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## Contextualizing Military Necessity

Nobuo Hayashi

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## CONTEXTUALIZING MILITARY NECESSITY

Nobuo Hayashi\*

### ABSTRACT

*Modern theories correctly reject the Kriegsraison doctrine, according to which the laws of war do not override the necessities of war and it is rather the latter that override the former. One such theory holds that unqualified rules of international humanitarian law (“IHL”) exclude military necessity being invoked de novo as a ground for deviation therefrom, yet not as a ground for additional restraint thereon. This theory—let us call it “counter-Kriegsraison”—is unacceptable for two reasons. First, in none of the three pertinent contexts does military necessity restrict or prohibit militarily unnecessary conduct per se. Seen in a strictly material context of war-fighting, military necessity merely embodies a truism that it is in one’s strategic self-interest to pursue what is materially conducive to success and that it is similarly in one’s strategic self-interest to avoid what is not so conducive. Nor, in the context of IHL norm-creation, does military necessity give the law reason to forbid or limit given conduct. Unnecessary evil does, but unnecessary simpliciter does not, mean illegitimate. In positive international humanitarian law, military necessity functions exclusively as an exceptional clause. If not, or no longer, militarily necessary, deviant conduct simply reverts to being governed by the principal rule. It is the principal rule, rather than the military non-necessity of the conduct or the now inoperative exceptional clause, that renders such conduct unlawful. The second reason for which counter-Kriegsraison is untenable is the same reason for which Kriegsraison is untenable. Positive international humanitarian law has already “accounted for” military necessity. This means that no relevant element of military necessity has survived the process of IHL norm-creation and may consequently be invoked de novo vis-à-vis unqualified rules once this process has validly posited them. Where given conduct is unlawful according to a*

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\* Researcher, Peace Research Institute Oslo (PRIO). Formerly, Legal Advisor, Norwegian Centre for Human Rights, Faculty of Law, University of Oslo; Legal Officer, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia. The views expressed in this paper are strictly those of the author. All errors are his and his alone. He wishes to thank Arne Willy Dahl, William J. Fenrick, Guillermo Otálora Lozano, Joanna Nicholson, Simon O’Connor, Greg Reichberg, Henrik Syse, and Inna Uchkunova for their encouragement and thoughtful comments on earlier drafts.

validly posited IHL rule of an unqualified character, then, even if the conduct constitutes material military necessity, invoking it does not “repair” or “right” the conduct’s unlawfulness. Conversely, where given conduct is unqualifiedly lawful according to the applicable rule of positive international humanitarian law, the conduct’s lack of material military necessity does not “wrong” or “vitate” its otherwise conclusive lawfulness.

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## INTRODUCTION

The idea that international humanitarian law (“IHL”) has been developed with a view to striking a realistic and meaningful balance between military necessity and humanity finds support in several treaty provisions<sup>1</sup> as well as numerous scholarly writings.<sup>2</sup> In particular, it is often stressed that the law accounts for military necessity.<sup>3</sup>

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<sup>1</sup> See, e.g., Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, *reprinted in* 1 AM. J. INT’L L. (SUPPLEMENT: OFFICIAL DOCUMENTS) 95, 95–96 (1907) [hereinafter St. Petersburg Declaration]; see also Convention (IV) Respecting the Laws and Customs of War on Land pmbl., Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Convention IV]; INST. OF INT’L LAW, THE LAWS OF WAR ON LAND (1880), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 29, 31 (Dietrich Schindler & Jifí Toman eds., 4th rev. ed. 2004) [hereinafter OXFORD MANUAL].

<sup>2</sup> See, e.g., INGRID DETTER, THE LAW OF WAR 394 (2d ed. 2000); THOMAS ERSKINE HOLLAND, THE LAWS OF WAR ON LAND (WRITTEN AND UNWRITTEN) 12–13 (1908); CLAUDE PILLOUD ET AL., INT’L COMM. OF THE RED CROSS [ICRC], COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 392–93 (Yves Sandoz et al. eds., 1987); Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians* 39 ISR. L. REV. 81, 81 (2006); Geoffrey Best, *The Restraint of War in Historical and Philosophical Perspective*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 3, 5 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991); N.C.H. Dunbar, *The Significance of Military Necessity in the Law of War*, 67 JURID. REV. 201, 212 (1955); Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 37 (Dieter Fleck ed., 2d ed. 2008); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L. L.J. 49, 53 (1994); Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 798 (2010).

<sup>3</sup> See, e.g., NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 290 (2008); FRÉDÉRIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES § 353 (1987); PILLOUD ET AL., *supra* note 2, at 393; A.P.V. ROGERS, LAW ON THE BATTLEFIELD 4 (2d ed. 2004) (1996); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 269 (2010); U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT §§ 2.3, 16.44, at 23, 444 (2004); U.S. DEP’T OF THE ARMY, THE LAW OF LAND WARFARE 3–4 (1956); G.I.A.D. Draper, *Military Necessity and Humanitarian Imperatives*, 12 MIL. L. & L. WAR REV. 129, 142 (1973); Greenwood, *supra* note 2, at 38; *In re von Lewinski (called von Manstein)*, in ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES YEAR 1949, at 509, 512 (H. Lauterpacht ed., 1955) [hereinafter *von Manstein*]; Schmitt, *supra* note 2, at 801, n.19 (quoting Dep’t of Def., Law of War Manual (unpublished draft) (“Military necessity was weighed by nations as each express prohibition was promulgated, and again at the time each State Party ratified or acceded to each treaty.”)).

It was once asserted, controversially, that the laws of war do not override the necessities of war, and that it is rather the necessities of war that override the laws of war (“*Kriegsräson geht vor Kriegsmanier*”).<sup>4</sup> *Kriegsräson*, as this doctrine has come to be known, is now thoroughly discredited and considered obsolete.<sup>5</sup> In its place came a widely shared position according to which positive international humanitarian law admits no military necessity pleas in defense of delinquent conduct except where the law itself expressly envisions the admissibility of such pleas.

Some authorities take the matter further. According to one theory, the mere absence of military necessity renders even otherwise lawful belligerent conduct unlawful. It will be shown that this theory—let us call it “counter-*Kriegsräson*”—is untenable for two reasons. To begin with, a given act’s lack of military necessity does not *per se* imply that international humanitarian law has reason to prohibit or restrict it. Moreover, with the law having accounted for military necessity, none of its relevant elements, whatever their characteristics, have survived the process of IHL norm-creation. It follows that there is no basis for military necessity to operate as an additional layer of restraint on belligerent conduct over and above that imposed by validly posited IHL rules.

This Article begins with an overview of the three distinct contexts in which military necessity appears: material, normative, and juridical. Within a strictly material context, military necessity is essentially an *amoral* notion that merely separates competent fighting from incompetent fighting. To say that “ $X_1$ -ing is militarily necessary to such and such degrees” is simply to signify that  $X_1$ -ing conduces towards the materialization of a given military end to such and such degrees. Conversely, to say that “ $X_2$ -ing is militarily unnecessary to such and such degrees” is to signify that  $X_2$ -ing does not so conduce to such and such degrees. Thus understood, “material” military necessity embodies a two-fold truism. First, it is in one’s strictly strategic self-interest to perform an act to the extent that it is materially conducive to success. Second, it is similarly in one’s strictly strategic self-interest to forbear an act to the extent that it is not so conducive.

Within the context of IHL norm-creation, military necessity is one of the elements that modify the legitimacy of those kinds of belligerent conduct that

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<sup>4</sup> Schmitt, *supra* note 2, at 796.

<sup>5</sup> *See id.* at 797.

inflict evil.<sup>6</sup> Thus, while not everything done for a legitimate end that is a necessary evil may itself be legitimate, an evil that is unnecessary is invariably illegitimate. Military necessity is *not* an element in the legitimacy modification of every kind of belligerent conduct, however. Plainly, where the conduct entails no evil, its legitimacy or illegitimacy does not depend on whether it is materially necessary or unnecessary for the accomplishment of its end. “Normative” military necessity does not sanction the idea that unnecessary simpliciter means illegitimate.

Within the strictly juridical context of validly posited IHL rules, military necessity functions exclusively as an exceptional clause. It exempts a measure from certain validly posited IHL rules principally prescribing contrary action. Where the deviant conduct is not, or no longer, in accordance with juridical military necessity, it ceases to be excepted and reverts to being governed by the principal prescriptions. It is these prescriptions, of which the deviant conduct in question is now an unexcepted instance, that render it unlawful. The conduct’s unlawfulness emanates *neither* from its lack of military necessity *nor* from the now inoperative exceptional military necessity clause.

Both *Kriegsräson* and counter-*Kriegsräson* are, in effect, matters of military necessity being invoked de novo vis-à-vis unqualified IHL rules. Their invocability is therefore a contextual question—and that of juridical military necessity in particular. *Kriegsräson* is unacceptable because it purports to justify all conduct that constitutes a material military necessity even where it is already outlawed under positive IHL. Rejecting *Kriegsräson* amounts to rejecting the idea that given conduct’s material military necessity somehow “rights” or “repairs” its unlawfulness that would otherwise be unqualifiedly established by validly posited IHL rules. Nor is there any basis for suggesting *a contrario* that all conduct that is militarily unnecessary is unlawful according to positive IHL, even when the former contravenes none of the latter’s rules. This view would commit its adherents to a strange position whereby given conduct’s material military non-necessity somehow “wrongs” or “vitiates” its lawfulness that would otherwise be left unqualifiedly intact by positive IHL. *Kriegsräson* and counter-*Kriegsräson* are both predicated on the erroneous notion that the law does not fully account for military necessity. On this view, the process of IHL norm-creation has left some element of military necessity unaccounted for, and it is this element that now floats freely over validly

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<sup>6</sup> Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 B.U. INT’L L.J. 39, 41 (2010).

posited IHL rules. The only difference between *Kriegsräson* and counter-*Kriegsräson* is that this free-floating element of military necessity has a permissive attribute for the former, while it has a prohibitive one for the latter.

## I. “MATERIAL” MILITARY NECESSITY: MILITARY NECESSITY IN A STRICTLY MATERIAL CONTEXT

### A. *Military Necessity as a Matter of Amoral, Vocational Competence*

Material military necessity denotes a given course of action required for the accomplishment of a particular military goal.<sup>7</sup> Acting in accordance with material military necessity essentially means doing three things under the prevailing circumstances. First, the actor desires a military outcome, *Y*. Second, he or she identifies a range of realistically available courses of action—e.g., *X*<sub>1</sub>-ing, *X*<sub>2</sub>-ing, and *X*<sub>3</sub>-ing—each having reasonable chances of generating *Y*. Third, he or she chooses and pursues one option, e.g., *X*<sub>1</sub>-ing, that is superior to the other options on the strength of its chances and resource efficiency.<sup>8</sup> Here, *X*<sub>1</sub>-ing, *X*<sub>2</sub>-ing, and *X*<sub>3</sub>-ing enjoy various degrees of military necessity, depending on their relative conduciveness vis-à-vis *Y*'s materialization and their relative efficiency given the circumstances. The more conducive *X*<sub>1</sub>-ing is to *Y*'s materialization and the more efficient it is in view of the circumstances, the more of a material military necessity *X*<sub>1</sub>-ing is than *X*<sub>2</sub>-ing and *X*<sub>3</sub>-ing.

Thus understood, material military necessity is a function of the ends sought, the means chosen, and the circumstances prevailing at the time. It is a situation-specific and relational notion that does not involve any requirement of causation *sine qua non*. Just as there can be material military necessities, there can be material military *non*-necessities. Pursuing material military necessities and avoiding material military *non*-necessities is an *amoral* component of a soldier's vocational competence that separates belligerent conduct that is effective from that which is not.

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<sup>7</sup> See, e.g., PIETRO VERRI, DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT 75 (Edward Markee & Susan Mutti trans., 1992) (“In its wider sense, military necessity means doing what is necessary to achieve war aims.” (emphasis omitted)).

<sup>8</sup> It is not inconceivable that the available options have such limited chances of success, or that they are so inefficient resource-wide, or both, under the circumstances prevailing at the time, that there is no rational alternative to taking no action at all vis-à-vis the desired outcome.

### 1. Purpose, Conduct, and Circumstance

An ancient Benedictine abbey stands atop Monte Cassino in southern Italy. During World War II, Adolf Hitler ordered the hill incorporated into the defensive complex of the Gustav Line against the Allied advance from the south.<sup>9</sup> Monte Cassino was situated at the mouth of the Liri Valley with a commanding view of all approaches to the valley.<sup>10</sup> The valley provided the most direct gateway to Rome.<sup>11</sup> An entry into it became urgent for the Allied forces in view of the protracted battle at the Anzio beachhead, another strategic point for the purposes of weakening the Gustav Line.<sup>12</sup> The task of opening a Liri Valley entrance fell on forces under the command of Lieutenant General Sir Bernard Freyberg.<sup>13</sup>

In January 1944, Allied commanders were instructed to make every effort to avoid damage to the abbey.<sup>14</sup> This, however, was subject to a proviso added by the headquarters of General Sir Harold R.L.G. Alexander to the effect that “[c]onsideration for the safety of such areas will not be allowed to interfere with military necessity.”<sup>15</sup> On February 9, Lieutenant General Mark W. Clark authorized Freyberg “to fire against the monastery if in Freyberg’s judgment military necessity dictated this action.”<sup>16</sup> Major General F.S. Toker, Freyberg’s subordinate charged with weakening the Gustav Line at the Liri valley, determined that the abbey had to be destroyed.<sup>17</sup> When requesting an aerial bombardment, Freyberg stated that Toker “who is making the attack feels that it is an essential target and I thoroughly agree with him.”<sup>18</sup>

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<sup>9</sup> MARTIN BLUMENSON, *THE MEDITERRANEAN THEATER OF OPERATIONS: SALERNO TO CASSINO* 155, 311 (1969).

<sup>10</sup> *See id.* at 403.

<sup>11</sup> *See id.* at 226.

<sup>12</sup> *See id.* at 353, 385–96, 401.

<sup>13</sup> *See id.* at 401–02. General Freyberg was in command of the provisional New Zealand Corps with the 2nd New Zealand and 4th Indian Divisions under its control at the time. *See id.*

<sup>14</sup> *See id.* at 398.

<sup>15</sup> *Id.* at 398–99 (footnote omitted). General Alexander was the commander of the 15th Army Group at the time. *See id.* at 34.

<sup>16</sup> *Id.* at 403 (footnote omitted). General Clark was the commander of the U.S. Fifth Army at the time. *See id.* at 28.

<sup>17</sup> *See id.* at 403 (“The commander of the 4th Indian Division, Maj. Gen. F. S. Toker, after studying the problem of how to break the Gustav Line in the Cassino area, had no doubt that the monastery was a real obstacle to progress . . . . Since the monastery commanded all the approaches to the Liri valley, Toker decided it had to be destroyed before he could attack. He requested his corps commander, General Freyberg, to arrange for an air bombardment.” (footnote omitted)).

<sup>18</sup> *See id.* at 404.

Clark was of the opinion that the abbey's destruction was unwarranted.<sup>19</sup> He believed "that no military necessity existed, that a bombardment would endanger the lives of civilian refugees in the building, and that bombardment would probably fail to destroy the abbey and would be more than likely to enhance its value as a fortification."<sup>20</sup> Major General Alfred M. Gruenther, Clark's Chief of Staff, was told that Alexander had faith in Freyberg's judgment and that "[i]f there is any reasonable probability that the building is used for military purposes . . . its destruction is warranted."<sup>21</sup> Gruenther also informed Freyberg of Clark's view on the matter. One account of Freyberg's reply states:

General Freyberg said he had gone into the matter thoroughly with [Tucker], who was quite convinced that bombing the monastery was necessary. Freyberg added that he thought it was not "sound to give an order to capture Monastery Hill and at the same time deny the commander the right to remove an important obstacle to the success of this mission." A higher commander who refused to authorize the bombing, Freyberg warned, would have to take the responsibility if the attack failed. Gruenther said that Clark was ready to authorize the bombing if Freyberg considered it a military necessity. According to Gruenther's record, General Freyberg then said that "it was his considered opinion that it is a military necessity."<sup>22</sup>

An aerial bombardment was scheduled on February 13 and, after a delay, initiated two days later.<sup>23</sup> Almost six hundred tons of high-explosive virtually demolished the monastery.<sup>24</sup> The abbey's destruction did not bring about the hill's capture, however.<sup>25</sup> It took the Allied forces another three months to

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<sup>19</sup> *See id.*

<sup>20</sup> *Id.* at 405–06.

<sup>21</sup> *Id.* at 405.

<sup>22</sup> *Id.* at 406.

<sup>23</sup> *See id.* at 406–07, 409.

<sup>24</sup> *See id.* at 411.

<sup>25</sup> *See id.* at 417 ("As General Clark had foreseen, the bombardment of the abbey had failed to break the Gustav Line at its critical point. Not only the major bombing on 15 February, but the relatively heavy bombings on successive days, which had further reduced the monastery, failed to dislodge the stubborn and skillful troops in well-nigh perfect defensive positions. The ground and air commands in the theater were profoundly disappointed. Had the ground forces been unable to take advantage of the bombardment? Or were the bombers incapable of eradicating tactical positions and therefore useless for direct support of ground attack? No one seemed to know.... In the final analysis, no one had been altogether certain what the bombardment was supposed to accomplish except to flatten the abbey. The escalation of the air effort from a relatively modest attack to an overwhelming strike had achieved nothing beyond destruction, indignation, sorrow, and regret.").

break through the Gustav Line on the Liri Valley (May 15th)<sup>26</sup> and to capture Monte Cassino and its abbey (May 18th).<sup>27</sup>

Freyberg identified destroying the monastery as the conduct and capturing Monastery Hill as its purpose.<sup>28</sup> The circumstances surrounding the conduct and purpose included the abbey's structure, the hill's topography, weather conditions, weapons and communications equipment available, and so on.<sup>29</sup> In the event, the particularly thick outer walls of the abbey had "resisted the blasts and although breaches appeared none of them reached the ground level."<sup>30</sup> This, combined with unintegrated employment of airpower, "did nothing to lighten the task of the infantry, which was unable to take advantage of the confusion and destruction by staging a correlated attack."<sup>31</sup>

Whether the attack on the abbey did or did not constitute a material military necessity was hotly debated.<sup>32</sup> It is reasonable to assume that Freyberg and Tucker were professionally competent soldiers and found in good faith that the abbey's destruction was a material military necessity. It is also reasonable to assume, however, that Clark and the others were similarly competent soldiers who came to different conclusions in good faith.<sup>33</sup> Opinions of other persons associated with the Allied action were also divided.<sup>34</sup> The Germans' suspected use of the abbey for military purposes exacerbated the situation.<sup>35</sup>

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<sup>26</sup> ERNEST F. FISHER, JR., *THE MEDITERRANEAN THEATER OF OPERATIONS: CASSINO TO THE ALPS* 77 (1977).

<sup>27</sup> *Id.* at 78.

<sup>28</sup> See discussion *supra* notes 23–27.

<sup>29</sup> See BLUMENSON, *supra* note 9, at 402–03, 408.

<sup>30</sup> Nigel de Lee, *Moral Ambiguities in the Bombing of Monte Cassino*, 4 J. MIL. ETHICS 129, 135 (2005) (quoting G.R. STEVENS, *THE FOURTH INDIAN DIVISION* 286 (1950)).

<sup>31</sup> *Id.* at 135 (quoting STEVENS, *supra* note 30, at 286).

<sup>32</sup> See BLUMENSON, *supra* note 9, at 405–06.

<sup>33</sup> There were other skeptics too, such as Major General Geoffrey Keyes, Major General Charles W. Ryder, and Colonel Mark M. Boatner. See BLUMENSON, *supra* note 9, at 405, 407.

<sup>34</sup> Major General Fred L. Walker noted: "This was a valuable historical monument, which should have been preserved. The Germans were not using it and I can see no advantage in destroying it. No tactical advantage will result since the Germans can make as much use of the rubble for observation posts and gun positions as of the building itself. Whether the Germans used the building for an observation post or for emplacements makes little difference since the mountain top on which the building stands can serve the same purpose." *Id.* at 413 (footnote omitted). According to Blumenson, "In response [to a protest from the Vatican], President Roosevelt stated that he had issued instructions to prevent the destruction of historic monuments except in cases of military necessity. The bombardment, he said, had been unfortunate but necessary." *Id.* at 415–16.

<sup>35</sup> The German forces undertook to ensure respect for the abbey itself despite the fact that their commander, Henrich von Vietinghoff, acknowledged that the monastery had "good observation posts" and "good positions of concealment." See *id.* at 400. Initially, some Allied commanders received intelligence to the

To complicate the matter further, an act can be of different degrees of military necessity or non-necessity vis-à-vis its goal. All else being equal, one course of action can be more or less militarily necessary than another by virtue of their relative conduciveness vis-à-vis a given purpose. In view of Monte Cassino's capture as the Allied objective, destroying the abbey first and then advancing the infantry was arguably more militarily necessary than advancing the infantry without first destroying the abbey would have been. In addition, all else being equal, a given course of action can be more or less militarily necessary relative to one purpose than to another. For instance, destroying the abbey was arguably more militarily necessary vis-à-vis capturing the hill than it would have been vis-à-vis drawing the German strength away from Anzio.<sup>36</sup> Moreover, all else being equal, a given course of action can be more or less militarily necessary in relation to a given purpose in one set of circumstances than in another. Thus, destroying the abbey was arguably more militarily necessary for capturing the hill given the abbey's topographic dominance over the hill than, say, if it had not had such dominance.<sup>37</sup>

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effect that the Germans used the abbey. *See id.* at 408. Others disagreed, however, and later confirmed that the information was not accurate. *See id.* at 413–14.

<sup>36</sup> *See de Lee, supra* note 30, at 133 (“The Higher Command seemed to be losing sight of the object of operations . . . the object was not necessarily to attack and capture the Monte Cassino features. The object was to menace the enemy's position on the Gustav line as to induce him to withdraw from the Anzio front sufficient forces to preclude his exerting any sort of decisive pressure there . . . . There were two quite reasonable operations in that region that could be undertaken which would threaten the safety of the Monte Cassino feature sufficiently to draw Axis reinforcements.” (quoting Letter from Sir Francis Taker, Lieutenant Gen. in the British Army, to Major Gen. Henry “Taffy” Davies (May 26, 1965) (on file with Colonel G. Shakespear)); *see also* Reuben E. Brigety II, *Moral Ambiguities in the Bombing of Monte Cassino*, 4 J. MIL. ETHICS 139, 140 (2005) (“[O]ne might morally fault the Allied commanders not for their professional incompetence in the conduct of the assault, but for their lack of strategic imagination in assigning such grave military significance to capturing Cassino and the Abbey. Given that General Clark was advised by General Taker that the only possibility for success was to launch sustained and devastating air strikes on the target, which would have caused more damage than General Clark initially indicated would be acceptable to him, the Allies might have (and arguably should have) re-evaluated if there was another way to achieve their broad operational and strategic objectives in the Italian campaign without taking Cassino.”).

<sup>37</sup> Winston Churchill described the abbey's topography as follows: “The height on which the monastery stood surveyed the junction of the rivers Rapido and Liri and was the pivot of the whole German defense. It had already proved itself a formidable, strongly defended obstacle. Its steep sides, swept by fire, were crowned by the famous building . . . .” 5 WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: CLOSING THE RING* 499 (1951). General Alexander provided similar descriptions of topographic details of the hill as well as the difficulties confronting the Allies to Churchill. *See id.* at 508–09. One commentator argues that the material military necessity for the abbey's destruction was circumstantially undermined by the difficulties associated with coordinating aerial bombardment, artillery bombardment, and infantry attack. *See* Uwe Steinhoff, *Moral Ambiguities in the Bombing of Monte Cassino*, 4 J. MIL. ETHICS 142, 142 (2005) (“What Taker describes here is a complicated attack that requires the co-ordination of three different branches of the service and where timing is crucial. But war is characterized by what von Clausewitz called friction. In war, things have a strong

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

## 2. Causation Sine Qua Non Not Required

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

### a. No Causation Requirement

Acting in accordance with material military necessity does not imply overcoming what Carl von Clausewitz called war's “friction.”<sup>38</sup> Friction may well deny the military purpose's materialization despite the very best and otherwise effective courses of action being pursued.

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tendency not to go the way they were planned. In other words, the probability that the precisely co-ordinated campaign Taker asked for could have been delivered under the circumstances was extremely low.”)

<sup>38</sup> See CARL VON CLAUSEWITZ, ON WAR 119–21 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1989) (1832). Barry D. Watts offers the following taxonomy of Clausewitzian friction: danger's impact on the ability to think clearly and act effectively in war; the effects on thought and action of combat's demands for exertion; uncertainties and imperfections in the information on which action in war is unavoidably based; friction in the narrow sense of the internal resistance to effective action stemming from the interactions between the many men and machines making up one's own forces; the play of chance, of good luck and bad, whose consequences combatants can never fully foresee; physical and political limits to the use of military force; unpredictability stemming from interaction with the enemy; and disconnects between ends and means in war. See BARRY D. WATTS, CLAUSEWITZIAN FRICTION AND FUTURE WAR 30, 32 (1996).

Operation Market Garden is a case in point. According to one authoritative account, “Operation MARKET-GARDEN accomplished much of what it had been designed to accomplish. Nevertheless, by the merciless logic of war, MARKET-GARDEN was a failure. The Allies had trained their sights on far-reaching objectives. These they had not attained.”<sup>39</sup> The unattained objectives included securing a bridgehead beyond the Neder Rijn, effectively turning the north flank of the West Wall, cutting off Germany’s Fifteenth Army, and positioning the 21st Army Group for a drive around the north flank of the Ruhr.<sup>40</sup> The account continues:

Though MARKET-GARDEN failed in its more far-reaching ramifications, to condemn the entire plan as a mistake is to show no appreciation for imagination and daring in military planning and is to ignore the climate of Allied intelligence reports that existed at the time. While reasons advanced for the failure range from adverse weather (Field Marshall Montgomery) and delay of the British ground column south of Eindhoven (General Brereton) to faulty intelligence (the Germans), few criticisms have been leveled at the plan itself. In light of Allied limitations in transport, supplies, and troops for supporting the thrust, in light of General Eisenhower’s commitment to a broad-front policy, and in light of the true conditions of the German army in the West, perhaps the only real fault of the plan was overambition.<sup>41</sup>

With the possible exception of faulty intelligence, the reasons offered above are typical indicators of an operation’s Clausewitzian friction.<sup>42</sup> Moreover, many of the measures taken during the ultimately unsuccessful Operation Market Garden were nevertheless material military necessities for the Operation. By way of example, one might note the assault on the Arnhem

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<sup>39</sup> CHARLES B. MACDONALD, *THE EUROPEAN THEATER OF OPERATIONS: THE SIEGFRIED LINE CAMPAIGN* 198 (1963).

<sup>40</sup> *See id.* (also explaining that “[t]he hope of attaining these objectives had prompted the ambition and daring that went into Operation MARKET-GARDEN. Not to have realized them could mean only that the operation had failed”).

<sup>41</sup> *Id.* at 199; *see also* 6 WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: TRIUMPH AND TRAGEDY* 198–200 (1953) (describing how weather and dangerous river conditions contributed to the Allies’ difficulties in Operation Market Garden).

<sup>42</sup> Of course, not all commentators look upon Operation Market Garden’s failure so charitably—to put it mildly—by describing its difficulties and shortcomings as instances of Clausewitzian friction. *See, e.g.*, NORMAN DIXON, *ON THE PSYCHOLOGY OF MILITARY INCOMPETENCE* 145–48 (1976); *accord id.* at 148 (“For the student of military disasters, the attack on Arnhem ranks with Kut and the Bay of Pigs fiasco. Through inappropriate risk-taking, underestimation of the enemy, the neglect of unpalatable information and a failure of technology, military decisions by able brains, at high levels of command, brought down misery and chaos.” (citation omitted)).

highway bridge by Lieutenant Colonel J.D. Frost and his battalion,<sup>43</sup> as well as their subsequent effort to maintain their foothold on that bridge.<sup>44</sup> By all accounts, securing the Arnhem highway bridge under the circumstances prevailing at the time was one of the most crucial components of the operation.<sup>45</sup> The actions of Frost and his men were eminently relevant to the objectives' materialization: They reached the bridge and held their position amid intense enemy action, mounting casualties, and increasingly untenable conditions.<sup>46</sup>

Admittedly, the objectives' non-materialization *may*—and sometimes does—indicate the material military non-necessity of the measures taken for them.<sup>47</sup> It does not follow, however, that an objective's failure always entails the measure's lack of material military necessity or that a measure constitutes a material military necessity only where its objective materializes.

*b. No Conditio Sine Qua Non Requirement*

Nor does material military necessity involve *conditio sine qua non*. Causal elements of *conditio sine qua non* are by their very nature indemonstrable.<sup>48</sup> Moreover, having made allowances for Clausewitzian friction,<sup>49</sup> each

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<sup>43</sup> See, e.g., MACDONALD, *supra* note 39, at 171.

<sup>44</sup> See, e.g., *id.* at 171–72, 179, 185–86.

<sup>45</sup> See, e.g., CHURCHILL, *supra* note 41, at 196–97.

<sup>46</sup> See, e.g., *id.* at 198.

<sup>47</sup> Consider, for example, the fall of Singapore in 1942. The rather dramatic non-materialization of the British objective—i.e., to defend Singapore from Japanese forces advancing through the Malay Peninsula—has been attributed to a series of measures, some inadequate (e.g., the stationing of only severely limited and largely obsolete ships and aircraft) and others affirmatively detrimental (e.g., relentless self-deception and under-preparation), that were taken by British and Australian commanders. For further discussion, see TIMOTHY HALL, *THE FALL OF SINGAPORE* (1983). See also discussion *infra* Part I.A.3 for examples of material military *non*-necessities generally.

<sup>48</sup> What is often treated as a causal *sine qua non* is really an explanation of a singular event rather than the statement of a purported causal law governing similar combinations of events. See, e.g., DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 15–17, 149–62 (1980) (“What emerges, in the *ex post facto* atmosphere of explanation and justification, as *the* reason frequently was, to the agent at the time of action, one consideration among many, *a* reason.”). There may be other elements of *conditio sine qua non* that are demonstrable, but they are either mere analytic connections or incidental connections. See H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 115 (2d ed. 1985) (1959) (“If a man is knocked down and injured by a vehicle the fact that he is a man, human, and has a body, is something which is logically entailed by the description of the event with which we start and whose cause we may seek.”); *id.* at 116 (explaining that the act of shooting a gun successfully requires “the fact that the cartridge was charged with explosive”).

<sup>49</sup> See VON CLAUSEWITZ, *supra* note 38, at 119–21.

belligerent<sup>50</sup> is always faced with a *choice* among a range of courses of action vis-à-vis its objective.<sup>51</sup> This or that particular *range* may be a *sine qua non* with respect to this or that particular objective. Once the range is defined, however, the particular course of action chosen from that range is never truly a *sine qua non*. It is rather a matter of choosing that one course of action which is the *best*, all things considered. What makes the particular choice the best is a function of various criteria, such as the one that stands the greatest chances of accomplishing the objective, or the one that is the most resource-efficient, or the one that is the most politically acceptable among co-belligerents.

For instance, there is nothing *sine qua non* about the Allied forces landing on the beaches of Normandy for the purposes of invading northwest Europe. Landing at Normandy was arguably a material military necessity. It was arguably so, however, *not* because the Allied invasion of northwest Europe would have otherwise been unsuccessful. This one cannot know; it cannot be ruled out that landing at some other location might have also led to a successful Allied invasion of northwest Europe.<sup>52</sup> Landing at Normandy was arguably a material military necessity because its beaches were the *best* among other candidate locations, all things considered.

There may be one element—the genius of the military leader—that comes closest to being truly irreplaceable. Emir Faisal’s forces would in all likelihood not have taken Aqaba but for Lieutenant T.E. Lawrence.<sup>53</sup> Nevertheless, the mere fact that true military genius in action may practically constitute a *conditio sine qua non* for some of the objectives it achieves does not mean that its existence is the only situation in which one can intelligibly speak of material military necessity.

### 3. *Material Military Non-Necessities*

Wars can be poorly fought in various ways. For instance, *X-ing* may be wasteful relative to accomplishing *Y*; *X-ing* may be excessive in relation to accomplishing *Y*; *X-ing* may simply have no bearing whatsoever on accomplishing *Y*; or *X-ing* may be done for its own sake and without any

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<sup>50</sup> In this Article, the term “belligerent” refers not only to a party to an armed conflict but also to a combatant member of its armed forces.

<sup>51</sup> See *supra* Part I.A.

<sup>52</sup> Here, the possible *sine qua non* range of courses of action would have been to effect a landing somewhere. Without such a landing, it is quite difficult to imagine how the Allies would have successfully invaded northwest Europe.

<sup>53</sup> See T.E. LAWRENCE, SEVEN PILLARS OF WISDOM 167–68 (1935).

particular purpose. Wastefulness, excessiveness, impertinence,<sup>54</sup> purposelessness and the like are improvable non-necessities which are not solely the products of irreducible friction. They would typically emanate from ill-advised, unrealistic, or otherwise badly defined military goals, ill-chosen means, and/or poor execution<sup>55</sup> under the prevailing circumstances. In reality, uneconomical wars are often the combined result of these acts and goals.<sup>56</sup>

As noted earlier, material military necessity is a relational and evaluative notion.<sup>57</sup> The degree to which  $X_1$ -ing constitutes a material military necessity vis-à-vis  $Y$  is relative to the degree to which some  $X_2$ -ing constitutes a material military non-necessity vis-à-vis  $Y$ . There are two manners in which material military non-necessity may be construed. The first is where non-necessity emanates from the lack of cogency intrinsic to the end sought or the means taken. Consider futility and purposelessness, for example. Futility would arise where one identifies an end that is so utterly unattainable at the relevant time that none of the means then available would have any reasonable prospects of success.<sup>58</sup> Where there is no rational military end set, the act in question might be purposeless and incapable of being materially necessary in any meaningful sense of the expression.<sup>59</sup>

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<sup>54</sup> See *infra* Part I.A.3.a–c.

<sup>55</sup> Nigel de Lee suggests that the military necessity of attacking the Monte Cassino abbey diminished materially (if also morally) because it was not conducted professionally. See de Lee, *supra* note 30, at 133, 137; see also Brigety, *supra* note 36, at 140 (“In other words, De Lee suggests that the primary moral difficulty of the Cassino case is that the attack caused more damage than it might have done *if it were carried out in a more expert and discriminate manner.*”(emphasis added)).

<sup>56</sup> Ineffectiveness may be blamed on factors such as misguided leadership; political-ideological preconceptions; doctrinal rigidity; defective communication and co-ordination; unimaginativeness, distraction and indecision at the tactical, operational and/or strategic levels; poor intelligence; incompetent planning; inadequate training; lack of equipment; wasteful allocation and expenditure of resources; reckless bravery and adventurism; indiscipline; cowardice; low morale; defeatism; and so on. See, e.g., DIXON, *supra* note 42, at 50 (“poor planning, unclear orders, lack of intelligence (in both senses of the word) and fatal acquiescence to social pressures”); *id.* at 66 (“unrelieved stupidity” and generals being “inexperienced, irresolute and lacking moral courage”); *id.* at 144 (“passivity and courtesy, rigidity and obstinacy, procrastination, gentleness and dogmatism”); *id.* at 148 (“inappropriate risk-taking, underestimation of the enemy, the neglect of unpalatable information and a failure of technology”).

<sup>57</sup> See *supra* Part I.A.

<sup>58</sup> Futility would arise *inter alia* from situations where only forbearing from  $X$ -ing can be said to constitute a material military necessity vis-à-vis accomplishing  $Y$ , or where  $Y$  ought to be modified so that performing  $X$ -ing does become a material military necessity therefor. Examples include launching an assault with an insufficient amount of ammunition in the knowledge that the objective sought would remain unaccomplished as a result, as was arguably the case with numerous instances of kamikaze attacks and Hitler’s order to defend Berlin to the last man.

<sup>59</sup> One example is the Rape of Nanking.

The second manner in which material military non-necessity may be construed is where non-necessity emanates from the lack of cogency under the circumstances between an otherwise reasonably attainable end sought and the otherwise reasonably actionable means taken.<sup>60</sup> Examples include wastefulness, excessiveness, and impertinence.<sup>61</sup>

*a. Wastefulness*

Wastefulness means expending more resources than would be reasonably required to accomplish a military goal under the prevailing circumstances.<sup>62</sup> Failing to achieve an economy of force<sup>63</sup> typifies a material military non-necessity of this nature. During World War II, General Lloyd Fredendall of the U.S. Army received criticism for what may be characterized as the wasteful—not to mention ineffectual—expenditure of resources, that is, the command post he had constructed near Tebessa. According to one account:

Commanders usually try to establish their headquarters near a road, adjacent to existing communications facilities and close enough to the combat units for convenient visits. Fredendall's was distant from the front and far up a canyon, a gulch that could be entered only by a

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<sup>60</sup> It should be borne in mind however that, as noted earlier, the mere fact that certain Clausewitzian friction attends a given act in war is not itself indicative of the act's lack of material military necessity. The relevant comparison is *not* one with paper-perfect, arm-chair alternatives *but* one with those that are reasonably actionable, friction having been taken into account. Nor, for that matter, is it perforce the case that a measure's material military non-necessity derives from it not being the least injurious amongst those reasonably available courses of action that are similarly conducive towards the end's attainment or from it not retaining some acceptable ratio between the gain sought and the harm occasioned. Limiting injury and proportion are elements of what might be termed "juridical" military necessity. *See infra* Part III.B.2.

<sup>61</sup> *See infra* Part I.A.3.a-c.

<sup>62</sup> *See, e.g.*, Jochnick & Normand, *supra* note 2, at 53–54 ("Belligerents tend to use the minimal force necessary to achieve their political objectives.").

<sup>63</sup> The Joint Chiefs of Staff explain economy of force in the *Joint Operations* manual as:

- a. The purpose of the economy of force is to allocate minimum essential combat power to secondary efforts.
- b. Economy of force is the judicious employment and distribution of forces. It is the measured allocation of available combat power to such tasks as limited attacks, defense, delays, deception, or even retrograde operations to achieve mass elsewhere at the decisive point and time.

JOINT CHIEFS OF STAFF, JOINT OPERATIONS (JOINT PUBL'N 3-0) app. A, at A-2 (2008); *see also* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. 5, 33 n.92 (2010). Admittedly, calculating the economy of force in military operations, as well as determining what makes particular belligerent conduct economical as opposed to wasteful, would be anything but straightforward. Nevertheless, several formulas, such as the Lanchester Square Law for a given sector of ground combat and its variations, have been suggested. *See, e.g.*, PAUL K. DAVIS, RAND, AGGREGATION, DISAGGREGATION, AND THE 3:1 RULE IN GROUND COMBAT 2–6 (1995).

barely passable road constructed by his corps engineers. Though towering mountains and wooded hillsides concealed his presence, he had underground shelters dug and blasted for himself and his staff. Two hundred engineers would work for more than three weeks on this project, then abandon it unfinished under the German threat at Kasserine. . . . To those who asked, Fredendall explained that German aircraft were active over the area and that they made special efforts to destroy command posts. He had gone underground because he had no intention of having his activities disrupted. Though sixty or seventy miles behind the front was rather far for frequent visits to the combat units, he saw no need to be closer. He would run the battle by telephone and radio.<sup>64</sup>

Fredendall also had an entire anti-aircraft battalion emplaced to protect his command post.<sup>65</sup> General Dwight D. Eisenhower was quoted as saying: "It was the only time during the war that I ever saw a higher headquarters so concerned over its own safety that it dug itself underground shelters."<sup>66</sup> Fredendall sought the protection of his headquarters against detection and attack by German aircraft.<sup>67</sup> He endeavored to accomplish this objective by choosing the particular location for it and by expending considerable military resources—such as engineers for its construction and anti-aircraft batteries for its defense.<sup>68</sup> Some degree of protection from aerial threats, as well as some corresponding resource expenditure, may be reasonable for any military headquarters. It is arguable, however, that Fredendall's was exaggerated in the end sought and wasteful in the means taken.

During the Cuban Revolution, Che Guevara apparently came to regard targeted assassinations—he called it "terrorism"<sup>69</sup>—as a wasteful tactic. Thus,

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<sup>64</sup> MARTIN BLUMENSON, *KASSERINE PASS: ROMMEL'S BLOODY, CLIMACTIC BATTLE FOR TUNISIA* 86–87 (1966).

<sup>65</sup> See STEPHEN E. AMBROSE, *D-DAY, JUNE 6, 1944: THE CLIMACTIC BATTLE OF WORLD WAR II*, at 361 (1994).

<sup>66</sup> RICHARD COLLIER, *THE WAR IN THE DESERT* 162 (Time Life Books ed., 1977).

<sup>67</sup> See BLUMENSON, *supra* note 64, at 86–87.

<sup>68</sup> COLLIER, *supra* note 66, at 162.

<sup>69</sup> See CHE GUEVARA, *GUERRILLA WARFARE* 139–40 (J.P. Morray trans., Univ. of Neb. Press 1985) (1961) ("Sabotage has nothing to do with terrorism; terrorism and personal assaults are entirely different tactics. We sincerely believe that terrorism is of negative value, that it by no means produces the desired effects, that it can turn a people against a revolutionary movement, and that it can bring a loss of lives to its agents out of proportion to what it produces. On the other hand, attempts to take the lives of particular persons are to be made, though only in very special circumstances; this tactic should be used where it will eliminate a leader of the oppression. What ought never to be done is to employ specially trained, heroic, self-sacrificing human beings in eliminating a little assassin whose death can provoke the destruction in reprisal of all the revolutionaries employed and even more.").

In special circumstances, after careful analysis, assaults on persons will be used. In general, we consider that it is not desirable except for the purpose of eliminating some figure who is notorious for his villainies against the people and the virulence of his repression. Our experience in the Cuban struggle shows that it would have been possible to save the lives of numerous fine comrades who were sacrificed in the performance of missions of small value. Several times these ended with enemy bullets of reprisal on combatants whose loss could not be compared with the results obtained. Assaults and terrorism in indiscriminate form should not be employed.<sup>70</sup>

Here, targeted assassination was a means being considered for the purpose of eliminating individual figures notorious for their villainies against the people. For Guevara, the wastefulness of this tactic would issue from his conclusion that “it would have been possible to save the lives of numerous fine comrades who were sacrificed in the performance of missions of small value.”<sup>71</sup>

*b. Excessiveness*<sup>72</sup>

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

Concentrated artillery bombardment commonly practiced by the Allies during World War I is a case in point. The Battle of Neuve Chapelle in March 1915 saw the concentration of artillery fire reach one gun for four yards of

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<sup>70</sup> *Id.* at 131. Guevara goes on to state: “More preferable is effort directed at large concentrations of people in whom the revolutionary idea can be planted and nurtured, so that at a critical moment they can be mobilized and with the help of the armed forces contribute to a favorable balance on the side of the revolution.” *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> For abundant caution, it should be stressed that the expression “excessiveness” is used here in a strictly material sense. Of interest is *not* excessiveness of the sort prohibited, inter alia, in Article 51(5)(b) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3, 26 [hereinafter Additional Protocol I].

attacking front.<sup>73</sup> The then-prevailing doctrine emphasized the importance of maximizing the volume of shells falling per unit of space (i.e., the means taken) with a view to destroying as many physical obstacles on it as possible (i.e., the end sought) ahead of an infantry advance.<sup>74</sup> Inevitably, those shells which successfully eliminated obstacles such as barbed wires would come at the expense of numerous others which hit surfaces not, or no longer, containing any obstacle.<sup>75</sup> The inefficient excessiveness of bombarding Neuve Chapelle led to an adjustment in the barrage technique. At the Battle of Aubers in May 1915, “the bombardment before the attack on the ridge was more deliberate, and primarily concerned with accurate wire-cutting.”<sup>76</sup> This shift may have reduced the bombardment’s excessiveness vis-à-vis its stated purpose. One commentator notes, however, that what was really needed, and later implemented for efficiency, is a shift in the purpose sought (i.e., from maximum material damage to undermining enemy morale) and in the means taken (i.e., from the heaviest possible bombardment to one that catches the enemy by surprise and maximizes intensity).<sup>77</sup>

### c. *Impertinence*

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

In 2007, the Ig Nobel Prize for Peace was awarded to the U.S. Air Force Wright Laboratory “for instigating research & development on a chemical weapon—the so-called ‘gay bomb’—that will make enemy soldiers become sexually irresistible to each other.”<sup>78</sup> The award was based on research proposed for the development, inter alia, of “[c]hemicals that effect [sic] human behavior so that discipline and morale in enemy units is adversely effected [sic]. One distasteful but completely non-lethal example would be strong aphrodisiacs, especially if the chemical also caused homosexual behavior. Another example would be a chemical that made personnel very

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<sup>73</sup> See IAN V. HOGG, BARRAGE: THE GUNS IN ACTION 11–13 (1970).

<sup>74</sup> *Id.* at 15.

<sup>75</sup> There were complaints in the aftermath that “the wire cutting was patchy and the firing careless, one or two shells actually falling short during the barrage.” *Id.* at 16.

<sup>76</sup> *See id.*

<sup>77</sup> *See id.* at 14–15.

<sup>78</sup> *Winners of the Ig® Nobel Prize*, IMPROBABLE RESEARCH, <http://improbable.com/ig/winners> (last visited March 30, 2013); see ‘Gay Bomb’ Scoops Ig Nobel Award, BBC NEWS (Oct. 4, 2007), <http://news.bbc.co.uk/2/hi/science/nature/7026150.stm>.

sensitive to sunlight.”<sup>79</sup> Reportedly, however, the effort to develop weapons such as those which would simulate flatulence amongst enemy soldiers was not pursued when “researchers concluded that the premise for such a device was fatally flawed because ‘people in many areas of the world do not find faecal odour offensive, since they smell it on a regular basis.’”<sup>80</sup> The concern expressed by the Ig Nobel laureates might be reformulated as follows: There is a danger that the stated objective of adversely affecting enemy discipline and morale will not be pertinently served even if the bomb does simulate flatulence amongst enemy soldiers as intended.

Although it may come across as harsh historical second-guessing, being confronted with paradigm-changing weapons and tactics sometimes prompted warring parties to take courses of action which were impertinent vis-à-vis their military goals. Thus, at Agincourt in 1415, the numerically superior French men-at-arms charged “like lemmings” into their death at the hands of English longbows raining on them in a highly confined and increasingly crowded “killing zone.”<sup>81</sup> Military historians observe that the disjoint between the victory clearly sought (and assumed) by the French and their seemingly impertinent battlefield behavior, especially the eschewal of their own longbows, was attributable to the “confrontational ethos of the feudal warrior.”<sup>82</sup> Such ethos encompassed the traditional skills, weapons and education by which the feudal warrior identified himself, as well as “the alleged unwillingness of men-at-arms to cross weapons with archers, their social inferiors, when the chance to win glory, and prisoners, in combat with other men-at-arms presented itself.”<sup>83</sup> Agincourt arguably exemplifies material military non-necessity where the tactics were *not* cogently chosen in view of a military purpose, but driven in reality by impertinent considerations such as social status and personal gain.

#### 4. *Vocation and Amoralit*

The foregoing shows that material military necessity is an element of belligerent conduct, which separates fighting that is effective and conducive to

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<sup>79</sup> See U.S. AIR FORCE WRIGHT LAB., HARASSING, ANNOYING, AND “BAD GUY” IDENTIFYING CHEMICALS (1994), available at <http://www.sunshine-project.org/incapacitants/jnlwdpdf/wpafbchem.pdf>.

<sup>80</sup> See *US Military Pondered Love Not War*, BBC NEWS (Jan. 15, 2005), <http://news.bbc.co.uk/2/hi/americas/4174519.stm>.

<sup>81</sup> ROBERT L. O’CONNELL, *OF ARMS AND MEN* 104 (1989).

<sup>82</sup> *Id.*

<sup>83</sup> JOHN KEEGAN, *THE FACE OF BATTLE* 98 (1976).

success from fighting that is neither. The notion merely entails the truism that it is in each belligerent's strictly strategic self-interest to maximize his abilities and that it is similarly in his strictly strategic interest to avoid failures.

Indeed, to the consummate soldier of a Clausewitzian cast,<sup>84</sup> a good war is one in which every act constitutes a material military necessity—that is, executed both professionally and with the optimal resource mobilization, and directed towards a clearly defined, strategically sound, and reasonably attainable military goal under the prevailing circumstances.<sup>85</sup> Of course, as noted earlier, it is eminently possible that a soldier acts in accordance with material military necessity in a given situation without attaining his military goal.<sup>86</sup> Despite his unsparing efforts to the best of his occupational competence as a soldier, he may simply fall victim to war's inevitable friction—in other words, without anyone, himself or someone else, failing to act in accordance with material military necessity. Acting in accordance with material military necessity is not, and need not be, a guarantee of success.

As is the case with any other occupation, pursuing material military necessities and avoiding material military non-necessities is first and foremost a component of vocational competence.<sup>87</sup> This component involves assessing the relationship between the various means available and the various goals that might be pursued in the specific set of circumstances prevailing at the time. The component in question here is also essentially amoral. For our present purposes, “amoral” may be understood as follows: The component's amorality issues from its capacity to be ethically sound as well as unsound. Consequences of ethically pertinent belligerent conduct are readily convertible into material military costs—and benefits.<sup>88</sup> In particular, “amoral” here

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<sup>84</sup> VON CLAUSEWITZ, *supra* note 38, at 187 (“An army's military qualities are based on the individual who is steeped in the spirit and essence of [war]; who trains the capacities it demands, rouses them, and makes them his own; who applies his intelligence to every detail; who gains ease and confidence through practice, and who completely immerses his personality in the appointed task.”).

<sup>85</sup> *See id.* at 102–14, 697–771.

<sup>86</sup> *See supra* Part I.A.2.b.

<sup>87</sup> *See supra* Part I.A.

<sup>88</sup> Fighting ethically in counterinsurgency exemplifies materially competent and morally beneficial belligerent behavior. *See* U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL, para. 7-25, at 7-5 (2007) (“A key part of any insurgent's strategy is to attack the will of the domestic and international opposition. One of the insurgents' most effective ways to undermine and erode political will is to portray their opposition as untrustworthy or illegitimate. These attacks work especially well when insurgents can portray their opposition as unethical by the opposition's own standards. To combat these efforts, Soldiers and Marines treat noncombatants and detainees humanely, according to American values and internationally recognized human rights standards. In [counter-insurgency operations], preserving noncombatant lives and dignity is central to mission accomplishment. This imperative creates a complex ethical environment.”).

denotes the idea that affirmatively unethical actions can also be seen as materially competent.<sup>89</sup>

## *B. Objections*

The very notion of material military necessity is predicated on the thesis that the material component of the belligerent conduct's vocational competence is separable from its meta-material components such as ethics. Let us call this the "separability" thesis of material military necessity. This thesis holds that, as a matter of principle, the former component is capable of comprehension without reference to the latter. This remains so although, admittedly, the two may coincide in certain specific settings.

It follows that the separability thesis entails three major tenets. First, material military necessity is conceivable independently from whatever other sense or senses it may be seen to carry. Second, material military necessity is conceivable in the manner just described even though it does not exclude the possibility that material competence can form an innate part of ethical competence. Third, the separability remains true even though it may also be true that ethical competence can form an innate part of material competence. These three major tenets invite three corresponding objections. Let us consider them in turn.

### *1. Military Virtues vs. Ethical Virtues*

Does it not follow from the very use of evaluative terms such as "good" war and "bad" war<sup>90</sup> that there are similarly evaluative statements such as "sound" and "unsound" military decisions? Does this not mean then that there is something innately moral about this fighting being "competent" or that

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<sup>89</sup> Take the Holocaust and the Rwandan genocide, for example. Assuming that those who committed these atrocities intended to destroy the targeted groups, they were, in their own frighteningly appalling way, quite efficient in exterminating a very large number of victims.

<sup>90</sup> See JUDITH JARVIS THOMSON, *NORMATIVITY* 17 (2008) ("I asked earlier: which judgments are the evaluatives? I gave three examples, namely that D is a good person, E is a good tennis player, and F is a good toaster. They are obviously judgments to the effect that a certain thing is good in a certain respect. We also took note of the existence of such judgments as that G is good at doing crossword puzzles, H is good for England, and I is good for use in making cheesecake. These too are evaluative judgments to the effect that a certain thing is good in a certain respect. We can surely say that all judgments to the effect that a certain thing is good in a certain respect are evaluative judgments.").

fighting being “incompetent”—that is, fighting or not fighting as a good soldier *should*?<sup>91</sup>

Indeed, there may be something innately moral here. This Article asserts, however, that the innate morality of vocationally competent war-fighting is *not* inherently one of ethical behavior. In *On War*, von Clausewitz spoke of “moral factors,”<sup>92</sup> “principal moral elements”<sup>93</sup> and “military virtues.”<sup>94</sup> Of military virtues of the army, he wrote:

No matter how clearly we see the citizen and the soldier in the same man, how strongly we conceive of war as the business of the entire nation, opposed diametrically to the pattern set by the *condottieri* of former times, the business of war will always remain individual and distinct. Consequently for as long as they practice this activity, soldiers will think of themselves as members of a kind of guild, in whose regulations, laws, and customs the spirit of war is given pride of place. No matter how much one may be inclined to take the most sophisticated view of war, it would be a serious mistake to underrate professional pride (*esprit de corps*) as something that may and must be present in an army to the greater or lesser degree. Professional pride is the natural forces that activate the military virtues; in the context of this professional pride they crystallize more readily.<sup>95</sup>

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<sup>91</sup> See *id.* at 1–2 (“I suggest that we should focus on a different difference among our normative judgments. I will call our judgments that A ought to be kind to his little brother, that B ought to move his rook, and that C ought to get a haircut, *directives*. Intuitively, they differ from our judgment that D is a good person, that E is a good tennis player, and that F is a good toaster, which I will call *evaluatives*. We will want to attend to both kinds of normative judgment.”).

<sup>92</sup> VON CLAUSEWITZ, *supra* note 38, at 184 (“[The moral elements] constitute the spirit that permeates war as a whole, and at an early stage they establish a close affinity with the will that moves and leads the whole mass of force, practically merging with it, since the will is itself a moral quantity. Unfortunately they will not yield to academic wisdom. They cannot be classified or counted. They have to be seen or felt. The spirit and other moral qualities of an army, a general or a government, the temper of the population of the theater of war, the moral effects of victory or defeat—all these vary greatly. They can moreover influence our objective and situation in very different ways. . . . If the theory of war did no more than remind us of these elements, demonstrating the need to reckon with and give full value to moral qualities, it would expand its horizon, and simply by establishing this point of view would condemn in advance anyone who sought to base an analysis on material factors alone.”).

<sup>93</sup> *Id.* at 186. These elements, according to von Clausewitz, are the following: “the skill of the commander, the experience and courage of the troops, and their patriotic spirit.”

<sup>94</sup> *Id.* at 184–89.

<sup>95</sup> *Id.* at 187–88; see also *id.* (“An army that maintains its cohesion under the most murderous fire; that cannot be shaken by imaginary fears and resists well-founded ones with all its might; that, proud of its victories, will not lose the strength to obey orders and its respect and trust for its officers even in defeat; whose physical power, like the muscles of an athlete, has been steeled by training in privation and effort; a force that regards such efforts as a means to victory rather than a curse on its cause; that is mindful of all these duties and

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

Originally, I used the term “moral virtues” instead of “moral forces”. The word “virtue” is not morally neutral in the widespread sense of the expression “moral”. To say of somebody that he or she possesses certain virtues means that we praise him or her for being just or kind, etc. The term “force” seems to be more neutral. To push matters to the extreme: perhaps a (war) criminal can have moral forces in the Clausewitzian sense.<sup>96</sup>

Kleemeier lists what she regards as components of Clausewitzian “moral forces”: the “faculty of judgment,”<sup>97</sup> “bravery” or “courage,”<sup>98</sup> and “a passion for reason.”<sup>99</sup> It would appear that qualities such as these are merely descriptions—or prerequisites—of excellence in soldiering or effective fighting, rather than those in ethical conduct. The difference, then, would be one between what might be termed *military* virtues, with which von Clausewitz was concerned, on the one hand, and *ethical* virtues, on the other.<sup>100</sup>

A similar distinction has been suggested by Judith Jarvis Thomson. Thus:

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

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qualities by virtue of the single powerful idea of the honor of its arms—such an army is imbued with the true military spirit.”)

<sup>96</sup> Ulrike Kleemeier, *Moral Forces in War*, in *CLAUSEWITZ IN THE TWENTY-FIRST CENTURY* 107, 107 n.5 (Hew Strachan & Andreas Herberg-Rothe eds., 2007).

<sup>97</sup> *Id.* at 113.

<sup>98</sup> *Id.* at 114.

<sup>99</sup> *Id.* at 118–19.

<sup>100</sup> Contrary to popular belief, it may be doubted whether von Clausewitz really excluded the possibility of real-life warfare being amenable to ethical constraints. See Best, *supra* note 2, at 5; Paul Cornish, *Clausewitz and the Ethics of Armed Force*, 2 J. MIL. ETHICS 213, 219 (2003); Michael Howard, *Temperamenta Belli: Can War Be Controlled?*, in *RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT* 1, 1 (Michael Howard ed., 1979); David J. Lonsdale, *A View from Realism*, in *ETHICS, LAW AND MILITARY OPERATIONS* 29, 34 (David Whetham ed., 2011).

*qua* person who avoids responsibility for what he does, since it is saying that as people who do that go, he is good at it.<sup>101</sup>

Now, in relation to virtues,<sup>102</sup> Thomson observes:

We should notice . . . that . . . being a clever liar is a virtue in a liar. (The following is plainly true: a liar is as good a liar as a liar can be only if he or she is a clever liar. And it hardly needs saying that some liars are clever liars.) So be it. Being a clever liar is certainly not a moral virtue [read “ethical virtue” for the purposes of this article] in a liar. But our use of “virtue” here is the broad one, and being a clever liar *is* in that broad use a virtue in a liar—just as while being a sharp carving knife is not [an ethical] virtue in a carving knife, it is a virtue in a carving knife.<sup>103</sup>

Thomson speaks of desirable qualities in a soldier as “virtues”: “No doubt it is a virtue of a soldier to fight well; another is to obey appropriate orders.”<sup>104</sup> Here, “fight well” may be understood in comparison to Thomson’s discussion of “play chess well.”<sup>105</sup> Thus, “a chess move is strategically correct if and only if it is a move conducive to winning”<sup>106</sup>; so is, it would stand to reason, a belligerent move. It may therefore be said that “rules” of chess strategy<sup>107</sup> are analogous to “rules” of military strategy. Strategic correctness in war would simply mean pursuing material military necessities and avoiding material military non-necessities.

Thomson uses the expression “virtue” broadly<sup>108</sup> and, more importantly, distinguishes a “virtue” in a thing or a person of a particular functional nature from a “moral virtue” (again, read “ethical virtue”) in a person simpliciter.<sup>109</sup>

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<sup>101</sup> THOMSON, *supra* note 90, at 57–58.

<sup>102</sup> *See id.* at 73 (“For F to be a virtue in a K is for it to be the case that (i) K is a goodness-fixing kind, and (ii) a K is as good a K as a K can be only if it has F, and (iii) it is possible for there to be a K that lacks F, and (iv) it is not nomologically impossible for there to be a K that has F.”).

<sup>103</sup> *Id.* at 74 (alteration in original); *see also id.* at 81 (“[T]here may be strategic, tactical, and political virtues in a plan or act.”).

<sup>104</sup> *Id.* at 69 n.1. For being a soldier who fights well to be a virtue in a soldier is for it to be the case: (i) that the kind soldier is a goodness-fixing kind; (ii) that a soldier is a good soldier only if it has being a soldier who fights well; and (iii) that it is possible for there to be a soldier that lacks being a soldier who fights well. *See id.* at 71.

<sup>105</sup> *Id.* at 169 n.3.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *See id.* at 69.

<sup>109</sup> *See id.* at 79–81.

Thus, being a soldier who fights well is a military virtue in a soldier<sup>110</sup>; being an ethical person is an ethical virtue in a person.<sup>111</sup>

It is entirely conceivable that military virtues and ethical virtues in a person may coincide. What is not so is the idea that one type of virtue necessarily matches or entails the other. In Thomson's view, for the statement "A ought to V"<sup>112</sup> to be true is for it to be true that "if a K doesn't V, then it is a defective K."<sup>113</sup> Let A denote a soldier, K the kind soldier, and V pursuing material military necessities and avoiding material military non-necessities. For the statement "a soldier ought to pursue material military necessities and avoid material military non-necessities" to be true is for it to be true that if a soldier does not pursue material military necessities and/or avoid material military non-necessities, then he or she is a defective soldier. In other words, "being a soldier who pursues material military necessities and avoids material military non-necessities" is a military virtue in a soldier.

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

[T]here is no directive kind K+ such that K is a sub-kind of K+, and such that if a K+ does V, then it is a defective K+.<sup>114</sup>

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

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

Consider the December 1944 Malmédy Massacre. During their dash to the Meuse River, elements of SS Obersturmbannführer Joachim Peiper's unit

<sup>110</sup> See *id.* at 80–81. Being a soldier who fights well is a military virtue in a soldier just in case: (i) that a soldier is militarily as good a soldier as a soldier can be only if it has being a soldier who fights well; (ii) that it is possible for there to be a soldier that lacks being a soldier who fights well; and (iii) that it is not nomologically impossible for there to be a soldier that has being a soldier who fights well. See *id.* at 80.

<sup>111</sup> See *id.* at 79–80. Being an ethical person is a moral virtue in a person just in case: (i) that a person is morally as good as a person can be only if it has being an ethical person; (ii) that it is possible for there to be a person that lacks being an ethical person; and (iii) that it is not nomologically impossible for there to be a person that has being an ethical person. See *id.* at 79.

<sup>112</sup> A denotes a member of function-kind K and V a verb-phrase.

<sup>113</sup> THOMSON, *supra* note 90, at 212, 214. This also means that K is what Thomson calls a "directive kind" as well. See *id.* at 209 ("Let us say that a kind K is a directive-generating kind—a directive kind, for short—just in case there is such a property as being a defective K.").

<sup>114</sup> See *id.* at 214.

killed hundreds of American prisoners of war (“POWs”) at various locations.<sup>115</sup> An order had apparently come all the way from Hitler, via Colonel General Josef Dietrich, commander of the 6th SS Panzer Army.<sup>116</sup> It was ordered that the German forces “act with brutality and show no humane inhibitions,” that “a wave of fright and terror” should precede the attack, and that “the enemy’s resistance was to be broken by terror.”<sup>117</sup> Taking the creation of terror as their stated purpose yields the result that giving no quarter was arguably a material military necessity.<sup>118</sup> It is also possible that the expected pace of Peiper’s advance made it materially undesirable to care for enemy soldiers taken prisoner.<sup>119</sup> On this view, Peiper’s objective would be maintaining the momentum of his rapid advance, and his means of dispatching surrendered enemy soldiers would arguably constitute a material military necessity for his objective.

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<sup>115</sup> See C.E. STRAIGHT, OFFICE FOR JUDGE ADVOCATE GEN. FOR WAR CRIMES, REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, EUROPEAN COMMAND 48 (1948). See generally RICHARD GALLAGHER, MALMÉDY MASSACRE 55–72 (1964).

<sup>116</sup> STRAIGHT, *supra* note 115, at 48.

<sup>117</sup> HUGH M. COLE, THE ARDENNES: BATTLE OF THE BULGE 262–63 (1965); GALLAGHER, *supra* note 115, at 111.

<sup>118</sup> In the event, however, the terror did not produce the hoped-for breakdown of Allied resistance. Quite on the contrary, the news of Malmédy “undoubtedly stiffened the will of the American combatants.” See COLE, *supra* note 117, at 261; see also *id.* at 264 (“There were American commanders who orally expressed the opinion that all SS troops should be killed on sight and there is some indication that in isolated cases express orders for this were given.” (footnote omitted)).

<sup>119</sup> Peiper is quoted as seeking to have the killings excused “by the rapid movement of his *kampfgruppe* and its inability to retain prisoners under guard.” *Id.* at 263. The possibility that the expected pace of Peiper’s advance made it materially undesirable to care for enemy soldiers taken prisoner is contemplated, if not endorsed, in one account of the event. See Michael Reynolds, *Massacre at Malmédy During the Battle of the Bulge*, WORLD WAR II, Feb. 2003, at 43, 48–49 (“It has to be noted that Peiper’s men faced a very real problem in deciding what to do with the large number of prisoners taken in the Baugnez area. According to all German reports, Peiper was in a hurry to get to Ligneuville and capture the U.S. headquarters there, and he ordered the rest of the *Kampfgruppe* to follow up as quickly as possible. Faced with mounting delays and an irate commander, what were those at the crossroads to do with the prisoners? Armored columns had no spare manpower to look after POWs, and none of the follow-up infantry formation were anywhere near Five Points at the time. More than 100 men, even if they have surrendered and been disarmed, cannot be left to their own devices for long. Nor could they be ordered to start marching to the rear into captivity, as is usual in such circumstances, because there was a simple problem of geography. Peiper had penetrated the American lines on a very narrow front—a single road—and this meant that as far as the Germans were concerned the enemy lay along the N-23 to the northwest in Malmédy, the N-32 to the northeast in Waimes and the N-23 to the south in Ligneuville. There was therefore no road along which they could order the prisoners to set off. And it was more than possible that American combat units would move south out of Malmédy at any moment. A combination of all these factors—an angry SS lieutenant colonel in a hurry, no spare men to guard the prisoners, no easily available route to the rear and the possibility of American combat troops arriving at any moment—must have created a nightmare scenario for the officer in charge. It is therefore quite possible that he decided to take the simplest and most practical way out of his dilemma by giving an order to shoot the prisoners.”).

Given Peiper's objectives and the circumstances prevailing at the time, killing the American POWs in Malmédy might have signaled a military virtue and failing to do so a military defect. But if Peiper's men were to act not as soldiers (i.e., K) but as human beings (i.e., K+), then it is arguable that the second condition for the truth of Thomson's statement "A ought to V" was not satisfied.<sup>120</sup> It follows, then, that evaluating the virtues of the function-kind soldier is not the same as evaluating the virtues of the super-kind human being. What is important for the present purposes is that the former is capable of consideration, at least conceptually, without reference to the latter.

## 2. *Military Virtues as Ethical Virtues*

This Article proceeds on the assumption that prosecuting war is a purposive activity.<sup>121</sup> It is assumed that the soldier being called upon to pursue material military necessities and avoid material military non-necessities actually wants to succeed in what he or she has set out to do.<sup>122</sup> This assumption leads us to the second major objection to the idea that material military necessity is essentially *amoral*. There is perhaps something ethical even about being good *qua* soldier. It is indeed possible that a military virtue may *itself* be an ethical virtue.

The United States has long maintained a *Code of Conduct for Members of United States Armed Forces*.<sup>123</sup> It admonishes, among other things, that the

<sup>120</sup> Another way of putting it would be to point out the fact that, regarding those "ought" statements involving the kind human being, Thomson proposes a special normative thesis. See THOMSON, *supra* note 90, at 216 ("If A is a human being, then for it to be the case that A ought to V<sub>act</sub> is for it to be the case that if A knows at the time what will probably happen if he V<sub>act</sub>s and what will probably happen if he does not, then he is a defective human being if he does not."). There are many possible kinds of defects in a human being. Thomson lists, among others: being malicious, callous, lazy, greedy, unjust, reckless, imprudent, ruthless, cruel, sanctimonious, jealous, rude, weak-willed, unscrupulous, vengeful, petty, intemperate, cowardly, irresolute, misanthropic, irresponsible, lacking in self-respect, and lacking in generosity. *Id.* at 218. Plainly, some (though perhaps not all) of these defects are properly seen as ethical in nature. Moreover, some of these same defects clearly exemplify instances where military defects and ethical defects overlap each other.

<sup>121</sup> So did von Clausewitz, albeit implicitly. Clausewitzian theory makes no sense whatsoever unless one proceeds on the basis that each belligerent party wants to bring the war it fights to a conclusion on its own terms. See generally VON CLAUSEWITZ, *supra* note 38, at 90–99 (regarding purpose and means in war).

<sup>122</sup> See THOMSON, *supra* note 90, at 172 ("When we say, 'Alfred ought to move his queen,' . . . [w]e are also assuming that Alfred wants to win the game. We normally make these two assumptions when watching chess players, and we are normally right to make them. If we weren't making them, we wouldn't say, 'Alfred ought to move his queen.' At any rate, we would take a closer look at Alfred's circumstances and wants and weigh one thing against another before saying those words.").

<sup>123</sup> See Exec. Order No. 10,631, 3 C.F.R. 82 (1955 Supp.), *reprinted as amended* in 10 U.S.C. § 802 app. at 860 (2006):

U.S. soldier “make every effort to escape” and “accept neither parole nor special favors from the enemy” if captured.<sup>124</sup> As a POW, he or she is to “give no information or take part in any action which might be harmful to [his or her] comrades,” “evade answering further questions to the utmost of [his or her] ability,” and “make no oral or written statements disloyal to [his or her] country and its allies or harmful to their cause.”<sup>125</sup> Implicit in this code of conduct is the idea that refusing to divulge accurate intelligence to the enemy is not only a material military necessity, but also a sign of loyalty to comrades-in-arms as well as patriotic devotion to the nation. Does it not follow, then, that the ethical virtue of a patriotic citizen includes the military virtue as a soldier?

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

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

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- I. I am an American fighting man. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense.
  - II. I will never surrender of my own free will. If in command, I will never surrender my men while they still have the means to resist.
  - III. If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.
  - IV. If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.
  - V. When questioned, should I become a prisoner of war, I am bound to give only name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.
  - VI. I will never forget that I am an American fighting man, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

turn and ultimately to the ordinary citizens of his country who are likely to suffer for his failures.<sup>126</sup>

Of the commander's downward responsibility, Walzer notes:

His soldiers are in one sense the instruments with which he is supposed to win victories, but they are also men and women whose lives, because they are his to use, are also in his care. He is bound to minimize the risks his soldiers must face, to fight carefully and prudently, and to avoid wasting their lives, that is, not to persist in battles that cannot be won, not to seek victories whose costs overwhelm their military value, and so on. And his soldiers have every right to expect all this of him and to blame him for every sort of omission, evasion, carelessness, and recklessness that endangers their lives.<sup>127</sup>

On this view, it is the ethical duty of a soldier to fight competently by doing his or her best to pursue material military necessities and avoid material military non-necessities. It would appear, however, that the ethical virtue of the kind being articulated by Walzer here emanates from the particular community for which a soldier fights.<sup>128</sup> Nothing in the community-specific ethical virtue makes the strictly *amoral* construal of military virtue unintelligible. In other words, the strictly military virtue may *also* constitute a community-specific ethical virtue. This is a matter of contingency. Crucially, it does *not* show that this must be inevitable, i.e., true for all real as well as hypothetical communities. Nor, more importantly, does it show that the military virtue of a soldier forms part of the general ethical virtue of a human being. To use Thomson's terminologies, it may be, and in some specific situations is, the case that being a soldier who pursues material military necessities and avoids material military non-necessities is a military virtue in a soldier and a patriotic virtue in a citizen.<sup>129</sup> The fact that military competence can entail community-specific ethical significance merely shows that the former competence is amenable to being understood "on its own terms," as it were, in the first place. And it is precisely in this sense that this Article argues that material military necessity can be usefully and illuminatingly understood on its own terms.

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<sup>126</sup> MICHAEL WALZER, ARGUING ABOUT WAR 23–24 (2004).

<sup>127</sup> *Id.* at 24.

<sup>128</sup> In a perverse way, one could say that even terrorists might have moral virtues particular to the community or communities in whose name or on whose behalf they commit their acts. *See, e.g.,* Avishai Margalit & Michael Walzer, *Israel: Civilians & Combatants*, N.Y. REV. BOOKS, May 14, 2009, <http://www.nybooks.com/articles/archives/2009/may/14/israel-civilians-combatants>.

<sup>129</sup> THOMSON, *supra* note 90, at 69.

### 3. *Ethical Virtues as Military Virtues*

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

Both ethical virtues and military virtues do sometimes point the soldier in the same behavioral direction. Thus, in Iraq, fighting insurgents in such a way to garner the support of local residents proved not only strategically sound but also ethically important.<sup>130</sup> Conversely, destroying the cognitive faculties of Mohammed al-Qahtani, a high-value intelligence detainee, through harsh interrogation methods was arguably both unethical and lacking in material military necessity.<sup>131</sup>

The objection at issue, however, is not with the instrumentalist "strategic necessity" (expedient attention to ethical considerations).<sup>132</sup> Rather, it asserts that only ethically competent belligerent conduct counts—or should count, at any rate—as *truly* vocationally competent belligerent conduct. To begin with, it may be unethical to do what would otherwise be materially competent. At a 1943 speech before SS officers, Heinrich Himmler stated: "Whether 10,000 Russian females fall down from exhaustion while digging an anti-tank ditch interests me only in so far as the anti-tank ditch for Germany is finished."<sup>133</sup> Forcing the 10,000 Russian women in captivity to perform physical labor to

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<sup>130</sup> A degree of success in stabilizing Mosul in 2003 has largely been attributed to the adoption of the types of methods advocated in the U.S. counterinsurgency manual. *See* U.S. ARMY & MARINE CORPS, *supra* note 88, at xv. Such attribution is by no means unanimous, however. *See, e.g.*, MARTIN VAN CREVELD, *THE CHANGING FACE OF WAR: LESSONS OF COMBAT, FROM THE MARNE TO IRAQ* 270 (2006); Bradley Graham, *A Sharp Shift from Killing to Kindness*, WASH. POST, Dec. 4, 2004, at A1.

<sup>131</sup> In 2009, Susan Crawford, a Bush administration official then in charge of convening military commissions, admitted that al-Qathani's treatment had satisfied even the definition of torture as understood by the administration. *See* Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1. Al-Qathani's lawyer reportedly described him as "'paranoid,' 'incoherent,' 'cracked.'" *See* TORTURING DEMOCRACY (Washington Media Assocs, 2008), *transcript available at* [http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/td\\_transcript.pdf](http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/td_transcript.pdf).

<sup>132</sup> *See* Lonsdale, *supra* note 100, at 39–40.

<sup>133</sup> 4 OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 559 (1946).

exhaustion may have arguably constituted a material military necessity vis-à-vis its objective, namely an anti-tank ditch being completed. The question is whether, all things considered, such a clearly unethical course of action can ever be said to be materially virtuous.

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

When bombing dug-outs or cellars it was always wise to throw bombs into them first and have a look around them after. But we had to be very careful in this village as there were civilians in some of the cellars. We shouted down them to make sure. Another man and I shouted down one cellar twice and receiving no reply were just about to pull the pins out of our bombs when we heard a woman's voice cry out and a young lady came up the cellar steps. As soon as she saw us she started to speak rapidly in French and gave us both of us a hearty kiss. She and the members of her family had their beds, stove and everything else of use in the cellar which they had not left for some days. They guessed an attack was being made and when we first shouted down had been too frightened to answer. If the young lady had not cried out when she did we would have innocently murdered them all.<sup>134</sup>

Richards considered it “wise”—or perhaps militarily virtuous or materially competent, to use the expression adopted in this article—“to throw bombs into cellars first and have a look around them after.”<sup>135</sup> But he also clearly found it ethically troubling to do so. In fact, he found it ethically troubling to such a degree that he decided *not* to do the wise thing (and thereby “innocently murder” the French civilians).<sup>136</sup> Instead, Richards, together with his colleague, chose to shout several times into the cellar.<sup>137</sup> Walzer observes:

*Innocently murdered*, because they had shouted first; but if they had not shouted, and then killed the French family, it would have been, Richards believed, murder simply. And yet he was accepting a certain risk in shouting, for had there been German soldiers in the cellar, they might have scrambled out, firing as they came. It would have been more prudent to throw the bombs without warning, which means that

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<sup>134</sup> FRANK RICHARDS, *OLD SOLDIERS NEVER DIE 198–99* (1966). For further discussion of Richards's story, see MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 152, 154 (4th ed. 2006).

<sup>135</sup> RICHARDS, *supra* note 134, at 198–99.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

military necessity would have justified him in doing so . . . . And yet Richards was surely doing the right thing when he shouted his warning. He was acting as a moral man ought to act; his is not an example of fighting heroically, above and beyond the call of duty, but simply of fighting well. It is what we expect of soldiers.<sup>138</sup>

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

There may be military virtues “in the narrow, material sense” and military virtues “in the broad, holistic sense.” In the former, military virtues basically mean one’s ability to “get the job done,” whereas in the latter, military virtues include one’s ability and inclination to preserve humanity such as retaining one’s autonomous moral agency.<sup>139</sup> Perhaps military necessity in this “broad, holistic sense” may entail always acting in a manner that promotes or preserves humanity. Even if one were to concede that ethical virtues are intrinsic to the holistic construal of military virtues, however, some separate consideration of those remaining bits of the latter not entailing ethics is still possible. It is, then, in this narrow sense that this Article uses the term “material military necessity.”

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<sup>138</sup> WALZER, *supra* note 134, at 152, 154 (quoting RICHARDS, *supra* note 134, at 199). In contemporary terms, the “wise” thing to do in Richards’ situations is akin to ensuring force protection. David Luban objects to soldiers’ additional worth as “assets” and rejects political need for force protection. See David Luban, *Risk Taking and Force Protection* 35–40 (Georgetown Pub. Law and Legal Theory Research Paper No. 11-72, 2011), available at <http://scholarship.law.georgetown.edu/facpub/654>. But see 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 50 (2005) (“Australia, Canada and New Zealand have stated that the term ‘military advantage’ includes the security of the attacking forces.” (footnote omitted)); Benvenisti, *supra* note 2, at 90 (“The security of the attacking forces may be viewed as part of the military goals of the attacking army. In addition, emphasis must be placed on the army’s obligation towards its combatants. Imposing risks on combatants is justified to the extent that the risk is necessary to secure their individual interests and their interests as citizens. Imposing risks on them to protect enemy civilians means using them as mere tools for the benefit of others. This does not preclude the moral duty of *combatants* to consider taking some risks to reduce the harm to enemy civilians, but not a duty to actually risk themselves.” (footnotes omitted)).

<sup>139</sup> It has been suggested that being a vocationally competent officer entails preserving the humanity of those under his or her command. On this view, “we can . . . attribute to officers some level of control—and therefore responsibility—over the specific actions of their troops that might place the troops’ humanity in jeopardy . . . . A warrior’s humanity is most obviously at risk when he or she participates in an atrocity. Vile actions such as rape, the intentional slaughter of civilians, or the torture of prisoners of war dehumanize the victims and degrade the perpetrators. We require officers not to lead or order their subordinates to commit criminal actions such as these.” Shannon E. French, *Sergeant Davis’s Stern Charge: The Obligation of Officers To Preserve the Humanity of Their Troops*, 8 J. MIL. ETHICS 116, 121–22 (2009).

## II. “NORMATIVE” MILITARY NECESSITY: MILITARY NECESSITY IN THE CONTEXT OF IHL NORM-CREATION

The second distinct context in which military necessity appears is that of norm-creation in international humanitarian law. At issue here is not—or no longer—whether, in view of a specific objective under a specific set of circumstances, this or that course of action constitutes a material military necessity or non-necessity. It is rather whether a certain kind of conduct tends to constitute or is deemed capable of constituting a material military necessity or non-necessity; and whether, given the said tendency or capability, international humanitarian law should obligate, authorize, restrict, or prohibit this kind of conduct.

A contextual shift from the material to the normative is accompanied by two related shifts. The first is a shift from assessing particular events to assessing what may be termed “event patterns” or “event-kinds.” For our purposes, descriptions of particular “conduct-instances” such as “torturing al-Qahtani,”<sup>140</sup> are replaced by those of generalized “conduct-kinds” such as “torturing an intelligence detainee.” Similarly, descriptions of particular “purpose-instances” such as “extracting reliable and actionable intelligence regarding al-Qaida” are replaced by those of generalized “purpose-kinds” such as “extracting reliable and actionable intelligence regarding an adversary.” The other related shift concerns the evaluative nature of material military necessity. The question then was whether a given conduct-instance did or would constitute a material military necessity or non-necessity in view of its purpose-instance under its particular circumstances. The question now is what international humanitarian law should do about a given conduct-kind *if*—or *once*—it is agreed that a conduct-kind tends to constitute a material military necessity or non-necessity. Discussions of military necessity in the context of IHL norm-creation involve *stipulating* the material military necessity or non-necessity of conduct-kinds rather than *evaluating* that of conduct-instances.<sup>141</sup>

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<sup>140</sup> See Woodward, *supra* note 131.

<sup>141</sup> See R.B. Brandt, *Utilitarianism and the Rules of War*, 1 PHIL. & PUB. AFF. 145, 151 (1972) (“We should notice that the question which rules of war would be preferred by rational persons choosing behind a [Rawlsian] veil of ignorance is roughly the question that bodies like the Hague Conventions tried to answer. For there were the representatives of various nations, gathered together, say, in 1907, many or all of them making the assumption that their nations would at some time be at war. And, presumably in the light of calculated national self-interest and the principles of common humanity, they decided which rules they were prepared to commit themselves to follow, in advance of knowing how the fortunes of war might strike them in particular.”).

It would appear reasonable to assume that the conduct-kind “disabling an able-bodied, non-surrendering enemy combatant” is generally regarded as conducive toward the materialization of the purpose-kind “weakening the military forces of the enemy.”<sup>142</sup> In other words, it would appear reasonable to stipulate this conduct-kind’s material military necessity. Stipulated thus, should international humanitarian law have any reason to obligate, authorize, restrict, or prohibit this conduct-kind? To use another example, it appears reasonable to stipulate that destroying property in occupied territory is a conduct-kind that in principle lacks material military necessity. Would the material military non-necessity of this conduct-kind thus stipulated furnish international humanitarian law with any reason to obligate, authorize, restrict, or prohibit it?

Normative military necessity refers to this reason-giving function that stipulated material military necessity or non-necessity acquires in IHL norm-creation.<sup>143</sup> It should be noted that the stipulated material military necessity or non-necessity of a given conduct-kind is only one among various reasons for which the framers of international humanitarian law<sup>144</sup> would consider obligating, authorizing, restricting, or prohibiting it. Considerations such as humanity,<sup>145</sup> chivalry, fairness, justice, good faith, reciprocal self-interest,

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<sup>142</sup> This is the premise upon which the 1868 St. Petersburg Declaration rests. See St. Petersburg Declaration, *supra* note 1, at 95.

<sup>143</sup> What follows is essentially an exercise of practical normative reasoning with special reference to military necessity.

<sup>144</sup> This expression refers primarily to states which validly posit rules of international humanitarian law by forming custom and concluding treaties.

<sup>145</sup> The interplay between military necessity and humanity in the process of IHL norm-creation is the subject of a separate, in-depth analysis by this Author. See Nobuo Hayashi, *Military Necessity as Normative Indifference*, 44 GEO. J. INT’L L. 675 (2013); see also, e.g., Tokyo Chihō Saibansho [Tokyo Dist. Ct.] Dec. 7, 1963, Case No. 2,914 (wa) of 1955 and Case No. 4,177 (wa) of 1957 [*Shimoda v. State*], 8 JAPANESE ANN. INT’L L. 212, 240 (1964) (Japan); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 4–5 (2d ed. 2010) [hereinafter DINSTEIN, CONDUCT OF HOSTILITIES]; PILLOUD ET AL., *supra* note 2, at 683; 2 GEORG SCHWARZENBERGER, THE LAW OF ARMED CONFLICT 135 (1968); Draper, *supra* note 3, at 129, 141; Nico Keijzer, *Réponses à la Question 2*, 33 REV. BELGE DROIT INT’L 440, 442 (2000); Marco Pertile, “*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*”: A Missed Opportunity for International Humanitarian Law?, 14 ITALIAN Y.B. INT’L L. 121, 149–50 (2004); Yoram Dinstein, *Military Necessity*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L., [http://www.mpepil.com/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690-e333&recno=7&author=Dinstein%20%20Yoram](http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e333&recno=7&author=Dinstein%20%20Yoram) (last updated May 2009). According to Riccardo Mazzeschi, Enzo Cannizzaro holds the view that weighing military necessity vis-à-vis humanitarian considerations is what the principle of proportionality entails in a unitary system of international law. Riccardo Pisillo Mazzeschi, *Book Review: Il principio della proporzionalità nell’ordinamento internazionale*, 13 EUR. J. INT’L L. 1031, 1034 (2002) (reviewing ENZO CANNIZZARO, IL PRINCIPIO DELLA PROPORZIONALITÀ NELL’ORDINAMENTO INTERNAZIONALE (2000)).

battlefield management—in particular, protocols concerning inter-belligerent communication—sovereignty, economic gain, religious beliefs, culture, and the like, also acquire reason-giving functions. This Article juxtaposes the material military necessity or non-necessity of a given conduct-kind vis-à-vis the evil or non-evil entailed by it. For our present purposes, “evil”<sup>146</sup> denotes, among other things: the loss of life, injury and attack on the bodily, mental, or moral integrity of persons; unsanctioned property destruction and damage, change of ownership or control; unsanctioned change in social institutions or procedures; and so on, that are occasioned in connection with war. This construal encompasses all relevant evil, regardless of who suffers it.<sup>147</sup>

A. *Stipulated Material Military Necessity as an Element in the Legitimacy Modification of Evil Conduct-Kinds but Not of Any Conduct-Kinds*

It may be felt that, war being a “necessary evil” par excellence, anything that is unnecessary in it should *ipso facto* be evil and therefore illegitimate. That is not so, however. Things in war can be neither necessary nor evil; nor need they be illegitimate. The mere fact that a particular conduct-kind vis-à-vis a legitimate purpose-kind is deemed lacking in material military necessity does not mean that the said conduct-kind becomes illegitimate *for that reason alone*. In IHL norm-creation, stipulated material military necessity or non-necessity is indeed an element in the legitimacy modification of those conduct-kinds that are considered *evil*. It will be argued, however, that it is not an element in the legitimacy modification of *any* conduct-kinds, much less those that are not considered evil themselves.

One detects two sets of reference points here. The first set is the legitimacy or illegitimacy of the purpose-kind. In principle, it would be fair to say that the purpose-kind’s illegitimacy conclusively establishes the illegitimacy of *any* conduct-kind taken therefor. The latter’s illegitimacy would remain no matter whether it is otherwise deemed capable of constituting a material military necessity or non-necessity vis-à-vis the former. The same cannot be said where the purpose-kind is legitimate. The legitimacy of a purpose-kind does not *per*

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<sup>146</sup> This expression, although admittedly open-textured and imprecise, has been taken from the preamble of 1907 Hague Convention IV. *See* 1907 Hague Convention IV, *supra* note 1, pmb1. (“[T]he wording of [these provisions] has been inspired by the desire to diminish the evils of war, as far as military requirements permit . . .”).

<sup>147</sup> It will soon become apparent however that, in the specific context of IHL norm-creation, evil as it is understood here is ordinarily and intuitively associated with that inflicted by one party to the conflict upon its adversary or upon neutral parties. On the special case of evil that is exclusively self-inflicted (i.e., inflicted by one party to the conflict upon itself or its co-belligerent), see discussion *infra* Part II.D.

*se* preordain the legitimacy of the conduct-kind taken for its accomplishment. Rather, the latter's legitimacy or illegitimacy would depend on a second set of reference points. It comprises the various possible combinations between the conduct-kind's stipulated evilness or otherwise, and its stipulated material military necessity or non-necessity in view of its legitimate purpose-kind.

Normative military necessity does indeed offer weighty reasons for the particular manner in which the framers of international humanitarian law decide to formulate its rules. On its own, however, normative military necessity does not offer conclusive reasons. The mere fact that certain conduct-kinds are considered capable of constituting material military necessities does not mean that they are legitimate and should therefore be a matter of obligatory or permissive pursuit under international humanitarian law. Nor, more importantly for this Article, does the mere fact that certain conduct-kinds tend to constitute material military non-necessities mean that they are illegitimate and should be a matter of obligatory forbearance under international humanitarian law.

## *B. Purpose-Kinds Vis-à-Vis Conduct-Kinds*

### *1. The Purpose-Kind Itself Is Illegitimate*

Where the purpose-kind itself is illegitimate, whatever conduct-kind is adopted in pursuit thereof, deemed materially necessary or otherwise, is likewise illegitimate.<sup>148</sup> Thomson argues:

Suppose  $V_{act-1}$ -ing and  $V_{act-2}$ -ing are two distinct act-kinds. Let us ask what the conditions are under which the following is true: A ought not  $V_{act-1}$  in order to  $V_{act-2}$ . One thing that would plainly make it true is its being the case that A ought not  $V_{act-1}$ . (If you ought not do a thing, then a fortiori, you ought not do it in order to bring such and such about.) I suggest that there is one other thing that would make it true, namely its being true the case that A ought not  $V_{act-2}$ . (If you ought not bring such and such about, then you ought not try to.) In sum, I suggest that we should accept: For it to be the case that A ought not  $V_{act-1}$  in order to  $V_{act-2}$  is for the following to be the case: either A ought not  $V_{act-1}$ , or A ought not  $V_{act-2}$ .<sup>149</sup>

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<sup>148</sup> See, e.g., Henry Shue, *Civilian Protection and Force Protection*, in *ETHICS, LAW AND MILITARY OPERATIONS*, *supra* note 100, at 135, 137.

<sup>149</sup> See THOMSON, *supra* note 90, at 222.

For our present purposes, the truth of “A ought not  $V_{act-2}$ ” is a sufficient condition, though not a necessary condition, for the truth of “A ought not  $V_{act-1}$ .” In other words, whenever “A ought not  $V_{act-2}$ ” is true, “A ought not  $V_{act-1}$ ” is also true.

In his criticism of what Lon Fuller termed “internal morality of law,”<sup>150</sup> H.L.A. Hart observed that it is vital to distinguish between purposive activity and morality:

Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. (‘Avoid poisons however lethal if they cause the victim to vomit’, or ‘Avoid poisons however lethal if their shape, color, or size is likely to attract notice.’) But to call these principles of the poisoner’s art ‘the morality of poisoning’ would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.<sup>151</sup>

Here,  $V_{act-2}$  would be “poison the victim” and  $V_{act-1}$  “avoid poisons however lethal if they cause the victim to vomit” and the like. To put it differently,  $V_{act-1bis}$  would be “choose and administer only that kind and amount of poison, and only in such a manner, so as to poison the victim effectively.” Once it is accepted that A ought not to poison B, then it follows that A ought not to choose and administer that kind and amount of poison in such a manner so as to poison B effectively. Similarly, in Walzer’s words:

In the course of a bank robbery, a thief shoots a guard reaching for his gun. The thief is guilty of murder, even if he claims that he acted in self-defense. Since he had no right to rob the bank, he also had no right to defend himself against the bank’s defenders. He is no less guilty for killing the guard than he would be for killing an unarmed bystander . . . The thief’s associates might praise him for the first killing, which was in their terms necessary . . . But we won’t judge him in that way, because the idea of necessity doesn’t apply to criminal activity: it was not necessary to rob the bank in the first place.<sup>152</sup>

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<sup>150</sup> See LON L. FULLER, *THE MORALITY OF LAW* 4 (rev. ed. 1969).

<sup>151</sup> H.L.A. Hart, Book Review, 78 *HARVARD L. REV.* 1281, 1286 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)); see also H.L.A. Hart, *Lon L. Fuller: The Morality of Law*, in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 343, 350 (1983) (book review).

<sup>152</sup> See, e.g., WALZER, *supra* note 134, at 128.

The same may be said of belligerent conduct. Thus, according to the 1868 St. Petersburg Declaration, “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”<sup>153</sup> The declaration delegitimizes any object in war—no matter how rational it may otherwise be—that is *not* concerned with weakening the military forces of the enemy. In other words, the declaration delegitimizes any purpose-kind more or other than the weakening of the military forces of the enemy.<sup>154</sup> It would follow that any conduct-kind taken, whether it is otherwise deemed capable of constituting a material military necessity or non-necessity, in pursuit of an illegitimate purpose-kind in war is similarly illegitimate.

It might be thought that the same reasoning would—or should—subordinate the legitimacy of an act *in bello* to the legitimacy of an end *ad bellum*. Contemporary international humanitarian law has not yet reached that stage.<sup>155</sup>

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<sup>153</sup> St. Petersburg Declaration, *supra* note 1. For a similar but broader formulation, see Final Protocol of the Brussels Conference of 1874, Aug. 27, 1874, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 21, 22 (“[T]he only legitimate object which States should have in view during war is to weaken the enemy without inflicting upon him unnecessary suffering.”).

<sup>154</sup> Illegitimate purpose-kinds would include strictly personal gain, lebensraum, racial extermination, and the like.

<sup>155</sup> See, e.g., William V. O’Brien, *The Meaning of ‘Military Necessity’ in International Law*, in 1 WORLD POLITY 109, 142–44 (1957). Unsuccessful assertions to this effect were made by de Menthon, a French prosecutor at Nuremberg. It was a popular theme among Allied prosecutors in post-World War II war crimes trials. It might be asked whether the strict separation between *jus ad bellum* and *jus in bello* is always or everywhere advisable. On one end, in favor of maintaining the traditional separation, are Adam Roberts and Jasmine Moussa. See, e.g., Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT’L REV. RED CROSS 963 (2008); Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT’L REV. RED CROSS 931 (2008); Adam Roberts, *The Principle of Equal Application of the Laws of War*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 226 (David Rodin & Henry Shue eds., 2008). Those on the other end include Jeff McMahan, David Rodin, Christopher Kutz and Anthony Coates, among others. See, e.g., JEFF MCMAHAN, *KILLING IN WAR* (2009); Anthony Coates, *Is the Independent Application of Jus in Bello the Way To Limit War?*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS, *supra*, at 176; Christopher Kutz, *Fearful Symmetry*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS, *supra*, at 69; Jeff McMahan, *The Morality of War and the Law of War*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS, *supra*, at 19; David Rodin, *The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry Is Half Right*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS, *supra*, at 44. Be that as it may, this is not a matter pursued further here.

## 2. *The Purpose-Kind Itself Is Legitimate*

The situation changes where the purpose-kind is not illegitimate in itself. Here, the familiar adage—“the end justifies the means”—comes to mind.<sup>156</sup> This adage mirrors utilitarian thinking.<sup>157</sup> It is not our purpose here to explore the philosophical terrain of utilitarianism. Of interest is rather the specific manner in which military necessity reveals its relationship to it in IHL norm-creation.

Utilitarianism becomes relevant to IHL in five ways.<sup>158</sup> The first is in its normative relation to *jus ad bellum* briefly noted earlier. Espousing thoroughgoing utilitarianism<sup>159</sup> would amount to abandoning the separation between *jus ad bellum* and *jus in bello* and subsuming all questions of *jus in bello* under those of *jus ad bellum*. In particular, it would amount to asserting that *any* belligerent conduct-kind materially necessary for victory in a just war is *ipso facto* legitimate.

Second, within *jus in bello* itself, thoroughgoing utilitarianism would entail the idea that material military necessity per se is a utility worthy of IHL protection or promotion and that material military non-necessity per se is a disutility apt for prohibition or restriction.<sup>160</sup> As will be seen below, IHL norm-creation appears to take the intrinsic utility of material military necessity seriously, though not conclusively; what it does *not* do, however, is to treat material military non-necessity as an intrinsic disutility that should be prohibited or restricted.<sup>161</sup> It is more likely that international humanitarian law

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<sup>156</sup> Thomson is ambivalent about what role, if any (that is, utilitarian or not), the legitimacy of a purpose-kind plays in the legitimacy or otherwise of the conduct-kind chosen. See THOMSON, *supra* note 90, at 222–23 (“Are there also truths of the form: A ought to V<sub>act</sub>-1 in order to V<sub>act</sub>-2? Alice ought not give her child an alpha-pill in order to kill it. Ought she give her child an alpha-pill in order to cure it? I don’t myself think it matters much to what she ought to do for what V<sub>act</sub>-2-ing it is such that she gives her child an alpha-pill in order to V<sub>act</sub>-2, so long as it is not the case that she ought not V<sub>act</sub>-2. (Though it might well matter to our assessment of how good a mother she is.) But others may think otherwise, and I therefore leave it open.”).

<sup>157</sup> See generally Th.A. van Baarda, *Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective from Military Ethics*, 11 Y.B. INT’L. HUMANITARIAN L. 3, 5–6 (2008) (“Classical utilitarianism . . . states that morally just is that course of action that creates the greatest amount of good for the largest number of people. When an agent considers his options, he is obligated to choose that option, which leads to this result.”).

<sup>158</sup> Admittedly, there are ways in which utilitarianism becomes relevant to international humanitarian law *in addition* to those discussed here. See, e.g., van Baarda, *supra* note 157, at 10–12.

<sup>159</sup> That is to say, utilitarianism not of a rule-based variety or a variety to which side constraints are attached.

<sup>160</sup> See discussion *infra* Part II.C.2.a–b.

<sup>161</sup> See discussion *infra* Part II.C.2.b.

is a system of norms in which the relationship between pursuing purpose-kinds and taking militarily necessary conduct-kinds is characterized by a form of rule-utilitarianism<sup>162</sup> or a form of utilitarianism to which what Robert Nozick calls “side constraints”<sup>163</sup> are attached.<sup>164</sup>

The third way in which utilitarian thinking becomes relevant to IHL is in the latter’s normative relation to *Kriegsräson*. Put simply, *Kriegsräson*’s utilitarian rationale is that a great deal of evil may need to be endured for a greatly important end in war.<sup>165</sup> Plainly, this rationale—although certainly *not* the doctrine’s notorious *modus operandi*<sup>166</sup>—is present in the very idea of normatively regulating belligerent conduct. IHL norm-creation is well-placed to deal with, and indeed contains, such a rationale.<sup>167</sup> IHL norm-creation is driven by the desire to reduce, as far as possible, the range of belligerent conduct whose compliance or non-compliance with the law depends on a crude utilitarian interest-balancing exercise by the law’s addressees.<sup>168</sup>

Fourth, *reducing* this range is not the same as *eliminating* it altogether. Unsatisfactory as it may be, some validly posited rules of international humanitarian law amount to little more than what Nigel Simmonds calls “a residual provision” creating “a general legal duty always to act for the greater good.”<sup>169</sup> This general duty has been variously described in ethics as the “principle of double effect”<sup>170</sup> and the “principle of double intention.”<sup>171</sup> One

<sup>162</sup> See Brandt, *supra* note 141, at 146–47.

<sup>163</sup> ROBERT NOZIK, ANARCHY, STATE, AND UTOPIA 29 (1974).

<sup>164</sup> See Shue, *supra* note 148, at 136.

<sup>165</sup> See LARRY MAY, WAR CRIMES AND JUST WAR 196–97 (2007) (“For if there is a tactic that must be employed in order to win a war and the winning the war is morally very important, then it would be only the rule fetishist who thought that, on grounds of humaneness itself, this exceptional case must be subject to absolute prohibitions.”). *But see* WALZER, *supra* note 134, at 251–63.

<sup>166</sup> What is at stake in the context of IHL norm-creation is not so much *Kriegsräson*’s actual operation. The latter is a matter discussed in greater detail below in connection with considerations of military necessity being invoked *de novo* against validly posited IHL rules. See discussion *infra* Part IV.

<sup>167</sup> See, e.g., NIGEL SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE 37–40 (2d ed. 2002); Manuel Atienza, *Reasoning and Legislation*, in THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS IN JURISPRUDENCE 297, 303–04 (Luc J. Wintgens et al. eds., 2005).

<sup>168</sup> See SIMMONDS, *supra* note 167, at 37–40.

<sup>169</sup> See *id.* at 39; see also SOLIS, *supra* note 3, at 269 (“In these allowances, terms like ‘if possible,’ ‘as far as possible,’ and ‘if urgent,’ introduce elements of uncertainty and risks of arbitrary conduct. Without these concessions, which take reality into account, the allowances could not have been formulated and approved in the first place.”); Schmitt, *supra* note 2, at 804–05.

<sup>170</sup> See, e.g., COLM MCKEOGH, INNOCENT CIVILIANS: THE MORALITY OF KILLING IN WAR 64–65 (2002); HENRY SIDGWICK, THE ELEMENTS OF POLITICS 254 (London, MacMillian & Co. 1891); WALZER, *supra* note 134, at 153; James F. Keenan, *The Function of the Principle of Double Effect*, 54 THEOLOGICAL STUD. 294 (1993); Joseph T. Mangan, *An Historical Analysis of the Principle of Double Effect*, 10 THEOLOGICAL STUD.

example of this is the manner in which international humanitarian law deals with attacks.<sup>172</sup>

Fifth, humanity appears to occupy an increasingly privileged place in the utility calculus of international humanitarian law. That it does so often seems to be simply assumed, but sometimes it is articulated in IHL instruments<sup>173</sup> as well as in judicial rulings<sup>174</sup> and scholarly writing.<sup>175</sup> It may be said that, generally, humanity is anchored through the celebrated Martens clause.<sup>176</sup> A net

41, 43 (1949); Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 Y.B. INT'L HUMANITARIAN L. 79, 104–05 (2004).

<sup>171</sup> See WALZER, *supra* note 134, at 155–6.

<sup>172</sup> See, e.g., Additional Protocol I, *supra* note 72, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b); Neuman, *supra* note 170, at 102–05; Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 Y.B. INT'L HUMANITARIAN L. 3, 26–30 (2005); see also discussion *infra* Part IV.B.1.

<sup>173</sup> St. Petersburg Declaration, *supra* note 1, at 95 (“[T]he progress of civilization should have the effect of alleviating[] as much as possible the calamities of war.”).

<sup>174</sup> See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 262 (July 8) (“Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity—make the conduct of armed hostilities subject to a number of strict requirements.”).

<sup>175</sup> See, e.g., SALAH EL-DIN AMER ET AL., INT'L INST. OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA: EXPLANATION, pt. I, § I, paras. 2–2.1, at 74 (Louise Doswald-Beck ed., 1995); PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE § B, para. 2(c), at 7 (2009) [hereinafter AIR WARFARE MANUAL]; Emily Camins, *The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity*, 90 INT'L REV. RED CROSS 853, 878–89 (2008); H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 363–64 (1952); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 243 (2000); MAY, *supra* note 165, at 53–57, 67–90.

<sup>176</sup> See the various instruments in which the Martens clause appears, such as the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects (with Protocols) pmbl., Oct. 10, 1980, 1342 U.N.T.S. 137, 163–64; Convention on Cluster Munitions pmbl., May 30, 2008, 48 I.L.M. 357 (2009); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) pmbl., June 8, 1977, S. TREATY DOC. NO. 100.2, 1125 U.N.T.S. 609, 611 (1987) [hereinafter Additional Protocol II]; Additional Protocol I, *supra* note 72, art. 1(2); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 158, Aug. 12, 1949, 6 U.S.T. 3516, 3623, 75 U.N.T.S. 287, 392 [hereinafter Geneva Convention IV]; Geneva Convention Relative to the Treatment of Prisoners of War art.142, Aug. 12, 1949, 6 U.S.T. 3316, 3424, 75 U.N.T.S. 135, 242 [hereinafter Geneva Convention III]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 62, Aug. 12, 1949, 6 U.S.T. 3217, 3255, 75 U.N.T.S. 85, 120 [hereinafter Geneva Convention II]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 63, Aug. 12, 1949, 6 U.S.T. 3114, 3152, 75 U.N.T.S. 31, 68 [hereinafter Geneva Convention I]; 1907 Hague Convention IV, *supra* note 1, pmbl.; Convention (II) with Respect to the Laws and Customs of War on Land, pmbl., July 29, 1899, 32 Stat. 1803, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 60, 61; see also DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 145, at 8–9; Hayashi, *supra* note 6, at 47; Theodor Meron, *The Martens Clause, Principles of Humanity, and*

increase in humanity—or a net reduction in inhumanity, as the case may be—is often considered weightier<sup>177</sup> than, say, a net increase in the satisfaction of other considerations such as material military necessity and sovereignty.<sup>178</sup>

What follows is a detailed assessment of the relationship between the legitimacy of purpose-kinds *in bello* and the legitimacy or otherwise of conduct-kinds *in bello*.

### C. *Conduct-Kinds Vis-à-Vis Purpose-Kinds*

As noted earlier, assuming that the purpose-kind itself is legitimate leaves the legitimacy or illegitimacy of the conduct-kind subject to two reference points.<sup>179</sup> They are, respectively, whether the conduct-kind itself is or is not seen as evil, and whether it is deemed constitutive of a material military necessity or non-necessity vis-à-vis the purpose-kind. These two reference points can be combined in four ways, namely: (1) the conduct-kind is considered evil and constitutive of a material military necessity; (2) it is deemed evil and lacking in material military non-necessity; (3) it is regarded as non-evil and constitutive of a material military necessity; and (4) it is treated as non-evil and lacking in material military necessity.

#### 1. *The Conduct-Kind Itself Is Considered Evil*

Where the conduct-kind in question is deemed evil, its stipulated material military necessity or non-necessity is indeed one element in its legitimacy modification.<sup>180</sup> Let us assume for the moment that this evil conduct-kind tends to constitute a material military necessity. We would then have to compare the urge to reduce the evil embodied *ex hypothesi* by that conduct-kind, on the one hand, and the stipulated concession that it tends to constitute a material military necessity, on the other. Should the latter be seen as weightier than the former, then the conduct-kind's claim to legitimacy would be enhanced. Conversely, if it were deemed more evil than materially necessary, then its

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*Dictates of Public Conscience*, 94 AM. J. INT'L L. 78 (2000); Schmitt, *supra* note 2, at 800–01; Helmut Strebler, *Martens Clause*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 326 (1992).

<sup>177</sup> See PILLOUD ET AL., *supra* note 2, at 395.

<sup>178</sup> See Hayashi, *supra* note 6, at 46.

<sup>179</sup> See *supra* Part II.B.2.

<sup>180</sup> By treating military necessity as proportionality, David Luban appears to limit his understanding of military necessity to this particular setting. See David Luban, *Military Lawyers and the Two Cultures Problem* 46–49 (Georgetown Pub. Law and Legal Theory Research Paper No. 12-057, 2012), available at <http://scholarship.law.georgetown.edu/facpub/937>.

claim to legitimacy would diminish. Should the relative weight be indeterminate, the question of the conduct-kind's legitimacy would remain uncertain.

In contrast, that conduct-kind which is regarded as evil and lacking in material military necessity is plainly illegitimate. Unnecessary evil is evil simpliciter and unmitigated evil is illegitimate.<sup>181</sup> Even then, however, it is *not* the conduct-kind's stipulated lack of material military necessity that renders it illegitimate. It is rather the conduct-kind's stipulated evil—now laid bare and unmodified by considerations of normative military necessity—that does.

The kind of situation at issue can be illustrated as follows. In his autobiography, Raleigh Trevelyan, a World War II veteran, recounted an encounter with a German soldier:

There was a wonderfully vulgar sunshine. Everything was the colour of pink geraniums, and birds were singing. We felt like Noah must have done when he saw his rainbow. Suddenly Viner pointed across the stretch of scrubby heath. An individual, dressed in German uniform, was wandering like a sleep-walker across our line of fire. It was clear that for the moment he had forgotten war, and—as we had been doing—was reveling in the promise of warmth and spring.

“Shall I bump him off?” asked Viner, without a note of expression in his voice.

I had to decide quickly. “No,” I replied, “just scare him away.”

Viner aimed above the man's head, and fired. The Jerry turned for a moment or two, stared at us with mouth open, then went bounding through the trees, waving his rifle above his head.

“Another bomb-happy,” said Bishop, who happened to be standing by us, and he gave him a parting shot.

Only Sergeant Chesterton didn't laugh. He said that we should have killed the fellow, since his friends would now be told precisely where our trenches were.<sup>182</sup>

Sergeant Chesterton apparently thought that the German soldier should have been killed. Here, Chesterton's purpose-*instance* was “keeping the

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<sup>181</sup> See *supra* Introduction.

<sup>182</sup> RALEIGH TREVELYAN, *THE FORTRESS: A DAIRY OF ANZIO & AFTER* 23 (1956). It was common among British soldiers to refer to their German counterparts as “Jerries.” See WALZER, *supra* note 134, at 140–41.

location of his unit's trench concealed from the Germans."<sup>183</sup> With a view to accomplishing this purpose-instance, he advocated the adoption of the conduct-*instance* "shooting to kill the German soldier who had noticed the unit's presence." Correspondingly, the purpose-*kind* at issue is "keeping the location of the trench of one's unit concealed from the enemy"<sup>184</sup> and the conduct-*kind* "shooting to kill an enemy combatant who has noticed the presence of one's unit." It would appear intuitive that the purpose-*kind*, so formulated, is legitimate. The conduct-*kind*, as phrased, would also be considered clearly evil inasmuch as it involves the taking of human life. The variable that remains to be fixed is whether the conduct-*kind* would be deemed constitutive of a material military necessity or lacking in it vis-à-vis the purpose-*kind*.

*a. Evil and Necessary*

Suppose now that, as was apparently the case in the aforementioned episode, the German soldier was able-bodied and not offering to surrender. In other words, he was not placed *hors de combat* at the time. Then Chesterton's would-be conduct-instance—"shooting to kill the German soldier who had noticed the presence of Chesterton's unit and was not placed *hors de combat* at that particular moment"—was arguably a material military necessity vis-à-vis the original purpose-instance. Similarly, the conduct-*kind*—"shooting to kill an enemy combatant who has noticed the presence of one's unit and is not placed *hors de combat* at the time"—arguably tends to constitute a material military necessity vis-à-vis the corresponding purpose-*kind*. It appears that those involved in IHL norm-creation to date have declined to treat disabling enemy combatants not placed *hors de combat* as illegitimate.<sup>185</sup> Arguably, according to today's validly posted IHL rules, it is not unlawful to disable them by way of killing.

Admittedly, the foregoing does not show that the stipulated material military necessity of any conduct-*kind* always trumps its evilness.<sup>186</sup> The mere fact that a given conduct-*kind* is deemed evil yet constitutive of a material

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<sup>183</sup> Note here that this Article does *not* treat "disabling the German soldier" as Chesterton's purpose-instance.

<sup>184</sup> Similarly, this Article does *not* treat "disabling an enemy combatant" as the corresponding purpose-kind.

<sup>185</sup> See discussion *infra* Part IV.B.1.b as to whether one is duty-bound by positive international humanitarian law to "capture rather than kill" even an enemy combatant not placed *hors de combat*.

<sup>186</sup> See, e.g., Marshall Cohen, *Morality and the Laws of War*, in PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS 71, 74, 75 (Virginia Held et al. eds., 1974).

military necessity does not settle the matter as to whether it becomes legitimate or illegitimate. Its legitimacy or illegitimacy all depends on the process of IHL norm-creation and the outcome that it generates. The process involves the weighing of the general value that is, or would be, harmed by the conduct-kind's stipulated evil, on the one hand, and the stipulated need for this conduct-kind to be adopted if the realization of its legitimate purpose-kind were to be attempted, on the other.<sup>187</sup> It may happen that the conduct-kind's stipulated evil prevails over its stipulated material military necessity and thereby renders it illegitimate. The unqualified<sup>188</sup> IHL duty to forbear torture—even effective tortures are deemed much too cruel to be permitted—is a case in point.<sup>189</sup> Conversely, the conduct-kind's stipulated material military necessity may prevail over its stipulated evil and thereby render it legitimate. Such is the case, for instance, with the episode at hand. Shooting to kill an enemy combatant not placed *hors de combat* for keeping the location of one's trench concealed from the enemy—or, more broadly, for legitimate purpose-kinds generally—is arguably an unqualified IHL liberty.<sup>190</sup>

### b. *Evil and Unnecessary*

Let us now assume that the German soldier had dropped his rifle, thrown his hands up and unambiguously offered to surrender—i.e., he had in fact placed himself *hors de combat* at the time. Then it is arguable that shooting to kill him *qua* conduct-instance would have constituted a material military non-necessity vis-à-vis keeping the location of the trench used by Chesterton's unit

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<sup>187</sup> The existence of this interplay is implied in various parts of international humanitarian law. See, e.g., 1907 Hague Convention IV, *supra* note 1, pmb. (“[T]he wording of [these provisions] has been inspired by the desire to diminish the evils of war, as far as military requirements permit . . . .”); St. Petersburg Declaration, *supra* note 1, at 95 (“[The commission has] by a common accord the technical limits within which the necessities of war ought to yield to the demands of humanity . . . the progress of civilization should have the effect of alleviating, as much as possible the calamities of war . . . .”). For a further discussion on the military-humanity interplay in IHL norm-creation, see Hayashi, *supra* note 145.

<sup>188</sup> This Article describes as “unqualified” those rules to which no exceptional clauses are attached. Thus, rules can be “unqualified” in a general way, i.e., unqualified by *any* exceptional clauses. Alternatively, rules can be “unqualified” in a limited way, i.e., qualified by certain exceptional clauses but not, for example, by those exceptional clauses emanating from military necessity.

<sup>189</sup> See, e.g., BRIAN OREND, *THE MORALITY OF WAR* 123 (2006) (“We do not have to do a cost-benefit analysis to determine whether such [for example, rape, genocide or torture] are impermissible in warfare: we already judge such acts to be heinous crimes because of their very nature.”); David Whetham, *The Just War Tradition: A Pragmatic Compromise*, in *ETHICS, LAW AND MILITARY OPERATIONS*, *supra* note 100, at 65, 82 (“[T]he principle of proportionality and also the idea of *mala in se* . . . recognizes that some methods of war are simply evil in themselves, and cannot be justified under any circumstances.”).

<sup>190</sup> See discussion *infra* Part V.B.2 regarding the status of “capture rather than kill” under positive international humanitarian law.

concealed from the Germans *qua* purpose-instance. All else being equal, taking the German prisoner (who would then be removed from the battlefield and detained in the rear area) would have constituted more of a material military necessity for Chesterton's unit than shooting to kill him.<sup>191</sup> That would have been so in view of the ammunitions saved.<sup>192</sup> Given this alternative, shooting to kill the German would have arguably been wasteful (ammunition-wise) and excessive (death being an externality here). Note here that the evil entailed by shooting to kill the German soldier remains the same in kind and amount; it is its material military necessity that now ceases to exist. The evil conduct-instance has moved from constituting a material military necessity vis-à-vis its legitimate purpose-instance to constituting a material military non-necessity vis-à-vis the same legitimate purpose-instance.

The corresponding conduct-kind, "shooting to kill an enemy combatant who has noticed the presence of one's unit and is placed *hors de combat* at the time," would arguably lack material military necessity vis-à-vis the corresponding purpose-kind, "keeping the location of the trench used by one's unit concealed from the enemy." It seems uncontroversial that a conduct-kind that is deemed evil and lacking in material military necessity vis-à-vis its otherwise legitimate purpose-kind is plainly illegitimate. According to Michael Schmitt, it is illegitimate to commit "destructive or harmful acts that are unnecessary to secure a military advantage."<sup>193</sup> This idea finds support amongst several commentators<sup>194</sup> as well as a number of military manuals.<sup>195</sup>

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<sup>191</sup> This Article does *not* assume that the conditions of combat in which Chesterton's unit found itself would be of the kind covered by Article 41(3) of Additional Protocol I. See Additional Protocol I, *supra* note 72, art. 41(3).

<sup>192</sup> It is nevertheless possible that the German soldier's unexplained and prolonged disappearance might have alerted his comrades to the potential presence of enemies nearby.

<sup>193</sup> Michael N. Schmitt, Book Review: *Law on the Battlefield*, 8 U.S. A.F. ACAD. J. LEGAL STUD. 255, 258 (1997) (reviewing A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* (1996)); Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1, 52 (1997). Here, "destructive or harmful" may be seen as indicating the evilness of the measure taken and "unnecessary" the lack of material military necessity vis-à-vis its otherwise legitimate end.

<sup>194</sup> See, e.g., GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 242 (1994) (quoting Napoleon: "My great maxim has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules [i.e. customary law], is excusable only so far as it is absolutely necessary; everything beyond that is criminal.") (alteration in original); PILLOUD ET AL., *supra* note 2, at 396; ARCHER POLSON, *PRINCIPLES OF THE LAW OF NATIONS, WITH PRACTICAL NOTES AND SUPPLEMENTARY ESSAYS ON THE LAW OF BLOCKADE AND ON CONTRABAND OF WAR* 42 (Philadelphia, T. & J.W. Johnson, 1853); BILL RHODES, *AN INTRODUCTION TO MILITARY ETHICS: A REFERENCE HANDBOOK* 105 (2009) ("Rather, [military necessity] requires that all harm inflicted must be the result of legitimate military requirements; doing harm capriciously or wantonly violates military necessity."); SIDGWICK, *supra* note 170, at 255, 257; SOLIS, *supra* note 3, at 258; TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 20 (1970) ("[T]he ravages of war should be mitigated as

Where a given conduct-kind is illegitimate for the reason just described, the relevant IHL rule would unqualifiedly prohibit it. Such would be the case, for example, regarding the conduct unqualifiedly prohibited under Article 25 of the 1907 Hague Regulations. This Article stipulates that “[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.”<sup>196</sup> According to the British manual:

The reason for this rule is that there is no military need to attack a place that is not being defended. It can simply be occupied without resistance or bypassed. Enemy armed forces are likely to have withdrawn. Any remaining members of the enemy armed forces in the place can be taken prisoner of war and their weapons and military equipment captured.<sup>197</sup>

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

*c. Preamble of the 1868 St. Petersburg Declaration: Evil Means Illegitimate If Unnecessary*

As noted earlier, the St. Petersburg Declaration stipulates that “*the only legitimate object* which states should endeavor to accomplish during war is to weaken the military force of the enemy.”<sup>198</sup> The Declaration goes on to hold

far as possible by prohibiting needless cruelties, and other acts that spread death and destruction and are not reasonably related to the conduct of hostilities.”); Draper, *supra* note 3, at 135; Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Protocol I*, 1 AM. U. J. INT’L L. & POL’Y 117, 117 (1986); Richard Wasserstrom, *The Responsibility of the Individual for War Crimes, in PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS*, *supra* note 186, at 47, 49.

<sup>195</sup> See, e.g., OFFICE OF THE JUDGE ADVOCATE GEN., CANADIAN FORCES, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS § 202, at 2-1 (2003) [hereinafter CANADIAN MANUAL] (“humanity” effectively held to render *unnecessary evil* illegitimate); U.K. MINISTRY OF DEF., *supra* note 3, §§ 2.4–2.4.1, at 23 (“humanity” effectively held to render *unnecessary evil* illegitimate); U.S. DEP’T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS ET AL., THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.1, at 5-2 (2007) [hereinafter COMMANDER’S HANDBOOK] (“[The law’s] purpose is to ensure that the violence of hostilities is directed toward the enemy’s war efforts and is not used to cause unnecessary human misery and physical destruction. The principle of military necessity recognizes that force resulting in death and destruction will have to be applied to achieve military objectives, but its goal is to limit suffering and destruction to that which is necessary to achieve a valid military objective.”).

<sup>196</sup> Convention (IV) Respecting the Laws and Customs of War on Land, Annex, arts. 25, 36, Oct. 18, 1907, 36 Stat. 2295, 2302 [hereinafter 1907 Hague Regulations]; see also Additional Protocol I, *supra* note 72, art. 59.

<sup>197</sup> U.K. MINISTRY OF DEF., *supra* note 3, § 5.37.1, at 91; see also Dinstein, *Military Necessity*, *supra* note 145, § 3.

<sup>198</sup> St. Petersburg Declaration, *supra* note 1, at 95 (emphasis added).

that “*for this purpose, it is sufficient to disable the greatest possible number of men.*”<sup>199</sup> Disabling the greatest number of men was thereby held to be all that any belligerent should ever need to do in order to weaken the military forces of his enemy. Accordingly, though clearly evil and part of the “calamities of war,” disabling such men was to remain legitimate as far as the St. Petersburg Declaration was concerned. This first part of the Declaration’s preamble deals with a conduct-kind that is considered evil yet constitutive of material military necessity vis-à-vis its legitimate purpose-kind.<sup>200</sup>

There is one further step in the Declaration where disablement by way of injury or death now becomes the purpose-kind and employing certain projectiles becomes the conduct-kind. The Declaration states that its drafters have “by common accord fixed the technical limits within which the necessities of war ought to yield to the demands of humanity.”<sup>201</sup> There is no indication, however, that the drafters decided to let the latter requirements perform or always trump the former necessities. Nor is there any indication that the drafters intended categorically to outlaw employing those means of combat that are deemed evil yet capable of constituting material military necessities vis-à-vis their legitimate ends. On the contrary, they appear to have specifically declined to delegitimize such conduct-kinds.<sup>202</sup> The Declaration itself falls short of delegitimizing disabling the greatest number of men and using explosive projectiles four hundred grams or more in weight. There may be suffering that is aggravating yet not useless (such as the suffering that disablement itself entails) and there may be death that is inevitable yet not useless (such as death as a form of disablement itself). Similarly, there may be injury that is not superfluous and suffering that is not unnecessary.<sup>203</sup> Admittedly, the mere fact that the Declaration declines to delegitimize these conduct-kinds does not mean that it thereby conclusively legitimizes them. Nothing in the Declaration precludes the possibility of the said conduct-kinds becoming illegitimate on grounds that are established independent of, or subsequent to, the Declaration itself. Such grounds may very well arise, for instance, from the scope of evil broadening or the requisite thresholds of material military necessity heightening—or both as the case may be—over time.

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<sup>199</sup> *Id.* (emphasis added).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *See id.*

<sup>203</sup> The declaration is otherwise silent as to whether evil conduct becomes illegitimate *even if* it is materially militarily necessary. *See* Schmitt, *supra* note 2, at 803.

As noted earlier, excessiveness is a species of material military non-necessity. The St. Petersburg Declaration essentially stipulates that, *qua* conduct-kind, employing explosive projectiles weighing under four hundred grams produces both evil that is necessary to effect disablement and evil that is materially excessive (i.e. external to disablement).<sup>204</sup> The Declaration proclaims that the disablement of the greatest number of men “would be *exceeded* by the employment of arms which *uselessly* aggravate the sufferings of disabled men, or render their death inevitable.”<sup>205</sup> At stake now is evil entailed by the suffering of *disabled* men—i.e., those men who are already disabled but alive.<sup>206</sup> Aggravating their suffering and/or rendering their death inevitable is hereby declared illegitimate insofar as it is deemed an evil that lacks material military necessity for weakening the military forces of the enemy. In the words of the Declaration, “the employment of such arms would, *therefore*, be contrary to the laws of humanity.”<sup>207</sup> This second part of the Declaration’s preamble deals with a conduct-kind that is considered evil and lacking in material military necessity vis-à-vis its otherwise legitimate purpose-kind. As far as the St. Petersburg Declaration is concerned, disabling the greatest possible number of men is a conduct-kind that is considered evil yet constitutive of a material military necessity vis-à-vis its legitimate purpose-kind and is therefore legitimate; however, aggravating the suffering of disabled men is a conduct-kind that is deemed evil and bereft of material military necessity vis-à-vis the same purpose-kind and is therefore illegitimate.<sup>208</sup> Disablement per se may legitimately take the form of incapacitating injury or death. But evil that is extrinsic or additional to disablement itself is unnecessary.<sup>209</sup> The Declaration then proceeds to ban the employment of explosive projectiles weighting less than four hundred grams—an unnecessary evil.<sup>210</sup>

The Declaration exemplifies the notion that, when unnecessary, evil remains straightforwardly illegitimate. Where a given conduct-kind is held as both evil and lacking in material military necessity, and where that conduct-

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<sup>204</sup> See St. Petersburg Declaration, *supra* note 1, at 95–96.

<sup>205</sup> *Id.* (emphasis added).

<sup>206</sup> They are “alive,” so they are susceptible to further suffering.

<sup>207</sup> St. Petersburg Declaration, *supra* note 1, at 95 (emphasis added).

<sup>208</sup> See *id.*

<sup>209</sup> See, e.g., Hans Blix, *Means and Methods of Combat*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 135, 138–39 (1988).

<sup>210</sup> See, e.g., Dinstein, *Military Necessity*, *supra* note 145, § 6 (commenting on the rationale behind the St. Petersburg Declaration) (“It is virtually a truism today that causing unnecessary suffering to enemy combatants cannot be a matter of military necessity.”).

kind is held to be illegitimate as a result, this merely shows that material military non-necessity does not overrule or adulterate what is already evil.

## 2. *The Conduct-Kind Is Considered Non-Evil*

The foregoing demonstrates that the stipulated material military necessity or non-necessity of an *evil* conduct-kind, is an element in its legitimacy modification. The question, then, is this: Is the stipulated material military necessity or non-necessity of *any* conduct-kind also an element in its legitimacy modification? In other words, does the fact that it is militarily unnecessary to do something per se mean that it is therefore illegitimate to do so?

These questions are to be answered in the negative, particularly in respect of conduct-kinds that are *not* deemed evil themselves. Plainly, it would be legitimate, if not also affirmatively mandatory, to adopt a conduct-kind that is considered non-evil and constitutive of a material military necessity. Similarly, it might be normatively indifferent, but clearly not illegitimate, to adopt a conduct-kind that is deemed non-evil and lacking in material military necessity. It is possible that there may simultaneously be some third elements that modify the legitimacy of these conduct-kinds. We are not concerned with such elements here, however.

Let us return to Chesterton and the German soldier. Suppose now that Chesterton advocates disabling the German non-lethally by employing an entirely harmless yet effective weapon that happens to be at Chesterton's disposal.<sup>211</sup> Now the conduct-instance is non-lethally disabling the able-

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<sup>211</sup> Admittedly, whether "non-lethal" weapons really exist is a matter of considerable controversy. See, e.g., WILLIAM H. BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* 246–50 (2009); David P. Fidler, *The Meaning of Moscow: "Non-Lethal" Weapons and International Law in the Early 21st Century*, 87 INT'L REV. RED CROSS 525, 531, 550 (2005). Be that as it may, however, one can proceed on the assumption that there are indeed genuinely "non-lethal" weapons if employed properly. Consider the sticky foam, for example. If sprayed on the target's mouth and/or nose, sticky foam may cause injury or even death. On such lethal effects that even "non-lethal" weapons can have, see BOOTHBY, *supra*, at 246–47, 249. During Operation United Shield in Somalia, the U.S. Marine Corps reportedly employed sticky foams for blocking and access delay, with some success. See Steven H. Scott, *Sticky Foam as a Less-Than-Lethal Technology*, 2934 SPIE Proc: SECURITY SYS. & NONLETHAL TECH. FOR L. ENFORCEMENT, Jan. 27, 1997, at 96, 96 ("In late 1994, Sandia was contacted by the Marine Corps to support material applications for non-lethal use in Operation United Shield . . ."); *id.* at 103 ("The Marine Corps was loaned a number of sticky foam guns, 1000 pounds of sticky foam, two fill stations, and approximately a dozen safety kits for training, use protocol development, and ultimate deployment in Somalia. The Marine Corps performed extensive scenario testing, use-of-force protocol development, and toxicology/safety reviews prior to deployment of any of the non-lethal technologies to Somalia including sticky foam. These evaluations allowed the Marine Corps to develop escalating force

bodied, non-surrendering German soldier who has noticed the presence of Chesterton's unit, and the purpose-instance is keeping the location of the trench used by Chesterton's unit concealed from the Germans. Reformulated as a conduct-kind and a purpose-kind, respectively, the former becomes non-lethally disabling an able-bodied, non-surrendering enemy soldier who has noticed the presence of one's unit and the latter keeping the location of the trench used by one's unit concealed from the enemy. The variable that has yet to be fixed is whether the conduct-kind is deemed constitutive of a material military necessity or non-necessity vis-à-vis the purpose-kind.

*a. Non-Evil and Necessary*

The German soldier is able-bodied and not offering to surrender, i.e., not placed *hors de combat* at the relevant moment. It would appear that non-lethally disabling him would constitute a material military necessity vis-à-vis keeping the location of the trench used by Chesterton's unit concealed from the Germans. The corresponding conduct-kind would likewise tend to constitute a material military necessity vis-à-vis the corresponding purpose-kind. A given conduct-kind that is deemed neither evil nor lacking in material military necessity vis-à-vis its legitimate purpose-kind would be straightforwardly legitimate. The resulting IHL rule would most likely reflect this by authorizing the conduct-kind in question.<sup>212</sup>

*b. Non-Evil and Unnecessary*

Now let us suppose, once again, that the German soldier drops his rifle, throws his hands up and unambiguously offers to surrender. In other words, he does in fact place himself *hors de combat* at the time. Then, arguably, even non-lethally disabling him would constitute a material military non-necessity vis-à-vis keeping the location of the trench used by Chesterton's unit concealed

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response options for non-lethals and supported the successful use of sticky foam in blocking and access delay applications in Somalia.”). The effectiveness may have been less than stellar, however. See JON RONSON, *THE MEN WHO STARE AT GOATS* 50 (Simon & Schuster 2009) (2004) (“The foam has had a rocky history. In Somalia in February 1995, United Nations peacekeeping forces were attempting to hand out food when the crowd began to riot. U.S. Marines were brought in to calm things down and aid in the UN’s withdrawal. ‘Use the Sticky Foam!’ ordered the commanding officer. And the Marines did. They sprayed the foam not into the crowd, but in front of it so it would harden and produce an instant wall between the rioters and the food. The Somali crowd paused, looked at the bubbling, expanding, hardening, custard like substance, waited for it to solidify, climbed over it, and carried on rioting.”).

<sup>212</sup> Such would be the case, for example, regarding the use of “non-lethal” weapons in a manner that is indeed non-lethal. It should be noted that it is debatable whether a party that possesses non-lethal weapons is duty-bound to use them. See, e.g., BOOTHBY, *supra* note 211, at 249.

from the Germans. Compared to this conduct-instance, and all else being equal, simply taking the German soldier prisoner would constitute more of a material military necessity in view of the ammunitions saved. In other words, non-lethally disabling the German soldier is arguably wasteful in view of the non-lethal weapons being expended. Here, the non-evil character of non-lethally disabling the German soldier remains the same in nature and degree; it is its material military necessity that now ceases to exist. The non-evil conduct-instance in question has moved from embodying material military necessity to lacking it vis-à-vis the legitimate purpose-instance. Correspondingly, the conduct-kind of non-lethally disabling an enemy combatant who has noticed the presence of one's unit and is placed *hors de combat* at the time would tend to constitute a material military non-necessity vis-à-vis the purpose-kind of keeping the location of the trench used by one's unit concealed from the enemy. Would this, and other similarly non-evil conduct-kinds deemed lacking in material military necessity vis-à-vis their otherwise legitimate purpose-kinds, become illegitimate by dint of their stipulated material military non-necessity *alone*?

This Author has argued elsewhere that military necessity has helped distinguish between acts in war deemed materially necessary and hence prima facie permissible on the one hand, and on the other, those deemed materially unnecessary and hence impermissible.<sup>213</sup> On this view, IHL norm-creation separates that conduct-kind which is legitimate by dint of it tending to constitute a material military necessity, from that which is illegitimate by dint of it tending to constitute a material military non-necessity. It would follow that matters of rational conduct transform themselves into those of normative imperative—namely, “that which *can* be done without *must* be done without.”<sup>214</sup> Thus construed, normative military necessity would be a notion that provides framers of IHL rules with a reason to restrict or prohibit the pursuit of material military non-necessities per se.

This Author no longer subscribes to this view. One component in a basic syllogism, i.e., the major premise, is missing in its chain of reasoning. Let the minor premise be “the conduct-kind  $X_I$ -ing tends to constitute a material military non-necessity” and let the conclusion be “the conduct-kind  $X_I$ -ing is illegitimate.” In order for these two propositions to form a complete syllogism, a major premise such as “any conduct-kind  $X_n$ -ing which tends to constitute a

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<sup>213</sup> See Hayashi, *supra* note 6, at 45.

<sup>214</sup> *Id.*

material military non-necessity is illegitimate” is needed. As noted earlier, a proposition such as this embodies one of the two corollaries of thoroughgoing utilitarianism, namely that disutilities are per se illegitimate.<sup>215</sup> Yet, no cogent reason has been articulated for which any proposition of this character does or should exist in IHL norm-creation.<sup>216</sup> On the contrary, there is good reason to consider that it is of no concern to IHL norm-creation when belligerents engage in conduct-kinds that tend to lack material military necessity. In other words, it is of no concern to IHL norm-creation to protect or prohibit belligerents from engaging in poor strategic, operational, or tactical behavior per se. Material wastefulness, excessiveness, impertinence, and the like are, strictly speaking, matters of incompetence *qua* member of a function-kind.

Consider falling for enemy deceptions, for example. From February 26<sup>217</sup> until September 8, 1944,<sup>218</sup> the Allied Powers conducted Operation Fortitude, a

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<sup>215</sup> See, e.g., Brandt, *supra* note 141, at 154 (“This restriction, incidentally, itself manifests utilitarian considerations, for a nation is limited to the use of means *necessary* to overcome an opponent. Clearly it is contrary to the general utility that any amount or manner of force be employed when it is *not* necessary for victory.”); see also MELZER, *supra* note 3, at 281–82; CANADIAN MANUAL, *supra* note 195, § 202, at 2-1; PILLOUD ET AL., *supra* note 2, at 396; COLEMAN PHILLIPSON, INTERNATIONAL LAW AND THE GREAT WAR 132 (William S. Hein & Co., Inc. 2005) (1915); ROGERS, *supra* note 3, at 6; SOLIS, *supra* note 3, at 258; TAYLOR, *supra* note 194, at 34; U.K. MINISTRY OF DEF., *supra* note 3, §§ 2.2.1.c–d, at 22; U.K. MINISTRY OF DEF., JOINT SERVICES PUBLICATION 383: THE MANUAL OF THE LAW OF ARMED CONFLICT AMENDMENT 3, § 22, at 5 (2010); COMMANDER’S HANDBOOK, *supra* note 195, § 5.3.1; Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 230–31 (1998); Draper, *supra* note 3, at 130; N.C.H. Dunbar, *Military Necessity in War Crimes Trials*, 29 BRIT. Y.B. INT’L L. 442, 444 (1952); Greenwood, *supra* note 2, at 36–37; Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, 299 INT’L REV. RED CROSS 98, 107 (1994).

<sup>216</sup> There are, at best, only vague and oblique references to it. See, e.g., Brandt, *supra* note 141, at 153–54 (“The position of a nation in a serious war is such, then, that it considers overpowering the enemy to be absolutely vital to its interests (and possibly to those of civilized society generally)—so vital, indeed, that it is willing to risk its very existence to that end. It is doubtful that both sides can be well justified in such an appraisal of the state of affairs. But we may assume that in fact they do make this appraisal. In this situation, we must simply take as a fact that neither side will consent to or follow rules of war which seriously impair the possibility of bringing the war to a victorious conclusion. This fact accounts for the restriction within which I suggested a choice of the rules of war must take place. We may notice that the recognized rules of war do observe this limitation: they are framed in such a way as not to place any serious obstacle in the way of a nation’s using any available force, if necessary, to destroy the ability of another to resist. As Oppenheim has observed, one of the assumptions underlying the recognized rules of war is that ‘a belligerent is justified in applying any amount and any kind of force which is necessary for . . . the overpowering of the opponent.’ This limitation, however, leaves a good deal of room for rules of war which will maximize expectable long-range utility for all parties. This restriction, incidentally, itself manifests utilitarian considerations, for a nation is limited to the use of means *necessary* to overcome an opponent. Clearly it is contrary to the general utility that any amount or manner of force be employed when it is *not* necessary for victory.”).

<sup>217</sup> See ROGER HESKETH, *FORTITUDE: THE D-DAY DECEPTION CAMPAIGN 27* (2000).

<sup>218</sup> See *id.* at 290, 297.

deception operation designed to augment the prospect of Operation Overload (the Allied invasion of northwest Europe) by denying Germany knowledge of the true location and moment of the D-Day landing. Fortitude had three major components. Fortitude North simulated a threat of Allied landing on Norwegian coasts.<sup>219</sup> Fortitude South maintained the pre-D-Day illusion of an Allied assault on the Pas de Calais region of northern France,<sup>220</sup> while Fortitude South II sought to induce Germany into believing that Normandy was a diversion ahead of a main invasion at Pas de Calais.<sup>221</sup> A combination of wireless deception,<sup>222</sup> inclusion of false information in communication with Allied POWs in German custody and to resistance organizations,<sup>223</sup> concealment of real forces and display of decoys,<sup>224</sup> restriction on troop leaves and postal services,<sup>225</sup> and, most importantly, double agents,<sup>226</sup> was used in the operation. Historical assessments of Fortitude's impact on Germany vary, but it appears commonly agreed that the deception did help the German High Command retain its major formations in the Pas de Calais area before and after the Allied forces landed on Normandy.<sup>227</sup>

Germany naturally sought to obtain the information on the invasion with a view to optimizing its defense preparations.<sup>228</sup> In this it largely failed due, inter alia, to its overestimation of Allied strength,<sup>229</sup> its own preoccupations about an ideal landing site,<sup>230</sup> its internal disagreement and indecision,<sup>231</sup> as well as its generally inadequate intelligence.<sup>232</sup> Of the latter, one account states:

According to John Masterman, who ran the Double-Cross Committee, the British captured and turned every agent whom the Germans sent to Great Britain. This could imply a certain degree of ineptitude on the part of the Germans either in the people whom they chose to be agents or in the level of training that they gave

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<sup>219</sup> See MARY KATHRYN BARBIER, D-DAY DECEPTION: OPERATION FORTITUDE AND THE NORMANDY INVASION 42, 45 (2007).

<sup>220</sup> See *id.* at 64–67.

<sup>221</sup> See *id.* at 127–31.

<sup>222</sup> See *id.* at 24–26.

<sup>223</sup> See *id.* at 26.

<sup>224</sup> See *id.* at 26–30.

<sup>225</sup> See *id.* at 30–32.

<sup>226</sup> See *id.* at 32–39. See generally HESKETH, *supra* note 217, at 46–57.

<sup>227</sup> See BARBIER, *supra* note 219, at 187–95.

<sup>228</sup> See generally *id.* at 148–81.

<sup>229</sup> See *id.* at 158–59.

<sup>230</sup> See *id.* at 149–50, 169–70.

<sup>231</sup> See *id.* at 161, 165–67, 171–75.

<sup>232</sup> See *id.* at 159–60, 167–68.

prospective agents. There is no denying that the British excelled at identifying possible enemy spies. The exploits of Garbo and Tricycle, as portrayed in their autobiographies and their case files, seem at times a bit far fetched; therefore, one has to wonder why the Germans failed to question their reliability and appeared to accept all of the information that these two and other spies provided. According to “Johnny” Jebson, a double agent known as Artist, Canaris “did not care if all the agents in Britain were fakes as long as he could go to Field Marshal Keitel, the head of the German high command, and report that he had twelve agents in Britain, each of them writing a letter every week.” In addition, it is possible, by the end of the war, that several Abwehr officers were no longer employing agents despite the fact that they were still providing information from them. Several officers pocketed the money meant for the agents and either fabricated the information or obtained it from the newspapers.<sup>233</sup>

For our present purposes, Germany’s purpose-instance might be described as discovering the true location and moment of the main Allied landing on northwest Europe in 1994 and one of its conduct-instances as choosing, training and monitoring Garbo and Tricycle as German agents operating in Great Britain. It is arguable that the latter constituted a material military non-necessity for the former on account of its wastefulness and impertinence. Moreover, it was a material military non-necessity of a nature that revealed Germany’s own improvable vocational incompetence not entailing evil per se.<sup>234</sup> The same would be true of the corresponding purpose-kind and conduct-kind, respectively. In view of the legitimacy of espionage itself as a purpose-kind,<sup>235</sup> the framers of IHL have apparently seen no reason to protect the party engaged in espionage from non-evil material military non-necessities such as failing to select, train, and handle its spies properly. Nor, for that matter, have they considered it their business to prohibit such non-evil material military non-necessities outright.

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<sup>233</sup> See *id.* at 159–60 (footnotes omitted).

<sup>234</sup> This Article will soon consider situations where vocational incompetence produces “own-side” evil.

<sup>235</sup> See, e.g., 1907 Hague Regulations, *supra* note 196, art. 24; DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 145, at 241; 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 157, at 419 (H. Lauterpact ed., 7th ed. 1952) (1906); AIR WARFARE MANUAL, *supra* note 175, § R, r. 119, at 42; U.K. MINISTRY OF DEF., *supra* note 3, §§ 5.15–5.15.1, at 63.

c. *Preamble of the 1868 St. Petersburg Declaration: Does Unnecessary Mean Illegitimate Even If Non-Evil?*

The St. Petersburg Declaration may be seen to encapsulate the idea that a conduct-kind becomes illegitimate on account of its stipulated lack of material military necessity alone.<sup>236</sup> But it does not. As noted earlier, the Declaration delegitimizes that particular conduct-kind which is deemed evil and lacking in material military necessity, i.e., the employment of explosive projectiles weighing less than four hundred grams.<sup>237</sup> The Declaration's drafters found to be "contrary to the laws of humanity" excessive *evil* brought about "by the employment of arms" that either uselessly aggravate the suffering of disabled men or render their death uselessly inevitable.<sup>238</sup> Plainly, the Declaration's reasoning does not address itself at all to situations where the conduct-kind is considered non-evil in the first place.

Consequently, the Declaration does not assert that the conduct-kind that is deemed materially unnecessary for its otherwise legitimate purpose-kind becomes illegitimate *for that reason alone*. Indeed, where the conduct-kind in question is considered non-evil, its stipulated material military non-necessity such as wastefulness, excessiveness, impertinence, and pointlessness, would not itself be a ground for its illegitimacy.

It would appear, then, that where a given conduct-kind deemed lacking in material military necessity becomes illegitimate for some reason, the reason is *not* its stipulated material military non-necessity. The reason would rather be the operation of some other element or elements in that conduct-kind's legitimacy modification. Thus, a conduct-kind considered lacking in material military necessity may become illegitimate on account of its stipulated evil (e.g., mistreating persons *hors de combat*),<sup>239</sup> its stipulated lack of chivalry, unfairness, or bad faith (e.g., improper use of enemy uniforms in certain situations of combat)<sup>240</sup> and the like.

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<sup>236</sup> See Hayashi, *supra* note 6, at 47.

<sup>237</sup> See *supra* notes 204–210 and accompanying text.

<sup>238</sup> St. Petersburg Declaration, *supra* note 1, at 95.

<sup>239</sup> See Additional Protocol I, *supra* note 72, art. 41(1); Hayashi, *supra* note 145, at 728.

<sup>240</sup> See 1907 Hague Regulations, *supra* note 196, art. 23(f); Additional Protocol I, *supra* note 72, art. 39(2); Hayashi, *supra* note 145, at 752 (footnote omitted) ("[D]uring combat, the law clearly and unqualifiedly prohibits the use of enemy uniforms. Performing this conduct-kind would generally be deemed both unfair and confusing for everyone—including, self-defeatingly, those fighting for the very party resorting to such a tactic. 'Prescriptive fairness' would demand and normative military necessity would robustly permit the forbearance of this conduct-kind. Consequently, a prospect of their firm joint satisfaction arises. The positive IHL rule on the matter makes the pursuit of this joint satisfaction unqualifiedly obligatory.").

*D. Special Cases: Conduct-Kinds Considered Evil in an Exclusively Self-Inflicted Way*

The discussion has thus far proceeded on the assumption that evil as understood in IHL norm-creation encompasses all evil regardless of who suffers it. It may be asked, however, whether this assumption is apt always and everywhere. Does IHL norm-creation really concern itself consistently with those conduct-kinds which are considered evil but in an exclusively self-inflicted way? If it does, does it juxtapose the conduct-kinds' exclusively self-inflicted evil vis-à-vis their stipulated material military necessity or non-necessity in the same way as those conduct-kinds deemed evil but not in an exclusively self-inflicted way?

There is no compelling reason for which those conduct-kinds involving exclusively self-inflicted evil should fall outside the scope of legitimacy modification in IHL norm-creation.<sup>241</sup> Nevertheless, instances where they are included seem to be distinctly limited.<sup>242</sup> More often than not, IHL norm-creation appears aloof vis-à-vis conduct-kinds of the type in question here. Thus, for example, the legitimacy or otherwise of the following conduct-kinds does not appear to be considered in IHL norm-creation: deliberately inflicting discipline and fighting spirit through fear<sup>243</sup>; incurring loss of life amongst one's own soldiers resulting from decisions of incompetent and/or inexperienced commanders,<sup>244</sup> actions of barrier troops,<sup>245</sup> artillery tactics,<sup>246</sup>

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<sup>241</sup> See, e.g., Benvenisti, *supra* note 2, at 82–83 (demonstrating that one vision of international humanitarian law “highlights the overriding and unconditional humanitarian obligation toward civilians regardless of their nationality”).

<sup>242</sup> See, e.g., *id.* at 87 (“The principle of universality suggests that the right to life of enemy civilians is entitled to the same protection granted to that of our own civilians, that all civilians be shown the same concern during combat, regardless of their national affiliation. This principle is *not* explicitly recognized in the law on the conduct of hostilities . . .”).

<sup>243</sup> An example is refusing to permit one's own civilians in a besieged city to evacuate with a view to driving locally raised units to “defend the city more desperately.” ANTONY BEEVOR, *STALINGRAD* 106 (1998). The same thought appears to have been in Goebbel's mind in defense of Berlin. See ANTONY BEEVOR, *BERLIN: THE DOWNFALL 1945*, at 178 (2002).

<sup>244</sup> Consider, for example, the massive loss of life at the Somme. See DIXON, *supra* note 42, at 388 (placing blame more on Haig than on Rawlinson); MARTIN MIDDLEBROOK, *THE FIRST DAY ON THE SOMME: 1 JULY 1916*, at 271–73 (1972) (placing blame more on General Sir Henry Rawlinson than General Sir Douglas Haig).

<sup>245</sup> In the summer of 1942, during the Axis advance towards Stalingrad, Stalin issued Order No. 227 which came to be known as “Not One Step Backwards.” According to Antony Beevor:

The order was to be read to all troops in the Red Army. ‘Panic-mongers and cowards must be destroyed on the spot. The retreat mentality must be decisively eliminated. Army commanders who have allowed the voluntary abandonment of positions must be removed and sent for

executing deserters,<sup>247</sup> and, at least hypothetically, soldiers being ordered passively to allow their own deaths” if the commander believes it is necessary for mission accomplishment;<sup>248</sup> inflicting or sustaining friendly fires;<sup>249</sup> and deploying faulty equipment resulting in the gratuitous loss or reduction of fighting capabilities.<sup>250</sup>

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immediate trial by military tribunal.’ Anyone who surrendered was ‘a traitor to the Motherland’. Each army had to organize ‘three to five well-armed detachments (up to 200 men each)’ to form a second line to shoot down any soldier who tried to run away. Zhukov implemented this order on the Western Front within ten days, using tanks manned by specially selected officers. They followed the first wave of an attack, ready ‘to combat cowardice’, by opening fire on any soldiers who wavered.

BEEVOR, STALINGRAD, *supra* note 243, at 85; *see also id.* at 167 (“Blocking groups . . . were placed behind [militia brigades] to prevent retreat.”). An arguably “milder” version of the same idea can be seen in the orders reportedly given to Allied airborne division sergeants dropping over Normandy, in Beevor’s words:

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

ANTONY BEEVOR, D-DAY: THE BATTLE FOR NORMANDY 28 (2009).

<sup>246</sup> *See* HOGG, *supra* note 73, at 21 (“By the time of the Somme, July 1916, more experience had been gained and more ammunition and guns amassed, and artillery support began to take on the shape with which it closed [World War I]. Moreover the infantry had become more used to the idea of close support and had realized the advantages of the curtain of fire. They began to speak of ‘leaning on the barrage’ by which they meant following close upon the bursting shells . . . The French, with their greater elan and still-unconquered spirit of attack at all costs, were known to observe that unless the infantry suffered ten percent of their casualties from their own artillery, they weren’t following the barrage close enough!”).

<sup>247</sup> It has been suggested that the court-martial, guilty verdict and execution of U.S. Army Private Eddie Slovik on account of desertion had to do with the need to discourage further desertions, already a problem, amid the difficult Hürtgen Forest campaign. *See, e.g.*, WILLIAM BRADFORD HUIE, THE EXECUTION OF PRIVATE SLOVIK 9–10 (1954) (“Major Frederick J. Bertolet . . . stated . . . ‘If the death penalty is ever to be imposed for desertion it should be imposed in this case, not as a punitive measure nor as retribution, but to maintain that discipline upon which alone an army can succeed against the enemy.’”); *id.* at 12 (“[W]ith the 28th Division bloodily engaged in Hürtgen Forest, a division court-martial gave Slovik the death sentence.”).

<sup>248</sup> Richard V. Meyer & Mark David Maxwell, *The Natural Right to Intervene: The Evolution of the Concepts of Justification and Excuse for Both State and Individual*, 7 J. INT’L CRIM. JUST. 555, 556 (2009) (citing RICHARD B. MYERS, JOINT CHIEFS OF STAFF, STANDING RULES OF ENGAGEMENT OF UNITED STATES FORCES § 3(a) (2005)); *see also id.* at 556 n.3 (“The previous Standing Rules of Engagement were promulgated in January 2000 (CJCSI 3121.01A).”).

<sup>249</sup> *See, e.g.*, R v. Sec’y of State for Def., [2010] UKSC 29 [103] (Lord Hope) (appeal taken from Eng.); PETER ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES 139 (2006) (“Allied armed forces may mistake friendly forces as being those of the enemy and attack them. These, so-called ‘friendly fire’ incidents have occurred to a greater or lesser extent in all modern armed conflicts.”).

<sup>250</sup> R v. Sec’y of State for Def., [2010] UKSC 29 [127] (Lord Rodger).

### 1. *Minding One's Own Business*

The underlying assumption for the exclusion of these norms from international humanitarian law seems to be as follows. In principle, the sort of evil with which international humanitarian law concerns itself is first and foremost that which a party to a conflict inflicts on its adversary or on a neutral party. Conversely, international humanitarian law does not really concern itself with evil that a party inflicts upon itself or sustains amongst those associated with it.<sup>251</sup> It might be said that there is something faintly Millian<sup>252</sup> about this assumption.<sup>253</sup> This may be explained by the fact that international humanitarian law has been developed primarily to regulate inter-belligerent and belligerent-neutral relations, rather than relations between co-belligerents, between a belligerent and persons and objects intrinsically affiliated with it, or between a belligerent and persons or objects similarly affiliated with its co-belligerent.<sup>254</sup> Thus, if, as shown above, it is not of concern to IHL norm-

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<sup>251</sup> It is arguable that international human rights law is making its inroads into the minimization of *intra*-party evil. See *infra* Parts I.D.2, IV.B.2.

<sup>252</sup> That is, John Stuart Mill. See J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 49 (R.B. McCallum ed., 1948) (1859) (“But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.”). Thereafter, Mill reiterates the idea that a person should be able to act on his own judgment and “stand the consequences” when those actions do not cause harm to others. *Id.* at 67; *accord id.* at 86 (“If either a public officer or any one else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. Nevertheless, when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk; in this case, therefore (unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty), he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.”).

<sup>253</sup> But see Luban, *supra* note 138, at 33 (“Notably, the impartial character of the obligation to avoid unintended harm to civilians is the conventional understanding of the principle of distinction, as well as the understanding embedded in the law of war.”). Interestingly, however, Luban offers no authorities for the view that the principle of distinction in attacks applies to the attacker’s own civilians; rather, he appears simply to assume it.

<sup>254</sup> In this connection, see Finland’s ultimately unsuccessful attempt to specify in the *chapeau* of Article 75 of Additional Protocol I concerning fundamental guarantees that such guarantees apply to “the Parties’ own nationals and nationals of . . . co-belligerent States having normal diplomatic representation with the Party in whose power they are.” 3 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 295 (1978); see also PILLOUD ET AL., *supra* note 2, at 838 (referring to a declaration of the Finnish government on the ratification of Additional Protocol I) (“[T]he Finnish Government declare their understanding that under Article 72, the field of application of Article 75 shall be interpreted to include also the nationals of the Contracting Party applying the provisions of that Article . . .”). The International Committee of the Red Cross (“ICRC”) notes ambiguities here. See PILLOUD ET AL., *supra* note 2, at 868 (“What conclusion can be drawn

creation whether the belligerent fights competently and increases its prospects of success or incompetently and imperils itself with dangers of failure, it is of little concern to IHL norm-creation whether the belligerent inflicts evil on itself, its co-belligerent, or those associated with them while seeking success or inviting failure.

A similar assumption is perhaps more clearly discernible in the manner in which war crimes are perceived.<sup>255</sup> The absence of positively shared allegiance between the perpetrator and the victim is formally required for grave breaches of the Geneva Conventions of 1949. The perpetrator's own nationals—whether defined technically, e.g., by Article 4 of Geneva Convention IV,<sup>256</sup> or more creatively as in *Tadić*<sup>257</sup>—are not protected under the “grave breaches” provisions. As regards other war crimes, such as serious violations of the laws and customs of war, the absence of shared allegiance appears to be taken for granted through the formulation of a requisite nexus.<sup>258</sup> The same may be said *mutatis mutandis* of war crimes even when committed in non-international armed conflicts.<sup>259</sup> This stands in contrast to crimes against humanity<sup>260</sup> and the so-called “auto-genocide” as a species of genocide.<sup>261</sup>

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from this? Some claim that the fact that the reference to own nationals was deleted reveals an intention to exclude nationals from the application of the provisions of Article 75. Others believe that precisely by virtue of the wording of Article 72 (*Field of application*) and Article 75 there was no need to mention nationals of the Parties to the conflict explicitly.”) Interestingly, the ICRC argues that, in wars of national liberation, the fact that the victim may technically be a national of the state in whose power he or she finds him- or herself should not deprive that victim of protection under Article 75 precisely because the former is not bound by a duty of allegiance vis-à-vis the latter. *See id.* at 867. Nevertheless, the ICRC concludes that the provisions of Part V, Section III, of Additional Protocol I (which includes Article 75) “apply to a Party to the conflict’s own nationals, except where the article itself indicates otherwise.” *Id.* at 838; *see also* RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 40, 42 (2002).

<sup>255</sup> *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 67 (3d ed. 2013); Ted van Baarda, *The Ethical Challenges of a Complex Security Environment*, in ETHICS, LAW AND MILITARY OPERATIONS, *supra* note 100, at 148, 154–55.

<sup>256</sup> *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>257</sup> *See* Prosecutor vs. Tadić, Case No. IT-94-1-A, Appeal Judgement, paras.164–69 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

<sup>258</sup> *See, e.g.*, Prosecutor vs. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, paras. 58–59 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

<sup>259</sup> *See, e.g.*, Prosecutor vs. Haradinaj, Case No. IT-04-84-T, Trial Judgement, para. 1 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (describing how Kosovar Albanians were charged with war crimes against Kosovar Albanian victims because of the latter’s “collaboration” with the Serbian authorities); Prosecutor vs. Limaj, Case No. IT-03-66-T, Trial Judgement, paras. 1, 36, 45 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005). *But see* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgement pursuant to Article 74 of the Statute, paras. 37–51 (Int’l Crim. Ct. Mar. 14, 2012) (noting that at no point was the possibility that the victims’ ethnic or other bases of allegiance might not diverge from that of their victimizers raised as an issue).

Many conduct-kinds that involve exclusively self-inflicted evil are characterized by what a belligerent party does or does not owe its constituent people, whom it asks to support its cause and make sacrifices therefor.<sup>262</sup> For example, it may very well be that a grossly negligent combat decision of a commanding officer imperiling the life of his subordinates may constitute a breach of the latter's human right to life.<sup>263</sup> On an incident involving the death

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<sup>260</sup> See, e.g., M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 72 (2d rev. ed. 1999) ("The essential difference between acts deemed war crimes and those deemed 'crimes against humanity' is that the former acts are committed in time of war against nationals of another state, while the latter acts are committed against nationals of the same state as that of the perpetrators."); GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 260 (3d ed. 2006) (1999) ("[O]ne significant distinction between a war crime and a crime against humanity would be that the latter could be committed by a government against its own nationals (e.g. the Nazis against German Jews), while war crimes could be perpetrated only upon enemies or foreigners."); Egon Schwelb, *Crimes Against Humanity*, 23 *BRIT. Y.B. INT'L L.* 178, 182 (1946) ("[C]rimes committed by Germans against Germans, however reprehensible, are in a different category from war crimes and cannot be dealt with under the same procedure.").

<sup>261</sup> See, e.g., Florian Jessberger, *The Definition and the Elements of the Crime of Genocide*, in *THE GENOCIDE CONVENTION—A COMMENTARY* 87, 110 (Paola Gaeta ed., 2009). William Schabas was initially skeptical of the notion, but he appears to have rescinded this skepticism. Compare WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 119–20, 148–49 (2000), with WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 138–40 (2d ed. 2009).

<sup>262</sup> See, e.g., WALZER, *supra* note 126, at 24.

<sup>263</sup> See, e.g., ROWE, *supra* note 249, at 137–39; *accord id.* at 138–39 ("Depending upon the degree of risk of loss of life and the nature of the compulsion (through the medium of military punishment for refusing to obey orders) it is possible to foresee a situation where a soldier may arbitrarily be deprived of his life. An extreme example may illustrate the point. A commander has taken very little care over a plan to attack an enemy military installation with large numbers of his own soldiers. He expects that very many of them will be killed in the attack. If, however, any reasonable commander had thought through the planned operation he would have concluded that the loss of life of his own soldiers would clearly be excessive compared with the concrete and direct military advantage to be gained from the attack. It might not be difficult to conclude here that some of his men have been deprived of their lives arbitrarily." (footnotes omitted)). In the view of this Author, however, Rowe's view is deeply problematic for two reasons. First, it is not unusual at all that a commander may find himself ordering his soldiers to launch a dangerous and risky assault, fully expecting many of them to lose their lives doing it. The extent to which the commander takes care over his plans may first of all be a matter of his personality (some commanders are more cautious than others). Besides, speaking of cautious/audacious style of commanding, would it make any difference if the commander himself expected to lose his life during the planned assault given its high risk and nevertheless led the assault? It is possible that he acted negligently as far as his subordinates' lives are concerned, but it is equally possible that he may be praised for his bravery and leadership rather than blamed for the deaths of his soldiers. Second, even if, arguendo, it can be said that a state is bound by its human rights obligations not to let its commanders launch attacks that are too risky given the weapons, personnel, conditions, and so on, how would it follow from *this* that the death of one's own soldiers in such attacks becomes a breach of their right to life if such losses "would clearly be excessive compared to the concrete and direct military advantage to be gained" from these attacks? This is clearly a formulation borrowed from in the proportionality test applicable to attacks, as Rowe himself admits. See *id.* at 138 n.102. But the relevant "loss" variable for determining their proportionality or otherwise is not the loss of life of one's own soldiers, but that of civilians. Why should the standard for determining the

of a soldier caused by heatstroke while serving in Iraq,<sup>264</sup> the Supreme Court of the United Kingdom held:

If armed forces on active service abroad are within a State's jurisdiction for purposes of article 1 [of the European Convention on Human Rights], the question arises of the scope of the substantive obligations imposed by article 2 [of the same convention]. Would the Strasbourg Court hold that they extend to the adequacy of the equipment with which the forces are provided; to the planning and execution of military manoeuvres? These questions are not easy to address, but an affirmative answer certainly cannot be excluded.<sup>265</sup>

The failure of a government adequately to budget its military procurement programs, train its troops, and ensure competent combat decisions by its commanders, may properly be a matter of domestic accountability<sup>266</sup> and perhaps even of accountability under international human rights law. Whether it is, or should properly be, of concern to international humanitarian law remains unclear.<sup>267</sup>

## 2. *Delegitimizing Self-Inflicted Evil in War*

There is nevertheless some indication that, in certain limited circumstances, IHL norm-creation does take it upon itself to reduce evil that is exclusively self-inflicted. Where some conduct-kinds involving such evil are also deemed lacking in material military necessity, their illegitimacy appears to be readily affirmed and contrary action readily demanded.<sup>268</sup>

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arbitrariness of the loss of a soldier's life in an attack in which he participated from the viewpoint of human rights depend on whether that loss was or was not excessive compared to the concrete and direct military advantage anticipated from that attack? *See, e.g.*, R v. Sec'y of State for Def., [2010] UKSC 29 [120–24] (Lord Rodger) (appeal taken from Eng.).

<sup>264</sup> *See, e.g.*, *Army Blamed for Iraq Heat Death*, BBC NEWS (Nov. 10, 2006), [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/south\\_of\\_scotland/6137990.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/south_of_scotland/6137990.stm).

<sup>265</sup> R v. Sec'y of State for Def., [2010] UKSC 29, [79] (Lord Phillips); *see also id.* [100–06] (Lord Hope), [118–19] (Lord Rodger). *But see id.* [214], [216–17] (Lord Mance).

<sup>266</sup> *See, e.g.*, *Family Sues MoD over Marine Death*, BBC NEWS (Oct. 12, 2009), [http://news.bbc.co.uk/2/hi/uk\\_news/england/humber/8302050.stm](http://news.bbc.co.uk/2/hi/uk_news/england/humber/8302050.stm); *MoD Budget 'Harm' Claims Denied*, BBC NEWS (Aug. 23, 2009), [http://news.bbc.co.uk/2/hi/uk\\_news/8217172.stm](http://news.bbc.co.uk/2/hi/uk_news/8217172.stm); *Soldiers' Families 'Losing Faith' in MoD*, BBC NEWS (Dec. 7, 2004), [http://news.bbc.co.uk/2/hi/programmes/file\\_on\\_4/4075539.stm](http://news.bbc.co.uk/2/hi/programmes/file_on_4/4075539.stm).

<sup>267</sup> *But see* Peter Rowe, *The Obligation of a State Under International Law To Protect Members of Its Own Armed Forces During Armed Conflict or Occupation*, 9 Y.B. INT'L HUMANITARIAN L. 3, 16–24 (2006).

<sup>268</sup> *See, e.g.*, the rules contained in Articles 73 through 77, as well as Article 79, of Additional Protocol I. Additional Protocol I, *supra* note 72, arts. 73–77, 79. According to the ICRC, these rules protect not only victims in the hands of their adversary but also those in the hands of their own state. PILLOUD ET AL., *supra* note 2, at 838. Article 3 common to the Geneva Conventions and Article 4 of Additional Protocol II also appear to apply to all eligible persons without distinction as to their allegiance. *See* IV OSCAR M. UHLER ET

The norm underlying Article 58<sup>269</sup> of Additional Protocol I appears to indicate that even those conduct-kinds considered evil in an exclusively self-inflicted way yet constitutive of material military necessities can sometimes be illegitimate.<sup>270</sup> The norm underlying Article 54(5) of Additional Protocol I begins by recognizing “vital requirements of any Party to the conflict in the defence of its national territory against invasion.”<sup>271</sup> In recognition of such requirements, it authorizes deviation from the prohibition against the destruction of objects indispensable to the survival of the civilian population—this prohibition being otherwise binding upon a party to the conflict within such territory under its own control—where deviation is “required by imperative military necessity.”<sup>272</sup> In other words, this norm renders legitimate the infliction of self-inflicted evil in the form of scorched earth from which one’s own population will suffer. It does so, however, *only* in the event of imperative military necessity.<sup>273</sup> This shows, first, that scorching one’s own territory is principally unlawful and, second, that it is exceptionally lawful only if imperatively demanded by military necessity.<sup>274</sup>

Similarly, the belligerent’s duty to separate cultural property from military objectives under its own control also transcends the exclusion of self-inflicted

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AL., COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 40 (Jean S. Pictet ed., 1958); PILLLOUD ET AL., *supra* note 2, at 1359, 1369–70.

<sup>269</sup> Additional Protocol I, *supra* note 72, art. 58; *see also* article 51(7) of Additional Protocol I, although this latter provision is not limited to the treatment of one’s own civilians and civilian objects. *See id.* art. 51(7).

<sup>270</sup> *See* PILLLOUD ET AL., *supra* note 2, at 692. The duty that Article 58 creates for a belligerent party is predicated, at least vis-à-vis its own population, on self-interest. *See id.* at 692, 694; U.K. MINISTRY OF DEF., *supra* note 3, § 5.36.2, at 89.

<sup>271</sup> Additional Protocol I, *supra* note 72, art. 54(5).

<sup>272</sup> *Id.*; *see also* Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INT’L REV. RED CROSS 94, 100 (1993).

<sup>273</sup> *See, e.g.*, PILLLOUD ET AL., *supra* note 2, at 659 (“in an extreme case”); *see also* Dinstein, *Military Necessity*, *supra* note 145, § 8. The British military manual mentions conduct-kinds such as “the flooding of low-lying areas to impede invading forces” as falling within the scope of Article 54(5). U.K. MINISTRY OF DEF., *supra* note 3, § 5.27.1, at 74.

<sup>274</sup> A number of states present in Geneva during the negotiations of this provision initially *took it for granted* that norms such as this apply only where the evil in question would be inflicted by one party to the conflict and suffered by another. *See* 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 280, 350 (1978). The adoption of Article 54(5) in its final formulation shows the drafters’ effective concession that authorizing scorching one’s own territory if imperatively demanded by military necessity was an unavoidable trade-off for otherwise unqualifiedly prohibiting the destruction of objects indispensable to the survival of the civilian population—that is, presumably, including one’s own civilian population. *See id.* at 462, 516.

evil.<sup>275</sup> The legitimacy or otherwise of such evil depends, inter alia, on whether “military necessity imperatively requires” its infliction.<sup>276</sup> Furthermore, each belligerent, when compelled to abandon its wounded and sick to an adversary, is duty-bound by international humanitarian law to reduce self-inflicted evil by leaving with them elements of its medical personnel and *materiél* to assist in their care—although, admittedly, only as far as “military considerations permit.”<sup>277</sup>

### III. “JURIDICAL” MILITARY NECESSITY: MILITARY NECESSITY IN THE CONTEXT OF VALIDLY POSITED IHL RULES

The foregoing demonstrates that a given conduct-kind’s stipulated lack of material military necessity does not render it illegitimate or give the framers of IHL rules reason to prohibit or restrict it. Nor, as will be shown below, is a given conduct-instance’s failure to satisfy juridical military necessity *the* basis for its unlawfulness under positive international humanitarian law.

In its strictly juridical context, military necessity exceptionally permits certain conduct-instances principally prohibited by validly posited IHL rules. As such, juridical military necessity is essentially an evaluative notion used to interpret and apply provisions of international humanitarian law to specific facts.<sup>278</sup>

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<sup>275</sup> See Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 4(1), May 14, 1954, S. TREATY DOC. NO. 106-1(A), 249 U.N.T.S. 240 [hereinafter Hague Cultural Property Convention].

<sup>276</sup> See *id.* art. 4(2). It appears that it is the avoidance of evil inflicted upon such property as a “universal” concern, rather than that seen from a strictly self-interested point of view, that is at stake. See, e.g., JIŘÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 68–69 (1996).

<sup>277</sup> Geneva Convention I, *supra* note 176, art. 12; see Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 1, July 27, 1929, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 409, 411; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 1, July 6, 1906, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 1, 385, 387. This rule, according to the ICRC, meets a “humanitarian requirement so obviously necessary.” See I FRÉDÉRIC SIORDET, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 141 (Jean S. Pictet ed., 1952).

<sup>278</sup> This Author has discussed juridical military necessity in some detail elsewhere. See generally Hayashi, *supra* note 6.

A. *Military Necessity as a Clause Exceptionally Modifying the Content of a Principal Rule*

Juridical military necessity appears exclusively in exceptional clauses attached to certain validly posited IHL provisions.<sup>279</sup> The former clauses authorize conduct-instances deviant from the latter provisions' principal prescriptions to the extent required for the attainment of military purpose-instances and otherwise in conformity with positive international humanitarian law.<sup>280</sup> Where deviation is not, or is no longer, so required, the conduct-instance ceases to be excepted and reverts to being governed by the principal prescriptions. In other words, a conduct-instance's lack of military necessity renders inoperative the exceptional military necessity clause attached to the principal rule by which the corresponding conduct-kind is regulated.

It is important to bear in mind here that the conduct-instance's lack of military necessity does not, by itself, render it unlawful. For example, the ground on which a given instance of militarily unnecessary destruction or seizure of enemy property becomes unlawful is *neither* its lack of military necessity *nor* the now inoperative exceptional military necessity clause attached to Article 23(g) of the Hague Regulations.<sup>281</sup> Rather, the ground is the principal content of that provision, whereby "it is especially forbidden [t]o destroy or seize the enemy's property"<sup>282</sup> of which the destruction in question becomes an unexcepted instance.<sup>283</sup>

B. *Specific Requirements of Juridical Military Necessity*

Juridical military necessity entails four requirements: (i) that the conduct-instance be adopted primarily for some specific military purpose-instance, (ii)

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<sup>279</sup> See *id.* at 55–56. A recapitulation of some of its highlights may nevertheless be of some use here.

<sup>280</sup> See *id.* at 59; see also Robin Geiß, *Military Necessity: A Fundamental 'Principle' Fallen into Oblivion*, in 2 SELECT PROC. EUR. SOC. INT'L L. 554, 558–65 (Hélène Ruiz Fabri et al. eds., 2010).

<sup>281</sup> 1907 Hague Regulations, *supra* note 196, art. 23(g).

<sup>282</sup> *Id.*

<sup>283</sup> Similarly, Article 53 of Geneva Convention IV principally prohibits the destruction by the Occupying Power of real or personal property in territories it occupies "except where such destruction is rendered absolutely necessary by military operations." Geneva Convention IV, *supra* note 176, art. 53. Before the Eritrea–Ethiopia Claims Commission, Ethiopia declined to contend that the destruction of Tserona Town constituted a military necessity or that the exceptional clause found in Article 53 of Geneva Convention IV applied to it. The Commission proceeded to find Ethiopia responsible for the destruction, an act principally prohibited by Article 53 of Geneva Convention IV. See *Ethiopia vs. Eritrea*, Eritrea–Ethiopia Claims Commission, Partial Award Central Front—Eritrea's Claims 2, 4, 6, 7, 8, & 22, § 63, § 71, at 138, 139 (Apr. 28, 2004).

that the conduct-instance be required for the attainment of that purpose-instance, (iii) that the purpose-instance be in conformity with positive international humanitarian law, and (iv) that the conduct-instance itself be otherwise in conformity with that law.<sup>284</sup>

### 1. *Adopting the Conduct-Instance Primarily for Some Specific Military Purpose-Instance*<sup>285</sup>

This requirement is two-fold. First, it must be shown that there was, in fact, a specific purpose-instance for which the conduct-instance was adopted. Second, it must be shown that this purpose-instance was primarily military in nature.

Juridical military necessity pleas are inadmissible where the conduct-instance is adopted for no purpose-instance.<sup>286</sup> If, for example, an area was devastated purposelessly, it would lack any meaningful point of reference against which the devastation's military necessity is to be assessed.<sup>287</sup> "[N]ecessary . . . for *what?*,"<sup>288</sup> one might ask in vain. The military purpose-instance sought need not be complete submission of the enemy. While it is true that this formulation was found in some, typically older, military manuals,<sup>289</sup> it is not the case in most of the later ones,<sup>290</sup> nor is it the case in jurisprudence<sup>291</sup> or commentaries.<sup>292</sup>

<sup>284</sup> See Hayashi, *supra* note 6, at 62; Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4 J. MIL. ETHICS 3, 11–12 (2005).

<sup>285</sup> See Hayashi, *supra* note 6, at 63–68.

<sup>286</sup> See discussion *supra* Part II.A.3 regarding purposelessness as a variety of material military non-necessity.

<sup>287</sup> See, e.g., United States v. List (*Hostages Trial*) (Military Tribunal V 1948), in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 757, 1253–54 (1950) [hereinafter 11 NUERNBERG MILITARY TRIBUNALS]. Albeit in the context of deportation/forcible transfer as a crime against humanity, one trial chamber of the International Criminal Tribunal for the Former Yugoslavia ruled that military necessity does not justify evacuation for the sake of evacuation. See Prosecutor vs. Krstić, Case No. IT-98-33-T, Trial Judgment, paras. 524–27 (Aug. 2, 2001).

<sup>288</sup> MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 525 (1961) (emphasis added).

<sup>289</sup> See, e.g., CANADIAN MANUAL, *supra* note 195, § 202.2, at 2-1 (allowing complete submission only as “the primary aim of armed conflict” (emphasis added)); WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW ch.1, para. 3, at 1 (1958); U.S. DEP’T OF THE ARMY, *supra* note 3, at 4.

<sup>290</sup> See, e.g., U.K. MINISTRY OF DEF., *supra* note 3, § 2.2, at 21 (“complete or partial submission of the enemy”); U.K. MINISTRY OF DEF., JOINT SERVICES PUBLICATION 383, *supra* note 215, § 22, at 5; COMMANDER’S HANDBOOK, *supra* note 195, at 5-2 (“partial or complete submission of the enemy”); see also DE MULINEN, *supra* note 3, § 352 (“overpowering of the enemy”).

Even if a specific purpose-instance is shown to have existed, it must additionally be shown that the purpose-instance was primarily military in nature. Here, the expression “military” may be understood as a quality characterizing or purportedly characterizing<sup>293</sup> sound strategic, operational, or tactical thinking in the planning, preparation, and execution of belligerent activities. It follows that military necessity pleas are inadmissible with respect to conduct-instances adopted for purpose-instances that are *not* primarily military in the sense just described. Such pleas are also inadmissible where the conduct-instance was adopted primarily for some non-military purpose-instance yet would incidentally produce militarily useful results.<sup>294</sup>

## 2. *Conduct-Instance Required for the Materialization of the Military Purpose-Instance*<sup>295</sup>

In order for juridical military necessity pleas to be admissible, the conduct-instance must be required for the attainment of the military purpose-instance.<sup>296</sup> Assessing the admissibility of such pleas therefore involves evaluating the relationship between the conduct-instance adopted, on the one hand, and the purpose-instance that it was meant to attain, on the other.

Within the meaning of juridical military necessity, a conduct-instance cannot be considered required for a particular military purpose-instance unless it satisfies all of the following criteria:

- (i) That the conduct-instance was materially relevant to the attainment of the military purpose-instance;
- (ii) That, of those materially relevant conduct-instances that were reasonably available, the one adopted was the least evil; and

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<sup>291</sup> See, e.g., *Hardman v. U.S. (U.K. v. U.S.)*, 6 R. INT’L ARB. AWARDS 25, 26 (Arb. Trib. 1913); *Hostages Trial*, in 11 NUERNBERG MILITARY TRIBUNALS, *supra* note 287, at 1296–97.

<sup>292</sup> See, e.g., ROGERS, *supra* note 3, at 5; SCHWARZENBERGER, *supra* note 145, at 131–32; SOLIS, *supra* note 3, at 260; Greenwood, *supra* note 2, at 36.

<sup>293</sup> “Purportedly characterizing” accounts for incompetence.

<sup>294</sup> See Hayashi, *supra* note 6, at 64–68.

<sup>295</sup> See *id.* at 68–87.

<sup>296</sup> Various expressions, such as “indispensable,” “need,” “requirement,” “necessary,” and so on, have been used to denote essentially the same notion of “required.” See, e.g., Instructions for the Government of Armies of the United States in the Field art. 14, Apr. 24, 1863 [hereinafter Lieber Code], *reprinted in THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 6 (“indispensable”); DE MULINEN, *supra* note 3, § 354 (“indispensable”); MCDUGAL & FELICIANO, *supra* note 288, at 524, 527 (1961) (“necessary”); William Gerald Downey, Jr., *The Law of War and Military Necessity*, 47 AM. J. INT’L L. 251, 254 (1953) (“need”); Robert W. Gehring, *Loss of Civilian Protection Under the Fourth Geneva Convention and Protocol I*, 90 MIL. L. REV. 49, 55 (1980) (“requirement”); O’Brien, *supra* note 153, at 138 (“indispensable”); Dinstein, *Military Necessity*, *supra* note 145, *passim* (“necessary”).

- (iii) That the evil that the conduct-instance would cause was not disproportionate to the gain that it would achieve.<sup>297</sup>

Understood thus, the conduct-instance “being required” does *not* mean “constituting a material military necessity.” The two notions may be similar to each other to the extent that material relevance is a common element in them. They are dissimilar, however, because material military necessity alone contains an element of superior conduciveness or efficiency, and judicial military necessity alone contains the criteria of least injuriousness (see (ii) above) and acceptable evil-gain ratio (see (iii) above). In other words, criteria (ii) and (iii) make the scope of juridical military necessity more restrictive than that of material military necessity. These two criteria arguably have humanity-driven origins. Material military necessity concerns itself with competent or incompetent fighting; juridical military necessity concerns itself with exceptionally authorizing deviation from the law which, as noted earlier, gives humanity a privileged position in its norm-creation.<sup>298</sup>

Where a given conduct-instance fails to satisfy the four cumulative criteria, it is arguably better described as a military “advantage” or “convenience,”<sup>299</sup> ineligible for exception than as a military “necessity.” A situation may also arise where even the least evil of those reasonably available and materially relevant conduct-instances causes, or is expected to cause, disproportionate injury. Where this is the case, juridical military necessity may leave the belligerent with no alternative but to modify the military purpose-instance or abandon its pursuit altogether.<sup>300</sup>

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<sup>297</sup> David Kretzmer observes that this three-pronged test is “accepted in some domestic systems as a general principle in international law” and “adopted by international bodies.” David Kretzmer, *The Supreme Court of Israel: Judicial Review During Armed Conflict*, 47 GERMAN Y.B. INT’L L. 392, 450 (2004).

<sup>298</sup> See discussion *supra* Part II.B.2.

<sup>299</sup> *But see, e.g.*, MELZER, *supra* note 3, at 291–92; ROGER O’KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 122–23 (2006) (discussing Eisenhower’s General Order No. 68, Dec. 29, 1943); SOLIS, *supra* note 3, at 264 (“Sometimes, military necessity is invoked when military convenience is closer to truth.”); Draper, *supra* note 3, at 134 (“One thing seems to be clear. Military ‘necessity’ is not synonymous with ‘military convenience.’” (quoting *von Manstein, supra* note 3, at 522)); *von Manstein, supra* note 3, at 522 (“Now first and obvious comment on the wording of [Article 23(g) of the 1907 Hague Regulations] is that the requirement is ‘necessity’ and not ‘advantage.’”).

<sup>300</sup> See Hayashi, *supra* note 6, at 80. Walzer makes a similar ethical argument regarding Hiroshima. See WALZER, *supra* note 134, at 263–68.

3. *Purpose-Instance, for Which the Conduct-Instance Was Adopted, in Conformity with Positive International Humanitarian Law*<sup>301</sup>

Juridical military necessity pleas are inadmissible where the purpose-instance for which the conduct-instance was adopted was itself contrary to positive international humanitarian law. This is so even if the belligerent chooses among the relevant and available conduct-instances the one that is the least evil and whose injurious effect is not disproportionate to the gain. This requirement, together with the next requirement discussed below, makes juridical military necessity an exception from an obligation rather than a justification or excuse for that obligation's breach.

4. *Adopted Conduct-Instance Itself Otherwise in Conformity with Positive International Humanitarian Law*<sup>302</sup>

Juridical military necessity does not exempt conduct-instances from the prescription of unqualified IHL rules. The prohibition against the killing of POWs and enemies who have surrendered at discretion is a case in point.<sup>303</sup> This is an unqualified prohibition. If the circumstances surrounding the captor are such that it becomes no longer feasible to keep his prisoner of war in custody—for example, encirclement by enemy formations and shortage of food rations—and if he kills the prisoner of war as a result, then he is not entitled to plead military necessity.<sup>304</sup>

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<sup>301</sup> See Hayashi, *supra* note 6, at 87–90.

<sup>302</sup> *Id.* at 91–93.

<sup>303</sup> See, e.g., Rome Statute of the International Criminal Court art. 8(2)(a)(i), 8(2)(b)(vi), done July 17, 1998, 2187 U.N.T.S. 90; Geneva Convention III, *supra* note 176, art. 130; Charter of the International Military Tribunal art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 280, 288; 1907 Hague Regulations, *supra* note 196, art. 23(c).

<sup>304</sup> The U.S. Military Commission in Augsburg, Germany, convicted Gunther Thiele and Georg Steinert of killing an American prisoner of war notwithstanding their military necessity pleas. U.S. Military Commission, *Trial of Gunther Thiele and Georg Steinert*, in U.N. WAR CRIMES COMM'N, 3 LAW REPORTS OF TRIALS OF WAR CRIMINALS 56, 58 (1948); see also *United States vs. Ludwig Klueftgen*, Case No. 12-1502 (U.S. Military Trib. 1947); HOWARD S. LEVIE, *TERRORISM IN WAR—THE LAW OF WAR CRIMES* 501 (1993). Similarly, in the *Hostages Trial*, Walter Kuntze was charged with the killing of unarmed civilians in occupied Greece and Yugoslavia. He asserted that, with ground troops in short supply, intimidating the population was militarily necessary in order to maintain order and security. This assertion was rejected. See *United States v. List (Hostages Trial)* (1948), in 11 NUERNBERG MILITARY TRIBUNALS, *supra* note 287, at 757, 1281.

### 5. *Miscellaneous Observations: Knowledge, Urgency, Scale, and Competence*<sup>305</sup>

Evaluating juridical military necessity also involves considering factors such as knowledge, urgency, scale, and competence. Pleas made under exceptional military necessity clauses based exclusively on hindsight are inadmissible. Such pleas must be assessed in the light of the purpose-instance that the belligerent had in mind when he adopted the conduct-instance. The mere fact that a conduct-instance taken initially for some non-military purpose-instance happens to fulfill a military purpose-instance afterwards does not, retrospectively, turn it into juridical military necessity.<sup>306</sup> Conversely, a given conduct-instance's reasonable availability to the belligerent, its material relevance to his stated military purpose-instance and the scope and nature of its evil should be assessed on the basis of his contemporaneous and bona fide knowledge thereof.<sup>307</sup>

It is possible that urgency<sup>308</sup> is an aspect of juridical military necessity. But if it is, then urgency or a lack thereof is already implied in the notion of the conduct-instance being "required" or "not required" for the attainment of its purpose-instance.<sup>309</sup> In order for a given conduct-instance to be considered "required" for a particular purpose-instance, it must be the least evil of the alternatives that are reasonably available and materially relevant at the time, and its evil must remain in proportion to the gain that it would achieve.<sup>310</sup>

The range of such alternatives, as well as the degree of thoroughness with which the belligerent would be expected to assess them, would in general increase or decrease with the amount of time he had before

<sup>305</sup> See Hayashi, *supra* note 6, at 94–101.

<sup>306</sup> See, e.g., H CJ 606/78 Ayyub v. Minister of Defense [1979] (Isr.), translated in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–80: THE LEGAL ASPECTS app. A, at 382 (Meir Shamgar ed., 1982); H CJ 390/79 Dweikat v. Gov't of Israel (*Elon Moreh*) [1979] IsrSC 34(1) (Isr.), translated in 19 I.L.M. 148, 173–74 (1980).

<sup>307</sup> Prosecutor vs. Galić, Case No. IT-98-29-T, Judgement and Opinion, para. 58 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); *Hostages Trial*, in 11 NUERNBERG MILITARY TRIBUNALS, *supra* note 287, at 1297; MELZER, *supra* note 3, at 296–97; Brian J. Bill, *The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare*, 12 Y.B. INT'L HUMANITARIAN L. 119, 125 (2009) (quoting *Hostages Trial*, in 11 NUERNBERG MILITARY TRIBUNALS, *supra* note 287, at 1295–97); von Manstein, *supra* note 3, at 522; Dinstein, *Military Necessity*, *supra* note 145, § 28.

<sup>308</sup> See, e.g., Geneva Convention II, *supra* note 176, art. 28 ("urgent military necessity"); Geneva Convention I, *supra* note 176, art. 33 ("urgent military necessity"); *id.*, art. 34 ("urgent necessity"); MCDUGAL & FELICIANO, *supra* note 288, at 72 ("prompt realization"); Downey, Jr., *supra* note 296, at 254–56 ("urgent need, admitting of no delay"); O'Brien, *supra* note 153, at 138–41 ("immediately indispensable").

<sup>309</sup> See *supra* Part III.B.2.

<sup>310</sup> See *supra* Part III.B.2.

[choosing to adopt one]. The less urgent [the conduct-instance was] in view of [the purpose-instance], the more carefully the belligerent would be expected to choose it and hence the more effectively he would be expected to minimise its injurious effect.<sup>311</sup>

There might be something counterintuitive about scaling different degrees of juridical military necessity—such as, for example, from “mere” military necessity to “unavoidable” military necessity and then to “imperative” military necessity. Some commentators suggest that there is a hierarchy of military necessity;<sup>312</sup> others, meanwhile, express their doubts.<sup>313</sup> It would be less odd, however, should one accept the three aforementioned criteria for the conduct-instance to be considered “required” for the purpose-instance. Where the expression “military necessity” is juridically modified by a restrictive adjective, it *could* mean, for example, that the interests protected are considered so important that the belligerent ought to:

- (i) Search more extensively for conduct-instances other than the one being contemplated that may be reasonably available and materially relevant to the purpose-instance;
- (ii) Evaluate more vigorously the relative evilness between all reasonably available and materially relevant conduct-instances identified before determining which one is the least injurious; and
- (iii) Set a more stringent standard of acceptable evil-gain ratio for the conduct-instance being considered before determining whether it is or it is not disproportionately injurious.<sup>314</sup>

It is not inconceivable that a given conduct-instance passes the “ordinary” juridical military necessity threshold and yet it fails to pass a “higher” juridical military necessity threshold.

Under certain circumstances, pleas made by a person pursuant to juridical military necessity may become invalid by virtue of his status alone. For example, only the commanders of forces in the field are authorized to make

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<sup>311</sup> Hayashi, *supra* note 6, at 98.

<sup>312</sup> See, e.g., PILLOUD ET AL., *supra* note 2, at 1472–73; SCHWARZENBERGER, *supra* note 145, at 134–35; Pertile, *supra* note 145, at 136, 151–52; Elmar Rauch, *Le Concept de Nécessité Militaire dans le Droit de la Guerre*, 19 Mil. L. & L. War Rev. 205, 216–18 (1980).

<sup>313</sup> See, e.g., DE MULINEN, *supra* note 3, § 355; DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 145, at 7–8; MELZER, *supra* note 3, at 295–96; O’KEEFE, *supra* note 299, at 123, 157–59; ROGERS, *supra* note 3, at 145, 152; H. McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, 30 Mil. L. & L. War Rev. 215, 224, 234 (1991); Gabriella Venturini, *Necessity in the Law of Armed Conflict and in International Criminal Law*, 41 NETH. Y.B. INT’L L. 45, 53 (2010); Dinstein, *Military Necessity*, *supra* note 145, § 13.

<sup>314</sup> Marco Pertile appears to make similar suggestions. See Pertile, *supra* note 145, at 151–52.

use of the buildings, material, and stores of fixed medical establishment in case of urgent military necessity.<sup>315</sup> Where fighting occurs on a warship, its sick-bays and their equipment may be used for other purposes only if considered militarily necessary by the commander into whose power they have fallen.<sup>316</sup> Similar provisions are found in the 1954 Hague Cultural Property Convention<sup>317</sup> and its 1999 Hague Cultural Property Protocol II.<sup>318</sup>

#### IV. INVOKING MILITARY NECESSITY DE NOVO

It is widely accepted that military necessity pleas de novo are inadmissible vis-à-vis validly posited IHL rules that are unqualified.<sup>319</sup> The standard argument is based on the inferred existence of an exclusionary intention on the part of the framers of international humanitarian law. As noted at the outset of this Article, it is often said that the law has already “accounted for” military necessity.<sup>320</sup> Explaining this “accounting for” typically takes the following form.<sup>321</sup> In some places, one sees express military necessity exceptions.<sup>322</sup> This clearly indicates the framers’ intention to permit pleas being made de novo under such exceptional clauses. It follows, *a contrario*, that the framers of unqualified rules intended to disallow deviations on account of military necessity; otherwise, they would have appended exceptional clauses expressly allowing such deviations to these rules. The exclusion of military necessity is therefore intended elsewhere.<sup>323</sup> In other words, no considerations of military necessity other than those reflected in exceptional clauses have survived the

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<sup>315</sup> See Geneva Convention I, *supra* note 176, art. 33.

<sup>316</sup> See Geneva Convention II, *supra* note 176, art. 28.

<sup>317</sup> See Hague Cultural Property Convention, *supra* note 275, art. 9.

<sup>318</sup> See Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 6(c), Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Hague Cultural Property Protocol II].

<sup>319</sup> See, e.g., MELZER, *supra* note 3, at 290; PILLOUD ET AL., *supra* note 2, at 393; von Manstein, *supra* note 3, at 512; Dinstein, *Military Necessity*, *supra* note 145, §§ 8–11.

<sup>320</sup> See *supra* note 3 and accompanying text.

<sup>321</sup> Elsewhere, however, this Author argues that the *argumendum a contrario* commonly used in this context is too crude, incomplete, and ultimately, un-illuminating. There is a more nuanced version that better explains what it means to say that international humanitarian law “accounts for” military necessity and why military necessity is inadmissible de novo. This better and more nuanced reason will also show that humanitarian considerations may in some circumstances be invoked de novo effectively as a justification and/or excuse for deviant behavior. See Hayashi, *supra* note 6, at 56–57.

<sup>322</sup> See Greenwood, *supra* note 2, at 38.

<sup>323</sup> See, e.g., Draper, *supra* note 3, at 138; Greenwood, *supra* note 2, at 38.

process of IHL norm-creation. Consequently, where the rule is unqualified, military necessity does not except, justify, or excuse contrary behavior.<sup>324</sup>

There are two ways in which the inadmissibility of military necessity *de novo* may be overlooked or misunderstood.<sup>325</sup> First, military necessity pleas may be attempted effectively as a justification and/or excuse; this is essentially what *Kriegsräson* purports to do. Second, military necessity is invoked frequently in recent years as an additional layer of normative restriction over and above the body of validly posited IHL rules. What this Author proposed to call counter-*Kriegsräson* at the beginning of this Article encapsulates the latter position. Common to both *Kriegsräson* and counter-*Kriegsräson* is the erroneous notion that certain elements of military necessity survive the process of IHL norm-creation and that these surviving elements are capable of determining the lawfulness or otherwise of specific conduct-instances once positive international humanitarian law has run its course.

#### A. *Kriegsräson and Its Variations*

*Kriegsräson* essentially holds that military necessity pleas *de novo* are or should be admissible even as a justification and/or excuse in support of conduct-instances deviant from the unqualified prescriptions of validly posited IHL rules. The material military necessity of any given conduct-instance *vis-à-vis* a legitimate purpose-instance overrides and renders inoperative any provisions of the law that prescribe contrary action. Although the law does indeed take military necessity into consideration,<sup>326</sup> it cannot be construed so that the belligerent is denied the option to adopt such conduct-instances as may be required for the successful prosecution of its war. 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, however, the former prevails over the latter.

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<sup>324</sup> See, e.g., Gerald J. Adler, *Targets in War: Legal Considerations*, 8 Hous. L. Rev. 1, 16 (1970); Greenwood, *supra* note 2 at 37–38.

<sup>325</sup> See, e.g., Schmitt, *supra* note 2, at 796 (“[Military necessity] has been proffered both to justify horrendous abuses during armed conflicts and to impose impractical and dangerous restrictions on those who fight.”).

<sup>326</sup> It is doubtful whether the advocates of *Kriegsräson* denied this.

### 1. *Material Military Necessity as Conclusive Lawfulness, All Things Considered*<sup>327</sup>

It is not difficult to see how tempting it must be for some—particularly those with thoroughly utilitarian inclinations to whom the adage “the end justifies the means” rings true—to regard juridical military necessity as a justification and/or excuse. After all, the idea that a conduct-instance is materially necessary for a legitimate purpose-instance tends to strengthen the idea that the former is, at least *prima facie*, legitimate as well. Embracing this idea is only one small step away from asserting that a given conduct-instance’s material military necessity “rights” or “repairs” its unlawfulness otherwise unqualifiedly established in light of the validly posited IHL rules applicable to it.

*Kriegsräson* found increasing following in Germany during the late-nineteenth century and remained influential among German military and international lawyers until the end of World War II.<sup>328</sup> Since its unambiguous rejection in post-World War II war crimes trials,<sup>329</sup> *Kriegsräson* has been thoroughly discredited.<sup>330</sup>

To many commentators, juridical military necessity has no place outside the confines of specific exceptional clauses.<sup>331</sup> Admitting military necessity

<sup>327</sup> See also Hayashi, *supra* note 6, at 52–55.

<sup>328</sup> For a systematic and comprehensive analysis of *Kriegsräson* and its contours, see Isabel V. Hull, “Military Necessity” and the Laws of War in Imperial Germany, in ORDER, CONFLICT, AND VIOLENCE 352, 359–74 (Stathis N. Kalyvas et al. eds., 2008). See also, e.g., GEOFFREY BEST, HUMANITY IN WARFARE 172–79 (1983); 1 JAMES WILFORD GARNER, INTERNATIONAL LAW AND THE WORLD WAR 278–82 (1920), 2 JAMES WILFORD GARNER, INTERNATIONAL LAW AND THE WORLD WAR 195–98 (1920); PHILLIPSON, *supra* note 215, at 133–38; SOLIS, *supra* note 3, at 265–68; Dunbar, *supra* note 2, at 203–04, 207–08; Mika Nishimura Hayashi, *The Martens Clause and Military Necessity*, in THE LEGITIMATE USE OF MILITARY FORCE: THE JUST WAR TRADITION AND THE CUSTOMARY LAW OF ARMED CONFLICT 135, 137–38 (Howard M. Hensel ed., 2008); O’Brien, *supra* note 153, at 119–37.

<sup>329</sup> See, e.g., United States vs. von Leeb (*High Command*) (Military Tribunal VA 1948), 11 NUERNBERG MILITARY TRIBUNALS, *supra* note 287, at I, 541; United States v. List (*Hostages Trial*) (Military Tribunal V 1948), 11 NUERNBERG MILITARY TRIBUNALS, *supra* note 287, at 757, 1255–56, 1272–73, 1296; United States vs. Krupp von Bohlen und Halbach (*Krupp*) (Military Tribunal III 1948), 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at III, 1340 (1950) [hereinafter 9 NUERNBERG MILITARY TRIBUNALS] (regarding “total war”); *von Manstein*, *supra* note 3, at 512–13.

<sup>330</sup> See, e.g., CANADIAN MANUAL, *supra* note 195, § 202, at 2-1; SCHWARZENBERGER, *supra* note 145, at 136; SOLIS, *supra* note 3, at 269; U.K. MINISTRY OF DEF., *supra* note 3, § 2.3, at 23; Greenwood, *supra* note 2, at 38.

<sup>331</sup> See, e.g., Rep. of the Int’l Law Comm’n, 35th Sess., May 5–July 25, 1980, at 45–46, U.N. Doc. A/35/10; GAOR, 35th Sess., Supp. No. 10 (1980) [hereinafter *ILC Report 1980*]; DE MULINEN, *supra* note 3, §§ 352, 353; DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 145, at 6; LESLIE C. GREEN, THE

pleas de novo for deviations from unqualified rules would risk making the law unduly volatile and subservient to the exigencies of war.<sup>332</sup> Military manuals,<sup>333</sup> judicial decisions,<sup>334</sup> and numerous commentators<sup>335</sup> are also in support of this view.

## 2. *Self-Preservation*

Some commentators who reject *Kriegsräson* still advocate a scope of juridical military necessity that would, under certain circumstances, go beyond express exceptional clauses.<sup>336</sup> For example, in Julius Stone's view, military

CONTEMPORARY LAW OF ARMED CONFLICT 147–48 (3d ed. 2008); INT'L HUMANITARIAN LAW RESEARCH INITIATIVE, THE SEPARATION BARRIER AND INTERNATIONAL HUMANITARIAN LAW: POLICY BRIEF 5–6 (2004); FRITS KALSHOVEN, BELLIGERENT REPRISALS 366 (1971); ROBERT KOLB, IUS IN BELLO: LE DROIT INTERNATIONAL DES CONFLITS ARMÉS 57 (2003); LEVIE, *supra* note 304, at 496–97; PILLIOUT ET AL., *supra* note 2, at 392–93, 399; ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 33–37 (1957); G. Abi-Saab & L. Condorelli, *Réponses à la Question 1, b*, 33 REV. BELGE DROIT INT'L 406, 407–08 (2000); A. Andries & J. Verhaegen, *Réponses à la Question 2*, 33 REV. BELGE DROIT INT'L 428, 435 (2000); Draper, *supra* note 3, at 138, 142; Dunbar, *supra* note 2, at 202; Meyrowitz, *supra* note 215, at 108.

<sup>332</sup> Recently, in the context of the so-called “war on terror,” controversial arguments have been advanced with a view to effectively excepting, justifying and/or excusing torture despite its unqualified prohibition under international law. *See, e.g.*, White House Counsel Judge Alberto Gonzales, DoD Gen. Counsel William Haynes, DoD Deputy Gen. Counsel Daniel Dell’Orto, & Army Deputy Chief of Staff for Intell. Gen. Keith Alexander, Press Briefing, (Jun. 22, 2004), *transcript available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040622-14.html>. *But see, e.g.*, Scott Horton, *Kriegsräson or Military Necessity? The Bush Administration’s Wilhelmine Attitude Towards the Conduct of War*, 30 FORDHAM INT’L L.J. 576 (2007).

<sup>333</sup> *See, e.g.*, CANADIAN MANUAL, *supra* note 195, § 202, at 2-1; U.K. MINISTRY OF DEFENCE, *supra* note 3, §§ 2.2.1(b), 2.3, 16.44, at 22, 23, 444; U.S. DEP’T OF THE ARMY, *supra* note 3, at 4; COMMANDER’S HANDBOOK, *supra* note 195, at 5-2.

<sup>334</sup> *See, e.g.*, *High Command*, 11 NUERNBERG MILITARY TRIBUNALS, *supra* note 287, at 541; *Hostages Trial*, 11 NUERNBERG MILITARY TRIBUNALS, *supra* note 287, at 1255–56, 1272, 1296; *Krupp*, 9 NUERNBERG MILITARY TRIBUNALS, *supra* note 329, at 1340; *In re Burghoff*, in ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 1949 DIGEST, *supra* note 3, at 551, 554–57; *In re Rauter*, in ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES YEAR 1949, *supra* note 3, at 526, 543; *von Manstein*, *supra* note 3, at 512–13.

<sup>335</sup> *See* PERCY BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS: A HISTORY AND COMMENTARY 5 (Paul R. Rothman & Co 1994) (1908); DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 145, at 6; JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 88 (1985); Elihu Root, *Opening Address*, 15 AM. SOC’Y INT’L L. PROC. 1, 3 (Krause Reprint Corp. 1968) (1921); Donald A. Wells, *The Limits of War and Military Necessity*, 19 J. SOC. PHIL. 3 (1988).

<sup>336</sup> *See, e.g.*, 2 GARNER, *supra* note 328, at 196–97 (“It must be admitted that within reasonable limits this much criticised theory [i.e. *Kriegsräson*] is legally defensible; that is to say, a belligerent is justified in disregarding a rule of war law whenever conformity to the rule would involve his destruction . . .”). *N.b.*, upon closer reading, however, it becomes apparent that Garner’s support for self-preservation is more reserved. *See id.* at 193–95, 197; *see also* Brandt, *supra* note 141, at 147 n.3 (“It is conceivable that ideal rules of war would include one rule to the effect that anything is allowable, if necessary to prevent absolute catastrophe. As Oppenheim remarks, it may be that if the basic values of society are threatened nations are

necessity does—or should, in any event—entitle a state at war to depart from its duties under international law on account of self-preservation.<sup>337</sup> Stone clearly embraced the criticism of what he called military necessity in “such an extended German sense.”<sup>338</sup> His doubts concern whether this criticism, while valid in relation to *Kriegsräson*, could be defensibly construed as excluding self-preservation.<sup>339</sup>

In its advisory opinion on the legality of the threat or use of nuclear weapons, the International Court of Justice observed that such threat or use would *generally* be contrary to international humanitarian law.<sup>340</sup> The opinion went on to state, however, that the court “cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence . . . when its survival is at stake.”<sup>341</sup> The court held, by seven votes to seven, with the President casting the deciding vote, that it “cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake . . . .”<sup>342</sup> It may be argued that the court’s ambivalence goes beyond *jus ad bellum*—the opinion speaks of “an extreme circumstance of self-defence”<sup>343</sup>—to encompass *jus in bello*.<sup>344</sup> Judges<sup>345</sup> and experts<sup>346</sup> have responded with concern. The opinion may be seen as

possibly released from all the restrictions in order to do what ‘they deem to be decisive for the ultimate vindication of the law of nations.’”) (citing 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 351 (H. Lauterpacht ed., 7th ed. 1955)).

<sup>337</sup> See JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES—AND WAR—LAW 352–53 (1954).

<sup>338</sup> *Id.* at 352.

<sup>339</sup> See *id.* at 352–53. But see Dunbar, *supra* note 215, at 443. Some commentators would even question whether self-preservation should be discussed alongside justificatory military necessity to begin with. See, e.g., SCHWARZENBERGER, *supra* note 145, at 136; WALZER, *supra* note 134, at 305; Cohen, *supra* note 186, at 76–78; Dinstein, *Military Necessity*, *supra* note 145, § 10-1.

<sup>340</sup> See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 262–63 (July 8).

<sup>341</sup> *Id.* at 263.

<sup>342</sup> *Id.* at 266; see also *id.* at 263.

<sup>343</sup> *Id.* at 301 (separate opinion of Ranjeva, J.).

<sup>344</sup> See, e.g., *id.* at 301–02 (separate opinion of Ranjeva, J.); DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 145, at 85; Christopher Greenwood, *Jus ad Bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 247, 249–50 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999); Nishimura Hayashi, *supra* note 328, at 143–44.

<sup>345</sup> See, e.g., Legality of the Threat of Use of Nuclear Weapons, 1996 I.C.J., at 590 (Higgins, J. dissenting); *id.* at 513–20 (Weeramantry, J. dissenting).

<sup>346</sup> See, e.g., Luigi Condorelli, *Le droit international humanitaire, ou l’exploration par la Cour d’une Terra à peu près incognita pour Elle*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND

embracing the view that situations constituting or analogous to self-preservation and involving the right of self-defense may justify the threat or use of nuclear weapons notwithstanding its general incompatibility with international humanitarian law.<sup>347</sup>

### 3. *Material Impossibility and Impracticality*

According to Hillaire McCoubrey, Jean Pictet espoused a version of juridical military necessity whereby non-compliance with a rule would be tolerated in the event of genuine material impossibility.<sup>348</sup> In truth, however, it is doubtful whether Pictet discussed “genuine material impossibility” really as a variant of juridical military necessity. All Pictet said is this:

[T]here is an implicit clause in any law to the effect that no one is obliged to do what is impossible. This remains implicit because if it were stated openly the risks of abusive and tendentious interpretations would be too great. . . . Thus, when we speak of what is “impossible” we must refer only to a genuine material impossibility.<sup>349</sup>

Pictet’s treatment of genuine material impossibility as an implicit clause stands in stark contrast to his thoroughgoing rejection of implicit military necessity clauses: “We should emphasize that there is *no express or implicit clause* in the law of war giving priority to military necessity—otherwise there would be no such thing as the law of war!”<sup>350</sup> McCoubrey himself suggested that, for the purposes of military necessity, “necessity connotes an immediate

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NUCLEAR WEAPONS, *supra* note 344, 229, 244–45; Judith Gardam, *Necessity and Proportionality in Jus ad Bellum and Jus in Bello*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, *supra* note 344, at 275, 292; Marcelo G. Kohen, *The Notion of ‘State Survival’ in International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, *supra* note 344, at 293, 310; *see also* DINSTEIN, CONDUCT OF HOSTILITIES (2010), *supra* note 145, at 85–86; SOLIS, *supra* note 3, at 269; Nishimura Hayashi, *supra* note 328, at 143–44.

<sup>347</sup> *See* Greenwood, *supra* note 2, at 36–37; Greenwood, *supra* note 344, at 264.

<sup>348</sup> *See* McCoubrey, *supra* note 313, at 220 (“The second position . . . of military necessity appears to be reflected [into a] much more limiting model advanced by Jean Pictet . . . . Here the doctrine of military necessity is reduced to an admission that in certain cases it may be ‘impossible’ to comply with legal norms in which case a ‘defence’ in respect of *prima facie* unlawful action will arise.” (footnotes omitted)); *see also* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 303–04 (2d ed. 1998).

<sup>349</sup> PICTET, *supra* note 335, at 88.

<sup>350</sup> *Id.* (emphasis added).

and overwhelming circumstance in military action, which renders [strict] compliance, upon rational [analysis], impractical rather than ‘impossible.’”<sup>351</sup>

### B. Counter-Kriegsräson

Counter-*Kriegsräson* treats juridical military necessity as an additional layer of normative restraint over conduct-instances that are otherwise in conformity with validly posited IHL rules.<sup>352</sup> On this view, a given conduct-instance’s material military non-necessity “wrongs” or “vitiates” its lawfulness otherwise conclusively established or left intact in light of those validly posited IHL rules applicable to it. The idea that a conduct-instance is lacking in material military necessity vis-à-vis its legitimate purpose-instance strengthens the perception that it is illegitimate or, at a minimum, weakens the perception that it is legitimate.<sup>353</sup>

As noted earlier, the standard argument is that the inadmissibility of military necessity de novo, vis-à-vis unqualified provisions of positive international humanitarian law, issues from the fact that their drafters have already accounted for military necessity.<sup>354</sup> Recall further that it is for this reason that *Kriegsräson* is unacceptable. This line of reasoning is readily espoused by the vast majority of authorities.<sup>355</sup> Yet, inexplicably, many of them go on to state or imply that, over and above validly posited IHL rules, military necessity imposes a further restraint on belligerent conduct and outlaws material military non-necessities that would otherwise remain lawful.<sup>356</sup> Counter-*Kriegsräson* asserts, in effect, that military non-necessity per se connotes illegitimacy and that this delegitimizing attribute of military necessity has survived the process of IHL norm-creation.

Some military manuals appear to suggest such a view.<sup>357</sup> This position also finds support among a number of commentators.<sup>358</sup> Of the latter, Nils Melzer is

<sup>351</sup> McCoubrey, *supra* note 313, at 237. McCoubrey went on to qualify his position: “Impractical is a term here carefully chosen, it is by no means intended to imply the concession to tactical and strategic convenience which is implicit in the maxim *kriegsrason geht vor kriegsmanier*.” *Id.*

<sup>352</sup> See Hayashi, *supra* note 6, at 47.

<sup>353</sup> As noted earlier, this Author used to lean towards a similar position. See Hayashi, *supra* note 6, at 44–45.

<sup>354</sup> See DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 145, at 6.

<sup>355</sup> See *supra* notes 333–335.

<sup>356</sup> See, e.g., PICTET, *supra* note 335, at 88.

<sup>357</sup> See COMMANDER’S HANDBOOK, *supra* note 195, at 5-2 (“[The goal of military necessity] is to limit suffering and destruction to that which is necessary to achieve a valid military objective. Thus it prohibits the use of any kind or degree of force not required for the partial or complete submission of the enemy with a

perhaps the most vocal and articulate.<sup>359</sup> His views on the matter appear to have evolved primarily in connection with the question as to whether international humanitarian law imposes an affirmative duty upon belligerents to “capture rather than kill” enemy combatants,<sup>360</sup> a long-running debate that has regained currency in recent years.<sup>361</sup>

### 1. *Material Military Non-Necessity as Conclusive Unlawfulness, All Things Considered*

According to Melzer, “[T]he principle of military necessity reduces the sum total of lawful military action from that which positive IHL does not prohibit *in abstracto* to that which is actually required *in concreto*.”<sup>362</sup> He continues:

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minimum expenditure of time, life, and physical resources.”); *see also* U.K. MINISTRY OF DEF., *supra* note 3, § 2.2.1(d), at 22 (“[T]he use of force which is not necessary is unlawful.”). This latter formulation is curious and, in honesty, quite mysterious, inasmuch as the manual continues to state that unnecessary use of force is unlawful “since it involves wanton killing or destruction.” It is far from clear whether unnecessary use of force always involves wanton killing or destruction. According to Nils Melzer, Colombia’s Manual of Operational Law says that military necessity is restrictive. *See* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 831, 910 (2010).

<sup>358</sup> *See, e.g.*, SCHWARZENBERGER, *supra* note 145, at 135; TAYLOR, *supra* note 194, at 34; Federic L. Borch, *Targeting After Kosovo: Has the Law Changed for Strike Planners?*, NAVAL WAR COLLEGE REV., Spring 2003, at 64, 66; Greenwood, *supra* note 2, at 36–37, 38; Meyrowitz, *supra* note 215, at 107; Shue, *supra* note 148, at 136–37; Venturini, *supra* note 313, at 48–50.

<sup>359</sup> Nils Melzer, *Targeted Killing or Less Harmful Means?—Israel’s High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity*, 9 Y.B. INT’L HUMANITARIAN L. 87, 108–13 (2006).

<sup>360</sup> The idea was famously articulated by Jean Pictet. *See* PICTET, *supra* note 335, at 75–76 (“If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.”); *see also* INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 82 n. 221 (2009) [hereinafter INTERPRETIVE GUIDANCE]; MELZER, *supra* note 3, at 289; Melzer, *supra* note 359, at 108–13. On the rejection of Pictet’s assertion, *see, for example*, FRITS KALSHOVEN, *The Soldier and His Golf Clubs*, in REFLECTIONS ON THE LAW OF WAR: COLLECTED ESSAYS 359, 368–75 (2007); Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 785–87, 799 (2010); Schmitt, *supra* note 2, at 835.

<sup>361</sup> *See, e.g.*, Marco Sassòli, *The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?*, 39 ISR. Y.B. ON HUM. RTS. 177, 189–90 (2009).

<sup>362</sup> MELZER, *supra* note 3, at 286. In the *Interpretive Guidance*, a subtle (yet significant) modification has been made to the text. *See* INTERPRETIVE GUIDANCE, *supra* note 360, at 79 (“*In conjunction*, the principles of military necessity *and of humanity* reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.” (emphasis added) (footnote omitted)). Further, *see* Nils Melzer, *Targeted Killings in Operational Law Perspective*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF

This means that, for example, a direct attack against an otherwise legitimate military target constitutes a violation of IHL if that attack is not required for the submission of the enemy with a minimum expenditure of time, life and physical resources . . . . [T]he various provisions of IHL which permit a particular conduct in armed conflict constitute the result of “equations” which already include the “necessity-factor.” Since it is precisely this necessity-factor which makes that conduct lawful despite its deviation from the more restrictive rules applicable in peace time, the loss or absence of this factor necessarily changes the equation to the effect that the said conduct becomes unlawful . . . . The restrictive aspect of military necessity has significant practical consequences because it requires at least a basic assessment of military necessity in each case, and not only where positive IHL expressly so demands. While positive prohibitions may restrict the extent to which military necessity can justify military action, the absence of a prohibition does not liberate parties to the conflict from the fundamental constraints imposed by the principle of military necessity.<sup>363</sup>

Melzer refers to “particular conduct” simpliciter rather than particular conduct that is *evil*. It would therefore appear that he asks himself whether “materially unnecessary per se means unlawful” and *not*—to be abundantly clear—whether “materially unnecessary *evil* means unlawful.” Material military necessity separates that belligerent conduct-instance which is conducive to the accomplishment of its objective from that which is not.<sup>364</sup> It is also true that the material military necessity or non-necessity of a given conduct-instance involves its “basic assessment . . . in each case.”<sup>365</sup> As demonstrated above, however, evaluating the military necessity or non-necessity of a conduct-instance matters only in the notion’s material context (i.e. strictly as a strategic self-interest)<sup>366</sup> and juridical context (i.e. strictly as an express exceptional clause),<sup>367</sup> *not* in its normative context. Besides, the

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MILITARY OPERATIONS 277, 300 (Terry D. Gill & Dieter Fleck eds., 2010) (“In conjunction, the principles of military necessity and of humanity *could be said* to reduce the sum total of permissible military action . . . .” (emphasis added) (footnote omitted)); see also Nils Melzer, *The ICRC’s Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, in *THE RIGHT TO LIFE* 151, 162 (Christian Tomuschat et al. eds., 2010). Despite these modifications, however, two principal characteristics of interest to our present discussion remain. First, adding humanity does not per se alter the idea that military necessity still reduces that sum total, at least as far as Melzer is concerned. Second, adding “could be said” preserves the argument that military necessity reduces the sum total of lawful military action.

<sup>363</sup> MELZER, *supra* note 3, at 287 (footnotes omitted).

<sup>364</sup> See *supra* Part I.

<sup>365</sup> MELZER, *supra* note 3, at 287.

<sup>366</sup> See *supra* Part I.

<sup>367</sup> See *supra* Part III.

latter context does not support the idea that lacking in material military necessity means illegitimate apt for prohibition or restriction under positive international humanitarian law.<sup>368</sup> Thus, the mystery still remains: How, in Melzer's view, does the proposition "X-ing is *materially unnecessary* in view of its basic military necessity assessment" transform itself into the proposition "X-ing is *unlawful* in view of its basic military necessity assessment"?

It appears that Melzer's arguments are two-fold. First, in his view, validly posited IHL rules are merely necessity-driven derogations in armed conflict from their more restrictive peacetime counterparts. Second, Melzer effectively asserts that certain elements of military necessity survive the process of IHL norm-creation.

*a. Validly Posited IHL Rules as Necessity-Based Derogations from Peacetime Rules*

Melzer mentions the "more restrictive rules applicable in peace time" from which "this necessity-factor . . . makes . . . conduct lawful despite its deviation."<sup>369</sup> In essence, Melzer appears to treat every belligerent conduct-instance as a deviation from its corresponding conduct-kind in peacetime and every validly posited IHL rule as a necessity-driven derogation clause from its "more restrictive" counterpart applicable in peacetime. From these rules, only those deviant conduct-instances that constitute material military necessities would, on an individual basis, be eligible for derogation.<sup>370</sup> This, it is submitted here, is a highly idiosyncratic construal of international humanitarian law. One would rather think that, once an armed conflict exists, international humanitarian law provides a stand-alone—albeit admittedly nonexclusive—normative framework by which the compliance or otherwise of a given belligerent conduct-instance with its own rules can be intelligibly assessed.

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<sup>368</sup> See *supra* Part II.

<sup>369</sup> MELZER, *supra* note 3, at 287.

<sup>370</sup> In this connection, Melzer says something interesting. *Id.* at 289 ("In the final analysis, as much as the positive rules of IHL may *presume* the existence of military necessity, they also *presuppose* such necessity as an inherent condition for the lawfulness of military operations. Therefore, where the targeting of an individual is concerned, the restrictive aspect of military necessity as *informed* (and not: *balanced*) by humanitarian considerations requires that, whenever possible, even combatants be captured rather than killed." (footnotes omitted)); *id.* at 290 ("For the most part, this balance [between the permissive function of military necessity and other interests such as humanitarian, cultural, religious, political, environmental or economic values] has already been made, and is expressed in positive rules. As long as the military necessity presumed by those provisions is not manifestly absent in the concrete circumstances, hostilities can be conducted according to these rules without carrying out a renewed balance of interests.").

Even if, *arguendo*, any conduct-instance lacking in material military necessity did expose itself to those “more restrictive” peacetime rules and, even if, *arguendo*, the latter rules did render such a conduct-instance unlawful, it is the said peacetime rules, *not* the absence of material military necessity, that would render the conduct-instance unlawful. Even according to Melzer’s own terminology, the *loss* or *absence* of the “necessity-factor” is not what “wrongs” or “vitiates” the conduct-instance’s lawfulness otherwise left intact by validly posited IHL rules. He argues instead that, with this necessity-factor now removed, the conduct-instance would be assessed by reference to the more restrictive peacetime rules, and that these rules would render the conduct-instance unlawful.<sup>371</sup>

Notwithstanding the foregoing, Melzer appears to suggest that international humanitarian law would still be the body of law by reference to which the militarily unnecessary conduct-instance is to be regarded as unlawful. In Melzer’s own words: “[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.”<sup>372</sup> The position implied here is therefore *not* that of another, epistemologically distinct body of law functioning as *lex specialis* relative to international humanitarian law on a given conduct-instance. It is rather that a conduct-instance otherwise lawful according to positive international humanitarian law nevertheless becomes unlawful *according to the same body of law*, all things considered, if that conduct-instance is lacking in material military necessity and thus becomes “deviant from the more restrictive rules applicable in peace time.”<sup>373</sup>

Melzer’s position that “materially unnecessary” means “unlawful” under IHL does not appear to match the reason he gives for his position—i.e., that IHL’s rules are necessity-based derogations from the more restrictive peacetime rules.

*b. Purported Survival of Elements of Military Necessity Through the Process of IHL Norm-Creation*

Melzer also observes:

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<sup>371</sup> *Id.* at 287.

<sup>372</sup> *Id.* (emphasis added).

<sup>373</sup> *Id.*

[C]ontrary to what powerful States and many authors appear to believe, the fact that IHL does not prohibit direct attacks against combatants does not give rise to a legal entitlement to kill combatants at any time and any place so long as they are not *hors de combat* within the meaning of Article 41(2) AP I [Additional Protocol I of 1977]. Strictly speaking, although the absence of such a prohibition is undisputedly intentional, it constitutes no more than a strong presumption that, in a situation of armed conflict, it will generally be militarily necessary to kill, injure, or capture combatants of the opposing armed forces in order to bring about the submission of the adversary with a minimum expenditure of time, life and physical resources. It does not permit the senseless slaughter of combatants where there manifestly is no military necessity to do so, for example where a group of defenseless soldiers has not had the occasion to surrender, but could clearly be captured *without additional risk to the operating forces*.<sup>374</sup>

Note Melzer's reference to "no more than a strong assumption that . . . it will generally be militarily necessary" to kill, injure, or capture eligible enemy combatants with a maximum resource efficiency.<sup>375</sup> On this assumption, the mere fact that the law takes military necessity into consideration does not leave the belligerent at liberty to do that which is in fact militarily unnecessary. Where rules are formulated without an express military necessity exception, it merely means that whatever these rules authorize is considered *generally* militarily necessary. Where there *is* a collision between a conduct-instance constituting a material military non-necessity and a conduct-instance being lawful according to validly posited IHL rules, the former prevails over the latter—effectively by "wronging" or "vitiating" it.<sup>376</sup> Where material military necessity does not exist or ceases to exist with respect to a particular conduct-instance, the law, all things considered, does not authorize it.<sup>377</sup> In other words, the idea that a given conduct-instance's lack of material military necessity should be a reason for its restriction or prohibition has survived the process of IHL norm-creation (the framers of IHL rules themselves having declined to act on such an idea). It may be recalled here that this line of reasoning is identical in structure if not in direction to that used in *Kriegsräson*.<sup>378</sup> If one were to reject *Kriegsräson* because it impermissibly involves the purported survival of

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<sup>374</sup> *Id.* at 288 (footnotes omitted).

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 289–90.

<sup>377</sup> *Id.* at 297.

<sup>378</sup> See *infra* Part IV.A.

military necessity considerations through the process of IHL norm-creation, one should reject counter-*Kriegsräson* precisely for the same reason.

One might take Melzer as arguing more specifically that belligerents are bound by a standing duty—this being a duty of international humanitarian law—to *reduce* the amount of *evil* being inflicted even on eligible enemy combatants. Thus, whenever a choice is possible between incapacitating them via two alternative means, one involving less evil than the other, the belligerent is duty-bound to choose the less evil alternative. There are two difficulties with this argument. First, arguably, this line of reasoning is no longer based on military necessity *per se*; it would rather derive itself from humanity.<sup>379</sup> Second, what is being advocated here is essentially the application of the “double effect” rule to all aspects of military operations, including active hostilities between opposing combatants who have not been placed *hors de combat*. Problematically, double effect as articulated by Henry Sidgwick,<sup>380</sup> or revised as double intention by Walzer,<sup>381</sup> operates only in respect of minimizing collateral damage.<sup>382</sup> Nowhere does Sidgwick suggest that double effect entails a duty to capture rather than kill when the former is possible; rather, his subsequent discussions focus on non-combatants and combatants placed *hors de combat*.<sup>383</sup> Similarly, Walzer’s concern is not with the amount of evil inflicted on enemy combatants. He is exclusively concerned, at least as far as the text shows, with the need to spare civilians.<sup>384</sup> Indeed, in the words of Françoise J. Hampson: “The question of ‘double effect’ is addressed in the case of attacks against military objectives where there is a risk of considerable

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<sup>379</sup> See INTERPRETIVE GUIDANCE, *supra* note 360, at 82 (“In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, *it would defy basic notions of humanity* to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.” (emphasis added)); Melzer, *The ICRC’s Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, *supra* note 362, at 162; see also Hayashi, *supra* note 145, at 766–78, for the tentative possibility that humanitarian exhortations and demands may arguably survive the process of IHL norm-creation and render contrary conduct—instances unlawful, all things considered, notwithstanding the latter’s lawfulness otherwise left intact by those validly posited IHL rules applicable to them.

<sup>380</sup> See, e.g., SIDGWICK, *supra* note 170, at 254 (“It is clear that the aim of a moral combatant must be to disable his opponent, and force him to submission, but not to do him (1) any mischief which does not tend materially to this end, nor (2) any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief.”); Neuman, *supra* note 170, at 104–05.

<sup>381</sup> WALZER, *supra* note 134, at 155–56.

<sup>382</sup> The doctrine’s narrow focus has also attracted criticisms. See, e.g., Elizabeth Anscombe, *War and Murder*, in WAR, MORALITY, AND THE MILITARY PROFESSION 285, 294–96 (Malham M. Wakin ed., 1979); van Baarda, *supra* note 157, at 32–35.

<sup>383</sup> See SIDGWICK, *supra* note 170, at 254–57.

<sup>384</sup> See WALZER, *supra* note 134, at 155–56.

civilian casualties, by means of the principle of proportionality. The principle does not appear to be applicable, at least in the current state of the law, to military operations in an exclusively military environment.”<sup>385</sup>

On February 27, 1991, toward the conclusion of hostilities in the Gulf War, a large number of retreating Iraqi forces along Highway 8 came under attack by the Coalition forces.<sup>386</sup> According to one account:

The run down the highway showed more clearly than any other episode the weaknesses of Iraqi field forces and the onesidedness of the conflict. Through the afternoon and night of 27 February the tankers, Bradley gunners, and helicopter crews and artillerymen of the 1st and 4th Battalions, 64th Armor, fired at hundreds of vehicles trying to re-deploy to meet the new American attack from the west, or simply to escape north across the Euphrates River valley and west on Highway 8. With no intelligence capability left to judge the size or location of the oncoming American armored wedges and attack helicopter swarms, as well as insufficient communications to coordinate a new defense, Iraqi units stumbled into disaster. Unsuspecting drivers of every type of vehicle, from tanks to artillery prime movers and even commandeered civilian autos, raced randomly across the desert or west on Highway 8 only to run into General McCaffrey’s firestorm. Some drivers, seeing vehicles explode and burn, veered off the road in vain attempt to escape. Others stopped, dismounted, and walked toward the Americans with raised hands. When the division staff detected elements of the *Hammurabi Division* of the *Republican Guard* moving across the 24th’s front, McCaffrey concentrated the fire of nine artillery battalions and an Apache battalion on the once elite enemy force. At dawn the next day, the twenty-eighth, hundreds of vehicles lay crumpled and smoking on Highway 8 and at scattered points across the desert.<sup>387</sup>

Let us say that McCaffrey’s conduct-instance was “applying overwhelming military force by the Coalition” and his purpose-instance “disabling able-bodied, non-surrendering Iraqi combatants.” It would appear that the former was lawful in view of the latter.<sup>388</sup> Even if, *arguendo*, the deaths and injuries

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<sup>385</sup> See Françoise J. Hampson, *Means and Methods of Warfare in the Conflict in the Gulf*, in *THE GULF WAR 1990–91* IN INTERNATIONAL AND ENGLISH LAW 89, 106 (Peter Rowe ed., 1993).

<sup>386</sup> This incident is not to be confused with a similar incident involving a much larger number of Iraqis which took place on February 26, 1991 on Highway 80 (also known as the “Highway of Death”).

<sup>387</sup> *THE WHIRLWIND WAR 194–95* (Frank N. Schubert & Theresa L. Kraus eds., 1995).

<sup>388</sup> Note here that they were simply retreating, not offering to surrender. See, e.g., *CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW* 165 (Roy Gutman et al. eds., rev. ed. 2007); *ROGERS, supra* note 3, at 31 (“There can be no question that the column was a legitimate target. It comprised enemy soldiers who had not

suffered by the retreating Iraqi combatants rendered the conduct—instance a material military *non-necessity*—say, by dint of its material excessiveness vis-à-vis the purpose—instance—would it follow that it was *therefore* unlawful despite the standing attack liability to which combatants are exposed unless placed *hors de combat*?<sup>389</sup> Hampson, although apparently commenting on a subsequent, more controversial “turkey shoot” incident in March 1991, observed:

The military forces and equipment of the adversary are a legitimate target of attack until they surrender. There may have been a misunderstanding if the [retreating] Iraqis thought they would not be attacked, provided they did not attack the coalition forces, whereas what was required was the abandonment of all their equipment. Allowing the coalition forces the benefit of the doubt on that score, it would appear that the Iraqi forces could be attacked. The question then becomes whether they were subjected to “unnecessary suffering or superfluous injury.”

. . . If the devastation was wrought by general purpose bombs or the strafing of the columns of vehicles and forces, this would appear to be lawful unless it represented “unnecessary suffering or superfluous injury.”

*The killings might seem both unnecessary and superfluous, but the prohibition concerns suffering or injury, rather than unnecessary or superfluous actions . . . .*

This may suggest, particularly if military forces were unwilling to carry on attacking an unresisting adversary, the need for a new principle. It would be an extension of the existing rule. It would require that an attack should not proceed, even against a legitimate target and by means of a lawful weapon, where it is unnecessary or superfluous to the attainment of the war aim. The principal difficulty with such a rule would be in distinguishing between an unresisting enemy and one in tactical retreat. So long as the Iraqi government

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surrendered. They represented a military threat to coalition operations . . . . As for the question of bad faith, this is not established by examination of the facts. On 22 February 1991, President Bush presented Saddam Hussein with an ultimatum, which expired the following day. It required the Iraqis to commence their withdrawal from Kuwait before expiry of the ultimatum and complete it within one week. In return, the allied undertook not to attack withdrawing troops so long as the withdrawal continued according to the ultimatum. Iraq did not accept these terms, so the conditions of the ultimatum lapsed and the ground attack started on 24 February. Even after that the allies announced that the retreating Iraqis would be safe so long as they abandoned their weapons and vehicles. Needless to say, those on the Basra road did not do so.”); *see also* DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 145, at 102–03.

<sup>389</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 INTERNATIONAL HUMANITARIAN LAW: ANTECEDENTS AND CHALLENGES OF THE PRESENT TIME 58–59 (Joanna Nowakowska-Matusecka ed., 2010).

took no steps to obtain a cease-fire, its fighting forces were a legitimate target, even if they no longer offered an immediate threat to the coalition forces.<sup>390</sup>

Besides, as noted earlier, the prohibition of superfluous injury and unnecessary suffering refers to *evil*.<sup>391</sup> Even a similar principle—i.e., that “the right of the Parties to the conflict to choose methods or means of warfare is not unlimited”<sup>392</sup>—does not change the situation. It does not because the basis for the limitation in question need not be the lack of military necessity on the part of the means or method of warfare concerned. Rather, it could be based on humanity, chivalry, fairness, and/or justice,<sup>393</sup> as well as a host of other considerations.<sup>394</sup> There is no reason for which the military non-necessity of a given means and method of warfare should per se furnish a basis for the limitedness of the belligerent’s right to choose it. Proponents of military necessity as an additional layer of restriction have yet to (1) demonstrate that the “meta”-rule of the kind in question does actually exist *de lege lata* or (2) advocate the valid establishment of such a rule *de lege ferenda*.<sup>395</sup>

One has yet to see a cogent basis for the view that military necessity is inadmissible *de novo vis-à-vis* validly posited IHL rules as a justification or excuse yet it is admissible *de novo vis-à-vis* such rules as an additional layer of restraint. The difficulties arise from the fact that this view relies erroneously on the purported existence of a notion that lacking military necessity means unlawful and the purported survival of military necessity considerations through the process of IHL norm-creation. As it stands, counter-*Kriegsräson* remains unconvincing.<sup>396</sup>

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<sup>390</sup> Hampson, *supra* note 385, at 107 (emphasis added) (footnote omitted); see also COMMANDER’S HANDBOOK, *supra* note 195, at 5-3 (military necessity does not prohibit the “application of overwhelming force against enemy combatants, units and material consistent with the principles of distinction and proportionality”).

<sup>391</sup> In other words, *injury* that is superfluous and *suffering* that is unnecessary.

<sup>392</sup> Additional Protocol I, *supra* note 72, art. 35(1); see also 1907 Hague Regulations, *supra* note 196, art. 22; Gehring, *supra* note 296, at 57–58.

<sup>393</sup> See, e.g., Oxford Manual, *supra* note 1, at 37–38.

<sup>394</sup> See, e.g., MELZER, *supra* note 3, at 281 (listing interests that are “cultural, religious, political, environmental, or economic” in character).

<sup>395</sup> See, e.g., Hampson, *supra* note 385, at 107.

<sup>396</sup> See, e.g., Dapo Akande, *Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities*, 59 INT’L & COMP. L.Q. 180, 192 (2010) (“Therefore, no further and more specific restraints exist with regard to who is subject to lethal force.”); Schmitt, *supra* note 2, at 835 (“[M]ilitary necessity infuses IHL; it is not a prohibition which applies over and above the extant rules.”); Schmitt, *supra* note 63, at 41 (“No state practice exists to support the assertion that the principle of military necessity applies as a separate restriction that constitutes an additional hurdle over which an attacker must pass before mounting

## 2. Possibilities of a Validly Posited “Capture Rather Than Kill” Rule?

It would of course be a different matter altogether if the question were how military necessity should be understood strictly as a means of interpreting validly posited IHL rules. Melzer asserts that “*within the parameters* set by the more specific provisions of IHL governing the conduct of hostilities, considerations of military necessity and humanity should serve as guiding principles in determining the kind and degree of force which is permissible against legitimate military targets.”<sup>397</sup> Nor should the foregoing discussion be taken to preclude all logical or future possibilities whereby “capture rather than kill” may come to be seen as an operative restraint on combat behavior.

Indeed, there are at least four distinct possibilities. One concerns what Melzer calls “the more restrictive rules applicable in peace time.”<sup>398</sup> If it were agreed that these rules do validly impose such a restraint whatever validly posited IHL rules say about the conduct in question,<sup>399</sup> then “capture rather than kill” might indeed come to bind belligerents. The interplay between international humanitarian law and international human rights law in times of armed conflict, a debate with a long history which has become lively again these days,<sup>400</sup> may be relevant in this regard. Similarly, some general principles of public international law may impose restrictions on belligerent conduct independently of international humanitarian law.<sup>401</sup> One problem remains: It does *not* follow from this possibility that the duty in question would be a duty of international humanitarian law.

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an attack.”); *id.* at 42 (“The crucial issue is not whether the individual in question can feasibly be captured but instead whether he or she has clearly expressed his or her intention to surrender. The claim that an individual who has not surrendered must, when feasible, be captured (or at least not attacked) is purely an invention of the [ICRC’s] Interpretive Guidance [on direct participation in hostilities].”).

<sup>397</sup> Melzer, *supra* note 357, at 904 (emphasis added) (citation omitted); see also *id.* at 907–08 (“It appears justified . . . to regard considerations of military necessity and of humanity, which are generally recognized as underlying and informing the entire normative framework of IHL, as guiding principles for the interpretation of the rights and duties of belligerents *within the parameters set by the more specific provisions of IHL* governing the conduct of hostilities.” (emphasis added)).

<sup>398</sup> MELZER, *supra* note 3, at 287.

<sup>399</sup> Whether it is or should be so agreed is an entirely different question.

<sup>400</sup> See, e.g., Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INT’L REV. RED CROSS 881 (2006); Doswald-Beck & Vité, *supra* note 272; Françoise Hampson, *Human Rights Law and International Law: Two Coins or Two Sides of the Same Coin?*, in 91 BULL. HUM. RTS. 46 (1992); Melzer, *Targeted Killings in Operational Law Perspective*, *supra* note 362, at 298–99.

<sup>401</sup> See, e.g., Melzer, *Targeted Killings in Operational Law Perspective*, *supra* note 362, at 299.

A second possibility is where it is shown that the peacetime restraint enters the *corpus juris* of positive international humanitarian law through connecting clauses such as the Martens Clause.<sup>402</sup> A third possibility exists if or when the process of IHL norm-creation—whether the process is customary or conventional—validly posits a new IHL rule imposing a “capture rather than kill” duty on belligerents. Fourth, it may be asked whether some elements of humanitarian considerations survive the process of IHL norm-creation and operate as additional, free-floating determinants of a given conduct-instance’s lawfulness over and above validly posited IHL rules.<sup>403</sup>

## V. VARIABILITY OF MILITARY NECESSITY

Material military necessity is a relational, situation-dependent, and evaluative idea. It describes the process through which one assesses whether a particular course of action was, or would be, necessary or unnecessary vis-à-vis a given military purpose under the prevailing circumstances.<sup>404</sup> It is therefore arguable that the idea of material military necessity does not vary *as such*. What can, and does, vary, however, is the specific conclusion one may reach on the material military necessity or non-necessity of a given conduct-instance and the reasons he or she may give therefor.

As noted above, even among those assessors of comparable competence and experience observing the same event more or less simultaneously, opinions varied as to whether destroying the Monte Cassino abbey constituted a material military necessity.<sup>405</sup> Hindsight is also an element in the variability of specific material military necessity assessments. The evolution of military doctrine in response to actual battlefield experiences, such as that concerning barrage discussed earlier,<sup>406</sup> is a typical example. Similarly, as Agincourt indicates,<sup>407</sup> military history can bring new insights to the perceived appositeness of those strategies and tactics employed in the past, which may otherwise come across as materially impertinent.

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<sup>402</sup> See, e.g., YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW 657–60, 666 (2009).

<sup>403</sup> See Hayashi, *supra* note 145, at 766–78 (providing a tentative suggestion that such a possibility might indeed exist).

<sup>404</sup> See Hayashi, *supra* note 6, at 41–42.

<sup>405</sup> See *supra* Part III.A.1.

<sup>406</sup> See *supra* Part III.A.3.b. As the technique becomes more refined, the particular manner in which artillery fire was concentrated during the Battle of Neuve Chapelle would come to be seen as excessive.

<sup>407</sup> See *supra* Part III.A.3.c.

It may be said that normative military necessity's reason-giving function itself remains unvaried. Nevertheless, the very stipulation that a particular conduct-kind is deemed constitutive of or lacking in material military necessity is variable.<sup>408</sup> So is, by extension, the specific reason-giving weight given to this or that conduct-kind's permissibility once its material military necessity has been stipulated.<sup>409</sup>

To begin with, the legitimate purpose-kinds vis-à-vis which conduct-kinds are to be deemed militarily necessary or unnecessary have themselves proved variable. The contentious debate as to whether launching an attack (i.e. conduct-kind) should be limited to destroying, capturing, or neutralizing a military objective (i.e. purpose-kind) as defined in Article 52(2) of Additional Protocol I, or as defined inter alia by its effective contribution to the adversary's war-fighting or war-sustaining capability, is a case in point.<sup>410</sup> As for conduct-kinds, technological advances and tactical evolutions have rendered using numerous types of weapons of diminishing effectiveness and utility.<sup>411</sup> The kinds of circumstances in which the material military necessity or non-necessity of a conduct-kind is to be stipulated have also varied. Thus, for a long time, military operations were limited to land and sea. The emergence of the airspace as an increasingly important arena in the early-twentieth century<sup>412</sup> was only matched by the rise of the outer space in the post-World War II era<sup>413</sup> and cyberspace in the twenty-first century.<sup>414</sup>

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<sup>408</sup> In other words, a given conduct-kind  $X$ -ing considered to constitute a material military necessity at a given moment  $T_n$  may no longer be so considered at a subsequent moment  $T_{n+1}$ . Thus, von Clausewitz observed: "If, then civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct." VON CLAUSEWITZ, *supra* note 38, at 76.

<sup>409</sup> This also implies variability in the stipulation of evil and non-evil conduct-kinds as well as the weight of their prohibitive reason-giving value. For example, recruiting children and using them in combat has arguably come to be seen as a conduct-kind that is *distinctively* evil, i.e., as opposed to the evil deemed to be entailed by recruiting persons and using them in combat generally. Similarly, destroying cultural property may entail evil that is distinct from that present in destroying objects.

<sup>410</sup> See, e.g., DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 145, at 95–96; ROGERS, *supra* note 3, at 80–81; Michael N. Schmitt, *The Law of Targeting*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 131, 148–49 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

<sup>411</sup> See, e.g., GREEN, *supra* note 331, at 43 (siege weapons, since siege had become less frequent); *id.* at 35 (anti-armor weapons, since knightly heavy metal armor had gone out of fashion); *id.* at 38 (the "dum-dum" bullet, though its ban was resisted for a while by some states insisting on its lawful use against "savages"); *id.* at 64 (certain incendiary weapons, since they had become less relevant in mechanized warfare).

<sup>412</sup> See, e.g., Richard Overy, *Air Warfare*, in THE OXFORD HISTORY OF MODERN WAR 262, 262–63 (Charles Townshend ed., 2005).

<sup>413</sup> See, e.g., Michael N. Schmitt, *Computer Network Attack: The Normative Software*, 4 Y.B. INT'L HUMANITARIAN L. 53, 59 (2001).

<sup>414</sup> See, e.g., *id.*

Juridical military necessity varies, albeit not so much in its essence as in its specific manifestations and requirements. It does so not only in the existence or otherwise of exceptional military necessity clauses and/or their scope. It also varies in the manner in which the specific requirements are understood and interpreted where exceptional military necessity clauses are indeed available.

Thus, in the nineteenth century, it was, according to the Lieber Code, exceptionally permitted to deny quarter in unusual conditions of combat on account of military necessity.<sup>415</sup> Be that as it may, today's international humanitarian law clearly contains no such exception vis-à-vis the prohibition against denying quarter.<sup>416</sup> The same may be said *mutatis mutandis* of objects indispensable to the survival of the civilian population. Article 53 of Geneva Convention IV prohibits the belligerent from destroying real or personal property in the territory it occupies "except where such destruction is rendered absolutely necessary by military operations."<sup>417</sup> The types of military operations envisaged in this exceptional clause are commonly understood to include the so-called "scorched earth" policy by an occupying force in retreat.<sup>418</sup> By virtue of Article 54(2) of Additional Protocol I, however, such a force is no longer eligible for this exception in respect to objects indispensable to the survival of the civilian population.<sup>419</sup> Conversely, in 1949, Article 49 of Geneva Convention IV<sup>420</sup> arguably added a military necessity clause excepting temporary evacuation of residents from occupied territories to the hitherto unqualified prohibition against their deportation upheld in *von Manstein*.<sup>421</sup> Variability also permeates the types of indicators considered satisfactory for certain of the requirements of juridical military necessity. As regards the requisite knowledge, for example, improvements in the quantity and quality of intelligence gathered and analyzed may well heighten the standard of contemporaneous and bona fide knowledge expected of the person invoking military necessity pleas. Lastly, states bound by Article 6 of Hague Cultural Property Protocol II<sup>422</sup> effectively undertake to re-interpret and arguably

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<sup>415</sup> See Lieber Code, *supra* note 296, art. 60, at 11 ("[A] commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners."); see also 2 OPPENHEIM, *supra* note 235, at 169–70.

<sup>416</sup> See, e.g., Additional Protocol I, *supra* note 72, art. 40; Additional Protocol II, *supra* note 176, art. 4(1).

<sup>417</sup> Geneva Convention IV, *supra* note 176, art. 53.

<sup>418</sup> See IV COMMENTARY, *supra* note 267, at 302.

<sup>419</sup> See Additional Protocol I, *supra* note 72, art. 54(2).

<sup>420</sup> See Geneva Convention IV, *supra* note 176, art. 49.

<sup>421</sup> See *von Manstein*, *supra* note 3, at 523; see also Hayashi, *supra* note 6, at 92–93.

<sup>422</sup> See Hague Cultural Property Protocol II, *supra* note 318, art. 6.

tighten the scope of the military necessity exception available under Article 4(2) of the Hague Cultural Property Convention.<sup>423</sup>

### CONCLUSION

The foregoing demonstrates the multifaceted character of military necessity as a notion used in international humanitarian law. Despite its deceptively simple and straightforward appearance—after all, how difficult can it be for one to tell when something is militarily necessary or unnecessary?—the concept requires a careful, contextualized discussion.

Materially, military necessity merely separates vocational competence from vocational incompetence. Material military necessity indicates that it is in one's strategic self-interest to perform military necessities and forbear military non-necessities. In IHL norm-creation, the stipulated material military necessity of a given conduct-kind does not conclusively establish its legitimacy; nor does its stipulated lack of material military necessity alone connote its illegitimacy. Normative military necessity does matter, albeit not conclusively, for the legitimacy or otherwise of evil conduct-kinds. Nevertheless, normative military necessity does not turn the material military *non*-necessity of an evil conduct-kind into the basis for its illegitimacy. Rather, it would simply show that unnecessary evil is unmitigated evil. Nor does normative military necessity modify the legitimacy of conduct-kinds that are not evil in the first place. In the strictly juridical context of validly posited IHL rules, military necessity operates exclusively as an exception from their qualified principal prescriptions. Juridical military *non*-necessity reverts conduct-instances to being regulated by the principal rule. Because it is strictly an exception, military necessity does not justify or excuse deviant conduct from the unqualified prescriptions of validly posited IHL rules.

*Kriegsräson* has been correctly rejected. The stipulated material military necessity of a conduct-kind may be a weighty reason for the framers of IHL rules to consider authorizing it. If a validly posited IHL rule unqualifiedly prohibits the conduct-kind, however, this means that the rule's framers have accounted for the said reason and set it aside. In other words, this particular reason-giving element of military necessity has not survived the process of

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<sup>423</sup> See Hague Cultural Property Convention, *supra* note 275, art. 4(2); O'KEEFE, *supra* note 299, at 252–57.

IHL norm-creation and is therefore inadmissible de novo vis-à-vis unqualified IHL rules.

Counter-*Kriegsräson* should be rejected because there is no indication that militarily unnecessary simpliciter means illegitimate per se. Furthermore, as far as unqualified IHL rules are concerned, the fact that they have been validly posited implies that their framers have already reflected upon normative considerations of military necessity and declined to let them survive. It follows that military necessity does not operate as an additional layer of restraint over and above unqualified rules of positive international humanitarian law.