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Introduction

1.1 THE TOPIC

Considerations and conceptions of military necessity can be traced back as long as law has been governing aspects of war, and in close connection to the idea of restraint¹ in war due to humanitarian concerns.² Military necessity in the context of humanitarian concerns has also been said to illustrate a deeply rooted contradiction: ‘Ambiguity and contradiction . . . mark in general the whole of our Europe-based philosophy of war, which is found in the reconciliation of the principles of military necessity and humanitarian concern.’³

To choose a topic such as the legal concept of military necessity is therefore almost as ambitious as attempting to write a book ‘on everything about law and war’. Nevertheless, unless it is sufficiently in-depth, it is not truly interesting. I have therefore chosen to pursue the following question in this book:

What are the legal limits of the commander’s assessment of military necessity under the International Law of Armed Conflict during the conduct of hostilities?

The term ‘military necessity’ calls for a discretionary judgment – the ‘assessment’ – by the military commander in the field during combat operations. The

¹ On the conceptual idea of restraint in war in a historical perspective, see for example Best, ‘Restraint in war’, 3–26. See also Howard, ‘Constraints on warfare’, at page 2–3.

² On the balance between military necessity and humanitarian concerns in general, see for example Draper, ‘Military necessity and humanitarian imperatives’, at page 130; Kelsen and Tucker, *Principles of International Law*; Pictet, *Development and Principles of International Humanitarian Law*; Schmitt, ‘Military necessity and humanity in international humanitarian law’; Dinstein, ‘Military necessity’, at para. 1–7. See also Hayashi ‘Military necessity as normative indifference’, 675–782. On the question of whether military necessity and humanitarian concerns are always opposed, see Chapter 6.

³ Best, ‘Restraint in war’, at page 5.

'assessment' thus lies at the heart of this book, and the conceptual findings with regard to this discretionary judgment, referred to as the 'military margin of appreciation', is encapsulated in Chapter 4. In order to approach the core of the question however, I address different legal concepts under the international Law of Armed Conflict (LOAC) governing the conduct of hostilities and which in its own way strongly embodies the concept of military necessity. Among these concepts, civilian immunity from attacks (covering both persons and objects) and the proportionality rule protecting civilians and civilian objects from damage which will be excessive in relation to the concrete and direct military advantage anticipated, are prominent. Throughout this – also historical – survey I attempt to analyse, discuss and frame the limits of the assessment of military necessity via treaty law, state practice, case law and doctrinal debate.

In 1924 the legal scholar Spaight wrote: 'War, after all, is only a means to an end.'⁴ The remark could also have been quoted elsewhere, from another time, and definitely not necessarily from a legal scholar. For the purpose of the present book however, the point is exactly that *even* from a legal point of view it appears impossible to escape the difficult relationship between *means* of warfare and *ends* of war. And in the midst of this difficulty is the legal concept of *military necessity* – simply because any notion of 'necessity' connotes a 'for what' – the means and methods considered necessary in order to achieve a military purpose.⁵ It is no understatement to point out the vagueness of this point of departure: 'As with many abstract concepts, the answers to specific questions depend on the circumstances, appraised in the light of the humanitarian ends that justify the restraints. *Determining the proper relation between means and ends in situations of great complexity and uncertainty is never easy.*'⁶

With the privilege of hindsight US Secretary of Defence Robert McNamara (1961–8) has stated with regard to World War II (WWII) that:

Why was it necessary to drop the nuclear bomb if Le May was burning up Japan? And he went on from Tokyo to firebomb other cities. 58% of Yokohama. Yokohama is roughly the size of Cleveland. 58% of Cleveland destroyed. Tokyo is roughly the size of New York. 51% of New York destroyed. 99% of the equivalent of Chattanooga, which was Toyama. 40% of the equivalent of Los Angeles, which was Nagoya. This was all done before the

⁴ Spaight, *Air Power and War Rights*, at page 2.

⁵ This question is further addressed in Chapter 2.

⁶ See Schachter's remarks in 'Implementing limitations on the use of force', at page 39, where the quotation is from his comments upon the questions of proportionality and necessity. Emphasis added.

dropping of the nuclear bomb, which by the way was dropped by Le May's command. Proportionality should be a guideline in war. Killing 50% to 90% of the people of 67 Japanese cities and then bombing them with two nuclear bombs is not proportional, in the minds of some people, to the objectives we were trying to achieve.⁷

The concept of 'military necessity' is liable to abuse. And what is perhaps worse: abuse can be exercised with the best of intentions if based on flimsy or flawed intelligence or poor knowledge of the law. This book is devoted to the limits placed on military commanders in order to avoid such abuse.

1.2 DEFINING 'NECESSITY' AT THE OUTSET

'Necessity' is a generic term referring to a certain state of being required, an 'indispensable thing',⁸ or, as stated in *Black's Law Dictionary*: 'something that must be done or accomplished for any one of various reasons . . . context normally supplies a sense of the degree of urgency'.⁹ Correspondingly, the adjective 'necessary' may be understood as a term referring to what is 'required to be done', or what is 'inevitably resulting from the nature of things'.¹⁰ Under the LOAC it is considered *necessary* to disable as many enemy combatants as possible from continued fighting in order to weaken the enemy forces and gain military advantages for own forces.¹¹ Bearing in mind these ordinary meanings given to the terms, the meaning of 'necessity' and 'necessary' under international law must be understood as specifically related to the area of law in question. The present book is concerned exclusively with the concept of necessity under the LOAC, namely *military necessity*, and must thus be distinguished from the concept as it appears under areas of law adjacent, but not identical, to the LOAC, such as the *jus ad bellum*, the law on Responsibility of States for Internationally Wrongful Acts and the international human rights law.¹²

⁷ From the film *Fog of War* (2003), directed and produced by Errol Morris.

⁸ Soanes and Stevenson (eds.), *Concise Oxford English Dictionary*, page 956.

⁹ Garner (ed.), *Black's Law Dictionary*, at page 1193.

¹⁰ Soanes and Stevenson, *Concise Oxford English Dictionary*, page 956. In *Black's Law Dictionary*, the similar phrase is: 'needed for some purpose or reason; essential', at page 1192.

¹¹ The notion of combatants is dealt with below, in Chapter 9, and the notion of military advantage – as well as the concept of 'weakening the enemy forces' – is dealt with in Chapter 14.

¹² The relationship between the topic of this book and the *jus ad bellum*, the international law of state responsibility and the international human rights law (IHR), is dealt with below, in Sections 1.4 and 1.5.

1.3 MILITARY NECESSITY IN THE LAW OF INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT

In the present book military necessity is primarily dealt with in the framework for international armed conflicts (IACs). Acknowledging that a majority of armed conflicts in the world today are classified as non-international armed conflicts (NIACs), most of the legal framework (governing the conduct of hostilities) is still, at least as a matter of treaty law, drafted for IACs.¹³ Having said this, core rules of the international Law of Armed Conflict also apply in their essence to NIACs.¹⁴ Due to the selection of rules subject to analysis in this book, the findings will, in most cases, be applicable to NIACs as well. The concept of ‘necessity’ – albeit with different terminology – is referred to on a couple of occasions in the Protocol II Additional to the Geneva Conventions (AP II) concerning displacement of civilians if ‘imperative reasons so demand’¹⁵ and the duty to search for wounded, sick or shipwrecked persons ‘whenever circumstances permit’.¹⁶ Furthermore – and of more importance for the present book – the principles of distinction, unnecessary suffering, proportionality, precautions in attack and the prohibition of wanton destruction of property, which all contain in-built (or even explicit) considerations of military necessity, appear occasionally in treaty law applicable in NIAC,¹⁷ and

¹³ This is the case with the four Geneva Conventions (GC) as well as their Additional Protocol (AP). See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) (1949); Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) (1949); Convention (III) Relative to the Treatment of Prisoners of War (GC III) (1949); Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (AP I) (1977). See common article 2 to the four GCs, and article 1 of the AP I.

¹⁴ Dinstein, *Non-international Armed Conflicts in International Law*, at pages 213–19.

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (AP II) (1977), article 17.

¹⁶ AP II article 8.

¹⁷ AP II article 13 and 13(3), as well as common article 3 to the four GCs, which embodies the rule on Direct Participation in Hostilities (DPH). A reference to military objectives is in AP II article 15 in the context of dangerous forces (the protection of works and installations containing dangerous forces is dealt with in Chapter 17 of this book). Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as Amended on 3 May 1996 (Protocol II of the CCW) replicates the definitions of military objectives and civilian objects in article 2(6) and (7), as well as the prohibition on unnecessary suffering in article 3(3), the prohibition on indiscriminate attacks 8(a) and (b), the proportionality rule in article 3(8)(c) and the duty to take precautionary measures in article 8(10). Convention on the Prohibition of the Use, Stockpiling,

is as well reflective of the customary law of NIAC.¹⁸ Those parts of this book which are *not applicable* to NIACs are therefore, in essence, those sections dealing with lawful combatancy and the entitlement to prisoner of war status in Chapters 9 and 10.¹⁹

1.4 DISCIPLINES AND AREAS OF LAW WHICH ARE, AND ARE NOT, DEALT WITH

Let us return to the research question: what are the legal limits of the commander's assessment of military necessity under the LOAC during the conduct of hostilities? First of all, I deal with *legal* limits, not political restraint on military operations, nor ethical norms and moral obligations.²⁰ This must not be taken to diminish the practical importance of other limitations upon the commander's assessment, such as moral and political restraints. In fact, the commander's practical freedom of manoeuvre may be entirely dependent upon limitations other than international law, issued through the chain of

Production and Transfer of Anti-Personnel Mines and Other Destruction (Ottawa Convention) (1997) states in its preamble that the States parties are 'basing themselves' on the principle of limitation (on this principle, see further Chapter 7 of this book) and as well on the prohibition of unnecessary suffering and the principle of distinction. The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999) replicates the definition of military objectives in article 1(f), the proportionality rule and the duty to take precautionary measures with regard to cultural property in article 7, as well as including the notion of military necessity together with the target selection rule when protection is waived, in article 6. On the notion of military necessity in the target selection rule with regard to cultural property, see further Chapter 16 of this book. The Rome Statute of the International Criminal Court (Rome Statute) (1998) lists the war crimes that violate the principle of distinction and destruction of property not demanded by imperative military necessity in article 8(2)(e), (i) and (xii), at page 1320. Criminal law is dealt with in Chapter 5.

¹⁸ See Henckaerts and Doswald-Beck, *International Committee of the Red Cross Customary International Humanitarian Law* (CIHL), also accessible with updated commentaries at: ICRC, Customary IHL Database, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (2019) Rule 1 (distinction), Rule 11 (indiscriminate attacks), Rule 14 (proportionality), Rule 15 (precautions in attack), Rule 70 (unnecessary suffering) and Rule 50 (destruction of property). Dinstein, *Non-international Armed Conflicts in International Law*, also points out that the principles of distinction, unnecessary suffering, indiscriminate attacks, proportionality and precautions apply in NIACs, at pages 213–19.

¹⁹ These correspond to those parts of treaty law where the provisions in the AP I do not amount to customary law in international armed conflicts, see Section 1.6.1 below.

²⁰ For discussions on military necessity with its roots in the legal discipline, but with a more interdisciplinary perspective, see for example O'Brien, *The Conduct of Just and Limited War*, at pages 79 ff.; Hayashi, 'Contextualizing military necessity', pages 195–220; Ohlin and May, *Necessity in International Law*.

command as rules of engagement (ROE) or standard operating procedures (SOP).²¹ Some aspects of the relationship between limits under the LOAC and other limits are dealt with in Chapter 4, in order to illustrate the commander's margin of appreciation under the LOAC. Having said this, theoretical foundations and the structure of the LOAC as such *are*, to a certain extent, dealt with in this book. The very concept of military necessity may be perceived as a 'bridge' between facts and law and between facts and assessments of the facts and thus invite discussion of the relationship between the norm on the one hand and the person assessing the norm and its application on the other hand. This discussion is, in its general form, a part of Chapter 4. Another aspect of viewing military necessity as a 'bridge' between facts and law is as part of the discussion of *Kriegsraison* (in Chapter 6), where military necessity represents the outer limit of law as such. This study of military necessity as part of the LOAC is therefore bound to be an exercise of balance between dwelling into the theoretical underpinnings of the 'concept of law'²² and the detailed analysis of how military necessity appears in concrete legal rules.

This book is about the concept of military necessity under the law governing the conduct of hostilities in international armed conflicts, the *jus in bello*, which applies 'to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.²³ The *jus in bello* has to be distinguished from the necessity of resort to use of force between States, the *jus ad bellum*. This distinction is dealt with specifically in Section 1.5 below. Furthermore, this book is *not* about necessity as a ground precluding wrongfulness under the International Law on State Responsibility, nor about international human rights law or criminal law as such.²⁴ The relationship to the law on State Responsibility and Human Rights law are commented upon briefly in the following.

Necessity as a ground precluding the wrongfulness of an act in general is governed by article 25 in the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts

²¹ For an account of these limitations on the commander's room of manoeuvre, see Johansen, 'Mission command and command responsibility'.

²² The expression is taken from Hart, *The Concept of Law*.

²³ Common article 2(1) to the four Geneva Conventions (in GC I).

²⁴ A number of war crimes have in-built references to military necessity, such as destruction of property not justified by imperative military necessity. Where these provisions naturally occur, I address them in this book. Beyond this, I do not address conditions for criminal responsibility. See further my remarks in Section 1.6.4, below, on the practice of international courts and tribunals.

(2001).²⁵ Article 25(2)(a) excludes the possibility to invoke necessity if ‘the international obligation in question excludes the possibility of invoking necessity’. In the commentary to this rule Crawford states that: ‘the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of “military necessity”’.²⁶

The relationship between the general law on State responsibility and military necessity is also addressed in Section 2.6, with regard to the issue of military necessity as a permission or prohibition under the LOAC.²⁷

International human rights law is a body of law distinct from the LOAC. This point of departure remains, although their areas of concurrent application may grow close on a number of occasions. Human rights obligations do not, in principle, cease to apply during situations of armed conflict. Yet, they are not drafted for the sole purpose of armed conflict. The LOAC, on the other hand, is drafted specifically for situations of armed conflict, which has consequently given rise to the LOAC being viewed as the *lex specialis* in the sense that it prevails in case of conflict of norms.

Finally, dealing with the law governing the conduct of hostilities, this book is not concerned with the law of belligerent occupation. Considerations of military necessity (or the similar considerations of ‘security’) by the occupant are numerous under the law of occupation. Yet, these considerations bear the distinctive mark of being made in situations of de facto control over a hostile territory.²⁸ During the conduct of hostilities, the situation is not the same. Although a comparison between assessments of military necessity done

²⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, as corrected. On terminology in older literature, see also Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, at pages 128–9. On the distinction between general and particular necessity under international law, see for example Agius, ‘The invocation of necessity in international law’, at pages 110 and 112, commenting on the relationship between Draft Articles on State Responsibility article 25 and the LOAC treaties. See also pages 121–2 commenting on the relationship between the concept of self-defence (or self-preservation) and military necessity, as well as referring to the doctrine of *Kriegsraison* as an expression of the conflation of these two concepts.

²⁶ See Crawford, *The International Law Commission’s Articles on State Responsibility*, at page 185.

²⁷ That the two concepts are distinct was also emphasised in the Eighth Report on State Responsibility. See UN Doc. A/CN.4/318/Add.5–7, page 34, remarks by Roberto Ago, who points out that the concept of military necessity is not a ‘subcategory’ of those situations that may give rise to a state of necessity.

²⁸ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land (1907 Hague Regulations)

throughout belligerent occupation and assessments done during the conduct of hostilities would be interesting (not least with regard to the question of ‘necessary for what?’, as addressed in Chapter 2), the task of dealing with both is simply too comprehensive for the present study.²⁹

1.5 THE SCOPE OF THE LOAC AND THE LIMITS OF CONTEXT: *JUS AD BELLUM VS JUS IN BELLO*

Lawyers distinguish between *jus ad bellum* and *jus in bello*. While *jus ad bellum* governs the initial right to resort to force between States, and lies outside the scope of this book, the *jus in bello* governs the use of force during armed conflict. In the distinction between these two sets of legal frameworks lies a presumption of independence: *jus in bello* applies equally to both parties to the armed conflict, regardless of which side is responsible for having started the war. An eventual violation of *jus ad bellum* rules does not impact on the application of *jus in bello* rules. This is the established legal point of departure.³⁰ Repeatedly, this sharp distinction has been challenged with reference to the moral inequality between the aggressor and the victim State.³¹ Recently, the debate appears to have taken shape as a conflict between ‘Separationists’ and ‘Conflationists’, where the ‘Conflationist’ position is willing to merge the *jus ad bellum* and the *jus in bello*.³² Although Conflationist views seem to be primarily *ethical*, there might be some ‘spill over’ to legal

(1907). Occupation is defined by article 42, to be when a territory ‘is actually placed under the authority of the hostile army’.

²⁹ A comparison is done for the purpose of addressing the scope of humanitarian assistance by Bashi, ‘Justifying restrictions on reconstructing Gaza’, at page 154. The difficulties of distinguishing between military and political objectives of warfare, during an occupation, appear to imply that the distinction is more easily upheld in targeting decisions. As discussed both in Chapter 2 and in Chapter 14 in this book, practice has shown that the distinction proves difficult everywhere – including during conduct of hostilities.

³⁰ See AP I article 1(1), at page 715, which states that the duty to respect the rules exist in ‘all circumstances’, and Sandoz, Swinarski and Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977* (AP I Commentary), page 37, at para. 48. See also the Schmitt (general ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, in commentary 1 to rule 72, stating that: ‘It is important to note that the conditions of necessity and proportionality in the *jus ad bellum* are distinct from the concept of military necessity and the rule of proportionality in the *jus in bello*.’

³¹ A brief account is given in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) (OTP Report) at the International Criminal Tribunal for the former Yugoslavia (ICTY), at para. 32.

³² See Weiler and Deshman, ‘Far be it from thee to slay the righteous with the wicked’, pages 25–61.

argumentation.³³ A regrettable source of confusion over the legal ‘Separationist’ point of departure can be found in the International Court of Justice (ICJ) Advisory Opinion on the Threat or Use of Nuclear Weapons from 1996. In this case the Court, among others, considered the use of nuclear weapons in light of the ‘principles and rules of international humanitarian law (IHL) applicable in armed conflict and of the law of neutrality’³⁴ and stated (finally) that:

Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.³⁵

The Court seems to hold open the possibility that the legality of a particular means of warfare (nuclear weapons) can be considered differently in a situation of self-defence from other situations.³⁶ Unsurprisingly, considerations of military necessity are used as a driving force behind such positions,³⁷ although this use of the concept of military necessity is just as often rejected by scholars: ‘Military necessity should be confined to the plight in which armed forces may find themselves under the stress of active warfare.’³⁸

Among a number of scholars, the *jus ad bellum* is repeatedly held to impose restrictions on targeting during the conduct of hostilities, that is, as an additional (to the *jus in bello*) set of rules applicable in armed conflict.³⁹ Obviously, it cannot be denied that the *jus ad bellum* applies, sometimes concurrently, to

³³ One such example is found in the article by Dunlap, ‘The end of innocence’, pages 9–17. Another recent example is found in Otieno, Wabuke and Otieno, ‘The Fission and Fusion in International Use of Force’, pages 303–28.

³⁴ Legality of the Threat or Use of Nuclear Weapons, pages 226 ff., at para. 74.

³⁵ Ibid., at para. 97.

³⁶ In fact, the ICJ is not the first to lean on *jus ad bellum* considerations for a possible justification of the atomic bomb. On the same direction, see for example O’Brien, *The Conduct of Just and Limited War*, at page 76, where he refers to a proportionality assessment under necessity. The issue of proportionality as an alleged component of military necessity is dealt with in Chapter 13 in this book.

³⁷ In this respect, see (again) O’Brien, *ibid.*, at pages 84–5. An argument in favour of interpreting the laws of armed conflict differently, according to the different political purposes of war, is also given by Kelsen and Tucker, *Principles of International Law*, at pages 115–16.

³⁸ See Dunbar, ‘Military necessity in war crimes trials’, at page 443.

³⁹ See for example Greenwood, *Essays on War in International Law*, at page 83, where he argues that *jus ad bellum* may have an effect upon what is to be considered a lawful target. Green and Waters, ‘Military targeting in the context of self-defence actions’, who argue at page 23 that the *jus ad bellum* targeting rules does not absolutely prohibit the targeting of civilians. I disagree that *jus ad bellum* addresses targeting. Any measures taken as part of lawful self-defence must abide by the rules governing conduct of hostilities under *jus in bello* – and the targeting of civilians under these rules is prohibited, see Chapter 7.

the *jus in bello*. I do, however, contest that the *jus ad bellum* addresses the issue of targeting as such. Concrete activities comprising the conduct of hostilities, such as, for example, attacks and other military operations resulting in destruction or seizure of property or the capture of personnel, is governed particularly by the rules set out in *jus in bello*. In the case of conflict between norms, *jus in bello* prevails (*lex specialis*). In short, this book rests on the following view: military necessity neither transcends the scope of the *jus in bello* (it cannot be invoked to ‘terminate the entire war’),⁴⁰ nor does it yield to requirements of the *jus ad bellum* as such (a lawful attack under *jus in bello* remains a lawful attack under *jus in bello*).⁴¹ That said, a number of restrictions may be imposed on the actual conduct of hostilities, either by international law (such as the law of neutrality) or by States themselves, through mission specific regulations such as rules of engagement. These restrictions do not, however, alter the content of the *jus in bello* (by interpretation) nor the conception of military necessity per se.⁴² To base the application of *jus in bello* upon the distinction in the *jus ad bellum* between the right-doer and the wrong-doer appears futile and dangerous.⁴³ Precisely because war is a political tool and an enterprise of means to achieve political ends, it is a continuous struggle to preserve a legal presumption of conduct that is ‘purely military’.⁴⁴

1.6 SPECIFIC ISSUES REGARDING SOURCES

As in any study or application of the law in the field of international law, this book is based on the two primary sources of international law: treaties and customary international law. The point of departure is stated in article 38 of

⁴⁰ In support of this, see McDougal and Feliciano, *Law and Minimum World Order*, at page 527 who, in a critique of the Vietnam War in its aftermath, also illustrate the dangerous potential when writing into the principle of military necessity a conception of the legitimate ‘purpose of war’. For a similar view in more recent literature, see for example Sassoli ‘*Jus ad bellum and Jus in bello*’, at page 249. In a slightly different direction, see Schmitt, ‘Targeting and humanitarian law’, at page 157 where he claims that the views of Sassoli are ‘overly simplistic’, although Schmitt himself also argues strongly in favour of upholding the separation between the *jus ad bellum* and the *jus in bello*.

⁴¹ An unclear phrase is found by O’Connell, ‘Historical development and legal basis’, at page 35.

⁴² On the application of the rules in different circumstances, see in particular Chapter 14, on the notion of military advantage.

⁴³ See for example Schmitt, ‘Targeting and humanitarian law’, at page 160. This view is even more explicitly expressed in the OTP Report at para. 33. See also Boivin, ‘The legal regime applicable to targeting military objectives’, at page 28.

⁴⁴ The expression is from Clausewitz, *On War*, at page 607.