers during the battle of Brest[46]; Antony Beevor regarding Allied and Axis attitudes towards self-inflicted evil during World War II[47]; and Robert L. O'Connell for his account of Agincourt.[48]

In addition, this thesis cites historians such as Stephen E. Ambrose,[49] John Antal,[50] Mary Kathryn Barbier,[51] Geoffrey Best,[52] Winston Churchill,[53] Hugh M. Cole,[54] Richard Collier,[55] Martin

[43] Predominantly in the English language, though this thesis also refers to some French and translated German materials from time to time.
[44] See Martin Blumenson, *The Mediterranean Theater of Operations: Salerno to Cassino* (1969).
[45] See *ibid.*, *Kasserine Pass: Rommel's Bloody, Climactic Battle for Tunisia* (1966).
[46] See *ibid*., *The European Theater of Operations: Breakout and Pursuit* (2005). See also Alfred M. Beck et al., *The Technical Services: The Corps of Engineers: The War Against Germany* (1985).
[47] See Antony Beevor, *Berlin: The Downfall 1945* (2002); *ibid.*, *D-Day: The Battle for Normandy* (2009); *ibid.*, *Stalingrad* (1998).
[48] See Robert L. O'Connell, *Of Arms and Men: A History of War, Weapons, and Aggression* (1989).
[49] See Stephen E. Ambrose, *D-Day, June 6, 1944: The Climatic Battle of World War II* (1994).
[50] See John Antal, *City Fights: Selected Histories of Urban Combat from World War II to Vietnam* (2003).
[51] See Mary Kathryn Barbier, *D-Day Deception: Operation Fortitude and the Normandy Invasion* (2007).
[52] See Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1980); *ibid.*, "Restraints on War by Land Before 1945", in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979) 17; *ibid.*, "The Restraint of War in Historical and Philosophical Perspective", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead* (1991) 3; *ibid.*, *War and Law Since 1945* (1994).
[53] See Winston S. Churchill, 5 *The Second World War: Closing the Ring* (1951); *ibid.*, 6 *The Second World War: Triumph and Tragedy* (1953).
[54] See Hugh M. Cole, *United States Army in Wold War II – The European Theater of Operations – The Ardennes: Battle of the Bulge* (1965).
[55] See Richard Collier, *The War in the Desert* (1977).

van Creveld,[56] Ernst F. Fisher, Jr.,[57] Richard Gallagher,[58] Timothy Hall,[59] Roger Hesketh,[60] William Bradford Huie,[61] John Keegan,[62] Charles B. MacDonald,[63] Martin Middlebrook,[64] and Paul G. Perpaoli, Jr.,[65] as well as Frank N. Schubert and Theresa L. Kraus.[66] We also benefit from Roberts Graves,[67] T.E. Lawrence,[68] Emilio Lussu,[69] Frank Richards,[70] and Raleigh Trevelyan,[71] for their first-hand narratives of military campaigns.

This thesis also broach military strategy, a discipline in which Carl von Clausewitz[72] continues to inspire ideas and discussions. Barry D. Watts explains that von Clausewitz's "friction" includes, among other things, danger's impact on the belligerent's ability to think and act; combat's demands for exertion; uncertain and imperfect information; armed forces' internal resistance to effective action; the play of chance and luck; physical and political limits to the use of military force; unpredictable interaction with the enemy; and disconnects between ends and means.[73] This thesis uses friction to explain why causation is not a requirement of material military necessity.

Von Clausewitz regarded committing needless brutalities, such as putting prisoners to death and devastating cities and countries, first and foremost as a sign of ineffective and unintelligent fighting.[74] This observation goes to support one element of the joint satisfaction thesis that some belligerent acts can be both inhumane and unnecessary. We also refer to Ulrike Kleemeier's treatment of moral dimensions in Clausewitzian thinking,[75] as well as the possibility that von Clausewitz may not have excluded ethical limitations on real-life warfare – a fact noted not only by Best[76] but also by Paul Cornish,[77] Michael Howard[78] and David J. Lonsdale.[79]

Our discussion of the joint satisfaction thesis' "necessary-humane" alignment invokes two strands of modern military strategy. One concerns ethical fighting in counterinsurgency. Advocated by writers such as David Galula[80] and John A. Nagl,[81] this notion has found support in the US Army, the US Marine Corps,[82] and Colombia's defence ministry.[83] The other is David A. Deptula's "effects-

[56] See Martin van Creveld, *The Changing Face of War: Lessons of Combat, from the Marne to Iraq* (2006); *ibid.*, *The Transformation of War* (1991).
[57] See Ernst F. Fisher, Jr., *The Mediterranean Theater of Operations: Cassino to the Alps* (1977).
[58] See Richard Gallagher, *Malmédy Massacre* (1964).
[59] See Timothy Hall, *The Fall of Singapore* (1983).
[60] See Roger Hesketh, *Fortitude: The D-Day Deception Campaign* (2000).
[61] See William Bradford Huie, *The Execution of Private Slovik* (1954).
[62] See John Keegan, *The Face of Battle* (1976).
[63] See Charles B. MacDonald, *The European Theater of Operations: The Siegfried Line Campaign* (1963).
[64] See Martin Middlebrook, *The First Day on the Somme: 1 July 1916* (1972).
[65] See Paul G. Pierpaoli, Jr., "Siboney, Cuba", in Spencer C. Tucker (ed.), *The Encyclopedia of the Spanish-American and Philippine-American Wars: A Political, Social, and Military History* 590 (2009).
[66] See Frank N. Schubert and Theresa L. Kraus (eds.), *the Whirlwind War* (1995).
[67] See Roberts Graves, *Good-Bye to All That* (1929).
[68] See T.E. Lawrence, *Seven Pillars of Wisdom* (1935).
[69] See Emilio Lussu, *Sardinian Brigade* (1939).
[70] See Frank Richards, *Old Soldiers Never Die* (1966).
[71] See Raleigh Trevelyan, *The Fortress: A Dairy of Anzio & After* (1956).
[72] See Carl von Clausewitz, *On War* (1832; Michael Howard and Peter Paret eds. and trans., 1989).
[73] See Barry D. Watts, *Clausewitzian Friction and Future War* (1996), at 30, 32.
[74] See von Clausewitz, *supra* note 72, at 85.
[75] See Ulrike Kleemeier, "Moral Forces in War", in Hew Strachan and Andreas Hererg-Roth (eds.), *Clausewitz in the Twenty-First Century* (2007) 107.
[76] See Best, "Historical and Philosophical Perspective", *supra* note 52, at 5.
[77] See Paul Cornish, "Clausewitz and the Ethics of Armed Force", 2 *Journal of Military Ethics* 213 (2003).
[78] See Michael Howard, "*Temperamenta Belli*: Can War Be Controlled?", in Howard (ed.), *supra* note 52, 1, at 1.
[79] See David J. Lonsdale, "A View from Realism", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 29, at 34.
[80] See David Galula, *Counterinsurgency Warfare: Theory and Practice* (1964).
[81] See John A. Nagl, *Counterinsurgency Lessons from Malaya and Vietnam: Learning to Eat Soup with a Knife* (2002).
[82] See U.S. Army and Marine Corps, *Counterinsurgency Field Manual* (2007).
[83] See Colombian Ministry of National Defence, *Comprehensive Human Rights and IHL Policy* (2008), paras. 11-17.

based operations" (EBO).[84] These operations are predicated on the belief that it is strategically expedient to be humane by carefully regulating the destructive efforts of attacks and minimising collateral damage. To be sure, Matt M. Matthews,[85] Justin Kelly and David Kilcullen,[86] Milan N. Vego,[87] Ron Tira,[88] and Avi Kober, [89] criticise EBO. It nevertheless appears to form the US Air Force's operational doctrine.[90] In addition, this thesis cites various tactical theories (e.g., Lanchester's Square Law[91]), evolutions of combat techniques (e.g., barrage[92]), reflections of military leaders (e.g., Che Guevara[93]), and psychological assessments of operational decisions (e.g., Norman Dixon[94]).

Judith Jarvis Thomson's seminal work on normative reasoning[95] informs our discussion of the relationship between military virtues and ethical virtues. Her arguments also shape this thesis when considering how the legitimacy or illegitimacy of an end affects the legitimacy or illegitimacy of its means. Georg Henrik von Wright articulated the idea of morally indifferent behaviour.[96] The joint satisfaction thesis combines this concept with Wesley Newcomb Hohfeld's "privilege"[97] – or "liberty", as it subsequently came to be called – and Hans Kelsen's observation that a permission to do something is contradictory to a duty to refrain from it,[98] to demonstrate that military necessity considerations are normatively indifferent. The notion that some humanitarian considerations affirmatively demand or condemn action, while others exhibit normative indifference, also takes inspirations from Lon Fuller's distinction between the morality of duty and the morality of aspiration.[99]

It is a central claim of this thesis that the belligerent always has the option to act in a manner that jointly satisfies military necessity and humanity. Joint satisfaction is straightforward where military necessity permits what humanity demands, or where military necessity merely tolerates what humanity condemns. The situation becomes less obvious should the two sets of considerations contradict each other. This thesis exposes Hart's erroneous conclusion that joint conformity with a duty and a counter-liberty within one legal system is logically impossible and that these norms find themselves in conflict as a result.[100] We look instead to Stephen Munzer, for whom only rules that impose incompatible duties or incompatible permissions backed up with strong pressure or policy conflict with each other.[101]

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[84] See David A. Deptula, *Effects-Based Operations: Change in the Nature of Warfare* (2001).
[85] See Matt M. Matthews, *We Were Caught Unprepared: The 2006 Hezbollah-Israeli War* (2006), at 61-65.
[86] See Justin Kelly and David Kilcullen, "Chaos versus Predictability: A Critique of Effects-Based Operations", 2 *Australian Army Journal* 87 (2004).
[87] See Milan N. Vego, "Effects-Based Operations: A Critique", 41 *Joint Forces Quarterly* 51 (2006).
[88] See Ron Tira, "Breaking the Amoeba's Bones", 9 *Strategic Assessment* (2006).
[89] See Avi Kober, "the Israel Defence Forces in the Second Lebanon War: Whey the Poor Performance?", 31 *Journal of Strategic Studies* 3 (2008), at 32-33.
[90] See U.S. Air Force, 1 *Air Force Basic Doctrine: Air Force Doctrine Document* (2003), at 18; U.S. Air Force, 2 *Operations and Organization: Air Force Doctrine Document 13-20* (2007), at 13-20.
[91] See, e.g., David K. Davis, *Aggregation, Disaggregation, and the 3:1 Rule in Ground Combat* (1995).
[92] See Ian V. Hogg, *Barrage: The Guns in Action* (1970).
[93] See Che Guevara, *Guerrilla Warfare* (1961; J.P. Morray trans., 1985).
[94] See Norman Dixon, *On the Psychology of Military Incompetence* (1976).
[95] See Judith Jarvis Thomson, *Normativity* (2008).
[96] See Georg Henrik von Wright, "Deontic Logic", 60 *Mind* 1 (1951); *ibid.*, "Ought to Be – Ought to Do", in Georg Meggle (ed.), *Actions, Norms, Values: Discussions with Georg Henrik von Wright* (1999) 3.
[97] See Wesley Newcomb Hohfeld, "Fundamental Legal Concepts as Applied in Judicial Reasoning", 26 *Yale Law Journal* 710 (1919), at 710.
[98] See Hans Kelsen, *Pure Theory of Law* (Max Knight trans., 1967), at 205-208; *ibid.*, *General Theory of Norms* (Michael Hartney trans., 1991), at 189.
[99] See Lon Fuller, *The Morality of Law* (1964), at 4.
[100] See H.L.A. Hart, "Kelsen's Doctrine of the Unity of Law", in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) 309, at 326-327, 330-331.
[101] See Stephen Munzer, "Validity and Legal Conflicts", 82 *Yale Law Review* 1140 (1973), at 1142-1146.

Elsewhere, this thesis refers to Donald Davidson,[102] as well as Hart and Tony Honoré,[103] on causation; Bruno Celano[104] and Ota Weinberger on norm conflicts[105]; Joseph Raz on moral ideals[106]; John Finnis[107] and Matthew H. Kramer[108] on Hohfeldian liberties; and Finnis[109] and Jeff McMahan[110] on the validity of legal rules that prohibit what morality demands.

This thesis assimilates ethics, including military ethics, into various parts of its investigations. Of the numerous experts referred to, Michael Walzer easily ranks as the most influential.[111] We make extensive use of "double effect"[112] – which Walzer revises as "double intention"[113] – in our discussion of utilitarianism and counter-*Humanitätsgebot*. Using Richards' actions while in the northern French village of Englefontaine as an example, Walzer raises questions about the extent to which soldiers should risk self-endangerment in order to protect civilians.[114]

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[102] See Donald Davidson, *Essays on Actions and Events* (1980).

[103] See H.L.A. Hart and Tony Honoré, *Causation in the Law* 2d ed. (1985).

[104] See Bruno Celano, "Norm Conflicts: Kelsen's View in the Late Period and a Rejoinder", in Stanley L. Paulson and Bonnie Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998) 343.

[105] See Ota Weinberger, "Logical Analysis in the Realm of Law", in Meggle (ed.), *supra* note 96, 291.

[106] See Raz, *Practical Reason and Norms*, *supra* note 38, at 91-95.

[107] See John Finnis, "Some Professional Fallacies About Rights", 4 *Adelaide Law Review* 377 (1971), at 377; *ibid.*, *Natural Law and Natural Rights* (1980), at 199.

[108] See Matthew H. Kramer, "Rights Without Trimmings", in Matthew H. Kramer et al., *A Debate Over Rights: Philosophical Enquiries* (1998) 7, at 10-20.

[109] See Finnis, *Natural Law and Natural Rights*, *supra* note 107, at 361-363, 365.

[110] See Jeff McMahan, "The Morality of War and the Law of War", in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 19, at 39.

[111] See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977); *ibid.*, *Arguing About War* (2004).

[112] See, e.g., Thomas Aquinas, *Summa Theologiæ* (1485); Henry Sidgwick, *The Elements of Politics* (1891), at 254; Joseph T. Mangan, "An Historical Analysis of the Principle of Double Effect", 10 *Theological Studies* 41 (1949), at 43; Elizabeth Anscombe, "War and Murder", in Malham M. Wakin (ed.), *War, Morality, and the Military Profession* (1979) 285, at 294-296; James F. Keenan, "the Function of the Principle of Double Effect", 54 *Theological Studies* 294 (1993); Alison McIntyre, "Doing Away with Double Effect", 111 *Ethics* 219 (2001); Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (2002), at 64-65; Noam Neuman, "Applying the Rule of Proportionality; Force Protection and Cumulative Assessment in International Law and Morality", 7 *Yearbook of International Humanitarian Law* 79 (2004); Noam Zohar, "Double Effect and Double Intention: A Collectivist Perspective", 40 *Israel Law Review* 730 (2007); Th.A. van Baarda, "Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective from Military Ethics", 11 *Yearbook of International Humanitarian Law* 3 (2008), at 32-35; T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (2008); Ralph Wedgwood, "Scanlon on Double Effect", 83 *Philosophy and Phenomenological Research* 464 (2011); Steven P. Lee, *Ethics and War: An Introduction* (2012), at 173-181; Dean Cocking, "Collateral Damage: Intending Evil and Doing Evil", in David W. Lovell and Igor Primoratz (eds.), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (2012) 53; Bradly Gershel, "Applying Double Effect in Armed Conflicts: A Crisis of Legitimacy", 27 *Emory International Law Review* 741 (2013); Luban, "Risk Taking", *supra* note 114.

[113] See Walzer, *Just and Unjust Wars*, *supra* note 111, at 153-156.

[114] See *ibid.*, at 152, 154, 305-306. See also A.P.V. Rogers, "Conduct of Combat and Risks Run by the Civilian Population", 21 *Military Law and the Law of War Review* 293 (1982), at 310; R. George Wright, "Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality", 67 *Notre Dame Law Review* 335 (1991), at 354-357; William J. Fenrick, "Attacking the Enemy Civilian as a Punishable Offence", 7 *Duke Journal of Comparative and International Law* 539 (1997), at 548-549; Thomas W. Smith, "Protecting Civilians … or Soldiers? Humanitarian Law and the Economy of Risk in Iraq", 9 *International Studies Perspectives* 144 (2008); Avishai Margalit and Michael Walzer, "Israel: Civilians & Combatants", *New York Times Review of Books*, 14 May 2009; Jeff McMahan, *Killing in War* (2009), at 198-202; David Whetham, "The Just War Tradition: A Pragmatic Compromise", in Whetham (ed.), *supra* note 79, 65, at 83; Jean-Philippe Kot, "Israeli Civilians v. Palestinian Combatants? Reading the Goldstone Report in Light of the Israeli Conception of the Principle of Distinction", 24 *Leiden Journal of International Law* 961 (2011); Peter Margulies, "Valor's Vices: Against a State Duty to Risk Forces in Armed Conflict", 37 *Vermont Law Review* 271 (2012); Ziv Bohrer and Mark Osiel, "Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties *v*. Safeguarding Soldiers", 46 *Vanderbilt Journal of Transnational Law* 747 (2013); Ziv Bohrer and Mark Osiel, "Proportionality in War: Protecting Soldiers from Enemy Captivity, and Israel's Operation Cast Lead – 'The Soldiers Are Everyone's Children'", 22 *Southern California Interdisciplinary Law Journal* 637 (2013); Cheryl Abbate, "Assuming Risk: A Critical Analysis of a Soldier's Duty to Prevent Collateral Casualties", 13 *Journal of Military Ethics* 70 (2014); Seth Lazar, "Necessity and Non-Combatant Immunity", 40 *Review of International Studies* 53 (2014); David Luban, "Risk Taking and Force Protection", in Yitzhak Benbaji and Naomi Sussmann (eds.), *Reading Walzer* (2014) 277; Nancy Sherman, "The Moral

This thesis argues that an act's consistency with military necessity is never a reason for which IHL framers consider obligating its performance. In this connection, we examine the ethical unease surrounding the disabling of what Walzer calls "naked" soldiers. He acknowledges, at least implicitly, that military necessity permits the killing of such soldiers.[115] Despite Larry May's criticism to the contrary,[116] at no point does Walzer suggest that the rules of war make it impermissible not to kill them. Walzer and May also disagree as to whether a great deal of evil may be endured for a greatly important end in war.[117] Walzer joins Hart,[118] Thomson[119] and Henry Shue[120] on the idea that the illegitimacy of a purpose taints an agent's action.[121]

We differ from Walzer on some points. Thus, for instance, this thesis distinguishes what humanity *qua* reason-giving consideration in IHL norm-creation demands of a soldier from the largely community-oriented manner in which Walzer portrays that soldier's moral landscape.[122] Walzer finds that acting morally is part of simply fighting well, rather than fighting heroically.[123] Shannon E. French takes a similar position.[124] We contrast their views with the possibility that the vocational competence of a soldier may be seen in its strictly material, *a*moral context.

This thesis also engages ethics when assessing professionalism during the Allied action at Monte Cassino (featuring discussions among Nigel de Lee,[125] Beuben E. Brigety II,[126] and Uwe Steinhoff[127]); describing our conceptual transition from evaluating military necessity in its material context to stipulating military necessity in its normative context (by reference to R.B. Brandt[128]); determining when an act's evil trumps its material necessity (quoting Marshall Cohen,[129] Brian Orend,[130] and David Whetham[131]); considering some belligerent acts' capacity for "inhumane-unnecessary" and "humane-necessary" alignment (citing Best[132] and Brandt[133]); and conceding that some of the most horrific atrocities in history have been committed by well-disciplined armed forces (to Howard[134]). Other ethicists mentioned include Janina Dill[135] and Bill Rhodes.[136]

Psychic Reality of War", in *ibid.*, 302, at 320-321; Michael Walzer, "Response", in *ibid.*, 328, 328-329; Robert D. Sloane, "Puzzles of Proportion and the 'Reasonable Military Commander': Reflections on the Law, Ethics, and Geopolitics of Proportionality", 6 *Harvard National Security Journal* 299 (2015).

[115] See Walzer, *Just and Unjust Wars*, *supra* note 111, at 142.

[116] See Larry May, *War Crimes and Just War* (2007), at 109-112.

[117] See *ibid.*, at 196-197; Walzer, *Just and Unjust War*, *supra* note 111, at 251-263.

[118] See H.L.A. Hart, "Book Review", 78 *Harvard Law Review* 1281 (1965), at 1286; *ibid.*, "Lon L. Fuller: The Morality of Law", in Hart, *Essays*, *supra* note 100, 343, at 350.

[119] See Thomson, *Normativity*, *supra* note 95, at 222.

[120] See Henry Shue, "Civilian Protection and Force Protection", in Whetham (ed.), *supra* note 79, 135, at 137.

[121] See Walzer, *Just and Unjust War*, *supra* note 111, at 128.

[122] See *ibid.*, at 138-143, 305-306; Walzer, *Arguing About War, supra* note 111, at 23-24; Margalit and Walzer, *supra* note 114.

[123] See Walzer, *Just and Unjust Wars*, *supra* note 111, at 199.

[124] See Shannon E. French, "Sergeant Davis' Stern Charge: The Obligation of Officers to Preserve the Humanity of Their Troops", 8 *Journal of Military Ethics* 116 (2009).

[125] See Nigel de Lee, "Moral Ambiguities in the Bombing of Monte Cassino", 4 *Journal of Military Ethics* 129 (2005).

[126] See Reuben E. Brigety II, "Moral Ambiguities in the Bombing of Monte Cassino", 4 *Journal of Military Ethics* 139 (2005).

[127] See Uwe Steinhoff, "Moral Ambiguities in the Bombing of Monte Cassino", 4 *Journal of Military Ethics* 142 (2005).

[128] See R.B. Brandt, "Utilitarianism and the Rules of War", 1 *Philosophy and Public Affairs* 145 (1972).

[129] See Marshall Cohen, "Morality and the Laws of War", in Virginia Held, Sidney Morgenbesser and Thomas Nagel (eds.), *Philosophy, Morality, and International Affairs* (1974) 71, at 74.

[130] See Brian Orend, *The Morality of War* (2006), at 123.

[131] See Whetham, "The Just War Tradition: A Pragmatic Compromise", *supra* note 114, at 82.

[132] See Best, "Restraints on War by Land Before 1945", *supra* note 52, at 27-30.

[133] See Brandt, *supra* note 128, at 154-155.

[134] See Howard, "*Temperamenta Belli*", *supra* note 78, at 3-4.

[135] See Janina Dill and Henry Shue, "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption", 26 *Ethics & International Affairs* 311 (2012).

[136] See Bill Rhodes, *An Introduction to Military Ethics: A Reference Handbook* (2009).