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Military Necessity

Nobuo Hayashi

Military Necessity

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To Klára and Daniel

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List of Abbreviations

ABiH	Army of Bosnia and Herzegovina
COIN	Counterinsurgency
C-o-S	Chief of Staff
EBO	Effects-based operations
EMP	Electromagnetic pulse
FARC	Fuerzas Armadas Revolucionarias de Colombia
HVO	Croatian Defence Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International criminal law
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israel Defence Forces
IHL	International humanitarian law
IHRL	International human rights law
ILC	International Law Commission
IMT	International Military Tribunal
IS	Islamic State
JNA	Yugoslav People's Army
LOIAC	Law of international armed conflict
POW	Prisoner of war
TO	Territorial Defence

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).

Part I

Military Necessity in Its Material Context

In Part I, we examine military necessity in its strictly "material" context. In a nutshell, material military necessity embodies a two-fold truism. On the one hand, it is in the strategic self-interest of each belligerent to do what is militarily necessary and to avoid what is unnecessary. On the other hand, it is against the belligerent's strategic self-interest to forgo necessities of war or to encumber itself with non-necessities of war. Pursuing necessities and avoiding non-necessities is an *a*moral component of the belligerent's vocational competence, i.e., "to get the job done". This amoral component distinguishes fighting that is effective from that which is not.

This part consists of two chapters. Chapter 2 will show that material military necessity involves calculating the cogency between the means taken or considered *vis-à-vis* the ends sought under the circumstances prevailing or anticipated at the relevant time.[1] The material military necessity of a given act is invariably relational, evaluative and situation-specific. It is relational, because the degree to which a particular course of action is militarily necessary changes depending on the availability of alternative courses of action, military ends and sets of circumstances. That it is evaluative arises from the fact that, with enough facts, the material military necessity of this or that act is susceptible to reasonable assessment. It is situation-specific, insofar as no military necessity assessment of particular conduct can be meaningfully generalised.

Chapter 2 will also highlight several salient features of material military necessity. Thus, for example, we will see that it does not involve any requirement of causation *sine qua non*. Just as acts can be material military necessities, they can be non-necessities. Examples of the latter include non-necessities *per se* (e.g., acts that are futile *vis-à-vis* their stated objectives, acts that are purposeless), as well as relative non-necessities (e.g., acts that are wasteful, excessive or impertinent in view of their otherwise reasonably attainable objectives).

Chapter 3 counters three major objections to the idea that military necessity can be seen in its strictly material sense.[2] First, there may be something moral about a particular belligerent act being "competent" or "incompetent". One can nevertheless distinguish between a soldier's virtue in fighting militarily well and a person's virtue in behaving ethically well. Second, could it not be that a soldier's narrow vocational competence is itself part of his or her broader ethical competence as a person? It can indeed be the ethical duty of a soldier to fight competently by doing his or her best to pursue material military necessities and avoid non-necessities. As a notion, however, competent fighting is still capable of consideration that is separate from its broader ethical status.

Chapter 3 then addresses itself to the third and perhaps most serious objection. Is it not the case that only ethically competent fighting counts as *truly* vocationally competent fighting, all things considered? That ethical and military virtues occasionally point the soldier in the same behavioural direction goes without saying. At issue here is rather the idea that ethical virtues form an integral component of military virtues. To this, Chapter 3 offers the following rejoinder: The point of our discussion of material military necessity is *not* whether a soldier's true vocational competence must be seen holistically – although, in fairness, it is possible that it must be so in broader contexts. Whether this is the case or not, we are presently concerned with the intelligibility of that narrow part of fighting's vocational competence that does not involve ethics.

[1] An earlier version of Chapter 2 was published in 2013. See Nobuo Hayashi, "Contextualizing Military Necessity", 27 *Emory International Law Review* 189 (2013), at 195-211.
[2] An earlier version of Chapter 3 was published in 2013. See *ibid.*, at 211-222.

Chapter 2

Fitness of Means and Vocational Competence

Within a strictly material context, military necessity can be seen essentially as an *a*moral notion that merely separates competent fighting from incompetent fighting. To say that "doing this or that is militarily necessary to such and such a degree" is simply to signify that the conduct in question is conducive towards the materialisation of a given military end to such and such a degree. Conversely, to say that "doing this or that is militarily *un*necessary to such and such a degree" is to signify that the act does not so conduce to such and such a degree. Understood thus, "material" military necessity embodies a two-fold truism. First, it is in one's strictly strategic self-interest to perform an act to the extent that it is materially conducive to success. Second, it is similarly in one's strictly strategic self-interest to refrain from an act to the extent that it is not so conducive.

This chapter demonstrates that material military necessity denotes a given course of action required for the accomplishment of a particular military goal.[1] Acting in accordance with military necessity means doing three things under the prevailing circumstances. First, the actor desires a military outcome (*Y*). Second, he or she identifies a range of realistically available courses of action (X_1, X_2, X_3, … X_n), each having reasonable chances of generating *Y*. Third, he or she chooses and pursues one option, e.g., X_1, that is superior to the other options on the strength of its chances and resource efficiency.[2] Here, X_1, X_2, X_3, and so on, enjoy various degrees of military necessity, depending on their relative conduciveness *vis-à-vis Y*'s materialisation and their relative efficiency given the circumstances (*Z*). The more conducive X_1 is to *Y*'s materialisation and the more efficient it is in view of the circumstances, the more of a military necessity X_1 is than X_2, X_3, and the like.

Consequently, military necessity in its strictly material sense is a function of the ends sought, the means chosen, and the circumstances prevailing at the time. It is a situation-specific and relational notion that does not involve any requirement of causation *sine qua non*. Just as there can be material military necessities, there can be *non*-necessities.

1. Ends, Means and Circumstances

An ancient Benedictine abbey stands atop Monte Cassino in southern Italy. During World War II, Adolf Hitler ordered the hill incorporated into the defensive complex of the Gustav Line against the Allied advance from the south.[3] Monte Cassino was situated at the mouth of the Liri Valley with a commanding view of all of the valley's approaches.[4] The valley provided the most direct gateway to Rome.[5] An entry into it became urgent for the Allied forces in view of the protracted battle at the Anzio beachhead, another strategic point for the purposes of weakening the Gustav Line.[6] The task of opening a Liri Valley entrance fell on forces under the command of Lieutenant General Sir Bernard Freyberg.[7]

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[1] See, e.g., Pietro Verri, *Dictionary of the International Law of Armed Conflict* (1992), at 75 (emphasis omitted): "In its wider sense, necessity means doing what is necessary to achieve war aims".

[2] It is not inconceivable that the available options have such limited chances of success, or that they are so inefficient resource-wide, or both, under the circumstances prevailing at the time, that there is no rational alternative to taking no action at all *vis-à-vis* the desired outcome.

[3] See Martin Blumenson, *The Mediterranean Theater of Operations: Salerno to Cassino* (1969), at 155, 311.

[4] See *ibid.*, at 403.

[5] See *ibid.*, at 226.

[6] See *ibid.*, at 353, 385-396, 401.

[7] See *ibid.*, at 401-402. General Freyberg was in command of the provisional New Zealand Corps with the 2nd New Zealand and 4th Indian Divisions under its control at the time. See *ibid.*

In January 1944, Allied commanders were instructed to make every effort to avoid damage to the abbey.[8] This, however, was subject to a proviso added by the headquarters of General Sir Harold R.L.G. Alexander to the effect that "[c]onsideration for the safety of such areas will not be allowed to interfere with military necessity".[9] On 9 February, Lieutenant General Mark W. Clark authorized Freyberg "to fire against the monastery if in Freyberg's judgment military necessity dictated this action".[10] Major General F.S. Tuker, Freyberg's subordinate charged with weakening the Gustav Line at the Liri valley, determined that the abbey had to be destroyed.[11] When requesting an aerial bombardment, Freyberg stated that Tuker "who is making the attack feels that it is an essential target and I thoroughly agree with him".[12]

Clark was of the opinion that the abbey's destruction was unwarranted.[13] He believed "that no military necessity existed, that a bombardment would endanger the lives of civilian refugees in the building, and that bombardment would probably fail to destroy the abbey and would be more than likely to enhance its value as a fortification".[14] Major General Alfred M. Gruenther, Clark's Chief of Staff, was told that Alexander had faith in Freyberg's judgment and that "[i]f there is any reasonable probability that the building is used for military purposes … its destruction is warranted".[15] Gruenther also informed Freyberg of Clark's view on the matter. One account of Freyberg's reply states:

> General Freyberg said he had gone into the matter thoroughly with [Tuker], who was quite convinced that bombing the monastery was necessary. Freyberg added that he thought it was not "sound to give an order to capture Monastery Hill and at the same time deny the commander the right to remove an important obstacle to the success of this mission." A higher commander who refused to authorize the bombing, Freyberg warned, would have to take the responsibility if the attack failed. Gruenther said that Clark was ready to authorize the bombing if Freyberg considered it a military necessity. According to Gruenther's record, General Freyberg then said that "it was his considered opinion that it is a military necessity."[16]

An aerial bombardment was scheduled on 13 February and, after a delay, initiated two days later.[17] Almost six hundred tons of high-explosive virtually demolished the monastery.[18] The abbey's destruction did not bring about the hill's capture, however.[19] As Clark had foreseen,

> the bombardment of the abbey had failed to break the Gustav Line at its critical point. Not only the major bombing on 15 February, but the relatively heavy bombings on successive days, which had further reduced the monastery, failed to dislodge the stubborn and skillful troops in well-nigh perfect defensive positions. The ground and air commands in the theater were profoundly disappointed. Had the ground forces been unable to take advantage of the bombardment? Or were the bombers incapable of eradicating tactical positions and therefore useless for direct support of ground attack? No one seemed to know … In the final analysis, no one had been altogether certain what the bombardment was supposed to accomplish except to flatten the abbey. The escalation of

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[8] See *ibid.*, at 398.
[9] *Ibid.*, at 398-399 (footnote omitted). General Alexander was the commander of the 15th Army Group at the time. See *ibid.,* at 34.
[10] *Ibid.*, at 403 (footnote omitted). General Clark was the commander of the U.S. Fifth Army at the time. See *ibid.,* at 28.
[11] See *ibid.*, at 403 (footnote omitted): "The commander of the 4th Indian Division, Maj. Gen. F. S. Tuker, after studying the problem of how to break the Gustav Line in the Cassino area, had no doubt that the monastery was a real obstacle to progress ... Since the monastery commanded all the approaches to the Liri valley, Tuker decided it had to be destroyed before he could attack. He requested his corps commander, General Freyberg, to arrange for an air bombardment".
[12] *Ibid.*, at 404.
[13] See *ibid*.
[14] *Ibid.*, at 405-406.
[15] *Ibid.*, at 405.
[16] *Ibid.*, at 406.
[17] See *ibid.*, at 406-407, 409.
[18] See *ibid.*, at 411.
[19] See *ibid.*, at 417.

> the air effort from a relatively modest attack to an overwhelming strike had achieved nothing beyond destruction, indignation, sorrow, and regret.[20]

It took the Allied forces another three months to break through the Gustav Line on the Liri Valley (15 May)[21] and to capture Monte Cassino and its abbey (18 May).[22]

Freyberg identified the monastery's destruction as the conduct and Monastery Hill's capture as its purpose. The circumstances surrounding the conduct and purpose included the abbey's structure, the hill's topography, weather conditions, weapons and communications equipment available, and so on.[23] In the event, the particularly thick outer walls of the abbey had "resisted the blasts and although breaches appeared none of them reached the ground level".[24] This, combined with unintegrated employment of airpower, "did nothing to lighten the task of the infantry, which was unable to take advantage of the confusion and destruction by staging a correlated attack".[25]

Whether the attack on the abbey did or did not constitute a military necessity was hotly debated.[26] It is reasonable to assume that Freyberg and Tuker were professionally competent soldiers and found in good faith that the abbey's destruction was a military necessity. It is also reasonable to assume, however, that Clark and the others were similarly competent soldiers who came to different conclusions, also in good faith.[27] Opinions of other persons associated with the Allied action were also divided. For instance, Major General Fred L. Walker noted:

> This was a valuable historical monument, which should have been preserved. The Germans were not using it and I can see no advantage in destroying it. No tactical advantage will result since the Germans can make as much use of the rubble for observation posts and gun positions as of the building itself. Whether the Germans used the building for an observation post or for emplacements makes little difference since the mountain top on which the building stands can serve the same purpose.[28]

According to Martin Blumenson, U.S. President Theodor D. Roosevelt told the Vatican that "he had issued instructions to prevent the destruction of historic monuments except in cases of military necessity. The bombardment, he said, had been unfortunate but necessary".[29]

The Germans' suspected use of the abbey for military purposes exacerbated the situation. The German forces undertook to ensure respect for the abbey itself despite the fact that their commander, Henrich von Vietinghoff, acknowledged that the monastery had "good observation posts" and "good positions of concealment".[30] Initially, some Allied commanders received intelligence to the effect that the Germans used the abbey.[31] Others disagreed, however, and later confirmed that the information was not accurate.[32]

To complicate the matter further, an act can be of different degrees of military necessity or non-necessity *vis-à-vis* its goal. All else being equal, one course of action can be more or less militarily necessary than another by virtue of their relative conduciveness *vis-à-vis* a given purpose. In view of Monte Cassino's capture (*Y*) as the Allied objective, destroying the abbey first and then advancing

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[20] *Ibid.*
[21] See Ernst F. Fisher, Jr., *The Mediterranean Theater of Operations: Cassino to the Alps* (1977), at 77.
[22] See *ibid.*, at 78.
[23] See Blumenson, *Salerno to Cassino*, *supra* note 3, at 402-403, 408.
[24] Nigel de Lee, "Moral Ambiguities in the Bombing of Monte Cassino", 4 *Journal of Military Ethics* 129 (2005), at 135 (quoting G.R. Stevens, *The Fourth Indian Division* (1950), at 286).
[25] De Lee, *supra* note 24, at 135 (quoting Stevens, *supra* note 24, at 286).
[26] See Blumenson, *Salerno to Cassino*, *supra* note 3, at 405-406.
[27] There were other skeptics too, such as Major General Geoffrey Keyes, Major General Charles W. Ryder, and Colonel Mark M. Boatner. See *ibid.*, at 405, 407.
[28] *Ibid.*, at 413. Footnote omitted.
[29] *Ibid.*, at 415-416.
[30] See *ibid.*, at 400.
[31] See *ibid.*, at 408.
[32] See *ibid.*, at 413-414.

the infantry (X_1) was arguably more militarily necessary than advancing the infantry without first destroying the abbey (X_2) would have been, under the circumstances prevailing at the time (Z).

Alternatively, all else being equal, a given course of action can be more or less militarily necessary relative to one purpose than to another. For instance, under the prevailing circumstances (Z), destroying the abbey (X) was arguably more militarily necessary *vis-à-vis* capturing the hill (Y_1) than it would have been *vis-à-vis* drawing the German strength away from Anzio (Y_2). In Nigel de Lee's words:

> The Higher Command seemed to be losing sight of the object of operations ... the object was not necessarily to attack and capture the Monte Cassino features. The object was to menace the enemy's position on the Gustav line as to induce him to withdraw from the Anzio front sufficient forces to preclude his exerting any sort of decisive pressure there ... There were two quite reasonable operations in that region that could be undertaken which would threaten the safety of the Monte Cassino feature sufficiently to draw Axis reinforcements.[33]

In the further alternative, all else being equal, a given course of action can be more or less militarily necessary in relation to a given purpose in one set of circumstances than in another. Thus, destroying the abbey (X) was arguably more militarily necessary for capturing the hill (Y), given the abbey's topographic dominance over the hill (Z_1) than, say, if it had not had such dominance (Z_2). Winston Churchill described the abbey's topography as follows: "The height on which the monastery stood surveyed the junction of the rivers Rapido and Liri and was the pivot of the whole German defense. It had already proved itself a formidable, strongly defended obstacle. Its steep sides, swept by fire, were crowned by the famous building".[34] One commentator argues that the material military necessity for the abbey's destruction was circumstantially undermined by the difficulties associated with coordinating aerial bombardment, artillery bombardment, and infantry attack:

> What Tuker describes here is a complicated attack that requires the co-ordination of three different branches of the service and where timing is crucial. But war is characterized by what von Clausewitz called friction. In war, things have a strong tendency not to go the way they were planned. In other words, the probability that the precisely co-ordinated campaign Tuker asked for could have been delivered under the circumstances was extremely low.[35]

The Monte Cassino experience shows that the material military necessity or non-necessity of given belligerent conduct is inevitably situation-dependent and evaluative. Given enough facts, the proposition "destroying the Benedictine abbey atop Monte Cassino on 15 February 1944 constituted a military necessity for the Allies" is susceptible to reasonable assessment, although the determination may differ from assessor to assessor. What is insusceptible to such assessment is a generalised proposition – such as "destroying a building sitting atop a strategically important hill constitutes a military necessity" – postulated *a priori* in a manner that holds true for all, always and everywhere.

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[33] See de Lee, *supra* note 24, at 133 (quoting Letter from Sir Francis Tuker, Lieutenant General in the British Army, to Major General Henry "Taffy" Davies (26 May 1965) (on file with Colonel G. Shakespear)). See also Reuben E. Brigety II, "Moral Ambiguities in the Bombing of Monte Cassino", 4 *Journal of Military Ethics* 139 (2005), at 140: "[O]ne might morally fault the Allied commanders not for their professional incompetence in the conduct of the assault, but for their lack of strategic imagination in assigning such grave military significance to capturing Cassino and the Abbey. Given that General Clark was advised by General Tuker that the only possibility for success was to launch sustained and devastating air strikes on the target, which would have caused more damage than General Clark initially indicated would be acceptable to him, the Allies might have (and arguably should have) re-evaluated if there was another way to achieve their broad operational and strategic objectives in the Italian campaign without taking Cassino".

[34] Winston S. Churchill, 5 *The Second World War: Closing the Ring* (1951), at 499. Alexander provided similar descriptions of topographic details of the hill as well as the difficulties confronting the Allies to Churchill. See *ibid.,* at 508-509.

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

2. Causation *Sine Qua Non* Not Required

Establishing material military necessity does not entail *sine qua non* ("but for") causation. Generally, upholding the "but for" causation between one event, E_1, at a given moment and another event, E_2, at a subsequent moment amounts to asserting the truth of two propositions. They are, respectively, that both E_1 and E_2 in fact occur, and that E_2 would not have occurred "but for" E_1. The military necessity or otherwise of the conduct occurring (E_1=X) is capable of comprehension even where the purpose sought by it (E_2=Y) does not, in fact, materialise. Nor, even where E_2 materialises, does military necessity require that E_1's occurrence be E_2's *conditio sine qua non*.

2.1 No Causation Requirement

Acting in accordance with military necessity does not imply overcoming what Carl von Clausewitz called war's "friction".[36] Friction may well deny the military purpose's materialisation despite the very best and otherwise effective courses of action being pursued.

Operation Market Garden is a case in point. According to one authoritative account, "Operation MARKET-GARDEN accomplished much of what it had been designed to accomplish. Nevertheless, by the merciless logic of war, MARKET-GARDEN was a failure. The Allies had trained their sights on far-reaching objectives. These they had not attained".[37] The unattained objectives included securing a bridgehead beyond the Neder Rijn, effectively turning the north flank of the West Wall, cutting off Germany's Fifteenth Army, and positioning the 21st Army Group for a drive around the north flank of the Ruhr.[38] The account continues:

> Though MARKET-GARDEN failed in its more far-reaching ramifications, to condemn the entire plan as a mistake is to show no appreciation for imagination and daring in military planning and is to ignore the climate of Allied intelligence reports that existed at the time. While reasons advanced for the failure range from adverse weather (Field Marshall Montgomery) and delay of the British ground column south of Eindhoven (General Brereton) to faulty intelligence (the Germans), few criticisms have been leveled at the plan itself. In light of Allied limitations in transport, supplies, and troops for supporting the thrust, in light of General Eisenhower's commitment to a broad-front policy, and in light of the true conditions of the German army in the West, perhaps the only real fault of the plan was overambition.[39]

With the possible exception of faulty intelligence, the reasons offered above are typical indicators of an operation's Clausewitzian friction.[40] Moreover, many of the measures taken during the

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[36] See Carl von Clausewitz, *On War* (1832; Michael Howard and Peter Paret eds. and trans., 1989), at 119-121. Barry D. Watts offers the following taxonomy of Clausewitzian friction: danger's impact on the ability to think clearly and act effectively in war; the effects on thought and action of combat's demands for exertion; uncertainties and imperfections in the information on which action in war is unavoidably based; friction in the narrow sense of the internal resistance to effective action stemming from the interactions between the many men and machines making up one's own forces; the play of chance, of good luck and bad, whose consequences combatants can never fully foresee; physical and political limits to the use of military force; unpredictability stemming from interaction with the enemy; and disconnects between ends and means in war. See Barry D. Watts, *Clausewitzian Friction and Future War* (1996), at 30, 32.

[37] Charles B. MacDonald, *The European Theater of Operations: The Siegfried Line Campaign* (1963), at 198.

[38] See *ibid.* (also explaining that "[t]he hope of attaining these objectives had prompted the ambition and daring that went into Operation MARKET-GARDEN. Not to have realized them could mean only that the operation had failed").

[39] *Ibid.*, at 199. See also Winston S. Churchill, 6 *The Second World War: Triumph and Tragedy* (1953), at 198-200 (describing how weather and dangerous river conditions contributed to the Allies' difficulties in Operation Market Garden).

[40] Of course, not all commentators look upon Operation Market Garden's failure so charitably – to put it mildly – by describing its difficulties and shortcomings as instances of Clausewitzian friction. See, e.g., Norman Dixon, *On the Psychology of Military Incompetence* (1976), at 145-148, esp. 148 (citation omitted): "For the student of military disasters, the attack on Arnhem ranks with Kut and the Bay of Pigs fiasco. Through inappropriate risk-taking, underestimation of the enemy, the neglect of unpalatable information and a failure of technology, military decisions by able brains, at high levels of command, brought down misery and chaos".

ultimately unsuccessful Operation Market Garden were nevertheless military necessities for the operation. By way of example, one might note the assault on the Arnhem highway bridge by Lieutenant Colonel J.D. Frost and his battalion,[41] as well as their subsequent effort to maintain their foothold on that bridge.[42] By all accounts, securing the Arnhem highway bridge under the circumstances prevailing at the time was one of the operations' most crucial components.[43] The actions of Frost and his men were eminently relevant to the objectives' materialisation: They reached the bridge and held their position amid intense enemy action, mounting casualties, and increasingly untenable conditions.[44]

Admittedly, the objectives' non-materialisation *may* – and, sometimes, does – indicate the military non-necessity of the measures taken for them. Consider, for example, the fall of Singapore in 1942. In a rather dramatic fashion, the British objective of defending Singapore from Japanese forces advancing through the Malay Peninsula failed to materialise. This failure has been attributed to a series of measures, some inadequate (e.g., the stationing of only severely limited and largely obsolete ships and aircraft) and others affirmatively detrimental (e.g., relentless self-deception and under-preparation), that were taken by British and Australian commanders.[45] It does not follow, however, that an objective's failure always entails the measure's lack of military necessity, or that a measure constitutes a military necessity only where its objective materialises.

2.2 No *Conditio Sine Qua Non* Requirement

Nor does military necessity involve *conditio sine qua non*. Causal elements of *conditio sine qua non* are by their very nature indemonstrable. What is often treated as a causal *sine qua non* is really an explanation of a singular event rather than the statement of a purported causal law governing similar combinations of events.[46] There may be other elements of *conditio sine qua non* that are demonstrable, but they are either mere analytic connections or incidental connections.[47]

Moreover, having made allowances for Clausewitzian friction,[48] each belligerent is always faced with a *choice* among a range of courses of action *vis-à-vis* its objective. This or that particular *range* may be a *sine qua non* with respect to this or that particular objective. Once the range is defined, however, the particular course of action chosen from that range is never truly a *sine qua non*. It is rather a matter of choosing that one course of action which is the *best*, all things considered. What makes the particular choice the best is a function of various criteria, such as the one that stands the greatest chances of accomplishing the objective, or the one that is the most resource-efficient, or the one that is the most politically acceptable among co-belligerents.

For instance, there is nothing *sine qua non* about the Allied forces landing on the beaches of Normandy for the purposes of invading northwest Europe. Landing at Normandy was arguably a military necessity, but *not* because the Allied invasion of northwest Europe would have otherwise been unsuccessful. This one cannot know; it cannot be ruled out that landing at some other location

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[41] See, e.g., MacDonald, *supra* note 37, at 171.
[42] See, e.g., *ibid.*, at 171-172, 179, 185-186.
[43] See, e.g., Churchill, *Triumph and Tragedy*, *supra* note 39, at 196-197.
[44] See, e.g., *ibid.*, at 198.
[45] For further discussion, see Timothy Hall, *The Fall of Singapore* (1983). See also our discussion of military non-necessities below.
[46] See, e.g., Donald Davidson, *Essays on Actions and Events* (1980), at 15-17, 149-162 ("What emerges, in the *ex post facto* atmosphere of explanation and justification, as *the* reason frequently was, to the agent at the time of action, one consideration among many, *a* reason").
[47] See H.L.A. Hart and Tony Honoré, *Causation in the Law* 2d ed. (1985), at 115: "If a man is knocked down and injured by a vehicle the fact that he is a man, human, and has a body, is something which is logically entailed by the description of the event with which we start and whose cause we may seek". See also *ibid.*, at 116 (explaining that the act of shooting a gun successfully requires "the fact that the cartridge was charged with explosive").
[48] See von Clausewitz, *supra* note 36, at 119-121.

might have also led to a successful Allied invasion of northwest Europe.[49] Landing at Normandy was arguably a military necessity because its beaches were the *best* among other candidate locations, all things considered.

There may be one element – the genius of the military leader – that comes closest to being truly irreplaceable. In all likelihood, Emir Faisal's forces would not have taken Aqaba but for Lieutenant T.E. Lawrence.[50] Nevertheless, the mere fact that true military genius in action may practically constitute a *conditio sine qua non* for some of the objectives it achieves does not mean that its existence is the only situation in which one can intelligibly speak of military necessity.

3. Military Non-Necessities

Wars can be poorly fought in various ways. For instance, doing *X* may be wasteful relative to accomplishing *Y*; it may be excessive in relation to accomplishing *Y*; it may simply have no bearing whatsoever on accomplishing *Y*; or it may be done for its own sake and without any particular purpose. Wastefulness, excessiveness, impertinence, futility, purposelessness, and the like, are improvable non-necessities that are not solely the products of irreducible friction. They would typically emanate from ill-advised, unrealistic, or otherwise badly defined military goals, ill-chosen means, and/or poor execution[51] under the prevailing circumstances. In reality, uneconomical wars are often the combined result of these acts and goals.[52]

As noted earlier, material military necessity is a relational and evaluative notion. The degree to which X_1 constitutes a military necessity *vis-à-vis Y* is relative to the degree to which some X_2 constitutes a non-necessity *vis-à-vis Y*. There are two manners in which material military non-necessity may be construed.

3.1 Non-Necessities *per se*: Futility and Purposelessness

The first is where non-necessity emanates from the lack of cogency intrinsic to the end sought or the means taken. Consider futility and purposelessness, for example. Futility would arise where one identifies an end that is so utterly unattainable at the relevant time that none of the means then available would have any reasonable prospects of success. This occurs where, odd as it may sound, only refraining from *X* can be said to constitute a military necessity *vis-à-vis* accomplishing *Y*, or where *Y* ought to be modified so that performing *X* does become a necessity therefor. Examples include launching an assault with an insufficient amount of ammunition in the knowledge that the objective sought would remain unaccomplished as a result, as was arguably the case with numerous instances of kamikaze attacks and Hitler's order to defend Berlin to the last man.

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[49] Here, the possible *sine qua non* range of courses of action would have been to effect a landing somewhere. Without such a landing, it is quite difficult to imagine how the Allies would have successfully invaded northwest Europe.

[50] See T.E. Lawrence, *Seven Pillars of Wisdom* (1935), at 167-168.

[51] Nigel de Lee suggests that the military necessity of attacking the Monte Cassino abbey diminished materially, if also morally, because it was not conducted professionally. See de Lee, *supra* note 24, at 133, 137. See also Brigety, *supra* note 33, at 140 (emphasis added): "In other words, De Lee suggests that the primary moral difficulty of the Cassino case is that the attack caused more damage than it might have done *if it were carried out in a more expert and discriminate manner*".

[52] Ineffectiveness may be blamed on factors such as misguided leadership; political-ideological preconceptions; doctrinal rigidity; defective communication and co-ordination; unimaginativeness, distraction and indecision at the tactical, operational and/or strategic levels; poor intelligence; incompetent planning; inadequate training; lack of equipment; wasteful allocation and expenditure of resources; reckless bravery and adventurism; indiscipline; cowardice; low morale; defeatism; and so on. See, e.g., Dixon, *supra* note 40, at 50 ("poor planning, unclear orders, lack of intelligence (in both senses of the word) and fatal acquiescence to social pressures"), 66 ("unrelieved stupidity" and generals being "inexperienced, irresolute and lacking moral courage"), 144 ("passivity and courtesy, rigidity and obstinacy, procrastination, gentleness and dogmatism"), 148 ("inappropriate risk-taking, underestimation of the enemy, the neglect of unpalatable information and a failure of technology").

Where there is no rational military end set, the act in question might be purposeless and incapable of being materially necessary in any meaningful sense of the expression. The Rape of Nanking may be noted in this regard.

3.2 Relative Non-Necessities

The second manner in which non-necessity may be construed is where it emanates from the lack of cogency under the circumstances between an otherwise reasonably attainable end sought and the otherwise reasonably actionable means taken.[53] Examples include wastefulness, excessiveness, and impertinence.

3.2.1 Wastefulness

Wastefulness means expending more resources than would be reasonably required to accomplish a military goal under the prevailing circumstances.[54] Failing to achieve an economy of force[55] typifies a non-necessity of this nature. Admittedly, calculating the economy of force in military operations, as well as determining what makes particular belligerent conduct economical as opposed to wasteful, would be anything but straightforward. Nevertheless, several formulas, such as the Lanchester's Square Law for a given sector of ground combat and its variations, have been suggested.[56]

During World War II, General Lloyd Fredendall of the U.S. Army received criticism for what may be characterised as the wasteful – not to mention ineffectual – expenditure of resources, that is, the command post he had constructed near Tebessa. According to one account:

> Commanders usually try to establish their headquarters near a road, adjacent to existing communications facilities and close enough to the combat units for convenient visits. Fredendall's was distant from the front and far up a canyon, a gulch that could be entered only by a barely passable road constructed by his corps engineers. Though towering mountains and wooded hillsides concealed his presence, he had underground shelters dug and blasted for himself and his staff. Two hundred engineers would work for more than three weeks on this project, then abandon it unfinished under the German threat at Kasserine … To those who asked, Fredendall explained that German aircraft were active over the area and that they made special efforts to destroy command posts. He had gone underground because he had no intention of having his activities disrupted. Though sixty or seventy miles behind the front was rather far for frequent visits to the combat units, he saw no need to be closer. He would run the battle by telephone and radio.[57]

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[53] As noted earlier, however, the mere fact that certain Clausewitzian friction attends a given act in war is not itself indicative of the act's lack of military necessity. The relevant comparison is not one with paper-perfect, arm-chair alternatives, but one with those that are reasonably actionable, friction having been taken into account. Nor, for that matter, is it perforce the case that a measure's non-necessity derives from it not being the least injurious amongst those reasonably available courses of action that are similarly conducive towards the end's attainment, or from it not retaining some acceptable ratio between the gain sought and the harm occasioned. Limiting injury and proportion are elements of what might be termed "juridical" military necessity. See Part III below.

[54] See, e.g., Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War", 35 *Harvard International Law Journal* 49 (1994), at 53-54: "Belligerents tend to use the minimal force necessary to achieve their political objectives".

[55] The U.S. Joint Chiefs of Staff explain economy of force in the *Joint Operations* manual as follows: "The purpose of the economy of force is to allocate minimum essential combat power to secondary efforts. Economy of force is the judicious employment and distribution of forces. It is the measured allocation of available combat power to such tasks as limited attacks, defense, delays, deception, or even retrograde operations to achieve mass elsewhere at the decisive point and time". See Joint Chiefs of Staff, *Joint Operation (Joint Publication 3-0)* (2008), appendix A, at A-2. See also Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis", 1 *Harvard National Security Journal* 5 (2010), at 33 n.92; Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual* (2015), at 60, 1056.

[56] See, e.g., Paul K. Davis, *Aggregation, Disaggregation, and the 3:1 Rule in Ground Combat* (1995), at 2-6.

[57] Martin Blumenson, *Kasserine Pass: Rommel's Bloody, Climactic Battle for Tunisia* (1966), at 86-87.

Fredendall also had an entire anti-aircraft battalion emplaced to protect his command post.[58] General Dwight D. Eisenhower was quoted as saying: "It was the only time during the war that I ever saw a higher headquarters so concerned over its own safety that it dug itself underground shelters".[59] Fredendall sought the protection of his headquarters against detection and attack by German aircraft.[60] He endeavoured to accomplish this objective by choosing the particular location for it and by expending considerable military resources – such as engineers for its construction and anti-aircraft batteries for its defence.[61] Some degree of protection from aerial threats, as well as some corresponding resource expenditure, may be reasonable for any military headquarters. It is arguable, however, that Fredendall's was exaggerated in the end sought and wasteful in the means taken.

During the Cuban Revolution, Che Guevara apparently came to regard targeted assassinations – he called it "terrorism"[62] – as a wasteful tactic. Thus,

> In special circumstances, after careful analysis, assaults on persons will be used. In general, we consider that it is not desirable except for the purpose of eliminating some figure who is notorious for his villainies against the people and the virulence of his repression. Our experience in the Cuban struggle shows that it would have been possible to save the lives of numerous fine comrades who were sacrificed in the performance of missions of small value. Several times these ended with enemy bullets of reprisal on combatants whose loss could not be compared with the results obtained. Assaults and terrorism in indiscriminate form should not be employed.[63]

Here, targeted assassination was a means being considered for the purpose of eliminating individual figures notorious for their villainies against the people. For Guevara, the wastefulness of this tactic would issue from his conclusion that "it would have been possible to save the lives of numerous fine comrades who were sacrificed in the performance of missions of small value".[64]

3.2.2 Excessiveness[65]

As a type of non-necessity, excessiveness would imply the combination of two things. First, the means taken accomplishes its end. Second, the means also generates externalities. Expending more resources than would otherwise be reasonably required to accomplish a military goal would be excessive if, by doing so, the expender achieves that goal as well as some other consequences immaterial to the goal's accomplishment. Understood thus, it might be said that excessiveness is a species of wastefulness.

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[58] See Stephen E. Ambrose, *D-Day, June 6, 1944: The Climactic Battle of World War II* (1994), at 361.
[59] Richard Collier, *The War in the Desert* (1977), at 162.
[60] See Blumenson, *Kasserine Pass*, *supra* note 57, at 86-87.
[61] See Collier, *supra* note 59, at 162.
[62] See Che Guevara, *Guerrilla Warfare* (1961; J.P. Morray trans., 1985), at 139-140: "Sabotage has nothing to do with terrorism; terrorism and personal assaults are entirely different tactics. We sincerely believe that terrorism is of negative value, that it by no means produces the desired effects, that it can turn a people against a revolutionary movement, and that it can bring a loss of lives to its agents out of proportion to what it produces. On the other hand, attempts to take the lives of particular persons are to be made, though only in very special circumstances; this tactic should be used where it will eliminate a leader of the oppression. What ought never to be done is to employ specially trained, heroic, self-sacrificing human beings in eliminating a little assassin whose death can provoke the destruction in reprisal of all the revolutionaries employed and even more".
[63] *Ibid.,* at 131. Guevara goes on to state (*ibid.*): "More preferable is effort directed at large concentrations of people in whom the revolutionary idea can be planted and nurtured, so that at a critical moment they can be mobilized and with the help of the armed forces contribute to a favorable balance on the side of the revolution".
[64] *Ibid*.
[65] To be abundantly clear, however, the expression "excessiveness" is used here in a strictly material sense. Of interest is *not* excessiveness of the sort prohibited, *inter alia*, in Article 51(5)(b) of Additional Protocol I. See Article 51(5)(b), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977).

Concentrated artillery bombardment commonly practiced by the Allies during World War I is a case in point. The Battle of Neuve Chapelle in March 1915 saw the concentration of artillery fire reach one gun for four yards of attacking front.[66] The then-prevailing doctrine emphasised the importance of maximising the volume of shells falling per unit of space (i.e., the means taken) with a view to destroying as many physical obstacles on it as possible (i.e., the end sought) ahead of an infantry advance.[67] Inevitably, those shells which successfully eliminated obstacles such as barbed wires would come at the expense of numerous others which hit surfaces not, or no longer, containing any obstacle.[68]

The inefficient excessiveness of bombarding Neuve Chapelle led to an adjustment in the barrage technique. At the Battle of Aubers in May 1915, "the bombardment before the attack on the ridge was more deliberate, and primarily concerned with accurate wire-cutting".[69] This shift may have reduced the bombardment's excessiveness *vis-à-vis* its stated purpose. One commentator notes, however, that what was really needed, and later implemented for efficiency, is a shift in the purpose sought (i.e., from maximum material damage to undermining enemy morale) and in the means taken (i.e., from the heaviest possible bombardment to one that catches the enemy by surprise and maximises intensity).[70]

3.2.3 Impertinence

Impertinence is what results where the stated, otherwise reasonably attainable objective would not be served in any meaningful way by pursuing, even successfully, the means chosen.

In 2007, the Ig Nobel Prize for Peace was awarded to the U.S. Air Force Wright Laboratory "for instigating research & development on a chemical weapon – the so-called 'gay bomb' – that will make enemy soldiers become sexually irresistible to each other".[71] The award was based on research proposed for the development, *inter alia*, of:

> Chemicals that effect [*sic*] human behavior so that discipline and morale in enemy units is adversely effected [*sic*]. One distasteful but completely non-lethal example would be strong aphrodisiacs, especially if the chemical also caused homosexual behavior. Another example would be a chemical that made personnel very sensitive to sunlight.[72]

Reportedly, however, the effort to develop weapons such as those which would simulate flatulence amongst enemy soldiers was not pursued when "researchers concluded that the premise for such a device was fatally flawed because 'people in many areas of the world do not find faecal odour offensive, since they smell it on a regular basis'".[73] The concern expressed by the Ig Nobel laureates might be reformulated as follows: There is a danger that the stated objective of adversely affecting enemy discipline and morale will not be pertinently served even if the bomb does simulate flatulence amongst enemy soldiers as intended.

Although it may come across as harsh historical second-guessing, being confronted with paradigm-changing weapons and tactics sometimes prompted warring parties to take courses of action which were impertinent *vis-à-vis* their military goals. Thus, at Agincourt in 1415, the numerically

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[66] See Ian V. Hogg, *Barrage: The Guns in Action* (1970), at 11-13.
[67] See *ibid.*, at 15.
[68] There were complaints in the aftermath that "the wire cutting was patchy and the firing careless, one or two shells actually falling short during the barrage". *Ibid.,* at 16.
[69] *Ibid.*
[70] See *ibid.*, at 14-15.
[71] "Winners of the Ig® Nobel Prize", Improbable Research (http://improbable.com/ig/winners). See also "'Gay Bomb' Scoops Ig Nobel Award", *BBC News*, 4 October 2007.
[72] U.S. Air Force Wright Lab., *Harassing, Annoying, and "Bad Guy" Identifying Chemicals* (1994) (http://www.sunshine-project.org/incapacitants/jnlwdpdf/wpafbchem.pdf).
[73] See "US Military Pondered Love Not War", *BBC News*, 15 January 2005.

superior French men-at-arms charged "like lemmings" into their death at the hands of English longbows raining on them in a highly confined and increasingly crowded "killing zone".[74] Military historians observe that the disjoint between the victory clearly sought (and assumed) by the French and their seemingly impertinent battlefield behaviour, especially the eschewal of their own longbows, was attributable to the "confrontational ethos of the feudal warrior".[75] Such ethos encompassed the traditional skills, weapons and education by which the feudal warrior identified himself, as well as "the alleged unwillingness of men-at-arms to cross weapons with archers, their social inferiors, when the chance to win glory, and prisoners, in combat with other men-at-arms presented itself".[76] Agincourt arguably exemplifies a non-necessity where the tactics were *not* cogently chosen in view of a military purpose, but driven in reality by impertinent considerations such as social status and personal gain.

4. Conclusion

The foregoing shows that material military necessity is an element of belligerent conduct, which separates fighting that is effective and conducive to success from fighting that is neither. The notion merely entails the truism that it is in each belligerent's strictly strategic self-interest to maximise his or her abilities and that it is similarly in each belligerent's strictly strategic interest to avoid failures.

Indeed, to the consummate soldier of a Clausewitzian cast,[77] a good war is one in which every act constitutes a material military necessity – that is, executed both professionally and with the optimal resource mobilisation, and directed towards a clearly defined, strategically sound, and reasonably attainable military goal under the prevailing circumstances.[78] Of course, as noted earlier, it is eminently possible that a soldier acts in accordance with material military necessity in a given situation without attaining his or her military goal. Despite the soldier's unsparing efforts to the best of his or her occupational competence, he or she may simply fall victim to war's inevitable friction – in other words, without anyone, himself or herself, or indeed anybody else, failing to act in accordance with military necessity. Acting in accordance with it is not, and need not be, a guarantee of success.

As is the case with any other occupation, pursuing material military necessities and avoiding non-necessities is first and foremost a component of vocational competence. This component involves assessing the relationship between the various means available and the various goals that might be pursued in the specific set of circumstances prevailing at the time. The component in question here is also essentially amoral. For our present purposes, "amoral" may be understood as follows: The component's amorality issues from its capacity to be ethically sound as well as unsound. Consequences of ethically pertinent belligerent conduct are readily convertible into material military costs

[74] Robert L. O'Connell, *Of Arms and Men: A History of War, Weapons, and Aggression* (1989), at 104.
[75] *Ibid.*
[76] John Keegan, *The Face of Battle* (1976), at 98.
[77] See von Clausewitz, *supra* note 36, at 187: "An army's military qualities are based on the individual who is steeped in the spirit and essence of [war]; who trains the capacities it demands, rouses them, and makes them his own; who applies his intelligence to every detail; who gains ease and confidence through practice, and who completely immerses his personality in the appointed task".
[78] See *ibid.*, at 102-104, 697-771.

– and benefits.[79] In particular, "amoral" here denotes the idea that affirmatively unethical actions can also be seen as materially competent.[80]

In the next chapter, we will address three major objections that may be raised against this line of reasoning. First, there can be something moral even about evaluating the material necessity or non-necessity of a belligerent act. Second, it is arguably part of a soldier's ethical virtue to fight competently. Third, a soldier's unethical conduct may not really constitute his or her truly professional conduct, all things considered.

[79] Fighting ethically in counterinsurgency exemplifies materially competent and morally beneficial belligerent behaviour. See U.S. Army and Marine Corps, *Counterinsurgency Field Manual* (2007), para. 7-25, at 7-5: "A key part of any insurgent's strategy is to attack the will of the domestic and international opposition. One of the insurgents' most effective ways to undermine and erode political will is to portray their opposition as untrustworthy or illegitimate. These attacks work especially well when insurgents can portray their opposition as unethical by the opposition's own standards. To combat these efforts, Soldiers and Marines treat noncombatants and detainees humanely, according to American values and internationally recognized human rights standards. In [counter-insurgency operations], preserving noncombatant lives and dignity is central to mission accomplishment. This imperative creates a complex ethical environment".

[80] Take the Holocaust and the Rwandan genocide, for example. Assuming that those who committed these atrocities intended to destroy the targeted groups, they were, in their own frighteningly appalling way, quite efficient in exterminating a very large number of victims.

Chapter 3

Objections and Responses

Material military necessity is predicated on the idea that the material component of the belligerent conduct's fitness as a means towards an end is separable from its meta-material components such as ethics. This thesis asserts that, as a matter of principle, the former component is capable of comprehension without reference to the latter. This remains so, although the two may admittedly coincide in certain specific settings.

It follows that the "separability" of these components entails three major tenets. First, military necessity in its strictly material sense is conceivable independently from whatever other meta-material sense or senses it may be seen to carry. Second, military necessity is conceivable in the manner just described, even though it does not exclude the possibility that material competence can form an innate part of ethical competence. Third, their separability remains true, even though it may also be true that ethical competence can form an innate part of material competence.

These three major tenets invite three corresponding objections. Is it not true that the two components involve evaluations of some description and that, as such, they are *moral* in character? Is the vocational virtue of a soldier not merely part of the ethical virtue of a patriotic citizen? Can it be that only ethically virtuous conduct really counts as vocationally virtuous conduct, all things considered? This chapter considers these objections in turn.

1. Military Virtues v. Ethical Virtues

Does it not follow from the very use of evaluative terms, such as "good" war and "bad" war,[1] that there are similarly evaluative statements such as "sound" and "unsound" military decisions? Does this not mean then that there is something innately moral about this fighting being "competent", or that fighting being "incompetent" – that is, fighting or not fighting as a good soldier *should*?[2]

Indeed, there may be something innately moral here. It is submitted however that the innate morality of vocationally competent war-fighting is *not* inherently one of ethical behaviour. In *On*

[1] See Judith Jarvis Thomson, *Normativity* (2008), at 17: "I asked earlier: which judgments are the evaluatives? I gave three examples, namely that D is a good person, E is a good tennis player, and F is a good toaster. They are obviously judgments to the effect that a certain thing is good in a certain respect. We also took note of the existence of such judgments as that G is good at doing crossword puzzles, H is good for England, and I is good for use in making cheesecake. These too are evaluative judgments to the effect that a certain thing is good in a certain respect. We can surely say that all judgments to the effect that a certain thing is good in a certain respect are evaluative judgments".

[2] See *ibid.*, at 1-2 (emphasis in original): "I suggest that we should focus on a different difference among our normative judgments. I will call our judgments that A ought to be kind to his little brother, that B ought to move his rook, and that C ought to get a haircut, *directives*. Intuitively, they differ from our judgment that D is a good person, that E is a good tennis player, and that F is a good toaster, which I will call *evaluatives*. We will want to attend to both kinds of normative judgment".

War, Carl von Clausewitz spoke of "moral factors",[3] "principal moral elements",[4] and "military virtues".[5] Of military virtues of the army, he wrote:

> No matter how clearly we see the citizen and the solider in the same man, how strongly we conceive of war as the business of the entire nation, opposed diametrically to the pattern set by the *condottieri* of former times, the business of war will always remain individual and distinct. Consequently for as long as they practice this activity, soldiers will think of themselves as members of a kind of guild, in whose regulations, laws, and customs the spirit of war is given pride of place. No matter how much one may be inclined to take the most sophisticated view of war, it would be a serious mistake to underrate professional pride (*esprit de corps*) as something that may and must be present in an army to the greater or lesser degree. Professional pride is the natural forces that activate the military virtues; in the context of this professional pride they crystallize more readily.[6]

It is unlikely that von Clausewitz used the expressions "moral" and "virtue" in a manner similar to the same expressions understood in ethical terms. Thus, in Ulrike Kleemeier's words:

> Originally, I used the term "moral virtues" instead of "moral forces". The word "virtue" is not morally neutral in the widespread sense of the expression "moral". To say of somebody that he or she possesses certain virtues means that we praise him or her for being just or kind, etc. The term "force" seems to be more neutral. To push matters to the extreme: perhaps a (war) criminal can have moral forces in the Clausewitzian sense.[7]

Kleemeier lists what she regards as components of Clausewitzian "moral forces": the "faculty of judgment",[8] "bravery" or "courage",[9] and "a passion for reason".[10] It would appear that qualities such as these are merely descriptions – or prerequisites – of excellence in soldiering or effective fighting, rather than those in ethical conduct. The difference, then, would be one between what might be termed *military* virtues, with which von Clausewitz was concerned, on the one hand, and *ethical* virtues, on the other.[11]

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[3] Carl von Clausewitz, *On War* (1832; Michael Howard and Peter Pare eds. trans., 1989), at 184: "[The moral elements] constitute the spirit that permeates war as a whole, and at an early stage they establish a close affinity with the will that moves and leads the whole mass of force, practically merging with it, since the will is itself a moral quantity. Unfortunately they will not yield to academic wisdom. They cannot be classified or counted. They have to be seen or felt. The spirit and other moral qualities of an army, a general or a government, the temper of the population of the theater of war, the moral effects of victory or defeat – all these vary greatly. They can moreover influence our objective and situation in very different ways ... If the theory of war did no more than remind us of these elements, demonstrating the need to reckon with and give full value to moral qualities, it would expand its horizon, and simply by establishing this point of view would condemn in advance anyone who sought to base an analysis on material factors alone".

[4] *Ibid.*, at 186. These elements, according to von Clausewitz, are the following: "the skill of the commander, the experience and courage of the troops, and their patriotic spirit".

[5] *Ibid.*, at 184-189.

[6] *Ibid.*, at 187-188. See also *ibid.*: "An army that maintains its cohesion under the most murderous fire; that cannot be shaken by imaginary fears and resists well-founded ones with all its might; that, proud of its victories, will not lose the strength to obey orders and its respect and trust for its officers even in defeat; whose physical power, like the muscles of an athlete, has been steeled by training in privation and effort; a force that regards such efforts as a means to victory rather than a curse on its cause; that is mindful of all these duties and qualities by virtue of the single powerful idea of the honor of its arms – such an army is imbued with the true military spirit".

[7] Ulrike Kleemeier, "Moral Forces in War", in Hew Strachan and Andreas Herberg-Roth (eds.), *Clausewitz in the Twenty-First Century* (2007) 107, at 107 n.5.

[8] *Ibid.*, at 113.

[9] *Ibid.*, at 114.

[10] *Ibid.*, at 118-119.

[11] Contrary to popular belief, it may be doubted whether von Clausewitz really excluded the possibility of real-life warfare being amenable to ethical constraints. See, e.g., Geoffrey Best, "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, at 5; Paul Cornish, "Clausewitz and the Ethics of Armed Force", 2 *Journal of Military Ethics* 213 (2003), at 219; Michael Howard, "*Temperamenta Belli*: Can War Be Controlled?", in Michael Howard (ed.), *Restraints on War:*

A similar distinction has been suggested by Judith Jarvis Thomson:

> Let us now look again at "Smith is a good liar." My characterization of the notions "praise/dispraise *simpliciter*" and "praise/dispraise *qua*" yields the following. Saying "Smith is a good liar" is dispraising Smith *simpliciter*, since it is or would be dispraiseworthy in Smith to be a liar. But it is also praising Smith *qua* liar, since it is saying that as liars go, Smith is a good one. So also for "Jones is good at avoiding responsibility for what he does." Saying that is dispraising Jones *simpliciter*, since it is or would be dispraiseworthy in Jones to avoid responsibility for what he does. But it is also praising Jones *qua* person who avoids responsibility for what he does, since it is saying that as people who do that go, he is good at it.[12]

Now, in relation to virtues,[13] Thomson observes:

> We should notice … that … being a clever liar is a virtue in a liar. (The following is plainly true: a liar is as good a liar as a liar can be only if he or she is a clever liar. And it hardly needs saying that some liars are clever liars.) So be it. Being a clever liar is certainly not a moral virtue [read "ethical virtue" for the purposes of this thesis] in a liar. But our use of "virtue" here is the broad one, and being a clever liar *is* in that broad use a virtue in a liar – just as while being a sharp carving knife is not [an ethical] virtue in a carving knife, it is a virtue in a carving knife.[14]

Thomson speaks of desirable qualities in a soldier as "virtues": "No doubt it is *a* virtue of a soldier to fight well; another is to obey appropriate orders".[15] Here, "fight well" may be understood in comparison to Thomson's discussion of "play chess well".[16] Thus, "a chess move is strategically correct if and only if it is a move conducive to winning"[17]; so is, it would stand to reason, a belligerent move. It may therefore be said that "rules" of chess strategy[18] are analogous to "rules" of military strategy. Strategic correctness in war would simply mean pursuing military necessities and avoiding non-necessities.

Thomson uses the expression "virtue" broadly[19] and, more importantly, distinguishes a "virtue" in a thing or a person of a particular functional nature from a "moral virtue" (again, read "ethical virtue") in a person *simpliciter*.[20] Thus, being a soldier who fights well is a military virtue in a soldier[21]; being an ethical person is an ethical virtue in a person.[22]

It is entirely conceivable that military virtues and ethical virtues in a person may coincide. What is not so is the idea that one type of virtue necessarily matches or entails the other. In Thomson's

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Studies in the Limitation of Armed Conflict (1979) 1, at 1; David J. Lonsdale, "A View from Realism", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 29, at 34.

[12] Thomson, *supra* note 1, at 57-58.

[13] See *ibid.*, at 73: "For F to be a virtue in a K is for it to be the case that (i) K is a goodness-fixing kind, and (ii) a K is as good a K as a K can be only if it has F, and (iii) it is possible for there to be a K that lacks F, and (iv) it is not nomologically impossible for there to be a K that has F".

[14] *Ibid.*, at 74. See also *ibid.*, at 81: "[T]here may be strategic, tactical, and political virtues in a plan or act".

[15] *Ibid.*, at 69 n.1. For being a soldier who fights well to be a virtue in a soldier is for it to be the case: (i) that the kind soldier is a goodness-fixing kind; (ii) that a soldier is a good soldier only if it has being a soldier who fights well; and (iii) that it is possible for there to be a soldier that lacks being a soldier who fights well. See *ibid.*, at 71.

[16] *Ibid.*, at 169 n.3.

[17] *Ibid*.

[18] *Ibid*.

[19] *Ibid.*, at 69.

[20] See *ibid.*, at 79-81.

[21] See *ibid.*, at 80-81. Being a soldier who fights well is a military virtue in a soldier just in case: (i) that a soldier is militarily as good a soldier as a soldier can be only if it has being a soldier who fights well; (ii) that it is possible for there to be a soldier that lacks being a soldier who fights well; and (iii) that it is not nomologicaly impossible for there to be a soldier that has being a soldier who fights well. See *ibid.*, at 80.

[22] See *ibid.*, at 79-80. Being an ethical person is a moral virtue in a person just in case: (i) that a person is morally as good as a person can be only if it has being an ethical person; (ii) that it is possible for there to be a person that lacks being an ethical person; and (iii) that it is not nomologically impossible for there to be a person that has being an ethical person. See *ibid.*, at 79.

view, for the statement "A ought to V"[23] to be true is for it to be true that "if a K doesn't V, then it is a defective K".[24] Let A denote a soldier, K the kind soldier, and V pursuing military necessities and avoiding non-necessities. For the statement "a soldier ought to pursue material military necessities and avoid non-necessities" to be true is for it to be true that if a soldier does not pursue military necessities and/or avoid non-necessities, then he or she is a defective soldier. In other words, "being a soldier who pursues military necessities and avoids non-necessities" is a military virtue in a soldier.

It turns out that Thomson's formula for the truth of an "A ought to V" statement includes an additional condition, namely that:

> [T]here is no directive kind K+ such that K is a sub-kind of K+, and such that if a K+ does V, then it is a defective K+.[25]

In other words, for the statement "A ought to V" to be true is for the following to be true, that:

> If a K doesn't V, then it is a defective K; and there is no directive kind K+ such that K is a sub-kind of K+, and such that if a K+ does V, then it is a defective K+.

Consider the December 1944 Malmédy Massacre. During their dash to the Meuse River, elements of SS Obersturmbannführer Joachim Peiper's unit killed hundreds of American prisoners of war (POWs) at various locations.[26] An order had apparently come all the way from Adolf Hitler, via Colonel General Josef Dietrich, commander of the 6th SS Panzer Army.[27] It was ordered that the German forces "act with brutality and show no humane inhibitions", that "a wave of fright and terror" should precede the attack, and that "the enemy's resistance was to be broken by terror".[28] Taking the creation of terror as their stated purpose yields the result that giving no quarter was arguably a military necessity.[29]

It is also possible that the expected pace of Peiper's advance made it materially undesirable to care for enemy soldiers taken prisoner. Peiper is quoted as seeking to have the killings excused "by the rapid movement of his kampfgruppe and its inability to retain prisoners under guard".[30] The possibility that the expected pace of Peiper's advance made it materially undesirable to care for enemy soldiers taken prisoner is contemplated, if not endorsed, in one account of the event:

> It has to be noted that Peiper's men faced a very real problem in deciding what to do with the large number of prisoners taken in the Baugnez area. According to all German reports, Peiper was in a hurry to get to Ligneuville and capture the U.S. headquarters there, and he ordered the rest of the *Kampfgruppe* to follow up as quickly as possible. Faced with mounting delays and an irate commander, what were those at the crossroads to do with the prisoners? Armored columns had no spare manpower to look after POWs, and none of the follow-up infantry formation were anywhere near Five Points at the time. More than 100 men, even if they have surrendered and been disarmed, cannot be left to their own devices for long. Nor could they be ordered to start marching to the rear into captivity, as is usual in such circumstances, because there was a simple problem of geography. Peiper had penetrated the American lines on a very narrow front – a single road –

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[23] A denotes a member of function-kind K and V a verb-phrase.

[24] Thomson, *supra* note 1, at 212, 214. This also means that K is what Thomson calls a "directive kind" as well. See *ibid.*, at 209: "Let us say that a kind K is a directive-generating kind – a directive kind, for short – just in case there is such a property as being a defective K".

[25] See *ibid.*, at 214.

[26] See C.E. Straight, Office for Judge Advocate General for War Crimes, *Report of the Deputy Judge Advocate for War Crimes, European Command* (1948), at 48. See generally Richard Gallagher, *Malmédy Massacre* (1964), at 55-72.

[27] See Straight, *supra* note 26, at 48.

[28] Hugh M. Cole, *The Ardennes: Battle of the Bulge* (1965), at 262-263; Gallagher, *supra* note 26, at 111.

[29] In the event, however, the terror did not produce the hoped-for breakdown of Allied resistance. Quite on the contrary, the news of Malmédy "undoubtedly stiffened the will of the American combatants". See Cole, *supra* note 28, at 261. See also *ibid.,* at 264: "There were American commanders who orally expressed the opinion that all SS troops should be killed on sight and there is some indication that in isolated cases express orders for this were given".

[30] *Ibid.*, at 263.

> and this meant that as far as the Germans were concerned the enemy lay along the N-23 to the northwest in Malmédy, the N-32 to the northeast in Waimes and the N-23 to the south in Ligneuville. There was therefore no road along which they could order the prisoners to set off. And it was more than possible that American combat units would move south out of Malmédy at any moment. A combination of all these factors – an angry SS lieutenant colonel in a hurry, no spare men to guard the prisoners, no easily available route to the rear and the possibility of American combat troops arriving at any moment – must have created a nightmare scenario for the officer in charge. It is therefore quite possible that he decided to take the simplest and most practical way out of his dilemma by giving an order to shoot the prisoners.[31]

On this view, Peiper's objective would be maintaining the momentum of his rapid advance, and his means of dispatching surrendered enemy soldiers would arguably constitute a military necessity for his objective.

Given Peiper's objectives and the circumstances prevailing at the time, killing the American POWs in Malmédy might have signalled a military virtue and failing to do so a military defect. If Peiper's men were to act not as soldiers (i.e., K) but as human beings (i.e., K+), however, it is arguable that the second condition for the truth of Thomson's statement "A ought to V" was not satisfied.[32] It follows, then, that evaluating the virtues of the function-kind soldier is not the same as evaluating the virtues of the super-kind human being. What is important for our purposes is that the former is capable of consideration, at least conceptually, without reference to the latter.

2. Military Virtues as Ethical Virtues

This thesis proceeds on the assumption that prosecuting war is a purposive activity.[33] It is assumed that the soldier being called upon to pursue military necessities and avoid non-necessities actually wants to succeed in what he or she has set out to do. Of playing chess, Thomson notes:

> When we say, "Alfred ought to move his queen," ... [w]e are also *assuming* that Alfred wants to win the game. We normally make these two assumptions when watching chess players, and we are normally right to make them. If we weren't making them, we wouldn't say, "Alfred ought to move his queen." At any rate, we would take a closer look at Alfred's circumstances and wants and weigh one thing against another before saying those words.[34]

This purposive assumption leads us to the second major objection to the idea that material military necessity is essentially *a*moral. There is perhaps something ethical even about being good *qua* soldier. It is indeed possible that a military virtue may *itself* be an ethical virtue.

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[31] Michael Reynolds, "Massacre at Malmédy During the Battle of the Bulge", *World War II* (February 2003) 43, at 48-49.

[32] Another way of putting it would be to point out the fact that, regarding those "ought" statements involving the kind human being, Thomson proposes a special normative thesis. See Thomson, *supra* note 1, at 216: "If A is a human being, then for it to be the case that A ought to V_{act} is for it to be the case that if A knows at the time what will probably happen if he V_{act}s and what will probably happen if he does not, then he is a defective human being if he does not". There are many possible kinds of defects in a human being. Thomson lists, among others: being malicious, callous, lazy, greedy, unjust, reckless, imprudent, ruthless, cruel, sanctimonious, jealous, rude, weak-willed, unscrupulous, vengeful, petty, intemperate, cowardly, irresolute, misanthropic, irresponsible, lacking in self-respect, and lacking in generosity. See *ibid.,* at 218. Plainly, some – though perhaps not all – of these defects are properly seen as ethical in nature. Moreover, some of these same defects clearly exemplify instances where military defects and ethical defects overlap each other.

[33] So did von Clausewitz, albeit implicitly. Clausewitzian theory makes no sense whatsoever, unless one proceeds on the basis that each belligerent party wants to bring the war it fights to a conclusion on its own terms. See von Clausewitz, *supra* note 3, at 90-99 (regarding purpose and means in war).

[34] Thomson, *supra* note 1, at 172. Emphasis in original.

The United States has long maintained a Code of Conduct for Members of United States Armed Forces.[35] It admonishes, among other things, that the U.S. soldier "make every effort to escape" and "accept neither parole nor special favors from the enemy" if captured. As a POW, he or she is to "give no information or take part in any action which might be harmful to [his or her] comrades", "evade answering further questions to the utmost of [his or her] ability", and "make no oral or written statements disloyal to [his or her] country and its allies or harmful to their cause". Implicit in this code of conduct is the idea that refusing to divulge accurate intelligence to the enemy is not only a military necessity, but also a sign of loyalty to comrades-in-arms as well as patriotic devotion to the nation. Does it not follow, then, that the ethical virtue of a patriotic citizen includes the military virtue as a soldier?

It may do so. Michael Walzer speaks of the two-fold responsibility that a mid-level field commander has through the chain of command. Of the upward variety, Walzer observes:

> [The mid-level field commander's] obligation is to win the battles that he fights or, rather, to do his best to win, obeying the legal orders of his immediate superiors, fitting his own decisions into the larger strategic plan, accepting onerous but necessary tasks, seeking collective success rather than individual glory. He is responsible for assignments unperformed or badly performed and for all avoidable defeats. And he is responsible up the chain to each of his superiors in turn and ultimately to the ordinary citizens of his country who are likely to suffer for his failures.[36]

Of the commander's downward responsibility, Walzer notes:

> His soldiers are in one sense the instruments with which he is supposed to win victories, but they are also men and women whose lives, because they are his to use, are also in his care. He is bound to minimize the risks his soldiers must face, to fight carefully and prudently, and to avoid wasting their lives, that is, not to persist in battles that cannot be won, not to seek victories whose costs overwhelm their military value, and so on. And his soldiers have every right to expect all this of him and to blame him for every sort of omission, evasion, carelessness, and recklessness that endangers their lives.[37]

On this view, it is the ethical duty of a soldier to fight competently by doing his or her best to pursue military necessities and avoid non-necessities. It would appear, however, that the ethical virtue of the kind being articulated by Walzer here emanates from the particular community for which a soldier fights.[38] Nothing in the community-specific ethical virtue makes the strictly *a*moral construal of military virtue unintelligible. In other words, the strictly military virtue may *also* constitute a community-specific ethical virtue. This is a matter of contingency. Crucially, it does *not* show that this

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[35] See Code of Conduct for Members of the Armed Forces of the United States, Executive Order No. 10631 (17 August 1955; amended 1977, 1988):

I. I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

II. I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

III. If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

IV. If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

V. When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statement disloyal to my country and its allies or harmful to their cause.

VI. I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

[36] Michael Walzer, *Arguing About War* (2004), at 23-24.

[37] *Ibid.*, at 24.

[38] In a perverse way, one could say that terrorists might have moral virtues particular to the community or communities in whose name or on whose behalf they commit their acts. See, e.g., Avishai Margalit and Michael Walzer, "Israel: Civilians & Combatants", *New York Review of Books*, 14 May 2009.

must be inevitable, i.e., true for all real as well as hypothetical communities. Nor, more importantly, does it show that the military virtue of a soldier forms part of the general ethical virtue of a human being. To use Thomson's terminologies, it may be, and in some specific situations is, the case that being a soldier who pursues military necessities and avoids non-necessities is a military virtue in a soldier and a patriotic virtue in a citizen.[39] The fact that military competence can entail community-specific ethical significance merely shows that the former competence is amenable to being understood "on its own terms", as it were, in the first place. And it is precisely in this sense that this thesis argues that material military necessity can be usefully and illuminatingly understood on its own terms.

3. Ethical Virtues as Military Virtues

There is a more serious objection to separability as an idea. Is there not something more to a soldier's vocational competence than his or her mere ability to fight effectively and "get the job done?" Is it not true that a soldier would not even be a vocationally virtuous soldier unless he or she is also an ethically virtuous soldier? Where performing *X* is consistent with material military necessity yet inconsistent with what is ethically expected of a soldier, should that soldier's competence *qua* soldier ultimately not depend on his or her refraining from *X*?

Both ethical and military virtues sometimes point the soldier in the same behavioural direction. Thus, in Iraq, fighting insurgents in such a way to garner the support of local residents proved not only strategically sound but also ethically important. Thus, for instance, a degree of success in stabilising Mosul in 2003 has largely been attributed to the adoption of the types of methods advocated in the U.S. counterinsurgency manual.[40] Conversely, destroying the cognitive faculties of Mohammed al-Qahtani, a high-value intelligence detainee, through harsh interrogation methods was arguably both unethical and lacking in military necessity.[41]

The objection at issue, however, is not with the instrumentalist "strategic necessity" (expedient attention to ethical considerations).[42] Rather, it asserts that only ethically competent belligerent conduct counts – or should count, at any rate – as *truly* vocationally competent belligerent conduct. To begin with, it may be unethical to do what would otherwise be materially competent. At a 1943 speech before SS officers, Heinrich Himmler stated: "Whether 10,000 Russian females fall down from exhaustion while digging an anti-tank ditch interests me only in so far as the anti-tank ditch for Germany is finished".[43] Forcing the 10,000 Russian women in captivity to perform physical labour to exhaustion may have arguably constituted a military necessity *vis-à-vis* its objective, namely an anti-tank ditch being completed. The question is whether, all things considered, such a clearly unethical course of action can ever be said to be militarily virtuous.

Conversely, it might be unethical to avoid what would otherwise be materially incompetent. Frank Richards, a World War I veteran, recalled his November 1914 action in northern France at a village called Englefontaine:

> When bombing dug-outs or cellars it was always wise to throw bombs into them first and have a look around them after. But we had to be very careful in this village as there were civilians in some of the cellars. We shouted down them to make sure. Another man and I shouted down one cellar twice and receiving no reply were just about to pull the pins out of our bombs when we heard a woman's voice cry out and a young lady came up the cellar steps. As soon as she saw us

[39] See Thomson, *supra* note 1, at 69.
[40] See U.S. Army and Marine Corps, *Counterinsurgency Field Manual* (2007), at xv. Such attribution is by no means unanimous, however. See, e.g., Martin van Creveld, *The Changing Face of War: Lessons of Combat, from the Marne to Iraq* (2006), at 270; Bradley Graham, "A Sharp Shift from Killing to Kindness", *The Washington Post*, 4 December 2004.
[41] See Bob Woodward, "Detainee Tortured, Says U.S. Official", *The Washington Post*, 14 January 2009. Al-Qathani's lawyer reportedly described him as "'paranoid,' 'incoherent,' 'cracked'". See Washington Media Associations, *Torturing Democracy* (2008).
[42] See Lonsdale, *supra* note 11, at 39-40.
[43] Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, 5 *Nazi Conspiracy and Aggression* (1946), at 559.

> she started to speak rapidly in French and gave us both of us a hearty kiss. She and the members of her family had their beds, stove and everything else of use in the cellar which they had not left for some days. They guessed an attack was being made and when we first shouted down had been too frightened to answer. If the young lady had not cried out when she did we would have innocently murdered them all.[44]

Richards considered it "wise" – or perhaps militarily virtuous or materially competent, to use the expression adopted in this thesis – "to throw bombs into cellars first and have a look around them after".[45] But he also clearly found it ethically troubling to do so. In fact, he found it ethically troubling to such a degree that he decided *not* to do the wise thing.[46] Instead, Richards, together with his colleague, chose to shout several times into the cellar.[47] Walzer observes:

> *Innocently murdered*, because they had shouted first; but if they had not shouted, and then killed the French family, it would have been, Richards believed, murder simply. And yet he was accepting a certain risk in shouting, for had there been German soldiers in the cellar, they might have scrambled out, firing as they came. It would have been more prudent to throw the bombs without warning, which means that military necessity would have justified him in doing so … And yet Richards was surely doing the right thing when he shouted his warning. He was acting as a moral man ought to act; his is not an example of fighting heroically, above and beyond the call of duty, but simply of fighting well. It is what we expect of soldiers.[48]

The objection holds that, where it appears to be vocationally competent *qua* soldier yet it is unethical *qua* human being to perform *X*, *true* vocational competence *qua* soldier, all things considered, lies with refraining from *X*. This is so, because ethical virtues form an integral component of military virtues. It follows that separability as an idea cannot stand.

There may be military virtues "in the narrow, material sense" and military virtues "in the broad, holistic sense". In the former, military virtues basically mean one's ability to "get the job done", whereas in the latter, military virtues include one's ability and inclination to preserve humanity such as retaining one's autonomous moral agency. It has been suggested that being a vocationally competent officer entails preserving the humanity of those under his or her command. On this view,

> we can ... attribute to officers some level of control – and therefore responsibility – over the specific actions of their troops that might place the troops' humanity in jeopardy ... A warrior's humanity is most obviously at risk when he or she participates in an atrocity. Vile actions such as rape, the intentional slaughter of civilians, or the torture of prisoners of war dehumanize the victims and degrade the perpetrators. We require officers not to lead or order their subordinates to commit criminal actions such as these.[49]

Perhaps military necessity in this "broad, holistic sense" may entail always acting in a manner that promotes or preserves humanity. Even if one were to concede that ethical virtues are intrinsic to the holistic construal of military virtues, however, some separate consideration of those remaining bits of the latter not entailing ethics is still possible. It is, then, in this narrow sense that this thesis uses the term "material military necessity".

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[44] Frank Richards, *Old Soldiers Never Die* (1966), at 198-199. For further discussion of Richard's story, see Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 4th ed. (2006), at 152, 154.
[45] Richards, *supra* note 44, at 198-199.
[46] See *ibid.*
[47] See *ibid*.
[48] Walzer, *supra* note 44, at 152, 154 (quoting Richards, *supra* note 44, at 199). In contemporary terms, the "wise" thing to do in Richards' situations is akin to ensuring force protection. Force protection is a matter that raises questions of risk-taking and involves an ethical principle known as double effect. See Part II, Chapter 7, and Part III, Chapter 8 below.
[49] Shannon E. French, "Sergeant Davis's Stern Charge: The Obligation of Officers to Preserve the Humanity of Their Troops", 8 *Journal of Military Ethics* 116 (2009), at 121-122.

4. Conclusion

The idea that the material and meta-material components of military necessity are separable is a modest one. This thesis merely asserts that the former component is capable of apprehension and evaluation without reference to the latter component. Strict materiality is but one dimension in our understanding of military necessity; it insists neither that there can be no other dimensions, nor that it never overlaps with such dimensions.

This chapter's main argument is rather that a given belligerent act can sometimes be considered militarily necessary from a strictly amoral point of view but not from a morally engaged one – or vice versa, as the case may be. We should be mindful of these possibilities, lest we speak at cross-purposes while debating about the military necessity of a belligerent act. This awareness becomes all the more important as we will soon begin approaching military necessity normatively and juridically.

This concludes Part I's discussion of military necessity in its strictly material context. Part II proceeds with "normative" military necessity, i.e., military necessity understood in the context of IHL norm-creation. In that context, military necessity is generalised and stipulatory. The material question was whether a given act was or would be militarily necessary, in view of its particular purpose and circumstances. The question in Part II will be what the framers of international humanitarian law should do about this kind of act, *once* it is agreed that it would generally be materially necessary or unnecessary *vis-à-vis* an otherwise legitimate kind of military purpose.

Part II's central assertion is that military necessity is normatively indifferent. Conduct is normatively indifferent where the two propositions – "It is permitted to perform it", and "It is permitted to refrain from it" – are both true simultaneously. Military necessity permits the belligerent to pursue what is materially necessary and to avoid what is unnecessary. It also leaves the belligerent at liberty to miss opportunities and commit blunders, however, because neither victory nor defeat is *per se* of concern to international humanitarian law. The law does not make it its business to ensure that each belligerent maximise its prospect of success or minimise its prospect of failure. IHL framers have no reason to obligate militarily necessary behaviour or prohibit militarily unnecessary behaviour.

Part II

Military Necessity in Its Normative Context

In Part I, we examined military necessity in its strictly "material" – that is to say, "*a*moral" – context. Part I's Chapter 2 raised questions, such as "What did it mean for Allied commanders in early 1944 to say that 'it was militarily (un)necessary to destroy the Abbey sitting atop Monte Cassino'?", "Is causation *sine qua non* an element of material military necessity?", "What makes certain belligerent action a material military non-necessity?", and "What does it mean for a soldier to pursue material military necessities and avoid non-necessities?"

Our discussion revealed that a particular belligerent act is capable of military necessity assessment given enough pertinent facts. Allied commanders drew reasonable, though dissimilar, conclusions about the material military necessity or non-necessity of the Monte Cassino Abbey's destruction, based on the facts then available to them. Whatever one's assessment of the abbey's destruction may be, however, one cannot determine in general and *a priori* whether destroying a building sitting atop a topographically dominant elevation is or would be militarily necessary or unnecessary.

Material military necessity is a function of the ends sought, the means chosen, and the circumstances prevailing or anticipated at the time. An act's military necessity or otherwise is susceptible neither to being taken out of its particular circumstances nor to being generalised. Nor does the notion involve any requirement of causation *sine qua non*. An act may constitute a material military non-necessity on account of its lack of cogency *vis-à-vis* its purported goal, as well as its purposelessness, wastefulness, excessiveness, or impertinence. Pursuing material military necessities and avoiding non-necessities is a strictly *a*moral component of a soldier's vocational competence that separates belligerent conduct that is effective from that which is not.

Part I's Chapter 3 addressed three major objections to the idea that military necessity can be seen in its strictly material sense, i.e., in isolation from other, moral or ethical perspectives. First, is there not something inherently moral about this particular belligerent action being "competent", or that belligerent action being "incompetent" – in other words, fighting, or failing to fight, as a good soldier *should*? Second, could it not be the case that a soldier's strictly material military competence is itself part of his or her broader ethical competence as a soldier? Third, is it not true that only ethically competent belligerent behaviour counts as *truly* vocationally competent behaviour, all things considered?

We saw that one can meaningfully distinguish between a soldier being virtuous because he or she fights militarily well, on the one hand, and a person being virtuous because he or she behaves ethically well, on the other. While it may indeed be the ethical duty of a soldier to fight competently by doing his or her best to purse material military necessities and avoid non-necessities, the content of this duty is capable of consideration that is separate from its broader ethical status. Nor is it the point of our discussion of material military necessity that, at the end of the day, a soldier's true vocational competence must be seen holistically (it is possible that it must be so). Our point is rather that even a holistic understanding of such competence includes elements that are strictly material, and that it is meaningful to discuss these elements when trying to understand what military necessity encompasses.

Part II of this thesis investigates military necessity in its "normative" context. This is a context where military necessity appears as a weighty consideration in the process of norm-creation in international humanitarian law.

We are no longer concerned as to whether a given course of action constitutes, or would constitute, a material military necessity or non-necessity, in view of its specific objective under its specific set of circumstances. At issue here is whether a certain kind of conduct tends to constitute, or is deemed capable of constituting, a material military necessity or non-necessity; and whether, given the said tendency or capability, international humanitarian law should obligate, permit, restrict, or prohibit this kind of conduct.

This contextual shift from the material in Part I to the normative in Part II is accompanied by two related shifts. The first is a shift from assessing particular events to assessing patterns or kinds of events. For our purposes, descriptions of particular acts, such as "torturing Mohammed al-Qahtani",[1] are replaced by those of generalised kinds of acts, such as "torturing an intelligence detainee". Similarly, descriptions of particular purposes, such as "extracting reliable and actionable intelligence regarding al-Qaida", are replaced by those of generalised kinds of purposes, such as "extracting reliable and actionable intelligence regarding an adversary".

The other related shift concerns the evaluative nature of material military necessity. The question in Part I was whether a given act did or would constitute a material military necessity or non-necessity, in view of its particular purpose and circumstances. The question in Part II is what international humanitarian law should do about a given kind of act, *if*, or *once*, it is agreed that it would generally be materially (un)necessary *vis-à-vis* a given kind of military purpose. Thus, for instance, there may well be no material military necessity to intern this or that particular prisoner of war (POW) given the particular circumstances of his or her capture. Nevertheless, interning POWs is generally deemed militarily necessary.[2] Normative military necessity prompts the framers of IHL rules[3] to leave the belligerent at liberty to intern, or decline to intern, POWs.[4]

Discussions of military necessity in the context of IHL norm-creation involve *stipulating* the material military necessity or non-necessity of kinds of conduct, rather than *evaluating* that of instances of conduct. As R.B. Brandt observed:

> We should notice that the question which rules of war would be preferred by rational persons choosing behind a [Rawlsian] veil of ignorance is roughly the question that bodies like the Hague Conventions tried to answer. For there were the representatives of various nations, gathered together, say, in 1907, many or all of them making the assumption that their nations would at some time be at war. And, presumably in the light of calculated national self-interest and the principles of common humanity, they decided which rules they were prepared to commit themselves to follow, in advance of knowing how the fortunes of war might strike them in particular.[5]

It would appear reasonable to assume that the kind of act, "disabling an able-bodied, non-surrendering enemy combatant", is generally regarded as conducive towards the materialisation of the kind of belligerent purpose, "weakening the military forces of the enemy".[6] In other words, it would appear reasonable to stipulate the material military necessity of this kind of belligerent conduct. Stipulated thus, should international humanitarian law have any reason to obligate, permit, restrict, or prohibit it? To use another example, it may be argued that "destroying property in occupied territory" is a kind of belligerent conduct that in principle lacks material military necessity. Would this arguable material military non-necessity furnish international humanitarian law with any reason to obligate, permit, restrict, or prohibit the kind of belligerent conduct in question?[7]

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[1] In 2009, Susan Crawford, a Bush administration official then in charge of convening military commissions, admitted that al-Qathani's treatment had satisfied even the definition of torture as understood by the administration itself. See Bob Woodward, "Detainee Tortured, Says U.S. Official", *Washington Post*, 14 January 2009.

[2] See, e.g., Sibylle Scheipers, "Introduction: Prisoners of War", in Sibylle Scheipers (ed.), *Prisoners in War* (2010) 1, at 7-8; Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual* (2015), at 58.

[3] 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.

[4] See, e.g., Article 5, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907); Article 21, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949). But see Article 41(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977).

[5] R.B. Brandt, "Utilitarianism and the Rules of War", 1 *Philosophy and Public Affairs* 145 (1972), at 151.

[6] This is the premise upon which the 1868 St. Petersburg Declaration rests. See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (11 December 1868).

[7] Unless otherwise noted, whenever the remainder of Part II refers to "conduct", it refers to the *kind* of conduct rather than its *instance*. The same goes for "purposes".

"Normative military necessity" refers to this reason-giving function[8] that stipulated material military necessity or non-necessity acquires in IHL norm-creation. It should be noted that military necessity is only one of many considerations that the framers of IHL rules would take into account.[9] Other reason-giving considerations include humanity, chivalry, fairness, justice, good faith, reciprocal self-interest, sovereignty, economic gain, religious beliefs, culture, and the like.

Part II elucidates in greater detail the interplay between normative military necessity and humanity as weighty reason-giving considerations in the process of IHL norm-creation.[10] It will be argued that military necessity is normatively indifferent, and that the belligerent always has the option to satisfy both military necessity and humanity by acting as directed by the latter.

Part II consists of four chapters. Chapter 4 juxtaposes the stipulated material military necessity or non-necessity of a given kind of belligerent conduct *vis-à-vis* the evil or non-evil that it is deemed to entail.[11] For our purposes, "evil"[12] denotes, among other things, the loss of life, injury and attack on the bodily, mental, or moral integrity of persons; unsanctioned property destruction and damage, change of ownership or control; unsanctioned change in social institutions or procedures; and so on, that are occasioned in connection with war. This construal encompasses all relevant evil, regardless of who suffers it.[13]

It will be shown that the legitimacy of an evil act does depend, at least in part, on its material military necessity. Where the act is regarded as evil and lacking in material military necessity, it is likely that IHL framers will forbid it. The lawfulness of an evil yet militarily necessary act is likely to depend on the process of IHL norm-creation and the outcome that it generates. The process involves the weighing of the general value that is, or would be, harmed by the act's evil, on the one hand, and the need for that act to be adopted if the realisation of its legitimate purpose were to be attempted, on the other.

The same cannot be said, however, of *any* belligerent act, and, in particular, of an act that is not considered evil in the first place. Plainly, it would be legitimate, if not also affirmatively mandatory, to do what is considered non-evil and materially necessary for the materialisation of a legitimate purpose. Similarly, a belligerent act that is neither evil nor militarily necessary is likely to escape the stigma of illegitimacy.

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[8] Or, "legislative policy" as Diane A. Desierto puts it. See Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (2012), at 326.

[9] See, e.g., Janina Dill and Henry Shue, "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption", 26 *Ethics & International Affairs* 311 (2013).

[10] See also, e.g., *Shimoda v. State*, Case No. 2,914 (wa) of 1955 and Case No. 4,177 (wa) of 1957, Tokyo District Court, 7 December 1963, in 8 *Japanese Annual of International Law* 212 (1964), at 240; Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 2d ed. (2010), at 4-5; Claude Pilloud and Jean Pictet, "Article 57 – Precautions in Attack", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 678, at 683; Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals* (1968), at 135; G.I.A.D. Draper, "Military Necessity and Humanitarian Imperatives", 12 *Military Law and Law of War Review* 129 (1973), at 141; Nico Keijzer, "Réponses à la Question 2", 33 *Revue belge de droit international* 440 (2000), at 442; Marco Pertile, "*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*: A Missed Opportunity for International Humanitarian Law?", 14 *Italian Yearbook of International Law* 121 (2004), at 149-50; Yoram Dinstein, "Military Necessity", *Max Planck Encyclopedia of Public International Law* 2d ed. (2009). According to Riccardo Mazzeschi, Enzo Cannizzaro holds the view that weighing military necessity *vis-à-vis* humanitarian considerations is what the principle of proportionality entails in a unitary system of international law. Riccardo Pisillo Mazzeschi, "Book Review: Il principio della proporzionalità nell'ordinamento internazionale", 13 *European Journal of International Law* 1031 (2002), at 1034 (reviewing Enzo Cannizzaro, *Il principio della proporzionalità nell'ordinamento internaztionale* (2000)).

[11] An earlier version of Chapter 4 was published in 2013. See Nobuo Hayashi, "Contextualizing Military Necessity", 27 *Emory International Law Review* 189 (2013), at 223-254.

[12] This expression, though admittedly open-textured and imprecise, has been taken from the preamble of 1907 Hague Convention IV ("[T]he wording of [these provisions] has been inspired by the desire to diminish the *evils* of war, as far as military requirements permit …") (emphasis added).

[13] It will soon become apparent however that, in the specific context of IHL norm-creation, evil as it is understood here is often associated with that inflicted by one party to the conflict upon its adversary or upon neutral parties. On the special case of evil that is exclusively self-inflicted (i.e., inflicted by one party to the conflict upon itself or its co-belligerent), see the discussion in Chapter 4.

Chapters 5 through 7 will propose and develop a "joint satisfaction" thesis of normative military necessity, with a view to replacing an existing one that may be styled "inevitable conflict" thesis. Chapter 5 summarises the latter thesis and discusses its salient features.[14] According to the inevitable conflict thesis, international humanitarian law "accounts for" military necessity by treating it as inevitably in conflict with humanity. This entails the assertion that no belligerent conduct is capable of jointly satisfying considerations of military necessity and humanity. That is so, for two reasons. First, acts that are deemed materially necessary are always deemed inhumane, and those considered consistent with humanity are always considered lacking in material military necessity. Second, as reason-giving considerations in IHL norm-creation, both military necessity and humanity generate imperatives.

"Accounting for" military necessity therefore involves weaving into positive international humanitarian law a workable compromise between fundamentally irreconcilable demands of military necessity and humanity. The law's framers do so by letting humanity trump military necessity, by letting the latter trump the former, or by working out some middle ground between them. The fact that every rule of positive international humanitarian law is a product of this process means that the law excludes both *de novo* military necessity pleas and *de novo* humanity pleas *vis-à-vis* its unqualified provisions.

Chapter 6 introduces revisions to two of the shortcomings from which the inevitable conflict thesis suffers.[15] These revisions also serve as stepping stones towards developing the joint satisfaction thesis. Thus, we will see that there are numerous instances where a belligerent act is both humane and consistent with military necessity – or, both inhumane and contrary to military necessity, as the case may be. Examples include fighting ethically in counterinsurgency and torturing a detainee of intelligence value to the point of incoherence, respectively.

Neither military necessity, nor humanity, always generates imperatives. For the purposes of IHL norm-creation, there is no reason why materially necessary acts (e.g., high-altitude aerial bombardment) *should be* performed. Nor, conversely, do the law's framers have any reason to forbid conduct merely for its lack of material military necessity. It follows that military necessity is normatively indifferent. Humanitarian considerations do often generate imperatives. This is particularly true when it comes to forbidding – or curtailing, at any rate – inhumane acts. Even then, however, some minor acts of inhumanity, such as restricting POW correspondence with the exterior, escape the stigma of outright condemnation. Many affirmatively humane acts go beyond one's "call of duty" and therefore remain a matter of praise rather than expectation.

In Chapter 7, we will repair the inevitable conflict thesis' two additional defects.[16] First, that thesis asserts that normative military necessity and humanity inevitably conflict with each other. Second, according to the same thesis, "accounting for" these considerations in IHL norm-creation is about resolving their inevitable conflict.

We will see that, because military necessity is normatively indifferent, it never conflicts with humanity. On the contrary, where humanity demands what military necessity permits, or where the former condemns what the latter merely tolerates, the option is always open to the belligerent to satisfy them both by acting in accordance with humanitarian imperatives. The framers of IHL rules "account for" this possibility when they choose unqualifiedly to obligate the pursuit of such jointly satisfactory behaviour. Thus, for instance, international humanitarian law unqualifiedly prohibits the killing of persons placed *hors de combat*. The law also obligates the belligerent to respect the family honour and rights of residents in the territory it occupies. The fact that third considerations, such as sovereign interests, limit the number of positive IHL rules of this character does not diminish the validity of this observation.

Chapter 7 demonstrates that joint satisfaction is possible even where a given act is condemned by humanity yet permitted by military necessity, or demanded by the former yet merely tolerated by

[14] An earlier version of Chapter 5 was published in 2013. See Nobuo Hayashi, "Military Necessity as Normative Indifference", 44 *Georgetown Journal of International Law* 675 (2013), at 688-703.
[15] An earlier version of Chapter 6 was published in 2013. See *ibid.*, at 703-726.
[16] An earlier version of Chapter 7 was published in 2013. See *ibid.*, at 726-749.

the latter. Where this occurs, IHL norm-creation becomes a matter of making jointly satisfactory behaviour obligatory and, if this is the case, making it so unqualifiedly, principally, indeterminately, or exceptionally.

Chapters 6 and 7 leave us with one remaining difficulty associated with the inevitable conflict thesis, i.e., the inadmissibility of *de novo* military necessity and humanity pleas *vis-à-vis* unqualified IHL rules. This is a question that arises in the two concepts' strictly "juridical" context. Accordingly, we shall defer its detailed consideration to Part III, Chapter 8.

Chapter 4

Military Necessity and Legitimacy Modification

War being a "necessary evil" *par excellence*,[1] it may be felt that anything that is unnecessary in it would *ipso facto* be evil and therefore illegitimate. That is not so, however. Things in war can be neither necessary nor evil; nor need they always be illegitimate. This chapter will show that the mere fact that a particular belligerent act is deemed lacking in material military necessity *vis-à-vis* its legitimate military purpose does not mean that the act becomes illegitimate *for that reason alone*. In IHL norm-creation, material military necessity or non-necessity is indeed an element in the legitimacy modification of an act that is seen as *evil*. It will be argued, however, that it is not an element in the legitimacy modification of *any* belligerent act, much less an act that is not considered evil.

Here, one detects two sets of reference points. The first set is the legitimacy or illegitimacy of the military purpose that the actor seeks to attain. It would be fair to say that the illegitimacy of a purpose, once established, preordains the illegitimacy of any act taken therefor. The latter's illegitimacy would remain, no matter whether it is deemed materially necessary or unnecessary *vis-à-vis* its illegitimate purpose.

An act's legitimacy is not a foregone conclusion, however, where its military purpose is legitimate. The act's legitimacy or illegitimacy would rather depend on a second set of reference points. This set consists of the various possible combinations between the act's evil or otherwise, on the one hand, and its material military necessity or non-necessity *vis-à-vis* the legitimate purpose, on the other.

Normative military necessity does indeed offer weighty reasons for the particular manner in which the framers of international humanitarian law decide to formulate its rules. Nevertheless, the reasons that this necessity offers are not conclusive. The mere fact that certain behaviour is considered consistent with material military necessity does not mean that it therefore becomes legitimate and the IHL framers would make it lawful. Nor, more importantly for Chapter 4, does the mere fact that certain conduct is deemed materially unnecessary mean that it becomes illegitimate and would be forbidden.

1. Purpose *vis-à-vis* Conduct

Let us first consider how the legitimacy of a military purpose may or may not affect the legitimacy of a belligerent act taken therefor. As will be seen below, the act's illegitimacy inevitably follows wherever the purpose is illegitimate. Questions of material military necessity no longer matter to such an act.

Where the purpose itself is legitimate, evaluating the act's legitimacy requires looking into the interplay between the material military necessity with which the act may or may not be consistent, on the one hand, and the evil that it may or may not entail, on the other.

1.1 Where the Purpose Sought Is Illegitimate

The idea that, where the purpose is illegitimate, whatever is done in its pursuit is likewise illegitimate[2] seems intuitively sound. Judith Jarvis Thomson argues:

> Suppose V_{act}-1-ing and V_{act}-2-ing are two distinct act-kinds. Let us ask what the conditions are under which the following is true: A ought not V_{act}-1 in order to V_{act}-2. One thing that would

[1] See, e.g., Jimmy Carter, "Nobel Lecture", 10 December 2002.
[2] See, e.g., Henry Shue, "Civilian Protection and Force Protection", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 135, at 137.

> plainly make it true is its being the case that A ought not V_{act}-1. (If you ought not do a thing, then a fortiori, you ought not do it in order to bring such and such about.) I suggest that there is one other thing that would make it true, namely its being true the case that A ought not V_{act}-2. (If you ought not bring such and such about, then you ought not try to.) In sum, I suggest that we should accept: For it to be the case that A ought not V_{act}-1 in order to V_{act}-2 is for the following to be the case: either A ought not V_{act}-1, or A ought not V_{act}-2.[3]

At issue here is Thomson's second consideration. Thus, the truth of "A ought not V_{act}-2" is a sufficient condition, though not a necessary condition, for the truth of "A ought not V_{act}-1". In other words, whenever "A ought not V_{act}-2" is true, "A ought not V_{act}-1" is also true.

In his criticism of what Lon Fuller termed "internal morality of law",[4] H.L.A. Hart observed that it is vital to distinguish between purposive activity and morality:

> Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ('Avoid poisons however lethal if they cause the victim to vomit', or 'Avoid poisons however lethal if their shape, color, or size is likely to attract notice.') But to call these principles of the poisoner's art 'the morality of poisoning' would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.[5]

Here, Thomson's "V_{act}-2" would be Hart's "poison the victim", and "V_{act}-1" would be "avoid poisons however lethal if they cause the victim to vomit", and the like. To put it differently, "V_{act}-1*bis*" would be "choose and administer only that kind and amount of poison, and only in such a manner, so as to poison the victim effectively". Once it is accepted that "A ought not to poison B", it follows that "A ought not to choose and administer that kind and amount of poison in such a manner so as to poison B effectively".

Albeit in a slightly different context of justificatory self-defence, Michael Walzer senses the same normative consequence that the illegitimacy of a purpose has on an agent's action:

> In the course of a bank robbery, a thief shoots a guard reaching for his gun. The thief is guilty of murder, even if he claims that he acted in self-defense. Since he had no right to rob the bank, he also had no right to defend himself against the bank's defenders. He is no less guilty for killing the guard than he would be for killing an unarmed bystander … The thief's associates might praise him for the first killing, which was in their terms necessary … But we won't judge him in that way, because the idea of necessity doesn't apply to criminal activity: it was not necessary to rob the bank in the first place.[6]

The same may be said, *mutatis mutandis,* of belligerent conduct. According to the 1868 St. Petersburg Declaration, "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy".[7] The declaration delegitimises any object in war, no matter how rational it may otherwise be, that is *not* concerned with weakening the military forces of the enemy. In other words, the declaration delegitimises any purpose that is more, or other than, the weakening of the military forces of the enemy.[8] It would follow, then, that any belligerent

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[3] Judith Jarvis Thomson, *Normativity* (2008), at 222.

[4] See Lon L. Fuller, *The Morality of Law*, rev. ed. (1969), at 4.

[5] H.L.A. Hart, "Book Review", 78 *Harvard Law Review* 1281 (1965), at 1286 (reviewing Lon L. Fuller, *The Morality of Law* (1964)). See also H.L.A. Hart, "Lon L. Fuller: The Morality of Law", in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) 343, at 350.

[6] Michael Walzer, *Just and Unjust Was: A Moral Argument with Historical Illustrations*, 4th ed. (2006), at 128.

[7] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (11 December 1868). For a similar but broader formulation, see Final Protocol of the Brussels Conference of 1874 (27 August 1874) ("[T]he only legitimate object which States should have in view during war is to weaken the enemy without inflicting upon him unnecessary suffering").

[8] Understood thus, illegitimate purposes would include strictly personal gain, lebensraum, racial extermination, and so on.

action that is taken, whether it is otherwise deemed consistent with material military necessity, in pursuit of such an illegitimate purpose in war, is similarly illegitimate.

It might be thought that the same reasoning would, or should, subsume the legitimacy of an act *in bello* to the legitimacy of an end *ad bellum*. Whether the strict separation between *jus ad bellum* and *jus in bello* is always or everywhere advisable, is an issue that is highly contentious but not addressed further in this thesis.[9] Suffice it to note here that contemporary *jus in bello* does not yet appear to have reached that stage of subsumption.[10]

1.2 Where the Purpose Sought Is Legitimate

The situation changes where the military purpose is not illegitimate in itself. Thomson appears ambivalent about what role, if any, a legitimate purpose plays in the legitimacy or otherwise of the conduct chosen:

> Are there also truths of the form: A ought to V_{act}-1 in order to V_{act}-2? Alice ought not give her child an alpha-pill in order to kill it. Ought she give her child an alpha-pill in order to cure it? I don't myself think it matters much to what she ought to do for what V_{act}-2-ing it is such that she gives her child an alpha-pill in order to V_{act}-2, so long as it is not the case that she ought not V_{act}-2. (Though it might well matter to our assessment of how good a mother she is.) But others may think otherwise, and I therefore leave it open.[11]

Here, the familiar adage – "the end justifies the means" – comes to mind. It may be said that this adage embodies utilitarian thinking. According to one commentator: "Classical utilitarianism … states that morally just is that course of action that creates the greatest amount of good for the largest number of people. When an agent considers his options, he is obligated to choose that option, which leads to this result".[12]

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[9] 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 Concenring the Role of *Ius ad Bellum* in Targeting", in Paul A.L. Ducheine, Michael N. Schmitt and Frans P.B. Osinga (eds.), *Targetting: The Challenges of Modern Warfare* (2016) 101. At one end, in favour of maintaining the traditional separation, are: Adam Roberts, Jasmine Moussa, Laure Blank, Robert Kolb, and Richard Hyle. 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 *Just 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). Those at the other end include Jeff McMahan, David Rodin, Christopher Kutz, and Anthony Coates. 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 9, 176; Christopher Kutz, "Fearful Symmetry", in *ibid.*, 69; Jeff McMahan, "The Morality of War and the Law of War", in *ibid.*, 19; David Rodin, "The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry Is Half Right", in *ibid.*, 44; Rotem M. Giladi, "Reflections on Proportionality, Military Necessity and the Clausewitzian War", 45 *Israel Law Review* 323 (2012).

[10] See, e.g., William V. O'Brien, "The Meaning of 'Military Necessity' in International Law", 1 *World Polity* 109 (1957), at 142-144. De Menthon, a French prosecutor at Nuremberg, made unsuccessful assertions to this effect. It was a popular theme among Allied prosecutors in various other post-World War II war crimes trials as well.

[11] See Thomson, *supra* note 3, at 222-223.

[12] 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 5-6.

It is not our purpose to explore the philosophical terrain of utilitarianism. Of interest here is rather the specific manner or manners in which military necessity reveals its relationship to utilitarianism in IHL norm-creation. Five such ways may be highlighted.[13] The first is utilitarianism's normative relation to *jus ad bellum* that we noted above. Espousing thoroughgoing utilitarianism[14] would amount, ultimately, to abandoning the separation between *jus ad bellum* and *jus in bello* and to subsuming all questions of *jus in bello* under those of *jus ad bellum*. For the outcome of this version of utilitarian thinking would be that *any* belligerent conduct that is materially necessary for victory in a just war is *ipso facto* legitimate; contrariwise, any belligerent act that is materially unnecessary therefor is *ipso facto* illegitimate.

Here, brief mention may be made of the *Nuclear Weapons* Advisory Opinion rendered by the International Court of Justice (ICJ) in 1996.[15] This opinion contains a controversial disclaimer:

> [I]n view of the current state of international law … the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[16]

Commentators note with concern that this passage may leave open the possibility that the lawfulness *ad bellum* of use or threat of armed force in extreme self-defence may effectively set its unlawfulness *in bello* aside.[17]

Second, strictly within *jus in bello*, unfettered utilitarianism would assert that every kind of belligerent conduct that is conducive to military success maximises utility and therefore merits IHL protection or promotion. Conversely, material military non-necessity *per se* would be a disutility apt for prohibition or restriction under IHL.[18]

As will be seen below, IHL norm-creation appears to take the intrinsic utility of material military necessity seriously, though not conclusively. What it does *not* do, however, is to treat material military non-necessity as an intrinsic disutility that should be prohibited or restricted *in bello*.[19] It is more likely that international humanitarian law is a system of norms in which the relationship between pursuing legitimate purposes and taking militarily necessary actions is characterised by a form of rule-utilitarianism,[20] or a form of utilitarianism to which what Robert Nozik calls "side constraints"[21] are attached.[22]

The third way in which utilitarian thinking becomes relevant to international humanitarian law is in the law's relation to *Kriegsräson*. Simply put, *Kriegsräson*'s rationale is that a great deal of evil

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[13] Admittedly, there are also ways in which utilitarianism becomes relevant to international humanitarian law *in addition to* those discussed here. See, e.g., *ibid*., at 10-12.

[14] In other words, utilitarianism that is neither of a rule-based variety, nor of a variety to which side constraints are attached. See below.

[15] *Legality of the Threat or Force of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports (1996) 226.

[16] *Ibid*., para. 105(2)(E).

[17] See, e.g., *Separate Opinion of Judge Fleischhauer*, *Nuclear Weapons*, *ibid.*, 305, paras. 2-3; *Dissenting Opinion of Judge Higgins*, *ibid.*, 583, paras. 28-29; Rein Müllerson, "On the Relationship between *Jus Ad Bellum* and *Jus In Bello* in the General Assembly Advisory Opinion", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 267, at 268-272; Judith Gardam, "Necessity and Proportionality in *Jus Ad Bellum* and *Jus In Bello*", in *ibid.*, 275, at 289-291; Luigi Condorelli, "Nuclear Weapons: A Weighty Matter for the International Court of Justice – *Jura Non Novit Curia*?", 316 *International Review of the Red Cross* 9 (1997); Stefan Kandelbah, "Nuclear Weapons and Warfare", *Max Planck Encyclopedia of Public International Law* 2d ed. (2009), para. 47; Michael Bothe, "Nuclear Weapons Advisory Opinions", *Max Planck Encyclopedia of Public International Law* 2d ed. (2011), para. 19. But see Christopher Greenwood, "*Jus Ad Bellum* and *Jus In Bello* in the Nuclear Weapons Advisory Opinion", in Boisson de Chazournes and Sands (eds.), *supra* note 17, 247, at 263-264.

[18] See, e.g., Eric David, *Le Droit de conflits armés* 3d ed. (2002), at 273; Janina Dill and Henry Shue, "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption", 26 *Ethics & International Affairs* 311 (2012), at 320.

[19] See, e.g., A.P.V. Rogers, "What Is a Legitimate Military Target?", in Richard Burchill et al. (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (2005) 160, at 177.

[20] See R.B. Brandt, "Utilitarianism and the Rules of War", 1 *Philosophy and Public Affairs* 145 (1972), at 146-147.

[21] Robert Nozik, *Anarchy, State, and Utopia* (1974), at 29.

[22] See Shue, *supra* note 2, at 136.

may need to be endured for a greatly important end in war, and that law cannot meaningfully – or should not, in any event – pre-empt high-utility actions. To hold otherwise, in Larry May's words, would be to be a "rule fetishist".[23] Martti Koskenniemi explains this rationale thus:

> If … it is pragmatically unthinkable that a statesman might be deterred from using the weapon in a situation of extreme national danger (for instance, in order to prevent the killing of his or her innocent compatriots) merely because of what the legal adviser might say, then an opinion [such as the *Nuclear Weapons* Advisory Opinion] underwriting such an absolute prohibition would have condemned the law to irrelevance already in advance.[24]

Koskenniemi continues:

> But I cannot see such an absolute rule as rationally justifiable either (or, indeed, justifiable by reference to recent history of warfare). If the law's purpose is to protect the innocent (and it is hard to see a more basic purpose for it in a system that excludes reference to personal virtue), and the launching of a nuclear strike would be the only means to attain this, then I cannot see how it could be excluded. In this sense, at least *prima facie*, the use of nuclear weapons in self-defence could not be excluded.[25]

Plainly, the utilitarian rationale implicit in *Kriegsräson*, although certainly not the doctrine's notorious *modus operandi*, is present in the very idea of regulating belligerent conduct through norms.[26] IHL norm-creation is a process that is well placed to deal with, and indeed contains, such a rationale.[27] This process is driven by IHL framers' desire to reduce, as far as possible, the range of belligerent conduct whose compliance or non-compliance with the law is left to a crude utilitarian interest-balancing exercise done by the law's addressees.[28]

Fourth, *reducing* this range is not the same as *eliminating* it altogether. Unsatisfactory as it may be, some rules of positive international humanitarian law amount to little more than what Nigel Simmonds calls "a residual provision" that creates "a general legal duty always to act for the greater good".[29] Gary D. Solis explains: "In these allowances, terms like 'if possible,' 'as far as possible,' and 'if urgent,' introduce elements of uncertainty and risks of arbitrary conduct. Without these concessions, which take reality into account, the allowances could not have been formulated and approved in the first place".[30]

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[23] Larry May, *War Crimes and Just War* (2007), at 196-197. But see Walzer, *Just and Unjust Wars*, *supra* note 6, at 251-263.

[24] Martti Koskenniemi, "Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons", 10 *Leiden Journal of International Law* 137 (1997), at 142.

[25] *Ibid.*, at 145-146 (emphasis in original; footnote omitted).

[26] See, e.g., Frits Kalshoven, "Grotius' *Jus In Bello*, with Special Reference to Ruses of War and Perfidy", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 327, at 327-328. What is at stake in the context of IHL norm-creation is not so much *Kriegsräson*'s actual operation. The latter is a matter discussed in greater detail below in connection with the *de novo* invocation of military necessity considerations against absolute prohibitions of positive international humanitarian law. See Part II, Chapter 8 below.

[27] See, e.g., Nigel Simmonds, *Central Issues in Jurisprudence* 2d ed. (2002), at 37-40; Manuel Atienza, "Reasoning and Legislation", in Luc J. Wintgens et al. (eds.), *The Theory and Practice of Legislation: Essays in Legisprudence* (2005) 297, at 303-304.

[28] See Simmonds, *supra* note 27, at 37-40.

[29] *Ibid.*, at 39. See also Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance, 50 *Virginia Journal of International Law* 795 (2010), at 804-805.

[30] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), at 269.

This residual utility-maximising duty has been variously described in ethics as the "principle of double effect"[31] and the "principle of double intention".[32] The manner in which international humanitarian law deals with attacks in hostilities exemplifies how such a principle operates on the ground.[33]

Fifth, humanity appears to occupy an increasingly privileged place in the utility calculus of international humanitarian law. That it does so, an idea whose first articulation in treaty law appeared in the St. Petersburg Declaration,[34] has since been reiterated in modern judicial rulings. Thus, the ICJ held:

> Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements.[35]

This sentiment is echoed in the historic *Tadić* Jurisdiction Decision that the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) issued in 1995:

> [T]he impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.[36]

International manuals[37] and scholarly works[38] concur. It may be said that, generally, the celebrated Martens Clause[39] anchors humanity's relevance in IHL norm-creation – although the clause's

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[31] 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; James F. Keenan, "The Function of the Principle of Double Effect", 54 *Theological Studies* 294 (1993); Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (2002), at 64-65; Walzer, *Just and Unjust Wars*, *supra* note 6, at 153; 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), at 104-105.

[32] Walzer, *Just and Unjust Wars*, *supra* note 6, at 155-156.

[33] See, e.g., Articles 51(5)(b), 57(2)(a)(iii), 57(2)(b), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977); Neuman, *supra* note 31, at 102-105; Kenneth Watkin, "Assessing Proportionality: Moral Complexity and Legal Rules", 8 *Yearbook of International Humanitarian Law* 3 (2005), at 26-30; Schmitt, "Preserving the Delicate Balance", *supra* note 29, at 804-805.

[34] See, e.g., St. Petersburg Declaration ("[T]he progress of civilization should have the effect of alleviating as much as possible the calamities of war …").

[35] *Nuclear Weapons* Advisory Opinion, para. 95.

[36] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 97.

[37] See San Remo Manual on International Law Applicable to Armed Conflicts at Sea (12 June 1994), para. 2; Manual on International Law Applicable to Air and Missile Warfare (15 May 2009), para. 2(c). See also, e.g., Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995), at 74; Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2009), at 59-60.

[38] See, e.g., Hersch Lauterpacht, "The Problem of the Revision of the Law of War", 29 *British Yearbook of International Law* 360 (1952), at 363-364; Theodor Meron, "The Humanization of Humanitarian Law", 94 *American Journal of International Law* 239 (2000), at 243; Emily Camins, "The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity", 90 *International Review of the Red Cross* 853 (2008), at 878-889; May, *supra* note 23, at 53-57, 67-90, Robert Kolb, "The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions", in Kjetil Mujezinović Larsen, Camilla Guldhal Cooper and Gro Nystuen (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (2013) 23, at 52-55.

[39] See the preambles of various instruments in which the Martens Clause appears, e.g., Convention (II) with Respect to the Laws and Customs of War on Land (29 July 1899); Convention (IV) Respecting the Laws and Customs of War on

precise role therein remains a matter of debate.[40] Thus, for instance, a net increase in humanity – or a net reduction in inhumanity, as the case may be – is sometimes considered weightier[41] than, say, a net increase in the satisfaction of other considerations such as material military necessity and sovereignty. The military necessity-humanity interplay in the process of IHL norm-creation is a complex one that we will investigate in Chapter 7.

What follows now is a detailed assessment of the relationship *in bello* between legitimate purposes and the legitimacy or illegitimacy of various kinds of belligerent conduct taken therefor.

2. Conduct *vis-à-vis* Purpose

As noted earlier, the purpose's legitimacy subjects the legitimacy or illegitimacy of the conduct to two reference points. They are, respectively, whether the conduct itself is or is not seen as evil, and whether it is deemed materially necessary or unnecessary *vis-à-vis* that purpose.

These two reference points can be combined in four ways, namely:

(i) The conduct is deemed evil yet consistent with material military necessity;
(ii) The conduct is deemed evil and lacking in material military necessity;
(iii) The conduct is deemed non-evil and consistent with material military necessity; and
(iv) The conduct is deemed neither evil nor consistent with material military necessity.

Let us examine them in turn.

2.1 The Conduct Is Deemed Evil

Where a given act is deemed evil, its material military necessity or non-necessity is indeed one element in the act's legitimacy modification. Let us assume for the moment that this evil act is in fact necessary for the attainment of its legitimate purpose.

Our reasoning here would proceed, roughly, as follows. We would compare the urge to reduce the evil this act entails, on the one hand, and the *ex hypothesi* concession that the act is materially necessary, on the other. Should the act's material military necessity be considered weightier than its evil, its claim to legitimacy would be enhanced. Conversely, if the act were deemed more evil than

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Land (18 October 1907); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects (10 October 1980); Convention on Cluster Munitions (30 May 2008). See also, e.g., Article 63, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949); Article 62, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Article 142, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949); Article 158, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949); Article 1(2), Additional Protocol I.

[40] See Chapter 7 below. See also, e.g., Shigeki Miyazaki, "The Martens Clause and International Humanitarian Law", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 432; Antonio Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", 11 *European Journal of International Law* 187 (2000); Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", 94 *American Journal of International Law* 78 (2000); Yoram Dinstein, *Conduct of Hostilities Under the Law of International Armed Conflict* 2d ed. (2010), at 8-9; Schmitt, "Preserving the Delicate Balance", *supra* note 29, at 800-801; Kolb and Hyle, *supra* note 9, at 63; Jochen von Bernstorff, "Martens Clause", *Max Planck Encyclopedia of Public International Law* 2d ed. (2009); 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.

[41] See, e.g., Jean de Preux, "Article 35 – Basic Rules", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 389, at 395.

necessary, its claim to legitimacy would diminish. Should the relative weight be indeterminate, the act's legitimacy would remain uncertain.

In contrast, an act that is deemed evil and lacking in material military necessity is plainly illegitimate. For unnecessary evil is evil *simpliciter*, and unmitigated evil is invariably illegitimate. Crucially, however, even in such cases, the act's illegitimacy does *not* emanate from its non-necessity. Rather, the act's emanates from its evil, an evil that is now laid bare and unmodified by considerations of military necessity.

Let an axiomatic example illustrate this reasoning. In his autobiography, Raleigh Trevelyan, a British Army veteran during World War II, recounted an encounter with a German soldier:

> There was a wonderfully vulgar sunshine. Everything was the colour of pink geraniums, and birds were singing. We felt like Noah must have done when he saw his rainbow. Suddenly Viner pointed across the stretch of scrubby heath. An individual, dressed in German uniform, was wandering like a sleep-walker across our line of fire. It was clear that for the moment he had forgotten war, and – as we had been doing – was revelling in the promise of warmth and spring.
>
> "Shall I bump him off?" asked Viner, without a note of expression in his voice.
>
> I had to decide quickly. "No," I replied, "just scare him away."
>
> Viner aimed above the man's head, and fired. The Jerry turned for a moment or two, stared at us with mouth open, then went bounding through the trees, waving his rifle above his head.
>
> "Another bomb-happy," said Bishop, who happened to be standing by us, and he gave him a parting shot.
>
> Only Sergeant Chesterton didn't laugh. He said that we should have killed the fellow, since his friends would now be told precisely where our trenches were.[42]

Sergeant Chesterton thought that the German soldier should have been killed. Here, Chesterton's purpose might be formulated as "keeping the location of his unit's trenches concealed from the Germans".[43] With a view to accomplishing this purpose, he advocated a particular act, namely, "shooting to kill the German soldier who had noticed the unit's presence". Here, the corresponding *kinds* of purpose and act would be "keeping the location of the trenches of one's unit concealed from the enemy",[44] and "shooting to kill an enemy combatant who has noticed the presence of one's unit", respectively.

It would appear that the kind of purpose, so formulated, is legitimate. Also, as phrased, the kind of act in question would seem clearly evil, inasmuch as it involves the taking of human life. The variable that remains to be fixed is whether the said kind of act would be deemed consistent with material military necessity, or lacking in it, *vis-à-vis* the kind of purpose at issue.

2.1.1 The Conduct Is Deemed Evil Yet Necessary

Suppose now that, as was apparently the case in the aforementioned episode, the German soldier was able-bodied and not offering to surrender. In other words, he was not placed *hors de combat* at the time.[45]

Then, arguably, the act that Sergeant Chesterton advocated, i.e., "shooting to kill the German soldier who had noticed the presence of Chesterton's unit and was not placed *hors de combat* at that particular moment", was materially necessary in order to achieve his purpose. Similarly, the corresponding kind of act, i.e., "shooting to kill an enemy combatant who has noticed the presence of one's

[42] Raleigh Trevelyan, *The Fortress: A Dairy of Anzio & After* (1956), at 23. It was common among British soldiers to refer to their German counterparts as "Jerries". See also Walzer, *Just and Unjust Wars*, *supra* note 6, at 140-141.

[43] Note here that we are *not* treating "disabling the German soldier" as Chesterton's purpose.

[44] Similarly, we are *not* treating "disabling an enemy combatant" as the relevant kind of purpose.

[45] For an indicative treaty definition of a person placed *hors de combat* under international humanitarian law, see Article 41, Additional Protocol I. See also Avril McDonald, "*Hors de Combat*: Post-September 11 Challenges to the Rules", in Hensel, *supra* note 40, 219.

unit and is not placed *hors de combat* at the time", would be deemed materially necessary *vis-à-vis* the corresponding kind of purpose.

It appears that those involved in IHL norm-creation to date have declined to consider it illegitimate to disable enemy combatants not placed *hors de combat*.[46] Arguably, according to today's positive international humanitarian law, it is not unlawful to disable these combatants by way of killing.[47]

This does *not* mean, however, that the material military necessity of any belligerent behaviour always trumps its evilness. Marshall Cohen notes:

> The [Hague] conception permits the interests of humanity to carry enough weight so that they can sometimes inhibit the operation of the principle of military necessity. On this conception, therefore, the appeal to military necessity is by no means always a legitimate one; indeed, it is sometimes plainly ruled out.[48]

The mere fact that an act is deemed evil yet materially necessary does not settle the matter as to whether it becomes conclusively legitimate or illegitimate. The process of IHL norm-creation involves the weighing of the general value that is, or would be, harmed by the act's evil, on the one hand, and the need for this act to be adopted if the realisation of its legitimate purpose were to be attempted, on the other. The existence of this interplay is implied in various parts of international humanitarian law.[49]

It may happen that an act's evil prevails over its material military necessity and thereby renders it illegitimate. The unqualified[50] IHL prohibition against torture, underpinning our conviction that even effective tortures are deemed much too cruel to be permitted, is a case in point. Indeed, it has been suggested that "[w]e do not have to do a cost-benefit analysis to determine whether such [acts] are impermissible in warfare: we already judge such acts to be heinous crimes because of their very nature."[51]

Conversely, an act's material military necessity may prevail over its evil and thereby render it legitimate. Such is arguably the case, for instance, with Sergeant Chesterton's suggested action.

2.1.2 The Conduct Is Deemed Evil and Unnecessary

Let us now alter the episode somewhat. Assume that the German soldier dropped his rifle, threw his hands up and unambiguously offered to surrender – i.e., he had in fact placed himself *hors de combat* at the time.[52]

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[46] See Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual* (2015), at 58. Here, the so-called "capture rather than kill" debate springs to mind. See Part III, Chapter 8 below.

[47] Some commentators have argued that, where two courses of action equally conducive to the attainment of a military purpose are available, international humanitarian law obligates the belligerent to take the one that is less injurious than the other. Moreover, on this view, the belligerent's failure to do so amounts to a breach of the law even if it does not separately prohibit the more injurious course of action. See Part III, Chapter 8 below.

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

[49] See, e.g., St. Petersburg Declaration ("[The commission has] by a common accord the technical limits within which the necessities of war ought to yield to the demands of humanity … the progress of civilization should have the effect of alleviating, as much as possible the calamities of war …"); preamble, 1907 Hague Convention IV ("[T]he wording of [these provisions] has been inspired by the desire to diminish the evils of war, as far as military requirements permit …"). For a further discussion on the military-humanity interplay in IHL norm-creation, see Chapter 7 below.

[50] In this thesis, the expression "unqualified" refers to those rules to which no exceptional clauses are attached. Thus, rules can be "unqualified" in a general way, i.e., unqualified by *any* exceptional clauses. Alternatively, rules can be "unqualified" in a limited way, i.e., qualified by certain exceptional clauses but not, for example, by those exceptional clauses emanating from military necessity. See Part III, Chapters 8 and 9 below.

[51] Brian Orend, *The Morality of War* (2006), at 123. See also David Whetham, "The Just War Tradition: A Pragmatic Compromise", in Whetham, *supra* note 2, 65, at 82 ("[T]he principle of proportionality and also the idea of *mala in se* … recognizes that some methods of war are simply evil in themselves, and cannot be justified under any circumstances").

[52] See Article 41(2)(b), Additional Protocol I.

Arguably, in those modified circumstances, shooting to kill the German soldier would be materially unnecessary in order to keep the location of the trenches used by Chesterton's unit concealed from the Germans. All else being equal, taking the German prisoner – who would then be removed from the battlefield[53] and detained in the rear area – would be more consistent with material military necessity for Chesterton's unit, than shooting to kill that soldier.[54] That would be so, at a minimum, in view of the ammunitions spared and the German soldier's life saved.[55]

Conversely, given this alternative, shooting to kill the German would arguably be wasteful (ammunition-wise) and excessive (death being an externality). The evil entailed by shooting to kill the German soldier remains the same in kind and amount; it is the act's material military necessity that now ceases to exist. The evil act has moved from being a material military necessity *vis-à-vis* its legitimate purpose, to constituting a material military non-necessity *vis-à-vis* the same legitimate purpose.

The corresponding *kind* of belligerent conduct, i.e., "shooting to kill an enemy combatant who has noticed the presence of one's unit and is placed *hors de combat* at the time", would lack material military necessity *vis-à-vis* the corresponding *kind* of belligerent purpose, namely, "keeping the location of the trenches used by one's unit concealed from the enemy". It seems uncontroversial that a kind of act deemed evil and lacking in material military necessity *vis-à-vis* its otherwise legitimate kind of purpose is plainly illegitimate. According to Michael Schmitt, it is illegitimate to commit "destructive or harmful acts that are unnecessary to secure a military advantage".[56] Here, the expression "destructive or harmful" may indicate the evilness of the act taken, and the expression "unnecessary" the lack of material military necessity *vis-à-vis* the act's legitimate end.

This idea finds support amongst commentators,[57] as well as a number of national military manuals. Thus, in the words of the U.S. Navy Commanders' Handbook:

> [The law's] purpose is to ensure that the violence of hostilities is directed toward the enemy's war efforts and is not used to cause unnecessary human misery and physical destruction. The principle of military necessity recognizes that force resulting in death and destruction will have to be applied to achieve military objectives, but its goal is to limit suffering and destruction to that which is necessary to achieve a valid military objective.[58]

Other manuals treat humanity as effectively rendering unnecessary evil illegitimate.[59]

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[53] As required, e.g., by Article 7, Convention Relative to the Treatment of Prisoners of War (27 July 1929); Article 19, Geneva Convention III.

[54] In this chapter, we are *not* assuming that the conditions of combat in which Chesterton's unit found itself were of the kind covered by Article 41(3) of Additional Protocol I.

[55] Admittedly, it is still possible that the German soldier's unexplained and prolonged disappearance might alert his comrades to the potential presence of enemies nearby.

[56] Michael N. Schmitt, "Book Review*: Law on the Battlefield*", 8 *U.S. Air Force Academy Journal of Legal Studies* 255 (1997), at 258 (reviewing A.P.V. Rogers, *Law on the Battlefield* (1996)). See also Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict", 22 *Yale Journal of International Law* 1 (1997), at 52.

[57] See, e.g., Geoffrey Best, *War and Law Since 1945* (1994), at 242; de Preux, *supra* note 41, at 396; Archer Polson, *Principles of the Law of Nations, with Practical Notes and Supplementary Essays on the Law of Blockade and on Contraband of War* (1853), at 42; Bill Rhodes, *An Introduction to Military Ethics: A Reference Handbook* (2009), at 105; Sidgwick, *supra* note 31, at 255, 257; Solis, *supra* note 30, at 258; Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970), at 20; G.I.A.D. Draper, "Military Necessity and Humanitarian Imperatives", 12 *Military Law and Law of War Review* 129 (1973), at 135; Waldemar A. Solf, "Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Protocol I", 1 *American University Journal of International Law and Policy* 117 (1986), at 117; Richard Wasserstrom, "The Responsibility of the Individual for War Crimes", in Held et al., *supra* note 48, 47, at 49; William H. Boothby, *The Law of Targeting* (2012), at 60.

[58] U.S. Department of the Navy et al., *The Commander's Handbook on the Law of Naval Operations* (2007), at 5-2.

[59] See, e.g., Office of the Judge Advocate General, Canadian Forces, *Law of Armed Conflict at the Operational and Tactical Levels* (2003), at 2-1; U.K. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 23; Office of General Counsel, *Department of Defense Law of War Manual*, *supra* note 46, at 59.

Where given conduct is considered illegitimate for the evil that it entails, and the lack of its material military necessity leaves its illegitimacy unmitigated, the relevant IHL rule would unqualifiedly prohibit it. Such is the case, for example, with the conduct unqualifiedly prohibited under Article 25 of the 1907 Hague Regulations. This article stipulates that "[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited".[60] According to the British Manual:

> The reason for this rule is that there is no military need to attack a place that is not being defended. It can simply be occupied without resistance or bypassed. Enemy armed forces are likely to have withdrawn. Any remaining members of the enemy armed forces in the place can be taken prisoner of war and their weapons and military equipment captured.[61]

Here, occupying or bypassing an undefended locality is a legitimate purpose. Attacking or bombarding such a locality is an act that is deemed evil and lacking in material military necessity for it.

2.1.3 Preamble of the 1868 St. Petersburg Declaration: Evil Conduct Is Illegitimate If Unnecessary

The St. Petersburg Declaration states: "*the only legitimate object* which states should endeavor to accomplish during war is to weaken the military force of the enemy".[62] The declaration goes on to proclaim that, "*for this purpose,* it is *sufficient* to disable the greatest possible number of men".[63] Disabling the greatest number of men is thereby held to be all that any belligerent should ever need to do in order to weaken the military forces of his enemy. Accordingly, though clearly evil and part of the "calamities of war",[64] the disablement of such men remains legitimate, as far as the St. Petersburg Declaration is concerned. This first part of the declaration's preamble deals with conduct that is considered evil yet materially necessary.

There is one further step in the text, where disablement by way of injury or death now becomes the purpose and the employment of certain projectiles becomes the act taken for its fulfilment. The declaration finds that its drafters have "by common accord fixed the technical limits within which the necessities of war ought to yield to the demands of humanity".[65] There is no indication, however, that the drafters decided to let the "demands of humanity" perforce trump the "necessities of war". Nor is there any indication that the drafters intended categorically to outlaw the employment of means of combat that are deemed evil yet consistent with material military necessities *vis-à-vis* their legitimate ends.[66]

On the contrary, the declaration's drafters appear to have declined to delegitimise such behaviour. The declaration itself falls short of delegitimising acts, such as disabling the greatest number of men *per se*, and using explosive projectiles 400 grams or more in weight generally. What this implies is two-fold. First, there may be suffering that is aggravating yet arguably not useless (e.g., suffering that disablement itself entails); there may also be death that is inevitable but arguably not useless (e.g., death as a form of disablement itself).[67] Similarly, there may be injury that is not superfluous, and

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[60] Article 25, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907). See also Article 59, Additional Protocol I.
[61] U.K. Ministry of Defence, *Joint Service Manual*, *supra* note 59, at 91. See also Yoram Dinstein, "Military Necessity", *Max Planck Encyclopedia of Public International Law* 2d ed. (2009), § 3.
[62] St. Petersburg Declaration (emphasis added).
[63] *Ibid.* (emphasis added).
[64] *Ibid.*
[65] *Ibid.*
[66] See also Schmitt, "Preserving the Delicate Balance", *supra* note 29, at 803.
[67] See, e.g., Yoram Dinstein, *Conduct of Hostilities*, *supra* note 40, at 64-66; Simon O'Connor, "Nuclear Weapons and the Unnecessary Suffering Rule", in Nystuen et al. (eds.), *supra* note 9, 128, at 131.

suffering that is not unnecessary.[68] Second, cruel as it may be if used against soldiers, heavier explosive projectiles may prove materially necessary for the attainment of some other legitimate purpose (e.g., explosives in shells[69]).

Needless to say, the mere fact that the St. Petersburg Declaration declines to delegitimise these acts does not mean that international humanitarian law conclusively legitimises them. Nothing in the declaration precludes the possibility that such acts can become illegitimate on grounds that are established independently of, or subsequently to, the declaration itself. Such grounds may very well arise, for instance, from the scope of evil broadening, or the requisite thresholds of material military necessity heightening – or both, as the case may be – over time.

As noted earlier, excessiveness is a species of material military non-necessity.[70] The St. Petersburg Declaration essentially stipulates that the employment of explosive projectiles weighing under 400 grams produces two kinds of evil, namely, evil that is necessary to effect disablement, and evil that is external to disablement. The declaration proclaims that the disablement of the greatest number of men "would be *exceeded* by the employment of arms which *uselessly* aggravate the sufferings of disabled men, or render their death inevitable".[71] At stake here is evil entailed by the suffering of *disabled* men – i.e., those men who are already disabled but, presumably, alive.[72] Aggravating their suffering and/or rendering their death inevitable is declared illegitimate, insofar as such an act is deemed evil that is external to their disablement.[73] In the declaration's words, "the employment of such arms would, *therefore*, be contrary to the laws of humanity."[74]

This second part of the declaration's preamble deals with conduct that is considered evil and materially unnecessary *vis-à-vis* its otherwise legitimate purpose. Bereft of material military necessity, aggravating the suffering of disabled men is an act that is evil *simpliciter*, and therefore invariably illegitimate. The declaration proceeds to ban the employment of explosive projectiles weighting less than 400 grams, an unnecessary evil.[75] As the ICJ noted in its *Nuclear Weapons* Advisory Opinion:

> In conformity with the aforementioned principles [i.e., the principle of distinction, the prohibition against causing unnecessary suffering to combatants, and the Martens Clause], humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives.[76]

Where given conduct is deemed both evil and lacking in material military necessity, and where that conduct is held to be illegitimate as a result, this merely shows that material military non-necessity does not overrule or militate against what is already evil.

2.2 The Conduct Is Deemed Non-Evil

Our discussion so far has shown that the material military necessity or non-necessity of an *evil* act is indeed an element in its legitimacy modification. The question, now, is this: Is the material military necessity or non-necessity of *any* act also an element in its legitimacy modification? In other

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[68] See, e.g., Christopher Greenwood, "The Law of Weaponry at the Start of the New Millennium", in Christopher Greenwood, *Essays on War in International Law* (2006) 223, at 236.
[69] See, e.g., Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War* 3d ed. (2000), at 53.
[70] See Part I, Chapter 2 above.
[71] St. Petersburg Declaration (emphasis added).
[72] "Alive" so that they are susceptible to further suffering.
[73] See, e.g., Frits Kalshoven, "Arms, Armaments and International Law", 191 *Receuil des Cours* (1985) 206; Hans Blix, "Means and Methods of Combat", in Henri Dunant Institute and UNESCO (eds.), *International Dimensions of Humanitarian Law* (1988) 135, at 138-139; William H. Boothby, *Weapons and the Law of Armed Conflict* (2009), at 55-56.
[74] St. Petersburg Declaration (emphasis added).
[75] See *ibid.*; Dinstein, "Military Necessity", *supra* note 61, § 6 ("It is virtually a truism today that causing unnecessary suffering to enemy combatants cannot be a matter of military necessity").
[76] *Nuclear Weapons* Advisory Opinion, para. 78

words, is the fact that it is materially unnecessary to do something a sufficient reason for which it is illegitimate to do so?

These questions are to be answered in the negative, particularly in respect of an act that is *not* deemed evil. Plainly, it would be legitimate, if not also mandatory, to do what is considered harmless and consistent with material military necessity. Similarly, it might be normatively indifferent, but would clearly not be illegitimate, to do what is deemed neither evil nor materially necessary. It is possible that there may be some third elements that modify the legitimacy of these types of acts,[77] but we are not concerned with such elements here.

Let us return to Sergeant Chesterton and his German soldier. Suppose that Chesterton advocates the German's non-lethal disablement by employing an entirely harmless yet effective weapon that happens to be at Chesterton's disposal. Two preliminary remarks are in order. First, whether "non-lethal" weapons really exist is a matter of considerable controversy.[78] For our purposes, however, one can nevertheless proceed on the assumption that there are indeed genuinely "non-lethal" weapons if employed properly.[79] Second, strictly for the sake of our argument, we are making further allowances that such weapons existed during World War II.

The conduct at issue, then, would be of the form "non-lethally disabling the able-bodied, non-surrendering German soldier who has noticed the presence of Chesterton's unit". This conduct's purpose remains the same, i.e., "keeping the location of the trenches used by Chesterton's unit concealed from the Germans".

Now we need to consider whether the kind of act "non-lethally disabling an able-bodied, non-surrendering enemy soldier who has noticed the presence of one's unit" is deemed materially necessary or unnecessary for the kind of purpose "keeping the location of the trenches used by one's unit concealed from the enemy".

2.2.1 The Conduct Is Deemed Non-Evil and Necessary

Let us say that the German soldier was able-bodied and not offering to surrender, i.e., not placed *hors de combat* at the relevant moment. Then, his non-lethal disablement would appear materially necessary to keep the location of the trenches used by Chesterton's unit concealed from the Germans.

Plainly, an act deemed neither evil nor lacking in material military necessity *vis-à-vis* a legitimate purpose would be legitimate.[80] The resulting IHL rule would most likely reflect this by authorising the act in question. Such would arguably be the case, for example, regarding the use of "non-lethal" weapons in a manner that is indeed non-lethal.[81]

2.2.2 The Conduct Is Deemed Neither Evil Nor Necessary

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[77] Consider chivalry, for example. See below.

[78] See, e.g., Lieutenant Colonel James C. Duncan, "A Primer on the Employment of Non-Lethal Weapons", 45 *Naval Law Review* 1 (1998); David P. Fidler, "The Meaning of Moscow: "Non-Lethal" Weapons and International Law in the Early 21st Century", 87 *International Review of the Red Cross* 525 (2005), at 531, 550; Boothby, *Weapons*, *supra* note 73, at 246-250; Stephen Coleman, "Discrimination and Non-Lethal Weapons: Issues for the Future Military", in David W. Lovell and Igor Primoratz (eds.), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (2012) 215.

[79] Consider sticky foam, for example. During Operation United Shield in Somalia, the U.S. Marine Corps reportedly employed sticky foams for blocking and access delay, with some success. See Steven H. Scott, "Sticky Foam as a Less-Than-Lethal Technology", 2934 *SPIE Proceedings: Security System & Nonlethal Technology for Law Enforcement* 96 (1997), at 96, 103. The effectiveness may have been less than stellar, however. See Jon Ronson, *The Men Who Stare at Goats* 2d ed. (2009), at 50.

[80] That is, as noted earlier, unless there are some third elements in the act's legitimacy modification.

[81] If sprayed on the target's mouth and/or nose, sticky foam may cause injury or even death. On such lethal effects that even "non-lethal" weapons can have, see Boothby, *Weapons*, *supra* note 78, at 246-247, 249. It should also be noted that it is debatable whether a party that possesses non-lethal weapons is duty-bound to use them. See, e.g., *ibid.*, at 249.

Now let us suppose, once again, that the German soldier dropped his rifle, threw his hands up and unambiguously offered to surrender, thereby placing himself *hors de combat* at the time.

Here, not even his non-lethal disablement would be materially necessary in order to keep the location of the trenches used by Chesterton's unit concealed from the Germans. All else being equal, non-lethally disabling the German soldier *hors de combat* would still involve wasting weapons, as opposed to simply taking him prisoner. The harmless character of his non-lethal disablement would remain the same in nature and degree; it is its material military necessity that would disappear. The harmless conduct would move from embodying material military necessity, to lacking it *vis-à-vis* its legitimate purpose. Would this, and other similarly harmless acts deemed materially unnecessary *vis-à-vis* their legitimate purposes, become illegitimate by dint of their material military non-necessity *alone*?

This author argued elsewhere that military necessity helps distinguish acts in war that are deemed materially necessary and hence *prima facie* permissible, from those deemed materially unnecessary and hence impermissible.[82] Matters of rational conduct transform themselves into those of normative imperative – i.e., "that which *can* be done without *must* be done without".[83] So construed, normative military necessity would be a notion that provides framers of IHL rules with a reason to restrict or prohibit material military non-necessities *per se*.[84]

This author no longer subscribes to this view. Its chain of reasoning lacks one component of a basic syllogism. Let the minor premise be "X_1-ing is lacking in material military necessity", and let the conclusion be "X_1-ing is illegitimate". In order for these two propositions to form a complete syllogism, they need to be accompanied by a major premise of the sort "any X_n-ing that is lacking in material military necessity is illegitimate".

The proposition "any X_n-ing that is lacking in material military necessity is illegitimate" would involve one of the two corollaries of thoroughgoing utilitarianism noted earlier, i.e., that disutilities are *per se* illegitimate.[85] Yet, no cogent reason has been articulated for which international humanitarian law should prohibit material disutilities. There are, at best, only vague and oblique references. Thus, in R.B. Brandt's words:

> The position of a nation in a serious war is such, then, that it considers overpowering the enemy to be absolutely vital to its interests (and possibly to those of civilized society generally) – so vital, indeed, that it is willing to risk its very existence to that end. It is doubtful that both sides can be well justified in such an appraisal of the state of affairs. But we may assume that in fact they do make this appraisal. In this situation, we must simply take as a fact that neither side will consent to or follow rules of war which seriously impair the possibility of bringing the war to a victorious conclusion. This fact accounts for the restriction within which I suggested a choice of the rules of war must take place. We may notice that the recognized rules of war do observe this limitation: they are framed in such a way as not to place any serious obstacle in the way of a nation's using any available force, if necessary, to destroy the ability of another to resist. As Oppenheim has observed, one of the assumptions underlying the recognized rules of war is that 'a belligerent is

[82] See Nobuo Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 28 *Boston University International Law Journal* 39 (2010), at 45.
[83] *Ibid*.
[84] See Dill and Shue, *supra* note 18, at 320.
[85] See also, e.g., Nils Melzer, *Targeted Killing in International Law* (2008), at 281-282; Office of the Judge Advocate General, *supra* note 59, at 2-1; de Preux, *supra* note 41, at 396; Coleman Phillipson, *International Law and the Great War* (1915), at 132; A.P.V. Rogers, *Law on the Battlefield* 2d ed. (2004), at 6; Solis, *supra* note 30, at 258; Taylor, *supra* note 57, at 34; U.K. Ministry of Defence, *Joint Service Manual*, *supra* note 59, at 22; U.K. Ministry of Defence, *Joint Services Publication 383: The Manual of the Law of Armed Conflict Amendment* 3 (2010), at 5; U.S. Department of the Navy, *supra* note 58, at 5-2; Burrus M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity", 92 *American Journal of International Law* 213 (1998), at 230-231; Draper, *supra* note 57, at 130; N.C.H. Dunbar, "Military Necessity in War Crimes Trials", 29 *British Yearbook of International Law* 442 (1952), at 444; Christopher Greenwood, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 2d ed. (2008) 1, at 36-37; Henri Meyrowitz, "The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977", 299 *International Review of the Red Cross* 98 (1994), at 107.

> justified in applying any amount and any kind of force which is necessary for … the overpowering of the opponent.' This limitation, however, leaves a good deal of room for rules of war which will maximize expectable long-range utility for all parties. This restriction, incidentally, itself manifests utilitarian considerations, for a nation is limited to the use of means *necessary* to overcome an opponent. Clearly it is contrary to the general utility that any amount or manner of force be employed when it is *not* necessary for victory.[86]

Contra Brandt, however, it would be of no concern to framers of IHL rules whether belligerents should or should not indulge in material military non-necessities. Surely, neither victory nor defeat is *per se* of concern to IHL norm-creation. The law's framers do not make it their business to ensure that each belligerent maximise its prospect of success or minimise its prospect of failure. In other words, it would be of no concern to IHL norm-creation to protect or prohibit belligerents from engaging in unwise strategic, operational, or tactical behaviour. Material wastefulness, excessiveness, impertinence, and the like[87] are, strictly speaking, matters of incompetence *qua* member of a function-kind.[88]

Consider falling for enemy deceptions, for example. From 26 February[89] until 8 September 1944,[90] the Allied forces conducted Operation Fortitude, a deception operation designed to strengthen Operation Overload (Allied invasion of northwest Europe) by denying Germany knowledge of the true location and moment of their D-Day landing. Fortitude had three major components. Fortitude North simulated a threat of Allied landing on Norwegian coasts.[91] Fortitude South maintained the pre-D-Day illusion of an Allied assault on the Pas de Calais region of northern France,[92] while Fortitude South II sought to induce Germany into believing that Normandy was a diversion ahead of the main invasion at Pas de Calais.[93] A combination of wireless deception,[94] inclusion of false information in communication with Allied POWs in German custody and to resistance organisations,[95] concealment of real forces and display of decoys,[96] restriction on troop leaves and postal services,[97] and, most importantly, double agents,[98] was used in the operation. While historical assessments of Fortitude's impact on Germany vary, they appear to agree that the deception did help the German High Command retain its major formations in the Pas de Calais area before and after the Allied forces landed on Normandy.[99]

Germany, for its part, sought to obtain the information on the invasion with a view to optimising its defence preparations.[100] In this Germany largely failed, due, among other things, to its overestimation of Allied strength,[101] its own preoccupations about an ideal landing site,[102] its internal disagreement and indecision,[103] as well as its generally inadequate intelligence.[104] Of the latter, one account states:

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[86] Brandt, *supra* note 20, at 153-154 (emphasis in original). See also David, *supra* note 18, at 273.
[87] See Part I, Chapter 2 above.
[88] See *ibid.*, Chapter 3 above.
[89] See Roger Hesketh, *Fortitude: The D-Day Deception Campaign* (2000), at 27.
[90] See *ibid.*, at 290, 297.
[91] See Mary Kathryn Barbier, *D-Day Deception: Operation Fortitude and the Normandy Invasion* (2007), at 42, 45.
[92] See *ibid.*, at 64-67.
[93] See *ibid.*, at 127-131.
[94] See *ibid.*, at 24-26.
[95] See *ibid.*, at 26.
[96] See *ibid.*, at 26-30.
[97] See *ibid.*, at 30-32.
[98] See *ibid.*, at 32-39. Generally, see Kesketh, *supra* note 89, at 46-57.
[99] See Barbier, *supra* note 91, at 187-195.
[100] Generally, see *ibid.*, at 148-81.
[101] See *ibid.*, at 158-159.
[102] See *ibid.*, at 149-50, 169-170.
[103] See *ibid.*, at 161, 165-167, 171-175.
[104] See *ibid.*, at 159-160, 167-168.

> According to John Masterman, who ran the Double-Cross Committee, the British captured and turned every agent whom the Germans sent to Great Britain. This could imply a certain degree of ineptitude on the part of the Germans either in the people whom they chose to be agents or in the level of training that they gave prospective agents. There is no denying that the British excelled at identifying possible enemy spies. The exploits of Garbo and Tricycle, as portrayed in their autobiographies and their case files, seem at times a bit far fetched; therefore, one has to wonder why the Germans failed to question their reliability and appeared to accept all of the information that these two and other spies provided. According to "Johnny" Jebsen, a double agent known as Artist, Canaris "did not care if all the agents in Britain were fakes as long as he could go to Field Marshal Keitel, the head of the German high command, and report that he had twelve agents in Britain, each of them writing a letter every week." In addition, it is possible, by the end of the war, that several Abwehr officers were no longer employing agents despite the fact that they were still providing information from them. Several officers pocketed the money meant for the agents and either fabricated the information or obtained it from the newspapers.[105]

Germany's purpose might be described as "discovering the true location and moment of the main Allied landing on northwest Europe in 1994", and one of the measures it took as "choosing, training and monitoring Garbo and Tricycle as German agents operating in Great Britain". Arguably, this action lacked material military necessity on account of its wastefulness and impertinence. Moreover, its material military non-necessity was of a nature that revealed Germany's own improvable vocational incompetence and did not entail evil *per se*. Given the legitimacy of wartime espionage itself,[106] the framers of IHL rules have apparently seen no reason to protect or prohibit the belligerent engaged in espionage from non-evil non-necessities, such as failing to select, train, and handle its spies properly.

2.2.3 Preamble of the 1868 St. Petersburg Declaration: Is Unnecessary Conduct Illegitimate Even If Non-Evil?

The St. Petersburg Declaration may appear to encapsulate the idea that a belligerent act becomes illegitimate merely on account of its material military non-necessity,[107] but it does not. As noted earlier, the declaration delegitimises particular conduct that is deemed evil and lacking in material military necessity, i.e., the employment of explosive projectiles weighing less than 400 grams. The declaration's drafters found to be "contrary to the laws of humanity" excessive *evil* brought about by the employment of arms that either uselessly aggravate the suffering of disabled men or render their death uselessly inevitable.[108] Plainly, the reasoning underpinning the declaration does not address itself to situations where the conduct is considered harmless in the first place.

Where an act that is deemed lacking in material military necessity becomes illegitimate for some reason, the reason is *not* its lack of material military necessity. It is rather the operation of some other element or elements in that conduct's legitimacy modification that is at play. Thus, an act considered materially unnecessary may become illegitimate on account of its evil (e.g., maltreating persons *hors de combat*[109]); its lack of chivalry, unfairness, or bad faith (e.g., improper use of enemy uniforms in certain situations of combat[110]); and the like.

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[105] *Ibid.*, at 159-160 (footnotes omitted).
[106] See, e.g., Article 24, 1907 Hague Regulations; Hersch Lauterpacht (ed.), 2 *Oppenheim's International Law: A Treatise* 7th ed. (1952), at 419; Dinstein, *Conduct of Hostilities*, *supra* note 40, at 241; Geoffrey S. Corn et al., *The Law of Armed Conflict: An Operational Approach* (2012), at 226; Manual on Air and Missile Warfare, para. 119; U.K. Ministry of Defence, *Joint Service Manual*, *supra* note 59, at 63.
[107] See N. Hayashi, *supra* note 82, at 47; Dill and Shue, *supra* note 18, at 320.
[108] St. Petersburg Declaration.
[109] See Article 41(1), Additional Protocol I; Chapter 7 below.
[110] See Part III, Chapter 8 below.

3. Special Cases: Conduct Considered Evil in an Exclusively Self-Inflicted Way

Thus far, our discussion has proceeded on the assumption that evil encompasses all evil, regardless of who suffers it. It may be asked, however, whether this assumption is apposite always and everywhere. Does IHL norm-creation really concern itself with conduct that is deemed evil but in an exclusively self-inflicted way? If it does, does it juxtapose the conduct's exclusively self-inflicted evil *vis-à-vis* its material military necessity or non-necessity, as it would with conduct deemed evil but not in an exclusively self-inflicted way?

3.1 Minding One's Own Business?

There is no compelling reason for which an act that involves exclusively self-inflicted evil should fall outside the scope of IHL norm-creation. Humanity, if not military necessity, would ensure that it does not. Eyal Benvenisti notes that one vision of international humanitarian law "highlights the overriding and unconditional humanitarian obligation toward civilians regardless of their nationality".[111] The same would go even for the disabled soldier, whether he be "friend or foe".[112]

The conduct of hostilities is a major exception in this regard, however.[113] The Soviet Union and Germany refused to permit their own civilians in Stalingrad and Berlin, both besieged during World War II, to evacuate, so that locally raised units would "defend the city more desperately".[114]

Modern military campaigns are also replete with loss of life amongst one's own soldiers. Let us first highlight instances of losses that are arguably consistent with material military necessity. During the Axis advance towards Stalingrad in the summer of 1942, Joseph Stalin issued Order No. 227, which came to be known as "Not One Step Backwards". According to Antony Beevor:

> The order was to be read to all troops in the Red Army. 'Panic-mongers and cowards must be destroyed on the spot. The retreat mentality must be decisively eliminated. Army commanders who have allowed the voluntary abandonment of positions must be removed and sent for immediate trial by military tribunal.' Anyone who surrendered was 'a traitor to the Motherland.' Each army had to organize 'three to five well-armed detachments (up to 200 men each)' to form a second line to shoot down any soldier who tried to run away. Zhukov implemented this order on the Western Front within ten days, using tanks manned by specially selected officers. They followed the first wave of an attack, ready 'to combat cowardice,' by opening fire on any soldiers who wavered.[115]

Beevor also recounts perhaps a somewhat "milder" version of the same idea practiced among the Allied forces. It can be seen in the orders that were reportedly given to airborne division sergeants dropping over Normandy:

> A sergeant mounted first to go to the front of the plane and the platoon commander last, as he would lead the way. The sergeant would bring up the rear so that he could act as "pusher" to make sure that everyone had left and nobody had frozen. "One trooper asked the sergeant if it was true that he had orders to shoot any man that refused to jump. 'That's the orders I've been given.' He said it so softly that everybody became quiet."[116]

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[111] Eyal Benvenisti, "Human Dignity in Combat: The Duty to Spare Enemy Civilians", 39 *Israel Law Review* 81 (2006), at 82-83.

[112] Jean S. Pictet (ed.), *Commentary II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1960), at 83; Jann K. Kleffner, "Protection of the Wounded, Sick, and Shipwrecked", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 2d ed. (2008) 325, at 331.

[113] See, e.g., Benvenisti, *supra* note 111, at 87.

[114] See Antony Beevor, *Stalingrad* (1998), at 106. See also Antony Beevor, *Berlin: The Downfall* 1945 (2002), at 178.

[115] Beevor, *Stalingrad*, *supra* note 114, at 85. See also *ibid.*, at 167 ("Blocking groups … were placed behind [militia brigades] to prevent retreat").

[116] Antony Beevor, *D-Day: The Battle for Normandy* (2009), at 28.

It has been suggested that the court-martial, guilty verdict and execution of U.S. Army Private Eddie Slovik on account of desertion had to do with the need to discourage further desertions, already a problem during the difficult 1944 Hürtgen Forest campaign.[117]

Sometimes, own-side losses are simply part and parcel of military operations. In his report on the evolution of artillery, Ian V. Hogg observed:

> By the time of the Somme, July 1916, more experience had been gained and more ammunition and guns amassed, and artillery support began to take on the shape with which it closed [World War I]. Moreover the infantry had become more used to the idea of close support and had realized the advantages of the curtain of fire. They began to speak of 'leaning on the barrage' by which they meant following close upon the bursting shells … The French, with their greater elan and still-unconquered spirit of attack at all costs, were known to observe that unless the infantry suffered ten percent of their casualties from their own artillery, they weren't following the barrage close enough![118]

Also, at least hypothetically, soldiers may be ordered to allow their own deaths passively "if the commander believes it is necessary for mission accomplishment".[119]

Inevitably, however, soldiers may also die from actions of their own forces or governments that are lacking in material military necessity. During the Battle of the Somme in 1916, for example, thousands upon thousands of Allied infantry soldiers perished due to the incompetent decisions of their commanders.[120] Peter Rowe also notes that "[a]llied armed forces may mistake friendly forces as being those of the enemy and attack them. These, so-called 'friendly fire' incidents have occurred to a greater or lesser extent in all modern armed conflicts".[121] Furthermore, the deployment of faulty equipment may result in the gratuitous loss or reduction of fighting capabilities.[122]

Today's positive international humanitarian law regulates none of these acts. The underlying assumption for this omission seems to be as follows. If, as suggested earlier, it is not of concern to IHL norm-creation whether the belligerent fights competently and increases its prospects of success, or incompetently and imperils itself with dangers of failure, it is likewise of little concern to IHL norm-creation whether the belligerent inflicts evil on itself, its co-belligerent, and those associated with them while succeeding or failing in its endeavours.[123]

There is something faintly Millian about this assumption. John Stuart Mill posited:

> But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.[124]

Mill then reiterated the idea that a person should be able to act on his own judgment and "stand the consequences" when his actions do not cause harm to others:

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[117] See, e.g., William Bradford Huie, *The Execution of Private Slovik* (1954), at 9-10, 12.

[118] See Ian V. Hogg, *Barrage: The Guns in Action* (1970), at 21.

[119] Richard V. Meyer and Mark David Maxwell, "The Natural Right to Intervene: The Evolution of the Concepts of Justification and Excuse for Both State and Individual", 7 *Journal of International Criminal Justice* 555 (2009), at 556 (citing Richard B. Myers, Joint Chiefs of Staff, Standing Rules of Engagement of United States Forces § 3(a) (2005)), 556 n.3 ("The previous Standing Rules of Engagement were promulgated in January 2000 (CJCSI 3121.01A)").

[120] See Norman Dixon, *On the Psychology of Military Incompetence* (1976), at 388 (placing blame more on General Sir Douglas Haig than on General Sir Henry Rawlinson); Martin Middlebrook, *The First Day on the Somme: 1 July 1916* (1972), at 271-273 (placing blame more on Rawlinson than on Haig).

[121] Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (2006), at 139. See also, e.g., *R. v. Secretary of State for Defence* [2010] UKSC 29 [103] (Lord Hope) (appeal taken from Eng.).

[122] See, e.g., *R. v. Secretary of State for Defence* [2010] UKSC 29 [127] (Lord Rodger).

[123] Arguably, international human rights law is making its inroads into the minimisation of *intra*-party evil. We will return to this theme shortly. See also Part III, Chapter 8 below.

[124] See J.S. Mill, *On Liberty and Considerations on Representative Government* (1948), at 49. See also *ibid.*, at 67.

> If either a public officer or any one else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. Nevertheless, when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk; in this case, therefore (unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty), he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.[125]

Such an attitude arguably underpins the fact that international humanitarian law has been developed primarily to regulate inter-belligerent and belligerent-neutral relations – rather than, say, relations between co-belligerents, between a belligerent and persons and objects intrinsically affiliated with it, or between a belligerent and persons or objects similarly affiliated with its co-belligerent.

Article 4 of Geneva Convention IV is axiomatic in this respect. The provision reads, in relevant parts:

> Persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.[126]

During the 1974-1977 Diplomatic Conference, Finland sought to specify in the *chapeau* of Additional Protocol I's Article 75 concerning fundamental guarantees that such guarantees apply to "the Parties' own nationals and nationals of … co-belligerent States having normal diplomatic representation with the Party in whose power they are".[127] Having failed to do so, Finland declared, upon ratification of the protocol: "[U]nder Article 72, the field of application of Article 75 shall be interpreted to include also the nationals of the Contracting Party applying the provisions of that Article".[128]

The Red Cross commentary of the article notes ambiguities:

> Some claim that the fact that the reference to own nationals was deleted reveals an intention to exclude nationals from the application of the provisions of Article 75. Others believe that precisely by virtue of the wording of Article 72 (*Field of application*) and Article 75 there was no need to mention nationals of the Parties to the conflict explicitly.[129]

The commentary argues, on the one hand, that the fact that victims of a war of national liberation may technically be nationals of the state in whose power they find themselves should not deprive them of protection under Article 75, where they are "not actually bound by a duty of allegiance"[130] *vis-à-vis* the state of their technical nationality. On the other hand, according to the Red Cross, the relevant provisions of Additional Protocol I "apply to a Party to the conflict's own nationals, except where the article itself indicates otherwise".[131]

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[125] *Ibid.*, at 86.
[126] Article 4, Geneva Convention IV.
[127] Federal Political Department, 3 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1978), at 295.
[128] Claude Pilloud and Jean Pictet, "Part IV, Section III – Treatment of Persons in the Power of a Party to the Conflict", in Sandoz, Swinarski and Zimmermann (eds.), *supra* note 41, 837, at 838.
[129] *Ibid.*, at 868.
[130] *Ibid*., at 867.
[131] *Ibid.* at 838. See also René Provost, *International Human Rights and Humanitarian Law* (2002) 40, 42.

3.2 Are All War Crimes Enemy's Crimes?

This ambivalence closely mirrors the manner in which war crimes are often perceived. One party to the conflict habitually reserves the label "war crimes" to describe acts that its adversary commits against persons and objects affiliated with it. Conversely, states may choose to deal with comparable acts committed by their own personnel under their domestic law.[132] Ted van Baarda observes:

> While a violation of the *jus in bello* which has been committed by the enemy is likely to be portrayed as a typical example the less-than-human nature of the enemy, propaganda may also suggest that a violation of the *jus in bello* committed by one's own side is merely a mishap, an accident, or an act which was at the least justified by the pressure of enemy advances. One author on international criminal law was able to quote with irony a Minister of Defence who stated that a war crime is by definition an act which is committed by the enemy. The frightening result is that there develops a strong possibility that war crimes can be committed without them being recognized as such by the perpetrator. After all, it is apparently a good cause he is fighting for (at least, that is what the population is told by propaganda). The cause, the national interest, appears to justify the actions. The chances are that the nationalistic premise *in war, my country can do no wrong* will collide head-on with an international value system embodied in universally accepted Laws of Armed Conflict and core human rights.[133]

The significance of such labelling is not limited to propaganda. There is some weight of authority for the view that international law also adheres to the exclusively inter-belligerent application of war crimes.[134] Commentators routinely cite *Pilz*[135] and *Motosuke*[136] as examples in support of this view.[137]

The absence of positively shared allegiance between the perpetrator and the victim is formally required for grave breaches of Geneva Conventions III and IV.[138] As noted earlier, Article 4 of Geneva Convention IV excludes the perpetrator's own "nationals" from that convention's protection, and hence from its grave breaches provisions.[139] While the 1999 *Tadić* Appeal Judgement does dispense with the strict interpretation of *de jure* nationality, it merely replaces that interpretation with

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[132] See, e.g., U.S. Uniform Code of Military Justice; Laurie R. Blank and Gregory P. Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War* (2013), at 578-579. But see the U.K. International Criminal Court (ICC) Act, and the cases held thereunder in which British military personnel were tried and convicted of war crimes properly so-called; Nathan Rasiah, "The Court-Martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice", 7 *Journal of International Criminal Justice* 177 (2009).

[133] Ted van Baarda, "The Ethical Challenges of a Complex Security Environment", in Whetham, *supra* note 2, 148, at 154-155 (footnote omitted).

[134] See, e.g., Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* 3d ed. (2013), at 67.

[135] See 17 *International Law Reports* 391 (1950); Göran Sluiter, "Pilz", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 872.

[136] See United Nations War Crimes Commission, 13 *Law Reports of Trials of War Criminals* (1949) 126; Jonas Nilsson, "Motosuke", in Cassese, *Oxford Companion*, *supra* note 135, at 816-817.

[137] See also Cassese and Gaeta, *supra* note 134, at 67 n.7; Jann K. Kleffner, "Friend or Foe? On the Protective Reach of the Law of Armed Conflict: A Note on the SCSL Trial Chamber's Judgment in the Case of *Prosecutor v. Sesay, Kallon and Gbao*", in Mariëlle Matthee et al. (eds.), *Armed Conflict and International Law: In Search of the Human Face Liber Amicorum in Memory of Avril McDonald* (2013) 285, at 299; Joanna Nicholson, *Fighters as Victims in International Criminal Law* (2014), at 154.

[138] See, e.g., Héctor Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute* (2008), at 61-62. *Contra* Olásolo, however, the grave breaches provisions of Geneva Conventions I and II arguably operate on a different basis. See below.

[139] See Article 147, Geneva Convention IV ("Grave breaches to which the preceding Article refers shall be those involving any of the following acts, if committed against persons or property protected by the present Convention …").

one based on ethnic allegiance.[140] In other words, the latter construal still retains the requirement of a "hostile" or "adverse" affiliation between the perpetrator and the victim.[141]

The same would be true, *mutatis mutandis*, of Article 4 of Geneva Convention III concerning the protection of POWs[142] and its grave breaches provisions.[143] Whether a flexible interpretation of the expression "enemy" found in Article 4 of Geneva Convention III along the lines suggested in *Tadić* finds widespread support remains to be seen.

As regards other war crimes, the absence of shared allegiance is either spelled out explicitly,[144] or frequently taken for granted in the formulation of a requisite nexus.[145] Similar assumptions appear to pervade even those war crimes that are committed in non-international armed conflicts.[146] The *Sesay et al.* Trial Judgement of the Special Court for Sierra Leone[147] is quite explicit on this point. In a somewhat puzzling ruling that purportedly encompasses both the laws of international and non-international armed conflicts,[148] the *Sesa*y Trial Chamber held:

> The Chamber is of the opinion that the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces.
>
> The law of international armed conflict regulates the conduct of combatants *vis-à-vis* their adversaries and persons *hors de combat* who do not belong to any of the armed groups participating in hostilities. In this respect, we recall that the field of application of the Third Geneva Convention is restricted to persons "who have fallen into the power of the enemy."
>
> It is trite law that an armed group cannot hold its own members as prisoners of war. The law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law. In our view, a different approach would constitute an inappropriate reconceptualisation of a fundamental principle of international humanitarian law.[149]

Recent international jurisprudence is not entirely consistent, however. With regard to certain types of war crimes committed in non-international armed conflicts, several rulings reveal a tendency

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[140] See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, *Judgement*, 15 July 1999, paras. 164-169. See also *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, *Judgement*, 16 November 1998, paras. 259, 263-266; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, *Judgement*, 20 February 2001, paras. 52-106; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, *Judgement*, 17 December 2004, paras. 322-323, 328-330.

[141] See also Kleffner, "Friend or Foe?", *supra* note 137, at 292. But see Nicholson, *supra* note 137, at 153-164.

[142] See also, e.g., Judicial Committee of the Privy Council (U.K.), *Public Prosecutor v. Oie Hee Koi* and the connected appeals, 4 December 1967, [1968] A.C. 829 (finding it "trite law that an armed group cannot hold its own members as prisoners of war").

[143] See Article 130, Geneva Convention III ("Grave breaches to which the preceding Article refers shall be those involving any of the following acts, if committed against persons or property protected by the Convention …").

[144] A number of war crimes within the jurisdiction of the International Criminal Court contain explicit references to "hostile" and "adverse" affiliation of the persons and objects protected. See Articles 8(2)(b)(x), 8(2)(b)(xi), 8(2)(b)(xiii), 8(2)(b)(xiv), 8(2)(b)(xv), 8(2)(e)(ix), 8(2)(e)(xi), 8(2)(e)(xii), of the Rome Statute of the International Criminal Court (17 July 1998) and their corresponding elements.

[145] See, e.g., Michael Cottier, "(vi)", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2d ed. (2008), at 344 (regarding the war crime of "killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at his discretion" under Article 8(2)(b)(vi), Rome Statute of the International Criminal Court); *Prosecutor v. Gragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, *Judgement*, 12 June 2002, paras. 58-59.

[146] See, e.g., *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, *Judgement*, 3 April 2008, para. 1 (describing how Kosovar Albanians were charged with war crimes against Kosovar Albanian victims because of the latter's "collaboration" with the Serbian authorities); *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, *Judgement*, 30 November 2005, paras. 1, 36, 45.

[147] *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, *Judgement*, 2 March 2009.

[148] See *ibid.*, paras. 977 (finding that "the armed conflict in Sierra Leone was of a non-international character"), 1452 (referring to "the law of international armed conflict" and to Geneva Convention III).

[149] *Ibid.*, paras. 1451-1453 (footnote omitted). For a sustained criticism of this ruling, see Kleffner, *supra* note 137; Nicholson, *supra* note 137, at 154-160.

towards disregarding "hostile" or "adverse" affiliations. For instance, the ICTY's *Kvočka et al.* Judgement dismisses as "irrelevant" for serious violations of common Article 3 the different ethnic groups to which the perpetrator and the victim belonged.[150] Nor, perhaps understandably, does the ICC consider such affiliations material to charges relating to the enlistment, conscription and use of child-soldiers.[151]

It may be said that the so-called "auto-genocide" as a species of genocide is undergoing a similar transformation.[152] This stands in contrast to crimes against humanity, a class of international crimes that have since their inception been specifically intended to cover, among other things, evil inflicted by authorities against their own nationals.[153]

3.3 Life of a Soldier

Many belligerent acts that involve exclusively self-inflicted evil concern what a party to the conflict does or does not owe its constituent people, whom it asks to support its cause and make sacrifices therefor.[154] We may ask whether one form of exclusively self-inflicted evil, i.e., a soldier's death caused by the incompetence of his or her commander, can amount to an arbitrary deprivation of life. According to Rowe:

> Depending upon the degree of risk of loss of life and the nature of the compulsion (through the medium of military punishment for refusing to obey orders) it is possible to foresee a situation where a solider may arbitrarily be deprived of his life. An extreme example may illustrate the point. A commander has taken very little care over a plan to attack an enemy military installation with large numbers of his own soldiers. He expects that very many of them will be killed in the attack. If, however, any reasonable commander had thought through the planned operation he would have concluded that the loss of life of his own soldiers would clearly be excessive compared with the concrete and direct military advantage to be gained from the attack. It might not be difficult to conclude here that some of his men have been deprived of their lives arbitrarily.[155]

Rowe's view here is deeply problematic, for two reasons. First, it is not unusual that a commander may find himself ordering his soldiers to launch a dangerous and risky assault, fully expecting many of them to lose their lives doing it. The extent to which the commander takes care over his plans may be a matter of his personality (some commanders are more cautious than others). Besides, speaking of cautious versus audacious styles of commanding, would it make any difference if the commander himself expected to lose his life during the planned assault, given its high risk, and nevertheless led the assault? Such a situation might well materialise, for example, where an encircled unit were to choose between a surrender in order to save lives and a last-ditch attempt to break out. Would

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[150] See *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, *Judgement*, 28 February 2005, para. 561.

[151] See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Judgement pursuant to Article 74 of the Statute*, 14 March 2012, paras. 37-51 (raising at no point the possibility that the victims' ethnic or other bases of allegiance might not diverge from that of their victimisers as an issue); *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, *Decision Pursuant to Article 61(7) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda* 9 June 2014, paras. 74-96, esp. 86 ("As part of its recruitment campaign, the [Hema-dominated armed formations with which Ntaganda was found to be affiliated] also implemented a policy of asking Hema families to contribute a child to the movement …").

[152] See, e.g., Florian Jessberger, "The Definition and the Elements of the Crime of Genocide", in Paola Gaeta (ed.), *The Genocide Convention – A Commentary* (2009) 87, at 110. William Schabas was initially sceptical of the notion, but he appears to have rescinded this scepticism. Compare William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2000), at 119-120, 148-149, with William A. Schabas, *Genocide in International Law: The Crime of Crimes* 2d ed. (2009), at 138-140.

[153] See, e.g., M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 2d rev. ed. (1999), at 72; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* 3d ed. (2006), at 260; Egon Schwelb, "Crimes Against Humanity", 23 *British Yearbook of International Law* 178 (1946), at 182.

[154] See, e.g., Michael Walzer, *Arguing About War* (2004), at 24.

[155] See, e.g., Rowe, *Impact of Human Rights Law*, *supra* note 121, at 138-139 (footnotes omitted).

it not be possible that, if the commander had chosen the latter, he might have acted negligently as far as his own life and those of his subordinates were concerned, but might have nevertheless earned praise for bravery and leadership rather than blame for the deaths of his soldiers?

Second, even if, *arguendo*, a state were duty-bound not to let its commanders launch attacks that are too risky, how would it follow *from this* that the death of its own soldiers in such attacks would become a breach of their right to life where such losses "would clearly be excessive compared to the concrete and direct military advantage to be gained"? This is evidently a formulation borrowed from the test of proportionality *in bello* applicable to attacks.[156] But the relevant "loss" variable for determining the proportionality or otherwise of such attacks is that of civilian life[157] – not one's own soldiers, much less those who are not placed *hors de combat*.[158] Why should the human rights standard for determining the arbitrariness of the loss of a soldier's life in an attack depend on whether this loss was excessive compared to the concrete and direct military advantage anticipated from that attack?[159]

In other ways, however, grossly negligent combat decisions of a commanding officer imperilling the life of his subordinates may indeed constitute breaches of the latter's human right to life. Of an incident involving the death of a soldier caused by heatstroke while serving in Iraq,[160] the U.K. Supreme Court said:

> If armed forces on active service abroad are within a State's jurisdiction for purposes of article 1 [of the European Convention on Human Rights], the question arises of the scope of the substantive obligations imposed by article 2 [of the same convention]. Would the Strasbourg Court hold that they extend to the adequacy of the equipment with which the forces are provided; to the planning and execution of military manoeuvers? These questions are not easy to address, but an affirmative answer certainly cannot be excluded.[161]

A government's failure adequately to budget its military procurement programmes, train its troops, and ensure competent combat decisions by its commanders, and so on, may properly be a matter of domestic accountability.[162] It may, perhaps, even be a matter of accountability under international human rights law.[163]

3.4 Delegitimising Self-Inflicted Evil in War

The question, then, is whether the reduction of exclusively self-inflicted evil is, or should be, of concern to international humanitarian law.[164] There are signs, however modest, that it is so. Where an act involving such evil is also deemed lacking in material military necessity, its illegitimacy appears to be readily affirmed and contrary action readily demanded.

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[156] Rowe himself admits this. See *ibid.* at 138 n.102.
[157] See, e.g., Articles 51(5)(b), 57(2)(a)(iii), 57(2)(b), Additional Protocol I.
[158] See, e.g., Rogier Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials", 46 *Israel Law Review* 271 (2013), at 304.
[159] See, e.g., *R. v. Secretary of State for Defence* [2010] UKSC 29 [120–24] (Lord Rodger) (appeal taken from Eng.).
[160] See, e.g., "Army Blamed for Iraq Heat Death", *BBC News*, 10 November 2006.
[161] R. v. Secretary of State for Defence [2010] UKSC 29 [79] (Lord Phillips); [100–06] (Lord Hope), [118-19] (Lord Rodger). But see *ibid.* [214], [216-17] (Lord Mance).
[162] See, e.g., "Soldiers' Families 'Losing Faith' in MoD", *BBC News*, 7 December 2004; "MoD Budget 'Harm' Claims Denied", *BBC News*, 23 August 2009; "Family Sues MoD Over Marine Death", *BBC News*, 12 October 2009.
[163] See, e.g., Peter Rowe, "Members of the Armed Forces and Human Rights Law", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 521, at 537-540.
[164] See, e.g., Peter Rowe, "The Obligation of a State Under International Law to Protect Members of Its Own Armed Forces During Armed Conflict or Occupation", 9 *Yearbook of International Humanitarian Law* 3 (2006), at 16-24.

Consider, for example, the belligerent's failure to protect and humanely treat helpless victims (including those of its own), contrary to Articles 73 through 77 and 79 of Additional Protocol I,[165] common Article 3,[166] or Geneva Conventions I and II.[167] Article 54 of Additional Protocol I may also be mentioned here. Article 54's second paragraph prohibits the belligerent from attacking, destroying, removing or rendering useless objects that are indispensable to the survival of the civilian population. Paragraph five of that article qualifies this prohibition, by recognising "vital requirements of any Party to the conflict in the defence of its national territory against invasion" and authorising derogation therefrom. This derogation is limited to objects located "within such territory under [the derogating party's] own control" and to situations where derogation is "required by imperative military necessity".[168] Article 54 shows, in principle, that it is illegitimate to inflict self-inflicted evil in the form of scorched earth from which one's own population will suffer.[169] This evil exceptionally ceases to be illegitimate, but only in the event of imperative military necessity.[170]

Initially, a number of states present in Geneva during the negotiations of Article 54 took it for granted that the rule would only apply where one party to the conflict inflicted the evil in question and another party suffered it.[171] Authorising scorching one's own territory if imperatively demanded by military necessity was an unavoidable trade-off in order to secure an otherwise unqualified prohibition against the destruction of objects indispensable to the survival of the civilian population – including, presumably, one's own civilian population.[172]

The separation of cultural property from military objectives under one's own control is another example.[173] Each party remains bound by this duty, until and unless "military necessity imperatively requires" the infliction of a self-inflicted evil in the form of its cultural property being exposed to harmful consequences of armed hostilities.[174] In addition, when compelled to abandon its wounded and sick to an adversary, each belligerent is duty-bound to reduce self-inflicted evil by leaving elements of its medical personnel and *materiél* with them to assist in their care. This duty remains in place as far as "military considerations permit".[175]

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[165] As noted earlier, according to the Red Cross commentary, these rules protect not only victims in the hands of their adversary but also those in the hands of their own state. Pilloud and Pictet, "Treatment of Persons", *supra* note 128, at 838.

[166] See Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 40; Sylvie-S. Junod, "Article 2 – Personal Field of Application", in Sandoz, Swinarski and Zimmermann (eds.), *supra* note 41, 1357, at 1359, 1369-1370.

[167] See Kleffner, *supra* note 137, at 294-296.

[168] Article 54(5), Additional Protocol I. See also, e.g., Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law", 293 *International Review of the Red Cross* 94 (1993), at 100. The British Manual refers to "the flooding of low-lying areas to impede invading forces" as an example of conduct falling within the scope of Article 54(5) exceptions. See U.K. Ministry of Defence, *Joint Service Manual*, *supra* note 59, at 74.

[169] See also Chapter 7 below.

[170] See also *ibid.* below; Claude Pilloud and Jean Pictet, "Article 54 – Protection of Objects Indispensable to the Survival of the Civilian Population", in Sandoz, Swinarski and Zimmermann (eds.), *supra* note 41, 651, at 659 ("in an extreme case"); Dinstein, "Military Necessity", *supra* note 61, § 8.

[171] See Federal Political Department, 15 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1978) 280, 350.

[172] See *ibid.*, at 462, 516.

[173] See, e.g., Article 4(1), Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954). It appears that it is the avoidance of evil inflicted upon such property as a "universal" concern, rather than that seen from a strictly self-interested point of view, that is at stake. See, e.g., Jiří Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Protocol, Signed 14 May, 1954 in the Hague, and on Other Instruments of International Law Concerning Such Protection* (1996), at 68-69.

[174] See Article 4(2), Hague Cultural Property Convention.

[175] See Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906); Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929); Article 12, Geneva Convention I. This rule, according to the ICRC, meets a "humanitarian requirement so obviously necessary". See Jean S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field* (1952), at 141.

Similarly, Article 58 of Additional Protocol I obligates each belligerent, though only "to the maximum extent feasible", to:

> (a) [W]ithout prejudice to Article 49 of [Geneva Convention IV[176]], endeavour to remove the civilian population, individual civilians and civilian objects under [its] control from the vicinity of military objectives;
> (b) [A]void locating military objectives within or near densely populated areas;
> (c) [T]ake the other necessary precautions to protect the civilian population, individual civilians and civilian objects under [its] control against the dangers resulting from military operations.[177]

In this connection, reference may also be made to Article 51(7) of Additional Protocol I that prohibits the use of civilian persons – including one's own – as human shields.[178]

4. Conclusion

This chapter shows that military necessity can indeed affect the legitimacy of a belligerent act, where the act is deemed evil and its purpose is considered legitimate. As we have seen, however, in no other circumstances does an act's legitimacy depend on whether it is materially necessary. Plainly, consistency or inconsistency with material military necessity is *not* an element in the legitimacy modification of the following types of conduct:

> 1. Wherever it is taken for a military purpose that is considered illegitimate – the act at issue is *ipso facto* illegitimate in that case; and
> 2. Wherever, while taken for a legitimate military purpose, it is deemed harmless to begin with – the act at issue is *ipso facto* legitimate in that case.[179]

More importantly, this chapter demonstrates that the lack of material military necessity, as such, is *never* a reason for a belligerent act's illegitimacy as far as IHL norm-creation is concerned. That the framers of IHL rules take the intrinsic material utility of a given belligerent act seriously, if not conclusively, is intuitively sound. It would be an error, however, to assume that they also took military disutilities *per se* seriously. For, although international humanitarian law endeavours to accommodate the pursuit of military necessities, the law does not make it its business to save incompetent belligerents from themselves. After all, if a warring party encumbers itself with missed opportunities and mounting blunders, it has only itself to blame.

Nevertheless, we should not take these Millian underpinnings too far. Albeit in a limited set of circumstances, the law does delegitimise exclusively self-inflicted evil, and it does mandate action with a view to reducing such evil. Our discussion in this chapter indicates the involvement of third elements in the legitimacy modification of numerous belligerent acts, including, but not limited to, those that entail exclusively self-inflicted evil.

How, then, does normative military necessity interact with other reason-giving considerations, such as humanity and chivalry, in the process of IHL norm-creation? It is to this question that we turn in Chapter 5.

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[176] Article 49 of Geneva Convention IV principally prohibits forcible transfers and deportations of protected persons from occupied territory.

[177] The duty that Article 58 creates for a belligerent party is predicated, at least *vis-à-vis* its own population, on self-interest. See *ibid*., at 692, 694; U.K. Ministry of Defence, *Joint Service Manual*, *supra* note 59, at 89.

[178] See Claude Pilloud and Jean Pictet, "Precautions against the Effects of Attacks", in Sandoz, Swinarski and Zimmermann (eds.), *supra* note 41, 691, at 692. For an illustration of using one's own civilians as human shields, see, e.g., Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (2003), at 67-69.

[179] That is, subject to the involvement of some third element in the act's legitimacy modification.

Chapter 5

Inevitable Conflict Thesis

International humanitarian law has been developed with a view to striking a realistic and meaningful balance between military necessity and humanity. It would follow, then, that the law has "accounted for" these considerations. This is a widely held view indeed.[1] Troublingly, however, what "accounting for" military necessity and humanity really means has remained obscure. This obscurity has given rise to different opinions.

These opinions may be grouped around two major sets of internally coherent ideas. Let us call the first set an "inevitable conflict thesis". On this view, "accounting for" military necessity and humanitarian considerations amounts to treating them as inevitably in conflict with each other. In other words, no belligerent conduct is capable of jointly satisfying them.

The truth of this assertion is predicated on the notion that both military necessity and humanity generate imperatives, and that these imperatives always create norm conflicts with regard to a given act. Such would be the case, for instance, between propositions of the sort "occupying powers must detain persons who threaten their security", and "occupying powers must not detain such persons". This notion is akin to a zero-sum game where obeying one imperative always comes at the expense of disobeying the other.

For proponents of the inevitable conflict thesis, weaving a workable compromise between military necessity and humanity into international humanitarian law is what "accounting for" them really means. Thus, a positive IHL rule may create a principal obligation, and then subject it to exceptions on grounds of military necessity and/or humanity. Consider Article 49 of Geneva Convention IV, for example:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand …[2]

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[1] See, e.g., Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (11 December 1868); Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907); *In re von Lewinski*, in Hersch Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases* (1949) 509, at 512; U.S. Department of the Army, *The Law of Land Warfare* (1956), at 4; U.K. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 23, 444; Jean de Preux, "Article 35 – Basic Rules", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 389, at 392-93; Thomas Erskine Holland, *The Laws of War on Land (Written and Unwritten)* (1908), at 13; N.C.H. Dunbar, "The Significance of Military Necessity in the Law of War", 67 *Juridical Review* 201 (1955), at 212; G.I.A.D. Draper, "Military Necessity and Humanitarian Imperatives", 12 *Military Law and Law of War Review* 129 (1973), at 142; Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (1987), at 83; Ingrid Detter de Lupis, *The Law of War* (1987), at 334; Geoffrey Best, "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: Essays in Honour of Frits Kalshoven* (1991) 3, at 5; Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War", 35 *Harvard International Law Journal* 49 (1994), at 53; Nils Melzer, *Targeted Killing in International Law* (2008), at 290; A.P.V. Rogers, *Law on the Battlefield* 2d ed. (2004), at 4; Eyal Benvenisti, "Human Dignity in Combat: The Duty to Spare Enemy Civilians", 39 *Israel Law Review* 81 (2006), at 81; Christopher Greenwood, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 2d ed. (2008) 1, at 37-38; Christine Byron, "Von Lewinski", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* 966 (2009), at 967; Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", 50 *Virginia Journal of International Law* 795 (2010), at 798; U.S. Department of Defence, *Law of War Manual* (quoted in *ibid.*, at 801 n. 19); Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), at 269.

[2] Article 49, Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

Here, the rule's framers have struck the compromise between military necessity and humanity in such a way that pleas arising *de novo* from either one of these grounds are admissible. There are also instances where the drafters have chosen to admit *de novo* military necessity pleas only,[3] or *de novo* humanity pleas only.[4] Leaving the rule unqualified elsewhere[5] implies that its framers intended to exclude such pleas. Consequently, no positive IHL rule admits *de novo* military necessity pleas, unless the rule itself envisages their admissibility expressly and in advance. The same exclusion also applies, *mutatis mutandis*, to *de novo* humanity pleas.

We may style the second set of ideas – to which the inevitable conflict thesis will be contrasted – a "joint satisfaction thesis".[6] In a nutshell, the latter thesis asserts that it is always possible for the belligerent to act in a manner that jointly satisfies military necessity and humanity. This is so, because military necessity is normatively indifferent. For the purposes of IHL norm-creation, neither the military necessity nor military non-necessity of a belligerent act really makes its performance or forbearance mandatory.

Humanity does demand some belligerent acts and condemns others. In some situations, humanity affirmatively demands what military necessity indifferently permits (e.g., "Belligerents must limit their attacks to legitimate military targets", and "Belligerents may limit their attacks to such targets"). Here, it is plain that the belligerent satisfies both considerations by acting in conformity with humanity. Admittedly, there are circumstances in which this kind of joint satisfaction is unavailable – e.g., "Prisoners of war (POWs) must be released where unusual conditions of combat make their evacuation to the rear area impractical", as opposed to "POWs may be killed in such conditions". Even there, however, what results is a norm contradiction, not a norm conflict. The belligerent can still satisfy military necessity and humanity by acting as directed by the latter.

According to the joint satisfaction thesis, IHL norm-creation "accounts for" military necessity in two ways. The first is by positing rules that make the pursuit of joint satisfaction unqualifiedly, principally, indeterminately, or exceptionally obligatory. The other is by declining or failing to posit such rules. Unqualified IHL obligations extinguish all contrary liberties, and render inadmissible all indifferent *de novo* pleas that might otherwise be invoked in defence of deviant behaviour. Crucially, it is possible that those *de novo* pleas that are not normatively indifferent remain admissible even *vis-à-vis* unqualified IHL rules.

What the joint satisfaction thesis shows is three-fold. First, normative military necessity furnishes the framers of IHL rules with robust reason to leave the belligerent at liberty to pursue material military necessities and to avoid non-necessities. Second, it also offers moderate reason for which the framers should consider leaving the belligerent at liberty even to forgo necessities and suffer non-necessities. Third, and most importantly, no positive IHL rules obligate or prohibit any belligerent action on account of its military necessity or non-necessity alone.

In this chapter, we will familiarise ourselves with the inevitable conflict thesis. Let us first take an overview of its main features. Our discussion will then concentrate on the thesis' two central assertions, namely, that a norm conflict between military necessity and humanity is inevitable, and that unqualified IHL rules exclude both *de novo* military necessity and *de novo* humanity pleas.

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[3] See, e.g., Article 143, Geneva Convention IV ("Such visits [by representatives or delegates of the protecting power] may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure").

[4] See, e.g., Article 127, Geneva Convention IV ("Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands. If the combat zone draws close to a place of internment, the internees in the said place shall not be transferred unless their removal can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred").

[5] See, e.g., Article 3 common to the Geneva Conventions ("[T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [i.e., those taking no active part in the hostilities] …").

[6] See Chapters 6 and 7, and Part III, Chapter 8 below.

1. Overview

In truth, the inevitable conflict thesis is a collated summation of the positions taken by commentators and authorities on normative military necessity that are disparate, fragmented, and sometimes inconsistent. Those to whom the thesis is attributed do not necessarily embrace it in all its aspects. Nevertheless, several major proponents, such as Yoram Dinstein and Michael Schmitt, are readily identifiable.

Dinstein championed the thesis in his earlier work. His 1982 *Max Planck Encyclopedia* entry on military necessity states:

> The laws of war are all based on a subtle balance between two opposing considerations: military necessity, on the one hand, and humanitarian sentiments, on the other … Each one of the laws of war discloses a balance between military necessity and humanitarian sentiments, as produced by the framers of international conventions or as crystallized in the practice of States. The equilibrium may be imperfect, but it is legally binding in the very form that it is constructed. It is not the privilege of each belligerent, let alone every member of its armed forces, to weigh the opposing considerations of military necessity and humanitarianism so as to balance the scales anew. *A fortiori*, it is not permissible to ignore legal norms on the ground that they are overridden by one of the two sets of considerations.[7]

A similar sentiment is reiterated in Dinstein's 2004 *Conduct of Hostilities* book:

> LOIAC [the law of international armed conflict] in its entirety is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations … In actuality, LOIAC takes a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism) … Every single norm of LOIAC is moulded by a parallelogram of forces: it confronts a built-in tension between the relentless demands of military necessity and humanitarian considerations, working out a compromise formula. The outlines of the compromise vary from one LOIAC norm to another. Still, in general terms, it can be stated categorically that no part of LOIAC overlooks military requirements, just as no part of LOIAC loses sight of humanitarian considerations. All segments of this body of law are stimulated by a realistic (as distinct from a purely idealistic) approach to armed conflict.[8]

The main contours of the inevitable conflict thesis are already visible in these passages. Thus, international humanitarian law strikes "subtle equilibrium" between military necessity and humanity. These are "diametrically opposed" considerations. "No part" of international humanitarian law loses sight of this equilibrium. No deviation from positive IHL rules is therefore permissible by dint of "one of the two sets of considerations" – in other words, neither *de novo* military necessity pleas nor *de novo* humanity pleas are admissible.

Dinstein's views have remained largely unchanged over the years.[9] Two recent modifications may be noted, however. He now acknowledges the existence of "rare occasions upon which the demands of military necessity converge with humanitarian considerations".[10] He cites the unqualified prohibition against attacking undefended towns, villages, or buildings, as an example.[11] Still, accord-

[7] Yoram Dinstein, "Military Necessity", 3 *Max Planck Encyclopedia of Public International Law* 274 (1982), at 274.
[8] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), at 16-17 (footnotes omitted).
[9] See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 2d ed. (2010), at 4-5; Yoram Dinstein, "Military Necessity", *Max Planck Encyclopedia of Public International Law* 2d ed. (2009); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 3d ed. (2016).
[10] Dinstein, "Military Necessity" (2009), *supra* note 9, § 3.
[11] See *ibid.*

ing to Dinstein, this "is not the normal situation. Ordinarily, military necessity will point in one direction and humanitarian considerations in another".[12] The other modification involves a change in the emphasis that he places on *de novo* pleas. Although he stands by the idea that no such pleas are admissible, he now says: "In particular, [belligerent parties] cannot try to avoid implementation of a given norm in the name of military necessity".[13] Omitted here is the notion that the parties cannot try to do so in the name of humanity.

Schmitt's positions closely echo those of Dinstein. Thus, Schmitt recently advocated:

- That "IHL represents a carefully thought out balance between the principles of military necessity and humanity"[14];
- That these principles are "opposing forces"[15];
- That "[e]very one of [IHL's] rules constitutes a dialectical compromise" between them[16]; and
- That "neither [military necessity nor humanity] independently justifies departure from its provisions, unless otherwise specifically provided for in the law".[17]

Schmitt, much like Dinstein, also acknowledges a limited possibility that military necessity and humanity may coincide:

> Consider a military objective in a concentration of civilians that would release chemicals harmful to the civilian population if attacked with regular explosive bombs. For the sake of analysis, assume that despite the expected incidental harm to civilians, the anticipated military advantage is great enough to comply with the proportionality principle. However, if incendiary weapons are employed, the resulting fire will consume the chemicals, thereby lessening the civilian impact and keeping the area accessible to ground forces.[18]

Here, Schmitt hypothesises a military purpose in the form of "destroying a military objective in a concentration of civilians that would release chemicals harmful to the civilian population if attacked by regular explosive bombs". Then, *vis-à-vis* this purpose, he proposes to compare two alternative courses of action. The first course of action may be described as "employing regular explosive bombs", and the other "employing incendiary weapons". Assuming that both are similarly conducive to the accomplishment of the said purpose, one may say that the latter is more consistent with material military necessity than the former. That is so, according to Schmitt, inasmuch as the resulting fire consumes the chemicals and keeps the area accessible to ground forces.[19]

Schmitt argues that, in the situation at hand, incendiary weapons are also more humane than regular explosive bombs. Incendiary weapons lessen the harmful chemicals' impact on the surrounding civilian population, whereas regular weapons do not. "In this scenario", Schmitt continues, "the use of incendiary weapons would serve both humanitarian and military ends".[20]

2. Inevitability of Norm Conflicts

[12] *Ibid.*, at § 4.
[13] *Ibid.*, at § 7.
[14] Schmitt, "Military Necessity and Humanity", *supra* note 1, at 798. See also Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis", 1 *Harvard National Security Journal* 5 (2010), at 6.
[15] Schmitt, "Military Necessity and Humanity", *supra* note 1, at 798.
[16] *Ibid.*, at 798. See also Schmitt, "Interpretive Guidance", *supra* note 14, at 6; Michael N. Schmitt, "Discriminate Warfare: The Military Necessity-Humanity Dialectic of International Humanitarian Law", in David W. Lovell and Igor Primoratz (eds.), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (2012) 85, at 88, 102.
[17] Schmitt, "Military Necessity and Humanity", *supra* note 1, at 801.
[18] *Ibid.*, at 816.
[19] Presumably, these forces are unequipped with protective gear.
[20] Schmitt, "Military Necessity and Humanity", *supra* note 1, at 816.

What relationship do proponents of the inevitable conflict thesis see between military necessity and humanity in the process of IHL norm-creation? What could Dinstein's "diametrical opposition"[21] between military necessity and humanity, or Schmitt's "dialectical compromise"[22] between them, really mean?

In this author's view, Dinstein and Schmitt can only be regarded as denying the possibility of a joint satisfaction between military necessity and humanity. Humanity always demands what military necessity spurns, and the former always condemns what the latter requires. The belligerent must *always* choose between acting as required by military necessity at the expense of humanity, on the one hand, and acting as demanded by humanity at the expense of military necessity, on the other. Similarly, the framers of IHL rules must *always* choose between prioritising humanity over military necessity, prioritising the latter over the former, and striking a compromise between them.

All positive IHL rules embody a choice of this character made in the process of their norm-creation. For, as Dinstein notes in his revised 2010 *Conduct of Hostilities* book:

> Every single norm of LOIAC is moulded by a parallelogram of forces: it confronts an inveterate tension between the demands of military necessity and humanitarian considerations, working out a compromise formula.[23]

We may think of the picture here as a tug of war, with military necessity pulling the rope of IHL norm-creation in one direction, and humanity pulling it in the other direction.[24]

In order for their positions to make sense, proponents of the inevitable conflict thesis must also uphold the combined truth of three subsidiary propositions, namely:

(i) That military necessity and humanity in their material sense never coincide;
(ii) That, normatively speaking, both military necessity and humanity offer reasons for which the framers of IHL rules should obligate obedience with the imperatives that the two considerations respectively generate; and
(iii) That obeying the imperatives of military necessity and obeying those of humanity always conflict with each other.

2.1 Non-Coincidence of Military Necessity and Humanity in Their Material Sense

The inevitability of conflict between military necessity and humanity in IHL norm-creation entails the notion that their material counterparts are of such a nature as to preclude coincidence. Every kind of belligerent conduct is either deemed inhumane yet consistent with military necessity, or deemed humane yet lacking in military necessity. Conversely, no act can be both humane and materially necessary, or both inhumane and materially unnecessary.

Consider the treatment of POWs in unusual conditions of combat. Dinstein discusses the matter thus:

> A good example for LOIAC rejecting military necessity in favour of humanitarian considerations pertains to the capture of prisoners of war. Under Geneva Convention (III) of 1949, prisoners of war in custody must not be put to death, and, as soon as possible after capture, they have to be evacuated to camps situated in an area far from the combat zone. As a rule, this will be done by assigning an escort to carry out the process of evacuation, ensuring that the prisoners of war will

[21] Dinstein, *Conduct of Hostilities* (2004), *supra* note 8, at 16; Dinstein, *Conduct of Hostilities* (2010), *supra* note 9, at 5.
[22] Schmitt, "Military Necessity and Humanity", *supra* note 1, at 798. See also Schmitt, "Interpretive Guidance", *supra* note 14, at 6; Schmitt, "Discriminate Warfare", *supra* note 16, at 102.
[23] Dinstein, *Conduct of Hostilities* (2010), *supra* note 9, at 5.
[24] See, e.g., Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 8; Emily Camins, "The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity", 90 *International Review of the Red Cross* 853 (2008), at 879.

> not be able to escape en route. The question is what happens when enemy combatants are captured by a small light unit (of, e.g., commandos or Special Forces), which can neither handicap the mission by encumbering itself with prisoners of war nor detach guards for their proper evacuation. Can the prisoners of war be shot by dint of military necessity? The answer is unequivocally negative. Article 41(3) of Additional Protocol I addresses the issue forthrightly, prescribing that – in these unusual conditions – the prisoners of war must be released. This had actually been the law long before the Protocol was adopted. Customary international law proscribes the killing of prisoners of war, 'even in cases of extreme necessity', when they slow up military movements or weaken the fighting force by requiring an escort. Military necessity cannot override the rule, since it is already factored into it. The legally binding compromise between military necessity and humanitarian considerations has been worked out in such a way that prisoners of war must either be kept safely in custody or released.[25]

Here, Dinstein apparently considers an act of the sort "killing a POW in unusual conditions of combat" inhumane yet consistent with material military necessity. Refraining from such killing, in contrast, would be deemed humane yet lacking in material military necessity.

As noted earlier, Dinstein concedes the existence of "rare" occasions where performing certain conduct, e.g., attacking undefended localities, can be regarded as both inhumane and materially unnecessary.[26] It does not appear, however, that he envisages any occasion, even exceptionally, where a given belligerent act can be deemed both humane and materially necessary. For that, one must turn to Schmitt's example of incendiary weapons.[27]

2.2 Military Necessity and Humanity as Generators of Imperatives

If, or once, it is agreed that a particular kind of belligerent conduct tends to be consistent with humanity, the framers of IHL rules will have very good reason to obligate its performance. They will also consider prohibiting acts that are deemed inhumane. Indeed, proponents of the inevitable conflict thesis appear to take this imperative-generating character of humanitarian considerations for granted.

Whether they also treat military necessity as imperative-generating is unclear. It would be essential that they do so, however, if the inevitability of norm conflict between military necessity and humanity were to make any sense. Military necessity's mandatory character would take two specific forms. First, acts deemed materially necessary ought to be performed. Second, those deemed materially unnecessary ought to be forborne.

2.2.1 Obligating Materially Necessary Acts

Dinstein states: "The dynamics of the law are such that whatever is required by military necessity, and is not excluded on the ground of humanitarianism, is permissible".[28] His reference to "whatever is required by military necessity" may be taken as indicating his appreciation of a given act being deemed materially necessary. Similarly, by "whatever is [so required] … is permissible", one may understand Dinstein's appreciation of normative military necessity as permitting, rather than demanding, the act's performance.

In fact, nowhere does Dinstein – nor does Schmitt, for that matter – appear to assert that the framers of IHL rules should consider making the performance of material military necessities obligatory. Indeed, the very idea feels odd. We saw earlier how the intrinsic utility of material military

[25] Dinstein, *Conduct of Hostilities* (2010), *supra* note 9, at 7 (footnotes omitted).
[26] See Dinstein, "Military Necessity" (2009), *supra* note 9, at § 3.
[27] See Schmitt, "Military Necessity and Humanity", *supra* note 1, at 816.
[28] Dinstein, *Conduct of Hostilities* (2010), *supra* note 9, at 6. See also Dinstein, *Conduct of Hostilities* (2004), *supra* note 8, at 18.

necessity is a serious reason-giving consideration in IHL norm-creation.[29] What this means is that the framers of IHL rules have good reason to leave the belligerent at liberty, rather than under an obligation, to pursue what is materially necessary. There is no reason why it should be of concern to international humanitarian law that everything done by belligerents be militarily necessary.[30]

Surprisingly, however, assertions that there is an obligation to perform material military necessities are not entirely unheard of. The 2007 *Al-Jedda* decision of the U.K. House of Lords[31] is a case in point. In that case, the Law Lords were asked to clarify, *inter alia*, the relationship between the European Convention on Human Rights[32] and the United Nations Charter.[33] On the one hand, Article 5(1) of the European Convention stipulates the principal duty of non-detention,[34] followed by a list of six grounds on which a limited power of detention may be inferred.[35] It is generally agreed that this list is "exhaustive"[36] and considered to exclude detention "where there is no intention to bring criminal charges within a reasonable time".[37] On the other hand, Article 103 of the UN Charter establishes a hierarchy, whereby a Charter obligation prevails over conflicting obligations arising from other international agreements.[38] The U.K. government, respondent in the case, argued that a series of Security Council resolutions adopted under Chapter VII of the UN Charter bound it with an affirmative duty to detain Al-Jedda.[39] By virtue of the Charter's Article 103, this counter-duty of security detention displaced the United Kingdom's conflicting duty of non-detention arising under the European Convention.[40]

Lord Bingham found that the relevant Security Council resolutions "use the language of authorisation, not obligation", and that, "[i]n ordinary speech to authorise is to permit or allow or license, not to require or oblige".[41] In other words, no conflicting duties under Article 5(1) of the European Convention and Article 103 of the UN Charter existed for the United Kingdom *vis-à-vis* Al-Jedda.

Lord Bingham then examined the law of belligerent occupation. Citing Article 43 of the 1907 Hague Regulations,[42] he held that the United Kingdom, as an occupying power, "was obliged … to take necessary measures to protect the safety of the public and its own safety".[43] Elsewhere in the case,[44] Al-Jedda, a British national at the time of his detention in Iraq, was found not to have been a

[29] See Chapter 4 above.
[30] See Chapter 4 above.
[31] See *R v. Secretary of State for Defence* [2007] UKHL 58 (hereinafter, "*Al-Jedda UKHL*").
[32] Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950).
[33] Charter of the United Nations (26 June 1945).
[34] Namely, that "[n]o one shall be deprived of his liberty …"
[35] Namely, "save in the following cases and in accordance with a procedure prescribed by law …"
[36] *Al-Jedda v. U.K.* Appl. no. 27021/08 (ECtHR, 7 July 2011) (hereinafter, "*Al-Jedda ECtHR*"), para. 99.
[37] *Ibid.*, para. 100.
[38] Article 103 of the UN Charter reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".
[39] See *Al-Jedda UKHL*, para. 26 (Lord Bingham).
[40] See *ibid*.
[41] *Ibid.*, para. 31. (Lord Bingham).
[42] See Article 43, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907). This provision reads: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".
[43] *Al-Jedda UKHL*, para. 32 (Lord Bingham).
[44] See *ibid.*, para. 128 (Baroness Hale).

"protected person" within the meaning of Article 4 of Geneva Convention IV.[45] Lord Bingham observed that the convention's Articles 41,[46] 42,[47] and 78[48]:

> [S]how plainly that there is a power to intern persons who are not protected persons, and it seems to me that if the occupying power considers it necessary to detain a person who is judged to be a serious threat to the safety of the public or the occupying power there must be an obligation to detain such person …[49]

Al-Jedda took his case to the European Court of Human Rights.[50] The court found – correctly, in this author's view[51] – that the law of belligerent occupation empowers, but it does not obligate, the occupying power to detain persons present on the territory that it administers solely on security grounds.[52]

Lord Bingham's reasoning has two, arguably distinct, prongs. One is the safety of the public, and the other is the occupying power's own safety. We are not presently concerned with the former. Suffice it to say that, while Article 43 of the 1907 Hague Regulations does create an affirmative duty to restore and ensure public order and safety, it is far from clear whether this necessarily translates into an affirmative duty of security detention.[53]

More importantly for our discussion here, the law of belligerent occupation clearly does not obligate the occupying power to protect its own safety. That remains the case, although it is also clearly in the occupier's own strategic interest, and hence consistent with material military necessity, to do so. Now, let us say that protecting an occupying power's own safety is a legitimate military purpose. Two questions arise. First, can detaining persons solely on security grounds be deemed consistent with material military necessity *vis-à-vis* that particular purpose? This author is of the view that it can. Second, does it follow that the framers of IHL rules should consider making security detention obligatory? Lord Bingham, it appears, felt so. "[I]t seems to me", he stated, "that if the occupying power considers it necessary to detain a person who is judged to be a serious threat to the safety of … the occupying power there must be an obligation to detain such person".[54]

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[45] Article 4 of Geneva Convention IV reads, in relevant parts: "Persons protected by the convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".

[46] Article 41 of Geneva Convention IV reads, in relevant parts: "Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment …"

[47] Article 42 of Geneva Convention IV reads, in relevant parts: "The internment or placing in assigned residence of protected persons may ordered only if the security of the Detaining Power makes it absolutely necessary".

[48] Article 78 of Geneva Convention IV reads, in relevant parts: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment".

[49] *Al-Jedda UKHL*, para. 32 (Lord Bingham).

[50] See *Al-Jedda ECtHR*.

[51] See 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), at 140.

[52] See also *ibid.*, at 6-9; *Al-Jedda ECtHR*, para. 107 ("In the Court's view it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort …").

[53] In upholding an affirmative duty of security detention under the 1907 Hague Regulations, Lord Bingham cited *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment,* ICJ Reports (2005) 168, para. 178. See *Al-Jedda UKHL*, para. 32 (Lord Bingham). The passage in question reads, in relevant parts: "This obligation [under Article 43 of the Hague Regulations] comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party".

[54] *Al-Jedda UKHL*, para. 32 (Lord Bingham). The expression that Lord Bingham used here – "there must be an obligation" – is somewhat ambiguous. It could be interpreted as suggesting that, in order to proceed with security-based detentions, an occupying power must first demonstrate the existence of an obligation to do so. Alternatively, Lord Bingham could have meant that an occupying power that finds detaining persons on security grounds necessary is duty-bound to detain them. In the context of our discussion, it is more likely that he meant the latter.

2.2.2 Prohibiting Materially Unnecessary Acts

That the framers of IHL rules should consider prohibiting materially unnecessary action is a very widely supported notion.[55] Some authorities appear to assume that unnecessary acts deserve to be banned, because only necessary ones deserve to be permitted. Thus, in D.I.A.D. Draper's words: "The law of war … accepts that in achieving victory … there is to be the minimum expenditure of blood, treasure, resources and time. That may have nothing whatever to do with humanitarian considerations and may be styled 'the doctrine of military economy'".[56] A.P.V. Rogers argues, as a foremost characteristic of military necessity in the law of war, that what military commanders do "must be justified in every case by military necessity",[57] and that "no action may be taken which is not militarily necessary".[58]

For others, non-necessities ought to be prohibited because armed force equals, or entails, the infliction of evil. According to the *U.S. Naval Commander's Handbook*, the goal of military necessity is:

> [T]o limit suffering and destruction to that which is necessary to achieve a valid military objective. Thus it prohibits the use of any kind or degree of force not required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources.[59]

Seen in isolation, the second sentence of this passage might suggest that "any kind or degree of force", evil or otherwise, would be prohibited if materially unnecessary. Such a view would come closer to that put forth by Draper and Rogers.

This apparent similarity becomes somewhat less definite, when one looks at the first sentence. That sentence appears to indicate the manual drafters' belief that force, whatever its kind or degree, tends to generate "suffering and destruction". It is, according to the drafters, with a view to limiting this tendency – "[t]hus" is the expression used – that military necessity prohibits unnecessary acts. In a similar spirit, several authors equate force with "injury",[60] "damage",[61] and "violence".[62]

Schmitt once belonged to this group. While reviewing the first edition of Rogers' *Law on the Battlefield*, Schmitt noted:

> To exist as a principle of law, military necessity must have independent legal valence. That can, by definition, only occur when it is characterized as a limitation … As a principle, military necessity prohibits destructive or harmful acts that are unnecessary to secure a military advantage.[63]

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[55] That is so, notwithstanding the fact that the mere lack of material military necessity does not signify an act's illegitimacy. See Chapter 4 above.
[56] Draper, *supra* note 1, at 130.
[57] Rogers, *Law on the Battlefield*, *supra* note 1, at 5. See also Melzer, *Targeted Killing*, *supra* note 1, at 286 ("[T]he principle of military necessity reduces the sum total of lawful military action from that which positive IHL does not prohibit *in abstracto* to that which is actually required *in concreto*").
[58] Rogers, *Law on the Battlefield*, *supra* note 1, at 6.
[59] U.S. Department of the Navy et al., *The Commander's Handbook on the Law of Naval Operations* (2007), at 5-3-1.
[60] See, e.g., Coleman Phillipson, *International Law and the Great War* (1915), at 131; N.C.H. Dunbar, "Military Necessity in War Crimes Trials", 29 *British Yearbook of International Law* 442 (1952), at 444 (quoting *ibid.*, at 132).
[61] See, e.g., Phillipson, *supra* note 60, at 131.
[62] See, e.g., *ibid.*, at 132; Dunbar, "War Crimes Trials", *supra* note 60, at 444; de Preux, *supra* note 1, at 396.
[63] Michael N. Schmitt, "Book Review: *Law on the Battlefield*", 8 *U.S. Air Force Academy Journal of Legal Studies* 255 (1997), at 257, 258.

He also asserted that "[m]ilitary necessity operates … to prohibit acts that are not militarily necessary; it is a principle of limitation, not authorization. In its legal sense, military necessity justifies nothing".[64] Schmitt has since expressly repudiated this idea.[65]

As for Dinstein, there is no indication that he ever accepted the lack of material military necessity as a reason for prohibiting an act under international humanitarian law.

2.3 Inevitable Conflict Between Imperatives of Military Necessity and Those of Humanity

Combining the non-coincidence between military necessity and humanity in their material context, with the idea that they both generate corresponding imperatives in IHL norm-creation, yields the result that these imperatives inevitably conflict. Put another way, military necessity and humanity inevitably conflict with each other, because they always describe and demand belligerent acts in opposite directions.

2.3.1 Norm Conflicts and Their Pre-Emption Generally

What do we mean by a norm conflict? A norm conflict exists where a particular act is subject simultaneously to mandatory performance and mandatory forbearance.[66] Thus, according to H.L.A. Hart:

> Many writers favour the idea (which seems intuitively acceptable) that conflict between two rules requiring or prohibiting actions is to be understood in terms of the logical possibility of joint obedience to them. Two such rules conflict if and only if obedience to them both ('joint obedience') is logically impossible. The crudest case of such a conflict are rules which respectively require and forbid the same action on the part of the same person at the same time or times. The logical impossibility of joint obedience may be exhibited in the following way. For any rule requiring or prohibiting action, we can form a statement (an 'obedience statement') asserting that the action that is required by the rule is done, or the action prohibited by the rule is not done. Two such rules conflict if their respective obedience statements are logically inconsistent and so cannot both be true. Thus (to take one of Kelsen's examples), suppose one rule requires certain persons to kill certain other human beings, and another rule prohibits the same persons from killing the same other human beings, the obedience statements corresponding to those rules would be of the general form, 'killing is done', and 'killing is not done'. Of course, before we can determine whether two statements of this general form are logically inconsistent or not, they would have to be filled out with specifications of the agents and victims and times to which the rules, explicitly or implicitly, related. If the same agents are required by one rule to do, and by another rule to abstain from, the same action at the same time this will be reflected in the corresponding obedience statements which would be logically inconsistent. Joint obedience to the rules would be logically impossible.[67]

Hart cautions, however, that the logical impossibility of joint obedience to which two conflicting norms give rise does not preclude the logical impossibility of their valid co-existence:

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[64] Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict", 22 *Yale Journal of International Law* 1 (1997), at 54.

[65] See Schmitt, "Military Necessity and Humanity", *supra* note 1, at 799, n.9.

[66] Admittedly, this is a somewhat crude version. Chapter 7 will present a more refined account of norm conflicts.

[67] H.L.A. Hart, "Kelsen's Doctrine of the Unity of Law", H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) 309, at 325 (footnotes omitted). See also Hans Kelsen, *General Theory of Norms* (Michael Hartney trans., 1991), at 191; 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, at 346-353.

> It is to be observed that this definition of conflict between rules leaves entirely open the question whether or not it is logically possible for two conflicting rules to coexist as valid rules of the same or different systems. To most people it would certainly seem possible for a law of one legal system made by one set of legislators to conflict with the law of another legal system made by another set of legislators; and it would perhaps seem equally obvious that one such law could conflict with some moral rule or principle. Joint obedience to these rules would be logically impossible, but their coexistence as valid rules would be logically possible. Further, though it would certainly be deplorable on every practical score if laws of a single legal system conflicted and the system provided no way of resolving such conflicts, it is still far from obvious that even this is a logical impossibility.[68]

That two conflicting norms may validly co-exist, even within one legal system, is indeed a logical possibility.[69] It would still be a functional shortcoming of that legal system to contain valid yet conflicting norms. Thus, if for nothing else, it would be in the practical interest of a legal system to pre-empt norm conflicts between its positive rules by co-ordinating its legislative processes.

2.3.2 Norm Conflicts Between Military Necessity and Humanity, and Their Pre-Emption in IHL Norm-Creation

We have so far established the following chain of reasoning underlying the inevitable conflict thesis. If a given belligerent act is deemed materially necessary, it is always deemed inhumane. Military necessity demands this act, whereas humanity condemns it. Conversely, if an act is considered humane, it is always considered materially unnecessary. Humanity makes its performance mandatory, while military necessity makes its forbearance mandatory. Obeying humanity always entails disobeying military necessity, and vice versa. Consequently, military necessity and humanity always result in norm conflicts.

Imagine a situation where either military necessity, or humanity, but not both, were the only set of reason-giving considerations for the framers of IHL rules. Arguably, in such a situation, no danger of norm conflict among the resulting rules would arise. Since both are relevant, however, and since, according to the inevitable conflict thesis, they always generate norm conflicts, it would be seriously detrimental to the functionality of international humanitarian law if these conflicting considerations led to the adoption of conflicting rules.

The process of IHL norm-creation endeavours to pre-empt such eventualities by striking a compromise between military necessity and humanity.[70] For proponents of the inevitable conflict thesis, this is what "accounting for" these considerations really means. The framers of IHL rules endeavour to do so:

(i) By letting humanity trump military necessity;
(ii) By letting military necessity trump humanity; or
(iii) By working out some middle ground between the two.

Let us consider a given belligerent act that is deemed inhumane yet materially necessary, e.g., detaining persons based exclusively on the security threats they pose to the occupying power. Letting humanity trump military necessity would result in an unqualified IHL rule of the form "the occupying power shall not detain persons on security grounds alone" being validly posited. Should military necessity prevail over humanity, the resulting IHL rule would make their detention obligatory instead.

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[68] Hart, *supra* note 67, at 325-26.

[69] See also Georg Henrik von Wright, "Value, Norm, and Action in My Philosophical Writings", Georg Meggle (ed.), *Actions, Norms, Values: Discussions with Georg Henrik von Wright* (1999) 11, at 21; Ota Weinberger, "Logical Analysis in the Realm of the Law", in *ibid.*, 291, at 300.

[70] It might be felt that techniques such as *lex specialis* and *jus cogens* would also be available. They are *not* the relevant techniques for our present purposes, however. See Part III, Chapter 8 below.

Applying the same line of reasoning to acts deemed humane yet materially unnecessary is bound to come across as awkward. Take the treatment of POWs in unusual conditions of combat, for example. On the one hand, were the framers of IHL rules to let humanity trump military necessity, they would validly posit an unqualified obligation of the form "POWs shall be released in unusual conditions of combat". On the other hand, letting military necessity prevail over humanity could very well lead to a strange obligation to kill them. After all, compared to killing them outright, neither dragging them around nor releasing them, thereby exposing their captor to dangers of detection by enemy forces nearby, seems consistent with material military necessity.

Bizarre as it may be, accepting the possibility of these contrasting IHL obligations is a view to which the inevitable conflict thesis commits its adherents. Holding otherwise would amount to conceding that military necessity does not generate imperatives. Conceding thus would, in turn, amount to acknowledging that a conflict between military necessity and humanity is in fact not inevitable.

Where a middle ground is worked out, the resulting rule is likely to contain a principal obligation to perform humane acts – or materially necessary acts, as the case may be – , followed by an exceptional obligation to abstain from such acts if military necessity or humanity so demands. Thus, for example, Article 143 of Geneva Convention IV obligates the detaining power to permit visits by representatives or delegates of the protecting power, "except for reasons of imperative military necessity".[71] Alternatively, the resulting rule may principally prohibit inhumane or materially unnecessary acts, and yet exceptionally obligate them should the latter be demanded by humanity and/or military necessity. One may recall Article 49 of Geneva Convention IV discussed at the outset of this chapter.

3. Inadmissibility of *de novo* Military Necessity and *de novo* Humanity Pleas *vis-à-vis* All Unqualified IHL Rules

The inevitable conflict thesis is remarkable for the starkly contrasting manner in which it juxtaposes military necessity with humanity in IHL norm-creation. Its significance does not end there, however. The thesis also claims that unqualified rules of positive international humanitarian law exclude all *de novo* military necessity pleas,[72] as well as all *de novo* humanity pleas.

This latter claim stems from two assertions. First, the existence of exceptional clauses on grounds of military necessity and/or humanity reveals the framers' intention to withhold them elsewhere. Second, every valid IHL rule embodies a compromise between military necessity and humanity.

3.1 Excluding *de novo* Military Necessity and *de novo* Humanity Pleas

Express military necessity exceptions are attached to some positive IHL rules.[73] This clearly indicates the framers' intention to admit *de novo* military necessity pleas *vis-à-vis* these rules. It fol-

[71] Article 143, Geneva Convention IV.

[72] The idea that military necessity may not be invoked *de novo vis-à-vis* unqualified rules of positive international humanitarian law is not controversial. To hold otherwise – i.e., whether it be military necessity as an additional layer of permission, or as an additional layer of restriction – is to conflate military necessity in its normative and juridical contexts. See Part III, Chapter 8 below. The joint satisfaction thesis also arrives at the same conclusion. What distinguishes the joint satisfaction thesis from the inevitable conflict thesis, however, is the chain of reasoning used when reaching this conclusion and the further consequences to which it gives rise. See Chapters 6 and 7, and Part III, Chapter 8 below.

[73] See, e.g., Article 23(g), 1907 Hague Regulations; Articles 8, 33, 34, 50, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949); Articles 8, 28, 51, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Article 126, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949); Articles 49, 53, 143, 147, Geneva Convention IV; Articles 4(2), 11(2), Convention for the Protection of Cultural Property

lows, *a contrario*, that the framers intended to disallow deviations from the prescriptions of unqualified rules on account of military necessity. Had it been otherwise, they would surely have qualified these rules by adding exceptional clauses expressly authorising such deviations. It can therefore be inferred that the exclusion of *de novo* military necessity pleas is generally intended.[74]

This also means that, other than those reflected in exceptional clauses, no considerations of military necessity survive the process of IHL norm-creation. Used in this fashion as an inferential technique, *argumendum a contrario* excludes military necessity in its juridical context in two important ways – namely, as a supposedly additional layer of normative restraint, and as a purported exception, justification or excuse.[75] Dinstein explains:

> Either way, the solution chosen by the framers of the treaty – or consolidated in the general practice of States – must be viewed as binding on Contracting Parties to the treaty, or on the entire international community, in the very form in which it is constructed. Belligerent parties are not free to question the manner in which the compromise between military necessity and humanitarian considerations was forged by the framers. In particular, they cannot try to avoid implementation of a given norm in the name of military necessity.[76]

Somewhat oddly, the same logic would also exclude humanity both as a supposedly additional layer of normative restraint, and as a purported exception, justification, or excuse *vis-à-vis* unqualified IHL rules. For there are positive IHL rules that expressly provide for exceptions on humanitarian grounds or, at any rate, on grounds that are arguably analogous. Article 127 of Geneva Convention IV prohibits, inter alia:

- The transfer of sick, wounded, or infirm internees and maternity cases involving arduous journeys, "unless their safety imperatively so demands"; and
- The transfer of internees in the event of the combat zone drawing close to their place of internment, "unless they are exposed to greater risks by remaining on the spot than by being transferred".[77]

Clearly, Article 127's framers intended to admit *de novo* humanity pleas as an exception to the principal obligation of non-transfer. The absence of similar exceptions in unqualified IHL rules indicates, *a contrario*, that their framers intended to disallow deviations on account of humanity. Accordingly, the general intention is to exclude humanity as an implicit exception, justification or excuse.

As noted above, Dinstein appears to have toned down from his earlier position that "it is not permissible to ignore legal norms on the ground that they are overridden by [humanitarian] considerations".[78] Schmitt, in contrast, insists on the inadmissibility of both *de novo* military necessity and *de novo* humanity pleas, at least as far as treaty law is concerned:

> Extant treaty law therefore reflects an agreed-upon balance between military necessity and humanity, such that *neither independently justifies departure from its provisions*, unless otherwise specifically provided for in the law … At times the express or inherent balance between military

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in the Event of Armed Conflict (14 May 1954); Articles 54(5), 62(1), 67(4), 71(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977); Article 17(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977); Articles 8(2)(b)(xiii), 8(2)(e)(viii), 8(2)(e)(xii), Rome Statute of the International Criminal Court (17 July 1998); Article 6, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999).

[74] See Draper, *supra* note 1, at 138; Greenwood, *supra* note 1, at 37-38; Gerald J. Adler, "Targets in War: Legal Considerations", 8 *Houston Law Review* 1 (1970-1971), at 16.

[75] See Part III, Chapters 8 and 9 below.

[76] Dinstein, "Military Necessity" (2009), *supra* note 9, at § 7.

[77] Article 127, Geneva Convention IV.

[78] Dinstein, "Military Necessity" (1982), *supra* note 7, at 274 (emphasis added). Compare this with Dinstein, *Conduct of Hostilities* (2004), *supra* note 8, at 18-19; Dinstein, "Military Necessity" (2009), *supra* note 9, at § 7; Dinstein, *Conduct of Hostilities* (2010), *supra* note 9, at 6-7.

necessity and humanity may appear illogical, such that one or the other ought to be invoked to rebalance an existing rule. But any such rebalancing would be without justification insofar as the new balance deviates from that which states have agreed upon.[79]

3.2 Military Necessity and Humanity "Accounted for" in All Positive IHL Rules

Neither military necessity nor humanity may be invoked *de novo vis-à-vis* unqualified IHL rules, because the process of their norm-creation already "accounts for" both considerations. What would happen, however, if it could be shown that this process does not always "account for" military necessity and/or humanity in the way just described? Would it follow that, in such cases, *de novo* military necessity and/or *de novo* humanity pleas might conceivably be admissible even *vis-à-vis* unqualified IHL rules?

Dinstein and Schmitt flatly deny such a possibility. For them, no positive IHL rule leaves military necessity and humanity unaccounted for. On the contrary, they are quite emphatic that "every single norm"[80] of international humanitarian law, and "every one of its rules",[81] embodies a compromise between military necessity and humanity.[82] It would appear that, to Dinstein and Schmitt at least, the admissibility of *de novo* military necessity and *de novo* humanity pleas *vis-à-vis* unqualified IHL rules is an academic question – that is, unless and until such rules are discovered or newly created.

4. Conclusion

In this chapter, we have canvassed some salient features of one internally coherent theory that best explains, or would best explain, the various positions taken by weighty IHL authorities. Thus, to say that international humanitarian law "accounts for" military necessity and humanity is to treat them as generators of mutually incompatible imperatives. If left unaddressed by the law's framers, these imperatives would inevitably result in conflicting IHL rules with which the belligerent is unable to comply simultaneously. Pre-empting such functional defects involves striking a compromise between military necessity and humanity. Since this compromise permeates the entire *corpus juris* of positive international humanitarian law, all *de novo* military necessity and humanity pleas are excluded save where the rule itself envisions their admissibility expressly and in advance.

Securing the logical consistency of this theory has come at a price. First, the theory requires materially necessary acts always to be inhumane, and humane acts always to be materially unnecessary. And yet, as Dinstein and Schmitt themselves acknowledge, the non-coincidence of military necessity and humanity in their material sense sits uncomfortably with the fact that some belligerent acts can be both inhumane and unnecessary, or both materially necessary and humane. Second, military necessity and humanity would normatively conflict with each other only if they both generated imperatives; but it is difficult to see why the framers of IHL rules should consider obligating materially necessary acts and prohibiting unnecessary ones. Third, treating military necessity – or humanity, for that matter – as a generator of imperatives would imply that exceptional clauses attached to positive IHL rules should take the form of obligations. That, however, is plainly not the case. Fourth, it simply seems too inflexible to hold the belligerent to the letter of unqualified IHL rules, even against genuine and urgent humanitarian considerations.

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[79] Schmitt, "Military Necessity and Humanity", *supra* note 1, at 801, 805 (emphasis added).

[80] See Dinstein, *Conduct of Hostilities* (2010), *supra* note 9, at 5; Dinstein, *Conduct of Hostilities* (2016), *supra* note 9, at 10. See also Dinstein, "Military Necessity" (2009), *supra* note 9, at § 7.

[81] Schmitt, "Military Necessity and Humanity," *supra* note 1, at 798. See also Schmitt, "Interpretive Guidance", *supra* note 14, at 6.

[82] See also Robert Kolb, "La nécessité militaire dans le droit des conflits armés: essai de clarification conceptuelle", in Société française pour le droit international, *Colloque de Grenoble, La nécessité en droit international* (2007), at 158: "[i]l n'y a pas une seule norme du droit des conflits armés qui ne réponde à une mise en balance entre les intérêts humanitaires et les intérêts issus des nécessités de la situation de belligérance".

This author submits that we can, and should, remedy these flaws. It is, in essence, their rectification that transforms the inevitable conflict thesis into the joint satisfaction thesis. Let us see how this transformation occurs in the next three chapters.

Chapter 6

Joint Satisfaction Thesis I – Alignment and Indifference

The joint satisfaction thesis rejects the idea that materially necessary acts are always inhumane, and humane acts are always materially unnecessary. On the contrary, numerous belligerent acts reveal an alignment between military necessity and humanity in their material context. This alignment can be characterised either as "necessary-humane", or as "*un*necessary-*in*humane".

The thesis also asserts that neither military necessity nor humanity always generates imperatives. Humanity does demand some acts and condemn others. Nevertheless, it leaves certain kinds of belligerent conduct to matters of permission and tolerance. Military necessity, for its part, never prompts the framers of IHL rules to consider obligating materially necessary acts or prohibiting unnecessary ones.

In the event of a "necessary-humane" alignment, military necessity permits, and humanity often demands, the act's performance. Conversely, an "unnecessary-inhumane" alignment suggests that it is the act's forbearance that military necessity permits and humanity frequently demands. Either way, by acting in accordance with the alignment, the belligerent satisfies both sets of considerations.

Admittedly, not all belligerent acts are subject to such an alignment. Some may be deemed materially necessary yet inhumane, or humane yet materially unnecessary. Even in these cases, however, joint satisfaction of a somewhat more limited character is always available. That is so, because military necessity is normatively indifferent. Thus, even where military necessity merely tolerates what humanity demands, or where the latter permits what the latter condemns, the belligerent still satisfies both considerations jointly, by acting in accordance with humanity's imperatives.

Consequently, wherever an act involves considerations of military necessity and humanity,[1] their joint satisfaction is always possible. A norm conflict between them is therefore not inevitable.

In this chapter, we will see how military necessity and humanity in their material sense may, and frequently do, align with each other. In addition, it will be shown that normative military necessity not only permits materially necessary acts, but it also tolerates unnecessary ones. Nor, for that matter, does humanity demand all humane acts or condemn all inhumane acts – although, admittedly, it often does.

1. Military Necessity-Humanity Alignment in Their Material Context

Dinstein concedes the existence of "rare" occasions where a belligerent act can be both materially unnecessary and inhumane.[2] While clearly a welcome improvement on his earlier position, Dinstein ought to accept the possibility of such occasions far beyond that of rarity.

On the one hand, Dinstein's failure to do so is unfortunate, given his otherwise apposite observation:

> Military commanders are often the first to appreciate that their professional duties can, and should, be discharged without causing pointless distress to the troops.[3]

Presumably, pointless distress of the kind that Dinstein has in mind includes exposure to situations of needless inhumanity. On the other hand, even conceding this latter point so forthrightly would render a principal component of the inevitable conflict thesis untenable.

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[1] We will see, in Part III, Chapter 8 below, that not all belligerent acts in fact involve considerations of military necessity and humanity.

[2] Yoram Dinstein, "Military Necessity", *Max Planck Encyclopedia of Public International Law* (2009), at § 3.

[3] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed conflict* (2010), at 5.

It appears that Dinstein's refusal to recognise the possibility of a "humane-necessary" alignment remains firm.[4] He thereby locks himself further into the inevitable conflict thesis. Michael Schmitt, in contrast, at least acknowledges situations where using incendiary weapons may be both more inhumane, and more consistent with material military necessity, than using ordinary explosives.[5] Schmitt's concession is far from adequate, however. As will be seen below, there are numerous other, more intuitive, examples.

Let us first highlight those belligerent acts that typify the "unnecessary-inhumane" alignment. Our discussion will then turn to those characterised by the "necessary-humane" alignment.

1.1 Inhumane and Unnecessary

Mohammed al-Qahtani was captured in Afghanistan, and brought to Guantánamo in November 2002.[6] While in detention, he was subjected repeatedly to harsh interrogation techniques.[7] Extracting actionable intelligence regarding al-Qaida's activities was among those ostensible purposes for which these techniques were administered.[8] In 2009, Susan Crawford, a Bush administration official then in charge of convening military commissions, admitted that al-Qahtani's treatment had satisfied even the definition of torture as understood by the administration itself.[9] Al-Qahtani's lawyer reportedly described him as "'paranoid,' 'incoherent,' 'cracked'".[10]

One would agree that the act "torturing Mohammed al-Qahtani to the point of incoherence" was not only inhumane, but also materially unnecessary *vis-à-vis* its purpose "extracting actionable intelligence regarding al-Qaida's activities from him". It would follow that the kind of act "torturing a detainee of intelligence value to the point of incoherence" might be deemed both inhumane and materially unnecessary *vis-à-vis* the kind of purpose "extracting actionable intelligence regarding enemy activities from a detainee of intelligence value".

In the early phases of the Iraq War, U.S. soldiers killed an increasing number of civilians. Such killings fuelled anti-American sentiments amongst the very people that the United States claimed to have come to protect.[11] These incidents are indicative of inhumanity as well as a lack of material military necessity.

That belligerent acts can be deemed both inhumane and materially unnecessary is an old notion indeed, one that is also very widely accepted.[12] According to Henry Sidgwick, a 19th-century utilitarian thinker, the belligerent "may be expected to abstain from recruiting his army compulsorily out of the population of an invaded country".[13] It being assumed that the local population would be recruited in order to replenish the recruiting army, Sidgwick apparently deemed this mode of recruitment materially unnecessary. The lack of material military necessity here would emanate from the fact that "the modern sense of nationality would not only excite a strong reprobation for such conduct, but would also make the forced recruits a bad element of the army".[14]

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[4] See Chapter 5 above.
[5] See Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", 50 *Virginia Journal of International Law* 795 (2010), at 816.
[6] See Adam Zagorin and Michael Duffy, "Inside the Interrogation of Detainee 063", *Time*, 20 June 2005.
[7] See *ibid*.
[8] See *ibid*.
[9] See Bob Woodward, "Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials", *The Washington Post*, 14 January 2009.
[10] Washington Media Association, *Torturing Democracy: Annotated Transcript* (2008), at 52.
[11] See, e.g., Richard C. Paddock, "Shots to the Heart of Iraq", *Los Angeles Times*, 25 July 2005.
[12] See Stephen C. Neff, "Prisoners of War in International Law: The Nineteenth Century", in Sibylle Scheipers (ed.), *Prisoners in War* (2010) 57, at 63-64 (citing Emmerich de Vattel, *The Law of Nations; or, the Principles of Natural Law Applied to Conduct and to the Affairs of Nations and Sovereigns* (1758; Charles G. Fenwrick trans., 1916) 280, at 284-286).
[13] Henry Sidgwick, *The Elements of Politics* (1891), at 255.
[14] *Ibid*.

It is somewhat less clear whether, at the time of his writing in 1891, Sidgwick himself considered it inhumane to force persons to serve in the armed forces of a hostile power. All that Sidgwick noted is:

> [T]here has been a considerable change since the now prohibited practice was largely carried on by the Prussians in Saxony in 1756; owing to the general growth of national sentiment that has taken place in the interval.[15]

Be that as it may, the notion that forced recruitment of residents in occupied territory – or, indeed, that of enemy nationals generally – is inhumane appears to have become evident over time. This notion had already appeared in Articles 36 and 37 of the 1874 Brussels Declaration,[16] and Articles 47 and 48 of the 1880 Oxford Manual.[17] Articles 44 and 45 of the 1899 Hague Regulations[18] were adopted at the first Peace Conference without much dissent[19]; nor was there any significant debate at the 1949 Diplomatic Conference[20] where Articles 51 and 147 of Geneva Convention IV[21] were negotiated. The Red Cross commentary on Article 51 notes:

> [The prohibition's] object is to protect the inhabitants of the occupied territory from actions offensive to their patriotic feelings or from attempts to undermine their allegiance to their own country.[22]

Several German accused were convicted of similar acts committed during World War II.[23] Those involved in the adoption and articulation of Articles 8(2)(a)(v) and 8(2)(b)(xv) of the Rome Statute of the International Criminal Court[24] appear to have found it unnecessary to revisit the sense of inhumanity that underlie these crimes.[25]

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[15] *Ibid*.

[16] See Articles 36, 37, Project of an International Declaration concerning the Laws and Customs of War (27 August 1874).

[17] See Articles 47, 48, The Laws of War on Land (9 September 1880).

[18] See Article 44, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land (29 July 1899) ("Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited"). See also Article 23(h), Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907) ("A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war"); *ibid.*, Article 45 ("It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power").

[19] See, e.g., Carnegie Endowment for International Peace, *The Proceedings of the Hague Peace Conferences Translation of the Official Texts: The Conference of 1899* (1920), at 63, 427-428, 487, 557-558.

[20] See, e.g., Federal Political Department, 2-A *Final Record of the Diplomatic Conference of Geneva of 1949* (1949), at 665, 776-777, 799-800, 809, 828-829; Federal Political Department, 2-B *Final Record of the Diplomatic Conference of Geneva of 1949* (1949), at 193-194, 416-417; Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 292-293, 600.

[21] See Article 51, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) ("The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces"). See also *ibid*., Article 147 ("[C]ompelling a protected person to serve in the forces of a hostile Power"); Article 130, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949); Jean S. Pictet (ed.), *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* (1960), at 628.

[22] Pictet, *Commentary IV*, *supra* note 20, at 293.

[23] See, e.g., *Robert Wagner et al*., in which a Permanent Military Tribunal at Strasbourg convicted Wagner, Röhn, and Schuppel, under Article 75 of the French penal code then in force. See United Nations War Crimes Commission, 3 *Law Reports of Trials of War Criminals* (1948) 23, at 40-41, 51. See also *Erhard Milch*, United Nations War Crimes Commission, 7 *Law Reports of Trials of War Criminals* (1948) 27, at 38-40, 53-61.

[24] See Article 8(2)(a)(v), Rome Statute of the International Criminal Court (17 July 1998) ("Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power"). See also *ibid.*, Article 8(2)(b)(xv) ("Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war").

[25] See, e.g., Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003), at 97-99, 269-271.

Elsewhere, Sidgwick clearly deemed acts of the sort "harsh[ly] treat[ing …] non-combatants" both inhumane, and materially unnecessary *vis-à-vis* purposes of the sort "scaring the enemy into submission".[26] In view of such purposes, Sidgwick continued, the acts concerned would "on the whole" be:

> [T]oo uncertain and remote to outweigh (1) the danger of rousing the sympathetic indignation of neutrals, together with (2) the serious inconveniences to which an invading army is exposed in the midst of a population embittered by private injuries.[27]

Sidgwick also offered analogous reasons when explaining the grounds on which indiscriminate pillage had come to be prohibited.[28]

R.B. Brandt is even more explicit when suggesting a possible link between an act's inhumanity and its lack of material military necessity. For Brandt:

> There are some things that troops may be tempted to do which are at best of negligible utility to their nation but which cause serious loss to enemy civilians, although not affecting the enemy's power to win the war.[29]

It seems clear that these "things" constitute various kinds of belligerent conduct that "troops may be tempted" to perform. We may also treat "bringing tangible utility to one's nation", and "adversely affecting the enemy's power to win the war", as the relevant kinds of purpose. Arguably, Brandt deems performing the former materially unnecessary in relation to the latter.[30] It also appears that he considers the "serious loss to enemy civilians" entailed by the acts in question to be inhumane.

Brandt then enumerates, as examples of acts deemed both materially unnecessary and inhumane, murdering prisoners of war (POWs)[31]; plundering private or public property[32]; raping women and ill-treating populations of occupied territories[33]; and wantonly destroying cities, towns, or villages, as well as devastating.[34] As will be seen below, these kinds of conduct typically find their corresponding prohibitions in positive international humanitarian law.[35]

Other commentators add yet more examples to the list. L.B. Schapiro maintained that repatriating deserters in the aftermath of hostilities would be not only inhumane, but also materially unnecessary:

> [W]ars have often been fought over issues of principle. Desertion from the ranks of one belligerent may in such circumstances be an act not of cowardice but of political faith, an act which not only weakens the moral case of the belligerent from which the desertion takes place but also strengthens the moral case of the belligerent to which the deserter flees. To surrender a deserter in such circumstances may be not only an act of bad faith and akin to the surrender of a political refugee, but also an act of bad policy, since it may discourage others from doing the same in any future war.[36]

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[26] See Sidgwick, *supra* note 13, at 256.
[27] *Ibid*.
[28] See *ibid*. See also Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law", 293 *International Review of the Red Cross* 94 (1993), at 99.
[29] R.B. Brandt, "Utilitarianism and the Rules of War", 1 *Philosophy and Public Affairs* 145 (1972), at 154.
[30] See also Doswald-Beck and Vité, *supra* note 28, at 99.
[31] See Brandt, *supra* note 29, at 154-155.
[32] See *ibid.*, at 155. See also Doswald-Beck and Vité, *supra* note 28, at 99.
[33] See Brandt, *supra* note 29, at 155.
[34] See *ibid.*
[35] See Chapter 7 below.
[36] L.B. Schapiro, "Repatriation of Deserters", 29 *British Yearbook of International Law* 310 (1952), at 311. But see J.A.C. Gutteridge, "The Repatriation of Prisoners of War", 2 *International and Comparative Law Quarterly* (1953) 207, at 214.

There is arguably a dissonance between the "inhumane-unnecessary" alignment that Schapiro found here, on the one hand, and the positive IHL rule regarding the post-hostilities repatriation of deserters, on the other. The first paragraph of Article 118 of Geneva Convention III provides:

> Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.[37]

This provision makes no reference to deserters; nor, for that matter, do deserters appear to be treated on a footing that is different from POWs elsewhere in the convention.[38] Nevertheless, according to the Red Cross commentary, deserters should be excluded from the scope of Article 118.[39] The commentary expresses the humanitarian rationale for this exclusion, as follows:

> Enemy military personnel who have been illegally enrolled in the armed forces cannot be treated on the same basis as other prisoners of war, nor can those who go over to the other side. Although many countries, for instance Great Britain, treated the latter as prisoners of war, this does not mean that they are entitled to that status. The Detaining Power is under no obligation to repatriate persons who have deserted to the other side. Similarly, their names are not usually notified to their country of origin. It should, however, be noted that the status of a deserter who has gone over to the other side must be determined by the way in which he surrendered or by his statements during initial questioning. A prisoner of war does not become a deserter merely because he makes a statement in the course of captivity.[40]

In truth, the pervasive room for an "inhumane-unnecessary" alignment is but a reflection of what Carl von Clausewitz advocated nearly two centuries ago:

> If, then, civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct.[41]

For von Clausewitz, committing needless brutalities, such as putting prisoners to death and devastating cities and countries, was first and foremost a sign of ineffective and unintelligent fighting.[42] Numerous commentators have since echoed this Clausewitzean thinking.[43] For Geoffrey S. Corn and Gary P. Corn, international humanitarian law is

> replete with examples of the symmetry between regulation and operational logic. A quintessential example is the prohibition against the infliction of superfluous or unnecessary suffering ... By prohibiting the calculated inflection of superfluous suffering or injury, the principle advances not

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[37] Article 118, Geneva Convention III.

[38] The same goes, *mutatis mutandis*, for those POWs who have expressed their wish not to be repatriated after the cessation of active hostilities. We shall return to this particular type of POWs in Part III, Chapter 8 below.

[39] See Pictet, *Commentary III*, *supra* note 21, at 549. See also Marco Sassoli, "The Status, Treatment and Repatriation of Deserters under International Humanitarian Law", *Yearbook of the International Institute of Humanitarian Law* 9 (1985), at 35-36.

[40] *Ibid*.

[41] Carl von Clausewitz, *On War* (1832; Michael Howard and Peter Paret eds. trans., 1976), at 85. See also Doswald-Beck and Vité, *supra* note 28, at 99 (referring to "sadistic acts of cruelty").

[42] See also, e.g., Myres S. McDougal and Florentino P. Feliciano, "International Coercion and World Public Order: The General Principles of the Law of War", 67 *Yale Law Journal* 771 (1958), at 812.

[43] See, e.g., Ernst H. Feilchenfeld, *Prisoners of War* (1948), at 97; Robert E. Osgood, *Limited War: The Challenges to American Strategy* (1957), at 18; Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961), at 811-813; W.T. Mallison, Jr., "The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and in Limited Wars", 36 *George Washington Law Review* 308 (1967), at 314-315; Jean Pictet, *Humanitarian Law and the Protection of War Victims* (1975), at 30; Department of the Air Force, *Judge Advocate General Activities: International Law – The Conduct of Armed Conflict and Air Operations* (1976), at 1-12; Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War", 35 *Harvard International Law Review* 49 (1994), at 53-54.

> only a humanitarian purpose, but also the military logic reflected in the concept of economy of force. There is no military value in wasting resources for the purpose of exacerbating the suffering of an opponent already rendered combat ineffective; the principle of law is consistent with this logic … Another example is the law of military objective. While there may be definitional uncertainty on the fringes of the rule when it is operationally applied, the underlying premise is militarily sound: the application of combat power should be limited only to those persons, places, or things that contribute to the achievement of operational objectives. This rule is consistent with the logic that a resource-conscience commander should instinctively avoid wasting resources on targets of no operational or tactical significance.[44]

Indeed, Corn and Corn call it "the reasoned judgment of the profession-at-arms" that "unnecessary violence, destruction, and suffering will not only waste limited and valuable resources, but will also ultimately undermine the strategic purpose of armed conflict: restoration of peace".[45]

To be abundantly clear, what is suggested in this chapter is *not* that no brutalities may ever be deemed materially necessary (some plainly are), or that no effective armies ever commit needless brutalities (some plainly do).[46] The point here is rather that it is erroneous to insist on the total absence, or even the rarity as Dinstein does, of belligerent acts that can be deemed inhumane and materially unnecessary at the same time.

1.2 Humane and Necessary

While serving as commander of the U.S. Army's 101st Airborne Division in northern Iraq, Lieutenant General David Petraeus stressed the importance of "selective use of force" during raids.[47] Rather than bursting in, for instance, his soldiers would "surround the house and then go to the door and knock".[48] Petraeus was praised, though by no means exclusively or uncontestedly,[49] for a degree of success that he had achieved in stabilising Mosul in 2003.[50]

Petraeus' action exemplifies the idea of ethical fighting in counterinsurgency. Indeed, the notion that it is strategically expedient to counter insurgencies ethically, with a view to earning the support of local residents, is hardly new. The British practiced it in Malaya.[51] David Galula, a theorist, proclaimed it the first law of counterinsurgency warfare.[52]

Building on their own experience in Iraq since 2003, the U.S. Army and Marine Corps issued the oft-cited *Counterinsurgency Field Manual* in 2007.[53] Although presented in the manual as "paradoxes" and "counterintuitive to the traditional U.S. view of war",[54] the following propositions merely encapsulate the "humane-necessary" alignment that pervades in counterinsurgency warfare:

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[44] Geoffrey S. Corn and Lieutenant Colonel Gary P. Corn, "The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens", 47 *Texas International Law Journal* 337 (2012), at 359-360.
[45] *Ibid*., at 358-359. See also Kenneth J. Keith, "The Present State of International Humanitarian Law", 9 *Australian Yearbook of International Law* 13 (1980), at 34 (suggesting that "attacks directed at civilians can be counterproductive").
[46] See below.
[47] Michael R. Gordon, "The Struggle for Iraq: Reconstruction; 101st Airborne Secures Success in Northern Iraq", *The New York Times*, 4 September 2003.
[48] *Ibid.*
[49] See, e.g., Bradley Graham, "A Sharp Shift from Killing to Kindness", *Washington Post*, 4 December 2004; Martin van Creveld, *The Changing Face of War: Lessons of Combat, from the Marne to Iraq* (2006), at 270.
[50] See, e.g., U.S. Army and Marine Corps, *Counterinsurgency Field Manual* (2007), at xv.
[51] See John A. Nagl, *Counterinsurgency Lessons from Malaya and Vietnam: Learning to East Soup with a Knife* (2002), at 87-107.
[52] See David Galula, *Counterinsurgency Warfare: Theory and Practice* (1964), at 52.
[53] See U.S. Army and Marine Corps, *supra* note 50. See also Colombian Ministry of National Defence, *Comprehensive Human Rights and IHL Policy* (2008), paras. 11-17.
[54] See U.S. Army and Marine Corps, *supra* note 50, at 47.

(i) The "[u]ltimate success in COIN [counterinsurgency] is gained by protecting the populace"[55];
(ii) "[U]sing force precisely and discriminately strengthens the rule of law that needs to be established"[56]; and
(iii) "Counterinsurgents often achieve the most meaningful success in garnering public support and legitimacy for the [host nation] government with activities that do not involve killing insurgents".[57]

The field manual goes on to explain:

> Insurgents use unlawful violence to weaken the [host nation] government, intimidate people into passive or active support, and murder those who oppose the insurgency … Kindness and compassion can often be as important as killing and capturing insurgents.[58]

The manual admonishes that those leading counterinsurgency efforts display qualities, such as "[g]enuine compassion and empathy for the populace",[59] and "serve as a moral compass",[60] so that "the populace must feel protected, not threatened, by COIN forces' actions and operations".[61] More specifically:

> A key part of any insurgent's strategy is to attack the will of the domestic and international opposition. One of the insurgents' most effective ways to undermine and erode political will is to portray their opposition as untrustworthy or illegitimate. These attacks work especially well when insurgents can portray their opposition as unethical by the opposition's own standards. To combat these efforts, Soldiers and Marines treat non-combatants and detainees humanely, according to American values and internationally recognized human rights standards. In COIN, preserving noncombatant lives and dignity is central to mission accomplishment. This imperative creates a complex ethical environment.[62]

Much the same can be said of the evolution in the American doctrine of aerial warfare known as "effects-based operations"[63]:

> Effects-based operations (EBO) are operations that are planned, executed, assessed, and adapted to influence or change systems or capabilities in order to achieve desired outcomes … The key insights are: that effective operations must be part of a coherent plan that logically supports and ties all objectives and the end state together; that the plan to achieve the objectives must guide employment … EBO is focused upon desired outcomes – objectives and the end state – and all efforts should be directed in a logically consistent manner toward their attainment … EBO seeks to attain objectives efficiently, but the availability of resources may constrain the options. That is, commanders must accomplish their assigned missions, but within that constraint, they should be accomplished for as little "cost" (in terms of lives, treasure, time, and/or opportunities) as possible.[64]

EBO efforts are characterised, first and foremost, by their aspiration to maximise consistency with material military necessity.[65]

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[55] *Ibid.*, at 48.
[56] *Ibid.*
[57] *Ibid.*, at 49.
[58] *Ibid.*, at 167.
[59] *Ibid.*, at 239.
[60] *Ibid*.
[61] *Ibid.*, at 238.
[62] *Ibid.*, at 245-246.
[63] See, e.g., David A. Deptula, *Effects-Based Operations: Change in the Nature of Warfare* (2001).
[64] U.S. Air Force, 2 *Operations and Organization: Air Force Doctrine Document 13-20* (2007), at 13-14.
[65] See *ibid.* at 15-17. See also Claude Pilloud and Jean Pictet, "Article 51 – Protection of the Civilian Population", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977*

EBO, to be sure, has come under sustained criticism in the context of land warfare.[66] The U.S. Army[67] and the Joint Command[68] have abandoned this doctrine. It appears, however, that the U.S. Air Force continues to embrace it.[69] According to a complementary Air Force document, applying the effects-based approach successfully to strategic attacks yields, among other things, the following result:

> [Strategic attacks] of valid military objectives can have the coercive effect of creating unrest among an enemy's population and/or weakening of the enemy's infrastructure. These mechanisms are aimed at impacting the enemy's popular will or perception. In the past, these mechanisms have involved directly targeting civilian populations to increase disaffection and pressure the adversary leadership to accept the demands of the coercer. However, the legality and morality of directly attacking an enemy's civilian populace is against international law concerning the conduct of war. The US remains committed to these laws and principles that support them. Additionally, historical evidence suggests that strategies directed against an enemy's population seldom succeed. Now, however, with the advent of precision weaponry, the US is capable of carefully regulating the destructive effects of [strategic attacks] thereby minimizing collateral damage. This capability enables the US to use these coercive mechanisms in a way that complies with the laws of armed conflict.[70]

EBO shows that military thinkers of some technologically advanced air forces consider it strategically expedient to be humane by carefully regulating the destructive effects of attacks and minimising collateral damage. Similarly, by using the example of incendiary weapons, Schmitt acknowledges that the more technologically advanced party in an asymmetrical conflict has "little incentive … to deviate from IHL – at least until its opponent does".[71] He also foresees EBO's "potential of enhancing the humanitarian ends of IHL with no detriment to military necessity".[72] Here, Schmitt is only a small step away from joining those[73] who argue that the "necessary-humane" alignment can manifest itself in numerous other acts, too.

1.3 Effective Armies Committing Atrocities – Do They Invalidate the Possibilities of Military Necessity-Humanity Alignment?

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to the Geneva Conventions of 12 August 1949 (1987) 613, at 621; Hans Blix, "Means and Methods of Combat", in Henri Dunant Institute and UNESCO (eds.), *International Dimensions of Humanitarian Law* (1988) 135, at 145.

[66] See, e.g., Matt M. Matthews, *We Were Caught Unprepared: The 2006 Hezbollah-Israeli War* (2006), at 61-65; Justin Kelly and David Kilcullen, "Chaos Versus Predictability: A Critique of Effects-Based Operations", 2 *Australian Army Journal* 87 (2004); Milan N. Vego, "Effects-Based Operations: A Critique", 41 *Joint Forces Quarterly* 51 (2006); Ron Tira, "Breaking the Amoeba's Bones", 9 *Strategic Assessment* (2006); Avi Kober, "The Israel Defense Forces in the Second Lebanon War: Why the Poor Performance?", 31 *Journal of Strategic Studies* 3 (2008), at 32-33.

[67] See Department of the Army, *The Operations Process*, FMI 5-0.1 (2006), at 1-32; U.S. Army Combined Arms Center, *Army Doctrine Update #1* (2007), at 4-5.

[68] See James N. Mattis, "USJFCOM Commander's Guidance for Effects-Based Operations", 51 *Joint Forces Quarterly* 105 (2008), at 108.

[69] See U.S. Air Force, 1 *Air Force Basic Doctrine: Air Force Doctrine Document* (2003), at 18; U.S. Air Force, *Operations and Organization*, *supra* note 64, at 13-20.

[70] U.S. Air Force, 1-1.2 *Strategic Attack: Air Force Doctrine Document* (2007), at 32-33.

[71] Michael N. Schmitt, "Asymmetrical Warfare and International Humanitarian Law", in Wolff Heintschel von Heinegg and Volker Epping (eds.), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen* (2007) 11, at 21.

[72] *Ibid.*, at 37. In fairness, he also notes the danger of the doctrine adversely affecting IHL compliance. *See ibid.*, at 37-38; Michael N. Schmitt, "Effects-Based Operations and the Law of Aerial Warfare", 5 *Washington University Global Studies Law Review* 265 (2006). See also William H. Boothby, *The Law of Targeting* (2012), at 489-511.

[73] See, e.g., Geoffrey Best, "Restraints on War by Land Before 1945", in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979) 17, at 28-30; Brandt, *supra* note 29, at 154-155; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 7; Christopher Greenwood, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *Handbook of International Humanitarian Law* 2d ed. (2008) 1, at 38.

In one of his addresses to those attending the 1899 Hague Peace Conference, Friedrich von Martens declared:

> Those who have caused the idea of humanity to progress in the practice of war are not so much the philanthropists and publicists as the great captains, such as Gustavus Adolphus, who have seen war with their own eyes. Being obliged to place a curb on the inflamed passions of their soldiers, they inaugurated a discipline in their armies, which was the source of the regulation of the usages of war, which discipline was all the more necessary in case of invasion of a hostile territory.[74]

In a somewhat similar vein, Christopher Greenwood suggests that "most rules of humanitarian law reflect good military practice, and adherence by armed forces to those rules is likely to reinforce discipline and good order within the forces concerned".[75] In Greenwood's view, the kind of belligerent behaviour that is IHL-compliant (and, arguably, humane) also tends to be disciplinarily sound (and, arguably, consistent with material military necessity). That this is so, according to Corn and Corn, is a fact that is "often overlooked in contemporary scholarship and commentary".[76]

It may be objected that some of the most horrific atrocities in history have been committed by well-disciplined armed forces. Indeed, as Michael Howard warned:

> Military activity thus carries an intrinsic imperative towards control; an imperative derived from the need to maintain order and discipline, to conserve both moral and material forces and ensure that these are always responsive to direction. These military criteria however will not necessarily coincide with the dictates of humanity … The military principle of "economy of force" may sometimes conveniently coincide with the dictates of transcendent moral values, but there is little historical justification for assuming that this will always be the case.[77]

Take, for example, the notoriously brutal tactics, such as the beheadings of hostages, to which the so-called "Islamic State" (IS) resorts. Robert McFadden, an intelligence security consultant, is quoted as saying that IS "can easily broadcast their atrocities to the world, which serves the dual purpose of instilling terror in their enemies and enticing new recruits inspired by the cult of martyrdom".[78] Acts deemed consistent with material military necessity need not perforce be deemed consistent with humanity; on the contrary, they may well display the exact opposite characteristics.

Is this possibility, admittedly on point, such that it invalidates the point made by Greenwood? It is submitted here that it does not. Greenwood's thesis is that acting humanely is likely to strengthen discipline, whereas the objection merely asserts that good discipline may not necessarily lead to humane behaviour. Both of these propositions can be simultaneously true, and the truth of one proposition does not negate that of the other.

Greenwood's statements have two essential components. The first is the idea that "most rules of humanitarian law reflect good military practice". In this proposition, one finds two variables, namely: (a) observing or disregarding these rules, and (b) having good or bad military practice. From these variables follow four possible combinations:

(i) That observance of IHL rules reflects good military practice;
(ii) That observance of IHL rules reflects bad military practice;

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[74] Carnegie Endowment, *supra* note 19, at 506. See also preface, Oxford Manual.
[75] Greenwood, *supra* note 73, at 38. See also Martin van Creveld, *The Transformation of War* (1991), at 89-90; Doswald-Beck and Vité, *supra* note 28, at 99.
[76] Corn and Corn, *supra* note 44, at 359.
[77] Michael Howard, "*Temperamenta Belli*: Can War Be Controlled?", in M. Howard, *supra* note 73, 1, at 3-4. But see van Creveld, *Transformation*, *supra* note 75, at 88-89.
[78] Graeme Hamilton, "ISIS Uses Gruesome Social Media Posts to Recruit More 'Blood-Thirsty' Jihadists and Instill Terror in Enemies", *National Post*, 11 August 2014. See also, e.g., Fawaz A. Gerges, "Islamic State: Can Its Savagery Be Explained?", *BBC News*, 9 September 2014; Frank Gardner, "Islamic State Message Shows Desire for US Boots on the Ground", *BBC News*, 22 September 2014.

(iii) That disregard of IHL rules reflects good military practice; and
(iv) That disregard of IHL rules reflects bad military practice.[79]

Greenwood offers two assertions, and two assertions only. He clearly affirms the truth of the first combination, according to which observance of IHL rules reflects good military practice. He also clearly rejects the truth of the second combination: for him, observance of IHL rules cannot be a reflection of bad military practice.

Objections of the sort in consideration here purport to have the third combination – i.e., that disregard of IHL rules reflects good military practice – undermine Greenwood's view. In this, however, they do not succeed. What the objection really says is that good military discipline does not necessarily reflect observance of IHL rules, since even effective armies can commit atrocities. Greenwood's claim simply does not comment on disregard of IHL rules at all, let alone how such disregard might reflect the quality of military practice.

That this objection misfires may also be seen from another, more causal angle. Greenwood's second proposition holds that "adherence by armed forces to those [IHL] rules is likely to reinforce discipline and good order within the forces concerned". Here, too, there are two variables: (a) armed forces adhering or not adhering to IHL rules; and (b) armed forces reinforcing or not reinforcing discipline and good order. The four resulting combinations are:

(i) That IHL-adherent armed forces are likely to reinforce discipline and good order;
(ii) That IHL-adherent armed forces are *un*likely to reinforce discipline and good order;
(iii) That *non*-IHL-adherent armed forces are likely to reinforce discipline and good order; and
(iv) That *non*-IHL-adherent armed forces are *un*likely to reinforce discipline and good order.

Greenwood clearly affirms the truth of the first combination, and rejects the truth of the second. Just as evidently, he does not address himself to the third or fourth combination, because he simply does not discuss what happens to non-IHL-adherent armed forces. And yet, the aforementioned objection would have us believe that the third combination can be true, and that it invalidates the position Greenwood takes.

Plainly, it does not. The fact that some highly disciplined armed forces are capable of committing large-scale IHL breaches only establishes that being IHL-adherent is not a *conditio sine qua non* for reinforced discipline and good order. This fact is immaterial to Greenwood's assertions, however. For him, as long as it remains true that adherence to IHL rules is likely to reinforce discipline and good order, and that it is unlikely to undermine discipline and good order, it makes strategic sense for armed forces to promote such adherence. This remains so, whatever consequence non-adherence to IHL rules may entail for the quality of military discipline and order.

Other commentators, such as Geoffrey Best and Brandt, describe certain measures taken during belligerent occupation in similar terms.[80] Article 49 of Geneva Convention IV envisages situations where the total or partial evacuation of a given area may be humane, or materially necessary – or both, as the case may be. The provision reads, in relevant parts:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand …[81]

[79] According to Sidgwick, W.E. Hall apparently asserted the truth of this last combination, at least as regards the relationship between troops committing indiscriminate pillage and maintaining discipline among them. See Sidgwick, *supra* note 13, at 258.
[80] See Best, *Restraints*, *supra* note 73, at 28-29; Brandt, *supra* note 29, at 155.
[81] Article 49, Geneva Convention IV.

According to the Red Cross commentary, the latter demands may include situations in which "an area is in danger as a result of military operations or is liable to be subjected to intense bombing" and "the presence of protected persons in [the] area hampers military operations".[82]

2. Military Necessity as Normative Indifference

The inevitable conflict thesis holds that, as a set of reason-giving considerations in IHL norm-creation, humanity always demands humane acts and condemns inhumane acts.[83] The said thesis also asserts that military necessity always demands acts that are deemed materially necessary and condemns those deemed unnecessary.[84] In other words, in their normative context, both humanity and military necessity always generate imperatives.

The joint satisfaction thesis refutes these assertions in two ways. First, normative military necessity provides the framers of IHL rules with no reason to obligate materially necessary acts *per se*. Rather, it merely endeavours to ensure that such acts' performance remains permitted and their forbearance tolerated. Nor does military necessity urge the framers to prohibit materially unnecessary acts. It simply encourages the framers to permit their forbearance and tolerate their performance. In other words, military necessity is normatively indifferent.

Second, while humanity can indeed be a generator of imperatives in many cases, it is not necessarily so in others. Humanity, in fairness, is likely to prompt the framers of IHL rules to forbid inhumane acts. Nevertheless, some such acts may very well remain tolerated by it. Whether humanity demands the performance of all humane acts is even less clear. It does appear to do so sometimes, but numerous acts that are deemed evidently humane give rise to humanitarian permissions rather than demands.

2.1 Normative Indifference Generally

This author submits that military necessity only generates what Georg Henrik von Wright called morally indifferent forms of behaviour. The Finnish philosopher explained these forms of behaviour thus:

> If the negation of an act is forbidden, the act itself is called obligatory. For instance: it is forbidden to disobey the law, hence it is obligatory to obey the law. We *ought* to do that which we are *not allowed not to* do. If an act and its negation are both permitted, the act is called (morally) indifferent. For instance: in a smoking compartment we may smoke, but we may also not smoke. Hence smoking is here a morally indifferent form of behaviour.[85]

Von Wright subsequently revised his position regarding the relationship between permissions, prohibitions, and obligations. According to his revised view, "the negation of an obligation is a permission 'to the contrary'; and the negation of a permission is an obligation to the contrary".[86] Be that

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[82] Pictet, *Commentary IV*, *supra* note 20, at 280.
[83] See Chapter 5, above.
[84] See *ibid*.
[85] Georg Henrik von Wright, "Deontic Logic", 60 *Mind* 1 (1951), at 3-4 (emphasis in original).
[86] Georg Henrik von Wright, "Ought to Be – Ought to Do", in Georg Meggle (ed.), *Actions, Norms, Values: Discussions with Georg Henrik von Wright* (1999) 3, at 6. Von Wright continued (*ibid.*, at 4, 5-6): "Most deontic logics use two operators: *O* for obligation ('ought') and *P* for permission ('may'). On what may be called a received view, the operators are interdefinable with the aid of the symbol of negation ~, $O = \sim P \sim$ and $P = \sim O \sim$. This view I do no longer find acceptable. A special symbol for prohibition, however, is not needed, since a prohibition may be defined as an obligation to the contrary ($O \sim$) and an obligation as a prohibition to the contrary ($O \sim \sim p = Op$). This I find acceptable … By the negation-norm of a [*sic*] *O*-norm I understand a *P*-norm, the content of which is the negation of the content of the *O*-norm. Similarly, the negation-norm of a *P*-norm is a *O*-norm, the content of which is the negation of the content of the *P*-norm".

as it may, the essence of von Wright's observations regarding the relationship between obligations and permissions, as well as those regarding morally indifferent behaviour, remains valid for our purposes here.

2.2 Normative Indifference *vis-à-vis* Military Success or Failure

It is in the belligerent's strictly strategic self-interest to do what is materially necessary, and to avoid what is unnecessary.[87] Insofar as this is the case, it may be said that normative military necessity "robustly" permits the performance of materially necessary acts, as well as the forbearance of unnecessary ones. Conversely, it is against one's strictly strategic self-interest to forgo material military necessities, or to endure non-necessities.[88] Military necessity may still be said to permit him or her to do so, if only "moderately" – although, perhaps, it is more apt to say that military necessity merely "tolerates" such behaviour.

All these are, nevertheless, permissions. Indeed, in IHL norm-creation, military necessity becomes relevant only to the extent that it seeks to render the maximum possible range of belligerent acts what Wesley Newcomb Hohfeld called "privileges",[89] and subsequently came to be known as Hohfeldian "liberties".[90] As such, military necessity does not prohibit or restrict. It only – and therefore indifferently – permits.[91]

Dinstein observes that "[t]he dynamics of the law are such that whatever is required by military necessity, and is not excluded on the ground of humanitarianism, is permissible".[92] This statement, while true, does not present a complete picture. It needs to be supplemented with: "Or, for that matter, whatever is *not* required by military necessity, and is not excluded on the ground of humanitarianism, is *also* permissible". Thus, if international humanitarian law were an autonomous system of rules wherein only military necessity operated as reason-giving considerations, this law would contain nothing but permissions.[93]

International humanitarian law does prohibit numerous acts that happen to be deemed materially unnecessary. As seen earlier, however, the lack of material military necessity is *not* the reason for their prohibition.[94] Similarly, although the law obligates the performance of some acts that happen to be militarily necessary,[95] their consistency with material military necessity is *not* what explains the existence of these obligations.

2.3 Disabling "Naked" Soldiers

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[87] See Part I, Chapter 2, above.
[88] See *ibid.*
[89] See Wesley Newcomb Hohfeld, "Fundamental Legal Concepts as Applied in Judicial Reasoning", 26 *Yale Law Journal* 710 (1919), at 710.
[90] See John Finnis, "Some Professional Fallacies About Rights", 4 *Adelaide Law Review* 377 (1971), at 377; John Finnis, *Natural Law and Natural Rights* (1980), at 199; Matthew H. Kramer, "Rights Without Trimmings", in Matthew H. Kramer et al., *A Debate Over Rights: Philosophical Enquiries* (1998) 7, at 10-20.
[91] See also Jens D. Ohlin, "The Duty to Capture", 97 *Minnesota Law Review* 1268 (2013), at 1304 (footnote omitted): "military necessity tracks the licencing function of IHL more than it tracks the regulating function of IHL, the latter being carried by more specific prohibitory rules".
[92] Dinstein, *Conduct of Hostilities*, *supra* note 3, at 6.
[93] Joseph Raz, *Practical Reason and Norms* (1999), at 85-87, 90; Ota Weinberger, "Logical Analysis in the Realm of the Law", in Meggle, *supra* note 86, at 292. Dinstein *is* therefore correct when he says (Dinstein, *Conduct of Hostilities*, *supra* note 3, at 4): "[I]f military necessity were the sole beacon to guide the path of armed forces in wartime, no limitation of any significance would have been imposed on the freedom of action of Belligerent Parties".
[94] See Chapter 4 above.
[95] See Chapter 7 below.

Holding otherwise would generate consequences that are highly counterintuitive. Consider Michael Walzer's discussion of "naked" soldiers,[96] for example. By this expression, he refers to those soldiers "who look funny, who are taking a bath, holding up their pants, reveling in the sun, smoking a cigarette".[97] Walzer notes that it is "not against the rules of war" to kill such soldiers.[98] He then recounts the stories of five men during the two World Wars who declined to kill "naked" soldiers,[99] adding:

> Their refusals seem, even to them, to fly in the face of military duty. Rooted in a moral recognition, they are nevertheless more passionate than principled decisions. They are acts of kindness, and insofar as they entail any danger at all or lower minutely the odds for victory later, they may be likened to superogatory acts. Not that they involve doing more than is morally required; they involve doing less than is permitted.[100]

At issue here is *not* whether refusing to kill "naked" soldiers is consistent with humanity (which it clearly is). Rather, we are presently concerned as to whether killing such soldiers may be materially necessary and, if so, whether normative military necessity demands killing them.

A clear distinction should be drawn between what Walzer calls "the rules of war" and "military duty". It appears evident that the latter is what each of Walzer's five protagonists owes his respective state *qua* citizen-soldier under that state's domestic law.[101] It seems equally evident, however, that they owed no such duty towards the international community – such as it was in those days – *qua* combatants under that community's laws and customs of war.[102] The prominence of their national military duty is also highlighted by the fact that what Walzer describes by reference to these men is the moral landscape of typical conscripts serving in mass national armies of the early 20th century.[103]

We may also consider Walzer's expression "doing less than permitted" analogous to "declining to perform what normative military necessity permits". Implicit in his view, in other words, is the idea that military necessity permits the killing of "naked" soldiers, since it is deemed materially necessary.

Two questions arise here. First, should it really be deemed consistent with material military necessity to kill "naked" soldiers? For Walzer, shooting even a "naked" soldier is materially necessary because, in a nutshell, that soldier has allowed himself "to be made into a dangerous man".[104] It is submitted here that a soldier's role as a dangerous man does *not* have to do with the danger that the soldier actually poses to his or her enemy, at a specific moment via a specific act. Rather, it has to do with the fact that being a soldier means being a member of a dangerous function-kind.[105]

Larry May criticises Walzer for defending "the justifiability of shooting the naked soldier; indeed, [Walzer] says that it is, strictly speaking, impermissible not to shoot [that naked soldier]".[106] May's objection is based on the idea that not all members of the soldier "class" are dangerous all the time to their enemy soldiers or to their enemy states.[107] Thus, while they are in fact "naked", and therefore posing no requisite danger, it should not be permitted to shoot them. In so arguing, however,

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[96] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977), at 138-143.
[97] *Ibid.*, at 142.
[98] *Ibid*. This, it is submitted here, is also the correct view of positive international humanitarian law. See Chapter 7 below.
[99] These five men are: Wilfred Owen, Robert Graves, George Orwell, Raleigh Trevelyan, and Emilio Lussu. See Walzer, *Just and Unjust Wars*, *supra* note 96, at 139-143.
[100] *Ibid.*, at 143.
[101] See Part I, Chapter 3 above.
[102] See *ibid*.
[103] See Walzer, *Just and Unjust Wars*, *supra* note 96, at 142-143, 305-306. It should be noted that, in his more recent reflections, Walzer does include members of professional armed forces. See Michael Walzer, *Arguing About War* (2004), at 23-24.
[104] Walzer, *Just and Unjust Wars*, *supra* note 96, at 145.
[105] See Part I, Chapter 3 above.
[106] Larry May, *War Crimes and Just War* (2007), at 109 (footnote omitted).
[107] See *ibid.*, at 109-112.

May invokes "the principle of humanity",[108] rather than, say, the momentary lack of the said act's material military necessity. Furthermore, May asks:

> Walzer may think that by not surrendering, the naked soldier indicates that he is still a member of the group and thus without immunity from being killed. But why are all of the members of the group to be treated the same? Why is the only way to regain one's immunity completely to remove oneself from the group? [W]hat do we do with the fact that even those who surrender are legitimately seen as required to try to escape so that they can rejoin their military units [?][109]

"[T]hose who surrender", according to May, "are legitimately seen as required" to escape and re-join their military units – but *in whose eye* are they so seen? As noted earlier, escape and non-cooperation with the captor arguably constitute ethical virtues that are community-specific,[110] and duties that a surrendering soldier may owe *vis-à-vis* the specific community for which he or she fights. The framers of IHL rules, in contrast, have no reason of their own to expect such virtues of POWs, and therefore to impose corresponding duties on them. It appears that this particular basis for May's criticism of Walzer unhelpfully conflates distinct moral constituencies.

It seems to this author that, as Walzer apparently suggests, killing even a "naked" soldier can indeed be deemed materially necessary.[111] In any event, however, it is, *contra* May, clearly not Walzer's assertion that the "rules of war" make it impermissible not to kill such a soldier.

The second question is whether, regardless of Walzer and May's views on the matter, killing eligible enemy combatants in active hostilities somehow becomes an act that military necessity demands, rather than merely permits. Bill Millin was a Scottish combat bagpiper during the D-Day landing.[112] Indications are that Millin's work boosted the morale among members of his unit:

> And ["Ladies from Hell"] raised the hearts and minds of the home side, so much so that when Mr Millin played on June 5th, as the troops left for France past the Isle of Wight and he was standing on the bowsprit just about keeping his balance above the waves getting rougher, the wild cheers of the crowd drowned out the sound of his pipes even to himself.[113]

For the Germans, undermining the morale of Millin's comrades would have been materially necessary. Assuming that Millin was indeed a combatant, and hence a lawful target according to the laws and customs of war then in force, he would have been liable to attacks by German defenders of the Normandy beaches. And yet, according to one account, "[a]ll the way, [Millin] learned later, German snipers had had him in their sights but, out of pity for this madman, had not fired".[114]

It might appear that, in one sense, Millin was "naked" in the eyes of those German snipers, even during active combat, because of his "madman" behaviour. In another sense, however, he was perhaps not truly "naked". After all, the tunes he played during the D-Day invasion were not exactly unguarded revelations of his vulnerability as "a man".[115]

Be that as it may, by declining to take Millin out, the Germans might have ultimately failed in their national duty. It would be odd to say, however, that they failed to act as demanded by military necessity. Although contrary to material military necessity, a failure of this kind is something that military necessity simply tolerates. The framers of IHL rules still have no reason to forbid it; rather, they have reason to leave the belligerent at liberty to do at its own peril.

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[108] *Ibid.*, at 111. See also *ibid.*, at 172-189.
[109] *Ibid.*, at 111.
[110] See Part I, Chapter 3 above.
[111] Here, too, we are immediately drawn to the "capture rather than kill" debate. See Part III, Chapter 8 below.
[112] "Bill Millin, Piper at the D-Day Landings, Died on August 17th, Aged 88", *The Economist*, 26 August 2010.
[113] *Ibid.*
[114] *Ibid.*
[115] Emilio Lussu, *Sardinian Brigade* (1939), at 170. See also Walzer, *Just and Unjust Wars*, *supra* note 96, at 142.

2.4 High-Altitude Aerial Bombardment

The same is true of other materially necessary acts, such as reducing risks of self-endangerment. The altitude of 15,000 feet at which NATO bombers flew during the early phases of the 1999 Kosovo crisis became a highly contentious issue.[116] A.P.V. Rogers notes:

> Humanitarian considerations would require the pilot to get close to the target to identify it properly; military considerations would require the pilot to fly at a safe height to be at reduced risk from anti-aircraft fire.[117]

Let us leave aside, for the moment, what it is that humanity would have to say about pilots exposing themselves to dangers of anti-aircraft fire while endeavouring to verify their targets.[118]

Of immediate concern to us here is the notion that "military considerations would require the pilot to fly at a safe height to be at reduced risk from anti-aircraft fire". Roger appears to be using the word "require" in the sense that climbing to a higher altitude is what one would have to do, if he or she were to act consistently with material military necessity. One would agree that the kind of belligerent act "fly[ing] at a safe height to be at reduced risk" might be conducive towards military purposes of the sort "preserving one's military strength". In other words, it would be in the belligerent's strictly strategic self-interest to minimise risks of self-endangerment.

Rogers clearly does not use the word "require" in the sense that military necessity would prompt the framers of IHL rules to bind combat aircrews in a duty to fly at a sufficiently high altitude for their own safety. Nor should there be any reason for the situation to be otherwise. Military necessity merely gives the law's framers weighty reason to permit this conduct. Here, too, reducing safety for some reason – for example, out of humanitarian concern for the civilians on the ground – is an option that military necessity tolerates and the law leaves the belligerent entirely at liberty to choose.

2.5 Recruiting Child Soldiers

Even weirder consequences would await, were it the case that normative military necessity turned an act's consistency with material military necessity into a reason for which international humanitarian law should obligate its performance.

Studies show that some warring parties recruit child soldiers and use them in hostilities, on the grounds that children's superior stamina[119] and reduced fear or revulsion for atrocities,[120] as well as their abundance and economy,[121] make their recruitment and use strategically advantageous. It could therefore be argued that recruiting child soldiers and using them in hostilities is materially necessary.

Even if, *arguendo*, it were the case, the framers of IHL rules would still have no reason whatsoever to make the recruitment and use of child soldiers in hostilities obligatory.

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[116] See, e.g., Amnesty International, *NATO/Federal Republic of Yugoslavia "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force* (2000), at 16-17; Human Rights Watch, *Civilian Death in the NATO Air Campaign* (2000), at 23; International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO bombing Campaign Against the Federal Republic of Yugoslavia* (2000), para. 56; W.J. Fenrick, "Targeting and Proportionality During the NATO Bombing Campaign against Yugoslavia", 12 *European Journal of International Law* 489 (2001), at 501; Colonel Frederic L. Borch, "Targeting After Kosovo: Has the Law Changed for Strike Runners?", 56 *Naval War College Review* 64 (2003); 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), at 94; Boothby, *The Law of Targeting*, *supra* note 72, at 185-187.

[117] A.P.V. Rogers, "Zero-Casualty Warfare", 82 *International Review of the Red Cross* 165 (2000), at 175.

[118] See Part III, Chapter 8 below.

[119] See, e.g., Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict* (1994), at 26.

[120] See *ibid.*

[121] See P.W. Singer, *Children at War* (2006), at 52-56.

3. Nor Does Humanity Always Generate Imperatives

The situation is somewhat more nuanced for humanity. Acts, such as assuming certain risks of self-endangerment in favour of civilians and caring for the wounded and sick, would be deemed humane, and humanity would readily demand their performance. Yet some other humane acts may remain permitted, rather than demanded. Similarly, humanity does not condemn all acts that are, or would be, deemed inhumane.

3.1 Humanity's Permission and Tolerance

The conclusion of agreements recognising hospital zones and localities is a case in point. Article 23 of Geneva Convention I provides, in relevant parts:

> In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties to the conflict, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.
>
> Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created.[122]

The Red Cross commentary on this article observes:

> The 1947 Conference of Government Experts showed that States were not inclined to adopt clauses of a mandatory nature in this matter. The most the experts would agree to was that the Geneva Conventions should provide for the possible creation of such places of refuge, their recognition by the enemy was, however, to be dependent upon the conclusion of special agreements … Article 23 … of the 1949 Convention is optional in character. It should be noted, however, that the object of international Conventions is to define the obligations which States contract towards one another. It is not customary for them to include mere suggestions, although examples of this do exist. *The above course has been adopted in the case of hospital zones, because the authors of the Convention wished to draw attention to their importance from the humanitarian point of view, and to recommend their adoption in practice*. The responsible authorities in each country should not, therefore, regard Article 23 as being a mere reference to a possible solution; they should look upon it as a recommendation to make every effort to apply that solution in practice.[123]

It was noted elsewhere that, "[w]hile these provisions are not mandatory, they nevertheless serve as the basis for procedures, the desirability of which, from a humanitarian standpoint, cannot be gainsaid".[124] The foregoing shows that the humanitarian desirability of an act alone does not compel the conclusion that humanity therefore demands its performance. On the contrary, regrettable as it may otherwise be, declining or failing to conclude agreements recognising hospital zones and localities is a less-than-ideal act that humanity tolerates.

Plunder, torture and the like would be deemed inhumane and unhesitatingly condemned. Humanity might still tolerate some relatively minor acts of inhumanity. Examples include limiting[125]

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[122] See Article 23, Geneva Convention I.

[123] Jean S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), at 210, 211-212 (emphasis added).

[124] Raymund T. Yingling and Robert W. Ginnane, "The Geneva Conventions of 1949", 46 *American Journal of International Law* 393 (1952), at 400.

[125] See Article 71, Geneva Convention III.

and censoring[126] communications between POWs and the exterior. The Red Cross commentary on Geneva Convention III explains the underlying rationale thus:

> In principle, prisoners of war are entitled to send and receive an unlimited number of letters and cards which may be sent to any destination or may come from any part of the world, without any distinction of a national kind.
>
> This is the principle, but one can easily understand that its full application must inevitably be restricted, whether because of transport difficulties or because of the military security of the Detaining Power.[127]

From the standpoint of strictly humanitarian ideals, those held in custody exclusively on non-penal grounds[128] should be allowed to establish and maintain communication with the outside world. If so, declining or failing to facilitate such communication would be contrary to those humanitarian ideals.

Nevertheless, Article 71 of Geneva Convention III concedes that the volume of correspondence may be limited to two letters and four cards monthly, "if the Detaining Power deems it necessary" to do so.[129] Significantly, this article does not restrict such limitations to any specific grounds.[130] Similarly, Article 76 of the same convention appears reconciled with the inevitability of censoring POW correspondence. The provision imposes no restriction whatsoever on the permissible reasons for censorship to be carried out; the rule only stipulates that it "shall be done as quickly as possible".[131] It would appear, then, that humanity tolerates this somewhat inhumane course of action.

In other words, although what humanity demands or condemns is not a matter of normative indifference, what it merely permits or tolerates is.

3.2 "Humanity of Duty" v. "Humanity of Aspiration"

That this is so should not be surprising. Philosophers acknowledge that ethics and morality in society encompass not only duties and obligations, but also those qualities that go beyond them. Thus, according to Hart:

> [E]ven within the morality of a particular society, there exist side by side with the structure of mandatory moral obligations and duties and the relatively clear rules that define them, certain moral *ideals*. The realization of these is not taken, as duty is, as a matter of course, but as an achievement deserving praise. The hero and the saint are extreme types of those who do *more*

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[126] See *ibid.*, Article 76.

[127] Pictet (ed.), *Commentary III*, *supra* note 21, at 345.

[128] That POW internment is entirely non-penal in character is a well-established notion in modern international humanitarian law. See, e.g., Article 61, Oxford Manual. This has given rise to a degree of awkwardness *vis-à-vis* Article 5(1) of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950). See, e.g., *Cyprus v. Turkey* decided by the European Human Rights Commission (App. No. 6780/74 & 6950/75); 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), at 565 (calling the *Cyprus v. Turkey* ruling "absurd"). The terrorist attacks on 11 September 2001 ushered in a series of contentious debates regarding the non-penal character of POW internment. See, e.g., Derek Jinks, "The Applicability of the Geneva Conventions to the 'Global War on Terrorism'", 46 *Virginia Journal of International Law* 165 (2005-2006); Sean D. Murphy, "Evolving Geneva Convention Paradigms in the 'War on Terrorism': Applying the Core Rules to the Release of Persons Deemed 'Unprivileged Combatants'", 75 *George Washington Law Review* 1105 (2006-2007); David E. Graham, "The Dual U.S. Standard for the Treatment and Interrogation of Detainees: Unlawful and Unworkable", 48 *Washburn Law Journal* 325 (2008-2009); Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (2010); Helen Duffy, *The 'War on Terror' and the Framework of International Law* 2d ed. (2015).

[129] Article 71, Geneva Convention III.

[130] See *ibid.* In contrast, this article restricts *further* limitations on the volume to situations where "the Protecting Power is satisfied that it would be in the interests of the prisoners of war concerned to do so owing to difficulties of translation caused by the Detaining Power's inability to find sufficient qualified linguists to carry out the necessary censorship".

[131] *Ibid.*, Article 76.

> than their duty. What they do is not like obligation or duty, something which can be demanded of them, and failure to do it is not regarded as wrong or matter for censure. On a humbler scale than the saint or hero, are those who are recognized in a society as deserving praise for the moral virtues which they manifest in daily life such as bravery, charity, benevolence, patience, or chastity. The connection between such socially recognized ideals and virtues and the primary mandatory forms of social obligation and duty is fairly clear. Many moral virtues are qualities consisting in the ability and disposition to carry forward beyond the limited extent which duty demands, the kind of concern for others' interests or sacrifice of personal interest which it does demand. Benevolence and charity are examples of this. Other moral virtues like temperance, patience, bravery, or conscientiousness are in a sense ancillary: they are qualities of character shown in exceptional devotion to duty or in the pursuit of substantive moral ideals in the face of special temptation or danger.[132]

One may also recall Lon Fuller's celebrated distinction between what he called "morality of duty" and "morality of aspiration".[133] His theory explains why certain morally relevant conduct is a matter of duty,[134] whereas some other morally relevant conduct is a matter of aspiration,[135] and how it is that the former engages penalties whereas the latter engages rewards.[136]

And so, *mutatis mutandis*, it is the case with humanity in the context of IHL norm-creation. Humanity expects the performance of some humane acts as a matter of course, and one's refusal or failure to do so would attract censure. In contrast, humanity places the performance of many other humane acts beyond one's "call of duty", and renders them praiseworthy rather than mandatory. Similarly, while humanity would forthrightly demand the forbearance of numerous inhumane acts, it would decline to condemn a limited number of other such acts.

The "pointer" where the "humanity of duty" ends, and where the "humanity of aspiration" begins, is bound to be highly contentious. Fuller himself conceded as much, at least in relation to the "pointer" at which the "morality of duty" yields to the "morality of aspiration".[137]

Recall here Frank Richards' action at the northern French village of Englefontaine[138]:

> When bombing dug-outs or cellars it was always wise to throw bombs into them first and have a look around them after. But we had to be very careful in this village as there were civilians in some of the cellars. We shouted down them to make sure. Another man and I shouted down one cellar twice and receiving no reply were just about to pull the pins out of our bombs when we heard a woman's voice cry out and a young lady came up the cellar steps. As soon as she saw us she started to speak rapidly in French and gave the both of us a hearty kiss. She and the members of her family had their beds, stove and everything else of use in the cellar which they had not left for some days. They guessed an attack was being made and when we first shouted down had been too frightened to answer. If the young lady had not cried out when she did we would have innocently murdered them all.[139]

Richards considered it "wise" to "throw bombs into [cellars] first and have a look around them after". It may be said that, by calling this course of action "wise", he essentially meant that it would

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[132] H.L.A. Hart, *The Concept of Law* 2d ed. (1997), at 182-183 (emphasis in original). For a slightly different take of supererogation, see Raz, *supra* note 93, at 91-95, esp. 94 (footnote omitted): "How can one be permitted to refrain from action which is required by reason? The solution is to be found in the notion of an exclusionary permission. The permission to refrain from performing an act supererogation is an exclusionary permission, a permission not to act on certain reasons. An act is a supererogatory act only if it is an act which one ought to do on the balance of reasons and yet one is permitted not to act on the balance of reasons".

[133] See Lon L. Fuller, *The Morality of Law* (1964), at 4.

[134] See *ibid.*, at 19-27.

[135] See *ibid.*, at 15-19.

[136] See *ibid.*, at 30-32.

[137] See *ibid.*, at 9-13, 27-30.

[138] See Part I, Chapter 3 above.

[139] Frank Richards, *Old Soldiers Never Die* (2009), at 310. See also Walzer, *Just and Unjust Wars*, *supra* note 96, at 152, 154.

be consistent with material military necessity, and therefore something that it would be in his strictly *a*moral self-interest to do.

But Richards also clearly found it morally troubling to do the "wise" thing. Instead, together with his colleague, Richards chose to shout several times into the cellar. In Walzer's words: "[H]e was accepting a certain risk in shouting, for had there been German soldiers in the cellar, they might have scrambled out, firing as they came. It would have been more prudent to throw the bombs without warning, which means that military necessity would have justified him in doing so".[140] Contemporary thinkers debate whether the risk of self-endangerment of the kind assumed by Richards is what humanity merely permits, or what it demands.[141]

4. Conclusion

This chapter refutes two salient features of the inevitable conflict thesis, namely that military necessity and humanity in their material context never coincide with each other, and that their normative counterparts always generate imperatives. On the contrary, our discussion reveals how "necessary-humane" and "unnecessary-inhumane" alignments are not only intuitively sound but also widely accepted. It also becomes clear that military necessity is always normatively indifferent, while humanity is so in respect of certain acts and not so in respect of others.

What do these revelations mean for the idea that a norm conflict between military necessity and humanity is inevitable, and that IHL norm-creation is about pre-empting such a conflict from finding its way into positive IHL rules? We will consider this question in Chapter 7.

[140] Walzer, *Just and Unjust Wars*, *supra* note 96, at 152.

[141] For further discussions of this debate, see, e.g., Walzer, *Just and Unjust Wars*, *supra* note 96, at 152, 154, 305-306; 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 Review of Books*, 14 May 2009; David Whetham, "The Just War Tradition: A Pragmatic Compromise", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 65, at 83; 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 Psychic Reality of War", in *ibid.*, 302, at 320-321; Michael Walzer, "Response", in *ibid.*, 328, at 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).

Chapter 7

Joint Satisfaction Thesis II – "Accounting for" the Military Necessity-Humanity Interplay in IHL Norm-Creation

According to the inevitable conflict thesis, humanity always demands what military necessity spurns, and the former always condemns what the latter requires. In Chapter 6, however, we saw how a given act can be both humane and materially necessary, or both inhumane and materially unnecessary. Nor, despite the inevitable conflict thesis' suggestion to the contrary, does military necessity and humanity always generate imperatives. It was shown, in particular, how military necessity is always normatively indifferent.

The stage is now ready for the joint satisfaction thesis to refute the notion that a norm conflict between the two sets of considerations is inevitable. Wherever military necessity permits what humanity demands, or wherever the former merely tolerates what the latter condemns, it always remains open to the belligerent to act in a manner that satisfies both simultaneously. The question, then, is how the framers of IHL rules choose to regulate conduct where such a possibility exists. We will see that the framers are likely to impose unqualified prohibitions against acts that are deemed unnecessary and inhumane. It is somewhat less likely that the framers will obligate necessary and humane acts.

We will then consider two less straightforward situations. Thus, military necessity may permit, whereas humanity may condemn, the same conduct. Conversely, a given act may be merely tolerated by military necessity yet demanded by humanity. Even in these situations, however, the belligerent satisfies both considerations jointly, albeit limitedly, by acting in accordance with humanity's imperatives. It is for the IHL framers to decide whether to obligate such jointly satisfactory behaviour, and, if so, whether to obligate it unqualifiedly, principally, indeterminately, or exceptionally.

1. Joint Satisfaction Thanks to Military Necessity-Humanity Alignment

Where an act is condemned by humanity and tolerated by military necessity, the belligerent satisfies both considerations by refraining from that act. Where humanity demands and military necessity permits an act, the belligerent satisfies both by performing that act.

These types of joint satisfaction might be characterised, metaphorically, as "firm". Their "firmness" emanates from the fact that the underlying act embodies an "unnecessary-inhumane" or "necessary-humane" alignment between military necessity and humanity in their material sense.[1] How do the framers of IHL rules approach possibilities of such jointly satisfactory behaviour? Do they prohibit what humanity condemns and military necessity merely tolerates? Do they obligate what humanity demands and military necessity permits? What explains situations where the framers do not do so?

1.1 Unqualified Obligations to Pursue Joint Satisfaction That Is Based on Forbearance

Let us begin with acts that humanity condemns and military necessity merely tolerates. Typically, international humanitarian law "accounts for" the possibility of joint satisfaction when its rules unqualifiedly prohibit this kind of belligerent conduct.[2]

[1] See Chapter 6 above.
[2] See R.B. Brandt, "Utilitarianism and the Rules of War", 1 *Philosophy and Public Affairs* 145 (1972), at 154-155.

We have already considered several paradigmatic examples of belligerent conduct that fall within this category. They include: using explosive projectiles weighing less than 400 grams[3]; bombarding undefended localities[4]; and shooting to kill a person placed *hors de combat*.[5] To these, one may add shooting persons descending from aircraft in distress.[6]

Prohibitions of this type extinguish all contrary liberties to behave otherwise (i.e., to perform the prohibited acts). These prohibitions are "unqualified". In other words, under no circumstances are they subject to modification on account of countervailing considerations that are normatively indifferent. The rules' framers have declined to let any indifferent considerations survive the process of their norm-creation.[7] Consequently, *de novo* pleas that emanate from such considerations are inadmissible *vis-à-vis* these unqualified IHL prohibitions.[8]

Neither what humanity condemns, nor what military necessity tolerates, is immutable to the passage of time. Nor, for that matter, is the manner of their interplay. As Michael N. Schmitt noted:

> Of course, all policy decisions are contextual in the sense of being based on past, existing, or anticipated circumstances. When circumstances change, the perceived sufficiency of a particular balancing of military necessity and humanity may come into question.[9]

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[3] See Chapter 4 above. The prohibition appears in the 1868 St. Petersburg Declaration. See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (11 December 1868). See also Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian Law* (2005), at 272-274. Chris af Jochnick and Roger Normand call it "an unreliable and already obsolete weapon" when the 1868 St. Petersburg Declaration was concluded. See Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War", 35 *Harvard International Law Journal* 49 (1994), at 66-67. But see William H. Boothby, *Weapons and the Law of Armed Conflict* (2009), at 141-144.

[4] See Chapter 4 above. The prohibition appears in Article 15, Brussels Declaration; Article 25, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907); Article 59, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977); Article 3(c), Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 8(2)(b)(v), Rome Statute of the International Criminal Court (17 July 1998). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 164-170.

[5] See Chapter 4 above. The prohibition appears in Article 41(1), Additional Protocol I; Article 8(2)(b)(vi), Rome Statute. See also a debate concerning the somewhat flexible scope of what constitutes *hors de combat*. Ryan Goodman, "The Power to Kill or Capture Enemy Combatants", 24 *European Journal of International Law* 819 (2013); Michael N. Schmitt, "Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'", 24 *European Journal of International Law* 855 (2013); Ryan Goodman, "The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt", 24 *European Journal of International Law* 863 (2013).

[6] See Article 42(1), Additional Protocol I. See also W. Hays Parks, "Air War and the Laws of War", 32 *Air Force Law Review* 1 (1990), at 108-111; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 170-172; Federal Political Department, 6 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1978), at 108-110; Federal Political Department, 15 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1978), at 94-95, 97, 99. But see *ibid.*, at 97, 104-105, 386, 429; L.R. Penna, "Customary International Law and Protocol I: An Analysis of Some Provisions", Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 201, at 212-214.

[7] As will be seen in Part III, Chapter 8, however, the joint satisfaction thesis leaves open the possibility whereby considerations that are normatively *not* indifferent, such as humanitarian imperatives, may in fact survive the process of IHL norm-creation. Having survived thus, they may act as an additional layer of restraint or obligation over and above positive IHL rules.

[8] Here, too, pleas that emanate from non-indifferent considerations may in fact be admissible even *vis-à-vis* unqualified IHL prohibitions. See Part III, Chapter 8 below.

[9] Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", 50 *Virginia Journal of International Law* 795 (2010), at 799. See also Alain Pellet, "The Destruction of Troy Will Not Take Place", in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (1992) 169, at 170, 194-195; Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1968), at 135.

Accordingly, a given act may be deemed materially necessary at one moment in history yet unnecessarily at another. Similarly, our understanding of what is humane and inhumane may evolve over time, rendering certain conduct newly consistent – or inconsistent, as the case may be – with humanity. These fluctuations inevitably affect what act becomes a matter of forbearance-based joint satisfaction that the framers of IHL rules choose unqualifiedly to prohibit.

1.1.1 Using Banned Weapons

Technological advances and tactical evolutions over the course of history have played an important role in reducing the effectiveness and utility of numerous types of weapons.[10] Such is the case with siege weapons,[11] anti-armour weapons,[12] the "dum-dum" bullet,[13] and certain incendiary weapons,[14] just to name a few. A weapon's diminished utility has in turn hastened the ripeness for its restriction or outright prohibition.[15] Chris af Jochnick and Roger Normand were therefore correct when they stated:

> After headed debate, the delegates at the [1899] Hague Conference managed to prohibit the use of only three weapons, all of dubious military value: Asphyxiating gases, dum dum bullets, and balloon-launched munitions. Prohibitions on these weapons received widespread support among delegates eager to demonstrate humanitarian motives but reluctant to compromise military interests.[16]

Two questions arise here. One concerns the "inhumane and unnecessary" correlation. If it is true that weapons of diminishing utility are correspondingly susceptible to bans, would the same apply to inhumane methods of combat more broadly and, indeed, to inhumane conduct generally? In other words, would it be the case that the framers of IHL rules would ban all inhumane and unnecessary acts? If not, what explains it?

Let us defer a full discussion of this particular matter until later in this chapter. Suffice it to note here that not all instances of conduct exhibiting the "inhumane and unnecessary" correlation will be the subject of unqualified IHL prohibitions. There are several reasons for this, including the largely self-inflicted character of the evil that the relevant acts typically entail, and the existence of sovereign interests favouring maximum freedom of action.

The other question concerns the "inhumane yet necessary" counter-correlation. If useless weapons have typically become the subject of an IHL ban, would it follow, *a contrario*, that those weapons deemed materially necessary would be incapable of IHL prohibition? Nuclear weapons – whose use has so far escaped a universal ban, despite the 1996 advisory opinion on their legality issued by the

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[10] See generally Boothby, *Weapons*, *supra* note 3; Leslie C. Green, "What One May Do in Combat – Then and Now", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven* (1991) 269, at 274, 293-294.

[11] That is so, according to Leslie C. Green, since siege had become less frequent. See Leslie C. Green, *The Contemporary Law of Armed Conflict* 3d ed. (2008), at 34.

[12] Similarly, since knightly heavy metal armour had gone out of fashion. See Green, *Law of Armed Conflict*, *supra* note 11 at 38, 156 n.70.

[13] Although its ban was resisted for a while by some states insisting on its lawful use against "savages". See, e.g., Jochnick and Normand, *supra* note 3, at 73; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 268-271; Green, *Law of Armed Conflict*, *supra* note 11, at 38, 158. William Hays Parks notes that most armed forces use only full-metal jacketed bullets, because only they would be reliably fired from military weapons. See W. Hays Parks, "Conventional Weapons and Weapon Reviews," 8 *Yearbook of International Humanitarian Law* 55 (2005), at 69; Boothby, *Weapons*, *supra* note 3, at 145-146.

[14] Since they had become less relevant in mechanised warfare. See, e.g., Green, *Law of Armed Conflict*, *supra* note 11, at 64, 165-166.

[15] See, e.g., Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (1954), at 550-551.

[16] Jochnick and Normand, *supra* note 3, at 72.

International Court of Justice (ICJ)[17] and efforts of a growing number of states as well as global civil society in recent years[18] – come to mind.

This is also a matter that will be explored in greater detail below. In particular, we will see how the IHL framers may choose to posit an unqualified prohibition on account of its inconsistency with humanitarian imperatives, where normative military necessity permits contrary behaviour. It may nevertheless be instructive here to appreciate how Jochnick and Normand arguably exaggerated the correlation between the diminishing utility of a means or method of warfare, on the one hand, and its susceptibility to restriction or prohibition, on the other.[19] These commentators effectively reversed the said susceptibility by asserting that, insofar as a given means or method of warfare retains its utility, it is *in*susceptible to meaningful restriction or prohibition.

To be sure, Jochnick and Normand are not the first to espouse such a view. They largely echo M.W. Royse, according to whom:

> [T]he two great peace conferences of modern times [in The Hague, in 1899 and 1907], along with their lesser predecessors, did not succeed in reducing armaments, or in restricting the development and improvement of weapons, or in prohibiting or restricting the use of any effective weapon or method of warfare … The proceedings of the Hague Conference demonstrate rather that a weapon will be restricted in inverse proportion, more or less, to its effectiveness; that the more efficient a weapon or method of warfare the less likelihood there is of its being restricted in action by rules of war.[20]

Some weapons did, however, become the subject of an unqualified ban despite the perception that they were not without utility. Poison and poisonous weapons, including asphyxiating and other gases,[21] are a case in point. For, after all, it is not entirely inconceivable for them to be delivered against the right target, in the right doses, and at the right moment, and to be effective as a result.[22] According to William H. Boothby, Hersch Lauterpacht admitted this possibility when he observed:

> Oppenheim refers to the practice of diffusing poisonous and asphyxiating gases from cylinders or otherwise than by projectiles during World War I, and concludes that, irrespective of whether that practice breached the prohibition on poisons and poisonous weapons, it was illegal to the extent that it exposed combatants to unnecessary suffering.[23]

On this view, diffusion of poisonous and asphyxiating gases from cylinders and so on would be illegal *to the extent that* it exposed combatants to unnecessary suffering.

Whether the prohibitions contained in Article 23(a) and (e) of the 1907 Hague Regulations[24] really encompassed this kind of diffusion during World War I may be debatable.[25] What is significant for our purposes, however, is two-fold. First, Lauterpacht, at least as described by Boothby, conceded

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[17] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996) 226.

[18] See, e.g., John Burroughs, *the Illegality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (1998); Ved P. Nanda and David Krieger, *Nuclear Weapons and the World Court* (1998); "Pledge Presented at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons by Austrian Deputy Foreign Minister Michael Linhart", 9 December 2014.

[19] See Jochnick and Normand, *supra* note 3, at 67, n.72, 68-69. See also Townsend Hoopes, "Comments", in Peter D. Trooboff (ed.), *Law and Responsibility in Warfare: The Vietnam Experience* (1975) 142.

[20] M.W. Royse, *Aerial Bombardment and the International Regulation of Warfare* (1928), at 131-132 (quoted in Jochnick and Normand, *supra* note 3, at 76, n.123).

[21] See, e.g., Boothby, *Weapons*, *supra* note 3, at 117-121.

[22] Conversely, of course, these can also be employed in a manner that renders them ineffective. See Roberts Graves, *Good-Bye to All That* (1929), at 198-211.

[23] Boothby, *Weapons*, *supra* note 3, at 119 (quoting Hersch Lauterpacht (ed.), 2 *Oppenheim's International Law* 2d ed. (1952), at 340, n.6).

[24] The provisions read, in relevant parts: "In addition to the prohibitions provided by special Conventions, it is especially forbidden … (a) [t]o employ poison or poisonous weapons [and] (e) [t]o employ arms, projectiles, or material calculated to cause unnecessary suffering".

[25] See, e.g., James Wilford Garner, 1 *International Law and the World War* (1920), at 271-278.

that not all part of the suffering to which the diffusion of these gases exposed combatants might be unnecessary. In other words, only that part of this suffering considered unnecessary would render the diffusion unlawful.[26] Second, despite this room for consistency with material military necessity, positive international humanitarian law has prohibited the diffusions of poisonous and asphyxiating gases, together with the use of gases generally.[27]

1.1.2 Killing POWs

Geneva Convention III of 1949 unqualifiedly prohibits the killing of prisoners of war (POWs).[28] Historically, however, the notion of sparing POWs' lives had little to do with humanity.

In medieval Europe, for instance, sparing POWs had more to do with other political, strategic and practical reasons – including, in particular, their captors' decidedly selfish and un-humanitarian interests such as pecuniary gain and prestige.[29] It is only later in time that humanitarian sentiments came to match such practice. Thus, as observed by G.I.A.D. Draper:

> It may well be that much of the Law of Arms of the pre-Grotian period imposed binding legal restrictions, well understood by those engaged in warfare, for reasons that had little to do with our modern philosophy of humanitarianism. The sparing of prisoners and the system of parole had little basis in humanitarian considerations. Dead prisoners cannot pay ransom and a prisoner cannot raise the ransom unless he has the chance to go home and persuade his family and friends to put up the money for his liberty. Later, as so often in the passage of legal history, these same legal institutions, quarters and parole, get viewed in quite another light, i.e., the changing morality of a later age when humanitarianism in warfare becomes acceptable and demanded.[30]

By the 18th century, the Grotian notion that POWs should be spared[31] found resonance in Jean-Jacque Rousseau's writings:

> War, then, is not a relation between man and man, but a relation between state and state, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as

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[26] Indeed, some commentators suggest that gases were no more inhumane than other weapons. See Stone, *Legal Controls*, *supra* note 15, at 554.

[27] See, e.g., Article 13(a), Project of an International Declaration concerning the Laws and Customs of War (27 August 1874); Article 8(a), The Laws of War on Land (1880); Article 23(a), Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land (29 July 1899); Article 23(a), 1907 Hague Regulations; Article 8(2)(b)(xvii), 8(2)(b)(xviii), Rome Statute; *United States of America et al. v. Hermann Wilhelm Göring et al.*, 1 *Trial of the Major War Criminals Before the International Military Tribunal* (1947) 171, at 220; Henckaerts and Doswald-Beck, 1 *Customary International Humanitarian Law*, *supra* note 3, at 251-254, 259-263; Jean Pascal Zanders, "International Norms Against Chemical and Biological Warfare: An Ambiguous Legacy", 8 *Journal of Conflict & Security Law* 392 (2003), at 392-394; Green, *Law of Armed Conflict*, *supra* note 11, at 161, 167-168. See also Stone, *Legal Controls*, *supra* note 15, at 555-556; Frits Kalshoven, "Arms, Armaments and International Law", 191 *Recueil des Cours* (1985) 183, at 216, and n.33 (quoted in Boothby, *Weapons*, *supra* note 3, at 122); Boothby, *Weapons*, *supra* note 3, at 121-125.

[28] See Article 4, 1899 Hague Regulations; Article 4, 1907 Hague Regulations; Article 2, Convention Relative to the Treatment of prisoners of War (27 July 1929); Article 13, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949). See also Article 23, Brussels Declaration; Article 63, Oxford Manual; Jean S. Pictet (ed.), *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* (1960), at 140; Article 41(3), Additional Protocol I; Article 8(2)(a)(i), Rome Statute; Part III, Chapter 8 below, for a discussion concerning the unqualified prohibition against killing POWs even out of mercy.

[29] See, e.g., Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary* (1908), at 20-21; Peter H. Wilson, "Prisoners in Early Modern European Warfare", in Sibylle Scheipers (ed.), *Prisoners in War* (2011) 39, at 44-53.

[30] G.I.A.D. Draper, "Military Necessity and Humanitarian Imperatives", 12 *Military Law and Law of War Review* 129 (1973), at 129. See also, e.g., Geoffrey Butler and Simon MacCoby, *The Development of International Law* (1928), at 122-123; M.H. Keen, *The Laws of War in the Late Middle Ages* (1965), at 156-185; Stephen C. Neff, "Prisoners of War in International Law: The Nineteenth Century", in Scheipers, *Prisoners*, *supra* note 29, 57.

[31] See Hugo Grotius, 2 *De Jure Belli Ac Pacis Libri Tres* (Francis W. Kelsey trans., 1925), at 737-739.

> members of the fatherland, but as its defenders … The aim of war being the destruction of the hostile state, we have a right to slay its defenders so long as they have arms in their hands; but as soon as they lay them down and surrender, ceasing to be enemies or instruments of the enemy, they become again simply men, and no one has any right over their lives.[32]

This "liberal"[33] tendency consolidated in the 19th century with the issuance of the Lieber Code in 1863[34] and the Brussels Declaration in 1874,[35] followed by the adoption of the two Hague Regulations.[36]

1.1.3 Committing Rape

The unqualified prohibition against rape also shows how the military necessity-humanity interplay may evolve over time.[37]

In medieval Europe, rape in the aftermath of the conquest of a city by storm was lawful. This was permitted by military necessity, notwithstanding its evident inhumanity.[38] According to M.H. Keen:

> Women could be raped … The prospect of this free run of his lusts for blood, spoil and women was a major incentive to a soldier to persevere in the rigours which were likely to attend to a protracted siege.[39]

Today's international humanitarian law unqualifiedly prohibits rape.[40] This change may be due to the fact that rape's inhumanity has become universally acknowledged. It can also be argued that the military utility attributed to rape has diminished if not entirely eliminated,[41] and that military necessity has shifted from permitting rape to "merely" tolerating it. Indeed, R.B. Brandt observed: "And the rape of women … of occupied countries serves no military purpose. On the contrary, such behaviour arouses hatred and resentment and constitutes a military liability".[42]

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[32] Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right* (H.J. Tozer trans., 1998), at 10-11. See also Emer de Vattel, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Joseph Chitty trans., 1844), at 63, 68-70; Neff, *supra* note 30, at 70.

[33] Claude Pilloud, "Protection of the Victims of Armed Conflicts", in Henri Dunant Institute and UNESCO (eds.), *International Dimensions of Humanitarian Law* (1988) 167, at 168.

[34] See Article 56, Instructions for the Government of Armies of the United States in the Field (24 April 1863).

[35] Article 23, Brussels Declaration. See also Article 63, Oxford Manual.

[36] Article 4, 1899 Hague Regulations; Article 4, 1907 Hague Regulations. See also Pictet, *Commentary III Geneva Convention*, *supra* note 28, at 140; Sibylle Scheipers, "Prisoners and Detainees in War", *European History Online* (2011).

[37] See, e.g., Pellet, *supra* note 9, at 170, 194-195; Schmitt, "Preserving the Delicate Balance", *supra* note 9, at 799; Schwarzenberger, *The Law of Armed Conflict*, *supra* note 9, at 135.

[38] See, e.g., Keen, *supra* note 30, at 121-122.

[39] See *ibid.*, at 121-122.

[40] See, e.g., Article 76(1), Additional Protocol I; Article 4(2)(e), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977); Article 8(2)(b)(xxii), 8(2)(e)(vi), Rome Statute. See also *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paras. 596-598, 686-688; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, *Judgement*, 10 December 1998 para. 185; *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23&23/1-T, *Judgement*, 22 February 2001, para. 460; *Prosecutor v. Dragoljub Kunarac et al.* Case No. IT-96-23&23/1-A, *Judgement*, 12 June 2002, paras. 125-133; *Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, *Judgement*, 28 April 2005, paras. 547-551; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 323-327; Gloria Gaggioli, "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law", 94 *International Review of the Red Cross* 503 (2014), at 511-513.

[41] This is without prejudice to the *rhetoric* of rape as a "weapon of war" or "method of war". See Gaggioli, "Sexual Violence", *supra* note 40, at 517-519.

[42] Brandt, "Utilitarianism", *supra* note 2, at 155. See also Gaggioli, "Sexual Violence", *supra* note 40, at 517-519.

1.2 Unqualified Obligations to Pursue Joint Satisfaction That Is Based on Performance

Joint satisfaction of the "firm" kind also results where the belligerent performs what humanity demands and military necessity permits. Here, too, international humanitarian law "accounts for" the two sets of considerations when it imposes an unqualified obligation to perform the act in question.

This remains the case, although categorical IHL obligations that can be said to embody the "necessary and humane" alignment are limited in number. Our earlier discussion has highlighted the humane treatment of residents and their property in occupied territory as an example.[43] In Brandt's words: "So utility is maximized, within our indicated basic limitations, by a strict rule calling for good treatment of the civilian population of an occupied territory".[44]

It should be noted that treating civilians in occupied territory well in 18th- and 19th-century wars had more to do with military considerations than humanitarian ones. The latter essentially "caught up" with the former – or so, at least, the theory would go.[45] In any event, today's international humanitarian law imposes a number of unqualified, affirmative obligations upon the belligerent in its administration of occupied territory.[46]

As with the unqualified prohibitions, these unqualified obligations extinguish all contrary liberties to behave otherwise (i.e., to refrain from the acts in question). Under no circumstances are they modifiable on account of countervailing indifferent considerations. Since no such considerations survived the process of its norm-creation, unqualified IHL obligations do not admit *de novo* pleas that emanate from them.[47]

2. Absence of Unqualified Obligations Despite Military Necessity-Humanity Alignment

We should not assume, too hastily, that possibilities of "firm" joint satisfaction *always* result in unqualified IHL rules being posited on the matter. On the contrary, numerous acts that exhibit the alignment between military necessity and humanity elude unqualified IHL regulation. This occurs where positive international humanitarian law contains no pertinent rules, or where, although the law does contain such rules, their scope of application is limited.

Three major explanations readily present themselves. To begin with, some acts deemed both inhumane and lacking in material military necessity are of a nature to involve exclusively self-inflicted evil.[48] We saw earlier that, whereas international humanitarian law addresses itself to such

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[43] See Chapter 6 above.

[44] Brandt, "Utilitarianism", *supra* note 2, at 155.

[45] What happened in reality appears less auspicious. See Geoffrey Best, "Restraints on War by Land Before 1945", in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979) 17, at 27-28.

[46] See, e.g., Articles 46 (respecting family honour and rights), 55 (safeguarding the capital of public buildings), 56 (treating properties of municipalities and other entities as private property), 1899 Hague Regulations; Articles 46 (respecting family honour and rights), 55 (safeguarding the capital of public buildings), 56 (treating properties of municipalities and other entities as private property), 1907 Hague Regulations. No major debate regarding these provisions occurred at the 1899 and 1907 Hague Conferences, where delegates adopted them largely based on Article 38 of the Brussels Declaration. See also Articles 50 (facilitating the proper working of institutions for education and care of children), 58 (permitting spiritual assistance, and accepting consignments of religious material and facilitating their distribution), 59 (agreeing to relief schemes), Geneva Convention IV. Here, too, no major difficulties arose at the 1949 Diplomatic Conference regarding Articles 50 and 59 of Geneva Convention IV, drawn as they were from Articles 46 and 48 of the Stockholm Draft. Article 58 was introduced by the Holy See and adopted without debate. See Federal Political Department, II-A *Final Record of the Diplomatic Conference of Geneva of 1949* (1949), at 748, 831; Federal Political Department, II-B *Final Record of the Diplomatic Conference of Geneva of 1949* (1949), at 421. See also Hans-Peter Gasser and Knut Dörmann, "Protection of the Civilian Population", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 489, at 276-278; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 178-181.

[47] The joint satisfaction thesis envisions potential room where non-indifferent pleas may in fact be admissible even *vis-à-vis* unqualified IHL obligations. See Part III, Chapter 8 below.

[48] See Chapter 4 above.

acts in limited circumstances, it still remains heavily influenced by the Millian presumption of behavioural autonomy.[49] In addition, acts that are deemed humane and materially necessary often embody the "humanity of aspiration", rather than the "humanity of duty", rendering them a matter of permission.[50] Since, with respect to such acts, neither military necessity nor humanity generates imperatives, it is unlikely that the framers of IHL rules will elect to make the pursuit of joint satisfaction obligatory.

Thus, for example, Article 34 of Geneva Convention II strictly forbids the possession or use of a secret code by hospital ships for their wireless or other means of communication.[51] According to the Red Cross commentary:

> The fact that the use of any secret code is prohibited affords a guarantee to the belligerents that hospital ships will not make improper use of their transmitting apparatus or any other means of communication. Hospital ships may only communicate in clear, or at least in a code which is universally known, and rightly so, for the spirit of the Geneva Conventions requires that there should be nothing secret in their behaviour vis-à-vis the enemy.[52]

This prohibition was relaxed in paragraph 171 of the 1994 Sam Remo Manual, which stipulates: "In order to fulfil most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage".[53] That hospital ships should now be permitted to use cryptographic equipment arguably has to do with a combination of military necessity (i.e., warships cannot otherwise communicate in clear with hospital ships without revealing their own position) and humanity (i.e., only by communicating with other warships can hospital ships effectively carry out their humanitarian mission in the modern world).[54]

Similar consequences also result from the presence of *third* considerations in the process of IHL norm-creation.[55] Take sovereign interests,[56] for example. They have blocked or delayed the adoption of an unqualified IHL rule – or, in any event, the extension of an existing one's scope of application – even where it would otherwise accord with humanity and material military necessity.

2.1 *Clausula si omnes*

The *si omnes* clauses[57] typify historical instances where considerations of sovereignty amongst adversarial powers once procured the occasional exclusion of positive IHL rules that would have otherwise unqualifiedly obligated jointly satisfactory behaviour.[58] It is widely agreed today that general participation is no longer a requirement for the application of IHL rules.[59]

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[49] See Chapter 4 above.
[50] See Chapter 6 above.
[51] See Article 34, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949).
[52] Jean S. Pictet (ed.), *Commentary II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1960), at 193.
[53] See San Remo Manual on International Law Applicable to Armed Conflicts at Sea (12 June 1994), para. 171.
[54] This author is grateful to Charles Garraway for his insight on the matter. See also Wolff Heintschel von Heinegg, "Maritime Warfare", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 145, at 157-159.
[55] On the significance of third considerations generally, see Part III, Chapter 8 below.
[56] See Jochnick and Normand, *supra* note 3, at 71-72.
[57] See, e.g., Pictet, *Commentary III*, *supra* note 28, at 21-22; Philippe Gautier, "General Participation Clause (Clausula si omnes)", *Max Planck Encyclopedia of Public International Law* 2d ed. (2006).
[58] See Gautier, *supra* note 57, paras. 4-6.
[59] See Article 2(3) common to the Geneva Conventions. See also Georges Abi-Saab, "The Specifics of Humanitarian Law", in Swinarski, *Studies and Essays*, *supra* note 6, at 267-268; Gautier, *supra* note 57, paras. 6-7; Theodor Meron, "The Geneva Conventions and Public International Law", 91 *International Review of the Red Cross* 619 (2009), at 621.

2.2 Non-International Armed Conflicts

Considerations of sovereign interests have also hindered the adoption of treaty provisions that would unqualifiedly prohibit inhumane and unnecessary acts in non-international armed conflicts.[60] Through the years leading up to 1949, the International Committee of the Red Cross (ICRC) tried unsuccessfully to rally state support in its effort to broaden the scope of application of the four Geneva Conventions in their entirety to cover all types of armed conflict.[61] The same is true of the defeat of numerous would-be provisions of Additional Protocol II.[62]

Two appellate rulings in the *Tadić* case at the International Criminal Tribunal for the Former Yugoslavia (ICTY) may be briefly noted in this regard. In 1995, the Appeals Chamber found, *inter alia*, that "prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities"[63] had now become customarily applicable in non-international armed conflicts as well. This ruling has been widely praised for its contribution to IHL development.[64] Predictably, however, it has also attracted criticisms on account of its creative customary law methodologies[65] and threat to state sovereignty.[66]

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[60] See, e.g., Alexander Zahar, "Civilizing Civil War: Writing Morality as Law at the ICTY", in Bert Swart, Alexander Zahar and Göran Suiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011) 469, at 500-502; Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012) 32, at 37-39; Dieter Fleck, "The Law of Non-International Armed Conflict", in Fleck, *Handbook* 3d ed., *supra* note 46, 581, at 590.

[61] See, e.g., Jean S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field* (1952), at 38-48; Frits Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 133, at 140; Georges Abi-Saab, "Non-International Armed Conflicts", in Henri Dunant Institute and UNESCO (eds.), *International Dimensions of Humanitarian Law* (1988) 217, at 220; David A. Elder, "The Historical Background of Common Article 3 of the Geneva Conventions of 1949", 11 *Case Western Reserve Journal of International Law* 37 (1979), at 41-54; Lindsay Moir, *The Law of Internal Armed Conflict* (2002), at 24-29; Rogier Bartels, "Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts", 91 *International Review of the Red Cross* 35 (2009), at 57-61; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (2012), at 40-42; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010), at 44-49.

[62] See, e.g., Abi-Saab, "Non-International Armed Conflicts", *supra* note 61, at 230-233; Moir, *Internal Armed Conflict*, *supra* note 61, at 91-96; Lindsay Moir, "Towards the Unification of International Humanitarian Law?", in Richard Burchill, Nigel D. White and Justin Morris (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (2005) 108, at 111-113; Bartels, *supra* note 61, at 61-64; Meron, "Geneva Conventions", *supra* note 59, at 622-623; Sivakumaran, *supra* note 61, at 49-52; Cullen, *supra* note 61, at 86-102; Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2d rev. ed. (2013), at 714-720.

[63] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 127.

[64] See, e.g., Christopher Greenwood, "International Humanitarian Law and the *Tadić* Case", in Christopher Greenwood, *Essays on War in International Law* (2006) 457, at 473-474; Christopher Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia", 2 *Max Planck Yearbook of United Nations Law* 97 (1998), at 130; Theodor Meron, "War Crimes Law Comes of Age", 92 *American Journal of International Law* 462 (1998), at 463; Allison Marston Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War", 59 *Vanderbilt Law Review* 1 (2006), at 25-26; Francoise Hampson, "Relevance for the Prosecution of Violations of International Humanitarian Law", in Larry Maybee and Benarji Chakka (eds.), *Custom as a Source of International Humanitarian Law* (2007) 103, at 109; Shane Darcy, "Bridging the Gaps in the Laws 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, at 328-329.

[65] See, e.g., Frits Kalshoven, "Development of Customary Law of Armed Conflict", in Kalshoven, *Reflections*, *supra* note 61, 321, at 324; Schmitt, "Preserving the Delicate Balance", *supra* note 9, at 818-819.

[66] See, e.g., Peter W. Murphy, book review on "Judging War Criminals", 35 *Texas International Law Journal* 325 (2000), at 332; Schmitt, "Preserving the Delicate Balance", *supra* note 9, at 819-820, 822.

The other *Tadić* ruling is the 1999 Appeal Judgment.[67] It effectively holds that the 1949 Geneva Conventions apply to certain types of armed conflicts ordinarily deemed non-international in character,[68] and that Geneva Convention IV extends protection to some victims traditionally considered ineligible.[69] These findings, too, have received expressions of support[70] and concern[71] alike.

2.3 Belligerent Reprisals[72]

Sovereign interests have also delayed the establishment of a prohibition against subjecting civilian persons to belligerent reprisals during active hostilities in international armed conflicts.[73] As will be seen below, this technique is commonly regarded as inhumane and of little or no material utility. Yet, much to the consternation of those sensitive to state sovereignty, the ICTY's *Martić* Rule 61 Decision[74] and *Kupreškić* Trial Judgment[75] declare the technique customarily unlawful. Reactions to these decisions[76] have been largely disapproving.[77]

The *Martić* Rule 61 Chamber offered two problematic bases. The first is the so-called "respect and ensure respect" obligation found in Article 1 common to all Geneva Conventions.[78] It is true that the ICJ invoked common Article 1 in its *Nicaragua* Judgement.[79] However, that court did not consider common Article 1 to contain new obligations or obligations that are more stringent than those that international humanitarian law already stipulates. It seems generally agreed that common Article

[67] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, *Judgement*, 15 July 1999.
[68] See *ibid.*, paras. 83-162.
[69] See *ibid.*, paras. 163-169.
[70] See, e.g., Danner, *supra* note 64, at 25-26; Shane Darcy, "Bridging the Gaps", *supra* note 64, at 326-328.
[71] See, e.g., Murphy, *supra* note 66, at 332; Frits Kalshoven, "From International Humanitarian Law to International Criminal Law", in Kalshoven, *Reflections*, *supra* note 61, 947, at 953-954.
[72] An earlier version of the following passages in belligerent reprisals is scheduled for publication. 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).
[73] See, e.g., Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 520-523; Meron, "Geneva Conventions", *supra* note 59, at 623. That states parties to Additional Protocol I without reservations are unqualifiedly forbidden to resort to this technique is uncontroversial. See Article 51(6), Additional Protocol I.
[74] See *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, *Decision*, 8 March 1996, para. 17.
[75] See *Prosecutor v. Zoran Kupreškić et al*., Case No. IT-95-16-T, *Judgement*, 14 January 2000, para. 531.
[76] See, e.g., UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 421; Payam Akhavan, "The Dilemmas of Jurisprudence: The Contribution of the Ad Hoc Tribunals to International Humanitarian Law", 13 *American University International Law Review* 1518 (1998), at 1518-1520; Greenwood, "Development of International Humanitarian Law", *supra* note 64, at 123-125; Shane Darcy, "The Evolution of the Law of Belligerent Reprisals", 175 *Military Law Review* 184 (2003); Frits Kalshoven, "Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal", in Lal Chand Vohrah et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003) 481; Christopher Greenwood, "Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia", in Greenwood, *Essays*, *supra* note 64, 331; Robert Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", 11 *Journal of Conflict & Security Law* 239 (2006), at 255-256; Michael A. Newton, "Reconsidering Reprisals", 20 *Duke Journal of Comparative and International Law* 361 (2009-2010); Schmitt, "Preserving the Delicate Balance", *supra* note 9, at 820-822; Milan Kuhli and Klaus Günther, "Beyond Dispute: International Judicial Institutions as Lawmakers: Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals", 12 *German Law Journal* 1261 (2011); Brian San Yk, "Legal Regulation of Belligerent Reprisals in International Humanitarian Law: Historical Development and Present Status", *African Yearbook on International Humanitarian Law* 134 (2012); Veronika Bílková, "Belligerent Reprisals in Non-International Armed Conflicts", 63 *International and Comparative Law Quarterly* 31 (2014).
[77] But see Alexander Orakhelashvili, book review, 79 *British Yearbook of International Law* 371 (2009), at 373.
[78] See *Martić* Rule 61 Decision, para. 15.
[79] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment,* ICJ Reports (1986) 14, para. 220 (cited in *Martić* Rule 61 Decision, para. 15).

1 does not do so,[80] despite occasional suggestions to the contrary.[81] The *Martić* Rule 61 Chamber also invoked General Assembly Resolution 2675,[82] Article 51(6) of Additional Protocol I,[83] and Article 4 of Additional Protocol II.[84] Whether taken together or individually, however, it does not appear that these authorities alone establish the existence of a customary IHL prohibition on belligerent reprisals against civilians in hostilities.[85]

In contrast to the *Martić* Rule 61 Decision, the *Kupreškić* Trial Judgement approaches belligerent reprisals from four distinct angles. They are:

(1) The Martens Clause as a requirement for restrictive interpretation[86];
(2) The Martens Clause as a basis for elevating *opinio necessitatis* above *usus*[87];
(3) Belligerent reprisals' deontological undesirability[88]; and
(4) Belligerent reprisals' diminishing relative utility.[89]

The first angle stems from the manner in which one is to interpret those IHL provisions that grant belligerents discretionary powers, as well as those that extend protection to civilians, and the place occupied by the Martens Clause therein. Thus, in the Trial Chamber's words:

> However, this [Martens] Clause enjoins, as a minimum, reference to those principles [of humanity] and dictates [of public conscience] any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 [of Additional Protocol I] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.[90]

If the Martens Clause did require that the belligerent's discretionary power be interpreted with maximum restriction, it might be argued that belligerent reprisals against civilians during hostilities should be considered unavailable given the technique's ambiguous status under customary international humanitarian law. According to some commentators, the Martens Clause effectively reverses any *Lotus*-esque *in dubio pro libertate* that may otherwise remain under that law.[91] To the extent that

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[80] See, e.g., Adam Roberts, "The Laws of War: Problems of Implementation", in European Commission, 1 *Law in Humanitarian Crisis* (1996) 13, at 30-32; Greenwood, "Development of International Humanitarian Law", *supra* note 64, at 124; Carlo Focarelli, "Common Article 1 of the Geneva Conventions: A Soap Bubble?", 21 *European Journal of International Law* 125 (2010), at 171.

[81] See, e.g., *Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: Written Observations Submitted by the Government of Solomon Islands to the International Court of Justice*, 20 June 1995, para. 3.10 ("The threat of [nuclear weapons'] use must be considered as totally incompatible with the solemn obligation undertaken by States under common Article 1 of the four Geneva Conventions of 1949 and Article 1(1) of the 1st 1977 Additional Protocol 'to respect and ensure respect' of the four Conventions and the Protocol"). Nowhere in its advisory opinion on nuclear weapons does the ICJ refer to common Article 1.

[82] General Assembly Resolution 2675 (XXV), 9 December 1970 (cited in *Martić* Rule 61 Decision, para. 16).

[83] Article 51(6), Additional Protocol I (cited in *Martić* Rule 61 Decision, para. 16).

[84] Article 4, Additional Protocol II (cited in *Martić* Rule 61 Decision, para. 16).

[85] Interestingly, both the *Martić* Trial and Appeal Judgments apparently accept that belligerent reprisals are not completely outlawed. See *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, *Judgement*, 12 June 2007, paras. 465-468; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, *Judgement*, 8 October 2008, paras. 263-269.

[86] See *Kupreškić* Trial Judgment, para. 525.

[87] See *ibid.*, paras. 527, 531-533.

[88] See *ibid.*, paras. 528-529.

[89] See *ibid.*, para. 530.

[90] *Ibid.*, para. 525. See also, e.g., de Breucker's statement at the 1974 Diplomatic Conference (Federal Political Department, 8 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1987), at 18); Antonio Cassese, "The Martens Clause: Half a Loaf or Simply a Pie in the Sky?", 11 *European Journal of International Law* 187 (2000), at 212.

[91] See, e.g., *Dissenting Opinion of Judge Shahabuddeen*, *Nuclear Weapons* Advisory Opinion 375, at 394-396; *Dissenting Opinion of Judge Weeramantry*, *ibid.*, 429, at 494-496; Louise Doswald-Beck, "International Humanitarian Law and the

the clause can be seen as a "safeguard of customary humanitarian law by supporting the argument that what is not prohibited by treaty may not necessarily be lawful",[92] the notion that it renders the *Lotus* presumption difficult to uphold seems reasonable. As will be seen below, however, it is not clear whether a *full* reversal – i.e., *in dubio pro prohibitione* – is what the Martens Clause really gives us.[93]

Second, in the *Kupreškić* Trial Chamber's view, the lawfulness or unlawfulness of belligerent reprisals against civilians in combat zones is

> an area where *opinio juris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule of principle of humanitarian law.[94]

Note how the chamber subtly shirts its attention from *opinio juris sive necessitatis* to just *opinio necessitatis*.[95] Although the full Latin maxim does encompass both *opinio juris* and *opinio necessitatis*, international law authorities almost always refer to the underlying notion as *opinio juris*.[96] *Opinio necessitatis* may bring the matter closer to what "needs" to be done, rather than law as it actually is. The chamber appears to be suggesting that, in international humanitarian law, the belief of the relevant law-making entities regarding the aforementioned "need" is sufficient for the finding of custom. Crucially, on this view, such a finding is possible even where neither their corresponding belief regarding the law as it is, nor their corresponding behaviour on the ground, exists.[97]

This suggestion is quite novel, although not entirely without precedent.[98] Can the Martens Clause really be seen to warrant such a shift in our discussion of customary international humanitarian law, from one based on *opinio juris* to that based on *opinio necessitates*?[99] This is to say nothing of the fact that the *Kupreškić* Trial Judgement enlists into the group of relevant *opinio*-holders not only

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Advisory Opinion of the International Court of Justice on the Legality of Threat or Use of Nuclear Weapons", 316 *International Review of the Red Cross* 35 (1997); Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", 316 *International Review of the Red Cross* 125 (1997).

[92] Jochen von Bernstorff, "Martens Clause", *Max Planck Encyclopedia of Public International Law* (2009), para. 13. See also *Nuclear Weapons* Advisory Opinion, para. 84; *Legality of the Threat or Use of Nuclear Weapons (Request for an Advisory Opinion by the United Nations General Assembly): Statement of the Government of the United Kingdom*, 16 June 1995, para. 3.58; International Court of Justice, *Verbatim Record*, 15 November 1995(CR 95/34), at 78; Abi-Saab, "Specifics", *supra* note 59, at 274-275; Georg Schwarzenberger, *The Legality of Nuclear Weapons* (1958), at 10-11 (cited in Cassese, "The Martens Clause", *supra* note 90, at 189, fn. 3).

[93] See below.

[94] *Kupreškić* Trial Judgment, para. 527.

[95] See also *ibid.*, paras. 531-533.

[96] See *North Sea Continental Shelf, Judgment*, ICJ Reports (1969) 3, paras. 71, 77. See also International Law Association, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000), at 7 (referring to the "subjective" element of customary law as "*opinio juris sive necessitatis* (or *opinio juris* for short)"), 32-34.

[97] See, e.g., Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument: Reissue with New Epilogue* (2005), at 421; David J. Bederman, *Custom as a Source of Law* (2010), at 20-22.

[98] See, e.g., Maurice H. Mendelson, "The Formation of Customary International Law", 272 *Recueil des Cours* (1998), at 271; Antonio Cassese, "A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*", 10 *European Journal of International Law* 791 (1999), at 797-799.

[99] See, e.g., Robert Cryer et al. (eds.), *An Introduction to International Law and Procedure* 2d. ed. (2010), at 134 n.109; Achilles Skordas, "Hegemonic Custom?", in Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundation of International Law* (2003) 317, at 325-330; Erik Vincent Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict* (2006), at 167.

states[100] – whose *opinio necessitatis* may be more ambiguous than it is presented to be in the decision[101] – but also the ICRC,[102] the *Martić* Rule 61 Chamber[103] and the International Law Commission.[104]

The third and fourth angles depart from public international law methodology. The *Kupreškić* Trial Judgement invokes belligerent reprisals' "inherent barbarity"[105] as a means of seeking compliance with international law. The judgments notes: "The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation".[106] Moreover, "the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights".[107]

These are arguments based on belligerent reprisals' problematic deontological status,[108] regardless of whether they effectively compel the delinquent adversary to return to IHL compliance. Both the *Kupreškić* Trial Judgment and those who criticise it – even the most vocal and influential ones, such as Christopher Greenwood and Frits Kalshoven – deem the technique inhumane.[109] The question is whether international humanitarian law should ban belligerent reprisals *because of* their inhumanity, or whether it should tolerate them *in spite of* their inhumanity.[110]

This leads us to the fourth angle from which the *Kupreškić* Trial Judgement approaches belligerent reprisals. The judgment rejects the utilitarian arguments often offered in their support. Thus,

> while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner. A means of inducing compliance with international law is at present more widely available and, more importantly, is beginning to prove fairly efficacious: the prosecution and punishment of war crimes and crimes against humanity by national or international courts.[111]

This angle is not really about belligerent reprisals *per se*. It is rather about an alternative means.[112] Nor, for that matter, does the question concern itself with belligerent reprisals' efficaciousness, or a lack thereof.[113] Neither the judges nor their critics claim that belligerent reprisals are effective in achieving what they are intended to achieve. It is quite the contrary. By their proponents' own

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[100] See *Kupreškić* Trial Judgment, paras. 532-533.
[101] See, e.g., Christopher Greenwood, "Belligerent Reprisals", *supra* note 76, at 344-346; Schmitt, "Preserving the Delicate Balance", *supra* note 9, at 820-821.
[102] See *Kupreškić* Trial Judgment, para. 532.
[103] See *ibid.*
[104] See *ibid.*, para. 534.
[105] *Ibid.*, para. 528.
[106] *Ibid*.
[107] *Ibid.*, para. 529.
[108] Robert Kolb calls it "a translation of a Kantian categorical imperative into the law". See Robert Kolb, "International Humanitarian Law and Its Implementation by the Court", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 1015, at 1032. See also *ibid.*, at 1033-1034.
[109] See Frits Kalshoven, *Belligerent Reprisals* (1971), at 42-44, 342-344; Frits Kalshoven, "Two Recent Decisions of the Yugoslavia Tribunal", *supra* note 76, at 481.
[110] See generally, e.g., Françoise Hampson, "Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949", 37 *International and Comparative Law Quarterly* 818 (1988); Frits Kalshoven, "Belligerent Reprisals Revisited", in Kalshoven, *Reflections*, *supra* note 61, 759, at 771-776.
[111] *Kupreškić* Trial Judgment, para. 530. See also Kalshoven, *Belligerent Reprisals*, *supra* note 109, at 370-371; Christopher Greenwood, "Reprisals and Reciprocity in the New Law of Armed Conflict", in Michael A. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (1989) 227, at 238-246.
[112] See, e.g., Kolb, "Implementation", *supra* note 108, at 1034.
[113] Tellingly, nowhere in the *Kupreškić* Trial Judgment do the judges discuss the danger of counter-reprisals and escalations to which belligerent reprisals are (in)famously vulnerable.

admission,[114] belligerent reprisals are fraught with risks of abuse and adverse consequences, and states rarely, if ever, resort to them these days.[115]

In other words, all concerned appear to agree that belligerent reprisals, including those against civilians during hostilities, are both inhumane and of questionable consistency with material military necessity. The question rather involves the supposed efficaciousness of the "prosecution and punishment of war crimes and crimes against humanity by national or international courts". The *Kupreškić* Trial Judgment suggests that, all else being equal, the more efficacious such prosecution and punishment have become over time, the less justifiable belligerent reprisals have become by comparison. Conversely, then, the technique's "modicum of justification in the past" would remain in place today, should modern war crimes prosecutions prove inefficacious.

Perhaps the judgment's first claim regarding the wider availability of war crimes prosecutions before national or international courts may have some grain of truth. Its second claim that their efficaciousness is also improving, however, may be suspect.[116] Here, a hint of naïveté surrounding the judgement's assertion – understandable though it may have been in 2000, given the still largely intact optimism about international criminal justice at the time – is difficult to dispel.

Schmitt faults the *Martić* and *Kupreškić* decisions with the unusual methodologies of public international law used, and the unsubstantiated optimism offered about the potential of war crimes prosecutions. In his words: "When they engage in such activism, international tribunals supplant states in their role as the arbiter of the balance [between military necessity and humanity]".[117] This, it is submitted here, indicates two things. First, these rulings are seen as challenging the law's traditionally state-driven mode of norm-creation and adjustment. Second, judges are seen as taking the law into directions to which not all states may be prepared to go.

3. Joint Satisfaction Amid Military Necessity-Humanity Contradiction

Not all belligerent acts are amenable to what we metaphorically called "firm" joint satisfaction at the outset of this chapter. Can we still speak of joint satisfaction, albeit perhaps of a more "modest" character, with respect to these other acts?

At stake here are situations in which a given act is amenable neither to an "inhumane-unnecessary" alignment, nor to a "humane-necessary" alignment. One important tenet of the joint satisfaction thesis is that, even where this occurs, it is still always open to the belligerent to act in a manner that jointly satisfies military necessity and humanity. Accordingly, there is no norm conflict here, either.

3.1 Frustration Between a Duty and a Counter-Liberty

Where humanity condemns what military necessity permits, or where humanity demands what military necessity only tolerates, it might thought that a norm conflict will result. On this view, a norm conflict also exists where forcing the norm's addressee "to refrain from exercising one of its rights could thus lead to the frustration of the permissive norm equally as with an obligatory one".[118] Indeed, this author himself recently wrote:

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[114] See, e.g., Kalshoven, *Belligerent Reprisals*, *supra* note 109, at 41-42; Greenwood, "Twilight", *supra* note 109, 295, at 295, 316.

[115] Writing in 1989, Christopher Greenwood predicted that "belligerent reprisals will continue to enjoy a twilight existence". See Greenwood, "Twilight", *supra* note 109, 295, at 329.

[116] See, e.g., Schmitt, "Preserving the Delicate Balance", *supra* note 9, at 821.

[117] *Ibid.*, at 822.

[118] Marko Milanović, "Norm Conflict in International Law: Whither Human Rights?", 20 *Duke Journal of Comparative and International Law* 69 (2009), at 73. See also Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", in *Report of the Study Group of the International Law Commission*, A/CN.4/L.682, paras. 24-25; Erich Vranes, "The Definition of 'Norm Conflict' in International Law and Legal Theory", 17 *European Journal of International Law* 395 (2006).

> [F]rustration between a duty of non-detention [arising from Article 5(1) of the European Convention on Human Rights] and a counter-power of security detention [arising from the law of belligerent occupation] can constitute a norm conflict.[119]

He argued that meta-rules often invoked in order to resolve norm conflicts, such as *lex specialis*,[120] *lex superior*,[121] *lex posterior*,[122] and *lex favorabilis*,[123] are highly ambiguous and ultimately inconclusive.[124] We should focus instead on the effects that the application of meta-rules produces on the affected norms.[125] The effects in question include conflict avoidance through harmonisation or clarification[126]; conflict elimination through invalidation, restriction or exception[127]; and conflict remedy through modification in the operation of secondary rules.[128]

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[119] 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), at 146.

[120] See, e.g., Article 31(3)(1), Vienna Convention on the Law of Treaties (23 May 1969); Article 55, Responsibility of States for Internationally Wrongful Acts (12 December 2001).

[121] See, e.g., Articles 53, 64, Vienna Convention on the Law of Treaties (23 May 1969).

[122] See, e.g., *ibid.*, Articles 30, 59.

[123] 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.

[124] See, e.g., 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), at 462, 482 (calling *lex specialis* "descriptively misleading, vague in meaning, and of little practical use in application"); Nancie Prud'homme, "*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?", 40 *Israel Law Review* 356 (2007), at 378-386; Kenneth Watkin, "Use of Force During Occupation: Law Enforcement and Conduct of Hostilities", 94 *International Review of the Red Cross* 267 (2012), at 301-304.

[125] See Hayashi, "Good Intentions", *supra* note 119, at 148-149.

[126] See *ibid.*, at 17-18. See also, e.g., Article 31(3)(c), Vienna Convention on the Law of Treaties; *Nuclear Weapons* Advisory Opinion, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Reports (2004) 136, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment*, ICJ Reports (2005) 168, para. 106; *Al-Adsani v. United Kingdom* (App. No. 35763/97) (21 November 2001) ECtHR, para. 55; *Bankovic et al. v. Belgium et al.* (App. No. 2207/99) (12 December 2001) ECtHR, para. 57; *Varnava et al. v. Turkey* (App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16071/90, 16072/90, 16073/90) (18 September 2009) ECtHR, para. 185; *Nada v. Switzerland* (App. No. 10593/08) (12 September 2012) ECtHR, para. 170; *Georgia v. Russia* (App. No. 38263/08) (13 December 2011) ECtHR, para. 72; *Al-Saadon and Mufdhi v. United Kingdom* (App. No. 61498/08) (2 March 2010) ECtHR, para. 126; *Hassan v. United Kingdom* (App. No. 29750/09) (16 September 2014) ECtHR, paras. 102-105; Cordula Droege, "The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", 40 *Israel Law Review* 310 (2007), at 335; Noam Lubell, "Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate", 40 *Israel Law Review* 648 (2007), at 655; 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), at 605; 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), at 196-197; Milanović, "Norm Conflict Perspective", *supra* note 124, at 463, 468; Andrea Gioia, "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 201, at 214; 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), at 1897-1902; Jean d'Aspremont and Elodie Tranchez, "The Quest for a Non-Conflictual Coexistence Between International Human Rights Law and International Humanitarian Law: Which Role for the *Lex Specialis* Principle?", in Kolb and Gaggioli, *Research Handbook*, *supra* note 123, at 234-238.

[127] See Hayashi, "Good Intentions", *supra* note 119, at 150-151. See also, e.g., 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* 593 (2007), at 597-598

[128] See Hayashi, "Good Intentions", *supra* note 119, at 151. See also, e.g., Article 59, Responsibility of States for Internationally Wrongful Acts; International Law Commission, *Report on the Work of Its Fifty-Third Session (23 April-1 June and 2 July-10 August 2001)*, A/56/10, at 143; Sir Humphrey Waldock, "Second Report on the Law of Treaties", in International Law Commission, 2 *Yearbook of the International Law Commission 1963*, A/CN.4/SER.A/1963/ADD.1, 36, at 55 (quoting Sir Gerald Fitzmaurice); Rudolf Bernhardt, "Article 103", in Bruno Simma et al. (eds.), *The Charter of the*

Norm conflicts of a "frustrating" sort involve two rules, one containing an obligation and the other a counter-liberty, that are independently valid according to un-integrated fields of law to which they respectively belong.[129] What we call "norm contradictions" in this chapter would be similar to norm conflicts of this sort, if:

- The "law of humanity" and the "law of military necessity" were two un-integrated fields of law; and
- We were confronted with an act that is prohibited by one valid rule of the "law of humanity", yet permitted at the same time by another, equally valid rule of the "law of military necessity".

The same would be true, *mutatis mutandis*, if positive international humanitarian law, even as an integrated system, contained two equally valid rules, one prohibiting the belligerent from performing an act and the other permitting the same addressee simultaneously to perform it.

It is plain, however, that we are concerned here neither with two un-integrated fields, nor with two independently valid IHL rules containing an obligation and a counter-liberty. At issue is rather the interplay between humanity and military necessity *qua* reason-giving considerations in the process of IHL norm-creation. We want to understand how the framers take such considerations into account when positing one uniquely valid IHL rule on the matter.

3.2 Norm Contradiction Generally

Where a given act is a matter of normative indifference, there is neither any obligation to perform it, nor any obligation to refrain from it.[130] If, then, one norm stipulating such indifference regarding a particular action is juxtaposed *vis-à-vis* another norm stipulating an obligation to perform it, or to refrain from it, the two norms contradict each other.

Joint satisfaction nevertheless results where the addressee acts according to the latter obligation. Norm contradiction becomes problematic if, but only if, the addressee avails itself of the indifferent liberty in such a manner that leaves the contrary obligation unfulfilled.[131]

3.2.1 Liberty and Permission as the Absence of a Contrary Duty

In Hohfeld's first-order jural relations, a "liberty" to perform an act corresponds to the absence of a "duty" to refrain from that act.[132] This liberty is normatively contradictory to the latter duty. They contradict each other, because the following two statements – namely, that "it is the case that there exists an affirmative duty to refrain from this act", and that "it is *not* the case that there exists an affirmative duty to refrain from this act" – cannot both be true at the same time, with respect to the same addressee, and for the same instance of the said act. According to Matthew H. Kramer,

> As Hohfeld was fully aware, the contradiction lies … between a duty to do ϕ and a liberty to *abstain from* ϕ – or between a duty to abstain from ϕ and a liberty to do ϕ. If *Y* has a duty to

United Nations: A Commentary 2d ed. (2002) 1292, at 1298; Koskenniemi, "Fragmentation", *supra* note 118, paras. 333-340; Rain Liivoja, "The Scope of the Supremacy Clause of the United Nations Charter", 57 *International and Comparative Law Quarterly* 583 (2008), at 596-597; Milanović, "Whither Human Rights?", *supra* note 118, at 76-77; Samantha A. Miko, "Norm Conflict, Fragmentation, and the European Court of Human Rights", *Boston College Law Review, Symposium Issue* 1351 (2013), at 1361.

[129] See, generally, Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal Order: The Doctrine of *Lex Specialis*", 74 *Nordic Journal of International Law* 27 (2005).

[130] See Chapter 6 above.

[131] In contrast, norm conflict of the sort that involves incompatible obligations always becomes problematic, no matter which obligation the address chooses to follow.

[132] See Chapter 6 above.

> abstain from interfering with *Z*'s project ϕ, then *Y* does not have a liberty to interfere. Similarly, if *Y* has a duty to render certain assistance to *Z* for the doing of ϕ, then *Y* does not have a liberty to refuse to give such assistance. Conversely, if *Y* does have a liberty to interfere with *Z*'s doing of ϕ, then *Y* does not have a duty to refrain from interfering; and if *Y* does have a liberty to withhold assistance from *Z*, then *Y* does not have a duty to provide the assistance.[133]

In other words, where a person has a duty to perform ϕ and a liberty to refrain from ϕ, there is a norm contradiction.

Much like the Hohfeldian "liberty", a "permission" to perform an act, as understood by Georg Henrik von Wright, equals the absence – or the negation – of a "duty" to refrain from it.[134] A permission to do something is contradictory to a duty to refrain from it.[135]

3.2.2 Overcoming Norm Contradiction Always a Matter of Choice

To this, one may add von Wright's notion of normative indifference.[136] Where given conduct is a matter of normative indifference, both its performance and forbearance are permitted. There is neither a duty to perform nor a duty to refrain from it. Should one normatively indifferent norm stand alongside a contrary duty, they contradict each other.

The question now is whether joint satisfaction is or is not possible where this contradiction occurs. In Hart's view, joint conformity is logically impossible where there is a norm contradiction:

> The contradictory of '*A* ought not to be done' is 'it is not the case that *A* ought not to be done', and two ought-statements of this form would describe not two rules that require [*sic*] and prohibited the same action, but two rules, one of which prohibited and the other of which permitted the same action.[137]

Hart also observed:

> Laws and rules … instead of requiring or forbidding action, may either expressly permit action, or by not forbidding them, tacitly permit them; and it is clear that there may be conflicts between laws that forbid and laws or legal systems that expressly or tacitly permit. To meet such cases, we should have to use not only the notion of obedience, which is appropriate to rules requiring or forbidding action, but the notion of acting on or availing oneself of a permission. We might adopt the generic term 'conformity' to comprehend both obedience to rules that require or prohibit and acting on or availing oneself of permission, and we could adopt the expression 'conformity statements' to cover both kinds of corresponding statement. In fact, the conformity statement showing that a permissive rule (e.g. permitting though not requiring killing) had been acted on will be of the same form as the obedience statement for a rule requiring the same action (killing is done). So if one rule prohibits and another rule permits the same action by the same person at the same time, joint conformity will be logically impossible and the two rules will conflict.[138]

There are two difficulties with Hart's reasoning. First, given the very nature of permission, treating "acting on it" as "conforming" to the rule would be odd, unless one also treated "refraining

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[133] Matthew H. Kramer, "Rights Without Trimmings", in Matthew H. Kramer, N.E. Simmons and Hillel Steiner, *A Debate over Rights: Philosophical Enquiries* (1998) 7, at 13 (footnote omitted).

[134] See Georg Henrik von Wright, "Ought to Be – Ought to Do", in Georg Meggle (ed.), *Actions, Norms, Values: Discussions with Georg Henrik von Wright* (1999) 3, at 5-6.

[135] See *ibid.*, at 5-6. See also Vranes, *supra* note 118, at 409; Hans Kelsen, *Pure Theory of Law* (Max Knight trans., 1967), at 205-208; Hans Kelsen, *General Theory of Norms* (Michael Hartney trans., 1991), at 189 (on logical contradiction as opposed to norm conflict).

[136] See Chapter 6 above.

[137] 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 330-331 (footnotes omitted; emphasis in original).

[138] *Ibid.*, at 326-327 (footnotes omitted).

from it" as "conforming" to the same rule. Yet Hart implicitly considers the latter non-conformity.[139] Treating refraining from a permitted act as non-conformity gives rise to Hart's second difficulty. He treated permission and its contrary duty as being in conflict with each other.

Compare this with Stephen Munzer's three rule-combinations. They are:

(i) Where "[t]wo duty-imposing rules may require and forbid the same action by the same person at the same time"[140];
(ii) Where "[a] rule may impose a duty on certain persons to act (not to act) at a certain time, while another rule may permit such persons not to act (to act) at that time"[141] ("case (ii),"as Munzer called it); and
(iii) Where "[a] rule may allow certain persons to act at a certain time, and another may allow them not to act in that way at that time"[142] (similarly, "case (iii)").

Of these three combinations, Munzer regarded only the first as properly embodying a norm conflict.[143] He went on to state that "the joint conformity theory deals very awkwardly, if at all, with cases (ii) and (iii)",[144] adding:

> Now in case (ii) we might be willing to apply the word "conflict" if the norm-subject acted on the permissive rule; for he would then have violated a duty-imposing rule. But if the norm-subject discharged his obligation under the duty-imposing rule, we would usually be reluctant to say that he was in a situation of "conflict" merely because he did not simultaneously act on the permissive rule. So far as cases of type (iii) are concerned, our inclination would be to say … that the two permissive rules do not conflict at all. Yet the joint conformity theory would commit us to precisely the opposite conclusion.[145]

Plainly, joint conformity is possible in both cases (ii) and (iii). For case (ii), joint conformity results, just where the addressee acts according to the obligation. The "jointness" of the said conformity is lost, just where the addressee acts upon the contradictory permission. For case (iii), joint conformity arises, no matter which permission is acted upon.[146]

Munzer nevertheless recognised the existence of something resembling a conflict with respect to cases (ii) and (iii), in certain circumstances. Thus, for case (ii):

> Normally, no conflict will exist on any occasion when the norm-subject discharges the obligation imposed by the duty-imposing rule and simply declines to act on the permissive rule. But the answer may be different if there is a strong pressure or policy, intimately related to the permission, for the norm-subject to avail himself of the permission. Suppose that … one rule prohibits doctors from treating patients found injured on the roadway and another permits such treatment. Suppose that neglecting to treat such persons is a hideous violation of professional ethics, accepted morality, and express public policy to reduce roadway deaths. Assume further that the permission to treat such persons is corroborated by the law in various ways, *e.g.*, by depriving one treated of the right to sue for battery, by setting a lower standard of professional care for such treatment, or even by offering physicians some reward for saving injured persons. In this case, I think it is accurate to say that the rules "clash" or "collide" even when the norm-subject does not act on the permission. Certainly, on such an occasion the norm-subject is put in a quandary … quite different from the mere bafflement he might feel if simultaneously forbidden and permitted to do an act that neither law nor society seeks to promote.[147]

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[139] Non-conformity it would indeed be, *if* the underlying rule were of a kind to *require* action.
[140] Stephen Munzer, "Validity and Legal Conflicts", 82 *Yale Law Review* 1140 (1973), at 1142.
[141] *Ibid*.
[142] *Ibid*.
[143] *Ibid.*, at 1143.
[144] *Ibid*.
[145] *Ibid*.
[146] See also Vranes, *supra* note 118, at 409.
[147] Munzer, *supra* note 140, at 1145-1146 (footnote omitted).

Here, there is, indeed, an informal norm conflict. Joint conformity is logically impossible. Similarly, for case (iii), Munzer envisaged conflict-like instances where "the norm-subject acts on one permission and thereby fails to act on a different permission which is backed by a strong, intimately related pressure or policy".[148]

This particular conclusion that Munzer drew regarding case (iii) is incomplete, however. Rectifying this incompleteness requires adding two observations. First, even if one of the two permissions at issue is backed by a strong, intimately related pressure or policy, this and the other permission are still in a relationship of norm contradiction akin to case (ii). Second, joint conformity is possible, just where the addressee acts in accordance with the former permission.

3.3 Norm Contradiction Between Military Necessity and Humanity

To say that military necessity permits particular behaviour and tolerates contrary behaviour at the same time, is to say that the notion is normatively indifferent on the matter. Norm contradiction arises where humanity demands what military necessity merely tolerates, and where the former condemns what the latter permits.

During World War I, Emilio Lussu, an officer in the Italian army, spotted an Austrian officer while reconnoitring the enemy trench from a perfectly concealed position:

> The Austrian officer lit a cigarette. Now he was smoking. This cigarette formed an invisible link between us. No sooner did I see its smoke than I wanted a cigarette myself; which reminded me that I had some with me … There was no doubt that I considered the war morally and politically justified. My conscience as a man and a citizen was not in conflict with my military duties. War was, for me, a hard necessity, terrible, to be sure, but one to which I submitted, as one of the many necessities, unpleasant but inevitable, of life. Moreover, I was on campaign and there were men fighting under my orders. That is to say, morally, I was fighting twice over. I had already taken part in many engagements. It was therefore quite logical for me to fire on an enemy officer. I insisted on my men keeping alert while on patrol, and shooting straight if the enemy offered them a target. Then why did I not fire on this officer? I knew it was my duty to fire. Otherwise it would have been monstrous for me to have continued to fight and to make others do so. There was no doubt about it: I ought to fire. And yet I did not … In front of me I had a young officer who was quite unconscious of the danger that threatened him. I could not have missed him. I could have fired a thousand rounds at that range and never have missed once. All I had to do was to press the trigger and he would have fallen dead. The certainty that his life depended solely on my will made me hesitate. What I had in front of me was a man. A man! I could see his face perfectly clearly. The light was increasing and the sun was just becoming visible behind the tops of the mountains. Could I fire like this, at a few paces, on a man – as if he were a wild boar? I began to think that perhaps I ought not to do so. I reasoned like this: To lead a hundred, even a thousand, men against another hundred, or thousand, was one thing; but to detach one man from the rest and say to him, as it were: "Don't move, I'm going to shoot you. I'm going to kill you" – that was different. Entirely different. To fight is one thing, but to kill a man is another. And to kill him like that is to murder him … "You can't kill a man like that!" I said to myself … I could think of letting another do what I could not reconcile with my own conscience. I had the rifle with its barrel through the branches of the bush, and the butt resting on the ground. The corporal was close beside me. Signing to him to take the butt, I whispered: "Look here – I'm not going to fire on a man, alone, like that. Will you?" The corporal took hold of the rifle-butt. Then he said: "No, I won't either." We crept back into our trenches, on all fours.[149]

[148] *Ibid.*, at 1146.

[149] Emilio Lussu, *Sardinian Brigade* (1939), at 169-171. See also Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations* 4th ed. (2006), at 141-142.

It should be noted that Lussu's "duty to fire" would be one that he owed, *qua* citizen-soldier, strictly towards Italy under its domestic law.[150]

Military necessity would leave Lussu at liberty to fire. On this view, it would *not* be the case that Lussu ought to withhold fire. Military necessity would also leave him at liberty to withhold fire, however. Consequently, it would not be the case that Lussu ought not to withhold fire, either. Humanity, for its part, would demand that Lussu avoid harming another human being. It would follow that, according to humanity, it is the case that Lussu ought to withhold fire.

The two propositions – "it is *not* the case that Lussu ought to withhold fire", on the one hand, and "it is the case that Lussu ought to withhold fire", on the other – reveal a norm contradiction. Would joint satisfaction be impossible between that part of military necessity according to which Lussu was at liberty to fire, and humanity according to which Lussu ought to withhold fire?

In the event, Lussu did withhold fire, as demanded by humanity. Since military necessity creates neither a corresponding duty nor a contrary duty that would be incumbent upon Lussu, he also satisfied military necessity by withholding fire. Thus, Lussu acted in a manner that generated joint satisfaction of the two sets of considerations.

Admittedly, this joint satisfaction is "modest" in character, given the fact that Lussu declined to act upon a liberty (i.e., to fire) that military necessity permitted rather than merely tolerated. Had Lussu chosen to fire, however, he would not have jointly satisfied both considerations. His pursuit of that liberty would have come at the expense of the contrary humanitarian demand.

3.4 Permission and "Strong Pressure or Policy"

Could it still be that military necessity's permission is analogous to what Munzer called "a strong pressure or policy"[151] that is intimately related to it? If it were, then, there would arguably be an informal norm conflict between that permission and humanity's contrary demand.

Munzer's description indicates that such a pressure or policy involves the combination of two elements. The first is what he called "a hideous violation of professional ethics, accepted morality, and express public policy"[152] that arises from failing to act on the permission at hand. The other is the existence of various corroborations, such as legal protections and incentives in favour of acting on that permission.[153] No such combination of analogous elements would be found in the manner in which IHL norm-creation treats military necessity.[154]

In contrast, what humanity permits might, indeed, be seen as somewhat analogous to "strong pressures or policies" intimately related to it. This permission may not entitle its satisfier to specific legal protection or incentive. Failing to satisfy it, however, might in some circumstances be considered deplorable – if not, perhaps, quite "hideous[ly]"[155] so – by accepted international morality or public policy. If, and to the extent that, such an analogy might be drawn, there would be possibilities of informal norm conflict between one liberty permitted by humanity and another, contrary liberty permitted by military necessity.

4. Obligations to Pursue Joint Satisfaction Amid Military Necessity-Humanity Contradiction

Joint satisfaction involving norm contradictions comes in two forms. First, where an act is condemned by humanity yet permitted by military necessity, the belligerent satisfies both considerations

[150] See Part I, Chapter 3 above.
[151] See Munzer, *supra* note 140, at 1145.
[152] *See ibid.*
[153] *See ibid.*, at 1145-1146.
[154] Here, too, the picture can be quite different from a strictly community-specific point of view discussed in Part I, Chapter 3 above.
[155] Munzer, *supra* note 140, at 1145.

by refraining from it. Second, the belligerent satisfies both by performing an act, where humanity demands what military necessity only tolerates.

How the process of IHL norm-creation "accounts for" these possibilities of joint satisfaction varies from one type of conduct to another. Five distinct types of consequences are discernible. They are:

(i) The law posits an *unqualified* obligation to pursue joint satisfaction;
(ii) The law posits a *principal* obligation to do so;
(iii) The law posits an *indeterminate* obligation to do so;
(iv) The law posits only an *exceptional* obligation to do so; and
(v) The law *declines*, or *fails*, to posit an obligation to do so.

Each of these consequences reveals unique characteristics of the military necessity-humanity interplay involved. It also shows what becomes of military necessity's permission not to pursue joint satisfaction.

4.1 Unqualified Obligations

Today's international humanitarian law categorically prohibits the belligerent from attacking the civilian population or on individual civilians not directly participating in hostilities.[156] Admittedly, it has taken this prohibition a long time to develop, as the difficult history regarding the restrictions on "morale bombing" and indiscriminate attacks shows.[157] Here, the obligatory pursuit of joint satisfaction has arguably changed from principal to unqualified. According to Emily Camins:

> Protocol I went against the tide of history by expressly conferring civilian status on all those who were not combatants properly so called, regardless of whether or not they were harmless. The inclusive definition of 'civilian' in Article 50 of Protocol I meant that classes of people not fitting the traditional civilian mould were nonetheless entitled to immunity against attack. As a result of Protocol I's undifferentiating conception of civilians, international humanitarian law found itself, in the words of Best, 'teetering on the edge of a credibility gap,' with the law bestowing on all classes non-combatants the same protection … Notions of military necessity suggest that civilians whose actions are harmful to the enemy should lose their immunity from attack. In contrast with previous manifestations of the exception to civilian immunity, however, Article 51(3) does not permit the targeting of all civilians whose attack is necessary from a military perspective. Rather, only those who are participating directly in hostilities may be subject to attack.[158]

Similarly, international humanitarian law unqualifiedly prohibits methods or means of combat that are intended or expected to cause widespread, long-term and severe damage to the environment.[159] Other examples of unqualified IHL prohibitions include those against denying quarter[160];

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[156] See Article 51(1), 51(3), Additional Protocol I; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 3-8. See also Article 8(2)(b)(i), 8(2)(e)(i), Rome Statute. Generally, see also Judith Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (1993).

[157] See generally Jochnick and Normand, *supra* note 3, at 79-95.

[158] Emily Camins, "The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity", 90 *International Review of the Red Cross* 853 (2008), at 880-881.

[159] See Articles 35(3), 55(1), Additional Protocol I; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 151-158. See also Stefan Oeter, "Methods and Means of Combat", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 2d ed. (2008) 119, at 132 (quoting Jean de Preux, "Article 35 – Basic Rules", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 389, at 410-411).

[160] See Article 23(c) and (d), 1907 Hague Regulations; Article 40, Additional Protocol I; Article 4(1), Additional Protocol II; Article 8(2)(b)(xii), 8(2)(e)(x), Rome Statute; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 161-163. See also Morris Greenspan, *The Modern Law of Land Warfare* (1959), at 111-112; Claude Pilloud, "Article 40 – Quarter", in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, *supra*

deliberately inflicting terror amongst civilians[161]; starving civilians as a method of combat[162]; recruiting children into the armed forces and using them in hostilities[163]; using biological and chemical weapons,[164] anti-personal landmines,[165] and poisoned weapons[166]; using POWs[167] or protected persons[168] as human shields; compelling residents of occupied territory to furnish information[169]; and taking hostages.[170]

As for the pursuit of performance-based joint satisfaction, one may cite, for example, the unqualified obligation to release POWs with provisions in unusual conditions of combat.[171] Here, the obligatory pursuit of joint satisfaction has arguably changed from principal to unqualified. In the days of the Napoleonic Wars, the military necessity of such situations led to POWs being killed en

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note 159, 473, at 475, n.8; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 2d ed. (2010), at 7. Bothe, Partsch and Solf, however, consider this rule a reflection of conduct that is deemed both inhumane and lacking in military necessity. See Both, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, *supra* note 62, at 249.

[161] See Article 51(2), Additional Protocol I; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 8-11; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, *Judgement and Opinion*, 5 December 2003, paras. 63-138; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, *Judgement*, 30 November 2006, paras. 69-109; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, *Separate and Dissenting Opinion of Judge Schomburg*, 30 November 2006, 4-22, 24; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, *Judgement*, 12 December 2007, paras. 873-888; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, *Judgement*, 12 November 2009, paras. 24-41; Frits Kalshoven, "Bombardment: From 'Brussels 1874' to 'Sarajevo 2003'", in Kalshoven, *Reflections*, *supra* note 61, 431, at 455-463.

[162] See Article 54(1), Additional Protocol I; Article 8(2)(b)(xxv), Rome Statute; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 186-189. See also George A. Mudge, "Starvation as a Means of Warfare", 4 *International Law* 228 (1970), at 228-251; Waldemar A. Solf, "Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I", 1 *American University Journal of International law and Policy* 117 (1986), at 133.

[163] See Article 77(2), Additional Protocol I; Article 8(2)(b)(xxvi), 8(2)(e)(vii), Rome Statute; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 482-488; *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), *Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, 31 May 2004; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Judgment Pursuant to Article 74 of the Statute*, 14 March 2012. See also Peter Rowe, "The Obligation of a State Under International Law to Protect Members of Its Own Armed Forces During Armed Conflict or Occupation", 9 *Yearbook of International Humanitarian Law* 3 (2006), at 17-18.

[164] See Article 1, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (13 January 1993); Article 1, Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (10 April 1972); Article 8(2)(b)(xviii), Rome Statute; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 256-263. See also Josef Goldblat, "The Biological Weapons Convention: An Overview", 79 *International Review of the Red Cross* 251 (1997), at 257; A.V. Lowe, "1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction", in N. Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (1988) 629, at 643.

[165] See Article 1, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (18 September 1997).

[166] See Article 23(a), 1907 Hague Regulations; Article 8(2)(b)(xvii), 8(2)(b)(xviii), Rome Statute; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 251-254. See also Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law", 33 *International Review of the Red Cross* 94 (1993), at 99.

[167] See Article 23, Geneva Convention III. See also *United States of America v. Wilhelm von Leeb et al.*, *Judgment*, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* (1950) 462, at 588.

[168] See Article 28, Geneva Convention IV; Article 51(7), Additional Protocol I; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 337-340; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, *Judgement* 3 March 2000, para. 716; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, *Judgement*, 26 February 2001, para. 57; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, *Judgement*, 25 June 1999, para. 229; *Adalah et al. v. GOC Central Command et al.*, HCJ 3799/02, *Judgment*, 23 June 2005.

[169] See Article 44, 1907 Hague Regulations.

[170] See Article 34, Geneva Convention IV; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 334-336. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), at 227.

[171] See Article 41(3), Additional Protocol I. See also Dinstein, *Conduct of Hostilities* (2010), *supra* note 160, at 7.

masse.[172] According to Antony Beevor, General Maxwell Talyor "said that if you were to take prisoners, they handicap our ability to perform our mission. We were going to have to dispose of prisoners as best we saw fit".[173]

In the 19th century, it was, according to the Lieber Code, exceptionally permitted to deny quarter in unusual conditions of combat on account of military necessity.[174] Telford Taylor interpreted this permission as an indication of the absence of a prohibition against denying quarter.[175] But the opinions of Taylor's contemporaries seem to have differed. Thus, for Morris Greenspan:

> A commander is not entitled to kill his prisoners to preserve his own forces, even in cases of extreme necessity. Neither may he do so because they slow up his movements, weaken his fighting force because they require a guard, consume supplies, or appear certain to be set free by their own forces.[176]

Julius Stone took a more nuanced position, especially in situations "where a State's principal forces cannot detain prisoners, and where their release would so reinforce the enemy as to make defeat inevitable".[177] Be that as it may, it seems clear that today's international humanitarian law contains no such exception *vis-à-vis* its unqualified prohibition against denying quarter. This removes any ground for military necessity-based exceptions to the obligatory release of POWs in unusual conditions of combat where captivity is not an option.

The fact that these IHL rules have been posited means that their framers have elected to let the demands of humanity trump the contrary permission of military necessity with respect to the acts in question. Indeed, as observed by Marshall Cohen:

> [The Lieber-Hague conception of the laws of war] permits the interests of humanity to carry enough weight so that they can sometimes inhibit the operation of the principle of military necessity. On this conception, therefore, the appeal to military necessity is by no means always a legitimate one; indeed, it is sometimes plainly ruled out.[178]

In addition, the framers of these unqualified IHL rules have elected to exclude such an appeal for all conceivable circumstances where the belligerent is presented with an opportunity to perform or to refrain from the act in question. By positing such rules, international humanitarian law extinguishes any liberty on the belligerent's part to behave as might otherwise be permitted by military necessity.

4.2 Principal Obligations

Article 53 of Geneva Convention IV prohibits the belligerent from destroying real or personal property in the territory it occupies "except where such destruction is rendered absolutely necessary by military operations".[179] The types of military operations envisaged in this exceptional clause are

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[172] See Gunther Rothenberg, "The Age of Napoleon", in Michael Howard et al. (eds.), *The Laws of War: Constraints on Warfare in the Western World* (1994) 86, at 90-91.
[173] Antony Beevor, *D-Day: The Battle for Normandy* (2009), at 24.
[174] See Article 60, Lieber Code ("[A] command is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners") (emphasis in original).
[175] See Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970), at 36 n.
[176] Greenspan, *supra* note 160, at 103 (footnote omitted). See also Marshall Cohen, "Morality and the Laws of War", in Virginia Held, Sidney Morgenbesser and Thomas Nigel (eds.), *Philosophy, Morality, and International Affairs* (1974) 71, at 77.
[177] Stone, *Legal Controls*, *supra* note 15, at 558, fn. 67.
[178] Cohen, *supra* note 176, at 74.
[179] See Article 53, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949). See also Article 23(g), 1907 Hague Regulations; Article 3(b), ICTY Statute; Article 8(2)(a)(iv), Rome Statute; Henckaerts

commonly understood to include the so-called "scorched earth" policy by an occupying force in retreat.[180] By virtue of Article 54(2) of Additional Protocol I, however, such a force is no longer eligible for this exception with respect to objects indispensable to the survival of the civilian population.[181]

In 1949, Article 49 of Geneva Convention IV arguably added a military necessity clause exempting temporary evacuation of residents from occupied territories to the hitherto unqualified prohibition against their deportation upheld in *von Manstein*.[182] An ICTY Trial Chamber suggested in *Krstić* that the judge advocate' conclusion in *von Manstein* ran counter to the relevant provisions of Geneva Convention IV:

> Indeed, the judge advocate went so far as to suggest that deportation of civilians could never be justified by military necessity, but only by concern for the safety of the population … This position, however, is contradicted by the text of the later Geneva Convention IV, which does include "imperative military reasons", and the Geneva Convention is more authoritative than the view of one judge advocate.[183]

The expression "imperative military reason" appears in Article 49(2) of Geneva Convention IV.[184] Von Manstein's verdict was announced in December 1949, several months after the adoption of the Geneva Conventions.[185] It may well be that the law espoused by the drafters of Geneva Convention IV, which allowed military necessity exceptions to the prohibition against deportation, was an improvement upon the law that did not allow such exceptions. This exception first appeared in Article 27 of a 1947 document on the protection of civilians prepared by government experts.[186] It was reformulated into draft Article 45 at the Stockholm Red Cross Conference the following year, to the effect that "[t]he occupying Power shall not undertake total or partial evacuation of a given area, unless the security of the population or imperative military considerations demand".[187] At no point do the preparatory works leading up to the 1949 Diplomatic Conference indicate where the idea of this exception originated or whether, once brought into the form of a draft provision, it was seriously debated.

Be that as it may, however, Geneva Convention IV was clearly not in force when von Manstein deported civilians from occupied Ukraine during World War II. Nor is it clear whether Article 49(2)

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and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 175-182; Brandt, "Utilitarianism", *supra* note 2, at 155-60; Doswald-Beck and Vité, "Humanitarian Law and Human Rights Law", *supra* note 166, at 100. This exception encompasses the destruction of cultural property and objects indispensable to the survival of the civilian population. For cultural property, see Article 4(2), Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954); Article 6, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999); Doswald-Beck and Vité, *supra* note 166, at 100; Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), at 121-132. For objects indispensable to the survival of the civilian population, see Articles 54(2), 54(5), Additional Protocol I.

[180] See Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 302.

[181] See Article 54(2), Additional Protocol I; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 189-193.

[182] See *In re von Lewinski (called von Manstein)*, *Annual Digest and Reports of Public International Law Cases Year 1949* (1955), at 523.

[183] *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, *Trial Judgement*, 2 August 2001, para. 526 n.1178.

[184] See Article 49(2), Geneva Convention IV. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 457-462.

[185] See *Lewinski*, at 510.

[186] See International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14-26, 1947)* (1947), at 288: "This prohibition [against individual or collective deportations or transfers] applies to all persons in [occupied] territories. It shall not constitute an obstacle to the general evacuation of an area by the occupying Power, if military operations make it necessary".

[187] Federal Political Department, 1 *Final Record of the Diplomatic Conference of Geneva of 1949* (1949), at 120. The ICRC commented (*Draft Revised or New Conventions for the Protection of War Victims Established by the International Committee of the Red Cross with the Assistance of Government Experts, National Red Cross Societies and Other Humanitarian Associations* (1948), at 173): "The evacuation of particular cases … is permitted in two cases, namely by way of limitation: (1) if the security of the population requires; (2) if imperative military considerations demand".

of Geneva Convention IV codified a pre-existing customary rule. It is unclear whether the only pre-World War II articulation on the matter, i.e., Article 19(b) of the 1934 Tokyo draft, actually contains any military necessity exception.[188] Article 6(b) of the Nuremberg Charter and Article II(1)(b) of Control Council Law No. 10, both adopted in 1945, list "deportation to slave labour or for any other purpose, of civilian population from occupied territory" as a war crime without qualification.[189]

Customary international humanitarian law also principally prohibits the destruction of captured enemy and neutral merchant vessels, yet exceptionally authorises their destruction.[190]

Some IHL rules impose principal obligations to perform acts, while exceptionally authorising their forbearance. Thus, for instance, Article 15 of the 1907 Hague Regulations principally obligates the belligerent to allow, and even assist, humanitarian personnel in the discharge of their functions, yet exceptionally authorises the belligerent to restrict or prohibit such discharge if and to the extent required by military necessity.[191]

Similarly, by virtue of Article 126(1)[192] and Article 126(4)[193] of Geneva Convention III, representatives of the Protecting Powers and ICRC delegates have the right of visits and private interviews with POWs. Article 126(2)[194] contains a similar, albeit more restrictive, clause subject to the imperative character of the military necessity invoked and the exceptional and temporary nature of the prohibition imposed. Interestingly, this latter clause was inserted by the ICRC on its own initiative, and adopted without discussion at the 1949 Diplomatic Conference.[195] A substantially identical set of provisions is found in Geneva Convention IV.[196] Draper observes:

> This is perhaps the classical formula of the modern law of armed conflicts. It is a provision of paramount importance both for the ICRC upon whom the main duty of these visits devolves, and for the POW. Without the right to make such visits the supervisory system of the Geneva (POW) Convention is, in large part, rendered sterile. Places where such visits are likely to be subject to considerable restriction, certainly as to the timing of them, are interrogation centres and screening camps. It is in such places, frequently under the tight control of the Intelligence Services of the Detaining Power, that, experience shows, much of the unlawful treatment of POW takes place, generally under the desire to obtain military intelligence at all costs. When such places are freely accessible to non-military and para-military Intelligence Services the right of the Protecting Power or of the ICRC to make the visits envisaged in the Convention is the main humanitarian counter-balance to secret and cruel methods of interrogation.[197]

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[188] See ICRC, *Report*, *supra* note 186, at 288: "Deportations outside the territory of the occupied State are forbidden, unless they are evacuations intended, on account of the extension of military operations, to ensure the security of the inhabitants".

[189] See Article 6(2), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945); Article II(1)(b), Control Council Law No. 10 (20 December 1945).

[190] See Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930 (1936); San Remo Manual on International Law Applicable to Armed Conflicts at Sea, para. 102; Wolff Heintschel von Heinegg, "The Law of Armed Conflict at Sea", in Fleck, *Handbook* 3d ed., *supra* note 46, 464, at 490-491; Michael Bothe, "The Law of Neutrality," in *ibid.*, 549, at 571.

[191] See Article 15, 1907 Hague Regulations. See also Article 71(3), Additional Protocol I. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 200-202.

[192] Article 126(1), Geneva Convention III ("Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witness, either personally or through an interpreter").

[193] *Ibid.*, Article 126(4) ("The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives").

[194] *Ibid.*, Article 126(2) ("Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure").

[195] See Pictet, *Commentary III*, *supra* note 28, at 611. See also Pictet, *Commentary IV Geneva Convention*, *supra* note 180 at 576.

[196] See Article 143, Geneva Convention IV.

[197] Draper, *supra* note 30, at 139.

Other IHL rules also exhibit the same characteristics that combine principal obligations to perform an act with exceptional liberties to refrain from it. They include those rules which obligate the Detaining Power to allow internees to receive shipments that may meet their needs, yet exceptionally authorise it to limit their quantity[198]; those which principally obligate combatants to distinguish themselves from the civilian population, yet exceptionally grant them partial waiver[199]; those which principally obligate attacking parties to give effective advance warning, yet exceptionally authorise them to withhold it[200]; and those which principally obligate belligerents to allow civil defence organisations to work, yet exceptionally release them from this obligation.[201]

Furthermore, at least by implication, international humanitarian law principally obligates the Detaining Power to allow correspondence between POWs and internees and the exterior, yet exceptionally releases it from this obligation[202]; and principally obligates parties to ensure the conveyance of mail and relief shipment, yet exceptionally releases them from this obligation.[203]

The adoption of these rules reveals that their framers have elected, in principle, to let humanitarian demands take precedence over contrary liberties otherwise permitted by military necessity. The law makes the pursuit of joint satisfaction primarily obligatory, whenever an opportunity to perform or refrain from the conduct at issue presents itself. The obligatory nature of this pursuit ceases, however, if and to the extent that, in a particular situation, acting otherwise is in fact militarily necessary.[204]

The rules at issue forbid acts deemed inhumane yet materially necessary, and obligate those deemed humane yet materially unnecessary. It is important to remember that, in some specific circumstances, acting in deviation from the principal rules can be, and sometimes is, in fact materially necessary.[205] Each such instance exempts the belligerent from its otherwise principal obligation to pursue joint satisfaction. In other words, through these rules, the law limits the liberty on the part of the belligerent to act as permitted by military necessity to specific situations where it is, in fact, materially necessary to do so.

4.3 Indeterminate Obligations

Certain positive IHL rules indeterminately obligate the pursuit of joint satisfaction. The interplay between military necessity and humanity involved leaves their precedence *vis-à-vis* each other

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[198] See Article 108, Geneva Convention IV. This provision envisages situations where "military necessity require[s] the quantity of such shipments to be limited", implying that otherwise impermissible limitations are exceptionally permissible if and to the extent they actually constitute military necessities.

[199] See Article 44(3), Additional Protocol I; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 384-389. This duty is partially waived when operating under special circumstances if and to the extent required by these circumstances. Guerrillas are entitled to a looser self-distinction requirement in recognition of "situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot … distinguish himself" in accordance with a fuller self-distinction requirement. See also Camins, *supra* note 158, at 880-881.

[200] See Article 26, 1907 Hague Regulations; Article 57(2)(c), Additional Protocol I; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 62-65. See also Stone, *Legal Controls*, *supra* note 15, at 622-623; A.P.V. Rogers, *Law on the Battlefield* 2d ed. (2004), at 88. Belligerents need not give such warning if "circumstances do not permit" (such as assault requiring an element of surprise); Pnina Shavrit Baruch, "The Obligation to Give Effective Warnings: Lessons Learned from Recent Conflicts", in Edoardo Greppi (ed.), *Conduct of Hostilities: The Practice, the Law and the Future* (2015) 115, at 118-119.

[201] See Article 62(1), Additional Protocol I. That is, "except in case of imperative military necessity".

[202] See Article 71, Geneva Convention III; Article 107, Geneva Convention IV. That is, unless it is temporarily necessary to prohibit such correspondence. See Article 76, Geneva Convention III; Article 112, Geneva Convention IV; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 445-447.

[203] See Article 111, Geneva Convention IV. That is, unless prevented by military operations.

[204] See Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual* (2015), at 55.

[205] Indeed, the very fact that acting in such a manner is permitted by military necessity means that this kind of conduct is deemed materially necessary.

unsettled. The resulting rule authorises the non-pursuit of joint satisfaction if and to the extent permitted by military necessity; the same rule also obligates pursuit insofar as humanity demands it.[206] In so doing, the rule does not specify the point at which the authorised non-pursuit gives way to the obligatory pursuit by reference to one set of considerations or the other. The framers effectively transfer the burden of discovering this point to those adjudicating, or governed by, the rule in question.

Those rules concerning proportionality in attacks,[207] and the use of weapons of a nature to cause superfluous injury and unnecessary suffering,[208] arguably exemplify this outcome.[209] Similarly, with respect to the use of incendiary weapons, the U.K. manual observes:

> Although these weapons can cause severe injury to personnel, their use is lawful provided the military necessity for their use outweighs the injury and suffering which their use may cause.[210]

Reference may also be made to those rules that obligate humane but militarily unnecessary action "as far as military considerations permit",[211] "whenever circumstances permit",[212] and "to the maximum extent feasible".[213]

4.4 Exceptional Obligations

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[206] Office of General Counsel, *supra* note 204, at 55-56.

[207] See Articles 51(5)(b), 57(2)(a)(iii), 57(2)(b), Additional Protocol I; Article 8(2)(b)(iv), Rome Statute. See also Lieutenant Colonel William J. Fenrick, "The Rule of Proportionality and Protocol I in Conventional Warfare", 98 *Military Law Review* 91 (1982); Kenneth Watkin, "Assessing Proportionality: Moral Complexity and Legal Rules," 8 *Yearbook of International Humanitarian Law* 3 (2005); Stefan Oeter, "Methods and Means of Combat", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 115, at 122; Office of General Counsel, *supra* note 204, at 51, 60-62.

[208] See St. Petersburg Declaration; Article 23(e), 1907 Hague Regulations; Article 35(2), Additional Protocol I; preamble, Convention on Prohibition and Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (10 October 1980); Article 6(2), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices (Protocol II)(10 October 1980); Article 3(a), ICTY Statute; Article 8(2)(b)(xx), Rome Statute (subject to the adoption of an annex). See also de Preux, "Article 35", *supra* note 159, 389, at 399-410; Henri Meyrowitz, "The Principle of Superfluous Injury and Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977", 34 *International Review of the Red Cross* 98 (1993); *Dissenting Opinion of Judge Shahabuddeen*, *Nuclear Weapons* Advisory Opinion 375, at 402-405; *Dissenting Opinion of Judge Weeramantry*, *ibid.*, 429, at 497-499; *Dissenting Opinion of Judge Higgins*, *ibid.*, 583, at 585-587; Yves Sandoz, "International Humanitarian Law in the Twenty-First Century", 6 *Yearbook of International Humanitarian Law* 3 (2003), at 8; W. Hays Parks, "Means and Methods of Warfare", 38 *George Washington International Law Review* 511 (2006), at 517 n.25; Frits Kalshoven, "Conventional Weaponry: The Law from St. Petersburg to Lucerne and Beyond", in Kalshoven, *Reflections*, *supra* note 61, 377, at 386-387; Théo Boutruche, *L'Interdiction des Maux Superflus: Contribution á l'Études des Principes et Règles Relatifs aux Moyens et Méthodes des Guerre en Droit International Humanitaire* (2008); Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2010), at 65-67.

[209] See Doswald-Beck and Vité, "Humanitarian Law and Human Rights Law", *supra* note 166, at 100; Schmitt, "Preserving the Delicate Balance", *supra* note 9, at 804-05; David Luban, "Risk Taking and Force Protection", in Yitzhak Benbaji and Naomi Sussmann (eds.), *Reading Walzer* (2014) 277, at 294-297; Michael Walzer, "Response", in *ibid.*, 328, at 329.

[210] UK Ministry of Defence, *supra* note 76, at 111.

[211] That is, for example, leaving elements of a party's medical personnel and *materiél* with the wounded and sick to assist in the latter's care should the party in question be compelled to abandon them to the enemy. See Article 12, Geneva Convention I. See also Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906) ("so far as military conditions permit"); Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929) ("as far as military exigencies permit"); Pictet, *Commentary I Geneva Convention*, *supra* note 61, at 141-142.

[212] That is, for example, searching, collecting, and evacuating the wounded, sick, shipwrecked, and dead. See Article 15, Geneva Convention I; Article 18, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 396-399, 406-408; Doswald-Beck and Sylvain Vité, "Humanitarian Law and Human Rights Law", *supra* note 166, at 100.

[213] That is, for example, removing movable cultural property from the vicinity of military objectives and avoiding locating military objectives near cultural property. See Article 8, Second Hague Cultural Property Protocol.

Customary international humanitarian law principally authorises the declaration and establishment of blockades.[214] Conversely, in principle, the blockading party is customarily authorised to deny free passage of essential goods to blockaded ports.[215]

One set of IHL rules stands out for their unusually high degree of convulsion. The rules in question are Article 33(2) of Geneva Convention I[216] and Article 28 of Geneva Convention II[217] regarding the treatment of certain medical facilities and equipment. These provisions principally authorise the commander to make use of the objects concerned in accordance with the "laws of war".[218] The rules then exceptionally obligate the commander not to do so, if and to the extent that forbearance proves humane, i.e., insofar as the objects are required for the care of the wounded and sick. Intriguingly, this obligation of non-diversion is again subject to a further exception, if and to the extent required by urgent military necessity. The latter exception is available, however, only once humanity's demand, i.e., proper care of those nursed therein, has been ensured.[219]

By positing these rules, their framers have elected principally to let military necessity's permission trump humanity's contrary demands – the latter being where the joint satisfaction lies – with respect to act in issue. The belligerent's liberty to act as permitted by military necessity is no longer limited to specific situations where it is, in fact, materially necessary to do so. On the contrary, the liberty remains in place regardless.

What matters instead is the fact that, in certain specific circumstances, the contrary action can sometimes be humane.[220] Although principally optional, the pursuit of joint satisfaction becomes exceptionally obligatory, and the contrary liberty exceptionally unavailable, just in cases where the said pursuit does in fact prove humane.

It might be said that those in favour of upholding a duty to "capture rather than kill" in combat are effectively seeking to have it recognised as a positive IHL rule under this heading.[221] On this view, international humanitarian law would principally authorise the killing of enemy combatants yet, all else being equal, exceptionally obligate belligerents not to kill them whenever a more humane means of their disablement (i.e., capture) happens to be reasonably available. Opponents would counter by claiming that the matter falls into situations described below, where there is no positive IHL rule obligating non-killing.

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[214] That is, unless it has the sole purpose of starving the civilian population or is disproportionately injurious to the civilian population. See San Remo Manual, paras. 93, 102; Peter Macalister-Smith, "Protection of the Civilian Population and the Prohibition of Starvation as a Method of Warfare: Draft Texts on International Humanitarian Assistance", 31 *International Review of the Red Cross* 440 (1991), at 445; Wolff Heintschel von Heinegg, "Naval Blockade", in Michael N. Schmitt (ed.), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday* (2000) 203, at 216; von Heinegg, "The Law of Armed Conflict at Sea", in Fleck, *Handbook* 3d ed., *supra* note 46, 463, at 535-536.

[215] That is, unless the civilian population is inadequately supplied. See San Remo Manual, para. 103; Wolff Heintschel von Heinegg, "Blockade", *Max Planck Encyclopaedia of Public International Law* (2009), §§ 49-52.

[216] See Article 33(2), Geneva Convention I ("The buildings, material and stores of fixed medical establishments of the armed forces shall remain subject to the laws of war, but may not be diverted from that purpose as long as they are required for the care of wounded and sick. Nevertheless, the commander of forces in the field may make use of them, in case of urgent military necessity, provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them").

[217] Article 28, Geneva Convention II ("Sick-bays and their equipment [on board a warship] shall remain subject to the laws of warfare, but may not be diverted from their purpose so long as they are required for the wounded and sick. Nevertheless, the commander into whose power they have fallen may, after ensuring the proper care of the wounded and sick who are accommodated therein, apply them to other purposes in case of urgent military necessity").

[218] On this expression, see Pictet, *Commentary I Geneva Convention*, *supra* note 61, at 274-275; Jean S. Pictet (ed.), *Commentary II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1960), at 176-177.

[219] In Draper's words: "To what extent this *via media* gains in value over the less sophisticated statement of the humanitarian dictate followed by the qualification of (urgent or imperative) military necessity is open to doubt". Draper, *supra* note 30, at 139.

[220] Indeed, the very fact that acting in such a manner is demanded by humanity means that this kind of conduct is deemed humane.

[221] For further discussion of "capture rather than kill", see Part III, Chapter 8 below.

5. No Obligation to Pursue Joint Satisfaction Amid Military Necessity-Humanity Contradiction

One last set of consequences of interest to us remains. This set is marked by the absence of an obligation under positive international humanitarian law to pursue joint satisfactory behaviour.

We may interpret these consequences in two ways. One possibility is that the law's framers have declined to impose any obligation – be it an unqualified, principal, indeterminate, or exceptional one. Clearly, no such obligation exists where the law expressly authorises the non-pursuit of joint satisfaction.

Alternatively, the framer may fail to posit an obligation, or otherwise choose to leave the matter unregulated.[222] We must then consider (a) whether the law creates a normative environment with permissive or prohibitive presumptions, and (b) what role, if any, considerations of military necessity and humanity play therein.

5.1 Where the Law Affirmatively Authorises Non-Pursuit of Joint Satisfaction

The framers have declined to obligate the pursuit of joint satisfaction where a rule affirmatively authorises contrary behaviour. Consider, e.g., those rules that authorise the Detaining Power to intern POWs[223]; the belligerent to search and control medical vessels[224]; and the Occupying Power to confiscate such state property in occupied territory as may be used for military operations.[225] The same may also be true where, for instance, the law expressly withholds inviolability of postal correspondence in case of blockade violations.[226]

The framers of these rules have elected to grant permissions of military necessity unfettered priority over contrary demands of humanity. With respect to these acts, the law leaves the belligerent entirely at liberty to act as permitted by military necessity. It in no way matters whether acting in such a manner happens to be materially necessary or unnecessary at a particular moment; nor is it relevant whether contrary action happens to be humane or inhumane. Acting as demanded by humanity, and thereby acting in joint satisfaction, is now entirely optional whenever the belligerent is presented with an opportunity to do so.

5.2 Where the Law Fails to Obligate Jointly Satisfactory Behaviour

More often, however, the relevant acts are found through the absence of positive IHL rules. Examples include:

- The absence of prohibitions against forcibly displacing eligible enemy combatants through combat[227];

[222] The latter is akin in character to what Munzer called "bare" permissions. See Munzer, *supra* note 140, at 1141-1142, 1145 n.13.
[223] See Article 5, 1907 Hague Regulations; Article 21, Geneva Convention III. See also Sandra Krähenmann, "Protection of Prisoners in Armed Conflict", in Fleck, *Handbook* 3d ed., *supra* note 46, 359, at 366, 392; Office of General Counsel, *supra* note 204, at 58.
[224] See Article 31, Geneva Convention II.
[225] See Article 53, 1907 Hague Regulations.
[226] See Article 1, Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (18 October 1907).
[227] See *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-99-A, *Judgement*, 30 January 2015, para. 774.

- The absence of prohibitions against using artillery, either observed or unobserved, against lawful military objectives in civilian-populated areas[228];
- The absence of prohibitions against attacking or disabling eligible enemy combatants[229] (including airborne troops during their descent[230]);
- The absence of prohibitions against deliberately inflicting terror amongst enemy combatants[231];
- The absence of prohibitions against starving enemy combatants as a method of combat[232];
- The absence of prohibitions against lifting protection for medical units, personnel, and *materiél*, as well as those belonging to civil defence organisations, that are used to commit acts harmful to the enemy[233];
- The absence of prohibitions against the Detaining Power censoring correspondence between POWs[234] or internees[235] with the exterior;
- The absence of prohibitions against the Occupying Power collecting contributions and requisitions[236]; and
- The absence of rules obligating the belligerent to grant requests by its adversary for medical flights.[237]

These are arguable instances where the framers have elected to leave the non-pursuit of joint satisfaction "barely" permitted.[238]

Elsewhere, the absence of a positive rule obligating the pursuit of joint satisfaction may imply the law's failure to do so. Arguably, the ICJ's agnosticism regarding the lawfulness of the use or threat of nuclear weapons in certain circumstances is a case in point.[239] Also, in its study on customary international humanitarian law, the ICRC conceded that the law is not clear as to whether belligerent reprisals against civilians during hostilities are lawful or unlawful outside Additional Protocol I.[240]

Positive international humanitarian law leaves it unclear whether a party is duty-bound, in contact zones as well as areas it controls, to grant protection to medical flights of an adversary where no prior agreement has been reached to permit such flights and before they are recognised as such.[241] Nor is it clear whether a state party bound by Additional Protocol II is obligated to ensure supplies

[228] This, at least, is the view advocated by Geoffrey S. Corn and Gary P. Corn. See Geoffrey S. Corn and Lieutenant Colonel P. Corn, "The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens", 47 *Texas International Law Journal* 337 (2012), at 370. But see *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T *Judgement*, 15 April 2011, para. 1906, n.932; Darren Valletgoed, "The Last Round? A Post-Gotovina Reassessment of the Legality of Using Artillery Attack Against Built-Up Areas", 18 *Journal of Conflict & Security Law* 25 (2013), at 39.

[229] See Office of General Counsel, *supra* note 204, at 58.

[230] See Article 42(3), Additional Protocol I. See also Jean de Preux, "Article 42 – Occupants of Aircraft", in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, *supra* note 159, 493, at 501.

[231] See *ibid.*, at 618.

[232] See Article 17, Lieber Code; Esbjörn Rosenblad, "Starvation as a Method of Warfare – Conditions for Regulation by Convention", 7 *International Lawyer* 252 (1973), at 253, 254-255.

[233] See Articles 21, 22, Geneva Convention I; Articles 34, 35, Geneva Convention II; Article 19, Geneva Convention IV; Articles 13, 65(1)-(2), Additional Protocol I.

[234] See Article 76, Geneva Convention III.

[235] See Article 107, Geneva Convention IV.

[236] See Articles 49, 52, 1907 Hague Regulations.

[237] See Article 29(3), Additional Protocol I. But see Manual on International Law Applicable to Air and Missile Warfare (15 May 2009), para. 78(c).

[238] See Munzer, *supra* note 140, at 1141-1142, 1145 n.13.

[239] See *Nuclear Weapons* Advisory Opinion, paras. 95-97, 105(2)(E). See also Oeter, *supra* note 159, 115, at 154-156.

[240] See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 3, at 520-523. See also UK Ministry of Defence, *supra* note 76, at 420-421; Jean-François Quéguiner, "The Principle of Distinction: Beyond an Obligation of Customary International Humanitarian Law", in Howard M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (2008) 161, at 174-175; Schmitt, "Preserving the Delicate Balance", *supra* note 9, at 820-822.

[241] See Articles 26, 27(2), Additional Protocol I; Air and Missile Warfare Manual, para. 78(a).

essential to the survival of the civilian population.[242] There is no clear IHL rule obligating civilians directly participating in hostilities, continuously or otherwise, to distinguish themselves from non-participating civilians[243]; or obligating parties with advanced, precision-guided weapons to exhaust such weapons first.[244]

5.3 *In dubio pro libertate* or *prohibitione*?

A question arises as to whether international humanitarian law generates any permissive or prohibitive presumptions with respect to acts not specifically regulated by its positive rules. This author is of the view that, while the Martens Clause arguably reduces or extinguishes the *in dubio pro libertate* presumption articulated in the *Lotus* case,[245] the clause does not appear to replace it with an *in dubio pro prohibitione* presumption.

In our context, *in dubio pro libertate* asserts that it is lawful to act in any given fashion unless it is specifically prohibited by positive IHL rules. Such a permissive presumption resonates with those for whom, "[i]n the simplest terms, nations do not legislate self-denying restrictions on those weapons and techniques that they judge their survival to depend upon".[246]

Others argue that the Martens Clause effectively reverses this presumption.[247] No major problem would arise, should "reversal" simply mean the presumption's diminishment or removal. It would be more contentious, however, to regard the Martens Clause as extinguishing *in dubio pro libertate* and substituting it with *in dubio pro prohibitione*. The latter would assert that it is unlawful to act in a given manner unless IHL rules expressly authorise it.

Commentators identify at least four possible interpretations of the Martens Clause[248]:

(i) As a safeguard of customary international law, to the effect that what is not prohibited by treaty may not necessarily be lawful[249];
(ii) As an interpretive device, whereby *jus in bello* should in cases of doubt be interpreted according to the principles of humanity and dictates of public conscience[250];

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[242] See Article 18(2), Additional Protocol II. See also Pictet, *Commentary I Geneva Convention*, *supra* note 61, at 1478-1480.

[243] See Nobuo Hayashi, "Continuous Attack Liability Without Right or Fact of Direct Participation in Hostilities – The ICRC *Interpretive Guidance* and Perils of a Pseudo-Status", in Joanna Nowakowska-Małusecka (ed.), *International Humanitarian Law: Antecedences and Challenges of the Present Time* (2010) 56, at 75-76.

[244] See Air and Missile Warfare Manual, para. 8. On a variation of this theme, i.e., whether states are duty-bound to use non-lethal weapons, see Boothby, *Weapons*, *supra* note 3, at 249.

[245] *The Case of the S.S. 'Lotus'*, 1927 PCIJ Series A, No. 19. See also Ole Spiermann, "*Lotus* and the Double Structure of International Legal Argument", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 131; Daniel Bodansky, "*Non Liquet* and the Incompleteness of International Law", in *ibid.*, 153, at 161-165; Hugh Thirlway, "The Nuclear Weapons Advisory Opinions: The Declarations and Separate and Dissenting Opinions", in *ibid.*, 390, at 406-409.

[246] See Jochnick and Normand, *supra* note 3, at 56 (citing Hoopes, *supra* note 19, at 142), 68-69.

[247] *Dissenting Opinion of Judge Shahabuddeen*, *Nuclear Weapons* Advisory Opinion 375, at 405-411; *Dissenting Opinion of Judge Weeramantry*, *ibid.*, 429, at 492-496; Doswald-Beck, "Advisory Opinion", *supra* note 91, at 49.

[248] Cassese, "The Martens Clause", *supra* note 90; Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", 94 *American Journal of International Law* 78 (2000), at 87; von Bernstorff, "Martens Clause", *supra* note 92, para. 13. See also Michael Salter, "Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause", 17 *Journal of Conflict & Security Law* 403 (2012).

[249] See also *Nuclear Weapons* Advisory Opinion, paras. 84, 87; *Statement of the Government of the United Kingdom*, *supra* note 92, para. 32; *Verbatim Record*, *supra* note 92, at 78; Schwarzenberger, *Nuclear Weapons*, *supra* note 92, at 10-11 (cited in Cassese, "The Martens Clause", *supra* note 90, at 189 n.3); Mary Ellen O'Connell, "Historical Development and Legal Basis," in Fleck, *Handbook* 3d ed., *supra* note 46, 1, at 34.

[250] *Kupreškić* Trial Judgment, para. 525; Cassese, "The Martens Clause", *supra* note 90, at 189-190, 212.

(iii) As an affirmation that the principles of humanity and dictates of public conscience constitute separate sources of international law, to be distinguished from treaty or customary law[251]; and
(iv) As a device in customary *jus in bello* that loosens the requirements normally prescribed for *usus* and elevates *opinio* to a rank higher than normally admitted.[252]

It is doubtful whether any of these interpretations, even if sound in themselves, warrants the conclusion that the Martens Clause itself injects international humanitarian law with *in dubio pro prohibitione*.[253] Nor would the law's increasing "homo-centricity"[254] alone generate such an effect. It is, if anything, humanity, the dictates of public conscience, and so on, that would have more potential in this regard.[255] The Martens Clause would merely be a conduit through which they would shape substantive IHL rules.

6. Conclusion

The inevitable conflict thesis insists that obeying the imperatives of military necessity and obeying those of humanity always conflict with each other. IHL norm-creation is about pre-empting these considerations from giving rise to conflicting rules of positive international humanitarian law.

This chapter shows both propositions to be false. To begin with, possibilities of joint satisfaction are plain where humanity demands what military necessity permits, or where humanity condemns what military necessity merely tolerates. Even for conduct that is not amenable to the "inhumane-unnecessary" or "humane-necessary" alignment, the belligerent still satisfies both considerations by acting in accordance with humanity.

Moreover, IHL norm-creation is about obligating or not obligating jointly satisfactory behaviour. Where joint satisfaction is "firm", it often results in the adoption of an unqualified IHL obligation to pursue that satisfaction. Where such an obligation is absent, this can be explained by reference to considerations other than humanity or military necessity. Should military necessity and humanity contradict each other, the framers would decide whether to obligate the pursuit of "modest" joint satisfaction and, if so, whether to do so unqualifiedly, principally, indeterminately, or only exceptionally. This process is what "accounting for" the military necessity-humanity interplay in IHL norm-creation really means.

This concludes Part II's discussion of military necessity in its norm-creating context. In Part III, we will begin investigating military necessity in its strictly "juridical" context. Its first chapter, namely Chapter 8, examines how the joint satisfaction thesis transforms one final aspect of the inevitable conflict thesis. The latter thesis claims that neither *de novo* military necessity pleas, nor *de novo* humanity pleas, are admissible *vis-à-vis* unqualified IHL rules. That, according to the inevitable conflict thesis, is so because the framers intended *a contrario* to admit them elsewhere by inserting exceptional military necessity and humanity clauses.

The joint satisfaction thesis will demonstrate two things. First, unqualified IHL rules extinguish all indifferent considerations that might otherwise permit contrary behaviour. What precludes all in-

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[251] Meron, "Martens Clause", *supra* note 248, at 81 nn.20, 22 (citing Shahabuddeen Dissenting Opinion, at 406), 86 n.55 (citing Shahabuddeen Dissenting Opinion, at 408); Cassese, "The Martens Clause", *supra* note 90, at 190-192.
[252] *Kupreškić* Trial Judgment, para. 527; Meron, "Martens Clause", *supra* note 248, at 88; Cassese, "The Martens Clause", *supra* note 90, at 214.
[253] Meron, "Martens Clause", *supra* note 248, at 86 (citing Ticehurst, *supra* note 91, at 126), 88 (citing Doswald-Beck, "Advisory Opinion", *supra* note 91, at 49).
[254] See Robert Kolb, "The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions", in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (2013) 23, at 24, 52; Meron, "Martens Clause", *supra* note 248, at 88.
[255] See Meron, "Martens Clause", *supra* note 248, at 86 (citing Ticehurst, *supra* note 91, at 126), 88 (citing Doswald-Beck, "Advisory Opinion", *supra* note 91, at 49).

different *de novo* pleas is the unqualifiedly duty-imposing character of these rules. It is *not* the empirically troublesome claim of the inevitable conflict thesis according to which every positive IHL rule embodies the military necessity-humanity interplay.

Second, non-indifferent considerations, such as humanitarian imperatives, may survive the process through which the framers posit unqualified rules. These considerations may therefore operate as an additional layer of permission or restraint even over those rules of positive international humanitarian law that are otherwise unqualified. Where humanity condemns what an unqualified IHL rule obligates, for example, the belligerent may invoke the former as a ground for declining to comply with the latter.

Part III

Military Necessity in Its Juridical Context

Our discussion in Part II reveals what it means to "account for" military necessity in IHL norm-creation. In its strictly normative context, military necessity offers weighty reasons for the particular manner in which IHL framers should formulate its rules. Where a given kind of act is deemed militarily necessary, the framers have good reason to leave the belligerent at liberty to pursue it. Where an act is considered unnecessary, the framers have strong reason to permit the belligerent to refrain from it. Importantly, the framers even have reason to tolerate situations where the belligerent fails or declines to pursue military necessities or to avoid non-necessities. Military necessity is only one of several reason-giving considerations in the process of IHL norm-creation. The resulting rules do not always reflect military necessity's normative indifference.

Chapter 4 showed that military necessity is an element in the legitimacy modification of those acts that inflict evil. While not every necessary evil done for a legitimate end may itself be legitimate, an evil that is unnecessary is invariably illegitimate. Nevertheless, military necessity does *not* modify the legitimacy of every kind of belligerent conduct. Plainly, where the conduct entails no evil to begin with, its legitimacy or illegitimacy does not depend on whether it is materially necessary or unnecessary in order to accomplish its end. Military necessity in its normative context does not sanction the idea that unnecessary *simpliciter* means illegitimate.

Chapter 4 also addressed special problems that arise where a given act is considered evil yet in an exclusively self-inflicted way. Is this kind of behaviour something with which the framers of IHL rules should concern themselves? We saw that, in principle, international humanitarian law does not make it its business to save incompetent belligerents from themselves. If an army suffers heavy losses due to the poor decisions made by its commanders, it has, as far as international humanitarian law is concerned, only itself to blame. There are nevertheless signs that the law does delegitimise self-inflicted evil in some circumstances and mandate action with a view to reducing such evil.

How does military necessity interact with other reason-giving considerations in IHL norm-creation? Chapters 5 through 7 compared two competing perspectives on the interplay between military necessity and humanity. Chapter 5 discussed one perspective styled "inevitable conflict thesis". The inevitable conflict thesis holds that no given kind of belligerent conduct is capable of jointly satisfying military necessity and humanity. That is so, because (i) military necessity and humanity in their material sense never coincide; (ii) both in their normative sense generate imperatives; and (iii) obeying the imperatives of military necessity and obeying those of humanity always conflict with each other.

On this view, "accounting for" military necessity means embedding a meaningful compromise between the fundamentally irreconcilable demands of military necessity and humanity into positive IHL rules. Since this balance permeates the entire *corpus juris* of positive international humanitarian law, neither military necessity nor humanity pleas *de novo* are admissible in defence of a breach of the law's unqualified rules.

In Chapters 6 and 7, we introduced and developed a rival theory named "joint satisfaction thesis". Chapter 6 demonstrated how the joint satisfaction thesis refutes the inevitable conflict thesis' first two assertions. Numerous kinds of belligerent conduct can in fact be both humane and consistent with military necessity. Conversely, numerous others can be both inhumane and contrary to military necessity. This remains true, notwithstanding the fact that effective armies can and sometimes do also commit atrocities.

Furthermore, military necessity in the context of IHL norm-creation never generates imperatives. On the contrary, it is always normatively indifferent. IHL framers have no reason to *obligate* militarily necessary action, or to *prohibit* militarily unnecessary action. Rather, they have reason to keep both types of actions within each belligerent party's discretion to pursue or forgo. Nor, for that matter, does humanity always demand humane acts or condemn inhumane ones – although, admittedly, it often does.

In Chapter 7, we saw the joint satisfaction thesis rebut the idea that the belligerent cannot simultaneously obey the imperatives of military necessity and those of humanity. The fact that military necessity is normatively indifferent means that it never conflicts with humanity. Where both humanity demands and military necessity permits an act, the belligerent jointly satisfies both considerations by performing that act. Where humanity condemns and military necessity merely tolerates an act, the belligerent satisfies both by refraining from that act. Positive international humanitarian law contains a number of rules that reflect these possibilities. Even where humanity condemns what military necessity permits, or where humanity demands what military necessity merely tolerates, joint satisfaction is still always possible. In such situations, the belligerent jointly satisfies these considerations by acting according to humanitarian imperatives.

The joint satisfaction thesis shows that IHL framers decide whether to obligate given jointly satisfactory behaviour and, if so, whether to obligate that act unqualifiedly, principally, indeterminately, or exceptionally. Each rule of positive international humanitarian law that emerges from this process has therefore "accounted for" military necessity.

Part III probes the legal consequences to which "accounting for" military necessity gives rise. As we proceed, our focus shifts away from military necessity in its normative context to military necessity in its strictly "juridical" context.

This context takes as its point of departure those conventional or customary IHL rules that have been validly posited. Whether certain kinds of conduct should generally be deemed militarily necessary or unnecessary, and how the law's framers should regulate them in view of their stipulated military necessity or non-necessity, are no longer in issue. Rather, our aim here is to tackle questions such as: How should we apply unqualified rules of positive international humanitarian law to situations where the rules' addressee cites military necessity while engaging in deviant behaviour? Where a positive IHL rule contains an express military necessity clause, how should we interpret it in relation to the facts at hand? What place do military necessity pleas have, if any, in the adjudication of international crimes charges?

Moving from normative military necessity in Part II to juridical military necessity in Part III entails two related shifts. First, in principle, we are no longer assessing patterns or kinds of conduct that may be deemed militarily necessary or unnecessary.[1] Instead, we are back to assessing specific acts, such as "destroying the houses and their contents at Sibony, Cuba, in June 1898".[2] The same is true of the purposes for which specific acts are taken, e.g., "preventing V Corps of the United States Army, Sibony's occupation force at the time, from being decimated by a yellow fever epidemic feared".[3] We are then to consider whether these specific acts constitute military necessity within the meaning of applicable IHL rules.[4]

Second, in Part II, we *stipulated* the material military necessity or non-necessity of a given kind of behaviour. In Part III, we once again *evaluate* that of concrete instances.[5] Unlike Part I that looked at military necessity strictly in the context of material reality, however, it is the relevant IHL provisions that furnish the basis of evaluation in Part III. In other words, Part III explores how the law's addressees, adjudicators and commentators *interpret* military necessity in its juridical context.

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[1] Chapter 8 is a partial exception. See below.

[2] See, e.g., 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), at 590-591.

[3] See *ibid*.

[4] In the event, a Great Britain-United States Arbitral Tribunal ruled in *Hardman* that the destruction of property at Siboney in 1898 did constitute military necessity. See *William Hardman (United Kingdom) v. United States*, 18 June 1913, 6 *Reports of International Arbitral Awards* (2006) 25, at 26; 7 *American Journal of International Law* 879 (1913), at 881; 2 *British Yearbook of International Law* 197 (1921-1922), at 199: "the necessity of war was the occupation of Siboney, and that occupation involved the necessity, according to the medical authorities … of taking the said sanitary measures, i.e., the destruction of the houses and their contents. In other words, the presence of the United States troops at Siboney was a necessity of war and the destruction required of their safety was consequently a necessity of war". See also Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1968), at 131-132; Hilaire McCoubrey, "The Nature of the Modern Doctrine of Military Necessity", 30 *Revue de droit militaire et de droit de la guerre* 215 (1991), at 222-223.

[5] Here, too, Chapter 8 is a partial exception. See below.

"Juridical military necessity" takes three forms. In one, it manifests itself through exclusion. As argued earlier, the framers of unqualified IHL rules have "accounted for" all indifferent considerations, including military necessity, by setting them aside and obligating jointly satisfactory behaviour without exception. Rules of this type extinguish all counter-liberties to behave otherwise. It follows that *de novo* pleas emanating from such considerations are inadmissible *vis-à-vis* these rules. To argue otherwise is to embrace the underlying premises of *Kriegsräson* and other discredited doctrines.

Juridical military necessity may also take the form of an exceptional clause attached to certain provisions of positive international humanitarian law. Where such a clause appears, it signifies the process of IHL norm-creation through which the framers have elected specifically to entitle the belligerent to plead military necessity as a ground for exemption from the principal rule. What constitutes military necessity within the meaning of such a clause is a matter of legal interpretation. As will be seen below, juridical military necessity is narrower in scope than material military necessity. Where deviation is not, or no longer, militarily necessary in its juridical sense, the conduct ceases to be excepted and reverts to being governed by the principal prescriptions.

The third form that juridical military necessity takes is as a negative element in some war crimes and crimes against humanity. Several offences, such as those involving property destruction and forcible displacement, are built on substantive IHL rules that admit military necessity exceptions. The onus rests with the prosecution to show the absence of military necessity in order to prove that these crimes have been committed. When a rule envisages an exception, and when the rule's violation constitutes a crime, it is only logical that the absence of circumstances that satisfy the exception's requirements is itself an element of that crime.

Part III contains three chapters, each encompassing one of the three aforementioned forms that juridical military necessity takes. Chapter 8 deals with one difficulty associated with the inevitable conflict thesis that "spills over" into the juridical context.[6] According to the thesis' proponents, no unqualified rule of positive international humanitarian law admits any *de novo* military necessity or humanity pleas. That is so, because (a) the IHL framers took both considerations into account when positing every one of its rules, and (b) they would have added express exceptional clauses to unqualified rules if they had intended otherwise.

Chapter 8 demonstrates, first, that some positive IHL rules, including those that are unqualified, do not involve both military necessity and humanity in their norm-creation. On the contrary, they contain either military necessity but not humanity, or humanity but not military necessity. This fact exposes the inevitable conflict thesis to the uncomfortable prospects that *de novo* military necessity pleas may be admissible *vis-à-vis* at least some unqualified IHL rules.

The joint satisfaction thesis also holds that *de novo* military necessity pleas are inadmissible, but for different reasons. As seen in Part II, positing an unqualified IHL obligation *ipso facto* means extinguishing all counter-liberties that emanate from indifferent considerations. When the framers posit an unqualified rule, they account for these considerations by setting them aside. In other words, indifferent considerations do not survive the process through which unqualified IHL obligations come into existence. Since military necessity is normatively indifferent, *de novo* pleas built on it are inadmissible as a basis for deviation from such obligations. The same can be said of what humanity merely permits or tolerates.

Chapter 8 will also introduce potential cases in which certain *de novo* pleas may not necessarily be excluded *vis-à-vis* unqualified IHL rules. We have some reason to think that the process of IHL norm-creation may not account for genuine norm conflicts between unqualified obligations that it posits, on the one hand, and counter-imperatives that non-indifferent considerations generate, on the other. Accordingly, we also have some reason to accept the possibility that the latter imperatives may function as an act's residual lawfulness-modifiers over and above positive IHL rules. It is not inconceivable that acting as demanded by humanity may "right" or "repair" its unlawfulness otherwise

[6] An earlier version of Chapter 8 was published in 2013. See Nobuo Hayashi, "Military Necessity as Normative Indifference", 44 *Georgetown Journal of International Law* 675 (2013), at 749-778; Nobuo Hayashi, "Contexualizing Military Necessity", 27 *Emory International Law Review* 189 (2013), at 262-279.

established by unqualified IHL rules; or, conversely, an act's compliance with the latter may be "wronged" or "vitiated" if humanity condemns it.

Chapter 9 investigates the significance and content of juridical military necessity.[7] It appears exclusively as an exception from those principal rules of positive international humanitarian law that envisage its admissibility explicitly and in advance. Express military necessity clauses indicate where normative military necessity has survived IHL norm-creation. These clauses authorise behaviour deviating from the principal prescription of those IHL provisions to which they are attached if, and to the extent that, such behaviour is required for the attainment of a military purpose and otherwise in conformity with international humanitarian law. If not, or no longer, "required" in the sense just described, the conduct in question simply reverts to being governed by the principal rule, which in turn renders it unlawful. Juridical military necessity exempts eligible conduct from certain principal IHL obligations; juridical military non-necessity returns ineligible conduct to them.

Chapter 9 distinguishes juridical military necessity as an exception from the state of necessity as a circumstance precluding wrongfulness. It then identifies and substantiates four cumulative requirements of juridical military necessity. First, the measure must be taken primarily for some specific military purpose. Second, the measure must be required for the purpose's attainment. Third, the purpose must be in conformity with international humanitarian law. Fourth, the measure itself must otherwise be in conformity with that law. The second requirement contains three further criteria. They are: the measure's material relevance to the purpose, the measure's least injuriousness relative to reasonably available alternatives, and an acceptable injury-benefit ratio. These criteria also make the scope of juridical military necessity narrower than that of material military necessity.

Chapter 10 examines the absence of military necessity as an element of acts punishable under international criminal law.[8] Several property- and displacement-related war crimes contain an element according to which the underlying act, such as destruction and forcible transfer, must be shown to lack military necessity. The same is true of their corresponding crimes against humanity. This chapter focuses on the work done by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC). The ICTY has developed a sizable body of jurisprudence in which this element is interpreted and applied to complex facts. Although the quality of ICTY judgements on military necessity exceptions varies, the tribunal's case law, seen in its entirety, is consistent with the four requirements identified in Chapter 9.

How the ICC will fare in the long-term remains to be seen. The fact that the court is still at a relatively early stage of its jurisprudential development means that its treatment of military necessity as a negative element of some crimes is also limited in volume and refinement. There is a danger that the court's statutory provisions on grounds for excluding individual criminal responsibility may be used to admit *de novo* military necessity pleas as a justification or excuse through the backdoor.

[7] An earlier version of Chapter 9 was published in 2010. See Nobuo Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", 28 *Boston University International Law Journal* 39 (2010), at 49-101.

[8] An earlier version of Chapter 10 was published in 2010. See *ibid*., at 101-138.

Chapter 8

Joint Satisfaction Thesis III – Exclusionary and Non-Exclusionary Effects

To what consequences does the military necessity-humanity interplay in IHL norm-creation give rise? In particular, do the two considerations operate as free-floating lawfulness-modifiers over positive IHL rules?

Both the inevitable conflict thesis and the joint satisfaction thesis hold that international humanitarian law "accounts for" military necessity once its framers have posited unqualified rules. Both of these theses also agree that one consequence of this is that military necessity does not operate as an additional layer of lawfulness-modification over such rules. *De novo* military necessity pleas are therefore inadmissible.

The inevitable conflict thesis reaches this conclusion based on two problematic claims. The first is *argumendum a contrario*.[1] The fact that some specific IHL rules contain exceptional clauses means, *a contrario*, that those IHL rules without such clauses admit no exceptions. The soundness of this inferred intention hinges, in turn, on the notion that the framers of every positive IHL rule containing no exceptional clause considered adding such a clause and then decided not to do so. This leads us to the inevitable conflict thesis' other contentious claim. The inferred exclusion holds if, but only if, it is true that the military necessity-humanity interplay underpins the norm-creation of every positive IHL rule.[2] Conceding otherwise would amount to acknowledging that not all of these rules in fact "account for" military necessity or humanity. Those rules that do not account for them would arguably be susceptible to *de novo* military necessity and/or *de novo* humanity pleas.

The joint satisfaction thesis refutes both claims. Positing an unqualified IHL rule has the logical effect of precluding all *de novo* pleas that are built on indifferent considerations. It does so, even if these considerations do not specifically appear in the process of that rule's norm-creation. Since military necessity in its normative context is a set of indifferent considerations,[3] *de novo* pleas emanating from them are *ipso facto* inadmissible *vis-à-vis* unqualified IHL rules. This outcome does not depend on the IHL framers' exclusionary intention being inferred *a contrario* from the existence of some IHL rules that expressly envisage such pleas.

The inevitable conflict thesis asserts that unqualified IHL rules exclude *de novo* humanity pleas as well. Here, too, their exclusion is implied, because some IHL rules do admit exceptions on account of humanity.[4] The joint satisfaction thesis will show flaws in this reasoning, and propose a more nuanced picture. Some humanitarian considerations are normatively indifferent[5] and, accordingly, inadmissible as bases for *de novo* pleas. Humanity also demands action and condemns others, however.[6] Since we have reason to believe that non-indifferent considerations may survive the process of IHL norm-creation, we also have reason to accept the possibility that they may modify an act's lawfulness over and above unqualified rules of positive international humanitarian law.

This chapter proceeds as follows. First, we will see that IHL norm-creation does not always involve the military necessity-humanity interplay. Examples will be given where at least one of the two sets of considerations is missing. Second, our discussion will demonstrate that unqualified IHL rules preclude all *de novo* pleas that emanate from indifferent considerations. Their exclusion always results, because positing an unqualified obligation extinguishes its addressee's option to avail itself of any contrary liberties.[7] Inadmissible *de novo* pleas include *Kriegsräson* as well as its variations, and what may be termed *Humanitätsräson.* Third, the chapter will show situations where the letter of

[1] See Part II, Chapter 5 above.
[2] See *ibid*.
[3] See Part II, Chapter 6 above.
[4] See Part II, Chapter 5 above.
[5] See Part II, Chapter 6 above.
[6] See *ibid*.
[7] See Part II, Chapter 7 above.

unqualified rules may not be all there is to an act's IHL compliance. These situations reveal the existence of a genuine norm conflict between an unqualified IHL obligation, on the one hand, and a counter-duty or liberty backed up with what Stephan Munzer called "strong pressure or policy",[8] on the other.

1. IHL Norm-Creation Not Involving the Military Necessity-Humanity Interplay

The inevitable conflict thesis claims that *all* positive IHL rules embody the interplay between humanity and military necessity. In fact, some, including those creating unqualified obligations, do not. Several of those involve military necessity but *not* humanity,[9] whereas others involve humanity but *not* military necessity.[10]

1.1 Military Necessity, Not Humanity

A number of positive IHL rules involve military necessity but not humanity in their creation. Where this occurs, military necessity is typically juxtaposed *vis-à-vis* considerations of fairness or chivalry, pecuniary gain, and sovereignty.

Consider, for instance, the IHL prohibition against "improper" use of enemy uniforms.[11] Of relevance here is their use "while engaging in attacks".[12] Our discussion does not concern the use of enemy uniforms where there is no deceptive intention,[13] or no intention to engage in hostile acts.[14] Rather, we are interested in acts such as "using enemy uniforms with intention to deceive" with a view to achieving purposes such as "obtaining tactical advantage over the enemy". It should also be noted that we are looking exclusively at *enemy* uniforms.[15]

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[8] See Stephan Munzer, "Validity and Legal Conflicts", 82 *Yale Law Review* 1140 (1973), at 1145-1146. See also Part II, Chapter 7 above.

[9] Nils Melzer suggests that the interplay may involve military necessity, on the one hand, and considerations other than humanity, such as "cultural, religious, political, environmental, and economic" ones, on the other. See Nils Melzer, *Targeted Killing in International Law* (2008), at 281. Perhaps religious considerations, including mercy and compassion, may at times be deemed humanity-equivalent. See Carolyn Evans, "The Double-Edged Sword: Religious Influences on International Humanitarian Law", 6 *Melbourne Journal of International Law* 1 (2005), at 12-27; Frédéric Mégret, "A Cautionary Tale from the Crusades? War and Prisoners in Conditions of Normative Incommensurability", in Sibylle Scheipers (ed.), *Prisoners in War* (2010) 23, at 23.

[10] Or, for that matter, the process may involve neither military necessity nor humanity. This particular possibility is not explored further here. In view of the claim made by the inevitable conflict thesis, we will have accomplished our purpose once it is shown that there are *some* positive IHL rules from whose process of norm-creation *either* military necessity *or* humanity is absent.

[11] See Article 13(f), Project of an International Declaration Concerning the Laws and Customs of War (27 August 1874); Article 23(f), Regulations with Respect to the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land (29 July 1899); Article 23(f), Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907). See also Rule 64, Manual on the International Law Applicable to Cyber Warfare (15 March 2013); Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare: Prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence* (2013), at 188-191.

[12] Article 39(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977). See also Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary* (1908), at 283.

[13] See Thomas Erskine Holland, *The Laws of War on Land (Written and Unwritten)* (1908), at 45; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 2d ed. (2010), at 238; Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual* (2015), at 299.

[14] Dinstein, *Conduct of Hostilities*, *supra* note 13, at 238. The British manual holds that using enemy uniforms, e.g., in rear areas for training purposes, would not be improper. See U.K. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 61. See also Office of General Counsel, *supra* note 13, at 299.

[15] That is, rather than, e.g., neutral uniforms. See below.

The expression "improper" has given rise to differences of opinion.[16] Nevertheless, there appear to be two distinct situations – i.e., during combat and in enemy-held territory – where the use of enemy uniforms is unqualifiedly banned. First, the law unqualifiedly prohibits the use of enemy uniforms in combat.[17] If some of those fighting for a party wore the uniforms of its adversary during combat, it would be unfair for that adversary. "Fairness"[18] as a reason-giving consideration in IHL norm-creation would prompt the law's framers to consider banning such practice. Meanwhile, the tactic would be confusing for everyone[19] – including, self-defeatingly, those fighting for the very party that resorts to it. Normative military necessity would therefore only tolerate the use of enemy uniforms in combat.

A prospect of jointly satisfying fairness and military necessity arises here. By unqualifiedly obligating that satisfaction, the framers of IHL rules on the use of enemy uniforms have accounted for both considerations. Admittedly, in some situations of isolated, close-quarter combat where there is no real danger of confusion amongst one's own ranks, it may prove consistent with military necessity to wear enemy uniforms. If one does so, however, he or she will not be entitled to plead military necessity *de novo*.

Second, international humanitarian law unqualifiedly prohibits the use of enemy uniforms in enemy-held territories.[20] Even if wearing enemy uniforms might prove materially necessary for the wearer,[21] it would be considered lacking in fairness for the party to which the uniforms belong. Here, too, the framers of this unqualified prohibition have accounted for fairness and military necessity by setting military necessity aside.

Nowhere in this process does humanity appear. Improperly using enemy uniforms is distinct from improperly using the uniforms of "neutral and other States not Parties to the conflict".[22] That is so, because only the latter is

> of great concern to the Red Cross … [R]espect for the rules of neutrality is fundamental for carrying out the mandate of a Protecting Power … By sheltering a neutral State from military operations, this concept makes it possible to carry out humanitarian activities for the benefit of the States involved in the conflict.[23]

Unlike the improper use of neutral and non-party uniforms, the improper use of enemy uniforms is not enumerated as an example of perfidy in Article 37(1)(d) of Additional Protocol I.[24] Several states proposed its inclusion[25] – or, at any rate, other enemy markers such as distinctive emblems[26] –

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[16] See *Trial of Otto Skorzeny and Others*, 9 *Law Reports of Trials of War Criminals* (1949) 90, at 92-93; Ronald F. Roxburgh (ed.), 2 *Oppenheim's International Law: A Treatise* 3d ed. (1921), at 228; Jean de Preux, "Article 39 – Emblems of Nationality", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1897) 461, at 466.

[17] Article 39(2), Additional Protocol I.

[18] Or, perhaps, chivalry. See below. The Department of Defense calls it "good faith". See Office of General Counsel, *supra* note 13, at 295.

[19] Roxburgh, *supra* note 16, at 228: "As regards the use of the national flag, the military ensigns, and the uniforms of the enemy, theory and practice are unanimous in prohibiting such use during actual attack and defence, since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe".

[20] That is, unless the user is a POW wearing enemy uniform "in order to conceal, facilitate or protect" his or her escape. See de Preux, "Article 39", *supra* note 16, at 467.

[21] Wearing enemy uniforms while performing commando operations would constitute a breach of this prohibition, but not necessarily an act of espionage. See U.K. Ministry of Defence, *supra* note 14, at 61.

[22] Article 39(1), Additional Protocol I.

[23] De Preux, "Article 39", *supra* note 16, at 465.

[24] The provision reads: "the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict". See Article 37(1)(d), Additional Protocol I. But see Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), 2 *Customary International Humanitarian Law* Pt. I (2005), at 1341-1353 (citing Belgium, France, Germany, Greece, Hungary, Israel, Romania, and Switzerland which treat improper use of enemy uniforms as perfidious).

[25] See, e.g., Federal Political Department, 3 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (1978), at 163 (Belgium).

[26] See *ibid.*, at 162 (Norway).

at the Diplomatic Conference. These proposals did not succeed for reasons that are not entirely clear. All that the preparatory works indicate is that "[e]xamples that were debatable or involved borderline cases were avoided".[27]

Be that as it may, it makes sense to exclude the use of enemy uniforms from Article 37(1)(d). Perfidy's definition specifically involves IHL "protection".[28] Plainly, enemy uniforms are not *per se* protected under international humanitarian law.[29] The law does not confer upon the wearer of a party's uniform any special protection *vis-à-vis* other members of its own armed forces.[30] It follows that "feigning" membership in the enemy's armed forces does not amount to "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, *protection under the rules of international law applicable in armed conflict*" as required by Article 37(1).[31]

This interpretation accords with the proviso that is often added to Article 37(1)(d). The Red Cross commentary notes:

> With regard to the United Nations, it is appropriate to state that the wrongful use of its signs, emblems or uniforms can constitute an act of perfidy in the sense of Article 37 only in cases where the personnel of the United Nations have the status of neutral or protected persons, and not in situations where members of the United Nations armed forces intervene in a conflict as combatants, even when this is for peacekeeping purposes. However, this type of abuse remains unlawful.[32]

First, if feigning protected status by using the UN uniforms and other markers ceases to be perfidious where UN forces become involved as combatants, the same would *a fortiori* be true of feigning the status of enemy combatants by using their uniforms and markers. Second, whereas it is true that unauthorised use of the UN emblem remains unlawful, perfidy is not the basis for this prohibition.[33]

Should adherents of the inevitable conflict thesis agree that humanity does not appear in the unqualified IHL prohibition against improper use of enemy uniforms, they would be compelled to concede that *de novo* humanity pleas in support of using enemy uniform may be admissible in some situations (e.g., hostage rescue operations[34]).

There are further instances of IHL norm-creation that arguably embody the interplay between military necessity and considerations of fairness, chivalry or honour, but not humanity. Examples include the unqualified prohibition against active military service by paroled or repatriated prisoners

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[27] 15 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (1978), at 382. See also Article 21(d) of the ICRC's draft Additional Protocol II ("the use in combat of the enemy's distinctive military emblems") (see 1 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (1978), at 39); this draft article was deleted without discussion and by consensus at the conference's 52nd plenary meeting on 6 June 1977. See 7 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (1978), at 128.

[28] This element was added at the suggestion of Canada, Ireland and the United Kingdom. See 3 *Official Records*, *supra* note 25, at 164; 11 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (1978), at 259-270. See also Mike Madden, "Of Wolves and Sheep: A Purposive Analysis of Perfidy Prohibitions in International Humanitarian Law", 17 *Journal of Conflict & Security Law* 439 (2012); Richard B. Jackson, "Perfidy in Non-International Armed Conflicts", 88 *International Law Studies* 237 (2012).

[29] Office of General Counsel, *supra* note 13, at 299.

[30] See Part II, Chapter 4 above. See also, Sean Watts, "Law-Of-War Perfidy", 219 *Military Law Review* 106 (2014), at 114.

[31] Terry Gill describes perfidy also as being contrary to chivalry. See Terry Gill, "Chivalry: A Principle of the Law of Armed Conflict?", in Mariëlle Matthee, Brigit Toebes and Marcel Bruns (eds.), *Armed Conflict and International Law: In Search of the Human Face:* Liber Amicorum *in Memory of Avril McDonald* (2013) 33, at 41-42.

[32] Jean de Preux, "Article 37 – Prohibition of Perfidy", in Sandoz, Swinarski and Zimmermann (eds.), *Commentary on the Additional Protocols*, *supra* note 16, 429, at 439 (footnotes omitted). See also 15 *Official Records*, *supra* note 27, at 382.

[33] See Article 38(2), Additional Protocol I.

[34] We will soon discuss a real-life hostage rescue operation in which the Red Cross emblem was misused. See below.

of war (POWs)[35] and by those sick, wounded, or shipwrecked who have been returned.[36] The framers of these rules juxtaposed considerations of chivalry or honour condemning such service[37] with those of military necessity permitting it. Elsewhere, the framers have occasionally decided to leave the belligerent at liberty to pursue military necessities despite their arguably unchivalrous or honourless character. The rules that authorise the detention and search of parlementaires,[38] and the absence of rules that prohibit espionage *per se*,[39] exemplify such occasions.

Some positive IHL rules embody the interplay between military necessity, on the one hand, and considerations of pecuniary gain, prestige or sovereignty, on the other. Historically, those rules that obligate the sparing of POWs' lives and authorise their parole had little to do with humanity.[40] It may also be argued that a number of occupation-related rules account for the displaced state's interests[41] but not humanity. Much of the law on neutrality concerns itself with the safeguarding of neutral interests,[42] rather than humanitarian considerations.

1.2 Humanity, Not Military Necessity

Conversely, there are positive IHL rules that involve humanity but not military necessity in their norm-creation. In such situations, humanity is often compared to chivalry and honour; sometimes, humanitarian imperatives are juxtaposed with countervailing humanitarian imperatives.

By virtue of Article 49 of Geneva Convention III, officer POWs "may in no circumstances be compelled to work".[43] It appears that the rule's framers accounted for both chivalry or honour condemning such treatment and humanity permitting it, by imposing an unqualified ban on compulsory labour for officer POWs.

Neither the 1874 Brussels Declaration[44] nor the 1899 Hague Regulations[45] contain a categorical prohibition against compelling officer POWs to work. The expression "officers excepted" was first

[35] See Article 6, Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864); Articles 31-33, 1874 Brussels Declaration; Articles 10-12, 1899 Hague Regulations; Articles 10-12, 1907 Hague Regulations; Article 74, Convention Relative to the Treatment of Prisoners of War (27 July 1929); Article 117, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949). See also Evan J. Wallach, "Pray Fire First Gentlemen of France: Has 21st Century Chivalry Been Subsumed by Humanitarian Law?", 3 *Harvard National Security Journal* 431 (2012).

[36] See Article 16, Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Roxburgh, *supra* note 16, at 192.

[37] See Gary D. Brown, "Prisoner of War Parole: Ancient Concept, Modern Utility", 156 *Military Law Review* 200 (1998), at 210-214; Office of General Counsel, *supra* note 13, at 67.

[38] See Articles 44-45, Brussels Declaration; Articles 33-34, 1899 Hague Regulations; Articles 33-34, 1907 Hague Regulations. See also Carnegie Endowment for International Peace, *The Proceedings of the Hague Peace Conferences Translation of the Official Texts: The Conference of 1899* (1920), 60-61; Gill, *supra* note 31, at 42; Office of General Counsel, *supra* note 13, at 832-833.

[39] See Roxburgh (ed.), *supra* note 16, at 222-223. See also Manual on International Law Applicable to Air and Missile Warfare (15 May 2009), para. 119; Dinstein, *Conduct of Hostilities*, *supra* note 13, at 241. The absence of rules prohibiting espionage *per se* is to be distinguished from the status and treatment of persons caught engaging in acts of espionage. See, e.g., Roxburgh, *supra* note 16, at 223; Bordwell, *supra* note 12, at 292.

[40] See Part II, Chapter 7 above.

[41] See, e.g., Geoffrey Best, "Restraints on War by Land Before 1945", in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979) 17, at 28-29 (regarding requisitions).

[42] See Article 24, 1907 Hague Regulations; Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (18 October 1907); Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War (18 October 1907); Roxburgh, *supra* note 16, at 400-404; Paul Seger, "The Law of Neutrality", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 248, at 254-257.

[43] Article 49, Geneva Convention III. See also Article 6, 1907 Hague Regulations; Article 27, 1929 POW Convention.

[44] See Article 25, 1874 Brussels Declaration.

[45] See Article 6, 1899 Hague Regulations.

added to Article 6 of the 1907 Hague Regulations, upon a Spanish proposal.[46] At the 1949 Diplomatic Conference, Drafting Committee No. 1 proposed what became the final text of Article 49 of Geneva Convention III on officer exemption.[47] This unqualified prohibition stands, although compulsory labour would be considered humane for POWs in general.

The most logical explanation for this ban is that officer POWs are too senior in rank to be subjected to forced labour.[48] After all, labour may be imposed on POWs exclusively "with a view to … maintaining them in a good physical and mental health".[49] In the Red Cross commentary's words:

> Provision is made for prisoners of war to work because of humanitarian considerations and not on account of the economic interest of the Detaining Power; the primary purpose is, through work, to preserve the bodily health and morale of prisoners of war. In addition, camp administration is made easier and, lastly, the prisoners are materially better off because of the pay which they receive.[50]

When it comes to officer POWs, however, these humanitarian desiderata have been accounted for and set aside. *De novo* pleas emanating from them are therefore inadmissible *vis-à-vis* Article 49.

Article 118 of Geneva Convention III arguably imposes an unqualified obligation upon the Detaining Power to repatriate POWs after the cessation of active hostilities.[51] The article's drafters juxtaposed considerations of sovereignty – that is, of the home state – demanding repatriation[52] with humanity demanding non-repatriation in some circumstances,[53] and chose to set the latter aside in favour of the former.[54] As will be seen below, the role of humanitarian demands *vis-à-vis* unqualified IHL rules obligating contrary action raises complex issues.

Elsewhere, the juxtaposition may involve competing imperatives of humanity. For instance, positive international humanitarian law unqualifiedly prohibits medical interference with POWs "not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest".[55] Article 78(1) of Additional Protocol I unqualifiedly prohibits the evacuation of children to a foreign country "except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require".[56]

In none of these cases does military necessity appear as reason-giving considerations. For adherents of the inevitable conflict thesis, accepting these characterisations would be tantamount to

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[46] See Carnegie Endowment for International Peace, 3 *The Proceedings of the Hague Peace Conferences Translation of the Official Texts: The Conference of 1907* (1921), at 18, 103-104, 242. See also Article 41, Draft Convention Relative to the Treatment of Prisoners of War (approved by the 1948 XVIIth International Red Cross Conference in Stockholm) ("officers and persons of equivalent status excepted").

[47] See Federal Political Department, 2-A *Final Record of the Diplomatic Conference of Geneva of 1949* (1949), at 361.

[48] See Carnegie Endowment, *Proceedings*, *supra* note 46, at 103 (Spanish delegate explaining that officer POWs should not be compelled to perform "annoying tasks"); Federal Political Department, 2-A *Final Record*, *supra* note 47, at 361 (Soviet delegate describing how "it would be wrong to place [regular non-commissioned officers who were often regarded as lower-ranking officers] on an equal footing with other [non-regular] non-commissioned officers").

[49] Article 49, Geneva Convention III.

[50] Jean S. Pictet (ed.), *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* (1960), at 260.

[51] Article 118, Geneva Convention III ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities").

[52] At the 1949 Diplomatic Conference, the Soviet delegate opposed the Austrian amendment, ostensibly on the ground that the possibility of non-repatriation "could be used to the detriment of the prisoners themselves and of their country". The U.S. delegate agreed. See Federal Political Department, 2-A *Final Record*, *supra* note 47, at 324, 462. See also III Commentary, at 542-543. As will be seen below, the returning state's sovereign interests were disguised as concerns for the welfare of their soldiers taken prisoner.

[53] At the 1949 Diplomatic Conference, Austria proposed and Israel supported an amendment to this effect. See Federal Political Department, 2-A *Final Record*, *supra* note 47, at 324, 462.

[54] See *ibid.*, at 462: "The Austrian amendment was rejected by a large majority".

[55] Article 13, Geneva Convention III.

[56] Article 78(1), Additional Protocol I. See also Article 24, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949); Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 909-913.

conceding the existence of unqualified IHL rules that do not account for military necessity. Consequently, *de novo* military necessity pleas would be admissible *vis-à-vis* these rules. Specific instances of compelling officer POWs to work, refusing to repatriate POWs or interfering with them medically, and evacuating children temporarily to a foreign country – if they do happen to be militarily necessary – would all be lawful notwithstanding their otherwise unqualified prohibitions.

2. Excluding *de novo* Indifference Pleas

The inevitable conflict thesis contends that all positive IHL rules embody the military necessity-humanity interplay. It is based on this assertion that neither *de novo* military necessity pleas nor *de novo* humanity pleas are admissible *vis-à-vis* unqualified rules. The previous section shows how problematic the first contention is, and how the second claim unravels as a result.

The joint satisfaction thesis also holds that unqualified rules exclude all *de novo* pleas emanating from indifferent considerations. Accordingly, *Kriegsräson*, as well as its variations like self-preservation, and what might be termed *Humanitätsräson*, are inadmissible *vis-à-vis* such rules.[57] The reasons for this outcome are quite different, however.

2.1 Exclusionary Basis

We are here concerned with the consequences of norm contradictions that occur in IHL norm-creation. As seen in Chapter 7, norm contradictions are distinct from norm conflicts – whether they be full conflicts between duties and counter-duties, conflicts of a frustrating character between duties and counter-liberties that are already independently valid as legal rules, or informal conflicts between two contradictory liberties where strong pressure or policy underpins one or both of them.

Whenever the IHL framers choose to posit a rule in unqualified terms, they logically exclude all counter-liberties otherwise sanctioned by military necessity. That is so, because military necessity is normatively indifferent. Indeed, this logical exclusion applies to counter-liberties sanctioned by *any* indifferent considerations. Since humanity also remains normatively indifferent towards some acts,[58] *de novo* pleas based on such considerations are inadmissible as grounds for deviation from unqualified IHL rules.

2.2 *Kriegsräson* and Its Variations

Kriegsräson's main claim in its juridical context may be summarised as follows. Although international humanitarian law accounts for military necessity, it cannot be construed in such a manner that the belligerent is denied the option to do what it needs to succeed. Where a positive IHL rule is formulated without an express military necessity exception, it merely signals agreement among its framers that deviation from the rule's prescriptions would ordinarily be lacking in military necessity. Neither the law nor its framers can be deemed to have foreseen all future events and legislated for them without the need for adjustments. Accordingly, whenever deviation happens to be militarily necessary, this necessity overrides and renders inoperative any provisions of the law that prescribe contrary action.[59]

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[57] 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 37.

[58] See Part II, Chapter 6 above.

[59] See, e.g., Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes – and War – Law* (1954), at 352: "the latter [*Kriegsmanier*, or 'custom of war'] binding on a belligerent in ordinary circumstances, the former [*Kriegsräson*] overruling it in special circumstances, where necessary either for escaping military danger, or for attaining military success. It had the effect of reducing the Hague Regulations to merely moral authority" (footnote omitted).

Kriegsräson is unacceptable because it purports to justify militarily necessary conduct even where positive international humanitarian law has already extinguished all indifferent counter-liberties. Rejecting *Kriegsräson* means rejecting the idea that material military necessity somehow "rights" or "repairs" the unlawfulness of such conduct. Insofar as they are variations of *Kriegsräson*, self-preservation,[60] self-defence[61] and impracticality[62] pleas are to be rejected for the same reason.

2.2.1 Consistency with Military Necessity as Conclusive Lawfulness, All Things Considered

It can be tempting for some – particularly those with thoroughly consequentialist leanings to whom the adage "the end justifies the means" rings true – to regard military necessity as a justification. The idea that a belligerent act is materially necessary for a legitimate military purpose tends to strengthen the idea that the act is, at least *prima facie*, legitimate as well.[63] Embracing these ideas is only one small step away from asserting that a given act's military necessity rights or repairs its illegality, even where such illegality is otherwise established in light of unqualified rules of positive international humanitarian law. What is crucial here, however, is the fact that the framers have already taken this step and extinguished counter-liberties for the law's addressees. Purporting to reinsert these liberties amounts to taking the same step *anew*, essentially negating the law's existence as an autonomous and previously agreed-upon body of binding norms.[64]

As noted earlier, *Kriegsräson* found increasing following in Germany during the late-nineteenth century, and remained influential among German military and international lawyers until the end of World War II. Since its unambiguous rejection in post-World War II war crimes trials, *Kriegsräson* has been thoroughly discredited.[65] Most authorities now agree that juridical military necessity has no place outside the confines of specific exceptional clauses.[66]

2.2.2 Self-Preservation

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[60] *Ibid.*, at 352-353. But see N.C.H. Dunbar, "Military Necessity in War Crimes Trials", 29 *British Yearbook of International Law* 442 (1952), at 443; Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1968), at 136; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 4th ed. (2006), at 305; Marshall Cohen, "Morality and the Laws of War", in Virginia Held, Sidney Morgenbesser and Thomas Nagel (eds.), *Philosophy, Morality, and International Affairs: Essays Edited for the Society for Philosophy and Public Affairs* (1974) 71, at 76-78; Yoram Dinstein, "Military Necessity", *Max Planck Encyclopedia of Public International Law* 2d ed. (2009), §§ 10-11.

[61] *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports (1996) 226, paras. 95-96. But see *Dissenting Opinion of Judge Higgins*, *ibid*., 583, paras. 28-29; *Dissenting Opinion of Judge Weeramantry*, *ibid*., 429, at 513-520; Luigi Condorelli, "Le droit international humanitaire, ou l'exploration par la cour d'une terra à peu près incognita pour elle", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 229, at 244-245; Christopher Greenwood, "*Jus ad bellum* and *Jus in bello* in the Nuclear Weapons Advisory Opinion", in *ibid.*, 247, at 264; Judith Gardam, "Necessity and Proportionality in *Jus ad Bellum* and *Jus in Bello*", in *ibid.*, 275, at 292; Marcelo G. Kohen, "The Notion of 'State Survival' in International Law" in *ibid.*, 293, at 310; 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 143-144; Dinstein, *Conduct of Hostilities* (2010), *supra* note 13, at 85-86; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), at 269; Christopher Greenwood, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian law* 2d ed. (2008) 1, at 36-37.

[62] H. McCoubrey, "The Nature of the Modern Doctrine of Military Necessity", 30 *Revue de droit militaire et de droit de la guerre* 215 (1991), at 237.

[63] See Part II, Chapter 4 above.

[64] In the context of the so-called "war on terror" championed by the Bush administration, controversial arguments were advanced with a view to effectively excepting, justifying and/or excusing torture despite its unqualified prohibition under international law. See, e.g., Alberto Gonzales, William Haynes, Daniel Dell'Orto and Keith Alexander, Press Briefing, 22 June 2004. But see, e.g., Scott Horton, "*Kriegsraison* or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War", 30 *Fordham International Law Journal* 576 (2006).

[65] See *ibid*.

[66] See *ibid*.

Some commentators who reject *Kriegsräson* still defend a scope of juridical military necessity that in certain circumstances would go beyond express exceptional clauses. At first sight, James Wilford Garner may come across as one of them. He stated:

> It must be admitted that within reasonable limits this much criticized theory [i.e., *Kriegsräson*] is legally defensible; that is to say, a belligerent is justified in disregarding a rule of war law whenever conformity to the rule would involve his destruction.[67]

Upon closer reading, however, it becomes apparent that Garner's support for self-preservation was more reserved.[68] R.B. Brandt is another:

> It is conceivable that ideal rules of war would include one rule to the effect that anything is allowable, if necessary to prevent absolute catastrophe. As Oppenheim remarks, it may be that if the basic values of society are threatened nations are possibly released from all the restrictions in order to do what "they deem to be decisive for the ultimate vindication of the law of nations".[69]

It is in Julius Stone that we find self-preservation's perhaps most forceful advocate. In his view, military necessity does – or should, at any rate – entitle a state at war to depart from its duties under international law on account of self-preservation.[70] Stone clearly accepted the criticism of what he called military necessity in "such an extended German sense".[71] His doubts concerned whether this criticism, while valid in relation to *Kriegsräson*, could be defensibly construed as excluding self-preservation:

> The central point of criticism of the German doctrine is undoubtedly the extended notion of "necessity" held thus to justify the overriding of the law of war, a notion covering not merely the needs of military survival, but also lesser dangers, and even the needs of positive military success … This reasoning, however, would forbid departure from the rules of war-law even in face of the direst needs of survival. Yet it remains ground common to British, American, French, Italian and other publicists, as well as German, that a State is privileged, in title of self-preservation, to violate its ordinary duties under international law, even towards States with which it is at peace; and may also itself determine when its self-preservation is involved. Neither practice nor the literature explain satisfactorily how the privilege based on self-preservation in time of peace can be denied to States at war. If, as the Writer believes, the German doctrine is properly condemned, a frank review of the meaning of the self-preservation doctrine remains all the more urgent.[72]

Contrast Stone's position with N.C.H. Dunbar's. Dunbar urged that:

> [T]he phrase "necessity in self-preservation" is more properly employed to describe a danger or emergency of such proportions as to threaten immediately the vital interests, and, perhaps, the very existence, of the state itself. Military necessity should be confined to the plight in which armed forces may find themselves under stress of active warfare.[73]

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[67] James Wilford Garner, 2 *International Law and the World War* (1920), at 196-197.
[68] See *ibid.*, at 193-195, 197.
[69] R.B. Brandt, "Utilitarianism and the Rules of War", 1 *Philosophy and Public Affairs* 145 (1972), at 147 n.3 (citing Hersch Lauterpacht (ed.), 2 *Oppenheim's International Law: A Treatise* 7th ed. (1955), at 351).
[70] See Stone, *supra* note 59, at 352-353.
[71] *Ibid.*, at 352.
[72] *Ibid.*, at 352-353. Footnotes omitted.
[73] Dunbar, *supra* note 60, at 443. See also Stone's response to Dunbar's criticism (Stone, *supra* note 59, at 353 n.24).

Be that as it may, self-preservation has no place in positive international humanitarian law as long as it is understood merely as a more radical version of *Kriegsräson*.[74]

This conclusion could change in two ways. One is where self-preservation in international humanitarian law might somehow be deemed normatively non-indifferent or, though indifferent, backed up with strong pressure or policy. There is no indication in the law that this is the case.

The other possibility is where self-preservation might constitute an established right outside of international humanitarian law, such as, e.g., in *jus in bello*. The 1996 *Nuclear Weapons* advisory opinion rendered by the International Court of Justice (ICJ) is particularly relevant here. In that opinion, the court observed that the threat or use of nuclear weapons would *generally* be contrary to international humanitarian law.[75] The opinion goes on to state that the court "cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence … when its survival is at stake".[76] The court held, by seven votes to seven, with the President casting the deciding vote, that it "cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".[77]

One may question whether the ICJ really acknowledged self-preservation as a rule of *jus ad bellum*.[78] *If* it were a valid norm, however, we might have a norm conflict of a frustrating kind. On the one hand, positive international humanitarian law imposes an unqualified duty to refrain from launching an indiscriminate attack on cities.[79] This duty, on the other hand, might "frustrate" the *ex hypothesi* right of self-preservation under *jus ad bellum* that would sanction a counter-liberty to launch such an attack in extreme cases.

As noted earlier, the relationship between *jus ad bellum* and *jus in bello* is not within the ambit of this thesis.[80] The debate continues unabated,[81] despite the fairly uniform insistence amongst IHL specialists that the two fields remain separate. This separation would mean that lawful acts of self-defence under *jus ad bellum* ought not right or repair IHL violations (or vice versa)[82]; and, conversely, that acts in breach of *jus ad bellum* ought not wrong or vitiate IHL-compliant behaviour (or vice versa). The enduring salience of this issue reveals the intractable character of norm conflicts between independently valid rules that belong respectively to two un-integrated fields of international law.[83]

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[74] The Department of Defense manual also observes: "It is … unlawful for a commander to kill enemy prisoners in the force's custody on grounds of self-preservation …" See Office of General Counsel, *supra* note 13, at 525. Some commentators even question whether self-preservation should be discussed alongside justificatory military necessity in the first place. See, e.g., Schwarzenberger, *supra* note 60, at 136; Walzer, *supra* note 60, at 305; Cohen, *supra* note 60, at 76-78; Dinstein, "Military Necessity", *supra* note 60, §§ 10-11; Robert Kolb, "La nécessité militaire dans le droit des conflits armés: essai de clarification conceptuelle", in Société française pour le droit international, *Colloque de Grenoble, La nécessité en droit international* (2007), at 168, 170; Gabriella Venturini, "Necessity in the Law of Armed Conflict and International Criminal Law", 41 *Netherlands Yearbook of International Law* 45 (2010), at 51.

[75] See *Nuclear Weapons* Advisory Opinion, *supra* note 61, para. 105(2)(E).

[76] *Ibid*., para. 96.

[77] *Ibid.*, para. 105(2)(E); see also *ibid*., para. 96.

[78] See, e.g., Kohen, *supra* note 61, 293.

[79] See, e.g., Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian Law* (2005), at 37-38.

[80] See Part II, Chapter 4 above.

[81] See, e.g., *Higgins Dissenting Opinion*, *supra* note 61, para. 29; *Weeramantry Dissenting Opinion*, *supra* note 61, at 513-520; *Separate Opinion of Judge Ranjeva*, *Nuclear Weapons* Advisory Opinion, *supra* note 61, 294, at 301-302; Dinstein, *Conduct of Hostilities*, *supra* note 13, at 85; Greenwood, "*Jus ad Bellum* and *Jus in Bello*", *supra* note 61, at 249-250, 264; Nishimura Hayashi, *supra* note 61, at 143-144; Condorelli, "Le droit international humanitaire", *supra* note 61, at 244-245; Gardam, *supra* note 61, 275, at 292; Kohen, *supra* note 61, 293, at 310; Greenwood, "Historical Development", *supra* note 61, at 36-37; Dinstein, *Conduct of Hostilities*, *supra* note 13, at 85-86; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict* (2008), at 21-28; Solis, *supra* note 61, at 269; Keiichiro Okimoto, *The Distinction and Relationship between* Jus ad Bellum *and* Jus in Bello (2011); 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.

[82] *Prosecutor* v. *Nikola Šainović et al.*, Case No. IT-05-87-A, *Judgement*, 23 January 2014, para. 1662.

[83] 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) at 42, 44; Marko Milanović, "A Norm Conflict Perspective on the

2.2.3 Material Impossibility and Impracticality

According to Hilaire McCoubrey, Jean Pictet espoused a version of military necessity whereby non-compliance with a positive IHL rule would be tolerated in the event of genuine material impossibility. In McCoubrey's words:

> The second position … of military necessity appears to be reflected [into a] much more limiting model advanced by Jean Pictet … Here the doctrine of military necessity is reduced to an admission that in certain cases it may be "impossible" to comply with legal norms in which case a "defence" in respect of *prima facie* unlawful action will arise.[84]

It is doubtful, however, whether Pictet actually regarded "genuine material impossibility" as a variant of juridical military necessity. All Pictet said is this:

> [T]here is an implicit clause in any law to the effect that no one is obliged to do what is impossible. This remains implicit because if it were stated openly the risks of abusive and tendentious interpretations would be too great … Thus, when we speak of what is "impossible" we must refer only to a genuine material impossibility.[85]

Pictet's treatment of genuine material impossibility as an implicit clause stands in stark contrast to his thoroughgoing rejection of implicit military necessity clauses: "We should emphasize that there is *no express or implicit clause* in the law of war giving priority to military necessity – otherwise there would be no such thing as the law of war!"[86] McCoubrey himself suggested that, for the purposes of military necessity, "necessity connotes an immediate and overwhelming circumstance in military action, which renders [strict] compliance, upon rational [analysis], impractical rather than 'impossible'".[87]

There may be certain situations in which it is impractical to comply with unqualified IHL obligations. The mere fact that these situations exist, however, does nothing to change the fact that unqualified IHL rules exclude *de novo* pleas emanating from indifferent permissions. In fact, McCoubrey's unfortunate allusion to impracticality conceals an idea that might otherwise deserve serious consideration. That idea would not entail a norm contradiction between an unqualified IHL rule and a counter-liberty on account of impracticality. Rather, it would entail a full conflict between the rule and a humanitarian counter-imperative.[88]

2.3 *Humanitätsräson*

Let us now consider the exclusionary effects that unqualified IHL rules have *vis-à-vis* humanity's indifferent permissions. *Humanitätsräson* asserts that, although IHL accounts for humanity, it cannot be construed in a manner that deprives the belligerent of its liberty to act humanely. Where a positive IHL rule is formulated without an express humanitarian exception, it merely shows that the rule's framers considered deviation from its prescriptions generally inhumane. Neither the law nor its

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Relationship between International Humanitarian Law and Human Rights Law", 16 *Journal of Conflict & Security Law* 459 (2010), at 476, 482.

[84] McCoubrey, "Modern Doctrine", *supra* note 62, at 220. Footnotes omitted. See also Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* 2d ed. (1998), at 303-304.

[85] Jean Pictet, *Development and Principles of International Humanitarian Law* (1985), at 88.

[86] *Ibid.* Emphasis added.

[87] McCoubrey, "Modern Doctrine", *supra* note 62, at 237. McCoubrey went on to qualify his position: "Impractical is a term here carefully chosen, it is by no means intended to imply the concession to tactical and strategic convenience which is implicit in the maxim *kriegsrason geht vor kriegsmanier*". *Ibid.*

[88] See below.

framers can be deemed to have foreseen all future events and legislated for them. Consequently, deviation that is in fact humane takes precedence over any provisions of the law that prescribe contrary action. "Necessities of humanity override rules of war", in other words.

Humanitätsräson is inadmissible *vis-à-vis* unqualified IHL rules precisely for the reason that *Kriegsräson* is inadmissible. Holding otherwise would amount to accepting the idea that, like *Kriegsräson*, acting as permitted by humanity somehow repairs or rights the act's unlawfulness. The framers of unqualified IHL rules have already accounted for humanity's indifferent considerations by excluding all counter-liberties emanating from them. Reinserting theses liberties is tantamount to re-legislating international humanitarian law to suit the inserter's circumstances.

2.3.1 Consistency with Humanity's Indifferent Permissions as Conclusive Lawfulness, All Things Considered

Humanitätsräson may appeal to those for whom the end does – or should – justify the means. If anything, *Humanitätsräson*'s case would be stronger than *Kriegsräson*'s. The end sought is not some legitimate belligerent purpose, but a humanitarian one. Who can object to that?

Gabriella Blum asserts that a humanitarian necessity defence should be available to justify deviations even from unqualified prohibitions of positive international humanitarian law. These prohibitions include, for example, Articles 3 (hostage taking), 8 (renunciation of rights), 27 (acts and threats of violence), 28 (human shields) and 51 (forced participation in military operations) of Geneva Convention IV; and Article 51(7) (human shields) of Additional Protocol I.[89] Blum also advocates this defence *vis-à-vis* the absolute IHL prohibitions against torture[90]; deliberate, indiscriminate or excessively injurious attacks on civilians; and the use of poisonous weapons.[91] Blum goes on to state: "[A]ssassinations of rogue leaders … and, in some extreme cases, even the deliberate killing of civilians or combatants who are *hors de combat*, might be justified under a humanitarian necessity justification, provided they meet all the relevant conditions".[92] The conditions are:

(1) That the conduct in question was designed to minimise harm to individuals other than the defendant's compatriots[93];
(2) That the person could reasonably expect that his or her action would be effective as the direct cause of minimising the harm[94]; and
(3) That there were no less harmful alternatives under the circumstances to produce a similar humanitarian outcome.[95]

As these requirements indicate, and Blum freely admits, hers is a "lesser-evil" or "greater good" defence.[96] Diane A. Desierto mounts a convincing rebuttal of Blum's theory.[97] Desierto finds Blum's strict utilitarian metric plainly incompatible with the distinct institutional design and purposes of *jus in bello.*[98] Nor does Blum sufficiently describe the process of determining "humanitarian" intentions for breaking *jus in bello* obligations during armed conflicts.[99] She fails to show why the current use

[89] See Gabriella Blum, "The Laws of War and the 'Lesser Evil'", 35 *Yale Journal of International Law* 1 (2010), at 16 (citing an Israel Supreme Court case, HCJ 3799/02, *Adalah et al. v. GOC Central Command, IDF et al.*, 23 June 2005); see also *Adalah*, paras. 20-23.
[90] Blum, *supra* note 89, at 20.
[91] *Ibid.*, at 25.
[92] *Ibid.*, at 67.
[93] *Ibid.*, at 63, 67.
[94] *Ibid.*, at 64-65, 67.
[95] *Ibid.*, at 66-67.
[96] *Ibid.*, at 35.
[97] See Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (1012), at 333-347.
[98] See *ibid.*, at 343.
[99] See *ibid.*

of military necessity as both a *legislative policy* (i.e. what this thesis calls normative military necessity) and a *legislated norm* (similarly, juridical military necessity) in *jus in bello* is inadequate for her supposedly "humanitarian" purposes.[100] Desierto concludes that, with her deontological, consequentialist and institutional reasons for modern *jus in bello*'s alleged deficiencies, Blum effectively sets up straw arguments nowhere in accord with the law's actual *legal* reasoning.[101]

Suffice it to note here that *Humanitätsräson* is no more persuasive for well-meaning humanitarians than *Kriegsräson* is for efficiency-maximising soldiers. Both *Humanitätsräson* and *Kriegsräson* hinge the lawfulness of given belligerent conduct on the legitimacy of its goal (net gain in humanity; net gain in military success). They are both prepared to let consequentialist considerations trump all contrary side-constraints.[102] In short, they both engage in exactly the same process of reasoning.

In fairness, Blum is neither alone nor the first to put forth humanity-driven consequentialism. Let us consider four examples where analogous views have been advanced. They are: misusing the Red Cross emblem in bloodless hostage rescue operations; killing persons placed *hors de combat* out of mercy; forcibly preventing civilians from leaving besieged localities, with a view to expediting capitulation; and fighting shorter wars without moderation, rather than fighting longer wars with moderation.

2.3.2 Misusing the Red Cross Emblem in Bloodless Hostage Rescue Operations

On 2 July 2008,[103] Colombia carried out a daring operation codenamed "Operation Jaque" in which it freed fifteen hostages held by the Fuerzas Armadas Revolucionarias de Colombia (FARC). Relevant facts are as follows[104]: Prior to the rescue, Colombia's military intelligence had infiltrated senior FARC leadership. Infiltrators successfully induced the guerrillas into arranging what they believed was a relocation of Ingrid Betancourt and fourteen other hostages. Colombian military agents, disguised as journalists and members of a fictitious humanitarian organisation, arrived at the designated collection point in two helicopters and brought the hostages on board. Shortly after take-off, two FARC members who boarded the helicopter alongside their hostages were overpowered by the Colombian agents.

In the aftermath, it was reported that at least one of the Colombian agents who arrived at the collection site wore a bib with the ICRC symbol printed on it, a claim initially denied by the Colombian authorities.[105] However, Álvaro Uribe, Colombia's then president, soon confirmed that one nervous soldier did so against orders and conveyed his government's apologies to the ICRC.[106] Video footage suggesting deliberate misuse of the emblem surfaced several weeks later, prompting the ICRC to express "serious concern".[107]

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[100] See *ibid.*
[101] See *ibid.*, at 344.
[102] See Part II, Chapter 4 above.
[103] See Tim Padgett, "Colombia's Stunning Hostage Rescue", *Time*, 2 July 2008.
[104] See "Colombia Hostage Betancourt Freed", *BBC News*, 3 July 2008; "Colombia Tricks Rebels into Freeing Hostages", *MSNBC*, 3 July 2008; Simon Romero, "Colombia Plucks Hostages from Rebels' Grasp", *The New York Times*, 3 July 2008.
[105] See Karl Penhaul, "Colombian Military Used Red Cross Emblem in Rescue", *CNN*, 15 July 2008.
[106] See International Committee of the Red Cross, "Colombia: ICRC Underlines Importance of Respect for Red Cross Emblem", News Release 08/129, 16 July 2008; "Betancourt Rescuer Wore Red Cross", *BBC News*, 17 July 2008; "Colombian Soldier Wore Red Cross Logo in Hostage Rescue", *The New York Times*, 17 July 2008.
[107] See International Committee of the Red Cross, "Colombia: ICRC Deplores Improper Use of Red Cross Emblem", News Release 08/139, 6 August 2008.

Under both conventional[108] and customary[109] law, misusing the Red Cross emblem has long been the subject of an unqualified prohibition. At stake here is the humanitarian demand that Red Cross workers be able to discharge their functions without hindrance or suspicion. It does not matter whether misusing the emblem can simultaneously be consistent with humanity's other indifferent permissions. It might be felt that the misuse in this particular case was harmless – if also conducive to the success of the operation's humanitarian ends[110] – and, consequently, that Colombia was at liberty to resort to it.[111] One might therefore be tempted to argue that the use of the Red Cross emblem in Operation Jaque should be deemed lawful, all things considered, despite its unqualified prohibition under positive international humanitarian law. These arguments would be immaterial because the rule's framers have extinguished such counter-liberties and excluded *de novo* pleas emanating from them.

2.3.3 "Mercy Killing"

The next three examples are even more contentious, as it becomes increasingly less clear whether the conduct in question can be deemed humane to begin with. It is unclear whether humanity in its normative sense permits or even tolerates it. The fact remains, however, that humanity's indifferent permission has been invoked by those seeking to release themselves from their unqualified IHL obligation on the matter.

On 21 May 2004, Captain Rogelio "Roger" Maynulet killed Karim Hassan in central Iraq.[112] While on patrol in Kufa, Maynulet's tank company chased and fired at a car thought to be carrying militants loyal to Muqtada Sadr. One passenger was killed immediately, while Hassan, who was driving the car, was badly injured. Maynulet then fatally shot Hassan. Maynulet was tried before a U.S. court-martial sitting in Germany. The prosecution alleged that Maynulet, who had been trained in first aid, "played God" by "prescrib[ing] two bullets. He did not call his superiors for guidance, didn't consult with his medic". Maynulet reportedly told a witness that Hassan "had half his brain hanging out, there was nothing more that could be done for him", and argued in court that he shot the man to "put him out of his misery". The court-martial found Maynulet guilty of assault with intent to commit manslaughter.

When viewed in the manner most favourable to Maynulet, the evidence might reveal a situation where hastening Hassan's death without additional pain was not inhumane or, in any event, no more inhumane than leaving him for dead without medical intervention such as the administration of morphine.

The idea that humanity should permit certain instances of mercy killing is not new. Henry Sidgwick noted:

> In the Declaration of St. Petersburg, in 1868, the European powers laid down that it would be "contrary to the laws of humanity to employ arms which render death inevitable." I do not under-

[108] See Articles 39, 44, 53, 54, Geneva Convention I; Articles 41, 44, 45, Geneva Convention II; Article 38(1), Additional Protocol I; Article 12, Additional Protocol II; Articles 24, 28, 1929 Wounded and Sick Convention; Article 23(f), 1907 Hague Regulations; Articles 27, 28, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906); Article 23(f), 1899 Hague Regulations.
[109] See Henckaerts and Doswald-Beck, *supra* note 79, at 207-209.
[110] Ingrid Betancourt publicly praised the operation's bloodless success. See, e.g., "Betancourt Rescue in Colombia: Israeli Connection", *Ynet*, 4 July 2008.
[111] Operation Jaque did, however, involve what might constitute a perfidious capture. See John C. Dehn, "Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction", 6 *Journal of International Criminal Justice* 627 (2008), at 632-633, 644. See also Dinstein, *Conduct of Hostilities*, *supra* note 13, at 229. Perfidy can arguably be *contra* humanity in general, if confidence in the rules protecting victims, relief personnel, and the like, were to be eroded. See U.K. Ministry of Defence, *supra* note 14, at 60; Dehn, *supra* note 111, at 632-633.
[112] See "U.S. Army Captain Is Found Guilty in Shooting Death of Wounded Iraqi", *Stars and Stripes*, 31 March 2005; "US Captain Guilty of Iraq Killing", *BBC News*, 31 March 2005.

> stand the principle on which this is laid down, since death is the most effectual kind of disablement; and if the process that made it inevitable also made dying more rapid, without making it more painful, the sufferings of a battlefield would be materially diminished.[113]

One senses a subtle misconstrual here. Of concern to the St. Petersburg Declaration was, *inter alia*, an act of the kind "making the death of already disabled men inevitable".[114] Sidgwick instead considered "making the death that is already inevitable more rapid and without increased pain". The position he apparently asserted is nevertheless sufficiently clear. If death is already inevitable – for example, because the person in question is mortally wounded and no medical services would be available in time – , then hastening his or her death without aggravating pain might be humane in certain circumstances. Doing so in the right circumstances would or should be indifferently permitted by humanity.

Such logic is unconvincing as a ground for seeking a release from the unqualified IHL prohibition against killing persons placed *hors de combat*.[115] Sidgwick's rejoinder, insofar as it can be understood as being directed at this prohibition, rather than (misguidedly) at the St. Petersburg Declaration, mirrors humanity's indifferent counter-liberty that is accounted for and extinguished by the rule in question. Hassan's killing was a clear breach of that prohibition.

2.3.4 Forcibly Preventing Civilians from Leaving Besieged Localities

In 1941, the German forces besieging Leningrad were ordered to prevent civilians from leaving the city by firing upon them.[116] Military Tribunal V, which tried Field Marshall Wilhelm von Leeb, noted in its judgment that the German artillery did fire upon civilian residents of Leningrad who were attempting to flee the siege.[117]

It was once considered lawful for the besieging party to deny exit to civilians trapped in the besieged locality.[118] Today, there is an unqualified IHL prohibition against starving civilians as a method of warfare.[119] *A fortiori*, it is unqualifiedly prohibited to prevent civilians from leaving besieged localities or from receiving humanitarian relief.[120] Sean Watts explains:

> In light of the aforementioned prohibition on starvation of civilian populations, it seems clear that neither a besieging nor a besieged force may compel civilians to remain in a besieged area that

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[113] Henry Sidgwick, *The Elements of Politics* (1891), at 255 n.1; see also Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970), at 36.

[114] See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (11 December 1868).

[115] See Article 41, Additional Protocol I.

[116] See, e.g., "Letter of Transmittal and, 'Reichenau Order', of 10 October 1941, Distributed by XXVIII Army Corps of the 18th Army, Commanded by Defendant von Kuechler", in *United States of America v. Wilhelm von Leeb et al.*, 10 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1951) 1211, at 1212.

[117] *United States of America v. Wilhelm von Leeb et al.*, *Judgment*, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950) 462, at 563.

[118] See Article 18, Instructions for the Government of Armies of the United States in the Field (24 April 1863); Roxburgh (ed.), *supra* note 16, at 219; *High Command*, at 563 (citing Morris Greenspan, *The Modern Law of Land Warfare* (1959), at 350-351; Charles Cheney Hyde, 3 *International Law Chiefly as Interpreted and Applied by the United States* 2d rev. ed. (1945), at 1802-1803); Department of the Army, *The Law of Land Warfare* (1956), at 20.

[119] Of interest here is this unqualified ban during siege. We are not concerned with Article 54(5) of Additional Protocol I, which exceptionally authorises scorching earth even if it also entails starving civilians where such a tactic is "required by imperative military necessity". See Article 54(5), Additional Protocol I.

[120] See Article 70(1), Additional Protocol I. See also Charles A. Allen, "Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law", 19 *Georgia Journal of International and Comparative Law* 1 (1989); Sean Watts, "Under Siege: International Humanitarian Law and Security Council Practice Concerning Urban Siege Operations", *Harvard Law School Brookings Project on Law and Security: Counterterrorism and Humanitarian Engagement Project* (2014), at 70; U.K. Ministry of Defence, *supra* note 14, at 87-88, 220-221. But see Yoram Dinstein, "The Right to Humanitarian Assistance", 53 *Naval War College Review* 77 (2000), at 84.

> lacks adequate food and water … At a minimum, Parties engaged in siege are obliged to arrange for removal of starving civilian populations from besieged areas to the extent they are unable or unwilling to supply them with adequate food and water in the besieged area.[121]

This ban accounts for, and sets aside, any counter-liberty that may otherwise emanate from indifferent considerations. The rule precludes all *de novo* indifference pleas that purport to except, justify or excuse specific instances of forcibly preventing civilians from fleeing a besieged locality.[122]

Traditional justifications for this tactic would run as follows.[123] The purpose of a siege is to compel the surrender of an opponent holed up in a locality. Sieges involve, among other things, cutting off supplies and encouraging those trapped inside to exert pressure upon the adversary to surrender. Surrender would arguably be hastened if civilians were denied exit and made increasingly desperate.[124] Shooting fleeing civilians to force them back into the besieged locality may therefore be deemed consistent with military necessity for the besieging party.[125] This is admittedly a tactic that involves brutalising the locality's civilian residents. All things considered, however, forcibly denying civilians exit should be deemed no more brutal than allowing humanitarian relief and/or civilian flights, because the former means shortening the sieges whereas the latter means lengthening it.

Even if, *arguendo*, it were conceded that forcibly trapping civilians in a siege might be considered humane in the sense just described, and even if, *arguendo*, it were conceded that humanity might indifferently permit such conduct, *de novo* pleas on this ground would still be inadmissible in support of specific instances where the tactic is used.

Furthermore, the act's alleged consistency with humanity is itself suspect. One may agree that shorter sieges would generally be more humane than longer ones, all else being equal.[126] Similarly, one may agree that sieges that do not involve the forcible denial of civilian flight or humanitarian relief (let us call such sieges "open" sieges) would be considered more humane than those involving such denial ("sealed" sieges), all else being equal. From these stipulations, one may derive four types of sieges, each having one of the following characteristics: (a) short and sealed; (b) short and open; (c) long and sealed; and (d) long and open. Identifying these siege types enables us to group them into six sets of comparisons for the purpose of assessing their degrees of humanity. The six sets are:

Comparison 1	Short and sealed v. short and open;
Comparison 2	Long and sealed v. long and open;
Comparison 3	Sealed and short v. sealed and long;
Comparison 4	Open and short v. open and long;
Comparison 5	Short and open v. long and sealed; and
Comparison 6	Short and sealed v. long and open.

Holding the shortness of the two siege types equal (Comparison 1) yields the result that one type that is open would be deemed more humane than the other that is sealed. Of the two siege types

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[121] Watts, *supra* note 120, at 16. See also Eyal Benvenisti, "Human Dignity in Combat: The Duty to Spare Enemy Civilians", 39 *Israel Law Review* 81 (2006), at 101-102; Office of General Counsel, *supra* note 13, at 290-291; United Nations Security Council UNSC Resolution 2139 (2014) (22 February 2014), paras. 4-6.

[122] See Yoram Dinstein, "Siege Warfare and the Starvation of Civilians", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven* (1991) 145, at 151: "Compelling humanitarian considerations demands that, if civilians attempt to evacuate an invested town, they must not be precluded by the besieging force from crossing the lines".

[123] See Roxburgh (ed.), *supra* note 16, at 218-219; *High Command*, at 563 (citing Hyde, *supra* note 117, at 1802-1803); Greenspan, *supra* note 118, at 350-351.

[124] This is a perception doubtless reinforced by the historical fact that the defenders of a besieged locality were held responsible for the plight of its residents. See Matthew Waxman, "Siegecraft and Surrender: The Law and Strategy of Cities as Targets", 39 *Virginia Journal of International Law* 353 (1998), at 363-364, 397-398.

[125] See, e.g., Dinstein, "Siege Warfare", *supra* note 122, at 146.

[126] Waxman describes how offers of surrender immunities and threats of post-assault sacking (in the event that the besieged declines that offer) were combined in medieval European siege warfare to great effect. See Waxman, *supra* note 124, at 355-366.

that are comparably long (Comparison 2), it is clear that the type that is open would be more humane than the type that is sealed. If sealed (Comparison 3), the short siege type would tend to generate greater humanity than the long type. For those inside a locality under open siege (Comparison 4), it would be more humane if the siege lasted shorter rather than longer. These four comparisons merely reiterate and confirm our initial stipulations.

If we were to compare one siege type that is short and open *vis-à-vis* another siege type that is long and sealed (Comparison 5), the former would clearly be more humane than the latter. When comparing a siege type that is short and sealed on the one hand, and a siege type that is long and open on the other (Comparison 6), however, we may not so readily come to any conclusion as to which one would tend to be more humane than the other.

The traditional argument for forcibly preventing civilian flights and denying humanitarian relief revolves around a particular take on Comparison 6. On this view, a siege type that is sealed yet short would yield greater net humanity than a siege type that is open yet long. The veracity of this claim rests on three assumptions. First, sealed sieges tend to be short.[127] Second, opening sieges typically lengthens them. Third, shortening sieges would bring greater net humanity than reducing their brutality, all things considered. However, none of these assumptions is self-evidently true, or even intuitively sound. The greater net humanity claimed is undermined by the eminent possibility that sealed sieges can be long, open sieges can be short, and reducing brutality in a siege may very well bring greater net humanity than shortening it. Moreover, sealing or opening a siege is up to the besieging party[128] – also the party more likely to assert the lawfulness of sealed sieges – but shortening or lengthening it is not.[129]

2.3.5 Implementing von Moltke's "Greatest Kindness"

Melmuth von Moltke's observation that "[t]he greatest kindness in war is to bring it to a speedy conclusion"[130] is rejected for the same reason. In an 1880 letter, he argued:

> It should be allowable with that view to employ all methods save those which are absolutely objectionable ('dazu müssen alle nicht geradezu verwerfliche Mittel freistehen'). I can by no means profess agreement with the Declaration of St. Petersburg when it asserts that 'the weakening of the military forces of the enemy' is the only lawful procedure in war. No, you must attack all the resources of the enemy's Government: its finances, its railways, its stores, and even its prestige. Thus energetically, and yet with a moderation previously unknown, was the late war against France conducted. The issue of the campaign was decided in two months, and the fighting did not become embittered till a revolutionary Government, unfortunately for the country, prolonged the war for four more months.[131]

In von Moltke's view, "you *must* attack all the resources of the enemy's Government". His real assertion would best be understood as that according to which "you *must be permitted* to attack all the resources of the enemy's Government".

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[127] See, e.g., George Alfred Mudge, "Starvation as a Means of Warfare", 4 *International Lawyer* 228 (1970), at 266-268; Esbjörn Rosenblad, "Starvation as a Method of Warfare – Conditions for Regulation by Convention", 7 *International Lawyer* 252 (1973), at 256.

[128] See Article 70, Additional Protocol I; Watts' discussion of Security Council Resolution 2139 (Watts, *supra* note 120, at 20-22).

[129] As the Duke of Alva was to learn towards the end of his increasingly frustrated campaign in the Low Countries. See Waxman, *supra* note 124, at 366-368.

[130] "Letter from von Moltke to Bluntschli", in Thomas Erskine Holland, *Letters to "The Times" upon War and Neutrality (1881-1920)* 3d ed. (1921) 23, at 25.

[131] *Ibid*.

Similar sentiments have been expressed elsewhere. Article 29 of the Lieber Code notes: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief".[132] Garner quoted Paul von Hindenburg as saying:

> [o]ne cannot ... make war in a sentimental fashion. The more pitiless the conduct of the war, the more humane it is in reality, for it will run its course all the sooner. The war which of all wars is and must be the most humane is that which leads to peace with as little delay as possible.[133]

Similarly, in Geoffrey Best's words: "Short wars, [Julius von Hartmann, a Prussian-born general] said – it was a common refrain in those years – were the most humane; whatever apparent severity finished a war quickly might in the long run appear to be the superior humanity".[134]

More recently, Jeremy Rabkin observed: "Perhaps, for example, lives would be saved, overall, by pursuing a speedy victory, even if doing so risks more casualties in the short run. Strict adherence to rules, if it prolonged the conflict and substantially increased the casualty count – let alone if it inhibited a democracy's war effort enough to give victory to a brutal tyrant – might then be judged *less* humane".[135]

According to the St. Petersburg Declaration, it is illegitimate to seek any objects in war that are more or other than the weakening of the military force of the enemy.[136] Von Moltke's "greatest kindness" purports to show, first, that seeking these other objects is capable of being humane – or, at any rate, no less humane than limiting oneself to the St. Petersburg Declaration's admonitions. Second, in specific cases where seeking objects other than the weakening of the military force of the enemy is indeed humane in the sense just described, "it should be allowable" to do so.

Even if this were all true, implementing von Moltke's "greatest kindness" does nothing to justify deviations from unqualified IHL rules. Moreover, the very claim underlying this argument – namely, that with respect to a choice between a war that is short yet brutal and a war that is long yet humane, it is the former that embodies greater kindness – is questionable. As is the case with sieges, the defensibility of von Moltke's claim rests on the truth of three assumptions. First, brutal wars tend to be short. Second, humane wars tend to be long. Third, shortening wars tends to bring greater net humanity than reducing brutality in them.[137] These assumptions are all eminently contestable. Brutalising wars may not shorten them. Nor is it necessarily true that humanising wars lengthens them. Reducing brutality in wars may very well bring greater net humanity than shortening them.

Moreover, while it is possible for one warring party to control the brutality or humanity of its own actions, it is not possible for that party alone to control the length of its war. Being subjected to brutality may not undermine one's will or ability to continue fighting; in fact, it may have the opposite effect on that person's morale. During World War II, for instance, the news of the Malmédy massacre[138] "undoubtedly stiffened the will of the American combatants".[139] According to Hugh M. Cole, a military historian, "[t]here were American commanders who orally expressed the opinion that all

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[132] See Article 29, Lieber Code. See also Brandt, *supra* note 69, at 160-161; Walzer, *supra* note 60, at 263-268; Waxman, *supra* note 124, at 366.

[133] Garner, *supra* note 67, at 281-282, esp. 281 n.4.

[134] Geoffrey Best, *Humanity in Warfare* (1980), at 146. Footnote omitted. See also *ibid.*, at 146 n.23: "This maxim was no doubt popularized by its appearance in Article 29 of Lieber's Code: 'The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.' That this was believed only by the 'less cultured and less educated military men' (as Gustave Moynier had alleged) was rather indignantly denied by Britain's leading military expert on the Geneva Conventions, Colonel W. G. Macpherson, 1910, p. 607: 'It is an opinion held by some of the most humane and thoughtful officers in the armies of all nations'; also by the Kaiser, who apparently thought 'methods of terrorism' ('alone capable of affecting a people as degenerate as the French') would get the war over in two months: see R. H. Minear, *Victors' Justice*, Princeton, 1971, p. 100".

[135] Jeremy Rabkin, "The Strange Pretensions of Contemporary Humanitarian Law", in Christopher A. Ford and Amichai Cohen (eds.), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (2012) 41, at 56-57.

[136] See St. Petersburg Declaration.

[137] See, e.g., Best, *Humanity*, *supra* note 134, at 145-146.

[138] See also Part I, Chapter 3 above.

[139] See, e.g., Hugh M. Cole, *United States Army in World War II – The European Theater of Operations – The Ardennes: Battle of the Bulge* (1965), at 261.

SS troops should be killed on sight and there is some indication that in isolated cases express orders for this were given".[140]

3. Admitting *de novo* Non-Indifference Pleas

The inevitable conflict thesis and the joint satisfaction thesis agree that IHL rules exclude all *de novo* military necessity pleas and *de novo* indifferent humanity pleas. We will now consider where the two theses stand on the admissibility of *de novo* pleas that emanate from humanitarian demands and condemnations.

The inevitable conflict thesis asserts that these latter pleas are also inadmissible *vis-à-vis* unqualified IHL rules. That is so, because their framers have accounted for all contrary considerations of humanity and elected to extinguish all of them. The joint satisfaction thesis finds this assertion unpersuasive. As will be seen below, it is not inconceivable that those kinds of humanitarian considerations that generate imperatives may survive the process of norm-creation through which IHL framers posit unqualified rules. Consequently, these considerations may function as residual lawfulness-modifiers over and above such rules.

Our discussion has so far concerned itself with how IHL norm-creation accounts for contradictions between imperatives and counter-liberties. It does not show, in one way or another, whether IHL norm-creation accounts for genuine norm conflicts. What happens to non-indifferent considerations that generate counter-imperatives? Is it possible that they survive the process of IHL norm-creation? This thesis does not investigate such a possibility in detail. But we can develop some good ideas about what the consequences of their survival may entail. One plausible consequence is that they may function as layers of lawfulness modification in addition to positive international humanitarian law.

3.1 Counter-*Kriegsräson*

Before proceeding further, however, we need to dispose of one theory that purports to present military necessity in a non-indifferent light.

Let us call this notion "counter-*Kriegsräson*". This is a variant of *Kriegsräson*, because it is about military necessity's residual effects in relation to positive IHL rules. This is a "counter" doctrine, because the alleged residual effects are restrictive rather than permissive. Counter-*Kriegsräson* is predicated on two perceptions of normative military necessity. First, some aspects of military necessity survive the process of IHL norm-creation and consequently act as free-floating lawfulness modifiers. In other words, positive international humanitarian law does *not* fully account for military necessity. Second, those aspects of military necessity that remain unaccounted for are *not* normatively indifferent. In the juridical context, they function as additional layers of normative restraint over conduct that is otherwise in conformity with positive international humanitarian law.

3.1.1 Lack of Military Necessity as Conclusive Unlawfulness, All Things Considered

As noted earlier, *Kriegsräson* is unacceptable because the framers of unqualified IHL rules have already accounted for military necessity. The vast majority of authorities who readily espouse this line of reasoning inexplicably go on to accept that, over and above positive IHL rules, military necessity outlaws unnecessary acts. The U.S. Naval Commander's Handbook states:

> [The goal of military necessity] is to limit suffering and destruction to that which is necessary to achieve a valid military objective. Thus it prohibits the use of any kind or degree of force not

[140] *Ibid*., at 264. Footnote omitted.

> required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources.[141]

This position also finds support among a number of commentators.[142] Of those, Nils Melzer is perhaps the most vocal and articulate.[143] His views on the matter appear to have evolved primarily in connection with the so-called "capture rather than kill" debate, a long-running IHL theme that has regained currency in recent years.

In 2008, Melzer asserted that "the principle of military necessity reduces the sum total of lawful military action from that which positive IHL does not prohibit *in abstracto* to that which is actually required *in concreto*".[144] The ICRC's 2009 *Interpretive Guidance* on the notion of direct participation in hostilities, of which Melzer was the principal author, registers a subtle yet significant modification to this formulation:

> *In conjunction*, the principles of military necessity *and of humanity* reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.[145]

Melzer further retreated from his initial position when he subsequently noted: "In conjunction, the principles of military necessity and of humanity *could be said* to reduce the sum total of permissible military action".[146]

As will be seen below, adding the principle of humanity to the mix broadens Melzer's argumentative basis. For the time being, however, let us concentrate on how he invokes the principle

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[141] See Department of the Navy, Office of the Chief of Naval Operations, et al., *The Commander's Handbook on the Law of Naval Operations* (2007), at 5-2. See also U.K. Ministry of Defence, *supra* note 14, at 22: "[T]he use of force which is not necessary is unlawful". However, this formulation is curious and, in honesty, quite mysterious. The British Manual continues to state that unnecessary use of force is unlawful "since it involves wanton killing or destruction". It is far from clear whether unnecessary use of force always involves wanton killing or destruction. According to Nils Melzer, Colombia's Manual of Operational Law says the same thing. See Nils Melzer, "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities", 42 *New York University Journal of International Law and Policy* 831 (2010), at 910.

[142] See, e.g., Schwarzenberger, *supra* note 60, at 135; Taylor, *supra* note 113, at 34; Federic L. Borch, "Targeting After Kosovo: Has the Law Changed for Strike Planners?", 56 *Naval War College Review* 64 (Spring 2003), 66; Greenwood, "Historical Development", *supra* note 61, at 36-37, 38; Henri Meyrowitz, "The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977", 299 *International Review of the Red Cross* 98 (1994), at 107; Henry Shue, "Civilian Protection and Force Protection", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 135, at 136-137; Gabriella Venturini, "Necessity in the Law of Armed Conflict and in International Criminal Law", 41 *Netherlands Yearbook of International Law* 45 (2010), at 48-50; Geoffrey S. Corn et al., *The Law of Armed Conflict: An Operational Approach* (2012), at 115-117; Mary Ellen O'Connell, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 1, at 37; Jens D. Ohlin, "The Duty to Capture", 97 *Minnesota Law Review* 1268 (2013), at 1298-1306; Yves Sandoz, "Land Warfare", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 91, at 93; Lawrence Hill-Cawthorne, "The Role of Necessity in International Humanitarian and Human Rights Law", 47 *Israel Law Review* 225 (2014), at 231; Yishai Beer, "Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity", 26 *European Journal of International Law* 801 (2015).

[143] Nils Melzer, "Targeted Killing or Less Harmful Means? – Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity", 9 *Year Book of International Humanitarian Law* 87 (2006), at 108-113.

[144] Melzer, *Targeted Killing*, *supra* note 9, at 286.

[145] See International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009), at 79. Emphasis added; footnote omitted.

[146] Nils Melzer, "Targeted Killings in Operational Law Perspective", in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010) 277, at 300. Emphasis added; footnote omitted. See also Nils Melzer, "The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law", in Christian Tomuschat (ed.), *The Right to Life* (2010) 151, at 162; Nils Melzer, "The Principle of Distinction between Civilians and Combatants", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 296, at 330.

of military necessity. Melzer's case is that, even on its own, this latter principle does, or could be said to, reduce that sum total:

> a direct attack against an otherwise legitimate military target constitutes a violation of IHL if that attack is not required for the submission of the enemy with a minimum expenditure of time, life and physical resources … [T]he various provisions of IHL which permit a particular conduct in armed conflict constitute the result of "equations" which already include the "necessity-factor." Since it is precisely this necessity-factor which makes that conduct lawful despite its deviation from the more restrictive rules applicable in peace time, the loss or absence of this factor necessarily changes the equation to the effect that the said conduct becomes unlawful … The restrictive aspect of military necessity has significant practical consequences because it requires at least a basic assessment of military necessity in each case, and not only where positive IHL expressly so demands. While positive prohibitions may restrict the extent to which military necessity can justify military action, the absence of a prohibition does not liberate parties to the conflict from the fundamental constraints imposed by the principle of military necessity.[147]

Melzer refers to "particular conduct" without further qualification, rather than particular conduct *that is evil*. It would appear that he asks himself whether materially unnecessary *per se* means unlawful and *not* – to be abundantly clear – whether materially unnecessary *evil* means unlawful.

In its strictly material sense, military necessity separates that belligerent conduct which is conducive to the accomplishment of its objective from that which is not.[148] It is also true that the act's material necessity or non-necessity involves its "basic assessment … in each case".[149] As demonstrated in Part II, Chapter 5, however, an act's lack of material military necessity does not *per se* mean illegitimacy; nor does this lack offer IHL framers reason to restrict or prohibit the act.[150] Thus, the mystery still remains: How, in Melzer's view, does the proposition "an act is *materially unnecessary* in view of its basic military necessity assessment" transform itself into the proposition "an act is *unlawful* in view of its basic military necessity assessment"?

Melzer's arguments open three lines of inquiry. First, he asserts that positive IHL rules are merely necessity-based derogations in armed conflict from their more stringent counterparts in peace time. Second, Melzer puts forward a classic counter-*Kriegsräson*. Third, he defends Pictet's duty to "capture rather than kill".

3.1.2 Positive IHL Rules as Necessity-Based Derogations from Peacetime Rules

Melzer's passage quoted above speaks of the "more restrictive rules applicable in peace time" from which "this necessity-factor … makes [belligerent] conduct lawful despite its deviation".[151] In essence, he treats every belligerent act as a deviation from its peacetime counterpart, and therefore every positive IHL rule as a necessity-driven derogation clause on account of armed conflict from its "more restrictive" counterpart applicable in times of peace. From the latter rule, only that deviant instance which proves militarily necessary would, on an individual basis, be eligible for derogation.

This is a highly idiosyncratic construal of international humanitarian law. One would rather think that, in principle, international humanitarian law constitutes a stand-alone – albeit admittedly nonexclusive – normative framework applicable in armed conflict by which a given belligerent act's compliance *with its own rules* can be intelligibly assessed.

Even if an act lacking in material military necessity did expose itself to those more restrictive peacetime rules and, even if the rules did render such an act unlawful, it is these latter rules, *not* the absence of material military necessity, that would make it so. By Melzer's own admission, with this

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[147] Melzer, *Targeted Killing*, *supra* note 9, at 287. Footnotes omitted.
[148] See Part I, Chapter 2 above.
[149] See Melzer, *Targeted Killing*, *supra* note 9, at 287. See also Part I, Chapter 2 above.
[150] See Part II, Chapter 4 above.
[151] Melzer, *Targeted Killing*, *supra* note 9, at 287.

"necessity-factor" now removed, the act would be assessed by reference to the more restrictive peacetime rules.[152] Puzzlingly, however, he continues to insist that "a direct attack against an otherwise legitimate military target constitutes *a violation of IHL* if that attack is not required for the submission of the enemy with a minimum expenditure of time, life and physical resources".[153] The position implied here is therefore *not* that of another, epistemologically distinct body of law (such as international human rights law) functioning as *lex specialis* relative to international humanitarian law. It is rather that conduct that is otherwise lawful according to positive international humanitarian law becomes unlawful *according to the same body of law*, all things considered, if the conduct is lacking in military necessity and thus becomes "deviant from the more restrictive rules applicable in peace time".[154]

It would appear that, even according to Melzer's theory, a "loss or absence"[155] of material military necessity merely reverts the act in question to the more restrictive peacetime rules. This loss or absence itself seems incapable of constituting the restrictive or prohibitive norm needed to establish the act's unlawfulness.

3.1.3 Purported Survival of Elements of Military Necessity through IHL Norm-Creation

Melzer's inability to substantiate military necessity as a restrictive notion also invalidates his assertion that military necessity considerations somehow survive IHL norm-creation. He posits:

> [C]ontrary to what powerful States and many authors appear to believe, the fact that IHL does not prohibit direct attacks against combatants does not give rise to a legal entitlement to kill combatants at any time and any place so long as they are not *hors de combat* within the meaning of Article 41(2) AP I [Additional Protocol I of 1977]. Strictly speaking, although the absence of such a prohibition is undisputedly intentional, it constitutes no more than a strong presumption that, in a situation of armed conflict, it will generally be militarily necessary to kill, injure, or capture combatants of the opposing armed forces in order to bring about the submission of the adversary with a minimum expenditure of time, life and physical resources. It does not permit the senseless slaughter of combatants where there manifestly is no military necessity to do so, for example where a group of defenseless soldiers has not had the occasion to surrender, but could clearly be captured *without additional risk to the operating forces*.[156]

According to Melzer, the absence of an express IHL prohibition against direct attacks on eligible enemy combatants is "no more than a strong presumption that … it will generally be militarily necessary to kill, injure, or capture" them in order to compel the adversary's submission efficiently.[157] In other words, the fact that international humanitarian law takes military necessity into consideration does not leave the belligerent at liberty to do what is, in fact, militarily unnecessary. Where rules are formulated without reference to military necessity, it merely means that whatever these rules authorise is deemed *generally* militarily necessary. In the event of a collision between an act being militarily *un*necessary, and it being otherwise lawful according to positive IHL rules, the former "wrongs" or "vitiates" the latter.[158] Where the military necessity for particular belligerent conduct is not, or no longer, present, the law, all things considered, prohibits it.[159] This is so, because the idea that a given act's lack of military necessity should be a reason for its prohibition has survived IHL norm-creation.

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[152] *Ibid.*, at 287.
[153] *Ibid.* Emphasis added.
[154] *Ibid.*
[155] *Ibid*.
[156] *Ibid.*, at 288. Footnotes omitted; emphasis in original.
[157] *Ibid.*
[158] *Ibid.*, at 289-290.
[159] *Ibid.*, at 297.

This line of reasoning is identical in structure, if not in direction, to that used in *Kriegsräson*.[160] Since military necessity is normatively indifferent, it does not survive the process through which the framers posit unqualified IHL rules. Even if some aspects of military necessity did survive the process (which it did not), the notion's normative indifference means that these aspects would contain nothing restrictive or prohibitive. An act's lack of material military necessity does not wrong or vitiate its lawfulness if it complies with positive international humanitarian law, just as an act's consistency with such necessity does not right or repair its unlawfulness if it flouts an unqualified IHL rule. We have no reason to accept *Kriegsräson* or counter-*Kriegsräson*.[161]

3.1.4 "Capture Rather Than Kill"

Pictet famously observed: "If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil".[162] Could Melzer be trying to assert the existence of a similar duty? When a choice is possible between disabling eligible enemy combatants via two alternative means, one involving less evil than the other, is the belligerent duty-bound to choose the less evil alternative?

Elsewhere, this author argued that Melzer's least injurious means theory would fail as a species of counter-*Kriegsräson*.[163] That, it is submitted here, still remains the case as the foregoing discussion demonstrates. One major trouble is the fact that Melzer couches most of his arguments around what he sees as restrictive aspects of military necessity. This thesis shows that military necessity is the wrong heading under which to pursue the "capture rather than kill" debate.

Once we look beneath the surface, it becomes apparent that the matter may be considered more meaningfully under the heading of humanity.[164] Melzer himself implies as much:

> In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, *it would defy basic notions of humanity* to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.[165]

As an element of humanity, there are at least four distinct possibilities. One concerns what Melzer calls "the more restrictive rules applicable in peace time".[166] *If* it were agreed that these rules do impose such a restraint during military operations – whatever positive IHL rules say about the

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[160] See above.

[161] See, e.g., Dapo Akande, "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities", 59 *International and Comparative Law Quarterly* 180 (2010), at 192; Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", 50 *Virginia Journal of International Law* 795 (2010), at 835; Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis", 1 *Harvard National Security Journal* 5 (2010), at 41-42.

[162] See Pictet, *Development and Principles*, *supra* note 85, at 75-76. See also International Committee of the Red Cross, *Interpretive Guidance*, *supra* note 145, at 82 n. 221; Melzer, *Targeted Killing*, *supra* note 9, at 289; Melzer, "Targeted Killing or Less Harmful Means?", *supra* note 143, at 108-113. On the rejection of Pictet's assertion, see, e.g., Frits Kalshoven, "The Soldier and His Golf Clubs", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 359, at 368-375; W. Hays Parks, "Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect", 42 *New York University Journal of International Law and Policy* 769 (2009-2010), at 785-787, 799; Schmitt, "Military Necessity and Humanity", *supra* note 161, at 835.

[163] See Nobuo Hayashi, "Contextualizing Military Necessity", 27 *Emory International Law Review* 189 (2013), at 268-277.

[164] See also Parks, *supra* note 162, at 785 (citing Jean S. Pictet, *Humanitarian Law and the Protection of War Victims* (1975), at 32).

[165] See International Committee of the Red Cross, *Interpretive Guidance*, *supra* note 145, at 82. Emphasis added. See also Melzer, "The ICRC's Clarification Process", *supra* note 146, at 162.

[166] Melzer, *Targeted Killing*, *supra* note 9, at 287.

conduct in question[167] – , *then* "capture rather than kill" might indeed come to bind belligerents.[168] The interplay between international humanitarian law and international human rights law in times of armed conflict, a debate with a long history that has become lively again recently,[169] may be relevant in this regard. Similarly, some general principles of public international law may impose restrictions on belligerent conduct independently of international humanitarian law.[170] Only one difficulty remains: It does *not* follow from this possibility that the duty in question would be a duty of international humanitarian law.

A second possibility is where it is shown that the peacetime restraint enters the *corpus juris* of positive international humanitarian law through connecting clauses such as the Martens Clause. Here too, we have already touched upon some of the problems associated with the clause's interpretation.[171] A third possibility exists if, or when, the framers posit a new IHL rule imposing a duty upon belligerents to "capture rather than kill" enemy combatants. Interestingly, Michael N. Schmitt's main complaint about the judicial activism of international criminal tribunals in IHL development is not the law's new content *per se*, but judges "supplant[ing] states in their role as arbiter of the [military necessity-humanity] balance".[172] Conversely, adding a duty to "capture rather than kill" to positive international humanitarian law would not be so problematic as long as it was done by states themselves.

Fourth, it may be asked whether those humanitarian considerations that are *not* normatively indifferent survive IHL norm-creation and operate as extra determinants of a given act's lawfulness. What Melzer calls "basic notions of humanity" may very well belong there. Let us then turn to two variations of such considerations.

3.2 *Humanitätsgebot*[173]?

As noted in Chapter 7, humanitarian demands and condemnations are not normatively indifferent. It is over their treatment in the context of positive international humanitarian law that the joint satisfaction thesis departs most radically from the inevitable conflict thesis. The idea of joint satisfaction leaves open the possibility that non-indifferent considerations may survive the process of norm-creation through which international humanitarian law posits its rules, including, in particular, its unqualified rules. It is possible that this process does not resolve such genuine norm conflicts as these rules may have with contrary imperatives.

Genuine norm conflicts are by no means unique to the international legal regulations of armed conflicts. On the contrary, all sorts of genuine norm conflicts are a fact of life in general. How these conflicts are dealt with varies from one body of positive legal rules to another. If we have reason to believe that norm conflicts remain unresolved, then we also have reason to accept the possibility that

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[167] Whether it is or should be so agreed is an entirely different question.

[168] See, e.g., HCJ 769/02, *Public Committee against Torture in Israel et al. v. The Government of et al.*, 11 December 2005, para. 40.

[169] See, e.g., Louise Doswald-Beck, "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?", 88 *International Review of the Red Cross* 881 (2006); Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law", 293 *International Review of the Red Cross* 94 (1993); Françoise Hampson, "Human Rights Law and International Law: Two Coins or Two Sides of the Same Coin?", in 91 *Bulletin of Human Rights* 46 (1992); Melzer, "Targeted Killings in Operational Law Perspective", *supra* note 146, at 298-299.

[170] See, e.g., Melzer, "Targeted Killings in Operational Law Perspective", *supra* note 146, at 299.

[171] See Part II, Chapter 7 above. With special reference to the clause and belligerent occupation, see Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (2009), at 657-660, 666.

[172] See Schmitt, "Military Necessity and Humanity", *supra* note 161, at 822.

[173] Elsewhere, this author has used various expressions, such as "non-indifferent *Humanitätsräson*" (see Nobuo Hayashi, "Military Necessity as Normative Indifference", 44 *Georgetown Journal of International Law* 675 (2013), at 766) and "affirmative *Humanitätsräson*" (see Nobuo Hayashi, "Basic Principles", in Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (2016)), to convey the same idea.

non-indifferent considerations[174] may operate as additional layers of lawfulness modification for particular acts over and above positive law.

This possibility echoes one tenet of inclusive legal positivism. A given legal system may, though need not, contain a Hartian rule of recognition that requires its would-be rules to conform to substantive moral or ethical norms. This school of thought itself appears ambivalent as to (a) whether a would-be rule's failure to do so would merely result in its invalidity; (b) whether the moral or ethical norm to which it fails to conform would take its place as a valid rule on the matter[175]; or (c) whether the impugned rule would retain its validity but the moral or ethical norms would function as exceptions, justifications or excuses for individual cases of deviation therefrom.

How might this work in relation to positive IHL rules? In Jeff McMahan's view:

> When the morality of war requires what the law forbids, I believe that one must do what morality requires. And those who violate the law for moral reasons ought not, in general, to conceal the violation but ought instead to acknowledge what they have done and cite their moral justification for having done it. In this way, they demonstrate their respect for the law, thereby encouraging a general climate in which even morally motivated violations of the law are exceptional and undertaken only with reluctance. This is important precisely because it is so easy for people to persuade themselves that their own violations of the law are morally necessary.[176]

Since humanitarian imperatives are species of non-indifferent considerations, it is possible that compliance with their demands may be admissible as *de novo* pleas *vis-à-vis* unqualified IHL rules. This points to the potential existence of a *Humanitätsgebot* doctrine (where humanity demands what positive IHL rules prohibit) and a counter-*Humanitätsgebot* doctrine (where humanity condemns what positive IHL rules authorise).

We will consider two representative examples of *Humanitätsgebot*[177]: repatriating or not repatriating POWs after the cessation of hostilities; and interning POWs on land or aboard vessels at sea.

3.2.1 Repatriating v. Not Repatriating POWs after the Cessation of Hostilities

[174] They include what public morals, religious beliefs, justice, fairness, chivalry, honour, and the like, demand or condemn. In connection with honour, for example, see Hugo Grotius, 2 *De Jure Belli Ac Pacis Libri Tres* (James Brown Scott ed., Francis W. Kelsey trans., 1925), at 716.

[175] See generally Matthew H. Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (1999); Matthew H. Kramer, *Where Law and Morality Meet* (2004); W.J. Waluchow, *Inclusive Legal Positivism* (1994).

[176] McMahan, "Morality of War", *supra* note 57, at 39. McMahan's solution might be contrasted with John Finnis'. One interesting aspect of Finnis' natural law theory is its assertion that even some iniquitous rules of law may have to be obeyed if the legal system is itself legitimate on the whole. See John Finnis, *Natural Law and Natural Rights* (1980), at 361-362, 365. Arguably, the iniquitousness of a legal rule as understood by Finnis may include not only the conduct it stipulates generally, but also certain specific instances where they become iniquitous by virtue of the particular circumstances surrounding them. It would follow that, where a positive legal rule unqualifiedly forbids an act, and yet refraining from that act in a specific situation happens to be less humane than performing it, and where humanity demands its performance in that particular situation, Finnis would still argue that one should refrain from it.

[177] Admittedly, there may be further examples that this chapter does not examine. Thus, in certain "transformative" types of belligerent occupation, a potentially insoluble norm conflict may arise between Article 43 of the 1907 Hague Regulations and Article 64 of Geneva Convention IV requiring the Occupying Power to preserve the local law in force (such as Sharia law), on the one hand, and certain human rights obligations by which the Occupying Power is bound, on the other. See Gregory H. Fox, *Humanitarian Occupation* (2008), at 233-272; Marko Milanović, "Norm Conflicts, International Humanitarian Law, and Human Rights Law", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 95, at 121-123; Philip Spoerri, "The Law of Occupation", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 182, at 192-198. Others, such as Dinstein, do not appear convinced by such a construal, if read in conjunction with the rules contained in Article 27 of Geneva Convention IV. See Yoram Dinstein, *The International Law of Belligerent Occupation* (2009), at 113.

L.B. Schapiro lamented that the long history of not repatriating certain categories of POWs (such as deserters[178]) experienced an unfortunate turn at the 1899 Hague Peace Conference:

> At The Hague, in the laudable attempt to achieve the humane object of ensuring repatriation without the delay or hindrance occasioned by the necessity of a special agreement, the equally humane requirement that the unwilling prisoner should not be repatriated, at any rate without some guarantee for his safety where he had compromised himself in the eyes of his own state, was forgotten.[179]

Nevertheless, the practice of states declining to repatriate POWs against their will, or without some guarantee of their safety, continued well after World War I.[180] According to Schapiro, "the fate of the prisoners of war whom he repatriated after hostilities was, on grounds of humanity, a responsibility of the repatriating belligerent".[181] Some argued that Article 75 of the 1929 POW Convention[182] did not change the situation.[183]

Article 118 of Geneva Convention III stipulates that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities".[184] That this provision creates an unqualified obligation finds support in some scholarly writings[185] as well as its drafting history.[186] Austria proposed, and Israel supported, an amendment that envisaged exceptions to mandatory repatriation, inspired, *inter alia,* by the notion that "[p]risoners of war must have the option of not returning to their country if they so desire".[187] The Soviet Union and the United States objected.[188] The Soviet delegate argued that such a provision "could be used to the detriment of the prisoners themselves and of their country".[189] He also asserted that the Detaining Power might exert undue pressure on POWs, hindering their ability to express themselves "with complete freedom".[190] The proposed amendment was defeated by a "large majority".[191]

This particular episode in the drafting process of Article 118(1) stands in contrast to that of Article 109(3) of the same Convention, which provides that no sick or injured POW who is eligible for repatriation may be repatriated against his or her will during hostilities.[192] This latter provision, proposed by the ICRC and supported by Belgium, New Zealand, Italy, Switzerland, and the Soviet

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[178] On the notion of deserters, see also Marco Sassoli, "The Status, Treatment and Repatriation of Deserters under International Humanitarian Law", *Yearbook/International Institute of Humanitarian Law* 9 (1985).
[179] L.B. Schapiro, "Repatriation of Deserters", 29 *British Yearbook of International Law* 310 (1952), at 319.
[180] *Ibid.*, at 319-322.
[181] *Ibid.*, at 318.
[182] See Article 75, 1929 POW Convention.
[183] See J.A.C. Gutteridge, "The Repatriation of Prisoners of War", 2 *International and Comparative Law Quarterly* 207 (1953), at 209-210. For a brief discussion of the post-1929 state practice offering POWs an option of non-repatriation, see Jan P. Charmatz and Harold M. Wit, "Repatriation of Prisoners of War and the 1949 Geneva Convention", 62 *Yale Law Journal* 391 (1953), at 401-402.
[184] Article 118, Geneva Convention III.
[185] *See* Horst Fischer, "Protection of Prisoners of War", in Fleck (ed.), *The Handbook of International Humanitarian Law*, *supra* note 61, 367, 416.
[186] But see Sassoli, "Status, Treatment and Repatriation", *supra* note 178, at 31-32 (emphasis in original; footnotes omitted): "Although the 1949 Diplomatic Conference almost unanimously rejected the Austrian proposals stating that prisoners of war shall be entitled to apply for their transfer to any other country which is ready to accept them or that at least they must have the option of not returning to their country if they so desire, this rejection is not to be construed as laying down the principle of forcible repatriation; it was meant to prevent prisoners of war from having the *right* to be sent at great expense 'to the other side of the world' and to avoid introducing an escape clause which Detaining Power might use as a pretext to refrain from repatriating all prisoners of war (at the time, some two million World War II prisoners of war who had served in the forces of the Axis Powers were still detained in the Soviet Union)".
[187] See Federal Political Department, 2-A *Final Record*, *supra* note 47, at 462.
[188] See *ibid.*; Pictet (ed.), *Commentary III*, *supra* note 50, at 542-543.
[189] Federal Political Department, 2-A *Final Record*, *supra* note 47, at 324.
[190] *Ibid.*, at 462.
[191] See *ibid*.
[192] See Article 109(3), Geneva Convention III: "No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities".

Union, survived Canadian and British objections.[193] The Red Cross commentary insists that Article 109(3), despite its text to the contrary, covers not only sick or wounded POWs but also able-bodied ones.[194]

It is plain that a situation may arise where a Detaining Power finds itself bound by this unqualified duty to repatriate POWs on the one hand, and a humanitarian demand against their repatriation in certain cases on the other. The entity entitled to the former duty's fulfilment is the state on which the POWs depend. As described in the Red Cross commentary, those who supported the view that Article 118 obligates a Power detaining POWs to repatriate, if need be by force, all the prisoners in its hands "considered that the duties which the Convention laid upon the Detaining Power were duties for which that Power was responsible towards the Power of origin of prisoners of war, but not towards the prisoners themselves".[195]

Humanitarian considerations for non-repatriation require more reflection. Article 118 itself does not appear to entitle the POWs to demand that the Detaining Power refrain from repatriating them. Any humanitarian demands against their repatriation that might exist would therefore be extrinsic to Article 118 itself.[196] It is the advent of international human rights law – together with international refugee law, and particularly its *non-refoulement* principle – that has strengthened the case for humanity demanding non-repatriation in appropriate circumstances.[197]

There is a genuine norm conflict here[198]: on the one hand, an unqualified obligation to repatriate POWs after the cessation of hostilities, owed by the Detaining Power to the state of repatriation; and on the other, a humanitarian demand not to return persons to a place where they may be persecuted or tortured, "owed" by the Detaining Power to the POWs held in its custody.

This dilemma arose in the aftermath of the Korean War.[199] Formally, Article 118 of Geneva Convention III was not binding upon the parties at that time. They nevertheless undertook to abide by the Geneva Conventions or, in any event, by the humanitarian principles underpinning them.[200]

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[193] See Federal Political Department, 2-A *Final Record*, *supra* note 47, at 291, 373, 391; Federal Political Department, 2-B *Final Record of the Diplomatic Conference of Geneva of 1949* (1949), at 312-314. The Swiss delegate pointedly stated that the provision "not only affect[ed] prisoners of war as prisoners, but also as refugees" (Federal Political Department, 2-A *Final Record*, *supra* note 47, at 397). The United Kingdom unsuccessfully argued that "a country should be allowed to decide for itself whether it will give refuge and asylum to a foreigner who has come to that country not by a voluntary act of his own; for instance, when a Detaining Power is satisfied that he has good grounds for staying, but there should not be an obligation on the Detaining Power to keep a prisoner of war who, as the Convention itself says, ought no longer to be a prisoner of war" (Federal Political Department, 2-B *Final Record*, *supra* note 193, at 313).

[194] See Pictet (ed.), *Commentary III*, *supra* note 50, at 512-513.

[195] Pictet (ed.), *Commentary III*, *supra* note 50, at 544. According to Fischer, the Detaining Power's duty to repatriate POWs in its custody to the state of their destination may only be waived "on a case-by-case basis taking into account the supervision by the ICRC" since ICRC delegates "alone are in a position to determine whether prisoners of war in fact prefer to remain in the state of the detaining power, or in another state, rather than returning to their home country". Fischer, *supra* note 185, at 416. Whereas the ICRC's humanitarian role is beyond reproach, it is doubtful whether its opinion on the POWs' preferences alone can relieve their Detaining Power of its duty to repatriate them to their state of destination.

[196] See Carl E. Lundin, Jr., "Repatriation of Prisoners of War: The Legal and Political Aspects", 39 *American Bar Association Journal* 559 (1953), at 563; Pitman B. Potter, "Repatriation of Prisoners of War", 46 *American Journal of International Law* 508 (1952), at 509.

[197] See, e.g., Sassoli, "Status, Treatment and Repatriation", *supra* note 178, at 32, 34-35; Theodor Meron, "The Humanization of Humanitarian Law", 94 *American Journal of International Law* 239 (2000), at 253-256. See also Françoise Hampson, "The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict", in David James Cantor and Jean-François Durieux (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014) 373.

[198] *See* Jaro Mayda, "The Korean Repatriation Problem and International Law", 47 *American Journal of International Law* 414 (1953), at 435.

[199] See Pictet (ed.), *Commentary III*, *supra* note 50, at 543-546.

[200] See Lundin, *supra* note 196, at 560; Mayda, *supra* note 408, at 424-426; Potter, *supra* note 406, at 508 ("[T]he principles of … Article 118 may be regarded as repeating established law").

The rule contained in Article 118 became the subject of heated debate,[201] exacerbated by the ideological undercurrent of the Cold War.[202] Commentators offered increasingly complex and, at times farfetched, interpretations of Article 118 with a view to reconciling a positive IHL rule unqualifiedly obligating repatriation with humanity demanding non-repatriation.[203] The issue resurfaced during the Iran-Iraq War,[204] and again in the Gulf War.[205]

The inevitable conflict thesis would have no choice but to hold that Article 118's adoption in 1949 compulsorily resolved the norm conflict by letting the duty of repatriation trump the humanitarian demand of non-repatriation. It would follow, then, that *de novo* pleas drawn from the latter demand are inadmissible *vis-à-vis* Article 118. Adherents of the inevitable conflict thesis might argue that techniques such as *lex specialis*[206] and *jus cogens*[207] would take care of the problem. The difficulty persists, however, insofar as the inevitable conflict thesis maintains that it is unqualified rules of positive international humanitarian law themselves that account for military necessity and humanity, and that it is this fact that renders *de novo* military necessity and *de novo* humanity pleas inadmissible *vis-à-vis* such rules. Appealing to extra-IHL rules for explanations is therefore not an answer that the thesis' adherents can accept without contradicting themselves.

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[201] See United Nations General Assembly Resolution 610 (VII) (3 December 1952), para. 2.

[202] See Charmatz and Wit, *supra* note 183, at 393-394, 414; Lundin, *supra* note 196, at 561-563. On the difficulty associated with ascertaining the true intentions of POWs requesting – or not requesting – asylum, see, *e.g.*, R.R. Baxter, "Asylum to Prisoners of War", 30 *British Yearbook of International Law* 489 (1953); Charmatz and Wit, *supra* note 183, at 412-414; Yves Sandoz, "The International Committee of the Red Cross as Guardian of International Humanitarian Law" (31 December 1998) (http://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm).

[203] See Pictet (ed.), *Commentary III*, *supra* note 50, at 546-550, esp. 548: "While recognizing the possibility of recourse to general humanitarian rules, one should nevertheless make a rather strict appraisal of each case, since the Third Geneva Convention has certainly not established a system under which repatriation depends solely on the wishes of the prisoner of war concerned. Each case must therefore be dealt with individually, on its own merits. A decision against repatriation must be reserved for exceptional cases where the dangers involved for the person concerned seems manifestly unjust and grave". See also Gutteridge, "Repatriation", *supra* note 183, at 212, 216; Lundin, *supra* note 196, at 560-561; Schapiro, *supra* note 179, at 323.

[204] See, e.g., John Quigley, "Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War After the Close of Hostilities", 5 *American University Journal of International Law and Policy* 73 (1989-1990), at 81-83.

[205] The ICRC reportedly took the view that "no Iraqi prisoners of war will be repatriated against their will" and that "all Iraqi prisoners of war who expressed an unwillingness to return to Iraq … should be considered as refugees". See Peter Rowe, "Prisoners of War in the Gulf Area", in Peter Rowe (ed.), *The Gulf War 1990-91 in International and English Law* (1993) 188, at 203 (footnote omitted) (citing *The Times* (5 March 1991) and International Committee of the Red Cross, ICRC Bulletin, no.184 (May 1991)). See also International Committee of the Red Cross, Annual Report (1991), at 101 (referring to an ICRC memorandum presented to Iraqi and coalition authorities in which it was stipulated that "no prisoner of war or civilian internee may be returned to his country of origin against his will"), 102 (reporting that those Iraqi citizens in Saudi camps who had refused repatriation were given refugee status by the Riyadh authorities). It is now the policy of the United Kingdom that "prisoners of war should not be repatriated against their will". See U.K. Ministry of Defence, *supra* note 14, at 205.

[206] Repatriating or not repatriating POWs after the cessation of hostilities is possibly one area where international human rights law and/or international refugee law prohibiting repatriation in certain situations functions as the *lex specialis* relative to international humanitarian law obligating repatriation in all situations. Typically, it is international humanitarian law that is seen as *lex specialis* relative to international human rights law in situations of armed conflict. See *Nuclear Weapons* Advisory Opinion, *supra* note 61, para. 25; Greenwood, "*Jus ad Bellum* and *Jus in Bello*", *supra* note 61, at 248, 252, 265. But see Arai-Takahashi, *supra* note 171, at 401-7, 414-25; Vera Gowland-Debbas, "The Right to Life and the Relationship Between Human Rights and Humanitarian Law", in Tomuschat (ed.), *The Right to Life*, *supra* note 145, 123, at 137-42; Christopher Greenwood, "Scope of Application of Humanitarian Law", in Fleck (ed.), *The Handbook of International Humanitarian Law*, *supra* note 61, 45, at 74-75; Henckaerts and Doswald-Beck, *supra* note 79, at 299-305; Stephane Jaquemet, "The Cross-Fertilization of International Humanitarian Law and International Refugee Law", 83 *International Review of the Red Cross* 651 (2001), at 663-664; Marco Sassòli and Laura M. Olson, "The Relationship Between International Humanitarian 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), at 600, 603-605; Vincent Chetail, "Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, and International Human Rights Law", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 700, at 730-732.

[207] For a discussion as to whether *non-refoulement* has attained the status of *jus cogens*, see Walter Kälin et al., "Article 33, para. 1", in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 1327, at 1347-1349.

They might also argue that the subsequent practice has effectively modified Article 118,[208] such that it now contains an implicit exceptional humanity clause. This argument may have the superficial appeal of describing how the law has "caught up" with the humanitarian demand on post-hostilities POW repatriation. It is unlikely that such a conclusion would have assisted those during the Korean War who found themselves grappling with the norm conflict created when Article 118 was validly posited in 1949.

Humanitätsgebot, if it does exist, arguably offers a more cogent explanation. The mere fact that a positive IHL rule in the form of Article 118 unqualifiedly obligates post-hostilities POW repatriation may not have resolved the underlying norm conflict. All things considered, it is not clear whether the *unqualifiedness* of Article 118 *vis-à-vis* conflicting humanitarian demands was, in 1949, or has since been, conclusive for positive international humanitarian law on the matter.[209] The process of norm-creation through which the framers posited Article 118 may not have fully accounted for that element of humanity which demands non-repatriation under certain circumstances. It is possible that, despite its categorical language, Article 118 cannot be said to have extinguished countervailing humanitarian demands. Consequently, it is possible that *de novo* pleas emanating from such demands in support of non-repatriation are admissible *vis-à-vis* Article 118.

3.2.2 Interning POWs on Land v. Interning Them aboard Vessels at Sea

Article 22 of Geneva Convention III unqualifiedly obligates the Detaining Power to intern its POWs on land.[210] No corresponding obligation was included in Article 9 of the 1929 POW Convention.[211] It was inserted in Article 20 of the Stockholm draft[212] and adopted at the 1949 Diplomatic Conference without discussion.

During the Falklands-Malvinas conflict, a large number of Argentine POWs captured by British forces were held, pending repatriation, aboard military vessels at sea. This, according to the United Kingdom, was done "with the concurrence of the ICRC, because there was nowhere suitable to hold [POWs] on the Falkland Islands and the intention was to repatriate them as soon as possible".[213] The British Manual asserts that "[t]emporary internment on board ship for the purpose of evacuation from the combat zone is permissible".[214] The essence of the British assertion is that, notwithstanding a positive IHL rule that otherwise unqualifiedly obligates POW internment on land, the law authorises it aboard military vessels at sea if and to the extent demanded by humanity. This is clearly a genuine norm conflict, pitching Article 22 against the humanitarian demand that the Argentine POWs be interned aboard vessels at sea under the circumstances of the Falklands-Malvinas conflict.

The inevitable conflict thesis would have to hold that positive international humanitarian law has conclusively resolved this norm conflict in favour of POW internment on land. If the thesis were nevertheless to defend the lawfulness of their sea-borne internment by reference to that law, it would have to do so with techniques other than an appeal to humanity demanding such measures. *Humanitätsgebot* would suggest, first, that humanity demands POW internment in locations other than land under certain circumstances. Second, it would acknowledge the possibility that this humanitarian

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[208] See, e.g., Article 31(3)(b), Vienna Convention on the Law of Treaties (23 May 1969).

[209] In this connection, see Office of General Counsel, *supra* note 13, at 636 (footnote omitted): "Thus, [Geneva Convention III] does not itself change accepted principles of international law under which asylum is applicable to POWs, and the Detaining Power may, but is not required to, grant asylum".

[210] Article 22, Geneva Convention III. See also Claude Pilloud, "Protection of the Victims of Armed Conflicts: II – Prisoners of War", in Henri Dunant Institute and UNESCO (eds.), *International Dimensions of Humanitarian Law* (1988) 167, at 175.

[211] See Article 9, 1929 POW Convention.

[212] See Article 20, Draft Convention Relative to the Treatment of Prisoners of War (in Federal Political Department, 1 *Final Record of the Diplomatic Conference of Geneva of 1949* (1949) 73, at 78).

[213] U.K. Ministry of Defence, *supra* note 14, at 158 n.123.

[214] *Ibid.*, at 158. Footnote omitted.

demand might have survived the process through which Article 22 was adopted. It would follow that *de novo* pleas emanating from these demands might be admissible.

In substance, McCoubrey's appeal to impracticality as a justification for deviation from unqualified IHL rules is better understood as an appeal to *Humanitätsgebot*:

> Here the particular circumstances of conflict on and around South Atlantic islands rendered the primary aims of the Third Convention, humane conditions of internment and early repatriation, more readily achieved through a technical violation than through a strict "black letter" compliance and no complaint was made in respect of the procedure adopted. This may be regarded as a form of "necessity", albeit not strictly "military", which dictated a variation in the detailed application of a "humanitarian" provision without compromising the attainment of the fundamental objective.[215]

In other words, international humanitarian law would exceptionally authorise deviations even from the prescriptions of its unqualified rules when humanity so demands.

3.3 Counter-*Humanitätsgebot*?

The same might be true of a counter-*Humanitätsgebot*. A positive IHL rule may authorise what humanity condemns. The manner in which this manifests itself may vary from one situation to another. It can also be subtle. Typically, the case involves a positive IHL rule declining or failing to obligate what humanity demands or, in any event, obligating less than what humanity demands. The rule thereby authorises what humanity condemns – namely, choosing not to act as demanded by humanity. The question is whether there is any normative basis for supposing that this choice might "wrong" or "vitiate" its compliance with positive international humanitarian law.

Consider the case of a combatant assuming risk of self-endangerment with a view to sparing civilians.[216] It has been suggested that positive international humanitarian law obligates some risk-taking in this regard.[217] The kind and extent of this obligation in a given situation remain unclear.[218] Does humanity demand that a combatant assume greater risks of self-endangerment than positive IHL rules do? Would humanity condemn the combatant if he or she chose to risk only the obligatory minimum? Could that combatant have acted in breach of international humanitarian law, all things considered, whatever lower degree the law's positive rules might otherwise appear to obligate? Should there really be such a thing called counter-*Humanitätsgebot*, the answer to these questions might very well be affirmative.

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[215] McCoubrey, "Modern Doctrine", *supra* note 62, at 228. According to Charles Garraway, the United Kingdom, having consulted the matter with the ICRC, decided that the hostilities had already ceased and that the Argentine POWS were placed on the ship as the first step of their repatriation under Article 118, rather than detained within the meaning of Article 22. This author is grateful to Garraway for his insight here.

[216] Generally, see, e.g., Michael Walzer, *Arguing About War* (2004); Jeff McMahan, *Killing in War* (2009), at 198-202 (regarding extra risk-taking *vis-à-vis* child soldiers); 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).

[217] See, e.g., 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; William J. Fenrick, "Attacking the Enemy Civilian as a Punishable Offense", 7 *Duke Journal of Comparative and International Law* 539 (1997), at 548-549.

[218] See Part II, Chapter 6 above; 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; *See Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, *Joint Separate Opinion of Judge McDonald and Judge Vohrah*, 7 October 1997, para. 84; *ibid.*, *Separate and Dissenting Opinion of Judge Cassese*, paras. 47, 50; Nobuo Hayashi, "The Role of Judges in Identifying the Status of Combatants", 2 *Acta Societatis Martensis* 69 (2006); Steven P. Lee, *Ethics and War: An Introduction* (2012), at 218-222; 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).

Similarly, *if* humanity did demand "capture rather than kill", and *if* the process of IHL norm-creation through which "killing rather than capturing" had come to be seen as lawful under positive international humanitarian law did not fully account for this demand, *then* it might be argued that killing rather than capturing is, all things considered, unlawful under that law.[219]

3.3.1 "Capture Rather Than Kill" Redux – Stretching the Envelope of Positive Law

The current debate primarily revolves around whether a duty to minimise harm inflicted on eligible enemy combatants can be found within the existing IHL framework. Melzer himself asserts that "*within the parameters* set by the more specific provisions of IHL governing the conduct of hostilities, considerations of military necessity and humanity should serve as guiding principles in determining the kind and degree of force which is permissible against legitimate military targets".[220]

On 27 February 1991, towards the conclusion of hostilities in the Persian Gulf, a large number of Iraqi forces retreating from Kuwait along Highway 8 came under attack by the Coalition forces.[221] According to one account:

> The run down the highway showed more clearly than any other episode the weaknesses of Iraqi field forces and the onesidedness of the conflict. Through the afternoon and night of 27 February the tankers, Bradley gunners, and helicopter crews and artillerymen of the 1st and 4th Battalions, 64th Armor, fired at hundreds of vehicles trying to redeploy to meet the new American attack from the west, or simply to escape north across the Euphrates River valley and west on Highway 8. With no intelligence capability left to judge the size or location of the oncoming American armored wedges and attack helicopter swarms, as well as insufficient communications to coordinate a new defense, Iraqi units stumbled into disaster. Unsuspecting drivers of every type of vehicle, from tanks to artillery prime movers and even commandeered civilian autos, raced randomly across the desert or west on Highway 8 only to run into General McCaffrey's firestorm. Some drivers, seeing vehicles explode and burn, veered off the road in vain attempt to escape. Others stopped, dismounted, and walked toward the Americans with raised hands. When the division staff detected elements of the *Hammurabi Division* of the *Republican Guard* moving across the 24th's front, McCaffrey concentrated the fire of nine artillery battalions and an Apache battalion on the once elite enemy force. At dawn the next day, the twenty-eighth, hundreds of vehicles lay crumpled and smoking on Highway 8 and at scattered points across the desert.[222]

McCaffrey's purpose may be described as "disabling able-bodied, non-surrendering Iraqi combatants", and his conduct as "applying overwhelming military force by the Coalition".

Positive IHL rules unqualifiedly prohibit attacking persons *hors de combat*,[223] as well as employing methods of warfare of a nature to cause superfluous injury and unnecessary suffering.[224]

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[219] If morality requires capturing rather than killing the enemy combatant while the law permits killing the enemy combatants, then, according to McMahan, one ought simply to obey the requirement. See McMahan, "Morality of War", *supra* note 57, at 37; International Committee of the Red Cross, *Interpretive Guidance*, *supra* note 145, at 82; Melzer, "The ICRC's Clarification Process", *supra* note 146, at 162.

[220] Melzer, "Keeping the Balance", *supra* note 141, at 904 (emphasis added; footnote omitted). See also *ibid.*, at 907-908 (emphasis added): "It appears justified … to regard considerations of military necessity and of humanity, which are generally recognized as underlying and informing the entire normative framework of IHL, as guiding principles for the *interpretation* of the rights and duties of belligerents *within the parameters set by the more specific provisions of IHL* governing the conduct of hostilities".

[221] This incident is not to be confused with a similar incident involving a much larger number of Iraqis which took place on February 26, 1991 on Highway 80 (also known as the "Highway of Death").

[222] Frank N. Schubert and Theresa L. Kraus (eds.), *The Whirlwind War* (1995), at 194-195.

[223] See Article 41, Additional Protocol I.

[224] See Article 35(2), Additional Protocol I.

Assuming that most of the Iraqi combatants were retreating rather than offering to surrender,[225] had they nevertheless placed themselves *hors de combat*, with the result that it would have been unlawful to attack them? Would the incident have amounted to using methods of warfare of a nature to cause superfluous injury and unnecessary suffering?

Ryan Goodman proposes an interpretation of *hors de combat* and superfluous injury and unnecessary suffering that would, if correct, render McCaffrey's actions arguably in breach of international humanitarian law.[226] First, building on the Red Cross commentary[227] on Article 41(2)(a) of Additional Protocol I,[228] Goodman argues that "combatants who no longer have the means to defend themselves – who are at the mercy of their adversary – are, indeed, covered by this more direct and, in some cases, more protective framework".[229] On this view, neither one's actual capture or detention, nor his or her clear expression of an intention to surrender, is, strictly speaking, a pre-requisite. Second, Goodman enlists the Red Cross commentary's observation that:

> An escape, or an attempt to escape, by a prisoner or any other person considered to be *hors de combat*, justifies the use of arms for the purpose of stopping him. However, once more, the use of force is only lawful to the extent that the circumstances require it. It is only permissible to kill a person who is escaping if there is no other way of preventing the escape in the immediate circumstances.[230]

Third, Goodman asserts that the prohibition against the use of means and methods of a nature to cause superfluous injury and unnecessary suffering means that such use "may be unlawful if the magnitude of harm to enemy fighters far outweighs the military benefit"[231]; and that "the specific rule on superfluous injury and unnecessary suffering includes a prohibition on unnecessary killing".[232]

Critics respond that Goodman conflates the expression "methods of warfare" (i.e. of a nature to cause superfluous injury or unnecessary suffering) with the act of killing or capturing.[233] They also contend that the expression "in the power" found in Article 41(2)(a) means capture or detention,[234] with the crucial question being:

> [W]hether an individual is unambiguously in the captor's control, such that he poses no risk to the captors or civilians (e.g., a risk of suicide bombing) and taking custody would be operationally

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[225] We do not know exactly what happened to those who "stopped, dismounted, and walked toward the Americans with raised hands". For the sake of argumentative focus, let us exclude them from the scope of our discussion here. If (heavens forbid) these soldiers were attacked, that would clearly be an IHL breach.

[226] See Ryan Goodman, "The Power to Kill or Capture Enemy Combatants", 24 *European Journal of International Law* 819 (2013).

[227] Jean de Preux, "Article 41 – Safeguard of an enemy *hors de combat*", in Sandoz, Swinarski and Zimmermann (eds.), *Commentary on the Additional Protocols*, *supra* note 16, 479, at 484: "Some consider that having fallen into the power means having fallen into enemy hands, i.e., having been apprehended. This is virtually never the case when the attack is conducted by the airforce, which can certainly have enemy troops in its power without being able, or wishing, to take them into custody or accept a surrender (for example, in the case of an attack by helicopters). In other cases land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat … A defenceless adversary is *hors de combat* whether or not he has laid down arms".

[228] The provision reads: "A person is *hors de combat* if … he is in the power of an adverse Party".

[229] Goodman, "Power to Kill or Capture", *supra* note 226, at 836. See also Sergei A. Egorov, "International Legal Protections for Persons *Hors de Combat*", in José Doria, Hans-Peter Gassser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 561, at 565: "A defenceless adversary is *hors de combat* whether or not he has laid down his arms".

[230] De Preux, "Article 41", *supra* note 227, at 488; Goodman, "Power to Kill or Capture", *supra* note 226, at 850.

[231] Goodman, "Power to Kill or Capture", *supra* note 226, at 839-840.

[232] *Ibid.*, at 840.

[233] See, e.g., Michael Schmitt, "Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'", 24 *European Journal of International Law* 855 (2013), at 856-857; Geoffrey S. Corn, Laurie R. Blank, Chris Jenks and Eric Talbot Jensen, "Belligerent Targeting and the Invalidity of a Least Harmful Means Rule", 89 *International Law Studies* 536 (2013), at 593-596.

[234] See, e.g., Corn et al., *supra* note 233, at 586-588. But see Ryan Goodman, "The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt", 24 *European Journal of International Law* 863 (2013), at 864-865.

> feasible in the attendant circumstances. In other words, the *hors de combat* rule prohibits an attack that is nothing but an execution because the individual concerned has already been captured.[235]

It would also appear that there is a key difference between escaping or attempting to escape following capture or detention (i.e., already placed *hors de combat*), on the one hand, and evading initial capture or detention (i.e., not yet placed *hors de combat*), on the other. The former places itself in a protective paradigm and introduces a requirement of minimum escalation of force.[236] The latter, in contrast, would remain part of hostilities where disablement sets the parameters. Clearly, the permissible choice amongst otherwise lawful methods of combat is capped at the point of superfluous injury or unnecessary suffering. No formal hierarchy exists amongst various forms of disablement, however; nor, as least as far as positive IHL rules are concerned, must these forms be attempted in a particular order.

Of the Iraqi soldiers, A.V.P. Rogers states:

> There can be no question that the column was a legitimate target. It comprised enemy soldiers who had not surrendered. They represented a military threat to coalition operations … As for the question of bad faith, this is not established by examination of the facts. On 22 February 1991, President Bush presented Saddam Houssein with an ultimatum, which expired the following day. It required the Iraqis to commence their withdrawal from Kuwait before expiry of the ultimatum and complete it within one week. In return, the allied undertook not to attack withdrawing troops so long as the withdrawal continued according to the ultimatum. Iraq did not accept these terms, so the conditions of the ultimatum lapsed and the ground attack started on 24 February. Even after that the allied announced that the retreating Iraqis would be safe so long as they abandoned their weapons and vehicles. Needless to say, those on the Basra road did not do so.[237]

Françoise Hampson, although apparently commenting on a subsequent, more controversial "turkey shoot" incident in March 1991, observes:

> The military forces and equipment of the adversary are a legitimate target of attack until they surrender. There may have been a misunderstanding if the [retreating] Iraqis thought they would not be attacked, provided they did not attack the coalition forces, whereas what was required was the abandonment of all their equipment. Allowing the coalition forces the benefit of the doubt on that score, it would appear that the Iraqi forces could be attacked. The question then becomes whether they were subjected to "unnecessary suffering or superfluous injury." … If the devastation was wrought by general purpose bombs or the strafing of the columns of vehicles and forces, this would appear to be lawful unless it represented "unnecessary suffering or superfluous injury. The killings might seem both unnecessary and superfluous, but the prohibition concerns suffering or injury, rather than unnecessary or superfluous actions … This may suggest, particularly if military forces were unwilling to carry on attacking an unresisting adversary, the need for a new principle. It would be an extension of the existing rule. It would require that an attack should not proceed, even against a legitimate target and by means of a lawful weapon, where it is unnecessary or superfluous to the attainment of the war aim. The principal difficulty with such a rule would be in distinguishing between an unresisting enemy and one in tactical retreat. So long as the Iraqi government took no steps to obtain a cease-fire, its fighting forces were a legitimate target, even if they no longer offered an immediate threat to the coalition forces.[238]

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[235] Schmitt, "Wound, Capture, or Kill", *supra* note 233, at 860.

[236] See, e.g., Pictet (ed.), *Commentary IV*, *supra* note 56, at 245-247. See also *ibid.*, at 247-248, in connection with the suppression of a POW rebellion.

[237] A.P.V. Rogers, *Law on the Battlefield* 2d ed. (2004), at 31. See also Roy Gutman et al. (eds.), *Crimes of War 2.0: What the Public Should Know* rev. ed. (2007), at 165; Dinstein, *Conduct of Hostilities*, *supra* note 13, at 102-103.

[238] Françoise J. Hampson, "Means and Methods of Warfare in the Conflict in the Gulf", in Rowe (ed.), *The Gulf War*, *supra* note 205, 89, at 107. Footnote omitted. See also Navy Commander's Handbook, *supra* note 141, at 5-3: military necessity does not prohibit the "application of overwhelming force against enemy combatants, units and material consistent with the principles of distinction and proportionality".

This author does not believe that the Iraqi soldiers were placed *hors de combat* at the time of the incident. Nor were they subjected to methods of warfare of a nature to cause superfluous injury and unnecessary suffering. The mere fact that their disablement took the form of death and wounding rather than capture does not *per se* constitute a breach of positive international humanitarian law.

3.3.2 "Capture Rather Than Kill" Redux – Ripping the Envelope of Positive Law

More fundamentally, a counter-*Humanitätsgebot* would place humanity's imperatives over and above positive international humanitarian law itself. As noted by Emily Crawford, Pictet's admonition is more of a "philosophy"[239] than an interpretive technique of existing IHL rules. Thus, even if killing the Iraqi combatants were in compliance with positive IHL rules, would it still not be unlawful under international humanitarian law as long as they could have been disabled alive?

There is a hint of double effect in such an argument. First developed by Thomas Aquinas, double effect requires that the agent (1) exclusively intend to achieve good, and (2) intend to minimise the foreseeable evil that the good's pursuit may cause.[240] The standard IHL context in which double effect is discussed today is that of minimising collateral damage.[241] This narrow focus has been criticised.[242] In fact, as a concept, there is no reason why double effect cannot also apply to the disablement of enemy soldiers. On this view, the belligerent must always seek the least injurious form of disablement available. Thus, *if* double effect were what humanity demanded, and *if* counter *Humanitätsgebot* did exist, *then* failing to capture rather than kill in circumstances where both forms of disablement had been reasonably available might, all things considered, be unlawful under international humanitarian law.

4. Promoting Humanity Above and Beyond Positive IHL Obligations

At this point, both *Humanitätsgebot* and counter-*Humanitätsgebot* remain mere hypotheses. In view of their potentially far-reaching consequences, we should carefully scrutinise them.

The situation is quite different where the acts unqualifiedly obligated by positive IHL rules fall short of what humanity permits. In such cases, acting in accordance with humanity *ipso facto* fulfils – and goes beyond – what the law obligates.[243]

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[239] Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (2015), at 87.

[240] See Thomas Aquinas, *Summa Theologiæ* (1485). See also, e.g., Sidgwick, *supra* note 113, at 254; Walzer, *supra* note 60, at 153; Joseph T. Mangan, "An Historical Analysis of the Principle of Double Effect", 10 *Theological Studies* 41 (1949), at 43; 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); T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (2008); Ralph Wedgwood, "Scanlon on Double Effect", 83 *Philosophy and Phenomenological Research* 464 (2011); 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; David Luban, "Risk Taking and Force Protection", in Yitzhak Benjaji and Naomi Sussmann (eds.), *Reading Walzer* 277 (2014).

[241] See, e.g., Sidgwick, *supra* note 113, at 254-257; Neuman, *supra* note 240, at 104-105; Walzer, *supra* note 60, at 155-156; Hampson, "Means and Methods of Warfare", *supra* note 238, at 106; Noam J. Zohar, "Double Effect and Double Intention: A Collectivist Perspective", 40 *Israel Law Review* 730 (2007); Steven P. Lee, *Ethics and War: An Introduction* (2012), at 173-181; Bradley Gershel, "Applying Double Effect in Armed Conflicts: A Crisis of Legitimacy", 27 *Emory International Law Review* 741 (2013).

[242] See, e.g., Elizabeth Anscombe, "War and Murder", in Malham M. Wakin (ed.), *War, Morality, and the Military Profession* (1979) 285, at 294-296; 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.

[243] See, e.g., Bruno Zimmermann, "Article 1 – General Principles and Scope of Application", in Sandoz, Swinarski and Zimmermann (eds.), *Commentary on the Additional Protocols*, *supra* note 16, 33, at 37. The kind of behaviour at issue

Take the regulation of non-international armed conflicts, for example. As noted earlier, the legislative history of common Article 3 reveals that the ICRC had initially endeavoured to render the content of the 1949 Geneva Conventions applicable in its entirety to all armed conflicts.[244] Against this background, states deemed it permitted by considerations of sovereign interests to limit the scope of such content to international armed conflicts. At the 1949 Diplomatic Conference, this particular norm contradiction resulted in common Article 3 capturing only the "compulsory minimum" joint satisfaction between humanitarian demands and sovereign liberties.[245] It is clear, however, that positive international humanitarian law authorises bringing further humanity to non-international armed conflicts. Indeed, there is a standing "invitation to exceed that minimum"[246] established in common Article 3. States remain at liberty to act on this invitation, for instance, by concluding special agreements.[247] Although strictly as a matter of policy rather than law, several states have also forgone the distinction between international and non-international armed conflicts when instructing their military personnel on international humanitarian law. Thus, Germany's national military manual no longer distinguishes between the two types of armed conflicts.[248] William J. Fenrick notes:

> Although a technical interpretation of the law may result in the conclusion that the armed forces are engaged in a non-international armed conflict, it may be considered desirable to require those forces to comply with the higher standards of IHL/LOAC for international armed conflicts. Indeed, as many armed forces prefer to train to a "One Book" standard and, where IHL/LOAC is concerned, that standard is the law applicable to international armed conflicts, it may not be difficult to require the armed forces to comply as a matter of policy with IHL/LOAC for international armed conflicts on all occasions when they are deployed on out-of-country operations.[249]

Positive international humanitarian law does not (yet) appear to obligate the belligerent to capture rather than kill an adversary where both courses of action are equally available. Plainly, however, the law permits the belligerent to do so.[250] Strictly as a matter of permissive further humanisation, this choice makes eminent sense.[251]

5. Conclusion

The inevitable conflict thesis argues that every positive IHL rule contains the military necessity-humanity interplay. Neither is therefore admissible as *de novo* pleas *vis-à-vis* unqualified rules.

This chapter demonstrates that the first claim is false. Some rules exhibit the involvement of military necessity but not humanity in the process of their norm-creation. Meanwhile, some other rules embody humanity's juxtaposition with considerations other than military necessity. Accepting this fact compels the inevitable conflict thesis to contradict itself, because it must then accept the

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closely echoes that which exhibits ethical qualities requisite for the broader, humanity-preserving conception of vocational competence as a soldier. See Part I, Chapter 3 above.

[244] See Part II, Chapter 7 above; Pictet (ed.), *Commentary III*, *supra* note 50, at 28-31.

[245] Pictet (ed.), *Commentary IV*, *supra* note 56, at 37; see also *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua. v. United States of America)*, *Merits*, *Judgment*, ICJ Reports (1986) 14, para. 114; Joyce A. C. Gutteridge, "The Geneva Conventions of 1949", 26 *British Yearbook of International Law* 294 (1949), at 300.

[246] Pictet (ed.), *Commentary IV*, *supra* note 56, at 37.

[247] See Article 3 common to Geneva Conventions I-IV: "The Parties to the conflict should further endeavour to bring into force, by means of special agreement, all or part of the other provisions of the present Convention". See also Article 19(1)-(2), Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954).

[248] See Wolff Heintschel von Heinegg, "The German Manual", in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* 2d ed. (2010) 109, at 112.

[249] William J. Fenrick, "Reflections on the Canadian Experience with Law of Armed Conflict Manuals", in *ibid.*, 97, at 105. See also Dieter Fleck, "The Law of Non-International Armed Conflicts", in Fleck (ed.), *The Handbook of International Humanitarian Law*, *supra* note 61, 605, at 629-630.

[250] See, e.g., Parks, *supra* note 162, at 809; Schmitt, "Military Necessity and Humanity", *supra* note 161, at 861.

[251] Capturing an eligible enemy combatant would generally be deemed more humane than killing him or her.

possibility that *de novo* military necessity and *de novo* humanity pleas may be admissible *vis-à-vis* at least some unqualified IHL rules.

The joint satisfaction thesis explains the mechanics of IHL norm-creation differently. Unqualified obligations of positive IHL rules preclude *de novo* military necessity pleas, because the very fact of these rules' adoption logically extinguishes all indifferent counter-liberties. Since military necessity considerations are normatively indifferent, none of the permissions they generate, and hence no *de novo* plea emanating from them (e.g., *Kriegsräson*), is admissible *vis-à-vis* unqualified IHL rules. The same goes for humanity's indifferent permissions and *de novo* pleas supposedly built on them (e.g., *Humanitätsräson*).

Both the inevitable conflict and joint satisfaction theses reject counter-*Kriegsräson*. The latter thesis, however, counsels against dismissing too hastily the possibilities of what might be called *Humanitätsgebot* and counter-*Humanitätsgebot*. These possibilities arise from the fact that the process of IHL norm-creation may leave genuine norm conflicts unresolved.

The same may even be said of chivalry. Although it is difficult to decipher its content,[252] chivalry appears indifferent regarding certain kinds of belligerent conduct (e.g., ruses) and not indifferent regarding others (e.g., improper use of enemy uniforms). One may ask whether chivalry is admissible *de novo* as a justification or excuse for deviation from positive international humanitarian law, or whether it functions as an additional layer of normative restraint thereon. As is the case with *Humanitätsräson*, both a *Ritterlichkeitsräson*[253] and a counter-*Ritterlichkeitsräson* are safely rejected. Their non-indifferent variants, i.e., a *Ritterlichkeitsgebot* and counter-*Ritterlichkeitsgebot*, perhaps merit further research.[254]

This chapter shows the exclusionary effects that the adoption of unqualified IHL rules generates for indifferent considerations, as well as the possible absence of such effects for non-indifferent considerations. We have not said anything about situations where a positive IHL rule specifically envisages military necessity pleas. To what consequences does IHL norm-creation give rise where the framers have elected to retain military necessity as valid exceptions from the principal prescriptions of positive international humanitarian law? How are we to interpret and apply such exceptions? In the next chapter, we will investigate the significance and content of express military necessity clauses.

[252] See Thomas C. Wingfield, "Chivalry in the Use of Force", 23 *University of Toledo Law Review* 111 (2001); Rain Liivoja, "Chivalry without a Horse: Military Honour and the Modern Law of Armed Conflict", in Rain Liivoja and Andres Saumets (eds.), *The Law of Armed Conflict: Historical and Contemporary Perspectives* (2012) 75.

[253] That is, "*Ritterlichkeitsräson geht vor Kriegsmanier*" (necessities of chivalry override rules of war).

[254] See Rain Liivoja, "Law and Honour: Normative Pluralism in the Regulation of Military Conduct", in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* 143 (2013); Gill, *supra* note 31, at 43-49.

Chapter 9

Significance and Content of Juridical Military Necessity

In its juridical context, military necessity exempts measures from certain positive IHL rules that principally prescribe contrary behaviour. These measures are authorised to the extent that they are required for the attainment of military purposes and otherwise remain in conformity with positive international humanitarian law.[1] Where measures do not, or no longer, fulfil these conditions, they cease to be exempted, revert to being governed by the principal prescriptions, and become unlawful.

This chapter endeavours to elucidate the significance and content of military necessity in positive international humanitarian law. Assessing juridical military necessity involves interpreting the principal IHL rules and their exceptional clauses *vis-à-vis* the particular set of facts at issue. As an exception, military necessity contains four discernible requirements. First, the measure must be taken primarily for some specific military purpose. Second, the measure must be required for the purpose's attainment. Third, the purpose must be in conformity with international humanitarian law. Fourth, the measure itself must otherwise be in conformity with that law.[2] Our discussion will reveal continuing disagreements in some areas, in particular the criteria of proportionality for determining whether the measure taken was required for the attainment of the military purpose sought.

1. Juridical Military Necessity as an Exception

Exceptional military necessity has not yet been authoritatively defined. This thesis proposes the following definition: Military necessity exempts a measure from certain specific rules of positive international humanitarian law that principally prescribe contrary action, to the extent that the measure is required for the attainment of a military purpose and otherwise in conformity with that law.

It is submitted that this definition embodies custom. As seen below, the definition's various aspects find support in major military manuals reflecting state practice and/or *opinio juris*,[3] and are confirmed by judicial decisions[4] as well as scholarly writings.[5]

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[1] See, e.g., Robin Geiß, "Military Necessity: A Fundamental 'Principle' Fallen into Oblivion", in Hélène Ruiz Fabri et al. (eds.), 2 *Select Proceedings of the European Society of International Law* (2010) 554, at 558-565.

[2] See Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective", 4 *Journal of Military Ethics* 3 (2005), at 11-12.

[3] See, e.g., U.S. Department of the Navy, Office of the Chief of Naval Operations et al., *The Commander's Handbook on the Law of Naval Operations* (1995), at 5-1; U.S. Department of the Army, *The Law of Land Warfare* (1956), at 4; Office of the Judge Advocate General, Canadian Forces, *Law of Armed Conflict at the Operational and Tactical Levels* (2000), at 2-1, 16-5; U.K. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 21-23; Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual* (2015), at 51-58. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), 2 *Customary International Law* Pt. I (2005), at 1002-1010. Caution may be advisable, however, because it is arguable that not all military manuals necessarily enjoy the same probative value on the practice and/or *opinio juris* of the states that issue them. See, e.g., Nobuo Hayashi, "Introduction", in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* 2d ed. (2010) 17, at 33-34; Charles Garraway, "Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces", in *ibid.*, 45, at 50, 53; David Turns, "Military Manuals and the Customary Law of Armed Conflict", in *ibid.*, 65.

[4] See below.

[5] See, e.g., Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (1928), at 59-61; William Gerald Downey, Jr., "The Law of War and Military Necessity", 47 *American Journal of International Law* 251 (1953), at 254; B.V.A. Röling, "The Law of War and the National Jurisdiction Since 1945", 100 *Recueil des Cours* (1960) 377, at 382-387; N.C.H. Dunbar, "Military Necessity in War Crimes Trials", 29 *British Yearbook of International Law* 442 (1952); William V. O'Brien, "The Meaning of 'Military Necessity' in International Law", 1 *World Polity* (1957) 109; Robert W. Gehring, "Loss of Civilian Protections Under the Fourth Geneva Convention and Protocol I", 90 *Military Law Review* 49 (1980), at 54-58; Yoram Dinstein, "Military Necessity", 3 *Encyclopedia of Public International Law* (1982) 274; Christopher Greenwood, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* 2d ed. (2008) 1, at 36-38; Yutaka Arai-Takahashi, "Excessive Collateral Civilian Casualties and Military Necessity: Awkward Crossroads in International Humanitarian Law between State Responsibility and Individual

2. Military Necessity as an Exception v. State of Necessity as a Circumstance Precluding Wrongfulness

Before proceeding further, we need to clarify two key differences between military necessity as an exception, on the one hand, and the state of necessity as a circumstance precluding wrongfulness, on the other. The first difference concerns their status: exceptional military necessity forms part of what we call "primary rules" of international law, whereas the state of necessity is a "secondary rule". Moreover, the two concepts have distinct contents.

2.1 Primary and Secondary Rules

For some time, our standard discourse on the international law of state responsibility has separated "primary rules" from "secondary rules".[6] To the former group belong those rules that determine the content of a substantive obligation and whose breach constitutes an internationally wrongful act. Exceptional clauses modify the content of the primary rules to which they are attached. It may therefore be said that juridical military necessity forms part of these rules and that acts in fulfilment of its requirements are not internationally wrongful.[7]

To the group of "secondary rules" belong the conditions for the existence of an internationally wrongful act,[8] as well as the legal consequences that flow from it.[9] Justifications and excuses are examples of secondary rules. Circumstances precluding *wrongfulness* – as opposed to, say, *blameworthiness* – may be considered functionally analogous to justifications.[10] In the international law of state responsibility, necessity constitutes such a circumstance.[11]

In its earlier consideration of justificatory necessity, the International Law Commission (ILC) treated military necessity separately as an exception under international humanitarian law:

> The Commission finally came to consider the cases in which a State has invoked a situation of necessity to justify actions not in conformity with an international obligation under the law of war

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Criminal Liability", in Freya Baetens and Christine Chinkin (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (2015) 325, at 332.

[6] See Pierre-Marie Dupuy, "The International Law of State Responsibility: Revolution or Evolution?", 11 *Michigan Journal of International Law* 105 (1989); Y. Matsui, "The Transformation of the Law of State Responsibility", in René Provost (ed.), *State Responsibility in International Law* (2002) 3, at 3-4; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 14-16. It should be noted that legal philosophers often use the same pair of expressions to denote notions that are quite different. See, e.g., Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans., 1949), at 58-61, 143-144; H.L.A. Hart, *The Concept of Law* 2d ed. (1994), at 77-96.

[7] See also International Law Commission, 2 *Yearbook of the International Law Commission* Pt II (2001) 20, at 84 (footnotes omitted): "as embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating … to the question of 'military necessity' … which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law … while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations". See also Robert D. Sloane, "On the Use and Abuse of Necessity in the Law of State Responsibility", 106 *American Journal of International Law* 447 (2012), at 497; Arai-Takahashi, "Excessive Collateral Civilian Casualties", *supra* note 5, at 336, 337-338.

[8] See Articles 1-15, Articles on the Responsibility of States for Internationally Wrongful Acts (12 December 2001).

[9] See *ibid.*, Articles 28-41.

[10] But see Robert Rosenstock, "Symposium: The ILC's State Responsibility Articles: the ILC and State Responsibility", 96 *American Journal of International Law* 792 (2002), at 794; Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (2012), at 103-108.

[11] It is in this context that the *Coleman v. Mexico* case (*Bond Coleman (U.S.A.)* v. *United Mexican States*, United States and Mexico General Claims Commission, 3 October 1928, 4 *Reports of International Arbitral Awards* (2006) 365, at 367-368; see also Desierto, *supra* note 10, at 51 n.60) is best understood.

> and, more particularly, has pleaded a situation coming within the scope of the special concept described as "necessities of war". There has been much discussion, mainly in the past, on the question whether or not "necessity of war" or "military necessity" can be invoked to justify conduct not in conformity with that required by obligations of the kind here considered. On this point a preliminary clarification is required. The principal role of "military necessity" is not that of a circumstance exceptionally precluding the wrongfulness of an act which, in other circumstances, would not be in conformity with an obligation under international law ... [W]hat is involved is certainly not the effect of "necessity" as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather the effect of "non-necessity" as a circumstance precluding the lawfulness of conduct which that rule normally allows.[12]

As our discussion in Chapter 8 shows, the commission's allusion to non-necessity "as a circumstance precluding the lawfulness of conduct which that rule normally allows" comes dangerously close to counter-*Kriegsräson*.[13]

Be that as it may, the ILC concluded that the state of necessity would be inadmissible as a justification for non-compliance with a provision of IHL conventions:

> The second category of obligations to which the Commission referred, with the same aim, was that of obligations established in the text of a treaty, where the treaty is one whose text indicates, explicitly or implicitly, that the treaty excludes the possibility of invoking a state of necessity as justification for conduct not in conformity with an obligation which it imposes on the contracting parties. This possibility is obviously excluded if the treaty explicitly says so, as in the case of certain humanitarian conventions applicable to armed conflicts. However, there are many cases in which the treaty is silent on the point. The Commission thinks it important to observe in this connection that silence on the part of the treaty should not be automatically construed as allowing the possibility of invoking the state of necessity. There are treaty obligations which were especially designed to be equally, or even particularly, applicable in abnormal situations of peril for the State having the obligation and for its essential interests, and yet the treaty contains no provision on the question now being discussed (this is true of other humanitarian conventions applicable to armed conflicts). In the view of the Commission, the bar to the invocability of the state of necessity then emerges implicitly, but with certainty, from the object and the purpose of the rule, and also in some cases from the circumstances in which it was formulated and adopted.[14]

According to the ILC, the inadmissibility of necessity as a circumstance precluding wrongfulness *vis-à-vis* positive IHL rules emanates from the very nature of the activities that these rules are intended to regulate.[15] This solution, while not without merit, effectively precludes any room for *Humanitätsgebot*.[16] The commission observes that "[t]here are treaty obligations which were especially designed to be equally, or even particularly, applicable in abnormal situations of peril for the State having the obligation and for its essential interests, and yet the treaty contains no provision on the question now being discussed", adding: "this is true of other humanitarian conventions applicable to armed conflicts". Those "abnormal situations of peril", however, are also situations where humanitarian considerations become particularly acute. It is to these situations that IHL conventions are "especially designed to be equally, or even particularly, applicable". Consequently, "the bar to the invo-

[12] ILC, 2 *Yearbook of the International Law Commission* Pt II (1980) 13, at 45-46.
[13] See Chapter 8 above.
[14] ILC, 1980 *Yearbook*, *supra* note 12, at 50-51. See also Article 25(2)(a), Articles on State Responsibility: "In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if … [t]he international obligation in question excludes the possibility of invoking necessity".
[15] See also ILC, 2001 *Yearbook*, *supra* note 7, at 84; David Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", 99 *American Journal of International Law* 88 (2005), at 99; Sarah Heathcote, "Circumstances Precluding the Wrongfulness in the ILC Articles on State Responsibility: Necessity", in James Crawford et al. (eds.), *The Law of International Responsibility* (2010) 491, at 498; Gabriella Venturini, "Necessity in the Law of Armed Conflict and in International Criminal Law", 41 *Netherlands Yearbook of International Law* 45 (2010), at 52.
[16] See Chapter 8 above.

cability" of all *de novo* humanity pleas "then emerges implicitly, but with certainty … from the circumstances in which [the rule] was formulated and adopted".

2.2 Distinct Contents

In addition to their dissimilar status, military necessity and the state of necessity have distinct requirements. For example, according to Article 25(1)(a) of the ILC articles on state responsibility, necessity may be invoked by a state only where the act in question "is the only means available" to safeguard its imperilled interest.[17] The ILC's commentary states that "[t]he plea is excluded if there are other (otherwise) lawful means available, even if they may be more costly or less convenient".[18] In addition, Article 25(2)(b) disqualifies a state from invoking necessity if it has contributed to the situation of necessity.

As will be shown below, exceptional military necessity does not contain these conditions. In order to be eligible for military necessity exceptions, the belligerent need *not* show that its conduct was a *conditio sine qua non* for the purpose's attainment. Nor is the belligerent's contribution to the creation of circumstances of exceptional military necessity a ground for its inadmissibility. The mere fact that the belligerent becomes involved in an armed conflict certainly does not disqualify it from relying on military necessity clauses. The same goes for such strategic, operational and tactical decisions, or such manners in which campaigns, manoeuvres and military operations unfold, as may place the belligerent in situations where acting in a certain way becomes militarily necessary.

Nor is it a prerequisite for exceptional military necessity that the conduct should also qualify as justificatory necessity.[19] Although, as a matter of fact, certain conduct may satisfy both sets of requirements simultaneously, this does not mean that exceptional military necessity and the state of necessity are identical notions or that one entails the other.

3. Specific Requirements of Juridical Military Necessity

In its juridical context, military necessity exempts a measure from certain specific rules of positive international humanitarian law that principally prescribe contrary action, to the extent that the measure is required for the attainment of a military purpose and otherwise in conformity with that law. Defined thus, the notion may be broken into four requirements:

(1) That the measure was taken primarily for some specific military purpose;
(2) That the measure was required for the attainment of the military purpose, it being understood that "required" here means:
    (a) That the measure was materially relevant to the military purpose's attainment;
    (b) That, of those materially relevant and reasonably available measures, the one taken was the least evil; and
    (c) That the evil that the measure would cause was not disproportionate to the gain that it would achieve;

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[17] See also ICL, *Commentary*, *supra* note 7, at 83.
[18] *Ibid*.
[19] Arai-Takahashi, "Excessive Collateral Civilian Casualties", *supra* note 5, at 337-338. But see, e.g., International Humanitarian Law Research Initiative, *The Separation Barrier and International Humanitarian Law: Policy Brief* (2004), at 6: "The second test [of military necessity] relates to the existence of a state of necessity that justifies the measures the occupying power intends to take. This state of necessity varies according to circumstances: it could be a clear danger facing the forces of occupation, it could emerge from the requirement of military operations, or it could be a present need of the occupation forces (like food, water, medical equipments, command posts, etc.). In any case, the state of necessity refers only to situations that are *within* the occupied territory, and facing the occupying power in the course of occupation. The occupying power has the burden of demonstrating the existence of this state of necessity". See also *ibid.* at 8-9, 12-13.

(3) That the military purpose for which the measure was taken was in conformity with international humanitarian law; and
(4) That the measure itself was otherwise in conformity with international humanitarian law.

These four requirements are cumulative. Should a given measure fail to satisfy any one or more of them, the measure would be "militarily unnecessary" within the meaning of exceptional military necessity clauses.

Two notable consequences follow. First, failing to satisfy these requirements is distinct from being militarily unnecessary in its strictly material sense.[20] Whereas criterion (2)(a) is common to both material and juridical military necessity, the latter alone contains criteria (2)(b) and (2)(c).[21] Also, whereas juridical military necessity formally requires both the measure taken and the purpose sought to comply with international humanitarian law, compliance is, at best, merely an expedient desideratum for strictly material military necessity.[22] In other words, juridical military necessity is more restrictive in scope than material military necessity. It is therefore possible that a belligerent act is consistent with military necessity in its strictly material context and yet fails to qualify for the application of a military necessity clause.

As will be seen below, the particular route chosen by the Israel Defence Forces (IDF) Commander for the erection of a separation fence in some parts of the West Bank may have constituted a material military necessity, but was found by the Israeli Supreme Court to be ineligible for the application of a military necessity exception.

Second, an act being "militarily unnecessary" in its juridical sense simply means that the exceptional clause ceases to apply to it.[23] The clause's inapplicability exposes the conduct to the IHL rule's principal content, which in turn renders it unlawful. The act's unlawfulness emanates neither from its lack of judicial military necessity, nor from the now inoperative military necessity clause.

For example, Article 53 of Geneva Convention IV principally prohibits the destruction by the Occupying Power of real or personal property in territories it occupies, "except where such destruction is rendered absolutely necessary by military operations".[24] Before the Eritrea-Ethiopia Claims Commission, Ethiopia declined to contend that the destruction of Tserona Town constituted a military necessity, or that the exceptional clause found in Article 53 of Geneva Convention IV applied to it. The commission proceeded to find Ethiopia responsible for the destruction, an act principally prohibited by Article 53 of Geneva Convention IV.[25]

In addition to the four requirements listed above, military necessity involves questions about both the knowledge and formal competence of the person invoking it. These questions will be considered later.

3.1 The Measure Was Taken Primarily for Some Specific Military Purpose

This requirement is two-fold. First, it must be shown that there was, in fact, a specific purpose for which the measure was taken. Second, it must be shown that this purpose was primarily military in nature. It is not a requirement of juridical military necessity that the belligerent seek the submission of its enemy, despite occasional suggestions to the contrary.

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[20] See Part I, Chapter 2 above.

[21] Conversely, material military necessity alone entails the comparison between the degrees to which two reasonably available courses of action would be conducive *vis-à-vis* a common military goal under the prevailing circumstances. See *ibid.*

[22] See Part I, Chapter 2, and Part II, Chapters 4 and 5 above.

[23] See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* ICJ Reports (2004) 136, para. 135 (finding that the court was not convinced that "the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations").

[24] Article 53, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

[25] See *Ethiopia v. Eritrea*, Eritrea-Ethiopia Claims Commission, *Partial Award Central Front – Eritrea's Claims 2, 4, 6, 7, 8, & 22,* 28 April 2004, paras. 63, 71.

3.1.1 The Existence of a Specific Purpose

Military necessity exception is unavailable where the measure is taken for no purpose.[26] If, for example, an area was devastated purposelessly, it would lack any meaningful point of reference against which the devastation's necessity is to be assessed. "[N]ecessary … for *what*?", one might ask in vain.[27] In the words of Myres S. McDougal and Florentino P. Feliciano,

> [a] particular combat operation, comprising the application of a certain amount of violence, can be appraised as necessary or unnecessary only in relation to the attainment of a specified objective. Obviously, further clarification of the principle of military necessity is, in corresponding part, contingent upon specification of legitimate belligerent objectives.[28]

Similarly, in *Hostage*, Military Tribunal V held:

> [Military necessity] does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law ... [Military necessity] does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.[29]

3.1.2 The Purpose's Primarily Military Nature

Even if a specific purpose is shown to have existed, it must additionally be shown that the purpose was primarily military in nature. Here, the expression "military" may be understood as a quality characterising or purportedly characterising[30] sound strategic, operational or tactical thinking in the planning, preparation and execution of belligerent activities. It follows that military necessity is inadmissible in respect of measures taken for purposes that are *not* primarily military in the sense just described.[31]

In the event of an aerial bombardment, "[t]he officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities".[32]According to commentators, the officer in question would be exempt from his duty to warn the authorities should military necessity so require.[33] One primarily military purpose cited in this regard is the aversion of danger to the attacking aircraft.[34] Factors such as oversight on the part of the officer, and the absence of friendly local population likely to be affected by the bombardment, would not suffice.

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[26] See Part I, Chapter 2 above.
[27] Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961), at 525.
[28] *Ibid*.
[29] *United States of America v. Wilhelm List et al.*, *Judgment*, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950) 757, at 1253-1254. Albeit in the context of deportation/forcible transfer as a crime against humanity, one trial chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) ruled that military necessity does not justify evacuation for the sake of evacuation. See *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, *Judgement*, 2 August 2001, paras. 524-527.
[30] "Purportedly characterising" accounts for incompetence.
[31] See, e.g., Ronald F. Roxburgh (ed.), 2 *Oppenheim's International Law: A Treatise* 3d ed. (1921), at 213: "[i]n every case destruction … must not be merely be the outcome of a spirit of plunder or revenge …"
[32] Article 26, 1907 Hague Regulations.
[33] See, e.g., Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes – and War – Law* (1954), at 622-623; A.P.V. Rogers, *Law on the Battlefield* 2d ed. (2004), at 88.
[34] See, e.g., Stone, *supra* note 33, at 622; Rogers, *supra* note 33, at 88.

No less pertinent for the requirement that the measure be taken for a primarily military purpose are situations of belligerent occupation. This is so because the occupier might present its geopolitical, demographic, ideological and/or economic ambitions as legitimate military concerns.[35]

Two Israeli cases may be illustrative of the intricacies involved. In *Elon Moreh*, the Supreme Court of Israel, sitting as the High Court of Justice, declared null and void an order issued by the IDF Commander for the Judaea and Samaria Region to requisition privately owned Palestinian land for the establishment of a civilian settlement.[36] The court found that the settlement's establishment was a predominantly political decision in which military considerations would have been of secondary importance at best. The court determined that, in the final analysis, the establishment would not have been approved by the government but for the purposes of satisfying the desire of a religious interest group and acting on "the Jewish people's right to settle in Judaea and Samaria".[37]

At issue in *Elon Moreh* was whether the requisition order was in conformity with the customary IHL rules contained in Article 52 of the 1907 Hague Regulations. According to this article, "[r]equisitions in kind and services shall not be demanded from municipalities or inhabitants [of the territory under occupation] except for the needs of the army of occupation ... Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied".[38]

Traditionally, the Israeli Supreme Court has interpreted "the needs of the army of occupation" broadly to encompass:

> (i) All kinds of purposes demanded by the necessities of war;
> (ii) Military movements, quartering and the construction of defence positions;
> (iii) What is required to "safeguard public order and security" within the meaning of Article 43 of the Hague Regulations; and
> (iv) What the army needs in order to fulfil its task of defending the occupied area against hostile acts liable to originate from outside.[39]

In considering the matter at hand, the court directed its attention to the decisions of the Ministerial Defence Committee and the Cabinet, as well as the professional opinion provided to them by the then Chief of Staff (C-o-S) according to which the requisition would indeed be consistent with military needs.[40]

The court held:

> [T]his professional view of the C-o-S would in itself not have led to the taking of the decision on the establishment of the Elon Moreh settlement, had there not been another reason, which was the driving force for the taking of said decision in the Ministerial Defence Committee and in the Cabinet plenum – namely, the powerful desire of the members of Gush Emunim to settle in the

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[35] See HCJ 10356/20, *Yoav Hess et al. v. The Commander of IDF Forces in the West Bank, GOC Central Command and the State of Israel*, and HCJ 10497/20, *The Hebron Municipality et al. v. Major General Moshe Kaplinsky et al.*, 4 March 2004, at para. 12; HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces in the West Bank*, 30 June 2004, paras. 26-27.

[36] See HCJ 390/79, *Izat Muhamed Mustafa Dweikat et al. v. The Government of Israel et al.*, 22 October 1979 (reprinted in 19 *International Legal Materials* 148 (1980)).

[37] *Ibid.*, at 170.

[38] Article 52, 1907 Hague Regulations.

[39] *Elon Moreh*, at 168-169. See also *Hess et al.* and *The Hebron Municipality et al.*, at para. 9. According to Stone, however, the expression "needs of the army of occupation" is intended to be narrower in scope than the expression "necessities of war". See Stone, *supra* note 33, at 708. See also Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1968), at 245-246, 270-271; Marco Pertile, "'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory': A Missed Opportunity for International Humanitarian Law?", 14 *Italian Yearbook of International Law* 121 (2004), at 135; David Kretzmer, "The Supreme Court of Israel: Judicial Review During Armed Conflict", 47 *German Yearbook of International Law* 392 (2004), at 447; David Kretzmer, "The Advisory Opinion", *supra* note 15, at 97; David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel", 94 *International Review of the Red Cross* 207 (2012), at 216-218.

[40] The C-o-S's "central point", as described by the court, was that "a settlement on that site serves as a stronghold protecting freedom of traffic on the nearby roads at the time of deployment of reserve forces on the eastern front in time of war". *Elon Moreh*, at 155; see also *ibid.*, at 153-154.

> heart of Eretz-Israel, as close as possible to the town of Nablus ... [B]oth the Ministerial Committee and the Cabinet majority were decisively influenced by reasons lying in a Zionist point of view of the settlement of the whole Land of Israel.[41]

The evidence showed that political bodies initiated the civilian settlement's establishment at the site; the IDF authorities did not initiate the settlement's establishment as would be expected if the matter involved genuine military needs.[42] On the contrary, the C-o-S gave his approval only *post factum* to what was essentially a political programme.[43] In the court's view, this particular sequence of events did not attest to "there having been from the outset a military necessity to take private land in order to establish the civilian settlement, within the bounds of Article 52 of the Hague Regulations".[44] Justice M. Landau, writing for the unanimous court,[45] concluded:

> The political consideration was, therefore, the dominant factor in the Ministerial Defence Committee's decision to establish the settlement at that site, though I assume the Committee as well as the Cabinet majority were convinced that its establishment *also* (emphasis in the original – Trans.) fulfils military needs; and I accept the declaration of the C-o-S that he, for his part did not take into account political considerations, including the pressure of the Gush Emunim members, when he came to submit his professional opinion to the military level. But a secondary reason, such as the military reason in the decisions of the political level which initiated the settlement's establishment does not fulfil the precise strictures laid down by the Hague Regulations for preferring the military need to the individual's right to property. In other words: would the decision of the political level to establish the settlement at that site have been taken had it not for the pressure of Gush Emunim and the political-ideological reasons which were before the political level? I have been convinced that had it not been for these reasons, the decision would not have been taken in the circumstances which prevailed at the time.[46]

The court declined to rule upon the truth of the claim that it was militarily necessary to establish a civilian settlement at the site in question.[47] On this matter the court deferred, as it had done so in previous cases,[48] to the professional opinion of the C-o-S.[49] Through this deference, the court arguably acknowledged that the settlement *might* have actually fulfilled the military needs as suggested by the C-o-S if the requisition order had been upheld and the settlement established.

This arguable acknowledgement is significant. It would appear that the court was prepared to annul a predominantly political decision to requisition private land in occupied territory despite its potential fulfilment of genuine military needs. It would also appear that the lawfulness of the *Elon*

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[41] *Ibid.*, at 169.
[42] See *ibid.*, at 171.
[43] See *ibid.*, at 173.
[44] *Ibid.*, at 175.
[45] Two justices concurred with Justice Landau. The other two justices also concurred but appended separate opinions of their own. See *ibid.*, at 148.
[46] *Ibid*. Justice Landau went on to (a) dispose of the problem associated with the plurality of purposes in decision-making by holding that a decision's lawfulness should be judged according to its dominant purpose, and to (b) defend the approach he had taken to purposes and motives whereby the two notions are treated as sharing a common area of meaning. See *ibid.*, at 175 (citing S.A. de Smith, *Judicial Review of Administrative Action* 3d ed. (1973). See also *Elon Moreh*, at 175-176.
[47] The court did, however, note the existence of diametrically opposing views on this subject. See *Elon Moreh*, at 154-156.
[48] See Kretzmer, "Law of Belligerent Occupation", *supra* note 39, at 228.
[49] See *Elon Moreh*, at 152-156. The court, quoting a passage from its previous ruling (not yet published at the time), said (*ibid.*, at 156): "In a dispute of this sort on military-professional questions, in which the course [*sic*.] has no fixed view of its own, we shall presume that the professional views expressed in the affidavit on behalf of the respondents, speaking in the name of those who are responsible for the preservation of security in the administered territories and within the Green Line, are the correct views. Very convincing evidence is needed to contradict this presumption".

Moreh requisition order depended on whether it had really been decided for the right purposes,[50] *not* whether it would have generated the right results.

In *Beit Sourik*, the Israeli Supreme Court had before it a petition against orders issued by the IDF Commander in the area of Judea and Samaria to seize land for the purpose of erecting a separation fence.[51] The petitioners were landowners and village councils affected by the orders. They alleged, *inter alia*, the commander's lack of authority to issue the orders; the fence's political, non-military purpose; the lack of military necessity for the fence being erected along the planned route; defects in the procedure that rendered the land seizures illegal; and violations of the local inhabitants' fundamental rights.[52]

The court upheld the commander's authority to construct the fence.[53] It then proceeded with the examination of the fence's route chosen by the commander and its lawfulness under international humanitarian law.[54] The court looked, *inter alia*, to Articles 53 of Geneva Convention IV for this purpose, yet without considering whether the erection of the barrier constituted "military operations" within the meaning of that article.[55] Marco Pertile suggests that it does not, on the ground that

> [t]he construction of the wall, as a complex project, planned over a span of years and substantially preventive in nature is quite different from the traditional concept of military operations. A flexible interpretation of the text of Article 53 [of Geneva Convention IV] would be necessary in order to include the wall amongst military operations. Such a solution however seems to be precluded by the wording of the Article which, after stressing the overall prohibition of the destruction of property, recognises the necessities of military operations in the form of a derogatory clause. As for all derogatory clauses strict interpretation is required.[56]

It may be asked whether the expression "military operations", even if strictly interpreted, actually precludes a project such as the one in question here simply because it is complex, involves years of planning and pursues preventive purposes. Far from being "quite different from the traditional concept of military operations", as Pertile puts it, constructing defensive fortifications with these characteristics has been part and parcel of territorial warfare. The mere fact that such a project occurs on occupied territory does not *per se* alter its character as a military operation.

If it were true that the wall's erection did not constitute "military operations" within the meaning of Article 53, however, then it would be arguable that the seizure orders of the IDF commander had arguably not been issued "primarily for some military purpose".

3.1.3 Submission of the Enemy?

[50] See *Beit Sourik*, para. 27. See also HCJ 7957/04, *Zaharan Yunis Muhammad Mara'abe et al.* v. *The Prime Minister of Israel et al.*, 15 September 2005, para. 98.
[51] See *Beit Sourik*, paras. 1-6.
[52] See *ibid.*, paras. 10-11.
[53] *Ibid.* The court dismissed the petitioners' claim that the military commander decided to erect the fence on political, not military, considerations. It also dismissed alleged defects in the seizure proceedings and the exercise of the military commander's authority therein. See *ibid.*, paras. 26-32. See also *Alfei Menashe*, paras. 15-23, 98-101.
[54] See *Beit Sourik*, paras. 33-35.
[55] See *ibid.*, para. 35.
[56] Pertile, *supra* note 39, 135-136. See also *ibid.*, at 150-151; Alexander Orakhelashvili, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction", 11 *Journal of Conflict & Security Law* 119 (2006), at 137 ("Military operations in the West Bank ceased a long time ago and the Wall itself is hardly meant to serve the needs of the Israeli army. Whatever the situation in the West Bank, it cannot currently be denoted as a state of war").

The military purpose sought need not be complete submission of the enemy.[57] While this formulation was found in some, typically older, military manuals,[58] it is not the case in most of the later ones[59] and commentaries.[60]

There is some authority for the view that military necessity may be admissible for purposes that are purely defensive in nature or for the sanitary requirements of an occupation force. In *Hostage*, for instance, the U.S. Military Tribunal acquitted Lothar Rendulic of wanton destruction of private and public property in Finmark, Norway, a charge based on the rules contained in Article 23(g) of the 1907 Hague Regulations. The tribunal held: "The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation coming within the exceptions contained in Article 23g [of the Hague Regulations]".[61] At no point did the tribunal consider whether the destruction ought to have been militarily necessary to defeat the advancing Soviet troops, let alone the armed forces of the Soviet Union as a whole.[62]

In *Hardman*, the Great Britain-United States Arbitral Tribunal ruled that the measures taken by an occupation force for the maintenance of its sanitary conditions constituted military necessity. The tribunal stated:

> In the present case [involving an 1898 United States military campaign in Cuba], the necessity of war was the occupation of Siboney, and that occupation … involved the necessity, according to the medical authorities ... of taking the said sanitary measures, i.e., the destruction of the houses and their contents. In other words, the presence of the United States troops at Siboney was a necessity of war and the destruction required for their safety was consequently a necessity of war.[63]

Similarly, A.P.V. Rogers observes:

> The reference to the complete submission of the enemy, written in light of the experience of total war in the Second World War, is probably now obsolete since war can have a limited purpose as in the termination of the occupation of the Falkland Islands in 1982 or of Kuwait in 1991.[64]

Admittedly, Rogers has made this observation specifically with the 1958 British manual[65] in mind. Nevertheless, his observation would also be valid *vis-à-vis* other manuals that refer to the complete submission of the enemy or adversary as an aspect of military necessity.

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[57] Roxburgh (ed.), *supra* note 31, at 212 (emphasis in original): "All destruction of, and damage to, enemy property for the purpose of offence and defence is *necessary* destruction and damage, and therefore lawful, whether it be on the battlefield during battle, or in preparation for battle or siege".

[58] See, e.g., Office of the Judge Advocate General, *supra* note 3, at 2-1 (allowing complete submission only as "the *primary aim* of armed conflict") (emphasis added); The War Office, *The Law of War on Land, Being Part III of the Manual of Military Law* (1958), at 1; U.S. Department of the Army, *supra* note 3, at 4.

[59] See, e.g., Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (1987), at 82-83 ("overpowering of the enemy"); U.K. Ministry of Defence, *supra* note 3, at 21 ("complete or partial submission of the enemy"); U.K. Ministry of Defence, *Joint Services Publication 383: The Manual of the Law of Armed Conflict Amendment* (2010) 3, at 5; U.S. Department of the Navy, *supra* note 3, at 5-2 ("partial or complete submission of the enemy"); Office of General Counsel, *supra* note 3, at 56-57.

[60] See, e.g., Schwarzenberger, *supra* note 39, at 131-132; Rogers, *supra* note 33, at 5; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), at 260; Greenwood, *supra* note 5, at 36.

[61] *Hostage*, at 1296-1297.

[62] See also *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* (1950) 1, at 541; McDougal and Feliciano, *supra* note 27, at 74-75.

[63] *William Hardman (United Kingdom) v. United States*, 18 June 1913, 6 *Reports of International Arbitral Awards* (2006) 25, 26; 7 *American Journal of International Law* 879 (1913), at 881; 2 *British Yearbook of International Law* 197 (1921-1922), at 119. See also Schwarzenberger, *supra* note 39, at 131-132; Hilaire McCoubrey, "The Nature of the Modern Doctrine of Military Necessity", 30 *Revue de droit militaire et de droit de la guerre* 215 (1991), at 222-223.

[64] Rogers, *supra* note 33, at 5.

[65] The War Office, *supra* note 58.

3.2 The Measure Was Required for the Attainment of the Military Purpose

In order for juridical military necessity pleas to be admissible, the measure taken must be "required"[66] for the attainment of the military purpose. Assessing the admissibility of such pleas therefore involves evaluating the relationship between the measure taken on the one hand, and the purpose that it was meant to attain on the other.

Within the meaning of juridical military necessity, a measure cannot be considered required for a particular military purpose unless it satisfies all of the following criteria:

(i) That the measure was materially relevant to the attainment of the military purpose;
(ii) That, of those materially relevant measures that were reasonably available, the one taken was the least evil; and
(iii) That the evil that the measure would cause was not disproportionate to the gain that it would achieve.[67]

Where a given measure fails to satisfy the three cumulative criteria, it is arguably better described as a military "advantage" or "convenience"[68] ineligible for exception than as a military "necessity". A situation may also arise where even the least evil of those reasonably available and materially relevant measures causes, or is expected to cause, disproportionate injury. Where this is the case, juridical military necessity may leave the belligerent with no alternative but to modify the military purpose or abandon its pursuit altogether.[69]

3.2.1 The Measure's Material Relevance to the Military Purpose's Attainment

Military necessity is inadmissible where the measure would have no material bearing on the attainment of the stated military purpose.[70]

In *Peleus*, Heinz Eck was brought before a British Military Court on charges of ordering the killing of survivors of a sunken Allied vessel in violation of the laws and usages of war. Eck argued that the elimination of the vessel's traces with a machine gun and hand grenades was operationally necessary to save his U-boat and its crew.

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[66] Various expressions, such as "indispensable", "need", "requirement", "necessary", and so on, have been used to denote essentially the same notion of "required". See, e.g., Article 14, Instructions for the Government of Armies of the United States in the Field (24 April 1863) ("indispensable"); de Mulinen, *supra* note 59, at 83 ("indispensable"); McDougal and Feliciano, *supra* note 27, at 524, 527 ("necessary"); Downey, *supra* note 5, at 254 ("need"); Robert W. Gehring, "Loss of Civilian Protection Under the Fourth Geneva Convention and Protocol I", 90 *Military Law Review* 49 (1980), at 55 ("requirement"); O'Brien, *supra* note 5, at 138 ("indispensable"); Dinstein, *Military Necessity (1982)*, *supra* note 5, passim ("necessary").

[67] David Kretzmer observes that this three-pronged test is "accepted in some domestic systems as a general principle in international law" and "adopted by international bodies". Kretzmer, "Judicial Review During Armed Conflict", *supra* note 39, at 450.

[68] See, e.g., *In re von Lewinski (called von Manstein)*, *Annual Digest and Reports of Public International Law Cases* (1949) 509, at 522 ("Now first and obvious comment on the wording of [Article 23(g) of the 1907 Hague Regulations] is that the requirement is 'necessity' and not 'advantage'"); Nils Melzer, *Targeted Killing in International Law* (2008), at 291-292; Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), at 74-75, 122-123; Solis, *supra* note 60, at 264 ("Sometimes, military necessity is invoked when military convenience is closer to truth"); G.I.A.D. Draper, "Military Necessity and Humanitarian Imperatives", 12 *Military Law and Law of War Review* 129 (1973), at 134 ("One thing seems to be clear. Military 'necessity' is not synonymous with 'military convenience'" (quoting *von Manstein*, at 522)).

[69] Michael Walzer makes a similar ethical argument regarding Hiroshima. See Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations* (1977), at 263-268.

[70] See, e.g., *Hostage*, at 1253-1254 ("There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces"); *see also,* Dinstein, *Military Necessity (1982), supra* note 5, at 275; McDougal and Feliciano, *supra* note 27, 524-525; Pertile, *supra* note 39, at 151.

Relevant facts of the case are as follows. On the South Atlantic Ocean, the U-boat commanded by Heinz Eck sank the *Peleus*, a Greek ship chartered by the British Ministry of War Transport. Those members of the thirty five-strong *Peleus* crew who had survived the sinking reached two rafts and floating wreckage. The submarine surfaced, called over one of the survivors for interrogation, and left the scene of the sinking for about 1,000 metres. The submarine then returned, opened machine-gun fire and threw grenades on those in the water and on the rafts. The firing went on for about five hours at night, killing all but three (a fourth died later).[71]

Eck contended, *inter alia*:

- That all possibility of saving the survivors' lives had lapsed;
- That it was against the order of the German U-boat Command to take them on board his U-boat;
- That he was in a vulnerable region of the Atlantic Ocean where many U-boats had been sunk;
- That he considered the rafts to be a danger since they would indicate to airplanes the exact spot of the sinking and they could be equipped with signalling communication devices;
- That no humans were seen on the rafts when he opened fire; and
- That he thought the survivors had jumped out of the rafts.[72]

The judge advocate summarised the notion of operational necessity, as alleged by Eck, thus:

> The purpose of that firing was primarily the destruction of the wreckage in order that every trace of the sinking might be obliterated. [Eck] says he realized that a consequence of the carrying out of that order must have been the death of certain survivors, and that it was a decision that he regretted: but he says … he was under an operational necessity to do what he did because he had as his first duty to ensure that the submarine was protected against attack by Allied aircraft. He says that the only way of doing that was to take every possible step on that night to destroy every trace of the sinking. If as a result of that survivors were killed it was unfortunate for them, but he was under the paramount necessity of protecting his boat and his crew.[73]

For our purposes, we might treat "operational necessity" as an alleged variant of "military necessity". McCoubrey observed:

> At the post-war trial before a British Military Tribunal of the U-Boat commander, Kapitanleutnant Eck, and others of the personnel of the submarine, an argument was advanced peripherally that the massacre might have been justified by the need to prevent the survivors revealing the location of the U-Boat, in effect a form of military necessity.[74]

Eck's argument was unsuccessful. The court found him guilty as charged and sentenced him to death by shooting.[75]

In his summary to the court, the judge advocate conceded that circumstances *could* arise in which a belligerent might be justified in killing an unarmed person for the purpose of saving his own life.[76] Be that as it may, the judge advocate asked the court:

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[71] See John Cameron, *Trial of Heinz Eck, August Hoffmann, Walter Weisspfennig, Hans Richard Lenz and Wolfgang Schwender (The* Peleus *Trial)* (1948), at 56-57; United Nations War Crimes Commission, "The Peleus Trial", 1 *Law Reports of Trials of War Criminals* (1947), at 1-21.

[72] See UN War Crimes Commission, "Peleus", *supra* note 71, at 4-5.

[73] Cameron, *supra* note 71, at 126-27.

[74] McCoubrey, *supra* note 63, at 225. It is acknowledged here, however, that views may differ as to whether *Peleus* really involves any issue of military necessity at all. Doubts emanate primarily from the fact that the underlying prohibition does not appear to admit military necessity exceptions.

[75] Cameron, *supra* note 71, at 127; UN War Crimes Commission, "Peleus", *supra* note 71, at 20-21.

[76] See Cameron, *supra* note 71, at 127; UN War Crimes Commission, "Peleus", *supra* note 71, at 12, 15.

> Do you or do you not think that the shooting of machine-guns at substantial pieces of wreckage and rafts would be an effective way of destroying every trace of this sinking? Do you or do you not think it fairly obvious that in any event a patch of oil would have been left after this steamship had sunk, which would have been an indication to any aircraft that was in the neighbourhood that a ship had recently been sunk, and that a submarine was probably in that area and it was well worth searching for it?[77]

It is possible that the judge advocate was sceptical about the truthfulness of Eck's claim that Eck had ordered the shooting in order to preserve the U-boat and the lives of its crew.[78] But if the judge advocate was sceptical, it does not appear from the trial record that he invited the court specifically to entertain this matter.

Instead, the judge advocate questioned the notion that shooting the floating rafts and wreckage would have actually resulted in every trace of the sinking being eliminated – and hence, supposedly, the location of the U-boat being concealed. He did so by suggesting that the shooting would not have erased the oil patches whose continued presence would lead to detection.[79]

A measure's relevance to its purpose also became an issue in *Beit Sourik*. The petitioners in that case submitted alternative routes for the fence.[80] Members of a non-governmental Council for Peace and Security, acting as *amici curiae*, provided expert opinions on security that differed in part from those of the respondents.[81] The Israeli Supreme Court ruled that Articles 23(g), 46 and 52 of the Hague Regulations, as well as Articles 27 and 53 of Geneva Convention IV, "create a single tapestry of norms that recognizes both human rights and the needs of the local population as well [as] recognizing security needs from the perspective of the military commander".[82] "Between these conflicting norms", continued the court, "a proper balance must be found".[83]

The court held that such a balance would be found by reference to proportionality, a principle rooted not only in international law but also in Israeli administrative law.[84] The court divided proportionality into three subtests.[85] According to one subtest, referred to in the judgement as the "appropriate means" or "rational means" test, "[t]he means that the administrative body uses must be constructed to achieve the precise objective which the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realisation of the objective".[86]

Using this test, the court reiterated its traditional deference to the professional opinion of the military commanders who had been in charge. The petitioners failed to persuade the court that it should prefer the position of the Council for Peace and Security when it differed from that of the commander.[87] Consequently, the court held that the commander's chosen route satisfied this test.[88]

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[77] Cameron, *supra* note 71, at 127. In this connection, see also the *Llandovery Castle* case as reported by the United Nations War Crimes Commission. United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) at 48-49.

[78] See Cameron, *supra* note 71, at 127. ("Remember [Eck] cruised about the site of this sinking for five hours. He refrained from using the speed which was at his disposal of 18 knots to get away as quickly as he could from the site of the sinking. He preferred to go round shooting, as he says, at wreckage by means of machine-guns").

[79] Eck admitted to his defense counsel that he could not possibly erase all traces of the sinking. But he "only wanted to destroy the bigger pieces which were recognizable to aeroplanes". *Ibid.* at 52.

[80] See *Beit Sourik*, para. 17.

[81] See *ibid.* paras. 17, 47.

[82] *Ibid.*, para. 35.

[83] *Ibid*.

[84] *Ibid.*, paras. 36-37. See also Kretzmer, "Law of Belligerent Occupation", *supra* note 39, at 228-229 n.104 (citing Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2011)).

[85] The three subtests are: (a) the "appropriate means" or "rational means" test; (b) the "least injurious means" test; and (c) the "proportionate means" test (or proportionality "in the narrow sense"). See *Alfei Menashe*, para. 30.

[86] *Beit Sourik*, para. 41.

[87] See *ibid*., paras. 46-47, 56-57, 66, 70, 75, 80.

[88] In the end, of the eight orders challenged by the petitioners, the court unanimously nullified five in their entirety and two in part. The court found that these orders failed to satisfy the third, "proportionate means" test. In respect of the remaining order, the route had already been changed and the petitioners did not raise any argument during the proceedings. The court denied the petition in respect of this latter order, as the parties had not substantially disputed it. *See ibid.*, paras. 50, 80.

3.2.2 Least Evil Among Materially Relevant and Reasonably Available Measures

It is not necessary that the measure taken be the *only* reasonably available course of action for the attainment of a given military purpose. Such singular availability hardly ever occurs. There would almost always be two or more reasonably available courses of action that are materially relevant to the purpose.[89] It follows that in almost no case does a measure's "requiredness" for a military purpose depend on whether the purpose would not have been attained but for the measure taken. Here, no question of counter-factual *conditio sine qua non* – which, by definition, cannot be proven[90] – need be considered.

Exceptional military necessity demands that, among all reasonably available and materially relevant measures *vis-à-vis* a given military purpose, the belligerent choose one that causes the least injury to objects and interests otherwise protected by these rules.[91] In principle, military necessity is inadmissible where, in relation to the stated military purpose, at least one materially relevant yet less injurious measure was reasonably available to the belligerent other than the one taken.

This line of reasoning was proposed in *Peleus*, albeit indirectly. The judge advocate took issue with the amount of cruelty involved in the killing of the survivors relative to the amount of cruelty involved in an alternative course of action that he implied had been reasonably available to Eck. The court was asked:

> Do you or do you not think that a submarine commander who was really and primarily concerned with saving his crew and his boat would have done as Kapitänleutnant Schnee, who was called for the Defence, said he would have done, namely, have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance?[92]

Implicit herein is the notion that, even if the shooting had eliminated all traces of the sinking, it would not have been operationally necessary to do so in order to save Eck's U-boat and its crew.[93] The judge advocate presented the court with the possibility that Eck would have achieved the same purpose by another means, namely by removing himself and his boat from the location of the sinking "at the highest possible speed at the earliest possible moment for the greatest possible distance". Had Eck chosen to act as Schnee said he would, it would not have been operationally necessary for Eck to order the killing of any unarmed person[94] – although, admittedly, the survivors on the rafts and wreckage would be left to their fate.[95]

The evidence showed that a man of comparable experience would have considered this alternative reasonably available to him had he found himself in a similar situation. The defence witness,

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[89] See, e.g., Article 6(a)(ii), Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of armed conflict (26 March 1999). See also below.

[90] See Part I, Chapter 2 above.

[91] See, e.g., *Beni-Madan Rzini Case (Great Britain v. Spain)*, Spanish Zone of Morocco Claims Commission, 29 December 1924, 2 *Annual Digest of Public International Law Cases Years 1923 to 1924* (1933) 168 ("It ought not to have been difficult for the military authorities, once they had seized the cattle, to separate the animals belonging to peaceful farmers from those owned by rebels. The slaughter of the animals was not justified by military necessity"); Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* 3d ed. (2014), at 474 ("if the military goal could be achieved through appropriation or similar means, destruction is not permitted as it is disproportionate").

[92] Cameron, *supra* note 71, at 127.

[93] That the actual elimination of all traces of the sinking would have saved Eck's boat and its crew does not appear to have been in issue.

[94] An unidentified reporter of the *Peleus* case noted that, "on the facts of the case this behaviour [shooting at helpless survivors of a sunken ship] was not operationally necessary, i.e. the operational aim, the saving of ship and crew, could have been achieved more effectively without such acts of cruelty". UN War Crimes Commission, "Peleus", *supra* note 71, at 16.

[95] The four men who survived Eck's machine gun fire and grenades spent the next twenty-five days drifting on the open sea. See Cameron, *supra* note 71, at xxvi; UN War Crimes Commission, "Peleus", *supra* note 71, at 3.

Kapitänleutnant Schnee, was a member of the German U-boat Command who had sunk about thirty Allied ships and received military decorations.[96] During cross-examination, Schnee said:

> What did you do after [sinking a ship]? – I have always tried to get away as quickly as possible out of the danger zone because it is well known that after the sinking of a ship the enemy is most alert to retaliate.
>
> Is that, in your opinion, the correct thing to do after you have sunk a ship? – That is according to my opinion the most important thing for my boat.
>
> …
>
> What would you have done if you had been in Eck's position? – I would under all circumstances have tried my best to save life, as that is a measure which was taken by all U-boat Kommandanten; but when I am informed of this case, then I can only explain it as this, that Kapitänleutnant Eck through the terrific experience he had been through lost his nerve.
>
> Does that mean that you would not have done what Kapitänleutnant Eck did if you had kept your nerve? – I would not have done it.[97]

The *Beit Sourik* case also featured this "least injurious means" test. The Israeli Supreme Court defined it thus: "[T]he means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used".[98]

One disputed segment of the fence's route surrounded the ridge of Jebel Muktam. The petitioners described the severe damage that would afflict the nearby villages, which already suffered from 75% unemployment. The fence along the chosen route was said to affect large areas of cultivated land as well as tens of thousands of olive and fruit trees.[99] According to the affidavit provided by the Council for Peace and Security, no effective light weapon fire from Jebel Muktam was possible on any Israeli town or on Route 443 connecting Jerusalem to the centre of the country. It was argued that not every topographically controlling hill such as Jebel Muktam was required for the fence's defence. The council suggested that it would be easier to defend obstacles at a location three kilometres to the south of the current route. In the council's view, the local population would be dangerously and needlessly embittered by the inevitable construction of agricultural gates.[100] The petitioners presented two alternative routes.[101]

The commander responded that, topographically, the alternative routes were considerably inferior to his own. He stated that control of the Jebel Muktam hill overlooking the entire area was a matter of critical military importance; the fence would prevent the hill being taken and decrease the risk of attacks on Route 443.[102] The commander also differed from the petitioners on the scale of the injury.[103] It appears from the judgement that the commander had taken several concrete steps with a view to reducing the injury by creating agricultural gates, offering compensation, transferring rather than uprooting olive trees, considering the location of even unauthorised Palestinian buildings and locally correcting some portions of the route.[104]

The fact that the route suggested by the Council for Peace and Security was less injurious than the route chosen by the commander was not, however, in dispute. Once again the court deferred to the commander's position that the alternative route would grant him less security than his proposed route would. The court ruled: "By our very determination that we shall not intervene in that position,

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[96] See UN War Crimes Commission, "Peleus", *supra* note 71, at 6.
[97] Cameron, *supra* note 71, at 69-70.
[98] *Beit Sourik*, para. 41.
[99] See *ibid.*, para. 52.
[100] See *ibid.*, paras. 54-55.
[101] See *ibid.*
[102] See *ibid.*, paras. 51, 55.
[103] See *ibid.*, para. 53.
[104] See *ibid.*, para. 55.

we have also determined that there is no alternate route that fulfills, to a similar extent, the security needs while causing lesser injury to the local inhabitants".[105] The same was held to be the case for the other disputed segments of the commander's chosen route.[106]

In fairness to the court, the comparison at issue was one between the alternatives that were reasonably available to the commander and materially relevant *to the same purpose*. It is only among these alternatives that the commander would be called upon to choose the least injurious. In the particular circumstances surrounding each disputed segment of the fence, the court did *not* agree that the commander's chosen route and the Council for Peace and Security's alternative route achieved the same degree of security.[107]

3.2.3 Proportionality between the Injury and the Gain

Military necessity is inadmissible where the harm resulting from the measure is disproportionate to the purpose's military value. This is so, even if the measure is the least injurious of all alternatives that are reasonably available and materially relevant to the purpose.

The precise relationship between military necessity and proportionality is not entirely clear. It appears uncontroversial that military necessity and proportionality are closely related concepts.[108] Beyond this, however, there is no consensus as to how proportionality operates within the notion of military necessity – or *vice versa*, for that matter. Some treat proportionality as an element of military necessity.[109] Others suggest that it is military necessity that constitutes an element of proportionality.[110]

One difficulty is the fact that exceptional military necessity operates in the narrow confines of express IHL clauses, whereas proportionality is a highly open-textured concept that appears in various fields of international law and with scopes and variables that are not necessarily the same.[111] In *jus ad bellum* concerning the use of force in self-defence, for example, proportionality is typically determined on the basis of (i) the quantum of force used relative to (ii) the repulsion of the imminent

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[105] *Ibid.*, para. 58.

[106] See *ibid.*, paras. 67, 70, 76, 80.

[107] Compare this ruling in *Beit Sourik* with the ruling in *Alfei Menashe* where the Israeli Supreme Court held that the least injurious means test had not been satisfied in respect of the fence surrounding the Alfei Menashe nucleus. See *Alfei Menashe*, para. 114: "It seems to us that the required effort has not been made, and the details of an alternative route have not been examined, in order to ensure security with a lesser injury to the residents of the villages. Respondents must reconsider the existing route".

[108] See, e.g., *Legal Consequences* Advisory Opinion, *Separate Opinion of Judge Kooijmans*, para. 34; David Luban, "Military Necessity and the Cultures of Military Law", 26 *Leiden Journal of International Law* 315 (2013), at 343-345.

[109] See, e.g., McDougal and Feliciano, *supra* note 27, at 72; O'Brien, *supra* note 5, at 138, 148-149; International Humanitarian Law Research Initiative, *supra* note 19, at 7; Elizabeth Samson, "Necessity, Proportionality, and Distinction in Nontraditional Conflicts: The Unfortunate Case Study of the Goldstone Report", in Christopher A. Ford and Amichai Cohen (eds.), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (2012) 195, at 202; Arai-Takahashi, "Excessive Collateral Civilian Casualties", *supra* note 5, at 332; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, *Judgement*, 10 July 2008, para. 357.

[110] See, e.g., Michael N. Schmitt, "Book Review: Law on the Battlefield", 8 *U.S. Air Force Academy Journal of Legal Studies* 255 (1997), at 257 (reviewing A.P.V. Rogers, *Law on the Battlefield* 1st ed. (1996)); Rogers, *supra* note 33, at 6 (referring to Schmitt's review of the first edition).

[111] Two disciplines of particular interest here are *jus ad bellum* and *jus in bello*. See, e.g., *Ethiopia v. Eritrea*, Eritrea-Ethiopia Claims Commission, *Final Award on Ethiopia's Damages Claims*, 17 August 2009, para. 316; Ricardo Pisillo Mazzeschi, "Book Review: Il Principio Della Proporzionalitá Nell'Ordinamento Internazionale", 13 *European Journal of International Law* 1031 (2002), at 1031-1036; Andreas Zimmermann, "*Jus ad Bellum*, *Jus in Bello* and the Issue of Proportionality", 11 *Max Planck Yearbook of United Nations Law* 99 (2007); Christian J. Tams and James G. Devaney, "Applying Necessity and Proportionality to Anti-Terrorist Self-Defence", 45 *Israel Law Review* 91 (2012); Enzo Cannizzaro, "Proportionality in the Law of Armed Conflict", in Andrew Clapham and Paola Gate (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 332; Michael Newton and Larry May, *Proportionality in International Law* (2014).

or actual attack against which the right of self-defence is exercised.[112] Within *jus in bello* concerning the lawfulness of attacks on military objectives involving unintended civilian casualties, the most widely accepted pair of variables for comparison is one between (i) "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof", and (ii) the "concrete and direct military advantage anticipated".[113]

As an element of exceptional military necessity,[114] proportionality weighs the injury that the measure would cause to protected persons, objects and interests *vis-à-vis* the value of the military purpose that the measure would achieve. In *Beit Sourik*, considerations of proportionality in this sense proved decisive.[115] The Israeli Supreme Court called such considerations "proportionality in the narrow sense".[116] According to the court, "the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means".[117]

The court divided this narrow proportionality into two subgroups. One subgroup was to be applied with "absolute values [by] directly comparing the advantage of the administrative act with the damage that results from it".[118] The other, to be applied in a "relative manner", was defined as follows:

> [T]he administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act – by employing alternate means, for example – ensures a substantial reduction in the injury caused by the administrative act.[119]

It is this latter variant of proportionality, i.e., "in the narrow sense" and applied in a "relative manner", that the court used when considering the facts before it.

Proportionality was examined on a segment-by-segment basis.[120] For each disputed segment of the route, the court weighed the injury to the local inhabitants[121] *vis-à-vis* the security benefit derived from the fence being erected along the route chosen by the commander.

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[112] See, e.g., Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 159-179; Giovanni Distefano, "Use of Force", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 545, at 555-556; Office of General Counsel, *supra* note 3, at 62.

[113] See Articles 51(5)(b), 57(2)(b), Additional Protocol I. See also, e.g., Ben Clarke, "Contemporary Legal Doctrine on Proportionality in Armed Conflicts: A Select Review", 3 *Journal of International Humanitarian Studies* 391 (2012); Ben Clarke, "Proportionality in Armed Conflicts: A Principle in Need of Clarification?", 3 *Journal of International Humanitarian Legal Studies* 73 (2012); Geoffrey S. Corn et al., *The Law of Armed Conflict: An Operational Approach* (2012), at 123-125, 187-189; Jason Wright, "'Excessive' Ambiguity: Analysing and Refining the Proportionality Standard", 94 *International Review of the Red Cross* 819 (2012); Yoram Dinstein, "The Principle of Proportionality", in Kjetil Mujezionvić Larsen, Camilla Guldhal Cooper and Gro Nystuen (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (2013) 72; Joshua Andresen, "New Voices: Challenging the Perplexity over *Jus in Bello* Proportionality", 7 *European Journal of Legal Studies* 19 (2014); Jeremy Rabkin, "Proportionality in Perspective: Historical Light on the Law of Armed Conflict", 16 *San Diego International Law Journal* 263 (2015).

[114] Kretzmer, "Law of Belligerent Occupation", *supra* note 39, at 228-229. See also UN War Crimes Commission, *History*, *supra* note 77, at 488 (discussing the case involving "a German officer who had completely destroyed a large Roman Catholic church when his unit left Horst-Melderslo in Holland. [Committee I] decided that, while military necessity may have existed for the destruction of the spire of the church to prevent its use as an allied observation tower, no necessity existed for the complete and utter destruction of the whole church").

[115] See also Kretzmer, "Judicial Review During Armed Conflict", *supra* note 39, at 449 (referring to "the big question"); Kretzmer, "The Law of Belligerent Occupation", *supra* note 39, at 229-230.

[116] *Beit Sourik*, para. 41.

[117] *Ibid*.

[118] *Ibid.*

[119] *Ibid.*

[120] See *ibid.*, para. 49. The court, however, made observations about the overall injury to the local inhabitants affected by the entire length of the separation fence examined in the case. See *ibid*., paras. 82-84.

[121] The court added to the injury side of the equation "human rights and the necessity of ensuring the provision of the needs and welfare of the local inhabitants" and "family honour and rights ... protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention". *Beit Sourik*, para. 59.

As regards the Jebel Muktam segment of the fence, the court agreed that the alternative route presented by the Council for Peace and Security would substantially decrease the injury. The court so agreed, against the backdrop of the commander's opinion – which, as noted earlier, the court assumed to be correct – that he would have less security in the area as a result.[122] Effectively, the court ruled in favour of the decrease in the injury caused to the local inhabitants over the decrease in the degree of security accruing to the commander. In the court's view, "the security advantage reaped from the route as determined by the military commander, in comparison to the ... route [proposed by the Council for Peace and Security], does not stand in any reasonable proportion to the injury to the local inhabitants caused by this route".[123]

The court found that the commander's order to seize land for the construction of the separation fence in the Jebel Muktam area was disproportionate in its injurious effect on the local inhabitants relative to the security gain he sought by it.[124] The court made similar findings regarding the other disputed segments of the fence: The "severe" injury that the commander's route caused to the local inhabitants was held to be more disproportionate to the level of security he sought than the injury caused by an alternative route – such as the one suggested by the Council for Peace and Security – would be to the somewhat lower level of security that it would achieve.[125]

Consequently, the seizure orders concerning the fence's disputed segments were declared null and void.[126] The court considered the measure taken by the commander militarily *un*necessary within the meaning of relevant IHL clauses, because it accepted the possibility of at least one alternative measure whereby a minor modification to the original purpose would result in a significantly superior security-injury ratio.

The "relative" proportionality test affected the court's handling of the case in three important ways. Firstly, it reduced the difficulty in comparing two dissimilar variables. Had the court applied an "absolute" proportionality test, it would have had to compare the amount of injury caused to the local inhabitants with the degree of security gained through the commander's route. Thanks to the "relative" proportionality test, the court had two sets of comparison, each containing two variables to be weighed on the same measurement. These sets were:

(i) A comparison between the amount of injury to the local inhabitants resulting from the route chosen by the commander, on the one hand, and the amount of injury to the local inhabitants resulting from an alternative route, such as the one suggested by the Council for Peace and Security, on the other; and
(ii) A comparison between the degree of security sought by the commander's route, on the one hand, and the degree of security sought by the alternative route, on the other.

Where the reduction in injury was greater than the reduction in security, the alternative route would be superior to the commander's chosen route in terms of their security-injury ratios. Also, according to the "relative" proportionality test, the existence of such an alternative route would mean that the route chosen by the commander was disproportionate in its injurious effects *vis-à-vis* its security goal.

Secondly, the application of the "relative" proportionality test underscored the fact that the measure and the purpose were, in fact, both capable of measurement. This was particularly significant for the purpose at issue in *Beit Sourik*, namely the degree of security anticipated from the construction of the fence. A military purpose of this nature is qualitatively different from a military purpose that would be either attained or unattained but not amenable to partial attainment of different degrees. As a means of assessing military necessity, the "relative" proportionality test might not be suitable for

[122] In other words, the commander's route may very well have constituted a strictly material military necessity relative to the council's alternative route. See Part I, Chapter 2 above.
[123] *Beit Sourik*, para. 61.
[124] See *ibid*., paras. 60-62.
[125] See *ibid.*, paras. 67, 70-71, 76, 80.
[126] See *ibid.*, para. 86.

situations such as the one in which Eck found himself where the belligerent's purpose could not be measured in graduated terms.

Lastly – and, perhaps, most controversially – , the court applied the "relative" proportionality test in an attempt to avoid some hard questions. The court observed:

> Indeed, the real question in the "relative" examination of the third proportionality subtest is *not* the choice between constructing a separation fence which brings security but injures the local inhabitants, or not constructing a separation fence, and not injuring the local inhabitants. The real question is whether the security benefit reaped by the acceptance of the military commander's position (that the separation fence should surround Jebel Muktam) is proportionate to the additional injury resulting from his position (with the fence separating local inhabitants from their lands).[127]

Whether this is really what the "relative" proportionality test says, however, is debatable. For this test, as it was defined by the court, effectively opens a veritable Pandora's Box. The court's conclusion was that, compared to the alternatives suggested by the petitioners, the route chosen by the commander was disproportionately injurious. It was *not* the court's conclusion that those alternatives themselves were proportionately injurious.[128] Whether these alternatives were proportionately or disproportionately injurious would depend on the availability or otherwise of some further alternatives with a superior security-injury ratio. Such a "relative" proportionality analysis could go on *ad infinitum*.[129]

The question, then, is this: Could there be a stage at which the IDF Commander in the West Bank would cease to be capable of proposing any route within the occupied territory that was less disproportionately injurious than, for instance, some alternative route outside the territory? Would this not mean that the construction of a fence with an acceptable security-injury ratio might possibly go beyond the commander's authority? Would this also not mean that the commander himself might at some point have to choose not to construct the separation fence at all and therefore not to injure the local inhabitants at all? That these questions *may* yield an affirmative answer is inherent in the "relative" proportionality test.

It is therefore *not* because the "relative" proportionality test did not raise these questions that the court managed to avoid them. The court managed to do so for two reasons. First, it refused to question the commander's authority in principle to erect the fence on the territory he occupied.[130] By refusing to question the commander's authority, the court refused to contemplate the prospect that even the least disproportionately injurious measure at his disposal might be too disproportionately injurious. Second, the specific alternatives presented by the petitioners and the Council for Peace and Security were virtually all situated in the territory he occupied.[131] It would have been interesting to see the court's reaction had some or all alternative routes proposed by the petitioners been located on the Israeli side of the "Green Line".

These questions did not escape the attention of two international institutions. One was the International Committee of the Red Cross (ICRC), which several months before the *Beit Sourik* case

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[127] *Ibid.*, para. 61. Emphasis added.

[128] Nor, to be sure, was the court called upon to identify any particular route with an acceptable security-injury ratio. The court noted (*ibid.*, para. 71): "This is the military commander's affair". Also of note is the court's statement (*ibid.*, para. 80): "we are of the opinion that the military commander must map out an alternate arrangement ... Such alternate routes were presented before us. We shall not take any stand whatsoever regarding a particular alternate route. The military commander must determine an alternative which will, provide a fitting, if not ideal, solution for the security considerations, and also allow proportionate access of Beit Daku villagers to their lands".

[129] Thus, theoretically, petitions could keep coming before the Israeli Supreme Court every time the military commander decided on a new route which was less disproportionately injurious than the previous route. In *Alfei Menashe*, the court noted that there had already been seven petitions arising from the new route chosen by the military commander in light of the ruling in *Beit Sourik*. See *Alfei Menashe*, para. 36.

[130] See *Beit Sourik*, paras.10-11.

[131] See *Beit Sourik* (maps attached to the judgement).

issued a press release in which it expressed an unusually blunt view of the matter.[132] The other, the International Court of Justice (ICJ), rendered an advisory opinion on the legal consequences of the construction of the wall within ten days of the Israeli Supreme Court's ruling.[133]

Neither the ICRC nor the ICJ denied Israel's right to take lawful measures to protect its population.[134] Nor is there any indication that, in their view, the construction of the barrier *as such* lacked any material bearing on Israel's efforts to combat terrorist attacks launched from the West Bank. Rather, they juxtaposed the injury done and rights denied to residents in the occupied territory against the measures taken by Israel in the light of its rights and obligations under international law.

Unlike the Israeli Supreme Court, the two organisations did not examine the wall on a segment-by-segment basis. It appears that they treated as one object the entire length of the barrier that diverted from the "Green Line" into the occupied territory.

The ICRC declared that the barrier, "insofar as its route deviates from the 'Green Line' into occupied territory", is contrary to international humanitarian law.[135] To the ICRC,

> [t]he problems affecting the Palestinian population in their daily lives clearly demonstrate that [the barrier] runs counter to Israel's obligation under IHL to ensure the humane treatment and well-being of the civilian population living under its occupation. The measures taken by the Israeli authorities linked to the construction of the Barrier in occupied territory go *far beyond* what is permissible for an occupying power under IHL.[136]

The ICRC essentially found that Israel's actions were disproportionate to the injury caused. It called upon Israel "not to plan, construct or maintain this Barrier within occupied territory".[137]

The ICJ declined to consider Article 23(g) of the Hague Regulations,[138] but it took note of the military necessity exception under Article 53 of Geneva Convention IV. The court held that it was, "on the material before it", not convinced that "the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations".[139]

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[132] See International Committee of the Red Cross, *Press Release, Israel/Occupied and Autonomous Palestinian Territories: West Bank Barrier Causes Serious Humanitarian and Legal Problems*, 18 February 2004. Strictly speaking, the ICRC's observations do not constitute judicial findings of any sort. They are nevertheless significant for our discussion, in view of the organisation's general policy of discreetness and the special place that it has occupied in the development and implementation of international humanitarian law.

[133] See *Legal Consequences*. In its Resolution ES-10/14 adopted on 12 December 2003, the UN General Assembly requested an advisory opinion from the ICJ on the following question: "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"

[134] The ICRC recognised "Israel's right to take measures to ensure the security of its population. However, these measures must respect the relevant rules of [international humanitarian law]". ICRC, *supra* note 132. Similarly, the ICJ observed (*Legal Consequences*, para. 141): "The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law".

[135] See ICRC, *supra* note 132.

[136] *Ibid.* Emphasis added.

[137] *Ibid.*

[138] See *Legal Consequences*, para. 124. For views supporting the exclusion of Article 23(g) of the Hague Regulations from the scope of analysis in the ICJ's advisory opinion, see Pertile, *supra* note 39, at 134-136; Orakhelashvili, *supra* note 56, at 123. For criticisms, see Kretzmer, "The Advisory Opinion", *supra* note 15, at 95-96.

[139] *Legal Consequences*, para. 135.

The freedom of movement, a human right under Article 12 of the International Covenant on Civil and Political Rights,[140] was also considered. The court, quoting with approval General Observation No. 27 of the Human Rights Committee,[141] observed that restrictions to this freedom must be directed towards the ends authorised, "conform to the principle of proportionality", and "be the least intrusive instrument amongst those which might achieve the desired result".[142] Here, too, the court found, "[o]n the basis of the information available to it", that Israel's measures did not meet these conditions. Consequently,

> the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order.[143]

The court concluded that Israel was obligated to cease the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem; to dismantle those parts of the wall therein that have already been built; and to repeal or render ineffective all related legislative and regulatory acts.[144] Israel was also found to be duty-bound to make reparations to the victims by way of restitution or compensation.[145]

When the court ruled that the construction of the wall in occupied Palestine by Israel was unnecessary for its security objectives, it did so on the basis of the "specific course Israel has chosen".[146] Would this mean that the court might have arrived at a different conclusion had Israel chosen some other route? What if Israel had invited the court to consider the routes suggested by the petitioners in the *Beit Sourik* case – which, as noted earlier, still remained in the occupied territory for the most part? In other words, would the court have been prepared to consider the wall's "relative" proportionality?

The court might have been prepared to do so. Even if it had, however, it is doubtful whether the court's conclusion would have been different. After all, the court declared Israel's construction of the wall to be a breach of international law as long as it occurred in the Occupied Palestinian Territory.[147] It would appear that, in the view of the court, the injury done and rights denied to the local inhabitants were such that no route with an acceptable security-injury ratio would conceivably exist within the occupied territory.[148] The same could be said of the ICRC's view of the matter.

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[140] See *ibid.*, para. 136. Article 12 of the International Covenant on Civil and Political Rights states, in part, as follows:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> …
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Israel is a state party to the covenant. *Legal Consequences*, para. 103.

[141] See Human Rights Committee, *General Comment No. 27: Freedom of Movement (Art. 12)*, 1 November 1999, para. 14: "Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected".

[142] *Legal Consequences*, para. 136.

[143] *Ibid.*, para. 137.

[144] See *ibid.*, para. 151.

[145] See *ibid.*, paras. 152-153.

[146] *Ibid.*, para. 137.

[147] See *ibid.*, para. 163(3)(A).

[148] For a different take of the ICJ's position on this matter, see Kretzmer, "Judicial Review During Armed Conflict", *supra* note 39, at 100: "The only possible explanation for the conclusion that the construction of the whole barrier contravenes international law in general, and international humanitarian law in particular, is that some principle forbids an occupying power from building such a barrier in occupied territory, even when this construction involves neither the attempted annexation of territory, nor a specific violation of international humanitarian law or international human rights

Israel elected to limit its involvement in the ICJ's advisory proceedings to jurisdictional issues.[149] As a result, at no point during the proceedings did the court benefit from the kind of detailed submissions made by the IDF commander on his security considerations that the Israeli Supreme Court had in *Beit Sourik*.[150] Instead, the ICJ found itself relying heavily on the reports and other materials submitted to it by the Secretary-General of the United Nations describing Israel's concerns and actions, as well as submissions made by other participants in the proceedings and information available in the public domain.[151]

The court determined that it still had sufficient information and evidence upon which to render an opinion.[152] Indeed, the court rendered its opinion on the basis of the material "before it"[153] or "available to it". [154] Of such material, however, one cannot fail to notice the considerable discrepancy between the quantity and quality of information regarding the injury to the residents in the occupied territory, on the one hand, and the lack thereof regarding the security benefit sought by the occupying

law, such as the unlawful seizure or destruction of property, unjustified limitations on freedom of movement, or arbitrary interference with the right to privacy and family. Does such a principle exist?"

[149] See *Written Statement of the Government of Israel on Jurisdiction and Propriety*, 30 January 2004. Israel stated (*Legal Consequences*, para. 55): "According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits". The court noted however that "Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes". *Ibid.*, para. 57.

[150] In this connection, see Government of Israel, *supra* note 149, at 107-110. Israel asserted that the court would lack sufficient information and evidence to perform "[a]ny assessment of the military necessity of the fence" including, in particular (*ibid.*, at 108-109):

(a) an assessment of the security threat faced by Israel, which would in turn require an assessment of the nature and scale of terrorist attacks, the continuing nature of the threat, and the likely nature and scale of future attacks;
(b) an assessment of the effectiveness of the fence to address the security threat relative to other available means;
(c) an assessment of the motives behind the construction of the fence;
(d) an assessment of the routing of the fence, including an assessment of whether the routing was justified by military necessity so far as concerns individual sections of the fence;
(e) an assessment of the specific nature and extent of the construction, including an assessment of whether these aspects were justified by military necessity so far as concerns individual sections of the fence, to cover, for example, the issue of whether there was a justification on grounds of military necessity for those short sections of wall;
(f) an assessment of the specific nature of the threat to the Israeli population at different sections of the fence;
(g) in the light of the claim that the requirements of proportionality can better be met by different routing of the fence, an assessment of the relative threat arising as a result of such different routing and of whether the requirements of military necessity could thus be satisfied.

[151] See, e.g., *Legal Consequences*, para. 57.

[152] See *ibid.*, para. 58.

[153] *Ibid.*, para. 135.

[154] *Ibid.*, para. 137.

power, on the other. The advisory opinion was criticised by several ICJ judges[155] and others[156] for this reason.

Similarly, the ICRC stated that its conclusions were "based on the ICRC's monitoring of the living conditions of the Palestinian population and on its analysis of the applicable IHL provisions".[157] The extent to which the ICRC actually took into consideration the degree and nature of security sought by Israel through the construction of the barrier is not clear.

The Israeli Supreme Court, the ICJ and the ICRC all concluded that, at a minimum, military necessity was inadmissible in the particular instance of the wall being built along the route chosen by the IDF's regional commander in some part of the Greater Jerusalem area.[158] Yet this apparent consensus among the three institutions masks their profound disagreements about what proportionality entails within the context of exceptional military necessity. Their disagreement persists in:

(i) The choice of variables – should proportionality be examined "relatively" between the rate of reduction in benefit and the rate of reduction in injury with respect to two alternative measures, or should it be examined "absolutely" between the benefit and injury with respect to one measure?
(ii) The scale of comparison – should proportionality be examined microscopically, involving only certain identifiable portions of the measure and their discrete benefit-injury ratios, or should it be examined macroscopically, involving the totality of the measure and its overall benefit-injury ratio?[159]
(iii) The choice, quality and quantity of relevant data necessary to make an informed assessment.

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[155] See, e.g., *Declaration of Judge Buergenthal*, *ibid.*, 244, para. 7 ("Instead, all we have from the Court is a description of the harm the wall is causing and a discussion of various provisions of international humanitarian law and human rights instruments followed by the conclusion that this law has been violated. Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it 'is not convinced' but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing"); *Separate Opinion of Judge Owada*, *ibid.*, 260, paras. 22-23 ("What seems to be wanting, however, is the material explaining the Israeli side of the picture, especially in the context of why and how the construction of the wall as it is actually planned and implemented is necessary and appropriate ... It seems clear to me that here [*i.e.* where the court has stated that it is not convinced that the course Israel has chosen is essential to maintaining national security] the Court is in effect admitting the fact that elaborate material on this point from the Israeli side is not available, rather than engaging in a rebuttal of the arguments of Israel on the basis of the material that might have been made available by Israel on this point"). But Judge Owada was prepared to accept that "no justification based on the 'military exigencies', even if fortified by substantiated facts, could conceivably constitute a valid basis for precluding the wrongfulness of the act on the basis of the stringent conditions of proportionality". *Ibid.*, para. 24. Judge Higgins observed that, the "very partial" nature of the information directly provided by Israel notwithstanding, "there is undoubtedly a significant negative impact upon portions of the population of the West Bank that cannot be excused on the grounds of military necessity allowed by those Conventions; and nor has Israel explained to the United Nations or to this Court why its legitimate security needs can be met only by the route selected". *Separate Opinion of Judge Higgins*, *ibid.*, 207, para. 40. Judge Kooijmans expressed his preference for more references to terrorist acts in the opinion, but agreed that the court dealt with Israel's positions sufficiently. In his view, the court did not put the wall to the proportionality test. *Kooijmans Separate Opinion*, *supra* note 108, 219, para. 13. Referring to the *Beit Sourik* case, Judge Kooijmans considered that the route chosen by Israel rendered the injury caused to the inhabitants "manifestly disproportionate" to the interests that Israel sought to protect. *Ibid.*, para. 34.

[156] See, e.g., *Alfei Menashe*, paras. 62-65; Geoffrey R. Watson, "The '*Wall*' Decisions in Legal and Political Contexts", 99 *American Journal of International Law* 6 (2005), at 25; Kretzmer, "The Advisory Opinion"*, supra* note 15, at 98-100; Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the ICJ *Wall* Advisory Opinion", 99 *American Journal of International Law* 102 (2005), at 110-114; Pertile, *supra* note 39, at 153.

[157] ICRC, *supra* note 132.

[158] For similarities between the ICJ and the Israeli Supreme Court see Watson, *supra* note 156, at 22.

[159] See *Alfei Menashe*, para. 58: "The ICJ held that the building of the wall, and the regime accompanying it, are contrary to international law (paragraph 142). In contrast, the Supreme Court in *The Beit Sourik Case* held that it is not to be sweepingly said that any route of the fence is a breach of international law. According to the approach of the Supreme Court, each segment of the route should be examined to clarify whether it impinges upon the rights of the Palestinian residents, and whether the impingement is proportional. It was according to this approach, that the fence segments discussed in *The Beit Sourik Case* were examined. Regarding some segments of the fence, it was held that their construction does not violate international law. Regarding other segments of the fence, it was held that their construction does violate international law". See also *ibid.*, paras. 66, 70.

Admittedly, the scope and manner of scrutiny were framed, to some extent, not by the forum itself, but by the particulars of the issue that was brought before it. Nevertheless, the controversy arising from Israel's conduct reveals that rules of international humanitarian law remain highly indeterminate in this area.

3.2.4 Note on Urgency

According to several commentators, it is not sufficient that the measure is required for the attainment of its military purpose. In their view, it must be required *urgently*.[160] Analogous terms are also used in several treaty provisions.[161]

It is possible that urgency is an aspect of military necessity. If it is, however, then urgency or a lack thereof appears to be already implied in the notion of the measure being "required" or "not required" for the attainment of its purpose. The range of reasonably available and materially relevant alternatives, as well as the degree of thoroughness with which the belligerent would be expected to assess them, would in general increase or decrease with the amount of time he or she had before making a decision. The less urgent an action was in view of a particular purpose, the more carefully the belligerent would be expected to choose it and hence the more effectively he or she would be expected to minimise its injurious effect.

Thus, where the purpose was not urgent for the belligerent at the time, it would be appropriate for the trier of fact to assess critically the availability of relevant alternatives and their respective degrees of injuriousness. For example, what would have happened if Rendulic had genuinely felt the Russian attack to be less imminent? Such a feeling might not have stopped Rendulic from considering the devastation of Finmark as a plausible precautionary measure against such an attack. Nevertheless, he would have considered it – or, in any event, he would have been expected to consider it – against a wider range of alternatives. And this wider range of options might very well have included at least one option that would be less injurious than devastating Finmark.

Where the purpose was urgent, the trier of fact might grant that the measure taken by the belligerent – though perhaps not as carefully chosen or harmless as it would otherwise have been – was really the best anyone in his or her position could do at the time.

3.2.5 Note on Degrees

In certain treaty provisions, exceptional military necessity appears with qualifying adverbs or adjectives such as "imperative(ly)",[162] "absolute(ly)"[163] and "unavoidable".[164] In other provisions,

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[160] See, e.g., Downey, *supra* note 5, at 254-256 ("urgent need admitting of no delay"); McDougal and Feliciano, *supra* note 27, at 72 ("prompt realization"); O'Brien, *supra* note 5, at 138-141 ("immediately indispensable").

[161] See, e.g., Articles 33 ("urgent military necessity"), 34 ("urgent necessity"), Geneva Convention I; Article 28 ("urgent military necessity"), Geneva Convention II.

[162] See, e.g., Article 23(g) ("imperatively demanded by the necessities of war"), 1907 Hague Regulations; Article 8 ("imperative military necessities"), Geneva Convention I; Article 8 ("imperative military necessities"), Geneva Convention II; Article 126 ("imperative military necessity"), Geneva Convention III; Articles 49 ("imperative military reasons"), 143 ("imperative military necessity"), Geneva Convention IV; Article 4(2) ("military necessity imperatively requires"), Hague Cultural Property Convention; Articles 54(5), 62(1), 67(4), 71(3) ("imperative military necessity"), Additional Protocol I; Article 17(1) ("imperative military reasons"), Additional Protocol II; Articles 8(2)(b)(xiii) ("imperatively demanded by the necessities of war"), 8(2)(e)(xii) ("imperatively demanded by the necessities of war"), 8(2)(e)(xii) ("imperatively demanded by the necessities of the conflict"), ICC Statute; Article 6 ("imperative military necessity"), Hague Cultural Property Protocol II.

[163] See, e.g., Article 54 ("absolute necessity"), 1907 Hague Regulations; Article 53 ("absolutely necessary by military operations"), Geneva Convention IV.

[164] See, e.g., Article 11(2) ("unavoidable military necessity"), Hague Cultural Property Convention.

the notion appears with no such adverbs or adjectives.[165] This textual discrepancy has led some commentators to suggest that there is a hierarchy of military necessity.[166] Meanwhile, other commentators have expressed their doubts.[167]

Indeed, there might be something counterintuitive about scaling different degrees of military necessity – such as, for example, from "mere" military necessity to "unavoidable" military necessity and then to "imperative" military necessity. It would be particularly so, if military necessity were understood to denote an action without which the belligerent could not hope to achieve his or her professed purpose in the first place. It would be less odd, however, should one accept the three aforementioned criteria for the measures to be considered "required" for the purpose. Where the expression "military necessity" is modified by a restrictive adjective, it *could* mean, for example, that the interests protected are considered so important that the belligerent ought to:

(i) Search more extensively for measures other than the one being contemplated that may be reasonably available and materially relevant to the purpose;
(ii) Evaluate more vigorously the relative injuriousness between all reasonably available and materially relevant measures identified; and
(iii) Set a more stringent standard of acceptable benefit-injury ratio for the measure being considered.[168]

In other words, it is not inconceivable that a given measure passes the "ordinary" military necessity threshold and yet fails to pass a "higher" military necessity threshold.

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[165] See, e.g., Article 6(b), Nuremberg Charter; Article 50, Geneva Convention I; Article 51, Geneva Convention II; Article 147, Geneva Convention IV; Articles 2(d), 3(b), ICTY Statute; Article 8(2)(a)(iv), ICC Statute.

[166] See, e.g., Schwarzenberger, *supra* note 39, at 134-135 (referring to the Nuremberg Charter as adopting a "more lenient" test for military necessity than the "imperatively demanded" military necessity under the 1907 Hague Regulations); E. Rauch, "Le Concept de Nécessité Militaire Dans le Droit de la Guerre", 19 *Revue de droit pénal militaire et de droit de la guerre* 209 (1980), at 216-218 (distinguishing among nécessité militaire "simple", nécessité militaire "inéclutable, la plus grave ou urgente", nécessité militaire "absolute", and nécessité militaire "impérieuse"); Sylvie-S. Junod, "Article 17 – Prohibition of Forced Movement of Civilians", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1471, at 1472-1473; Andreas Zimmermann, "Prohibited Destruction", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2d ed. (2008) 395, at 400; Roger O'Keefe, "Protection of Cultural Property", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 425, at 440. Pertile states (Pertile, *supra* note 39, at 136): "Necessity being qualified by Article 53 [of Geneva Convention IV] as 'absolute', one may moreover think that a generic military advantage would not be sufficient". See also *ibid.*, at 151-152.

[167] See, e.g., McCoubrey, *supra* note 63, at 224 ("The practical distinction between 'military necessity' and 'imperative military necessity' is far from clear, but the details of 'Nuremberg' jurisprudence does not appear to support the contention of a loosening of a critical standard"), 234 ("The precise significance of the addition of the term 'imperative' is less than wholly clear"). See also Rogers, *supra* note 33, at 145 (regarding "imperative" military necessity versus "unavoidable" military necessity), 152 (quoting Carcione's dismissive account of the different shades of military necessity implied in the conventional régime of cultural property protection). Dinstein observes (Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 2d ed. (2010), at 7-8 (footnote omitted): "Each of these adverbs or adjectives is devised to stress that military necessity has to be mulled over attentively and not acted upon flippantly. But this is true of all [law of international armed conflict] strictures". See also *ibid.*, at 177; de Mulinen, *supra* note 59, at 83; Hans Boddens Hassang, "Article 8(2)(b)(xiii) – Destroying or Seizing the Enemy's Property", in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 171; Eve La Haye, "Displacing Civilians", in *ibid.*, 215, at 216; Melzer, *supra* note 68, at 295-296; O'keefe, *Protection of Cultural Property*, *supra* note 68, at 123, 157-159; Rogers, *supra* note 33, at 145, 152; Gabriella Venturini, "Necessity in the Law of Armed Conflict and in International Criminal Law", 41 *Netherlands Yearbook of International Law* 45 (2010), at 53; Yoram Dinstein, "Military Necessity", *Encyclopedia of Public International Law* 2d ed. (2009), para. 13; Lindsay Moir, "Conduct of Hostilities – War Crimes", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 487, at 524; Lindsay Moir, "Displacement of Civilians as a War Crime Other Than a Violation of Common Article 3 in Internal Armed Conflicts", in *ibid.*, 639, at 641; Werle and Jessberger, *supra* note 91, at 472.

[168] Pertile appears to make similar suggestions. *See* Pertile, *supra* note 39, at 151-152.

Article 6(a) of the 1999 Second Protocol to the 1954 Hague Cultural Property Convention is arguably a case in point. The "imperative military necessity" exception available under Article 4(2) of the latter convention is further restricted to acts of hostility against cultural property where:

> (i) That cultural property has, by its function, been made into a military objective; and
> (ii) There is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.[169]

3.3 The Military Purpose for Which the Measure Was Taken Was in Conformity with International Humanitarian Law

Military necessity pleas are inadmissible where the purpose for which the measure was taken was itself contrary to international humanitarian law. This is so, even if the belligerent chooses among the relevant and available measures the one that is the least evil and whose injurious effect is not disproportionate to the gain.

In *Beit Sourik*, the Israeli Supreme Court noted the IDF commander's affidavit that "the fence is intended to prevent the unchecked passage of inhabitants of the area into Israel and their infiltration into Israeli towns located in the area".[170] The latter part of this statement clearly refers to the settlements on the West Bank. If it were true that these settlements have been established in breach of Article 49 of Geneva Convention IV, would it not follow that "measures taken to protect the residents of such settlements from terror attacks are in themselves illegal"?[171]

There are those who appear to respond to this question in the affirmative. In his declaration attached to the ICJ's *Legal Consequence* Advisory Opinion, Judge Buergenthal noted that the existence of the Israeli settlements in the West Bank "violates Article 49, paragraph 6 [of Geneva Convention IV]. *It follows* that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law".[172] Ardi Imseis likewise argues that "military necessity can operate only to protect the security interests of the occupying power's military forces, and then only within the occupied territory. An attempt to extend the concept of military necessity to protect the interests of Israeli colonies and their civilian inhabitants would offend this general principle".[173]

A common Latin maxim – *ex injuria jus non oritur* – springs to mind.[174] Others disagree, however. In Kretzmer's view,

> a theory that posits that the fact that civilians are living in an illegal settlement should prevent a party to the conflict from taking any measures to protect them would seem to contradict fundamental notions of international humanitarian law. After all, the measures may be needed to protect civilians (rather than the settlements in which they live) against a serious violation of [international humanitarian law].[175]

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[169] See Article 6(a), Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999). See also *ibid.*, Articles 10, 13 (regarding the granting and lifting of enhanced protection); O'Keefe, *Protection of Cultural Property*, *supra* note 68, at 252-256, 271-274; Jean-Marie Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", in María Teresa Dutli, *Protection of Cultural Property in the Event of Armed Conflict: Report on the Meeting of Experts (Geneva, 5-6 October 2000)* (2002) 27, at 35-46.

[170] *Beit Sourik*, para. 29. See also Kretzmer, "Judicial Review During Armed Conflict", *supra* note 39, at 445.

[171] Kretzmer, "Judicial Review During Armed Conflict", *supra* note 39, at 446. See also Kretzmer, "The Advisory Opinion", *supra* note 15, at 93.

[172] *Buergenthal Declaration*, *supra* note 155, 240, para. 9 (emphasis added). See also Imseis, *supra* note 156, at 112; Orakhelashvili, *supra* note 56, at 138.

[173] Imseis, *supra* note 156, at 112. Footnote omitted.

[174] See, e.g., *Legal Consequences* Advisory Opinion, *Separate Opinion of Judge Elaraby*, 246, para. 3.1; Imseis, *supra* note 156, at 112.

[175] Kretzmer, "The Advisory Opinion", *supra* note 15, at 93. Footnotes omitted.

Kretzmer goes on to state that

> [i]f one takes Imseis' view, one is led to the conclusion that the Israeli forces are prevented from lifting a finger to defend civilians in the settlements. This would seem to be an unacceptable conclusion, especially if one accepts (as Imseis does) that there has not been a close to military operations in the occupied territories.[176]

It is proposed here that a useful distinction might be drawn between (i) the availability of an exceptional relief from a contrary obligation, on the one hand, and (ii) the exercise of a general right, on the other. While Imseis is very clear about the former, his position on the latter may not be as categorical as Kretzmer describes. Once this distinction has been drawn, the differences between Imseis and Kretzmer may begin to seem somewhat less stark than meets the eye.

For the sake of argument, let us agree that the Israeli settlements in occupied Palestine are in breach of Article 49 of Geneva Convention IV. What follows this is that, insofar as the wall is erected to perpetuate unlawfulness by securing these settlements, neither the wall nor the adoption of various measures needed for its erection is eligible for exceptional military necessity clauses attached to the relevant provisions of the 1907 Hague Regulations and/or Geneva Convention IV. It follows further that the principal rule contained in these provisions remains applicable to the matters at hand. In other words, the unlawfulness of its purpose precludes the wall's erection falling within the ambit of military necessity clauses.

What does *not* necessarily follow is the suggestion that the settlements' unlawfulness exposes their civilian residents to the kind of attacks and harm against which civilians are ordinarily protected.[177] It is entirely possible that the residents of an unlawful settlement have the right to defend themselves in the event of unlawful attacks on them, and/or that Israel has the right to send IDF troops with a view to protecting their immediate safety against such attacks. The wall may disqualify itself as a lawful measure because it breaches Article 49's principal prohibition, but this disqualification is surely without prejudice to measures that may be lawful based on separate foundations. On this view, it is, as Kretzmer argues, indeed "not self-evident that the fact that the settlements were established in violation of international law means that *any* measures to protect civilians in those settlements are necessarily illegal".[178]

But then, Imseis's position – against which Kretzmer juxtaposes his – does not seem so sweeping either. Imseis essentially holds that Israel may not plead exceptional military necessity for the construction of the wall because its purpose is unlawful. Nowhere does he appear to suggest that international humanitarian law prevents "the Israeli forces ... from lifting a finger to defend civilians in the settlements". [179] Nor is this necessarily a conclusion to which "one is led" if one agrees with Imseis.

In October 2015, a growing number of incidents occurred in Israel and Occupied Palestinian Territories, including the city of Hebron in the West Bank, where armed Palestinian individuals attacked Israeli settlers and were killed as a result.[180] This author suggests that the issue be best looked at from the angle of self-defence for the Israelis, and questions asked as to whether the response was necessary and proportionate.

3.4 The Measure Itself Was Otherwise in Conformity with International Humanitarian Law

[176] *Ibid.*, at 93 n.41.
[177] It may be said that some, if not all, of the civilian residents participate directly in hostilities from time to time, and that they are liable to hostile acts for the duration of their direct participation therein. This, however, is a separate issue altogether.
[178] *Ibid*.
[179] *Ibid.*, at 93 n.41.
[180] See, e.g., "Israeli-Palestinian Violence: Knife Attackers Shot Dead", *BBC News*, 17 October 2015.

Juridical military necessity does not exempt measures from the prescription of unqualified IHL rules.[181] The unqualified prohibition against the killing of POWs and enemies who have surrendered at discretion[182] is a case in point. If the circumstances surrounding the captor are such that it becomes no longer feasible to keep his prisoner of war in custody – e.g., encirclement by enemy formations, shortage of food rations – , and if the captor kills the prisoner of war as a result, then he or she is not entitled to plead military necessity.[183] The U.S. Military Commission in Augsberg, Germany, convicted Gunther Thiele and Georg Steinert of killing an American prisoner of war notwithstanding their military necessity pleas.[184] In *Hostage*, Walter Kuntze was charged with the killing of unarmed civilians in occupied Greece and Yugoslavia. He asserted that, with ground troops in short supply, intimidating the population was militarily necessary in order to maintain order and security. This assertion was rejected.[185]

The fact that military necessity is inadmissible for measures in violation of unqualified IHL rules could arguably be seen as a choice between all-or-nothing alternatives. Thus, where the belligerent must choose between measures which are relevant to his or her lawful purpose but involve unlawful acts, on the one hand, and measures which amount to abandoning that purpose but involve no unlawful act, on the other, juridical military necessity would demand that the belligerent choose the latter. Extreme as it might appear, an analogous view was offered in *Rauter*:

> The circumstance that, if [the laws of war] are observed, a territory cannot be held under occupation, gives the Occupant no right to commit acts which are unequivocally prohibited by the law of nations; the proper alternative is for him to evacuate the whole or part of the occupied territory.[186]

In 1949, Erich von Manstein was brought before the British Military Court at Hamburg on charges including the devastation of occupied Ukraine and the deportation of local inhabitants therefrom during World War II.[187] The defence apparently alleged that the devastation had been rendered unavoidable by the military exigencies of the situation[188] and that, once it had been so rendered, "the deportation followed of necessity".[189] The judge advocate advised the court that "[d]eportation of the population from their homes is upon a different footing. Article 23(g) [of the Hague Regulations] has no application to this, and if it is to be defended at all, it must be upon some ground other than military necessity".[190] While the judge advocate might have thought that the prohibition against deportation admitted certain exceptions,[191] he clearly did not think that military necessity was one of them. As

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[181] See Part II, Chapter 7, and Chapter 8 above. See also *United States of America v. Alfred Felix Alwyn Krupp von Bohlen und Halbach et al.*, 10 *Law Reports of Trials of War Criminals* (1949) 69, at 138-139; *in re Wintgen*, Special Criminal Court, Amsterdam, 11 February 1949; Special Court of Cassation, 6 July 1949, 16 *Annual Digest and Reports of Public International Law Cases Year 1949* (1955) 484.

[182] See, e.g., Article 23(c), 1907 Hague Regulations; Article 6(b), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945); Article 130, Geneva Convention III; Articles 8(2)(a)(i), 8(2)(b)(vi), ICC Statute.

[183] See also Article 41(3), Additional Protocol I.

[184] *Trial of Gunther Thiele and Georg Steinert*, 3 *Law Reports of Trials of War Criminals* (1948) 56, at 58. See also Howard S. Levie, *Terrorism in War – The Law of War Crimes* (1993), at 501 (quoting observations about *United States of America v. Ludwig Klüttgen*, Case No. 12-1502 (1947)).

[185] See *Hostage*, at 1281.

[186] *In re Rauter*, *Annual Digest and Reports of Public International Law Cases* (1949) 526, at 543.

[187] See *von Manstein*, at 509-510.

[188] See *ibid.*, at 521.

[189] *Ibid.*, at 523.

[190] *Ibid.*

[191] According to the judge advocate, "any suggestion that the deportation was upon humanitarian grounds was expressly repudiated". *Ibid.* But the fact that he made this observation does not necessarily mean that he regarded evacuation on humanitarian grounds as a lawful exception from the prohibition against deportation. In this connection, see Roxburgh (ed.), *supra* note 31, at 216 (footnote omitted): "whenever a belligerent resorts to general devastation, he ought, if possible, to make some provision for the unfortunate peaceful population of the devastated tract of territory. It would be more humane to take them away into captivity rather than let them perish on the spot. The practice, resorted to during the South

noted earlier,[192] Article 49 of Geneva Convention IV does allow military necessity exceptions from the prohibition against deportation.

In a somewhat similar development, the 1935 Roerich Pact on the protection of artistic and scientific institutions and historic monuments protects eligible property without reference to military necessity exceptions.[193] Its successor, the 1954 Hague Cultural Property Convention, does make allowances for such exceptions.[194] Roger O'Keefe quotes the UNESCO expert committee as saying that "the law regulating the protection of cultural property in the course of hostilities had always been qualified by reference to military necessity [and declaring] the need to preserve this qualification".[195]

Military necessity may be inadmissible even where it is *prima facie* admissible. One rule may expressly authorise exceptions on account of military necessity, but another (typically subsequent) rule may restrict or extinguish such exceptions. Article 53 of Geneva Convention IV prohibits the belligerent from destroying real or personal property in the territory he or she occupies "except where such destruction is rendered absolutely necessary by military operations".[196] It is generally agreed that the types of military operations envisaged in this exceptional clause include the so-called "scorched earth" policy by an occupying force in retreat.[197] By virtue of Article 54(2) of Additional Protocol I,[198] however, such a force is no longer eligible for this exception in respect of objects indispensable to the survival of the civilian population.[199]

The same is arguably true of demolishing or using cultural property that is covered both under Article 4(1) of the 1954 Hague Cultural Property Convention and under Article 53 of Additional Protocol I. Whereas the former is subject to the imperative military necessity exception found in Article 4(2) of the Hague Convention, the latter is not subject to any such exception.[200]

4. Miscellaneous Observations

The foregoing elucidates what juridical military necessity contains. In addition to its content, however, the notion involves factors such as requisite knowledge and formal competence.

4.1 Knowledge

Exceptional military necessity pleas based solely on hindsight are inadmissible. They must be assessed in light of the particular purpose that the belligerent had in mind when he or she took the

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African War, of housing the victims of devastation in concentration camps, must be approved. The purpose of war may even oblige a belligerent to confine a population forcibly in concentration camps".

[192] See Part II, Chapter 7 above.

[193] See Articles 1, 5, Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (15 April 1935).

[194] See Article 4(2), Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954).

[195] O'Keefe, *Protection of Cultural Property*, *supra* note 68, at 122.

[196] Article 53, Geneva Convention IV.

[197] See, e.g., Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 302.

[198] Article 54(2), Additional Protocol I: "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive".

[199] If militarily necessary, a party to the conflict may still destroy objects indispensable to the survival of the civilian population which are located in its own territory. See Article 54(5), Additional Protocol I; Claude Pilloud and Jean Pictet, "Article 54 – Protection of Objects Indispensable to the Survival of the Civilian Population", in Sandoz, Swinarski and Zimmermann (eds.), *Commentary*, *supra* note 166, 651, at 659. According to the ICRC's *Customary Law Study*, the rule contained in Article 54 embraces custom. See Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian Law* (2005), at 189-193.

[200] See O'Keefe, *Protection of Cultural Property*, *supra* note 68, at 217, 251.

measure. The mere fact that a measure taken initially for some non-military purpose happens to fulfil a military one afterwards does not, retrospectively, turn it into military necessity. A given measure's reasonable availability to the belligerent, its material relevance to his or her stated military purpose, and the scope and nature of its evil, should also be assessed on the basis of that belligerent's contemporaneous and *bona fide* knowledge thereof.[201]

4.1.1 Knowledge of Purpose

As noted earlier, in *Elon Moreh*, the Israeli Supreme Court did not dispute the strictly professional opinion of the Chief of Staff that the settlement, if established, would fulfil military purposes. Nor did the court question that he had advised the Ministerial Defence Committee of his opinion. Yet, the court nullified the requisition order on the ground that its underlying decision had been made primarily for political purposes and only secondarily for military purposes. It would appear, then, that the requisition would have been upheld only if it had been decided primarily for military purposes. This would entail the showing, at a minimum, that such purposes actually existed and were known to those who made the decision.

Justice Landau's observations in *Beit-El*[202] are instructive here. In what appears to be a separate opinion, Justice Landau expressed his presumption that, on establishing the civilian settlement at Beit El, the military authorities "first gave thought and military planning to the act of settlement".[203] Indeed, it is on this basis that Justice Landau distinguished the *Beit-El* case from the *Elon Moreh* case: "[t]his time [*i.e.* in the *Eron Moreh* case] it was not demonstrated ... that in the establishment of the civilian settlement the act of settlement was preceded by the military authorities' thought and *military planning* (emphasis in the original – Trans.), as we noted in the Beit-El case".[204]

In *Hostage*, the U.S. Military Tribunal acquitted Lothar Rendulic of wanton destruction in Finmark, Norway. Rendulic contended that he devastated the area as a precautionary measure against an anticipated attack by his superior Russian pursuers. A question arose as to whether the devastation was justified by military necessity.[205] The tribunal held:

> We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgement on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the "scorched earth" policy in Finmark as a precautionary measure against an attack by superior

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[201] See, e.g., *Affaire des bien britannique au Maroc espagnol (Spain v. United Kingdom*), 1 May 1925, 2 *Reports of International Arbitral Awards* (2006) 615, at 645 ("Cela admis, il faut se souvenir, d'autre part, que le règlement auquel la clause susmentionnée se rattache fait une place très grande aux nécessités militaires. L'appréciation de ces nécessités doit être laissée dans une large mesure aux personnes mêmes qui sont appelées à agir dans des situations difficiles, ainsi qu'à leurs chefs militaires"); *von Manstein*, at 522; Melzer, *supra* note 68, at 296-297; Brian J. Bill, "The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare", 12 *Yearbook of International Humanitarian Law* 119 (2009), at 125 (quoting *Hostage*, at 1295-1297); Dinstein, *Military Necessity (2009)*, *supra* note 167, para. 28; Office of General Counsel, *supra* note 3, at 57.

[202] HCJ 606/78, *Ayub et al. v. Minister of Defence*, 15 March 1979, in Meir Shamgar (ed.), 1 *Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects* (1982) 382.

[203] *Ibid.*, at 386.

[204] *Elon Moreh*, at 173-174. For an account of the political background to the difference between *Beit-El* and *Elon Moreh*, see David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002), at 88-89.

[205] It is arguable that, at the relevant moment, the Finmark region resembled territory under belligerent occupation. The rule considered in the case, however, was Article 23(g) of the Hague Regulations concerning armed hostilities, rather than Articles 46-56 of the same Regulations concerning the treatment of property in occupied territory.

> forces. It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgement but he was guilty of no criminal act.[206]

The evidence adduced at trial showed that military necessity did not, in fact, exist. The tribunal ruled however that Rendulic's genuinely perceived danger of an enemy attack, under the circumstances prevailing at the time, should not be second-guessed simply because the full facts as they had become subsequently available contradicted or otherwise undermined his original perception about the danger.[207] This ruling would be sensible only if it were significant that Rendulic knew what the military purpose of the devastation was. If this were the case, however, the reverse would also be the case. Where the evidence makes it clear that the belligerent did not act in pursuit of any genuinely perceived military purpose, he or she would not be entitled to claim otherwise on account of hindsight. As noted earlier, *Elon Moreh* supports the view that the mere potentiality of "right" results does not necessarily imply the existence of "right" purposes.

4.1.2 Knowledge of Pertinence, Injuriousness and Proportionality

Whether a given measure was "required" for the attainment of its stated military purpose is also a matter that should be assessed on the basis of the belligerent's contemporaneous and *bona fide* knowledge. If, in view of the information available at the time, the belligerent honestly believed that the measure taken was required for the attainment of his or her purpose, the belligerent's belief should not be second-guessed on account of subsequent events.

Emphasis on the belligerent's contemporaneous and *bona fide* knowledge about the measure's requiredness is particularly important in active combat. Its exigencies may leave the belligerent with no option but to articulate a military purpose, identify a range of available and relevant measures, evaluate their relative injuriousness, and assess their proportionality – all in an extremely short period of time, on the basis of fragmented, incomplete and often contradictory information, and under highly stressful circumstances.

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[206] *Hostage*, at 1297. See also *High Command*, at 541: "Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature". Accordingly, in *High Command*, two accused were acquitted of property destruction in occupied territory. See *ibid.*, at 609 (judgement as to defendant Hans Reinhardt), 628 (judgement as to defendant Karl Hollidt).

[207] *Hostage*, at 1296: "There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgement, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist". See also *von Manstein*, at 522. In his summary to the British Military Court at Hamburg, the judge advocate reiterated the principles of no second-guessing and *in dubio pro reo*:

> In coming to a conclusion on this question as to whether the destruction caused by the accused was excusable upon this ground [of military necessity], it is essential that you should view the situation through the eyes of the accused and look at it at the time when the events were actually occurring. It would not be just or proper to test the matter in the light of subsequent events, or to substitute an atmosphere of calm deliberation for one of urgency and anxiety. You must judge the question from this standpoint: whether the accused having regard to the position in which he was and the conditions prevailing at the time acted under the honest conviction that what he was doing was legally justifiable. If, in regard to any particular instance of seizure or destruction, you are left in doubt upon the matter, then the accused is entitled to have that doubt resolved in his favour.

There is a clear link between the contemporaneous knowledge requirement of military necessity as an exception, on the one hand, and mistake of fact as a negation of the mental element required by a crime, on the other. This link, however, is a matter that goes beyond the scope of this chapter.

Conversely, the belligerent would not be entitled to take advantage of the hindsight and claim that the measure was required where the evidence makes it clear that he or she acted without such knowledge. One may refer to the ruling of an ICTY trial chamber in *Galić* – albeit in an admittedly different context of proportionality in attacks.[208] The chamber held:

> In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.[209]

One incident considered by the chamber involved two shells landing and exploding amid an impromptu football match in a residential area of Sarajevo. All players were off-duty combatants, surrounded by approximately 200 civilian and combatant spectators. According to one military report, the explosions killed six combatants and five civilians, and wounded fifty-five combatants and thirty-two civilians.[210] These numbers are classic examples of hindsight. Unless one was somewhat arbitrarily to assign different values to different types of human life, it would be difficult if not impossible to say definitively whether the attack was proportionate or disproportionate. The majority of the trial chamber declared the attack unlawful, but *not* on the basis of the eventual casualty figures. Rather, it did so on the basis of the consequences that the attack "would clearly be expected" to generate:

> Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated.[211]

It would appear that, the majority's view, the arguably proportionate casualty figures do not retroactively alter the clear expectations that an attack such as the one in question *would* cause disproportionate civilian casualties.[212]

4.2 Competence

Under certain circumstances, a person's reliance on military necessity may become invalid by virtue of his or her status alone. For example, only the commanders of forces in the field are authorised to make use of the buildings, material and stores of fixed medical establishments in case of urgent military necessity.[213] Similarly, where fighting occurs on a warship, its sick-bays and their equipment

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[208] See, e.g., Harvard Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2010), para. 5; Christine Byron, "International Humanitarian Law and Bombing Campaigns: Legitimate Military Objective and Excessive Collateral Damage", 13 *Yearbook of International Humanitarian Law* 175 (2010), at 192; Yutaka Arai-Takahashi, "A Battle Over Elasticity – Interpreting the Concept of 'Concrete and Direct Military Advantage Anticipated' under International Humanitarian Law", in Yves Haeck et al. (eds.), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (2014) 351, at 352.

[209] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, *Trial Judgement*, 5 December 2003, para. 58 (footnotes omitted).

[210] *Ibid.*, paras. 386-387.

[211] *Ibid.*, para. 387.

[212] Judge Nieto Navia dissented. See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, *Separate and Partially Dissenting Opinion of Judge Nieto-Navia*, 5 December 2003, paras. 63-65, esp. para. 65: "In light of the preceding evidence regarding [defending forces'] presence in and near the site of the incident, I conclude that the Prosecution has not established beyond a reasonable doubt that the two shells that exploded on 1 June 1993 in Dobrinja were fired deliberately or indiscriminately by the [attacking forces] at civilians".

[213] See Article 33, Geneva Convention I.

may be used for other purposes only if considered militarily necessary by the commander into whose power they have fallen.[214]

Within the context of cultural property, potential abuses of military necessity exceptions became the subject of particular concern.[215] This concern resulted in the adoption of Article 11(2) of the 1954 Hague Cultural Property Convention, which designates an officer competent to establish military necessity.[216] In respect of cultural property "specially protected" under Article 9 of the convention, only an officer commanding a force the equivalent of a division in size or larger may establish "unavoidable military necessity" whereby the property's immunity is withdrawn.[217] Article 4(2) of the convention permits the belligerent to waive his obligations under Article 4(1) if "military necessity imperatively requires such a waiver".[218] The convention itself contains no restriction as to who is authorised to invoke Article 4(2). According to Article 6(c) of the 1999 Hague Cultural Property Protocol II, however, only an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise, may invoke Article 4(2).[219] As regards the lifting of cultural property's enhanced protection under Article 10 of the protocol, an attack may be ordered only "at the highest operational level of command".[220]

It has been suggested that IDF commanders lack the power to seize property in occupied Palestine because Israel "[does] not have such power at all".[221] This view emanates from the argument that Article 23(g) of the Hague Regulations – which, if applicable, would have vested the commander with such power – does not apply to situations of belligerent occupation.[222] The issue raised in this argument is whether the law applies to the IDF commanders to begin with, rather than whether the applicable law properly authorises them.

5. Conclusion

This chapter shows how juridical military necessity appears as express clauses attached to those rules that principally prescribe contrary action.

We began by noting that military necessity as an exception under international humanitarian law is distinct in status and content from necessity as a circumstance precluding wrongfulness under the international law of state responsibility. Our discussion also identified and substantiated four cumulative requirements of exceptional military necessity. In order to be eligible, the measure must be taken primarily for the attainment of some specific military purpose; it must be required for the purpose's attainment; the purpose must be in conformity with international humanitarian law; and the measure itself must otherwise be in conformity with that law.

When a measure can be said to be "required" for a purpose's attainment is an area that is in need of further clarification. Beyond the fact that some reasonable ratio ought to be struck between the harm occasioned by the measure and the gain sought by it, much remains unsettled. There are also issues associated with the application of military necessity clauses, such as the requisite kind and scope of knowledge and the competence of the person relying on the notion.

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[214] See Article 28, Geneva Convention II.

[215] See, e.g., Jiří Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Protocol, Signed 14 May, 1954 in the Hague, and on Other Instruments of International Law Concerning Such Protection* (1996) at 79, 146-147.

[216] Article 11(2), Hague Cultural Property Convention. See also O'Keefe, *Protection of Cultural Property*, *supra* note 68, at 159-160.

[217] *Ibid*., Article 4(1).

[218] *Ibid.*, Article 4(2).

[219] Article 6(c), Hague Cultural Property Protocol II.

[220] See *ibid.*, Article 13(2)(c)(i).

[221] Orakhelashvili, *supra* note 56, at 137.

[222] See *ibid*. But see *Hostage*, at 1296-1297, where the tribunal found Rendulic not guilty of wanton destruction in Finmark by applying Article 23(g) of the 1907 Hague Regulations.

This leaves us with one major form of juridical military necessity yet to be examined. Several property- and displacement-related war crimes contain an element according to which the underlying act, such as destruction and forcible transfer, must be shown to lack military necessity.[223] The same is true of their corresponding crimes against humanity. In Chapter 10, we will explore the sizable case law developed by the ICTY, as well as the ICC's nascent jurisprudence, to see how these fora have grappled with the complex factual and legal issues that surround this element.

[223] See, e.g., *In re Esau*, Special Criminal Court, 's-Hertogenbosch, 27 April 1948; Special Court of Cassation, 21 February 1949, 16 *Annual Digest and Reports of Public International Law Cases Year 1949* (1955) 482.

Chapter 10

Juridical Military Necessity and Elements of Crimes

Chapters 8 and 9 dealt with how juridical military necessity manifests itself through exclusion and as exceptional clauses, respectively. In this chapter, we will study juridical military necessity's third form, i.e., as a negative element of several war crimes and crimes against humanity.

That military necessity in this context appears as a negative element of specific criminal acts – rather than as a justificatory or excusory plea – should not be surprising. First, this is a direct result of the inadmissibility of *de novo* military necessity pleas under positive international humanitarian law (IHL).[1] As will be seen below, substantive IHL rules form the basis on which all war crimes and some crimes against humanity are built. Where a given IHL prohibition is unqualified, there is no reason why the *actus reus* of its corresponding war crime or crime against humanity should admit military necessity as an exception. Nor, for that matter, should the crime be susceptible to military necessity pleas as a justification or excuse.

Second, the reverse is also true. We have seen that a number of IHL rules expressly permit deviations from their principal prescriptions on account of military necessity. If penal provisions were to criminalise these rules' breaches, their *actus reus* would also reflect the availability of such deviations. This is particularly the case for offences involving property destruction[2] and forcible population displacements.

The foregoing observations are broadly consistent with the material available in international criminal law.[3] Of such material, however, that produced under today's two major international criminal jurisdictions – i.e., the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC) – is by far the most comprehensive, systematic and detailed. Our discussion in this chapter will therefore focus on the ICTY and the ICC.

This chapter proceeds as follows. We will begin by reviewing how the ICTY has identified and articulated military necessity as a negative element of offences involving property destruction and forcible population displacement. We will then assess the quality of judicial reasoning and application of the law to the facts in the tribunal's voluminous cases. Three themes will receive our critical attention: (i) property destruction in the context of combat; (ii) property destruction outside of combat; and (iii) deportation and forcible transfer. It will be shown that, despite some mishaps, the ICTY jurisprudence as a whole is capable of presenting a coherent picture of exceptional military necessity as an element of crimes.

The chapter will then move on to the ICC. Its statutory treatment of military necessity exceptions largely mirrors the ICTY case law and corresponding IHL rules on the matter. The court finds itself at a much earlier stage of jurisprudential development, however. Its rulings to date are more limited in content and sophistication as a result. One potential source of contention concerns some of the grounds for excluding individual criminal responsibility under Article 31 of the Rome Statute. These grounds are vulnerable to abuse as backdoors through which defendants may attempt to introduce *de novo* military necessity pleas as a justification or excuse for their crimes.

1. International Criminal Tribunal for the Former Yugoslavia

As of 31 May 2016, the ICTY has not defined juridical military necessity. Nor has it discussed the requirements of military necessity as an element of crimes at any length. Yet the tribunal's various

[1] See Chapter 8 above.
[2] And, albeit to a significantly lesser extent, property misappropriation including pillage. This chapter will make occasional references to these offences where appropriate.
[3] See, in particular, the various post-World War II criminal trials referred to in Chapter 9 and elsewhere in this thesis.

chambers have not shied away from making factual determinations about the existence or absence of military necessity in the context of specific incidents.

These factual determinations have been made in connection with two crime categories. The first is large-scale property destruction, of which the absence of military necessity appears as an element. Forcible displacement of persons is the other. Since temporary evacuation is not unlawful if, *inter alia*, "imperative military reasons" so demand, it must be shown that the victim's displacement was either permanent or, though temporary, not demanded by imperative military reasons.

1.1 Absence of Military Necessity as an Element of Large-Scale Property Destruction

The ICTY Statute empowers the tribunal to prosecute large-scale property destruction under three headings. They are:

(a) Article 2(d), a grave breach of the 1949 Geneva Conventions[4];
(b) Article 3(b), a violation of the laws or customs of war[5]; and
(c) Article 5(h), a crime against humanity.[6]

1.1.1 Article 2(d), ICTY Statute

Causing "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" constitutes a grave breach of Geneva Conventions I, II and IV.[7] This grave breach is incorporated into Article 2(d) of the ICTY Statute.[8] The tribunal has considered Article 2(d) charges in six cases.[9]

Several tribunal decisions have distinguished between two types of property under Article 2(d).[10] The first type includes civilian hospitals, medical aircraft and ambulances that are "generally protected" by the Geneva Conventions.[11] Property of this type is "generally protected" from destruction or appropriation because it is protected irrespective of its location. It appears that the intended

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[4] Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993).
[5] *Ibid.,* Article 3(b).
[6] *Ibid.,* Article 5(h).
[7] Article 50, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949); Article 51, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Article 147, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949).
[8] Article 2(d), ICTY Statute.
[9] See *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, *Sixth Amended Indictment*, 9 December 2003, count 10 ("[u]nlawful and wanton extensive destruction and appropriation of property, not justified by military necessity"); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, *Second Amended Indictment*, 25 April 1997, count 11 ("extensive destruction of property"); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, *Amended Indictment*, 30 September 1998, counts 37, 40 ("extensive destruction of property"); *Prosecutor v. Mladen Naletilić (a/k/a "Tuta") and Vinko Martinović (a/k/a "Štela")*, Case No. IT-98-34-PT, *Second Amended Indictment*, 28 September 2001, count 19 ("extensive destruction of property"); *Prosecutor v. Ivica Rajić a/k/a Viktor Andrić*, Case No. IT-95-12-PT, *Amended Indictment*, 13 January 2004, count 9 ("extensive destruction not justified by military necessity and carried out unlawfully and wantonly"); *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, *Second Amended Indictment*, 11 June 2008, counts 19 ("extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly"), 22 ("appropriation of property, not justified by military necessity and carried out unlawfully and wantonly").
[10] See *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, *Judgement*, 26 February 2001, para. 341; *Prosecutor v. Mladen Naletilić (a/k/a "Tuta") and Vinko Martinović (a/k/a "Štela"*), Case No. IT-98-34-T, *Judgement*, 31 March 2003, para. 575; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, *Judgement*, 1 September 2004, para. 586. See also, e.g., Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), at 78; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 1 *Judgement*, 29 May 2013, para. 122.
[11] See *Kordić and Čerkez* Trial Judgement, para. 336; *Tuta and Štela* Trial Judgement, para. 575; *Brđanin* Trial Judgement, para. 586 n.1490; *Prlić et al.* Trial Judgement, para. 125.

juxtaposition is one between "general protection" in the sense that protection is not territorially conditional, on the one hand, and "limited protection" in the sense that protection is territorially conditional, on the other. One might say instead that the former would be more appropriately described as "special protection" or "enhanced protection" and the latter as "general protection".

Be that as it may, some ICTY trial chambers apparently concluded that military necessity exceptions do not apply to the prohibition against the destruction of property under "general protection". Thus, according to the *Tuta and Štela* Trial Chamber,

> two types of property are protected under the grave breach regime: i) property, regardless of whether or not it is in occupied territory, that carries general protection under the Geneva Conventions of 1949, such as civilian hospitals, medical aircraft and ambulances [irrespective of any military need to destroy them]; and ii) property protected under Article 53 of the Geneva Convention IV, which is real or personal property situated in occupied territory *when the destruction was not absolutely necessary by military operations* ... The Chamber considers that a crime under Article 2(d) of the Statute has been committed when: ... iii) the extensive destruction regards property carrying general protection under the Geneva Conventions of 1949, or; the extensive destruction *not absolutely necessary by military operations* regards property situated in occupied territory ...[12]

It is debatable, however, whether this conclusion finds support in the plain language of either Article 2(d) of the ICTY Statute, or in Article 50/51/147 of Geneva Convention I/II/IV that underpins it. To be sure, those IHL provisions cited by these chambers[13] protect the property in question from *attacks* regardless of military necessity. This does not necessarily mean, however, that these provisions also protect the property – and, in particular, immobile property such as buildings – from *destruction* regardless of military necessity. The Red Cross commentary on Geneva Convention I observes:

> The provision [prohibiting intentional destruction of material and stores defined in Article 33, Geneva Convention I] covers the material of both mobile units and fixed establishments. It also refers to stores of material, but only to those belonging to fixed establishments, as the nature of mobile units excludes their having stores in the real sense. *The stipulation does not, however, cover the actual buildings, which may in certain extreme cases have to be destroyed for tactical reasons*.[14]

As will be shown, the destruction of property may, but need not, constitute an attack against that property or *vice versa*.

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[12] *Tuta and Štela* Trial Judgement, paras. 575, 577. Footnotes omitted; emphasis added. See also *Brđanin* Trial Judgement, paras. 586, 588.

[13] See *Tuta and Štela* Trial Judgement, para. 575 n.1436 ("Several kinds of property are generally protected by the Conventions, irrespective of any military need to destroy them. See Chapters III, V and VI of Geneva Convention I (Protecting medical units, vehicles, aircraft, equipment and material) and Articles 22-35 (protecting hospital ships) and Articles 38-40 (protecting medical transports) of Geneva Convention II. See also Article 18 of Geneva Convention IV which provides that a civilian hospital 'may in no circumstances be the object of an attack, but shall at all times be respected and protected by the parties to the conflict'"); *Brđanin* Trial Judgement, para. 586 n.1490 ("Several provisions of the Geneva Conventions identify particular types of property accorded general protection. For example, Article 18 (protection of civilian hospitals), Articles 21 and 22 (protection of land, sea and air medical transports), of Geneva Convention IV; Articles 38-39 (protecting ships and aircraft employed for medical transport) of Geneva Convention II, A [*sic*.]; Articles 19-23 (protection of medical units and establishments), Articles 33-34 (protection of buildings and materials of medical units or of aid societies), Articles 35-37 (protection of medical transports), of Geneva Convention I").

[14] Jean S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), at 276. Emphasis added. See also Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 601 ("[T]he destruction and appropriation mentioned here are dependent on the necessities of war").

Real and personal property in occupied territory forms the second type of property falling within the scope of Article 2(d) of the ICTY Statute.[15] All Article 2(d) charges have involved the destruction and/or appropriation of real and personal property located in what the prosecution alleged was occupied territory. Yet it has become increasingly difficult for the prosecution to prove the existence of belligerent occupation.[16] This difficulty – together with considerations of judicial economy and a perceived lack of difference between the culpability of an accused convicted under Article 2(d) and the culpability of an accused convicted under Article 3(b) – appears to have led to a decrease in the number of charges brought under Article 2(d).

1.1.2 Article 3(b), ICTY Statute

Article 3(b) of the ICTY Statute provides for the prosecution of "wanton destruction of cities, towns or villages, or devastation not justified by military necessity", a violation of the laws or customs of war.[17] Several cases have been brought under this article.[18]

It is sometimes suggested that "wanton destruction of cities, towns or villages" on the one hand, and "devastation not justified by military necessity" on the other, are two distinct offences.[19] On this view, the former offence would not admit military necessity exceptions. The drafting history of Article 6(b) of the Nuremberg Charter – from which Article 3(b) of the ICTY Statute is drawn verbatim – appears to indicate that the two notions could indeed be considered distinct. The charter's 11 July

[15] See *Prosecutor v. Ivica Rajić a/k/a Viktor Andrić*, Case No. IT-95-12-R61, *Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence*, 13 September 1996, para. 42; *Blaškić* Trial Judgement, paras. 148-50; *Kordić and Čerkez* Trial Judgement, paras. 337-41; *Tuta and Štela* Trial Judgement, para. 575; *Brđanin* Trial Judgement, paras. 586, 588.

[16] See *Kordić and Čerkez* Trial Judgement, para. 808; *Tuta and Štela* Trial Judgement, paras. 586-88; *Brđanin* Trial Judgement, paras. 637-639. But see 1 *Prlić et al.* Trial Judgement, paras. 577-589.

[17] Article 3(b), ICTY Statute.

[18] See, e.g., *Prosecutor v. Naser Orić*, Case No. IT-03-68-PT, *Third Amended Indictment*, 30 June 2005, counts 3, 5 ("wanton destruction of cities, towns or villages, not justified by military necessity"); *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, *Third Amended Indictment*, 10 December 2003, count 4 ("devastation not justified by military necessity"); *Brđanin* Sixth Amended Indictment, count 11 ("[w]anton destruction of cities, towns or villages, or devastation not justified by military necessity"); *Prosecutor v. Milan Babić*, Case No. IT-03-72, *Indictment*, 6 November 2003, count 4 ("wanton destruction of villages, or devastation not justified by military necessity"); *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, *Third Amended Indictment*, 26 September 2003, count 5 ("wanton destruction of cities, towns or villages, not justified by military necessity"); *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42, *Second Amended Indictment*, 26 August 2003, count 4 ("devastation not justified by military necessity"); *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, *Second Amended Indictment*, 14 July 2003, count 12 ("wanton destruction of villages, or devastation not justified by military necessity"); *Tuta and Štela* Second Amended Indictment, count 20 ("wanton destruction not justified by military necessity"); *Rajić* Amended Indictment, count 10 ("wanton destruction of a city or devastation not justified by military necessity"); *Kordić and Čerkez* Amended Indictment, count 41 ("wanton destruction not justified by military necessity"); *Blaškić* Second Amended Indictment, counts 2, 12 ("devastation not justified by military necessity"); *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, *Amended Indictment*, 2 November 2005, count 2 ("wanton destruction of cities, towns or villages"); *Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67, *Third Amended Indictment*, 7 December 2007, count 12 (wanton destruction of villages, or devastation not justified by military necessity"); *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, *Amended Joinder Indictment*, 12 March 2008, count 5 ("wanton destruction of cities, towns or villages, or devastation not justified by military necessity"); *Prlić et al.* Second Amended Indictment, count 20 ("wanton destruction of cities, towns or villages, or devastation not justified by military necessity").

[19] See, e.g., *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.3, *Joint Defence Interlocutory Appeal of Trial Chamber Decision on Enver Hadžihasanović and Amir Kubura's Rule 98bis Motions for Acquittal*, 2 November 2004, para. 26; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, *Judgement*, 12 June 2007, para. 89; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, *Judgement*, 10 July 2008, para. 350; Mettraux, *supra* note 10, at 92-93.

1945 draft contained the expression "the wanton destruction of towns and villages".[20] This formulation remained essentially unchanged throughout the negotiations.[21] It is in the U.S. revision submitted on 31 July that the expression "wanton destruction of cities, towns or villages; devastation not justified by military necessity", separated by a semicolon, first appeared.[22] The record of the 2 August discussion does not reveal any information about this last-minute addition.[23] Nor is it clear how, after 2 August, the semicolon was replaced by the combination of a comma and the word "or". The charter was adopted six days later, on 8 August 1945.

It is submitted here however that, even if the two offences were to be considered distinct, they would share a common aspect in the sense that they only criminalise property destruction that is not justified by military necessity. Acts constituting "wanton destruction of cities, towns or villages" have consistently been interpreted to be those not justified by military necessity. For example, the International Military Tribunal found that "[c]ities and towns and villages were wantonly destroyed without military justification or necessity".[24] Article II(1)(b) of Control Council Law No. 10 lists "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" as a war crime. Neither the indictments nor the judgements in *High Command* and *Hostage* divided Article II(1)(b) into subgroups.

There are only a small number of decisions within the ICTY jurisprudence in which Article 3(b) was held to contain two distinct offences. In *Hadžihasanović and Kubura*, the appeals chamber discussed "the wanton destruction of cities, towns or villages" as one offence articulated in Article 3(b) of the statute, and "devastation not justified by military necessity" as another.[25] Even there, however, the chamber did not cite any authority in support of this distinction; in any event, it noted that "wanton destruction of cities, towns or villages not justified by military necessity" was a customary prohibition.[26] The other decision is the *Strugar* Trial Judgement, according to which "Article 3(b) codifies two crimes: 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity'".[27] Late in the same judgement, however, the trial chamber defined the elements of the crime of "wanton destruction not justified by military necessity".[28] It may be that the expressions "wanton"[29] and "not justified by military necessity" are functionally synonymous. At any rate, it appears uncontroversial in contemporary international humanitarian law and international criminal law that large-scale, militarily unnecessary property destruction is generally prohibited, and that violation of this general prohibition is treated as a war crime.[30]

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[20] See Robert H. Jackson, *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials* (1949), at 197.
[21] See *ibid.,* at 205, 293, 327, 351, 359, 373-374, 390, 392-393.
[22] See *ibid.,* at 395.
[23] See *ibid.,* at 399-419.
[24] *United States of America et al. v. Hermann Wilhelm Göring et al*, 22 *Trial of the Major War Criminals Before the International Military Tribunal* (1948) 411, at 470.
[25] See *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.3, *Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal*, 11 March 2005, para. 29.
[26] *Ibid.,* para. 30.
[27] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, *Judgement*, 31 January 2005, para. 291.
[28] *Ibid.,* para. 292.
[29] The French term used is "sans motif" – i.e., "without good reason". See also United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), at 34, 37-38 (American observations on charges of inhuman or atrocious conduct); Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), at 26, 32.
[30] See, e.g., Article 23(g), Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907); Article 6(b), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945); Article II(1)(b), Control Council Law No. 10, Punishment of Persons Guilty of war Crimes, Crimes against Peace and against Humanity (20 December 1945); Article 50, Geneva Convention I; Article 51, Geneva Convention II; Articles 53, 147, Geneva Convention IV; Articles 8(2)(b)(xiii), 8(2)(e)(xii), Rome Statute of the International Criminal Court (17 July 1998). See also *Martić* Trial Judgement, para. 91; *Boškoski and Tarčulovski* Trial Judgement, para. 350; 1 *Prlić et al.* Trial Judgement, paras. 165-166 *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, *Judgement*, 12 December 2012, para. 858; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, *Judgement*, 10 June 2010, para. 985.

1.1.3 Article 5(h), ICTY Statute

Article 5(h) of the ICTY Statute specifies "persecutions on religious, political and racial grounds" as a crime against humanity.[31] According to the tribunal's jurisprudence, property destruction may amount to persecutions under certain circumstances.[32] The tribunal has charged property destruction as an underlying act of persecutions in relation to numerous cases.[33]

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[31] Article 5(h), ICTY Statute.

[32] See, e.g., *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, *Judgement*, 27 September 2006, paras. 773-779, 782-783; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, *Judgement*, 17 January 2005, para. 594; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, *Judgement*, 17 December 2004, para. 108; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, *Judgement*, 31 July 2003, para. 764, 768; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, *Judgement*, 27 July 2004, para. 149; *Tuta and Štela* Trial Judgement, para. 704; *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1-S, *Sentencing Judgement*, 27 February 2003, para. 15; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, *Judgement*, 2 November 2002, para. 186; *Kordić and Čerkez* Trial Judgement, paras. 202, 205, 207; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, *Judgement*, 3 March 2000, paras. 227-228, 234; *Brđanin* Trial Judgement, paras. 1021-1024; *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, *Sentencing Judgement*, 30 March 2004, para. 123; *Prosecutor v. Milan Babić*, Case No. IT-03-72-S, *Sentencing Judgement*, 29 June 2004, paras. 14-17, 30-31; *Martić* Trial Judgement, para. 119; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, *Judgement*, 10 June 2010, paras. 982-987; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, *Judgement*, 23 February 2011, paras. 1770-1773; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, *Judgement*, 15 April 2011, paras. 1825-1830; *Tolimir* Trial Judgement, para. 859; *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, 1 *Judgement*, 27 March 2013, para. 86; *Popović* Trial Judgement, para. 987; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, *Judgement*, 24 March 2016, paras. 530-534.

[33] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, *Fourth Amended Joinder Indictment*, 14 May 2004, count 5 ("persecutions on political, racial and religious grounds [by way of] destruction of personal property and effects"); *Brđanin* Sixth Amended Indictment, count 3 ("persecutions [by way of] destruction [of property]"); *Babić* Indictment, count 1 ("persecutions on political, racial and religious grounds [by way of] deliberate destruction of homes, other public and private property"); *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, *Second Amended Indictment*, 29 September 2003, paras. 36-37 ("persecutions [by way of] destruction of property"); *Martić* Second Amended Indictment, count 1 ("persecutions on political, racial and religious grounds [by way of] deliberate destruction of homes, other public and private property"); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-PT, *Amended Joinder Indictment*, 26 May 2003, count 5 ("persecutions on political, racial and religious grounds [by way of] destruction of personal property"); *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-PT, *Fourth Amended Indictment*, 10 April 2002, count 6 ("persecutions [by way of] destruction [of residential and commercial properties]"); *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 & 40-PT, *Amended Consolidated Indictment*, 7 May 2002, count 3 ("persecutions on political, racial and religious grounds [by way of] intentional and wanton destruction of private property including houses and business premises and public property"); *Tuta and Štela* Second Amended Indictment, count 1; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, *Amended Indictment*, 27 October, 1999, count 6 ("persecutions on political, racial and religious grounds [by way of] destruction of personal property"); *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9, *Fifth Amended Indictment*, 30 May 2002, count 1 ("persecutions on political, racial and religious grounds [by way of] wanton and extensive destruction [of property]"); *Kordić and Čerkez* Amended Indictment, counts 1, 2 ("persecutions on political, racial or religious grounds [by way of] wanton and extensive destruction [of property]"); *Blaškić* Second Amended Indictment, count 1 ("persecutions on political, racial or religious grounds [by way of] destruction [of property]"); *Gotovina et al.* Amended Joinder Indictment, count 1 ("persecutions on political, racial and religious grounds [by way of] destruction and burning"); *Šešelj* Third Amended Indictment, count 1 ("persecutions … committed on political, racial and religious grounds [by way of] deliberate destruction of homes, other public and private property, cultural institutions, historic monuments and sacred sites"); *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, *Forth Amended Indictment*, 2 June 2008, count 5 ("persecutions on political, racial and religious grounds [by way of] wanton destruction"); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, *Third Amended Indictment*, 27 February 2009, count 3 ("persecutions [by way of] wanton destruction"); *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, *Third Amended Indictment*, 4 November 2009, count 6 ("persecutions on political, racial and religious grounds [by way of] the destruction of personal property and effects"); *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, *Second Amended Consolidated Indictment*, 10 September 2009, count 1 ("persecutions on political, racial and religious grounds [by way of] wanton destruction"); *Prosecutor v. Vujadin Popović et al.*, count 6 ("persecutions on political, racial and religious grounds [by way of] destruction of personal property"); *Tolimir* Trial Judgement, paras. 870-878; 1 *Stanišić and Župljanin* Trial Judgement, paras. 86-90; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 3 *Judgement*, 29 May 2013, paras. 1694-1713, 1725-1729, 1737-1741.

While some ICTY judgements clearly indicate the absence of military necessity as an element of persecutions by way of property destruction,[34] others do not.[35] This discrepancy is unfortunate, because the destruction of property justified by military necessity constitutes neither a grave breach of the Geneva Conventions nor a violation of the laws and customs of war. Yet this discrepancy might be taken to leave open the possibility that even militarily necessary – and, therefore, IHL-compliant – property destruction could constitute persecutions.[36]

1.2 Instances of Militarily Unnecessary Property Destruction

In *Kordić and Čerkez*, several trial-level findings of militarily unnecessary property destruction were overturned on appeal.[37] The appeals chamber found that no evidence had been adduced on the scale and manner of the destruction or on the absence of military necessity therefor.[38] With respect to Nadioci, the chamber held:

> It is not sufficient for the Prosecution to prove that destruction occurred. It also has to prove when and how the destruction occurred. It has to establish that the destruction was not justified by military necessity, which cannot be presumed and especially in the context of the Indictment in which the Prosecution pleaded that fighting continued until May 1994. The Appeals Chamber considers that in the absence of further evidence as to how the destruction occurred, no reasonable trier of fact could find that wanton destruction not justified by military necessity ... is established.[39]

That the timing of the property destruction in Nadioci had not been proven meant that the destruction might have occurred *during* the fighting. It is arguable that this, together with the lack of evidence on the manner in which the property was destroyed, gave rise to a reasonable doubt that Nadioci's property destruction was *caused by* the fighting.[40]

Underneath the appeals chamber's ruling lies a complex relationship between property destruction and active combat. Where property destruction occurs amid active combat, what significance does the fighting have on the military necessity or otherwise of the destruction? Conversely, where property is destroyed outside the context of combat, is such destruction perforce militarily unnecessary?

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[34] See, e.g., *Blaškić* Trial Judgement, para. 234; *Blaškić* Appeal Judgement, paras. 146, 149; *Blagojević and Jokić* Trial Judgement, para. 593; *Krajišnik* Trial Judgement, para. 776; *Gotovina et al.* Trial Judgement, para. 1827; *Popović et al.* Trial Judgement, paras. 984-986; *Karadžić* Trial Judgement, para. 532.

[35] See, e.g., *Kordić and Čerkez* Trial Judgement, para. 205; *Kordić and Čerkez* Appeal Judgement, paras. 108-09; *Tuta and Štela* Trial Judgement, paras. 238, 704, 706; *Plavšić* Sentencing Judgement, para. 15; *Stakić* Trial Judgement, para. 763.

[36] On the danger of recharacterising IHL-compliant conduct as a crime against humanity, see, e.g., Payam Akhavan, "Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence", 6 *Journal of International Criminal Justice* 6 (2008); Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* 3d ed. (2014), at 259; 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* (2016). But see, e.g., José Doria, "Whether Crimes Against Humanity Are Backdoor War Crimes", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 645, at 656-660.

[37] See, e.g., *Kordić and Čerkez* Trial Judgement, paras. 572, 625-649, 665, 806-807 (regarding Merdani, Nadioci, Pirići, Rotilj, Stari Vitez, and Vitez); *Kordić and Čerkez* Appeal Judgement, paras. 429, 465-466, 495, 503, 547 (regarding Merdani, Nadioci, Pirići, Rotilj, and Stari Vitez).

[38] See *Kordić and Čerkez* Appeal Judgement, para. 495.

[39] *Ibid.* See also *Martić* Trial Judgement, para. 93; 1 *Prlić et al.* Trial Judgement, para. 170. Since the absence of military necessity for property destruction cannot be presumed, the onus rests with the prosecution to show this absence. See *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, *Judgement*, 30 June 2006, para. 586 (quoting *Kordić and Čerkez* Appeal Judgement, para. 495). Showing the absence of military necessity entails, in turn, proving that at least one of its requirements was unfulfilled.

[40] See also *Štanišić and Župljanin* Trial Judgement, para. 334.

1.3 Property Destruction in the Context of Combat

There are four major factors to take into consideration when assessing the military necessity of property destruction in combat. First, as a threshold matter, one may look to the lawfulness or otherwise of the military activities that underlie the destruction in issue. Should property be destroyed as part of an assault on a locality that contains no military objective to begin with, then it would *ipso facto* be militarily unnecessary.

Second, we need to unpack the subtle way in which the act of attacking and that of destroying interact with each other. As will be seen below, a failure to appreciate this interplay is responsible for some of the confusions in the ICTY's case law that exist on military necessity. Third, these confusions are exacerbated by the fact that the tribunal has sought to describe military necessity by reference to military objectives. It is true that one's assessment as to whether the destruction of an object is militarily necessary often turns out to be the same, whether he or she adheres to these considerations or not. Failing to adhere to them nevertheless means offering unsound legal reasons and, occasionally, arriving at erroneous conclusions.

Fourth, the most intricate area of military necessity assessment involves the destruction of civilian objects during hostilities that does not take the form of an attack. Establishing an object's civilian status does not *per se* warrant the conclusion that its destruction is militarily unnecessary. The assessor must additionally consider the four requirements of juridical military necessity.[41] This stands in contrast to the fact that an object's civilian status does mean that a deliberate attack on it is *ipso facto* unlawful.

1.3.1 Lawfulness of the Underlying Military Activities

The *Blaškić* Trial Chamber held that the property destruction in Ahmići, Šantići, Pirići and Nadioci, as well as in Vitez and Stari Vitez, was militarily unnecessary because the underlying offensives on these localities were without military justification.[42] In so holding, the chamber effectively set forth two propositions: (1) as a matter of fact, there was nothing in these localities that justified the offensives; and (2) as a matter of law, where an offensive is launched on a locality without military justification, military necessity is inadmissible in respect of property destruction that occurs during the course of that offensive.

The *Blaškić* Appeals Chamber rejected the first proposition. It found that there was, in fact, some military justification for the offensives on the localities concerned, and consequently, that they were not *per se* unlawful.[43] This finding left the second proposition of the trial chamber unaddressed by the appeals chamber. It is submitted here that the second proposition is correct as a matter of law, to the extent that the property destruction forms part of the underlying military activities.[44] As noted earlier, military necessity does not except measures based on purposes that are contrary to international humanitarian law.[45] It would seem logical – indeed, truistic – to say that if an offensive is unlawfully launched on a locality, and if the offensive involves the destruction of property therein, then this destruction is devoid of military necessity. It does not follow *a contrario*, however, that the

[41] See Chapter 9 above.
[42] *Blaškić* Trial Judgement, paras. 402-410, 507-512.
[43] See *Blaškić* Appeal Judgement, paras. 235, 331-335, 437-438, 444 (regarding Ahmići, Nadioci, Pirići, Šantići, Stari Vitez, and Vitez).
[44] Examples of unjustified offensives include attacks launched on localities that are in fact undefended or non-defended, and those launched on special zones such as demilitarised zones.
[45] See Chapter 9 above.

lawfulness of an offensive on a locality renders all property destruction that accompanies that offensive militarily necessary. Plainly, the underlying offensive's lawfulness is *not* determinative of the destruction's military necessity.[46]

What, then, *is* determinative? Articulating informed responses to this question involves:

i. Distinguishing between attacking and destroying a piece of property;
ii. Distinguishing between military necessity and military objective, two similar-sounding yet very dissimilar concepts in positive international humanitarian law; and
iii. Distinguishing between the destruction of property that also constitutes an attack against that property, on the one hand, and the destruction of property that does not, on the other hand.

1.3.2 Attack v. Destruction

Article 49(1) of Additional Protocol I defines "attacks" as "acts of violence against the adversary, whether in offence or in defence".[47] There is no formal definition of "destruction" under international humanitarian law. Nevertheless, "attacks" and "destruction" are clearly interrelated notions. In active combat, the destruction of property typically takes the form of an attack against that property, or an attack against some other objective in its vicinity. Similarly, when particular property becomes the object of an attack, this attack often results in the property being totally or partially destroyed.

Not every successful attack necessarily entails the destruction of its objective, however. During the 1999 Kosovo crisis, NATO attacked some of Serbia's electrical power switch stations. According to news reports, NATO released small filaments of graphite over these facilities.[48] This material caused large-scale short circuits; nevertheless, other than burnt fuses, it left no material damage to the power switch stations.[49] Likewise, in 2003, the U.S. Air Force reportedly deployed an electromagnetic pulse (EMP) as a weapon in its attack against Iraq's satellite television network.[50] Its programmes were disrupted for several hours after the EMP temporarily disabled the broadcaster's equipment.[51]

If one were to insist that all attacks constitute destructions and *vice versa*, one would need to argue that NATO actually attacked the electrical power switch stations' fuses (rather than the stations themselves) and that the U.S. Air Force actually attacked the television network's circuitry (rather than the network itself). It is suggested here that this would not accord with how the two notions are ordinarily understood and used.

Nor, even if the belligerent launches an attack with a view to destroying an objective, does the attack necessarily cause the objective's destruction or damage. Thus, for instance, the ordnance may simply fail to detonate; the target may move sufficiently away from the area of impact to escape or withstand the blast; an undersupplied mortar battery may exhaust its limited rounds without hitting

[46] The *Blaškić* Appeals Chamber stated that it "does not therefore consider that the attack of 16 April 1993 on Vitez and Stari Vitez was unlawful *per se*, but agrees with the Trial Chamber only to the extent that crimes were committed in the course of the attack". *Blaškić* Appeal Judgement, paras. 438, 444.
[47] Article 49(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977). See Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* 2d ed. (2001), at 97 (noting that "'acts of violence' means acts of warfare involving the use of violent means: the term covers the rifle shot and the exploding bombs, not the act of taking someone prisoner (even though the latter may also involve the use of force)"). See also A.P.V. Rogers, *Law on the Battlefield* 2d ed. (2004), at 27-29.
[48] See, e.g., "'Soft Bombs' Hit Hard", *BBC News*, 3 May 1999. See also Rogers, *supra* note 47, at 27-29.
[49] *Ibid*.
[50] See, e.g., Joel Roberts, "U.S. Drops 'E-Bomb' On Iraqi TV", *CBS*, 25 March 2003.
[51] *Ibid*.

the target.[52] Plainly, if an attack is launched against an objective, and if the objective survives the attack, this does not mean that no attack has taken place at all.[53]

Conversely, under certain circumstances, property may be destroyed without being attacked.[54] During World War II, Japan demolished houses in order to create firebreaks in parts of its large cities (e.g., Nagoya) in anticipation of Allied aerial bombardments.[55] Even if Article 49(1) of Additional Protocol I had applied to these demolitions, they clearly would not have constituted "acts of violence against" the United States.

In September 1944, the port city of Brest in Bretagne, France, experienced fierce urban combat between German and Allied forces.[56] According to one account,

> [t]he battle for Brest entered its final but most painful stage. The 2d and 8th Division [of the U.S. Army] became involved in street fighting against [German] troops who seemed to contest every street, every building, every square. Machine gun and antitank fire from well-concealed positions made advances along the thoroughfares suicidal, and attackers had to move from house to house by blasting holes in the building walls, clearing the adjacent houses, and repeating the process to the end of the street.[57]

Allied combat engineers played a vital role in this process. They facilitated the advance of their infantry colleagues by partially or totally destroying local civilian buildings. Another account illustrates:

> [d]uring the bitter house-to-house street fighting that followed, the 2d Engineer Combat Battalion made its most valuable contribution. The engineers became adept at blowing holes in the walls of houses at points where the entering infantrymen would not have to expose themselves to enemy fire in the streets. On the eastern side, away from the enemy, the engineers blew holes through inner walls to enable the troops to pass safely from building to building and in ceilings to allow the infantry to pass from floor to floor when the Germans defended stairways. The engineers also developed several methods of quickly overcoming obstacles in the way of the advancing troops. The engineers ... learned to fill craters and ditches quickly by blowing debris into them from the walls of adjacent buildings.[58]

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[52] See also Terry D. Gill, "International Humanitarian Law Applied to Cyberwarfare: Precautions, Proportionality and the Notion of 'Attack' under the Humanitarian Law of Armed Conflict", in Nicholas Tsagourias and Russell Buchan (eds.), *Research Handbook on International Law and Cyberspace* (2015) 366, at 374-375.

[53] See Article 8(2)(b)(ii), ICC Statute (designating as a war crime the act of "[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives"). This war crime does not require that the attacks result in the objects being destroyed or damaged. The same can arguably be said of the elements of launching attacks in the knowledge that it will cause disproportionate collateral damage, a war crime stipulated under Article 8(2)(b)(iv) of the ICC Statute. See also Judith Gardam, "Crimes Involving Disproportionate Means and Methods of Warfare under the Statute of the International Criminal Court", in Doria, Gasser and Bassiouni (eds.), *supra* note 36, 537, at 546. As a matter of evidence, however, the prosecution may find it difficult to prove that an attack was deliberately directed against a particular objective except by showing that the objective was in fact destroyed or damaged as a result. At the ICTY, the *Galić* Trial Chamber ruled that the war crime of unlawful attacks on civilian persons requires the showing that the attacks *caused* death or serious injury. See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, *Judgement and Opinion*, 5 December 2003, paras. 42-44, 56, 62. See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, *Judgement*, 12 December 2007, para. 942.

[54] See, e.g., Roger O'Keefe, "Protection of Cultural Property", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 492, at 501: "As for the qualified prohibition on wilful destruction of or damage to cultural property other than by way of attacks, imperative military necessity may justify demolitions in order to impede the progress of enemy columns, to clear a line of fire or to deny cover to enemy fighters, although the extent of the destruction or damage in the event of will need to be calibrated to the degree of military necessity".

[55] See, e.g., Civil Defense Office, National Security Resources Board, Executive Office of the President, *Fire Effects of Bombing Attacks* (1950), at 18-19. See also John Antal, *City Fights: Selected Histories of Urban Combat from World War II to Vietnam* (2003), at 394 (regarding American army units during World War II using demolition charges to create a firebreak between Manila's north port area and residential districts).

[56] Martin Blumenson, *The European Theater of Operations: Breakout and Pursuit* (2005), at 646.

[57] *Ibid*.

[58] Alfred M. Beck et al., *The Technical Services: The Corps of Engineers: The War Against Germany* (1985), at 384-385.

Here, too, it would have been odd to characterise the actions of Allied engineers as "attacks" against local French property. After all, the violence in question was not directed against the "adversary". Also, according to the British manual, "[i]t may be permissible to destroy a house in order to clear a field of fire"[59] in non-international armed conflicts. Calling the destruction of such a house an "attack" would appear counterintuitive, as the act of violence is not truly directed "against the adversary".

For the same reason, genuinely unintended destructions of civilian objects commonly known as "collateral damage" would not constitute "attacks" against such objects. Where an attack results in collateral damage, it means, by definition, that the act of violence is properly directed against some military objective, i.e., "the adversary",[60] and *not* against the civilian objects that the act incidentally destroys or damages.[61]

1.3.3 Military Necessity v. Military Objective

The idea that destroying property and attacking property are two conceptually distinct acts also finds support in the dissimilar grounds on which their propriety depends. Property destruction is militarily necessary within the meaning of express military necessity clauses only if it is required for the attainment of a military purpose and otherwise in conformity with international humanitarian law.[62] Formulated thus, juridical military necessity pertains to the *measure* taken; that is, the very act of destruction. Compare this with the notion of a military objective that pertains to the *property* itself. The lawfulness of an attack against property depends primarily on whether the property constitutes a military objective. Under Article 52(2) of Additional Protocol I, property constitutes military objectives, only if (i) "by their nature, location, purpose or use [they] make an effective contribution to military action"[63] and if (ii) their "total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[64] If property constitutes a military objective, it is liable to attacks; if it does not, it constitutes a civilian object and is therefore immune from attacks.[65]

In other words, military necessity justifies the property's destruction, whereas the property's status as a military objective justifies attacks being directed against it. The acts of destroying property

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[59] U.K. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 393.

[60] Article 49(1), Additional Protocol I.

[61] This, of course, raises a separate problem as to whether one can really speak of a deliberate "attack" against civilians or civilian objects. After all, attacking a civilian person or object does not necessarily mean committing an act of violence against the adversary. Yet, Article 51(2) of Additional Protocol I clearly protects civilian persons from being made "the object of attack". Similarly, the protocol's Article 52(1) prohibits the belligerents from making civilian objects "the object of attack". Whether an attack *qua* IHL notion may encompass acts other than those stipulated in Article 49(1) of Additional Protocol I is a matter that goes beyond the scope of this thesis. Suffice it to note here that the International Committee of the Red Cross has taken this issue into account when formulating the requisite threshold of harm as part of its interpretive guidance on the notion of direct participation in hostilities. See International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), at 47: "In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack". See also *ibid.*, at 49 (footnotes omitted): "In IHL, attacks are defined as 'acts of violence against the adversary, whether in offence or in defence'. The phrase 'against the adversary' does not specify the target, but the belligerent nexus of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities".

[62] See Chapter 9 above.

[63] Article 52(2), Additional Protocol I.

[64] *Ibid*.

[65] *See ibid.,* Article 52(1).

and attacking property are conceptually distinct from each other, because the notions of military necessity and military objectives are conceptually distinct from each other.[66] The *Strugar* Trial Chamber therefore arguably erred when it stated that "military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I".[67] The same may be said of the *Strugar* Appeals Chamber:

> The Appeals Chamber also agrees that military necessity is not an element of the crime of destruction of, or damage to cultural property ... While the latter's requirement that the cultural property must not have been used for military purposes may be an element indicating that *an object does not make an effective contribution to military action in the sense of Article 52(2) of Additional Protocol I*, it does not cover the other aspect of military necessity, *namely the definite military advantage that must be offered by the destruction of a military objective*.[68]

The chamber is clearly of the view that military necessity is to be understood by reference to the two-prong definition of military objectives found in Article 52(2) of Additional Protocol I.[69]

This is an error, notwithstanding two familiar perceptions to the contrary. First, it is true that most instances of property destruction in combat would also be instances of property attack, and *vice versa*. It is also true that today's international humanitarian law limits lawful attacks to those directed at military objectives. This merely amounts to upholding the somewhat obvious truth that destroying a military objective by way of an attack is *ipso facto* militarily necessary.[70] It does not follow *a contrario* that destroying a civilian object by means other than an attack is perforce militarily unnecessary.[71]

Second, the 1999 Second Protocol to the 1954 Hague Cultural Property Convention effectively restricts the loss of cultural property's protection not just against destruction, but also against military use and acts of hostility, to situations where it constitutes a military objective "by its function"[72] – or, in the case of enhanced protection – "by its use".[73] As Roger O'Keefe observes:

> In addition, parties to a conflict to which the Second Protocol applies owe certain special obligations towards cultural property placed under Chapter 2's select regime of "enhanced" protection. They are prohibited from attacking such property unless by its use, and use alone, it becomes a military objective and the attack is the only feasible means of terminating such use. *All acts of*

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[66] See, e.g., Roger O'Keefe, "Protection of Cultural Property", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 423, at 440.

[67] *Strugar* Trial Judgement, para. 295. See also *Kordić and Čerkez* Appeal Judgement, paras. 465-466, 503; *Boškoski and Tarčulovski* Trial Judgement, para. 353; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, *Judgement*, 3 April 2007, para. 337; 1 *Prlić et al.* Trial Judgement, para. 123; *Karadžić* Trial Judgement, para. 533; William Fenrick, "Specific Methods of Warfare", in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 238, at 244.

[68] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, *Judgement*, 17 July 2008, para. 330. Emphasis added.

[69] See Article 52(2), Additional Protocol I. See also Kriangsak Kittichaisaree, *International Criminal Law* (2001), at 274 n.68: "This was the subject of the decision of the Anglo-American Arbitral Tribunal in the *Hardman Claim* in 1913. It was held that the act constituted 'military necessity'. (McCoubrey, *International Humanitarian Law*, 201). It is submitted, however, that the defence accepted in that case would better be characterised as 'necessity'. It was not 'military necessity' as the act did not target military objectives in order to secure military victory over the enemy". Here, the confusion appears to be three-fold. First, as noted in Chapter 9, the matter at issue in *Hardman* was exceptional military necessity, not justificatory necessity. Second, it is not a requirement of military necessity that the measure in question "target military objectives". Third, military necessity does not require military victory over the enemy to be the purpose of the measure taken.

[70] See below. See also O'Keefe, *Protection of Cultural Property*, *supra* note 29, at 128.

[71] See below.

[72] Article 6(a)(i), Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999).

[73] *Ibid.*, Article 13(1)(b).

hostility against cultural property under enhanced protection other than attacks, such as its demolition even for military ends, are absolutely forbidden.[74]

This, while undoubtedly significant for cultural property, is simply an extra layer of protection instituted under the 1999 Second Protocol by which its states parties are bound. It does not change the fact that, as concepts, military necessity and military objectives are distinct from each other.

In *Kordić and Čerkez*, the appeals chamber held that no evidence allowed "conclusions as to whether the shelling of Merdani was or was not justified by military necessity".[75] In so holding, the chamber appears to have concluded that the relevant question for determining the military necessity or otherwise of the property destruction in Merdani was whether the *shelling of that locality* was or was not justified by military necessity. The chamber's approach here is problematic in two respects.

To begin with, the shelling of a locality is not amenable to being "militarily necessary" or "unnecessary" within the context of positive international humanitarian law. Rather, it is amenable to being lawful or unlawful, depending on whether, *inter alia*, the locality does or does not contain any military objective or objectives, and whether the shelling targets such an objective or objectives.[76]

Moreover, as noted earlier, whereas combat-related property destruction is *ipso facto* militarily unnecessary where the underlying offensive is unlawful, the latter's lawfulness is not determinative of the former's military necessity. In other words, the shelling of military objectives in Medani may have been lawful, but not all property destruction that took place during this offensive may have been militarily necessary. Nor, despite the position taken by the *Blaškić* and *Kordić and Čerkez* Trial Chambers to the contrary, does military necessity justify targeting civilian objects.[77]

1.3.4 Destruction of Property Constituting a Military Objective

Where property constitutes a military objective, the property's status as a military objective justifies attacks being directed against it. The property's status as a military objective also means that, if an attack against the property results in its destruction, then this destruction is militarily necessary. Since attacking a military objective is lawful and the objective's resulting destruction is militarily necessary, destroying a military objective, even without attacking it, would *a fortiori* be lawful and militarily necessary. Thus, for instance, destroying enemy tanks, aircraft, and other equipment that had already been captured would be consistent with military necessity.

Some ICTY trial chambers declined to find the destruction of houses to be lacking in military necessity on the ground that they may have constituted military objectives at the time of their destruction.[78] The *Prlić et al.* Trial Chamber's majority found that the Old Bridge of Mostar constituted a military objective at the relevant time.[79] Nevertheless, according to the majority, the bridge's destruction was unlawful because the "damage to the civilian population" in the form of the humanitarian supplies cut as a result and very significant psychological impacts on Mostar's Muslim population

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[74] Roger O'Keefe, "Protection of Cultural Property", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 492, at 504. Emphasis added. See also O'Keefe, *Protection of Cultural Property*, *supra* note 29, at 255, 331-332.

[75] *See Kordić and Čerkez* Appeal Judgement, para. 429.

[76] Should the attacker indiscriminately treat the locality itself as his or her target, however, it would be unlawful to launch an attack on it even if it did contain military objectives. See, e.g., Article 51(5)(a), Additional Protocol I; *Gotovina et al.* Trial Judgement, paras. 1893, 1911, 1923, 1935, 1943; Hayashi, *supra* note 36.

[77] See *Kordić and Čerkez* Trial Judgement, para. 328; *Blaškić* Trial Judgement, para. 180. This error was acknowledged in *Galić* and other subsequent decisions. See, e.g., *Galić* Trial Judgement and Opinion, para. 44; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, *Judgement*, 29 July 2004, para. 109; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, *Corrigendum to Judgement of 17 December 2004*, 24 January 2005, para. 54; *Strugar* Trial Judgement, para. 278; *Milošević* Trial Judgement, para. 944; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, *Judgement*, 30 November 2006, paras. 130, 190. See also Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (2014), at 143-144.

[78] See, e.g., 3 *Prlić et al.* Trial Judgement, paras. 1525, 1558, 1563.

[79] See *ibid.*, para. 1582.

was "disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge".[80]

1.3.5 Destruction of Property Constituting a Civilian Object

A civilian object is *per se* immune from attacks. An attack against such an object is unlawful, be it deliberate or indiscriminate. If an attack is deliberately launched against a civilian object, and if the attack destroys that object and/or another civilian object or objects, then juridical military necessity does not exempt their destruction.[81] This is so, because the destruction in question does not satisfy the requirement that the measure be in conformity with international humanitarian law.[82] Similarly, if an attack is launched indiscriminately, and if the attack destroys a civilian object, then this destruction remains without military necessity.[83]

The *Strugar* Trial Chamber found that there was no military objective in the Old Town of Dubrovnik when it came under attack by the Yugoslav People's Army (JNA).[84] The JNA's shelling of the Old Town resulted in its partial destruction. The chamber rightly concluded that the shelling was deliberate or indiscriminate[85] and that the destruction of the Old Town was not justified by military necessity.[86] As noted earlier, however, it did so by equating the notion of military necessity with the notion of military objectives.[87] The correct reasoning would have been as follows:

(i) Attacks launched deliberately or indiscriminately against civilian objects are unlawful;
(ii) Military necessity does not except property destruction involving unlawful measures;
(iii) The destruction of property in the Old Town took the form of unlawful shelling of civilian objects; and, therefore,
(iv) The property destruction in the Old Town was not justified by military necessity.

It may happen that civilian objects are destroyed as part of collateral damage. For example, suppose Property A is a civilian object that is destroyed as a result of an attack specifically directed against Combatant B, an able-bodied, non-surrendering enemy combatant and a military objective. Property A's destruction forms part of incidental civilian casualties and damage. Suppose further that such casualties and damage are proportionate to the concrete and direct military advantage anticipated by Combatant B's disablement. Property A's destruction will then be militarily necessary, because the measure taken is required for the attainment of a military purpose and otherwise in conformity with international humanitarian law.[88] In this scenario, the attack against Combatant B constitutes the

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[80] *Ibid*., paras. 1583-1584, 1587. But see *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, 6 *Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti*, 29 May 2013, at 318-325, esp. 325 ("to my mind, the Old Bridge was a legitimate military objective whose destruction gave the HVO a definite military advantage by cutting off communications and the supply of food. I fail to see how the principle of proportionality could be applicable in this case. If the Old Bridge was a military objective, it quite simply had to be destroyed. In any event, there is no such thing as proportionate destruction").
[81] See *Kordić and Čerkez* Appeal Judgement, paras. 419, 426, 477, 485, 526.
[82] See Chapter 9 above.
[83] *Brđanin* Trial Judgement, para. 626 ("In some villages, attacks were preceded by an ultimatum: for example in the Hambarine area in late May 1992, an ultimatum was given for the surrender of a particular individual [Aziz Ališković, a checkpoint commander]. Following the expiration of the ultimatum, the Bosnian Muslim village of Hambarine was shelled by Bosnian Serb forces for the entire day. Houses were targeted indiscriminately. Tanks passed through the village and shelled the houses causing civilian casualties. Houses were looted and set on fire") (footnotes omitted).
[84] See *Strugar* Trial Judgement, paras. 193-194, 214, 284.
[85] See *ibid.,* paras. 214, 285-288, 329.
[86] See *ibid.,* paras. 328, 330.
[87] See *ibid.,* para. 295.
[88] See *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, *Judgement*, 15 March 2006, para. 45 ("The protection offered by Article 3(b) of the Statute is, however, limited by the exception of military necessity. The Chamber finds that collateral damage to civilian property may be justified by military necessity and may be an exception to the principles of protection of civilian property").

measure taken, while his disablement constitutes the military purpose. The measure's conformity with international humanitarian law emanates from two facts. First, Combatant B is a military objective. Second, *ex hypothesi*, the attack against him does not cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which are excessive in relation to the concrete and direct military advantage anticipated.[89]

If, however, Property A's destruction is incidental yet *dis*proportionate to the concrete and direct military advantage anticipated, it becomes unlawful and, accordingly, without military necessity. The measure taken runs counter to international humanitarian law, since disproportionate attacks are prohibited under Article 51(5)(b) of Additional Protocol I.[90] Nor, within the meaning of juridical military necessity, is the attack against Combatant B "required" for the concrete and direct military advantage anticipated insofar as the measure's injurious effect is disproportionate in relation to its stated purpose.

The *Martić* Trial Chamber observed:

> The Trial Chamber recalls the evidence that there was intensive shelling in Škabrnja on the morning of the attack. Moreover, there is evidence that fire was opened on private houses by JNA tanks and using hand-held rocket launchers. The Trial Chamber recalls the evidence that members of Croatian forces were in some of the houses in Škabrnja. In the Trial Chamber's opinion, this gives rise to reasonable doubt as to whether the destruction resulting from these actions was carried out for the purposes of military necessity. The elements of wanton destruction of villages or devastation not justified by military necessity (Count 12) have therefore not been met.[91]

It might be said that the some of the houses in Škabrnja were incidentally destroyed when JNA tanks engaged members of Croatian forces inside them. As far as these houses are concerned, the relevant consideration would be whether their destruction was excessive in relation to the objective of disabling the Croatian fighters. If the destruction was proportionate, then it was militarily necessary; if not, it was militarily unnecessary.

Accordingly, where the destruction of a civilian object takes the form of an unlawful attack, the attack's unlawfulness conclusively indicates the absence of military necessity for the object's destruction. Arguably, this is what the *Hadžihasanović and Kubura* Appeals Chamber meant when it held that "the conventional prohibition on attacks on civilian objects ... has attained the status of customary international law and that this covers 'wanton destruction of cities, towns or villages not justified by military necessity'". [92] The attack is unlawful if:

(i) It is deliberately directed against the civilian object concerned, or against another civilian object or objects;
(ii) It is indiscriminate[93]; or
(iii) It is directed against a military objective but causes disproportionate collateral damage.

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[89] See Article 51(5)(b), Additional Protocol I.

[90] See, e.g., *Blaškić* Trial Judgement, para. 510 ("Consequently, it was impossible to ascertain any strategic or military reasons for the 16 April 1993 attack on Vitez and Stari Vitez. In the event that there had been, the devastation visited upon the town was of out of all proportion with military necessity"). See also *Kordić and Čerkez* Trial Judgement, para. 734 ("On 8 September 1993 the HVO launched a successful attack on the village of Grbavica, a hillside feature to the west of Vitez and close to the Britbat camp at Bila. This feature had been used by the ABiH as a position for the purposes of sniping and, according to the evidence of Britbat officers who saw the attack, it was a legitimate military target. However, according to the same witnesses, the attack was accompanied by unnecessary destruction. For instance, Brigadier Duncan said that the objective was secured by an excessive use of force against the local population, causing massive destruction of property beyond any military necessity ...") (footnotes omitted).

[91] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, *Judgement*, 12 June 2007, para. 394.

[92] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.3, *Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal*, 11 March 2005, para. 30.

[93] See, e.g., 3 *Prlić et al.* Trial Judgement, paras. 1568-1570.

If a civilian object is destroyed as a result of such an attack, then it means that the object's destruction lacks military necessity.

As noted earlier, however, there are situations during active combat in which a belligerent destroys a civilian object without attacking that object or any other object. Where this occurs, the object's destruction is militarily necessary if it satisfies all the requirements of juridical military necessity.[94] If the destruction fails to satisfy one or more of the requirements, then it is without military necessity.

The *Orić* Trial Chamber held that property was destroyed without military necessity in Brađevina.[95] The chamber held that, "at the time of the attack, the property destroyed in Brađevina was neither of a military nature, nor was it used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs"[96] and that, "[c]onsequently, the destruction of property in Brađevina was not required for the attainment of a military objective".[97]

With the first ruling, the trial chamber determined in effect that the haystacks, sheds, houses, stables and livestock destroyed in Brađevina constituted civilian objects. If, as civilian objects, they were destroyed by deliberate, indiscriminate or disproportionate attacks, then this would *ipso facto* mean that their destruction was militarily unnecessary. The chamber described the circumstances of property destruction in Brađevina thus:

> The attack on Brađevina was launched from the direction of Kaludra. The attackers entered Brađevina from its lower part, and surrounded it. They met with no resistance. The attack came in two waves, the first by fighters approaching the houses of Brađevina firing upon the prone position, and the second by fighters following behind. Witnesses heard detonations and saw burning of haystacks and sheds. In the course of the attack, Bosnian Muslim fighters torched houses after taking out goods. Bosnian Muslim civilians joined fighters in torching stables and burning livestock in the meadows between Brađevina and Magudovići. Eventually, all the buildings of Brađevina, except those used for storing grain and food, were set on fire. Bosnian Muslim civilians remained in the area after the attack, searching for food and other goods.[98]

In view of these circumstances, it would not have been unreasonable for the trial chamber to conclude that the objects destroyed not only constituted civilian objects but were, in fact, attacked *as such* – i.e., deliberately.

The trial chamber did not do so. In fact, nowhere in the judgement is there any specific finding that, as civilian objects, the property destroyed in Brađevina was destroyed by attacks, let alone by unlawful ones.[99] Rather, it appears that, having determined the objects' civilian status, the trial chamber simply concluded – "consequently" is the expression used – that their destruction is incapable of satisfying any military purpose. The way in which the chamber discussed the events in Brađevina leaves open the possibility that some civilian property was destroyed by acts not constituting attacks. Where such a possibility exists, whether the destruction of the property in question was or was not required for the attainment of a military purpose is a matter that must be considered on a case-by-case basis.

Similarly, the *Boškoski and Tarćulovski* Trial Chamber considered most of the houses set alight in the village of Ljuboten civilian objects, and yet it declined to treat them as having been destroyed in deliberate attacks.[100] Rather, the chamber found itself asking whether these houses were used for

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[94] See Chapter 9 above. That is, unless the object in question constitutes cultural property and enjoys enhanced protection under Hague Cultural Property Protocol II.

[95] See *Orić* Trial Judgement, para. 618.

[96] *Ibid*. See also *ibid.,* paras. 607, 618, 632, 675 (holding, *inter alia,* that the property destroyed in Ježestica and Ratkovići was "neither of a military nature, nor ... used in a manner such as to make an effective contribution to the military actions of the Bosnian Serbs").

[97] *Ibid.,* para. 618.

[98] *Ibid.,* para. 613. Footnotes omitted.

[99] As noted earlier, lawful attacks, i.e., those properly directed against military objectives and not disproportionate in their injurious effects on civilian persons and objects, render the resulting property destruction lawful and militarily necessary.

[100] See *Boškoski and Tarčulovski* Trial Judgement, paras. 359-380.

any military purposes. Then, as regards those houses without such purpose, the chamber proceeded to find that their destruction was all without military necessity.

This somewhat roundabout way in which the *Orić* and *Boškoski and Tarćulovski* Trial Chambers approached the matter may very well have to do with the fact that the prosecution specifically charged the accused under Article 3(b) of the ICTY Statute, effectively tying the chambers' hands.

In *Kordić and Čerkez*, the appeals chamber upheld the trial chamber's ruling that the property destruction in Novi Travnik was not justified by military necessity:

> [A]part from the buildings destroyed or damaged due to the fighting along the separation line between the two forces, a number of buildings with no military interest belonging to civilian Muslims were destroyed in the part of the old town called Bare (the lower part, Ratanjska, at the entry of Novi Travnik). The nearest military objective was approximately 200-300 metres from there and other destroyed Muslim buildings were 700-800 metres from the front line … The Appeals Chamber is of the view that, although part of the HVO attack on Novi Travnik might have pursued a legitimate military purpose, a reasonable trier of fact could have, on the basis of the evidence in question, come to the conclusion beyond reasonable doubt that wilful and large scale destruction of Muslim properties not justified by military necessity also occurred in its course.[101]

It was found that there was a considerable distance between the properties destroyed, on the one hand, and the nearest military objective ("approximately 200-300 metres") and the front line ("700-800 metres"), on the other hand.[102] This distance would effectively eliminate the possibility that the destruction of Muslim buildings was incidental to attacks directed against military objectives nearby. The distance would also make it unlikely that stray shells and the like launched across the front line accidentally destroyed the properties. It would follow that they were destroyed either by deliberate or indiscriminate attacks, or by acts not constituting attacks.

The appeals chamber also found that the Muslim buildings had "no military interest".[103] This might mean that the properties destroyed constituted civilian objects. If they constituted civilian objects, and if their destruction was the result of deliberate or indiscriminate attacks, then the attacks would be unlawful and the destruction would be without military necessity. If, however, the proprieties were destroyed by acts other than attacks, then the mere fact that they constituted civilian objects would not conclusively demonstrate the absence of military necessity for their destruction.

Alternatively, "no military interest" might mean not only the properties' status as civilian objects but also the lack of military purpose served by their destruction. Provided this is the meaning that the appeals chamber had in mind, the destruction in question would fail to satisfy the requirement of juridical military necessity that the measure be taken for some specific military purpose[104] and would, accordingly, remain militarily unnecessary.

1.3.6 Property Destruction in the Context of Combat – A Summary

When assessing the juridical military necessity of combat-related property destruction, the trier of fact would consider the following questions.

- Was there any military justification for the combat activities of which the property destruction formed part? Absent any military justification, the trier of fact would find that the

[101] The acronym "HVO" refers to *Hrvasko Vijeće Obrane*, or "Croatian Defence Council". The HVO was the army of the Bosnian Croats. See *Kordić and Čerkez* Appeal Judgement, para. 391.
[102] *Ibid*.
[103] *Ibid*.
[104] See Chapter 9 above.

property destruction was militarily unnecessary. If at least some military justification existed,[105] then the trier would turn his or her attention to the property itself.

- Where there was some military justification for the underlying combat activities, did the individual property destroyed constitute a military objective? If it did, its destruction, whether caused by an attack or not, was militarily necessary.[106] If it constituted a civilian object, then the trier of fact would examine the particular circumstances of its destruction.
- Was the property at issue, a civilian object, made the object of a deliberate attack, destroyed as a result of a deliberate attack against another civilian object, or destroyed by an indiscriminate attack? An affirmative answer would yield the finding that the destruction was without military necessity; a negative answer would bring the trier of fact to the next question.
- Was the civilian object destroyed as a result of an attack directed against a military objective? If so, were the incidental civilian casualties and damage – of which the object's destruction formed part – in proportion to the concrete and direct military advantage anticipated? The lack of proportion between the injury and advantage would mean that the destruction at issue was militarily unnecessary, whereas the existence of proportion would indicate the destruction's military necessity.
- Lastly, where the civilian object was destroyed by an act not constituting an attack, did the destruction satisfy the requirements of military necessity?

The table below represents the relevant considerations for the juridical military necessity of property destruction where the underlying combat activities are held to have some military justification:

[105] Launching an offensive on a locality would be militarily justified if, for example, the locality contained military objectives. A strategically important locality may contain exclusively civilian objects, but that does not mean that no offensive may be lawfully launched on it. Such an offensive would be lawful if it is met with no resistance and no attack is directed against any object. If an object is destroyed during such an offensive, its military necessity would depend on whether the destruction satisfied all the requirements of military necessity.

[106] But see Articles 6(a)(i), 13(1)(b), Hague Cultural Property Protocol II.

<table>
<tr><td colspan="2" rowspan="2"></td><td colspan="2">The property destroyed was …</td></tr>
<tr><td>… a military objective.</td><td>… a civilian object.</td></tr>
<tr><td rowspan="6">The property was destroyed …</td><td>… as a result of a deliberate attack against it.</td><td>Lawful per se and therefore militarily necessary.</td><td>Unlawful per se and therefore militarily unnecessary.</td></tr>
<tr><td>… as a result of a deliberate attack against a(nother) civilian object.</td><td>Lawful per se and therefore militarily necessary.</td><td>Unlawful per se and therefore militarily unnecessary.</td></tr>
<tr><td>… as a result of an indiscriminate attack.</td><td>Lawful per se and therefore militarily necessary.</td><td>Unlawful per se and therefore militarily unnecessary.</td></tr>
<tr><td rowspan="2">… as a result of an attack against a(nother) military objective.</td><td rowspan="2">Lawful per se and therefore militarily necessary.</td><td>If not part of proportionate civilian casualties and/or damage, then unlawful and therefore militarily unnecessary.</td></tr>
<tr><td>If part of proportionate civilian casualties and/or damage, then lawful and therefore militarily necessary.</td></tr>
<tr><td>… not as a result of an attack.</td><td>Lawful per se and therefore militarily necessary.</td><td>Depends on whether the act of destruction was:
(a) required for the attainment of
(b) a military purpose, and
(c) otherwise in conformity with international humanitarian law.</td></tr>
</table>

In order for the prosecution to show beyond a reasonable doubt that the destruction of particular property in combat was without military necessity, it must prove:

(I) That the underlying combat activities (such as an offensive on a locality), of which the property's destruction formed part, lacked any military justification; or
(II) That, although some military justification (such as the strategic importance of the locality or the presence of military objectives therein) existed for the underlying combat activities:
  (1) The property destroyed was a civilian object; and
  (2) The property was destroyed by:
    (i) An attack:
      - directed deliberately against it or against another civilian object;
      - directed indiscriminately; or
      - directed against a military objective yet disproportionate in its harmful effect on civilian persons and/or objects; or
    (ii) An act, not constituting an attack, such that the property's destruction failed to satisfy at least one requirement of juridical military necessity.

The extent to which the prosecution can discharge its onus successfully depends on the quantity and quality of the evidence adduced. The prosecution's ability in this regard may be limited by the realities of active combat that make it difficult, if not impossible, to obtain the relevant evidence.

The April 1993 destruction of Muslim houses in Vitez/Stari Vitez is a case in point. The *Kordić and Čerkez* Trial Chamber found that the destruction was without military necessity.[107] This finding was, however, overturned on appeal:

> The Appeals Chamber takes into account the testimony of Col. Watters according to which most of the destruction during the April attacks was in the Muslim area of the town of Vitez, but has already held that the scale of such destruction is unknown. Exh. Z2715 does not specify when eighty houses were destroyed in the town of Vitez; part of these houses were obviously destroyed as a result of the 18 April truck bomb, which the Trial Chamber did not link with either of the Accused. Moreover, there were military objectives in Vitez/Stari Vitez, including the headquarters of the Muslim TO and the private houses from where combatants, (including members of the ABiH, the TO and every person taking a direct part in hostilities), were resisting. In the absence of evidence as to the scale of the destruction and as to the lack of military justification, the Appeals Chamber finds that no reasonable Trial Chamber could have concluded that destruction not justified by military necessity occurred in Vitez/Stari Vitez in April 1993.[108]

It appears that the insufficiency of evidence with respect to Vitez/Stari Vitez left, *inter alia*, the following three reasonable doubts unresolved. First, the presence of military objectives in Vitez/Stari Vitez could have militarily justified the underlying combat activities taking place in these localities. Second, at the time of their destruction, some Muslim houses might have constituted military objectives themselves. Third, even if the houses destroyed in Vitez/Stari Vitez were all civilian objects, it was not shown that they were destroyed by deliberate, indiscriminate, or disproportionate attacks, or by acts such that their destruction failed to satisfy one or more requirements of military necessity.[109]

1.4 Property Destruction Outside the Context of Combat

[107] See *Kordić and Čerkez* Trial Judgement, para. 808.
[108] The acronym "TO" refers to *teritoriajalna odbrana*, or "territorial defence", a militia organization originating from the defence structure of the former Social Federal Republic of Yugoslavia. The acronym "ABiH" refers to *Armija Bosne i Hercegovine*, or "Army of Bosnia and Herzegovina". See *Kordić and Čerkez* Appeal Judgement, paras. 465-466.
[109] *Ibid.* See also *Hadžihasanović and Kubura* Trial Judgement, paras. 1794, 1797, 1799, 1806-1807, 1830, 1832 (regarding Guča Gora, Maline, Šušanj, Ovnak, Brajkovići and Grahovčići).

In *Tuta and Štela*, the prosecution restricted the scope of its property destruction charges to events that occurred after the attacks.[110] The post-World War II United Nations War Crimes Commission took a similar approach.[111]

The absence of combat activities is relevant when determining the juridical military necessity of property destruction. The absence of combat, however, does not *per se* indicate the absence of military necessity. As noted earlier, in the *Hardman* claim, an occupation force's destruction of a house and its contents for the maintenance of sanitary conditions among its members was held to constitute military necessity. The destruction in question did not occur in the context of active combat.[112] Indeed, where an ICTY chamber made a finding of militarily unnecessary property destruction on the basis of little or no fighting, it typically did so on the ground that the destruction was ethnically driven.[113] In many cases, property destruction occurred in localities inhabited predominantly by members of a targeted ethnicity.[114] In other localities, only the property belonging to members of a targeted ethnicity or ethnicities was destroyed.[115]

It is submitted here that ethnically driven property destruction is *ipso facto* devoid of military necessity both within and without the context of combat.[116] Any decision to destroy property based

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[110] See *Tuta and Štela* Second Amended Indictment, paras. 55-56, 58 ("[f]ollowing the capture" of villages).

[111] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and Development of the Laws of War* (1948), at 488: "Committee I [of the Commission] often had to decide whether a given set of facts arising from the destruction of personal property, public property, or local monuments was a war crime, or whether such destruction was justified on the basis of military necessity in time of war. For example, the Committee refused to list for war crimes those Germans responsible for the demolition of a French lighthouse at Pas-de-Calais in September, 1944 (Commission No. 3603). Generally, the test applied was whether military operations were in progress, or were imminent".

[112] See *William Hardman (United Kingdom) v. United States*, 18 June 1913, 6 *Reports of International Arbitral Awards* (2006) 25, at 26; 7 *American Journal of International Law* 879 (1913), at 881; 2 *British Yearbook of International Law* 197 (1921-1922), at 199.

[113] See, e.g., *Kordić and Čerkez* Appeal Judgement, paras. 484-485, 583-586 (holding that damage done in Šantići and Ahmići was restricted to Muslim houses; that a reasonable trier of fact could have found that it was "of such a nature that it could not have been caused by the fighting" and "thus not justified by military necessity"; and that a reasonable trier of fact could have found that property destruction in Han Ploča Grahovci in Kiseljak was not justified by military necessity "[s]ince only Muslim houses were destroyed, and the destruction occurred when there was not much fighting"); *Blaškić* Trial Judgement, paras. 543-544, 549-550, 556-557, 559 (regarding Donja Večeriska, Gačice, and Grbavica); *Tuta and Štela* Trial Judgement, paras. 583, 585 (regarding Sovići and Doljani). The *Blagojević and Jokić* Trial Chamber found that the destruction of personal property taken from Bosnian Muslim detainees was not justified by military necessity. See *Blagojević and Jokić* Trial Judgement, para. 615.

[114] See, e.g., *Blaškić* Trial Judgement, paras. 565, 569, 579, 595-596 (regarding Lončari and Očehnići in Busovača, and Behrići and Gomionica in Kiseljak); *Brđanin* Trial Judgement, paras. 600, 608-634 (regarding Bosanska Krupa; Bosanski Novi; Blagaj Rijeka in Bosanski Novi; Donji Agići in Bosanski Novi; Bosanski Petrovac; Čelinac; Bašići in Čelinac; Ključ; Kotor Varoš; Stari Grad in Prijedo; Bišćani, Kozaruša, Kamičani, Kevljani, Rakovčani, Čarakovo and Rizvanovići in Prijedor; Hambarine in Prijedor; Kozarac in Prijedor; Briševo in Prijedor; Mahala in Sanski Most; Begići in Sanski Most; and Šipovo); *Kordić and Čerkez* Trial Judgement, paras. 740, 807 (regarding Stupni Do); *Štanišić and Župljanin* Trial Judgement, para. 264 (regarding Doganovci).

[115] See, e.g., *Blaškić* Trial Judgement, paras. 418, 510, 544, 598, 600, 605, 608, 613-614, 616, 619, 620, 622 (regarding Ahmići, Šantići, Pirići, Nadioci, Vitez, Stari Vitez, Donja Večeriska, Gromiljak in Kiseljak, Polje Višnjica, Višnjica in Kiseljak, Svinjarevo in Kiseljak, Grahovci, Han Ploča, and Tulica); *Blaškić* Appeal Judgement, para. 444 (regarding Vitez and Stari Vitez); *Kordić and Čerkez* Trial Judgement, paras. 635, 643, 807(i), 645, 659-660, 677, 805, 807(iv) (regarding Ahmići, Vitez, Donja Večeriska, Očehnići in Busovača, and Gačice); *Kordić and Čerkez* Appeal Judgement, paras. 484-485, 534, 558, 562, 563-564, 583-586 (regarding Šantići in Ahmići, Očehnići, Gomionica, Višnjica, Polje Višnjica, and Han Ploča-Grahovci in Kiseljak); *Tuta and Štela* Trial Judgement, paras. 582-585 (regarding Sovići and Doljani); *Brđanin* Trial Judgement, para. 1022 ("Unlike non-Serb property, Bosnian Serb property was systematically left intact and only sporadically damaged"); *Martić* Trial Judgement, paras. 258, 381, 383 (regarding Saborsko); 3 *Prlić et al.* Trial judgement, paras. 1523-1524, 1535-1543, 1546-1549, 1551-1552, 1554-1557, 1559-1562, 1564-1566, 1571-1574-1578, 1588-1591, 1593-1594, 1596-1599 (regarding Prozor; Duša, Hrasnica, Ždrimci, and Uzričje; Sovići and Doljani; Borojevići and Stolac; Bivolje Brdo; Stupni Do; Parcani; Skrobućani, Lug and Podaniš); *Štanišić and Župljanin* Trial Judgement, paras. 264, 282, 347, 491, 700, 812, 880, 982, 1041, 1119, 1190, 1248, 1286, 1356, 1498, 1688 (regarding Donji Vakuf, Prusac, Šeherdžik, Sokolina, Ključ, Kotor Varoš, Prijedor, Sanski Most, Taslić, Bileća, Bosanski Šamac, Brčko, Doboj, Gacko, Ilijaš, Pale, Vlasenica, Zvornik).

[116] See *Brđanin* Appeal Judgement, paras. 339-341; 3 *Prlić et al.* Trial Judgement, para. 1579-1580.

on its owner's ethnicity would fail to satisfy the requirement of juridical military necessity that the measure's purpose be in conformity with international humanitarian law.[117] There are two reasons for this failure. First, ethnicity-based selectiveness in the treatment of property would amount to adverse distinction. International humanitarian law prohibits adverse distinction in its application based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.[118] Whatever disagreement there might be about the definition of ethnicity, it would undoubtedly fall within one or more of these criteria. Second, where property is selectively destroyed with a view to adversely distinguishing its owners on the basis of their ethnicity,[119] and where other relevant facts are present,[120] the conduct may also constitute persecutions, a crime against humanity.

The *Hadžihasanović and Kubura*, *Orić* and *Prlić et al.* Trial Judgements are exceptional in the treatment of property destruction outside the context of combat. Regarding Vareš, the *Hadžihasanović and Kubura* Trial Chamber noted that the indictment had alleged militarily unnecessary destruction of dwellings, buildings and civilian personal property belonging to Bosnian Croats and Bosnian Serbs.[121] The chamber found that such destruction did indeed occur following the cessation of armed hostilities in Vareš.[122] In so doing, however, the chamber made no determination as to the ethnicity of the owners of the property destroyed. Rather, according to the judgement, the Bosnian Muslim perpetrators destroyed the doors and windows of the houses in Vareš for the "sole purpose" of committing plunder.[123] To the extent that this was in fact what the perpetrators intended, it was indeed militarily unnecessary because the purpose pursued was neither primarily military in nature nor in conformity with international humanitarian law.

The *Orić* Trial Chamber noted that the villages in which post-combat property destruction occurred were inhabited exclusively or almost exclusively by Bosnian Serbs.[124] This ethnic component of the destruction, however, does not appear to have had any impact on the chamber's ruling that the destruction was militarily unnecessary. The judgement indicates that the chamber viewed the absence of combat to mean the absence of military necessity:

> after the fighting has ceased, destruction can in principle no longer be justified by claiming 'military necessity'. A different situation arises if a military attack is launched against a settlement from which previously, due to its location and its armed inhabitants, a serious danger emanated for the inhabitants of a neighbouring village who are now seeking to remove this danger through military action. It may be that, after such a settlement has been taken, destruction of houses occurs in order to prevent the inhabitants, including combatants, [from returning and resuming attacks] ... [E]xcept for the rare occasions in which such preventive destruction could arguably fall within the scope of 'military necessity', the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime.[125]

The chamber's decision, it is submitted here, is at variance with the law. No authority or rationale exists for the view that, in the event of post-combat property destruction, military necessity is admissible only for one military purpose – i.e., to prevent members of the adversary party from re-occupying their combat positions. The two cases cited in the judgement fail to provide valid support, for the following reasons.

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[117] See Chapter 9 above.
[118] See Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian law* (2005), at 308.
[119] The prohibition against adverse distinction under international humanitarian law is equivalent to the principle of non-discrimination under international human rights law. See *ibid.,* at 309.
[120] Such as, for example, where the property was destroyed within the context of a widespread or systematic attack against a civilian population.
[121] See *Hadžihasanović and Kubura* Trial Judgement, para. 1833.
[122] *Ibid.,* para. 1846.
[123] See *ibid.,* paras. 1844-1846.
[124] See *Orić* Trial Judgement, paras. 593-594, 621, 660 (regarding Gornji Ratkovići and Ježestica).
[125] *Ibid.,* para. 588 (footnotes omitted). See also *ibid.,* paras. 607, 632-633, 674-675 (regarding Gornji Ratkovići and Ježestica). See also *Martić* Trial Judgement, para. 93.

The judgement refers to *Peleus* in support of the proposition that "after the fighting has ceased, destruction can in principle no longer be justified by claiming 'military necessity'".[345] At issue in *Peleus*, however, was *not* whether military necessity pleas should be admissible once the fighting had ceased. As noted earlier,[126] the judge advocate in that case had conceded that circumstances *could* arise in which a belligerent in Eck's position might be justified in killing an unarmed person for the purpose of saving his own life. At no point did the judge advocate limit the scope of his concession to situations where active combat was in progress. Rather, he questioned whether the measure taken by Eck had any material relevance to his stated purpose and, even if it did, whether it was the least injurious of those means that were materially relevant to the purpose and reasonably available to him.

The *Orić* Trial Judgement also relies on the ruling by the International Military Tribunal (IMT) against Alfred Jodl for the view that "the principle must be upheld that the destruction of civil settlements, as a rule, is punishable as a war crime".[127] In so doing, the judgement notes that "[a] policy of 'scorched earth', *i.e.*, the destruction of any facilities that might be useful to the enemy while withdrawing from an area, was not recognised at the Nuremberg Tribunal to be justified by military necessity ..."[128]

This reliance is unhelpful, because the IMT offered virtually no reason when it made the relevant ruling. One cannot hope to establish, for instance, whether the tribunal considered (i) that scorching earth *as such* could never be militarily necessary, or (ii) that the evidence rendered Jodl's specific order concerning northern Norway militarily unnecessary. The first interpretation, while possible, is unlikely. It appears to have been uncontroversial during World War II that scorching occupied territory was considered lawful if required by military necessity.[129] The second interpretation is more likely, although it suffers from the complete absence of any analysis in the IMT's ruling. Compare this with the U.S. Military Tribunal in *Hostage*. As noted earlier, this latter tribunal actually did offer legal and factual reasons for acquitting Rendulic of devastating the Finnmark area, a measure carried out on Jodl's orders.[130]

The *Prlić et al.* Trial Chamber found that the destruction of houses in Parcani by members of HVO special units in retaliation for the villagers hiding in the woods and refusing to surrender their weapons was not justified by military necessity.[131]

1.5 Absence of Military Necessity as an Element of Forcible Displacement

Article 49 of Geneva Convention IV prohibits deportation and transfer of protected persons from occupied territory, except in situations of temporary evacuation where "the security of the population or imperative military reasons so demand".[132] According to the ICRC, "imperative military reasons" exist "when the presence of protected persons in an area hampers military operations".[133]

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[126] See Chapter 9 above.

[127] *Orić* Trial Judgement, para. 588.

[128] *Ibid.,* at 207 n.1581. The relevant passage of the International Military Tribunal ruling reads as follows (*Nuremberg* Judgement, at 571): "By teletype of 28 October 1944, Jodl ordered the evacuation of all persons in northern Norway and the burning of their houses so they could not help the Russians. Jodl says he was against this, but Hitler ordered it and it was not fully carried out. A document of the Norwegian Government says such an evacuation did take place in northern Norway and 30,000 houses were damaged".

[129] See Chapter 9 above. By virtue of Article 54 of Additional Protocol I, scorching earth no longer admits military necessity exceptions where it involves a party to the conflict destroying "objects indispensable to the survival of the civilian population" not located in its own territory.

[130] This is not to say that the *Hostage* ruling on this matter is without criticism. See, e.g., Geoffrey Best, *War and Law Since 1945* (1994), at 328-330.

[131] See 3 *Prlić et al.* Trial Judgement, paras. 1526-1528.

[132] Article 49, Geneva Convention IV.

[133] Pictet (ed.), *Commentary IV Geneva Convention*, *supra* note 14, at 280. The commentary continues (*ibid.*): "[e]vacuation is only permitted in such cases, however, when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate". See also David Kretzmer, "The Advisory Opinion: The Light Treatment

Permanent transfer of protected persons for any reason, as well as their temporary evacuation not demanded by their security or for imperative military reasons, constitutes a grave breach of the convention.[134] This grave breach is incorporated into Article 2(g) of the ICTY Statute.[135] The ICTY has considered Article 2(g) charges against several defendants.[136]

Deportation is also a crime against humanity eligible for prosecution under Article 5(d) of the ICTY Statute. Whether deportation requires the victim to have crossed at least one international border remains a matter of dispute.[137] Owing in part to this unsettledness, the prosecution has developed a practice whereby one charge under Article 5(d) would frequently be accompanied by another, "back-up" charge of inhumane acts under Article 5(i) – also a crime against humanity – perpetrated through forcible transfer within the territory of one state. Charges of deportation and/or forcible transfer have been ruled upon in multiple trials.[138]

Lastly, under Article 5(h) of the ICTY Statute, persecutions may be committed by way of deportation and/or forcible transfer.[139] This form of persecutions has been adjudicated in many trials.[140]

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of International Humanitarian Law", 99 *American Journal of International Law* 88 (2005), at 93-94 n.43; Chapter 9 above.

[134] See Article 147, Geneva Convention IV.

[135] Article 2(g), ICTY Statute.

[136] See *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, *Judgement*, 17 October 2003, paras. 120, 1117, 1121, 1125; *Tuta and Štela* Trial Judgement, paras. 569-571, 763, 767; *Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, *Sentencing Judgement*, 31 July 2001, para. 8; 1 *Prlić et al*. Trial Judgement, para. 132.

[137] This particular issue need not detain us here. Suffice it to note the contrast between the growing majority of ICTY decisions upholding the existence of a cross-border element, on the one hand, and a minority of decisions rejecting its existence, on the other. Those decisions upholding the requirement include: *Tuta and Štela* Trial Judgement, para. 670; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, *Judgement*, 15 March 2002, para. 474; *Krstić* Trial Judgement, para. 521; *Brđanin* Trial Judgement, para. 542; *Simić* Trial Judgement, paras. 123, 129; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, *Decision on Motion for Judgement of Acquittal*, 16 June 2004, para. 68. Those decisions rejecting the requirement include: *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-R61, *Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, 20 October 1995, para. 23; *Stakić* Trial Judgement, paras. 671-684. The *Stakić* Appeal Judgement held that deportation must involve expulsion across a *de jure* border to another country or across a *de facto* border of occupied territory. See *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, *Judgement*, 22 March 2006, paras. 278, 289-303, 308 (but see partly dissenting opinion of Judge Shahabuddeen, paras. 19-76). As far as the ICTY jurisprudence is concerned, the *Stakić* Appeal Judgement has put the matter to rest. See *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, *Judgement*, 28 November 2006, paras. 172-175; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, 1 *Judgement*, 26 February 2009, paras. 165, 169; *Krajišnik* Trial Judgement, para. 723; *Prosecutor v. Mladen Naletilić (a/k/a "Tuta") and Vinko Martinović (a/k/a "Štela")*, Case No. IT-98-34-A, *Judgement*, 3 May 2006, para. 152, 212-213 (separate and partly dissenting opinion of Judge Schomburg); *Martić* Trial Judgement, paras. 107, 110; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, *Judgement*, 27 January 2014, paras. 532-542; 1 *Prlić et al.* Trial Judgement, paras. 47, 55-56.

[138] See, e.g., *Brđanin* Trial Judgement, paras. 539-570; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, 1 *Judgement*, 26 February 2009, paras. 163-172; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, *Judgement*, 23 January 2014, paras. 286-527; *Blagojević and Jokić* Trial Judgement, paras. 629-630; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, *Judgement*, 6 September 2011, paras. 113-116; *Martić* Trial Judgement, paras. 105-111; *Đorđević* Trial Judgement, paras. 1603-1614; *Gotovina et al.* Trial Judgement, paras. 1737-1741; *Tolimir* Trial Judgement, paras. 793-803; 1 *Stanišić and Župljanin* Trial Judgement, paras. 60-65; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, 1 *Judgement*, 30 May 2013, paras. 991-995; 1 *Prlić et al.* Trial Judgement, para. 47; *Karadžić* Trial Judgement, paras. 487-495.

[139] See, e.g., *Krnojelac* Trial Judgement, para. 433-434; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, *Judgement*, 17 September 2003, para. 222; *Tuta and Štela* Trial Judgement, paras. 671-672; *Simić* Trial Judgement, para. 48; *Blagojević and Jokić* Trial Judgement paras. 629-631; *Martić* Trial Judgement, para. 119; *Popović* Trial Judgement, para. 989; *Đorđević* Trial Judgement, paras. 1763-1764; *Gotovina et al.* Trial Judgement, paras. 1738, 1740; Trial Judgement, para. 120; *Tolimir* Trial Judgement, paras. 851, 860; 1 *Stanišić and Župljanin* Trial Judgement, paras. 81-82.

[140] See, e.g., 3 *Milutinović et al.* Trial Judgement, paras. 1207-1212; *Martić* Trial Judgement, para. 432; *Krajišnik* Trial Judgement, paras. 748-749, 807-809, 1182; *Blagojević and Jokić* Trial Judgement, paras. 616-618, 621; *Brđanin* Trial Judgement, paras. 556, 1025-1028, 1082, 1088, 1152; *Babić* Sentencing Judgement, paras. 11, 15; *Deronjić* Sentencing Judgement, paras. 29, 99-101, 120; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, *Sentencing Judgement*, 2 December 2003, paras. 12, 40-42; *Prosecutor v. Ivica Rajić a/k/a Viktor Andrić*, Case No. IT-95-12-S, *Sentencing Judgement*, 8 May 2006; *Simić et al.* Trial Judgement, paras. 1034-1050, 1115, 1119, 1123; *Stakić* Trial Judgement, paras. 881-882; *Tuta and Štela* Trial Judgement, paras. 669-672, 711, 763, 767; *Plavšić* Sentencing Judgement, paras. 5, 15; *Krno-*

The crimes against humanity of deportation, inhumane acts by way of forcible transfer, and persecutions by way of deportation/forcible transfer all contain the element that the victim was forcibly displaced "without grounds permitted under international law".[141] Such grounds include "imperative military reasons" within the meaning of Article 49 of Geneva Convention IV and Article 17(1) of Additional Protocol II.[142]

The tribunal has not dealt extensively with "grounds permitted under international law" or "imperative military reasons" in this context.[143] Only in some cases, such as *Tuta and Štela*, *Brđanin* and *Đorđević*, was the description of victims leaving or being transferred followed by some general finding that their departure was "unlawful"[144] or that it was not demanded by imperative military reasons.[145] No further insight was offered. In *Martić*, the trial chamber acknowledged that the absence of "grounds permitted under international law" and "imperative military reasons" was an element of deportation,[146] yet it did not engage in any factual discussion on this matter.[147] In a somewhat more elaborate manner, the *Krstić* Trial Chamber found that

> [i]n this case no military threat was present following the taking of Srebrenica. The atmosphere of terror in which the evacuation was conducted proves, conversely, that the transfer was carried out in furtherance of a well organised policy whose purpose was to expel the Bosnian Muslim population from the enclave. The evacuation was itself the goal and neither the protection of the civilians nor imperative military necessity justified the action.[148]

This relative brevity[149] stands in contrast to the considerable factual detail in which the tribunal has examined the military necessity of property destruction.

2. Military Necessity and the International Criminal Court

Within the context of positive international humanitarian law, military necessity has no role

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jelac Trial Judgement, paras. 472-485, 534; *Krstić* Trial Judgement, paras. 537, 676, 727; *Todorović* Sentencing Judgement, para. 45; *Kordić and Čerkez* Trial Judgement, 305; *Blaškić* Trial Judgement, at 267 (disposition); *Popović* Trial Judgement, para. 901; *Đorđević* Trial Judgement, paras. 1774-1778; *Gotovina et al.* Trial Judgement, paras. 1804, 1812-1813; *Perišić* Trial Judgement, paras. 743-746; *Tolimir* Trial Judgement, paras. 879-881; 1 *Stanišić and Simatović* Trial Judgement, paras. 1242-1243; *Karadžić* Trial Judgement, paras. 515-516. But see *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, *Judgement*, 31 March 2016, para. 17.

[141] See, e.g., *Stakić* Trial Judgement, para. 672; *Stakić* Appeal Judgement, para. 278; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, *Judgement*, 17 March 2009, paras. 304, 307-308; *Simić et al*. Trial Judgement, para. 125; *Tuta and Štela* Trial Judgement, para. 521; *Krnojelac* Trial Judgement, para. 475; *Krnojelac* Appeal Judgement, para. 222; *Blagojević and Jokić* Trial Judgement, paras. 595, 597; *Blaškić* Trial Judgement, para. 234; *Blaškić* Appeal Judgement, paras. 150-153; *Martić* Trial Judgement, paras. 107, 109; 1 *Milutinović et al*. Trial Judgement, para. 166; *Đorđević* Trial Judgement, para. 1607; *Tolimir* Trial Judgement, paras. 798-799; 1 *Prlić et al.* Trial Judgement, para. 52; *Štanišić and Župljanin* Trial Judgement, para. 61; 1 *Stanišić and Simatović* Trial Judgement, para. 994.

[142] See, e.g., *Brđanin* Trial Judgement, para. 556; 1 *Milutinović et al.* Trial Judgement, para. 166; Article 49, Geneva Convention IV; Article 17(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977).

[143] See *Blagojević and Jokić* Trial Judgement, para. 618; *Đorđević* Trial Judgement, paras. 1618-1679; *Štanišić and Župljanin* Trial Judgement, paras. 221, 281, 346, 490, 699, 810, 879, 934, 981, 1040, 1189, 1247, 1285, 1355, 1413, 1497, 1552, 1686; *Krajišnik* Appeal Judgement, paras. 308, 314.

[144] See, e.g., *Tuta and Štela* Trial Judgement, para. 542, 544, 551, 563 (regarding Mostar generally, and Mostar on 9 May 1993, 12-14 June 1993, and 29 September 1993).

[145] See, e.g., *ibid.,* para. 526 (regarding Sovići and Doljani); *Brđanin* Trial Judgement, para. 556 (1 September 2004) (in general, except Čelinac); *Đorđević* Trial Judgement, paras. 1691-1692; *Tolimir* Trial Judgement, paras. 812, 828.

[146] See *Martić* Trial Judgement, para. 107; *Karadžić* Trial Judgement, paras. 488, 492.

[147] See *Martić* Trial Judgement*,* paras. 426-432. See also *Krajišnik* Trial Judgement, paras. 727-732.

[148] *Krstić* Trial Judgement, para. 527.

[149] See *Krajišnik* Appeal Judgement, paras. 308 (emphasis added): "While the Trial Chamber did not explicitly find that the forcible displacements in the case at hand are 'without grounds permitted under international law', the Appeals Chamber is not satisfied that *this defect* of the Trial Chamber invalidates the verdict". See also *ibid.*, para. 314.

outside express exceptional clauses. It exempts deviations from the prescription of a rule only if the rule itself provides for military necessity exceptions. In this respect, the ICC's Rome Statute raises some awkward questions concerning the potential use before ICC proceedings of military necessity not only as an exception but also as one of the "grounds for excluding criminal responsibility".[150]

2.1 Article 8 and Elements of Crimes – Military Necessity as an Exception

The ICC has jurisdiction over crimes specified in Articles 5-8 of its statute.[151] They are defined in the Elements of Crimes document, an instrument by which the court is to guide itself when considering cases before it.[152] Four war crimes under Article 8 expressly admit exceptions on account of military necessity.[153] The absence of military necessity is an element of each of these crimes. They are:

(a) Extensive destruction and appropriation of property, a grave breach of the Geneva Conventions[154];
(b) Destruction or seizure of the enemy's property, a serious violation of the laws and customs of war in international armed conflict[155];
(c) Ordering the displacement of the civilian population for reasons related to the conflict, a serious violation of the laws and customs of war in non-international armed conflict[156]; and
(d) Destruction or seizure of the property of an adversary, a serious violation of the laws and customs of war in non-international armed conflict.[157]

The absence of military necessity also appears as part of an element of pillage,[158] a serious violation of the laws and customs of war in international and non-international armed conflict.[159]

For the most part, the corresponding IHL rules expressly provide for military necessity exceptions.[160] When a substantive rule envisages an exception, and when the rule's violation constitutes a

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[150] Article 31(1), ICC Statute. See also Héctor Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute* (2008), at 238.
[151] See Articles 5-8, ICC Statute.
[152] *See ibid.,* Articles 9(1), 21(1)(a).
[153] There are also offenses which implicitly admit exceptions on account of military necessity. See below. These offenses typically involve deportation or transfer of persons.
[154] See *ibid.,* Article 8(2)(a)(iv) ("Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"). One of the elements of this war crime is "[t]he destruction or appropriation was not justified by military necessity". See Elements of Crimes (7 April 2000), at 20-21.
[155] See Article 8(2)(b)(xiii), ICC Statute ("Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war"). One of the elements of this crime is that "[t]he destruction or seizure was not justified by military necessity". ICC Elements of Crimes, *supra* note 154, at 30-31.
[156] See Article 8(2)(e)(viii), ICC Statute ("Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand"). One of the elements of this crime is that "[s]uch order was not justified by the security of the civilians involved or by military necessity". ICC Elements of Crimes, *supra* note 154, at 46.
[157] See Article 8(2)(e)(xii), ICC Statute ("Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict"). One of the elements of this crime is that "the destruction or seizure was not justified by military necessity". ICC Elements of Crimes, *supra* note 154, at 48.
[158] The second element of the crime of pillage is that "the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use". ICC Elements of Crimes, *supra* note 154, at 31-32. An explanatory footnote is appended to this element (*ibid.*; emphasis added): "As indicated by the use of the term 'private or personal use', *appropriations justified by military necessity cannot constitute the crime of pillaging*". In earlier drafts of the elements of this war crime, the absence of military necessity appeared as an independent element. See Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (2002), at 272-273.
[159] See Articles 8(2)(b)(xvi), 8(2)(e)(v), ICC Statute.
[160] As regards extensive destruction and appropriation of property, a grave breach of the Geneva Conventions, see Article 50, Geneva Convention I; Article 51, Geneva Convention II; Article 147, Geneva Convention IV. As regards destruction or seizure of the property of the enemy or adversary, see Article 23(g), 1907 Hague Regulations. As regards ordering the

crime, it is only logical that the absence of circumstances satisfying the exception's requirements is itself an element of that crime.[161]

Where the absence of military necessity is an element of a war crime, the onus rests with the prosecution to show this absence.[162] Showing the absence of military necessity entails, in turn, proving that at least one of its requirements was unfulfilled.[163] The prosecution's failure to do so means that it has not proved that the crime was committed. When an accused is charged with a war crime of which the absence of military necessity is an element, and when he pleads military necessity, he challenges the notion that the crime was committed at all. Therefore, strictly speaking, pleading military necessity in this context does not constitute a "defence".[164] Conversely, in no other crimes enumerated under the ICC Statute does military necessity expressly appear as an exception. Nor does the absence of military necessity appear implicitly as one of their elements or part thereof. This is in line with the fact that the underlying positive IHL rules contain no military necessity exceptions.

There are, however, several offences in the ICC Statute which would admit, albeit implicitly, exceptions on account of military necessity. One is the crime of unlawful deportation or transfer, a grave breach of the Geneva Conventions listed under Article 8(2)(a)(vii) of the ICC Statute.[165] This grave breach emanates from Article 147 of Geneva Convention IV, which in turn is based on the convention's Articles 45 and 49. Article 49 exceptionally permits temporary evacuation of an area in occupied territory if, *inter alia*, "imperative military reasons so demand".[166] Temporary evacuations demanded by such reasons are not "unlawful" within the meaning of Article 8(2)(a)(vii) of the ICC Statute.[167] Similarly, the offence of deportation or transfer, a crime against humanity under Article 7(1)(d), contains as one of its elements the requirement that the victim was forcibly displaced "without grounds permitted under international law".[168] As noted earlier, the ICTY has interpreted that these grounds include "imperative military reasons" demanding temporary evacuation of an area in occupied territory. Lastly, offences within the jurisdiction of the ICC – including those of which the absence of military necessity is an explicit or implicit element – may amount to persecutions under Article 7(1)(h) of the statute.[169]

As of 31 May 2016, the ICC Prosecutor has issued arrest warrants or laid charges against the following individuals for some of the crimes in question:

(a) Germain Katanga,[170] Mathieu Ngudjolo Chui,[171] Callixte Mbarushimana,[172] Sylvestre

displacement of the civilian population, see Article 17(1), Additional Protocol II. The sole exception in this regard is pillage. See Dörmann, *supra* note 158, at 272-273.

[161] See, e.g., Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* 2d ed. (2010), at 423.

[162] See, e.g., *Brđanin* Appeal Judgement, para. 337; *Kordić and Čerkez* Appeal Judgement, para. 495; 1 *Milutinović et al.* Trial Judgement, para. 208; *Karadžić* Trial Judgement, para. 533.

[163] See Article 67(1)(i), ICC Statute (protecting the accused against having any reversal of the burden of proof imposed on him). It is unclear, however, whether the prosecution would be required to allege specifically and in advance which requirement or requirements of military necessity remained unfulfilled.

[164] This is so, even though, in an adversarial setting, the accused would most likely plead military necessity during his "defence" case and his pleas would be colloquially referred to as a "defence". See, e.g., George P. Fletcher, *Basic Concepts of Criminal Law* (1998), at 93-110.

[165] See Article 8(2)(a)(vii), ICC Statute.

[166] Article 49, Geneva Convention IV.

[167] See Dörmann, *supra* note 158, at 106 ("Arts. 45 and 49 [of Geneva Convention IV] set forth the conditions for unlawfulness").

[168] ICC Elements of Crimes, *supra* note 154, at 10.

[169] See *ibid.*, at 14.

[170] See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, *Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute*, 26 June 2008, count 13.

[171] See *ibid.*, count 13.

[172] See *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, *Document de notification des charges présenté par l'Accusation en application de l'article 61-3 du Statut de Rome*, 15 July 2011, count 11.

Mudacumura,[173] Abdel Raheem Muhammad Hussein,[174] and Bosco Ntaganda,[175] for property destruction (Article 8(2)(b)(xiii) or Article 8(2)(e)(xii));

(b) Ali Muhammad Al Abd-Al-Rahman ("Ali Kushayb"),[176] Jean-Pierre Bemba Gombo,[177] Ahmad Muhammad Harun ("Ahmad Harun"),[178] Katanga,[179] Joseph Kony,[180] Raska Lukwiya,[181] Chui,[182] Okot Odhiambo,[183] Dominic Ongwen,[184] Vincent Otti[185] and Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),[186] Bahar Idriss Abu Garda,[187] Abdallah Banda Abakaer Nourain,[188] Saleh Mohammed Jerbo Jamus,[189] Mbarushimana,[190] Mudacumura,[191] Hussein,[192] and Ntaganda,[193] for pillaging (Article 8(2)(e)(v)) or Article 8(2)(e)(v);

(c) Hussein,[194] and Ntaganda,[195] for forcible transfer (Article 8(2)(e)(viii));

(d) Harun[196] and Kushayb,[197] for property destruction (Article 8(2)(v)(xii));

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[173] See *Prosecutor v. Sylvestre Mudacumura*, Case No. ICC-01/04-01/12, *Decision on the Prosecutor's Application under Article 58*, 13 July 2012, count 11.

[174] See *Prosecutor v. Abdel Raheem Muhammad Huseein*, Case No. ICC-02/05-01/12, *Warrant of Arrest for Abdel Raheem Muhammad Hussein*, 1 March 2012, at 8.

[175] See *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, *Document Containing the Charges*, 10 January 2014, count 18.

[176] See *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Ali-Rahman* ("Ali Kushayb"), Case No. ICC-02/05-01/07, *Warrant of Arrest for Ali Kushayb*, 27 April 2007, counts 18, 36, 49.

[177] See *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, *Amended Document Containing the Charges Filed on 30 March 2009*, 30 March 2009, count 8.

[178] See *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Ali-Rahman ("Ali Kushayb")*, Case No. ICC-02/05-01/07, *Warrant of Arrest for Ahmad Harun*, 27 April 2007, counts 18, 36, 37, 49.

[179] See *Katanga and Chui* Amended Charges Document, count 12.

[180] See *Prosecutor v. Joseph Kony*, Case No. ICC-02/04-01/05, *Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005*, 27 September 2005, counts 9, 15, 19, 26, 33.

[181] See *Prosecutor v. Raska Lukwiya*, Case No. ICC-02/04, *Warrant of Arrest for Raska Lukwiya*, 8 July 2005, count 9. On July 11, 2007, the pre-trial chamber terminated the proceedings against Lukwiya. See *Prosecutor v. Joseph Kony et al.*, Case No. ICC-02/04-01/05, *Decision to Terminate the Proceedings Against Raska Lukwiya*, 11 July 2007.

[182] See *Katanga and Chui* Amended Charges Document, count 12.

[183] See *Prosecutor v. Okot Odhiambo*, Case No. ICC-02/04, *Warrant of Arrest for Okot Odhiambo*, 8 July 2005, counts 15, 19. On 10 September 2015, the pre-trial chamber terminated the proceedings against Odhiambo. See *Prosecutor v. Jospeh Kony et al.*, Case No. ICC-02/04-01/05, *Decision Terminating Proceedings Against Okot Odhiambo*, 10 September 2015.

[184] See *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04, *Warrant of Arrest for Dominic Ongwen*, 8 July 2005, count 33.

[185] See *Prosecutor v. Vincent Otti*, Case No. ICC-02/04, *Warrant of Arrest for Vincent Otti*, 8 July 2005, counts 9, 15, 19, 26, 33.

[186] See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, 4 March 2009, at 7.

[187] See *Prosecutor v. Bahar Idriss Abu Garda*, Case No ICC-02/05-02/09, *Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute*, 24 September 2009, count 3.

[188] See *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Mamus*, Case No. ICC-02/05-03/09, *Summons to Appear for Abdallah Banda Abakaer Nourain*, 27 August 2009, paras. 15, 19.

[189] See *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, *Summons to Appear for Saleh Mohammed Jerbo Jamus*, 27 August 2009, paras. 15, 19. On 4 October 2013, the trial chamber terminated the proceedings against Jerbo. See *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, *Public Redacted Decision Terminating Proceedings Against Mr. Jerbo*, 4 October 2013.

[190] See *Mbarushimana* Charges Document, count 12.

[191] See *Mudacumura* Decision, count 12.

[192] See *Hussein* Arrest Warrant, at 8.

[193] See *Ntaganda* Charges Document, count 11.

[194] See *Hussein* Arrest Warrant, at 8-9.

[195] See *Ntaganda* Charges Document, count 13.

[196] See *Harun* Arrest Warrant, counts 8, 19, 38, 50.

[197] See *Kushayb* Arrest Warrant, counts 8, 19, 38, 50.

(e) Harun,[198] Kushayb,[199] Omar Al Bashir,[200] Ntaganda,[201] William Samoei Ruto,[202] Henry Kiprono Kosgey,[203] Joshua Arap Sang,[204] Francis Kirimi Muthaura,[205] Uhuru Muigai Kenyatta,[206] and Mohammed Hussein Ali,[207] for deportation or forcible transfer (Article 7(1)(d));

(f) Harun,[208] Kushayb,[209] Hussein,[210] and Ntaganda,[211] for persecution by way of pillaging (Article 7(1)(h));

(g) Harun,[212] Kushayb,[213] Hussein,[214] Ntaganda,[215] Ruto,[216] Kosgey,[217] and Sang,[218] for persecution by way of property destruction (Article 7(1)(h)); and

(h) Harun, [219] Kushayb, [220] Hussein, [221] Ntaganda, [222] Ruto, [223] Kosgey, [224] Sang, [225] Muthaura,[226] Kenyatta,[227] and Ali,[228] for persecution by way of deportation or forcible transfer (Article 7(1)(h)).

2.2 Rulings to Date

Of these cases, a number have reached the pre-trial stage of confirming charges,[229] and one has

[198] See *Harun* Arrest Warrant, counts 9, 20, 51.
[199] See *Kushayb* Arrest Warrant, counts 9, 20, 51.
[200] See *Al Bashir* Arrest Warrant, at 7.
[201] See *Ntaganda* Charges Document, count 12.
[202] See *Prosecutor v. William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, *Document Containing Charges*, 15 August 2011, count 3.
[203] See *ibid*.
[204] See *ibid.*, count 4.
[205] See *Prosecutor v. Francis Kirimi Muthaura et al.*, Case No. ICC-01/09-02/11, *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 8 March 2011, count 2.
[206] See *ibid.* On 13 March 2015, the trial chamber terminated the proceedings against Kenyatta. See *Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, *Decision on the Withdrawal of Charges Against Mr Kenyatta*, 13 March 2015.
[207] See *Muthaura et al.* Summonses Decision, count 2.
[208] See *Harun* Arrest Warrant, counts 10, 21, 39.
[209] See *Kushayb* Arrest Warrant, counts 10, 21, 39.
[210] See *Hussein* Arrest Warrant, at 6-7.
[211] See *Ntaganda* Charges Document, count 10.
[212] See *Harun* Arrest Warrant, counts 1, 10, 21, 39.
[213] See *Kushayb* Arrest Warrant, counts 1, 10, 21, 39.
[214] See *Hussein* Arrest Warrant, at 6-7.
[215] See *Ntaganda* Charges Document, count 10.
[216] See *Ruto et al.* Charges Document, count 5.
[217] See *ibid*.
[218] See *ibid.*, count 6.
[219] See *Harun* Arrest Warrant, counts 1, 10, 39.
[220] See *Kushayb* Arrest Warrant, counts 1, 10, 39.
[221] See *Hussein* Arrest Warrant, at 6-7.
[222] See *Ntaganda* Charges Document, count 10.
[223] See *Ruto et al.* Charges Document, count 5.
[224] See *ibid*.
[225] See *ibid.*, count 6.
[226] See *Muthaura et al.* Summonses Decision, count 5.
[227] See *ibid*.
[228] See *ibid*.
[229] See, e.g., *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, *Decision Pursuant to Article 61(7)(a) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009; *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, *Decision on the Confirmation of Charges*, 8 February 2010; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, *Corrigendum of the "Decision on the Confirmation of Charges"*, 7 March 2011; *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, *Decision on the Confirmation of Charges*, 16 December 2011; *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, *Decision Pursuant to Article 61(7)(a) of the Rome Statute on the Charges of the Prosecutor Against*

reached its trial judgement.[230] Confirmation decisions are often quite superficial in their legal and factual discussions. For example, the *Bemba* Confirmation Decision states, without further elaboration, that the property "deprivation was not justified by military necessity".[231] The *Ntaganda* Confirmation Decision finds that the forcible transfer charged was without military necessity because "there is no indication of … any reason linked to the conduct of military operations".[232] The same decision also notes that the property destructions were militarily unnecessary because there is no evidence that the party involved "made a distinction between military objectives and civilian objects while shelling the densely populated villages"[233] and that the perpetrators "destroyed and burned the villages after the departure of the adverse party".[234]

One element of property destruction as a war crime under the Rome Statute is that the property enjoyed IHL protection at the time.[235] In its *Katanga and Chui* Confirmation Decision, the pre-trial chamber noted that this excludes (a) military objectives destroyed during an attack[236] and (b) civilian objects destroyed as part of a proportional attack against a military objective.[237] The chamber also held that this offence does not cover military objectives that are destroyed before or after falling into the hands of the attacking party and to the extent militarily necessary.[238] When finding specific destructions to be devoid of military necessity, however, the decision merely states that the property destroyed did not constitute military objectives.[239]

Much the same was reiterated in the *Katanga* Trial Judgement.[240] Three novel features may nevertheless be noted. First, the trial chamber looked to Article 14 of the 1863 Lieber Code for the definition of military necessity.[241] The definition given in that article[242] is not itself problematic, though somewhat antiquated and perhaps not entirely up to date if read together with the code's Article 15 that goes on to discuss the notion in greater detail.[243] When adjusted for modern IHL rules,

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Bosco Ntaganda, 9 June 2014; *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/05, *Decision on the Confirmation of Charges against Dominic Ongwen*, 23 March 2016.

[230] That is, the *Katanga* case. See *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, *Judgment Pursuant to Article 74 of the Statute*, 7 March 2014; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, *Judgment Pursuant to Article 74 of the Statute*, 21 March 2016.

[231] *Bemba* Confirmation Decision, para. 322.

[232] *Ntaganda* Confirmation Decision, para. 68. See also *Prosecutor v. William Samoei Ruto et al.*, Case No. ICC-01/09-01/11, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012, para. 268 ("the PNU supporters were forcibly displaced without grounds permitted under international law from the areas where they were lawfully present"); *Prosecutor v. Francis Kirimi Muthaura et al.*, Case No. ICC-01/09-02/11, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012, para. 253 ("the established facts do not reveal any grounds permitting the displacement under international law").

[233] *Ntaganda* Confirmation Decision, para. 72.

[234] *Ibid.*, para. 73.

[235] See ICC Elements of Crimes, *supra* note 154, at 26, 44.

[236] See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-04-01/07, *Decision on the Confirmation of Charges*, 30 September 2008, para. 312. See also *Mbarushimana* Confirmation Decision, para. 172.

[237] See *Katanga and Chui* Confirmation Decision, para. 313. See also *Mbarushimana* Confirmation Decision, para. 172.

[238] See *Katanga and Chui* Confirmation Decision, para. 318 (quoting Hans Boddens Hassang, "Article 8(2)(b)(xiii) – Destroying or Seizing the Enemy's Property", in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) at 171). See also *Mbarushimana* Confirmation Decision, para. 172.

[239] See *Katanga and Chui* Confirmation Decision, para. 324. See also *Mbarushimana* Confirmation Decision, paras. 175, 196, 208, 225.

[240] See *Katanga* Trial Judgment, paras. 889-895.

[241] See *ibid.*, para. 894 (citing *Kordić and Čerkez* Appeal Judgement, para. 686).

[242] See Article 14, Instructions for the Government of Armies of the United States in the Field (1863): "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".

[243] See *ibid.*, Article 15: "Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements

Article 14 largely corresponds to the definition of juridical military necessity proposed in Chapter 9. Second, the trial chamber interpreted the expression "imperatively demanded" found in Article 8(2)(e)(xii) to mean that the perpetrator ought to have "no other option" but to destroy the property in order to be eligible for military necessity.[244] Here, too, although a *sine qua non* causation is not a requirement of juridical military necessity,[245] a more stringent construction of its degrees is arguably consistent with the addition of qualifying adjectives and adverbs such as "imperative" and "imperatively."[246]

Third, according to the *Katanga* Trial Judgement, whether the destruction of property fell within military necessity is a case-by-case assessment to be carried out "by considering, for example, whether the destroyed property was defended or whether specific property was destroyed".[247] For this proposition, the judgement cites paragraphs 534[248] and 586[249] of the *Kordić and Čerkez* Appeal Judgement. That the *Katanga* Trial Chamber apparently understood these paragraphs to mean that there is no military necessity where "the destroyed property was defended" and where "specific property was destroyed" is deeply problematic. Plainly, neither factor is relevant when determining the existence or absence of juridical military necessity. As discussed earlier, it may become militarily necessary to destroy civilian objects, whether defended or not, in some circumstances. Nor is the fact that specific property was destroyed while the remainder was not, *per se* indicative of military necessity's absence. What the *Kordić and Čerkez* Appeal Judgement's passages quoted reveal is rather that all the property destroyed was civilian in character at the time and that it was destroyed based solely on the ethnic identity of its owner.

The *Katanga* Trial Chamber considered the following pieces of property destroyed in Bogoro on 24 February 2003:

- Houses, especially thatched houses and those with roofing sheets owned and occupied by Bogoro's predominantly Hema population[250];
- The *manyata* (small houses occupied by adversaries)[251]; and
- Buildings in Diguna Mission, including the CECA 20 church.[252]

Of these objects, the chamber apparently found all but the *manyata* to have been destroyed

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entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God".

[244] *Katanga* Trial Judgment, para. 894.

[245] See Chapter 9 above.

[246] See *ibid*.

[247] *Katanga* Trial Judgment, para. 894.

[248] The paragraph reads (footnote omitted): "Paragraph 659 [of the *Kordić and Čerkez* Trial Judgment] describing the events at Očehnići reads as follows:

> The village of Očehnići is to the south of Busovača. According to the Prosecution, it was subject to HVO attack in April 1993. The prosecution evidence was as follows. In the afternoon of 16 April 1993 masked HVO soldiers attacked the village by firing incendiary bullets into the houses. Within half an hour all the Muslim houses were burning. The villagers were unarmed and did not put up any resistance. One resident heard, at second-hand, that Paško Ljubičić was the leader of the unit that had attacked the village and that he had been ordered to do so by Brigadier Duško Grubešić, commander of the Zrinski Brigade, to "cleanse" Muslims from the area. The damage to Očehnići is clearly shown on the video recording taken during a helicopter flight over the area in May 1996 and played to the court during the trial. Around 20 men from Lončari were detained and taken to Kaonik on 16 April 1993. Upon arrival they were lined up and their valuables were stolen by HVO soldiers.

In the Appeals Chamber's view, a reasonable trier of fact could have concluded that the wilful destruction of all Muslim houses in Očehnići was of a large scale and not justified by military necessity since the villagers were unarmed and did not put up any resistance. Therefore, Kordić's argument that the Trial Chamber erred in finding that wanton destruction was committed in Očehnići in April 1993 fails. The Appeals Chamber upholds the Trial Chamber's finding that the crime was established".

[249] The paragraph reads: "The Appeals Chamber considers that a reasonable trier of fact could have found that the destruction was wilful and not justified by military necessity since only Muslim houses were destroyed, and the destruction occurred when there was not much fighting. The Appeals Chamber therefore upholds the Trial Chamber's finding that wanton destruction not justified by military necessity, Count 38 (Kordić), was established".

[250] See *Katanga* Trial Judgment, paras. 917-918.

[251] See *ibid.*, para. 921.

[252] See *ibid.*, para. 922.

without military necessity. Oddly, besides determining that the *manyata* arguably constituted military objectives[253] and implicitly that the others did not, the chamber did not apply the two bases of assessment that it had derived from the *Kordić and Čerkez* Appeal Judgement. This lack of reasoning is unilluminating. The facts as described in the judgement show that only the *manyata*, Hema property and religious buildings not used for military purposes were destroyed in Bogoro that day. It would not have been too difficult to find the latter two types of destructions lacking in military necessity.

As for the war crime of pillage, the *Katanga* Trial Chamber found that the property was stolen for personal gain and therefore devoid of military necessity.[254]

2.3 Article 31 – Military Necessity as a Justification/Excuse?

The potential use of military necessity as a justification or excuse affects those war crimes that do not provide for military necessity exceptions and, accordingly, of which the absence of military necessity is not an element. A person charged with one of these war crimes who pleads military necessity does not seek to negate any of its elements. Rather, that person seeks to deny wrongdoing (hence justified) or blameworthiness (hence excused) in the event that the prosecution proves every element of the offence. The defendant's reliance on military necessity in this fashion would constitute a "defence" properly so called.

That military necessity should be admitted as a genuine defence, however, is a highly controversial proposition. As noted earlier, positive IHL rules already "account for" military necessity. Admitting military necessity as a genuine defence would impermissibly amount to admitting it *de novo* for deviations from these rules.[255] The entire *corpus juris* of international humanitarian law would risk being unduly volatile and subservient to the exigencies of war.

Article 31(1) of the ICC Statute envisages several "grounds for excluding criminal responsibility".[256] According to one ground,

> a person shall not be criminally responsible if, at the time of that person's conduct ... (c) [t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.[257]

Note here that a person shall not be criminally responsible for war crimes if he acts "reasonably to defend ... property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the ... property protected".[258]

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[253] See *ibid*., paras. 921, 924, 946.
[254] See *ibid.*, paras. 906, 951. See also *Bemba* Trial Judgement, paras. 122-125.
[255] See Chapter 9 above.
[256] It is not clear whether, within the meaning of Article 31, a "ground for excluding criminal responsibility" constitutes a justification or excuse, or both. See, e.g., Kittichaisaree, *supra* note 67, at 269; Antonio Cassese, "Justifications and Excuses in International Criminal Law", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 1 *The Rome Statute of the International Criminal Law: A Commentary* (2002) 951, at 954-955; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), at 258; Albin Eser, "Article 31", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2d ed. (2008) 863, at 871-872; Geert-Jan Alexander Knoops, "The Diverging Position of Criminal Law Defences before the ICTY and the ICC: Contemporary Developments", in Doria, Gasser and Bassiouni (eds.), *supra* note 36, 779, at 779.
[257] Article 31(1)(c), ICC Statute.
[258] Ibid.

Could this clause be construed as introducing, in substance, a military necessity-like justification or excuse for war crimes? It appears from the drafting history that military necessity was treated at first as a potentially separate ground for excluding criminal responsibility.[259] During the final negotiations of the statute, the expression "in the case of war crimes, property which is essential for accomplishing a military mission" was added to what is now Article 31(1)(c).[260]

Several commentators have expressed their concern that this ground might be construed as though it were military necessity. E. van Sliedregt, for example, noted that the lack of clarity in the wording of Article 31(1)(c) "might be interpreted as allowing for a plea of military necessity. The clause 'property which is essential for accomplishing a military mission' might be taken to constitute a blank and open-ended allowance for a plea of military necessity, which would, however, be a violation of the laws of war".[261]

That there is such a risk seems undeniable, at least as a matter of principle. It is submitted here, however, that the clause's inclusion in Article 31(1)(c) would have more limited practical ramifications than it might appear.

The way in which the clause is formulated indicates that its admissibility is subject to the satisfaction of several requirements. They are:

(a) That the act was taken to defend property;
(b) That the act was reasonable;
(c) That the property was essential for accomplishing a military mission;
(d) That the act was taken against force;
(e) That the force was imminent;
(f) That the force was unlawful; and
(g) That the act was taken in a manner proportionate to the degree of danger to the property protected.

2.3.1 Narrower in Content Than Military Necessity as an Exception

The requirement that the act be taken with a view to defending certain property is foreign to the traditional understanding of military necessity. It was noted earlier that, in its legal function as an exception, military necessity encompasses a far wider range of purposes – from the maintenance of the belligerent's sanitary condition to the military defeat of his enemy.[262] Typically, the purposes concerned are abstract (e.g. the attainment of a degree of security for the occupation force), rather than material (e.g. the protection of an object), in nature. It is, among other things, this broad and abstract scope of permissible purposes that makes the potential introduction of military necessity as a genuine defence so contentious. If, as is the case with the exclusionary ground under Article 31(1)(c), the very notion of military necessity had been restricted to measures taken in defence of property, virtually none of the successful military necessity pleas in the history of international humanitarian law would have been successful.

Nor, for the exclusionary ground to be admissible under Article 31(1)(c), is it sufficient that the

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[259] See, e.g., Preparatory Committee, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals)* (1996), at 103, in M. Cherif Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (1999) 441, at 495. See also Preparatory committee, *Addendum, Report of the Preparatory Committee on the Establishment of an International Criminal Court* (1998), at 59 n.39 ("It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes").

[260] See, e.g., Eser, *supra* note 256, at 548; van Sliedregt, *supra* note 256, at 258.

[261] Van Sliedregt, *supra* note 256, at 259. See also, e.g., Geert-Jan G.J. Knoops, *Defenses in Contemporary International Criminal Law* (2001), at 89-91 (quoting N. Keijzer, "Réponse à la Question 2", 33 *Revue belge de droit international* 440 (2000), at 443); Keijzer, *supra* note 261, at 444-445; Catherine Denis and Miguel Romero, "Synthèse des débas de l'atelier du 12 juillet 2000", 33 *Revue belge de droit international* 463 (2000), at 480; Eric David, "Self-Defence and State of Necessity in the Statute of the ICC", in Doria, Gasser and Bassiouni, *supra* note 36, 757, at 769-770; Knoops, "Diverging Positions", *supra* note 256, at 786-788.

[262] See Chapter 9 above.

act be taken to defend *any* property. Rather, the property must be essential for accomplishing a military mission. Whatever it may mean for particular property to be "essential for accomplishing a military mission",[263] it seems highly likely that such property also constitutes a military objective. As a military objective, the property is liable to all lawful attacks and acts of destruction, and its destruction would *ipso facto* be militarily necessary. Conversely, only rarely would property "essential for accomplishing a military mission" retain its status as a civilian object. Where particular property does constitute a civilian object, it is immune from deliberate, indiscriminate or disproportionate attacks.

Unlike the ground under Article 31(1)(c), exceptional military necessity does not require that the measure be taken in response to force. A person is not eligible for the exclusionary ground under Article 31(1)(c), if the force against which he or she acts to defend the property is itself lawful. Since, as noted above, the type of property at issue here is almost always a military objective, the person in question will be eligible only (a) in a highly limited set of circumstances where the force in question involves prohibited means and methods of combat, and/or direct participation of civilians, or (b) in the unlikely event that the property defended is essential for a military mission and yet enjoys immunity as a civilian object.[264]

The remaining requirements of Article 31(1)(c) are substantively similar, if not identical, to those of military necessity as an exception. Thus, the clause requires that the act be "reasonable" for the property's defence.[265] This would resemble the requirement of juridical military necessity that the measure be "materially relevant" to and the "least injurious" for the attainment of a military purpose.[266] There is some authority for the view that the "reasonable act" test is an objective one.[267] If true, this test would arguably be more stringent than the belligerent's contemporaneous and *bona fide* knowledge, i.e., subjective awareness, of the various requirements of exceptional military necessity discussed earlier.[268]

The clause also requires that the act be taken against an "imminent" use of force.[269] This requirement would be akin to the notion of "urgency" implied in military necessity. Finally, the clause requires that the act be "proportionate" to the degree of danger to the property defended.[270] It would appear that the relevant ratio here is one between the danger to the property averted by the defensive act, on the one hand, and the harm caused by the same act, on the other.[271] Such a ratio would be analogous to the benefit-injury ratio used for the proportionality requirement of military necessity.

In view of the foregoing, the clause would not affect war crimes that already provide for military necessity exceptions. In other words, if all of the conditions in satisfaction of Article 31(1)(c) exist, then it is likely that they also satisfy all the requirements of juridical military necessity. Conversely, where the acts are not such as fulfil all of the latter, then they are unlikely to qualify for Article 31(1)(c).

2.3.2 Broader Availability to Offences Not Subject to Military Necessity Exceptions

To the extent that it would affect those crimes which envisage no military necessity exceptions, its scope is so restrictive that it would justify or excuse a far narrower range of measures than military necessity, if introduced as a genuine defence, would. The fact remains however that, no matter how

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[263] The looseness of this expression, as well as the difficulty that may arise in connection with its interpretation, has been noted elsewhere. See, e.g., Eser, *supra* note 256, at 549; Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", 10 *European Journal of International Law* 144 (1999), at 155.
[264] See, e.g., Gabor Rona, "Réponses à la Question 2", 33 *Revue belge de droit international* 446 (2000), at 449-450.
[265] Article 31(1)(c), ICC Statute.
[266] See Chapter 9 above.
[267] See, e.g., van Sliedregt, *supra* note 256, at 260-61.
[268] See Chapter 9 above. The ICC Statute treats mistake of fact separately, under Article 32(1). See Article 32(1), ICC Statute.
[269] Article 31(1)(c), ICC Statute.
[270] Ibid.
[271] See, e.g., Rona, *supra* note 264, 450.

restrictive in scope, Article 31(1)(c) is a qualitatively new defence to war crimes hitherto unknown in international humanitarian law. In Antonio Cassese's words:

> [V]ia international criminal law a norm of international humanitarian law has been created whereby a serviceman many now lawfully commit an international crime for the purpose of defending any "property essential for accomplishing a military mission" against an imminent and unlawful use of force. So far such unlawful use of force against the "property" at issue has not entitled the military to commit war crimes. They could only react by using lawful means or methods of combat or, *ex post facto*, by resorting to lawful reprisals against enemy combatants.[272]

To be sure, international humanitarian law does appear as part of the law that the court is bound to apply by virtue of Article 21 of its statute.[273] But the statute contains no interpretational device whereby international humanitarian law mandatorily trumps its statutory provisions such as Article 31(1)(c).[274] It would be incumbent upon the court itself to keep this clause in check by using its Article 31(2) powers wisely.[275]

Lastly, Article 31(3) of the statute provides for exclusionary grounds not enumerated under Article 31(1) where such grounds are derived from applicable law as set forth in Article 21.[276] Whether military necessity could constitute such a ground would depend on how the court interprets the "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". Our discussion on the nature and scope of juridical military necessity exclusively as an exception makes it abundantly clear that no treaty, principle or rule of international law admits *de novo* military necessity pleas as a genuine defence.[277] Nor, in all likelihood, would the court recognise military necessity as an unenumerated exclusionary ground under Article 31(3).

3. Conclusion

This chapter reveals the intricacies of military necessity as a negative element of several war crimes and crimes against humanity. In particular, it shows where the trier of law and fact must tread carefully when adjudicating military necessity claims.

On the whole, the ICTY jurisprudence on exceptional military necessity offers an encouraging prospect for its effective interpretation even in highly complex circumstances such as those involving combat-related property destructions. ICTY chambers have by and large captured relevant aspects of exceptional military necessity, evaluated evidence in accordance with its requirements, and come to sensible factual conclusions. Inevitably, some decisions come across as more attuned to military necessity's nuances than others. Several potential pitfalls may be noted. The first two concern how the conceptual distinctions between attacks and destructions, and those between military necessity and military objective, may be overlooked. Despite their significant overlap and interplay, the two sets of notions do have their unique spheres of meanings and legal foundations. Occasional oversights in this regard have resulted in several instances of inadequate reasoning and questionable findings where combat-related destructions of civilian objects did not take the form of attacks against them.

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[272] Cassese, *supra* note 263, at 154-155. See also Antonio Cassese et al. (rev.), *Cassese's International Criminal Law* 3d ed. (2013), at 213.

[273] See Article 21, ICC Statute: "The Court shall apply ... (b) [i]n the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".

[274] This problem would remain notwithstanding Article 21(3).

[275] See Article 31(2), ICC Statute: "The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it".

[276] See Article 31(3), ICC Statute.

[277] See, e.g., Denis and Romero, *supra* note 261, at 480. But see William A. Schabas, *An Introduction to the International Criminal Court* 4th ed. (2011), at 238-239; Gerhard Werle, "General Principles of International Criminal Law", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 54, at 58.

Two other situations that also envisage military necessity exceptions – i.e., property destruction outside of combat and forcible population displacement – have received a somewhat less amount of the ICTY's judicial attention. There, too, most chambers have reached appropriate conclusions. With the notable exception of *Orić*, those judgements dealing with property destruction outside of combat base their findings on pertinent factors besides the absence of fighting at the time. As regards forcible population displacements, ICTY rulings on the absence of grounds permitted under international law are primarily made as a matter of form rather than substance.

The ICC's case law on military necessity exceptions is still at an early stage of development. Unsurprisingly, the various pre-trial chambers' military necessity findings in their confirmation decisions have so far been tentative and perfunctory. *Katanga*, the only ICC trial judgement of interest to us to date, has not added much material that is new in this respect. On the contrary, the *Katanga* Trial Judgement exhibits the same inadequacy that some of its ICTY counterparts do – namely, a failure to entertain the possibility that the destruction of civilian objects may in certain circumstances be militarily necessary. The fact that most of the ICC cases considered in this thesis involve non-international armed conflicts and omit charges of unlawful attacks on civilian objects as a result, may mean that militarily unnecessary destructions are in effect used as substitute offences. This remains a conjecture at present, however.

Whether the ICC's current and future trials will hear sustained claims of exceptional military necessity remains to be seen. The same uncertainty surrounds Article 31 of the Rome Statute. Although, on its own, this article's reference to the defence of property may have relatively modest practical ramifications on the applicable law, there is a real danger that it will undermine the clarity and precision with which the ICC builds its case law on exceptional military necessity proper. In addition, Article 31's residual clause can be seen – though erroneously – as inviting *de novo* military necessity pleas as a justification or excuse. The court has all the more reason to adjudicate its upcoming cases with care.

Chapter 11

Conclusion

This thesis illustrates the normative process through which international humanitarian law creates its rules. Our discussion identifies major "ingredients" of the process, elucidates their interplay, and reflects on the consequences that the interplay entails *vis-à-vis* positive IHL rules. In addition to military necessity, this thesis considers humanity, chivalry and sovereignty where appropriate.

Key to our inquiry has been the idea that international humanitarian law is developed with a view to striking a realistic balance between military necessity and humanity and that, accordingly, the law "accounts for" them. In what follows,[1] let us recapitulate this thesis' principal findings and place them within the framework of IHL norm-creation under three broad headings:

(i) Military necessity and other reason-giving considerations;
(ii) The dynamics of their interplay; and
(iii) Their normative consequences.

1. Reason-Giving Considerations in IHL Norm-Creation

Military necessity is but one of the weighty reasons for which the framers of international humanitarian law formulate its rules in certain ways. Given military necessity's normative indifference, if it were the only relevant considerations, the law would contain only permissive rules. In contrast, while humanity offers grounds for which some belligerent conduct should remain indifferently permissive, it generates imperatives for other conduct. The same may be said of chivalry and sovereignty.

1.1 Military Necessity

Chapters 2 and 3 of this thesis show that material military necessity embodies a two-fold truism. Thus, it is in the belligerent's self-interest to do what is militarily necessary and to avoid what is unnecessary. Conversely, it is against its self-interest to let go of necessities of war or encumber itself with non-necessities. Material military necessity is a matter of calculating the degree of cogency between the means taken or considered, on the one hand, and the ends sought, on the other, under the circumstances prevailing or anticipated at the relevant time. To say that "doing this is militarily necessary" or "doing that is militarily unnecessary" is simply to signify the notion that the act in question does or does not conduce towards the materialisation of a given military end to some degree.

A given act's military necessity *vis-à-vis* its goal depends on the availability of other reasonably attainable goals and other reasonably conducive acts, as well as the prevailing circumstances. We observed that, for the Allies during World War II, the destruction of the Monte Cassino Abbey was, all else being equal, arguably more militarily necessary in order to conquer the monastery hill than if the goal had been to compel the German forces to divert their resources from the Anzio beachhead.[2] An act is also capable of military necessity assessments given enough pertinent facts. Allied leaders and commanders drew reasonable, though dissimilar, conclusions about the military necessity of the

[1] An earlier version of Chapter 11, written in late 2012 and early 2013, was published in April 2016. See Nobuo Hayashi, "Basic Principles", in Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (2016) 89.

[2] See Nigel de Lee, "Moral Ambiguities in the Bombing of Monte Cassino", 4 *Journal of Military Ethics* 129 (2005), at 133; Reuben E. Brigety II, "Commentary: Moral Ambiguities in the Bombing of Monte Cassino", 4 *Journal of Military Ethics* 139 (2005), at 140.

Benedictine abbey's destruction based on the facts that had been available to them at the time.[3] An act's military necessity or non-necessity is susceptible neither to being taken out of its particular circumstances nor to being generalised. Whatever one's assessment of the destruction of the abbey at Monte Cassino may have been, one cannot determine in general and *a priori* whether destroying a building sitting atop a topographically dominant elevation is militarily necessary or unnecessary.

Chapters 4-7 of this thesis discuss military necessity in IHL norm-creation. In that context, military necessity embodies indifference. Conduct is normatively indifferent where the two propositions "it is permitted to perform it" and "it is permitted to refrain from it" are both true simultaneously.[4] Military necessity permits the performance of what is militarily necessary and the forbearance of what is militarily unnecessary. It also tolerates the former's forbearance and the latter's performance, however, because neither victory nor defeat is *per se* of concern to international humanitarian law. The law does not make it its business to ensure that each belligerent maximise its prospect of success or minimise its prospect of failure. IHL framers themselves have no reason to obligate militarily necessary behaviour or prohibit militarily unnecessary behaviour.

As reason-giving considerations, military necessity is generalised and stipulatory. The material question was whether a given act was or would be militarily necessary, in view of its particular purpose and circumstances. The normative question is what international humanitarian law should do about this kind of act, *once* it is agreed that it would generally be militarily necessary or unnecessary *vis-à-vis* an otherwise legitimate kind of military purpose. There may well be no military necessity to intern prisoners of war (POW) in certain specific cases. Nevertheless, interning POWs is generally deemed militarily necessary.[5] Normative military necessity prompts IHL framers to leave the belligerent at liberty to intern or decline to intern its POWs.[6]

This thesis' Chapters 8-10 consider military necessity in the juridical context of positive international humanitarian law. Juridically, military necessity operates only as an exception. Military necessity clauses attached to certain IHL rules, such as that which prohibits property destruction in occupied territory,[7] exceptionally authorise behaviour deviating from the rules' principal prescriptions as long as such behaviour fulfils four cumulative requirements. First, the measure must be taken primarily for some specific military purpose. Second, the measure must be required for the purpose's attainment.[8] Third, the purpose must be in conformity with international humanitarian law. Fourth, the measure itself must otherwise be in conformity with the law. If not, or no longer, in fulfilment of these requirements, the deviant conduct reverts to being governed by the principal prescriptions, and it becomes unlawful. The conduct's unlawfulness emanates from its breach of the principal rule, *not* its lack of military necessity or the now inoperative exceptional clause.

Assessing juridical military necessity involves interpreting the relevant rules and clauses *vis-à-vis* the particular set of facts at issue. In *Hostage*, the U.S. Military Tribunal at Nuremberg applied Article 23(g) of the 1907 Hague Regulations to the "scorched earth" policy to which the German

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[3] See Martin Blumenson, *The Mediterranean Theater of Operations: Salermo to Cassino* (1993), at 403 (General Tuker in favour), 404 (General Freyberg in favour), 405-406 (General Clark against), 413 (General Walker against), 415 (President Roosevelt in favour).

[4] See G.H. von Wright, "Deontic Logic", 60 *Mind* 1 (1951), at 3-4.

[5] See Sibylle Scheipers, "Introduction: Prisoners of War", in Sibylle Scheipers (ed.), *Prisoners in War* (2010) 1, at 7-8.

[6] See Article 5, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907); Article 21, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949). But see Article 41(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977).

[7] See, e.g., Article 53, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

[8] This requirement contains three further criteria: (1) the measure taken must be materially relevant to the purpose's attainment; (2) of those measures that are materially relevant and reasonably available, the one taken must be the least evil; and (3) the evil that the measure would cause must not be disproportionate to the gain that it would achieve.

forces resorted in Finmark, northern Norway, in 1944.[9] It was found that "[t]here is evidence in the record that there was no military necessity for this destruction and devastation".[10]

We have also seen various perspectives on military necessity. It was once argued that military necessity pleas are, or should be, admissible *de novo* in support of conduct at odds with unqualified IHL rules. Thus, the material military necessity of given belligerent conduct overrides any IHL provisions that prescribe contrary action. The *Kriegsräson* doctrine remained influential among German military and international lawyers until the end of World War II.[11] Since its rejection at post-war trials,[12] *Kriegsräson* has been thoroughly discredited.[13] It is widely accepted today that military necessity has no place outside specific exceptional clauses.[14]

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[9] See *United States of America v. Wilhelm List* et al., *Judgment*, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950) 757, at 1296-1297.

[10] *Ibid.*, at 1296. Nevertheless, the tribunal declined to find the accused guilty of the crime charged. It did so on the ground that he honestly, albeit erroneously in retrospect, believed Finmark's devastation to be militarily necessary. See *ibid.*,1296-1297. For what has come to be known as the "Rendulic rule" of no second guessing, see Brian J. Bill, "The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare", 12 *Yearbook of International Humanitarian Law* 119 (2009).

[11] See, e.g., Isabel V. Hull, "'Military Necessity' and the Laws of War in Imperial Germany", in Stathis N. Kalyvas et al. (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* (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), at 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.

[12] 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; *Hostage*, *supra* note 9, at 1255-1256, 1272-1273, 1296; *In re 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 Bohlen und Halbach et al.*, *Judgement*, 9 *Trials of War Criminals Before the Nuernberg 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 Nuernberg Military Tribunals Under Control Council Law No. 10* (1951) 1, at 541.

[13] 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 11, at 269.

[14] See, e.g., U.S. Department of the Army, *The Law of Land Warfare* (1956), at 4; U.S. Department of the Navy, Office of the Chief of Naval Operations et al., *The Commander's Handbook on the Law of Naval Operations* (2007), at 5-2; Office of the Judge Advocate General, *supra* note 13, at 2-1; U.K. Ministry of Defence, *supra* note 13, at 22-23, 442; Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary* (1908), at 5; Elihu Root, "Opening Address", 15 *ASIL Proceedings* 1 (1921), at 3; Dunbar, "Significance", *supra* note 11, at 202; Robert W. Tucker, *The Law of War and Neutrality at Sea* (1957), at 33-37; G.I.A.D. Draper, "Military Necessity and Humanitarian Imperatives", 12 *Military Law and Law of War Review* 129 (1973), at 138, 142; Frits Kalshoven, *Belligerent Reprisals* (1971), at 366; International Law Commission, *Report on the International Law Commission on the Work of Its Thirty-Second Session*, A/35/10 (1980), at 45-46; Jean de Preux, "Article 35 – Basic Rules", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 389, at 392-393, 399; Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (1987), at 82-83; Henri Meyrowitz, "The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977", 34 *International Review of the Red Cross* 98 (1994), at 108; Donald A. Wells, "The Limits of War and Military Necessity", 19 *Journal of Social Philosophy* 3 (1988); Jean Pictet, *Development and Principles of International Humanitarian Law* (1985), at 88; Georges Abi-Saab and Luigi Condorelli, "Réponses à la question 1, b)", 33 *Revue belge de droit international* 406 (2000), at 407-408; Robert Kolb, *Ius in Bello: Le Droit international des conflits armés* (2003), at 57; Leslie C. Green, *The Contemporary Law of Armed Conflict* 3d ed. (2008), at 147-148; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 2d ed. (2010), at 6.

In some authorities' view, military necessity functions as a layer of normative restraint additional to positive international humanitarian law.[15] "Counter-*Kriegsräson*" entails two major assertions. First, as reason-giving considerations, military necessity condemns militarily unnecessary conduct. Second, these considerations survive the process of IHL norm-creation. Consequently, an act that would otherwise be lawful according to positive international humanitarian law becomes unlawful on account of its lack of material military necessity. We have seen that neither assertion is correct.

Military necessity has occasionally been equated with military objective, particularly in international criminal law.[16] This equation is unhelpful, since the former pertains to *conduct* whereas the latter pertains to *objects*.[17] Where given conduct is militarily necessary or unnecessary, IHL framers have reason to permit it or tolerate it. Where an object constitutes a military objective or a civilian object, it becomes principally liable to or immune from attacks.[18]

Military necessity is also sometimes treated synonymously with proportionality.[19] When calculating material military necessity, something approximating proportionality may characterise the measures taken *vis-à-vis* the goal sought. It is unclear, however, whether proportionality constitutes distinct reason-giving considerations in IHL norm-creation. Nor would it operate as a clause exceptionally modifying the normative content of a principal IHL rule. Within the context of positive international humanitarian law, proportionality would be best seen as an element in the rule that establishes the lawfulness or unlawfulness of an attack directed at a military objective.[20]

Any difference between military necessity on the one hand, and military advantage or convenience on the other, might be seen as one of degrees. The former might involve the act's indispensability, whereas the latter might encompass indispensability as well as mere gain, superiority or expediency. It is doubtful whether the indispensability of belligerent conduct is a viable distinguishing feature here, since no *conditio sine qua non* arguably informs material military necessity. Could it be, alternatively, that military advantage compares the belligerent's position *vis-à-vis* its adversary's but military necessity does not? Here, too, although military advantage may certainly be construed in this manner, it does not follow that the notion cannot be understood without reference to such comparisons. Normatively, military advantage could easily function as reason-giving considerations in IHL norm-creation. The law's framers would have very good reasons to leave militarily advantageous conduct permitted[21] and militarily disadvantageous conduct tolerated.

The clearest difference between the two notions lies in their juridical significance. In positive international humanitarian law, military advantage appears as an element in the definition of a military objective[22] and as an element in the proportionality test of an attack.[23] These features clearly

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[15] Schwarzenberger, *supra* note 13, at 135; Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970), at 34; Meyrowitz, *supra* note 14, at 107; Federic L. Borch, "Targeting After Kosovo: Has the Law Changed for Strike Planners?", 56 *Naval War College Review* 64 (2003), at 66; Greenwood, "Historical Development", *supra* note 13, at 36-37, 38; Gabriella Venturini, "Necessity in the Law of Armed Conflict and International Criminal Law", 41 *Netherlands Yearbook of International Law* 45 (2010), at 48-50; Henry Shue, "Civilian Protection and Force Protection", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 135, at 136-137; Nils Melzer, *Targeted Killing in International Law* (2008), at 286; U.S. Department of the Navy, *supra* note 14, at 5-2; U.K. Ministry of Defence, *supra* note 13, at 22; Nils Melzer, "Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities", 42 *New York University Journal of International Law and Policy* 831 (2010), at 910.

[16] See, e.g., *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, *Judgement*, 31 January 2005, para 295; *Prosecutor v Radoslav Brđanin*, Case No. IT-99-36-A, *Judgement*, 3 April 2007, para 337; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, *Judgement*, 17 July 2008, para 330; Kriangsak Kittichaisaree, *International Criminal Law* (2001), at 274 n.68.

[17] See Article 52(2), Additional Protocol I.

[18] See *ibid.*, Article 52(1).

[19] See, e.g., David Luban, "Military Necessity and the Cultures of Military Law", 26 *Leiden Journal of International Law* 315 (2013), at 343-345.

[20] See Article 51(5)(b), Additional Protocol I. As noted earlier, there is also an element of proportionality in juridical military necessity's second requirement.

[21] See W. Hays Parks, "Means and Methods of Warfare", 38 *George Washington International Law Review* 511 (2006), n.25 (citing Edward R. Cummings).

[22] See Article 52(2), Additional Protocol I.

[23] See Article 51(5)(b), Additional Protocol I.

distinguish military advantage from military necessity. More importantly, no positive IHL rules expressly admit military advantage or convenience as an exception to their principal prescriptions. Acts not in fulfilment of the four aforementioned requirements may be regarded as military advantage or convenience ineligible for deviation from IHL rules that envisage military necessity pleas.[24]

1.2 Humanity

Humanity is not a major subject of inquiry in this thesis.[25] For the most part, we have considered humanity only where it interacts with military necessity in some normatively significant way. It may nevertheless be useful here to give it some tentative contextual structure.

Humanity is said to be difficult to define.[26] It has been described, among other things, as:

(i) A notion that "forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes"[27];
(ii) A synonym with the prohibition of superfluous injury and unnecessary suffering[28];
(iii) An equivalent to the Martens Clause[29];
(iv) A vehicle through which international human rights law has made its way into the regulation of armed conflicts[30]; and
(v) An equivalent to what the International Court of Justice (ICJ) in its *Corfu Channel* judgement referred to as "elementary considerations of humanity".[31]

Perhaps it is easier to consider what humanity *does* in relation to international humanitarian law. It would appear that specific belligerent acts can be described as humane or inhumane, just as they can be described as militarily necessary or unnecessary. We saw that, at a village called Englefontaine in northern France during World War II, Frank Richards acted humanely by shouting rather than throwing bombs into the cellar.[32]

In IHL norm-creation, acts such as assuming some risks of self-endangerment in favour of civilians and caring for the wounded and sick would be deemed consistent with humanity and affirmatively demanded by it. Humanity would unhesitatingly condemn – i.e., demand that one refrain from – plunder, torture and the like as inhumane. Elsewhere, however, humanity may exhibit indifference. Examples include the conclusion of agreements recognising hospital zones and localities,[33] and the

[24] See, e.g., Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), at 122-123 (referring to Eisenhower's General Order No. 68, Dec. 29, 1943); *von Manstein*, 522; Draper, *supra* note 14, at 134; Melzer, *Targeted Killing*, *supra* note 15, at 291-292; Solis, *supra* note 11, at 264.
[25] For a comprehensive treatise on humanity in international law, see Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium (2010).
[26] See, e.g., Robin Coupland, "Humanity: What Is It and How Does It Influence International Law?", 83 *International Review of the Red Cross* 969 (2001); Kjetil Mujezinović Larsen and Camilla Guldahl Cooper, "Conclusions: Is There a 'Principle of Humanity' in International Humanitarian Law?", in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (2012) 349, at 355-357.
[27] U.K. Ministry of Defence, *supra* note 13, at 23.
[28] See Meyrowitz, *supra* note 14, at 98; Geoffrey S. Corn, "Principle of Humanity", *Max Planck Encyclopedia of Public International Law* (2012), paras. 1, 4.
[29] See U.K. Ministry of Defence, *supra* note 13, at 23; Nishimura Hayashi, *supra* note 11, at 136-137; Jochen von Bernstorff, "Martens Clause", *Max Planck Encyclopedia of Public International Law* (2012), para 14.
[30] See Theodor Meron, "The Humanization of Humanitarian Law", 94 *American Journal of International Law* 239 (2000).
[31] *Corfu Channel Case*, *Judgment*, ICJ Reports (1949) 4, at 22; Yoram Dinstein, "The Principle of Proportionality", in Larsen, Cooper and Nystuen (eds.), *supra* note 26, 72, at 73; *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports (1996) 226, para 79.
[32] Frank Richards, *Old Soldiers Never Die* (2001), at 310; Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* 4th ed. (2006), at 152, 154.
[33] This humane conduct nevertheless remains a matter of humanitarian permission. See Raymund T. Yingling and Robert W. Ginnane, "The Geneva Conventions of 1949", 46 *American Journal of International Law* 393 (1952), at 400.

censoring of communications between POWs and the exterior.[34] Philosophers acknowledge that morality in society encompasses not only duties and obligations but also those qualities that go beyond them.[35] The same may be said *mutatis mutandis* of humanity in IHL norm-creation.

The "pointer" at which the "humanity of duty" ends and the "humanity of aspiration" begins is a highly contentious matter.[36] In the Englefontaine episode, Richards considered it "wise" to "throw bombs into cellars first and have a look around them after". He also clearly found it morally troubling to do so, however. In fact, he found it so morally troubling that he decided *not* to do the wise thing. Instead, Richards, together with his colleague, chose to risk self-endangerment by shouting into the cellar. For Michael Walzer:

> Richards was surely doing the right thing when he shouted his warning. He was acting as a moral man ought to act; he is not an example of fighting heroically, above and beyond the call of duty, but simply of fighting well. It is what we expect of soldiers.[37]

Contemporary thinkers debate whether the risk of self-endangerment of the kind assumed by Richards is what humanity only permits, or what it demands.[38]

Juridically, humanity also functions as an exception. There are positive IHL rules, e.g., Article 49 of Geneva Convention IV,[39] that expressly admit exceptions on humanitarian grounds or, at any rate, on grounds that are arguably analogous. Deviating from the principal prescriptions of these rules is lawful, insofar as it is in fact humane to do so in the manner specified by the exceptional clauses. The question is whether humanity may also function as a justification or excuse *vis-à-vis* positive international humanitarian law. Can humanity's indifferent considerations be invoked *de novo* in support of belligerent behaviour deviating from an unqualified IHL rule ("*Humanitätsräson*")? Or, for that matter, can such considerations operate as an additional layer of normative restraint over positive international humanitarian law ("counter-*Humanitätsräson*")? This thesis has found both positions to be untenable. What the law should do with humanitarian demands ("*Humanitätsgebot*") and humanitarian condemnations ("counter-*Humanitätsgebot*") that are incompatible with its unqualified rules is arguably a different matter.

1.3 Chivalry and Other Considerations

Chivalry is a third and sometimes overlooked "ingredient" in the process of IHL norm-creation.[40] As with humanity, it appears more fruitful to focus on chivalry's normative and juridical functions in relation to IHL than to decipher its content.[41]

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[34] Similarly, this inhumane conduct nevertheless remains a matter of humanitarian toleration.

[35] See, e.g., H. L. A. Hart, *The Concept of Law* (1961), at 177-178; Lon L. Fuller, *The Morality of Law* rev. ed. (1969), at 4, 15-19, 19-27, 30-32.

[36] Fuller has conceded as much, at least in relation to the "pointer" at which the "morality of duty" yields to the "morality of aspiration". See Fuller, *supra* note 35, at 9-13, 27-30.

[37] Walzer, *Just and Unjust Wars*, *supra* note 32, at 154.

[38] See, e.g., *ibid.*, at 152, 154, 305-306; Avishai Margalit and Michael Walzer, "Israel: Civilians & Combatants", *New York Review of Books*, 14 May 2000; Luban, "Cultures of Military Law", *supra* note 19, at 22-24; Henry Shue, "Civilian Protection and Force Protection", in Whetham (ed.), *supra* note 15, 135, at 138; David Whetham, "The Just War Tradition: A Pragmatic Compromise", in *ibid.*, 65, at 83.

[39] See Article 49, Geneva Convention IV (principally prohibiting forcible transfers of residents in occupied territory yet exceptionally authorising their temporary evacuations "if the security of the population … so demand[s]").

[40] See, e.g., Terry Gill, "Chivalry: A Principle of the Law of Armed Conflict?", in Mariëlle Matthee, Brigit Toebes and Marcel Bruns (eds.), *Armed Conflict and International Law: In Search of the Human Face:* Liber Amicorum *in Memory of Avril McDonald* (2013) 33, at 40-41.

[41] See, e.g., Rain Liivoja, "Chivalry without a Horse: Military Honour and the Modern Law of Armed Conflict", in Rain Liivoja and Andres Saumets (eds.), *The Law of Armed Conflict: Historical and Contemporary Perspectives* (2012) 75; Rain Liivoja, "Law and Honour: Normative Pluralism in the Regulation of Military Conduct", in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (2013) 143.

Chivalry appears indifferent regarding certain kinds of belligerent conduct, but not so regarding others. Thus, it prompts IHL framers to tolerate certain techniques of deception as ruses of war and yet condemn certain others as perfidious, treacherous or otherwise improper. This thesis has found that chivalry's indifferent considerations are inadmissible *de novo* as justifications or excuses for deviation from positive international humanitarian law ("*Ritterlichkeitsräson*"). Nor do they function as an additional layer of normative restraint thereon ("counter-*Ritterlichkeitsräson*"). The situation is arguably less clear when it comes to chivalry's demands ("*Ritterlichkeitsgebot*") and condemnations ("counter-*Ritterlichkeitsgebot*").

Sovereignty also functions as reason-giving considerations in IHL norm-creation. They may entail indifference in some matters, e.g., the regulation of non-international armed conflicts, whereas they demand specific behaviour and condemn others on matters of neutrality.

2. Dynamics of Considerations Interplay

Reason-giving considerations in IHL norm-creation interact with one another in three distinct ways. They are:

(a) Where all the relevant considerations permit or demand the same behaviour ("norm alignment");
(b) Where one set of considerations permits particular behaviour, whereas another set demands contrary behaviour ("norm contradiction"); and
(c) Where two or more sets of considerations demand mutually incompatible behaviour ("norm conflict").

2.1 Norm Alignment and Joint Satisfaction

Chapter 5 of this thesis outlines doctrinal positions according to which military necessity and humanity find themselves in "diametrical opposition",[42] such that its resolution requires a "dialectical compromise".[43] As shown in Chapters 6 and 7, however, military necessity and humanity can and often do align themselves; moreover, their alignment is far more pervasive than "rare".[44]

That performing certain conduct is deemed both inhumane and militarily unnecessary is a widely accepted notion indeed. For Carl von Clausewitz, committing needless brutalities – e.g., putting prisoners to death and devastating cities and countries – was, first and foremost, a sign of ineffective and unintelligent fighting.[45] Similar observations have been made regarding pillaging indiscriminately[46]; murdering POWs[47]; plundering private or public property[48]; raping women and ill-

[42] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), at 16.
[43] Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", 50 *Virginia Journal of International Law* 795 (2010), at 801.
[44] Yoram Dinstein, "Military Necessity", *Max Planck Encyclopedia of Public International Law* (2010), para. 3.
[45] See Carl von Clausewitz, *On War* (Michael Howard and Peter Paret eds. trans., 1993), at 85. See also R.B. Brandt, "Utilitarianism and the Rules of War", 1 *Philosophical & Public Affairs* 145 (1972), at 155.
[46] See Henry Sidgwick, *The Elements of Politics* (1891), at 256.
[47] See Brandt, *supra* note 45, at 154-155.
[48] See *ibid.*, at 155; Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law", 293 *International Review of the Red Cross* 94 (1993), at 99.

treating populations of occupied territories[49]; attacking civilians[50]; abusing detained persons during counter-insurgency operations[51]; sadistic acts of cruelty[52]; and bombarding undefended localities.[53]

Where military necessity permits and humanity demands the conduct's forbearance, the belligerent satisfies both considerations by refraining from it. International humanitarian law may "account for" this possibility by positing an unqualified prohibition against the said behaviour.[54] This rule extinguishes all liberties to perform the conduct that military necessity may otherwise tolerate. Examples include IHL rules unqualifiedly prohibiting killing POWs[55]; bombarding undefended localities[56]; shooting persons descending from aircraft in distress[57]; and generally maltreating persons *hors de combat*.[58]

Joint satisfaction can also be performance-based. The idea that it is strategically expedient to fight ethically in counterinsurgency with a view to earning the support of local residents is hardly new.[59] The same has been said of certain measures taken during belligerent occupation,[60] as well as a doctrine of aerial warfare known as effects-based operations.[61] Here, too, international humanitarian law "accounts for" this possibility when it posits rules unqualifiedly obligating the conduct's performance.[62] The law thereby extinguishes any contrary liberties on the belligerent's part to behave otherwise as may be tolerated by military necessity.

The fact that some belligerent acts are amenable to joint satisfaction of this character does not mean that IHL framers always posit rules unqualifiedly obligating its pursuit. It is, as noted earlier, not *per se* of concern to international humanitarian law whether the belligerent fights competently or incompetently. Where this type of joint satisfaction is available, military necessity permits its pursuit and only tolerates its non-pursuit. The relative scarcity of these rules can also be explained by the fact that the framers may let *third* considerations permitting its non-pursuit, such as sovereignty, prevail.[63]

2.2 Norm Contradiction and Joint Satisfaction

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[49] See Brandt, *supra* note 45, at 155.
[50] See Kenneth James Keith, "The Present State of International Humanitarian Law", 9 *Australian Yearbook of International Law* 13 (1980), at 34.
[51] See U.S. Army and Marine Corps, *Counterinsurgency Field Manual* (2007), at 251.
[52] See Doswald-Beck and Vité, *supra* note 48, at 99.
[53] See Dinstein, "Military Necessity" (2010), *supra* note 44, para 3; U.K. Ministry of Defence, *supra* note 13, at 90.
[54] See Brandt, *supra* note ,45 at 154-155.
[55] See Article 13, Geneva Convention III.
[56] See Article 25, 1907 Hague Regulations.
[57] See Article 42(1), Additional Protocol I.
[58] See *ibid.*, Article 41(1).
[59] See John A. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (2002), at 87-107; David Galula, *Counterinsurgency Warfare: Theory and Practice* (1964), at 52; U.S. Army and Marine Corps, *supra* note 51, at 245-246.
[60] See Geoffrey Best, "Restraints on War by Land Before 1945", in Michael Howard (ed.), *Restraints in War: Studies in the Limitation of Armed Conflict* (1979) 17, at 28-29; Brandt, *supra* note 45, at 155.
[61] See David A. Deptula, *Effects-Based Operations: Change in the Nature of Warfare* (2001); Michael N. Schmitt, "Effects-Based Operations and the Law of Aerial Warfare", in Wolff Heintschel von Heinegg and Volker Epping (eds.), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen* (2007) 21, at 37.
[62] See Article 57(3), Additional Protocol I (obligating the attacking party to choose the least injurious amongst those military objectives offering similar military advantage); Brandt, *supra* note 45, at 155.
[63] *Clausula si omnes* exemplifies strictly historical instances where considerations of sovereignty amongst adversarial powers resulted in the non-application in certain circumstances of IHL rules that would otherwise have imposed unqualified obligations. Similarly, in 1949, the International Committee of the Red Cross failed to rally states in its effort to expand the scope of application of the four Geneva Conventions in their entirety to all types of armed conflict. See David A. Elder, "The Historical Background of Common Article 3 of the Geneva Convention of 1949", 11 *Case Western Reserve Journal of International Law* 37 (1979), 41-54; Georges Abi-Saab, "Non-International Armed Conflicts", in Henri Dunant Institute and UNESCO (eds.), *International Dimensions of Humanitarian Law* (1988) 217, at 220; Lindsay Moir, *The Law of Internal Armed Conflict* (2002), at 24-29. The same is true of the defeat of numerous would-be Additional Protocol II provisions. See Abi-Saab, "Non-International Armed Conflicts", *supra* note 63, at 230-233; Moir, *supra* note 63, at 91-96.

Where given conduct is a matter of indifference, there is neither any duty to perform it nor any duty to refrain from it. If, then, one norm stipulating such indifference regarding particular behaviour is juxtaposed *vis-à-vis* another norm stipulating a duty to perform it – or to refrain from it, as the case may be – , the two norms contradict each other. They do so, because both cannot be true simultaneously. Joint satisfaction nevertheless results where the norms' addressee acts according to the duty. Norm contradiction becomes problematic if, but only if, the addressee avails him- or herself of the liberty and thereby leaves the contrary duty unsatisfied.

At issue here is a situation where humanity demands what military necessity only tolerates, or the former condemns what the latter permits. The belligerent jointly satisfies both sets of considerations by acting in accordance with humanity.

IHL norm-creation deals with joint satisfaction of this kind in five ways. In one, international humanitarian law posits a rule *unqualifiedly* obligating its pursuit. Thus, the law categorically bans the denial of quarter[64]; attacks on the civilian population or on individual civilians not directly participating in hostilities[65]; deliberate infliction of terror amongst civilians[66]; their starvation as a method of combat[67]; recruitment of children into the armed forces and their use in hostilities[68]; use of POWs[69] or protected persons[70] as human shields; hostage-taking[71]; and permanent forcible transfers and deportations.[72] Those framing these rules have elected to let humanity's condemnation trump military necessity's contrary permission.[73] Similarly, the law unqualifiedly obligates the release of POWs with provisions in unusual conditions of combat.[74] By positing this rule, the law extinguishes any liberty on the belligerent's part to act otherwise as may be permitted by military necessity.

Second, a positive IHL rule may *principally* obligate the pursuit of joint satisfaction but exceptionally authorise its non-pursuit. Consider, for instance, those rules principally prohibiting yet exceptionally authorising the destruction of property[75]; the destruction of captured enemy and neutral merchant vessels[76]; and temporary evacuations of residents in occupied territories.[77] Conversely, the following acts are principally obligatory yet exceptionally optional: the Detaining Power allowing internees to receive shipments which may meet their needs[78]; combatants distinguishing themselves

[64] See Article 23(d), 1907 Hague Regulations; Article 40, Additional Protocol I. See also Morris Greenspan, *The Modern Law of Land Warfare* (1959), at 103; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 7.
[65] See Articles 51(1), 51(3), Additional Protocol I.
[66] See *ibid.*, Article 51(2).
[67] See *ibid.*, Article 54(1).
[68] See *ibid.*, Article 77(2). See also Peter Rowe, "The Obligation of a State under International Law to Protect Members of Its Own Armed Forces During Armed Conflict or Occupation", 9 *Yearbook of International Humanitarian Law* 3 (2006), at 17-18.
[69] See Article 23, Geneva Convention III.
[70] See Article 28, Geneva Convention IV.
[71] See *ibid.*, Article 34.
[72] See *ibid.*, Article 49.
[73] 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.
[74] See Article 41(3), Additional Protocol I; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 7.
[75] See Article 23(g), 1907 Hague Regulations; Article 49, Geneva Convention IV. See also Brandt, *supra* note 45, at 155-160; Doswald-Beck and Vité, *supra* note 48, at 100. This includes the destruction of cultural property and objects indispensable to the survival of the civilian population. For cultural property, see Article 4(2), Convention for the Protection of Cultural Property in the Event of Armed Conflict, (14 May 1954); Article 6, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999). For objects indispensable to the survival of the civilian population, see Article 54(5), Additional Protocol I.
[76] See para. 102, San Remo Manual on International Law Applicable to Armed Conflicts at Sea (12 June 1994).
[77] See Article 49, Geneva Convention IV.
[78] See *ibid.*, Article 108. This provision envisages situations where "military necessity require[s] the quantity of such shipments to be limited", implying that otherwise impermissible limitations are exceptionally permissible insofar as they actually happen to be militarily necessary.

from the civilian population[79]; attacking parties giving effective advance warning[80]; and belligerents allowing civil defence organisations to work.[81] Here, IHL framers have elected, in principle, to let humanitarian condemnations and demands take precedence over contrary liberties permitted by military necessity. Where these rules apply, the belligerent is obligated to pursue the joint satisfaction demanded by humanity and tolerated by military necessity – unless, and to the extent that, its non-pursuit proves militarily necessary in a particular situation.

Third, certain IHL rules *indeterminately* obligate the pursuit of joint satisfaction. Examples arguably include those rules concerning proportionality in attacks[82]; the use of weapons of a nature to cause superfluous injury and unnecessary suffering[83]; and those obligating humane but militarily unnecessary action "as far as military considerations permit",[84] "whenever circumstances permit",[85] and "to the maximum extent feasible".[86] The process of their norm-creation has left the priority between military necessity and humanity unsettled. The non-pursuit of joint satisfaction is authorised to the extent permitted by military necessity, while its pursuit is obligated to the extent demanded by humanity. The rules themselves do not specify the point at which the former gives way to the latter. Their framers effectively transfer the burden of discovering this point to the rules' addressees and adjudicators.

Fourth, there are some types of belligerent conduct over which IHL rules only *exceptionally* obligate the pursuit of joint satisfaction. Take, for example, the declaration and establishment of a blockade,[87] and the denial by the blocking party of free passage of essential goods to blockaded ports.[88] The framers of these rules have elected principally to let military necessity's permission trump humanity's contrary demands. The belligerent is at liberty to act as permitted by military necessity not only where it is in fact militarily necessary to do so; the same liberty remains in place even if it is not. This liberty not to pursue joint satisfaction exceptionally ceases where its pursuit does in fact prove humane.

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[79] See Article 44(3), Additional Protocol I. This duty is partially waived when, "owing to the nature of the hostilities an armed combatant cannot … distinguish himself" in accordance with it.

[80] See Article 26, 1907 Hague Regulations; Article 57(2), Additional Protocol I; Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (1954), at 622-623; A.P.V. Rogers, *The Law on the Battlefield* 2d ed. (2004), at 88. Belligerents need not give such warning if "circumstances do not permit" (such as assault requiring an element of surprise).

[81] See Article 62(1), Additional Protocol I. That is, "except in cases of imperative military necessity".

[82] See Doswald-Beck and Vité, *supra* note 48, at 100; Schmitt, "Military Necessity", *supra* note 43, at 804-805; David Luban, "Risk Taking and Force Protection", in Yitzhak Benjaji and Naomi Sussmann (eds.), *Reading Walzer* (2014) 277.

[83] See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (29 November-11 December 1868); Article 23(e), 1907 Hague Regulations. See also *Dissenting Opinion of Judge Higgins*, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports (1996) 583, at 586-587; Yves Sandoz, "International Humanitarian Law in the Twenty-First Century", 6 *Yearbook of International Humanitarian Law* 3 (2003), at 8; Parks, *supra* note 21, at n.25; Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2010), at 66.

[84] That is, e.g., leaving some of a party's medical personnel and materiel with the wounded and sick to assist in the latter's care should the party in question be compelled to abandon them to the enemy. See Article 12, Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 August 1949). See also Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906) ("so far as military conditions permit"); Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929) ("as far as military exigencies permit"); Jean S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), at 141-142.

[85] That is, e.g., searching, collecting and evacuating the wounded, sick, shipwrecked and dead. See Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian Law* (2005), at 396, 406; Article 15, Geneva Convention I; Article 18, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Doswald-Beck and Vité, *supra* note 48, at 100.

[86] That is, e.g., removing movable cultural property from the vicinity of military objectives and avoiding locating military objectives near cultural property. See Article 8, Hague Cultural Property Protocol II.

[87] That is, unless the blockade has the sole purpose of starving the civilian population or is disproportionately injurious to the civilian population. See paras. 93, 102, San Remo Manual.

[88] That is, unless the denial leaves the civilian population inadequately supplied. See para. 103, San Remo Manual.

Fifth, the law may *decline* or *fail* to obligate the pursuit of joint satisfaction altogether. It may *decline* to do so by positing rules that affirmatively authorise non-pursuit. Such is the case regarding the Detaining Power interning POWs[89]; the belligerent searching and controlling medical vessels[90]; and the Occupying Power confiscating state property in occupied territory which may be used for military operations.[91] The belligerent also remains at liberty to disable eligible enemy combatants, deliberately inflict terror amongst them, or starve them as a method of combat. As regards these acts, IHL framers have elected to grant permissions of military necessity unfettered precedence over contrary humanitarian demands. It in no way matters whether, at a given moment, availing oneself of the former permission is militarily necessary or unnecessary; nor does it matter whether contrary action happens to be humane or inhumane. Acting as demanded by humanity, and thereby acting in joint satisfaction, is now entirely optional.

As for the law's *failure*, one may look to the ICJ's agnosticism regarding the lawfulness or otherwise of nuclear weapons in certain circumstances.[92] The International Committee of the Red Cross also concedes that it is unclear whether customary international humanitarian law prohibits belligerent reprisals against civilians during hostilities.[93] Similarly, no IHL rule appears to obligate civilians taking a direct part in hostilities, continuously or otherwise, to distinguish themselves from those taking no such part.[94]

Is there a generally liberal or prohibitive presumption for conduct not specifically regulated by positive International humanitarian law? A conservative reading of the Martens Clause would hold that it merely safeguards the continued application of customary IHL rules.[95] Read more progressively, the clause would represent a framework through which IHL rules are to be interpreted.[96] As seen below, while indifferent considerations such as military necessity do not create additional layers of normative significance, non-indifferent considerations may.

Norm contradiction also occurs between permissions of military necessity and demands of chivalry. It has led to the adoption, *inter alia*, of IHL rules prohibiting improper use of enemy uniforms[97]; participation in hostilities by paroled or repatriated POWs and by those sick, wounded or shipwrecked who have been returned[98]; and treachery.[99] The military necessity-chivalry interplay also underlies IHL rules authorising the detention and search of parlementaires,[100] and the absence of prohibition against espionage *per se*.[101]

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[89] See Article 5, 1907 Hague Regulations; Article 21, Geneva Convention III.
[90] See Article 31, Geneva Convention II.
[91] See Article 53, 1907 Hague Regulations.
[92] See *Nuclear Weapons* Advisory Opinion, para. 97.
[93] See Henckaerts and Doswald-Beck, *supra* note 85, at 520-523. See also U.K. Ministry of Defence, *supra* note 13, at 420-421; Jean-François Quéguiner, "The Principle of Distinction: Beyond an Obligation of Customary International Humanitarian Law", in Hensel (ed.), *supra* note 11, 161, at 174-175; Schmitt, "Military Necessity", *supra* note 43, at 820-822.
[94] See Nobuo Hayashi, "Continuous Attack Liability without Right or Fact of Direct Participation in Hostilities – *The ICRC Interpretive Guidance* and Perils of a Pseudo-Status", in Joanna Nowakowska-Małusecka (ed.), *International Humanitarian Law: Antecedents and Challenges of the Present Time* (2010) 56, at 75-76.
[95] See Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", 94 *American Journal of International Law* 78 (2000), at 87-88; Dinstein, "Proportionality", *supra* note 31, at 72-73.
[96] See *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, *Judgement*, 14 January 2000, paras. 525-527; Antonio Cassese, "The Martens Clause: Half a Loaf or simply Pie in the Sky?", 11 *European Journal of International Law* 187 (2000).
[97] See Article 23(f), 1907 Hague Regulations; Article 39(2), Additional Protocol I. See also Bordwell, *supra* note 14, at 283.
[98] See Articles 10, 12, 1907 Hague Regulations; Ronald F. Roxburgh (ed.), *Oppenheim's International Law: A Treatise* 3d ed. (1921), at 192; Article 16, Geneva Convention II.
[99] See Article 23(b), 1907 Hague Regulations; Articles 8(2)(b)(xi), 8(2)(e)(ix), Rome Statute of the International Criminal Court (17 July 1998).
[100] See Articles 33, 34, 1907 Hague Regulations.
[101] See *ibid.*, Article 24; Roxburgh (ed.), *supra* note 98, at 222-223; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 241; para. 119, Manual on International Law Applicable to Air and Missile Warfare (15 May 2009).

2.3 Norm Conflict

Two norms conflict with each other where one obligates its addressee to perform a given act and the other prohibits the same act. The logical impossibility of joint obedience to which two conflicting norms give rise does not preclude the logical possibility of their valid co-existence. Conflicting norms may validly co-exist, even within one legal system.[102] It would nevertheless be a functional shortcoming of a legal system if it contained valid yet conflicting norms.[103]

Similarly, it would be seriously detrimental to the functionality of international humanitarian law if two conflicting sets of reason-giving considerations involved in its norm-creation led to the adoption of conflicting rules. The law endeavours to avoid them by letting one set trump the other, or by devising a compromise between them. Indifferent considerations, such as military necessity, do not obligate conduct and therefore do not become involved in norm conflicts. At stake here, rather, are those considerations that are not indifferent. For instance, one set of humanitarian considerations demands that the Detaining Power not medically intervene with a POW, whereas another set of humanitarian considerations arguably demands such intervention in certain circumstances. Article 13 of Geneva Convention III embodies a compromise struck between them. The same may be said *mutatis mutandis* of Article 78(1) of Additional Protocol I. This article principally prohibits evacuations of children to a foreign country, yet it arguably obligates their temporary evacuations where "compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require".

3. Consequences of Considerations Interplay

This thesis' Chapter 8 examines the consequences to which the interplay between reason-giving considerations in IHL norm-creation gives rise. As noted earlier, unqualified IHL rules extinguish all contrary liberties permitted or tolerated by indifferent considerations. The latter considerations have thus been "accounted for" and, consequently, do not modify an act's lawfulness otherwise established by the former rules. It is arguable, however, that the same may not be said so readily of conflicting demands and condemnations.

3.1 Military Necessity

Kriegsräson asserts that, although international humanitarian law accounts for military necessity, it cannot be construed so that the belligerent is denied the option to do what it needs to succeed. Where rules are formulated without an express military necessity exception, it merely means that military necessity and the law are considered *generally* in agreement over the normative content of these rules. Whenever there *is* a collision, the former prevails over the latter.

Kriegsräson is unacceptable, because it purports to justify all militarily necessary conduct even where it is already unqualifiedly outlawed in positive international humanitarian law. Rejecting *Kriegsräson* amounts to rejecting the idea that military necessity somehow "rights" or "repairs" the

[102] See Georg Henrik von Wright, "Value, Norm, and Action in My Philosophical Writings", in Georg Meggle (ed.), *Actions, Norms and Values: Discussions with Georg Henrik von Wright* (1999) 11, at 21; Ota Weinberger, "Logical Analysis in the Realm of Law", in *ibid.*, 300; 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 325.
[103] See Hart, "Kelsen's Doctrine", *supra* note 102, at 325-326.

unlawfulness of such conduct. Variations of the same theme, e.g., self-preservation,[104] self-defence[105] and impracticality,[106] are to be rejected for the same reason.

Counter-*Kriegsräson* is perhaps most forcefully stated in the following passage:

> [A] direct attack against an otherwise legitimate military target constitutes a violation of IHL if that attack is not required for the submission of the enemy with a minimum expenditure of time, life and physical resources … [T]he fact that IHL does not prohibit direct attacks against combatants does not give rise to a legal entitlement to kill combatants at any time and any place so long as they are not *hors de combat* within the meaning of Article 41(2) AP I. Strictly speaking, although the absence of such a prohibition is undisputedly intentional, it constitutes no more than a strong presumption that, in a situation of armed conflict, it will generally be militarily necessary to kill, injure, or capture combatants of the opposing armed forces in order to bring about the submission of the adversary with a minimum expenditure of time, life and physical resources. It does not permit the senseless slaughter of combatants where there manifestly is no military necessity to do so, for example where a group of defenceless soldiers has not had the time to surrender, but could clearly be captured *without additional risk to the operating forces*.[107]

On this view, the mere fact that international humanitarian law accounts for military necessity does not leave the belligerent at liberty to do what is, in fact, militarily unnecessary. Where IHL rules are unqualifiedly formulated, it simply means that whatever these rules authorise is deemed *generally* militarily necessary – "no more than a strong presumption", in other words. Where there *is* a collision between conduct being militarily unnecessary, on the one hand, and it being otherwise lawful according to positive IHL rules, on the other, the former "wrongs" or "vitiates" the latter. Where the military necessity for particular belligerent conduct does not exist or ceases to exist, the law, all things considered, prohibits it.

As seen above, counter-*Kriegsräson* is unconvincing[108] because it is predicated on two erroneous perceptions of military necessity *qua* reason-giving considerations. First, some aspects of military necessity survive the process of IHL norm-creation and act as a residual lawfulness modifier (which they do not). Put differently, international humanitarian law does not fully account for military necessity. Second, those aspects that remain unaccounted for are normatively not indifferent (which they are).

3.2 Humanity

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[104] See Stone, *supra* note 80, at 352-353. But see N.C.H. Dunbar, "Military Necessity in War Crimes Trials", 29 *British Yearbook of International Law* 442 (1952), at 443; Schwarzenberger, *supra* note 13, at 136; Walzer, *Just and Unjust Wars*, *supra* note 32, at 305; Cohen, "Morality and the Laws of War", *supra* note 73, at 76-78; Dinstein, "Military Necessity" (2010), *supra* note 44, paras. 10-11.

[105] See *Nuclear Weapons* Advisory Opinion, para. 97. But see *Higgins Dissenting Opinion*, at 590; *Dissenting Opinion of Judge Weeramantry*, *ibid.*, 429, at 513-520; Luigi Condorelli, "Le droit international humanitaire, ou l'exploration par la cour d'une terra à peu près incognita pour elle", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 229, at 244-245; Christopher Greenwood, "*Jus ad Bellum* and *Jus in Bello* in the Nuclear Weapons Advisory Opinion", in *ibid.*, 247, at 264; Judith Gardam, "Necessity and Proportionality in *Jus ad Bellum* and *Jus in Bello*", in *ibid.*, 275, at 292; Marcelo G. Kohen, "The Notion of 'State Survival' in International Law", in *ibid.*, 293, at 310; Nishimura Hayashi, *supra* note 11, at 143-144; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 85-86; Solis, *supra* note 11, at 269; Greenwood, "Historical Development", *supra* note 13, at 36-37.

[106] See Hilaire McCoubrey, "The Nature of the Modern Doctrine of Military Necessity", 30 *Revue de droit militaire et de droit de la guerre* 215 (1991), at 237.

[107] Melzer, *Targeted Killing*, *supra* note 15, at 287-288 (emphasis in original; footnotes omitted).

[108] Dapo Akande, "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities", 59 *International and Comparative Law Quarterly* 180 (2010), at 192; Schmitt, "Military Necessity", *supra* note 43, at 835; Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis", 1 *Harvard National Security Journal* 5 (2010), at 41, 43.

It stands to reason that pleas arising *de novo* from humanity's indifferent considerations are also inadmissible. Holding otherwise is tantamount to accepting the idea that, like *Kriegsräson*, acting as permitted yet not demanded by humanity somehow "repairs" or "rights" the act's unlawfulness.[109] *Humanitätsräson* is therefore untenable. We should also reject counter-*Humanitätsräson* for this reason. The belligerent's failure to do what is permitted by humanity would not render that failure unlawful if it otherwise remains lawful according to positive IHL rules.

Humanity's demands and condemnations are perhaps more complex. These aspects may in fact survive the process through which international humanitarian law posits its rules. It is possible that an IHL rule unqualifiedly obligating or prohibiting given conduct does not resolve such genuine norm conflicts as may exist with contrary humanitarian demands. Article 118 of Geneva Convention III stipulates that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities".[110] That this provision creates an unqualified obligation finds support in its drafting history[111] as well as some scholarly writings.[112] A situation may arise where a Detaining Power finds itself torn between Article 118 and a humanitarian demand of non-repatriation. This dilemma arose in the aftermath of the Korean War,[113] the Iran-Iraq War[114] and the Gulf War.[115]

Has Article 118's adoption compulsorily resolved the norm conflict by letting the duty of repatriation trump the conflicting humanitarian demand that may arise in specific cases? Neither *lex specialis*[116] nor *jus cogens*[117] offers a satisfactory alternative here, as it is unqualified IHL rules themselves that supposedly account for military necessity and humanity, and it is this fact that supposedly renders military necessity and humanity pleas inadmissible *de novo*.[118] Nor does the argument that the subsequent custom has modified Article 118, with the result that the provision now has an implicit exceptional humanity clause, remedy the difficulty. This remedy would not have been available to those during the Korean War grappling with the norm conflict created when Article 118 was adopted in 1949.

Humanitätsgebot offers an arguably more cogent explanation. The mere fact that Article 118 unqualifiedly obligates post-hostilities POW repatriation may not have resolved the norm conflict. It is not clear whether, all things considered, the *unqualifiedness* of the prescriptions contained in Article 118 *vis-à-vis* conflicting humanitarian demands was, in 1949, or has since been, conclusive for international humanitarian law. The idea that the latter demands may have survived the process of IHL norm-creation accommodates the possibility that humanitarian pleas *de novo* in support of non-repatriation are not inadmissible *vis-à-vis* Article 118.

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[109] See Gabriella Blum, "The Laws of War and the 'Lesser Evil'", 35 *Yale Journal of International Law* 1 (2010). But see Diane Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (2010).

[110] Article 118, Geneva Convention III.

[111] See Federal Political Department, 2-A *Final Record of the Diplomatic Conference of Geneva of 1949* (1949), at 324, 462; Jean S. Pictet (ed.), *Commentary Geneva Convention III Relative to the Treatment of Prisoners of War* (1960), at 542-543.

[112] See Horst Fischer, "Protection of Prisoners of War", in Fleck (ed.) *supra* note 13, 367, at 416.

[113] See Pictet (ed.), *Commentary Geneva Convention III*, *supra* note 111, at 543-546.

[114] See John Quigley, "Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War after the Close of Hostilities", 5 *American University Journal of International Law and Policy* 73 (1989-1990), at 81-83.

[115] See Peter Rowe, "Prisoners of war in the Gulf area", in Peter Rowe (ed.), *The Gulf War 1990-91 in International and English Law* (1993), at 203. It is now the U.K. policy that "prisoners of war should not be repatriated against their will". See U.K. Ministry of Defence, *supra* note 13, at 205.

[116] Repatriating or not repatriating POWs after the cessation of hostilities is possibly one area where international human rights law and international refugee law prohibiting repatriation in certain situations would function as the *lex specialis* relative to international humanitarian law obligating repatriation in all situations.

[117] For a discussion as to whether *non-refoulement* has attained *jus cogens* status, see Walter Kälin et al., "Article 33, para. 1 1951 Convention", in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 1327, at 1347-1348.

[118] See Yoram Dinstein, "Military Necessity", 3 *Max Planck Encyclopedia of Public International Law* (1982) 274, at 274; Dinstein, *Conduct of Hostilities* (2004), *supra* note 42, at 18-19; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 6-7; Dinstein, "Military Necessity" (2010), *supra* note 44, para. 7; Schmitt, "Military Necessity", *supra* note 43, at 805.

Nor, for that matter, is counter-*Humanitätsgebot* entirely inconceivable. An IHL rule may decline or fail to obligate what humanity demands or, in any event, unqualifiedly obligate less than what humanity demands.[119] Where this occurs, acting in accordance with humanitarian demands entails pursuing, and exceeding, the joint satisfaction envisaged in the rule. *If* it were agreed that humanity demands "capture rather than kill", and *if* it were true that the process of IHL norm-creation through which the lawfulness of "killing rather than capturing" has come to be secured does not fully account for such demands, *then* it might be argued that killing rather than capturing is, all things considered, unlawful under international humanitarian law.[120]

3.3 Chivalry

Both *Ritterlichkeitsräson* and counter-*Ritterlichkeitsräson* are safely rejected. What may not be so hastily dismissed[121] are their affirmative variations, i.e., *Ritterlichkeitsgebot* and counter-*Ritterlichkeitsgebot*.

4. Synthesis

This thesis advances eight observations, each accompanied by a brief explanation. They are grouped into two categories, namely: (a) those relating to military necessity itself; and (b) those relating to those aspects of international humanitarian law within which military necessity broadly falls.

4.1 Observations Relating to Military Necessity Itself

In its most elementary sense, determining whether a specific act is militarily necessary is about assessing the act's fitness as a means towards its end. International humanitarian law "accounts for" military necessity when the law's framers decide what to do about a given kind of conduct, in view of its capacity or tendency to constitute a material military necessity or non-necessity. Having "accounted for" military necessity, the law precludes all pleas that are derived from it, except where their admissibility is envisaged expressly and in advance. Military non-necessity appears as an element of war crimes and crimes against humanity where their underlying IHL rules admit military necessity exceptions.

4.1.1 Military Necessity in Its Material Context

In its material context, military necessity signifies how conducive a specific belligerent act is *vis-à-vis* the attainment of its military purpose under a given set of circumstances. Conversely, material non-necessity signifies the extent to which it is not so conducive. Futility, purposelessness, wastefulness, and impertinence, are among those factors that render belligerent action militarily unnecessary.

Material military necessity is a relative, evaluative and situation-dependent notion, and that its assessment may vary depending on the surrounding situations and even among similarly competent

[119] There is a standing "invitation to exceed that minimum" established in common Article 3. See Pictet (ed.), *Commentary Geneva Convention I*, *supra* note 84, at 52.
[120] 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 Studies of Soldiers* (2008) 19, at 37; International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), at 82; Nils Melzer, "The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law", in Christian Tomuschat et al. (eds.), *The Right to Life* (2010) 151, at 162.
[121] In this connection, see also Gill, *supra* note 40, at 43-49.

and experienced assessors. Clausewitzian friction explains why no causation, let alone one that is *sine qua non*, is part of material military necessity.

Understood thus, material military necessity separates fighting that is effective and conducive to success from fighting that is neither. The notion merely entails the two-fold truism that it is in each belligerent's strategic self-interest to pursue what he or she needs to accomplish and that it is also in his or her strategic self-interest to avoid failures. It is predicated on a soldier's vocational competence being separable from a person's ethical competence. The two competences' separability finds support among authorities and facts.

A soldier's strictly military virtue remains intelligible on its own, although it may also form part of a patriotic citizen's ethical virtue to fight competently. Similarly, the same narrow reading of a soldier's vocational competence to "get the job done" is viable, even if one were to agree that, all things considered, only ethically competent conduct should count as *truly* vocationally competent conduct and that clearly unethical conduct should not.

4.1.2 Military Necessity in Its Normative Context

A military purpose's illegitimacy clearly "taints" the legitimacy of any measure taken therefor. Such a measure is illegitimate, whether it is deemed materially necessary or not. Where the purpose sought is legitimate, however, the measure taken is not necessarily legitimate. In IHL norm-creation, the crude utilitarian adage that "the end justifies the means" does not always obtain, despite the fact that some readings of the *jus ad bellum-jus in bello* interplay, *Kriegsräson*, and humanity's ascendance may suggest the contrary.

Variations on Sergeant Chesterton's attitude towards an escaping German soldier illustrate how military necessity or non-necessity relates to the legitimacy of an act that entails evil or no evil. Assessing the legitimacy of a necessary evil is a complex task. An unnecessary evil is evil *simpliciter*, and unmitigated evil is plainly illegitimate. The situation is different for an act that is not evil. Whether such an act is militarily necessary or unnecessary is immaterial to its legitimacy. It is legitimate to perform, or to refrain from performing, an act that entails no evil and accords with military necessity (e.g., appropriate use of non-lethal weapons). The same is true of an act that is neither evil nor militarily unnecessary, such as Germany's failure properly to recruit, train and monitor its agents operating in the UK.

Accordingly, material military non-necessity, as such, is *never* a reason for a belligerent act's illegitimacy as far as IHL norm-creation is concerned. What de-legitimises an unnecessary evil is its evil, rather than its lack of necessity. That this is so echoes the fact that, although international humanitarian law endeavours to accommodate the pursuit of military necessities, the law does not make it its business to save incompetent belligerents from themselves. After all, if a warring party encumbers itself with missed opportunities and mounting blunders, it has only itself to blame. These Millian underpinnings mirror the fact that military history is rich with episodes of exclusively self-inflicted evil, and that there are relatively few IHL rules dealing with such evil.

Some erroneously assert that international humanitarian law obligates the performance of material military necessities. The opposite mistake, i.e., to assert that the law forbids materially unnecessary acts because only necessary ones should be permitted, is more common.

An act whose performance and forbearance are both permitted is morally indifferent. In IHL norm-creation, military necessity endows the belligerent with Hohfeldian liberties not only to pursue what is necessary and avoid what is unnecessary, but also to forgo necessities and encumber itself with non-necessities. Conversely, IHL framers have no reason to prohibit acts deemed militarily unnecessary or to obligate those deemed militarily necessary. Holding otherwise would amount to requiring that "naked" soldiers be killed; combat aircraft fly at high altitudes for their own safety; and belligerents recruit child soldiers.

4.1.3 Military Necessity in Its Juridical Context

International humanitarian law does not admit *de novo* military necessity pleas in defence of deviations from its unqualified rules. Such pleas are admissible only *vis-à-vis* those rules that envision military necessity exceptions expressly and in advance. Military necessity exempts a measure from those principal IHL rules to which it is attached, to the extent the measure is required for the attainment of a military purpose and otherwise in conformity with that law. These rules also reveal instances where the framers of international humanitarian law have specifically elected to let military necessity considerations survive the process of IHL norm-creation.

Juridical military necessity forms part of the very IHL rule it modifies. Acts that comply with the modified rule are not internationally wrongful. If not, or no longer, militarily necessary, the act reverts to being a non-exempted instance now bound by the principal rule. Military necessity *qua* exception is therefore distinct from the state of necessity *qua* circumstance precluding the wrongfulness of an act under the international law of state responsibility.

Customary international humanitarian law (e.g., war crimes cases, international rulings, arbitration decisions, domestic court decisions, military manuals, preparatory works, commentaries) establishes that juridical military necessity contains four cumulative requirements. First, the measure must be taken primarily for some specific military purpose. This means that a specific purpose must exist and that the purpose must be primarily military in nature. The belligerent need not take the measure with a view to ensuring the submission of its enemy, however. Second, the measure must be required for the military purpose's attainment. Whether a measure can be considered "required" depends on three criteria, namely: (a) whether the measure was materially relevant to the purpose's attainment; (b) whether, of the materially relevant and reasonably available measures, the one taken was the least injurious; and (c) whether the harm resulting from the measure was proportionate to the purpose's military value. The measure's urgency, as well as the notion that there may be different degrees of military necessity, appears to be already implied in this second requirement. Third, the military purpose sought must be in conformity with international humanitarian law. Fourth, the measure taken must otherwise be in conformity with that law.

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

4.1.4 Military Necessity as a Negative Element of Several Property- and Displacement-Related War Crimes and Crimes Against Humanity

Where a substantive IHL rule envisages a military necessity exception, and where the rule's violation constitutes an offence punishable under international criminal law, the absence of military necessity is an explicit or implicit element of that offence. At issue here are several war crimes and crimes against humanity involving property destruction and forcible population displacement. Since military non-necessity is an element to be proven, its onus rests with the prosecution.

The voluminous jurisprudence generated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) shows that the tribunal has treated military necessity in a manner that is mainly consistent with the notion's IHL requirements. Large-scale property destruction not justified by military necessity has been prosecuted under Articles 2(d), 3(b) and 5(h) of the ICTY Statute. Determining the military necessity of property destruction during the fighting is a highly complex task. Where the underlying combat activities lack military justification to begin with, military necessity is inadmissible with regard to property destruction that occurs during these activities. Should there be some justification, the question devolves to the destroyed object's status as a military objective (if so, *ipso facto* militarily necessary) or a civilian object; if it is a civilian object destroyed by an attack , then to

the attack's lawfulness (if so, *ipso facto* militarily necessary) or unlawfulness (if so, *ipso facto* militarily unnecessary); and, if it is a civilian object destroyed by an act not constituting an attack, then to the act's fulfilment or non-fulfilment of all of military necessity's IHL requirements.

Some ICTY decisions exhibit troublesome confusions, however. One concerns the failure to distinguish between military necessity, which pertains to the *measure*, on the one hand, and military objective, which pertains to the *property*, on the other. The other relates to the destruction of property that also constitutes an attack against that property, as opposed to the destruction of property that does not. This distinction is important where the property in question is a civilian object. The *Orić* as well as *Boškoski and Tarćulovski* Trial Judgments arguably deem the destruction of civilian objects incapable of satisfying any military purpose (which, as military necessity's first IHL requirement suggests, it may).

As regards property destroyed outside of combat, most ICTY rulings have correctly found the absence of military necessity in the destruction's ethnically driven character. Such destruction is indeed ineligible for the military necessity clause, since it amounts to adverse distinction of the kind prohibited under international humanitarian law. Where property is selectively destroyed with a view to discriminating its owners on account of their ethnicity, it may also constitute persecutions, a crime against humanity. In *Hadžihasanović and Kubura*, and *Prlić*, ICTY trial chambers concluded that the commission of plunder and retaliation did not render property destruction militarily necessary. Problematically, the *Orić* Trial Judgment seems to embrace the view that the absence of combat itself means the absence of military necessity (which it does not).

Articles 2(g), 5(d), 5(h) and 5(i) of the ICTY Statute directly or indirectly cover deportations and forcible transfers carried out without grounds permitted under international law, including, in particular, imperative military reasons. Nevertheless, only some of the trial judgments adjudicating these charges, such as *Tuta and Štela*, *Brđanin*, *Đorđević*, *Martić* and *Krstić*, discuss unlawfulness, let alone a lack of imperative military reasons, in connection with their displacement-related findings.

The Rome Statute of the International Criminal Court also contains a number of property- and displacement-related offences that explicitly or implicitly contain the absence of military necessity as an element. To date, the court's confirmation decisions and trial judgments dealing with this matter are limited both in number and significance. Some confirmation decisions find the absence of military necessity without elaboration. Others offer more yet still remain superficial. The *Katanga* Trial Judgment's discussion of military necessity cites the Lieber Code and interprets the expression "imperatively demanded" to mean "no other option", but it fails to identify proper criteria or to apply them to the fact at hand.

There is no room for *de novo* military necessity pleas where IHL rules are unqualified and where their violations constitute war crimes and/or crimes against humanity. Awkwardly, Article 31(1)(c) of the Rome Statute excludes individual criminal responsibility on account of acts performed in defence of property "essential for accomplishing a military mission". Though narrow in scope, this provision introduces a qualitatively new defence that may be mistaken as an invitation to plead military necessity *de novo vis-à-vis* punishable breaches of unqualified IHL rules. The same danger exists for Article 31(3).

4.2 Observations Relating to Those Aspects of International Humanitarian Law within Which Military Necessity Broadly Falls

Military necessity never conflicts with humanity in IHL norm-creation. Where the two considerations point towards the same behavioural direction, the law's framers often posit rules that unqualifiedly obligate the belligerent to act accordingly. International humanitarian law responds to contradictions between humanity's imperatives and military necessity's counter-liberties by creating various levels of obligatory compliance with the former. Unqualified IHL rules are insusceptible to *de novo* pleas based not only on military necessity but also on other indifferent considerations. The same may not be too hastily said of *de novo* pleas derived from humanitarian or chivalrous imperatives.

4.2.1 "Accounting for" the Military Necessity-Humanity Interplay in IHL Norm-Creation Where the Two Sets of Considerations Align with Each Other

Despite suggestions to the contrary, it is entirely plausible, indeed quite common, that belligerent acts may be neither humane nor militarily necessary. This is a position that finds ample support in episodes, as well as commentaries and IHL provisions.

Where humanity condemns what military necessity merely tolerates, it is plainly possible to satisfy both sets of considerations by refraining from the act. IHL framers account for such possibilities by positing unqualified prohibitions. Under no circumstances are these obligations subject to modifications on account of countervailing considerations that are normatively indifferent. Examples include the prohibitions against the use of certain weapons, bombarding undefended localities, shooting to kill those placed *hors de combat* or descending from aircraft in distress, and committing rape, among others. It does not necessarily follow, however, that international humanitarian law is incapable of restricting or banning inhumane means and methods as long as they retain military utility.

Conversely, numerous kinds of acts, such as ethical fighting in counterinsurgency and the so-called "effects-based operations", are both humane and necessary. IHL-compliant behaviour can simultaneously enhance discipline and accord with military necessity. Here, too, the belligerent jointly satisfies military necessity and humanity by behaving accordingly. Though limited in number, international humanitarian law does impose unqualified obligations of this nature, for instance, regarding some aspects of belligerent occupation.

Acts that jointly satisfy military necessity and humanity in this manner – i.e., either because they are both inhumane and unnecessary, or because they are both humane and necessary – do not always become the subject of unqualified IHL rules. One explanation for this is that many inhumane and unnecessary acts involve exclusively self-inflicted evil (see proposition 4.1.2 above). The fact that what is both humane and necessary tends to be a matter of moral praise, rather than moral demand, is another. The involvement of third considerations, most notably sovereign interests, in IHL norm-creation also limits the number of these rules. *Clausula si omnes* – though strictly of historical interest – , and resistance to the expansion of IHL rules applicable in non-international armed conflicts as well as a customary ban on belligerent reprisals against civilians in hostilities, exemplify the impacts such considerations can have.

4.2.2 "Accounting for" the Military Necessity-Humanity Interplay in IHL Norm-Creation Where the Two Sets of Considerations Contradict Each Other

Two norms are in conflict when one obligates and the other forbids the same conduct. It might be felt that humanity and military necessity conflict each other where the former condemns what the latter permits, or the former demands what the latter merely tolerates. That is not so, however, given military necessity's normative indifference (see proposition 4.1.2 above). Frustration between a duty and a counter-liberty would be problematic only if the two norms validly belonged to two un-integrated fields, or if they were independently valid rules within the same field (neither of which is the case with humanity and military necessity). Joint conformity remains a possibility where a duty and a counter-liberty contradict each other, and the agent achieves it by choosing to obey the duty.

Similarly, by acting in accordance with humanity, the belligerent can always jointly satisfy what humanity condemns or demands and what military necessity indifferently permits or tolerates. IHL framers account for this particular type of joint satisfaction when they make its pursuit (i) unqualifiedly obligatory, (ii) principally obligatory, (iii) indeterminately obligatory, (iv) exceptionally obligatory, or (v) entirely discretionary.

Unqualified obligations: One may list, among other things, the unqualified prohibitions against attacking civilians, using methods and means expected to cause environmental damage, denying quarter, deliberately inflicting terror amongst civilians, starving civilians as a method of combat, and using certain weapons. International humanitarian law unqualifiedly obligates the release of POWs with provisions in unusual conditions of combat. These rules indicate where IHL framers have elected to let the imperatives of humanity trump and extinguish all contrary permissions of military necessity.

Principal obligations: The law principally forbids the destruction of property in occupied territory, as well as captured enemy and neutral merchant vessels, yet exceptionally authorises their destruction if it is militarily necessary. IHL provisions obligate the belligerent to permit humanitarian activities, e.g., those undertaken by Red Cross delegates and representatives of Protecting Powers, yet exceptionally release it from these obligations where required by military necessity.

Indeterminate obligations: They include provisions concerning proportionality in attacks and the use of weapons of a nature to cause superfluous injury or unnecessary suffering. Also, consider IHL rules that obligate humane but militarily unnecessary action "whenever circumstances permit", and the like.

Exceptional obligations: Some blockade-related rules (e.g., declaration and establishment, denial of free passage to essential goods) fall within this category, as do those dealing with the treatment of certain medical facilities and equipment (e.g., sick-bays on board a warship). Here, militarily necessary action is principally authorised, yet exceptionally forbidden when it is in fact inhumane.

No obligations: IHL framers have specifically declined to obligate jointly satisfactory behaviour with respect to POW internment, search and control of medical vessels, and confiscation of state property in occupied territory. Positive international humanitarian law is arguably silent on various acts, e.g., forcible displacement, deliberate terrorisation and starvation of enemy combatants; use of artillery against lawful military objectives located in civilian-populated areas; and censorship of detainee correspondence. It remains debatable whether, even where positive IHL rules are silent, the Martens Clause has really replaced the *Lotus*-inspired presumed freedom of action (*in dubio pro libertate*) with a presumed prohibition (*in dubio pro prohibitione*).

4.2.3 Normative Consequences to Which "Accounting for" Indifferent Considerations in IHL Norm-Creation Gives Rise

When positing rules that unqualifiedly obligate humane conduct, IHL framers have elected to let the underlying humanitarian imperatives trump and set aside all contrary indifferent considerations (see propositions 4.2.1 and 4.2.2 above).

It follows that acting in accordance with indifferent considerations does not "right" or "repair" its unlawfulness if it is otherwise unqualifiedly established by positive international humanitarian law. All military necessity considerations exhibit normative indifference (see proposition 4.1.2 above). Nor, as noted earlier, do they survive the process of IHL norm-creation that posits unqualified rules. *Kriegsräson*, as well as its variations including self-preservation, self-defence and impracticality, is therefore unacceptable. The same is true of any *de novo* pleas founded on humanitarian considerations – or chivalrous considerations, for that matter – that are normatively indifferent. Admitting such pleas *vis-à-vis* unqualified IHL rules would amount to advocating *Humanitätsräson* (e.g., misusing the Red Cross emblem for humanitarian purposes, "mercy killing"), or *Ritterlichkeitsräson*.

If we were to reject indifferent considerations being pleaded *de novo* for breaches of unqualified IHL rules, we should also reject the popular idea that the same considerations "wrong" or "vitiate" a contrary act's compliance with positive IHL rules. Recent support for "capture rather than kill" as an IHL rule typifies counter-*Kriegsräson*, a position that would require military non-necessity to possess a normative property that is non-indifferently restrictive or prohibitive. This latter property is more likely to emanate from some elements of humanity and/or chivalry. Besides, why should those aspects of military necessity that would validate *Kriegsräson* be considered "accounted for" and extinguished

but not those that would validate counter-*Kriegsräson*? For the same reason, there should be no room for counter-*Humanitätsräson* or counter-*Ritterlichkeitsräson*.

4.2.4 Normative Consequences to Which "Accounting for" Non-Indifferent Considerations in IHL Norm-Creation Gives Rise

It is sometimes argued that the military necessity-humanity interplay permeates the entire *corpus juris* of international humanitarian law, and that all unqualified IHL rules exclude both *de novo* military necessity pleas and *de novo* humanity pleas. In fact, some of these rules involve military necessity but not humanity (e.g., prohibition against improper use of enemy uniforms), or humanity but not military necessity (e.g., prohibition against compelling officer POWs to perform labour), in their norm-creation. Nor, at least in theory, is it inconceivable that even unqualified IHL rules may admit *de novo* pleas emanating from non-indifferent considerations.

There is a conflict where an unqualified IHL rule obligates particular behaviour and humanity demands contrary behaviour. How norm conflicts are dealt with (e.g., through the adoption of a Hartian rule of recognition requiring would-be rules to comport with substantive moral norms) varies from one body of positive legal rules to another. Arguably, IHL norm-creation may leave genuine conflicts that can arise between unqualified rules it posits and contrary imperatives unresolved. Should the latter survive the process, they may then operate as additional layers of lawfulness modification over and above positive IHL rules.

Two legal solutions devised around POW treatment point to *Humanitätsgebot*'s possible existence. One involves Geneva Convention III's unqualified obligation to repatriate POWs after the cessation of hostilities *vis-à-vis* humanity's demand against forced repatriation on account of likely persecutions back home (e.g., Korea, Vietnam, Persian Gulf). The other concerns POW internment on land, an unqualified obligation under Article 22 of Geneva Convention III, *vis-à-vis* temporary internment aboard vessels at sea for expeditious evacuation from the combat zone (e.g., Falklands-Malvinas). Both cases are perhaps best explained by how, all things considered, international humanitarian law would exceptionally authorise deviations even from the prescriptions of its unqualified rules when humanity so demands.

Conversely, counter-*Humanitätsgebot* – if it exists – may effectively raise the degree to which combatants must risk self-endangerment with a view to sparing civilians beyond what positive IHL rules currently require. Similarly, it may obligate "capture rather than kill" despite the arguable absence of such an obligation under today's positive international humanitarian law.

The same can be said, *mutatis mutandis*, of *Ritterlichkeitsgebot* and counter-*Ritterlichkeitsgebot*.

5. Conclusion

The precise content of military necessity, humanity, chivalry and the like will doubtless continue to stir debate. This thesis nevertheless shows that their functions relative to international humanitarian law can be illuminated. The normative characteristics of these notions shape the dynamics of their interplay in the context of IHL norm-creation, as well as the consequences of such interplay *vis-à-vis* positive IHL rules.

More specifically, this thesis asserts that military necessity is indifferently permissive, regardless of the context in which it appears. It not only reaffirms the fallacy of *Kriegsräson* but also invalidates the idea that belligerent conduct consistent with positive international humanitarian law becomes unlawful by virtue of its military non-necessity alone. Moreover, this thesis confirms the inadmissibility of *de novo* military necessity pleas *vis-à-vis* unqualified IHL obligations without excluding the possibility that non-indifferent aspects of humanity and chivalry may survive IHL norm-creation and operate as additional layers of lawfulness determination over positive rules.

Here emerges a new theory of military necessity, as well as what it means to say that international humanitarian law "accounts for" it.

Summary

This thesis develops a theory of military necessity that systematically probes the notion's normative characteristics and explains its various contexts. In so doing, it is guided by two research questions. First, what does it mean to say that international humanitarian law "accounts for" military necessity? Second, to what normative consequences does the law "accounting for" military necessity give rise?

In its material context, military necessity is an element of belligerent conduct which separates fighting that is effective and conducive to success from fighting that is neither. The notion merely entails the truism that it is in each belligerent's strictly strategic self-interest to maximise his or her abilities, and that it is similarly in each belligerent's strictly strategic self-interest to avoid failures.

So understood, material military necessity does not involve any requirement of *sine qua non* causation. It is a relational concept, because the degree to which a given course of action is militarily necessary changes depending on the availability of alternative courses of action, military ends and sets of circumstances. It is also an evaluative notion, since the material military necessity of this or that act is susceptible to reasonable assessment given enough facts – though not all reasonable assessors of comparable experience or competence may come to the same conclusion on the matter. Furthermore, it is situation-specific insofar as no military necessity assessment of particular conduct can be meaningfully generalised.

Just as acts can constitute material military necessities, they can constitute non-necessities. Examples of the latter include futility, purposelessness, wastefulness, excessivenesss, and impertinence.

Military necessity can be construed in its strictly material – i.e., *a*moral – context. That is so, although there may be something moral about a particular belligerent act being vocationally competent or incompetent. The same is true notwithstanding the fact that it can indeed be the ethical duty of a soldier to fight competently by doing his or her best to pursue material military necessities and avoid non-necessities. It may be that only ethically competent fighting counts as truly vocationally competent fighting, all things considered. Even such a holistic understanding of military competence includes elements that are strictly material, however, and it is meaningful to discuss these elements when trying to understand what military necessity encompasses.

In its normative context, military necessity is indifferently permissive. It prompts the framers of international humanitarian law (IHL) to leave the belligerent at liberty not only to pursue what is materially necessary to succeed and avoid what is unnecessary, but also to imperil itself by forgoing the former and encumbering itself with the latter. Conversely, IHL framers have no reason to obligate acts on account of their military necessity, or to prohibit those on account of their non-necessity.

The mere fact that a given belligerent act lacks material military necessity *vis-à-vis* its legitimate military purpose does not mean that the act becomes illegitimate *for that reason alone*. In IHL norm-creation, material military necessity or non-necessity is indeed an element in the legitimacy modification of an act that is deemed evil. It is, however, not an element in the legitimacy modification of *any* belligerent act, much less an act that is not considered evil in the first place. Plainly, although international humanitarian law endeavours to accommodate the pursuit of military necessities, the law does not make it its business to save incompetent belligerents from themselves. If a warring party misses opportunities and commits blunders, it has only itself to blame. This is not to say that international humanitarian law completely ignores evil that is exclusively self-inflicted. In some circumstances, the law does mandate action with a view to reducing such evil.

This thesis refutes a predominant normative theory according to which military necessity and humanity are fundamentally irreconcilable with each other. The said theory advances six erroneous assertions. First, what is militarily necessary is always inhumane, and what is humane is always militarily unnecessary. Second, both military necessity and humanitarian considerations generate imperatives. Third, compliance with military necessity imperatives precludes compliance with humanitarian imperatives, and *vice versa*. Fourth, "accounting for" military necessity and humanity entails preempting conflicting considerations of military necessity and humanity from leading to the adoption

of conflicting IHL rules. Fifth, every positive IHL rule embodies a compromise between irreconcilable demands of military necessity and humanity. Sixth, neither *de novo* military necessity pleas nor *de novo* humanity pleas are admissible *vis-à-vis* unqualified IHL rules.

This thesis shows, first, that some belligerent acts are both militarily necessary and humane, or both militarily unnecessary and inhumane. This is consistent with the fact that the kind of belligerent behaviour that is IHL-compliant (and, arguably, consistent with humanity) tends to be disciplinarily sound (and, arguably, consistent with military necessity).

Second, all military necessity considerations are normatively indifferent. In the context of IHL norm-creation, military necessity not only permits belligerents to perform materially necessary acts and avoid unnecessary acts but also permits them to forgo necessities and endure non-necessities. In other words, it neither obligates, restricts nor prohibits. Some humanitarian considerations are also normatively indifferent. Humanity praises rather than demands some acts that are deemed humane. It also tolerates rather than condemns some deemed inhumane.

Third, whenever military necessity permits what humanity demands, or whenever the former tolerates what the latter condemns – i.e., whenever the two considerations align themselves – , it always remains open to the belligerent to act in a manner that satisfies both simultaneously. Even where military necessity permits yet humanity condemns the same conduct, or where a given act is tolerated by military necessity yet demanded by humanity – i.e., when the two considerations contradict one another – , the belligerent can still satisfy both considerations by acting in accordance with humanitarian imperatives.

Fourth, "accounting for" military necessity and humanity means that IHL framers fail, decline or elect to obligate behaviour that jointly satisfies these considerations. The framers often posit unqualified IHL obligations to perform what military necessity permits and humanity demands. They also tend to impose unqualified IHL prohibitions against what military necessity tolerates and humanity condemns. The situation is different where inhumane and militarily unnecessary acts are of a nature to involve exclusively self-inflicted evil; where humane and militarily necessary acts are of a nature to involve what humanity praises rather than demands; and where *third* considerations, such as sovereign interests, block the adoption of unqualified IHL rules.

Where military necessity and humanity contradict each other, IHL framers "account for" these considerations by positing an unqualified, principal, indeterminate or exceptional obligation to pursue their joint satisfaction. In some cases, however, positive IHL rules affirmatively authorise the belligerent not to act in a jointly satisfactory manner. Elsewhere, the absence of a positive rule obligating the pursuit of joint satisfaction implies the law's failure to impose one. Despite suggestions to the contrary, it is doubtful whether the Martens Clause itself creates a general presumption whereby the belligerent is obligated to choose joint satisfaction unless expressly authorised not to do so.

Fifth, not every unqualified rule of positive international humanitarian law embodies the military necessity-humanity interplay. Some involve military necessity but not humanity in the process of their norm-creation. Conversely, there are also unqualified rules whose creation involves humanity but not military necessity.

Sixth, unqualified IHL rules *ipso facto* excludes *de novo* military necessity pleas, but it is not clear whether they also exclude *de novo* pleas emanating from humanitarian imperatives. Positing an unqualified IHL rule logically precludes all *de novo* pleas that emanate from indifferent considerations. It does so, even if these considerations do not specifically appear in the process of that rule's creation. Since military necessity in its normative context is a set of indifferent considerations, *de novo* military necessity pleas are *ipso facto* inadmissible *vis-à-vis* unqualified IHL rules. This invalidates existing theories, such as those according to which military necessity trumps IHL rules (*Kriegsräson*) and the law illegalises unnecessary acts even if they are otherwise IHL-compliant (counter-*Kriegsräson*).

The same exclusionary effect may not necessarily apply to all humanitarian considerations. Some of them are normatively indifferent and, accordingly, inadmissible as bases for *de novo* pleas *vis-à-vis* unqualified IHL rules. Humanity also demands actions and condemns others, however. Since we have reason to believe that non-indifferent considerations may survive the process of IHL

norm-creation, we also have reason to accept the possibility that they may modify an act's lawfulness over and above unqualified rules of positive international humanitarian law.

In its juridical context, military necessity exempts conduct from certain positive IHL rules that principally prescribe contrary behaviour. Exceptional military necessity modifies the content of the principal rule to which it is attached. It is therefore distinct from the state of necessity as a circumstance precluding the wrongfulness under the international law of state responsibility. Conduct in fulfilment of exceptional military necessity's requirements comports with the principal rule and does not constitute an internationally wrongful act in the first place.

There are four cumulative requirements that an act must satisfy. To begin with, it must be taken primarily for some specific military purpose. In addition, the act must be "required" for the purpose's attainment. In order to be considered "required", the act must be materially relevant to the purpose, constitute the least evil among those options that are materially relevant and reasonably available, and remain within an acceptable injury-benefit ratio. Furthermore, the purpose sought must be in conformity with international humanitarian law. Lastly, the act itself must otherwise be in conformity with that law. It should also be noted that exceptional military necessity pleas based solely on hindsight are inadmissible. Under certain circumstances, a person's reliance on exceptional military necessity may become invalid by virtue of his or her status alone.

Juridical military necessity also manifests itself as a negative element of certain war crimes and crimes against humanity. Offences such as those involving property destruction and forcible population displacement are built on substantive IHL rules that admit military necessity exceptions. The onus rests with the prosecution to show the absence of military necessity in order to prove that these crimes have been committed. When a rule envisages an exception, and when the rule's violation constitutes a crime, it is only logical that the absence of circumstances that satisfy the exception's requirements is itself an element of that crime.

The International Criminal Tribunal for the Yugoslavia (ICTY) has dealt with property destruction in the context of combat, property destruction outside of combat, and deportation as well as forcible transfer, in its voluminous case law. A detailed examination of their findings reveals that, despite some mishaps, ICTY judges have by and large presented a coherent picture of exceptional military necessity as an element of punishable offences. The International Criminal Court (ICC) finds itself at a much earlier stage of its jurisprudential development. ICC rulings on military necessity to date are more limited in content and sophistication as a result. One potential source of contention concerns some of the grounds for excluding individual criminal responsibility that are listed under Article 31 of the ICC Statute. These grounds are vulnerable to abuse as backdoors through which defendants may attempt to introduce *de novo* military necessity pleas as a justification or excuse for their crimes.

Samenvatting (summary in Dutch)

Dit proefschrift ontwikkelt een theorie over militaire noodzaak, welke systematisch de normatieve karakteristieken van het begrip onderzoekt en het in verschillende contexten uitlegt. Twee onderzoeksvragen zijn leidend. Ten eerste, wat betekent het om te zeggen dat het internationaal humanitair recht "rekening houdt" met militaire noodzaak? Ten tweede, welke normatieve consequenties steken de kop op door het recht dat "rekening houdt" met militaire noodzaak?

In (haar) materiële context is militaire noodzaak een element van oorlogvoerend gedrag dat onderscheid maakt tussen toepassing van geweld dat effectief is en succes bevordert, en toepassing van geweld dat geen van beiden is. Het begrip omvat het gegeven dat het in het strategisch zelfbelang van elk van de strijdende partijen is om zijn of haar capaciteiten te maximaliseren en om mislukkingen te voorkomen.

In deze context vereist militaire noodzaak geen *sine qua non* causatie. Het is een relationeel concept, omdat de mate waarin een gegeven actie militair noodzakelijk is afhangt van de aanwezigheid van alternatieve mogelijkheden tot actie, de militaire doelen en de specifieke omstandigheden. Het is ook een evaluatief begrip, daar de materiële militaire noodzaak van een bepaalde daad onderhevig is aan een redelijke beoordeling mits voldoende feiten beschikbaar zijn – hoewel niet alle redelijke beoordelaars van gelijke ervaring of bekwaamheid tot dezelfde conclusie hoeven te komen. Tevens is het begrip afhankelijk van de situatie, in zoverre dat de militaire-noodzaakbeoordeling van bepaald gedrag niet betekenisvol gegeneraliseerd kan worden.

Evenals daden kunnen dienen als materiële militaire noodzakelijkheden, kunnen ze ook dienen als niet-noodzakelijkheden. Voorbeelden van het laatste zijn onder andere nutteloosheid, doelloosheid, verkwisting, overdadigheid, en impertinentie.

Militaire noodzaak kan opgevat worden in strikt materiële – dat wil zeggen *a*morele – zin. Het is echter mogelijk dat er iets moreel kan zijn aan een specifieke oorlogvoerende daad die professioneel gezien competent of incompetent is. Dit geldt ondanks het feit dat het de ethische plicht kan zijn van een soldaat om competent te vechten – door zijn of haar best te doen om militaire noodzakelijkheden na te streven en niet-noodzakelijkheden te vermijden. Het is mogelijk dat slechts de ethisch competente toepassing van geweld geldt als werkelijk professioneel competente toepassing. Echter, zelfs een dusdanig holistische verstandhouding van militaire vaardigheid als deze bevat elementen die strikt materieel zijn, en het is belangrijk om deze elementen te bespreken wanneer er gekeken wordt naar wat militaire noodzaak precies omvat.

In de normatieve context is militaire noodzaak onverschillig toelatend. Het beweegt de opstellers (of 'framers') van het internationaal humanitair recht (IHR) om een oorlogvoerende partij niet alleen vrij te laten om te doen wat militair noodzakelijk is om te slagen en te vermijden wat niet noodzakelijk is, maar ook om zichzelf in gevaar te brengen door het eerste te laten en zich met het tweede te belasten. IHR-opstellers hebben geen reden om daden te verplichten om hun militaire noodzaak, of te verbieden om hun niet-noodzaak.

Het gegeven dat het een bepaalde oorlogvoerende daad ontbreekt aan materiële militaire noodzaak tegenover haar legitieme doel betekent niet dat die daad om die reden alleen illegitiem wordt. Bij de totstandkoming van IHR-normen is materiële militaire noodzaak of niet-noodzaak inderdaad een element in het aanpassen van de legitimiteit van een daad welke beschouwd wordt als kwaadaardig. Het is echter niet een element in het aanpassen van de legitimiteit van *iedere* oorlogvoerende daad, en nog minder bij een daad die niet beschouwd wordt als kwaadaardig. Hoewel internationaal humanitair recht het streven naar militaire noodzakelijkheden probeert te accommoderen, maakt het recht het niet haar taak om incompetente partijen van zichzelf te redden. Wanneer een strijdende partij kansen mist en blunders begaat, heeft het louter zichzelf iets te verwijten. Echter, dit betekent niet dat internationaal humanitair recht eventueel kwaad die een partij zichzelf toebrengt volledig negeert. In sommige situaties staat het recht optreden toe met de bedoeling dit kwaad te reduceren.

Dit proefschrift verwerpt een overheersende normatieve theorie welke stelt dat militaire noodzaak en humaniteit fundamenteel onverenigbaar zijn met elkaar. Deze theorie promoot zes incorrecte

stellingen. Ten eerste, wat militair noodzakelijk is is altijd inhumaan, en wat humaan is is altijd militair niet-noodzakelijk. Ten tweede, zowel militaire noodzaak als humanitaire overwegingen produceren voorschriften. Ten derde, conformiteit met voorschriften inzake militaire noodzaak sluit conformiteit met humanitaire voorschriften uit, en *vice versa*. Ten vierde, "rekening houden met" militaire noodzaak en humaniteit omvat het voorkomen dat conflicterende overwegingen van militaire noodzaak en humaniteit leiden tot het aannemen van conflicterende IHR-regels. Ten vijfde, elke positieve IHR-regel belichaamt een compromis tussen onverzoenbare vereisten van militaire noodzaak en humaniteit. Ten zesde, noch *de novo* pleidooien betreffende militaire noodzaak, noch *de novo* humaniteitspleidooien zijn toelaatbaar tegenover ongekwalificeerde IHR-regels.

Dit proefschrift laat zien dat, ten eerste, sommige strijddaden zowel militair noodzakelijk als humaan zijn, of zowel militair niet-noodzakelijk als inhumaan. Dit komt overeen met het feit dat het soort oorlogvoerend gedrag dat conform het internationaal humanitair recht is (en mogelijk consistent met humaniteit) tevens disciplinair deugdelijk is (en mogelijk consistent met militaire noodzaak).

Ten tweede, dat alle overwegingen inzake militaire noodzaak normatief indifferent zijn. In de context van de IHR-normontwikkeling staat militaire noodzaak strijdende partijen niet alleen toe dat militair noodzakelijke daden verricht worden en militair niet-noodzakelijke dingen vermeden, maar het geeft hen ook de mogelijkheid om noodzakelijkheden te laten en niet-noodzakelijkheden te verdragen. In andere woorden, het verplicht noch verhindert, noch verbiedt. Sommige humanitaire overwegingen zijn ook normatief indifferent. Humaniteit stimuleert en prijst sommige daden die als humaan worden gezien, in plaats van dat het ze eist; tevens tolereert het sommige inhumane daden eerder dan dat het ze veroordeelt.

Ten derde, in het geval dat de militaire noodzaak toestaat wat humaniteit vereist, of in het geval dat het eerste tolereert wat het laatste veroordeelt – met andere woorden, wanneer de twee overwegingen overeenkomen –, dan blijft het altijd een optie voor de strijdende partij om op een manier te handelen die beiden bevredigt. Zelfs wanneer een militaire noodzaak een bepaalde actie toestaat en humaniteit dit tegenspreekt, of wanneer een bepaalde actie getolereerd wordt door de militaire noodzaak maar geëist wordt door humaniteit – met andere woorden, wanneer de twee overwegingen elkaar tegenspreken –, dan kan de strijdende partij nog steeds beide overwegingen bevredigen door te handelen naar humanitaire voorschriften.

Ten vierde, "rekening houden met" militaire noodzaak en humaniteit betekent dat IHR-opstellers falen, weigeren of ervoor kiezen om gedrag dat deze vereisten gezamenlijk bevredigd te verplichten. De 'framers' poneren vaak ongekwalificeerde IHR-verplichtingen om uit te voeren wat militaire noodzaak toestaat en humaniteit vereist. Ze hebben ook de neiging om ongekwalificeerde IHR-verboden op te leggen tegen wat militaire noodzaak tolereert en humaniteit veroordeelt. De situatie is anders wanneer inhumane en militair niet-noodzakelijke daden van een aard zijn waarin exclusief zelf-toegedaan kwaad wordt betrokken; wanneer humane en militair noodzakelijke daden van een aard zijn waarin wat humaniteit prijst in plaats van eist betrokken is; en wanneer andere overwegingen, zoals soevereine belangen, de opname van ongekwalificeerde IHR-regels tegenhoudt.

Als militaire noodzaak en humaniteit elkaar tegenspreken, dan verklaren IHR-framers deze overwegingen door een ongekwalificeerde, principiële, intermediaire of uitzonderlijke verplichting te poneren, om zo hun gezamenlijke bevrediging te bewerkstelligen. Echter, in sommige zaken staan positieve IHR-regels de strijdende partij toe om zich niet op een gezamenlijk bevredigende manier te gedragen. Elders impliceert de afwezigheid van een positieve regel die de zoektocht naar gezamenlijke bevrediging verplicht dat het recht er niet in slaagt om er een op te leggen. Ondanks suggesties die het tegendeel beweren, is het betwijfelbaar of de Martens Clausule zelf een algemene veronderstelling creëert waar de strijdende partij verplicht is om gezamenlijke bevrediging te kiezen, behalve wanneer deze uitdrukkelijk toestemming krijgt om dit niet te doen.

Ten vijfde, niet elke ongekwalificeerde regel van het positief internationaal humanitair recht belichaamt de wisselwerking tussen militaire noodzaak en humaniteit. Sommige bevatten militaire noodzaak maar niet humaniteit in het proces van de totstandkoming van de normen. Omgekeerd zijn er ook ongekwalificeerde regels waarvan de creatie draait om humaniteit, maar niet om militaire noodzaak.

Ten zesde, ongekwalificeerde IHR-regels sluiten *de novo* pleidooien voor militaire noodzaak *ipso facto* uit, maar het is onduidelijk of ze dit ook doen voor *de novo* pleidooien die voortkomen uit humanitaire voorschriften. Het poneren van een ongekwalificeerde IHR-regel sluit logischerwijs alle *de novo* pleidooien uit die niet specifiek voorkomen in het proces van de totstandkoming van deze regel. Aangezien militaire noodzaak in de normatieve context een set van indifferente overwegingen is, zijn *de novo* pleidooien inzake militaire noodzaak *ipso facto* niet-toelaatbaar tegenover ongekwalificeerde IHR-regels. Dit invalideert bestaande theorieën, zoals de theorieën die stellen dat IHR-regels overtroeft worden door militaire noodzaak (*Kriegsräson*) en die stellen dat de wet niet-noodzakelijke daden verbiedt, zelfs als ze voldoen aan het internationaal humanitair recht (counter-*Kriegsräson*).

Hetzelfde uitsluitende effect is niet noodzakelijk van toepassing op alle humanitaire overwegingen. Sommige overwegingen zijn normatief indifferent en zodoende niet-toelaatbaar als basis voor de *de novo* pleidooien tegenover ongekwalificeerde IHR-regels. Echter, humaniteit kan ook actie eisen of juist veroordelen. Aangezien we reden hebben om ervan uit te gaan dat niet-indifferente overwegingen het proces van het tot stand komen van IHR-normen kunnen overleven, hebben we ook reden om de mogelijkheid te accepteren dat zij de wettigheid van een daad aanpassen boven op de ongekwalificeerde regels van het positieve internationaal humanitair recht.

In haar juridische context stelt militaire noodzaak gedrag vrij dat voortkomt uit bepaalde positieve IHR-regels die principieel tegengesteld gedrag beschrijven. Uitzonderlijke militaire noodzaak modificeert de inhoud van de principiële regel waar het aan verbonden is. Het is daarom iets anders dan de status van noodzaak als een omstandigheid die de onrechtmatigheid onder het internationale recht van staatsaansprakelijkheid uitsluit. Gedrag met als doel het vervullen van de noodzakelijke vereisten van uitzonderlijke militaire noodzaak komt overeen met de principiële regel en betekent dus niet een internationaal onrechtmatige daad.

Er zijn vier cumulatieve vereisten die een daad moet bevredigen. Om te beginnen moet het hoofdzakelijk met een bepaald militair doel genomen worden. Daarnaast moet de daad "nodig" zijn om dit doel te halen. Om "nodig" te zijn moet de daad materieel relevant en redelijk beschikbaar zijn; het moet de minst kwade zijn onder de beschikbare opties die relevant en redelijk beschikbaar zijn; en het moet binnen een acceptabele schade-baten verhouding blijven. Verder moet het doel conform het internationaal humanitair recht zijn. Ten slotte moet de daad zelf ook conform dit recht zijn. Ook moet genoemd worden dat uitzonderlijke pleidooien betreffende militaire noodzaak louter gebaseerd op kennis achteraf, niet-toelaatbaar zijn. Onder bepaalde omstandigheden kan het vertrouwen dat een persoon heeft op uitzonderlijke militaire noodzaak ongeldig worden door zijn of haar status.

Juridische militaire noodzaak manifesteert zich ook als een negatief element bij bepaalde oorlogsmisdaden of misdaden tegen de menselijkheid. Overtredingen die bijvoorbeeld gaan over eigendomsvernieling en gedwongen volksverzetting zijn gebaseerd op substantieve IHR-regels die uitzonderingen op basis van militaire noodzaak toelaten. De verantwoordelijkheid om de afwezigheid van militaire noodzaak aan te tonen rust bij de aanklager, om op die manier te bewijzen dat deze misdaden gepleegd zijn. Wanneer een regel een uitzondering beschouwt, en wanneer de overtreding van deze regel een misdaad betekent, dan is het slechts logisch dat de afwezigheid van omstandigheden die de vereisten van de uitzondering bevredigen zelf een element is van die misdaad.

Het Joegoslaviëtribunaal heeft in zijn omvangrijke jurisprudentie gekeken naar eigendomsvernietiging in de context van strijd, eigendomsvernietiging buiten strijd, en zowel deportatie als gedwongen overdracht. Een gedetailleerd onderzoek naar hun bevindingen laat zien dat, ondanks enkele vergissingen, de rechters van het tribunaal over het algemeen een coherent beeld presenteren van uitzonderlijke militaire noodzaak als een element van strafbare overtredingen. Het Internationaal Strafhof bevindt zich echter in een vroeg stadium van de ontwikkeling van zijn jurisprudentie. Dit heeft tot gevolg dat tot op de dag van vandaag de beslissingen van het Strafhof over militaire noodzaak veel beperkter zijn qua inhoud en complexiteit. Een mogelijke bron van conflict betreft een aantal gronden die betrekking hebben op het uitsluiten van individuele criminele verantwoordelijkheid die beschreven zijn in Artikel 31 van het Statuut van het Internationale Strafhof. Deze gronden zijn kwetsbaar voor misbruik aangezien aangeklaagden ze zouden kunnen gebruiken om *de novo*

pleidooien inzake militaire noodzaak te introduceren als een rechtvaardiging of excuus voor hun misdaden.

References

Treaties and Treaty-Like Instruments

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864.

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868.

Final Protocol of the Brussels Conference of 1874, 27 August 1874.

Project of an International Declaration concerning the Laws and Customs of War, 27 August 1874.

The Laws of War on Land, 9 September 1880.

Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899.

Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (II) Respecting the Laws and Customs of War on Land, 29 July 1899.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906.

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

Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907.

Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907.

Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, 18 October 1907.

Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929.

Convention Relative to the Treatment of Prisoners of War, 27 July 1929.

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, 15 April 1935.

Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 6 November 1936.

Charter of the United Nations, 26 June 1945.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945.

Control Council Law No. 10, Punishment of Persons Guilty of war Crimes, Crimes against Peace and against Humanity, 20 December 1945.

Draft Revised or New Conventions for the Protection of War Victims, May 1948.

Draft Convention Relative to the Treatment of Prisoners of War, August 1948.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949.

Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.

International Covenant on Civil and Political Rights, 16 December 1966.

Vienna Convention on the Law of Treaties, 23 May 1969.

Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, 10 October 1980.

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices (Protocol II), 10 October 1980.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993.

Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993.

San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997.

Rome Statute of the International Criminal Court, 17 July 1998.

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999.

Responsibility of States for Internationally Wrongful Acts, 12 December 2001.

Convention on Cluster Munitions, 30 May 2008.

Manual on International Law Applicable to Air and Missile Warfare, 15 May 2009.

Manual on the International Law Applicable to Cyber Warfare, 15 March 2013.

United Nations Material

United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948).

General Assembly Resolution 610 (VII), 3 December 1952.

General Assembly Resolution 2444 (XXIII), 19 December 1968.

General Assembly Resolution 2597 (XXIV), 16 December 1969.

General Assembly Resolution 2675 (XXV), 9 December 1970.

International Law Commission, *Report of the International Law Commission on the Work of Its Thirty-Second Session (5 May-25 July 1980)*, A/35/10 (1980).

International Law Commission, 2 *Yearbook of the International Law Commission* Pt II (1980).

Centre for Human Rights, *Bulletin of Human Rights 91/1 I. Human Rights and Humanitarian Law II. Human Rights and Refugee Law* (1992).

Preparatory committee, *Addendum*, *Report of the Preparatory Committee on the Establishment of an International Criminal Court* (1998).

Human Rights Committee, General Comment No. 27: Freedom of Movement (Art. 12) (1999).

International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO bombing Campaign Against the Federal Republic of Yugoslavia* (2000).

International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April-1 June and 2 July-10 August 2001)*, A/56/10 (2001).

International Law Commission, 2 *Yearbook of the International Law Commission* Pt II (2001).

General Assembly Resolution ES-10/14, 12 December 2003.

Security Council Resolution 2139 (2014), 22 February 2014.

European Union Material

European Commission, 1 *Law in Humanitarian Crisis* (1996).

Organization of American States Material

Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* (2002).

Austrian Material

Pledge Presented at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons by Austrian Deputy Foreign Minister Michael Linhart (2014).

Canadian Material

Office of the Judge Advocate General, Canadian Forces, *Law of Armed Conflict at the Operational and Tactical Levels* (2000).

Office of the Judge Advocate General, Canadian Forces, *Law of Armed Conflict at the Operational and Tactical Levels* (2003).

Colombian Material

Colombian Ministry of National Defence, *Comprehensive Human Rights and IHL Policy* (2008).

Swiss Material

Federal Political Department, 1 *Final Record of the Diplomatic Conference of Geneva of 1949* (1949).

Federal Political Department, 2-A *Final Record of the Diplomatic Conference of Geneva of 1949* (1949).

Federal Political Department, 2-B *Final Record of the Diplomatic Conference of Geneva of 1949* (1949).

Federal Political Department, 1 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (1978).

Federal Political Department, 3 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1978).

Federal Political Department, 6 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1978).

Federal Political Department, 7 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (1978).

Federal Political Department, 8 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1978).

Federal Political Department, 11 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (1978).

Federal Political Department, 15 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1978).

United Kingdom Material

The War Office, *The Law of War on Land, Being Part III of the Manual of Military Law* (1958).

International Criminal Court (ICC) Act (2001).

Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004).

Ministry of Defence, *Joint Services Publication 383: The Manual of the Law of Armed Conflict Amendment* (2010).

United States Material

Instructions for the Government of Armies of the United States in the Field (1863).

Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, 5 *Nazi Conspiracy and Aggression* (1946).

Civil Defense Office, National Security Resources Board, Executive Office of the President, *Fire Effects of Bombing Attacks* (1950).

Uniform Code of Military Justice (1950).

Code of Conduct for Members of the Armed Forces of the United States, Executive Order No. 10631 (1955; amended 1977, 1988).

Department of the Army, *The Law of Land Warfare* (1956).

Department of the Air Force, *Judge Advocate General Activities: International Law – The Conduct of Armed Conflict and Air Operations* (1976).

Air Force Wright Lab., *Harassing, Annoying, and "Bad Guy" Identifying Chemicals* (1994).

Department of the Navy, Office of the Chief of Naval Operations et al., *The Commander's Handbook on the Law of Naval Operations* (1995).

Air Force, 1 *Air Force Basic Doctrine: Air Force Doctrine Document* (2003).

Alberto Gonzales, William Haynes, Daniel Dell'Orto and Keith Alexander, Press Briefing, 22 June 2004.

Department of the Army, *The Operations Process* (2006).

Air Force, 1-1.2 *Strategic Attack: Air Force Doctrine Document* (2007).

Air Force, 2 *Operations and Organization: Air Force Doctrine Document 13-20* (2007).

Army and Marine Corps, *Counterinsurgency Field Manual* (2007).

Army Combined Arms Center, *Army Doctrine Update #1* (2007).

Department of the Navy et al., *The Commander's Handbook on the Law of Naval Operations* (2007).

Joint Chiefs of Staff, *Joint Operation (Joint Publication 3-0)* (2008).

Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual* (2015).

<u>*Permanent Court of International Justice/International Court of Justice Cases*</u>

The Case of the S.S. 'Lotus', 1927 PCIJ Series A, No. 19.

Corfu Channel Case, *Judgment*, ICJ Reports (1949) 4.

North Sea Continental Shelf, Judgment, ICJ Reports (1969) 3.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), *Merits*, *Judgment*, ICJ Reports (1986) 14.

Legality of the Threat or Use of Nuclear Weapons, *Advisory Opinion*, ICJ Reports (1996) 226.

Separate Opinion of Judge Fleischhauer, *Legality of the Threat or Force of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports (1996) 305.

Dissenting Opinion of Judge Higgins, *Legality of the Threat or Force of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports (1996) 583.

Separate Opinion of Judge Ranjeva, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports (1996) 294.

Dissenting Opinion of Judge Shahabuddeen, *Legality of the Threat or Force of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports (1996) 375.

Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Force of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports (1996) 429.

Legality of the Threat or Use of Nuclear Weapons (Request for an Advisory Opinion by the United Nations General Assembly): Statement of the Government of the United Kingdom, 16 June 1995.

Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: Written Observations Submitted by the Government of Solomon Islands to the International Court of Justice, 20 June 1995.

International Court of Justice, *Verbatim Record*, 15 November 1995 (CR 95/34).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Advisory Opinion*, ICJ Reports (2004) 136.

Declaration of Judge Buergenthal, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Reports (2004) 244.

Separate Opinion of Judge Elaraby, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Reports (2004) 246.

Separate Opinion of Judge Higgins, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Reports (2004) 207.

Separate Opinion of Judge Kooijmans, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Reports (2004) 219.

Separate Opinion of Judge Owada, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, ICJ Reports (2004) 260.

Written Statement of the Government of Israel on Jurisdiction and Propriety, 30 January 2004.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), *Judgment*, ICJ Reports (2005) 168.

International Criminal Tribunal for the Former Yugoslavia Cases

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995.

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-R61, *Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, 20 October 1995.

Prosecutor v. Milan Martić, Case No. IT-95-11-R61, *Decision*, 8 March 1996.

Prosecutor v. Ivica Rajić a/k/a Viktor Andrić, Case No. IT-95-12-R61, *Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence*, 13 September 1996.

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14, *Second Amended Indictment*, 25 April 1997.

Prosecutor v. Dražen Erdemović, Case No. IT-96-22-A, *Separate and Dissenting Opinion of Judge Cassese*, 7 October 1997.

Prosecutor v. Dražen Erdemović, Case No. IT-96-22-A, *Joint Separate Opinion of Judge McDonald and Judge Vohrah*, 7 October 1997.

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2, *Amended Indictment*, 30 September 1998.

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, *Judgement*, 10 December 1998.

Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-T, *Judgement*, 16 November 1998.

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, *Judgement*, 25 June 1999.

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, *Judgement*, 15 July 1999.

Prosecutor v. Radislav Krstić, Case No. IT-98-33, *Amended Indictment*, 27 October 1999.

Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-T, *Judgement*, 14 January 2000.

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, *Judgement*, 3 March 2000.

Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-A, *Judgement*, 20 February 2001.

Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23&23/1-T, *Judgement*, 22 February 2001.

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, *Judgement*, 26 February 2001.

Prosecutor v. Stevan Todorović, Case No. IT-95-9/1-S, *Sentencing Judgement*, 31 July 2001.

Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, *Judgement*, 2 August 2001.

Prosecutor v. Mladen Naletilić (a/k/a "Tuta") and Vinko Martinović (a/k/a "Štela"), Case No. IT-98-34-PT, *Second Amended Indictment*, 28 September 2001.

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, *Judgement*, 15 March 2002.

Prosecutor v. Milomir Stakić, Case No. IT-97-24-PT, *Fourth Amended Indictment*, 10 April 2002.

Prosecutor v. Momčilo Krajišnik and Biljana Plavšić, Case No. IT-00-39 & 40-PT, *Amended Consolidated Indictment*, 7 May 2002.

Prosecutor v. Blagoje Simić et al., Case No. IT-95-9, *Fifth Amended Indictment*, 30 May 2002.

Prosecutor v. Gragoljub Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, *Judgement*, 12 June 2002.

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-T, *Judgement*, 2 November 2002.

Prosecutor v. Biljana Plavšić, Case No. IT-00-39&40/1-S, *Sentencing Judgement*, 27 February 2003.

Prosecutor v. Mladen Naletilić (a/k/a "Tuta") and Vinko Martinović (a/k/a "Štela"), Case No. IT-98-34-T, *Judgement*, 31 March 2003.

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-PT, *Amended Joinder Indictment*, 26 May 2003.

Prosecutor v. Milan Martić, Case No. IT-95-11-PT, *Second Amended Indictment*, 14 July 2003.

Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, *Judgement*, 31 July 2003.

Prosecutor v. Miodrag Jokić, Case No. IT-01-42, *Second Amended Indictment*, 26 August 2003.

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, *Judgement*, 17 September 2003.

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-PT, *Third Amended Indictment*, 26 September 2003.

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-PT, *Second Amended Indictment*, 29 September 2003.

Prosecutor v. Blagoje Simić et al., Case No. IT-95-9-T, *Judgement*, 17 October 2003.

Prosecutor v. Milan Babić, Case No. IT-03-72, *Indictment*, 6 November 2003.

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, *Sentencing Judgement*, 2 December 2003.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, *Judgement and Opinion*, 5 December 2003.

Prosecutor v. Pavle Strugar, Case No. IT-01-42-PT, *Third Amended Indictment*, 10 December 2003.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, *Separate and Partially Dissenting Opinion of Judge Nieto-Navia*, 5 December 2003.

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, *Sixth Amended Indictment*, 9 December 2003.

Prosecutor v. Ivica Rajić a/k/a Viktor Andrić, Case No. IT-95-12-PT, *Amended Indictment*, 13 January 2004.

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-S, *Sentencing Judgement*, 30 March 2004.

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, *Fourth Amended Joinder Indictment*, 14 May 2004.

Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, *Decision on Motion for Judgement of Acquittal*, 16 June 2004.

Prosecutor v. Milan Babić, Case No. IT-03-72-S, *Sentencing Judgement*, 29 June 2004.

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, *Judgement*, 29 July 2004.

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, *Judgement*, 1 September 2004.

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-AR73.3, *Joint Defence Interlocutory Appeal of Trial Chamber Decision on Enver Hadžihasanović and Amir Kubura's Rule 98bis Motions for Acquittal*, 2 November 2004.

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, *Judgement*, 17 December 2004.

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-T, *Judgement*, 17 January 2005.

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, *Corrigendum to Judgement of 17 December 2004*, 24 January 2005.

Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, *Judgement*, 31 January 2005.

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, *Judgement*, 28 February 2005.

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-AR73.3, *Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal*, 11 March 2005.

Prosecutor v. Naser Orić, Case No. IT-03-68-PT, *Third Amended Indictment*, 30 June 2005.

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-PT, *Amended Indictment*, 2 November 2005.

Prosecutor v. Fatmir Limaj et al., Case No. IT-03-66-T, *Judgement*, 30 November 2005.

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-T, *Judgement*, 15 March 2006.

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, *Judgement*, 22 March 2006.

Prosecutor v. Mladen Naletilić (a/k/a "Tuta") and Vinko Martinović (a/k/a "Štela"), Case No. IT-98-34-A, *Judgement*, 3 May 2006.

Prosecutor v. Ivica Rajić a/k/a Viktor Andrić, Case No. IT-95-12-S, *Sentencing Judgement*, 8 May 2006.

Prosecutor v. Naser Orić, Case No. IT-03-68-T, *Judgement*, 30 June 2006.

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, *Judgement*, 27 September 2006.

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, *Judgement*, 28 November 2006.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, *Judgement*, 30 November 2006.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, *Separate and Dissenting Opinion of Judge Schomburg*, 30 November 2006.

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, *Judgement*, 3 April 2007.

Prosecutor v. Milan Martić, Case No. IT-95-11-T, *Judgement*, 12 June 2007.

Prosectuor v. Vojislav Šešelj, Case No. IT-03-67, *Third Amended Indictment*, 7 December 2007.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-T, *Judgement*, 12 December 2007.

Prosecutor v. Ante Gotovina et al., Case No. IT-06-90-T, *Amended Joinder Indictment*, 12 March 2008.

Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-T, *Judgement*, 3 April 2008.

Prosecutor v. Vlastimir Đorđević, Case No. IT-05-87/1-PT, *Forth Amended Indictment*, 2 June 2008.

Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-T, *Second Amended Indictment*, 11 June 2008.

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-T, *Judgement*, 10 July 2008.

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, *Judgement*, 17 July 2008.

Prosecutor v. Milan Martić, Case No. IT-95-11-A, *Judgement*, 8 October 2008.

Prosecutor v. Milan Milutinović et al., Case No. IT-05-87-T, 1 *Judgement*, 26 February 2009.

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, *Third Amended Indictment*, 27 February 2009.

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, *Judgement*, 17 March 2009.

Prosecutor v. Mićo Stanišić and Stojan Župljanin, Case No. IT-08-91-PT, *Second Amended Consolidated Indictment*, 10 September 2009.

Prosecutor v. Zdravko Tolimir, Case No. IT-05-88/2-PT, *Third Amended Indictment*, 4 November 2009.

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, *Judgement*, 12 November 2009.

Prosecutor v. Vujadin Popović et al., Case No. IT-05-88-T, *Judgement*, 10 June 2010.

Prosecutor v. Vlastimir Đorđević, Case No. IT-05-87/1-T, *Judgement*, 23 February 2011.

Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač, Case No. IT-06-90-T *Judgement*, 15 April 2011.

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-T, *Judgement*, 6 September 2011.

Prosecutor v. Zdravko Tolimir, Case No. IT-05-88/2-T, *Judgement*, 12 December 2012.

Prosecutor v. Mićo Stanišić and Stojan Župljanin, Case No. IT-08-91-T, 1 *Judgement*, 27 March 2013.

Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-T, 1 *Judgement*, 29 May 2013.

Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-T, 3 *Judgement*, 29 May 2013.

Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-T, 6 *Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti*, 29 May 2013.

Prosecutor v. Jovica Stanišić and Franko Simatović, Case No. IT-03-69-T, 1 *Judgement*, 30 May 2013.

Prosecutor v. Nikola Šainović et al., Case No. IT-05-87-A, *Judgement*, 23 January 2014.

Prosecutor v. Vlastimir Đorđević, Case No. IT-05-87/1-A, *Judgement*, 27 January 2014.

Prosecutor v. Vujadin Popović et al., Case No. IT-05-99-A, *Judgement*, 30 January 2015.

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, *Judgement*, 24 March 2016.

Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-T, *Judgement*, 31 March 2016.

International Criminal Tribunal for Rwanda Cases

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, *Judgement*, 2 September 1998.

Prosecutor v. Mikaeli Muhimana, Case No. ICTR-95-1B-T, *Judgement*, 28 April 2005.

International Criminal Court Cases

Prosecutor v. Raska Lukwiya, Case No. ICC-02/04, *Warrant of Arrest for Raska Lukwiya*, 8 July 2005.

Prosecutor v. Okot Odhiambo, Case No. ICC-02/04, *Warrant of Arrest for Okot Odhiambo*, 8 July 2005.

Prosecutor v. Dominic Ongwen, Case No. ICC-02/04, *Warrant of Arrest for Dominic Ongwen*, 8 July 2005.

Prosecutor v. Vincent Otti, Case No. ICC-02/04, *Warrant of Arrest for Vincent Otti*, 8 July 2005.

Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05, *Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005*, 27 September 2005.

Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Ali-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07, *Warrant of Arrest for Ahmad Harun*, 27 April 2007.

Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Ali-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07, *Warrant of Arrest for Ali Kushayb*, 27 April 2007.

Prosecutor v. Joseph Kony et al., Case No. ICC-02/04-01/05, *Decision to Terminate the Proceedings Against Raska Lukwiya*, 11 July 2007.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, *Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute*, 26 June 2008.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-04-01/07, *Decision on the Confirmation of Charges*, 30 September 2008.

Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, 4 March 2009.

Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, *Amended Document Containing the Charges Filed on 30 March 2009*, 30 March 2009.

Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, *Decision Pursuant to Article 61(7)(a) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009.

Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Mamus, Case No. ICC-02/05-03/09, *Summons to Appear for Abdallah Banda Abakaer Nourain*, 27 August 2009.

Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09, *Summons to Appear for Saleh Mohammed Jerbo Jamus*, 27 August 2009.

Prosecutor v. Bahar Idriss Abu Garda, Case No ICC-02/05-02/09, *Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute*, 24 September 2009.

Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, *Decision on the Confirmation of Charges*, 8 February 2010.

Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09, *Corrigendum of the "Decision on the Confirmation of Charges"*, 7 March 2011.

Prosecutor v. Francis Kirimi Muthaura et al., Case No. ICC-01/09-02/11, *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 8 March 2011.

Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, *Document de notification des charges présenté par l'Accusation en application de l'article 61-3 du Statut de Rome*, 15 July 2011.

Prosecutor v. William Samoei Ruto et al., Case No. ICC-01/09-01/11, *Document Containing Charges*, 15 August 2011.

Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, *Decision on the Confirmation of Charges*, 16 December 2011.

Prosecutor v. Francis Kirimi Muthaura et al., Case No. ICC-01/09-02/11, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012.

Prosecutor v. William Samoei Ruto et al., Case No. ICC-01/09-01/11, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012.

Prosecutor v. Abdel Raheem Muhammad Huseein, Case No. ICC-02/05-01/12, *Warrant of Arrest for Abdel Raheem Muhammad Hussein*, 1 March 2012.

Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, *Judgement pursuant to Article 74 of the Statute*, 14 March 2012.

Prosecutor v. Sylvestre Mudacumura, Case No. ICC-01/04-01/12, *Decision on the Prosecutor's Application under Article 58*, 13 July 2012.

Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09, *Public Redacted Decision Terminating Proceedings Against Mr. Jerbo*, 4 October 2013.

Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, *Document Containing the Charges*, 10 January 2014.

Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, *Judgment Pursuant to Article 74 of the Statute*, 7 March 2014.

Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, *Decision Pursuant to Article 61(7)(a) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda*, 9 June 2014.

Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, *Decision on the Withdrawal of Charges Against Mr Kenyatta*, 13 March 2015.

Prosecutor v. Joseph Kony et al., Case No. ICC-02/04-01/05, *Decision Terminating Proceedings Against Okot Odhiambo*, 10 September 2015.

Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, *Judgment Pursuant to Article 74 of the Statute*, 21 March 2016.

Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/05, *Decision on the Confirmation of Charges against Dominic Ongwen*, 23 March 2016

Special Court for Sierra Leone Cases

Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), *Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, 31 May 2004.

Prosecutor v. Issa Hassan Sesay et al., Case No. SCSL-04-15-T, *Judgement*, 2 March 2009.

European Court of Human Rights Cases/European Human Rights Commission Decisions

Cyprus v. Turkey (App. No. 6780/74 & 6950/75), 26 May 1975.

Al-Adsani v. United Kingdom (App. No. 35763/97), 21 November 2001.

Bankovic et al. v. Belgium et al. (App. No. 2207/99), 12 December 2001.

Varnava et al. v. Turkey (App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16071/90, 16072/90, 16073/90), 18 September 2009.

Al-Saadon and Mufdhi v. United Kingdom (App. No. 61498/08), 2 March 2010.

Al-Jedda v. United Kingdom (App. No. 27021/08), 7 July 2011.

Georgia v. Russia (App. No. 38263/08), 13 December 2011.

Nada v. Switzerland (App. No. 10593/08), 12 September 2012.

Hassan v. United Kingdom (App. No. 29750/09), 16 September 2014.

Post-World War II Cases

Gunther Thiele and Georg Steinert, 13 June 1945.

Heinz Eck et al., 20 October 1945.

Robert Wagner et al., 24 July 1946.

United States of America et al. v. Hermann Wilhelm Göring et al., 30 September-1 October 1946.

Erhard Milch, 17 April 1947.

Otto Skorzeny et al., 9 September 1947.

Motosuke, 28 January 1948.

United States of America v. Wilhelm List et al., 19 February 1948.

United States of America v. Alfred Felix Alwyn Krupp von Bohlen und Halbach et al., 31 July 1948.

United States of America v. Wilhelm von Leeb et al., 27 October 1948.

United States of America v. Ludwig Klüttgen, 29 October 1948.

In re Burghoff, 3 January 1949.

In re Rauter, 12 January 1949.

In re Esau, 27 April 1948; 21 February 1949.

In re Wintgen, 11 February 1949; 6 July 1949.

In re von Lewinski (called von Manstein), 19 December 1949.

Pilz, 5 July 1950.

International Arbitration Cases

William Hardman (United Kingdom) v. United States, Great Britain-United States Arbitral Tribunal, 18 June 1913.

Beni-Madan Rzini Case (Great Britain v. Spain), Spanish Zone of Morocco Claims Commission, 29 December 1924.

Affaire des bien britannique au Maroc espagnol (Spain v. United Kingdom), Max Huber, 1 May 1925.

Coleman v. Mexico (*Bond Coleman (U.S.A.) v. United Mexican States)*, United States and Mexico General Claims Commission, 3 October 1928.

Ethiopia v. Eritrea, *Partial Award Central Front – Eritrea's Claims 2, 4, 6, 7, 8, & 22*, Eritrea-Ethiopia Claims Commission, 28 April 2004.

Ethiopia v. Eritrea, *Final Award on Ethiopia's Damages Claims*, Eritrea-Ethiopia Claims Commission, 17 August 2009.

National Cases

Llandovery Castle, Imperial Court of Justice, Germany, 16 July 1921.

Shimoda v. State, Case No. 2,914 (wa) of 1955 and Case No. 4,177 (wa) of 1957, Tokyo District Court, Japan, 7 December 1963.

Public Prosecutor v. Oie Hee Koi and the connected appeals, Judicial Committee of the Privy Council, United Kingdom, 4 December 1967.

Ayub et al. v. Minister of Defence, HCJ 606/78, High Court of Justice, Israel, 15 March 1979.

Izat Muhamed Mustafa Dweikat et al. v. The Government of Israel et al., HCJ 390/79, High Court of Justice, Israel, 22 October 1979.

The Hebron Municipality et al. v. Major General Moshe Kaplinsky et al., HCJ 10497/20, High Court of Justice, Israel, 4 March 2004.

Yoav Hess et al. v. The Commander of IDF Forces in the West Bank et al., HCJ 10356/20, High Court of Justice, Israel, 4 March 2004.

Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces in the West Bank, HCJ 2056/04, High Court of Justice, Israel, 30 June 2004.

Adalah et al. v. GOC Central Command, IDF, et al., HCJ 3799/02, High Court of Justice, Israel, 23 June 2005.

Zaharan Yunis Muhammad Mara'abe et al. v. The Prime Minister of Israel et al., HCJ 7957/04, High Court of Justice, Israel, 15 September 2005.

Public Committee against Torture in Israel et al. v. The Government of Israel et al., HCJ 769/02, High Court of Justice, Israel, 11 December 2005.

R v. Secretary of State for Defence, House of Lords Appellate Committee, United Kingdom, 12 December 2007.

R v. Secretary of State for Defence, Supreme Court of the United Kingdom, 30 June 2010.

Books and Articles

Cheryl Abbate, "Assuming Risk: A Critical Analysis of a Soldier's Duty to Prevent Collateral Casualties", 13 *Journal of Military Ethics* 70 (2014).

Georges Abi-Saab, "Non-International Armed Conflicts", in Henri Dunant Institute and UNESCO (ed.), *International Dimensions of Humanitarian Law* (1988) 217.

Georges Abi-Saab, "The Specifics of Humanitarian Law", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 267.

Georges Abi-Saab and Luigi Condorelli, "Réponses à la question 1, b)", 33 *Revue belge de droit international* 406 (2000).

Gerald J. Adler, "Targets in War: Legal Considerations", 8 *Houston Law Review* 1 (1970-1971).

Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012) 32.

Dapo Akande, "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities", 59 *International and Comparative Law Quarterly* 180 (2010).

Payam Akhavan, "Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence", 6 *Journal of International Criminal Justice* 6 (2008).

Payam Akhavan, "The Dilemmas of Jurisprudence: The Contribution of the Ad Hoc Tribunals to International Humanitarian Law", 13 *American University International Law Review* 1518 (1998).

Charles A. Allen, "Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law", 19 *Georgia Journal of International and Comparative Law* 1 (1989).

Stephen E. Ambrose, *D-Day, June 6, 1944: The Climactic Battle of World War II* (1994).

Amnesty International, *NATO/Federal Republic of Yugoslavia "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force* (2000).

Joshua Andresen, "New Voices: Challenging the Perplexity over *Jus in Bello* Proportionality", 7 *European Journal of Legal Studies* 19 (2014).

Elizabeth Anscombe, "War and Murder", in Malham M. Wakin (ed.), *War, Morality, and the Military Profession* (1979) 285.

John Antal, *City Fights: Selected Histories of Urban Combat from World War II to Vietnam* (2003).

Thomas Aquinas, *Summa Theologiæ* (1485).

Yutaka Arai-Takahashi, "A Battle Over Elasticity – Interpreting the Concept of 'Concrete and Direct Military Advantage Anticipated' under International Humanitarian Law", in Yves Haeck et al. (eds.), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (2014) 351.

Yutaka Arai-Takahashi, "Excessive Collateral Civilian Casualties and Military Necessity: Awkward Crossroads in International Humanitarian Law between State Responsibility and Individual Criminal Liability", in Freya Baetens and Christine Chinkin (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (2015) 325.

Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (2009).

Jean d'Aspremont and Elodie Tranchez, "The Quest for a Non-Conflictual Coexistence Between International Human Rights Law and International Humanitarian Law: Which Role for the *Lex Specialis* Principle?", in Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (2013) 234.

Manuel Atienza, "Reasoning and Legislation", in Luc J. Wintgens et al. (eds.), *The Theory and Practice of Legislation: Essays in Legisprudence* (2005) 297.

Ted van Baarda, "The Ethical Challenges of a Complex Security Environment", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 148.

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).

Freya Baetens and Christine Chinkin (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (2015).

Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2011).

Mary Kathryn Barbier, *D-Day Deception: Operation Fortitude and the Normandy Invasion* (2007).

Rogier Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials", 46 *Israel Law Review* 271 (2013).

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.

Rogier Bartels, "Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts", 91 *International Review of the Red Cross* 35 (2009).

Pnina Shavrit Baruch, "The Obligation to Give Effective Warnings: Lessons Learned from Recent Conflicts", in Edoardo Greppi (ed.), *Conduct of Hostilities: The Practice, the Law and the Future* (2015) 115.

M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 2d rev. ed. (1999).

M. Cherif Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (1999).

R.R. Baxter, "Asylum to Prisoners of War", 30 *British Yearbook of International Law* 489 (1953).

Alfred M. Beck et al., *The Technical Services: The Corps of Engineers: The War Against Germany* (1985).

David J. Bederman, *Custom as a Source of Law* (2010).

Yishai Beer, "Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity", 26 *European Journal of International Law* 801 (2015).

Antony Beevor, *Berlin: The Downfall 1945* (2002).

Antony Beevor, *D-Day: The Battle for Normandy* (2009).

Antony Beevor, *Stalingrad* (1998).

Yitzhak Benbaji and Naomi Sussmann (eds.), *Reading Walzer* (2014).

Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011).

Orna Ben-Naftali, "Introduction: International Humanitarian Law and International Human Rights Law – *Pas de Deux*", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 3.

Eyal Benvenisti, "Human Dignity in Combat: The Duty to Spare Enemy Civilians", 39 *Israel Law Review* 81 (2006).

Rudolf Bernhardt, "Article 103", in Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary* 2d ed. (2002) 1292.

Jochen von Bernstorff, "Martens Clause", *Max Planck Encyclopedia of Public International Law* 2d ed. (2009).

Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1980).

Geoffrey Best, "Restraints on War by Land Before 1945", in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979) 17.

Geoffrey Best, "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.

Geoffrey Best, *War and Law Since 1945* (1994).

Brian J. Bill, "The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare", 12 *Yearbook of International Humanitarian Law* 119 (2009).

Veronika Bílková, "Belligerent Reprisals in Non-International Armed Conflicts", 63 *International and Comparative Law Quarterly* 31 (2014).

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).

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).

Laurie R. Blank and Gregory P. Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War* (2013).

Hans Blix, "Means and Methods of Combat", in Henri Dunant Institute and UNESCO (eds.), *International Dimensions of Humanitarian Law* (1988) 135.

Gabriella Blum, "The Laws of War and the 'Lesser Evil'", 35 *Yale Journal of International Law* 1 (2010).

Martin Blumenson, *Kasserine Pass: Rommel's Bloody, Climactic Battle for Tunisia* (1966).

Martin Blumenson, *The European Theater of Operations: Breakout and Pursuit* (2005).

Martin Blumenson, *The Mediterranean Theater of Operations: Salerno to Cassino* (1969).

Daniel Bodansky, "*Non Liquet* and the Incompleteness of International Law", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 153.

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).

Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999).

William H. Boothby, *The Law of Targeting* (2012).

William H. Boothby, *Weapons and the Law of Armed Conflict* (2009).

Colonel Frederic L. Borch, "Targeting After Kosovo: Has the Law Changed for Strike Runners?", 56 *Naval War College Review* 64 (2003).

Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary* (1908).

Christopher J. Borgen, "Resolving Treaty Conflicts", 37 *The George Washington International Law Review* 573 (2005).

Michael Bothe, "Nuclear Weapons Advisory Opinions", *Max Planck Encyclopedia of Public International Law* 2d ed. (2011).

Michael Bothe, "The Law of Neutrality", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 549.

Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2d rev. ed. (2013).

Théo Boutruche, *L'Interdiction des Maux Superflus: Contribution á l'Études des Principes et Règles Relatifs aux Moyens et Méthodes des Guerre en Droit International Humanitaire* (2008).

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

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

Gary D. Brown, "Prisoner of War Parole: Ancient Concept, Modern Utility", 156 *Military Law Review* 200 (1998).

Richard Burchill et al. (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (2005).

John Burroughs, *The Illegality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (1998).

Geoffrey Butler and Simon MacCoby, *The Development of International Law* (1928).

Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundation of International Law* (2003).

Christine Byron, "International Humanitarian Law and Bombing Campaigns: Legitimate Military Objective and Excessive Collateral Damage", 13 *Yearbook of International Humanitarian Law* 175 (2010).

Christine Byron, "Von Lewinski", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* 966 (2009).

John Cameron, *Trial of Heinz Eck, August Hoffmann, Walter Weisspfennig, Hans Richard Lenz and Wolfgang Schwender (The Peleus Trial)* (1948).

Emily Camins, "The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity", 90 *International Review of the Red Cross* 853 (2008).

Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium (2010).

Enzo Cannizzaro, "Proportionality in the Law of Armed Conflict", in Andrew Clapham and Paola Gate (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 332.

Burrus M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity", 92 *American Journal of International Law* 213 (1998).

Carnegie Endowment for International Peace, *The Proceedings of the Hague Peace Conferences Translation of the Official Texts: The Conference of 1899* (1920).

Carnegie Endowment for International Peace, 3 *The Proceedings of the Hague Peace Conferences Translation of the Official Texts: The Conference of 1907* (1921).

David James Cantor and Jean-François Durieux (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014).

Jimmy Carter, "Nobel Lecture", 10 December 2002.

Antonio Cassese, "A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*", 10 *European Journal of International Law* 791 (1999) 791.

Antonio Cassese, "Justifications and Excuses in International Criminal Law", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 1 *The Rome Statute of the International Criminal Law: A Commentary* (2002) 951.

Antonio Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", 11 *European Journal of International Law* 187 (2000).

Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009).

Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", 10 *European Journal of International Law* 144 (1999).

Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* 3d ed. (2013).

Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), 1 *The Rome Statute of the International Criminal Law: A Commentary* (2002).

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.

Jan P. Charmatz and Harold M. Wit, "Repatriation of Prisoners of War and the 1949 Geneva Convention", 62 *Yale Law Journal* 391 (1953).

Vincent Chetail, "Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, and International Human Rights Law", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 700.

Winston S. Churchill, 5 *The Second World War: Closing the Ring* (1951).

Winston S. Churchill, 6 *The Second World War: Triumph and Tragedy* (1953).

Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014).

Ben Clarke, "Contemporary Legal Doctrine on Proportionality in Armed Conflicts: A Select Review", 3 *Journal of International Humanitarian Legal Studies* 391 (2012).

Ben Clarke, "Proportionality in Armed Conflicts: A Principle in Need of Clarification?", 3 *Journal of International Humanitarian Legal Studies* 73 (2012).

Carl von Clausewitz, *On War* (1832; Michael Howard and Peter Paret eds. and trans., 1976).

Anthony Coates, "Is the Independent Application of *Jus in Bello* the Way To Limit War?", in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 176.

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.

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

Hugh M. Cole, *United States Army in World War II – The European Theater of Operations – The Ardennes: Battle of the Bulge* (1965).

Stephen Coleman, "Discrimination and Non-Lethal Weapons: Issues for the Future Military", in David W. Lovell and Igor Primoratz (eds.), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (2012) 215.

Richard Collier, *The War in the Desert* (1977).

Luigi Condorelli, "Le droit international humanitaire, ou l'exploration par la cour d'une terra à peu près incognita pour elle", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 229.

Luigi Condorelli, "Nuclear Weapons: A Weighty Matter for the International Court of Justice – *Jura Non Novit Curia*?", 316 *International Review of the Red Cross* 9 (1997).

Geoffrey S. Corn, "Principle of Humanity", *Max Planck Encyclopedia of Public International Law* (2012).

Geoffrey S. Corn, Laurie R. Blank, Chris Jenks and Eric Talbot Jensen, "Belligerent Targeting and the Invalidity of a Least Harmful Means Rule", 89 *International Law Studies* 536 (2013).

Geoffrey S. Corn and Lieutenant Colonel Gary P. Corn, "The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens", 47 *Texas International Law Journal* 337 (2012).

Geoffrey S. Corn et al., *The Law of Armed Conflict: An Operational Approach* (2012).

Paul Cornish, "Clausewitz and the Ethics of Armed Force", 2 *Journal of Military Ethics* 213 (2003).

Michael Cottier, "(vi)", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2d ed. (2008) 344.

Robin Coupland, "Humanity: What Is It and How Does It Influence International Law?", 83 *International Review of the Red Cross* 969 (2001).

Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (2015).

Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (2010).

James Crawford et al. (eds.), *The Law of International Responsibility* (2010).

Martin van Creveld, *The Changing Face of War: Lessons of Combat, from the Marne to Iraq* (2006).

Martin van Creveld, *The Transformation of War* (1991).

Robert Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", 11 *Journal of Conflict & Security Law* 239 (2006).

Robert Cryer et al. (eds.), *An Introduction to International Law and Procedure* 2d. ed. (2010).

Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010).

Allison Marston Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War", 59 *Vanderbilt Law Review* 1 (2006).

Shane Darcy, "Bridging the Gaps in the Laws 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.

Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (2014).

Shane Darcy, "The Evolution of the Law of Belligerent Reprisals", 175 *Military Law Review* 184 (2003).

Eric David, *Le Droit de conflits armés* 3d ed. (2002).

Eric David, "Self-Defence and State of Necessity in the Statute of the ICC", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 757.

Donald Davidson, *Essays on Actions and Events* (1980).

Paul K. Davis, *Aggregation, Disaggregation, and the 3:1 Rule in Ground Combat* (1995).

John C. Dehn, "Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction", 6 *Journal of International Criminal Justice* 627 (2008).

Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict; Challenges Ahead, Essays in Honour of Frits Kalshoven* (1991).

Catherine Denis and Miguel Romero, "Synthèse des débas de l'atelier du 12 juillet 2000", 33 *Revue belge de droit international* 463 (2000).

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).

David A. Deptula, *Effects-Based Operations: Change in the Nature of Warfare* (2001).

Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (1012).

Ingrid Detter de Lupis, *The Law of War* (1987).

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

Yoram Dinstein, "Military Necessity", 3 *Max Planck Encyclopedia of Public International Law* 274 (1982).

Yoram Dinstein, "Military Necessity", *Max Planck Encyclopedia of Public International Law* 2d ed. (2009).

Yoram Dinstein, "Siege Warfare and the Starvation of Civilians", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven* (1991) 145.

Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2004).

Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 2d ed. (2010).

Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 3d ed. (2016).

Yoram Dinstein, *The International Law of Belligerent Occupation* (2009).

Yoram Dinstein, "The Principle of Proportionality", in Kjetil Mujezinović Larsen, Camilla Guldhal Cooper and Gro Nystuen (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (2013) 72.

Yoram Dinstein, "The Right to Humanitarian Assistance", 53 *Naval War College Review* 77 (2000).

Yoram Dinstein, *War, Aggression and Self-Defence* 5th ed. (2011).

Giovanni Distefano, "Use of Force", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 545.

Norman Dixon, *On the Psychology of Military Incompetence* (1976).

José Doria, "Whether Crimes Against Humanity are Backdoor War Crimes", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 645.

José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009).

Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003).

Louise Doswald-Beck, "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of Threat or Use of Nuclear Weapons", 316 *International Review of the Red Cross* 35 (1997).

Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995).

Louise Doswald-Beck, "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?", 88 *International Review of the Red Cross* 881 (2006).

Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law", 293 *International Review of the Red Cross* 94 (1993).

William Gerald Downey, Jr., "The Law of War and Military Necessity", 47 *American Journal of International Law* 251 (1953).

G.I.A.D. Draper, "Military Necessity and Humanitarian Imperatives", 12 *Military Law and Law of War Review* 129 (1973).

Cordula Droege, "The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", 40 *Israel Law Review* 310 (2007).

Helen Duffy, *The 'War on Terror' and the Framework of International Law* 2d ed. (2015).

N.C.H. Dunbar, "Military Necessity in War Crimes Trials", 29 *British Yearbook of International Law* 442 (1952).

N.C.H. Dunbar, "The Significance of Military Necessity in the Law of War", 67 *Juridical Review* 201 (1955).

Lieutenant Colonel James C. Duncan, "A Primer on the Employment of Non-Lethal Weapons", 45 *Naval Law Review* 1 (1998).

Pierre-Marie Dupuy, "The International Law of State Responsibility: Revolution or Evolution?", 11 *Michigan Journal of International Law* 105 (1989).

María Teresa Dutli, *Protection of Cultural Property in the Event of Armed Conflict: Report on the Meeting of Experts (Geneva, 5-6 October 2000)* (2002).

Sergei A. Egorov, "International Legal Protections for Persons *Hors de Combat*", in José Doria, Hans-Peter Gassser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 561.

David A. Elder, "The Historical Background of Common Article 3 of the Geneva Conventions of 1949", 11 *Case Western Reserve Journal of International Law* 37 (1979).

Albin Eser, "Article 31", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2d ed. (2008) 863.

Carolyn Evans, "The Double-Edged Sword: Religious Influences on International Humanitarian Law", 6 *Melbourne Journal of International Law* 1 (2005) 1.

Hélène Ruiz Fabri et al. (eds.), 2 *Select Proceedings of the European Society of International Law* (2010).

Ernst H. Feilchenfeld, *Prisoners of War* (1948).

William Fenrick, "Specific Methods of Warfare", in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 238.

William J. Fenrick, "Attacking the Enemy Civilian as a Punishable Offense", 7 *Duke Journal of Comparative and International Law* 539 (1997).

William J. Fenrick, "Reflections on the Canadian Experience with Law of Armed Conflict Manuals", in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* 2d ed. (2010) 97.

W.J. Fenrick, "Targeting and Proportionality During the NATO Bombing Campaign against Yugoslavia", 12 *European Journal of International Law* 489 (2001).

Lieutenant Colonel William J. Fenrick, "The Rule of Proportionality and Protocol I in Conventional Warfare", 98 *Military Law Review* (1982) 91.

John Finnis, *Natural Law and Natural Rights* (1980).

John Finnis, "Some Professional Fallacies About Rights", 4 *Adelaide Law Review* 377 (1971).

Horst Fischer, "Protection of Prisoners of War", in Dieter Fleck (ed.), *The Handbook of International Humanitarian law* 2d ed. (2008) 367.

Ernst F. Fisher, Jr., *The Mediterranean Theater of Operations: Cassino to the Alps* (1977).

Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 2d ed. (2008).

Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013).

Dieter Fleck, "The Law of Non-International Armed Conflict", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 581.

George P. Fletcher, *Basic Concepts of Criminal Law* (1998).

Carlo Focarelli, "Common Article 1 of the Geneva Conventions: A Soap Bubble?", 21 *European Journal of International Law* 125 (2010).

Christopher A. Ford and Amichai Cohen (eds.), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (2012).

Gregory H. Fox, *Humanitarian Occupation* (2008).

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

Lon L. Fuller, *The Morality of Law* (1964).

Lon L. Fuller, *The Morality of Law*, rev. ed. (1969).

Paola Gaeta (ed.), *The Genocide Convention – A Commentary* (2009).

Gloria Gaggioli, "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law", 94 *International Review of the Red Cross* 503 (2014).

Richard Gallagher, *Malmédy Massacre* (1964).

David Galula, *Counterinsurgency Warfare: Theory and Practice* (1964).

Judith Gail Gardam, "Proportionality and Force in International Law", 87 *American Journal of International Law* 391 (1993).

Judith Gardam, "Crimes Involving Disproportionate Means and Methods of Warfare under the Statute of the International Criminal Court", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 537.

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.

Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (2004).

Judith Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (1993).

James Wilford Garner, 1 *International Law and the World War* (1920).

James Wilford Garner, 2 *International Law and the World War* (1920).

Charles Garraway, "Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces", in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* 2d ed. (2010) 45.

Hans-Peter Gasser and Knut Dörmann, "Protection of the Civilian Population", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 489.

Philippe Gautier, "General Participation Clause (Clausula si omnes)", *Max Planck Encyclopedia of Public International Law* 2d ed. (2006).

Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (2005).

Robert W. Gehring, "Loss of Civilian Protection Under the Fourth Geneva Convention and Protocol I", 90 *Military Law Review* 49 (1980).

Robin Geiß, "Military Necessity: A Fundamental 'Principle' Fallen into Oblivion", in Hélène Ruiz Fabri et al. (eds.), 2 *Select Proceedings of the European Society of International Law* (2010) 554.

Bradley Gershel, "Applying Double Effect in Armed Conflicts: A Crisis of Legitimacy", 27 *Emory International Law Review* 741 (2013).

Rotem M. Giladi, "Reflections on Proportionality, Military Necessity and the Clausewitzian War", 45 *Israel Law Review* 323 (2012).

Terry Gill, "Chivalry: A Principle of the Law of Armed Conflict?", in Mariëlle Matthee, Brigit Toebes and Marcel Bruns (eds.), *Armed Conflict and International Law: In Search of the Human Face:* Liber Amicorum *in Memory of Avril McDonald* (2013) 33.

Terry D. Gill, "International Humanitarian Law Applied to Cyber-Warfare: Precautions, Proportionality and the Notion of 'Attack' under the Humanitarian Law of Armed Conflict", in Nicholas Tsagourias and Russel Buchan (eds.), *Research Handbook on International Law and Cyberspace* (2015) 366.

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.

Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010).

Andrea Gioia, "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 201.

Josef Goldblat, "The Biological Weapons Convention: An Overview", 79 *International Review of the Red Cross* 251 (1997).

Ryan Goodman, "The Power to Kill or Capture Enemy Combatants", 24 *European Journal of International Law* 819 (2013).

Ryan Goodman, "The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt", 24 *European Journal of International Law* 863 (2013).

Michael R. Gordon, "The Struggle for Iraq: Reconstruction; 101st Airborne Secures Success in Northern Iraq", *The New York Times*, 4 September 2003.

Vera Gowland-Debbas, "The Right to Life and the Relationship Between Human Rights and Humanitarian Law", in Christian Tomuschat (ed.), *The Right to Life* (2010) 123.

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.

David E. Graham, "The Dual U.S. Standard for the Treatment and Interrogation of Detainees: Unlawful and Unworkable", 48 *Washburn Law Journal* 325 (2008-2009).

Roberts Graves, *Good-Bye to All That* (1929).

Leslie C. Green, *The Contemporary Law of Armed Conflict* 3d ed. (2008).

Leslie C. Green, "What One May Do in Combat – Then and Now", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven* (1991) 269.

Morris Greenspan, *The Modern Law of Land Warfare* (1959).

Christopher Greenwood, "Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia", in Christopher Greenwood, *Essays on War in International Law* (2006) 331.

Christopher Greenwood, *Essays on War in International Law* (2006).

Christopher Greenwood, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 2d ed. (2008) 1.

Christopher Greenwood, "International Humanitarian Law and the *Tadić* Case", in Christopher Greenwood, *Essays on War in International Law* (2006) 457.

Christopher Greenwood, "*Jus Ad Bellum* and *Jus In Bello* in the Nuclear Weapons Advisory Opinion", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 247.

Christopher Greenwood, "Reprisals and Reciprocity in the New Law of Armed Conflict", in Michael A. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (1989) 227.

Christopher Greenwood, "Scope of Application of Humanitarian Law", in Dieter Fleck (ed.), *The Handbook of International Humanitarian law* 2d ed. (2008) 45.

Christopher Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia", 2 *Max Planck Yearbook of United Nations Law* 97 (1998).

Christopher Greenwood, "The Law of Weaponry at the Start of the New Millennium", in Christopher Greenwood, *Essays on War in International Law* (2006) 223.

Edoardo Greppi (ed.), *Conduct of Hostilities: The Practice, the Law and the Future* (2015).

Hugo Grotius, 2 *De Jure Belli Ac Pacis Libri Tres* (1646; James Brown Scott ed., Francis W. Kelsey trans., 1925).

Che Guevara, *Guerrilla Warfare* (1961; J.P. Morray trans., 1985).

Roy Gutman et al. (eds.), *Crimes of War 2.0: What the Public Should Know* rev. ed. (2007).

J.A.C. Gutteridge, "The Repatriation of Prisoners of War", 2 *International and Comparative Law Quarterly* 207 (1953).

Yves Haeck et al. (eds.), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (2014).

Francoise Hampson, "Human Rights and Humnitarian 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.

Françoise Hampson, "Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949", 37 *International and Comparative Law Quarterly* 818 (1988).

Françoise Hampson, "Human Rights Law and International Law: Two Coins or Two Sides of the Same Coin?", 91 *Bulletin of Human Rights* 46 (1992).

Françoise J. Hampson, "Means and Methods of Warfare in the Conflict in the Gulf", in Peter Rowe (ed.), *The Gulf War 1990-91 in International and English Law* (1993) 89.

Francoise Hampson, "Relevance for the Prosecution of Violations of International Humanitarian Law", in Larry Maybee and Benarji Chakka (eds.), *Custom as a Source of International Humanitarian Law* (2007) 103.

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).

Françoise Hampson, "The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict", in David James Cantor and Jean-François Durieux (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014) 373.

Timothy Hall, *The Fall of Singapore* (1983).

H.L.A. Hart, "Book Review", 78 *Harvard Law Review* 1281 (1965).

H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983).

H.L.A. Hart, "Kelsen's Doctrine of the Unity of Law", in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) 309.

H.L.A. Hart, "Lon L. Fuller: The Morality of Law", in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) 343.

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

H.L.A. Hart, *The Concept of Law* (1961).

H.L.A. Hart, *The Concept of Law* 2d ed. (1997).

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

Harvard Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2010).

Hans Boddens Hassang, "Article 8(2)(b)(xiii) – Destroying or Seizing the Enemy's Property", in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 171.

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).

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.

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

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

Nobuo Hayashi, "Continuous Attack Liability Without Right or Fact of Direct Participation in Hostilities – The ICRC *Interpretive Guidance* and Perils of a Pseudo-Status", in Joanna Nowakowska-Małusecka (ed.), *International Humanitarian Law: Antecedences and Challenges of the Present Time* (2010) 56.

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).

Nobuo Hayashi, "Introduction", in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* 2d ed. (2010) 17.

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, "Military Necessity as Normative Indifference", 44 *Georgetown Journal of International Law* 675 (2013).

Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* 2d ed. (2010).

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 2016).

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

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

Nobuo Hayashi, "Using Force by Means of Nuclear Weapons and Requirements of Necessity and Proportionality *Ad Bellum*", in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds.), *Nuclear Weapons Under International Law* (2014) 15.

Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (forthcoming 2016).

Eve La Haye, "Displacing Civilians", in Roy S. Lee (ed.), *The International Criminal Court* (2001) 215.

Sarah Heathcote, "Circumstances Precluding the Wrongfulness in the ILC Articles on State Responsibility: Necessity", in James Crawford et al. (eds.), *The Law of International Responsibility* (2010) 491.

Wolff Heintschel von Heinegg, "Blockade", *Max Planck Encyclopaedia of Public International Law* (2009).

Wolff Heintschel von Heinegg, "Maritime Warfare", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 145.

Wolff Heintschel von Heinegg, "Naval Blockade", in Michael N. Schmitt (ed.), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday* (2000) 203.

Wolff Heintschel von Heinegg, "The German Manual", in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* 2d ed. (2010) 109.

Wolff Heintschel von Heinegg, "The Law of Armed Conflict at Sea", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 463.

Wolff Heintschel von Heinegg and Volker Epping (eds.), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen* (2007).

Virginia Held, Sidney Morgenbesser and Thomas Nagel (eds.), *Philosophy, Morality, and International Affairs: Essays Edited for the Society for Philosophy and Public Affairs* (1974).

Jean-Marie Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", in María Teresa Dutli, *Protection of Cultural Property in the Event of Armed Conflict: Report on the Meeting of Experts (Geneva, 5-6 October 2000)* (2002) 27.

Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian Law* (2005).

Jean-Marie Henckaerts and Louise Doswald-Beck, 2 *Customary International Humanitarian Law* Pt. I (2005).

Henri Dunant Institute and UNESCO (eds.), *International Dimensions of Humanitarian Law* (1988).

Howard M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (2008).

Roger Hesketh, *Fortitude: The D-Day Deception Campaign* (2000).

Lawrence Hill-Cawthorne, "The Role of Necessity in International Humanitarian and Human Rights Law", 47 *Israel Law Review* 225 (2014).

Ian V. Hogg, *Barrage: The Guns in Action* (1970).

Wesley Newcomb Hohfeld, "Fundamental Legal Concepts as Applied in Judicial Reasoning", 26 *Yale Law Journal* 710 (1919).

Thomas Erskine Holland, *Letters to "The Times" upon War and Neutrality (1881-1920)* 3d ed. (1921).

Thomas Erskine Holland, *The Laws of War on Land (Written and Unwritten)* (1908).

Tony Honoré, "The Basic Norm of a Society", in in Stanley L. Paulson and Bonnie Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998) 89.

Townsend Hoopes, "Comments", in Peter D. Trooboff (ed.), *Law and Responsibility in Warfare: The Vietnam Experience* (1975) 142.

Scott Horton, "*Kriegsraison* or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War", 30 *Fordham International Law Journal* 576 (2006).

Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979).

Michael Howard, "*Temperamenta Belli*: Can War Be Controlled?", in Michael Howard (ed.), *Restraints on War: Studies in the Limitation of Armed Conflict* (1979) 1.

Michael Howard et al. (eds.), *The Laws of War: Constraints on Warfare in the Western World* (1994).

William Bradford Huie, *The Execution of Private Slovik* (1954).

Walter B. Huffman, "Margin of Error: Potential Pitfalls of the Ruling in *The Prosecutor v. Ante Gotovina*", 211 *Military Law Review* 1 (2012).

Isabel V. Hull, "'Military Necessity' and the Laws of War in Imperial Germany", in Stathis N. Kalyvas et al. (eds.), *Order, Conflict, and Violence* (2008) 352.

Human Rights Watch, *Civilian Death in the NATO Air Campaign* (2000).

Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (2003).

Charles Cheney Hyde, 3 *International Law Chiefly as Interpreted and Applied by the United States* 2d rev. ed. (1945).

Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the ICJ *Wall* Advisory Opinion", 99 *American Journal of International Law* 102 (2005).

International Committee of the Red Cross, Annual Report (1991).

International Committee of the Red Cross, "Colombia: ICRC Deplores Improper Use of Red Cross Emblem", News Release 08/139, 6 August 2008.

International Committee of the Red Cross, "Colombia: ICRC Underlines Importance of Respect for Red Cross Emblem", News Release 08/129, 16 July 2008.

International Committee of the Red Cross, ICRC Bulletin, no.184 (May 1991).

International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009).

International Committee of the Red Cross, "Israel/Occupied and Autonomous Palestinian Territories: West Bank Barrier Causes Serious Humanitarian and Legal Problems", Press Release, 18 February 2004.

International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14-26, 1947)* (1947).

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).

International Humanitarian Law Research Initiative, *The Separation Barrier and International Humanitarian Law: Policy Brief* (2004).

International Law Association, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000).

Richard B. Jackson, "Perfidy in Non-International Armed Conflicts", 88 *International Law Studies* 237 (2012).

Robert H. Jackson, *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials* (1949).

Stephane Jaquemet, "The Cross-Fertilization of International Humanitarian Law and International Refugee Law", 83 *International Review of the Red Cross* 651 (2001).

Florian Jessberger, "The Definition and the Elements of the Crime of Genocide", in Paola Gaeta (ed.), *The Genocide Convention – A Commentary* (2009) 87.

Derek Jinks, "The Applicability of the Geneva Conventions to the 'Global War on Terrorism'", 46 *Virginia Journal of International Law* 165 (2005-2006).

Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War", 35 *Harvard International Law Journal* 49 (1994).

Sylvie-S. Junod, "Article 2 – Personal Field of Application", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1357.

Sylvie-S. Junod, "Article 17 – Prohibition of Forced Movement of Civilians", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1471.

Walter Kälin et al., "Article 33, para. 1", in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 1327.

Frits Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 133.

Frits Kalshoven, "Arms, Armaments and International Law", 191 *Receuil des Cours* (1985) 183.

Frits Kalshoven, *Belligerent Reprisals* (1971).

Frits Kalshoven, "Belligerent Reprisals Revisited", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 759.

Frits Kalshoven, "Bombardment: From 'Brussels 1874' to 'Sarajevo 2003'", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 431.

Frits Kalshoven, "Conventional Weaponry: The Law from St. Petersburg to Lucerne and Beyond", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 377.

Frits Kalshoven, "Development of Customary Law of Armed Conflict", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 321.

Frits Kalshoven, "From International Humanitarian Law to International Criminal Law", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 947.

Frits Kalshoven, "Grotius' *Jus In Bello*, with Special Reference to Ruses of War and Perfidy", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 327.

Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007).

Frits Kalshoven, "Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal", in Lal Chand Vohrah et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003) 481.

Frits Kalshoven, "The Soldier and His Golf Clubs", in Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (2007) 359.

Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* 2d ed. (2001).

Stefan Kandelbah, "Nuclear Weapons and Warfare', *Max Planck Encyclopedia of Public International Law* 2d ed. (2009).

Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective", 4 *Journal of Military Ethics* 3 (2005).

Stathis N. Kalyvas et al. (eds.), *Order, Conflict, and Violence* (2008).

John Keegan, *The Face of Battle* (1976).

M.H. Keen, *The Laws of War in the Late Middle Ages* (1965).

James F. Keenan, "The Function of the Principle of Double Effect", 54 *Theological Studies* 294 (1993).

Kenneth J. Keith, "The Present State of International Humanitarian Law", 9 *Australian Yearbook of International Law* 13 (1980).

Justin Kelly and David Kilcullen, "Chaos Versus Predictability: A Critique of Effects-Based Operations", 2 *Australian Army Journal* 87 (2004).

Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans., 1949).

Hans Kelsen, *General Theory of Norms* (Michael Hartney trans., 1991).

Hans Kelsen, *Pure Theory of Law* (Max Knight trans., 1967).

N. Keijzer, "Réponse à la Question 2", 33 *Revue belge de droit international* 440 (2000).

Kriangsak Kittichaisaree, *International Criminal Law* (2001).

Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (2013).

Ulrike Kleemeier, "Moral Forces in War", in Hew Strachan and Andreas Herberg-Roth (eds.), *Clausewitz in the Twenty-First Century* (2007) 107.

Jann K. Kleffner, "Friend or Foe? On the Protective Reach of the Law of Armed Conflict: A Note on the SCSL Trial Chamber's Judgment in the Case of *Prosecutor v. Sesay, Kallon and Gbao*", in Mariëlle Matthee et al. (eds.), *Armed Conflict and International Law: In Search of the Human Face Liber Amicorum in Memory of Avril McDonald* (2013) 285.

Jann K. Kleffner, "Protection of the Wounded, Sick, and Shipwrecked", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 2d ed. (2008) 325.

Geert-Jan G.J. Knoops, *Defenses in Contemporary International Criminal Law* (2001).

Geert-Jan Alexander Knoops, "The Diverging Position of Criminal Law Defences before the ICTY and the ICC: Contemporary Developments", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 779.

Avi Kober, "The Israel Defense Forces in the Second Lebanon War: Why the Poor Performance?", 31 *Journal of Strategic Studies* 3 (2008).

Marcelo G. Kohen, "The Notion of 'State Survival' in International Law", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 293.

Robert Kolb, "International Humanitarian Law and Its Implementation by the Court", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 1015.

Robert Kolb, *Ius in Bello: Le Droit international des conflits armés* (2003).

Robert Kolb, "La nécessité militaire dans le droit des conflits armés: essai de clarification conceptuelle", in Sociéte française pour le droit international, *Colloque de Grenoble, La nécessité en droit international* (2007) 168.

Robert Kolb, "The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions", in Kjetil Mujezinović Larsen et al. (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (2013) 23.

Robert Kolb and Gloria Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (2013).

Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict* (2008).

Erik Vincent Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict* (2006).

Martti Koskenniemi, "Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons", 10 *Leiden Journal of International Law* 137 (1997).

Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument: Reissue with New Epilogue* (2005).

Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", *Report of the Study Group of the International Law Commission*, A/CN.4/L.682.

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).

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).

Matthew H. Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (1999).

Matthew H. Kramer, "Rights Without Trimmings", in Matthew H. Kramer et al., *A Debate Over Rights: Philosophical Enquiries* (1998) 7.

Matthew H. Kramer, *Where Law and Morality Meet* (2004).

Matthew H. Kramer et al., *A Debate Over Rights: Philosophical Enquiries* (1998).

Matthew H. Kramer, N.E. Simmons and Hillel Steiner, *A Debate over Rights: Philosophical Enquiries* (1998).

David Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", 99 *American Journal of International Law* 88 (2005).

David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel", 94 *International Review of the Red Cross* 207 (2012).

David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002).

David Kretzmer, "The Supreme Court of Israel: Judicial Review During Armed Conflict", 47 *German Yearbook of International Law* 392 (2004).

Milan Kuhli and Klaus Günther, "Beyond Dispute: International Judicial Institutions as Lawmakers: Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals", 12 *German Law Journal* 1261 (2011).

Christopher Kutz, "Fearful Symmetry", in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 69.

Kjetil Mujezinović Larsen and Camilla Guldahl Cooper, "Conclusions: Is There a 'Principle of Humanity' in International Humanitarian Law?", in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (2012) 349.

Kjetil Mujezinović Larsen, Camilla Guldhal Cooper and Gro Nystuen (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (2013).

Hersch Lauterpacht (ed.), 2 *Oppenheim's International Law: A Treatise* 7th ed. (1952).

Hersch Lauterpacht, "The Problem of the Revision of the Law of War", 29 *British Yearbook of International Law* 360 (1952).

T.E. Lawrence, *Seven Pillars of Wisdom* (1935).

Seth Lazar, "Necessity and Non-Combatant Immunity", 40 *Review of International Studies* 53 (2014).

Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001).

Steven P. Lee, *Ethics and War: An Introduction* (2012).

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

Howard S. Levie, *Terrorism in War – The Law of War Crimes* (1993).

Rain Liivoja, "Chivalry without a Horse: Military Honour and the Modern Law of Armed Conflict", in Rain Liivoja and Andres Saumets (eds.), *The Law of Armed Conflict: Historical and Contemporary Perspectives* (2012) 75.

Rain Liivoja, "Law and Honour: Normative Pluralism in the Regulation of Military Conduct", in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (2013) 143.

Rain Liivoja, "The Scope of the Supremacy Clause of the United Nations Charter", 57 *International and Comparative Law Quarterly* 583 (2008).

Rain Liivoja and Andres Saumets (eds.), *The Law of Armed Conflict: Historical and Contemporary Perspectives* (2012).

Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (2016).

Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal Order: The Doctrine of *Lex Specialis*", 74 *Nordic Journal of International Law* 27 (2005).

David J. Lonsdale, "A View from Realism", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 29.

David W. Lovell and Igor Primoratz (eds.), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (2012).

A.V. Lowe, "1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction", in N. Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (1988) 629.

David Luban, "Military Necessity and the Cultures of Military Law", 26 *Leiden Journal of International Law* 315 (2013).

David Luban, "Risk Taking and Force Protection", in Yitzhak Benbaji and Naomi Sussmann (eds.), *Reading Walzer* (2014) 277.

Noam Lubell, "Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate", 40 *Israel Law Review* 648 (2007).

Carl E. Lundin, Jr., "Repatriation of Prisoners of War: The Legal and Political Aspects", 39 *American Bar Association Journal* 559 (1953).

Emilio Lussu, *Sardinian Brigade* (1939).

Peter Macalister-Smith, "Protection of the Civilian Population and the Prohibition of Starvation as a Method of Warfare: Draft Texts on International Humanitarian Assistance", 31 *International Review of the Red Cross* 440 (1991).

Charles B. MacDonald, *The European Theater of Operations: The Siegfried Line Campaign* (1963).

W.T. Mallison, Jr., "The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and in Limited Wars", 36 *George Washington Law Review* 308 (1967).

Joseph T. Mangan, "An Historical Analysis of the Principle of Double Effect", 10 *Theological Studies* 41 (1949).

Avishai Margalit and Michael Walzer, "Israel: Civilians & Combatants", *New York Review of Books*, 14 May 2009.

Y. Matsui, "The Transformation of the Law of State Responsibility", in René Provost (ed.), *State Responsibility in International Law* (2002) 3.

Mariëlle Matthee, Brigit Toebes and Marcel Bruns (eds.), *Armed Conflict and International Law: In Search of the Human Face Liber Amicorum in Memory of Avril McDonald* (2013).

Matt M. Matthews, *We Were Caught Unprepared: The 2006 Hezbollah-Israeli War* (2006).

James N. Mattis, "USJFCOM Commander's Guidance for Effects-Based Operations", 51 *Joint Forces Quarterly* 105 (2008).

Larry May, *War Crimes and Just War* (2007).

Larry Maybee and Benarji Chakka (eds.), *Custom as a Source of International Humanitarian Law* (2007).

Jaro Mayda, "The Korean Repatriation Problem and International Law", 47 *American Journal of International Law* 414 (1953).

Ricardo Pisillo Mazzeschi, "Book Review: Il Principio Della Proporzionalitá Nell'Ordinamento Internazionale", 13 *European Journal of International Law* 1031 (2002).

Hilaire McCoubrey, "The Nature of the Modern Doctrine of Military Necessity", 30 *Revue de droit militaire et de droit de la guerre* 215 (1991).

Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* 2d ed. (1998).

Avril McDonald, "*Hors de Combat*: Post-September 11 Challenges to the Rules", in Howard M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (2008) 219.

Myres S. McDougal and Florentino P. Feliciano, "International Coercion and World Public Order: The General Principles of the Law of War", 67 *Yale Law Journal* 771 (1958).

Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961).

Alison McIntyre, "Doing Away with Double Effect", 111 *Ethics* 219 (2001).

Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (2002).

Jeff McMahan, *Killing in War* (2009).

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.

Georg Meggle (ed.), *Actions, Norms, Values: Discussions with Georg Henrik von Wright* (1999).

Frédéric Mégret, "A Cautionary Tale from the Crusades? War and Prisoners in Conditions of Normative Incommensurability", in Sibylle Scheipers (ed.), *Prisoners in War* (2010) 23.

Nils Melzer, "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities", 42 *New York University Journal of International Law and Policy* 831 (2010).

Nils Melzer, *Targeted Killing in International Law* (2008).

Nils Melzer, "Targeted Killings in Operational Law Perspective", in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010) 277.

Nils Melzer, "Targeted Killing or Less Harmful Means? – Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity", 9 *Yearbook of International Humanitarian Law* 87 (2006).

Nils Melzer, "The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law", in Christian Tomuschat (ed.), *The Right to Life* (2010) 151.

Nils Melzer, "The Principle of Distinction between Civilians and Combatants", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 296.

Maurice H. Mendelson, "The Formation of Customary International Law", 272 *Recueil des Cours* (1998) 271.

Theodor Meron, "The Geneva Conventions and Public International Law", 91 *International Review of the Red Cross* 619 (2009).

Theodor Meron, "The Humanization of Humanitarian Law", 94 *American Journal of International Law* 239 (2000).

Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", 94 *American Journal of International Law* 78 (2000).

Theodor Meron, "War Crimes Law Comes of Age", 92 *American Journal of International Law* 462 (1998).

Guénaël Mettraux, *International Crimes and the* Ad Hoc *Tribunals* (2005).

Michael A. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (1989).

Richard V. Meyer and Mark David Maxwell, "The Natural Right to Intervene: The Evolution of the Concepts of Justification and Excuse for Both State and Individual", 7 *Journal of International Criminal Justice* 555 (2009).

Henri Meyrowitz, "The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977", 299 *International Review of the Red Cross* 98 (1994).

Martin Middlebrook, *The First Day on the Somme: 1 July 1916* (1972).

Samantha A. Miko, "Norm Conflict, Fragmentation, and the European Court of Human Rights", *Boston College Law Review, Symposium Issue* 1351 (2013).

Marko Milanović, "A Non-Response to Weiler and Deshman", 24 *European Journal of International Law* 63 (2013).

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).

Marko Milanović, "Norm Conflict in International Law: Whither Human Rights?", 20 *Duke Journal of Comparative and International Law* 69 (2009).

Marko Milanović, "Norm Conflicts, International Humanitarian Law, and Human Rights Law", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 95.

J.S. Mill, *On Liberty and Considerations on Representative Government* (1948).

R. H. Minear, *Victors' Justice* (1971).

Shigeki Miyazaki, "The Martens Clause and International Humanitarian Law", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 432.

Lindsay Moir, "Conduct of Hostilities – War Crimes", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 487.

Lindsay Moir, "Displacement of Civilians as a War Crime Other Than a Violation of Common Article 3 in Internal Armed Conflicts", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 639.

Lindsay Moir, *The Law of Internal Armed Conflict* (2002).

Lindsay Moir, "Towards the Unification of International Humanitarian Law?," in Richard Burchill, Nigel D. White and Justin Morris (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (2005) 108.

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 *Just Ad Bellum* and *Jus In Bello*", in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds.), *Nuclear Weapons Under International Law* (2014) 59.

George A. Mudge, "Starvation as a Means of Warfare", 4 *International Law* 228 (1970).

Rein Müllerson, "On the Relationship between *Jus Ad Bellum* and *Jus In Bello* in the General Assembly Advisory Opinion", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 267.

Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (1987).

Stephen Munzer, "Validity and Legal Conflicts", 82 *Yale Law Review* 1140 (1973).

Peter W. Murphy, book review on "Judging War Criminals", 35 *Texas International Law Journal* 325 (2000).

Sean D. Murphy, "Evolving Geneva Convention Paradigms in the 'War on Terrorism': Applying the Core Rules to the Release of Persons Deemed 'Unprivileged Combatants'", 75 *George Washington Law Review* 1105 (2006-2007).

Richard B. Myers, Joint Chiefs of Staff, *Standing Rules of Engagement of United States Forces* § 3(a) (2005).

John A. Nagl, *Counterinsurgency Lessons from Malaya and Vietnam: Learning to East Soup with a Knife* (2002).

Ved P. Nanda and David Krieger, *Nuclear Weapons and the World Court* (1998).

Stephen C. Neff, "Prisoners of War in International Law: The Nineteenth Century", in Sibylle Scheipers (ed.), *Prisoners in War* (2010) 57.

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).

Michael A. Newton, "Reconsidering Reprisals", 20 *Duke Journal of Comparative and International Law* 361 (2009-2010).

Michael Newton and Larry May, *Proportionality in International Law* (2014).

Joanna Nicholson, *Fighters as Victims in International Criminal Law* (2014).

Jonas Nilsson, "Motosuke", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 816.

Joanna Nowakowska-Małusecka (ed.), *International Humanitarian Law: Antecedents and Challenges of the Present Time* (2010).

Robert Nozik, *Anarchy, State, and Utopia* (1974).

Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds.), *Nuclear Weapons Under International Law* (2014).

William V. O'Brien, "The Meaning of 'Military Necessity' in International Law", 1 *World Polity* 109 (1957).

Mary Ellen O'Connell, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 1.

Robert L. O'Connell, *Of Arms and Men* (1989).

Simon O'Connor, "Nuclear Weapons and the Unnecessary Suffering Rule", in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds.), *Nuclear Weapons Under International Law* (2014) 128.

Stefan Oeter, "Methods and Means of Combat", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 115.

Jens D. Ohlin, "The Duty to Capture", 97 *Minnesota Law Review* 1268 (2013).

Roger O'Keefe, "Protection of Cultural Property", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 492.

Roger O'Keefe, "Protection of Cultural Property", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3d ed. (2013) 423.

Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (2006).

Keiichiro Okimoto, *The Distinction and Relationship between* Jus ad Bellum *and* Jus in Bello (2011).

Héctor Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY's Case Law to the Rome Statute* (2008).

Alexander Orakhelashvili, book review, 79 *British Yearbook of International Law* 371 (2009).

Alexander Orakhelashvili, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction", 11 *Journal of Conflict & Security Law* 119 (2006).

Brian Orend, *The Morality of War* (2006).

Robert E. Osgood, *Limited War: The Challenges to American Strategy* (1957).

W. Hays Parks, "Air War and the Laws of War," 32 *Air Force Law Review* 1 (1990).

W. Hays Parks, "Conventional Weapons and Weapon Reviews," 8 *Yearbook of International Humanitarian Law* 55 (2005).

W. Hays Parks, "Means and Methods of Warfare", 38 *George Washington International Law Review* 511 (2006).

W. Hays Parks, "Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect", 42 *New York University Journal of International Law and Policy* 769 (2009-2010).

Stanley L. Paulson and Bonnie Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998).

Alain Pellet, "The Destruction of Troy Will Not Take Place", in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (1992) 169.

L.R. Penna, "Customary International Law and Protocol I: An Analysis of Some Provisions", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 201.

Marco Pertile, "'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory': A Missed Opportunity for International Humanitarian Law?", 14 *Italian Yearbook of International Law* 121 (2004).

Coleman Phillipson, *International Law and the Great War* (1915).

Jean S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field* (1952).

Jean S. Pictet (ed.), *Commentary II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1960).

Jean S. Pictet (ed.), *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* (1960).

Jean S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958).

Jean Pictet, *Development and Principles of International Humanitarian Law* (1985).

Jean Pictet, *Humanitarian Law and the Protection of War Victims* (1975).

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).

Claude Pilloud, "Article 40 – Quarter", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 473.

Claude Pilloud, "Protection of the Victims of Armed Conflicts", in Henri Dunant Institute and United Nations Educational, Scientific and Cultural Organization (eds.), *International Dimensions of Humanitarian Law* (1988) 167.

Claude Pilloud and Jean Pictet, "Article 51 – Protection of the Civilian Population", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 613.

Claude Pilloud and Jean Pictet, "Article 54 – Protection of Objects Indispensable to the Survival of the Civilian Population", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 651.

Claude Pilloud and Jean Pictet, "Article 57 – Precautions in Attack", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 678.

Claude Pilloud and Jean Pictet, "Part IV, Section III – Treatment of Persons in the Power of a Party to the Conflict", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 837.

Claude Pilloud and Jean Pictet, "Precautions against the Effects of Attacks", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 691.

Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (1992).

Archer Polson, *Principles of the Law of Nations, with Practical Notes and Supplementary Essays on the Law of Blockade and on Contraband of War* (1853).

Pitman B. Potter, "Repatriation of Prisoners of War", 46 *American Journal of International Law* 508 (1952).

Jean de Preux, "Article 35 – Basic Rules", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 389.

Jean de Preux, "Article 37 – Prohibition of Perfidy", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1897) 429.

Jean de Preux, "Article 39 – Emblems of Nationality", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1897) 461.

Jean de Preux, "Article 41 – Safeguard of an enemy *hors de combat*", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1897) 479.

Jean de Preux, "Article 42 – Occupants of Aircraft", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 493.

Norman G. Printer, "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).

Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2009).

René Provost, *International Human Rights and Humanitarian Law* (2002).

René Provost (ed.), *State Responsibility in International Law* (2002).

Nancie Prud'homme, "*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?", 40 *Israel Law Review* 356 (2007).

Jean-François Quéguiner, "The Principle of Distinction: Beyond an Obligation of Customary International Humanitarian Law", in Howard M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (2008) 161.

Noëlle Quénivet and Shilan Shah-Davis (eds.), *International Law and Armed Conflict: Challenges in the 21st Century* (2010).

John Quigley, "Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War After the Close of Hostilities", 5 *American University Journal of International Law and Policy* 73 (1989-1990).

Jeremy Rabkin, "Proportionality in Perspective: Historical Light on the Law of Armed Conflict", 16 *San Diego International Law Journal* 263 (2015).

Jeremy Rabkin, "The Strange Pretensions of Contemporary Humanitarian Law", in Christopher A. Ford and Amichai Cohen (eds.), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (2012) 41.

Nathan Rasiah, "The Court-Martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice", 7 *Journal of International Criminal Justice* 177 (2009).

E. Rauch, "Le Concept de Nécessité Militaire Dans le Droit de la Guerre", 19 *Revue de droit pénal militaire et de droit de la guerre* 209 (1980).

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.

Joseph Raz, *Practical Reason and Norms* (1999).

Joseph Raz, *The Authority of Law* 2d ed. (2009).

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).

Michael Reynolds, "Massacre at Malmédy During the Battle of the Bulge", *World War II* (February 2003).

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

Frank Richards, *Old Soldiers Never Die* (1966).

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 Laws of War: Problems of Implementation", in European Commission, 1 *Law in Humanitarian Crisis* (1996) 13.

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.

Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War* 3d ed. (2000).

Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* 3d ed. (2006).

Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (1928).

David Rodin, "The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry Is Half Right", in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 44.

David Rodin, *War and Self-Defence* (2003).

David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008).

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).

A.P.V. Rogers, *Law on the Battlefield* (1996).

A.P.V. Rogers, *Law on the Battlefield* 2d ed. (2004).

A.P.V. Rogers, "What Is a Legitimate Military Target?", in Richard Burchill et al. (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (2005) 160.

A.P.V. Rogers, "Zero-Casualty Warfare", 82 *International Review of the Red Cross* 165 (2000).

B.V.A. Röling, "The Law of War and the National Jurisdiction Since 1945", 100 *Recueil des Cours* (1960) 377.

Gabor Rona, "Réponses à la Question 2", 33 *Revue belge de droit international* 446 (2000).

Yaël Ronen, "Israel, Hizbollah, and the Second Lebanon War", 9 *Yearbook of International Humanitarian Law* 362 (2006).

Jon Ronson, *The Men Who Stare at Goats* 2d ed. (2009).

N. Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (1988).

Elihu Root, "Opening Address", 15 *ASIL Proceedings* 1 (1921).

Esbjörn Rosenblad, "Starvation as a Method of Warfare – Conditions for Regulation by Convention", 7 *International Lawyer* 252 (1973).

Robert Rosenstock, "Symposium: The ILC's State Responsibility Articles: the ILC and State Responsibility", 96 *American Journal of International Law* 792 (2002).

Gunther Rothenberg, "The Age of Napoleon", in Michael Howard et al. (eds.), *The Laws of War: Constraints on Warfare in the Western World* (1994) 86.

Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right* (trans. H.J. Tozer, 1998).

Peter Rowe, "Members of the Armed Forces and Human Rights Law", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 521.

Peter Rowe, "Prisoners of War in the Gulf Area", in Peter Rowe (ed.), *The Gulf War 1990-91 in International and English Law* (1993) 188.

Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (2006).

Peter Rowe (ed.), *The Gulf War 1990-91 in International and English Law* (1993).

Peter Rowe, "The Obligation of a State Under International Law to Protect Members of Its Own Armed Forces During Armed Conflict or Occupation", 9 *Yearbook of International Humanitarian Law* 3 (2006).

Ronald F. Roxburgh (ed.), 2 *Oppenheim's International Law: A Treatise* 3d ed. (1921).

M.W. Royse, *Aerial Bombardment and the International Regulation of Warfare* (1928).

Seyed-Ali Sadat-Akavi, *Methods of Resolving Conflicts Between Treaties* (2003).

Elizabeth Samson, "Necessity, Proportionality, and Distinction in Nontraditional Conflicts: The Unfortunate Case Study of the Goldstone Report", in Christopher A. Ford and Amichai Cohen (eds.), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (2012) 195.

Yves Sandoz, "International Humanitarian Law in the Twenty-First Century", 6 *Yearbook of International Humanitarian Law* (2003) 3.

Yves Sandoz, "Land Warfare", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 91.

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.

Yves Sandoz, "The International Committee of the Red Cross as Guardian of International Humanitarian Law" (31 December 1998).

Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987).

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.

Marco Sassoli, "The Status, Treatment and Repatriation of Deserters under International Humanitarian Law", *Yearbook of the International Institute of Humanitarian Law* 9 (1985).

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).

T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (2008).

William A. Schabas, *An Introduction to the International Criminal Court* 4th ed. (2011).

William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2000).

William A. Schabas, *Genocide in International Law: The Crime of Crimes* 2d ed. (2009).

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).

L.B. Schapiro, "Repatriation of Deserters", 29 *British Yearbook of International Law* (1952).

Sibylle Scheipers, "Introduction: Prisoners of War", in Sibylle Scheipers (ed.), *Prisoners in War* (2010) 1.

Sibylle Scheipers, "Prisoners and Detainees in War", *European History Online* (2011).

Sibylle Scheipers (ed.), *Prisoners in War* (2010).

Michael N. Schmitt, "Asymmetrical Warfare and International Humanitarian Law", in Wolff Heintschel von Heinegg and Volker Epping (eds.), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen* (2007) 11.

Michael N. Schmitt, "Book Review*: Law on the Battlefield*", 8 *U.S. Air Force Academy Journal of Legal Studies* 255 (1997).

Michael N. Schmitt, "Discriminate Warfare: The Military Necessity-Humanity Dialectic of International Humanitarian Law", in David W. Lovell and Igor Primoratz (eds.), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (2012) 85.

Michael N. Schmitt, "Effects-Based Operations and the Law of Aerial Warfare", 5 *Washington University Global Studies Law Review* 265 (2006).

Michael N. Schmitt, "Effects-Based Operations and the Law of Aerial Warfare", in Wolff Heintschel von Heinegg and Volker Epping (eds.), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen* (2007) 21.

Michael N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict", 22 *Yale Journal of International Law* 1 (1997).

Michael N. Schmitt (ed.), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday* (2000).

Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", 50 *Virginia Journal of International Law* 795 (2010).

Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare: Prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence* (2013).

Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis", 1 *Harvard National Security Journal* 5 (2010).

Michael N. Schmitt, "Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'", 24 *European Journal of International Law* 855 (2013).

Frank N. Schubert and Theresa L. Kraus (eds.), *The Whirlwind War* (1995).

Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1968).

Georg Schwarzenberger, *The Legality of Nuclear Weapons* (1958).

Egon Schwelb, "Crimes Against Humanity", 23 *British Yearbook of International Law* 178 (1946).

Steven H. Scott, "Sticky Foam as a Less-Than-Lethal Technology", 2934 *SPIE Proceedings: Security System & Nonlethal Technology for Law Enforcement* 96 (1997).

Paul Seger, "The Law of Neutrality", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 248.

Meir Shamgar (ed.), 1 *Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects* (1982).

Yuval Shany, "Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 13.

Nancy Sherman, "The Moral Psychic Reality of War", in Yitzhak Benbaji and Naomi Sussmann (eds.), *Reading Walzer* (2014) 302.

Henry Shue, "Civilian Protection and Force Protection", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 135.

Henry Sidgwick, *The Elements of Politics* (1891).

Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary* 2d ed. (2002).

Nigel Simmonds, *Central Issues in Jurisprudence* 2d ed. (2002).

P.W. Singer, *Children at War* (2006).

Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (2012).

Achilles Skordas, "Hegemonic Custom?", in Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundation of International Law* (2003) 317.

E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003).

Robert D. Sloane, "On the Use and Abuse of Necessity in the Law of State Responsibility", 106 *American Journal of International Law* 447 (2012).

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).

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).

Göran Sluiter, "Pilz", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 872.

S.A. de Smith, *Judicial Review of Administrative Action* 3d ed. (1973).

Thomas W. Smith, "Protecting Civilians … or Soldiers? Humanitarian Law and the Economy of Risk in Iraq", 9 *International Studies Perspectives* 144 (2008).

Sociéte française pour le droit international, *Colloque de Grenoble, La nécessité en droit international* (2007).

Waldemar A. Solf, "Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I", 1 *American University Journal of International Law and Policy* 117 (1986).

Gary D. Solis, "The *Gotovina* Acquittal: A Sound Course Correction", 215 *Military Law Review* 78 (2013).

Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010).

Ole Spiermann, "*Lotus* and the Double Structure of International Legal Argument", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 131.

Philip Spoerri, "The Law of Occupation", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 182.

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).

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

G.R. Stevens, *The Fourth Indian Division* (1950).

Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (1954).

Hew Strachan and Andreas Herberg-Roth (eds.), *Clausewitz in the Twenty-First Century* (2007).

C.E. Straight, Office for Judge Advocate General for War Crimes, *Report of the Deputy Judge Advocate for War Crimes, European Command* (1948).

Bert Swart, Alexander Zahar and Göran Suiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011).

Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984).

Christian J. Tams and James G. Devaney, "Applying Necessity and Proportionality to Anti-Terrorist Self-Defence", 45 *Israel Law Review* 91 (2012).

Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970).

Hugh Thirlway, "The Nuclear Weapons Advisory Opinions: The Declarations and Separate and Dissenting Opinions", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 390.

Judith Jarvis Thomson, *Normativity* (2008).

Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", 316 *International Review of the Red Cross* 125 (1997).

Ron Tira, "Breaking the Amoeba's Bones", 9 *Strategic Assessment* (2006).

Jiří Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Protocol, Signed 14 May, 1954 in the Hague, and on Other Instruments of International Law Concerning Such Protection* (1996).

Christian Tomuschat (ed.), *The Right to Life* (2010).

Raleigh Trevelyan, *The Fortress: A Dairy of Anzio & After* (1956).

Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2d ed. (2008).

Peter D. Trooboff (ed.), *Law and Responsibility in Warfare: The Vietnam Experience* (1975).

Robert W. Tucker, *The Law of War and Neutrality at Sea* (1957).

Spencer C. Tucker (ed.), *The Encyclopedia of the Spanish-American and Philippine-American Wars: A Political, Social, and Military History* (2009).

David Turns, "Military Manuals and the Customary Law of Armed Conflict", in Nobuo Hayashi (ed.), *National Military Manuals on the Law of Armed Conflict* 2d ed. (2010) 65.

Darren Valletgoed, "The Last Round? A Post-Gotovina Reassessment of the Legality of Using Artillery Attack Against Built-Up Areas", 18 *Journal of Conflict & Security Law* 25 (2013).

Emer de Vattel, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (1758; Joseph Chitty trans., 1844).

Emmerich de Vattel, *The Law of Nations; or, the Principles of Natural Law Applied to Conduct and to the Affairs of Nations and Sovereigns* (1758; Charles G. Fenwrick trans., 1916).

Milan N. Vego, "Effects-Based Operations: A Critique", 41 *Joint Forces Quarterly* 51 (2006).

Gabriella Venturini, "Necessity in the Law of Armed Conflict and in International Criminal Law", 41 *Netherlands Yearbook of International Law* 45 (2010).

Pietro Verri, *Dictionary of the International Law of Armed Conflict* (1992), at 75.

Lal Chand Vohrah et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003).

Erich Vranes, "The Definition of 'Norm Conflict' in International Law and Legal Theory", 17 *European Journal of International Law* 395 (2006).

Malham M. Wakin (ed.), *War, Morality, and the Military Profession* (1979).

Evan J. Wallach, "Pray Fire First Gentlemen of France: Has 21st Century Chivalry Been Subsumed by Humanitarian Law?", 3 *Harvard National Security Journal* 431 (2012).

Sir Humphrey Waldock, "Second Report on the Law of Treaties", in International Law Commission, 2 *Yearbook of the International Law Commission 1963*, A/CN.4/SER.A/1963/ADD.1, 36.

Michael Walzer, *Arguing About War* (2004).

Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977).

Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 4th ed. (2006).

Michael Walzer, "Response", in Yitzhak Benbaji and Naomi Sussmann (eds.), *Reading Walzer* (2014) 328.

W.J. Waluchow, *Inclusive Legal Positivism* (1994).

W.J. Waluchow, "The Many Faces of Legal Positivism", 48 *University of Toronto Law Journal* 387 (1998).

Richard Wasserstrom, "The Responsibility of the Individual for War Crimes", in Virginia Held, Sidney Morgenbesser and Thomas Nagel (eds.), *Philosophy, Morality, and International Affairs* (1974) 47.

Kenneth Watkin, "Assessing Proportionality: Moral Complexity and Legal Rules", 8 *Yearbook of International Humanitarian Law* 3 (2005).

Kenneth Watkin, "Use of Force During Occupation: Law Enforcement and Conduct of Hostilities", 94 *International Review of the Red Cross* 267 (2012).

Geoffrey R. Watson, "The '*Wall*' Decisions in Legal and Political Contexts", 99 *American Journal of International Law* 6 (2005).

Barry D. Watts, *Clausewitzian Friction and Future War* (1996).

Sean Watts, "Law-Of-War Perfidy", 219 *Military Law Review* 106 (2014).

Sean Watts, "Under Siege: International Humanitarian Law and Security Council Practice Concerning Urban Siege Operations", *Harvard Law School Brookings Project on Law and Security: Counterterrorism and Humanitarian Engagement Project* (2014).

Matthew Waxman, "Siegecraft and Surrender: The Law and Strategy of Cities as Targets", 39 *Virginia Journal of International Law* 353 (1998).

Ralph Wedgwood, "Scanlon on Double Effect", 83 *Philosophy and Phenomenological Research* 464 (2011).

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).

Ota Weinberger, "Logical Analysis in the Realm of the Law", in Georg Meggle (ed.), *Actions, Norms, Values: Discussions with Georg Henrik von Wright* (1999) 291.

Donald A. Wells, "The Limits of War and Military Necessity", 19 *Journal of Social Philosophy* 3 (1988).

Gerhard Werle, "General Principles of International Criminal Law", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 54.

Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* 3d ed. (2014).

David Whetham, "The Just War Tradition: A Pragmatic Compromise", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 65

David Whetham (ed.), *Ethics, Law and Military Operations* (2011).

Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012).

Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007).

Peter H. Wilson, "Prisoners in Early Modern European Warfare", in Sibylle Scheipers (ed.), *Prisoners in War* (2011) 39.

Thomas C. Wingfield, "Chivalry in the Use of Force", 23 *University of Toledo Law Review* 111 (2001).

Luc J. Wintgens et al. (eds.), *The Theory and Practice of Legislation: Essays in Legisprudence* (2005).

Jason Wright, "'Excessive' Ambiguity: Analysing and Refining the Proportionality Standard", 94 *International Review of the Red Cross* 819 (2012).

R. George Wright, "Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality", 67 *Notre Dame Law Review* 335 (1991).

Georg Henrik von Wright, "Deontic Logic", 60 *Mind* 1 (1951).

Georg Henrik von Wright, "Ought to Be – Ought to Do", in Georg Meggle (ed.), *Actions, Norms, Values: Discussions with Georg Henrik von Wright* (1999) 3.

Georg Henrik von Wright, "Value, Norm, and Action in My Philosophical Writings", in Georg Meggle (ed.), *Actions, Norms, Values: Discussions with Georg Henrik von Wright* (1999) 11.

Raymund T. Yingling and Robert W. Ginnane, "The Geneva Conventions of 1949", 46 *American Journal of International Law* 393 (1952).

Brian San Yk, "Legal Regulation of Belligerent Reprisals in International Humanitarian Law: Historical Development and Present Status", *African Yearbook on International Humanitarian Law* 134 (2012).

Alexander Zahar, "Civilizing Civil War: Writing Morality as Law at the ICTY", in Bert Swart, Alexander Zahar and Göran Suiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011) 469.

Jean Pascal Zanders, "International Norms Against Chemical and Biological Warfare: An Ambiguous Legacy", 8 *Journal of Conflict & Security Law* 392 (2003).

Andreas Zimmermann, "*Jus ad Bellum*, *Jus in Bello* and the Issue of Proportionality", 11 *Max Planck Yearbook of United Nations Law* 99 (2007).

Andreas Zimmermann, "Prohibited Destruction", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2d ed. (2008) 395.

Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011).

Bruno Zimmermann, "Article 1 – General Principles and Scope of Application", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 33.

Noam J. Zohar, "Double Effect and Double Intention: A Collectivist Perspective", 40 *Israel Law Review* 730 (2007).

Other Material

"'Soft Bombs' Hit Hard", *BBC News*, 3 May 1999.

Joel Roberts, "U.S. Drops 'E-Bomb' On Iraqi TV", *CBS*, 25 March 2003.

Bradley Graham, "A Sharp Shift from Killing to Kindness", *The Washington Post*, 4 December 2004.

"Soldiers' Families 'Losing Faith' in MoD", *BBC News*, 7 December 2004.

"US Military Pondered Love Not War", *BBC News*, 15 January 2005.

"U.S. Army Captain Is Found Guilty in Shooting Death of Wounded Iraqi", *Stars and Stripes*, 31 March 2005.

"US Captain Guilty of Iraq Killing", *BBC News*, 31 March 2005.

Adam Zagorin and Michael Duffy, "Inside the Interrogation of Detainee 063", *Time*, 20 June 2005.

Richard C. Paddock, "Shots to the Heart of Iraq", *Los Angeles Times*, 25 July 2005.

"Army Blamed for Iraq Heat Death", *BBC News*, 10 November 2006.

"'Gay Bomb' Scoops Ig Nobel Award", *BBC News*, 4 October 2007.

Tim Padgett, "Colombia's Stunning Hostage Rescue", *Time*, 2 July 2008.

"Colombia Hostage Betancourt Freed", *BBC News*, 3 July 2008.

"Colombia Tricks Rebels into Freeing Hostages", *MSNBC*, 3 July 2008.

Simon Romero, “Colombia Plucks Hostages from Rebels’ Grasp”, *The New York Times*, 3 July 2008.

“Betancourt Rescue in Colombia: Israeli Connection”, *Ynet*, 4 July 2008.

Karl Penhaul, “Colombian Military Used Red Cross Emblem in Rescue”, *CNN*, 15 July 2008.

“Betancourt Rescuer Wore Red Cross”, *BBC News*, 17 July 2008.

“Colombian Soldier Wore Red Cross Logo in Hostage Rescue”, *The New York Times*, 17 July 2008.

Washington Media Associations, *Torturing Democracy* (2008).

Bob Woodward, “Detainee Tortured, Says U.S. Official”, *The Washington Post*, 14 January 2009.

“MoD Budget ‘Harm’ Claims Denied”, *BBC News*, 23 August 2009.

“Family Sues MoD Over Marine Death”, *BBC News*, 12 October 2009.

“Bill Millin, Piper at the D-Day Landings, Died on August 17th, Aged 88”, *The Economist*, 26 August 2010.

Graeme Hamilton, “ISIS Uses Gruesome Social Media Posts to Recruit More ‘Blood-Thirsty’ Jihadists and Instill Terror in Enemies”, *National Post*, 11 August 2014.

Fawaz A. Gerges, “Islamic State: Can Its Savagery Be Explained?”, *BBC News*, 9 September 2014.

Frank Gardner, “Islamic State Message Shows Desire for US Boots on the Ground”, *BBC News*, 22 September 2014.

“Israeli-Palestinian Violence: Knife Attackers Shot Dead”, *BBC News*, 17 October 2015.

“Winners of the Ig® Nobel Prize”, Improbable Research (http://improbable.com/ig/winners).

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