Military necessity

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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.
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> 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.