

## CONTENTS

	<i>Acknowledgements</i>	xiv
	<i>List of Treaties and Associated Instruments</i>	xv
	<i>Table of Cases</i>	xviii
	<i>List of Abbreviations</i>	xxvi
	<b>PART I Introduction</b>	<b>1</b>
<b>1</b>	<b>Introduction</b>	<b>3</b>
	1.1 Towards a New Theory of Military Necessity	5
	1.2 Structure	7
	1.3 Theoretical Underpinnings	12
	<b>PART II Military Necessity in Its Material Context</b>	<b>17</b>
<b>2</b>	<b>Fitness of Means and Vocational Competence</b>	<b>19</b>
	2.1 Ends, Means and Circumstances	20
	2.2 No Need to Show But-for Causation	25
	2.2.1 No Causation Required	25
	2.2.2 No But-for Required	27
	2.3 Military Non-necessities	29
	2.3.1 Non-necessities Per Se: Futility and Purposelessness	29
	2.3.2 Relative Non-necessities	30
	2.3.2.1 Wastefulness	30
	2.3.2.2 Excessiveness	33
	2.3.2.3 Inappositeness	34
	2.4 Conclusion	35
<b>3</b>	<b>Objections and Responses</b>	<b>37</b>
	3.1 Military Competence vs. Ethical Competence	37
	3.2 Military Competence as Ethical Competence	44
	3.3 Ethical Competence as Military Competence	46
	3.4 Conclusion	49

	<b>PART III Military Necessity in Its Normative Context</b>	<b>51</b>
<b>4</b>	<b>Military Necessity and Legitimacy Modification</b>	<b>53</b>
4.1	From Materiality to Normativity	53
4.2	Necessity, Evil and Legitimacy	56
4.3	Purpose vis-à-vis Conduct	56
4.3.1	Where the Purpose Sought Is Illegitimate	57
4.3.2	Where the Purpose Sought Is Legitimate	60
4.4	Conduct vis-à-vis Purpose	66
4.4.1	The Conduct Is Deemed Evil	66
4.4.1.1	The Conduct Is Deemed Evil yet Necessary	68
4.4.1.2	The Conduct Is Deemed Evil and Unnecessary	69
4.4.1.3	Preamble of the 1868 St. Petersburg Declaration: Evil Conduct Is Illegitimate if It Is Unnecessary	72
4.4.2	The Conduct Is Deemed Un-evil	75
4.4.2.1	The Conduct Is Deemed Un-evil and Necessary	76
4.4.2.2	The Conduct Is Deemed Un-evil and Unnecessary	76
4.4.2.3	Preamble of the 1868 St. Petersburg Declaration: Is Un-evil Conduct Illegitimate if It Is Unnecessary?	81
4.5	Special Cases: Conduct Considered Evil in an Exclusively Self-Inflicted Way	81
4.5.1	Minding One's Own Business?	82
4.5.2	Are All War Crimes the Enemy's Crimes?	86
4.5.3	Life of a Soldier	91
4.5.4	Delegitimising Self-Inflicted Evil in War	93
4.6	Conclusion	96
<b>5</b>	<b>Inevitable Conflict Thesis</b>	<b>98</b>
5.1	Overview	101
5.2	Inevitability of Norm Conflicts	104
5.2.1	Non-coincidence of Military Necessity and Humanity in Their Material Sense	105
5.2.2	Military Necessity and Humanity as Generators of Imperatives	106
5.2.2.1	Obligating Materially Necessary Acts	107
5.2.2.2	Prohibiting Materially Unnecessary Acts	110
5.2.3	Inevitable Conflict between Imperatives of Military Necessity and Imperatives of Humanity	112
5.2.3.1	Norm Conflicts and Their Pre-emption Generally	112
5.2.3.2	Norm Conflicts between Military Necessity and Humanity, and Their Pre-emption in IHL Norm-Creation	114

## CONTENTS

ix

5.3	Inadmissibility of Military Necessity and Humanity Pleas vis-à-vis All Unqualified IHL Rules	116
5.3.1	Excluding Military Necessity and Humanity Pleas Alike	116
5.3.2	Military Necessity and Humanity Accounted for in All Positive IHL Rules	118
5.4	Conclusion	119
<b>6</b>	<b>Joint Satisfaction Thesis I: Alignment and Indifference</b>	<b>120</b>
6.1	Military Necessity-Humanity Alignment in Their Material Context	121
6.1.1	Unnecessary and Inhumane	122
6.1.2	Necessary and Humane	128
6.1.3	Effective Armies Committing Atrocities: Do They Invalidate the Possibilities of Military Necessity-Humanity Alignment?	131
6.2	Military Necessity as Normative Indifference	135
6.2.1	Normative Indifference Generally	136
6.2.2	Normative Indifference towards Military Success or Failure	136
6.2.3	Disabling 'Naked' Soldiers	138
6.2.4	High-Altitude Aerial Bombardment	141
6.2.5	Recruiting Child Soldiers	142
6.3	Nor Does Humanity Always Generate Imperatives	143
6.3.1	Humanity's Permission and Tolerance	143
6.3.2	Demanding vs. Praising Humane Acts	145
6.4	Conclusion	148
<b>7</b>	<b>Joint Satisfaction Thesis II: Accounting for the Military Necessity-Humanity Interplay in IHL Norm-Creation</b>	<b>149</b>
7.1	Joint Satisfaction Thanks to Military Necessity-Humanity Alignment	150
7.1.1	Unqualified Obligations to Pursue Joint Satisfaction that Is Based on Forbearance	150
7.1.1.1	Using Banned Weapons	152
7.1.1.2	Killing POWs	155
7.1.1.3	Committing Rape	156
7.1.2	Unqualified Obligations to Pursue Joint Satisfaction that Is Based on Performance	157
7.2	Paucity of Unqualified Obligations Despite Military Necessity-Humanity Alignment	158
7.2.1	General Participation Clause	160
7.2.2	Non-international Armed Conflicts	160
7.2.3	Belligerent Reprisals	162
7.3	Joint Satisfaction amid Military Necessity-Humanity Contradiction	170

7.3.1	Norm Contradiction Generally	171
7.3.1.1	Liberty and Permission as the Absence of a Contrary Duty	171
7.3.1.2	Overcoming Norm Contradiction Is Always a Matter of Choice	172
7.3.2	Frustration between a Duty and a Counter-Liberty	175
7.3.3	Norm Contradiction between Military Necessity and Humanity	178
7.3.4	Permission and ‘Strong Pressure or Policy’	180
7.4	Obligations to Pursue Joint Satisfaction amid Military Necessity-Humanity Contradiction	181
7.4.1	Unqualified Obligations	182
7.4.2	Principal Obligations	186
7.4.3	Indeterminate Obligations	191
7.4.4	Exceptional Obligations	192
7.5	No Obligation to Pursue Joint Satisfaction amid Military Necessity-Humanity Contradiction	194
7.5.1	Where the Law Affirmatively Authorises Non-pursuit of Joint Satisfaction	194
7.5.2	Where the Law Fails to Obligate Jointly Satisfactory Behaviour	195
7.5.3	<i>In dubio pro libertate</i> or <i>prohibitione</i> ?	197
7.6	Conclusion	199
<b>PART IV Military Necessity in Its Juridical Context</b>		<b>201</b>
8	<b>Joint Satisfaction Thesis III: Exclusionary and Non-exclusionary Effects</b>	<b>203</b>
8.1	From Normativity to Juridicity	203
8.2	Perils of Excluding Military Necessity Pleas vis-à-vis Unqualified IHL Rules on Unsound Empirical Bases and <i>a contrario</i> Reasoning	205
8.3	IHL Norm-Creation Not Involving the Military Necessity-Humanity Interplay	206
8.3.1	Involving Military Necessity But Not Humanity	207
8.3.2	Involving Humanity But Not Military Necessity	212
8.4	Excluding Indifference Pleas	214
8.4.1	Exclusionary Basis	215
8.4.2	<i>Kriegsräson</i> and Its Variations	215
8.4.2.1	Consistency with Military Necessity as Conclusive Lawfulness, All Things Considered	216
8.4.2.2	Self-Preservation	217
8.4.2.3	Material Impossibility and Impracticality	220
8.4.3	<i>Humanitätsräson</i>	221

## CONTENTS

xi

- 8.4.3.1 Consistency with Humanity's Indifferent Permissions as Conclusive Lawfulness, All Things Considered 222
- 8.4.3.2 Misusing the Red Cross Emblem in Bloodless Hostage Rescue Operations 223
- 8.4.3.3 'Mercy Killing' 225
- 8.4.3.4 Forcibly Preventing Civilians from Leaving Besieged Localities 226
- 8.4.3.5 Implementing von Moltke's 'Greatest Kindness' 230
- 8.5 Admitting Non-indifference Pleas 232
  - 8.5.1 Counter-*Kriegsräson* 233
    - 8.5.1.1 Lack of Military Necessity as Conclusive Unlawfulness, All Things Considered 233
    - 8.5.1.2 Positive IHL Rules as Necessity-Based Derogations from Peacetime Rules 236
    - 8.5.1.3 Purported Non-exclusion of Elements of Military Necessity through IHL Norm-Creation 237
    - 8.5.1.4 'Capture Rather than Kill' 239
  - 8.5.2 *Humanitätsgebot?* 241
    - 8.5.2.1 Repatriating vs. Not Repatriating POWs after the Cessation of Hostilities 243
    - 8.5.2.2 Interning POWs on Land vs. Interning Them aboard Vessels at Sea 248
  - 8.5.3 Counter-*Humanitätsgebot?* 250
    - 8.5.3.1 'Capture Rather than Kill' Redux: Stretching the Envelope of Positive Law 251
    - 8.5.3.2 'Capture Rather than Kill' Redux: Ripping the Envelope of Positive Law 256
- 8.6 Promoting Humanity Above and Beyond Positive IHL Obligations 257
- 8.7 Conclusion 259
- 9 **Significance and Content of Juridical Military Necessity** 261
  - 9.1 Juridical Military Necessity as an Exception 262
  - 9.2 Military Necessity as an Exception vs. State of Necessity as a Circumstance Precluding Wrongfulness 263
    - 9.2.1 Primary and Secondary Rules 263
    - 9.2.2 Distinct Contents 266
  - 9.3 Specific Requirements of Juridical Military Necessity 267
    - 9.3.1 Measure Was Taken Primarily for Some Specific Military Purpose 269
      - 9.3.1.1 Existence of a Specific Purpose 269
      - 9.3.1.2 Purpose's Primarily Military Nature 270
      - 9.3.1.3 Submission of the Enemy? 275

9.3.2	Measure Was Required for the Attainment of the Military Purpose	276
9.3.2.1	Measure's Material Relevance to the Military Purpose's Attainment	277
9.3.2.2	Least Evil among Materially Relevant and Reasonably Available Measures	281
9.3.2.3	Proportionality between the Injury and the Gain	285
9.3.2.4	Note on Urgency	298
9.3.2.5	Note on Degrees	299
9.3.3	Military Purpose for Which the Measure Taken Was in Conformity with IHL	301
9.3.4	Measure Itself Was Otherwise in Conformity with IHL	304
9.4	Miscellaneous Observations	307
9.4.1	Knowledge	307
9.4.1.1	Knowledge of Purpose	307
9.4.1.2	Knowledge of Pertinence, Injuriousness and Proportionality	310
9.4.2	Competence	312
9.5	Conclusion	313
<b>10</b>	<b>Military Necessity and Elements of Crimes</b>	<b>315</b>
10.1	International Criminal Tribunal for the Former Yugoslavia and the International Residual Mechanism for Criminal Tribunals	316
10.1.1	Absence of Military Necessity as an Element of Large-Scale Property Destruction	317
10.1.1.1	Article 2(d), ICTY Statute	317
10.1.1.2	Article 3(b), ICTY Statute	319
10.1.1.3	Article 5(h), ICTY Statute	322
10.1.2	Instances of Militarily Unnecessary Property Destruction	325
10.1.3	Property Destruction in the Context of Combat	325
10.1.3.1	Lawfulness of the Underlying Military Activities	326
10.1.3.2	Attack vs. Destruction	327
10.1.3.3	Military Necessity vs. Military Objective	331
10.1.3.4	Destruction of Property Constituting a Military Objective	334
10.1.3.5	Destruction of Property Constituting a Civilian Object	336
10.1.3.6	Property Destruction in the Context of Combat: A Summary	342
10.1.4	Property Destruction outside the Context of Combat	346
10.1.5	Absence of Military Necessity as an Element of Forcible Displacement	351

## CONTENTS

xiii

10.2	International Criminal Court	355
10.2.1	Article 8 and Elements of Crimes: Military Necessity as an Exception	355
10.2.2	Rulings to Date	361
10.2.3	Article 31: Military Necessity as a Justification/Excuse?	365
10.2.3.1	Narrower in Content than Military Necessity as an Exception	368
10.2.3.2	Broader Availability to Offences Not Subject to Military Necessity Exceptions	370
10.3	Conclusion	371
	<b>PART V Conclusion</b>	<b>373</b>
11	<b>Conclusion</b>	<b>375</b>
11.1	Accounting for Military Necessity	375
11.1.1	Material Military Necessity as Fitness of Means and Vocational Competence	376
11.1.2	Military Necessity as Normative Indifference	376
11.2	Normative Consequences	378
11.2.1	Exclusionary and Non-exclusionary Effects	379
11.2.2	Juridical Military Necessity as an Exception	380
11.2.3	Military Non-necessity as an Element of War Crimes and Crimes against Humanity	381
11.3	Summary	382
11.4	Implications beyond the Immediate Scope of This Book	382
11.4.1	In Relation to <i>Jus ad Bellum</i>	382
11.4.2	In Relation to International Human Rights Law	386
11.4.3	In Relation to International Criminal Law	388
11.5	Military Necessity: A New Theory	389
	<i>Select Bibliography</i>	391
	<i>Index</i>	405