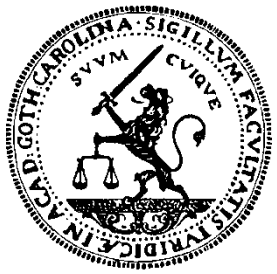

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Resurrection of Kriegsraison? The Military Necessity Principle and the Essence of International Humanitarian Law

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Summary

The ancient Kriegsraison doctrine awarded absolute predominance to the achievement of military advantages in armed conflicts and therefore granted the opportunity to secede from all restrictive laws of war. The doctrine was therefore formally condemned as abusive and inconsistent with modern International Humanitarian Law. Especially the contemporary military necessity principle is viewed as a factor that ruled out the Kriegsraison doctrine. Despite this narrative of a clear rejection, it remains challenged that the military necessity principle really differs from the Kriegsraison doctrine.

After assessing both concepts in detail, this paper thus compares the military necessity principle in modern International Humanitarian Law with the Kriegsraison doctrine. The analysis of the military necessity principle highlights the relevance of this comparative study by illustrating that the principle is indicative for the essence of the International Humanitarian Law system. A high level of systematic comparability between the concepts, based on teleological, conceptual, and functional similarities, suggests the domination of military considerations in International Humanitarian Law. Nonetheless the assessment additionally reveals that the modern law – that surrounds the isolated military necessity principle – ensures a high level of inviolable protection for individuals in armed conflicts. This protective system of modern International Humanitarian Law prevents the resurrection of the Kriegsraison doctrine through the military necessity principle.

In conclusion, the thesis illustrates that the military necessity principle and modern International Humanitarian Law did not completely break with the Kriegsraison doctrine. The legal system continues to facilitate military considerations. But at the same time, there are inviolable elements for the protection of individuals at the core of International Humanitarian Law. The thesis therefore exemplifies a conflicting essence of the International Humanitarian Law system. It is inferred that this contradictive essence facilitates the conduct of "lawfare". In the context of the recent reinvigoration of armed conflicts as political tool at the international stage, the observations within the thesis can help to understand the development of International Humanitarian Law.

Preface

The idea for this thesis started to develop during the International Humanitarian Law course of the International Human Rights Law programme in autumn 2021. The concept of “lawfare” and critical perspectives on the history, intention and application of International Humanitarian Law invited me to develop a more differentiated point of view on the subject. The purpose of this work is thus to clarify and illustrate the character of International Humanitarian Law.

Repeatedly the research pointed towards a relatedness between the Kriegsraison doctrine and the military necessity principle. Often it seemed like the doctrine was just the more honest and direct solution compared to the modern law and its application. The critical perspective on International Humanitarian Law and the relationship with the Kriegsraison doctrine therefore became the background of this thesis. The events that are taking place in the Ukraine since February 2022 further strengthened the belief that the field of International Humanitarian Law deserves critical attention.

For the support to realize the thesis I would like to thank my supervisor, Markus Gunneflo. His fundamental knowledge in the area of International Humanitarian Law helped me to concretize my aims and research questions. His interest in the theoretical and historical background of International Humanitarian Law moreover supported and guided the development of my thoughts.

Furthermore, I would like to thank Tyson Nicholas for his free time and interest during the period of the last year. It was always beneficial and interesting to discuss ideas in the field of International Humanitarian Law with him and to receive precise considerations from someone with a comprehensive practical experience.

All the teachers and lecturers of the International Human Rights Law programme, as well as all my fellow students, deserve high acknowledgements. They offered personal and critical views and invoked their different experiences. The diversity of individuals, academic backgrounds, and practical experiences enabled me to gain new insights and discover new

perspectives. Together they constantly challenged my point of view and made me overthink convictions − which is also reflected in this work.

Additionally, I would like to give thanks to the Raoul Wallenberg Institute and its fantastic library. Only its resources and facilities enabled me to write this thesis. A special thanks goes to Lena Olsson, the senior adviser, for her help with research material, for her will to make the library to the best possible environment for all students and for her unbroken enthusiasm about International Human Rights Law.

25 May 2022

Abbreviations

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
GCs	Geneva Conventions of 1949
GC I	Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II	Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GC III	Convention relative to the Treatment of Prisoners of War of 12 August 1949
GC IV	Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949
Hague Regulations	Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws of War on Land of 18 October 1907
IAC	International Armed Conflict
ICC Statute	Rome Statute of the International Criminal Court of 17 July 1998
ICJ	International Court of Justice
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
IHL	International Humanitarian Law
IL	International Law
IMT	International Military Tribunal (Nuremberg)
Lieber Code	General Order 100, Instructions for the Government of Armies of the United States in the Field from 1863 (issued by Francis Lieber)
LOAC	Law of Armed Conflict
NIAC	Non-International Armed Conflict
UNTS	United Nations Treaty Series
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America

1. Introduction: The Search for the Essence of International Humanitarian Law

"The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person […]."

− International Criminal Tribunal for the former Yugoslavia ("ICTY")[1]

The International Humanitarian Law ("IHL") is the international body of law that attempts to effectively limit the violent conduct in armed conflicts. The preliminary quote emphasizes the hope on which the IHL system is built. The expectation is that IHL, with protection as its essence, has the humanitarian potential to limit the suffering of individuals in times of armed conflicts.[2] Despite this narrative of protection, it is often claimed that IHL is in fact facilitating the conduct of armed conflicts and is not aligned to ensure the protection of individuals.[3]

The overall objective of this thesis is therefore to gain a better insight into the general orientation of IHL: is the protection of the individual human dignity really the essence of IHL or has the legal system a predominant permissive character that facilitates the interference with the rights of individuals?

The International Armed Conflict ("IAC") in the Ukraine emphasizes, that armed conflicts and their atrocities are not a question of the past but remain a reality of the 21st century. The current events thereby highlight that IHL − and especially the orientation at its core − continues to have a high significance for the international protection of individuals.

[1] *Prosecutor v Furundžija* (Judgement) ICTY IT-95-17/1-T (10 December 1998) <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> accessed 25 May 2022 [183].

[2] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226 [77–79]; Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 British Year Book of International Law 360, 363–364; Dietrich Schindler, 'International Humanitarian Law: Its Remarkable Development and Its Persistent Violation' (2003) 5 Journal of the History of International Law 165, 172.

[3] Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harvard International Law Journal 49, 50, 64; Charles J Dunlap Jr., 'Lawfare: A Decisive Element of 21st-Century Conflicts?' (2009) 54 JFQ: Joint Force Quarterly 34, 35; David Kennedy, *Of War and Law* (Princeton University Press 2006) 116; Robert Lawless, 'Practical and Conceptual Challenges to Doctrinal Military Necessity' in Claus Kreß and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (Oxford University Press 2020) 313.

1.1 Aims & Approach

To assess the essence of IHL, the thesis focuses on the military necessity principle. This focal point is justified because the said principle is one of the traditional core values of IHL.[4] Thus, an in-depth analysis of the principle can contribute to the understanding of the overarching IHL system. This is especially the case since it will be established in this context, that the character of the military necessity principle makes it an indicator of the general orientation of the IHL system.

The ancient Kriegsraison doctrine is the ideal benchmark to measure the military necessity principle against. The analysis of the Kriegsraison doctrine will illustrate, that the doctrine permits to override the laws of war for the achievement of military objectives in armed conflicts. This ability to suspend the laws of war for reasons of military advantages enabled the practice in the past to rely on the Kriegsraison doctrine when justifying the most cruel and barbaric acts of armed conflict. The general opinion is that the Kriegsraison doctrine was for these reasons rejected by a protective and humanitarian orientation in modern IHL.[5]

Nonetheless, the Kriegsraison doctrine and the military necessity principle are associated with each other. There is on the one hand a linguistic relatedness between the Kriegsraison doctrine and the military necessity principle. The doctrine was in the past translated from German into English with a variant of the term "military necessity".[6] Furthermore it was

[4] Bundesministerium der Verteidigung (German Ministry of Defence), Zentrale Dienstvorschrift - Humanitäres Völkerrecht in bewaffneten Konflikten (Joint Service Regulation - International Humanitarian Law in Armed Conflicts) 2016 [A-2141/1] paras 141–142; Burrus M Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 The American Journal of International Law 213, 230; Emily Crawford and Alison Pert, *International Humanitarian Law* (2nd edn, Cambridge University Press 2020) 45; Lawless (n 3) 288; Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 795, 796; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press 2005) 21.

[5] *United States of America vs Wilhelm List, et al. (Hostage Case)* [1948] Nuernberg Military Tribunals Case No 7, Volume XI Trials of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No 10 - Nuernberg October 1946-April 1949 (United States Government Printing Office, 1950) 757, 1256, 1272; Crawford and Pert (n 4) 50; Scott Horton, 'Kriegsraison or Military Necessity - The Bush Administration's Wilhelmine Attitude towards the Conduct of War Legal Issues Surrounding Guantanamo Bay' (2007) 30 Fordham International Law Journal 576, 589; Gary D Solis, *The Law of Armed Conflict - International Humanitarian Law in War* (2nd edn, Cambridge University Press 2016) 288–289.

[6] *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1272; Department of the Army and United States Marine Corps, The Commander's Handbook on the Law of Land Warfare 2019 [FM 6-27, MCTP 11-10C] para 8-73; Horton (n 5) 586–587; The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol XII (His Majesty's Stationery Office 1949) 123.

several times attempted to invoke the doctrine as legal justification with reference to the military necessity principle.[7] The consequential association between the concepts is reflected by the fact that most of the current literature and military manuals still see the need to distinguish the military necessity principle from the Kriegsraison doctrine.[8] Moreover it is even argued that the military necessity principle entails the resurrection of the Kriegsraison doctrine.[9]

Despite the claimed fundamental rejection of the Kriegsraison doctrine by modern IHL, there thus seems to be a relation between the doctrine and the military necessity principle. Therefore, the thesis compares the two concepts with each other to demonstrate the level of comparability and to examine its implications. A distinguishable character of the military necessity principle could confirm that modern IHL follows a humanitarian and protective orientation. A great overlap or the resurrection in modern IHL however would indicate that military freedom of action still overrules humanitarian limitation, and that human dignity thus cannot be at the core of IHL.

1.2 Research Question, Methodology & Material

In accordance with the objective and approach of the thesis, the overall research question is: does the military necessity principle differ from the Kriegsraison doctrine and what does their relationship imply for IHL in general?

To find a response to this question, a collection of four sub-questions is introduced that guides the thesis and its outline:

1. What is the Kriegsraison doctrine and why should it remain a relic of the past?
2. What is the military necessity principle and why has the principle's character implications for the general orientation of IHL?

[7] *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1253; Catherine Connolly, '"Necessity Knows No Law": The Resurrection of Kriegsraison through the US Targeted Killing Programme' (2017) 22 Journal of Conflict & Security Law 463, 467; The United Nations War Crimes Commission (n 6) 123.

[8] Chief of Defence Staff and Office of the Judge Advocate General, Joint Doctrine Manual - Law of Armed Conflict at the Operational and Tactical Levels 2001 [B-GJ-005-104/FP-021] s 202 para 5; Department of the Army and United States Marine Corps, The Commander's Handbook on the Law of Land Warfare (n 6) para 8-73; Lawless (n 3) 318 fn 165; Solis (n 5) 284–289.

[9] Eg: af Jochnick and Normand (n 3) 64 fn 59; Connolly (n 7) 495–496; Horton (n 5) 598.

3. Does the military necessity principle systematically differ from the Kriegsraison doctrine or is the principle the resurrection of the doctrine?
4. What does the relationship between the military necessity principle and the Kriegsraison doctrine imply for IHL in general?

Methodologically the thesis is based on the legal interpretation of international treaty law, international customary law, international jurisprudence, and practice. With the help of legal literature from academia, the material is made accessible through teleological, historical, systematic, and textual interpretation tools. The results of the interpretation processes are subsequently compared and evaluated.

Due to the lack of hard law, the analysis of the dogmatic development of Kriegsraison is focused on the academic work of *Lueder*, who introduced the doctrine into law and essentially shaped it.[10] His theoretical work is interpreted to clarify the structure and function of the concept. Various examples from the practical application of the doctrine are introduced to fill the theory with substance. Here the thesis relies on a German military manual from the beginning of the 20th century to illustrate how the laws of war and especially the Kriegsraison doctrine were understood by the German armed forces. The processes in front of the United States International Military Tribunal ("IMT") in Nuremberg further clarify this understanding. Academic literature delivers additional examples for the application of the Kriegsraison doctrine during World War I and World War II. Theory and practice are then consolidated to establish the framework of the Kriegsraison doctrine that will be used throughout the following assessment. To determine the formal rejection of the Kriegsraison doctrine in International Law ("IL"), the different international treaties that form the basis of IHL are introduced and interpreted. Similarly, relevant international jurisprudence is considered. Here again the focus lies on the decisions of the IMT after World War II. Reason for this focus is that it was the only occasion where the Kriegsraison doctrine was directly invoked in front of an

[10] Karl Lueder, '27. Stück: Krieg und Kriegsrecht im Allgemeinen' in Franz von Holtzendorff (ed), *Die Staatsstreitigkeiten und ihre Entscheidung*, vol 4 (Verlagsanstalt und Druckerei AG (vormals JF Richter) 1889); Karl Lueder, '28. Stück: Das Landkriegsrecht im Besonderen' in Franz von Holtzendorff (ed), *Die Staatsstreitigkeiten und ihre Entscheidung*, vol 4 (Verlagsanstalt und Druckerei AG (vormals JF Richter) 1889).

international tribunal or court. To complete the picture, arguments from contemporary and modern legal literature, that reject the Kriegsraison doctrine, are considered.

To determine the material for the interpretation of the content of the military necessity principle, the origin of the concept is the basis. In this context General Order 100, Instructions for the Government of Armies of the United States in the Field from 1863 ("Lieber Code")[11] and the jurisprudence of the IMT are mainly used. Based on the carved-out material, the modern military necessity principle is observed from a theoretical and practical perspective and its components examined. Additionally, a theory from *Luban* is used which demonstrates that the IHL system is divided into two opposing movements that disagree about the basic orientation of IHL.[12] This conflict shapes the IHL system. For the two poles the terms "LOAC vision" and "IHL vision" are introduced.[13] The thesis resorts to these notions because they appropriately reflect the connection and differences between the two movements. Terms and theory are applied to establish the role that the military necessity principle plays within the IHL system.

The products of the theoretical and practical analysis of the Kriegsraison doctrine and the military necessity principle are the foundation for their comparison. To enable the focus on their systematic relation, the comparative work is an isolated contemplation. Thus, the military necessity principle and the Kriegsraison doctrine are as far as possible compared detached from their surrounding legal circumstances. The analysis investigates similarities and differences between the concepts from a teleological, conceptual, and functional point of view.

The conclusion of the thesis brings together the results of the paper. The level of comparability between the Kriegsraison doctrine and the military necessity principle is interpreted in correlation with the established indicator-function of the principle for IHL in general.

[11] General Order 100, Instructions for the Government of Armies of the United States in the Field from 1863 (issued by Francis Lieber, promulgated 24 April 1863), Dietrich Schindler and Jirí Toman (eds), *The Laws of Armed Conflicts - A Collection of Conventions, Resolutions and Other Documents* (4th edn, Martinus Nijhoff Publishers 2004) 3.
[12] David Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 Leiden Journal of International Law 315.
[13] ibid 316.

The thesis and its methodology were initially inspired by the doctrinal work of *af Jochnick* and *Normand*, who introduced a strong critical perspective on the history of humanitarian instruments in IHL.[14] Their challenging of the intentions of well-known treaty law animated the critical assessment of the military necessity principle. *Connolly* and *Horton* caused the idea for the comparison between the principle and the Kriegsraison doctrine by claiming the resurrection of the doctrine in modern IHL.[15] Surprisingly inspiring for this paper was as well the late *Lueder* – the "theoretical father" of the Kriegsraison doctrine. His bona fide regarding the consistency and suitability of the Kriegsraison doctrine posed as a challenge to illustrate the flaws and shortcomings of the theory.

1.3 Outline

Following the order of the guiding questions, the thesis starts with answering the first sub-question by introducing the Kriegsraison doctrine to establish the benchmark for the following work (2.). The theoretical doctrine and the practical application, together with the international reception then establish why the doctrine is a negative example for IHL and the military necessity principle.

Next, to carve out its components, origin and content of the military necessity principle are illustrated (3.). This part furthermore concludes that the principle has an indicator-function regarding the general orientation of IHL. The chapter is therefore able to respond to the second research sub-question.

The third sub-question is answered by the following chapter (4.). Accordingly, based on the preceding assessments, the extracted military necessity principle and Kriegsraison doctrine are compared in a systematic way.

The conclusion summarizes the work of the thesis and examines the meaning of the comparative results for the essence of IHL (5.). This chapter reacts to the last sub-question and therefore can answer the overall research question. Additionally, this part takes a short outlook on what the general orientation indicates for the future regulation of armed conflicts

[14] af Jochnick and Normand (n 3).
[15] Connolly (n 7); Horton (n 5).

at the international level. In this context it is as well observed what relationship the essence of IHL has with the concept of "lawfare".

1.4 Terminology

As already illustrated throughout this introduction, the thesis distinguishes between the Kriegsraison *doctrine* and the military necessity *principle*. The terms are used because they are the traditional descriptions for the two legal concepts and hence facilitate the distinguishment. Furthermore, the term "principle" expresses that the military necessity principle serves as a basis for continuative law and legal interpretation within a comprehensive system of laws. The "doctrine", in the meanwhile, is understood as a self-contained concept that has no further interrelation with the surrounding law.

To ensure broad applicability, and in accordance with the Geneva Conventions from 1949 ("GCs"),[16] the thesis makes predominantly use of the term "armed conflict". The potentially limiting descriptions "war" or "warfare" are used as part of quotations or applied in their contemporary linguistic context. Nonetheless the terms have the same meaning within this work.

Furthermore, it must be explained why the thesis refers to *law of war*, *Law of Armed Conflict* ("LOAC"), and *IHL* while referring to the same body of law. The terminology for the law has developed over time.[17] Within this paper, the terms are used in the context of their respective historic application but address the same body of law that is nowadays known as IHL.

Finally, the thesis distinguishes between military necessity and the military necessity *principle*. Military necessity is understood as a purely practical consideration of military options and requirements to reach a certain objective or advantage in an operation. It is thus an argument of armed conflicts that integrates contemplations of military practicability, feasibility, and efficiency into IHL. The military necessity *principle* on the other hand identifies the legal concept with all its layers and functions.

[16] Crawford and Pert (n 4) 34.
[17] ibid; Charles J Dunlap Jr., 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts' (2001) 2 <https://people.duke.edu/~pfeaver/dunlap.pdf> accessed 25 May 2022; Schmitt (n 4) 805–806.

1.5 Limitations

The thesis focuses exclusively on the jus in bello and excludes questions regarding the legality of use of force − or respectively, the jus ad bellum. This is the case because the focus of the thesis, the military necessity principle, exclusively plays a role within the jus in bello.

While the distinguishment between IACs and Non-International Armed Conflicts ("NIACs") is highly relevant to determine the applicable law,[18] the paper will regularly not undertake this distinction. The military necessity principle is one of the core principles of IHL and is recognized in international customary law.[19] It is thus indistinctively applicable in IACs and NIACs. Hence is a differentiation between the terms usually not necessary in the context of this work.

[18] Crawford and Pert (n 4) 54; Solis (n 5) 159–160.
[19] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press 2005) Rules 50, 51, 56; Solis (n 5) 277.

2. The Kriegsraison Doctrine – Predominance of Military Interests in Law

"What leader would allow his country to be destroyed because of international law?"

– attributed to Otto von Bismarck[20]

This chapter exposits the theoretical origin of the Kriegsraison doctrine as well as its application in practice. Subsequent the international reception of the doctrine is illuminated. The interplay between theoretic object of the doctrine, its practical realization and the international reception will explain the perception of an overall rejection of the Kriegsraison doctrine. It simultaneously illustrates, why a resurrection of the Kriegsraison doctrine within the military necessity principle would have a significant indication for the principle and IHL.

2.1 The Doctrine in Theory

The Kriegsraison doctrine origins from an old German proverb, which established "Kriegsraison geht vor Kriegsmanier" – meaning that "the necessity in war overrules the manner of warfare". It can be traced back several centuries to a point in time when armed conflicts were not regulated by any strict laws, but by loose common understandings and typical habits.[21] In 1889, the German law professor *Lueder* lifted the doctrine into legal scholarship and academic thinking.[22]

a) The Systematic Structure

Lueder recognized that binding legal rules exist – originating from custom and treaties – which establish rights and obligations for all interrelations during armed conflicts.[23] These rules also included humanitarian limitations for the methods and means of warfare and legal protection

[20] af Jochnick and Normand (n 3) 64.
[21] Lassa FL Oppenheim, *Disputes, War and Neutrality*, vol II (Hersch Lauterpacht ed, 5th edn, Longmans, Green and Co 1935) 193–194; Solis (n 5) 284–285.
[22] af Jochnick and Normand (n 3) 63; Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Weidenfeld and Nicolson 1980) 172–173; Connolly (n 7) 466; James W Garner, 'The German War Code' (1918) 1 Urbana, University of Illinois under Direction of the War Committee 3, 11; Oppenheim (n 21) 193; John H Morgan, *The War Book of the German General Staff - Being 'The Usages of War on Land' Issued by the Great General Staff of the German Army* (McBride, Nast & Company 1915) 6; Jesse S Reeves, 'The Neutralization of Belgium and the Doctrine of Kriegsraison' (1915) 13 Michigan Law Review 179, 180; John Westlake, *Chapters on the Principles of International Law* (Fred B Rothman (originally published by Cambridge University Press 1894) 1982) 238.
[23] Lueder, '27. Stück: Krieg und Kriegsrecht im Allgemeinen' (n 10) 253–254, 265.

for civilians.[24] *Lueder* named this collection of legal limitations the "Kriegsmanier".[25] Deviant from the direct translation of mere "manners of war", *Lueder* thought the limitations to be legally binding.[26] Thus the Kriegsmanier was generally portrayed as inviolable.[27]

To understand the next step of *Lueder*'s argumentation, it is important to consider the predominant perception of war in Germany at that time. *Von Clausewitz*, a Prussian officer and military scientist, laid the foundation of this German understanding of the role of war.[28] Both, *Lueder* and *von Clausewitz*, viewed war as a tool of international politics for when the elimination of an enemy was the only remaining option for one's survival.[29] Consequently, they attributed an absolute character to war with a perspective that implied a "life or death"-conflict for entire nations. The view, that the only object of war is the complete defeat of the opponent to avoid one's own extermination leaves one logical consequence: all acts of armed conflict which are necessary to reach the object must be permissible − without legal or moral limitation.[30] Anything else would mean a contradiction to the object.[31]

The Kriegsraison doctrine is the translation of this general perception of war into law. According to *Lueder*, the absolute nature of armed conflicts makes exceptions from the regular obligation to observe and follow the laws of war necessary. Two exceptions from the rule are therefore introduced as the "Kriegsraison": situations of extreme necessity and situations of retaliation.[32]

The ratio of the retaliation exception is that compliance with the Kriegsmanier in armed conflicts cannot be expected from one party while the other party violates the law.[33] The consequence of the exception is that also the former party is no longer bound by the laws of war.

[24] ibid 185, 265.
[25] ibid 254.
[26] ibid 253–254.
[27] ibid.
[28] Carl von Clausewitz, *On War* (Tom Griffith ed, James John Graham tr, Wordsworth 1997) 5–6, 13–14.
[29] Lueder, '27. Stück: Krieg und Kriegsrecht im Allgemeinen' (n 10) 185; von Clausewitz (n 28) 363.
[30] Lueder, '27. Stück: Krieg und Kriegsrecht im Allgemeinen' (n 10) 187.
[31] ibid.
[32] ibid 254.
[33] ibid 255.

When discussing Kriegsraison in the context of this thesis, the exception of extreme necessity is the more relevant because its concept suggests a closer relation to the military necessity principle. According to *Lueder*, a situation of extreme necessity occurs when the object of the war can exclusively be achieved by the non-observance of the laws of war while the observance would foil the object.[34] *Lueder* argues that in this case group the interference with the Kriegsmanier must be permitted, because the achievement of the objects of war precedes all other considerations of law.[35] To verify this exception *Lueder* points out that also in criminal law the harming of others and the corresponding interference with law is permissible in exceptional circumstances (e.g.: self-defence). According to *Lueder* this principle must a fortiori find application in wars where much more is on the line than the physical integrity and the life of single individuals.[36] Furthermore, it is argued, that the denegation of exceptions from the law in these situations would be useless. The claim is that no military leader would rather follow international rules than to sacrifice the own party's military advantage and success. The latter argument reflects the same point of view as the preliminary quote that is attributed to *von Bismarck*.

The legal consequence of the exceptional cases is that the invoking party can lawfully interfere with all recognized and formally binding rules that limit acts of armed conflict. Consequently, every law of war may be disregarded.[37] To put it simple: Kriegsraison overrules the laws of war.

b) The Attempt of Limitation

To restrict these far-reaching legal consequences, *Lueder* declares that the application of Kriegsraison must remain the absolute exception. In this context *Lueder* highlights that Kriegsraison is not meant as a general denunciation of the laws of war.[38] This attempt to limit and relativise the extensive consequences of Kriegsraison is foiled by the fact, that the doctrine can indeed omit all laws of war. Relevant in this regard is as well that the only entity that can make the decision regarding the application of Kriegsraison is the legally competent

[34] ibid 254.
[35] ibid 255.
[36] ibid.
[37] ibid 190.
[38] ibid 256.

organ.[39] This means in practice, that regularly the acting commander of a military operation is able to override every rule and prohibition of the laws of war that limit her freedom to act on her own account. These circumstances facilitate an overly excessive application of the Kriegsraison doctrine. Hence the absolute exceptional character which *Lueder* tried to attribute to the Kriegsraison doctrine is questionable.

Lueder additionally extended the scope of the Kriegsraison doctrine even further by casually adding another exceptional case group. In this regard, *Lueder* accepted as Kriegsraison (1) acts that show the enemy the seriousness of a frivolously continued war to enforce peace and (2) acts that generally prevent the advance of enemy troops.[40] The outcome of the armed conflict in these new cases does not exclusively depend on the violation of the laws of war. Also, they do not require a preceding violation of Kriegsmanier by the opposing party. Hence the two new cases do not fall under the two established Kriegsraison case groups. The acts of armed conflict in the two additional examples just generally support the achievement of military objects in war. Thus, *Lueder* further extended the case groups of Kriegsraison with a third exception that permits the violation of the laws of war for the improvement of the own military position. *Lueder* underscored this extension when noting that to justify the application of the Kriegsraison doctrine momentary military advantages are enough since they might be of importance for the objects of the armed conflict in the long-term.[41] In fact, this theoretic structure allows to invoke the Kriegsraison doctrine in every single battle since military advantages are generally at stake in armed conflicts. Therefore, *Lueder* disproved his earlier claim, that Kriegsraison is of an exclusively exceptional nature.

c) A Backdoor for the Laws of War

The reference to the Kriegsraison doctrine allowed the violation of laws of war for retaliation, situations of extreme necessity and moreover for the sake of mere momentary military advantages. In conclusion, the Kriegsraison doctrine created a backdoor to circumvent the laws of war. Once opened, the backdoor leads to a limitless area of warfare by serving as justification for all interferences with all laws of war. In a Realpolitik-manner, the Kriegsraison

[39] ibid 187.
[40] Lueder, '28. Stück: Das Landkriegsrecht im Besonderen' (n 10) 484.
[41] ibid.

doctrine accepted that interferences with the laws of war must be accepted and legalized for the simple reason that they must take place to achieve the overall objects of a war.[42]

2.2 The Practical Application

To gain a holistic understanding of the concept, the following section illuminates how the Kriegsraison doctrine was translated into practice.

a) The Translation from Theory to Practice

A German military manual from 1902 converted international and national rules and procedures for warfare into practical directions for army officers.[43] Thus, the manual reflected the view of the leading practitioners and how they understood the transformation of Kriegsraison from theory to practice.[44] Directed at German officers the manual states in its introduction that "[a] war conducted with energy cannot be directed merely against the combatants of the Enemy State and the positions they occupy, but it will and must in like manner seek to destroy the total intellectual and material resources of the latter."[45] Hence the manual makes it clear from the beginning that it does not accept any absolute limitations for the methods and means of warfare but believes in total warfare. Thereby it joins in with the Kriegsraison doctrine. The manual seems to go one step further than the theoretic Kriegsraison doctrine when stating that "[h]umanitarian claims such as the protection of men and their goods can only be taken into consideration in so far as the nature and object of the war permit."[46] With this sentence the manual apparently turns around the exceptional character of the Kriegsraison doctrine. The theoretic doctrine formally applied Kriegsraison only as exception to the rule. The manual on the other hand gave general precedence to the objects of armed conflicts and thereby humanitarian protection became the exception to the rule.

The implementation of the Kriegsraison doctrine is furthermore exemplified when the manual calls it "[…] stigmatized as an unjustifiable compulsion […]" to use inhabitants to supply

[42] Lueder, '27. Stück: Krieg und Kriegsrecht im Allgemeinen' (n 10) 255.
[43] Garner (n 22) 4.
[44] ibid 6.
[45] Morgan (n 22) 68.
[46] ibid 68–69.

vehicles and to perform work for an occupying army.[47] In the next step it is nevertheless suggested that the Kriegsraison doctrine must decide in these cases.[48] The absolute domination of the object of war is additionally highlighted by the fact that the manual states, that against enemy combatants "[…] all means which modern inventions afford, including the fullest, most dangerous, and most massive means of destruction, may be utilized […]"[49]. In summary, the manual reflects a full dedication towards the object of war − without what still might be understood as formal restraint of the theoretic Kriegsraison doctrine. Altogether the Kriegsraison doctrine finds a more distinct and reckless expression.

In the context of World War I it is claimed that with the deportation of civilians as labour workers, the killing of hostages, the bombardment of undefended towns and the destruction of art galleries, historic monuments as well as educational buildings, German forces violated the laws of war and used the Kriegsraison doctrine as attempt to justify their actions.[50] On the other hand, it is advocated that the United Kingdom of Great Britain and Northern Ireland ("UK") also applied the Kriegsraison doctrine, when stopping and capturing ships with food resources, to enforce an embargo against Germany. These acts violated the laws of war because the embargo not only affected the German armed forces, but also caused the starvation of the civil population with the aim to defeat the thus weakened Germany militarily.[51]

During World War II, German officers tried to justify their attacks against merchant ships, the civilian population, and prisoners of war with the help of the Kriegsraison doctrine.[52] Also in front of the IMT, the doctrine was later invoked by defendants to legitimize illegal acts.[53] One defendant for example tried to justify, in the words of an order issued by himself, the commitment of "[r]uthless and immediate measures against the insurgents, against their

[47] ibid 154.
[48] ibid.
[49] ibid 85.
[50] Garner (n 22) 12–13.
[51] Robert L Nelson and Christopher Waters, 'Slow or Spectacular Death: Reconsidering the Legal History of Blockade and Submarines in World War I' (2019) 69 University of Toronto Law Journal 473, 482.
[52] Horton (n 5) 588; McKay M Smith, 'Bearing Silent Witness: A Grandfather's Secret Attestation to German War Crimes in Occupied France' (2013) 3 Law, Crime & History 82.
[53] The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol VIII (His Majesty's Stationery Office 1949) 66.

accomplices and their families. (Hanging, burning down of villages involved, seizure of more hostages, deportation of relatives, etc., into concentration camps.) [.]" with reference to Kriegsraison.[54]

b) The Consolidation of Theory & Practice

In conclusion, military forces during both World Wars made an excessive use of illegal methods and means of warfare in accordance with the Kriegsraison doctrine. When compared with the theoretic Kriegsraison doctrine, the practice seems to not fully accept an exceptional character of the doctrine. The practice rather applied the exception as the norm and thus apparently turned around the argumentation of the theory. But when considering the contradictions in *Lueder*'s theory that further extended the scope of the Kriegsraison doctrine, it becomes clear that the theory initiated and enabled the extensive application in practice. Theory and practice presuppose an absolute understanding of war, where all that counts is the ultimate defeat of the enemy. Accordingly, both enable an extensive and regular involvement of the Kriegsraison doctrine. With this cadence between theory and practice, the Kriegsraison doctrine receives its final holistic frame for the context of this thesis.

The practice revealed that the theoretic Kriegsraison doctrine was not equipped to face application as exceptional mechanism since it had an extensive scope. Furthermore, was its formally exceptional character not well-fortified against abuse. The Kriegsraison doctrine enabled parties to armed conflicts to constantly operate within a legal vacuum so to deliberately violate the laws of war to achieve military objectives. As the practical examples illustrate, this application of the Kriegsraison doctrine regularly led to acts of armed conflict that were of an especially relentless and brutal character.

2.3 The Kriegsraison Doctrine & The International Community

Reflections from law, jurisprudence, and legal literature illuminate that the Kriegsraison doctrine never officially received approval at the international stage. Moreover, the reaction by the international community delivers additional arguments that substantiate why the Kriegsraison doctrine forms a negative benchmark for IHL and the military necessity principle.

[54] ibid 38, 67.

a) Law

While the Kriegsraison doctrine included a backdoor towards a legal vacuum for absolute warfare, the 1907 Regulations concerning the Laws and Customs of War on Land[55] restricted methods and means of warfare without challenging the general bindingness of the limitations. Art. 22 Hague Regulations determines that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." Thus, different than the Kriegsraison doctrine, the norm establishes a generally applicable and definite limitation for acts of armed conflict. Continuing in this spirit, Art. 23 Hague Regulations prohibits certain acts of armed conflict. Different from the Kriegsraison doctrine, the Hague Regulations do not provide a mechanism for the limitless invalidation of this prohibition. Only in explicitly named cases is the interference with the law legitimate.[56] The Hague Regulations thus rejected the Kriegsraison doctrine by introducing inviolable limitations that do not provide general exceptions to prohibitions.[57] Later, the Hague Regulations became international customary law and thus applicable for all parties to armed conflicts.[58] Hence the rejection of the Kriegsraison doctrine by the Hague Regulations received authoritative rank at international level.

Westlake claimed that absolutely binding prohibitions were already recognized before the Hague Regulations came to existence.[59] He perceived for example the employment of poison and the refusing of quarter in armed conflicts as "[…] prohibited as too inhuman by a universal agreement […]" without exceptions.[60] While *Westlake* referred to unwritten, customary agreements, there are additionally treaties which support his claim. Already the 1856 Declaration of Paris,[61] which attempted to regulate naval warfare, disproved the Kriegsraison doctrine. The Declaration had a restricting effect on the parties, without providing an exception to the agreed principles. Furthermore, it was established that the parties were not allowed to enter other agreements which would violate the principles of the treaty.[62] This

[55] Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws of War on Land (adopted 18 October 1907, entered into force 26 January 1910) Schindler and Toman (n 11) 55 ("Hague Regulations").
[56] Art. 23 lit. g Hague Regulations. This exception is assessed in more detail under 3.2 b) ii), 4.2 and 4.4.
[57] Reeves (n 22) 181.
[58] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (n 2) paras 75, 79–81.
[59] Westlake (n 22) 236.
[60] ibid.
[61] Declaration Respecting Maritime Law of Paris (signed 16 April 1856) Schindler and Toman (n 11) 1055.
[62] Charles H Stockton, 'The Declaration of Paris' (1920) 14 The American Journal of International Law 356, 361.

illustrates that the signing parties intended to prevent any circumvention of the regulations and believed the treaty to be without suspending mechanisms. The refusal to tolerate anomalies and the attempt to preclude circumventions must be understood as rejection of the Kriegsraison doctrine. The same negation of limitless exceptions to the laws of war can be extracted from General Order 100, Instructions for the Government of Armies of the United States in the Field from 1863, which established the laws of war as outmost and inviolable limitation for warfare.[63]

More recent international treaties include a similar repudiation of limitless exceptions from restrictions on acts of armed conflict. The GCs sent the strongest signal yet against the Kriegsraison doctrine. Common Art. 3 I GCs, which regulates the minimum provisions that contracting parties have to observe in NIACs, states that certain acts "[…] are and shall remain prohibited *at any time* and *in any place* whatsoever […]"[64]. Common Art. 3 GCs thus establishes that there is no case at all in NIACs, where the basic rules might be interfered with. It follows, that all GCs acknowledge that there is a certain minimum standard in IHL, that cannot be overridden under any circumstances. This means that the basic idea of Kriegsraison − a backdoor towards a legal vacuum without binding law − is declined by the GCs.

Further examples for the opposition against the Kriegsraison doctrine can be found throughout all GCs. Art. 34 GC I does on the one hand provide an exception to the rule that "[…] real and personal property of aid societies which are admitted to the privileges of the Convention shall be regarded as private property." But the exception is limited and qualified by the fact that any requisition of such property can only happen in cases of urgent necessity "[…] and only after the welfare of the wounded and sick has been ensured." With the need to fulfil these qualifications, GC I thereby sets a high threshold of protection to the exception. Thus Art. 34 GC I shows that limitless exceptions like under the Kriegsraison doctrine are not accepted by modern IHL. The rejection of such limitless exceptions is also expressed by Art. 22, 24-26 of the Convention for the Amelioration of the Condition of Wounded, Sick and

[63] Art. 14 Lieber Code. The paper will discuss the Lieber Code in detail when analysing the origin and content of the principle of military necessity.
[64] Eg in: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ("GC I"). Emphasis added.

Shipwrecked Members of Armed Forces at Sea from 1949[65]. The articles grant protection to ships that provide relief for the wounded and shipwrecked. Art. 22 GC II establishes that these ships are absolutely protected and thus can *never* "[…] be attacked or captured, but shall at all times be respected and protected […]". Art. 5 of the Convention relative to the Protection of Civilian Persons in Time of War[66] regulates the treatment of persons within the territory or occupied territory of a contracting party, who have active hostile intent against that party, or are spies or saboteurs. Due to the character of their activities, the persons are excepted from the general protection of civilians. But even then, these persons still must be "[…] treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention."[67] In that way Art. 5 GC IV reintroduces a minimum protection for the concerned persons, that finds general application and thus prevents a limitless legal vacuum. Finally, according to Art. 146 GC IV, grave breaches of the Convention are to be made punishable by the contracting parties. Art. 147 GC IV includes the definition and lists several acts, which establish "grave breaches". Only acts of armed conflict that are militarily necessary, lawful and not conducted wantonly are not considered to be grave breaches.[68] Consequently, acts that are taken in accordance with reasons of military necessity can still amount to grave breaches if they are not in compliance with the law. Thus, military considerations can never justify the breach of positive formulated, absolute prohibitions that limit the methods and means of warfare in the GCs.

Different than the Kriegsraison doctrine, the GCs do not allow measures that go beyond the positive IHL. In the end this means an absolute rejection of the Kriegsraison doctrine by the GCs − or as *Horton* formulates it: the GCs "[…] put the last nails in the coffin of the doctrine of *Kriegsraison*."[69]

[65] Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ("GC II").
[66] Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 ("GC IV").
[67] Art. 5 GC IV.
[68] Similar regulations can be found in all the other GCs: Art. 49, 50 GC I, Art. 50, 51 GC II, Art. 129, 130 Convention relative to the Treatment of Prisoners of War ((adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135) ("GC III").
[69] Horton (n 5) 589.

The formal rejection of Kriegsraison in IHL was confirmed by the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts[70]. Art. 35 I AP I states that "[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." The rule establishes that acts of armed conflict in IACs are subject to absolute limitations. Or to fall back on the words of the Commentary on the AP I: the Kriegsraison doctrine "[…] is totally incompatible with the wording of Art. 35 I, and with the very existence of the Protocol."[71]

Most of the current national military manuals emphasize the denegation of the Kriegsraison doctrine in IHL. For example, the version of the UK states that "[n]ecessity cannot be used to justify actions prohibited by law."[72] The manual thus shows that military measures are not legally unlimited to achieve objects in armed conflicts. The United States of America ("US") accept positive IHL prohibitions as the absolute limitation for militarily required operations and infer a general rejection of the Kriegsraison doctrine.[73] In contrast to its predecessors, the modern German armed forces similarly recognize the restriction of methods and means of warfare by IHL and that military considerations cannot justify all deviations.[74]

In conclusion, IHL − formed by customs and treaties over the last 150 years − established an absolute inviolability for minimum restrictions of acts of armed conflict. This can be interpreted as the formal rejection of the foundations of the Kriegsraison doctrine by law.

b) Jurisprudence

In the aftermath of World War II, the Kriegsraison doctrine was invoked as defence strategy by defendants in front of the IMT in Nuremberg.

[70] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ("AP I").
[71] Claude Pilloud, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Yves Sandoz, Christophe Swinarski and Bruno Zimmermann eds, ICRC/Martinus Nijhoff Publishers 1987) para 1386.
[72] UK Ministry of Defence (n 4) 23.
[73] Department of the Army and United States Marine Corps, The Commander's Handbook on the Law of Land Warfare (n 6) para 8-73.
[74] Bundesministerium der Verteidigung (German Ministry of Defence) Zentrale Dienstvorschrift - Humanitäres Völkerrecht in bewaffneten Konflikten (Joint Service Regulation - International Humanitarian Law in Armed Conflicts) (n 4) paras 141, 142.

In US vs. von Leeb et al. − also known as „The High Command Case" − the prosecution carved out, that most defendants tried to invoke considerations of military necessity to justify their application of the so called "scorched earth policy".[75] The strategy of this policy is to leave no infrastructure, material or other objects behind which could be useful for the opposing party, when retreating from a territory during an armed conflict. Under this strategy, acts like the deportation, enslavement and starvation of civilians were committed by the German defendants. According to the prosecution there was generally no legitimate defence for the commitment of these acts because they were prohibited without exception by Art. 49-52 Hague Regulations.[76] The prosecution therefore defined the defendants' particular understanding of military necessity as Kriegsraison, because it was "[…] merely a denial of all laws, and a reaffirmation of the philosophy that the end justifies the means."[77]

In the following judgement, the IMT agreed with the prosecution regarding the invocation of the Kriegsraison doctrine by the defendants. The judges held that since Kriegsraison would include the right "[…] to do anything that contributes to the winning of war […]" such a mechanism would "[…] eliminate all humanity and decency and all law from the conduct of war […]".[78] The IMT reflected that the Kriegsraison doctrine violated the generally accepted principles of war and that the defendants could not justify their acts that way.[79] In conclusion, the IMT declared the Kriegsraison doctrine to be inconsistent with the applicable laws of war.

The IMT was also concerned with the Kriegsraison doctrine in US vs. List et al. − called the "Hostages Case" − because defendants again tried to justify their criminal acts by referring to the doctrine.[80] According to the IMT, the defendants misused the basically lawful principle of military necessity as a concept of military convenience and mere strategical interest when invoking Kriegsraison.[81] Subsequently, the IMT argued that Kriegsraison could not legalize

[75] The United Nations War Crimes Commission (n 6) 123.
[76] ibid 124.
[77] ibid 123.
[78] *United States of America vs von Leeb, et al. (High Command Case)* [1948] Nuernberg Military Tribunals Case No 12, Volume XI Trials of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No 10 - Nuernberg October 1946-April 1949 (United States Government Printing Office, 1950) 1, 541.
[79] ibid.
[80] William G Downey, 'The Law of War and Military Necessity' (1953) 47 The American Journal of International Law 251, 253.
[81] *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1252.

violations of positive rules in IL, since these rules established "prohibitive law".[82] In this context, the Kriegsraison doctrine was thus rejected because "[…] the rules of international law must be followed even if it results in the loss of a battle or even a war."[83]

The "Krupp Case" − US vs. Krupp von Bohlen und Halbach et al. − added further reasons in favour of the consistent denegation of the Kriegsraison doctrine. Here, the IMT argued that an armed conflict is an unforeseeable process, which generally leads to a struggle for life with unpredictable end.[84] According to the IMT, this feature was obvious to the persons involved in the creation of the "[…] rules and customs of land warfare […]".[85] Consequently the laws of war were made "[…] specifically for all phases of war."[86] Thus, there was no space for the Kriegsraison doctrine since the laws were applicable and binding in the doctrine's exceptional cases as well. Therefore, the IMT did not permit the argument of the defendants, that special situations would call for special measures that go beyond the law. For the IMT to accept Kriegsraison as defence would have meant "[…] to abrogate the laws and customs of war entirely."[87]

Altogether the judgements of the IMT were "[…] an affirmation that law must operate even in the chaos of total war."[88] The jurisprudence exemplified clear opposition to the Kriegsraison doctrine because the IMT refused to accept a limitless legal vacuum as consequence of the occurrence of special circumstances. On several occasions the IMT even explicitly rejected the Kriegsraison doctrine as a legal justification for illegal acts of armed conflict. It was thus confirmed that the Kriegsraison doctrine "[…] was condemned at Nuremberg […]"[89].

[82] ibid 1255–1256.
[83] ibid 1272.
[84] *United States of America vs Alfried Felix Alwyn Krupp von Bohlen und Halbach, et al. (Krupp Case)* [1948] Nuernberg Military Tribunals Case No 10, Volume IX Trials of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No 10 - Nuernberg October 1946-April 1949 (United States Government Printing Office, 1950) 7, 1347.
[85] ibid.
[86] ibid.
[87] ibid.
[88] af Jochnick and Normand (n 3) 90.
[89] Pilloud (n 71) para 1386.

c) Legal Literature

In 1894 *Westlake* exemplified that already contemporary authors criticized *Lueder* and his theoretic development of the Kriegsraison doctrine. He pointed out that the doctrine introduced two different levels for acts of armed conflicts: those that are generally necessary in war and others that are necessary in the exceptional circumstances of extreme necessity.[90] The distinguishment, based on different degrees of necessity, was subsequentially attacked for its uncertainty. Furthermore, *Westlake* questioned the moral integrity of Kriegsraison. His point was that the imprecise two-levelled benchmark of necessity could, because of the one-sided assessment of the same party that benefits from the act in question, easily be misused.[91] In consequence for him the doctrine "[…] practically reduces to narrow limits the protection given by any laws of war."[92] According to *Westlake* individuals would be safer in times of armed conflict with prohibitive laws of war without "[…] a licence to disregard them on the plea of necessity."[93]

Next, *Westlake* identified a mistake in *Lueder*'s analogy with the principle of self-defence in criminal law that he used to justify the existence of the Kriegsraison exceptions. *Westlake* clarified that the legal justification might be possible for the case of defensive violence against an attacker. But a justification would be impossible in criminal law, in a situation where violence was used with reference to self-defence against a third person, that did not attack, did not pose a risk nor was a party to a violent conflict.[94] The Kriegsraison doctrine does not include the limitation that the acts of armed conflict taken under the exceptional cases must be directed against the same entity that triggered the circumstances of the Kriegsraison exception. Thus, under the Kriegsraison doctrine, unlimited acts of armed conflicts could be committed against an entity that was not involved in the occurrence of the situation that triggered the Kriegsraison doctrine. Especially civilians could thus be targeted under the doctrine. *Lueder*'s argument, that the Kriegsraison doctrine follows a generally accepted provision in criminal law is thus wrong.

[90] Westlake (n 22) 241.
[91] ibid 243.
[92] ibid 249.
[93] ibid.
[94] ibid 258–259.

The Kriegsraison doctrine was furthermore criticized in the context of German conduct during World War I. *Garner* condemned the Kriegsraison doctrine for being used as exculpation for many violations in favour of German interests because the doctrine equalized considerations of military necessity with mere military interest.[95] Additionally, the doctrine was criticised for signifying a denunciation of IL altogether since any existing rules could simply be repealed.[96] A critique that was renewed during World War II was that the Kriegsraison doctrine allowed German forces to independently declare themselves disengaged from all laws of war. Altogether, the doctrine was denounced for being an expression of general contempt for the existing laws of war.[97]

It was also argued that Kriegsraison originated from a time when there was no binding law of war and that the introduction of obligatory law rendered Kriegsraison outdated.[98] The claim was that Kriegsraison could not continue to precede the "[…] firm rules recognised either by international treaties or by general custom."[99] It was disagreed that no distinguishment between Kriegsmanier and binding laws of war had to be made. According to this reasoning, the Kriegsraison doctrine wrongly assumed that the ancient non-binding habits of warfare were at the same level as the newly emerging binding laws of war. This argument explains why the Kriegsraison doctrine was able to insist on the absolute predominance of military considerations over the laws of war, while all other established legal instruments assumed the inviolability of the law.

Legal literature that rejects the Kriegsraison doctrine is found throughout the existence of the doctrine. During this period, several different arguments were produced to establish why the doctrine should be rejected.

[95] Garner (n 22) 12, 13–14. The same trend was already detected in: Lueder, '28. Stück: Das Landkriegsrecht im Besonderen' (n 10) 484.
[96] Elihu Root, 'Opening Address of the 15th Annual Meeting of the American Society of International Law, 27 April 1921' (1921) 15 American Society of International Law Proceedings 1, 2.
[97] Smith (n 52) 94.
[98] Oppenheim (n 21) 194.
[99] ibid.

d) Absolute Opposition from the International Community

Altogether the analysis of the reactions to the Kriegsraison doctrine suggests a history of absolute opposition which dates back for longer than a century. IHL, jurisprudence and legal literature seem to have consistently declined the underlying principles and values of the Kriegsraison doctrine, based on convincing arguments. Especially its application received harsh opposition. In conclusion, the Kriegsraison doctrine was formally disposed as inconsistent doctrine and as incongruous with the modern IHL.

2.4 The Kriegsraison Doctrine: A Relic of the Past

The theoretic development by *Lueder* together with its transformation into practice shaped the frame of the Kriegsraison doctrine. The initial quote, attributed to *von Bismarck*, incarnates the attitude of the Kriegsraison doctrine regarding the laws of war. But the quote similarly points towards the dangers of the doctrine. The application of the Kriegsraison doctrine leads to a vacuum in armed conflicts where legal limitations find no application and the achievement of military objectives has absolute priority. The doctrine thus created a climate in warfare, where the inviolability of the laws of war and the protection of individuals was considered to be not significant. The practical application of the Kriegsraison doctrine exemplified the repulsive consequences of the doctrine.

As reaction, the Kriegsraison doctrine received stringent opposition throughout history. Arguments from law, jurisprudence and legal literature illuminate that the Kriegsraison doctrine was rejected by modern IHL as inconsistent and too permissive. This reaction explains the general perception of an overall rejection of the Kriegsraison doctrine by IHL. In accordance with this narrative, it is nowadays general opinion that the doctrine must stay a relic of the past. A resurrection of the Kriegsraison doctrine within the military necessity principle would prove the opposite and imply a reckless, permissive nature of the principle. To find such a principle at the core of IHL would furthermore question the protective orientation of this international body of law.

3. The Military Necessity Principle – At the Core of International Humanitarian Law

> "No principle is more central to [IHL], nor more misunderstood, than that of military necessity."
>
> – Michael N. Schmitt[100]

The following chapter illustrates the historical development of the military necessity principle and analyses its contemporary content from a theoretical and practical perspective. Finally, based on the carved-out characteristics, the position of the principle in relationship to the general orientation of the IHL system is classified. The aim is to thereby identify why the interpretation and application of the military necessity principle have implications for the evaluation of the general orientation of IHL.

3.1 The Origin of the Military Necessity Principle

An assessment of the origin of the military necessity principle can help to determine today's conception of the principle.[101]

a) The Lieber Code

It was *Lieber* who clearly articulated military necessity as a limiting factor for armed conflicts and elevated it to a general legal principle.[102] His code for the Union government was approved in 1863 by President *Lincoln*, transformed into General Orders No. 100 and named after its drafter, becoming the "Lieber Code".[103] The relevant articles in the context of the military necessity principle are Art. 14-16 Lieber Code.[104]

Art. 14 Lieber Code initially defines military necessity as "[…] the necessity of those measures which are *indispensable for securing the ends of the war*, and which are *lawful according to the modern law and usages of war*."[105] Comparable to *von Clausewitz*, the Lieber Code aims

[100] Schmitt (n 4) 796.
[101] Carnahan (n 4) 219.
[102] ibid 213, 215; Horton (n 5) 578; Solis (n 5) 279.
[103] Carnahan (n 4) 214–215.
[104] For the complete text of the Lieber Code see Schindler and Toman (n 11) 3.
[105] Emphasis added.

at "securing the ends of war" and thus highlights the importance of reaching the objectives of the conflict.[106] Nonetheless, Art. 14 Lieber Code limits the ways to reach that objective in a twofold way. First, the measures taken must be "indispensable" to achieve the target. Consequently, not all measures might be used in accordance with the Lieber Code. Only the inevitable option that could potentially lead to the "ends of war" is in accordance with the Lieber Code. Secondly, all acts of armed conflict must be in accordance with "the modern law and usages of war." Thus Art. 14 Lieber Code subordinated all methods and means of warfare under the limitations of the existing laws of war.[107]

Art. 15 Lieber Code concretises the definition of the military necessity principle by listing acts of armed conflict which are acceptable under the principle. The definition becomes more detailed with Art. 16 Lieber Code, which limits the legitimate violence under the principle by excluding cruelty (inter alia torture), the use of poison, wanton devastation, perfidy and acts which make the return to peace unnecessarily difficult.

In conclusion, the most important features that the Lieber Code attributed to the military necessity principle are the general intent to limit violence in armed conflicts by law and the subordination of military necessities under these laws of war. Different than the Kriegsraison doctrine, the Lieber Code did not provide any general exceptions from the laws of war.

b) Transitional Period

The Lieber Code with its definition and implementation of the military necessity principle was well received in the international sphere.

In 1868, the St. Petersburg Declaration[108] banned certain arms that were considered unnecessarily cruel and therefore inhumane.[109] The preamble of the Declaration stated, "[t]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy […]." The preamble thus linked the legitimization

[106] von Clausewitz (n 28) 8.
[107] ibid 5, 7. *Von Clausewitz* here clearly has a different opinion than the Lieber Code.
[108] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Gramm Weight (signed 29 November/11 December 1868), Schindler and Toman (n 11) 91.
[109] Crawford and Pert (n 4) 8.

of certain acts of armed conflict to their "indispensable" role for the achievement of the "ends of war". The Declaration thus clearly repeated the ideas of the Lieber Code − even though the scope was limited to certain weapons and the military necessity principle was not mentioned explicitly.

The next important step for the principle of military necessity was the ratification of the Hague Regulations.[110] Especially the preamble makes it clear that the spirit of the Lieber Code's military necessity principle underlies the instrument.[111] When the preamble notes the "[…] desire to diminish the evils of war, as far as military requirements permit […]", it becomes obvious that the idea of limiting the methods and means of warfare to those "indispensable" for the "ends of war" is included. The Art. 22, 23 Hague Regulations analogously translated and incorporated ideas from the military necessity principle in the Lieber Code.[112] The norms show that there are absolute, inviolable limits for acts of armed conflicts and that these restrictions are to be determined based on considerations of military necessities.

With these numerous adaptations of the military necessity principle in the Lieber Code, the principle received broad acknowledgement. Thus, it found its way, mostly by implications and not by expressive references, into the relevant legal instruments and thereby into the laws of war.

c) The Hostages Case

In the aftermath of World War II, the IMT introduced a new understanding of the military necessity principle. The definition, that is extracted from the Hostages Case, is still today considered as authoritative and trendsetting.[113]

[110] Geoffrey S Corn, 'International & Operational Law Note' [1998, Issue 7] The Army Lawyer 71, 72.
[111] Dino Kritsiotis, 'Sequences of Military Necessity for the Jus in Bello' in Claus Kreß and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (Oxford University Press 2020) 264.
[112] Corn (n 110) 72; Kritsiotis (n 111) 265. Especially Art. 23 lit. g Hague Regulations is considered as an early version of today's application of military necessity in IHL instruments, as will be illuminated in detail later.
[113] Corn (n 110) 73; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) para 27; Lawless (n 3) 287; Luban (n 12) 341; Solis (n 5) 277; UK Ministry of Defence (n 4) 22.

Concerning the claim of the defendants that they acted in line with reasons of military necessity, the IMT stated, that "[m]ilitary necessity permits a belligerent, *subject to the laws of war*, to apply any amount and kind of force *to compel the complete submission of the enemy* with the *least possible expenditure of time, life, and money*."[114] The phrase determines that the Hostages Case definition followed the example of the Lieber Code as far as accepting the applicable "laws of war" as binding restriction for all methods and means of warfare. Furthermore, the IMT highlighted, that acts of armed conflict must at least bring some sort of military advantage to defeat the enemy and cannot be taken only for reasons of plain destruction, revenge, or lust to kill.[115]

The Hostages Case definition nevertheless leads to questionable consequences because it equalizes time and money with the life of individuals.[116] Acts of armed conflict that cause more civilian casualties, destruction and suffering than other available alternatives, but are cheaper than other options are not detrimental to the definition. Accordingly, it is legitimate to leave aside safer and more discriminating alternatives for the simple reason that they are more expensive. Therefore, one can rightfully accuse the Hostages Case definition of supporting "[…] military convenience, not military necessity."[117] The levelling of money and life furthermore provokes challenging moral questions about the legitimization and possibility to trade human lives with resources.

Nonetheless the definition of the military necessity principle in the Hostages Case remains one of the two most influential determinations of the term.[118] Despite legitimate critique, the IMT highlighted that military considerations and advantages do not have unrestricted precedence. At the same time, the IMT did not decline the general possibility to justify certain actions with the military necessity principle.[119] The main contribution to the development of the principle is the confirmation that prohibitive laws of war absolutely limit acts of armed conflicts.

[114] *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1253 (emphasis added). This definition will be referred to as the "Hostages Case definition".
[115] ibid; Solis (n 5) 278.
[116] Luban (n 12) 342.
[117] ibid.
[118] Lawless (n 3) 287.
[119] *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1296–1297.

d) Modern Day

All GCs, AP I and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)[120] explicitly mention military necessity as a principle and include the term in their regulating system.[121] As established under the reaction to the Kriegsraison doctrine, the treaties especially highlight the limiting and inviolable effect of prohibitive IHL.

Additionally, the military necessity principle is protected by Art. 8 II lit. a iv and Art. 8 II lit. b xiii of the Rome Statute of the International Criminal Court from 1998[122]. The articles establish that violations of the principle under certain circumstances − concretised by the ICC Statute − can amount to a war crime. The protection by international criminal law emphasises the respect for the principle in the international community.

National military manuals reflect this trend. Notwithstanding different legal systems and regions of the world, all manuals consider military necessity to be a core principle of IHL.[123]

Conclusively, the military necessity principle is in modern day widely recognised as a limiting legal principle of IHL that is also included in international customary law.[124] Despite the frequent use and broad acknowledgement of the military necessity principle in IHL, it still remains undefined in law.

[120] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 ("AP II").
[121] See for a list of norms that mention military necessity: Solis (n 5) 278 fn 47.
[122] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 ("ICC Statute").
[123] Bundesministerium der Verteidigung (German Ministry of Defence) Zentrale Dienstvorschrift - Humanitäres Völkerrecht in bewaffneten Konflikten (Joint Service Regulation - International Humanitarian Law in Armed Conflicts) (n 4) paras 141–142; Chief of Defence Staff and Office of the Judge Advocate General Joint Doctrine Manual - Law of Armed Conflict at the Operational and Tactical Levels (n 8) s 202 para 1; Department of the Army and United States Marine Corps, The Commander's Handbook on the Law of Land Warfare (n 6) para 1-19; Lawless (n 3) 288; UK Ministry of Defence (n 4) 23.
[124] Art. 8 II lit. b xiii ICC Statute; Henckaerts and Doswald-Beck (n 19) eg: Rule 50, 51, 56; Solis (n 5) 277.

e) The Material for the Determination of the Military Necessity Principle

The principle of military necessity started its development with the Lieber Code in 1863 and gained popularity and support throughout the last 150 years. Most importantly the jurisprudence after World War II added a slightly different shape. Since then, the military necessity principle has reached international customary law status and is referred to in all relevant IHL instruments. The development of the military necessity principle is a reverse reflection of the rejection of the Kriegsraison doctrine. The principle gained support and acknowledgement with the same steps in IHL, that signified the formal denegation of the Kriegsraison doctrine.

Today, the Lieber Code and the Hostages Case definition remain the relevant material for the determination of the military necessity principle since no legal definition is available.[125] Therefore the history of the principle, international instruments, and the practice function as important input to enable a comprehensive interpretation.

3.2 The Contemporary Content of the Military Necessity Principle

The following part examines the contemporary meaning of the military necessity principle from a theoretical and a practical angle. Based is the assessment on the origin of the military necessity principle and therefore especially on the Lieber Code and Hostages Case definition.

a) The Principle in Theory

The theoretical approach first aims to determine the definition of the military necessity principle. Subsequently, the theoretic character of the principle is examined.

i) Wide Definition

Since there is no legal definition of the military necessity principle available in authoritative IHL instruments, the Lieber Code and the Hostages Case definition are the relevant references.[126] Both sources only have a direct legally binding effect as far as states actively

[125] Downey (n 80) 252; Hilaire McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity Studies' (1991) 30 Military Law and Law of War Review 215, 237.
[126] Department of the Army and United States Marine Corps, The Commander's Handbook on the Law of Land Warfare (n 6) para 1-23; Henckaerts and Doswald-Beck (n 19) xxxi, Rule 50; Lawless (n 3) 288; Jens D Ohlin and Larry May, *Necessity in International Law* (Oxford University Press 2016) 106.

included them into their domestic law and as far as they have become part of international customary law. Neither the Lieber Code nor the Hostages definition provide the international community with a sufficiently precise and limited term.

The Lieber Code is clear about the establishment of the laws of war as limiting restriction for acts of armed conflicts, but the rest of the principle's meaning remains vague. Art. 15 and Art. 16 Lieber Code offer the only guidance regarding the methods and means that are "[…] indispensable for securing the ends of the war […]"[127]. But it remains open how this term is limited or limitable, since almost any destructive act of armed conflict against the enemy can be seen as crucial for securing the defeat of the opponent. It could even be argued that the more destructive an act is, the more promising it is for the defeat of the enemy. Accordingly, it is claimed that the Lieber Code "[…] subjects all humanitarian provisions to derogation based on an open-ended definition of military necessity […]."[128] The only acts of armed conflict that are expressively excluded from the broad definition of the principle are − according to Art. 16 Lieber Code − the most atrocious acts of armed conflicts.

Considering the Hostages Case definition, it was already illustrated how broad the included concept is and why "[t]he Hostages formula […] inflates the concept of necessity to include anything the military finds helpful."[129] In this regard especially the fact, that the opportunity to save money is sufficient to disregard more reluctant acts of armed conflict highlights the broadness of the definition.[130] The claim receives further support by the observation that the IMT seemed to have regarded air strikes directed against the civil population and a "nation's "will" to fight" − also called morale bombings − as in accordance with the military necessity principle.[131] Thus also the Hostages Case definition does not serve as a restrictive and precise definition.

The Lieber Code and the Hostages Case definition are extremely permissive and provide extensive definitions of the military necessity principle. As a result, the military necessity

[127] Art. 14 Lieber Code.
[128] af Jochnick and Normand (n 3) 65.
[129] Luban (n 12) 343.
[130] Eg: ibid 342–343.
[131] af Jochnick and Normand (n 3) 78, 89, 91–92.

principle is defined as allowing a party to an armed conflict to "[…] do whatever is dictated by military necessity in order to win the war, provided that the act does not exceed the bounds of lawfulness […]."[132] Two distinct elements can be extracted from this definition. Most importantly, prohibitive IHL is regarded as inviolable line for all acts of armed conflict. Secondly, there must be a close link between an act of armed conflict and the realistic opportunity to militarily weaken the opposing party.

ii) Legal Principle

The military necessity principle serves as an intra-legal principle in two different ways.

On the first − more visible − level, "military necessity" is explicitly named in IHL treaties and international customary law. Regularly the explicit inclusion of "military necessity" indicates the existence of a principle that establishes an exception to a rule. Examples for this explicit recognition of military necessity as a permissive legal principle can be found inter alia in customary law[133] and Art. 33 II GC I, Art. 28 GC II, Art. 126 GC III and Art. 146 GC IV. Treaties, international customary law, and national interpretations all draw military necessity as a legal mechanism that allows − when explicitly stated on isolated occasions − to make exceptions from rules and to interfere with IHL. This mechanism is overarchingly and directly built into IHL. The military necessity principle thus becomes an intra-legal principle.[134] Especially states attribute this first intra-legal level to the military necessity principle.[135]

On a second level − contrary to the first, permissive intra-legal level − the principle limits methods and means of warfare. According to the carved-out definition, the military necessity principle clearly determines the positive prohibitive rules of IHL as limiting line for all acts of armed conflict.[136] Consequentially, the level of limitation of this second layer of the military necessity principle depends on the surrounding rules and restrictions of IHL.

[132] Dinstein (n 113) paras 27–29.
[133] Henckaerts and Doswald-Beck (n 19) eg: Rule 38 lit. b, Rule 39, Rule 43 lit. b, Rule 50, Rule 51, Rule 56.
[134] The exception-mechanism of the military necessity principle is assessed in more detail below under 3.2 b) i) and 4.4.
[135] Lawless (n 3) 289.
[136] Art. 14 Lieber Code; *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1253; Carnahan (n 4) 218.

This conjunction with surrounding law awards also to the second level of the principle an intra-legal status. The limiting level of the military necessity principle is generally recognized and not contested in IHL and thus finds invariable application in all situations of armed conflict. It is therefore also applicable when not explicitly invoked by other IHL rules. The second intra-level of the principle has thus a stand-alone character.

In conclusion, the intra-legal principle of military necessity consists of two levels. The first level establishes sporadic exceptions from rules of IHL in explicitly marked cases. On a second level, the principle attempts to restrict all acts of armed conflict with an absolute limit for violence.

iii) Extra-Legal Value

Next to being an inter-legal *principle*, the military necessity principle functions as an extra-legal *value*.

The Lieber Code and the Hostages Case definition restrict parties of armed conflicts to only conduct acts, that "[…] are indispensable for securing the ends of the war […]"[137] and that demand the "[…] least possible expenditure of time, life, and money."[138] These limitations establish a legal link that separates permissive and necessary violence from wanton violence that does not contribute to the military objectives of an acting party. The requirement of this legal link shows that a balancing process is part of the military necessity principle. On the one side stands the maxim that violence is the language of armed conflicts and violent methods and means of warfare are thus inevitable to reach objectives. On the other side, the principle attempts to minimize the level of violence and to maximize the protection for affected individuals.[139] Thus, the military necessity principle constantly aims to invoke a comparison of the military and humanitarian advantages and disadvantages, which a certain act of armed conflict entails.

In this context, the military necessity principle takes effect through other legal principles as "motivating" intent to bring a balance to the opposing interests in the regulation of armed

[137] Art. 14 Lieber Code.
[138] *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1253.
[139] Lawless (n 3) 308; McCoubrey (n 125) 231; Schmitt (n 4) 799.

conflicts. Accordingly, some hold "[…] that [the military necessity principle] is best understood not as a practicable principle of the LOAC but rather as a conceptual or foundational interest that underlies the LOAC."[140] This balancing level of the military necessity principle hence is a basic value that informs other principles in IHL.[141] In this way inter alia the principle of proportionality[142] and the principle of distinction[143] are formed by the military necessity principle.

In conclusion, this balancing layer of the military necessity principle finds indirect application in IHL and is thus best characterized as an extra-legal value.

b) The Practical Application

The practical point of view observes how the theoretic aspects of the principle unfurl and thus studies the different ways in which the military necessity principle functions in practice.

i) Absolute Limitation for Violence

The formally biggest step of the military necessity principle away from the Kriegsraison doctrine was that it is nowadays unanimously recognized under the principle that acts of armed conflict are limited in an absolute manner by prohibitive IHL.[144] The reaction to the Kriegsraison doctrine as well as the origin and the second intra-legal level of the military necessity principle illustrate this development. As a result, the principle of military necessity prohibits parties to do "whatever it takes" to reach objectives in armed conflicts.[145] In conclusion, the principle forms an absolution limitation for violence.

ii) Exception from the Norm

As shown, the first intra-legal level of the military necessity principle allows exceptions to prohibitive IHL rules in extraordinary circumstances, which − according to the telos of the

[140] Lawless (n 3) 289.
[141] The balancing of military and humanitarian considerations itself is illuminated in detail under 3.2 b) iv).
[142] Lawless (n 3) 289; Luban (n 12) 322; Solis (n 5) 277.
[143] Mary E O'Connell, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, Oxford Scholarly Authorities on International Law 2021) 44; Lawless (n 3) 289.
[144] Bundesministerium der Verteidigung (German Ministry of Defence) Zentrale Dienstvorschrift - Humanitäres Völkerrecht in bewaffneten Konflikten (Joint Service Regulation - International Humanitarian Law in Armed Conflicts) (n 4) paras 141–142; Carnahan (n 4) 231; Corn (n 110) 73; Downey (n 80) 254, 262; Lawless (n 3) 289, 318–319; McCoubrey (n 125) 238; O'Connell (n 143) 42; UK Ministry of Defence (n 4) 21–22, 23.
[145] Solis (n 5) 285, 289.

mechanism − require special methods and means of warfare. In contrast to other IHL principles, the military necessity principle is thus often perceived as a "[…] right, permission, or justification […]" instead of being a "[…] limitation[s], prohibition[s], or obligation[s] […]" for the practice.[146] Within this sub-section, the military necessity principle is observed in an isolated way. Hence the limitations and qualifications for the exceptions by the surrounding IHL − as introduced in the response of IHL to the Kriegsraison doctrine[147] − are not considered.

Art. 23 lit. g Hague Regulations is the role model for the function of the military necessity principle as a legal justification for acts of armed conflicts which − without provided legal exception − usually would violate IHL.[148] The norm first prohibits "[…] to destroy or seize the enemy's property […]". The said prohibited act of armed conflict is once again allowed, if the "[…] destruction or seizure [is] imperatively demanded by the necessities of war." Accordingly, the military necessity principle functions as a door opener for acts that prima facie violate the law. It provides this function by introducing a permissive exception for cases where considerations of military necessity predominate the balance with humanitarian protection.

The IMT in the Hostages Case followed this rule-exception-narrative when supposing that military necessity is a principle that exceptionally can "permit" certain acts of armed conflict.[149] Thereby the judges showed that the permission under the principle disengages from the rule.

The same mechanism is used inter alia in Art. 53 GC IV. Again, the principle allows parties to IACs to destroy property in favour of considerations of military necessities.[150] Art. 54 V AP I follows the identical pattern. The norm provides the possibility to override the prohibition to target objects that are indispensable to the survival of the civilian population for reasons of "imperative" military necessity. This exception is especially remarkable because it was not

[146] Lawless (n 3) 300–301.
[147] See 2.3 a).
[148] Dinstein (n 113) para 28; Schmitt (n 4) 802.
[149] *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1253.
[150] Oscar Uhler and others, *Commentary - IV Geneva Convention Relative to The Protection of Civilian Persons in Time of War* (Jean S Pictet ed, (First Reprint 1994) International Committee of the Red Cross 1958) 302.

included within the first draft of the AP I. It was only introduced as reaction to the demand of the state parties to remain able to make use of the scorched earth policy.[151]

Examples for the function of the military necessity principle as exception from the norm can additionally be found in Art. 126 GC III, Art. 108, 143, 147 GC IV, Art. 62 I, 67 IV, 71 III AP I and Art. 4 II of the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention[152]. These numerous cases show how significant this function of the military necessity principle is in the IHL system. The importance is further highlighted by the fact that the state parties that negotiated AP I and AP II were especially interested in the allowance of these exceptions and emphasized their relevance.[153]

Conclusively, the first intra-legal level of the military necessity principle enables the practice − in exceptional circumstances − to lawfully interfere with positive prohibitions of the law. This function is only applicable when an exception is explicitly provided by a rule.

iii) Defending Military Convenience

The freedom to act for parties to armed conflicts is restricted by IHL rules. That the military necessity principle can exceptionally justify acts of armed conflicts, which prima facie violate IHL, thus triggers another function of the principle.

Because "[…] military necessity might be seen as the recognition of a "defence" within the law in cases wherein the detailed legal prescription proves in practice untenable […]",[154] parties

[151] Pilloud (n 71) paras 2116, 2121.
[152] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215.
[153] The Australian representative regarding the now Art. 54 V AP I: "My delegation wishes to say that the phrase "imperative military necessity" is imprecise as to its meaning and tends to provide a subjective text. My delegation will give this phrase a broad interpretation rather than a narrow one.", Federal Political Department, *Official Records of The Diplomatic Conference on The Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts - Geneva (1974-1977), Volume VI* (Federal Political Department 1978) 221. Another example can be seen in the explicit aim regarding the now Art. 16 AP II to allow a reference to an exception for reasons of military necessity: Federal Political Department, *Official Records of The Diplomatic Conference on The Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts - Geneva (1974-1977), Volume VII* (Federal Political Department 1978) 142.
[154] McCoubrey (n 125) 219.

to armed conflicts are tempted to apply the principle as argument to defend acts of armed conflict which go beyond the law. This line of defence has not necessarily a legal foundation and does not always find juridical acceptance − as the judgements of the IMT show. Still, it can attribute at least a first appearance of legitimacy to the concerned act of armed conflict. This appearance might be enough to misguide parties to commit illegal acts of armed conflicts with the claim to be acting under the military necessity principle. In summary, the military necessity principle might be "[…] invoked to justify almost any outrage."[155]

Another argumentative use of the exception-mechanism of the military necessity principle is to plead for a generally more permissive IHL system. This application is recognizable in the discussions of the drafts of the GCs and the APs. In the concerning conferences, the general acknowledgement of the permissive character of the intra-legal military necessity principle was clearly utilized to argue for a less restricting legal body. Underlying aim of the state parties was to ensure more freedom to act during armed conflicts. To reach that aim, the first level of the intra-legal principle and the broad interpretable definition of the military necessity principle were constantly emphasized and defended.[156]

The Hostages Case definition further widens the opportunity to use the military necessity principle in such an argumentative way. As illustrated, this is the case because "[…] the *Hostages* formulation remains overwhelmingly slanted in favour of militaries, and grants them enormous latitude. Read literally, military necessity includes any lawful act that saves a dollar or a day in the pursuit of military victory. These are claims of military convenience, not military necessity."[157] That States rely on this definition to expand their lawful military capabilities can be seen when assessing their military manuals.[158] Thus, "[s]ometimes military necessity is

[155] Carnahan (n 4) 230.
[156] Federal Political Department, *Final Record of the Diplomatic Conference of Geneva of 1949, Volume II - Section A* (Federal Political Department 1949) 648–651; Federal Political Department, *Official Records of The Diplomatic Conference on The Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts - Geneva (1974-1977), Volume VI* (n 153) 114–115, 221; Federal Political Department, *Official Records of The Diplomatic Conference on The Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts - Geneva (1974-1977), Volume VII* (n 153) 142.
[157] Luban (n 12) 342.
[158] Eg: UK Ministry of Defence (n 4) 21–22: "Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy *at the earliest possible moment with the minimum expenditure of life and resources*." Emphasis added.

invoked when military convenience is closer to truth."[159] States attempt to justify these efforts with their need to be able to accomplish and defend national interests.[160]

The theoretic set-up of the military necessity principle as exception-mechanism thus allows the principle to be applied as a military and political argument. This argument is used to defend interferences with IHL and to support the expansion of what is militarily permissible by law.

iv) Balancing Function

The balancing process was briefly introduced as basis of the extra-legal value layer of the military necessity principle. This layer has additionally an important function as room for balance in practice.

There is a need for such a space because two conflicting aims converge within the principle. On the one hand, the military necessity principle represents the collected considerations of military necessities within an armed conflict.[161] In other words the principle of military necessity "[…] recognizes the appropriateness of considering military factors in setting the rules of warfare."[162] On the other hand, the military necessity principle includes opposing considerations of humanitarian protection.[163] Humanitarian protection comprises, next to the protection of combatants, the protection of civilians as counterbalance to considerations of military necessities.

To be able to synergize these contradicting orientations, the military necessity principle therefore relies in all its layers and functions on a balancing capacity. The balancing function of the principle hence includes a space to solve the contradictions from case to case by harmonizing the oppositional "[…] realities of forceful action and [the] aspiration of legal limitation."[164]

[159] Solis (n 5) 282.
[160] Schmitt (n 4) 799.
[161] Corn (n 110) 73; Luban (n 12) 322; Schmitt (n 4) 799.
[162] Schmitt (n 4) 799.
[163] Bundesministerium der Verteidigung (German Ministry of Defence) Zentrale Dienstvorschrift - Humanitäres Völkerrecht in bewaffneten Konflikten (Joint Service Regulation - International Humanitarian Law in Armed Conflicts) (n 4) para 142; Lawless (n 3) 307; McCoubrey (n 125) 220, 231; Schmitt (n 4) 798, 799; Solis (n 5) 278.
[164] McCoubrey (n 125) 217.

c) The Military Necessity Principle: An Ambivalent Concept

The widely defined military necessity principle is simultaneously an intra-legal principle and an extra-legal value. It is a stand-alone principle with independent significance as well as an intention that becomes an integral part of law only through the transformative effect of other legal principles.

Because it absolutely limits the violence in acts of armed conflict, the military necessity principle has a restrictive effect. At the same time, the principle is permissive since it serves as recognized exception to protective rules. Additionally, the military necessity principle is used to defend military utility and to support claims against limiting humanitarian protection to achieve more freedom to act in armed conflicts. Finally, the military necessity principle offers a balancing function that attempts to merge the disputing characteristics of the principle and tries to unite the different poles.

The carved-out functions and contradicting layers make the military necessity principle to an ambivalent legal concept.

3.3 The Indicator-Function of the Military Necessity Principle

The following study places the military necessity principle in the IHL system and determines that the character of the military necessity principle permits the use of the principle as indicator for IHL. The intention is to further establish why the results of the subsequent comparison with the Kriegsraison doctrine have a continuative significance for the IHL system in general.

a) The Military Necessity Principle in the Fundamental Conflict of International Humanitarian Law

Decisive for the general orientation of IHL and the question if it is protective or not, is the status of an underlying conflict between two main poles. The two poles agree that armed conflicts should be conducted as humane as possible. But they fundamentally disagree regarding the general orientation and purpose of IHL. Especially the priorities and limitations on the way to achieve the “humanisation” of armed conflicts with law are controversial.

Luban introduced two terms that describe the different movements. The first opinion, that views effective humanitarian limitations by law sceptical and attributes priority to considerations of military necessity in armed conflicts, is labelled the "LOAC vision".[165] For the second movement, that believes in the true humanitarian character and protective intention of IHL, *Luban* proposes the term "IHL vision".[166] Depending on the vision that dominates the discussion around IHL, the system will be interpreted and applied differently. The IHL is thus trapped between the two poles because the legal system can only develop in one or the other direction since the movements have contractive objectives.[167] Thus, the general orientation of IHL and the protectiveness of its direction depend on the status of the conflict between LOAC and IHL vision. The following assessment illustrates that the military necessity principle is a melting point for this underlying doctrinal dispute.

i) The LOAC Vision

The LOAC vision has a critical perspective on the efficiency and protective objective of IHL. Accordingly, this perspective attributes priority to considerations of military necessity and neglects strict limitations for pure humanitarian purposes.

The view builds on the argument, that IHL is merely the realization of self-interests of states. Underlined is this claim by the fact that states still remain the "[…] pre-eminent international lawmakers [.]" for IL and thereby IHL.[168] Since states consider wars to be a tool of international politics,[169] it cannot be expected that IHL effectively limits the methods and means of warfare. Such limitations would mean that states voluntarily restrict their options for international politics. Far from that, this opinion claims that states instead make use of IHL "[…] to shield their conduct from closer scrutiny."[170] Thus the perspective believes that IHL is used to protect acts of armed conflict against criticism and legal consequences.[171] The LOAC vision accepts,

[165] Luban (n 12) 316.
[166] ibid.
[167] Crawford and Pert (n 4) 30; Dinstein (n 113) para 23; Dunlap Jr., 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts' (n 17) 19; Dunlap Jr., 'Lawfare' (n 3) 35–36; Luban (n 12) 347; Schmitt (n 4) 837.
[168] Luban (n 12) 347.
[169] von Clausewitz (n 28) 363. A confirmation for this belief can be seen in the Russian attack on the Ukraine in February 2022.
[170] Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (1994) 35 Harvard International Law Journal 387, 413.
[171] af Jochnick and Normand (n 3) 56, 58, 77, 91–92; Nelson and Waters (n 51) 474.

that violence in armed conflict is applied as the political instrument it is. Accordingly, the LOAC vision is based on the assumption that the expectation that IHL would ever operate in a purely protective and limiting way is simply wrong. Thus, some claim that it never was the intention of IHL to be restrictive. Rather they argue that parties to armed conflicts decided to restrict their freedom to act for other − non-humanitarian − reasons.[172]

Another argument that declines an efficient humanitarian character of IHL is the observation that it is just inconsistent to react to the constant misuse and violation of IHL in practice with the introduction of more rules.[173] It is thus asserted that the reality shows that a more comprehensive legal regulation of IHL is not able to realize more protection for individuals in armed conflicts anyway.

Altogether, the LOAC opinion believes in a more Realpolitik-way of the international political and legal landscape. Humanitarian limitations on methods and means of warfare can only find secondary attention in this reality of armed conflicts. The LOAC vision therefore pleads for more freedom to act in armed conflicts and the paramount priority for considerations of military necessity. In conclusion this translates into a tendency that restraints the limiting protectiveness of the IHL system. If the LOAC vision dominates the discussion, it cannot be expected that IHL focuses on the protection of human dignity.

ii) The IHL Vision

The other pole in the fundamental discussion − the IHL vision − presumes that IHL has the purpose of humanitarian protection, and that this object informs all rules and principles of the law. Most importantly, representatives of this opinion assume that it is possible to achieve increasing limitation of acts of armed conflict through IHL.

The movement presupposes that IHL maximizes the protection of individuals in times of armed conflicts.[174] It is therefore an evitable requirement for this opinion, that the protective

[172] af Jochnick and Normand (n 3) 53; Garner (n 22) 9–10; Morgan (n 22) 71–72; Reeves (n 22) 181.
[173] Dunlap Jr., 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts' (n 17) 16.
[174] ibid 2; Lauterpacht (n 2) 363–364. See in this context as well *Prosecutor v Furundžija* (Judgement) (n 1) [183]. Additionally, the history of IHL can be seen as a supporting argument for this view, see Crawford and Pert (n 4) 2; Schindler (n 2) 166.

law is obligatory and inviolable for parties of armed conflicts. Astonishingly, *Lueder* already argued that the laws of war satisfy these conditions.[175] He asserted, that the laws of war are regularly violated in practice, does not question their existence − just as the violation of criminal law does not altogether challenge the existence of criminal law.[176] Despite the introduction of the Kriegsraison doctrine into legal theory, *Lueder* paradoxically supported the humanitarian movement in this regard.

Additionally, the IHL vision argues that the body of law can indeed effectively restrict acts of armed conflict. A supporting argument is that such a humanisation of acts of armed conflict was in fact achieved in the past through the international abolition of certain methods and means of warfare.[177] *Lauterpacht* sees further proof for the existence of efficient legal restrictions in the rule that prohibits the intentional terrorization of the civil population in armed conflicts.[178] This recognized rule shows that there is indeed a minimum level of protection which restricts the use of more brutal methods and means of warfare. Hence the acceptance of this rule illustrates that warfare is not limitless, but that the stakeholders voluntarily chose to limit their available acts of armed conflict to their possible disadvantage.

Furthermore, it is assumed that the faith in the legitimacy and fairness of limiting IHL rules has a restrictive impact in practice.[179] The application of IHL to trigger international and domestic political pressure thus can even positively influence those who generally refuse to follow IHL.[180] Reputation and prestige of the parties to an armed conflict play an important role in this context.[181] In addition, the availability and application of the ICC Statute might exert corresponding pressure on decision-makers to conform with IHL.

Conclusively, the IHL vision claims that IHL is of purely humanitarian character and obligatory for all parties to armed conflicts. This perspective believes that IHL encompasses mechanisms

[175] Lueder, '27. Stück: Krieg und Kriegsrecht im Allgemeinen' (n 10) 189.
[176] ibid.
[177] ibid 268.
[178] Lauterpacht (n 2) 368–369.
[179] af Jochnick and Normand (n 3) 57; af Jochnick and Normand (n 170) 413.
[180] Charles J Dunlap Jr., 'Does Lawfare Need an Apologia?' (2010) 43 Case Western Reserve Journal of International Law 121, 141.
[181] Reeves (n 22) 179.

to ensure its observance. The IHL vision underlines its position with the belief, that even the smallest achievements in limiting methods and means of warfare in a humanitarian and protective manner must be seen as a success.[182] The dominance of the IHL vision thus entails an increasing level of protection for individuals in armed conflicts in law. Consequentially, the protection of human dignity is at the core of an IHL system controlled by the IHL vision.

iii) The Military Necessity Principle as Melting Point

The clash between the two visions is reflected within the military necessity principle because the different layers and functions introduce arguments of both visions into the principle. Thereby included within the same principle, they must collide due to their oppositional understandings of IHL.

Certain levels and functions of the military necessity principle are in accordance with either one of the visions. They hence integrate one of the views into the principle. The stand-alone intra-legal layer of the principle prohibits wanton violence in armed conflicts and thus influences the principle in accordance with humanitarian protective aims. In other words, this layer accompanies the IHL vision. The absolute limitation of violence also is in line with the IHL vision by establishing that the prohibitive laws of IHL are the formal border for all acts of armed conflict. The principle's use to defend military convenience on the other hand argues in favour of the LOAC vision by demanding precedence for military necessities.

Several other components that constitute the military necessity principle, directly contain the collision between IHL vision and LOAC vision in themselves. With a second step, they add this clash into the overarching principle. The capacity of the military necessity principle as extra-legal value adds such an initial clash by influencing other IHL principles with the intention to synergize violence as necessary tool of armed conflicts with the intention to maximize protection for individuals. Similarly, the balancing function as a component of the principle consists of a collision between LOAC vision and IHL vision and subsequently introduces this collision into the principle. The rule-exception-mechanism that is included in the intra-legal level of the military necessity principle adds a direct clash in a like manner. Within this mechanism, the rule is supporting the IHL vision because it strengthens the bindingness of

[182] af Jochnick and Normand (n 170) 416.

limiting laws. The exception on the other hand gives credit to the LOAC vision by giving priority to military needs.

In consequence, the collision between LOAC vision and IHL vision happens between and on several levels of the military necessity principle. This leads to a situation where necessarily one of the visions must always be favoured when bringing the principle to execution. A decision − based on the military necessity principle − to take a certain act of armed conflict or not is hence per se either an expression of the LOAC vision or the IHL vision. The visions thus cannot circumvent each other and must collide within the principle. Conclusively the military necessity principle does not only reflect the fundamental conflict of orientations that underlies the IHL system. Its ambivalent nature makes it to a melting point of the two visions.

b) The Military Necessity Principle as Indicator for International Humanitarian Law

The respectively dominant vision in IHL also controls the melting point in the military necessity principle. The opinion can enforce the functions and layers within the principle that are in line with the own approach. Where the visions clash, the dominating point of view will assert itself. Depending on which vision prevails at a certain point in time, the ambivalent military necessity principle thus will be interpreted and applied differently. If the LOAC vision controls, the interpretation and application of the principle facilitates the freedom to act in military operations and limits the protection of the individual. If the IHL vision dominates, the military necessity principle is interpreted and applied with a focus on limitations and the protection of individuals in armed conflict. The military necessity principle with its many gateways for the different visions, therefore indicates the status quo of the conflict that decides about the general orientation of IHL.

The indication-function can be exemplified with the Kriegsraison doctrine. The Kriegsraison doctrine gives absolute control to military considerations − all laws that limit acts of armed conflict for humanitarian reasons can be disregarded in cases of extreme necessity. Thus, the Kriegsraison doctrine is the complete realization of the LOAC vision. The existence and use of the Kriegsraison doctrine hence illustrates that − at least regionally − the LOAC vision clearly dominated the discussion at that time. Therefore, it can be inferred that the laws of war in

Germany during the period of the Kriegsraison doctrine were not at foremost about the protection of the individual but the military freedom to act.

The example illustrates that the current interpretation and application of the modern military necessity principle can make visible which doctrinal opinion dominates the IHL system. Since the dominating vision furthermore decides about the orientation of IHL, the principle indicates as well if IHL focuses on the protection of the individual or not. In conclusion, the character of the military necessity principle has a far-reaching significance for the IHL system in general.

3.4 The Military Necessity Principle: Ambivalent & Indicative

The military necessity principle, which developed from the Lieber Code and the Hostages Case definition, has an ambivalent character that not only legitimizes acts of armed conflict, but also restricts them. Concerning the introductory quote from *Schmitt*, the Janus-faced quality of the principle demonstrates why it is so often misinterpreted and misunderstood.

At the same time, the military necessity principle is a melting point for the doctrinal conflict that decides about the direction of IHL. Thus, the current character of the principle can indicate if the IHL system has the protection of the human dignity of the individual at its core or if the system generally privileges the military freedom to act. Accordingly, *Schmitt* also proves to be correct when describing the principle as central to IHL.

4. Comparison – The Military Necessity Principle & The Kriegsraison Doctrine

"[…] while the codification of the laws of war represented a formal rejection of kreigsraison [sic], it did not signify a substantive advance towards the humanitarian goal of restraining war conduct."

– Chris af Jochnick / Roger Normand[183]

After examining their characteristics in detail, the narrative of a rejection of the Kriegsraison doctrine by the military necessity principle emerges. It appears like the principle is the opposite of the doctrine. Still, inter alia *af Jochnick* and *Normand* claim that IHL never detached itself substantially from the doctrine. At the same time, the analysis illustrated that a great overlap of the military necessity principle with the Kriegsraison doctrine would have a crucial implication for the principle and the IHL system. Against this background the two legal concepts are now compared with each other to review the perception of the military necessity principle as an alternative draft.

To compare exclusively the principle and the doctrine with each other, the analysis will – as far as possible – focus on them in an isolated way. The comparative work thus will first observe teleological, conceptual, and functional similarities of the two legal concepts detached from their historical circumstances and surrounding law.

4.1 Teleological Similarities

The examination of teleological similarities between the Kriegsraison doctrine and the military necessity principle focuses on the analogue intentional background of the structures.

a) Expression of State Sovereignty

State sovereignty means that states are independent in their decision-making processes and that they thus have the power to accept or decline other authorities next to them.[184]

[183] af Jochnick and Normand (n 3) 64.
[184] Jan Klabbers, *International Law* (3rd edn, Cambridge University Press 2020) 75; Robert Kolb, *Theory of International Law* (Hart Publishing 2016) 197, 199.

It was already demonstrated, that the Kriegsraison doctrine is partly based on *von Clausewitz*' theory about war. *Von Clausewitz* identified armed conflicts as expression of a state policy with the object of the total elimination of the opponent.[185] Kriegsraison translated this understanding into law and reasoned that nothing − not even the established laws of war − could oppose to this object of state policy. Thus, the Kriegsraison doctrine insisted that states were under specific circumstances independent from all authority of the laws of war. Conclusively, the Kriegsraison doctrine was a clear expression of absolute state sovereignty.[186]

The military necessity principle is used as an argument to defend military convenience and its balancing function can be utilized to support military interests in discussions as well. Accordingly, the principle can channel claims that aim to secure effective military options to defend state interests.[187] Therefore, states make use of the military necessity principle to establish their capability to take the necessary measures without being limited by humanitarian restrictions. Thereby states highlight their independent decision-making process as well as their power to accept or decline the authority of the law. Thus "[t]he idea of military necessity derives essentially from the sovereign right of a State to take measures in the defence of its vital interests […]."[188]

Conclusively, the military necessity principle and the Kriegsraison doctrine have in common, that they are both an expression of State sovereignty.

b) Opposing Humanitarian Considerations

Within the context of IHL, humanity is understood as the object "[…] to prevent or mitigate suffering […]"[189]. The Kriegsraison doctrine as well as the military necessity principle are opposing humanitarian considerations in armed conflicts. When using the word "opposing" in this regard, it is not employed in a way, that precludes dismissive or hostile intention against humanitarian protection in law. Rather it implies that there is a contradiction between two values and that neither of them permits the other one the full implementation.

[185] von Clausewitz (n 28) 360, 363.
[186] A comprehensive definition of absolute sovereignty can be found in: Kolb (n 184) 197.
[187] Schmitt (n 4) 799.
[188] McCoubrey (n 125) 217.
[189] Lauterpacht (n 2) 364.

The exceptional cases of the Kriegsraison doctrine entail that all rules that limit acts of armed conflicts to the advantage of humanitarian considerations lose their force. The German military manual from 1902 highlighted this effect when stating that "[h]umanitarian claims such as the protection of men and their goods can only be taken into consideration in so far as the nature and object of the war permit."[190] Consequently, the Kriegsraison doctrine opposed humanitarian considerations in armed conflicts.

The balancing function of the military necessity principle is the reflection of the "[…] battlefield violence counterbalanced by humanitarian considerations."[191] Interests of military necessity and humanity can thus be seen as "[…] two diametrically opposed stimulants […]"[192] within the military necessity principle. This general relationship of counterbalance and opposition to humanitarian considerations is well recognized.[193] It can also be extracted from the exception-function of the military necessity principle in international customary law and in the GCs and APs. Inter alia Art. 23 lit. g Hague Regulations, Art. 126 GC III, Art. 53 GC IV and Art. 54 V AP I offer exceptions to rules which protect humanitarian values. The exception from a protective humanitarian rule under the military necessity principle is nothing else than the opposition to humanitarian considerations.

In summary, the Kriegsraison doctrine and the military necessity principle both oppose legal humanitarian considerations in armed conflicts.

4.2 Conceptual Similarity: The Rule-Exception-Mechanism

The cases of extreme necessity and retorsion in the Kriegsraison doctrine are introduced as exceptions to the obligation to observe the laws of war.[194] Only if the requirements of one of the exceptional cases are satisfied it can be deviated from the law. The application of Kriegsraison is accordingly an exception to the rule of the laws of war. The doctrine is therefore based on a rule-exception-mechanism.

[190] Morgan (n 22) 68–69.
[191] Solis (n 5) 278.
[192] Dinstein (n 113) para 23.
[193] Downey (n 80) 260–261; Lawless (n 3) 320; Schmitt (n 4) 799, 822.
[194] Lueder, '27. Stück: Krieg und Kriegsrecht im Allgemeinen' (n 10) 254.

It was demonstrated that also the military necessity principle, at its first intra-legal level, uses a rule-exception-mechanism and that Art. 23 lit. g Hague Regulations is the standard template for this function[195]. The IMT,[196] the GCs and AP I[197] internalized an identical mechanism of formulating exceptions to limiting IHL rules.

Conclusively, the military necessity principle applies the same rule-exception-mechanism as the Kriegsraison doctrine.

4.3 Functional Similarity: The Self-Declaration as Trigger

Under the Kriegsraison doctrine, single combatants or commanders were able to decide about declaring an exceptional case of Kriegsraison.[198] Belligerents therefore could determine for themselves when the laws of war were overridden by Kriegsraison exceptions.[199] This ability to trigger Kriegsraison and to thus declare the inapplicability of all laws of war signified immense power for an individual.

The military necessity principle includes the same trigger mechanism. The decision to apply the exception-mechanism under the principle is based on the specific circumstances of the act of armed conflict in question.[200] Therefore, the exception is triggered by the individual soldier who is in command in the concerning situation.

Consequently, the exception-mechanisms of the Kriegsraison doctrine and the military necessity principle have in common, that they are triggered for the specific act of armed conflict by a self-declaration of the person with commanding power. Both concepts provide individuals, who are themselves directly concerned by the legal consequences, with the opportunity to establish exceptions from the limiting application of IHL. Hence, the concepts entail the danger of a biased self-declaration, that is misusing the respective concept to justify

[195] Dinstein (n 113) para 28.
[196] *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1253.
[197] Eg: Art. 126 GC III, Art. 53, 108, 143, 147 GC IV and Art. 54 V, 62 I, 67 IV, 71 III AP I.
[198] Solis (n 5) 285.
[199] Reeves (n 22) 180.
[200] McCoubrey (n 125) 226.

acts of armed conflict that interfere with IHL. Accordingly, the Kriegsraison doctrine and the military necessity principle contain the potential for abuse in practice.

4.4 Objection to Similarities: Absolute Limitation for Violence?

The numerous teleological, conceptual, and functional similarities between the Kriegsraison doctrine and the principle of military necessity seem to establish a high level of comparability. Still, it must be opposed that there might be a difference which has the potential to nullify all similarities. As clarified throughout this thesis, the military necessity principle includes an absolute limitation for acts of armed conflict because it acknowledges the inviolability of the positive prohibitions of IHL. The Kriegsraison doctrine on the other hand does not accept any limitations as absolutely inviolable. This difference speaks against the resurrection of the Kriegsraison doctrine within the military necessity principle.

The principle's acceptance of the absoluteness of positive prohibitions can be pictured as a shell. This shell encircles and thereby restricts all acts of armed conflict that are taken under the military necessity principle with reference to the positive prohibitions in IHL. At the same time, this shell separates the principle from the Kriegsraison doctrine. The following part assesses if the separating shell between the isolated legal concepts is intact. Therefore, it is examined if the absolute limitation for violence really distinguishes the military necessity principle from the Kriegsraison doctrine.

a) Cracks in the Absolute Limitation

The consequence of the exception-mechanism of the military necessity principle is that the acts of armed conflict, that are taken under the exception, are detached from the specific IHL rule. Thereby, the exception-mechanism establishes legal channels through the shell of the prohibitive laws of IHL. These channels lead to an area that is uncovered by the regularly applicable IHL rules and therefore resembles the Kriegsraison doctrine. In other words: "[i]f a rule in the law of war provides an explicit exception for military necessity, well and good: the Kriegsraison principle applies."[201] The exceptions under the military necessity principle thus seem to tear down the shell that separates the principle from the Kriegsraison doctrine.

[201] Luban (n 12) 341–342.

It is argued that not many rules in IHL include the explicit exceptions and that their adverse effect on the protective system of IHL is consequentially limited.[202] But examples like Art. 54 V AP I, which permits exceptions from the rule that "[i]t is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive [.]"[203] illustrate how serious the consequences of even the few regulations with exception-mechanisms can be.

However, it could be countered that the additional levels and applications of the military necessity principle can prevent the emergence of a Kriegsraison-like legal vacuum as consequence of the exceptions.

According to the definition of the principle, only those acts of armed conflict are permitted which "[…] are indispensable for securing the ends of the war […]"[204] and require "[…] the least possible expenditure of […] life […]"[205]. At the same time only that destruction of life is permitted which "[…] is incidentally unavoidable by the armed conflicts of the war […]".[206] Thus, it could be claimed that within the exceptions of the military necessity principle, the additional limitations of the term ensure that the exceptions do not reach too far. The limitations could hence impede the becoming of a legal vacuum and uphold the prohibitive shell.

But these limitations do not differ in a qualitative way from the test that is included in the Kriegsraison doctrine. Firstly, the basis for the assessments of the rule-exception-mechanisms in doctrine and principle are equally the specific circumstances of the armed conflict. The decisions for the self-declaration of exceptions furthermore uniformly answer the question if

[202] ibid 342.
[203] Art. 54 II AP I.
[204] Art. 14 Lieber Code.
[205] *United States of America vs. Wilhelm List, et al. (Hostage Case)* (n 5) 1253.
[206] ibid.

the requirements of an exception have occurred. Starting point and result of the tests behind Kriegsraison doctrine and military necessity principle are thus already the same. Secondly, the Kriegsraison doctrine limits the application to cases where the aims of the armed conflict can exclusively be reached by the inobservance of the law.[207] The tests of "exclusively" in Kriegsraison and "indispensable" in the military necessity principle have no qualitative different level. Both, Kriegsraison doctrine and military necessity principle, assess available alternatives and compare the most likely consequences of these options. Hence the two tests apply the same requirements and follow the same way from starting point to application. In summary, the underlying assessments of the rule-exception-mechanisms of Kriegsraison doctrine and military necessity principle are based on the same starting point, try to answer the same question and follow the same qualitative process. The outcomes of the tests will consequently not deviate from each other in a noticeable way. Thus, the principle's limiting formulations do not differ from the limitations of the Kriegsraison doctrine. Since the practice has shown what results the limitations of the Kriegsraison doctrine permit, these requirements of the military necessity principle cannot prevent the establishment of a legal vacuum.

That the military necessity principle informs other principles of IHL as an extra-legal value could nonetheless distinguish the exceptions of the principle from those of the Kriegsraison doctrine. The principle as extra-legal value impairs the whole body of IHL with the aim to balance violence as necessity in armed conflicts with the intention to maximize the protection of individuals in armed conflicts. This makes the extra-legal value applicable even in the exceptional cases under the military necessity principle. Thus, the balancing process could affect the exceptions of the principle in a limiting way and help to prevent the formation of a legal vacuum. Especially the principle of proportionality could have such a positive influence. Proportionality requires in armed conflicts that military advantages, following from acts of armed conflicts that are taken under the military necessity principle, exceed the civilian damages.[208]

[207] Lueder, '27. Stück: Krieg und Kriegsrecht im Allgemeinen' (n 10) 256.
[208] Crawford and Pert (n 4) 46.

Yet the proportionality test cannot distinguish the military necessity principle from the Kriegsraison doctrine because a similar test is incarnated as well in the doctrine. The doctrine includes the proportionality test within the condition that the non-observance of the law must be the exclusively remaining military option that is available to reach the objects of the armed conflict. Requirement is thus that all other available options must be considered. Within the consideration process appropriate alternatives which bring the same military advantage but do not violate the laws of war must always be preferred. Therefore, the Kriegsraison doctrine requires that the military advantage that is achieved with an act under the doctrine must exceed the significance of a violation of the laws or war. In this context, the violation of the law can be equalized with the occurrence of civilian damages because the laws of war inter alia protect civilians. As within the military necessity principle, the Kriegsraison doctrine prioritizes the least interfering alternative and demands that military advantages counterbalance civilian damages. The extra-legal value layer of the principle hence cannot distinguish the principle's test from the Kriegsraison test with a reference to the principle of proportionality. The legal vacuum that follows from the exception-mechanism of the principle is thereby not limited in a way that divides it from the Kriegsraison doctrine.

The exceptions of the military necessity principle are triggered by a self-declaration. This suggests that other safety mechanisms, which are intended to limit the exceptions of the principle, might furthermore not perform efficiently. A commander that finds herself in the heated phase of an armed conflict is limited in her neutrality and acts under severe psychological and temporal pressure. A decision to declare an exceptional situation and to thus relieve oneself from the humanitarian rules that limit military options and capability might therefore come too easy. The examples from the conduct of German forces in World War I and World War II show how regularly − formally exceptional − special cases were established in ongoing armed conflicts. Accordingly, the limiting factors of the military necessity principle that are supposed to prevent a legal vacuum are not efficiently equipped against misapplication.

The limiting legal shell, that is established by the absolute limitation for violence within the military necessity principle, is cracked by channels that are formed by the rule-exception-mechanism. The comparison shows that the additional limiting levels and functions of the

military necessity principle cannot effectively prevent the emergence of a Kriegsraison-like legal vacuum as consequence of the exception-mechanism. Accordingly, there remains no difference between the legal consequences of the rule-exception-mechanisms of the Kriegsraison doctrine and the military necessity principle. In conclusion, the shell − which is supposed to surround and limit all acts of armed conflict under the military necessity principle and thereby separate the principle from the Kriegsraison doctrine − is fragile.

b) General Gaps in the Absolute Limitation

In areas of IHL that are simply not or only scarcely regulated, acts of armed conflicts are not restricted by prohibitive law. The separating shell of the military necessity principle, that is based on such positive prohibitions, thus additionally contains general gaps.

In principle, a party to an armed conflict is free in its methods and means of warfare if they are militarily necessary to reach the object of the armed conflict and if they are within the legal boundaries of IHL.[209] The effect of regulative gaps and the consecutive problem become apparent when realizing that "[m]uch of the destruction incident to warfare […] is not governed by specific legal rules […]."[210] In these areas, the absolute limitation of violence, which is established by positive prohibitions in IHL, does not have an effect. Consequently, the application of the Kriegsraison doctrine would have the equal results as the application of the military necessity principle in these areas.

Some claim that the Martens Clause in the Preamble of the Hague Regulations[211] establishes that "[…] the mere absence of an express IHL rule on point does not necessarily justify an action on the basis of military necessity; actions in warfare must equally reflect respect for humanity."[212] The Martens Clause could thus prevent, that regulative gaps in IHL lead to general gaps in the limiting shell of the military necessity principle. But even *Schmitt* accepts

[209] Dinstein (n 113) para 27.
[210] Carnahan (n 4) 218.
[211] The Martens Clause: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."
[212] Schmitt (n 4) 800.

that "[…] the Martens Clause applies only when the lex scripta is silent."[213] Against this background it must be objected that the Martens Clause has nowadays to be assessed from a new perspective. Today a much broader spectrum of armed conflicts is regulated in a much more specific way than over 150 years ago. As predicted by *Lueder*,[214] the legal gaps in the laws of war have become fewer. Consequently, "a more complete code of the laws of war" indeed has reached application, as required by the Martens Clause. The explicit silence of current IHL must thus be considered in a different light. Gaps of regulation in international instruments are today chosen to be left open. The partial silence of IHL instruments is thus intended by the international community. Accordingly, it would be incongruously with this intention to not accept that everything that is not regulated, is permitted. In consequence parties to armed conflicts remain unrestricted by the Martens Clause as long as they act within the limits of positive prohibitions and the military necessity principle.

Areas that open general gaps in the limiting shell of the military necessity principle are inter alia the environmental protection in armed conflicts,[215] the regulation of NIACs[216] and the protection of cultural property in armed conflicts[217]. Another most prominent case that additionally exemplifies such an underregulated area is the use or threat of nuclear weapons. The International Court of Justice ("ICJ") established that the use or threat with nuclear weapons is not universally prohibited.[218] This area of armed conflict therefore lacks explicit positive prohibitions. Hence, the military necessity principle does not limit the use of nuclear weapons in a more protective way than the Kriegsraison doctrine.

All in all, the shell of the military necessity principle contains additional gaps in legal areas where there is no or only little prohibitive positive IHL. The absolute limitation for violence within the principle does not distinguish it from the Kriegsraison doctrine in those areas.

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[213] ibid 801.
[214] Lueder, '27. Stück: Krieg und Kriegsrecht im Allgemeinen' (n 10) 191, 262–263, 265.
[215] Crawford and Pert (n 4) 206, 208. A helpful overview of the applicable law can be found in: Michaela Halpern, 'Protecting Vulnerable Environments in Armed Conflict: Deficiencies in International Humanitarian Law' (2015) 51 Stanford Journal of International Law 119, 126–134.
[216] Crawford and Pert (n 4) 38, 54.
[217] An area that is mostly protected by soft law instruments, see Niteesh K Upadhyay and Mahak Rathee, 'Protection of Cultural Property under International Humanitarian Law: Emerging Trends' (2020) 17 Brazilian Journal of International Law 390, 397–399, 400.
[218] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (n 2) paras 97, 105 (2).

c) Realpolitik & The Absolute Limitation

When assessing the laws and rules of IHL, the reality often paints a different picture than the plain legal instruments. The stakes that are involved in armed conflicts − not uncommonly the independence of a state or the existence of an ethnic group − explain the aberrations between law and reality.

The example of the Ukrainian defence against the attack by the Russian Federation is highlighting the involved interests and the price that is paid to defend them. In situations like this, the rhetorical question that is attributed to *von Bismarck* becomes relevant again: what leader would allow his country to be destroyed because of IL?

The underlying message is one of Realpolitik. The Russian attack from February 2022 illustrates how secondary IL and IHL become once a state leader believes to have discovered a vital interest for his respective state. Similarly, one can ask with respect to the mentioned Advisory Opinion of the ICJ: would the use of a nuclear weapon by the Ukraine for reasons of self-defence be legal in the current circumstances? And most importantly: would the legal rejection of this option be the reason for the restraint to make use of such a weapon? These considerations and questions of Realpolitik express how easily the reality can defy the line of absolute limitation for what is believed to be the "right reason". At the same time, the reality shows how tempting it is for a state, under extreme circumstances, to put aside legal limitations that restrict the capability to defend itself.[219]

The strength and importance of the Realpolitik perspective is highlighted by the principle's function as antagonism of humanitarian considerations. How should an international actor be expected to respect a principle which introduces an absolute limitation (and thus works in a humanitarian way), but at the same time opposes this underlying interest? Hence, the recognition of the absolute inviolability of positive law within the principle of military necessity is one of law, but not always one of reality. As a result, the shell of absolute acceptance of prohibitive law further loses meaningfulness.

[219] *Kennedy* picks up a similar Realpolitik-point of view by highlighting that the ancient just war theory still plays an important role in international politics and by discussing the possibilities and consequences of using nuclear weapons and introducing warrants for torture, Kennedy (n 3) 101–102, 109–111.

d) The Incompleteness of the Absolute Limitation

The isolated assessment shows that the recognition of absolute limitations in the military necessity principle is hollow and fragile. The rule-exception-mechanism, the general regulatory gaps within IHL and realism combined, tear big holes into the shell of the principle that is supposed to limit all acts of armed conflict and distinguish the principle from the Kriegsraison doctrine. The incompleteness of the shell means that the objection, that the absolute limitation for violence effectively discerns the military necessity principle from the Kriegsraison doctrine, must be rejected.

4.5 The Comparison: Similarities, but no Resurrection

The detached comparative analysis illustrates that the military necessity principle and the Kriegsraison doctrine have numerous teleological, conceptual, and functional similarities. The recognition of the inviolability of prohibitive law by the military necessity principle is moreover not a sufficient factor to nullify these similarities and to distinguish the principle from the Kriegsraison doctrine. The legal concepts, observed in an isolated way, are highly comparable with each other and the principle could thus be operated like the Kriegsraison doctrine.[220] Insofar *af Jochnick* and *Normand* are correct with their introductory claim that the military necessity principle was no substantive step away from the Kriegsraison doctrine.

Nonetheless, there is a factor which ensures that the military necessity principle is nowadays not operated like the Kriegsraison doctrine and cannot become the resurrection of the doctrine in modern IHL. This effect becomes apparent when leaving the isolated observation of the military necessity principle.

IHL today is much more comprehensive than ever.[221] It was illustrated within the reaction to the Kriegsraison doctrine, that the systems of modern IHL instruments rejected the option of a mechanism with generally suspensory effect on all laws.[222] Where the military necessity principle is not involved as exception to the rule, the modern IHL can therefore ensure a higher

[220] *Connolly* and *Horton* claim that exactly this is the case in the "war against terror": Connolly (n 7); Horton (n 5).
[221] *Schindler* summarizes the development towards a more comprehensive IHL, Schindler (n 2) 166–181.
[222] See 2.3 a).

and uninterrupted level of protection for individuals in armed conflicts. This level of protection in modern IHL can be held up because the military necessity principle does not generally challenge the authority of the law that surrounds the principle. Thus, when considering the military necessity principle in correlation with the IHL system − and not detached from the surrounding law − the principle has a less extensive effect than the Kriegsraison doctrine. While the doctrine allows limitless exceptions from all rules of IHL, the military necessity principle permits the occurrence of legal vacuums only in limited cases. Therefore, there can exist additional principles and rules in the surrounding IHL which set up general restrictions for acts of armed conflict that are not challenged by the military necessity principle. As was shown above, rules like Art. 22 Hague Regulations or Art. 35 AP I establish such basic limitations and highlight the legally inviolable protection of individuals in armed conflicts.

In conclusion, the military necessity principle − when assessed in an isolated way − does not systematically differ from the Kriegsraison doctrine. The narrative of a complete renunciation of the doctrine is for this reason inaccurate. It is only the modern IHL, that surrounds the military necessity principle, which prevents that the principle degenerates to the full resurrection of the Kriegsraison doctrine.

5. Conclusion: The Military Necessity Principle & The Conflicting Essence of International Humanitarian Law

"Military necessities are real, and law will not make them go away."

– David Luban[223]

The Kriegsraison is an ancient doctrine that poses a challenge for the inviolability of IHL and absolutely prioritizes military considerations vis-à-vis humanitarian protection. In practice, the application of this doctrine led to numerous violations of the laws of war with severe consequences for individuals. Therefore, the doctrine was formally rejected by the international community as inconsistent with modern IHL and as a relic of the past. Especially the military necessity principle was seen as relevant step within this process.

The military necessity principle is an ambivalent legal concept of modern IHL with elements that promote military freedom to act as well as protective, limiting components. This character makes the principle an indicator for the overall orientation of IHL. The current interpretation and application of the principle thus enable to appraise if the IHL system is focused on the protection of individuals in armed conflicts or not.

The examination of the indicator shows a high level of systematic comparability with the extensively permissive Kriegsraison doctrine. Additionally, the resemblance with Kriegsraison points to a dominating LOAC vision that supports the freedom to act in armed conflicts and only pays secondary attention to the protection of individuals. The high comparability with the Kriegsraison doctrine and the correlating dominance of the LOAC vision hence imply that the protection of individuals is not the essence of IHL.

The modern IHL that surrounds the military necessity principle on the other hand prevents that the principle becomes the full resurrection of the Kriegsraison doctrine. The surrounding law advocates a high and generally uninterrupted, legally inviolable level of protection for individuals in armed conflicts. This difference between modern law and the law under the Kriegsraison doctrine thereby implies that the protection of individuals is indeed at the core

[223] Luban (n 12) 347.

of modern IHL. This effect furthermore indicates a dominance of the IHL vision in the struggle for control over the orientation of the IHL system.

Because it is deviating and resembling the Kriegsraison doctrine at the same time, the indication of the military necessity principle for the orientation of the IHL system is pointing in two different directions. The indicator thus identifies that IHL, and its general orientation is ambivalent. The essence of IHL is consequentially not solely the protection of the human dignity of the individual in armed conflicts, but also the legal pursuit of military necessities. In conclusion, the analysis of the character of the military necessity principle and its comparison with the Kriegsraison doctrine illustrate that the essence of IHL is contradictive.

Luban's introductory quote suggests a reason for this conflicting essence of IHL. The fact is that as long as armed conflicts are part of human existence, military advantages and necessities must per definition continue to play a crucial part in them. This factual necessity must naturally be reflected in an analogous way in the law that governs the subject of armed conflicts.[224] As *Luban* states correctly, the law can simply not eliminate the realities of armed conflicts. Thus, IHL must remain split between the intentions to humanize armed conflicts and to make military necessities legally realizable in practice. The reason for the ambivalent indication and essence is therefore the regulatory substance of IHL. Since the substance of IHL provokes the contradiction, it can be expected that the international regulation of armed conflicts will continue to follow an orientation that is directed by this conflicting essence. This observation must remain accurate for as long as armed conflicts continue to exist.

In addition, it is this contradictory essence of IHL and the continuity of this condition that facilitates the use of "lawfare" in the IHL system. *Dunlap* introduced this portmanteau of "law" and "warfare" into the area of IHL.[225] He finally defined lawfare "[…] as the strategy of using − or misusing − law as a substitute for traditional military means to achieve an operational objective."[226] What this means was aptly summarized by *Kennedy* when stating that "[l]aw

[224] McCoubrey (n 125) 217; Schmitt (n 4) 799.
[225] Dunlap Jr., 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts' (n 17) 2, 4; Kennedy (n 3) 12; Orde F Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press 2016) 2, 6.
[226] Charles J Dunlap Jr., 'Lawfare Today: A Perspective Commentary' (2008) 3 Yale Journal of International Affairs 146, 146.

now offers an institutional and doctrinal space for transforming the boundaries of war into strategic assets, as well as a vernacular for legitimating and denouncing what happens in war."[227] The contradicting nature of IHL – with the protection of human dignity and the pursuit of military considerations as its essence – allows great room for controversial discussions. Both extremes, an absolute protection of individuals and the complete military freedom to act find support for their arguments since they can claim to be based on the essence of the legal system. Independent from the claim that is about to be made, one of the core factors of IHL can be emphasized. So, inter alia, legal argumentation, public international debates and the media can be used to establish a narrative that questions the lawfulness of the opponent's acts, while underlining the own legitimization. An example for such an application is the defence against air strikes by triggering international public pressure and influencing legal opinions that oppose such strategies.[228] The contradictory essence of IHL has thus contributed to make the legal system a battleground of lawfare.

The military necessity principle reflects the contradictory essence of IHL and incorporates the ambivalent nature through its different components. That the principle is a melting point for the underlying conflict of the IHL system establishes that within the principle extreme interpretations and applications collide. This collision entails the opportunity to make use of extreme legal arguments to strengthen limiting as well as permitting positions. The principle can thus equally be used to condemn acts of armed conflict for their illegality and to justify them in accordance with the principle. The principle is hence the perfect multifunctional tool of "lawfare". Consequentially the military necessity principle is an ideal gateway for entities to enter the battleground of lawfare in IHL.

The interrelation of the essence of IHL with the concept of lawfare establishes that not only international politics and the practice of armed conflict influence IHL. It is furthermore the law itself that is used as a method of warfare to influence the practice.[229] This reciprocal relation between law and practice additionally determines that the contradictive essence of IHL is a condition that reinforces itself through law and practice.

[227] Kennedy (n 3) 116.
[228] Dunlap Jr., 'Lawfare' (n 3) 36.
[229] Kennedy (n 3) 7.

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