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## **Military necessity**

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This thesis illustrates the normative process through which international humanitarian law creates its rules. Our discussion identifies major “ingredients” of the process, elucidates their interplay, and reflects on the consequences that the interplay entails *vis-à-vis* positive IHL rules. In addition to military necessity, this thesis considers humanity, chivalry and sovereignty where appropriate.

Key to our inquiry has been the idea that international humanitarian law is developed with a view to striking a realistic balance between military necessity and humanity and that, accordingly, the law “accounts for” them. In what follows,<sup>1</sup> let us recapitulate this thesis’ principal findings and place them within the framework of IHL norm-creation under three broad headings:

- (i) Military necessity and other reason-giving considerations;
- (ii) The dynamics of their interplay; and
- (iii) Their normative consequences.

#### 1. Reason-Giving Considerations in IHL Norm-Creation

Military necessity is but one of the weighty reasons for which the framers of international humanitarian law formulate its rules in certain ways. Given military necessity’s normative indifference, if it were the only relevant considerations, the law would contain only permissive rules. In contrast, while humanity offers grounds for which some belligerent conduct should remain indifferently permissive, it generates imperatives for other conduct. The same may be said of chivalry and sovereignty.

##### 1.1 Military Necessity

Chapters 2 and 3 of this thesis show that material military necessity embodies a two-fold truism. Thus, it is in the belligerent’s self-interest to do what is militarily necessary and to avoid what is unnecessary. Conversely, it is against its self-interest to let go of necessities of war or encumber itself with non-necessities. Material military necessity is a matter of calculating the degree of cogency between the means taken or considered, on the one hand, and the ends sought, on the other, under the circumstances prevailing or anticipated at the relevant time. To say that “doing this is militarily necessary” or “doing that is militarily unnecessary” is simply to signify the notion that the act in question does or does not conduce towards the materialisation of a given military end to some degree.

A given act’s military necessity *vis-à-vis* its goal depends on the availability of other reasonably attainable goals and other reasonably conducive acts, as well as the prevailing circumstances. We observed that, for the Allies during World War II, the destruction of the Monte Cassino Abbey was, all else being equal, arguably more militarily necessary in order to conquer the monastery hill than if the goal had been to compel the German forces to divert their resources from the Anzio beachhead.<sup>2</sup> An act is also capable of military necessity assessments given enough pertinent facts. Allied leaders and commanders drew reasonable, though dissimilar, conclusions about the military necessity of the

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<sup>1</sup> An earlier version of Chapter 11, written in late 2012 and early 2013, was published in April 2016. See Nobuo Hayashi, “Basic Principles”, in Rain Liivoja and Tim McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict* (2016) 89.

<sup>2</sup> See Nigel de Lee, “Moral Ambiguities in the Bombing of Monte Cassino”, 4 *Journal of Military Ethics* 129 (2005), at 133; Reuben E. Brigety II, “Commentary: Moral Ambiguities in the Bombing of Monte Cassino”, 4 *Journal of Military Ethics* 139 (2005), at 140.

Benedictine abbey's destruction based on the facts that had been available to them at the time.<sup>3</sup> An act's military necessity or non-necessity is susceptible neither to being taken out of its particular circumstances nor to being generalised. Whatever one's assessment of the destruction of the abbey at Monte Cassino may have been, one cannot determine in general and *a priori* whether destroying a building sitting atop a topographically dominant elevation is militarily necessary or unnecessary.

Chapters 4-7 of this thesis discuss military necessity in IHL norm-creation. In that context, military necessity embodies indifference. Conduct is normatively indifferent where the two propositions "it is permitted to perform it" and "it is permitted to refrain from it" are both true simultaneously.<sup>4</sup> Military necessity permits the performance of what is militarily necessary and the forbearance of what is militarily unnecessary. It also tolerates the former's forbearance and the latter's performance, however, because neither victory nor defeat is *per se* of concern to international humanitarian law. The law does not make it its business to ensure that each belligerent maximise its prospect of success or minimise its prospect of failure. IHL framers themselves have no reason to obligate militarily necessary behaviour or prohibit militarily unnecessary behaviour.

As reason-giving considerations, military necessity is generalised and stipulatory. The material question was whether a given act was or would be militarily necessary, in view of its particular purpose and circumstances. The normative question is what international humanitarian law should do about this kind of act, *once* it is agreed that it would generally be militarily necessary or unnecessary *vis-à-vis* an otherwise legitimate kind of military purpose. There may well be no military necessity to intern prisoners of war (POW) in certain specific cases. Nevertheless, interning POWs is generally deemed militarily necessary.<sup>5</sup> Normative military necessity prompts IHL framers to leave the belligerent at liberty to intern or decline to intern its POWs.<sup>6</sup>

This thesis' Chapters 8-10 consider military necessity in the juridical context of positive international humanitarian law. Juridically, military necessity operates only as an exception. Military necessity clauses attached to certain IHL rules, such as that which prohibits property destruction in occupied territory,<sup>7</sup> exceptionally authorise behaviour deviating from the rules' principal prescriptions as long as such behaviour fulfils four cumulative requirements. First, the measure must be taken primarily for some specific military purpose. Second, the measure must be required for the purpose's attainment.<sup>8</sup> Third, the purpose must be in conformity with international humanitarian law. Fourth, the measure itself must otherwise be in conformity with the law. If not, or no longer, in fulfilment of these requirements, the deviant conduct reverts to being governed by the principal prescriptions, and it becomes unlawful. The conduct's unlawfulness emanates from its breach of the principal rule, *not* its lack of military necessity or the now inoperative exceptional clause.

Assessing juridical military necessity involves interpreting the relevant rules and clauses *vis-à-vis* the particular set of facts at issue. In *Hostage*, the U.S. Military Tribunal at Nuremberg applied Article 23(g) of the 1907 Hague Regulations to the "scorched earth" policy to which the German

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<sup>3</sup> See Martin Blumenson, *The Mediterranean Theater of Operations: Salerno to Cassino* (1993), at 403 (General Tucker in favour), 404 (General Freyberg in favour), 405-406 (General Clark against), 413 (General Walker against), 415 (President Roosevelt in favour).

<sup>4</sup> See G.H. von Wright, "Deontic Logic", 60 *Mind* 1 (1951), at 3-4.

<sup>5</sup> See Sibylle Scheipers, "Introduction: Prisoners of War", in Sibylle Scheipers (ed.), *Prisoners in War* (2010) 1, at 7-8.

<sup>6</sup> See Article 5, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907); Article 21, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949). But see Article 41(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977).

<sup>7</sup> See, e.g., Article 53, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

<sup>8</sup> This requirement contains three further criteria: (1) the measure taken must be materially relevant to the purpose's attainment; (2) of those measures that are materially relevant and reasonably available, the one taken must be the least evil; and (3) the evil that the measure would cause must not be disproportionate to the gain that it would achieve.

forces resorted in Finmark, northern Norway, in 1944.<sup>9</sup> It was found that “[t]here is evidence in the record that there was no military necessity for this destruction and devastation”.<sup>10</sup>

We have also seen various perspectives on military necessity. It was once argued that military necessity pleas are, or should be, admissible *de novo* in support of conduct at odds with unqualified IHL rules. Thus, the material military necessity of given belligerent conduct overrides any IHL provisions that prescribe contrary action. The *Kriegsräson* doctrine remained influential among German military and international lawyers until the end of World War II.<sup>11</sup> Since its rejection at post-war trials,<sup>12</sup> *Kriegsräson* has been thoroughly discredited.<sup>13</sup> It is widely accepted today that military necessity has no place outside specific exceptional clauses.<sup>14</sup>

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<sup>9</sup> See *United States of America v. Wilhelm List et al., Judgment*, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950) 757, at 1296-1297.

<sup>10</sup> *Ibid.*, at 1296. Nevertheless, the tribunal declined to find the accused guilty of the crime charged. It did so on the ground that he honestly, albeit erroneously in retrospect, believed Finmark's devastation to be militarily necessary. See *ibid.*, 1296-1297. For what has come to be known as the “Rendulic rule” of no second guessing, see Brian J. Bill, “The Rendulic ‘Rule’: Military Necessity, Commander’s Knowledge, and Methods of Warfare”, 12 *Yearbook of International Humanitarian Law* 119 (2009).

<sup>11</sup> See, e.g., Isabel V. Hull, “‘Military Necessity’ and the Laws of War in Imperial Germany”, in Stathis N. Kalyvas et al. (eds.), *Order, Conflict, and Violence* (2008) 352, at 359-374; Coleman Phillipson, *International Law and the Great War* (1915), at 133-138; James Wilford Garner, 1 *International Law and the World War* (1920), at 278-282; James Wilford Garner, 2 *International Law and the World War* (1920), at 195-198; N.C.H. Dunbar, “The Significance of Military Necessity in the Law of War”, 67 *Juridical Review* (1955), at 203-204, 207-208; William V. O’Brien, “The Meaning of ‘Military Necessity’ in International Law”, 1 *World Polity* 109 (1957), at 119-137; Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1983), at 172-179; Mika Nishimura Hayashi, “The Martens Clause and Military Necessity”, in Howard M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (2008) 135, at 137-138; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), at 265-268.

<sup>12</sup> See, e.g., *In re Rauter*, 16 *Annual Digest and Reports of Public International Law Cases* 526 (1949), at 543; *In re Burghoff*, 15 *Annual Digest and Reports of Public International Law Cases* 551 (1949), at 554-557; *Hostage*, *supra* note 9, at 1255-1256, 1272-1273, 1296; *In re Lewinski (called von Manstein)*, 16 *Annual Digest and Reports of Public International Law Cases* 509 (1949), at 512-513; *United States of America v. Alfred Felix Alwyn Krupp von Bohlen und Halbach et al., Judgment*, 9 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950) 1327, at 1340; *United States of America v. Wilhelm von Leeb et al., Judgment*, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1951) 1, at 541.

<sup>13</sup> See, e.g., Office of the Judge Advocate General, Canadian Forces, *Law of Armed Conflict at the Operational and Tactical Levels* (2000), at 2-1; U.K. Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), at 23; Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1968), at 136; Christopher Greenwood, “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 2d ed. (2008) 1, at 38; Solis, *supra* note 11, at 269.

<sup>14</sup> See, e.g., U.S. Department of the Army, *The Law of Land Warfare* (1956), at 4; U.S. Department of the Navy, Office of the Chief of Naval Operations et al., *The Commander’s Handbook on the Law of Naval Operations* (2007), at 5-2; Office of the Judge Advocate General, *supra* note 13, at 2-1; U.K. Ministry of Defence, *supra* note 13, at 22-23, 442; Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary* (1908), at 5; Elihu Root, “Opening Address”, 15 *ASIL Proceedings* 1 (1921), at 3; Dunbar, “Significance”, *supra* note 11, at 202; Robert W. Tucker, *The Law of War and Neutrality at Sea* (1957), at 33-37; G.I.A.D. Draper, “Military Necessity and Humanitarian Imperatives”, 12 *Military Law and Law of War Review* 129 (1973), at 138, 142; Frits Kalshoven, *Belligerent Reprisals* (1971), at 366; International Law Commission, *Report on the International Law Commission on the Work of Its Thirty-Second Session*, A/35/10 (1980), at 45-46; Jean de Preux, “Article 35 – Basic Rules”, in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 389, at 392-393, 399; Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (1987), at 82-83; Henri Meyrowitz, “The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977”, 34 *International Review of the Red Cross* 98 (1994), at 108; Donald A. Wells, “The Limits of War and Military Necessity”, 19 *Journal of Social Philosophy* 3 (1988); Jean Pictet, *Development and Principles of International Humanitarian Law* (1985), at 88; Georges Abi-Saab and Luigi Condorelli, “Réponses à la question 1, b)”, 33 *Revue belge de droit international* 406 (2000), at 407-408; Robert Kolb, *Ius in Bello: Le Droit international des conflits armés* (2003), at 57; Leslie C. Green, *The Contemporary Law of Armed Conflict* 3d ed. (2008), at 147-148; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 2d ed. (2010), at 6.

In some authorities' view, military necessity functions as a layer of normative restraint additional to positive international humanitarian law.<sup>15</sup> "Counter-Kriegsräson" entails two major assertions. First, as reason-giving considerations, military necessity condemns militarily unnecessary conduct. Second, these considerations survive the process of IHL norm-creation. Consequently, an act that would otherwise be lawful according to positive international humanitarian law becomes unlawful on account of its lack of material military necessity. We have seen that neither assertion is correct.

Military necessity has occasionally been equated with military objective, particularly in international criminal law.<sup>16</sup> This equation is unhelpful, since the former pertains to *conduct* whereas the latter pertains to *objects*.<sup>17</sup> Where given conduct is militarily necessary or unnecessary, IHL framers have reason to permit it or tolerate it. Where an object constitutes a military objective or a civilian object, it becomes principally liable to or immune from attacks.<sup>18</sup>

Military necessity is also sometimes treated synonymously with proportionality.<sup>19</sup> When calculating material military necessity, something approximating proportionality may characterise the measures taken *vis-à-vis* the goal sought. It is unclear, however, whether proportionality constitutes distinct reason-giving considerations in IHL norm-creation. Nor would it operate as a clause exceptionally modifying the normative content of a principal IHL rule. Within the context of positive international humanitarian law, proportionality would be best seen as an element in the rule that establishes the lawfulness or unlawfulness of an attack directed at a military objective.<sup>20</sup>

Any difference between military necessity on the one hand, and military advantage or convenience on the other, might be seen as one of degrees. The former might involve the act's indispensability, whereas the latter might encompass indispensability as well as mere gain, superiority or expediency. It is doubtful whether the indispensability of belligerent conduct is a viable distinguishing feature here, since no *conditio sine qua non* arguably informs material military necessity. Could it be, alternatively, that military advantage compares the belligerent's position *vis-à-vis* its adversary's but military necessity does not? Here, too, although military advantage may certainly be construed in this manner, it does not follow that the notion cannot be understood without reference to such comparisons. Normatively, military advantage could easily function as reason-giving considerations in IHL norm-creation. The law's framers would have very good reasons to leave militarily advantageous conduct permitted<sup>21</sup> and militarily disadvantageous conduct tolerated.

The clearest difference between the two notions lies in their juridical significance. In positive international humanitarian law, military advantage appears as an element in the definition of a military objective<sup>22</sup> and as an element in the proportionality test of an attack.<sup>23</sup> These features clearly

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<sup>15</sup> Schwarzenberger, *supra* note 13, at 135; Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970), at 34; Meyrowitz, *supra* note 14, at 107; Federic L. Borch, "Targeting After Kosovo: Has the Law Changed for Strike Planners?", 56 *Naval War College Review* 64 (2003), at 66; Greenwood, "Historical Development", *supra* note 13, at 36-37, 38; Gabriella Venturini, "Necessity in the Law of Armed Conflict and International Criminal Law", 41 *Netherlands Yearbook of International Law* 45 (2010), at 48-50; Henry Shue, "Civilian Protection and Force Protection", in David Whetham (ed.), *Ethics, Law and Military Operations* (2011) 135, at 136-137; Nils Melzer, *Targeted Killing in International Law* (2008), at 286; U.S. Department of the Navy, *supra* note 14, at 5-2; U.K. Ministry of Defence, *supra* note 13, at 22; Nils Melzer, "Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities", 42 *New York University Journal of International Law and Policy* 831 (2010), at 910.

<sup>16</sup> See, e.g., *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, *Judgement*, 31 January 2005, para 295; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, *Judgement*, 3 April 2007, para 337; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, *Judgement*, 17 July 2008, para 330; Kriangsak Kittichaisaree, *International Criminal Law* (2001), at 274 n.68.

<sup>17</sup> See Article 52(2), Additional Protocol I.

<sup>18</sup> See *ibid.*, Article 52(1).

<sup>19</sup> See, e.g., David Luban, "Military Necessity and the Cultures of Military Law", 26 *Leiden Journal of International Law* 315 (2013), at 343-345.

<sup>20</sup> See Article 51(5)(b), Additional Protocol I. As noted earlier, there is also an element of proportionality in juridical military necessity's second requirement.

<sup>21</sup> See W. Hays Parks, "Means and Methods of Warfare", 38 *George Washington International Law Review* 511 (2006), n.25 (citing Edward R. Cummings).

<sup>22</sup> See Article 52(2), Additional Protocol I.

<sup>23</sup> See Article 51(5)(b), Additional Protocol I.

distinguish military advantage from military necessity. More importantly, no positive IHL rules expressly admit military advantage or convenience as an exception to their principal prescriptions. Acts not in fulfilment of the four aforementioned requirements may be regarded as military advantage or convenience ineligible for deviation from IHL rules that envisage military necessity pleas.<sup>24</sup>

## 1.2 Humanity

Humanity is not a major subject of inquiry in this thesis.<sup>25</sup> For the most part, we have considered humanity only where it interacts with military necessity in some normatively significant way. It may nevertheless be useful here to give it some tentative contextual structure.

Humanity is said to be difficult to define.<sup>26</sup> It has been described, among other things, as:

- (i) A notion that “forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes”<sup>27</sup>;
- (ii) A synonym with the prohibition of superfluous injury and unnecessary suffering<sup>28</sup>;
- (iii) An equivalent to the Martens Clause<sup>29</sup>;
- (iv) A vehicle through which international human rights law has made its way into the regulation of armed conflicts<sup>30</sup>; and
- (v) An equivalent to what the International Court of Justice (ICJ) in its *Corfu Channel* judgement referred to as “elementary considerations of humanity”.<sup>31</sup>

Perhaps it is easier to consider what humanity *does* in relation to international humanitarian law. It would appear that specific belligerent acts can be described as humane or inhumane, just as they can be described as militarily necessary or unnecessary. We saw that, at a village called Englefontaine in northern France during World War II, Frank Richards acted humanely by shouting rather than throwing bombs into the cellar.<sup>32</sup>

In IHL norm-creation, acts such as assuming some risks of self-endangerment in favour of civilians and caring for the wounded and sick would be deemed consistent with humanity and affirmatively demanded by it. Humanity would unhesitatingly condemn – i.e., demand that one refrain from – plunder, torture and the like as inhumane. Elsewhere, however, humanity may exhibit indifference. Examples include the conclusion of agreements recognising hospital zones and localities,<sup>33</sup> and the

<sup>24</sup> See, e.g., Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), at 122-123 (referring to Eisenhower’s General Order No. 68, Dec. 29, 1943); von Manstein, 522; Draper, *supra* note 14, at 134; Melzer, *Targeted Killing*, *supra* note 15, at 291-292; Solis, *supra* note 11, at 264.

<sup>25</sup> For a comprehensive treatise on humanity in international law, see Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2010).

<sup>26</sup> See, e.g., Robin Coupland, “Humanity: What Is It and How Does It Influence International Law?”, 83 *International Review of the Red Cross* 969 (2001); Kjetil Mujezinović Larsen and Camilla Guldahl Cooper, “Conclusions: Is There a ‘Principle of Humanity’ in International Humanitarian Law?”, in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds.), *Searching for a “Principle of Humanity” in International Humanitarian Law* (2012) 349, at 355-357.

<sup>27</sup> U.K. Ministry of Defence, *supra* note 13, at 23.

<sup>28</sup> See Meyrowitz, *supra* note 14, at 98; Geoffrey S. Corn, “Principle of Humanity”, *Max Planck Encyclopedia of Public International Law* (2012), paras. 1, 4.

<sup>29</sup> See U.K. Ministry of Defence, *supra* note 13, at 23; Nishimura Hayashi, *supra* note 11, at 136-137; Jochen von Bernstorff, “Martens Clause”, *Max Planck Encyclopedia of Public International Law* (2012), para 14.

<sup>30</sup> See Theodor Meron, “The Humanization of Humanitarian Law”, 94 *American Journal of International Law* 239 (2000).

<sup>31</sup> *Corfu Channel Case, Judgment*, ICJ Reports (1949) 4, at 22; Yoram Dinstein, “The Principle of Proportionality”, in Larsen, Cooper and Nystuen (eds.), *supra* note 26, 72, at 73; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996) 226, para 79.

<sup>32</sup> Frank Richards, *Old Soldiers Never Die* (2001), at 310; Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* 4th ed. (2006), at 152, 154.

<sup>33</sup> This humane conduct nevertheless remains a matter of humanitarian permission. See Raymund T. Yingling and Robert W. Ginnane, “The Geneva Conventions of 1949”, 46 *American Journal of International Law* 393 (1952), at 400.

censoring of communications between POWs and the exterior.<sup>34</sup> Philosophers acknowledge that morality in society encompasses not only duties and obligations but also those qualities that go beyond them.<sup>35</sup> The same may be said *mutatis mutandis* of humanity in IHL norm-creation.

The “pointer” at which the “humanity of duty” ends and the “humanity of aspiration” begins is a highly contentious matter.<sup>36</sup> In the Englefontaine episode, Richards considered it “wise” to “throw bombs into cellars first and have a look around them after”. He also clearly found it morally troubling to do so, however. In fact, he found it so morally troubling that he decided *not* to do the wise thing. Instead, Richards, together with his colleague, chose to risk self-endangerment by shouting into the cellar. For Michael Walzer:

Richards was surely doing the right thing when he shouted his warning. He was acting as a moral man ought to act; he is not an example of fighting heroically, above and beyond the call of duty, but simply of fighting well. It is what we expect of soldiers.<sup>37</sup>

Contemporary thinkers debate whether the risk of self-endangerment of the kind assumed by Richards is what humanity only permits, or what it demands.<sup>38</sup>

Juridically, humanity also functions as an exception. There are positive IHL rules, e.g., Article 49 of Geneva Convention IV,<sup>39</sup> that expressly admit exceptions on humanitarian grounds or, at any rate, on grounds that are arguably analogous. Deviating from the principal prescriptions of these rules is lawful, insofar as it is in fact humane to do so in the manner specified by the exceptional clauses. The question is whether humanity may also function as a justification or excuse *vis-à-vis* positive international humanitarian law. Can humanity’s indifferent considerations be invoked *de novo* in support of belligerent behaviour deviating from an unqualified IHL rule (“*Humanitätsrason*”)? Or, for that matter, can such considerations operate as an additional layer of normative restraint over positive international humanitarian law (“counter-*Humanitätsrason*”)? This thesis has found both positions to be untenable. What the law should do with humanitarian demands (“*Humanitätsgebot*”) and humanitarian condemnations (“counter-*Humanitätsgebot*”) that are incompatible with its unqualified rules is arguably a different matter.

### 1.3 Chivalry and Other Considerations

Chivalry is a third and sometimes overlooked “ingredient” in the process of IHL norm-creation.<sup>40</sup> As with humanity, it appears more fruitful to focus on chivalry’s normative and juridical functions in relation to IHL than to decipher its content.<sup>41</sup>

<sup>34</sup> Similarly, this inhumane conduct nevertheless remains a matter of humanitarian toleration.

<sup>35</sup> See, e.g., H. L. A. Hart, *The Concept of Law* (1961), at 177-178; Lon L. Fuller, *The Morality of Law* rev. ed. (1969), at 4, 15-19, 19-27, 30-32.

<sup>36</sup> Fuller has conceded as much, at least in relation to the “pointer” at which the “morality of duty” yields to the “morality of aspiration”. See Fuller, *supra* note 35, at 9-13, 27-30.

<sup>37</sup> Walzer, *Just and Unjust Wars*, *supra* note 32, at 154.

<sup>38</sup> See, e.g., *ibid.*, at 152, 154, 305-306; Avishai Margalit and Michael Walzer, “Israel: Civilians & Combatants”, *New York Review of Books*, 14 May 2000; Luban, “Cultures of Military Law”, *supra* note 19, at 22-24; Henry Shue, “Civilian Protection and Force Protection”, in Whetham (ed.), *supra* note 15, 135, at 138; David Whetham, “The Just War Tradition: A Pragmatic Compromise”, in *ibid.*, 65, at 83.

<sup>39</sup> See Article 49, Geneva Convention IV (principally prohibiting forcible transfers of residents in occupied territory yet exceptionally authorising their temporary evacuations “if the security of the population ... so demand[s]”).

<sup>40</sup> See, e.g., Terry Gill, “Chivalry: A Principle of the Law of Armed Conflict?”, in Mariëlle Matthee, Brigit Toebe and Marcel Bruns (eds.), *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald* (2013) 33, at 40-41.

<sup>41</sup> See, e.g., Rain Liivoja, “Chivalry without a Horse: Military Honour and the Modern Law of Armed Conflict”, in Rain Liivoja and Andres Saumets (eds.), *The Law of Armed Conflict: Historical and Contemporary Perspectives* (2012) 75; Rain Liivoja, “Law and Honour: Normative Pluralism in the Regulation of Military Conduct”, in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (2013) 143.



Chivalry appears indifferent regarding certain kinds of belligerent conduct, but not so regarding others. Thus, it prompts IHL framers to tolerate certain techniques of deception as ruses of war and yet condemn certain others as perfidious, treacherous or otherwise improper. This thesis has found that chivalry's indifferent considerations are inadmissible *de novo* as justifications or excuses for deviation from positive international humanitarian law ("*Ritterlichkeitsrason*"). Nor do they function as an additional layer of normative restraint thereon ("*counter-Ritterlichkeitsrason*"). The situation is arguably less clear when it comes to chivalry's demands ("*Ritterlichkeitsgebot*") and condemnations ("*counter-Ritterlichkeitsgebot*").

Sovereignty also functions as reason-giving considerations in IHL norm-creation. They may entail indifference in some matters, e.g., the regulation of non-international armed conflicts, whereas they demand specific behaviour and condemn others on matters of neutrality.

## 2. Dynamics of Considerations Interplay

Reason-giving considerations in IHL norm-creation interact with one another in three distinct ways. They are:

- (a) Where all the relevant considerations permit or demand the same behaviour ("*norm alignment*");
- (b) Where one set of considerations permits particular behaviour, whereas another set demands contrary behaviour ("*norm contradiction*"); and
- (c) Where two or more sets of considerations demand mutually incompatible behaviour ("*norm conflict*").

### 2.1 Norm Alignment and Joint Satisfaction

Chapter 5 of this thesis outlines doctrinal positions according to which military necessity and humanity find themselves in "diametrical opposition",<sup>42</sup> such that its resolution requires a "dialectical compromise".<sup>43</sup> As shown in Chapters 6 and 7, however, military necessity and humanity can and often do align themselves; moreover, their alignment is far more pervasive than "rare".<sup>44</sup>

That performing certain conduct is deemed both inhumane and militarily unnecessary is a widely accepted notion indeed. For Carl von Clausewitz, committing needless brutalities – e.g., putting prisoners to death and devastating cities and countries – was, first and foremost, a sign of ineffective and unintelligent fighting.<sup>45</sup> Similar observations have been made regarding pillaging indiscriminately<sup>46</sup>; murdering POWs<sup>47</sup>; plundering private or public property<sup>48</sup>; raping women and ill-

<sup>42</sup> Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), at 16.

<sup>43</sup> Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", 50 *Virginia Journal of International Law* 795 (2010), at 801.

<sup>44</sup> Yoram Dinstein, "Military Necessity", *Max Planck Encyclopedia of Public International Law* (2010), para. 3.

<sup>45</sup> See Carl von Clausewitz, *On War* (Michael Howard and Peter Paret eds. trans., 1993), at 85. See also R.B. Brandt, "Utilitarianism and the Rules of War", 1 *Philosophical & Public Affairs* 145 (1972), at 155.

<sup>46</sup> See Henry Sidgwick, *The Elements of Politics* (1891), at 256.

<sup>47</sup> See Brandt, *supra* note 45, at 154-155.

<sup>48</sup> See *ibid.*, at 155; Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law", 293 *International Review of the Red Cross* 94 (1993), at 99.

treating populations of occupied territories<sup>49</sup>; attacking civilians<sup>50</sup>; abusing detained persons during counter-insurgency operations<sup>51</sup>; sadistic acts of cruelty<sup>52</sup>; and bombarding undefended localities.<sup>53</sup>

Where military necessity permits and humanity demands the conduct's forbearance, the belligerent satisfies both considerations by refraining from it. International humanitarian law may "account for" this possibility by positing an unqualified prohibition against the said behaviour.<sup>54</sup> This rule extinguishes all liberties to perform the conduct that military necessity may otherwise tolerate. Examples include IHL rules unqualifiedly prohibiting killing POWs<sup>55</sup>; bombarding undefended localities<sup>56</sup>; shooting persons descending from aircraft in distress<sup>57</sup>; and generally maltreating persons *hors de combat*.<sup>58</sup>

Joint satisfaction can also be performance-based. The idea that it is strategically expedient to fight ethically in counterinsurgency with a view to earning the support of local residents is hardly new.<sup>59</sup> The same has been said of certain measures taken during belligerent occupation,<sup>60</sup> as well as a doctrine of aerial warfare known as effects-based operations.<sup>61</sup> Here, too, international humanitarian law "accounts for" this possibility when it posits rules unqualifiedly obligating the conduct's performance.<sup>62</sup> The law thereby extinguishes any contrary liberties on the belligerent's part to behave otherwise as may be tolerated by military necessity.

The fact that some belligerent acts are amenable to joint satisfaction of this character does not mean that IHL framers always posit rules unqualifiedly obligating its pursuit. It is, as noted earlier, not *per se* of concern to international humanitarian law whether the belligerent fights competently or incompetently. Where this type of joint satisfaction is available, military necessity permits its pursuit and only tolerates its non-pursuit. The relative scarcity of these rules can also be explained by the fact that the framers may let *third* considerations permitting its non-pursuit, such as sovereignty, prevail.<sup>63</sup>

## 2.2 Norm Contradiction and Joint Satisfaction

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<sup>49</sup> See Brandt, *supra* note 45, at 155.

<sup>50</sup> See Kenneth James Keith, "The Present State of International Humanitarian Law", 9 *Australian Yearbook of International Law* 13 (1980), at 34.

<sup>51</sup> See U.S. Army and Marine Corps, *Counterinsurgency Field Manual* (2007), at 251.

<sup>52</sup> See Doswald-Beck and Vité, *supra* note 48, at 99.

<sup>53</sup> See Dinstein, "Military Necessity" (2010), *supra* note 44, para 3; U.K. Ministry of Defence, *supra* note 13, at 90.

<sup>54</sup> See Brandt, *supra* note 45 at 154-155.

<sup>55</sup> See Article 13, Geneva Convention III.

<sup>56</sup> See Article 25, 1907 Hague Regulations.

<sup>57</sup> See Article 42(1), Additional Protocol I.

<sup>58</sup> See *ibid.*, Article 41(1).

<sup>59</sup> See John A. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (2002), at 87-107; David Galula, *Counterinsurgency Warfare: Theory and Practice* (1964), at 52; U.S. Army and Marine Corps, *supra* note 51, at 245-246.

<sup>60</sup> See Geoffrey Best, "Restraints on War by Land Before 1945", in Michael Howard (ed.), *Restraints in War: Studies in the Limitation of Armed Conflict* (1979) 17, at 28-29; Brandt, *supra* note 45, at 155.

<sup>61</sup> See David A. Deptula, *Effects-Based Operations: Change in the Nature of Warfare* (2001); Michael N. Schmitt, "Effects-Based Operations and the Law of Aerial Warfare", in Wolff Heintschel von Heinegg and Volker Epping (eds.), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen* (2007) 21, at 37.

<sup>62</sup> See Article 57(3), Additional Protocol I (obligating the attacking party to choose the least injurious amongst those military objectives offering similar military advantage); Brandt, *supra* note 45, at 155.

<sup>63</sup> *Clausula si omnes* exemplifies strictly historical instances where considerations of sovereignty amongst adversarial powers resulted in the non-application in certain circumstances of IHL rules that would otherwise have imposed unqualified obligations. Similarly, in 1949, the International Committee of the Red Cross failed to rally states in its effort to expand the scope of application of the four Geneva Conventions in their entirety to all types of armed conflict. See David A. Elder, "The Historical Background of Common Article 3 of the Geneva Convention of 1949", 11 *Case Western Reserve Journal of International Law* 37 (1979), 41-54; Georges Abi-Saab, "Non-International Armed Conflicts", in Henri Dunant Institute and UNESCO (eds.), *International Dimensions of Humanitarian Law* (1988) 217, at 220; Lindsay Moir, *The Law of Internal Armed Conflict* (2002), at 24-29. The same is true of the defeat of numerous would-be Additional Protocol II provisions. See Abi-Saab, "Non-International Armed Conflicts", *supra* note 63, at 230-233; Moir, *supra* note 63, at 91-96.

Where given conduct is a matter of indifference, there is neither any duty to perform it nor any duty to refrain from it. If, then, one norm stipulating such indifference regarding particular behaviour is juxtaposed *vis-à-vis* another norm stipulating a duty to perform it – or to refrain from it, as the case may be –, the two norms contradict each other. They do so, because both cannot be true simultaneously. Joint satisfaction nevertheless results where the norms' addressee acts according to the duty. Norm contradiction becomes problematic if, but only if, the addressee avails him- or herself of the liberty and thereby leaves the contrary duty unsatisfied.

At issue here is a situation where humanity demands what military necessity only tolerates, or the former condemns what the latter permits. The belligerent jointly satisfies both sets of considerations by acting in accordance with humanity.

IHL norm-creation deals with joint satisfaction of this kind in five ways. In one, international humanitarian law posits a rule *unqualifiedly* obligating its pursuit. Thus, the law categorically bans the denial of quarter<sup>64</sup>; attacks on the civilian population or on individual civilians not directly participating in hostilities<sup>65</sup>; deliberate infliction of terror amongst civilians<sup>66</sup>; their starvation as a method of combat<sup>67</sup>; recruitment of children into the armed forces and their use in hostilities<sup>68</sup>; use of POWs<sup>69</sup> or protected persons<sup>70</sup> as human shields; hostage-taking<sup>71</sup>; and permanent forcible transfers and deportations.<sup>72</sup> Those framing these rules have elected to let humanity's condemnation trump military necessity's contrary permission.<sup>73</sup> Similarly, the law unqualifiedly obligates the release of POWs with provisions in unusual conditions of combat.<sup>74</sup> By positing this rule, the law extinguishes any liberty on the belligerent's part to act otherwise as may be permitted by military necessity.

Second, a positive IHL rule may *principally* obligate the pursuit of joint satisfaction but exceptionally authorise its non-pursuit. Consider, for instance, those rules principally prohibiting yet exceptionally authorising the destruction of property<sup>75</sup>; the destruction of captured enemy and neutral merchant vessels<sup>76</sup>; and temporary evacuations of residents in occupied territories.<sup>77</sup> Conversely, the following acts are principally obligatory yet exceptionally optional: the Detaining Power allowing internees to receive shipments which may meet their needs<sup>78</sup>; combatants distinguishing themselves

<sup>64</sup> See Article 23(d), 1907 Hague Regulations; Article 40, Additional Protocol I. See also Morris Greenspan, *The Modern Law of Land Warfare* (1959), at 103; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 7.

<sup>65</sup> See Articles 51(1), 51(3), Additional Protocol I.

<sup>66</sup> See *ibid.*, Article 51(2).

<sup>67</sup> See *ibid.*, Article 54(1).

<sup>68</sup> See *ibid.*, Article 77(2). See also Peter Rowe, "The Obligation of a State under International Law to Protect Members of Its Own Armed Forces During Armed Conflict or Occupation", 9 *Yearbook of International Humanitarian Law* 3 (2006), at 17-18.

<sup>69</sup> See Article 23, Geneva Convention III.

<sup>70</sup> See Article 28, Geneva Convention IV.

<sup>71</sup> See *ibid.*, Article 34.

<sup>72</sup> See *ibid.*, Article 49.

<sup>73</sup> See Marshall Cohen, "Morality and the Laws of War", in Virginia Held, Sidney Morgenbesser and Thomas Nagel (eds.), *Philosophy, Morality, and International Affairs* (1974) 71, at 74.

<sup>74</sup> See Article 41(3), Additional Protocol I; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 7.

<sup>75</sup> See Article 23(g), 1907 Hague Regulations; Article 49, Geneva Convention IV. See also Brandt, *supra* note 45, at 155-160; Doswald-Beck and Vité, *supra* note 48, at 100. This includes the destruction of cultural property and objects indispensable to the survival of the civilian population. For cultural property, see Article 4(2), Convention for the Protection of Cultural Property in the Event of Armed Conflict, (14 May 1954); Article 6, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999). For objects indispensable to the survival of the civilian population, see Article 54(5), Additional Protocol I.

<sup>76</sup> See para. 102, San Remo Manual on International Law Applicable to Armed Conflicts at Sea (12 June 1994).

<sup>77</sup> See Article 49, Geneva Convention IV.

<sup>78</sup> See *ibid.*, Article 108. This provision envisages situations where "military necessity require[s] the quantity of such shipments to be limited", implying that otherwise impermissible limitations are exceptionally permissible insofar as they actually happen to be militarily necessary.

from the civilian population<sup>79</sup>; attacking parties giving effective advance warning<sup>80</sup>; and belligerents allowing civil defence organisations to work.<sup>81</sup> Here, IHL framers have elected, in principle, to let humanitarian condemnations and demands take precedence over contrary liberties permitted by military necessity. Where these rules apply, the belligerent is obligated to pursue the joint satisfaction demanded by humanity and tolerated by military necessity – unless, and to the extent that, its non-pursuit proves militarily necessary in a particular situation.

Third, certain IHL rules *indeterminately* obligate the pursuit of joint satisfaction. Examples arguably include those rules concerning proportionality in attacks<sup>82</sup>; the use of weapons of a nature to cause superfluous injury and unnecessary suffering<sup>83</sup>; and those obligating humane but militarily unnecessary action “as far as military considerations permit”,<sup>84</sup> “whenever circumstances permit”,<sup>85</sup> and “to the maximum extent feasible”.<sup>86</sup> The process of their norm-creation has left the priority between military necessity and humanity unsettled. The non-pursuit of joint satisfaction is authorised to the extent permitted by military necessity, while its pursuit is obligated to the extent demanded by humanity. The rules themselves do not specify the point at which the former gives way to the latter. Their framers effectively transfer the burden of discovering this point to the rules’ addressees and adjudicators.

Fourth, there are some types of belligerent conduct over which IHL rules only *exceptionally* obligate the pursuit of joint satisfaction. Take, for example, the declaration and establishment of a blockade,<sup>87</sup> and the denial by the blocking party of free passage of essential goods to blockaded ports.<sup>88</sup> The framers of these rules have elected principally to let military necessity’s permission trump humanity’s contrary demands. The belligerent is at liberty to act as permitted by military necessity not only where it is in fact militarily necessary to do so; the same liberty remains in place even if it is not. This liberty not to pursue joint satisfaction exceptionally ceases where its pursuit does in fact prove humane.

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<sup>79</sup> See Article 44(3), Additional Protocol I. This duty is partially waived when, “owing to the nature of the hostilities an armed combatant cannot ... distinguish himself” in accordance with it.

<sup>80</sup> See Article 26, 1907 Hague Regulations; Article 57(2), Additional Protocol I; Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (1954), at 622-623; A.P.V. Rogers, *The Law on the Battlefield* 2d ed. (2004), at 88. Belligerents need not give such warning if “circumstances do not permit” (such as assault requiring an element of surprise).

<sup>81</sup> See Article 62(1), Additional Protocol I. That is, “except in cases of imperative military necessity”.

<sup>82</sup> See Doswald-Beck and Vité, *supra* note 48, at 100; Schmitt, “Military Necessity”, *supra* note 43, at 804-805; David Luban, “Risk Taking and Force Protection”, in Yitzhak Benjaji and Naomi Sussmann (eds.), *Reading Walzer* (2014) 277.

<sup>83</sup> See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (29 November-11 December 1868); Article 23(e), 1907 Hague Regulations. See also *Dissenting Opinion of Judge Higgins, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996) 583, at 586-587; Yves Sandoz, “International Humanitarian Law in the Twenty-First Century”, 6 *Yearbook of International Humanitarian Law* 3 (2003), at 8; Parks, *supra* note 21, at n.25; Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2010), at 66.

<sup>84</sup> That is, e.g., leaving some of a party’s medical personnel and materiel with the wounded and sick to assist in the latter’s care should the party in question be compelled to abandon them to the enemy. See Article 12, Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 August 1949). See also Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906) (“so far as military conditions permit”); Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929) (“as far as military exigencies permit”); Jean S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), at 141-142.

<sup>85</sup> That is, e.g., searching, collecting and evacuating the wounded, sick, shipwrecked and dead. See Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian Law* (2005), at 396, 406; Article 15, Geneva Convention I; Article 18, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949); Doswald-Beck and Vité, *supra* note 48, at 100.

<sup>86</sup> That is, e.g., removing movable cultural property from the vicinity of military objectives and avoiding locating military objectives near cultural property. See Article 8, Hague Cultural Property Protocol II.

<sup>87</sup> That is, unless the blockade has the sole purpose of starving the civilian population or is disproportionately injurious to the civilian population. See paras. 93, 102, San Remo Manual.

<sup>88</sup> That is, unless the denial leaves the civilian population inadequately supplied. See para. 103, San Remo Manual.

Fifth, the law may *decline* or *fail* to obligate the pursuit of joint satisfaction altogether. It may *decline* to do so by positing rules that affirmatively authorise non-pursuit. Such is the case regarding the Detaining Power interning POWs<sup>89</sup>; the belligerent searching and controlling medical vessels<sup>90</sup>; and the Occupying Power confiscating state property in occupied territory which may be used for military operations.<sup>91</sup> The belligerent also remains at liberty to disable eligible enemy combatants, deliberately inflict terror amongst them, or starve them as a method of combat. As regards these acts, IHL framers have elected to grant permissions of military necessity unfettered precedence over contrary humanitarian demands. It in no way matters whether, at a given moment, availing oneself of the former permission is militarily necessary or unnecessary; nor does it matter whether contrary action happens to be humane or inhumane. Acting as demanded by humanity, and thereby acting in joint satisfaction, is now entirely optional.

As for the law's *failure*, one may look to the ICJ's agnosticism regarding the lawfulness or otherwise of nuclear weapons in certain circumstances.<sup>92</sup> The International Committee of the Red Cross also concedes that it is unclear whether customary international humanitarian law prohibits belligerent reprisals against civilians during hostilities.<sup>93</sup> Similarly, no IHL rule appears to obligate civilians taking a direct part in hostilities, continuously or otherwise, to distinguish themselves from those taking no such part.<sup>94</sup>

Is there a generally liberal or prohibitive presumption for conduct not specifically regulated by positive International humanitarian law? A conservative reading of the Martens Clause would hold that it merely safeguards the continued application of customary IHL rules.<sup>95</sup> Read more progressively, the clause would represent a framework through which IHL rules are to be interpreted.<sup>96</sup> As seen below, while indifferent considerations such as military necessity do not create additional layers of normative significance, non-indifferent considerations may.

Norm contradiction also occurs between permissions of military necessity and demands of chivalry. It has led to the adoption, *inter alia*, of IHL rules prohibiting improper use of enemy uniforms<sup>97</sup>; participation in hostilities by paroled or repatriated POWs and by those sick, wounded or shipwrecked who have been returned<sup>98</sup>; and treachery.<sup>99</sup> The military necessity-chivalry interplay also underlies IHL rules authorising the detention and search of parlementaires,<sup>100</sup> and the absence of prohibition against espionage *per se*.<sup>101</sup>

<sup>89</sup> See Article 5, 1907 Hague Regulations; Article 21, Geneva Convention III.

<sup>90</sup> See Article 31, Geneva Convention II.

<sup>91</sup> See Article 53, 1907 Hague Regulations.

<sup>92</sup> See *Nuclear Weapons Advisory Opinion*, para. 97.

<sup>93</sup> See Henckaerts and Doswald-Beck, *supra* note 85, at 520-523. See also U.K. Ministry of Defence, *supra* note 13, at 420-421; Jean-François Quéguiner, "The Principle of Distinction: Beyond an Obligation of Customary International Humanitarian Law", in Hensel (ed.), *supra* note 11, 161, at 174-175; Schmitt, "Military Necessity", *supra* note 43, at 820-822.

<sup>94</sup> See Nobuo Hayashi, "Continuous Attack Liability without Right or Fact of Direct Participation in Hostilities – *The ICRC Interpretive Guidance* and Perils of a Pseudo-Status", in Joanna Nowakowska-Małusecka (ed.), *International Humanitarian Law: Antecedents and Challenges of the Present Time* (2010) 56, at 75-76.

<sup>95</sup> See Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", 94 *American Journal of International Law* 78 (2000), at 87-88; Dinstein, "Proportionality", *supra* note 31, at 72-73.

<sup>96</sup> See *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, *Judgement*, 14 January 2000, paras. 525-527; Antonio Cassese, "The Martens Clause: Half a Loaf or simply Pie in the Sky?", 11 *European Journal of International Law* 187 (2000).

<sup>97</sup> See Article 23(f), 1907 Hague Regulations; Article 39(2), Additional Protocol I. See also Bordwell, *supra* note 14, at 283.

<sup>98</sup> See Articles 10, 12, 1907 Hague Regulations; Ronald F. Roxburgh (ed.), *Oppenheim's International Law: A Treatise* 3d ed. (1921), at 192; Article 16, Geneva Convention II.

<sup>99</sup> See Article 23(b), 1907 Hague Regulations; Articles 8(2)(b)(xi), 8(2)(e)(ix), Rome Statute of the International Criminal Court (17 July 1998).

<sup>100</sup> See Articles 33, 34, 1907 Hague Regulations.

<sup>101</sup> See *ibid.*, Article 24; Roxburgh (ed.), *supra* note 98, at 222-223; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 241; para. 119, Manual on International Law Applicable to Air and Missile Warfare (15 May 2009).

### 2.3 Norm Conflict

Two norms conflict with each other where one obligates its addressee to perform a given act and the other prohibits the same act. The logical impossibility of joint obedience to which two conflicting norms give rise does not preclude the logical possibility of their valid co-existence. Conflicting norms may validly co-exist, even within one legal system.<sup>102</sup> It would nevertheless be a functional shortcoming of a legal system if it contained valid yet conflicting norms.<sup>103</sup>

Similarly, it would be seriously detrimental to the functionality of international humanitarian law if two conflicting sets of reason-giving considerations involved in its norm-creation led to the adoption of conflicting rules. The law endeavours to avoid them by letting one set trump the other, or by devising a compromise between them. Indifferent considerations, such as military necessity, do not obligate conduct and therefore do not become involved in norm conflicts. At stake here, rather, are those considerations that are not indifferent. For instance, one set of humanitarian considerations demands that the Detaining Power not medically intervene with a POW, whereas another set of humanitarian considerations arguably demands such intervention in certain circumstances. Article 13 of Geneva Convention III embodies a compromise struck between them. The same may be said *mutatis mutandis* of Article 78(1) of Additional Protocol I. This article principally prohibits evacuations of children to a foreign country, yet it arguably obligates their temporary evacuations where “compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require”.

## 3. Consequences of Considerations Interplay

This thesis’ Chapter 8 examines the consequences to which the interplay between reason-giving considerations in IHL norm-creation gives rise. As noted earlier, unqualified IHL rules extinguish all contrary liberties permitted or tolerated by indifferent considerations. The latter considerations have thus been “accounted for” and, consequently, do not modify an act’s lawfulness otherwise established by the former rules. It is arguable, however, that the same may not be said so readily of conflicting demands and condemnations.

### 3.1 Military Necessity

*Kriegsräson* asserts that, although international humanitarian law accounts for military necessity, it cannot be construed so that the belligerent is denied the option to do what it needs to succeed. Where rules are formulated without an express military necessity exception, it merely means that military necessity and the law are considered *generally* in agreement over the normative content of these rules. Whenever there *is* a collision, the former prevails over the latter.

*Kriegsräson* is unacceptable, because it purports to justify all militarily necessary conduct even where it is already unqualifiedly outlawed in positive international humanitarian law. Rejecting *Kriegsräson* amounts to rejecting the idea that military necessity somehow “rights” or “repairs” the

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<sup>102</sup> See Georg Henrik von Wright, “Value, Norm, and Action in My Philosophical Writings”, in Georg Meggle (ed.), *Actions, Norms and Values: Discussions with Georg Henrik von Wright* (1999) 11, at 21; Ota Weinberger, “Logical Analysis in the Realm of Law”, in *ibid.*, 300; H.L.A. Hart, “Kelsen’s Doctrine of the Unity of Law”, in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) 309, at 325.

<sup>103</sup> See Hart, “Kelsen’s Doctrine”, *supra* note 102, at 325-326.

unlawfulness of such conduct. Variations of the same theme, e.g., self-preservation,<sup>104</sup> self-defence<sup>105</sup> and impracticality,<sup>106</sup> are to be rejected for the same reason.

Counter-*Kriegsrason* is perhaps most forcefully stated in the following passage:

[A] direct attack against an otherwise legitimate military target constitutes a violation of IHL if that attack is not required for the submission of the enemy with a minimum expenditure of time, life and physical resources ... [T]he fact that IHL does not prohibit direct attacks against combatants does not give rise to a legal entitlement to kill combatants at any time and any place so long as they are not *hors de combat* within the meaning of Article 41(2) AP I. Strictly speaking, although the absence of such a prohibition is undisputedly intentional, it constitutes no more than a strong presumption that, in a situation of armed conflict, it will generally be militarily necessary to kill, injure, or capture combatants of the opposing armed forces in order to bring about the submission of the adversary with a minimum expenditure of time, life and physical resources. It does not permit the senseless slaughter of combatants where there manifestly is no military necessity to do so, for example where a group of defenceless soldiers has not had the time to surrender, but could clearly be captured *without additional risk to the operating forces*.<sup>107</sup>

On this view, the mere fact that international humanitarian law accounts for military necessity does not leave the belligerent at liberty to do what is, in fact, militarily unnecessary. Where IHL rules are unqualifiedly formulated, it simply means that whatever these rules authorise is deemed *generally* militarily necessary – “no more than a strong presumption”, in other words. Where there *is* a collision between conduct being militarily unnecessary, on the one hand, and it being otherwise lawful according to positive IHL rules, on the other, the former “wrongs” or “vitiates” the latter. Where the military necessity for particular belligerent conduct does not exist or ceases to exist, the law, all things considered, prohibits it.

As seen above, counter-*Kriegsrason* is unconvincing<sup>108</sup> because it is predicated on two erroneous perceptions of military necessity *qua* reason-giving considerations. First, some aspects of military necessity survive the process of IHL norm-creation and act as a residual lawfulness modifier (which they do not). Put differently, international humanitarian law does not fully account for military necessity. Second, those aspects that remain unaccounted for are normatively not indifferent (which they are).

### 3.2 Humanity

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<sup>104</sup> See Stone, *supra* note 80, at 352-353. But see N.C.H. Dunbar, “Military Necessity in War Crimes Trials”, 29 *British Yearbook of International Law* 442 (1952), at 443; Schwarzenberger, *supra* note 13, at 136; Walzer, *Just and Unjust Wars*, *supra* note 32, at 305; Cohen, “Morality and the Laws of War”, *supra* note 73, at 76-78; Dinstein, “Military Necessity” (2010), *supra* note 44, paras. 10-11.

<sup>105</sup> See *Nuclear Weapons Advisory Opinion*, para. 97. But see Higgins *Dissenting Opinion*, at 590; *Dissenting Opinion of Judge Weeramantry*, *ibid.*, 429, at 513-520; Luigi Condorelli, “Le droit international humanitaire, ou l’exploration par la cour d’une terra à peu près incognita pour elle”, in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 229, at 244-245; Christopher Greenwood, “*Jus ad Bellum* and *Jus in Bello* in the Nuclear Weapons Advisory Opinion”, in *ibid.*, 247, at 264; Judith Gardam, “Necessity and Proportionality in *Jus ad Bellum* and *Jus in Bello*”, in *ibid.*, 275, at 292; Marcelo G. Kohen, “The Notion of ‘State Survival’ in International Law”, in *ibid.*, 293, at 310; Nishimura Hayashi, *supra* note 11, at 143-144; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 85-86; Solis, *supra* note 11, at 269; Greenwood, “Historical Development”, *supra* note 13, at 36-37.

<sup>106</sup> See Hilaire McCoubrey, “The Nature of the Modern Doctrine of Military Necessity”, 30 *Revue de droit militaire et de droit de la guerre* 215 (1991), at 237.

<sup>107</sup> Melzer, *Targeted Killing*, *supra* note 15, at 287-288 (emphasis in original; footnotes omitted).

<sup>108</sup> Dapo Akande, “Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities”, 59 *International and Comparative Law Quarterly* 180 (2010), at 192; Schmitt, “Military Necessity”, *supra* note 43, at 835; Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, 1 *Harvard National Security Journal* 5 (2010), at 41, 43.

It stands to reason that pleas arising *de novo* from humanity's indifferent considerations are also inadmissible. Holding otherwise is tantamount to accepting the idea that, like *Kriegsräson*, acting as permitted yet not demanded by humanity somehow "repairs" or "rights" the act's unlawfulness.<sup>109</sup> *Humanitätsräson* is therefore untenable. We should also reject counter-*Humanitätsräson* for this reason. The belligerent's failure to do what is permitted by humanity would not render that failure unlawful if it otherwise remains lawful according to positive IHL rules.

Humanity's demands and condemnations are perhaps more complex. These aspects may in fact survive the process through which international humanitarian law posits its rules. It is possible that an IHL rule unqualifiedly obligating or prohibiting given conduct does not resolve such genuine norm conflicts as may exist with contrary humanitarian demands. Article 118 of Geneva Convention III stipulates that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities".<sup>110</sup> That this provision creates an unqualified obligation finds support in its drafting history<sup>111</sup> as well as some scholarly writings.<sup>112</sup> A situation may arise where a Detaining Power finds itself torn between Article 118 and a humanitarian demand of non-repatriation. This dilemma arose in the aftermath of the Korean War,<sup>113</sup> the Iran-Iraq War<sup>114</sup> and the Gulf War.<sup>115</sup>

Has Article 118's adoption compulsorily resolved the norm conflict by letting the duty of repatriation trump the conflicting humanitarian demand that may arise in specific cases? Neither *lex specialis*<sup>116</sup> nor *jus cogens*<sup>117</sup> offers a satisfactory alternative here, as it is unqualified IHL rules themselves that supposedly account for military necessity and humanity, and it is this fact that supposedly renders military necessity and humanity pleas inadmissible *de novo*.<sup>118</sup> Nor does the argument that the subsequent custom has modified Article 118, with the result that the provision now has an implicit exceptional humanity clause, remedy the difficulty. This remedy would not have been available to those during the Korean War grappling with the norm conflict created when Article 118 was adopted in 1949.

*Humanitätsgebot* offers an arguably more cogent explanation. The mere fact that Article 118 unqualifiedly obligates post-hostilities POW repatriation may not have resolved the norm conflict. It is not clear whether, all things considered, the *unqualifiedness* of the prescriptions contained in Article 118 *vis-à-vis* conflicting humanitarian demands was, in 1949, or has since been, conclusive for international humanitarian law. The idea that the latter demands may have survived the process of IHL norm-creation accommodates the possibility that humanitarian pleas *de novo* in support of non-repatriation are not inadmissible *vis-à-vis* Article 118.

<sup>109</sup> See Gabriella Blum, "The Laws of War and the 'Lesser Evil'", 35 *Yale Journal of International Law* 1 (2010). But see Diane Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (2010).

<sup>110</sup> Article 118, Geneva Convention III.

<sup>111</sup> See Federal Political Department, 2-A *Final Record of the Diplomatic Conference of Geneva of 1949* (1949), at 324, 462; Jean S. Pictet (ed.), *Commentary Geneva Convention III Relative to the Treatment of Prisoners of War* (1960), at 542-543.

<sup>112</sup> See Horst Fischer, "Protection of Prisoners of War", in Fleck (ed.) *supra* note 13, 367, at 416.

<sup>113</sup> See Pictet (ed.), *Commentary Geneva Convention III*, *supra* note 111, at 543-546.

<sup>114</sup> See John Quigley, "Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War after the Close of Hostilities", 5 *American University Journal of International Law and Policy* 73 (1989-1990), at 81-83.

<sup>115</sup> See Peter Rowe, "Prisoners of war in the Gulf area", in Peter Rowe (ed.), *The Gulf War 1990-91 in International and English Law* (1993), at 203. It is now the U.K. policy that "prisoners of war should not be repatriated against their will". See U.K. Ministry of Defence, *supra* note 13, at 205.

<sup>116</sup> Repatriating or not repatriating POWs after the cessation of hostilities is possibly one area where international human rights law and international refugee law prohibiting repatriation in certain situations would function as the *lex specialis* relative to international humanitarian law obligating repatriation in all situations.

<sup>117</sup> For a discussion as to whether *non-refoulement* has attained *jus cogens* status, see Walter Kälin et al., "Article 33, para. 1 1951 Convention", in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 1327, at 1347-1348.

<sup>118</sup> See Yoram Dinstein, "Military Necessity", 3 *Max Planck Encyclopedia of Public International Law* (1982) 274, at 274; Dinstein, *Conduct of Hostilities* (2004), *supra* note 42, at 18-19; Dinstein, *Conduct of Hostilities* (2010), *supra* note 14, at 6-7; Dinstein, "Military Necessity" (2010), *supra* note 44, para. 7; Schmitt, "Military Necessity", *supra* note 43, at 805.



Nor, for that matter, is counter-*Humanitätsgebot* entirely inconceivable. An IHL rule may decline or fail to obligate what humanity demands or, in any event, unqualifiedly obligate less than what humanity demands.<sup>119</sup> Where this occurs, acting in accordance with humanitarian demands entails pursuing, and exceeding, the joint satisfaction envisaged in the rule. *If* it were agreed that humanity demands “capture rather than kill”, and *if* it were true that the process of IHL norm-creation through which the lawfulness of “killing rather than capturing” has come to be secured does not fully account for such demands, *then* it might be argued that killing rather than capturing is, all things considered, unlawful under international humanitarian law.<sup>120</sup>

### 3.3 Chivalry

Both *Ritterlichkeitsrason* and counter-*Ritterlichkeitsrason* are safely rejected. What may not be so hastily dismissed<sup>121</sup> are their affirmative variations, i.e., *Ritterlichkeitsgebot* and counter-*Ritterlichkeitsgebot*.

## 4. Synthesis

This thesis advances eight observations, each accompanied by a brief explanation. They are grouped into two categories, namely: (a) those relating to military necessity itself; and (b) those relating to those aspects of international humanitarian law within which military necessity broadly falls.

### 4.1 Observations Relating to Military Necessity Itself

In its most elementary sense, determining whether a specific act is militarily necessary is about assessing the act’s fitness as a means towards its end. International humanitarian law “accounts for” military necessity when the law’s framers decide what to do about a given kind of conduct, in view of its capacity or tendency to constitute a material military necessity or non-necessity. Having “accounted for” military necessity, the law precludes all pleas that are derived from it, except where their admissibility is envisaged expressly and in advance. Military non-necessity appears as an element of war crimes and crimes against humanity where their underlying IHL rules admit military necessity exceptions.

#### 4.1.1 Military Necessity in Its Material Context

In its material context, military necessity signifies how conducive a specific belligerent act is *vis-à-vis* the attainment of its military purpose under a given set of circumstances. Conversely, material non-necessity signifies the extent to which it is not so conducive. Futility, purposelessness, wastefulness, and impertinence, are among those factors that render belligerent action militarily unnecessary.

Material military necessity is a relative, evaluative and situation-dependent notion, and that its assessment may vary depending on the surrounding situations and even among similarly competent

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<sup>119</sup> There is a standing “invitation to exceed that minimum” established in common Article 3. See Pictet (ed.), *Commentary Geneva Convention I*, *supra* note 84, at 52.

<sup>120</sup> Jeff McMahan, “The Morality of War and the Law of War”, in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Studies of Soldiers* (2008) 19, at 37; International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), at 82; Nils Melzer, “The ICRC’s Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law”, in Christian Tomuschat et al. (eds.), *The Right to Life* (2010) 151, at 162.

<sup>121</sup> In this connection, see also Gill, *supra* note 40, at 43-49.

and experienced assessors. Clausewitzian friction explains why no causation, let alone one that is *sine qua non*, is part of material military necessity.

Understood thus, material military necessity separates fighting that is effective and conducive to success from fighting that is neither. The notion merely entails the two-fold truism that it is in each belligerent's strategic self-interest to pursue what he or she needs to accomplish and that it is also in his or her strategic self-interest to avoid failures. It is predicated on a soldier's vocational competence being separable from a person's ethical competence. The two competences' separability finds support among authorities and facts.

A soldier's strictly military virtue remains intelligible on its own, although it may also form part of a patriotic citizen's ethical virtue to fight competently. Similarly, the same narrow reading of a soldier's vocational competence to "get the job done" is viable, even if one were to agree that, all things considered, only ethically competent conduct should count as *truly* vocationally competent conduct and that clearly unethical conduct should not.

#### 4.1.2 Military Necessity in Its Normative Context

A military purpose's illegitimacy clearly "taints" the legitimacy of any measure taken therefor. Such a measure is illegitimate, whether it is deemed materially necessary or not. Where the purpose sought is legitimate, however, the measure taken is not necessarily legitimate. In IHL norm-creation, the crude utilitarian adage that "the end justifies the means" does not always obtain, despite the fact that some readings of the *jus ad bellum-jus in bello* interplay, *Kriegsräson*, and humanity's ascendancy may suggest the contrary.

Variations on Sergeant Chesterton's attitude towards an escaping German soldier illustrate how military necessity or non-necessity relates to the legitimacy of an act that entails evil or no evil. Assessing the legitimacy of a necessary evil is a complex task. An unnecessary evil is evil *simpliciter*, and unmitigated evil is plainly illegitimate. The situation is different for an act that is not evil. Whether such an act is militarily necessary or unnecessary is immaterial to its legitimacy. It is legitimate to perform, or to refrain from performing, an act that entails no evil and accords with military necessity (e.g., appropriate use of non-lethal weapons). The same is true of an act that is neither evil nor militarily unnecessary, such as Germany's failure properly to recruit, train and monitor its agents operating in the UK.

Accordingly, material military non-necessity, as such, is *never* a reason for a belligerent act's illegitimacy as far as IHL norm-creation is concerned. What de-legitimises an unnecessary evil is its evil, rather than its lack of necessity. That this is so echoes the fact that, although international humanitarian law endeavours to accommodate the pursuit of military necessities, the law does not make it its business to save incompetent belligerents from themselves. After all, if a warring party encumbers itself with missed opportunities and mounting blunders, it has only itself to blame. These Millian underpinnings mirror the fact that military history is rich with episodes of exclusively self-inflicted evil, and that there are relatively few IHL rules dealing with such evil.

Some erroneously assert that international humanitarian law obligates the performance of material military necessities. The opposite mistake, i.e., to assert that the law forbids materially unnecessary acts because only necessary ones should be permitted, is more common.

An act whose performance and forbearance are both permitted is morally indifferent. In IHL norm-creation, military necessity endows the belligerent with Hohfeldian liberties not only to pursue what is necessary and avoid what is unnecessary, but also to forgo necessities and encumber itself with non-necessities. Conversely, IHL framers have no reason to prohibit acts deemed militarily unnecessary or to obligate those deemed militarily necessary. Holding otherwise would amount to requiring that "naked" soldiers be killed; combat aircraft fly at high altitudes for their own safety; and belligerents recruit child soldiers.

#### 4.1.3 Military Necessity in Its Juridical Context

International humanitarian law does not admit *de novo* military necessity pleas in defence of deviations from its unqualified rules. Such pleas are admissible only *vis-à-vis* those rules that envision military necessity exceptions expressly and in advance. Military necessity exempts a measure from those principal IHL rules to which it is attached, to the extent the measure is required for the attainment of a military purpose and otherwise in conformity with that law. These rules also reveal instances where the framers of international humanitarian law have specifically elected to let military necessity considerations survive the process of IHL norm-creation.

Juridical military necessity forms part of the very IHL rule it modifies. Acts that comply with the modified rule are not internationally wrongful. If not, or no longer, militarily necessary, the act reverts to being a non-exempted instance now bound by the principal rule. Military necessity *qua* exception is therefore distinct from the state of necessity *qua* circumstance precluding the wrongfulness of an act under the international law of state responsibility.

Customary international humanitarian law (e.g., war crimes cases, international rulings, arbitration decisions, domestic court decisions, military manuals, preparatory works, commentaries) establishes that juridical military necessity contains four cumulative requirements. First, the measure must be taken primarily for some specific military purpose. This means that a specific purpose must exist and that the purpose must be primarily military in nature. The belligerent need not take the measure with a view to ensuring the submission of its enemy, however. Second, the measure must be required for the military purpose's attainment. Whether a measure can be considered "required" depends on three criteria, namely: (a) whether the measure was materially relevant to the purpose's attainment; (b) whether, of the materially relevant and reasonably available measures, the one taken was the least injurious; and (c) whether the harm resulting from the measure was proportionate to the purpose's military value. The measure's urgency, as well as the notion that there may be different degrees of military necessity, appears to be already implied in this second requirement. Third, the military purpose sought must be in conformity with international humanitarian law. Fourth, the measure taken must otherwise be in conformity with that law.

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

#### 4.1.4 Military Necessity as a Negative Element of Several Property- and Displacement-Related War Crimes and Crimes Against Humanity

Where a substantive IHL rule envisages a military necessity exception, and where the rule's violation constitutes an offence punishable under international criminal law, the absence of military necessity is an explicit or implicit element of that offence. At issue here are several war crimes and crimes against humanity involving property destruction and forcible population displacement. Since military non-necessity is an element to be proven, its onus rests with the prosecution.

The voluminous jurisprudence generated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) shows that the tribunal has treated military necessity in a manner that is mainly consistent with the notion's IHL requirements. Large-scale property destruction not justified by military necessity has been prosecuted under Articles 2(d), 3(b) and 5(h) of the ICTY Statute. Determining the military necessity of property destruction during the fighting is a highly complex task. Where the underlying combat activities lack military justification to begin with, military necessity is inadmissible with regard to property destruction that occurs during these activities. Should there be some justification, the question devolves to the destroyed object's status as a military objective (if so, *ipso facto* militarily necessary) or a civilian object; if it is a civilian object destroyed by an attack, then to

the attack's lawfulness (if so, *ipso facto* militarily necessary) or unlawfulness (if so, *ipso facto* militarily unnecessary); and, if it is a civilian object destroyed by an act not constituting an attack, then to the act's fulfilment or non-fulfilment of all of military necessity's IHL requirements.

Some ICTY decisions exhibit troublesome confusions, however. One concerns the failure to distinguish between military necessity, which pertains to the *measure*, on the one hand, and military objective, which pertains to the *property*, on the other. The other relates to the destruction of property that also constitutes an attack against that property, as opposed to the destruction of property that does not. This distinction is important where the property in question is a civilian object. The *Orić* as well as *Boškoski and Tarčulovski* Trial Judgments arguably deem the destruction of civilian objects incapable of satisfying any military purpose (which, as military necessity's first IHL requirement suggests, it may).

As regards property destroyed outside of combat, most ICTY rulings have correctly found the absence of military necessity in the destruction's ethnically driven character. Such destruction is indeed ineligible for the military necessity clause, since it amounts to adverse distinction of the kind prohibited under international humanitarian law. Where property is selectively destroyed with a view to discriminating its owners on account of their ethnicity, it may also constitute persecutions, a crime against humanity. In *Hadžihasanović and Kubura*, and *Prlić*, ICTY trial chambers concluded that the commission of plunder and retaliation did not render property destruction militarily necessary. Problematically, the *Orić* Trial Judgment seems to embrace the view that the absence of combat itself means the absence of military necessity (which it does not).

Articles 2(g), 5(d), 5(h) and 5(i) of the ICTY Statute directly or indirectly cover deportations and forcible transfers carried out without grounds permitted under international law, including, in particular, imperative military reasons. Nevertheless, only some of the trial judgments adjudicating these charges, such as *Tuta and Štela*, *Brđanin*, *Đorđević*, *Martić* and *Krstić*, discuss unlawfulness, let alone a lack of imperative military reasons, in connection with their displacement-related findings.

The Rome Statute of the International Criminal Court also contains a number of property- and displacement-related offences that explicitly or implicitly contain the absence of military necessity as an element. To date, the court's confirmation decisions and trial judgments dealing with this matter are limited both in number and significance. Some confirmation decisions find the absence of military necessity without elaboration. Others offer more yet still remain superficial. The *Katanga* Trial Judgment's discussion of military necessity cites the Lieber Code and interprets the expression "imperatively demanded" to mean "no other option", but it fails to identify proper criteria or to apply them to the fact at hand.

There is no room for *de novo* military necessity pleas where IHL rules are unqualified and where their violations constitute war crimes and/or crimes against humanity. Awkwardly, Article 31(1)(c) of the Rome Statute excludes individual criminal responsibility on account of acts performed in defence of property "essential for accomplishing a military mission". Though narrow in scope, this provision introduces a qualitatively new defence that may be mistaken as an invitation to plead military necessity *de novo vis-à-vis* punishable breaches of unqualified IHL rules. The same danger exists for Article 31(3).

#### 4.2 Observations Relating to Those Aspects of International Humanitarian Law within Which Military Necessity Broadly Falls

Military necessity never conflicts with humanity in IHL norm-creation. Where the two considerations point towards the same behavioural direction, the law's framers often posit rules that unqualifiedly obligate the belligerent to act accordingly. International humanitarian law responds to contradictions between humanity's imperatives and military necessity's counter-liberties by creating various levels of obligatory compliance with the former. Unqualified IHL rules are insusceptible to *de novo* pleas based not only on military necessity but also on other indifferent considerations. The same may not be too hastily said of *de novo* pleas derived from humanitarian or chivalrous imperatives.

#### 4.2.1 “Accounting for” the Military Necessity-Humanity Interplay in IHL Norm-Creation Where the Two Sets of Considerations Align with Each Other

Despite suggestions to the contrary, it is entirely plausible, indeed quite common, that belligerent acts may be neither humane nor militarily necessary. This is a position that finds ample support in episodes, as well as commentaries and IHL provisions.

Where humanity condemns what military necessity merely tolerates, it is plainly possible to satisfy both sets of considerations by refraining from the act. IHL framers account for such possibilities by positing unqualified prohibitions. Under no circumstances are these obligations subject to modifications on account of countervailing considerations that are normatively indifferent. Examples include the prohibitions against the use of certain weapons, bombarding undefended localities, shooting to kill those placed *hors de combat* or descending from aircraft in distress, and committing rape, among others. It does not necessarily follow, however, that international humanitarian law is incapable of restricting or banning inhumane means and methods as long as they retain military utility.

Conversely, numerous kinds of acts, such as ethical fighting in counterinsurgency and the so-called “effects-based operations”, are both humane and necessary. IHL-compliant behaviour can simultaneously enhance discipline and accord with military necessity. Here, too, the belligerent jointly satisfies military necessity and humanity by behaving accordingly. Though limited in number, international humanitarian law does impose unqualified obligations of this nature, for instance, regarding some aspects of belligerent occupation.

Acts that jointly satisfy military necessity and humanity in this manner – i.e., either because they are both inhumane and unnecessary, or because they are both humane and necessary – do not always become the subject of unqualified IHL rules. One explanation for this is that many inhumane and unnecessary acts involve exclusively self-inflicted evil (see proposition 4.1.2 above). The fact that what is both humane and necessary tends to be a matter of moral praise, rather than moral demand, is another. The involvement of third considerations, most notably sovereign interests, in IHL norm-creation also limits the number of these rules. *Clausula si omnes* – though strictly of historical interest – , and resistance to the expansion of IHL rules applicable in non-international armed conflicts as well as a customary ban on belligerent reprisals against civilians in hostilities, exemplify the impacts such considerations can have.

#### 4.2.2 “Accounting for” the Military Necessity-Humanity Interplay in IHL Norm-Creation Where the Two Sets of Considerations Contradict Each Other

Two norms are in conflict when one obligates and the other forbids the same conduct. It might be felt that humanity and military necessity conflict each other where the former condemns what the latter permits, or the former demands what the latter merely tolerates. That is not so, however, given military necessity’s normative indifference (see proposition 4.1.2 above). Frustration between a duty and a counter-liberty would be problematic only if the two norms validly belonged to two un-integrated fields, or if they were independently valid rules within the same field (neither of which is the case with humanity and military necessity). Joint conformity remains a possibility where a duty and a counter-liberty contradict each other, and the agent achieves it by choosing to obey the duty.

Similarly, by acting in accordance with humanity, the belligerent can always jointly satisfy what humanity condemns or demands and what military necessity indifferently permits or tolerates. IHL framers account for this particular type of joint satisfaction when they make its pursuit (i) unqualifiedly obligatory, (ii) principally obligatory, (iii) indeterminately obligatory, (iv) exceptionally obligatory, or (v) entirely discretionary.

*Unqualified obligations:* One may list, among other things, the unqualified prohibitions against attacking civilians, using methods and means expected to cause environmental damage, denying quarter, deliberately inflicting terror amongst civilians, starving civilians as a method of combat, and using certain weapons. International humanitarian law unqualifiedly obligates the release of POWs with provisions in unusual conditions of combat. These rules indicate where IHL framers have elected to let the imperatives of humanity trump and extinguish all contrary permissions of military necessity.

*Principal obligations:* The law principally forbids the destruction of property in occupied territory, as well as captured enemy and neutral merchant vessels, yet exceptionally authorises their destruction if it is militarily necessary. IHL provisions obligate the belligerent to permit humanitarian activities, e.g., those undertaken by Red Cross delegates and representatives of Protecting Powers, yet exceptionally release it from these obligations where required by military necessity.

*Indeterminate obligations:* They include provisions concerning proportionality in attacks and the use of weapons of a nature to cause superfluous injury or unnecessary suffering. Also, consider IHL rules that obligate humane but militarily unnecessary action “whenever circumstances permit”, and the like.

*Exceptional obligations:* Some blockade-related rules (e.g., declaration and establishment, denial of free passage to essential goods) fall within this category, as do those dealing with the treatment of certain medical facilities and equipment (e.g., sick-bays on board a warship). Here, militarily necessary action is principally authorised, yet exceptionally forbidden when it is in fact inhumane.

*No obligations:* IHL framers have specifically declined to obligate jointly satisfactory behaviour with respect to POW internment, search and control of medical vessels, and confiscation of state property in occupied territory. Positive international humanitarian law is arguably silent on various acts, e.g., forcible displacement, deliberate terrorisation and starvation of enemy combatants; use of artillery against lawful military objectives located in civilian-populated areas; and censorship of detainee correspondence. It remains debatable whether, even where positive IHL rules are silent, the Martens Clause has really replaced the *Lotus*-inspired presumed freedom of action (*in dubio pro libertate*) with a presumed prohibition (*in dubio pro prohibitionem*).

#### 4.2.3 Normative Consequences to Which “Accounting for” Indifferent Considerations in IHL Norm-Creation Gives Rise

When positing rules that unqualifiedly obligate humane conduct, IHL framers have elected to let the underlying humanitarian imperatives trump and set aside all contrary indifferent considerations (see propositions 4.2.1 and 4.2.2 above).

It follows that acting in accordance with indifferent considerations does not “right” or “repair” its unlawfulness if it is otherwise unqualifiedly established by positive international humanitarian law. All military necessity considerations exhibit normative indifference (see proposition 4.1.2 above). Nor, as noted earlier, do they survive the process of IHL norm-creation that posits unqualified rules. *Kriegsräson*, as well as its variations including self-preservation, self-defence and impracticality, is therefore unacceptable. The same is true of any *de novo* pleas founded on humanitarian considerations – or chivalrous considerations, for that matter – that are normatively indifferent. Admitting such pleas *vis-à-vis* unqualified IHL rules would amount to advocating *Humanitätsräson* (e.g., misusing the Red Cross emblem for humanitarian purposes, “mercy killing”), or *Ritterlichkeitsräson*.

If we were to reject indifferent considerations being pleaded *de novo* for breaches of unqualified IHL rules, we should also reject the popular idea that the same considerations “wrong” or “vitate” a contrary act’s compliance with positive IHL rules. Recent support for “capture rather than kill” as an IHL rule typifies counter-*Kriegsräson*, a position that would require military non-necessity to possess a normative property that is non-indifferently restrictive or prohibitive. This latter property is more likely to emanate from some elements of humanity and/or chivalry. Besides, why should those aspects of military necessity that would validate *Kriegsräson* be considered “accounted for” and extinguished

but not those that would validate counter-*Kriegsräson*? For the same reason, there should be no room for counter-*Humanitätsräson* or counter-*Ritterlichkeitsräson*.

#### 4.2.4 Normative Consequences to Which “Accounting for” Non-Indifferent Considerations in IHL Norm-Creation Gives Rise

It is sometimes argued that the military necessity-humanity interplay permeates the entire *corpus juris* of international humanitarian law, and that all unqualified IHL rules exclude both *de novo* military necessity pleas and *de novo* humanity pleas. In fact, some of these rules involve military necessity but not humanity (e.g., prohibition against improper use of enemy uniforms), or humanity but not military necessity (e.g., prohibition against compelling officer POWs to perform labour), in their norm-creation. Nor, at least in theory, is it inconceivable that even unqualified IHL rules may admit *de novo* pleas emanating from non-indifferent considerations.

There is a conflict where an unqualified IHL rule obligates particular behaviour and humanity demands contrary behaviour. How norm conflicts are dealt with (e.g., through the adoption of a Hartian rule of recognition requiring would-be rules to comport with substantive moral norms) varies from one body of positive legal rules to another. Arguably, IHL norm-creation may leave genuine conflicts that can arise between unqualified rules it posits and contrary imperatives unresolved. Should the latter survive the process, they may then operate as additional layers of lawfulness modification over and above positive IHL rules.

Two legal solutions devised around POW treatment point to *Humanitätsgebot*’s possible existence. One involves Geneva Convention III’s unqualified obligation to repatriate POWs after the cessation of hostilities *vis-à-vis* humanity’s demand against forced repatriation on account of likely persecutions back home (e.g., Korea, Vietnam, Persian Gulf). The other concerns POW internment on land, an unqualified obligation under Article 22 of Geneva Convention III, *vis-à-vis* temporary internment aboard vessels at sea for expeditious evacuation from the combat zone (e.g., Falklands-Malvinas). Both cases are perhaps best explained by how, all things considered, international humanitarian law would exceptionally authorise deviations even from the prescriptions of its unqualified rules when humanity so demands.

Conversely, counter-*Humanitätsgebot* – if it exists – may effectively raise the degree to which combatants must risk self-endangerment with a view to sparing civilians beyond what positive IHL rules currently require. Similarly, it may obligate “capture rather than kill” despite the arguable absence of such an obligation under today’s positive international humanitarian law.

The same can be said, *mutatis mutandis*, of *Ritterlichkeitsgebot* and counter-*Ritterlichkeitsgebot*.

## 5. Conclusion

The precise content of military necessity, humanity, chivalry and the like will doubtless continue to stir debate. This thesis nevertheless shows that their functions relative to international humanitarian law can be illuminated. The normative characteristics of these notions shape the dynamics of their interplay in the context of IHL norm-creation, as well as the consequences of such interplay *vis-à-vis* positive IHL rules.

More specifically, this thesis asserts that military necessity is indifferently permissive, regardless of the context in which it appears. It not only reaffirms the fallacy of *Kriegsräson* but also invalidates the idea that belligerent conduct consistent with positive international humanitarian law becomes unlawful by virtue of its military non-necessity alone. Moreover, this thesis confirms the inadmissibility of *de novo* military necessity pleas *vis-à-vis* unqualified IHL obligations without excluding the possibility that non-indifferent aspects of humanity and chivalry may survive IHL norm-creation and operate as additional layers of lawfulness determination over positive rules.

Here emerges a new theory of military necessity, as well as what it means to say that international humanitarian law “accounts for” it.