Military necessity

Hayashi, N.

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-

[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.