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Understanding Necessity in War and Conflict

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Submitted in fulfilment of the requirements
for the Degree of Doctor of Philosophy



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Abstract

The concept of necessity is frequently invoked in the context of war and conflict and in the context of the application of force more broadly. References by politicians, lawyers and military officers to a necessity that compels (non-)action are numerous in circumstances of violent crisis situations such as wars and conflicts. Despite this backdrop, the concept of necessity has, with few exceptions, largely escaped systematic study. The purpose of this thesis is to examine how necessity is understood in the context of war and conflict and investigates the extant concept across five separate knowledge communities - *ad bellum* & *in bello* international law, military strategy, reason of state and the Just War tradition. Using methodological tools of *Begriffsgeschichte*, this thesis treats necessity as a contested concept and examines how necessity is understood in each respective discourse and elucidate whether necessity has a uniform meaning or is a function of the discourse it is invoked in. This thesis will show that necessity is differently understood in each respective knowledge community and invoked to differing effects and for different purposes, thereby providing a more nuanced explanation of ways in which the (non-)use of force is justified and legitimised.

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Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Printed Name: Louis Bujnoch

Introduction: Making a Virtuous Inquiry of Necessity

*Teach thy necessity to reason thus;
There is no virtue like necessity.*

William Shakespeare
(John of Gaunt in Act I, Scene III of *Richard II*)

*And with necessity,
The tyrant's plea, excus'd his devilish deeds*

John Milton
(*Paradise Lost*, Book IV, Line 393)

Introduction

Early in his presidency, in an address to veterans in Phoenix Arizona in August 2009, then-president Barack Obama spoke of the fight against the Taliban in Afghanistan, a conflict still very much on the mind of the public and policymakers alike. In his remarks, Obama stated that the war in Afghanistan “is not a war of choice” and that it rather “is a war of necessity”.¹ This was of course a thinly veiled reference to the decision by his predecessor’s administration to militarily intervene in Iraq in 2003. The implication of this statement seems to be clear: the war in Afghanistan is thereby declared to be virtually forced upon the United States by the attacks of 11 September 2001. As such, it was not only within the scope of reasonable actions at the time, but beyond that, an indispensable course of action, while the intervention in Iraq is implicitly rendered an action of choice.

This assessment is somewhat echoed by Richard N Haas, a former career civil servant in the United States’ Departments of Defense and State, who chose the title *War of Necessity, War of Choice* for his book on the two wars the United States fought in Iraq.² Analogue to Obama’s statement, his assessment is all too clear. While the first war in Iraq during the

¹ The White House, “Remarks by the President at the Veterans of Foreign Wars convention”, Obama White House Archive, 17 August 2009. <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-veterans-foreign-wars-convention> (accessed 11 April 2017)

² R N Haas, *War of Necessity, War of Choice: A Memoir of Two Iraq Wars* (New York: Simon & Schuster, 2009)

term of Bush Sr. was in his view a necessity, unavoidable and forced by circumstance, the second war, during the administration of Bush jr., was a choice - the deliberate decision for the use of force among alternative options. Despite making use of different examples, the implication is the same regarding necessity. One war is characterised by its inevitability, while the other was a deliberate decision in the face of alternative options. The decision for a military intervention in Iraq in 2003 was of course in many ways predicated on the national security policy of the Bush administration, stating that the United States will “if necessary” act “preemptively”.³ Necessity, here, is used as a concept to express the (perceived) absence of any choice and the resulting imposition of a particular course of action - here, preemptive action.

What is common to the above examples is that they hinge on the invocation of ‘necessity’ in connection to war and the resort to the use of force – a usage of ‘necessity’ that is far from rare. The term ‘necessity’ of course denotes a far more pedestrian and everyday concept, whose meaning can be intuitively grasped. Thus, it is used in the context of, for instance, economic necessity or medical necessity to describe actions in those areas which were compelled by circumstance. Though there is a seeming overlap to those instances detailed above, the fundamental difference lies in the application of force and taking of lives. Even necessity in the context of force used by police is not of relevance when considering war and conflict. War necessarily implies the application of force to kill and has therefore historically been considered – ethically and legally – to be a separate sphere of conduct.⁴

Decisions about the resort to the use of force, or of particular conduct during hostilities, more often than not require the addition of authority and urgency, given that the use of force itself is generally considered to be *ultima ratio*. Highlighting that the resort to, or actions in war were not a choice but compelled by circumstance is one such way. Similar invocations have happened in the aftermath of the 9/11 attacks and the subsequent wars and interventions in various countries, as part of the War on Terror. In his testimony to the US Congress, Cofer Black, a former CIA employee and then coordinator for

³ White House, National Security Strategy of the United States, September 2002, p. 6, accessed at <http://nssarchive.us/national-security-strategy-2002/>, retrieved on 19.12.18

⁴ On war as separate sphere see for instance I Clark, *Waging War: A New Philosophical Introduction*, 2nd ed. (Oxford: Oxford Univ Press, 2015), in particular Ch. 2.

counterterrorism, stated that in this unfolding war “the gloves came off”.⁵ Practices like waterboarding and other forms of “[n]onlethal torture” were used to “secure information deemed necessary to prevent acts of terrorism”.⁶

Again, the implication seems clear. The decisions that were made regarding conduct, in this case practices deemed ‘nonlethal torture’, were seen as a requirement to secure information. Securing the information was essential and therefore the means to do so a necessity, not a choice. Of note is the fact that when necessity is invoked in this way, in the context of war and conflict - the *ultima ratio* - no further elaboration seems required. The implication of what necessity means in the context of each utterance seems to be implied, rather than explicitly stated. In this mould, President Xi Jinping stated that while “Chinese people do not fight other Chinese”, he went on to add that “Beijing would take necessary measures” against independence and separatist activities, without having to elaborate further on said measures.⁷

Beyond the practice of international politics even a cursory look at the International Relations (IR)⁸ scholarship that touches on the area of war and conflict, quickly reveals that the notion of necessity makes frequent appearances across many sub-fields of the discipline.⁹ Not wanting to forestall the literature review below, it suffices to say that necessity, invoked in the context of war and conflict, can be found across a range of theories, sub-disciplines and even related disciplines like International law. Despite the frequent invocation of necessity in the context of the use of force in both the practice of international relations as well as the study thereof, it seems to be an under-explored aspect, as the lack of further explanations shows.

⁵ M Bowden, “The Dark Art of Interrogation”, *The Atlantic Monthly*, October 2003, p.56

⁶ A Dershowitz, “Tortured Reasoning”, in *Torture: A Collection*, ed. Sanford Levinson (Oxford: Oxford Univ Press, 2004) p.257

⁷ Y Yang and E White, “Xi warns on foreign meddling in Taiwan”, *Financial Times*, 3 January 2019, p. 8

⁸ I will follow the convention, throughout this thesis, that international relations refers to the inter-relationships of states and the practice of international politics, while capitalised International Relations will refer to the study thereof.

⁹ Restricting myself to works that mention necessity in their title and trying to provide a sample which showcases the breadth of appearances necessity makes across sub-fields of IR, see eg. G A Raymond, “Necessity in Foreign Policy”, *Political Science Quarterly* 113, No. 4 (1998); S Lazar, “Necessity and non-combatant immunity”, *Review of International Studies* 40 (2014); J Dill and H Shue, “Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption”, *Ethics & International Affairs* 26, No. 3 (2012); and J Haslam, *No Virtue Like Necessity: Realist Thought in International Relations since Machiavelli* (New Haven: Yale Univ. Press, 2002).

Topic and Research Question

The topical focus of this thesis will therefore be on the usage of necessity as it relates to war and conflict. While necessity is invoked in other contexts, it is war and conflict – the *ultima ratio* – where necessity is used in conjunction with the application of force which explicitly involves the taking of lives. It is in this conjunction that necessity becomes a political concept through its application in the context of the ultimate political act. As the section above has shown, necessity is frequently invoked in connection to war and conflict in the practice of international politics, but also features in the study thereof, within the discipline of IR. The usage and context of these invocations varies, and the understanding of necessity seems to vary correspondingly across contexts. The research topic and question of this thesis centre on this very problem:

How is necessity understood in relation to war and conflict?

The introduction to this chapter has already listed a number of different usages of necessity in the context of war, conflict and the use of force. It seems reasonable to expect that necessity may not be uniformly invoked in terms of its intended meaning. This in turn would imply that without clear meaning, soldiers, politicians, policymakers and scholars are apt to talk past each other when invoking necessity in the most serious of circumstances - in the context of war and conflict. Therefore, it seems only fitting to examine how necessity is actually understood.

Given the variety of different invocations of necessity, it will be regarded as a contested political concept for the purposes of the research question and the ensuing investigation.¹⁰ Concepts constitute the “building blocks of political thought” and are therefore also integral to how actors conceive of the requirements of war and conflict.¹¹ Necessity, as mentioned above, can be used as everyday term or conceptually in other fields such as economics. However, it is in the context of war and conflict that it becomes a political concept of great importance which can be employed to great effect and consequence. The notion of necessity as concept will be further elaborated on below in the methodology

¹⁰ D Collier, F D Hidalgo and A O Maciuceanu, “Essentially contested concepts: Debates and applications”, *Journal of Political Ideologies* 11, No. 3 (2006), provides a good overview of the principle of what is meant by contested concepts.

¹¹ M Freeden, “Political Concepts and Ideological Morphology”, *The Journal of Political Philosophy* 2, No. 2 (1994), p. 140

section. It will suffice to say at this stage, that the understanding of necessity will be examined in treating necessity as a concept that is contested within professional groups and practice, but especially across different groups. It is this latter aspect that this thesis focuses on.

It is important to highlight that this examination does not hinge on the *term* necessity itself but seeks to gain an understanding of how the *underlying concept* is invoked. In this regard, this thesis will start from a ‘weak’ conceptualisation,¹² premised on the etymology of the term necessity, and is going to stipulate that necessity describes a (perceived) requirement for (in)action resulting from circumstance.¹³ It is of further note in this context that contrary to most other political concepts, necessity, so conceived, always relates to (in)action and political conduct rather than merely providing a rubric around which political thought is organised.

This thesis will examine how necessity is variously invoked across a range of different professional groups and their practice, which I will refer to as discourses or knowledge communities, which create their own bounded rationalities with respect to the understanding of necessity. As specific sets of understandings constitute discourses, the actors subscribing to each respective understanding build a knowledge community which has its own knowledge practices, i.e. usages of necessity. The examination will be organised around these discourses and their associated knowledge communities and focus on elucidating the extant understanding of necessity. Again, this is an aspect that is further explored in the methodology section below. This in turn allows us to add to the above-stated research question by specifying that the investigation of how necessity is understood in relation to war and conflict

will examine whether the understanding of the concept is uniform across these discourses or whether it is derivative thereof?

¹² This can also be thought of as a ‘weak ontology’ and is borrowing from security studies, where Barry Buzan has described security as “weakly conceptualized” see B Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, 2nd ed., (Colchester: ecpr press, 1991), p. 28

¹³ Regarding etymology, Michael Walzer traces necessity to the dual meaning of indispensable and inevitable, see M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), p. 8. This dual meaning will again be employed in the analysis below.

That is to say, the thesis will examine whether necessity is understood in the same way by different knowledge communities, or whether the differing knowledge practices of these professional communities drive a disparate understanding.¹⁴ The underlying premise in this approach is that while there can be different understandings of necessity within discourses, the greater contestation of the understanding of this concept in relation to war and conflict occurs across different practices and professions: that is to say it occurs across discourses. It is this comparative dimension that this thesis seeks to elucidate in order to examine contestation across discourses. On a matter which is as delicate to politics as the use of violence and war, gaining insights into whether there is a common understanding for how circumstance can compel (in)action is crucial. Do members of different professions and discourses mean the same thing when they invoke necessity in relation to war, or do they have different conceptions thereof? That is to say, can a conversation on common ground take place or will members of different professions and discourses talk past each other? Importantly, this also implies that this thesis will make no claims to reveal *the* understanding of necessity, but rather investigates a selection of discourses and their respective understandings of the concept.

The remainder of this chapter will further outline how the examination in this thesis is structured and how it seeks to answer the research question. The next section of this chapter will, firstly, provide a concise literature overview, outlining how the concept of necessity has been invoked or discussed in the context of war and conflict. In doing so, this overview will also survey the different discourses into which the understandings of necessity separate, which in turn will be useful for the structuring of this thesis going forward. Building on this literature overview, the next section will outline why and how the research topic and question matter. Despite being a frequently invoked concept in the context of the quintessential matter of high politics - war - necessity has largely escaped any further examinations, in particular of the comparative kind. This is followed by a delimitation of the scope of inquiry.

The two remaining sections will address the chosen methodology and the resulting approach to answering the research question respectively, before a summary at the end of the chapter. Premised on the consideration of necessity as a contested concept, the

¹⁴ Freeden, "Political Concepts and Ideological Morphology", pp. 146-7

methodology section outlines how this thesis will utilise the methodological tools of *Begriffsgeschichte* - conceptual history in the mould of Reinhart Koselleck and his colleagues. This mode of inquiry will be particularly helpful with regard to clarifying how necessity is understood and invoked across the different discourses in which the concept is invoked. The last section will then detail how this methodology is translated into the analytical approach for this thesis. Following from this, the section will then provide an outline of the substantive chapters to follow in this thesis, before the summary.

Literature Overview

This section will provide a concise literature overview which will draw out the different contexts that form their own discourses with respect to necessity. In doing so, this section will look at IR scholarship, broadly speaking, and touch on various sub- and related fields in the process such as international law, to name just one. This initial overview is important in demonstrating the gap in the treatment of necessity. In this context it is important to distinguish invocations of necessity from treatments or explanations of the concept. The former is the practical usage of the concept of necessity by a knowledge community within a set discourse. With the latter I refer to attempts at examining the concept and providing an explanation as to how the concept is used. This section will show that most strands of IR scholarship invoke necessity 'in passing', without making any effort to explicate what it means. Beyond that, this overview will also provide the basis for the design and methodology of the research approach of this thesis. While this will be elaborated on below, it will be based on the gaps in understanding exhibited in the literature, shown in this section.

The closest examination that necessity, as a concept invoked in the context of war and the use of force, has received, can not even be found in scholarship on international politics itself. Rather, this job falls to international legal scholars who have, in recent years, paid closer attention to the concept of necessity and how it is used in international law. Of note is the work Jens David Ohlin and Larry May which examines *Necessity in International Law* broadly and which was published as recently as 2016.¹⁵ Though some years older,

¹⁵ J D Ohlin and L May, *Necessity in International Law* (Oxford: Oxford Univ. Press, 2016). They branch out in their examination of the concept in including a chapter on necessity in criminal law.

Judith Gardam's monograph focuses specifically on the legal concept of necessity in the context of the use of force by states.¹⁶ Both Gardam and the work by Ohlin and May take a broad look at necessity in international law, which contains an examination of the concept of necessity as part of the resort to the use of force by states, but also looks at necessity in the context of legal doctrine that regulates the conduct in war, where it is usually referred to as military necessity.¹⁷ In examining both aspects, these two examples nicely illustrate that there are actually two separate strands of literature within the field of international law, one concerning itself with necessity and the question of the resort to war and the use of force, while the other examines necessity in the context of conduct and specific actions in war. These involve different bodies of international law and, more importantly, different conceptualisations of necessity and thus, they offer different discourses of necessity in relation to war and conflict - *ad bellum* and *in bello*.

Another aspect of note regarding these two discourses is that they not only invoke necessity in, say, making a legal-theoretical argument but also provide treatments of necessity, that is to say they conduct examinations of the concept and its role in international legal doctrine. As mentioned before, distinguishing these two aspects is important, as it seems rare for necessity to be invoked as part of a discourse as well as analysed within it. In both *ad bellum* and *in bello* international law however, necessity has featured in cases and is regularly analysed as a concept of legal doctrine.¹⁸ Even a cursory look at these international law discourses also makes clear that their developments have been very different. The extant *ad bellum* international law, and the role of necessity within it, premised on the UN legal regime, differs greatly from how the concept was invoked in the not too distant past. This is exemplified by the speech of Theobald von Bethmann Hollweg, the German Chancellor at the time of the First World War, in front of the Reichstag, in which he commented on the need to violate the neutrality of Belgium.¹⁹ There is a clear visible break with respect to the extant usage of the concept which largely

¹⁶ J Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge Univ. Press, 2004).

¹⁷ See for example Gardam, *Necessity, Proportionality and the Use of Force by States*, p. 2.

¹⁸ O Gross and F Ni Aolain, "Emergency, War and International Law - Another Perspective", *Nordic Journal of International Law* 70 (2001), provides a good elucidation of the role of necessity in legal doctrine, as well as highlighting knowledge practices and the usage of the concept within these discourses.

¹⁹ See the editorial comment "Germany and the Neutrality of Belgium", *American Journal of International Law* 8, no. 4 (1914), wherein Bethmann Hollweg is quoted as stating that Germany is "in a state of necessity, and necessity knows no law!" (p.880). He also acknowledges in the same speech that Germany committed a wrong and that this would be rectified upon reaching their goals of war.

hinges on the legal framework of the United Nations charter and the prohibition of the aggressive use of force by states. With respect to the conduct of war on the other hand, there is more of a linear development from early formulations like the Lieber Code, to our current Law of international Armed Conflict.²⁰ Here, the concept is framed as military necessity wherein the priorities dictated by military strategy and tactics are weighed against the imperatives stemming from humanitarian concerns.

In its *in bello* form, the legal understanding of necessity also closely relates to the knowledge community of military strategy. Here, the legal understanding of military necessity is requisite for instruction of young soldiers and officers for application in the field. Not surprisingly a number of legal scholars with military backgrounds or who are actively serving military personnel have written on the topic.²¹ Where this strand of literature departs from the aforementioned legal treatments is on the role that the concept of necessity plays. While it has the status of a functional legal principle in both the *ad bellum* and *in bello* international law literature, it is only underlying when it comes to military and strategy literature. The concept is used and discussed in the same functional manner only where it takes the form of the *in bello* legal concept. As mentioned above, the legal concept consists of two components, military strategy and tactics on the one hand and humanitarian imperatives on the other. The concept of necessity is approached in the military strategy literature through the former, the demands of military-prudential logic - of “strategic necessity”.²² This is representative for the literature of this discourse at large, wherein necessity is mostly conceptualised as underlying principle of prudence rather than specifically addressed.

Thus, the concept of necessity - outside of its import as a functional, legal concept - only features indirectly in the literature. Nevertheless, the principle enshrined in the concept is the underlying logic of military and operational planning. The self-image of soldiers and officers is undergirded by an identification with prudence as a guiding principle of

²⁰ B M Carnahan, “Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity”, *American Journal of International Law* 92, No. 2 (1998). The Lieber Code incidentally is also probably the first codification of the concept of necessity as legal principle.

²¹ See for example Major W G Downey jr, “The Law of War and Military Necessity”, *American Journal of International Law* 47, No. 2 (1953), pp. 251-262, and Colonel G I A D Draper, “Military Necessity and Humanitarian Imperatives”, *Mil. Law & L. War Rev.* 12, No. 2 (1973), pp. 129-151.

²² D J Lonsdale, “A view from Realism”, in D Whetham, ed., *Ethics, Law and Military Operations* (Houndsmills: Palgrave MacMillan, 2011), pp. 39-40.

conduct. This in turn is reflected in the understanding of strategy itself, conceived as a matching of military means to political ends. In this self-understanding, “[c]ompetent strategy will find alternative means and methods [...] in order to adapt in near real time to the challenge of necessity”.²³ Put simply, what needs to get done, will be done. This understanding underlies all aspects of military and strategic thinking and, of course, relates to war. The literature is reflective of this understanding of necessity and therefore hardly ever explicitly examines the concept. Nor is the concept often explicitly invoked in this strand of literature. The logic, imbued in the conceptualisation of necessity in the context of military operations and strategic thinking, is apparent in scholarly examinations of the military and strategic studies. It carries through all levels of planning and strategic thinking, from tactical battlefield decisions, across operational and strategic levels all the way to policymaking.

At the level where strategic planning and military operations connect to policymaking and, more importantly, to politics, Realism, in its broadest understanding, is the next important strand of literature.²⁴ In the International Relations (IR) literature on Realism “terms like *power*, *state* and *national interest* appear with great regularity, interspersed with claims about human nature or political necessity...”.²⁵ What IR theories of Realism and general expressions of power politics have in common, is that they are premised on the principle that “ordinary morality must yield to necessity” in statecraft.²⁶ In particular where the survival of political community - usually the state - is concerned, ethical norms as well as laws are seen as expendable - “[p]rudence simply overrides morality”.²⁷ This very much connects to the prudential understanding of necessity in the context of military operations and strategy, outlined above. Here too, necessity is a guiding principle not just for the theoretical discourse in the literature, but also a concept that is invoked by practitioners who subscribe to it.²⁸ As such, the concept of necessity features heavily in the Realism

²³ C S Gray, *The Strategy Bridge: theory for practice* (Oxford: Oxford Univ. Press, 2010), p. 155.

²⁴ This thesis will follow the convention to capitalise the word Realism when referring to the political theory.

²⁵ R B J Walker, *Inside/outside: International Relations as Political Theory* (Cambridge: Cambridge Univ. Press, 1993), p. 32. Emphases quoted from original. See also S Forde, “Classical Realism”, in T Nardin and D R Mapel, eds., *Traditions of international ethics* (Cambridge: Cambridge Univ. Press, 1992), who states that “[t]he essence of international realism is its belief in the primacy of self-interest over moral principle, of necessity and therefore as of right, in international politics” (p. 62), highlighting the link between necessity and a moral political outlook in relation to war and the use of force by states.

²⁶ T Nardin, “Ethical Traditions in International Affairs”, in T Nardin and D R Mapel, eds., *Traditions of international ethics* (Cambridge: Cambridge Univ. Press, 1992), p. 15.

²⁷ *Ibid.*, p. 16.

²⁸ See Raymond, “Necessity in Foreign Policy”, pp. 673-688 for a good overview of how necessity has

literature as an underlying guiding principle of prudence, but, more importantly, also through the countless invocations of the concept and references to it especially in the context of transgression of rules of law or moral norms in the use of force by states. This latter point especially pertains not only to the literature of IR but also to the everyday practice of international politics, which is the subject of investigation in said literature.

The last main strand of literature that covers necessity in the context of war and conflict is in some ways an amalgamation of those discussed above. The just war tradition has long and extensive roots extending as far back as Antiquity and the late Roman Empire and continues into our present day.²⁹ The tradition has provided a moral discourse through which questions regarding the legality of resorting to war - *jus ad bellum* - as well as the legality of actions therein - *jus in bello* - can be discussed and assessed. As such, the tradition, and by extension the strand of literature dealing with it, connects to modern day international law, aspects of military operations and strategic thinking as well as politics and statecraft - that is to say, it connects to all of the above-mentioned discourses.

Just war thought provides categories through which both *jus ad bellum* and *jus in bello* can be examined.³⁰ It is here that necessity features heavily, often linked to questions of proportionality and last resort. Again, despite invocations of necessity and the concept generally featuring heavily in the just war discourse and its accompanying literature, there is little discernible effort to elucidate how the concept is understood and used. Michael Walzer, one of the most prominent contemporary just war thinkers, tries to do so in *Just and Unjust Wars*, but unfortunately does not go further than some cursory attempts.³¹ Overall, the just war literature, as in the cases of the above-mentioned discourses, falls short when it comes to explaining a concept that is frequently invoked and referred to in this discourse.

This brief examination of various discourses and their associated literatures shows that although necessity is frequently invoked and generally features heavily in them, the

featured in realist writing on foreign policy making.

²⁹ See e.g. part I of A J Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006) for a comprehensive yet concise overview of the historical development of the just war tradition.

³⁰ See for example J T Johnson, *Morality and Contemporary Warfare* (New Haven: Yale Univ. Press, 1999), pp. 28-30 for a list of those categories in their classic and modern formulations. For a comparative overview of how these categories are treated in the writings of different just war scholars, see C Toner, "The Logical Structure of Just War Theory", *J Ethics* 14, No. 2 (2010), pp. 81-102.

³¹ Walzer, *Just and Unjust Wars*, chapter one, in particular p. 8.

concept is rarely investigated or explained. Rather, necessity is accepted at face value in arguments that concern war, conflict and the use of force by states. The legal literature constitutes an exception here, as it provides an examination of necessity as a concept in arguments for the resort to war, as well as in justifying conduct. Though international law literature goes beyond merely making invocations and references to necessity, it only examines necessity as a functional, legal concept within the confines of legal doctrine. Political ramifications and ‘spill over effects’ into other areas are hardly considered.³² This latter point pertains also to the clear points of connection between the various discourses described, which are also not examined with respect to the usage of necessity. Thus, despite clear connecting points in relation to necessity between various strands of literature, no effort has been made into understanding what invocations of, and references to necessity imply for different discourses. It is these points that are guiding the research project of the present thesis as principle underlying motivation but also its scope and methodology, as will be outlined below.

Necessary Research?

As the literature overview has shown, the concept of necessity finds mention in a lot of separate strands of literature which touch on war, conflict and the use of force by states. Nevertheless, the concept is rarely discussed or elucidated within said strands and, more importantly, it is never discussed across these separate strands of literature. It follows logically from the latter point that necessity as a cross-cutting concept has also never been expounded on. With the exception of the legal literature, where necessity is examined as a functional legal concept, its role as a political concept in the context of wars and conflict remains woefully under-explored. This applies even more so, from a comparative perspective, to a concept that finds usage in various different discourses, which, seemingly, employ the concept of necessity differently. In terms of academic scholarship there is therefore a clear gap when it comes to understanding how the concept of necessity is used in the context of war and conflict. This gap is all the more striking given that the concept of necessity, in this context, is an important factor in the decision of whether to resort to the *ultima ratio* - war. This lack of engagement with necessity exists in most of the

³² There are some exceptions in this regard, which can be especially found when necessity is discussed in the *ad bellum* context. In said context there are often references to political decisions in the use of force by states, going beyond mere legal considerations.

aforementioned discourses and associated literatures and is particularly obvious when viewed across said discourses. This in turn begs the question whether the understanding of necessity, or an element thereof, is uniform across discourses or is it derivative of it, which was highlighted as additional research question above.

Scope of Research

Before providing a more detailed account of the methodology and approach for the ensuing investigation, the aim of this section is to give a broad outline of the scope of the project as well as the rationale behind it. As this chapter has shown so far, the invocations of and references to necessity are plentiful in international politics and IR scholarship even when restricted to just those made in the context of war and conflict. For practical reasons, the examination of necessity will have to be focused and consequently exclude certain aspects. Generally, the focus of the present investigation will lie on the discourses presented above. Therefore, this thesis will not examine necessity in any context outside of war and conflict. As outlined earlier in this chapter, while the term necessity implies an everyday notion which can be intuitively be grasped and is used in a variety of other contexts such as medicine where lives are also at stake, it is only in the context of war and conflict where it becomes a political concept explicitly containing the possibility of taking other people's lives.

However, even though this thesis focuses on the concept of necessity in relation to war and conflict, this thesis will not examine all usages of necessity in relation to war either. The focus herein lies on the meaning of necessity as compelling (in)action given a set of circumstances. This in turn means that this investigation will not deal with references to necessity in the context of war that imply a positive meaning premised on the 'naturalness' of war.³³ This is to say that any expression of the need for war for assumed positive, epiphenomenal reasons, will not be examined.³⁴ Along the same lines, necessity will not be examined as a completely abstract concept, in and of itself, as has been done in other

³³ Necessity of war in the sense of positive benefits to the political community from war, through, for example, a cleansing process, are present in the writings of various political thinkers such as Machiavelli and Hegel.

³⁴ A discussion of this kind can be found in C Smith, "'We Have Mingled Politeness with the Use of the Sword': Nature and Civilisation in Adam Ferguson's Philosophy of War", *The European Legacy*, Vol. 15, No. 1 (2014), pp. 1-15; where Smith discusses Adam Ferguson's account of war as a component of civilisation.

areas.³⁵ Rather, necessity is regarded as political concept and examined in the discourses where it is used as an argument that describes an (in-)action being required due to the force of circumstance.

Methodology

The challenge in elucidating the understanding of necessity lies in the fact that necessity denotes a common term frequently used in daily life, but that it is also a political concept that is rather charged when used in the context of war and the use of force. Moreover, while this investigation is centred around necessity as it pertains to war and conflict, this category itself is spread across different discourses or communities, within which necessity appears to take different ‘shapes’ and meanings. Thus, the methodological requirements put to the research question have to ensure the differentiation between necessity in its different guises and allow for the interrogation of the concept across separate but related bounded rationalities. Moreover, shedding light on the extant understanding of necessity within said communities or discourses invariably requires some amount of historical context in which the present usage will be grounded. In sum, the methodology and approach chosen to investigate the research question has to be able to shed light on the understanding of necessity, in doing so separate the common term from its understanding relation to war and conflict, and do this across different communities with an eye on its historical roots.

The different usages and apparent different understandings of necessity presented at the beginning of this chapter serve as starting point for this undertaking. This plurality of understandings of necessity is what renders necessity a concept in Reinhart Koselleck’s definition of *Begriff* [concept]. Koselleck regarded the plurality of meanings as the distinguishing feature of concepts, which separated them from mere terms used in everyday language.³⁶ The notion that the contestation of the meaning of a word implies

³⁵ This sort of examination can be found in more analytical philosophy minded scholarship, see for example B Williams, “Practical Necessity”, in *Moral Luck: Philosophical Papers 1973-1980* (Cambridge: Cambridge Univ. Press, 1981), pp. 124-131. See also B Williams, *In the Beginning was the Deed: Realism and Moralism in Political Thought* (Princeton: Princeton Univ. Press, 2005). For commentary on Williams see C Cordner, “Ethical Necessity and Internal Reasons”, *Philosophy* 76, No. 298 (2001) and R J Gay, “Bernard Williams on Practical Necessity”, *Mind* 98, No. 392 (1989).

³⁶ R Koselleck “Einleitung”, in *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, ed. Werner Conze and Reinhart Koselleck (Stuttgart: Klett-Cotta, 1972), xxii.

that it is not a mere term, but a concept and contested at that is of course not new.³⁷ However, in addition to this plurality of meanings, a concept, in contrast to a mere term, in Koselleck's approach, also always has an *Allgemeinheitsanspruch* - that is, it makes a claim of generality of meaning.³⁸ Of course these criteria can easily be subsumed on necessity, which is the focus of investigation in this project. Necessity appears to be invoked differently and for different purposes depending on the discourse it is embedded and its associated community. At the same time, when necessity is invoked, it is done so without any further explanation or guidance as to the implications of said invocation. Thus, each discourse makes a claim of generality of meaning in the way they use necessity in the context of war and conflict, or else they would feel the need to provide further explanation as to how the concept is understood.

Given the scope of invocations of necessity and its associated scope of intended meanings in the political sphere, treating necessity as a contested political concept follows as a logical conclusion. Therefore, the methodology for examining the understanding of the necessity will have to take some form of conceptual analysis.³⁹ As conceptual analysis is not an overly well-defined methodological approach and given that historical aspects in the formation of understanding of necessity are taken into account, conceptual history appears to be an appealing vehicle for the methodology of the present investigation. This mode of intellectual history has been pioneered predominantly in German research, among others by Reinhart Koselleck himself, combining linguistic and societal aspects with historical inquiry to form an intellectual history focused on concepts - *Begriffsgeschichte*.⁴⁰ It seeks to elucidate meaning of concepts and, by virtue of its name, the history thereof. What makes Koselleck's approach stand out is that he did not merely seek a linguistic approach or variation of historical source analysis, but a methodological approach that would

³⁷ See for example W. B. Gallie, "Essentially Contested Concepts", *Proceedings of the Aristotelian Society*, 56, 1956, for an early example of the notion of contested concept, and D Collier, F D Hidalgo and A O Maciuceanu, "Essentially contested concepts: Debates and applications" for a discussion thereof.

³⁸ R Koselleck, "Begriffsgeschichte und Sozialgeschichte", reprinted in R Koselleck, ed., *Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten*, 10th ed. (Frankfurt a.M.: Suhrkamp, 2017), p. 119.

³⁹ Conceptual analyses have been conducted in security studies, a sub-field of IR, with the focus on security as a concept. See D A Baldwin, "The concept of security", *Review of International Studies* 23, No. 1 (1997).

⁴⁰ M Richter, "A German version of the 'linguistic turn': Reinhart Koselleck and the history of political and social concepts (Begriffsgeschichte)", in *The History of Political Thought in National Context*, ed. Dario Castiglione and Iain Hampsher-Monk (Cambridge: Cambridge Univ. Press, 2001). See also M Richter, *The History of Political and Social Concepts* (Oxford: Oxford Univ Press, 1995) for a more general introduction to Begriffsgeschichte.

combine these factors to elucidate social and political problematics.⁴¹ A similar approach was developed by Terence Ball as he was not aware of this historical project in German scholarship, which was only later widely made available in the English-speaking world through Melvin Richter.⁴² Koselleck in particular focused his work on concepts he deemed to be key concepts, or *Grundbegriffe* [basic concepts]. This was done especially through his lexicon of basic concepts.⁴³

Despite its name conceptual history is not solely a historical project. Understanding historical developments and changes in the meaning of contested concepts are of course a primary goal. However, the methodology of conceptual history in the mould of Koselleck's approach allows its application for different purposes as well.

This approach has become a primary mode of inquiry for investigations focusing on the contemporary relation between semantics and societal structures.⁴⁴ Koselleck himself did not regard his methodological approach to be fulfilled merely by his own lexical project and endorsed the application of the methodology of *Begriffsgeschichte* in other contexts.⁴⁵ It is a hallmark of this form of conceptual history to combine the examination of concepts in their extant form, with an examination of the historical-semantic development that has led up to that extant understanding. This form of conceptual history seeks to combine inquiry into the synchronic meaning of a concept, with a diachronic perspective that uncovers historical layers of meaning.⁴⁶ The synchronic perspective is here the most relevant to the present inquiry, as it relates to the extant understanding of a concept. The main question this thesis seeks to answer is how necessity is understood in relation to war and conflict. Therefore, this is not first and foremost a historical research project. However,

⁴¹ Koselleck, "Begriffsgeschichte und Sozialgeschichte".

⁴² See T Ball, *Transforming Political Discourse: Political Theory and Critical Conceptual History* (New York: Blackwell, 1988), in particular chapter one. See also M Richter, *The History of Political and Social Concepts*.

⁴³ W Conze and R Koselleck, eds., *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta, 1972).

⁴⁴ W Steinmetz, "Vierzig Jahre Begriffsgeschichte: The State of the Art", in H Kämpfer and L M Eichinger, eds., *Sprache - Kognition - Kultur: Sprache zwischen mentaler Struktur und kultureller Prägung* (Berlin: Walter de Gruyter, 2008), p.179.

⁴⁵ He actually regarded it as straightjacket at times, see R Koselleck, "Hinweise auf die temporalen Strukturen begriffsgeschichtlichen Wandels", reprinted in R Koselleck, ed., *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache* (Frankfurt a M: Suhrkamp, 2006), pp. 86-98. See also W Steinmetz, "Vierzig Jahre Begriffsgeschichte", p. 182 on this point.

⁴⁶ Koselleck, "Begriffsgeschichte und Sozialgeschichte", pp. 115-7. For a more general treatment of synchrony and diachrony in the context of historical inquiry see eg. E Coseriu, *Synchronie, Diachronie und Geschichte: Das Problem des Sprachwandels*, transl. H Sohre (München: Wilhelm Fink Verlag, 1974), pp. 206-47.

the conceptual history approach outlined above considers the diachronic perspective, which provides the historical layers of different understandings of a concept, as indispensable and indeed inseparable.⁴⁷ In Koselleck's words, "*Begriffsgeschichte* encompasses that zone of convergence in which the past, with its concepts, merges [eingeht] with contemporary concepts".⁴⁸

Thus, conceptual history can offer a solid methodological foundation for this investigation, in which the extant understanding of necessity can be examined, while also taking account of how this understanding was arrived at. Terence Ball, a noted conceptual historian, laying out ideas for the future of the academic study of conceptual history in a keynote address, saw "the present as history" as future path for the study of concepts.⁴⁹ The methodological approach for the present investigation will build on his idea of a conceptual history of the present and use it as its starting point to combine it with the tools of *Begriffsgeschichte*. Thus, the project will apply more of a synchronic focus in its investigation of necessity, while not entirely disregarding the diachronic dimension with which conceptual history is generally associated. As mentioned above, it is one of the hallmarks of *Begriffsgeschichte* that these two dimensions are not entirely separated.

In this understanding, conceptual history, even when focusing on one dimension, not only does not have to exclude the other, but must not exclude it.⁵⁰ For the purposes of the present project this means that in order to elucidate the extant understanding of necessity, the investigation will invariably have to draw on the 'deeper' historical roots of the usage of the concept. The addition of a diachronic dimension in the investigation of the concept of necessity is however not done solely to adhere to the methodological doctrine of this mode of conceptual history. Rather, it will offer additional analytical depth to the understanding of the extant concept, as the contemporary meaning of necessity often either contains aspects of its historical understanding or is even premised thereupon. Of particular interest in this context are any incidents of transitions [*Übergänge*] or overlaps

⁴⁷ Koselleck, "Begriffsgeschichte und Sozialgeschichte", pp. 114-18. See also J Ifversen, "About Key Concepts and How to Study Them", *Contributions to the History of Concepts* 6, No. 1 (2011), pp. 82-3.

⁴⁸ Koselleck, "Begriffsgeschichte und Sozialgeschichte", p. 127. Translation is my own.

⁴⁹ T Ball, "Confessions of a Conceptual Historian", in *Finnish Yearbook of Political Thought 2002 vol. 6*, ed. Pasi Ihalainen, Eerik Lagerspetz and Tuija Parvikko (Jyväskylä, SoPhi, 2002), p. 27.

⁵⁰ See R Koselleck, "Sozialgeschichte und Begriffsgeschichte", pp. 21-31 and "Stichwort Begriffsgeschichte", pp. 99-102, both reprinted in *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache* (Frankfurt a M: Suhrkamp, 2006).

[*Überlagerungen*] in understanding,⁵¹ as well as episodes of convergence or divergence in meaning.⁵² Such occasions can, moreover, occur within a single discourse, but may also appear across discourses and communities. Here, again, conceptual history and its methodology are well-suited to tease out these aspects and will help to bring the understanding of necessity in the context of war and conflict into sharp relief.

The discourses chosen for examination, in which necessity is being invoked, are a key component of this examination which therefore needs to be taken into account. While necessity is invoked widely, there are communities that form their own discourse, or bounded rationality, with respect to the concept. The understanding of necessity correspondingly varies across these discourses and it is this “multitude of often conflicting connotative meanings” that can be teased out with the help of an approach based on conceptual history.⁵³ The role of language in constituting these discourses - and by implication also constitutive of the understandings of necessity - is explicitly acknowledged by conceptual historians of this mould.⁵⁴ This in turn is important in relation to the understanding of necessity across different such bounded rationalities. One of the objectives of this project is to elucidate whether there is permanence in the understanding of necessity - over time as well as across different communities of bounded rationalities. The usage of “conceptions prevalent amongst certain groups of language users or even societies at large” is an aspect that is encapsulated by conceptual history.⁵⁵ That is to say, that the invocation of a concept like necessity by certain communities, or in certain discourses, forms its own bounded rationality. Consequently, the methodological approach is guided by this combination of an examination into the concept itself, as well as the usage of it across different discourses.

On this latter point, Helge Jordheim offers a helpful further tailoring of this methodological approach, which will be employed in the analysis of necessity below. He outlines the ‘asynchronicities of use’ of concepts, “by which concepts used by specific communities or used as part of a specific knowledge practices appear to be out of step with other concepts,

⁵¹ Koselleck, “Begriffsgeschichte und Sozialgeschichte”, p. 177.

⁵² Koselleck, “Stichwort: Begriffsgeschichte”, p. 99

⁵³ P Ihalainen, “Between historical semantics and pragmatics: Reconstructing past political thought through conceptual history”, *Journal of Historical Pragmatics*, Vol. 7, No. 1 (2006), p.117.

⁵⁴ Ibid., p. 118

⁵⁵ Ibid., p. 119

and even with themselves”.⁵⁶ The discourses in which necessity gets invoked can be rendered “specific communities” and in some cases also as “specific knowledge practices”. Necessity as a concept is common to these discourses but appears to be invoked differently and for different purposes. This fits with one of Jordheim’s distinction of two forms of asynchronicities of use, wherein one of them “the same concepts are used in different and even conflicting discourses”.⁵⁷ What Jordheim characterises here is a fitting approach for this research project. In necessity we have a concept that does get invoked in similar yet different ways across specific communities, which form their own discourses with respect to their usage of the concept. Moreover, these discourses, as will be outlined in chapters to follow, often find themselves in conflict or competition with one another. Therefore, this specific approach to conceptual history will be particularly useful for the purposes of the examination of necessity in this thesis.

In sum, the purpose of this research project is to elucidate the understanding of necessity in relation to war and conflict. Necessity fills the role of a political concept in this regard, as its meaning is contested and constituted through the language employed and the social context it is embedded in. While the focus of this investigation lies on the extant meaning of necessity, the general methodological approach of conceptual history seems nevertheless best suited to interrogate the meaning of necessity. In particular conceptual history of the German tradition of *Begriffsgeschichte*, which combines aspects of diachronic and synchronic inquiries is a useful methodological tool for the present research project. The present usage of necessity is sometimes more, sometimes less grounded in the history of the concept. This in turn is dependent on the context in which it is employed, that is to say the community or discourse in which it is used. Here, again, conceptual history offers a useful methodological approach. Specifically, Jordheim’s asynchronicities of use, which allows to examine the invocation of necessity across different discourses. All in all, the methodology will be of eclectic nature, but primarily borrow from methodological aspects of conceptual history to explicate the understanding of necessity, without, however, writing a conceptual history of necessity. The method and approach this translates into for this investigation is outlined in the next section below.

⁵⁶ H Jordheim, “Europe at Different Speeds: Asynchronicities and Multiple Times in European Conceptual History”, in *Conceptual History in the European Space*, ed. Willibald Steinmetz, Michael Freeden and Javier Fernández-Sebastián (New York, Berghan Books, 2017), p.53

⁵⁷ H Jordheim “Europe at Different Speeds”, p. 54.

Analytical Approach

The method of analysis is in essence comprised of four guiding analytical categories through which the invocations of necessity will be interrogated. Each of these categories is designed to probe a particular aspect of how the concept of necessity is used - either through appraising its 'setting' - that is to say how the concept of necessity relates to other concepts in the context of war and conflict - as in the case of the first two categories, or through examining the 'mechanics' of how the concept is invoked, what effect it has and for what purpose it gets invoked with the latter two categories. The former helps the analysis across discourses in assessing the context of the invocation of necessity. The latter is dedicated to the analysis of the concept itself and how it works within each respective discourse.

1) Term vs. Concept

This category clarifies how precisely the respective discourse or community invokes necessity, as the concept is sometimes subsumed under different terminology depending on the community invoking it. For instance, the broad concept of necessity is sometimes referred to as 'military necessity', on other occasions it is subsumed under a term not containing the word necessity at all. They invoke the same concept, but hint at potentially different ways of understanding necessity. The general approach chosen for this investigation conducts a semasiological investigation of the concept of necessity, examining the different understandings and usages of necessity in its various discourses.⁵⁸ There is a danger of missing invocations of necessity that do not match the term that has been ex-ante attached to the concept. Thus, this guiding category supplies the onomasiological component, which sheds light on other designations of terms to the same concept.⁵⁹ To correlate this to the concrete case at hand - this analytical category will capture when necessity, as a concept, is invoked through a term other than 'necessity'

⁵⁸ See Koselleck, "Begriffsgeschichte und Sozialgeschichte", p. 121; "Stichwort: Begriffsgeschichte", p. 101.

⁵⁹ R Koselleck, "Die Geschichte der Begriffe und Begriffe der Geschichte", reprinted in *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache* (Frankfurt a M: Suhrkamp, 2006), p. 62. See also Koselleck, "Begriffsgeschichte und Sozialgeschichte", p. 101 and S Penth, "Konzeptionen Historischer Semantik am Beispiel der Begriffe 'Friede und 'Krieg'", *Militär-geschichtliche Zeitschrift* 65 (2006).

itself.

In particular in order to establish whether the understanding of necessity contains elements which are uniform across discourses or if its usage is completely asynchronic, it is vital to first establish how the concept gets invoked in the first place. Koselleck highlights the general importance of including both semasiological as well as onomasiological lines of inquiry in conceptual history, stating that “both [...] are thus required to describe the historical change of the concepts as well as of the reality captured by said concepts”.⁶⁰ In this way, this category will not just capture different terms that describe the concept and reality behind it but its application across different discourses will also help to elucidate whether the usage of a different term in its concomitant understanding has any relation vis-à-vis other discourses and knowledge communities.

2) Demarcation and Contrast

The second category also serves the purpose of establishing the ‘setting’ within which necessity is being invoked. It will help to delineate how necessity is situated vis-à-vis other concepts in each respective discourse. The focus herein lies on establishing whether necessity is sharply demarcated to similar concepts or if its lines are blurred. Moreover, this category also seeks to determine whether necessity is set in opposition to other concepts. Antonyms that have been established in this way, help to further shed light on the ‘setting’ of the invocation of necessity but might also, beyond that, help to indicate how the concept is being used. Outlining the demarcation to and contrasting from other concepts will aid the comparative analysis of determining how necessity is invoked in different discourses and knowledge communities.

The methodological approach of conceptual history explicitly acknowledges the importance of the notions of demarcation and contrast. In their parlance *Gegenbegriffe* and *Nebenbegriffe*, corresponding to antonyms and secondary or incidental concepts, constitute an important aspect of the analysis of concepts. Demarcation and contrast of a concept

⁶⁰ Koselleck, “Die Geschichte der Begriffe und Begriffe der Geschichte”, p. 62, translation is my own. See also H Jordheim and I B Neumann, “Empire, imperialism and conceptual history”, *Journal of International Relations and Development* 14, Vol. 2 (2011) for an application of this methodological approach in the context of International Relations.

provides it with context and as a consequence concepts are being provided “expressive direction” [*Aussagerichtung*], in other words a concept is given meaning and understanding, through “secondary concepts [*Nebenbegriffe*] and antonyms [*Gegenbegriffe*]”.⁶¹ Therefore, this part of the analysis will probe each discourse as to how necessity is demarcated from other concepts and, whether it is set in opposition to another concept. This may not be the case in each single discourse under consideration. But where the understanding and invocation of the concept of necessity is guided through antonyms or secondary concepts, it is important that this is taken into account.

3) Configuration

The configuration of the concept of necessity is the category that primarily aims at the ‘mechanics’ of how the concept is invoked and, more importantly, how the concept works. The central questions of this analytical category are therefore how necessity does get invoked, for what purpose, and what effect its invocation has? The first aspect in this regard is to establish the level at which necessity is being invoked in relation to war and conflict. There is a difference between using the concept at the macro level, for example declaring war itself necessary, and a micro-level invocation where a battlefield commander may declare specific conduct and actions such as the shelling of a city necessary. It is important to first establish this level before examining what effect the invocation has and what purpose it serves.

Following this, the configuration also seeks to parse out the respective effect the invocation of necessity has at the level it is used. As has been mentioned above, there are two broad effects that the invocation of necessity usually causes. Firstly, there can be a temporal effect relating to the urgency of the matter under consideration. Declaring an action to be necessary often entails an implicit assumption as to how timely the action has to be taken. Again, it is important to establish whether this effect is present in order to analyse the understanding of necessity. Equally important is the examination of the second possible effect, the alteration of the scope of available actions. Here the invocation of necessity implies importance and expediency, thereby possibly rendering actions available or even

⁶¹ R Koselleck, *Begriffsgeschichten*, p. 534. Translation is my own. See also R Koselleck, “Zur historisch-politischen Semantik asymmetrischer Gegenbegriffe”, reprinted in R Koselleck, ed., *Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten*, 10th ed. (Frankfurt a.M.: Suhrkamp, 2017), pp. 211-18.

permissible that would not have otherwise been. Vice versa, it can render them unnecessary, i.e. unavailable and impermissible. Given that necessity is being examined in relation to war and conflict, the analysis of this effect is vital to the elucidation of the understanding of necessity - of the concept itself and across discourses.

Lastly, this analytical category seeks to shed light on the purpose for which necessity is being invoked. It is important to bear in mind that the present research project has been restricted in its scope to the examination of the understanding of necessity in relation to war and conflict. Therefore, the analysis will distinguish between two purposes for which necessity is invoked. The invoking party can, firstly, seek to achieve restraint. Through questioning if an action is truly necessary, the invocation of the concept can serve the purpose of actually curtailing the scope of available actions and question the urgency in which an action needs to be taken, determining the effect of the invocation. On the other hand, however, necessity can be invoked in a licensing fashion. Here the purpose is to achieve an effect whereby the scope of actions is expanded and urgency for action is high. It remains to highlight, again, that the purpose to which necessity is used is crucial to its understanding within as well as across discourses.

4) Importance

This last analytical category serves a dual purpose. Primarily it will gauge what importance is apportioned to the concept of necessity within a given discourse and community - in particular in relation to other concepts. This helps to further elaborate on the ‘setting’ in which necessity is used and will thus in particular integrate well with the second analytical category outlined above. Sharper demarcation or contrast could reasonably be expected if there is greater importance associated with a given concept. Generally speaking, the focus on the ‘setting’ of the concept is premised on the notion that “[p]olitical concepts acquire meaning [...] by means of their particular structural position within a configuration of other political concepts”.⁶² The examination of antonyms and secondary concepts is establishing just this ‘structural position’ vis-à-vis other concepts. Beyond this however, this category is also important in relation to the configuration of the concept and its mechanics which are examined through the third analytical category. Thus, concepts with

⁶² Freeden, “Political Concepts and Ideological Morphology”, p. 141

greater effect may be considered more important within a given discourse. Establishing the configuration of necessity in any particular discourse is a moot point if there is very little or no importance apportioned to the concept in the first place. The central question within this category is, thus, whether there is any form of weighting attached to necessity, in particular with respect to other concepts.

Structure and Main Lines of Argument

The structure of this thesis is organised around the five discourses within which the concept of necessity will be examined. Each chapter will be devoted to a single discourse and the examination of how necessity is used and understood within it, using the analytical categories outlined above. The consistent application of this approach across chapters allows for the comparative element in this analysis and thus the juxtaposition of the understandings of each respective discourse. The five discourses under consideration, and therefore the five substantive chapter of this thesis, are (in order): *Just War Tradition*, *Ad bellum International Law*, *In bello International Law*, *Strategy and Military Operations*, and *Staatsräson*. While these discourses are not representative of all usages of the concept of necessity in relation to war and conflict, they do represent the main knowledge communities and practices. Focusing on these five main discourses was a deliberate choice in a trade-off against an even wider assessment of necessity. Making such a trade-off is generally in line with conceptual analysis and conceptual history in particular.⁶³

The first discourse under consideration in chapter one of this thesis - the just war tradition - provides a moral discourse through which war, conflict and the use of force by states can be examined. The chapter examines three thinkers in this tradition and how they conceptualised necessity at various points in history. Through the frame of 'just war' and 'regular war', a historical reading of the just war tradition which categorises the respective readings of thinkers into the aforementioned two categories, this chapter shows that the just war tradition has undergone different conceptualisations of necessity in relation to war and conflict. The understanding of the concept of necessity in the extant form of this

⁶³ Koselleck in particular talks about the trade-off between focused analysis and breadth, see R Koselleck, "Hinweise auf die temporalen Strukturen begriffsgeschichtlichen Wandels", reprinted in R Koselleck, ed., *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache* (Frankfurt a M: Suhrkamp, 2006), pp. 86-98.

discourse, in turn, is exhibit in said categories and reveals a very complex conceptualisation with links to the discourses that will be subsequently discussed. In the reading of some just war thinkers it is close to the communitarianism of *Realpolitik* and pragmatic stance exhibited by members of the military strategy knowledge community, at other times it is closer to the formalism of international law and in particular its underlying humanitarian and ethical norms which emerged out of the just war tradition.

In international law a distinction is made between the usage community that can be subsumed under *ad bellum* international law, i.e. question regarding the legality of resorting to war, and *in bello* international law where legal points regarding the conduct of war are elaborated. Following from this, the second chapter of this thesis will examine the understanding of necessity in *ad bellum* international law. The chapter will outline the discourse it is embedded with and thus delineate the contemporary international law environment marked by United Nations (UN), its Charter and the concomitant prohibition of aggressive war. It will touch, moreover, on the International Law Commission (ILC) and its codification of the concept of necessity into international law doctrine. The analysis of necessity in this discourse will show that the understanding of necessity, in its codified form, is designed to be only very infrequently invoked. In line with the UN legal regime's restrictive nature, necessity has only limited applications to the use of force by states. Beyond application, the effects of necessity, in case of a valid plea, are also severely restricted. The reason for this extant understanding of necessity lies in the more recent history of the concept, when the concept was still understood to be of licensing nature and consequently invoked in the justification of war.

In bello international law on the other hand has a very different understanding of necessity, grounded in a different historical development of the understanding of the concept. The third chapter will show that here necessity is conceptualised as military necessity and is weighed against humanitarian imperatives in determining lawful conduct in war. The extant understanding of necessity in this body of law can be traced, like the whole body of law itself, back to customs and conventions of the conduct in war. Thus, the development of the understanding of necessity within this discourse is concomitantly much more linear than in *ad bellum* international law. Despite this more linear historical evolution however, more recent developments with respect to humanitarian law competing with the law of international armed conflict for application in *in bello* situations, result in competing

understandings of necessity.

Given the conceptualisation of necessity as military necessity, it is obvious that this also relates to the discourse of military operations and strategy. Indeed, the legal understanding finds import into this discourse, as it forms the basis on which soldiers and officer cadets are instructed and trained. Beyond this however, chapter four will show how the understanding of necessity depends on the hierarchical level of the knowledge community in this discourse. Overall, necessity is conceptualised as an underlying principle for members of this knowledge community. In this mould, 'doing what is necessary' is very much the self-image of military professionals, as well as scholars and strategic thinkers who also subscribe to this prudential conceptualisation of necessity.

The last substantive chapter of this thesis will examine necessity in the power political context. Chapter five is dedicated to the understanding of necessity in the setting of power politics and statecraft. Reason of state conceptualises necessity based on a logic that puts the maintenance and survival of political community - mostly the state, hence the name - above all other concerns. The chapter will show that as a consequence of this, the invocations of necessity are a counter image to that of *in bello* international law insofar as here the power of the state is balanced against moral norms. However, it is the counter image as power and survival - Kratos in Friedrich Meinecke's parlance - are prioritised over the other. Moreover, this emphasis on executive power invites the usage of the concept not only in support of transgressive actions but also invites decisive and urgent action.

The thesis will show that the understanding of necessity is largely derivative of the discourse it is invoked in. It is the knowledge communities and their specific knowledge practices that shape the understanding and usage of the concept. Despite the common factor of being invoked in relation to war and conflict, the understanding of necessity in relation to it varies greatly depending on the specific community, its knowledge practices and how they invoke the concept. Moreover, even within knowledge communities there can be further stratification as to the intended effect and purpose for which necessity is invoked. As such, uniformity of level, purpose and effect within a knowledge community is not always given. Overall, this thesis will show the frayed understandings of necessity exhibited across different discourses and associated knowledge communities and practices,

which in turn require additional explanation whenever necessity is invoked in relation to war and conflict.

Chapter 1: Just War and Necessity - Regular War, Just War and Emergencies

"It is one thing to accept the destruction of military objectives and of their immediate neighbourhood as a regrettable military necessity; it is quite another thing to exult in it, to gloat over it, and to regard it as something that is in itself worthy of almost jubilant congratulations."

Lord Bishop of Chichester George Bell, 9 February 1944, House of Lords¹

Introduction

The first discourse under consideration examines the conceptualisation of necessity in the just war tradition. The just war tradition is a diverse body of work in which thinkers and theorists have taken an ethical perspective on war and conflict, addressing the question of justice in the resort to war - *jus ad bellum* - and justice in its conduct - *jus in bello*.² While this separation into distinct spheres of inquiry is now familiar from international law, the just war tradition offers a moral discourse rather than a juridical assessment on both respective notions. This tradition has long roots, extending as far back as the classical world, in which these questions have been addressed anew, over time, with changing historical-political contexts. Despite these long roots it is not just an antiquarian project lacking practical applications in the contemporary world. Politicians and policy makers have shrouded themselves and their actions in the language of just war, no doubt in the hope of them and their actions appearing just in the eyes of others.³ The progressing

¹ The Lord Bishop made these remarks as part of a debate on the UK bombing policy during WWII. He also remarked that historically wars and actions in wars have been justified by "a class of arguments" premised on military necessity, which people are happy to listen and adhere to, but after the end of conflict wish they had never done so. Accessed at <https://hansard.parliament.uk/lords/1944-02-09/debates/d9464051-78ab-4db1-8708-33784c109ad2/BombingPolicy>, retrieved on 21 May 2019.

² There is also *jus post bellum*, the category that addresses questions of justice after the cessation of hostilities. Given the focus on necessity in relation to war and conflict, the chapter will exclusively focus on *jus ad bellum* and *jus in bello* in its analysis.

³ Just war thought, for instance, featured heavily in President Obama's Nobel acceptance speech, where he tried to reconcile his role as Commander-in-Chief of the United States military which was involved in two wars at the time and the award of the Nobel Peace Prize. Accessed at <https://www.nobelprize.org/prizes/peace/2009/obama/26183-nobel-lecture-2009/>, retrieved on 21 May 2019. See also C O'Driscoll, "Talking about Just War: Obama in Oslo, Bush at War", *Politics* 31, No. 2 (2011), pp. 82-90 for a discussion of the use of just war language by politicians touching specifically on the example of Obama's Nobel acceptance speech.

development of positive international law, as detailed in chapters one and two, equally does not render just war thinking obsolete. Rather, it offers a different, ethical perspective on question of justice surrounding war that is lacking from purely legalistic viewpoints and provides a set of principles with which the moral dimension of war and conflict can be examined.

This chapter will explore this tradition using three representative theorists whose contributions to the just war tradition marked important stages in its development and, importantly, also exhibit the changing understanding of necessity in the context of developments in just war thought as a whole. The chapter is organised in three principal sections. The first section will provide a brief overview of the just war tradition and its outlook on war and conflict. The second section offers an examination of the contribution of three just war theorists: Francisco de Vitoria, Alberico Gentili, and Michael Walzer. Vitoria's treatment of just war encapsulates a complete account of the classic formulation of just war thought in the late Middle Ages and the transition from the scholastics to natural law conceptions thereof. Alberico Gentili marks the transition into legalism and formalism in the outgoing sixteenth century. Lastly, the eclectic mix of influences in Michael Walzer's contemporary account of just war and revisionist reactions to it will be examined.

This chapter will use a framework which distinguishes between 'regular war' and 'just war' conceptualisations to interrogate the understanding and usage of the concept of necessity in the work of the aforementioned thinkers.⁴ The distinction between 'regular' and 'just war' is a historical reading of the just war tradition, in which theorists are distinguished by whether they advocate for equal rights and rules for all conflict parties – what Vattel referred to as “war in due form” – irrespectively of justice, or if they focus on the lawfulness of the use of force and thus proffer asymmetric rights between parties in conflicts, premised on justice only being able to lie with one of those parties.⁵ The

⁴ The terms 'regular war' and 'just war' when used in inverted commas will refer to this framework and their associated understanding. See P Haggemacher, “Just War and Regular War in Sixteenth Century Spanish Doctrine”, *International Review of the Red Cross* 32, No. 290 (1992); G M Reichberg “Just War and Regular War: Competing Paradigms”, in D Rodin and H Shue, eds, *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford Univ. Press, 2008), pp. 193-213; and C O'Driscoll, *Victory: The Triumph and Tragedy of Just War* (Oxford, Oxford Univ. Press, 2020), in particular chapter five.

⁵ E Vattel. *The Law of Nations; or, The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns*, transl. C G Fenwick (Washington D.C.: Carnegie Institution, 1916). See also more generally S C Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge Univ.

distinction into these two categories, which lies at the heart of this framework, has also implication of how the concept of necessity is conceived of. The necessity of (in)action, either in relation to *ad bellum* or *in bello* concerns, will be differently rationalised depending on the symmetry between all relevant parties involved in the conflict or war. Therefore, this framework is a useful tool in the examination of three key thinkers of the just war tradition.

The chapter will show that though none of the theorists falls neatly into one or the other category of the framework - 'regular' or 'just war' - it nevertheless helps to show how necessity is invoked in just war thought. The juridical understanding of 'just war' exhibits a more licensing understanding of necessity, though only for one party of the conflict or war, premised on a just cause that is being prosecuted. In the conceptualisation of 'regular war', necessity is more restrained and in line with familiar understandings from *in bello* international law outlined in chapter two and owed to the symmetric view applied to the conflict parties. These understandings can be traced through the history of the tradition and are represented in the extant discourse as well. Michael Walzer's own conception of just war seems to straddle both 'just war' and 'regular war' understandings of necessity, with the so-called revisionist thinkers in contemporary just war also pushing for the former. Overall, this leaves a frayed understanding of necessity, which, however, is always employed in the service of some conception of justice in relation to war and conflict, equipping it with an almost tragic quality given the awareness of the costs and consequences of warfare.

Necessity and Just War Thinking

Over the course of its long history, thinkers have touched on the question of justice in war and the concept of necessity on a number of occasions. The expression that 'necessity knows no law' is attributed to the Roman thinker Publilius Syrus, though in its original form it also highlighted that necessity is its own law instead.⁶ From this early expression of the connection between necessity, justice and war, there are numerous others littered

Press, 2005), Ch. 3.

⁶ Oxford Essential Quotations, *Publilius Syrus*, accessed at <https://www.oxfordreference.com/view/10.1093/acref/9780191843730.001.0001/q-oro-ed5-00008655>, retrieved on 12.04.2020

through history. Pope Nicholas I touched on necessity in relation to permissible conduct in war in his responses to the questions of the Bulgars in the 9th century, detailing when necessity allows to resort to war in otherwise impermissible circumstances.⁷ Philippe de Beaumanoir detailed in his *Coutumes de Beauvaisis* under what circumstances laws should not be observed due to necessity⁸, and Honoré de Bovet provided a precursor to military necessity arguments in his discussion on the legality of killing prisoners of war.⁹ All of these thinkers in one way or another connected the conceptualisation of necessity to justice in resorting to war or to the question of what constitutes permissible conduct therein.

In an example that see us closer to our modern conceptualisation of justice in war centred on international law, Hugo Grotius also discusses necessity and the violation of norms and rules on numerous occasions in his *On the Law of War and Peace*.¹⁰ Thus, the concept of necessity is intricately linked to the use of force, war and the question of justice in the those actions. As these examples have shown the concept of necessity has been part of the argument throughout history, and still remains so in international legal, strategic and political thought of today, as subsequent chapters of this thesis will show. However, as indicated in the introduction above, this chapter will focus on three key thinkers and their accounts of necessity within a tradition which has provided and continues to be one of the principle moral discourse on war.

Just War - A moral discourse on war

The just war tradition has historically provided one of the, if not *the* principal moral discourses on war and conflict. Despite the development of the various bodies of international law, outlined in subsequent chapters below, just war thought continues to provide an important lens in the examination of the justness of wars and conflicts to this day. As outlined in the introduction of this chapter, the just war discourse is organised

⁷ Fordham University Medieval Source Book, *The Responses of Pope Nicholas I to the Questions of the Bulgars A.D. 866 (Letter 99)*, accessed at <https://sourcebooks.fordham.edu/basis/866nicholas-bulgar.asp>, retrieved on 12.04.2020.

⁸ P de Beaumanoir, *The "Coutumes de Beauvaisis" of Philippe de Beaumanoir*, transl. F R P Akehurst (Philadelphia: Univ. Philadelphia Press, 1992), pp. 540-42.

⁹ H Bovet, "L'Arbre des Batailles [The Tree of Battles]", transl. R Richter-Bergmeier (Geneva: Droz, 2017). See also B Heuser, "Ordinances and Articles of War Before the Lieber Code, 866-1863: The Long Pre-History of International Humanitarian Law", *Yearbook of International Humanitarian Law*, Vol. 21 (2018), p. 154.

¹⁰ H Grotius, *On the Law of War and Peace [De Jure Belli ac Pacis]*, transl. A C Campbell (Kitchener: Batoche Books, 2001)

around two sets of criteria that help in the examination and assessment of the justice and legitimacy to resort to war - the *ad bellum* criteria of just cause, right authority, right intention, proportionality of ends, last resort, hope of success and aim for peace - and in war's conduct - the *in bello* criteria of proportionality of means and the protection of noncombatants and their distinction.¹¹ While there is some disagreement among just war thinkers and scholars on the exact respective interpretation of specific criteria and their relationship vis-à-vis each other, there is a general understanding that overall this is a moral discourse on war organised around these sets of criteria. The remainder of this section will provide a brief overview of the general hallmarks of the discourse of just war thought. In doing so, this section will take an ahistorical view of the tradition in order to show where and how the concept of necessity features within just war thought and more specifically where within the various just war criteria that it uses.¹²

While just war can more accurately be described as a tradition than a coherent theory, just war thought nevertheless contains a number of main tenets which are largely present across its various representations over time. Despite providing a moral discourse on war, just war thought is not restricted to abstract conceptions of justice, but rather sees value in the proximity to how said conceptions are applied. As such, the just war tradition has never been an isolated intellectual enterprise. Rather, it has natural affinities to related discourses such as of statecraft and military strategy. Indeed, James Turner Johnson, an influential proponent of just war thought who helped to revitalise the tradition, sums this up in *Morality and Contemporary Warfare*:

“Just war reasoning about the use of force is not properly understood as a collection of abstract moral ideals, alien to political judgements or military thinking and imposed from the outside. By its very nature, the just war approach to the ethics of the use of force is already in dialogue with the spheres of statecraft and military affairs.”¹³

Johnson expresses here the common aspiration of the tradition to serve as practical moral framework to questions of war and conflict - a sentiment also expressed by Michael

¹¹ See, for example, J T Johnson, *Morality and Contemporary Warfare* (New Haven: Yale Univ. Press, 1999), pp. 28-30, for a list of just war criteria. These can differ in their wording and the importance ascribed to them depending on the just war thinker or scholar in question. For a comparison see C Toner, “The Logical Structure of Just War Theory”, *J Ethics* 14, No. 2 (2010), pp. 82-3 who provides an overview of some scholars and how they conceive of just war criteria.

¹² This is not a perspective that I subscribe to with respect to just war, however that I will, out of necessity, employ here in order to highlight the general characteristics of just war thinking.

¹³ Johnson, *Morality and Contemporary Warfare*, p. 25.

Walzer.¹⁴ Moreover, Johnson also highlights that through this desire to provide a practical framework, the tradition necessarily offers connecting points to other discourses on war and conflict.

Given this proximity of just war thought to associated fields and its general concern with war, the concept of necessity is, of course, an element in the knowledge practices of this community as well. Without wanting to go into too much detail at this stage, when considering the above-listed just war criteria, both of the *ad bellum* and the *in bello*, it quickly becomes clear that the concept of necessity can be situated within most of them. Regarding the former, a number of *ad bellum* criteria relate to necessity arguments and their invocation. A just cause such as the defence of community and the preservation of its welfare have an immediate link to the necessity for the use of force. Thus, a cause for the resort to war can not only be conceived of as just, but the resort itself as necessary, using the concept in a licensing fashion. Conversely, some of the just war criteria can link to the concept of necessity in a restraining fashion. Whether the resort to force can be deemed necessary hinges on such criteria as right intention, proportionality of ends and last resort. Each of these criteria entails the question of whether the resort to war is truly necessary or if, for example, other options have not yet been exhausted (last resort). Conceived in this way, the concept of necessity also enters the just war discourse in a restraining fashion. This apparent dual nature lies at the core of how just war conceives of necessity and will be further examined below.

The criteria of just cause and last resort in particular connect to the concept of necessity and are also connected with each other. Last resort implies, as the name indicates, that the use of violence has to be the last means by which the underlying cause can be rectified. Conventionally this is understood to mean that other, non-violent means have been exhausted and that the use of force is the “most reasonable and proportionate choice [...] to bring about the justified end”.¹⁵ In more ‘classical readings of the tradition, last resort is considered to be merely prudential check on the part of the invoking party in their

¹⁴ Walzer describes *Just and Unjust Wars* as “a book of practical morality”, see M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), xxiii. An example of a very practical application of just war thought and the just war criteria is Christian Enemark and Christopher Michaelsen’s examination of the invasion of Iraq, see C Enemark and C Michaelsen, “Just War Doctrine and the Invasion of Iraq”, *Australian Journal of Politics and History* 51, No. 4 (2005), pp. 545-563.

¹⁵ J T Johnson, “The Just War Idea: The State of the Question”, *Social Philosophy and Policy* 23, No. 1 (2006), p. 184.

justification of resorting to war.¹⁶ However, it has also been noted that the last resort criterion and its underlying necessity logic are prone to be abused and thus can “be relied upon to excuse almost any excess” since “in desperate last resorts anything [is] permissible”.¹⁷ Here the last resort criterion displays the underlying problematic of how necessity is conceptualised. Does last resort indicate a necessity that licenses the resort to force, or does it imply a presumption against war and the use of force? James Turner Johnson, among others, does not see a presumption against the war and the use of force in the last resort criterion or the Just War tradition more generally.¹⁸ More recently so-called revisionist scholars have taken a different, far more restrictive view – an aspect that will be examined further below in this chapter.¹⁹

Along the same lines, the *in bello* criteria listed above also exhibit a link to the logic of necessity. The proportionality of means of force applied in a conflict has an implicit connection to the concept of necessity. Is the choice of weaponry necessary in the persecution of the ends of war, or is the damage resulting from it going beyond what is required for this? As chapter three below will show, this aspect has been enshrined in the Law of Armed Conflict. The same is true for the protection of noncombatants and their distinction. The principle of double effect can provide license for military action, but there are limits to what is possible. The question of necessity is not only central to the legal determination of what conduct is permissible but also to the moral deliberations found in just war thinking. What is readily apparent however is that the concept of necessity imbues the categories and criteria that guide just war thinking on the determination of just conduct in war and conflict.

This brief discussion shows that these criteria and guiding questions which are commonly applied in some shape or form in just war thinking, immediately reveal a connection to the logic of the necessity.²⁰ Chris Brown has described these criteria and just war at large as “a

¹⁶ Johnson, *Morality and Contemporary Warfare*, p. 34f.

¹⁷ G Best, *War and Law since 1945* (Oxford: Oxford Univ. Press, 1994), p. 59.

¹⁸ See Johnson, “The Just War idea”, p. 180-4.

¹⁹ See for example A Coates, “Is the Independent Application of *jus in bello* the Way to Limit War?”, in D Rodin and H Shue (eds.) *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford Univ. Press, 2008), where Coates states that “in just war thinking the criterion of *last resort* stands for the moral primacy of peace over war. It expresses a moral presumption against war and a moral preference for the non-violent and political resolution of conflict” (p. 190).

²⁰ Enemark and Michaelsen’s examination of the Invasion of Iraq, for example, touches at multiple points on necessity for instance as part of Security Council Resolutions, see Enemark and Michaelsen, “Just War

set of questions that act as an aid to the exercise of political judgement” and that “[w]e should ask these questions not because that is what just war theory or the just war tradition requires us to do, but because they are the appropriate questions to ask”.²¹ As the appropriate questions to ask and questions which exhibit a link to the concept of necessity, this chapter will focus on how those questions that guide just war thinking interact with necessity. It is important, however, to stress that these criteria are not set in stone, neither in their formulation, their importance or application in moral discourse on war. Brown cautions that those questions “are not necessarily the only questions that need to be asked, and perhaps some of them are not as important as they once were, but, taken together, they constitute a good starting point”.²² The connection of those changing just war criteria to the concept of necessity will be further explored in the next section, where it will be interrogated in the context of three just war thinkers - Vitoria, Gentili and Walzer - from different periods and their respective conceptualisation of those moral categories that guide just war thinking and the concept of necessity.

The Just War Tradition and Necessity - ‘Just War’ and ‘Regular War’

Those questions, criteria and principles guiding just war thinking mentioned above are not an invention of modern thought. On the contrary, the just war tradition encompasses the application of moral and ethical principles to questions of war and conflict which has been evident for millennia. Jean Bethke Elshtain probably described the deep roots of the just war tradition most accurately as a “complex genealogy”, which is commonly traced back to Greco-Roman origins across a web of interrelated ‘streams’ of literature, theories and schools that together amount to the tradition of just war thought.²³ Or, as Alex Bellamy described it, the just war tradition is “a two-thousand-year-old conversation about the legitimacy of war”.²⁴ The tradition is conventionally recognised to range in its historical scope from the late Roman Empire, with St Augustin often seen as founding thinker,²⁵

Doctrine”, pp. 552-555.

²¹ C Brown, “Just War and Political Judgement”, in A F Lang jr., C O’Driscoll and J Williams, eds., *Just War: Authority Tradition and Practice* (Washington DC: Georgetown University Press, 2013), p. 38.

²² Ibid., p. 38.

²³ J B Elshtain, “Reflections on War and Political Discourse: Realism, Just War, and Feminism in a Nuclear Age”, in J B Elshtain, ed., *Just War Theory* (New York: New York Univ. Press, 1992), p. 264.

²⁴ A J Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006), p. 2.

²⁵ Though this is the conventional telling of the historical scope of the just war tradition, scholars like, for

across the medieval world to early modernity and eventually our contemporary world.²⁶ This conventional account of the tradition is by an large considered to be of western, euro-centric form - which will also form the focus of this chapter - but has been supplemented with just war thought in other religious and cultural traditions.²⁷

This section will provide an examination of three key thinkers of the just war tradition whose contributions to the tradition marked important stages in the development of the tradition and lastingly affected it. Firstly, it will provide a short overview of the classic formulation of the just war criteria that emerged in the late Middle Ages. The focus herein will lie on engaging with the work of Francisco de Vitoria who, though he lived somewhat later, provides probably the clearest expression of this classic, medieval formulation of just war thought. Secondly, this section will engage with the writings of Alberico Gentili, whose work marks an important stage on the development from the classic just war framework to legalism and, later, positive international law. Lastly, this section will examine the work of Michael Walzer as a representative of the extant tradition. This section will discuss the contributions those scholars have made with respect to the development of just war thought and in particular where the concept of necessity is concerned, but will not make any claims to a complete and exhaustive interrogation of the respective scholars' writings or of contextual factors within which their works are embedded. Examining the works of these two thinkers will inform how the tradition and, more importantly, how the positing of necessity within it, have developed.

Francisco de Vitoria (1492-1546)

Francisco de Vitoria was a highly influential theologian, the “prime professor of Theology in the University of Salamanca”,²⁸ and a “towering figure” among sixteenth century

example, Cian O’Driscoll have supplemented this account with earlier examples of thinkers applying just war logic - in O’Driscoll’s case by the example of Xenophon, see C O’Driscoll, “Keeping the Tradition Alive: Just War and Historical Imagination”, *Journal of Global Security Studies* 3, No. 2 (2018), pp. 234-247.

²⁶ There are many accounts on just war thought as historical project. A good general overview can be found in A J Bellamy, *Just Wars*, pp. 13-114.

²⁷ See for example J Kelsay, *Arguing the Just War in Islam* (Cambridge Massachusetts: Harvard Univ. Press, 2009) for an account of just war thought in the Islamic tradition, and R Sorabji and D Rodin, eds., *The Ethics of War: Shared Problems in Different Traditions* (Hants: Ashgate Publishing, 2006) for an edited volume containing chapters on the just war in Judaism, Orthodox Christianity and Indian culture amongst others.

²⁸ D Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (Oxford: Oxford Univ. Press, 2009), p. 104.

scholars.²⁹ He studied in Paris where he not only came into contact with the work of St. Thomas Aquinas and other scholastics but also with the work of French humanists of the age.³⁰ Vitoria combined the medieval Scholasticism of Thomas Aquinas with the new and still emerging humanism and appeals to natural law, the early precepts of the ensuing early modern period.³¹ Vitoria's contribution is today represented by the categories of *Neo-Scholasticism* and *School of Salamanca*, categories which have been established to capture Vitoria's approach between traditionalism and engagement with emerging natural law thought. His relection on the laws of war - *De iure belli* - has been described as providing "the single best summation of medieval just-war doctrine", while also marking a point of transition.³²

As such, Vitoria was an important go-between in the development of just war thought, marking the transition from the medieval conceptualisation of just war thought towards natural law and later positive law legalism. Vitoria's principle contributions to the just war tradition specifically, are encapsulated in just two of his texts, *De Indis* published in 1539 on the question of whether the Spanish should colonise American Indians and *De jure belli*, an examination of the laws of war published in 1540 which built on his earlier publication on the Indian question.³³ Through the examination of the question of the treatment of the American Indians and his subsequent more general discussion of the laws of war which emerged out of it, Vitoria "provided an almost complete scholastic account of the Just War", which, more importantly, "remain[s] intact in one form or another" in "modern renderings of the natural law approach to the Just War".³⁴ Importantly, his thought also marks a transition with respect to the 'just war' – 'regular war' framework, falling mostly in the former but containing some aspects of the latter.

In *De Indis*, Vitoria examines the rights of native Americans encountered by Spanish colonisers in the New World of the Americas. In doing so, he concluded that the natives

²⁹ A J Bellamy, "Francisco de Vitoria", in C O'Driscoll and D Brunstetter, eds., *Just War Thinkers From Cicero to the 21st Century* (London: Routledge, 2017), p. 77.

³⁰ A J Bellamy, "Francisco de Vitoria"; see also "Introduction" in A Pagden and J Lawrence, eds., *Francisco de Vitoria: Political Writings* (Cambridge: Cambridge Univ. Press, 1991), pp. xiii-xvii.

³¹ See Bellamy, "Francisco de Vitoria", pp. 77-8; and J T Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton Univ. Press, 1981), pp. 94-103 and 174-79.

³² S C Neff, *Justice Among Nations: A History of International Law* (Cambridge, Massachusetts: Harvard Univ. Press, 2014), p. 147.

³³ Bellamy, "Francisco de Vitoria", p. 79; see also Pagden and Lawrence, "Introduction", pp. xxiii-xxviii.

³⁴ Bellamy, *Just Wars*, p. 50.

could indeed not be treated as barbarians simply due to their ‘heathen’ ways or the general perception of their society not amounting to a civilisation which has to be accorded the same respect as those of European nations.³⁵ Vitoria specifically deals with the question whether unbelievers “can be deprived of dominion”,³⁶ concluding that unbelief “does not cancel either natural or human law, but all forms of dominion (*dominia*) derive from natural or human law; therefore they cannot be annulled by lack of faith”.³⁷ This analysis concerned the issue of whether the above matter could have constituted a just cause which legitimised the resort to force. Of particular note is Vitoria’s deference to human and natural law in this matter. As mentioned above, the combination of scholastic traditionalism with the emerging natural and positive law conventions was of particular importance in the development of just war thought. The position Vitoria arrives at the end of his analysis was not only novel at the time, but can be described as innovative.³⁸ It certainly was for the development of just war thought, especially when he continued his analysis in *De jure belli*.

Where Vitoria showed his engagement with human and natural law in *De Indis*, he was far more specific about how he conceived of the laws of war more generally in *De jure belli*, premised on his methodological approach. There are a number of aspects of note in Vitoria’s conception of just war - in particular with respect to necessity. On the basis of his examination of the American Indian question, Vitoria concludes that matters of religions are not permissible grounds for war in the same way that a lack of faith does not negate natural or human law.³⁹ Vitoria goes further however in discussing permissible reasons and causes of a just war. He reasons that neither imperial⁴⁰ nor personal ambitions⁴¹ can serve

³⁵ F Vitoria, *De Indis* (1538), in A Pagden and J Lawrence, eds. *Vitoria: Political Writings* (Cambridge: Cambridge Univ. Press, 1991), Question 1 Article 1 - Question 1 Conclusion, §§4-24, pp. 239-251. All subsequent quotes from *De Indis* will be taken from the same volume and follow the same format of question number article number, paragraph followed by page number. Interestingly, and to connect to the last chapter of this thesis, Carl Schmitt fundamentally disagreed with Vitoria’s assessment, describing Vitoria’s approach as “ahistorical objectivity” - a somewhat strange statement from a legal scholar who himself makes historically questionable statements on a number of occasions, see C Schmitt, *Der Nomos der Erde: im Völkerrecht des Jus Publicum Europaeum*, 5th ed. (Berlin: Duncker & Humblot, 2011), p.75.

³⁶ Vitoria, *De Indis*, Q1 A3, §7, p. 243.

³⁷ *Ibid.*, p. 244; emphasis in parenthesis quoted from original.

³⁸ Bellamy, “Francisco de Vitoria”, p. 79.

³⁹ F Vitoria, *De jure belli*, in A Pagden and J Lawrence, eds., *Vitoria: Political Writings* (Cambridge: Cambridge Univ. Press, 1991), Question 1, Article 3, §10, pp. 302-3. All subsequent quotes from *De jure belli* will be taken from the same volume and follow the same format of question number, article number, paragraph, followed by page number.

⁴⁰ Vitoria, *De jure belli*, Q1, A3, §11, p. 303.

⁴¹ *Ibid.*, §12, p. 303.

as legitimate reasons to resort to war. The objection to these justifications for the resort to war were, however, rather well established at Vitoria's time, but his approach, which connects these aspects to natural law, developed the argument further. Either way, these objections pertain to the conceptualisation of necessity and the usage of the concept. Vitoria advocates a punitive, juridical conceptualisation of just war, in which just cause is the first and principle criterion determining the legitimacy of resorting to the use of force. Moreover, it is the principle route through which necessity gets invoked on the *ad bellum* side. In removing legitimate, that is 'just', causes of war, the conceptualisation of necessity becomes correspondingly narrower.

Vitoria's juridical understanding of just war builds on Augustine, declaring that the sole and only reason for resorting to war is to right a prior wrong, when harm has been inflicted.⁴² He further stipulates that not every prior wrong gives ground to waging war in response. Rather, "trivial offences" cannot be persecuted by resorting to the use of force, just like religious wars, as outlined above, cannot be legitimate.⁴³ Here, Vitoria defines the proportionality argument on the *ad bellum* side, by restricting what injuries war can be a legitimate response to, in turn also affecting how necessity arguments can be used. This however also relates to the criterion of 'right intent' insofar as Vitoria excludes "personal glory" as a valid reason to wage war and further sets out that war must be waged for "the common good of the commonwealth".⁴⁴ Rather, Vitoria states that "peace and security" have to be the ultimate aims for resorting to war, setting out another *ad bellum* criterion.⁴⁵ He also describes that war can also be resorted to on the right authority⁴⁶ and that it is also only permissible if disputes cannot otherwise be adjudicated,⁴⁷ in turn defining the right authority and last resort criteria. This formulation of *ad bellum* criteria is, again, impacting upon the conceptualisation of necessity in this regard. Invoking necessity in an argument for the resort to war needs to then adhere to the standards on authority and last resort

⁴² Ibid., §13, pp. 303-4.

⁴³ Ibid., §14, p. 304.

⁴⁴ Ibid., §12, p. 303.

⁴⁵ Ibid., Q3, §60, p. 327.

⁴⁶ Ibid., Q1, A2, §§2-9, pp. 299-302. Vitoria specifically invokes the concept of necessity in relation to the question of who can acquire the authority to wage war and how this is acquired. He states that "licence and authority to wage war may be conferred by necessity" (§9, p. 302).

⁴⁷ Ibid., Q2, A1, §21, p. 307 where Vitoria states that leaders and decision-makers have to "listen to the arguments of the opponents, if they are prepared to negotiate genuinely and fairly" and Q2, A3, §29, p. 310 where he makes a similar argument adding "to see if a clear decision can be reached in favour of himself or the other party" before resorting to war.

stipulated in this framework.

Thus, on the whole, Vitoria's conceptualisation of just war hinges on the notion of a just cause that rights a wrong, which, in turn, renders it punitive and juridical just war. He distinguishes, however, between subjective and objective justice in resorting to war, however, allowing for the possibility of there being justice on both sides.⁴⁸ In his reasoning this allowance is premised on ignorance of the injustice of its actions on one of the sides of conflict. This is an excuse that Vitoria explicitly makes for the subjects, that is to say for ordinary soldiers and citizens who may not be able, nor have full information, to assess the justice in resorting to war.⁴⁹ Nevertheless, actual justice can only ever exist on one side of the conflict in Vitoria's "unilateral" understanding of the law of war.⁵⁰ More importantly, the resulting asymmetry fundamentally determines the rights of parties to the conflict and the excuse of ignorance mentioned above does not apply to those that should know better such as princes and decision makers. Generally speaking, Vitoria's account of the *jus ad bellum* suggests a conceptualisation of war that renders it a "quasi-judicial activity", grounded in natural law.⁵¹ Thus, while there are some tentative steps towards symmetry of parties to a conflict, overall Vitoria is beholden to a notion of just war which is centred on the asymmetry resulting from the principle that justice lies only on one side in a conflict.

This is reflected in Vitoria's account of permissible conduct in war. Given that Vitoria acknowledges that there can be at least some doubt regarding the justice in resorting to war, he also cautions to restrain it in its conduct. Nonetheless, overall his *in bello* guidance on the conduct of war is on the whole still determined by the aforementioned asymmetry of justice in war and conflict. His conceptualisation of necessity regarding conduct in warfare derives from this. In his classic formulation of the *in bello* just war criteria, the two principle categories that guide the determination of just conduct are proportionality of military means employed and the distinction between combatants and non-combatants. On the latter point, Vitoria outlines the injustice of harming and killing "innocents" such as children, who are always innocent, and women, who are "presumed" innocent.⁵² He also analyses the permissible conduct with respect to various other groups of people in wars,

⁴⁸ Vitoria, *De jure belli*, Q2, A1-4, §§20-32, pp. 306-12. See also Bellamy, *Just Wars*, p. 53.

⁴⁹ Vitoria, *De jure belli*, Q2, A2 and 4, §§, 22-27 and §32, pp. 307-9 and pp. 312-13.

⁵⁰ See P Haggemacher, "Just War and Regular War", pp. 441

⁵¹ Bellamy, *Just Wars*, p. 52.

⁵² Vitoria, *De jure belli*, Q3, A1, §§35-36, pp. 314-5.

such as hostages and prisoners and debates whether they can be plundered, enslaved or executed.⁵³ These restraints on permissible conduct also inevitably bear upon the usage of a necessity argument in the justification of actions in warfare. This is however in turn affected by the asymmetry of justice in Vitoria's account of just war thinking.

Vitoria addresses the issue of what has come to be known as the rule of double effect. This concerns the injury and killing of innocents as a side effect of targeting combatants. He deems the killing of innocents lawful assuming that the war waged is a just war and that this is done by "accidental effect" where it cannot otherwise be avoided and that care should be taken "to ensure that the evil effects of the war do not outweigh the possible benefits sought by waging it".⁵⁴ The important point to stress is that the underlying assumption is that the injuring party has a just cause on its side. This, again, pertains to Vitoria's conceptualisation of a just war with justice residing on one side of the conflict. Said side enjoys then substantially more rights in the conflict, like, for example, that actions taken in pursuit of the just cause that kill innocents are not deemed illegal due to double effect. Without a just cause, the other side in a war or conflict does not enjoy such privileges. This is again reflected in Vitoria's account of proportionality of means. He states that practices "must not be allowed to go beyond the limits which the necessities of warfare demand, and the legitimate customs of war permit".⁵⁵ While necessity works here in a restraining way, it is still subject to the overall rule that "in the just war one may do everything necessary for the defence of the public good"⁵⁶ and "everything necessary for security and peace",⁵⁷ rendering necessity a far more licensing concept.

Vitoria's conception of necessity, both on the *ad bellum* and *in bello* sides hinges on whether the invoking party to a conflict has justice on its side - which is primarily determined through a just cause. The resort to war in turn is tightly restricted to correct wrongs that have been inflicted, not giving states and their leaders a free hand in their decision to resort to war.⁵⁸ Rather, he restricts the causes and motives that allow for such a course of action and encourages leaders to seek advice to dispel doubt about the legality of

⁵³ Ibid., A2-8, §§39-57, pp. 317-25.

⁵⁴ Ibid., A1, §§37-8, pp. 315-17.

⁵⁵ Ibid., A3, §42, p. 319.

⁵⁶ Vitoria, *De jure belli*, Q1, A4, §15, p.304.

⁵⁷ Ibid., Q1, A4, §18, p. 305.

⁵⁸ Vitoria talks primarily about harm that has been done as the basis for a just war. His conception is juridical in nature, also describing it as a "culpable offence". See Vitoria, *De jure belli*, Q1, A4, §13, p. 303.

such action.⁵⁹ Overall, his conception of just war is probably best summarised in this statement from the conclusion of *De jure belli*, where he states that “[t]he prince should only accede to the necessity of war when he is dragged reluctantly but inevitably into it”, which in turn also clearly sketches out the understanding of necessity in this classic formulation of just war thought.⁶⁰ Vitoria’s account of just war thus falls into the ‘just war’ category, which is not synonymous with the name of the tradition as a whole, but part of a reading of the tradition which divides it into ‘just war’ and ‘regular war’.⁶¹ Within this dichotomous reading ‘just war’ “focuses first and foremost on the lawfulness of the use of force, which it allows only in reaction to a wrong that the responsible party refuses to repair”, thus rendering ‘just war’ “a sanction aimed at restoring the law which has been violated”.⁶²

This of course matches Vitoria’s just war thought and his concomitant conceptualisation of necessity, though the notion of ignorance about the injustice of one’s actions hints at the understanding manifested in the ‘regular war’ rubric.⁶³ A just cause is the primary criterion in this reading of the just war tradition. It determines which party of the conflict has justice on its side and uses war as juridical tool to pursue the righting of a wrong. Said party can then make use of invocations to necessity, as justice allows it to take all necessary steps and employ all necessary means to rectify said wrong, with very few limitations and restraints thereupon. This contrasts with the notion of ‘regular war’ which will be explored in the context of the next theorist under discussion - Alberico Gentili - in the next section below.

Alberico Gentili (1552-1608)

As far as the millennia of history of the just war tradition are concerned, the historical distance between Francisco de Vitoria and Alberico Gentili is negligible. Nevertheless,

⁵⁹ Ibid., Q2, A1, §21, p. 307 where Vitoria states that “One must consult reliable and wise men who can speak with freedom and without anger or hate or greed.”

⁶⁰ Vitoria, *De jure belli*, Q3, §60, p. 327.

⁶¹ See P Haggemacher, “Just War and Regular War”, pp. 434-445 and G M Reichberg “Competing Paradigms”, pp. 193-213 for good overviews of this reading of the tradition.

⁶² Haggemacher, “Just War and Regular War”, p. 435.

⁶³ See Reichberg, “Competing Paradigms”, p. 202 who states that despite not arguing for belligerent equality, Vitoria’s notion nevertheless hints at the logic of ‘regular war’ but is probably more owed to notions of mercy than actual symmetry of rights of belligerents.

Gentili, despite being born only half a century or so after Vitoria, can be seen as a thinker who marks a separate and important stage in the development of the just war tradition. Gentili was studied law in his native Italy before teaching the subject at the University of Oxford.⁶⁴ Beyond his post teaching law, Gentili also made somewhat of a political career as legal advisor to the crown during the reigns of Queen Elisabeth and King James.⁶⁵ Despite this illustrious career, Gentili is unfortunately still largely forgotten as an important scholar in the just war tradition and in the development of international law. Gentili's intellectual contribution was important and similar in some ways to Vitoria's.

Where Vitoria combined the traditionalism of the Scholastics of the late Middle Ages with the tentatively emerging natural law and legalism, Gentili was cutting the ties to the former and firmly pushed just war thought towards the legalism that would come into full bloom with Grotius, Pufendorf and Vattel - theorists that would overshadow Gentili's contribution to just war thought as well as to the development of international law.⁶⁶ His contribution, along with other scholars such as Ayala, was to leave medieval theological antecedents of just war thought behind in favour of natural law, change the conceptualisation of war and to concomitantly introduce more formal rigour into just war thinking. The result of this shift is of course a different conceptualisation of necessity and how the concept can be invoked. In this vein, as the remainder of this section will show, Gentili's account of just war also falls into the 'regular war' rubric of the dichotomy introduced above, which focuses on formal aspects of war rather than on the wrongs committed and the question of justice.⁶⁷

Regarding the shift away from medieval conceptions of justice grounded in theology, Gentili and many of his compatriots saw natural law as the most important factor in the determination of justice, believing sovereigns despite their status to remain "'below' natural and international law" in important respects regarding war.⁶⁸ The ensuing change in

⁶⁴ J Kelsay, "Alberico Gentili (1552-1608)", in C O'Driscoll and D Brunstetter, eds., *Just War Thinkers: From Cicero to the 21st Century* (London: Routledge, 2017), p. 119

⁶⁵ Ibid., pp. 119-20.

⁶⁶ John Kelsay, among others, mentions that Gentili's contributions had been historically overlooked and still do not attract a lot of scholarly examination. See "Alberico Gentili (1552-1608)", p. 118. Interestingly, Carl Schmitt, just as in the case of Vitoria above, draws on Gentili's work, describing him along with Balthasar Ayala as the "true founders of international law", see *Der Nomos der Erde*, p. 98 (translation my own).

⁶⁷ Haggenmacher, "Just War and Regular War", p. 435.

⁶⁸ A P D'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (London: Hutchinson Univ. Library, 1951), p. 68, q.i. Bellamy, *Just Wars*, p. 59.

understanding of war as a concept is summed up by Stephen Neff stating that a “conspicuous sign of the new outlook on warfare was the stress of these writers on *formal* aspects of warfare over substantive questions of the justice of the underlying dispute”, referring to legal scholars like Gentili and Ayala.⁶⁹ This is not only an important element for the subsequent development of the tradition but also significant for how Gentili conceptualised necessity. The understanding and invocation of necessity is affected by this formalism, grounded in equality and symmetry of rights of belligerents in a war or conflict, is the hallmark of the ‘regular war’ rubric that Haggenmacher and others have established. Theorists who fall into this category regard wars as “contests between equal belligerents who [are] both entitled to wage war, owing to their sovereign status, regardless of the cause that had prompted the conflict”.⁷⁰ Consequently, *in bello* rights and prerogatives are equally distributed between the parties of a conflict and independent of the *ad bellum* question and, importantly, both sides have equal access to invocations of necessity.

Despite Gentili’s stance on the competence of sovereigns to resort to war, he is not unconditionally licensing on the *ad bellum* side. He sees legitimate causes for the resort to warfare in the violation of natural law, therefore privileging defensive wars in this regard. He even goes further than that, drawing on Cicero, to describe defence as necessary, stating that

“[t]here is one rule which endures for ever, to maintain one’s safety by any and every means. ‘Every method of securing safety is honourable. This has been taught to philosophers by reason, to barbarians by necessity, to the nations by custom, to wild animals by Nature herself. This law is not written, but inborn’.”⁷¹

Gentili goes to great length analysing various forms of legitimate defensive wars, but also examines what forms of offensive wars can be legitimate. He states that “offensive war has the same motives, arising from necessity, expediency, or honour”.⁷² He further defines the necessity legitimisation as the understanding “that we cannot maintain our existence without making war”, which speaks to an underlying communitarian value basis.⁷³ Gentili

⁶⁹ S C Neff, *Justice Among Nations: A History of International Law* (Cambridge: Harvard Univ. Press, 2014), p. 149.

⁷⁰ Reichberg, “Competing Paradigms”, p. 200.

⁷¹ A Gentili, *De Jure Belli Tres*, trans. John C Rolfe (Oxford: Clarendon Press, 1933 [1598]), Book I, Chapter 13, p. 59. All subsequent citations will be taken from the same edition and follow the same format of book, chapter and page number.

⁷² Gentili, *De Jure Belli Tres*, Bk. I, Ch. 17, p. 79.

⁷³ *ibid.*

therefore, very much posits the concept of necessity in the context of legitimising factors for the resort to war. This, however, should not be misconstrued as a purely licensing conceptualisation of necessity. Rather, Gentili's mapping of necessity is more complex, as was in the case of Vitoria and the just war tradition more generally.

Gentili's understanding of necessity is linked to the legitimization of war, while at the same time reining in the unrestricted usage of the concept. This is maybe best encapsulated in the statement that "[o]f course a just war is always necessary since the war arises from necessity, and there is no other way in which we can avenge our wrongs or guards against injury to ourselves or others".⁷⁴ Here Gentili clearly points out that necessity emerges out of conceptions of justice and therefore cannot be a vehicle for unrestricted license to, and in warfare. As a matter of fact, he goes to great length to highlight the *ultima ratio* character of war, which requires the exhaustion of other available means as an *ad bellum* criterion. Hence, he describes the law of war as "one of necessity" and hence it being "the last resort of all".⁷⁵ Gentili and his contemporaries cut the ties of just war thought to Christian political theology which had served as the underpinning to just war up until this point. They replaced this with a system of sovereigns, who, as outlined above, are equal in status and despite having the option of recourse to war, remain bound by natural law. They understood this to be the "law of peace *and* war, and not *just* the law of peace", where war had to fulfil necessity requirements to be just.⁷⁶

Gentili's aforementioned formalism is one example of how necessity is posited as restrictive not just in abstract just war thought, but also as concrete knowledge practice. Gentili's remarks on the requirement for a formal declaration of war to take place before any force is employed as part of hostilities illustrates this point. He states that it is "natural law, that before you take hostile steps, you first utterly renounce the friendship or common tie which you have [...]"⁷⁷, thus explicitly rendering a declaration of war "necessary".⁷⁸ In a reference to litigation, he even goes on to compare a declaration of war to a legal writ in a civil lawsuit to underscore the requirements for formulaic processes in the legitimization of

⁷⁴ *ibid.*, Bk. III, Ch. 18, p. 388.

⁷⁵ *Ibid.*, Bk. II, Ch. 1, p. 133

⁷⁶ M Forsyth, "The tradition of International Law", in T Nardin and D R Mapel, eds., *Traditions of international ethics* (Cambridge: Cambridge Univ. Press, 1992), p. 29. Emphases quoted from original.

⁷⁷ Gentili, *De Jure Belli Tres*, Bk. II, Ch. 1, p. 132.

⁷⁸ *Ibid.*

warfare.⁷⁹ He makes similar links to civil law in other places as well. Highlighting that the law of war needs to be “impartial to each of the litigants” - a need resulting from the possibility of war to be just on both sides - Gentili compares this to civil legal procedures of the “Forum”.⁸⁰ Again, this has important implications for how in particular *ad bellum* necessity is posited in just war thinking. Even-handedness due to justice on either side is one of the reasons why Gentili describes necessity for war in the sense of last resort and why he insisted on formalistic processes in warfare. This taken together with his penchant for natural law demonstrates not only how he contributed in the development of just war thought and international law but also how necessity was concomitantly deployed differently.

On the *in bello* side, Gentili proves arguably far less innovative in his approach. While the argumentation in the justification of the *in bello* criteria is somewhat differently rooted compared to his predecessors, he still does make the case for proportionality of means and the distinction between combatants and non-combatants. Like in the medieval formulations of just war thought, Gentili discusses such points as the use of certain weapons,⁸¹ conduct in warfare⁸², in particular with respect to captives and prisoners⁸³, as well as non-combatants.⁸⁴ While Gentili’s mobilisation of the concept of necessity makes allowances, just as on the *ad bellum* side as outlined above, there are limits to these. The use of poison in warfare is one example where Gentili’s mapping of the concept of necessity in relation to *in bello* criteria is exhibited. Gentili examines the permissibility of the use of poison against the background of the principle that “what the law does not permit, necessity makes allowable” and comes to the firm conclusion that “necessity does not oblige us to violate the rights of our adversaries, or even the right of any one”.⁸⁵ Here, Gentili once again acknowledges the licensing element of the concept of necessity, but posits the concept against firm, absolute restrictions derived from underlying ethical values and natural law.

Gentili’s conception of necessity therefore significantly contrasts with Vitoria’s. The main

⁷⁹ Ibid., p. 131.

⁸⁰ Ibid., Bk. I, Ch. 6, p.33. See also Neff, *Justice Among Nations*, p. 149 on this point.

⁸¹ Ibid., Bk. II, Chs.6-7, pp. 155-165.

⁸² Ibid., Bk. II, Chs. 10-14, pp. 176-201.

⁸³ Ibid., Bk. II, Chs. 15-19, pp. 202-245.

⁸⁴ Ibid., Bk. II, Chs. 21-2, pp. 251-269.

⁸⁵ Ibid., Bk. II, Ch. 6, p. 159.

difference being that they have different stances on the distribution of justice among belligerents and hence conceive differently about the rights that parties to a conflict have. Where Vitoria starts from the presumption that only one side can truly have justice on their side - some allowance for ignorance notwithstanding - and as a consequence conceives of an asymmetry in *in bello* rights, Gentili favours a symmetrical approach in *ad bellum* and *in bello*, as well as their independence. The conceptualisation of necessity is accordingly different between both accounts. In Vitoria's account the invocation of necessity is in line with the asymmetric distribution of rights among belligerents. Accordingly, the party with justice on its side can also invoke necessity to licence conduct premised on the justification of just cause. Gentili on the other hand conceives of sovereigns of equal standing with the option to resort to war. This option is not unlimited, nor is the permissible conduct in war and hence while both sides can invoke necessity, its licensing properties have limits. These two conceptualisations are reflective of the distinction between 'just war' and 'regular war', as outlined above. Both of these notions are present in the extant discourse as well, as the next section will show.

Contemporary Just War Thought - Michael Walzer's Eclecticism and the Revisionists

Vitoria and Gentili are part of the roots out of which emerged, at first hesitantly, a budding legalistic system of positive international law, which, in its extant form, will be elucidated in chapters two and three of this thesis. While international law has become the primary line of inquiry into the legitimacy of wars and conflicts, just war thought has retained - or regained - its place as moral discourse on warfare. The focus in the examination of the contemporary, extant just war discourse will focus on Michael Walzer's work and in particular on *Just and Unjust Wars* (J UW), his main contribution to the just war tradition "unambiguously the most influential academic reconsideration of the tradition in recent times", highlighting the importance of Walzer as a just war scholar and in particular his key contribution in this regard.⁸⁶ Walzer's work offers additional insights however, which justify its selection as the focus of this section beyond the degree of its dissemination and concomitant importance. Rather, the composition of his work stands out, as his account of just war is characterised by an eclecticism that blends "contractualist, communitarian,

⁸⁶ N Rengger, "On the just war tradition in the twenty-first century", *International Affairs* 78, No. 2 (2002), p. 355.

deontological, and utilitarian insights” and its “arguments for the moral status of political community, its acceptance of the moral distinctiveness of war as a social practice, and its strong endorsement of the moral distinction between the spheres of *ad bellum* and *in bello* justice”.⁸⁷

Walzer’s work, in short, offers an eclecticism that is reflective of the long and deep roots of the just war tradition itself and as such, as will be shown below, also combines aspects of ‘just war’ and ‘regular war’ into one theory. Hence, while Walzer’s work builds on the rich tradition of just war thought in many respects, it also reveals intervals and gaps in its conceptualisation of legitimacy and justice in war and conflict. Jeff McMahan believes that this can at least partly be explained by the development of international law and a legalistic outlook on questions of justice in war, stating that “while early theories of the law of nations drew heavily on the ideas of classical just war theorists, the contemporary theory of the just war is in many respects discontinuous with the classical theory and relies instead on doctrines drawn from the law”.⁸⁸ Thus, the appeal in Walzer’s work lies also in his eclectic blending of traditions and frameworks, which is representative of the discourse and its practices and therefore relevant to how necessity is posited within it.

Walzer’s conception of just war can be explained at least in part by his motivation to delve into the tradition in the first place. In the preface to the first edition of *JUW*, penned in 1977, he states that the starting point was not an examination of war in general, as an institution, but specifically the “American intervention in Vietnam”.⁸⁹ He also clearly expresses the purpose for which he engages with just war thought against the backdrop of Vietnam, “to recapture the just war for political and moral theory” and thereby to provide a “book of practical morality”.⁹⁰ This reinforces the aspect above, that Walzer has not chosen a general treatise on war as his goal and hence does not chose a general examination of war under moral and ethical considerations as his starting point. In line with this argument, Walzer also grounds morality in his approach explicitly in the “doctrine of human rights”.⁹¹ This also speaks to the aforementioned points on Walzer’s eclecticism and the point raised by Jeff McMahan that contemporary just war thought is influenced by the

⁸⁷ K Hutchings, “War and moral stupidity”, *Review of International Studies* 44, No. 1 (2017), pp. 84-5.

⁸⁸ McMahan, “The Morality of War”, p. 20.

⁸⁹ Walzer, *Just and Unjust Wars*, p. xix.

⁹⁰ *Ibid.*, pp. xxii and xxiii respectively.

⁹¹ *Ibid.*, p. xxiv.

legalism of international law as much as international law at its inception was influenced by the just war tradition.

Though Walzer sees the duality of *jus ad bellum* and *jus in bello* “at the heart of all that is most problematic in the moral reality of war”, he accepts the division into these constituent parts and orders JUW accordingly, but calls them ‘Theory of Aggression’ and ‘The War Convention’ respectively.⁹² The remainder of this section will explore these two dimensions with respect to how necessity is posited within them and relate it to framework of ‘just war’ and ‘regular war’ introduced above. In doing so, the section will focus on Walzer’s conceptualisation of necessity as risk in the *in bello* context and the notion of supreme emergency as an *ad bellum* argument in which necessity plays a crucial part and provide a brief contrast through the view of just war revisionists. It will show that Walzer combines the symmetrical elements of ‘regular war’ with equal rights and protections for combatants and belligerents, with a pronounced ‘just war’ element in his account of supreme emergency that introduces an element of asymmetric justice and leads to a different understanding of necessity.

In the ‘War Convention’, that is to say on the *in bello* side, Walzer posits the concept of necessity as an expression of probability and risk. Invocations to necessity in the conduct of war are in this view essentially just references to the risk combatants and non-combatants are exposed to, or expose themselves to, in war. Walzer states that the concept of military necessity,

“justifies not only whatever is necessary to win the war, but also whatever is necessary to reduce the risks of losing, or simply to reduce losses or the likelihood of losses in the course of the war. In fact, it is not about necessity at all; it is a way of speaking in code, or a hyperbolical way of speaking about probability and risk”.⁹³

Not only does Walzer give a very clear mapping of necessity within its wider discourse, he also provides a judgement of the necessity argument in this context. Necessity, in this contemporary rendition of just war thought, is part of military and legal logic in the regulation of war, but prone to be abused. The *in bello* criteria of proportionality and distinction prevalent in contemporary just war thought and international law were borne

⁹² Ibid., p. 21.

⁹³ Ibid., p. 144.

out of moral considerations however, to offer a counterweight to military-prudential reasoning.

Deploying the concept of necessity in order to render humanitarian concerns obsolete is a means of reducing it to a solely prudential category with respect to proportionality. Moreover, such a rendition of necessity also pertains to the principle of distinction and the question of liability to attack. Risk, in this understanding, does not just concern the risk resulting from a given course of (in)action as reflected in proportionality, it also raises the question of ‘risk to whom’? Necessity conceived as military necessity in its purest form is therefore not solely “a calculation of probability and risk” and rather “a reflection on the status of the men and women whose lives are at stake”.⁹⁴ Walzer follows in the tradition of just war thought to highlight the special status of soldiers with respect to the risks entailed in combat and war at large. Thus, he outlines a framework in which necessity can loosen standards akin to a civil emergency, which, however, is not to say that there are no rules at all. Importantly, the rules apply to soldiers too, as “no one can be killed for trivial purposes”, though combatants necessarily experience higher risks.⁹⁵ He illustrates this point by way of the historical example of the bombing raids of the Free French air force during World War II. While attempting to weaken the military and industry of German-occupied France, they strived to minimise losses of their compatriots who were forced to work in German industry and military installations. In order to do so, they inevitably had to “accept greater risks for themselves” through risky precision bombing raids at low altitude.⁹⁶ Premised on their conception of necessity, they recognised their own comparatively higher liability to attack, the increasing risk to themselves and the reduction of risk to civilians on the ground.

There are limits to risks, and by extension to necessity, on the prudential side as well. These limits are roughly fixed at the “point where any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated”.⁹⁷ This point in turn translates to the *ad bellum* side as well. Here too, Walzer translates invocations of necessity as expressions of risks and probability - at least initially. In the

⁹⁴ Ibid.

⁹⁵ Ibid., p. 156

⁹⁶ Ibid., p. 157.

⁹⁷ Ibid.

very first chapter of JUW, entitled *Against 'Realism'*, Walzer outlines his reading of realist logic. He delineates a communitarian framework “where self-interest and necessity prevail”.⁹⁸ Consequently, war and conflict rely on the same conceptualisation of necessity, where circumstances force certain courses of (in)action, even if they are in contravention of ethical norms or laws. He uses the example of the Melian Dialogue, an exchange between Athenian generals and the leaders of the island of Melos during the Peloponnesian War, to illustrate this point. In this exchange, infamous in the realist tradition, the Athenians justify their threatening posture towards Melos as a necessity - in order to preserve the Athenian empire Melos has to either surrender or be destroyed.⁹⁹ Walzer concludes that the Athenian “argument has to do with probabilities and risks”, but is not denoting a necessity in the sense of a course of action without alternative.¹⁰⁰ Rather, he questions the underlying normative premise that the empire needed to be preserved and highlights the lack of foresight that would give credence to a necessity argument.

Walzer thus rejects the deployment of necessity, represented as recourse to seemingly moral categories of risk and probability, as a justification for the logic of Realism on the *ad bellum* side. It is therefore surprising when Walzer later on in JUW turns to this very necessity logic in the context of what he dubs ‘supreme emergency’ situations.¹⁰¹ Though all wars and conflicts are crises and emergencies in some shape or form, and thus by definition circumstances out of the ordinary, Walzer accords a conflict situation fulfilling a specific set of conditions the status of an emergency that goes even beyond merely ‘normal’ war. He stipulates two conditions which have to be met simultaneously. Firstly the danger has to be imminent in the strictest sense of the word and secondly, and more importantly, the consequences from inaction would have to be serious¹⁰², to such an extent that “our deepest values and our collective survival are in imminent danger”.¹⁰³ A situation that meets these criteria permits the transgression of the rules he himself stipulates in his

⁹⁸ Ibid., p. 3.

⁹⁹ Ibid., pp. 5-10. See also Thucydides, *The War of the Peloponnesians and the Athenians*, trans. J Mynott (Cambridge: Cambridge Univ. Press, 2013), V 84-115, pp. 378-85, for a full account of the Melian Dialogue.

¹⁰⁰ Walzer, *Just and Unjust Wars*, p. 8.

¹⁰¹ Ibid., pp. 251-68. Walzer uses the concept of supreme emergency to draw an ethical distinction to a mere ‘normal’ emergency situation and consequently is more licensing in the former. While not entirely the same, Walzer’s argument contains echoes of Cicero’s distinction between wars of choice (for honour) and wars of survival. He expands on the concept of supreme emergency in the essay “Emergency Ethics”, reprinted in M Walzer, ed., *Arguing About War* (New Haven: Yale Univ. Press, 2004), pp. 33-50.

¹⁰² Walzer, *Just and Unjust Wars*, pp. 251-5.

¹⁰³ Walzer, “Emergency Ethics”, p. 33.

war convention, such as the intentional targeting of civilians as in the allied bombing raids during WWII, the sole historical example he cites in support of supreme emergency.¹⁰⁴ This naturally goes against Walzer's own earlier-stated argument deployed against the logic of Realism, wherein necessity is invoked in order to legitimate ethical and legal transgressions, because they would require foresight about the consequences that give rise to the necessity argument in the first place. He is aware of this however, acknowledging that hard cases make bad law and that the emergency ethics framework can be a slippery slope.

Walzer further qualified his position on 'supreme emergency' in subsequent publications. He acknowledges the underlying communitarian basis of his emergency ethics but claims that this does not necessarily negate individual human rights, which he declared the basis of his own moral argument in *JUW*. In trying to reconcile both aspects, Walzer returns to the historical precedents of the tradition by way of classic formulations of just war thought. He states that even though it is communitarian there is moral benefit from granting transgression of ethical norms, styling supreme emergency as way of negotiating between the "absolutism of rights" and the "radical flexibility" of extreme utilitarianism without being able to ultimately resolve both positions.¹⁰⁵ He further states that "moral communities make great immoralities morally possible. But they do this only in the face of a far greater immorality", such as when "the very existence of a particular community" is concerned.¹⁰⁶ This account of supreme emergency evokes the category of 'just war' introduced above and stands in opposition to Walzer's otherwise 'regular war' account of the moral and ethical rules of warfare. His notion of a supreme emergency implies justice being limited to one side of the conflict and results in asymmetric rights of belligerents.¹⁰⁷ As mentioned above, Walzer's positing of necessity in the context of supreme emergencies does not seem to map onto his conception of just war thought based on individual rights. Unsurprisingly his account of supreme emergencies is also one of the primary points of attack for criticisms of Walzer's just war thought.¹⁰⁸

¹⁰⁴ Walzer, *Just and Unjust Wars*, pp. 255-268.

¹⁰⁵ Walzer, "Emergency Ethics", pp. 35-40.

¹⁰⁶ *Ibid.*, p. 50.

¹⁰⁷ See Haggenmacher, "Just War and Regular War" and Reichberg, "Competing Paradigms" for an account of the difference in both categories.

¹⁰⁸ See inter alia: I Clarke, *Waging War: A New Philosophical Introduction*, 2nd ed. (Oxford: Oxford Univ. Press, 2015), as well as D C Hendrickson, "In Defense of Realism: A Commentary on Just and Unjust Wars", *Ethics & International Affairs* 11, No. 1 (1997) both of which comment on how Walzer's supreme

Even though Walzer went to great length in his subsequent writings on the topic to clarify his stance on supreme emergency, that despite its implicit permissiveness it was not a blank cheque as far as licensing actions went, the principle still stands at odds with the remainder of his just war theory. In it necessity is posited as a concept that is essentially permissive, albeit not limitless in this regard, in line with a 'regular war' conceptualisation. Making it a constituent part of his theory fits with Walzer's overall eclectic approach, but does not necessarily sit well with the tradition of just war thought. While just war thought can be licensing against the criteria which have developed in the tradition over time, the notion of 'supreme emergency' is a slippery slope that brings it logically close to the 'do everything necessary' logic of *Realpolitik*. The underlying communitarianism in 'supreme emergency' provides the 'just cause' and proportionality of ends criteria and additionally implies a case of last resort. Therefore it mobilises necessity in the mould of decisiveness and reason of state of Meinecke, Carl Schmitt among others, the very logic against which Walzer positions his own just war thought at the very outset of JUW, stating that necessity arguments conceived that way would require "foresight" about the severity of dangers encountered and can therefore be regarded as "the work of historians, not historical actors".¹⁰⁹

Walzer's 'mixed' account of the morality of and in war contrasts with another stream of just war thought. In recent years a group of more philosophical minded scholars has called much of the moral foundation of just war thought, and by extension of international law, into question, gaining these scholars the 'revisionists' label. Their criticism has many implications for the conceptualisation of necessity, but also, more generally, for the moral relevance for the bodies of law that make up the rules and regulations surrounding war and conflict and how they are applied. Importantly though, despite most of these revisionists criticising the moral basis of just war and the laws of war, they restrict themselves to just that and largely do not seek to change the laws of war for fear of undermining the legal protections in place, as flawed as they regard them to be.¹¹⁰ On a general level, the

emergency closely relates - and replicates - the realist logic of necessity; whereas N Rengger, *Just War and International Order: The Uncivil Condition in World Politics* (Cambridge: Cambridge Univ. Press, 2013), in particular ch. 5 offers a novel critique of supreme emergency built on Oakeshottian philosophy, concerning his binary of civil associations vs. teleocratic states.

¹⁰⁹ Walzer, *Just and Unjust Wars*, p. 8.

¹¹⁰ S Lazar, "Just War Theory: Revisionists Versus Traditionalists", *Annual Review of Political Science* 20 (2017), pp. 38-9. Jeff McMahan, probably the most prominent just war revisionist, espouses this view of

disagreement between traditional just war scholars and revisionists is their approach to the examination of morality in war. Traditional just war thought ascribes a special status to wars and, concomitantly, to acts of killing and violence committed as part of it.

This position is criticised on the basis that “many revisionist are reductivists”, who argue “[i]n their most extreme moments [...] that wars are justified if and only if they composed exclusively of justified acts of individual self- and other defence”.¹¹¹ The key point for attack in the revisionist argument lies in the logical separation in the *jus ad bellum* and *jus in bello* and the resultant moral equivalence between combatants, which builds the foundation for much of traditional just war thought. Thus, the revisionist agenda aims at the conception of the liability to attack in war and conflict.¹¹² In this thinking, *in bello* protections are a constituent part of the *ad bellum* criterion of a just cause. When attacking without a just cause, the thinking goes, defending combatants cannot make themselves liable to be targeted by attacking combatants. This view is grounded in a different interpretation of the principle of discrimination in targeting outlined above. Revisionists like Jeff McMahan distinguish between “legitimate and illegitimate targets”, rather than “between combatants and noncombatants”.¹¹³ The legitimacy of a target, in McMahan’s reasoning, hinges on the “moral responsibility for an unjust threat [...] that provides a just cause for war”, which is to say that “soldiers who lack a just cause also lack legitimate targets”.¹¹⁴ This conceptualisation is of course also much more in line with the category of ‘just war’ and its asymmetric account of justice and rights of conflicts.

As mentioned above, this view calls into question the logical separation between *jus ad bellum* and *jus in bello*, and, by extension, also the moral equivalence which was afforded to combatants of all parties to a conflict. As a consequence of this, the *ad bellum* and in particular the criterion of just cause is privileged in revisionist just war theory, again in line

critiquing without aspiring to undermine the laws of war in his book chapter “The Morality of War and the Law of War”, in D Rodin and H Shue, eds., *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford Univ. Press, 2008), pp. 19-43. McMahan brings up compliance with the laws of war specifically as an objection to his proposed reassessment of just war thought (pp.39-41).

¹¹¹ Lazar, “Revisionists Versus Traditionalists”, p. 40.

¹¹² J McMahan, “The Ethics of Killing War”, *Ethics* 114 (2004), in particular pp. 693-695 where he provides an overview of the criticism he brings to bear in his own argument. See also J MacMahan, *Killing in War* (Oxford: Clarendon Press, 2009) for a book-length elaboration of his argument; and C Barry, “Review article: A challenge to the reigning theory of the just war”, *International Affairs* 87, No. 2 (2011), pp. 457-466 for a succinct summary and discussion thereof.

¹¹³ J McMahan, “Just Cause for War”, *Ethics & International Affairs* 19, No. 1 (2005), p.6.

¹¹⁴ *ibid.*

with a ‘just war’ conceptualisation. This in turn has important implications for the conceptualisations of necessity. As this account of revisionist just war thought is far from complete and only serves illustrative purposes, said implications for the conceptualisation of necessity will likewise only serve illustrative purposes. Key implications resulting from this revisionist perspective will in turn further shed light on how this discourse posits necessity and how the usage of this concept is embedded in knowledge practices of this community. The privileging of the just cause criterion in revisionist just war thought and in line with a ‘just war’, is the primary driver for the concomitant reassessment of how necessity is posited in a revised just war discourse. As the other criteria, within the *ad bellum* as well as the *in bello* criteria, become logically dependent on just cause, the necessity argument ultimately does so too.

Necessity, in this conceptualisation, becomes a restraining element unless a just cause is underlying any recourse to the use of the necessity concept. Thus, “a just cause is necessary for an act of war to be justified” and that hostilities consequently have to “cease once the just cause has been achieved”.¹¹⁵ Beyond the *ad bellum* “[j]ust cause is necessary not only for it to be permissible for political leaders to resort to war; it is also necessary for it to be permissible to *participate* in war”.¹¹⁶ McMahan’s words clearly shows how the concept of necessity is mapped onto the just cause criterion as pivot. This substantially differs from conceptualisations of necessity in ‘generic’ just war logic espoused by traditionalist. There, the concept could license as well as restrain, depending on the mobilisation of the underlying value basis. In revisionist thought the rights of belligerents and in particular *in bello* rights, hinge on the question of just cause, since “when there is no just cause, acts of war can be neither discriminate, *necessary*, nor proportionate”.¹¹⁷ This revised interpretation of the just war criteria and just war thought more broadly is, of course, controversial,¹¹⁸ not least because the traditionalist just war position draws at least

¹¹⁵ *ibid.*, p. 7.

¹¹⁶ *ibid.* Emphasis quoted from original.

¹¹⁷ *Ibid.*, p. 6. Emphasis added.

¹¹⁸ Revisionists generally and McMahan in particular have been criticised from a variety of argumentative angles, of which I want to provide some examples with no claim at representativeness or completeness. Ian Clark’s *Waging War* answers McMahan in outlining what sets wars apart from a moral perspective (ch. 2). James Turner Johnson, “Contemporary Just War Thinking: Which is Worse, to Have Friends or Critics?”, *Ethics & International Affairs* 27, No.1 (2013), pp. 34-7, sees McMahan’s argument too focused on recent just war thought represented by Michael Walzer and ignoring much of the history of the tradition with its complex influences. Kimberly Hutchings’ “War and moral stupidity”, *Review of International Studies* 44, No. 1 (2017), criticises McMahan’s epistemic argument that combatants should know whether their combat actions do in fact serve a just cause. Hutchings contrasts this account of moral stupidity and moral

some of its authority from its deep and long history, which will be elaborated on in the next section.

What revisionist just war thought highlights is how the conceptualisation of necessity can be mapped onto whether the just war theorist in question falls into the ‘just war’ or ‘regular war’ category. In the case of Walzer, both categories somewhat apply as his account of ‘supreme emergency’ evokes the understanding of a ‘just war’ given his privileging of just cause in such situations, while his theory mostly relies on a ‘regular war’ conceptualisation. Vitoria’s account of just war thought similarly privileges the question of just cause with only minor reservations in the form of some allowance for ignorance. This privileging is put to the extreme by the just war revisionists, whose whole moral account of warfare pivots on the question whether the war or conflict in question constitutes a just war or not. The conceptualisation of necessity in turn hinges on this underlying understanding of justice and whether it is asymmetrically distributed or not.

Analysis

The just war tradition offers a moral discourse on war organised around criteria divided into two sets, the *ad bellum* and *in bello*. The concept of necessity is a central aspect to the criteria and the overall objective of just war thinking, to demarcate occasions in which the resort to war is ethically legitimate and what conduct therein is justifiable. Thus, in this knowledge community, necessity in relation to war and conflict has, over the course of its long history been, and continues to be, posited as licensing and restraining in the search of a balance that negotiates ethical imperatives.

Term v Concept

The term necessity is only occasionally mentioned directly and the concept is also in and of itself only rarely invoked. Rather, necessity mostly features indirectly. The just war criteria which have developed over time in the tradition are imbued with the concept of necessity. Implicit in the understanding of such criteria as ‘just cause’, or proportionality is the mapping of necessity in this knowledge community. While these criteria technically do

intelligence with one inspired by Jane Addams.

use labels such as proportionality, the essence of what such criteria seek to test is whether a war, or particular conduct in war is deemed necessary on an ethical basis. The understanding of the concept in the just war discourse as a quasi-tragic balancing force shines through in most of these criteria and is particularly obvious in some. It is just cause and last resort, for example, that translate into the tragic, ethical necessity of resorting to war, but not an invocation to necessity itself that is used to this end.

Demarcation and Contrast

Following on from the onomasiological analysis above, it is not surprising that the concept of necessity is not demarcated sharply either in this knowledge community. As mentioned above, necessity is rarely directly invoked, but is, through its presence in the just war criteria, weaved into the fabric of this discourse. Consequently, necessity is not delimited in any special way against other concepts in the sense of *Nebenbegriffe*, nor is it set into contrast to other concepts as an antonym. Nevertheless, at a general level the understanding of necessity in this discourse can be seen as in opposition of purely pragmatic invocations of the concept, analogue, but inversely to this analytical category in the *Realpolitik* discourse of chapter five below, where reason of state, at a general level, is set in opposition to ‘idealistic’ conceptions of politics. The just war discourse is fundamentally conceived on the basis of an ethical framework in which war is recognised as an activity that should not be resorted to lightly and without thorough examination of the reasoning behind it. Thus, the knowledge community at large, though accepting of war under certain conditions, is somewhat set against the ‘everything necessary’ prudence of Realism and reason of state.

Configuration

The elaborations in the chapter above have shown that the configuration of necessity in this discourse follows the breadth the discourse itself exhibits. For instance, as the knowledge community covers both, *ad bellum* as well as *in bello* considerations, the concept of necessity does get invoked at both the macro level, to make an argument for the necessity to resort to war, and the micro level justifying specific conduct within war. Therefore, as far as knowledge practice is concerned, necessity can be and does get invoked by state leaders, politicians and decision-makers on the one hand, but also by

soldiers, platoon leaders and officers regarding their conduct.

With respect to the intended effect, it is clear that the prevalent knowledge practice in the discourse is to almost exclusively affect the available scope of actions, and not the temporal scope. The latter is already accounted for in the ‘last resort’ criterion on the *ad bellum* and not present on the *in bello* side. The effect on the available scope of actions is, of course, the resort to war in the first place, but can also regard questions in the choice of weapons (proportionality) and targeting (distinction) in the context of the conduct of war. The purpose for which necessity is invoked can be both regarded as licensing and restraining. The criteria that have developed in the just war tradition are an expression of a moral discourse that accepts that war can be ethically legitimate, but in full awareness of the negative consequences that accompany wars and conflicts, the knowledge community fundamentally regards the occurrence of war as a tragedy. Thus, the discourse as a whole, and the just war criteria within it, can almost be regarded as a test as to when necessity can be invoked to license. If the criteria are not met, war or specific conduct in war, is simply deemed not necessary and the concept’s purpose is restraining.

Importance

Following on from the above analytical categories, it becomes quite obvious that the knowledge community and its practices attach great importance to the concept of necessity. The concept encapsulates the quintessence of the discourse, the question of whether war and conduct therein can be seen as necessary. Members of this knowledge community accept that, under certain conditions, war tragically can be necessary. However, the knowledge practice of invoking necessity in this discourse is set up such that war only should be rendered legitimate if it truly is necessary. The moral categories and criteria that make up the discourse help to achieve this mapping of the concept of necessity. Therefore, just like a prudential understanding of necessity formed the basis of the self-understanding of the military strategy discourse, the question of whether war is necessary against the backdrop of an ethical framework, forms the *raison d’être* of the just war discourse.

Conclusion

The just war discourse is a complex construct, resting on a tradition of thinking with a long lineage that has brought it into contact with a diverse set of other discourses such as Realism, military and strategy, as well as international law. The complex makeup of this discourse, in turn, is felt when it comes to the question of how this knowledge community posits necessity in relation to war and conflict. Akin to Classical Realism in International Relations theory, there is an element of tragedy in just war thinking. The tragedy lies in the recognition of the costs, or evil to use the term of its theological antecedents, that wars and conflicts entail on the one hand and the recognition of the need to resort to war or to certain conduct therein, in certain circumstances. This is reflected in different ways in just war thought that either falls in the ‘just war’ category, which privileges belligerents premised on their just cause and the formalism and equal rights in a ‘regular war’ conception. The concept of necessity is posited along those very same lines within this knowledge community.

Necessity is seen as a double-edged sword. War is sometimes necessary, but if we resort to it then we provide conditions that ensure that it really is only used in situations where it is truly necessary. This understanding of necessity is represented in both the *ad bellum* as well as the *in bello* just war criteria. Most of these can be used to make a licensing necessity argument, but at the same time serve to restrain. Therefore, the just war discourse and its associated knowledge community are something of a mirror image of the military strategic discourse outlined above. While strategic considerations posit necessity as an essentially prudential concept, which is only balanced through the humanitarian elements contained in international law, the just war tradition posits necessity as a tragic element in relation to war and conflict. Given the right kind of circumstances, the resort to war may not only be ethically legitimate but may also be ethically necessary.

The concept of necessity is deployed with reluctance, however, and not embraced. The quote by the Lord Bishop George Bell at the outset of this chapter reflects this attitude well. Michael Walzer captured the same notion in JUW, stating that

“indeed it may be necessary ‘to hack one’s way through’, but it is no virtue to be too eager to do that or to do it too soon, for it is not the opposing army that is hacked through in such a case, but innocent men and women, whose rights are

intact, whose lives are at stake”.¹¹⁹

Necessity can serve to license though with great reluctance and only under specific conditions, otherwise it restrains.

¹¹⁹ Walzer, *Just and Unjust Wars*, p. 250.

Chapter 2: *Ad Bellum* International Law - Wither Necessity?

“Necessitas non habet legem”
(Necessity has no law)
Anonymous Latin Proverb

Introduction

The expression that necessity has no law can be traced back for centuries while its originator remains unidentified. Nonetheless, the proverb provides timeless insights on the relation between the notion of necessity and law. For as old as the proverb is, there was a perception of conflict, if not of mutual exclusivity, between necessity and the law. Necessity is generally invoked as part of ‘emergency reasoning’, in which measures are stipulated that transgress rules and laws. The question of what and how something may necessitate the *ultima ratio* of measures - war - is not just an age-old question, but one still pertinent today. This chapter will investigate the question of how necessity is understood in the context of the extant *ad bellum* international law discourse.

The extant international law discourse is largely defined by the doctrinal regime established through the United Nations (UN) and its Charter, with the legal understanding of necessity in this discourse being no exception. In the aftermath of World War II (WWII), the UN and the adoption of its charter brought about a new international legal regime that prohibited the aggressive use of force and sought to render war a purely defensive measure. This chapter will show that the understanding of necessity in this extant discourse is an extension of the UN legal regime, in which the applicability of necessity is narrowed and restricted. Moreover, it will be shown that as the UN legal regime was a reaction to WWII, rendering the conceptualisation of necessity within said legal regime a function of its past. The understanding of necessity within the bounded rationality of *ad bellum* international law therefore is a function of past state practice and the changed *opinio juris* on the role of war in the international state system. Nevertheless, the legal understanding of the concept has remained somewhat in flux despite codification. Curiously, its

understanding has remained open in particular in relation to some aspects related to the use of force. All in all, rather than not having any law, as the proverb goes, necessity is restricted by law and understood in the terms that the international *ad bellum* legal doctrine sets. This understanding is marked by a reaction to and rejection of past state conduct and exhibited in the narrow conceptualisation of necessity.

In order to elucidate the understanding of necessity in this context, this chapter will firstly provide an account of the UN legal framework within which the extant legal conceptualisation of the concept is embedded. This chapter will, for reasons of scope, not address at length issues relating to Chapter VII powers on the use of force and focus on the legal conceptualisation of necessity. Rather, the focus will lie on the legal codification of necessity and the crucial role played by the International Law Commission (ILC) in this process. To this end the draft article on necessity will be presented and its individual components examined. This second section will demonstrate how the wording chosen by the ILC is aimed at narrowing the scope of necessity and limiting its invocation. The third section of this chapter will contrast the narrowly codified version of necessity with past state practice of the concept, highlighting that the difference in understanding of necessity is rooted in the differing role of war. The chapter will then proceed with the analysis based on the four guiding questions outlined in the introductory chapter. Within this fourth section, the congruence between term and concept, the demarcation to other concepts, the configuration of necessity as well as the importance ascribed to it, will be elaborated. Across these sections, the examination will rely primarily on UN and ILC documents and will in particular draw on the two most important commentaries on the draft article on necessity by the special rapporteurs Roberto Ago and James Crawford respectively.¹ Lastly, a short summary discussion will conclude that in this discourse the understanding of necessity is narrow in scope, a rejection of its past conceptualisation and still not completely settled.

The ILC and the UN Legal Regime

¹ Special rapporteurs are designated point persons on a given topic of international law and are part of the ILC structure. They develop topics, elaborate on the state of the law and make proposal and write draft provisions in their reports. Roberto Ago and James Crawford were instrumental on the topic of State Responsibility in this regard. See <https://legal.un.org/ilc/structure.shtml>.

The concept of necessity long predates the contemporary international law regime. However, in its current legal form, necessity has been enshrined into the international law regime through the codification process of the International Law Commission. The ILC was instituted through the United Nations and was ultimately a result of the enactment of its Charter. The backdrop provided in this section will aid in the analysis of necessity within this discourse when applying the analytical framework with its four guiding categories outlined in the introductory chapter. Moreover, having established this context will help to contrast the necessity discourse in the contemporary international law discourse with its understanding prior to the current UN regime. This will bring in particular the configuration and importance of the concept of necessity in its current *ad bellum* legal discourse into focus.

Through the establishment of the UN and the adoption of its charter its member states also adopted a new legal regime. This new regime was principally marked by a reassessment of the role of war in the international state system, which was exhibited by the prohibition of the aggressive use of force by states.² The ILC was set up in the aftermath of the enactment of the UN Charter and constitutes one of its bodies.³ Its existence was foreshadowed through the Charter itself, as Article 13(1)(a) states that the General Assembly of the UN shall initiate studies that “promot[e] international co-operation in the political field and encourag[e] the progressive development of international law and its codification”.⁴ Therefore, the ILC’s stated purpose could be described as aiding in solidifying international legal foundations through the codification of customary international legal principles. This continued a pre-war trend to further formalise international law doctrine either through treaty law or through the codification of international legal customs based on state practices.⁵ In this context the aforementioned ILC approach to “codification” was defined as the legal formulation of existing state practice, while “progressive

² See U. Scheuner, “Krieg als Mittel der Politik im Lichte des Völkerrechts”, in *Freiheit ohne Krieg? Beiträge zur Strategie-Diskussion der Gegenwart im Spiegel der Theorie von Carl von Clausewitz*, ed. Clausewitz-Gesellschaft (Bonn, Dümmler, 1980), for information on the changing role of war. For a general overview on the UN and its legal regime see G Best, *War & Law since 1945* (Oxford, Oxford University Press, 1994), pp. 67-79.

³ For information on the ILC in general see B G Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (The Hague, Martinus Nijhoff, 1977). as well as *ILC Report of the international Law Commission on the work of its forty-eight session*, 1996, A/51/10, ch. VII in particular paras. 150-244 in which the ILC reflects on its past work.

⁴ United Nations Charter Article 13(1)(a), <http://www.un.org/en/sections/un-charter/chapter-iv/index.html>

⁵ I Sinclair, *The International Law Commission* (Cambridge, Grotius Publications Limited, 1987) Chapter one.

development” of international law was set as the preparation of draft conventions.⁶ The positivist stance with which the ILC approached the codification of customary international law is an important factor in the crafting of the article on necessity. Rather than deriving concepts from first principles, the ILC first and foremost regards it as their role to identify the relevant “existing state practice” in order to define and codify legal concepts. Legal concepts are thus viewed as being established between states through their actions rather than predating states themselves. This was also the approach taken by the ILC in the codification of the concept of necessity - as we shall see below - which has an important bearing on its extant understanding.⁷

One of the most important topics considered for codification was the responsibilities of states for internationally wrongful acts and which had previously been under consideration at the unsuccessful first international conference on codification in The Hague in 1930.⁸ Stephen Neff describes the whole complex of state responsibility as the “most useful set of articles” the ILC codified. Moreover, he regards state responsibility as “the ultimate in ‘lawyers law’ in the international sphere”, given that it comprises the “rules and principles that govern determinations of liability in general in international law - the prerequisites for liability, special defenses to be recognized, and legal consequences of breaches of law, including remedies available to victim states”.⁹ Within the remit of this complex also fall “circumstances precluding wrongfulness” (for an internationally wrongful act), among which the concept of necessity can be found. Thus, the concept of necessity - state of necessity in the parlance of the ILC - is explicitly acknowledged as a form of exculpation within the *ad bellum* discourse of international law, giving grounds to conduct that would otherwise be in contravention to the responsibilities of a state.

Within the context of the ILC a state of necessity is therefore codified as a plea which, under certain conditions, precludes the wrongfulness of a state which has violated its responsibilities. Before this will be analysed in detail below, it is important to acknowledge that the concept of necessity is, like the ILC itself, embedded in the UN regime within this

⁶ ILC Report, 1996, A/51/10, para. 156

⁷ On the positivist stance in international law generally see e.g. S C Neff, *Justice Among Nations: A History of International Law* (Cambridge Massachusetts, Harvard University Press, 2014) Sections III and IV

⁸ On the study of the topic by the ILC see ILC Report, 2001, A/56/10, ch. IV, paras. 28-43; on prior codification attempts see Sinclair, *The International Law Commission*, pp.3-5, and Neff, *Justice Among Nations*, pp. 362-364.

⁹ Neff, *Justice Among Nations*, p.414

discourse. For the purposes of the present investigation it is important to highlight that within this bounded rationality necessity has to always be understood in the context of the prohibition of aggression and the restrictions on the use of force put in place by the UN Charter. Despite these ‘restrictions’, the concept of necessity continues to play an important role in the *ad bellum* international law discourse. The ILC, based on its mandate, examined the concept of necessity and studied examples of states of necessity in past state practice. Special rapporteurs were designated within the ILC who reported regularly on the work carried out on the draft articles for state responsibilities in the decades of study. Roberto Ago and James Crawford stand out as those rapporteurs who authored the most influential commentary on necessity, elaborating at length on the historical precedents taken into account in codifying necessity¹⁰. The work of the ILC and its special rapporteurs ultimately led to the adoption of the draft articles on state responsibility for internationally wrongful acts, including necessity, in 2001.

ILC Draft Article on Necessity

The articles on responsibility of states for internationally wrongful acts drafted by the ILC were adopted in December 2001 through General Assembly resolution 56/83, which commended them to governments “without prejudice to the question of their future adoption”.¹¹ Chapter V of these articles contains “circumstances precluding wrongfulness”, which, if applicable, “provides a shield against an otherwise well-founded claim for the breach of an international obligation” by a state.¹² The six circumstances that the ILC recognised in international practice and chose to codify in its articles are: consent (Art. 20), self-defence (Art. 21), countermeasures (Art. 22), *force majeure* (Art. 23), distress (Art. 24) and necessity (Art. 25), with Article 26 clarifying that none of the aforementioned circumstances can preclude wrongfulness in case of violation of a peremptory norm of

¹⁰ J Crawford, 2002, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press), pp. 1-4 [hereinafter Crawford Commentary]. ILC, “Addendum - Eighth report on State responsibility by Mr. Roberto Ago”, 1980, A/CN.4/31/Add.5-7 [hereinafter Ago Commentary], paras. 1-81. See also Neff, “Justice Among Nations”, p.414.

¹¹ UN Doc A/RES/56/83 (2001); for articles see UN, “Responsibility of States for Internationally Wrongful Acts”, 2001, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, accessed 01.02.18 [hereinafter ARSIWA]; The text adopted by the General Assembly resolution was corrected through document A/56/49(Vol.I)/Corr.4 The above link contains the corrected wording

¹² ILC Report, 2001, A/56/10, ch. V, para. 1

international law.¹³ This exhaustive list of special circumstances indicates the ILC's desire to clearly distinguish between underlying concepts. Indeed, in its commentary the ILC often points out that historical state practice has sometimes applied these concepts in the wrong contexts, a point which will be further examined below. The inclusion of article 26 underlines the intention of the ILC to ensure that these newly-codified articles can not be invoked in the violation of peremptory norms, such as the prohibition of aggression by states. This latter point will be crucial for the analysis that is to follow below. The concept of necessity in the *ad bellum* discourse, as codified by the ILC, appears to be rather restricted in its application to questions of war and conflict. Before addressing this point and examining the demarcation of necessity to the other above-mentioned concepts, this section will first present article 25 on necessity in detail and discuss its constituent parts, before the next section will apply the analytical categories to these components in turn.

In order to examine the codified version of necessity that defines the contemporary *ad bellum* International law discourse, I will quote the article here in full:¹⁴

Article 25
Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril;

And

 - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) the international obligation in question excludes the possibility of invoking necessity; or
 - (b) the State has contributed to the situation of necessity.

One of the first things that is noticeable about article 25 is that it is defined in the negative, only allowing its invocation if all the conditions under (1) are met. Moreover, the second half of the codified concept details when necessity must not be invoked. This restrictive

¹³ ARSIWA, Art. 19-26.

¹⁴ ARISWA, Art. 25.

design hints at the special nature of necessity within the category of circumstances precluding wrongfulness. This seems to be supported by the exhaustive commentary provided by the ILC to their own article. Article 25 has received by far the longest commentary notes out of all the special circumstances that can be invoked in defence of conduct that violate the principles of state responsibility.¹⁵

The invocation of necessity is accordingly restricted to circumstances outlined in (1) (a) and (b). Thus, a state may only invoke necessity if an “essential interest” is affected, highlighting the exceptional nature of its application, which is more restrictive than other special circumstances.¹⁶ While the ILC concedes that the invocation of necessity in state practice has invariably been related to the interests of states, it made sure to codify it in a way that valid applications of the concept concern only the absolute core, “essential” interests. It is also worthy of note that the wording does not prescribe an essential interest of state, as wording in earlier drafts did.¹⁷ Through this deliberate omission, Ago and the ILC stress that “essential interest” is in no way identical to, nor synonymous with, the issue of self-preservation of a state and that the legal codification of necessity should accordingly not be interpreted as such. Ago acknowledges that necessity used to be understood in this way and was invoked accordingly, but describes the idea of a subjective ‘right of necessity’ as “absolute nonsense today”.¹⁸ Moreover, valid invocations of necessity in existing state practice have more frequently touched on essential interests other than the preservation of its existence.¹⁹ With respect to the understanding of necessity in relation to war and conflict, separating necessity from survival, as Ago and the ILC do, is crucial. Rather than in relation to survival, necessity has been invoked, for example, in relation to essential environmental and ecological interests of the state. In the *Torrey Canyon* case,²⁰ as well as in the more recent *Gabcikovo-Nagymaros Project* case of 1997,²¹

¹⁵ See ILC Report, 2001, A/56/10, ch. V for commentary on the respective articles for all six special circumstances and the notes on Art. 26.

¹⁶ O Spiermann, “Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens”, *Nordic Journal of International Law*, Vol. 71, 2002, p. 527.

¹⁷ I Johnstone, “The plea of ‘Necessity’ in International Legal Discourse: Humanitarian Intervention and Counter-terrorism”, *Columbia Journal of Transnational Law*, Vol. 43, No. 2, 2005, p. 342.

¹⁸ Ago Commentary, paras. 8, 9, 12.

¹⁹ Ago Commentary, para. 12. See also R Boed, “State of Necessity as Justification for Internationally Wrongful Conduct”, *Yale Human Rights and Development Journal*, Vol. 3, No. 1 (2000) p. 10.

²⁰ The *Torrey Canyon* was a Liberian oil tanker, which went aground off the coast of Cornwall. After other failed attempts the British government resorted to bombing the wreck in order to burn the remaining oil. See Crawford Commentary, p. 181, para. 9; and The “*Torrey Canyon*”, Cmnd. 3246, 1967, Her Majesty’s Stationary Office, London.

²¹ In this dispute between Hungary and Slovakia the former terminated a 1977 treaty signed with

the concept of necessity has been affirmed as a valid part of customary international law, but also to be valid in relation to environmental questions.²² What this case also demonstrated, was that the determination of what constitutes an essential interest is not left to the judgement of individual states, but relies on international consensus. The International Court of Justice (ICJ) concluded in this case that environmental and ecological concerns are accepted as essential interests by the international community, though they were not met in this case.²³

Moving on to the next component, the codified version of necessity stipulates that it can only be invoked if the “essential interest” analysed above is threatened by “grave and imminent peril”. Ago commented on this point that the danger to the interest has to be “extremely grave”, representing a present danger, which lies “entirely beyond the control of the State whose interest is threatened”.²⁴ Here, again, the ILC article as well the commentary on it, highlight the exceptional nature of a valid necessity plea. In the above-mentioned example of the *Gabcíkovo-Nagymaros Project* case, the ICJ concluded that the standard for “grave and imminent” peril was not met, as the ecological consequences were mere future risks and did not constitute an imminent danger.²⁵ However, the court as well as later ILC commentary left open the possibility for the application of the necessity plea even in situations with an element of uncertain future.²⁶ Thus, overall, immediacy (imminent), as well as the serious nature of the threat (grave, peril) are both components that have to be individually met by the facts of case and are meant as further restrictions on the invocation of the concept. The last component of (1) (a) of the codified article equally works to restrict the concept in its applicability, stating that the action taken out of

Czechoslovakia for the joint creation of dams, citing threats to the environment as essential interest in their ecological necessity defence.

See J D Ohlin and L May, *Necessity in International Law*, (Oxford, Oxford University Press, 2016) pp.41-2 for a brief overview.

²² The ICJ ruling in this case explicitly acknowledges the general validity of necessity, in the form of the ILC article, as a defence to a treaty or customary obligation in contemporary international law, though it questioned whether the conditions were met for ecological necessity in this case. Of note is also that this explicit acknowledgement was before the ILC draft articles were adopted, which happened four years later. See *Gabcíkovo-Nagymaros Project* (Hungary v. Slovakia), 1997 ICJ Rep. 7; and R Lefeber, “The *Gabcíkovo-Nagymaros Project* and the Law of State Responsibility”, *Leiden Journal of International Law*, Vol. 11, 1998.

²³ M Agius, “The Invocation of Necessity in International Law”, *Netherlands International Law Review*, LVI, 2009, p.102-3. And, generally, the *Gabcíkovo-Nagymaros Project* case.

²⁴ Ago Commentary, para.13

²⁵ *Gabcíkovo-Nagymaros Project*, paras. 54-55

²⁶ A Laursen, “The Use of Force and (the State of) Necessity”, *Vanderbilt Journal of Transnational Law*, Vol 37 (2004) p. 504-5.

necessity - and constituting an internationally wrongful act violating state responsibility - needs to be “the only way” to react for said state to the safeguard its “essential interest” against the “grave and imminent peril”. Further explaining this, Ago states that “it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations”, clearly pointing out that necessity must not be ‘an easy way out’.²⁷ Moreover he explains that the action to preserve the threatened essential interest which is in violation of state responsibility “must be clearly indispensable in its totality, and not only in part”.²⁸ Thus any action “in excess of what is strictly necessary is *ipso facto* a wrongful act, even if the excuse of necessity would otherwise be allowed to operate”.²⁹ This also serves to ensure that necessity cannot be invoked with impunity by states and to prevent the abuse of the concept through narrowing its applicability.

Part (1) (b) of article 25 contains what could be described as a balancing requirement for necessity.³⁰ It stipulates that the invocation of necessity cannot impair an essential interest of the other state (through acting in contravention of state responsibility towards that state) or of the international community as a whole. Therefore, this requirement is in essence about the balancing of interests by two or more states in a situation in which necessity is invoked. In doing so, this stipulation suggests that a determination has to be made as to which carries more weight. Ago comments that the interest enshrined in the state obligation that is violated “must obviously be inferior” to the essential interest under threat for the necessity claim to be valid.³¹ In this context, again, it becomes obvious that the prevention of abuse of the concept of necessity was a key criterion in the shaping of its codification.³² The ILC acknowledges that necessity is fundamentally guided by state interest in existing state practice, however it ensured that this would not render the necessity plea a right. Rather, the ILC ensured a balancing element historically deemed “indispensable” through a “comparison of the conflicting interests”.³³ The ILC codification

²⁷ Ago Commentary, para. 14. See also Gabčíkovo-Nagymaros Project, paras. 55-57, where the ICJ ruled that Hungary has had other options for safeguarding.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Boed, “State of Necessity”, pp. 18-19

³¹ Ago Commentary, para. 15

³² See also Crawford Commentary, p.178, para. 2 on the limitations of the article and safeguarding against abuse.

³³ B Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London, Stevenson & Sons Limited, 1953), p. 74.

also extends this balancing to the collective interests of the international community as a whole, given that “certain obligations are by their very nature such that all states have an interest in their up-keeping” and that consequently “all states can be held to have a legal interest in their protection”.³⁴ This not only nullifies claims to a derived right to necessity vis-à-vis other individual states, but secures a weighting of interests against broader, international norms.

The second part of article 25 details the circumstances in which a state can not make a valid plea of necessity for its conduct. This part is inaugurated with the words “in any case”, clearly specifying that the circumstances detailed are over and above the conditions of part (1), which already narrowed its application, and in addition to article 26, which excludes the necessity plea for violations of *jus cogens* principles. Subsection (a) states that necessity may not be invoked if the obligation does not allow for its invocation - explicitly or implicitly. Some humanitarian conventions, for example, explicitly exclude the plea to necessity in relation to war and conflict, while, on other occasions, this exclusion, if not explicitly stated, derives “from the object and the purpose of the rule” in question.³⁵ Yet again, the ILC’s codification exhibits its intention of limiting the application of article 25, in order to prevent abuses of its invocation becomes apparent. This ‘thread’ can also be found in subsection (b), which ensures that states can not abuse the plea of necessity through creating the conditions requiring the plea, and thus in turn the preclusion of wrongfulness for their subsequent actions. This argument was put forward in the arbitration case of *CMS v. Argentina*, concerning the latter’s derogation from its responsibility to pay its creditors. When Argentina invoked financial necessity resulting from its strained fiscal situation, the plea was rejected on the basis that governmental policies contributed to Argentina’s fiscal crisis, which caused it to renege on its repayments in the first place.³⁶ It is apparent that this subsection, too, is designed to prevent states from invoking necessity at will, derogating from their responsibilities enshrined in the law on state responsibility or resulting from primary obligations. However, the “contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral” for the plea to necessity to be precluded.³⁷ Even when taking this latter

³⁴ Agius, “The Invocation of Necessity”, p. 106.

³⁵ Crawford Commentary, p. 185, para. 19

³⁶ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 20 April 2005, paras. 328-329. See also Agius, “The Invocation of Necessity”, p.110-11.

³⁷ Crawford Commentary, p. 185, para. 20.

qualification into account, this restriction seems to have been included to undercut states wilfully invoking necessity, not as a defence forced from circumstance, but as part of a designed ‘play’.

The above paragraphs have outlined the codified version of necessity in the extant *ad bellum* discourse of international law and elucidated how it is being invoked and judged upon. However, these legal pronouncements have so far scarcely touched on the topic of war and conflict itself. This however is not an oversight on the part of the ILC and other institutions of international law, but rather a result of the extant international legal regime. As outlined above, with the advent of the UN regime and its concomitant prohibition of aggressive use of force, legal questions concerning war and conflict have been relegated to self-defence and collective security. Despite this prohibition now being a recognised norm of *jus cogens*, there is still an evolving role of necessity in the discourse on conflict.³⁸ While the modern, codified concept of necessity was de-coupled from the notion of a state right to necessity as a derivative of the right to self-preservation, the ILC has been studiously vague about whether the invocation of necessity is a valid plea for all cases of use of force - even those short of aggression. Roberto Ago raised the point of the usage of force short of aggression himself in the addendum to the eighth report. Here he first reiterates the prohibition of aggression and the acceptance of this prohibition as *jus cogens* norm that in turn also disqualifies any plea of necessity to justify its violation.³⁹ Beyond that however, Ago raises the question if all uses of force can be subsumed under the term aggression, or if there are indeed uses of force short of aggression for which the necessity plea would be permissible.⁴⁰ Specifically he talks about “certain actions by States in the territory of other States which, although they may sometimes be coercive in nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression.”⁴¹ An example for such an action would be the pursuit of armed groups across the border of another state. While there is a derogation of state responsibility, the argument is that it does not constitute a case of aggression against the other state as an entity, but merely against the armed group. The problem of this position is of course that most modern uses of force take a limited character and are not full scale, properly declared

³⁸ Ago Commentary, para. 16. As well as Johnstone, “The Plea of Necessity”, p. 342-348.

³⁹ Ago Commentary, paras. 55, 58.

⁴⁰ Johnstone, “The Plea of Necessity”, p. 342-348.

⁴¹ Ago Commentary, para. 56.

wars anymore.

The ILC position on the invocation of necessity in the context of the use of force therefore seems to lie in highlighting peremptory norms such as the prohibition of aggression and the provisions of the UN regime more generally, while not taking a stance in cases that do not clearly fall under this rubric. A handful of cases have helped to shape the concept of necessity vis-à-vis the use of force in those areas that the ILC does not further comment on. These cases span a variety of motivations for invocation, contexts and circumstances, but all concern the application of necessity to uses of force short of aggression. First is the *Nicaragua case* concerning the support for armed rebel groups in El Salvador, in which it seems clear that the ICJ supported the notion of differentiating between different degrees in the use of force ranging from armed attacks to less severe forms.⁴² While the court erected a relatively high threshold for what level of support of armed groups constitutes an armed attack, it generally opened up the possibility for a necessity type argument in relation to the use of force, without further expanding on whether this includes forcible countermeasures.⁴³ If there is indeed a difference in degree between uses of force to the extent that some are not covered by the prohibition stemming from *jus cogens*, then this would open it up to the necessity plea and, by extension, also to the very abuse that the ILC intended to undercut through its codification.⁴⁴ Another case concerns NATO's intervention in Kosovo, where Belgium invoked necessity - in addition to Security Council resolutions - in their oral pleadings in justification of the use of force. The argument put forward was in essence one of humanitarian intervention, where the suggested essential interest lay in the rescue of people in danger of imminent peril.⁴⁵ This case is of note for Belgium availing itself of the necessity plea in connection to the use of force, but also because the essential interest stipulated by Belgium concerns more or less wholly a third party rather than the Belgian state or (one of) its citizens. The court ultimately never passed down any judgement on the invocation of necessity, as it never came to a ruling due to

⁴² Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), 1986 ICJ 14; See also Johnstone, "The plea of Necessity", p. 366-7 and Laursen, "The use of Force", p. 511.

⁴³ N. Tsagourias, "Necessity and the Use of Force: A Special Regime", in *Netherlands Yearbook of International Law* Volume 41, eds. I F Dekker and E Hey (The Hague, TMC Asser Press, 2010), p. 26.

⁴⁴ See Agius, "The Invocation of Necessity", p. 107.

⁴⁵ Interestingly the Belgian representative replaced the wording "essential interest" from the draft article with "values", see Legality of Use of Force (*Yugo. v. Belg.*), Oral Pleadings, 10 May 1999, ICJ, CR 99/15. See also Johnstone, "The plea of Necessity", p. 362-6; and Laursen, "The use of Force", p. 503-4.

jurisdictional grounds.⁴⁶

The most important, and at the same time the most recent case, where the necessity plea played a key role is the *Construction of a Wall* case, concerning the erection of a security barrier by Israel. The intention posited for the building of the wall was to physically stop security threats from the West Bank. Before the ICJ dealt with the matter, the Israeli Supreme Court deemed the erection of the barrier justifiable, given ‘military necessity.’⁴⁷ The issue at hand was the placement of the wall, which created a closed space between the proposed barrier and the Green Line in certain areas. The court deemed this to risk prejudgment of a future border between Israel and a future Palestinian state.⁴⁸ The most interesting aspect of the case lies in its connection to the use of force. The prejudgment through the placement of the wall would constitute a *fait accompli*, which in turn would render it a *de facto* annexation. This argument is subject to the obvious caveat that this is applied in the expectation of future sovereignty of a Palestinian state, whose territory can be annexed.⁴⁹ The court considered the necessity plea, based on the codified version of the ILC draft articles, however, strangely, without either of the litigants invoking the concept. It concluded that while the security interest of Israel does constitute an ‘essential interest’ in the sense of the draft article, the wall in its proposed route was not the sole way to safeguard this essential interest.⁵⁰ Therefore, while the court did not permit the necessity plea in the concrete circumstances of the case, it left open the validity of the plea itself, potentially making a security barrier along a different route permissible. As such, this case more than the other cases mentioned highlights the gaps the codification of the concept of necessity has left open. The attempt by the ILC to codify the concept in such a way that it will not be open to abuse by states, as it has been in the past, has nevertheless left the necessity plea vague with respect to uses of force short of outright aggressive war.

In the extant legal *ad bellum* discourse, the concept of necessity has been fundamentally shaped by the codification process undertaken by the ILC. In this form, necessity was shaped to be a restrictive concept with narrow applications. The commentary by the special

⁴⁶ Ohlin and May, *Necessity in International Law*, p. 45.

⁴⁷ Ohlin and May, *Necessity in International Law*, p.46-7. Though the Israeli Supreme Court stated that the exact route of the wall would also require justification.

⁴⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, paras. 84-5.

⁴⁹ Construction of a Wall, paras. 86-7, 121; see also Agius, “The Invocation of Necessity”, p.108-9.

⁵⁰ Construction of a Wall, paras. 140-141.

rapporteurs on state responsibility clearly suggests that the intention of the ILC was to prevent the abuse of the invocation of necessity. To this end, the adapted wording ensured that necessity would only apply to the most exceptional of circumstances, despite hinging on the threat to an essential interest - a rather vague rubric. The codified version not only encapsulates past state practice, but also finds reflection in more recent cases, where necessity was explicitly acknowledged as a concept of customary international law, in the most recent cases with reference to the ILC draft article on the subject. These cases, too, exhibit the limited application of necessity, with strict adherence to its narrow formulation. This limited application is particularly pronounced when it comes to the invocation of necessity in the context of the use of force, which in the past has been a source of wilful usage of the concept. In the first instance this is ensured through the UN regime with its charter provisions that prohibit the aggressive use of force as a *jus cogens* norm of international law. This in turn is reflected in article 25 (2) (a) on necessity itself and in article 26 explicitly outlining the invalidity of reasons precluding wrongfulness for violations of peremptory norms. Nevertheless, there is a question over the application of necessity to uses of force short of aggression that the ILC seems to have deliberately avoided in taking a position on. In addition to the question over whether an invocation of necessity in such situations would be valid and legal, i.e. in addition to questions of the application of law, this point will also shape the discourse of necessity itself.

Necessity in the Historical Context

As the above examination shows, the extant discourse of *ad bellum* international law, differs significantly from prior conceptualisations in a number of respects. This, of course, is not altogether surprising given the overall development of international law to the systematised, codified system of positive law we assume under this rubric today. The extant understanding of necessity within this bounded rationality, however, is very much an extension of its former understandings. Therefore, in order to elucidate the understanding of necessity in relation to war and conflict within this discourse, it seems prudent to examine how necessity was conceptualised before it assumed its current form. In this regard the transition from the 19th century to the contemporary international law system and in particular the changing role of war and its concomitant change in the conceptualisation of necessity during the period from the onset of World War I (WWI)

until the end of World War II as well as the founding of the UN are key to understanding the extant discourse of rationality in international law. The understanding of necessity in relation to war and conflict is thus contingent on the development of the *opinio juris* regarding the legality of (aggressive) war over the same period of time.

The motivation for the codification of necessity, as mentioned above, arose from abusive state practice in the usage of necessity of the then-recent past. Roberto Ago noted in his commentary that the ILC “must eliminate the idea [...] that the problem inherent in state of necessity is that of an opposition, a conflict between two ‘subjective rights’, one of which must inevitably be sacrificed to the other”.⁵¹ This pertains to the idea of fundamental rights of states that “originated in the nineteenth century” and refers to the right of existence by states.⁵² In the prevailing interpretation of international law of the time, states, as the locus of political power and community, had a duty to self-preservation. Deriving from this were fundamental rights that enabled states to ensure this self-preservation. That is to say, states had to do what is necessary in order to guarantee survival in a system often described with the attribute ‘self-help’. At its core, this conceptualisation of international law was an extension of the guiding principle of the predominance of the sovereign territorial state.⁵³ As such, necessity, as a concept, was seen as a function of the role of war and, on a higher level, of the ordering principle of international relations between states.

Up to WWI international law evolved such that an emphasis was put on the “ordered coexistence” of states, over any religious and especially moral imperatives that used to form part of international legal rationales.⁵⁴ Consequently, the right to war of states to secure their survival in this international order of sovereign states remained “one of the great primary subdivisions of all the great books on international law up to 1914”.⁵⁵ To scholars as well as practitioners of international law there was therefore no doubt that this implied that they were dealing with “the law of peace *and* war, and not *just* the law of peace”.⁵⁶ Despite this sovereign right of war, states rarely asserted this right without a plea

⁵¹ Ago Commentary, para. 7.

⁵² Ibid.

⁵³ M Forsyth, “The Tradition of International Law”, in *Tradition of International Ethics*, eds. T Nardin and D R Mapel (Cambridge, Cambridge University Press, 1992), p. 25.

⁵⁴ Forsyth, “The Tradition of International Law”, p.25.

⁵⁵ Ibid., p. 29.

⁵⁶ Ibid., p. 29, emphases quoted from original.

of “self-preservation, and of self-defence, or necessity or protection of vital interests...”.⁵⁷ The important difference to contemporary conceptualisations of self-defence and even self-preservation is that during this era they did not merely mean a passive reaction to attack in some shape or form, but also implied the advancement of a state’s interests over another’s.⁵⁸ In this environment necessity was taken at almost literal face value. War was deemed a necessary tool for survival and to serve the interests of the state. At the same time, the invocation of necessity was a requisite, additional element in the resort to war and was used to support the state’s interests.⁵⁹

The experience of WWI and especially the scale of the conflict led to a rethink of how international order should be conceived of and in particular of the role of international law. Against this backdrop, the fundamental right of states to wage war became a point of contention. The foundation of the League of Nation (LoN) and the promulgation of its Covenant signalled a desire to return the default setting of international order to one of peace where war required a justification, using the medieval just war regime as example.⁶⁰ This rendered necessity at the same time both less and more important. On the one hand the Covenant sought to end the line of argument of necessary war anchored in the self-help system in order to pacify the state system. On the other, however, measures short of war and their justification became increasingly important, as they were left to the discretion of member states and due to the contentious wording of ‘resort to war’ in the Covenant.⁶¹ Therefore, concepts like self-defence and, more importantly, necessity gained in currency, as a means for states to circumvent the otherwise rigid new rules of the Covenant.

The measures enshrined in the League Covenant coupled with the subsequent *Kellogg-Briand Pact* sought to all but outlaw war, with only some allowance for exceptions. These efforts however did not fully realise their intended aim and arguably merely reduced the

⁵⁷ I Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press, 1963), p. 41.

⁵⁸ D K Linnan, “Self-Defence, Necessity and U.N. Collective Security: United States and other Views”, *Duke Journal of Comparative & International Law*, Vol.1, No.1, 1991, p. 58.

⁵⁹ For an example of this legal tradition especially prevalent among German scholars see J Kohler, “Not kennt kein Gebot. Die Theorie des Notrechts und die Ereignisse unserer Zeit”, *Weltwirtschaftliches Archiv*, Vol. 10 (1917).

⁶⁰ S C Neff, *War and the Law of Nations: A General History* (Cambridge, Cambridge University Press, 2005), p. 285.

⁶¹ Brownlie, *International Law and the Use of Force*, pp. 59-61. See also Neff, *War and the Law of Nations*, pp. 285-6, 296-313.

frequency of conflicts, rather than outright pacify the international state system. The reason for this lies in the underlying mismatch between the political and legal aspect of the LoN regime. The LoN was first and foremost a political body that sought to manage the interests of states in order to prevent the outbreak of war, without, however, being fully buttressed by a judicial foundation.⁶² Beyond this ‘structural’ point, the fundamental issue was a lack of concomitant change in the *opinio juris* in line with the political structures the LoN provided. Legal thought of the time never completely shed the legal positivist conceptions of war and thus remained bound to its related idea of self-preservation.⁶³ With respect to the understanding of necessity within this discourse some changes took place, but the lack of adjustment in the underlying attitude towards war - or conflict measures short of the definition of war - as a tool of politics meant that necessity essentially still filled the same role. Necessity may not have been invoked in direct support of advancing state interests, but through the guise of measures short of war it still supported state actions at the same level and for the same effect and purpose.

Nevertheless, the League, its Covenant, as well as the *Kellogg-Briand Pact* set in motion the change that would see the creation of the UN regime after WWII, which, in principle, all but completed the changes to the international legal and state systems that were sought. The UN Charter reaffirms the general rejection of war already present in the League Covenant and the *Kellogg-Briand Pact*, but went beyond either in tightening the concepts involved and providing a better structure. The UN regime did not make use of the ambiguous concept of war but opted to refer to ‘use of force’ in its legal language. Moreover, the Security Council infrastructure was a marked, if not perfect, improvement on the LoN dispute resolution mechanism.⁶⁴ This was a clear expression of the underlying changing *opinio juris*, which, after the horrors of another World War sought a more outright ban of aggressive use of force. As such, the development that started with the anti-war sentiment after WWI came to its conclusion in the UN and its Charter, with the acceptance of the “peremptory character, allowing of not derogation of the principle prohibition of aggression”.⁶⁵ This was, however, not just an accepted legal opinion in the

⁶² Neff, *Justice Among Nations*, p. 351ff. Another structural fault was that the Covenant only applied to members of the LoN, but not generally to all states.

⁶³ Neff, *War and the Law of Nations*, p. 285; Linan, “Self-Defence, Necessity and U.N. Collective Security”, p. 61-5.

⁶⁴ Linnan, “Self-Defence, Necessity and U.N. Collective Security”, pp. 67-70.

⁶⁵ Ago Commentary, para. 58.

strictest sense, but also found reflection in international legal practice. In his dissenting opinion in the *Corfu Channel Case*, judge Krylov stated that with the coming into force of the UN Charter, “the so-called right of self-help, also known as the law of necessity (*Notrecht*) [...] can no longer be invoked. It must be regarded as obsolete”.⁶⁶ As a legal concept however, necessity was not entirely dismissed, but its legal understanding was reassessed. It was deemed that the concept’s continued existence in the legal doctrine, on balance, was still justified. This was however without allowing the same nature of invocation as in the 19th century, which in retrospect was regarded as abusive.⁶⁷ As a result, we had the aforementioned codification efforts by the ILC, which aimed at putting necessity on a more solid footing. The development towards the current legal doctrinal form of necessity has therefore to be seen against the backdrop of its history. Thus, necessity in the extant discourse has to be understood as a function of its former meaning, where its extant form is a counteracting of its former understanding.

Analysis

After outlining how necessity works as a purely legal device and detailing the historical antecedent to its contemporary, codified form, this section will turn its attention to gain an understanding of how necessity is conceptualised within this discourse. For that purpose we leave the legal doctrinal understanding behind and turn to the analytical categories outlined in the introduction. While the above discussion shows how necessity is being used within the bounded rationality of the international legal context, it does not elucidate said bounded rationality itself. Examining, in turn, whether necessity is used consistently as a concept, how it is being demarcated and contrasted, how it is being configured and what importance is attached to it, will help to define the role of the concept of necessity within this discourse.

Term v. Concept

In the first place, we have to examine how the concept is invoked in the discourse in which

⁶⁶ Dissenting opinion Judge Krylov in the *Corfu Channel Case* (United Kingdom v. Albania), ICJ Reports (1949), p.77.

⁶⁷ Crawford Commentary, p. 182-3, para. 13.

the concept of necessity is embedded. Specifically, this implies an assessment of the congruence between the term necessity and the concept as such. While this may seem like a minor concern, it is important to determine whether people speak of necessity, or indeed use other terms to express the idea of necessity. In the case of the *ad bellum* international law discourse in its extant form, there is a congruence between the term and the concept. The codification efforts undertaken by ILC were aimed at clarifying the concept and establishing a unified, codified definition. This, however, came in response to the historic usage of the concept, which was far from clear-cut. As mentioned above, in past international practice “cases abound in which a State has invoked a situation of necessity (whether it used those precise terms or others to describe it)”, clearly demonstrating that the legal form of the concept of necessity was not necessarily tethered to the term itself.⁶⁸ Resulting from this, the ILC considered examples of past state practices where other special circumstances were invoked. Among these examples are the invocation of *force majeure* in relation to the settlements of debts between the Ottoman and Russian Empires as part of the *Russian Indemnity Case*. The submission by the Ottoman Empire cited financial difficulties in meeting the repayment schedule and concluded that the non-payment was due to *force majeure*, “but which, rather, as [the ILC has] several times pointed out, bore the hallmark of a ‘state of necessity’”.⁶⁹ Likewise, Crawford’s commentary notes that the famous *Caroline* incident “though frequently referred to as an instance of self-defence, really involved the plea of necessity...”. However, Crawford also acknowledges that identifying the necessity plea happens against the backdrop of a case that took place “at a time when the law concerning the use of force had a quite different basis than it now has”.⁷⁰ Nevertheless, both examples demonstrate the importance of distinguishing between the term employed by the invoking party and the underlying concept, which are not necessarily congruent.

Distinguishing between the term used and the underlying concept employed is the very method that Ago, Crawford and the ILC adopted in their codification process. In order for past state practice to inform the formalisation and codification of legal principles, congruence between term and concept, or lack thereof, has to be taken into account. This separation then in turn informs our understanding of necessity within the present *ad bellum*

⁶⁸ Ago Commentary, para. 21, Parenthesis quoted from original.

⁶⁹ Ibid., para. 22.

⁷⁰ Crawford Commentary, p. 179, para. 5

discourse of international law. Changes in the language that is used to invoke necessity may hint at changes in the underlying understanding of necessity within the discourse and vice versa. Necessity has been used in contexts that would warrant the invocation of other legal concepts, as have other special circumstances been used in situations of necessity. As mentioned above, this applies in particular to the understanding of necessity in connection to the right of states derived from their overarching duty to self-preservation. It was the ILC's intention however to bring the concept of necessity, like other concepts that fall under reasons precluding wrongfulness, in line with the UN Charter and its prohibition of aggression. Fuzzy and ill-defined concepts, such as necessity was for much of the time between the 19th and mid-20th century, undermined this new understanding of the concept of war as defined by the UN regime. The understanding of necessity within the extant *ad bellum* discourse of international law, as well as the discourse itself, are therefore marked by the changes it has seen over time - in particular the sharp demarcation that arrived with the UN Charter after WWII.⁷¹ The way necessity was invoked in the past reflects a different understanding of the concept, premised on the concept of rights of states and the associated different ordering principle of international relations. In essence, the extant discourse of necessity is a function of its earlier understanding and was specifically premised on it. The understanding had evolved along with the prevalent *opinio juris* of the international community and can also be found in the way the concept is delimited and configured within this discourse.

Delimitation and Contrast

The efforts by Roberto Ago, the other special rapporteurs and the ILC more generally, are also evident when examining how necessity is delimited and contrasted in the extant discourse. The above analysis has pointed out that there was an intention to separate necessity as a concept from previous understandings and unify the term necessity with the underlying concept in the extant *ad bellum* international law discourse. The codification process involved a similar endeavour seeking to delimit necessity from other special circumstances. Therefore, examining closely how necessity was delimited and contrasted within this group of legal conditions will further the present analysis and shed light on the

⁷¹ Though, of course, many of the changes that were brought about were rooted in earlier attempts during the League of Nations regime between the two World Wars.

understanding of necessity within this bounded rationality.⁷²

As briefly mentioned above, necessity, as codified in article 25 of the draft articles on state responsibility, is only one of six reasons precluding the wrongfulness of a state in the derogation of a state responsibility. The codification, as well as recent applications of the concept in case law, make a point of adhering to the strict definitions established. Necessity, in its codified form, is not set in opposition to another concept in the sense of pairing it with an antonym. It is, however, contrasted with the other circumstances precluding wrongfulness, from which it can be distinguished in several ways. The application of necessity does not hinge on the prior conduct of the injured state, as is the case for consent, self-defence and countermeasures. All three require certain conduct of the injured or injuring party before they can be invoked.⁷³ It also differs from *force majeure* insofar as the conduct of the invoking state is not involuntary or coerced. The invocation of necessity implies that the conduct that constitutes the derogation of state responsibility was undertaken deliberately and willingly.⁷⁴ Necessity is furthermore unique in its usage of ‘essential interest’ as a condition of its application. This framing of necessity contrasts starkly to, say, distress, which concerns danger to individuals in the charge of a state rather than an essential interest of the same - a point to which I will return below when examining the configuration of the concept. These facts further limit the applicability of the concept.

This tendency to sharply distinguish between these legal concepts and their tenets follows from the aforementioned desire to ensure that the appropriate terms are matched with the underlying legal concepts and the desire for a narrow and limited applicability of necessity. As mentioned above, the extensive commentary on article 25 underlines the special nature of necessity vis-à-vis the concepts of the other special circumstances. Here again it becomes apparent that the desire to rein in possible abuse of the concept of necessity, common in the past, was a guiding principle in the formulation of the concept of necessity. The unique framing of essential interest, not found in other circumstances precluding wrongfulness, works as a safeguard against frequent invocation of the necessity plea. In a similar mould, this is evident in the way necessity was delimited and contrasted to the other draft articles. The need for clearly defined concepts in these legally important articles

⁷² On interchangeable use see for example Ago Report, para. 106

⁷³ Crawford, Commentary, p. 178, para. 2

⁷⁴ Ibid., p. 178, para. 2

stems from past instances in which concepts were applied wrongly, invoked wilfully and not clearly separated in the legal meaning or political effect. Understanding necessity in the extant *ad bellum* international law discourse requires an appreciation of the differences in these concepts and their boundaries, not for the sake of clarity in the law and its application, but because it is the quality that defines bounded rationality itself. This aspect of the discourse, like the previous, is driven by a desire to modify the understanding of necessity in line with the changes brought about by the UN Charter and the prohibition of aggression as a rule of *jus cogens*. This is closely related to the next section on the configuration of the concept of necessity in this discourse.

Configuration

The configuration of the concept of necessity within the discourse under discussion significantly differs from how it is delimited and contrasted. Rather than examining its boundaries, the configuration looks at the ‘mechanics’ of the concept. The key questions in this regard are the level of operation of the concept and for what purpose the concept is invoked to achieve what effect? Given that the discourse under discussion is the *ad bellum* part of international law, it is not altogether surprising that the configuration of necessity within this bounded rationality is such that its effect is aimed at the ‘macro’, or state level. Here, the conceptualisation of necessity in relation to war and conflict is largely understood in relation to states as the sole relevant unit.⁷⁵ Consequently, necessity is configured to work at this level and understood for the state or a political community as a whole.

The effect that the invocation of necessity has in this discourse is also readily discernible from the description of the articles within which it is embedded - the preclusion of wrongfulness and therefore the ascertainment that while derogation of state responsibility has occurred, it is of no legal consequence. With respect to war and conflict this implies, should the concept in its legally codified version be applicable, that the use of force does not entail a breach of international law. The level of operation has not substantially

⁷⁵ It should be acknowledged however, as was also mentioned previously, that the concept as enshrined in article 25 can apply to third parties or the international community more broadly. It can therefore also relate to individuals as part of an Responsibility to Protect argument. As such it still operates broadly on the state level, but can take individuals on the sub-state level into account.

changed when compared to the past usage of the concept. Changes to the configuration of the concept, resulting from the aforementioned desire by the ILC to prevent abuses and to bring the concept in line with the prohibition of aggressive wars, are most apparent in the purpose with which the concept can be invoked.

The purpose with which necessity is invoked in this context is premised on the aforementioned intended effect. Against the backdrop of the articles outlining circumstances precluding wrongfulness, the purpose of necessity is to *justify* or *excuse* the conduct of the state, which constitutes said wrong. The chasm between a justification of conduct, i.e. a *de facto* legalisation, and an excuse of conduct, which implicitly acknowledges a rule and its transgression, makes a notable difference for the purpose which necessity can be invoked for. Necessity in its contemporary codified form, overall seems to favour the role of an excusing concept rather than a justifying one, although there is some debate on this matter. Vaughan Lowe made “a plea for excuses” in his critique of the draft articles highlighting the difference between justification and excuse - “there is behaviour that is right; and there is behaviour that, though wrong, is understandable and excusable”. He continues to stress that despite being a basic distinction, “the very stuff of classic tragedy”, which no one would reasonably conflate, the very distinction “practically disappears in the Draft Articles”.⁷⁶ The ILC was indeed not overly clear with its choice of wording, in particular in previous drafts of the articles where they would variously talk of justification and excuse in the same documents.⁷⁷ Some of this criticism persists and takes historical state practice of the concept of necessity into account. Robert Sloane, for example, regards the codification of necessity by the ILC as fundamentally flawed when compared to the historical usage of the concept. In his opinion the defence has been “highly circumscribed” in the past, given that the only essential interest that was recognised as warranting a necessity plea was self-preservation of the state. Moreover, he asserts that the concept was never understood as a reason precluding wrongfulness and rather merely “temporarily suspended or excuse[d] a state’s failure to carry out its international legal obligations”.⁷⁸

⁷⁶ V Lowe, “Precluding Wrongfulness or Responsibility: A Plea for Excuses”, *European Journal of International Law*, Vol. 10, No. 2 (1999), p. 406. The draft articles criticised here are not those that were later adopted, but at an earlier stage of codification.

⁷⁷ Johnstone, “The Plea of Necessity”, p. 352-3.

⁷⁸ R D Sloane, “On the Use and Abuse of Necessity in the Law of State Responsibility”, *American Journal of International Law*, Vol. 106 (2012), p. 471.

Nonetheless, the overall notion of necessity as an excuse is broadly accepted, not least because James Crawford and the ILC sought to address some of the criticism raised.⁷⁹ Crawford responded that the wrongfulness stipulated in the articles exists rather in the abstract and that, consequently, “[i]t is as if responsibility is precluded rather than wrongfulness”.⁸⁰ He adds that this is in particular true for the necessity plea, as it involves deliberately wrongful conduct, which is not the case for other circumstances stipulated.⁸¹ His main commentary, which was written after his response to the criticism, also makes specific reference to this issue. Having explained the specific features of the codified concept he states “that necessity will only rarely be available to *excuse* non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse”.⁸² Herein Crawford reiterates the position of the ILC that the necessity plea had been abused in past state practice and that the codification sought to deliberately design the article to prevent this from occurring in the future. This aspect also relates to the unique characteristic of necessity that it is based on state interest rather than the violation of a more objective state right. Past instances of abuse often resulted from the desire of states to justify conduct based on state interest, but in violation of a state obligation. Not only did the ILC go to great length to make abundantly clear that interest is not synonymous with self-preservation, it, more importantly, ensured that their codification of necessity would be an excusing, rather than a justifying concept. This understanding of necessity has also found its way into international legal practice through the *Gabcikovo-Nagymaros case* in which the ICJ clarified that the necessity plea can merely “exonerate from [...] responsibility” and is not a tool to render the violation of state obligations legal.⁸³

The turn towards necessity as an excuse, rather than a justification has therefore not just been achieved nominally, in codified legal doctrine, but also in international legal practice. It bears reminding that in this present discourse, necessity is invoked at the macro, or state level and focuses on the political community as a whole. As subsequent chapters will show, this is not the case in every discourse under discussion. More importantly however, the

⁷⁹ See for example Tsagourias, *Necessity and the Use of Force*, p. 40.

⁸⁰ J Crawford, “Revising the Draft Articles on State Responsibility”, *European Journal of International Law*, Vol. 10, No. 2 (1999), p.444.

⁸¹ *Ibid.*; See also Johnstone “The Plea of Necessity”, p. 353-4.

⁸² Crawford Commentary, p.178. para. 2; emphasis added.

⁸³ *Gabcikovo-Nagymaros Project*, para. 101

configuration in the *ad bellum* part of international law is such that the extant discourse has rendered necessity an excuse for the violation of a state responsibility. This implies that the violation is acknowledged and thus also the rule as such. This contrasts starkly to past state practice in which necessity was used to justify conduct, that is to say in which states sought to make conduct legal without acknowledgement of the transgression of a rule or law. The extant understanding of necessity has to be seen here, yet again, as a result of the changes in the *opinio juris* with respect to the role of war in the international state system. The configuration of necessity, in the extant *ad bellum* international law context, is therefore set in opposition to its former configuration. The commentary by the ILC and in particular two of its special rapporteurs - Roberto Ago and James Crawford - specify that the article on necessity was crafted to undermine future invocations of necessity mirroring past state practice.

Importance

Lastly, the analysis of the concept requires an evaluation of the importance ascribed to necessity - in particular vis-à-vis other concepts. Gaining an idea of where necessity fits within the hierarchy of concepts within a given discourse, will help to elucidate its role and, consequently, aid in explaining how it is understood with respect to war and conflict. Within the bounded rationality of international law, the importance of necessity is illustrated in two ways. This is, firstly, the importance that is ascribed to necessity as a concept and the articles it is embedded with have within legal doctrine itself. As previously mentioned, the whole complex of state responsibility can be described as “the ultimate in ‘lawyer’s law’”.⁸⁴ The determination of liability, and with it the special circumstances and defences that are used in the process, are a key aspect of international law and international relations. As such, necessity and the other circumstances precluding wrongfulness, are of importance not just as a legal device, but for international state practice as well. The very fact that the ILC chose this set of articles as among the first for codification only further underlines their importance.

This, however, applies not just to necessity, but to other circumstances precluding wrongfulness as well. To draw out the importance attached to the concept of necessity itself, one only needs to look at the attention paid to it by the ILC, as well as the

⁸⁴ Neff, *Justice Among Nations*, p.414.

international courts and tribunals and practitioners of international law more generally. The commentary provided by the ILC on the necessity draft article far exceeds that of any of the other special circumstances. Ago as well as Crawford go to great length to spell out what the rationale and meaning is behind the wording of the article and to clarify how this is rooted in past state practice.

This desire to not leave any ‘wobble room’ with respect to the understanding of necessity in the extant *ad bellum* discourse can also only be comprehended when taking a closer look at the history of the concept. As has been pointed out in several places in this chapter, in the past, necessity has been frequently abused by states. The importance attributed to the concept in the extant discourse derives from the desire to avoid such instances in future state practice. The aforementioned change in configuration of necessity from a justification towards an excuse is the clearest expression of this aspiration. In past state practice the justificatory role of necessity, combined with its unclear definition, has ascribed an outsized importance and value to the concept, especially in comparison to other special circumstances. Necessity worked in those instances like a shell concept that could be ‘filled’ according to what state goals demanded. In narrowing its applicability and changing its configuration, there was a deliberate attempt to reduce this significance.

This is to say that the importance of the concept is exhibited by the attempt to render the concept, comparatively, unimportant in the extant discourse. Thus, like in the case of the other analytical categories above, the importance of the concept can be described as a function of the past usage of the concept. The importance ascribed to necessity in the extant discourse is set in opposition to the importance it once enjoyed. Limiting its application and changing its configuration makes necessity no more important than any other special circumstance codified in the draft articles, but actually reveals the true importance necessity enjoys even within the extant discourse of *ad bellum* international law.

Conclusion

In order to gain an understanding of necessity with respect to war and conflict in the extant international law discourse, one has to look at necessity in its current codified doctrinal

form, but also to its historical antecedents. In its current form, necessity is codified in rather precise legal language that narrows its applicability and limits its effects. The ILC, while accepting a continuing place for the concept within international law, emphasised the restrictive nature of it, limiting the occurrence of valid pleas to necessity. In comparison to other concepts that also fall under the legal category of reasons precluding wrongfulness, necessity has far more elaborate accompanying commentary ensuring it is narrowly applied in practice. As outlined above, this insistence on a narrow and limited application has to be seen against the historical usage of the concept. The special rapporteurs and the ILC frequently refer to abusive invocations of necessity in past state practice that is to be inhibited through the codification of the concept.

The contrast between the extant usage and understanding of the concept and past invocations is therefore stark. While in both instances, past and present usage, there is congruence between term and concept, there are marked differences in the way the concept was delimited, configured, as well as the importance ascribed to it. As the above analysis shows, the ILC codification and commentary goes to great length to differentiate between necessity and other concepts that are part of the reasons precluding wrongfulness. Historically these concepts have been blurred and often used interchangeably. In their codification effort the ILC often declared past state practices invocations of necessity even if the state involved referred to self-defence or other concepts. As explained above, this 'looser' conceptualisation of necessity stemmed partly from the international order at the time that gave states the fundamental right to self-preservation. Given this right, the exact justification for the use of force was of secondary concern. The sharp delimitation in the current legal form of necessity is rooted in this past, lax usage and shapes its extant understanding.

Similarly, the configuration of the extant concept differs markedly from its historic predecessor. The only similarity between both, given that both concern *ad bellum* international law, is their effect at the macro, or, state level. Beyond this however, their configuration differs. The invocation of necessity used to have the effect of a justification that sought to render conduct legal, whereas in the extant discourse it merely excuses. Based on the difference in effect, one can also make out the different purposes to which necessity is invoked. In its current form, the plea to necessity can only be made in emergency situations when a state is left with no other options. The purpose for which

necessity can be invoked is thus fairly limited, though more recent cases such as the *Construction of a Wall* case hint at a slightly broader scope than was initially intended. Indeed, some legal scholars worry about a possible future third legal category permitting the use of force.⁸⁵ The doctrinal restrictions imposed through the ILC wording, so far, seem to hold however. In past state practice, the purpose to which necessity was invoked was however not passive, but usually as active support of state aims. With the effect of rendering conduct legal, seeming transgressions in pursuit of state aims were nullified. Again, the extant discourse of necessity has to be seen as a function of its former usage. Examining the legal language employed in the codification and the commentary on the draft articles hints at the aim to set the modern form of the concept in opposition to the role that it used to play.

With respect to the importance ascribed to necessity, present and past usage of the concept form a paradox. In the extant discourse the importance apportioned to necessity vis-à-vis other reasons precluding wrongfulness is drawn from the attempt to render it unimportant. By restricting necessity in its scope and application and providing commentary to the same effect, the ILC only reveals how important they deem necessity. The converse is true for the historic understanding of necessity. The concept of necessity was seemingly very important for states in pursuit of their goals, given how the concept was used. Taking into account that in this historic usage concepts were often used interchangeably, however, indicates that necessity itself, ultimately, was not all that important. There was just a perceived need for a justification that played into the idea of a right to war rooted in self-preservation. Once more, we can see how the extant understanding of necessity is a function of its historic usage.

In sum, we find an extant discourse of necessity in the *ad bellum* part of international law that is a reflection and indeed a rejection of its history. The historic state practice of using necessity pleas to advance state aims forms the backdrop against which the codification of the concept was conducted. This took place as part of broader change that started in the anti-war sentiment in the aftermath of WWI, but did not find its completion until the end of yet another world war. With the inception of the UN and the adoption of its Charter, the

⁸⁵ See Ohlin and May, *Necessity in International Law*, p.45 arguing that in addition to the two UN mechanisms necessity could become a third legal route to the legal use of force.

prohibition of the aggressive use of force was now regarded as a peremptory norm. The understanding of necessity in the extant *ad bellum* discourse revolves around this watershed in the legal and political organisation of states and their international relations. Examining this change in understanding of necessity in more detail, the aforementioned developments in the demarcation, configuration and ascribed importance are reflective of this. The codification imposed strict delimitations and precise definitions that were historically missing and led to confusing pleas. The configuration was altered from a justifying concept to an excusing concept with diminished importance, given its limited application. All in all, the extant legal discourse is characterised by its effort to cast necessity in opposition to past state practice and in opposition to how many would still like to understand the concept. The extant understanding with its limited application - in particular in relation to war and conflict - offers only little resemblance to its historic predecessor. Its extant understanding however derives precisely from this historic usage, which it rejects and against which it was codified.

Chapter 3: The Conduct of War - Necessity vs. Humanity

*“German soldiers are good and decent,
and if they did anything wrong
it was because of military necessity”*

Wilhelm Keitel
(Chief of German High Command,
27 March 1946)¹

Introduction

As the preceding chapter outlined, necessity in international law used to be intricately linked to the subjective rights of states - in particular as far as legal questions of the resort to war, or *ad bellum* international law, are concerned. This was often subsumed under the general heading of military necessity, to underline the notion that states had the right to self-preservation and, consequently, also to self-defence. Today, the term ‘military necessity’ refers to the application of the concept of necessity in the context of the question of how force is applied after hostilities have broken out. Thus, it is not the question of using force itself, which *ad bellum* international law addressed in chapter one, but the *in bello* aspect of international law that seeks to regulate how wars are conducted. The ‘military’ in military necessity therefore signifies the actual application of military force and not, as the term sometimes used to be employed, questions of whether one should resort to military force in the first place.

The similarities do not end there however, as here too we find deep roots of the application of the concept of necessity in the regulation of the conduct of war. Often-cited examples include the prohibition of the crossbow in medieval warfare or the acceptance of priests and religious dignitaries as non-combatants.² In contrast to *ad bellum* international law however, the concept of necessity took a very different development in *in bello*

¹ L Goldensohn, *The Nuremberg Interviews: Conversations with the Defendants and Witnesses* (London: Pimlico, 2007), p. 158

² J T Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton: Princeton Univ Press, 1975), pp. 43-6; 64-75. See also F H Russel, *The Just War in the Middle Ages* (Cambridge: Cambridge Univ Press, 1975)

international law doctrine. The development of the former, as the previous chapter outlined, is marked by the watershed moment shift of the Nuremberg trials, the enactment of the United Nations and its Charter, whereas the latter, as the examination in this chapter will find, has been subject to a protracted and fairly continuous development from the 19th century to the present day. In the following, this chapter will outline how necessity is understood in this discourse and in the process delineate the developments in customary international law since the 19th century have led to the concept of necessity in its extant form in *in bello* international law.

To do so, the chapter will provide an overview of the make-up of *in bello* international law and how necessity is situated within it. Here, again, the two sides of international law contrast rather starkly. Rather than having a single article of codified law in which necessity is enshrined, the *in bello* law framework is comprised of customary law and multilateral treaties - primarily the Hague and Geneva Convention treaty frameworks - which were successively developed and expanded and make up the body of law commonly known either as Law of International Armed Conflict (LOIAC) or International Humanitarian Law (IHL). In particular the customary aspect plays a crucial role in the development of this body of law and the understanding of necessity within it. As the example above indicates, customary rules on the conduct of war long pre-date any conception of international law in our modern understanding. These deep roots are important in gaining an appreciation of how the contemporary understanding came about and why there is another body of law - International Human Rights Law (IHRL) - which is also increasingly considered in *in bello* situations and entails an entirely different understanding of necessity.

The chapter is divided into three principle sections. The first two sections will examine, in order, the LOIAC framework and the competing human rights approach (IHRL). Each will cover extant as well as historical aspects of both respective legal bodies and their understanding of necessity. The third, brief section of the chapter is specifically dedicated to a comparison between both and a recently emerging notion of a co-application of both legal principles. Specifically, this chapter will firstly outline the extant LOIAC framework and how necessity is embedded within it. To this end the main treaty frameworks will be presented and examined with regard to how necessity is enshrined within them as a concept. This is followed by an examination of the history of LOIAC to elucidate how the

current understanding of necessity was arrived at, before analysing necessity in the law of armed conflict with the help of the analytical categories outlined in the introduction. The same *modus operandi* follows the examination of IHRL and its competing understanding of necessity regarding the conduct of hostilities in war and conflict. The extant law will be outlined, followed by an examination of the historical dimension that lead to its current understanding, before turning to an analysis thereof. Like in the previous chapter, the examination of international law in this chapter is not aimed at interrogating all intricacies and finer points of these bodies of law and their application. Rather, this chapter seeks to elucidate the understanding of necessity within the ‘confines’ of what can broadly be called *in bello* international law. While legal doctrinarian points invariably are under discussion, the primary aim is to arrive at an appreciation of how necessity is invoked as a political concept in this knowledge community and how this may or may not map onto the usage of necessity in other communities and discourses.

Law of International Armed Conflict

On the *in bello* side of International law, the concept of necessity is embedded in a body of law comprised of customary practices and multilateral treaty frameworks regulating the conduct of hostilities in wars and conflict. This collective body is either known as the Law of International Armed Conflict (LOIAC), or as International Humanitarian Law (IHL). While both terms describe the same collective body of law, there is an obvious semantic difference in their respective names.³ For the purposes of this thesis I will follow the convention established by the Geneva treaty framework in referring to it in terms of the law of armed conflict, rather than in terms of humanitarian law. The reason for this choice is twofold - one substantive and one pragmatic. Firstly, I agree with Yoram Dinstein, among others, who regard this semantic difference as important considering the general mechanism of balancing competing concerns within this body of law - more on this below.⁴ Secondly, given the discussion of International Human Rights law later in this

³ There are also frequent reference to the Law of Armed Conflict in this context, however given the differences pertaining to the application of this body of law to civil v interstate wars, I follow the convention established by others and refer to it as the Law of International Armed Conflict for clarity’s sake.

⁴ Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed (Cambridge: Cambridge Univ Press, 2010), pp. 18-9. My agreement with Dinstein is confined to the notion of semantic clarity and does not extend to some of his other views regarding human rights law.

chapter, I regard it as advisable, for clarity's sake and out of pragmatism, to avoid the rather similar terms of 'humanitarian' and 'human rights' laws. This may seem to be merely a minor issue of nomenclature, but the terms being employed to refer to the body of law already bears a significance on how certain points of the law are applied and, more importantly, how necessity is understood and invoked within them⁵.

Examining this body of law, it immediately becomes apparent that the situation found here substantially differs from the one in the previous chapter on the understanding of necessity in *ad bellum* international law. In contrast to the previous chapter, where we had in the main one codified version of necessity, based on customary state practice, the *in bello* is marked by a collective body of law principally comprised of customary international law and multilateral treaties regulating the conduct of warfare.⁶ Consequently, there is no single, carefully codified 'version' of necessity, but multiple references in various treaties and customary practice that make up the concept. Therefore, the LOIAC has to be regarded holistically, in order to get an understanding of how the concept of necessity is invoked within it. As pointed out already, this collective body of customary law and multilateral treaties is concerned with the conduct of hostilities and seeks to regulate them. This in turn implies that the laws enshrined in the LOIAC are primarily aimed at the operational level or lower during hostilities - an aspect I will expand on below. It behoves us to highlight however, that many of these laws are nevertheless bestowed as the rights of states and their representatives during conflict and not onto individuals.⁷ This is an aspect that will be of importance in the unfolding argument in this chapter and also have some bearing upon the understanding of necessity in this discourse.

As mentioned above, the sources for LOIAC are customary law in the first place and multilateral treaties and treaty frameworks, which have become increasingly important in regulating the conduct of hostilities. Customary law is defined as "evidence of a general

⁵ On the different cultures between military lawyers, using the term LOIAC, and civilian lawyers, which employ IHL, see D Luban, "Military Necessity and the Cultures of Military Law", *Leiden Journal of International Law*, Vol. 26, No. 2 (2013)

⁶ By treaties I denote any formal agreement between more than two states concerning the conduct of hostilities. Therefore, I subsume all 'conventions', 'agreements', 'protocols' etc. that fulfil the above condition under the term treaty for the purposes of this research project.

⁷ Y Dinstein, *The Conduct of Hostilities*, p. 20. While some of the rights detailed in these laws are explicitly bestowed upon individuals, this is neither the case in all instances, nor is this regarded as a sine qua non condition.

practice accepted as law” by states.⁸ This notion merely reaffirms the positivist principle of modern international law that states create (customary) international law through their actions. Until about the mid-nineteenth century customs established within and across cultural contexts constituted the sole basis of *in bello* international law minimising the effects of violence during conflict.⁹ Such customs could take various shapes and forms and an example from the medieval period was described at the outset of the chapter. This form of regulation of hostilities was then complemented by multilateral treaties from about the middle of the 19th century. Not wanting to forestall the section on the historical development offered below, it suffices to say that from the St. Petersburg Declaration in 1868, probably being the first multilateral treaty regulating the conduct of hostilities, there was a succession of treaties that followed its example¹⁰. These do not however constitute completely separated sources of law. Some multilateral agreements seek to formalise existing customs, while some agreements have since their coming into force been accepted as customary international law, therefore applying even to countries that were not signatories to the original treaty.¹¹

Through this collective body of customary international law and multilateral treaties, the extant LOIAC has taken the shape of a general framework, which balances the competing concerns of those covered by this body of law. This balancing happens between on the one hand humanitarian concerns for belligerents and civilians affected by conflict alike and the requirements for the successful pursuit of the aims of war on the other.¹² Again, this contrasts notably to the situation encountered in the previous chapter where the codification of necessity clearly stipulated when and how it can be applied. In the LOIAC context however, necessity is weighed against competing concerns, with the ultimate aim being to strike a balance between them. The importance of this can scarcely be stressed enough. Necessity in its extant form, in the context of this body of law, through its origin

⁸ Statute of the International Court of Justice, Art 38 (1) (b). It bears highlighting that ‘general’ in this context does not equate to universal acceptance by every state, see Vol I (1) *Oppenheim’s International Law*, R. Jennings and A. Watts eds., 9th ed. (Harlow: Pearson Education Limited, 1992), p.29

⁹ ICRC, *Customary International Humanitarian Law*, Vol. I: Rules (Cambridge: Cambridge Univ Press, 2005), p. xv

¹⁰ There were however other treaties or sets of rules before it, such as the Paris Declaration of 1856 or the Lieber Code, which, however, are either not strictly speaking multilateral or not regulating hostilities as such.

¹¹ The International Military Tribunals at Nuremberg (1946) and Tokyo (1948), both stated that the Hague Convention (IV) of 1907 had acquired the status of representing the customary law of nations regarding the regulation of conflict. See also Y Dinstein, *The Conduct of Hostilities*, p. 15

¹² See e.g. N Melzer, *International Humanitarian Law: A Comprehensive Introduction* (Geneva: ICRC, 2016), pp. 18-9; or Y Dinstein, *The Conduct of Hostilities*, pp. 4-6.

in international custom and being scattered across treaties, has assumed the form of a general principle in the LOIAC. This in turn influences the understanding of necessity and the way it is being invoked in the context of *in bello* international law.

Military necessity is therefore a general principle of the LOIAC framework, yet it is also explicitly mentioned in treaty provisions. In the following I will focus on the most relevant treaties and treaty frameworks and additionally focus on the most recent provisions in which it appears.¹³ Military necessity is anchored in the two principal pillars of the LOIAC, the Geneva and Hague treaty frameworks, which can be said to cover the protection of victims and the conduct of hostilities respectively.¹⁴ They are however not two separate branches of the same body of law, but mutually complementary. The four Geneva Conventions of 1949 are the most recent form of the treaty framework, replacing an earlier version of the treaty framework, and were supplemented in 1977 with two additional protocols.¹⁵ The four conventions cover all victims of hostilities, which respectively are: the wounded and sick,¹⁶ the shipwrecked,¹⁷ prisoners of war¹⁸ and civilians¹⁹. The Additional Protocols supplements this framework and specifically deals with the protection of victims of international²⁰ and non-international armed conflict²¹ respectively. Military necessity is mentioned in every of these conventions and protocols, as a consideration set against the humanitarian restrictions stipulated in the same, underlining the importance the concept has for the overall workings of the LOIAC.

¹³ The section on the historical development of the LOIAC below will touch on older treaties (or earlier versions of existing frameworks) to illustrate how the law has evolved.

¹⁴ Y Dinstein, *The Conduct of Hostilities*, pp. 14-8.

¹⁵ If referred to as collective treaty framework [hereinafter Geneva Convention]. In terms of the supplemented Protocols [hereinafter Additional Protocols] if referring to them as collective addition to the Geneva Convention of 1949.

¹⁶ “Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field” [hereinafter Geneva I], reprinted in D Schindler and J Toman, eds. *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht: Martinus Nijhoff, 1988), no. 46, pp.373-400.

¹⁷ “Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea” [hereinafter Geneva II], reprinted in *Laws of Armed Conflicts*, no. 47, pp. 401-422.

¹⁸ “Convention relative to the Treatment of Prisoners of War” [hereinafter Geneva III], reprinted in *Laws of Armed Conflicts*, no. 48, pp. 423-493.

¹⁹ “Convention relative to the Protection of Civilian Persons in Time of War” [hereinafter Geneva IV], reprinted in *Laws of Armed Conflicts*, no. 49, pp. 495-556.

²⁰ “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict” [hereinafter Additional Protocol I], reprinted in *Laws of Armed Conflicts*, no. 53, pp- 621-688.

²¹ “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict” [hereinafter Additional Protocol II], reprinted in *Laws of Armed Conflicts*, no. 54, pp- 689-700.

The protections afforded to the various constituencies the respective conventions address, are weighed against the criterion of military necessity. With regard to the protection of civilian property for example, enshrined in article 53 of Geneva IV, it is prohibited by an occupying power to destroy civilian property unless “where such destruction is rendered absolutely necessary by military operations”.²² This manner of wording is representative for the desire to balance the competing demands of providing humanitarian protections on the one hand and ensuring that the attainment of military goals is not hindered on the other, which is prevalent throughout the Geneva Convention and the LOIAC more generally. The ICRC, instrumental in the development of the LOIAC as positive law body, clarified the role of military necessity in its commentary on the Additional Protocols to the Geneva Convention. It reiterates that LOIAC “is a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other”, before making clear that as a result of this the LOIAC framework functions in such a way that “a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question”.²³ Both aspects are crucial to the extant understanding of necessity in this discourse.

The ‘Hague Law’ is a comparable framework of multiple conventions covering different aspects of the conduct of hostilities. Not all of the Hague conventions have stood the test of time however and many are considered to be obsolete. Nevertheless, the conventions regarding the respect for the “Laws and Customs of War on Land” still forms an important part of LOIAC today - indeed to the extent, as mentioned above, that they were subsequently considered to have transformed from treaty law into customary international law.²⁴ Here again we can find multiple references to necessity in relation to the balance between humanitarian imperatives and military requirements. These references can be of different nature however and are often in a circumspect way. Article 22 of Hague II/IV for instance merely states that “the right of belligerents to adopt means of injuring the enemy

²² Art. 53, Geneva IV, *The Laws of Armed Conflicts*, p. 517.

²³ Y Sandoz et al., eds. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC (Geneva: Martinus Nijhoff, 1987), para. 1389, pp. 392-3. See also G I A D Draper, “Military Necessity and Humanitarian Imperatives”, *RDMDG* 12, No. 2 (1973), p. 123.

²⁴ “Convention with Respect to the Laws and Customs of War on Land of 1899” [hereinafter Hague II] and “Convention with Respect to the Laws and Customs of War on Land of 1907” [hereinafter Hague IV], reprinted in *Laws of Armed Conflicts*, no. 7-8, pp. 63-98. Regarding the transformation to customary law see e.g. Y Dinstein, *The Conduct of Hostilities*, p.15

is not unlimited”²⁵. Thus, the term military necessity is not even used in this case, yet the reference to the aforementioned balance between military requirements and humanitarian aspects is clear. This becomes more obvious in article 35 of Additional Protocol I to the Geneva Convention where this point is further detailed.²⁶ Similarly so in the next article 23 (g) of Hague II/IV, where it is stated that is prohibited to “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.²⁷ Not only is the term military necessity explicitly used, but the weighing off of competing demands is clearly visible.

These are merely the two main components building the foundation of the LOIAC, which are supplemented by a multitude of other treaties regulating various other aspects of war and conflict.²⁸ For the purposes of this investigation we will not go into full detail of the make-up of the LOIAC with all its treaties. It suffices to appreciate the overall balancing mechanism anchored in the LOIAC body as a whole. This is the key, relevant part to the understanding of necessity and to appreciate how the concept is being invoked. The overall framework is one of balancing, a process that underpins the whole body of law and is the key principle in its application. The treaty law component reflects this, through the allowance for derogation of certain prohibitions based on the invocation of military necessity. However, derogation is only permitted in those instances where a treaty provisions explicitly details the possibility for the same. The invocation of necessity and thus the application of the LOIAC is, however, not as straight forward as this overview may make it appear. Judith Gardam brings the difficulty in the application of the law to a point when she writes: “It has been very difficult to achieve consensus over the years as to the military effectiveness or necessity part of the equation. Necessity is a relative term and requires a determination of ‘necessary for what’”.²⁹

On the whole, this ‘translation’ into practice can be subsumed through two main principles - distinction and proportionality, which are also largely reflected in the treaty law making

²⁵ Art. 22 Hague II and Hague IV, *Laws of Armed Conflicts*, p.82.

²⁶ Art. 35, Protocol I, *Laws of Armed Conflicts*, p.644-5.

²⁷ Art. 23 (g) Hague II and Hague IV, *Laws of armed Conflicts*, p. 83.

²⁸ For instance, the treaty on the prohibition of certain conventional weapons and the chemical weapons treaty framework among others.

²⁹ J Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge Univ Press, 2004), p. 70. Her quote specifically refers to the context of superfluous injury.

up LOIAC.³⁰ These two principles reflect the aforementioned humanitarian components through, for example, distinction through targeting. This entails an effort to “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives”, as stated in Additional Protocol I.³¹ Beyond this general principle of distinction, the Additional Protocol further defines military objectives as those which “make an effective contribution to military action” and whose “total or partial destruction, capture or neutralization, [...], offers a definite military advantage”.³² Through this further specification the Additional Protocol also offers a better understanding of how military necessity is understood in the LOIAC. Similarly, article 54 of Additional Protocol I outlines the protection of objects indispensable to the survival of the civilian population. However in clause (3) (b) the prohibition of attacking or destroying such objects is removed if “in direct support of military action” and so long as the civilian population is not adversely affected.³³ These examples not only illustrate the principle of distinction and how it is being applied, but how it relates to the idea of military necessity and military advantage.

Conflict parties do not just have to adhere to the principle of distinction, for example in targeting, but also to proportionality. Here again the protections afforded are set in relation to either the concept of military necessity or military advantage. Article 51 of Additional Protocol I outlines the protections of the civilian population as non-combatants and how this is exhibited in proportionality. Generally speaking article 51 (5) (b) of Additional Protocol I prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.³⁴ Analogue to the principle of distinction above, the principle of proportionality is also linked to the notion of military advantage, which in turn pertains to the concept of military necessity. Despite the necessity to achieve an advantage on the battlefield, attacks of the nature

³⁰ J D Ohlin and L May, *Necessity in International Law* (Oxford: Oxford Univ Press, 2016), p. 176. See also e.g. ICRC, *Customary International Humanitarian Law, Vol. II: Practice* (Cambridge: Cambridge Univ Press, 2005) for an overview of the application of LOIAC and its principles.

³¹ Art. 48 Additional Protocol I, *Laws of Armed Conflicts*, p.650. See also ICRC, *Customary International Law Vol. II*, chs. 1 and 2.

³² Art. 52 (2) Additional Protocol I, *Laws of Armed Conflicts*, p 652.

³³ Art. 54 (3) (b) Additional Protocol I, *Laws of Armed Conflicts*, p. 653.

³⁴ Art. 51 (5) (b) Additional Protocol I, *Laws of Armed Conflicts*, p. 651. See also ICRC, *Customary International Law Vol. II*, ch. 4.

detailed in the above-quoted article are nevertheless forbidden by law.

The protections entailed in this principle do not just apply to civilians, but also to combatants of the conflict parties. There is a substantial sub-set of LOIAC treaty law that is devoted to the prohibition of certain modes or means - in particular certain munitions - of warfare.³⁵ This is exhibited in the conventions prohibiting means of warfare that cause unnecessary harm and superfluous injuries. Again, Additional Protocol I provides a general principle underlying the LOIAC in this regard.³⁶ Naturally these do not just extend to civilians, but also benefit combatants of all parties to the conflict in question.

In summary, the Law of International Armed Conflict describes provision of customary nature or grounded in treaty law, which regulate the conduct of hostilities and seek to minimise 'excessive' effects thereof. This is realised through the regulation of the hostilities between the conflict parties on the operational level on the one hand, but also through the limitation of other victims such as civilians. This body of law is, however, not restrictive in nature. The LOIAC explicitly recognises the general principle of military necessity, i.e. the need for requirements to attain the goals of war. The LOIAC seeks to balance between these competing demands, between humanitarian considerations and the requirements of military necessity and even makes explicit allowance for the latter in the case of certain prohibitions.

The understanding of necessity in *in bello* international law is therefore not simply derived from a single codified article within this body of law. Rather the concept of necessity is enshrined as a general legal principle that is weighed against competing considerations. While the understanding and invocation of the concept may at first appear to be licensing in nature, it has to be considered that military necessity cannot be regarded in isolation. The LOIAC is about balancing these concerns and therefore military necessity must not be regarded without its competing humanitarian concerns. In short, LOIAC is strictly speaking not about two individual but competing principles, but rather about the balancing of two equal but opposed principles. In order to better appreciate how this understanding of necessity was arrived at, it helps to further examine the historical development of the

³⁵ ICRC, *Customary International Law Vol. II*, ch. 20.

³⁶ Art. 35 (2) Additional Protocol I, *Laws of Armed Conflicts*, p. 644, stipulating that "it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".

LOIAC - in particular its treaty law component.

History and Development

The invocation and application of necessity in extant *in bello* international law - military necessity - outlined above, does, however, not fully account for the understanding of the concept of necessity itself. This section will describe the developments that have led to the extant usage of the concept and elucidate how necessity became one half of the ‘balancing act’ delineated in the preceding section. In particular, the aim of this section is to further examine the understanding of necessity as military necessity, where the origins of this lie and how it came to be a ubiquitous conceptual reference in the contemporary body of law. Though the chapter so far has focused on the extant law, however the regulation of conduct in warfare and during hostilities more generally is of course not a modern phenomenon. Long before an international legal system as we would recognise today emerged, warring parties had developed customs that regulated their hostile conduct. In the introduction to this chapter we made reference to the recognition of priests as non-combatants who should be spared from the consequences of battle and war. Thus, while the concept may not have existed as such at the time, there was a notion of the principle of distinction as outlined in the previous section. Similarly, the prohibition of the use of crossbows hints at a notion of proportionality and the mitigation of unnecessary cruelty.³⁷ Even before these medieval forms, regulating the conduct of warfare in some shape or form has been prevalent as far back as the classical world. The focus in this section, while providing a historical backdrop, will lie on the more recent historical development, where a clear expression of international law - as we would recognise it today - is evident. The diachronic element of this investigation is therefore analogue in its time horizon to the one undertaken in the previous chapter - from the 19th century onwards.

The earliest expression of *in bello* law as *lex scripta* is commonly considered to be the Paris Declaration of 1856 regarding the respect for Maritime Law. The Paris Declaration is not of note due its legal contents, but because it was the first multilateral treaty that provided written rules on the conduct between states in times of war and conflict, thereby

³⁷ J T Johnson, *Ideology, Reason, and the Limitation of War*, pp. 43-6; 64-75. For a more general overview of just war thought and regulations of hostilities in the Middle Ages see F H Russel, *The Just War in the Middle Ages*.

setting a precedent that would be repeated in other, similar conventions.³⁸ Of much greater importance for the development of this body of law and indeed for the understanding on necessity within it was the “Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight” of 1868.³⁹ Despite the impression the name may give, the St. Petersburg Declaration did not just have a narrow impact, regulating the usage of certain munitions. This latter aspect is nevertheless important of course, as the declaration was the “first formal treaty of international law banning a specific category of weapons [...] because it was considered to inflict unnecessary suffering on combatants”.⁴⁰ This helped to establish the foundations for the principle of proportionality mentioned in the previous section of this chapter. Additionally, the St. Petersburg Declaration continued the practice of regulating the conduct of hostilities through multilateral treaties, helping to create new *lex scripta* as well as paving the way for the formalisation of customary law in the future.

The source for the apportioning of a key place in the historical development of international law, however resides in the preamble of the St. Petersburg Declaration. The description of the purpose of the declaration contained within the preamble substantially shaped the development of international law and, more importantly, how necessity came to be understood in this knowledge community. The preamble states that “in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which *the necessities of war ought to yield to the requirements of humanity*”.⁴¹ This was the first expression of the overall guiding ‘mechanism’ of the legal framework of the LOIAC as outlined above. That is to say, it is the first expression in written law that military necessities need to be weighed against humanitarian considerations in conflict. This not only framed the understanding of the concept of necessity within this discourse, but it also framed the make-up of the LOIAC as a body of law. The St. Petersburg Declaration goes further however, in this ‘framing exercise’. The first sentence stipulates

³⁸ “Declaration Respecting Maritime Law” [hereinafter Paris Declaration], reprinted in *Laws of Armed Conflicts*, no 62, pp.787-90. For historical significance see e.g. S C Neff, *War and the Laws of Nations: A General History* (Cambridge: Cambridge Univ Press, 2005), p.188.

³⁹ “Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight” [hereinafter St.Petersburg Declaration], reprinted in *Laws of Armed Conflicts*, no. 9, pp.101-3.

⁴⁰ J Dill and H Shue, “Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption”, *Ethics & International Affairs* 26, No. 3 (2012) p. 321.

⁴¹ St. Petersburg Declaration, Preamble, *Laws of Armed Conflicts*, p. 102. Emphasis added.

that “the progress of civilization should have the effect of alleviating as much as possible the calamities of war”.⁴² This clearly maps onto the above sentence at the beginning of the preamble in setting the path for future *in bello* law.

Another important contribution of the St. Petersburg Declaration, and more important with regard to this investigation, is the understanding of military necessity. The next two sentences of the declaration state that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy” and that “for this purpose it is sufficient to disable the greatest possible number of men”.⁴³ Here the declaration has defined and demarcated what can legitimately constitute a military objective in war and conflict. In doing so, the declaration has also shaped the understanding of military necessity, seeing as necessity in this context is derived from the need to achieve said military objectives.⁴⁴ A further analysis of this will follow below, in the next section. For now it helps to elucidate how the extant understanding of necessity in *in bello* international law was arrived at, though the declaration, in itself, does not offer a very precise definition of military necessity either. This is where another legal document of crucial importance to the development of the law comes into play. The “General Orders No. 100”, known after its author as the Lieber Code, issued during the American Civil War, clearly and concisely codified military necessity.⁴⁵ To this day Lieber’s definition forms the basis of the understanding of the concept in LOIAC.⁴⁶

Article 14 of the Lieber Code provides the definition of 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”⁴⁷. The Lieber Code did not become part of international treaty law and remained limited in its national and temporal application. However, through the above codification of military necessity, the Lieber Code provided the definition that came to underpin the understanding of necessity in

⁴² Ibid.

⁴³ Ibid.

⁴⁴ See also Dill and Shue, “Limiting the Killing in War”, p. 321-4 on this point.

⁴⁵ “Instructions for the Government of Armies of the United States in the Field: Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863” [hereinafter Lieber Code], reprinted in *Laws of Armed Conflicts*, no. 1, pp.3-23.

⁴⁶ For the importance of the Lieber Code see B M Carnahan, “Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity”, *American Journal of International Law* 92, No. 2 (1998)

⁴⁷ Art. 14 Lieber Code, *Laws of Armed Conflicts*, p. 6

LOIAC. Necessity encompasses all measures required to attain the goals of war, so long as they are legal. Here we encounter again the connection of military necessity to military objectives that defines its scope, while the reference to the legality is analogue to the balancing of necessity with humanitarian concerns. The following two articles go on to further detail what military necessity permits (Art. 15) and what is not covered by it and deemed illegal (Art. 16). Therefore, military necessity “admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contest of war”.⁴⁸ On the other hand military necessity does not admit of cruelty, i.e. “the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.”⁴⁹

Thus, with respect to necessity, the Lieber Code is like an earlier form of the extant understanding of necessity in miniature. It is clear that both, the St. Petersburg Declaration as well as the Lieber Code, were instrumental in shaping the LOIAC and their influence can still be felt today. The Geneva and Hague legal frameworks that were to emerge over subsequent decades built on these early examples of international treaty law and established the principle of military necessity as a core pillar thereof. This pillar does however not exist in isolation and has been seen from the outset as only one variable on one side of an equation that - *nomen est omen* - balances. The other variable being humanitarian concerns and the limits of international law that circumscribe what military necessity can be invoked for. The understanding of the extant LOIAC and the concept of necessity within it is therefore rooted in these earliest beginning of the written *in bello* international law, which has subsequently seen a fairly steady development towards more rules regulating the conduct of hostilities enshrined in multilateral treaty law.⁵⁰

⁴⁸ Art. 15 Lieber Code, *Laws of Armed Conflicts*, p. 6. Emphases quoted from original.

⁴⁹ Art. 16 Lieber Code, *Laws of Armed Conflicts*, p. 6.

⁵⁰ Analogue to the *ad bellum* international law domain, there was a brief period where, in particular in German legal scholarship, states mooted the opinion that military necessity can always overrule humanitarian considerations (*kriegsraison vor kriegsmanier*). However this opinion was not generally accepted and only occurred during a comparably brief period when seen against the overall development. See M N Schmitt “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, *Virginia Journal of International Law* 50, No. 4 (2010), pp. 796-8 as well as W G Downey jr., “The Law of War and Military Necessity”, *American Journal of International Law* 47, No. 2 (1953), pp. 252-3.

Analysis

The above examination of the concept of necessity in the extant body of the LOIAC and of its historical origins hint at a substantially different understanding of necessity than in *ad bellum* international law - what one would assume to be a very similar discourse - discussed in the previous chapter. Certainly in terms of the make-up of the LOIAC and how this body of law is applied, there are substantial differences to the *ad bellum* case, where a clear codification of necessity exists by now and is being applied.

The below analysis follows the method outlined in the introduction and will examine the concept of necessity itself, outside the legal doctrine it is embedded in.

Term v Concept

As the examination of the extant law and its historic origins above have shown, the concept of necessity is primarily understood as ‘military necessity’, which is also the term that is employed in this area of law. For the purposes of this analysis this implies that we have by a large congruence between term and concept. Nevertheless, the addendum of ‘military’ that is being attached to necessity offers clear indication of how the term is specifically invoked. This can be related back to the semantic difference between LOIAC and IHL mentioned at the outset of this chapter. Both identify the same body of law despite employing vastly different descriptors, which, in turn, give this body of law a substantially different framing. As outlined in the introduction, some legal scholars prefer to stick with the denotation of this as the Law of International Armed Conflict to underline its relation to the regulation of armed conflict. Calling it International Humanitarian Law, so they charge, give the undue impression that the law is solely about the restriction of hostilities on humanitarian grounds, when it is about striking a balance.⁵¹ Similarly, adding the descriptor ‘military’ to necessity clearly states how the concept of necessity is understood and how it can be invoked.

Therefore, the concept is, at least to a certain extent, derivative of the discourse it is employed in. Necessity, as understood by the *in bello* international law knowledge community, is invariably related to regulated military conflict. This becomes also obvious

⁵¹ See Y Dinstein, *The Conduct of Hostilities*, p. 19.

in how military necessity is set in relation to military objectives when it comes to the regulation of hostilities and to how necessity can be invoked - in particular with respect to scope. Overall, the concept is clearly denoted though, with a term that for all intents and purposes is congruent to the concept itself. In a notable contrast to the preceding chapter, this aspect has not been subject to change in the past. On the contrary, the issue of term and concept in this discourse has remained relatively stable, especially when compared to necessity in *ad bellum* international law where there has been an incongruence at times. In sum, we can identify congruence between term and concept - historically as well as in the extant understanding of the concept.

Delimitation and Contrast

The delimitation of military necessity within this discourse, or rather the lack thereof, is yet another difference to the understanding of necessity in *ad bellum* international law. Whereas the codification of necessity in the previous chapter required a careful delimitation to similar legal concepts, the conceptualisation of military necessity in this knowledge community on the other hand does not. Military necessity is defined through the early attempt of codification by the Lieber Code and through references to it in the earliest treaty provisions of international law that regulates hostilities in war and conflict. As a concept, there is no need to demarcate necessity from other, similar concepts. The makeup of the overall framework of LOIAC is, however, such that military necessity is just one of two components which are balanced against each other. Thus, rather than through demarcation, necessity is delimited through contrasting. The humanitarian considerations against which military necessity is balanced in the application of the LOIAC, works as a conceptual antonym to the understanding of necessity in this discourse. And yet, based on the underlying principle of how this body of law is applied, military necessity cannot be understood in isolation, but has to be regarded as two sides of the same coin. This in turn has implications for the importance apportioned to the context, which are analysed further below.

Configuration

The examination of the configuration of the concept of necessity in each respective knowledge community aims to elucidate the ‘mechanism’, of how the understanding of the

concept ‘plays out’ when it is invoked - that is to say how it takes effect. Despite the preceding, as well as the present chapter belonging to the international law knowledge community, there are, yet again, notable differences therein. The most notable difference concerns the level at which the concept is being invoked and takes effect in the first place. As *in bello* international law, like the name suggests, regulates hostilities after they have broken out, the concept is in this context clearly not aimed at the macro, state level. Despite the term military necessity sometimes being employed to justify the resort to force, in a legal doctrinarian sense it is restricted to the regulation of hostilities and not decisions to resort to the same. The level of application of the concept can vary to some extent, from individual soldiers to commanders overseeing the actions of hundreds or thousands of soldiers, but it remains on the micro level.

Following on from this, the question is what purpose the invocation of military necessity serves when it is being invoked at this level? Again, this is not a straightforward answer for the concept, as it is understood in this discourse. The reason for this can also be found in the overall makeup of how the LOIAC framework is set up. The balancing between military necessity and humanitarian concerns, which have to be viewed together as a single unit, makes this determination rather complicated.

The definition of military necessity - “those measures which are indispensable for securing the ends of war” - in place at least since the Lieber Code, hints at a licensing understanding of the purpose of the concept.⁵² Defining the concept as everything that is necessary to achieve the military objectives in war make it appear to be boundless and unrestricted. However, Lieber’s codification, as well as later definitions, also go on to circumscribe the concept. The Lieber Code restricts it to those measures which are indispensable, but also lawful. A much more recent ICRC commentary on the Additional Protocols goes even further in stating that “necessity is the limit of legality. Any violence which exceeds the minimum that is necessary is unlawful”.⁵³ Defining military necessity as the bare minimum required to attain military goals on the other hand would render it restraining in purpose.

Indeed this constraining function is by some scholars regarded to be the historical origin of the concept - and one that is not present anymore in contemporary conceptualisation of

⁵² Lieber Code, *Laws of Armed Conflicts*, p.6; See also Y Sandoz et al., *Commentary on the Additional Protocols*, p.392-7.

⁵³ Y Sandoz et al., *Commentary on the Additional Protocols*, para. 1395, p. 396.

military necessity.⁵⁴ However, this picture gets more complicated when taking into account that the LOIAC framework is set up in a way that allows derogations from the laws it contains if the provisions in question make an allowance for a military necessity exception. Here the purpose of military necessity within the *in bello* international law discourse very much appears to be licensing, as it permits actions that would otherwise be unlawful. The only way of squaring these two contrasting accounts regarding the purpose to which the concept is being invoked, can be found, yet again, in the overall setup of the LOIAC framework. Seen in isolation, military necessity very much appears to be licensing in its purpose. However, as mentioned several times during this chapter, the *raison d'être* of the LOIAC framework is the balancing of military necessity and humanitarian concerns. Seen in this context, the purpose for military necessity is both, licensing and restraining, depending on what the situation demands.

Lastly, it remains to determine through what effect the invocation of necessity works in this discourse. As the above analysis has purposefully alluded to, within the context of the LOIAC, military necessity mostly affects the scope of options available to the invoking party. As mentioned above, if a provision makes specific allowance for a derogation based on military necessity, otherwise unlawful actions are rendered permissible. This is reflected in the balancing between humanitarian concerns and those measures required to attain the goals of war. The effect an invocation of military necessity seeks to achieve is to enable the usage of precisely such measures. Thus, the effect that is sought is in the main one of a change in scope. On rare occasions, an invocation of necessity can have a temporal effect, hastening decisions and the employment of measures. In terms of legal doctrine however, military necessity primarily works through affecting the scope of available options.

Importance

The importance apportioned to the concept of necessity within this knowledge community is reflected in the overall setup of this body of law. As mentioned towards the beginning of this analysis section, the overall 'mechanics' of the LOIAC framework ascribe exceptional importance to the concept of military necessity. It is one of the two main factors, which are

⁵⁴ See Carnahan, "Lincoln Lieber and the Laws of War" on the historically constraining role, and Y Beer, "Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity", *European Journal of International Law* 26, No. 4 (2015), pp. 807-9.

balanced against each other. As such, military necessity is not just a concept that can be invoked in this context, but a basic principle underlying the whole body of law. Nevertheless, as mentioned before, military necessity cannot be viewed in isolation and has to be seen together with humanitarian concerns as two sides of the same coin. Consequently, the importance apportioned to necessity in this knowledge community can not be divorced from its conceptual antonym either.

Summary: Necessity in LOIAC

The Law of International Armed Conflict is the principle body of law in *in bello* international law and the concept of necessity plays a vital role within in. This role, and the understanding of the concept underpinning it, substantially differs from how the necessity is conceptualised in *ad bellum* international law. While military necessity relates to the requirements to attain the goals of war, it is balanced against humanitarian concerns, which can restrict the former. The understanding of the concept is permeated by this overall framework of the body of law and affects in particular its configuration and the importance apportioned to it. The roots for this lie in the history of this body of law and in particular in the emerging *lex scripta* of the law of armed conflict. The development of this body of law has also been fairly constant since the first multilateral conventions, providing more treaty law that make up the LOIAC and shape the understanding of necessity.

The Law of International Armed Conflict is, however, not the only relevant body of law in the realm of *in bello* international law - albeit still the most important one. The following section will examine the relevance of human rights law and its effect on the understanding on necessity.

(International) Human Rights Law

An account of necessity in the extant *in bello* international environment would not be complete without an examination of the concept in human rights law, specifically in International Human Rights Law (IHRL).⁵⁵ Individual human rights have become more

⁵⁵ I will employ the term 'Human Rights' when talking about those individual rights in general and the term 'International Human Rights Law' when specifically talking of the application of human rights law to conflicts.

important in legal affairs, but in particular in the twenty-first century this has also posed “significant challenges to the traditional view that international humanitarian law exclusively regulates the use of force in armed conflict”.⁵⁶ This, of course in turn implies that a challenge by IHRL to the LOIAC framework also means, for the purposes of this investigation, that the role and understanding of necessity is being challenged. This section will therefore examine the IHRL framework and how necessity is understood within this discourse - in particular how this understanding differs and why it does. It will, secondly, look at the significance of the historical development that lead to the increasing importance of IHRL in this regard, before applying the same analysis as above to the concept of necessity as understood in IHRL. The last part of this section will then compare both LOIAC and IHRL necessity and discuss current considerations of the co-application of both bodies of law.

The legal framework governing the laws of war - LOIAC - and the general human rights framework differ substantially in points of fundamental importance to this investigation. Within LOIAC, there is an assumption of equal status among belligerents, with a presumption to lawful killing as part of the hostilities in war and conflict. International human rights law on the other hand bestows rights to the individual in an effort to constrain the sovereign’s treatment of and command over subjects under its control, which is to say that it is applied predominantly domestically.⁵⁷ Moreover, the rules and regulations enshrined in LOIAC, as its full name implies, apply in times of war and conflict, while human rights law is primarily designed to apply in peacetime. In particular this latter aspect has, however, been subject to change, with IHRL being more and more applied in the context of conflict situations.⁵⁸ This raises the question to what extent this may have a bearing on the understanding of necessity within the *in bello* international law discourse and how necessity is understood within IHRL? As can be imagined, based on the different underlying principles of either framework, the concept of necessity “provides less cross-context unity than one might hope”.⁵⁹

⁵⁶ K Watkin, “Controlling the use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict”, *American Journal of International Law* 98, No.1 (2004), p.1.

⁵⁷ Ohlin and May, *Necessity in International Law*, p. 121-2, see also Watkin, “Controlling the Use of Force”, p. 2

⁵⁸ Watkin, “Controlling the Use of Force”, p.1

⁵⁹ Ohlin and May, *Necessity in International Law*, p.122

The human rights framework is based on the United Nations (UN) Declaration of Human Rights, which in turn has been adopted into other, often regional, human rights frameworks. An example of the latter would be the European Convention on Human Rights (ECHR), which I will use as principle example below, based on its success and its successive development.⁶⁰ The key provision pertaining to the issue of war and conflict is enshrined in article 2 of the ECHR, describing the right to life. It stipulates that “everyone’s right to life shall be protected by law” and that “[n]o one shall be deprived of his life intentionally”.⁶¹ Even this most fundamental right is, however, not absolute. The article further outlines that the above provision can be derogated from in case of a conviction of a crime. More importantly, the second paragraph also details derogation in more general terms, “when it results from the use of force which is no more than *absolutely necessary*”⁶², in the pursuit of one of three actions described in the article. Similarly, structured articles can be found for the rights to private and family life (Art. 8), freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10) and freedom of assembly and association (Art. 11).⁶³

Common to all four of these articles is the description of the right, before exceptions are stipulated in which states may interfere, which all have to be lawful, and necessary for a “democratic society”, and in the interests of a public good specified in each respective article.⁶⁴ This gives the impression of the role of necessity being analogue to LOIAC, where derogation of rules would also be defined through references to the concept of (military) necessity. Nevertheless, the role necessity plays within IHRL differs from LOIAC, primarily due to how necessity is conceptualised. In IHRL, necessity forms part of a proportionality analysis (PA), which in turn is comprised of four tests in successive

⁶⁰ A S Sweet and J Mathews, “Proportionality Balancing and Global Constitutionalism”, *Columbia Journal of Transnational Law* 47, No.1 (2008), p. 145. Sweet and Mathews describe the ECHR as “the most effective human rights regime in the world, today covering the territory of 46 states and more than 800 million people”, and note that the “High Contracting Parties, in successive treaty revisions, have steadily upgraded the regime’s scope and capacities”. The ECHR also recognises the UN Declaration of Human Rights in its preamble, see Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov.4 , 1950 [hereinafter ECHR], p.5

⁶¹ Art 2 (1) ECHR.

⁶² Art. 2 (2) ECHR, emphasis added.

⁶³ Art. 8-11 ECHR.

⁶⁴ Ibid. With respect to public good, Art. 8, for instance, stipulates “in the interests of national security, public safety or the economic well-being of the country” as the public for which derogation from the adherence to the right is permitted. On this point see also Sweet and Mathews, “Proportionality Balancing”, p. 146-7.

order.⁶⁵ Firstly, the legitimacy stage probes the authority for the action under consideration. The second test concerns the means employed and their suitability for the action in question. This serves to verify that the means must stand in some relation to the (policy) goals in question. The third stage involves a crucial test - for the PA, as well as for the purposes of this investigation. This is the necessity analysis, which employs a 'least-restrictive means' (LRM) test. This test pertains to the above-quoted statement that no more force than absolutely necessary should be used. Thus, the LRM test, on a more general level "ensures that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals".⁶⁶ Lastly, the analysis examines whether the action in question was proportionate in the 'narrow sense', that is to say that violation of a right entails sufficient benefits to justify the action.⁶⁷

Any action that is considered unsuitable in its means (second test) or fails the necessity of least-restrictive means test "is *per se disproportionate*".⁶⁸ Indeed, the most scrutiny, and thus the most likely source for failing adjudication, stems from the LRM test. Most government actions tend to have the right authority and be suitable in terms of means, however they are often not employing the least-restrictive means available and therefore fail the necessity test.⁶⁹ An example for this is the case of *United Kingdom v. McCann* before the European Court of Human Rights, in which the necessity test became a contentious point in the adjudication.⁷⁰ The case involved the shooting of two IRA terrorist suspects, believed to be planning and executing a bombing in Gibraltar, though no weapons or explosives were later found on their bodies. The court applied article 2 of the ECHR and specifically the section on the "use of force which is not more than absolutely necessary" and the PA with its strict standard of necessity as described above.⁷¹ Indeed, the court criticised an earlier British-held inquest on the matter, which did not employ the stricter LRM test for necessity, when assessing the soldiers' claim that they believed it was

⁶⁵ Sweet and Mathews, "Proportionality Balancing", pp. 74-7 for a detailed account of proportionality analysis and balancing in human rights. See also Ohlin and May, *Necessity in International Law*, pp.123-5 for an overview specifically pertaining to IHRL.

⁶⁶ Sweet and Mathews, "Proportionality Balancing", p. 75.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ohlin and May, *Necessity in International Law*, p.124.

⁷⁰ Case of McCann and Others v. The United Kingdom, Application No. 18984/91, Judgement 27 September 1995 [hereinafter McCann].

⁷¹ Art. 2 (2) ECHR. Regarding the application of the standard for necessity see McCann, para. 149.

necessary to shoot the suspects.⁷² Moreover, when applying the LRM test, the court noted that as the authorities had identified the suspects in advance and surveilled them, there had been multiple opportunities to apply force without having to resort to shoot to kill.⁷³ The court consequently ruled that there had been a breach of article 2 of the ECHR.⁷⁴

This case is illustrative of the different understandings of necessity and how this corresponds to different legal conceptualisations. The key point is that necessity is understood as part of a proportionality analysis and that within that, necessity is defined in terms of least-restrictive means. This understanding of necessity is rooted in a completely different underlying basis of this body of law. The IHRL conception of humanity takes the human rights of the individual as its starting point and applies strict standards to their adherence. Rather than balancing the competing demands of humanitarian concerns and military necessity in LOIAC, the application of a human rights regime leads to very narrow exceptions for the derogation of the rights of the individual. The increasing application of IHRL to conflict situations therefore affects the extant understanding of the concept of necessity within the *in bello* international law discourse. The application of IHRL entails a different conception of necessity and different standards in the adjudication of whether the use of force, or the nature of the force employed, was necessary.

History and Development

Some of the reasons for the increased application of IHRL and for the relationship between it and LOIAC can be found in the historical development of human rights law. The origins of human rights law help to explain how this body law are being increasingly applied to the area of war and conflict. This in turn explains the origins for the different conceptualisation of necessity and sheds light onto current questions regarding the applicability of LOIAC and IHRL to legal questions in the context of conflicts and the use of force.

Both bodies of law have a common starting point - “both human rights and humanitarian

⁷² McCann, para. 106, the court noted that the inquest only applied the “reasonable force” or “reasonable necessity” standard rather than undertaking a proportionality assessment evaluating whether there was absolute necessity for the deadly use of force.

⁷³ McCann, paras. 202-3

⁷⁴ McCann, para. 214

law” share “respect for human values and the dignity of the human person”.⁷⁵ This common starting point actually stretches further. Though the LOIAC framework traditionally locates many if not most rights to be with states or their representatives, given that it is a body of law that came into being to regulate hostilities between states. The Geneva Convention however explicitly bestows some rights onto the individual. These can be found across all four conventions. Article 6 of Geneva I, for instance, stipulates that “[n]o special agreement shall adversely affect [...] nor restrict the *rights which it confers upon them*”.⁷⁶ The article is very specific in bestowing these rights on the individuals belonging to the groups detailed in the article. The ICRC commentary on this article also notes that this wording goes further than an alternative proposed at the conference at the time, which was rejected, as “[i]t is these words, in fact, which most accurately interpret the underlying intention of Article 6”.⁷⁷

The Geneva Convention of 1949 therefore takes a prominent place in establishing the rights of individuals in international law regulating war and conflict. It was not until the Geneva Convention, and in particular through articles 6 and 7 across its individual conventions, “that the existence of rights conferred on protected persons was affirmed”.⁷⁸ The so-called common article 3 to the Geneva Convention also fits this mould.⁷⁹ It provides a minimum level of protection to those not involved in hostilities in case of a non-international conflict. This was the first general protection afforded of this kind and is also referred to as a “Convention in miniature”⁸⁰, given the protections it affords in a single article, and it was hoped that it “would ensure observance of certain fundamental human rights”.⁸¹ This trend of expanding protections for individuals also fits into the broader picture, considering the Universal Declaration of Human Rights dating to a year before the Geneva Convention or the war crimes tribunal at Nuremberg, which furthered the shift from an interstate to an individual rights perspective.⁸² These examples clearly demonstrate

⁷⁵ Watkin, “Controlling the Use of Force”, p. 9

⁷⁶ Art. 6, Geneva I, Laws of Armed Conflicts, p.377 emphasis added.

⁷⁷ J S Pictet, ed. *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Vol. I (Geneva: ICRC, 1952), p. 73 [hereinafter Convention I Commentary].

⁷⁸ Ibid, p. 82.

⁷⁹ The term ‘common article’ derives from the fact that article 3 is identical across all four Conventions passed at Geneva in 1949.

⁸⁰ *Convention I Commentary*, p. 48.

⁸¹ T Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law* 94, No. (2000), p. 246.

⁸² Ibid. pp. 247-8.

that despite their later divergent paths, IHRL and LOIAC do indeed have a common origin in history. Some scholars believe that based on this shared origin and common core in each respective body of law there will be a convergence between both where for example human rights law can fill 'gaps' left in the application of LOIAC.⁸³ This in turn raises interesting question regarding co-application of both bodies of law - not least for the application and understanding of the concept of necessity - which I will address further below.

Analysis

Before turning to the co-application of the aforementioned bodies of law with their divergent conceptualisations of necessity, this section will first examine in a brief analysis how the concept is understood in IHRL.

Term v Concept

The term necessity being used in various articles in human rights conventions such as the ECHR. However, the essential conceptualisation of necessity can be found in the proportionality assessment that is commonly applied in adjudication over the violation of rights of individuals. Here, necessity constitutes only a single stage among a total of four. Even though the necessity stage is arguably the most important, given the significance attributed to the least-restrictive means test, which makes up the necessity stage, it remains that necessity is subsumed under a superordinate concept in this context. Necessity forms only a part of a superordinate concept, which makes it difficult to address the issue of congruence between the term and the underlying concept.

Demarcation and Contrast

Given the above analysis, there is no demarcation as such. Necessity is separated from other steps, but is subsumed under the superordinate concept of the proportionality analysis. All respective stages that are part of the PA are delimited from each other and concern different aspects of the action breaching a right or rights that is to be adjudicated.

⁸³ Ibid. pp. 266-273.

The significance of the LRM test that the necessity stage entails, in particular, delimits the concept from other aspects of the overall assessment. There is however no demarcation and contrasting in the form of a conceptual antonym as in the case of necessity in LOIAC. Here, rather, necessity is much more integrated into a larger concept that forms the underpinning for the IHRL body as such.

Configuration

With respect to the level of application, while human rights are bestowed on individuals and hence work at the micro level, the violation of individual rights in IHRL relates to the actions of states and would thus fall onto the macro level. Necessity as a principal component in the assessment of rights violations therefore does not neatly fall into one or the other category. Again, this noticeably contrasts with the understanding of necessity under LOIAC. Similarly in its degree of differentiation, is the purpose to which necessity is employed in this body of law. The LRM test that for necessity indicates an unequivocally restraining purpose in the conceptualisation of necessity. Any means that go beyond the bare minimum requirements to attain a policy goal render an action immediately disproportionate. Here, the invocation of the concept really does imply that only what truly is necessary is also legal. This in turn pertains to the effect the invocation of the concept has in IHRL. The constraint set through the LRM test affects the scope of available actions for governments and states. Only truly necessary actions are allowed and only work in exceptions. For the use of force under the ECHR (Art. 2 (2) for example this is the absolute necessity for its use in defence (a), to effect a lawful arrest (b), or to quell an insurrection (c). This very specific and narrow stipulation of actions and circumstances for actions severely restricts the scope of available actions, as does the LRM-test of necessity.

Importance

Given that necessity does not have the overt presence as it does in LOIAC, it is not easy to assess its importance vis-à-vis other concepts. Nevertheless, given the significance of the necessity stage and the LRM test in the PA, it seems clear that necessity still is a concept of very great importance despite being subsumed under a superordinate concept. As mentioned above, the LRM is one of only two of the PA tests, which can immediately render actions disproportionate and consequently illegal. This is also reflected in how the

concept of necessity is used in the codified articles of the ECHR. Somewhat analogue to its usage in LOIAC, necessity, here too, defines exceptions to the articles and allows derogations from its stipulations. However, in IHRL maybe more than in the laws of armed conflict, necessity describes only absolute exceptions. Its usage as signifier in that regard only underlines the important role the concept plays for the workings of the IHRL body of law as a whole.

Comparison and Co-application

We are therefore left with two different understandings of necessity, in two different bodies of law that are potentially employed to adjudicate over the same facts of a case. While the LOIAC framework balances military necessity against humanitarian concerns when deciding on actions in war and conflict, IHRL applies a very strict least-restrictive means necessity test as part of an overall proportionality assessment in order to judge the legality of such actions. As mentioned above, given the international legal practice over the last two decades, many scholars see a convergence between both bodies of law.⁸⁴ There is however also potential for conflict between advocates for either body of law over their application. Nominally this problem has been settled through the ICJ declaring LOIAC the *lex specialis* for situations of conflict.⁸⁵ In the *Nuclear Weapons* case the court decided that despite human rights applying in some sense to all situations, the determination of whether the use of force to kill was justified falls to the law of armed conflict. What the court thereby did was to establish a “mildest form of co-application” between both bodies of law.⁸⁶ The question of co-application of both bodies of law has since been a hotly debated topic. The implication for the use of the concept of necessity can be quite stark, depending on which body of law is applied at any given time.⁸⁷

One mode of making use of co-application is to regard it as “gap-filling exercise”, in which LOIAC applies as the *lex specialis*, but “when there is no IHL rule on point” this opens the possibility for IHRL being applied to the situation at hand.⁸⁸ In many ways this

⁸⁴ Ibid., pp. 266-273.

⁸⁵ Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, ICJ, July 8 1996, para. 25, p. 240.

⁸⁶ Ohlin and May, *Necessity in International Law*, p. 129.

⁸⁷ Schmitt, “Military Necessity and Humanity” gives a good overview of influences on Humanitarian Law through human rights, but also international tribunals and other factors.

⁸⁸ Ibid., p. 127. IHL in the quote, as noted in the introduction to this chapter, refers to the laws of international armed conflict.

is already an established *modus operandi* in international law practice. Many non-governmental organisations (NGOs), which were and still are instrumental in the advocacy for the application of human rights in the *in bello* international law domain, have pushed for the application of IHRL when there was no corresponding law in LOIAC. Likewise, they themselves do look to the LOIAC framework when they are confronted with conflict situations.⁸⁹ The question of what body of law has to be employed in what specific situation goes, however, beyond the scope of the present investigation. It suffices to say that the aforementioned developments regarding the importance of IHRL need to be taken into account for an assessment of the extant understanding of the concept of necessity. Co-application could have a profound impact on the understanding of necessity, given that “[i]f both IHL and IHRL apply *at the same time*, this would potentially displace the licensing version of military necessity that dominates modern IHL”.⁹⁰ Having said that, a final evaluation of how much this will come to bear on the understanding of the concept in practice, remains to be seen.

Conclusion

Grasping the understanding of the concept of necessity in the *in bello* international law knowledge community is not as straightforward as it may first appear. In the other international law discourse - *ad bellum*, discussed in the previous chapter - the concept of necessity features as a codified concept clearly setting out how the concept can be invoked, based on passed state practice and the intentions under the UN international law regime. The present discourse offers a more complicated picture. Rather than being clearly codified in a single article specifically dedicated to the invocation of necessity, the concept is scattered across various conventions that make up the body of law comprising the laws of international armed conflict. The nature of the conceptualisation of necessity as such is fundamentally different in the *in bello* international law discourse. Here, necessity is of profound importance, despite not being enshrined into legal doctrine as such, but as one of two underlying principles that undergird the whole body of law and its application. Necessity is conceptualised as the needs and requirements for the attainment of the goals in war and thus termed military necessity. This consideration is balanced against

⁸⁹ Watkin, “Controlling the Use of Force”, pp. 30-1.

⁹⁰ Ohlin and May, *Necessity in International Law*, p. 127.

humanitarian considerations in the pursuit of these goals. As a result of this balancing, the LOIAC calls for distinction in targeting and proportionality in the choice and application of military means.

Necessity in itself can therefore largely be seen as licensing, which is effected through an increasing scope of available actions. Given the nature of this body of law however, necessity can not be seen in isolation. Rather, the concept always has to be considered together with its conceptual antonym - the aforementioned humanitarian considerations. The latter, by virtue of the need for balance, have a constraining effect. Both have to be considered together when appraising the understanding of necessity in this knowledge community.

To complicate the picture, a more recent trend sees the increasing application of an altogether different body of law to situations of law and conflict. Human rights law has been applied on more occasions. As to the understanding of necessity, this body of law entails a fundamentally different notion of the concept and its application. As part of IHRL, necessity is defined in much more restraining fashion as a least-restrictive means test and thus understood in an absolute sense. This implies that the usage of any means or force employed beyond that absolute minimum necessary to attain a goal is disproportionate and thus illegal. These contrasting conceptualisations of necessity naturally clash when it comes to their application to the same domain - war and conflict.

While LOIAC was designated the *lex specialis* for adjudications on the use of force in conflict, IHRL is still believed to be able to fill the gaps where the laws of war may not provide an appropriate provision. The co-application of both bodies of law offers many opportunities for the overall development of *in bello* international law, but also leaves a number of questions marks, not least on the understanding of necessity and how it is invoked in this knowledge community. A final and definitive assessment on the understanding of necessity in the extant *in bello* international law discourse is therefore a moot point. An overall trend to increasing importance being place on humanitarian restrictions in armed conflicts and the application of human rights is easily discernible. Whether this trend will lead to the stricter understanding of necessity in IHRL to assert itself over and displace the understanding in LOIAC remains to be seen.

Chapter 4: Strategy and Military Operations - Necessity as *Raison d'être*

"It became necessary to destroy the town to save it"

Unnamed United States Major referring to
the bombing of Ben Tre, South Vietnam, 1968¹

"Si vis pacem, para bellum"
(If you want peace, prepare war)

Roman Proverb

"Necessitas ultimum et maximum telum est."
(Necessity is the last and strongest weapon)

Livy, Annales IV, 28

Introduction

The knowledge community under discussion in this chapter follows seamlessly from the preceding discussion of military necessity in *in bello* international law. The community where military necessity most applies to is, not altogether surprisingly, the military. Military operations, the planning and execution thereof, invariably make allusions to and indeed invocations of the concept of necessity. The quote at the outset of this chapter, calling for the preparation for war in order ensure peace, exhibits a notion of necessity that is inherent to this knowledge community and its self-image - an important point that will be picked up on later in this chapter. In strategy we find the connection between policy goals related to national security and the organisation and execution of military operations to realise said goals. The discourse on necessity surrounding military strategy is particularly intriguing, given the complex connection between political goals and the planning and execution of measures of war, the *ultima ratio* of the political sphere.

It is important to make a functional distinction between several levels in this discourse and the remainder of this chapter will address the understanding and invocation of necessity on a micro, or tactical, level as well as on the operational and strategic levels. While these

¹ Peter Arnett (AP), "Major Describes Move", *New York Times*, 8 February 1968, p.14

levels are functionally separated, they are connected through a hierarchy chain, where authority is directed to the next lower level and information travels from the bottom up. The military-strategic discourse sits between the other discourses and knowledge communities. As indicated above, the discourse links to international law whose restraining effect permeates all functional levels of this knowledge community with increasing efficacy the 'lower' the level. As a matter of fact, the concept of (military) necessity, as outlined in the previous chapter, forms the basis of instruction on the matter for cadets in their basic training and later in the field. On the other side, the military-strategic nexus integrates with the statecraft discourse, which will be examined in chapter five. This knowledge community is thus rendered, not least through the self-understanding of this community, a node connecting to other discourses. This finds reflection in the knowledge community's understanding of the concept of necessity as the investigation in this chapter will show.

In order to gain an appreciation of how the concept of necessity is understood within this discourse and how it is invoked, this chapter will firstly provide an overview of strategy and military operations, its various levels that are to be distinguished and the general makeup of this knowledge community. To this end, the first section will define the term strategy as it relates to military operations and war more specifically. Based on this definition the other levels under consideration - operational and tactical levels - are explained and the distinction of practitioners and theorists will be outlined. This section will form the basis upon which the remainder of the chapter and its analysis is built. Subsequent sections in this chapter will be dedicated to each respective hierarchical level, followed by a final section dedicated to the analysis of the understanding of necessity, before concluding with a summary.

Thus, the second section elucidates the understanding of invocation on necessity on the tactical level and how soldiers in the field are instructed on the concept. Here, the understanding is 'imported' from international law and thus more or less congruent to the *in bello* legal understanding outlined in the previous chapter. Departing from this legalistic-axiomatic understanding, the operational level offers a conceptualisation of necessity that further takes into account the ultimate military and policy goals, as the example of Counter Insurgency (COIN) campaigns show. Lastly, the strategic level reveals the close link to policy goals and the realm of politics itself. At this level it becomes apparent that necessity

is not just another concept invoked within this knowledge community, but that necessity also underpins the military-strategic discourse as its *raison d'être*. That is to say that necessity is not just instrumentally invoked as a means to an end, but in the nature of military-strategic reasoning, becomes an end in itself.

Strategy, Operations and Tactics - Three Levels of Military Activity

The military-strategy knowledge community comprises a number of functional levels that require distinguishing, as well as a separation between theorists and practitioners so far not encountered in the previously discussed knowledge communities. While the military-strategy knowledge community has an understanding of necessity as such, as the remainder of this chapter will show, the functional separation within the discourse has some bearing on the understanding and representation of the concept. Thus, it behoves us to provide an outline of the different levels of the discourse in order to enable an examination of the conceptualisation of necessity at said different levels within the knowledge community. Moreover, this section will also provide a diachronic component in the account of the military strategy discourse on necessity, outlining how the historic development of the discourse has impacted its extant conceptualisation.²

The military strategy knowledge community is best regarded as a complex of inter-locking 'chains' of functionality and responsibility connecting its separate levels, "where the logic at each level is supposed to govern the one below and serve the one above".³ There are a number of ways in which members of this knowledge community attempt to distinguish between said levels and there is some debate as to the most suitable approach to do this. Since a discussion on the benefits and drawbacks of the various methods of stratifying the discourse goes beyond the scope of the present inquiry, the representation chosen here restricts itself to three levels - tactical, operational and strategic - which is also one of the most common ways of separating functional levels.⁴ In this functional separation, the

² It is also important to point out that (military) history has been the traditional domain of studying strategy until very recently, see for example H Strachan, "Strategy in the Twenty-First Century", in *The Changing Character of War*, ed. H Strachan and S Scheipers (Oxford: Oxford Univ. Press, 2011). The inclusion of a small diachronic component in the analysis of this chapter therefore is a consequence of the make-up of this discourse and not solely a consequence of the methodological design of this study.

³ R K Betts, "Is Strategy an Illusion?", *International Security* 25, No. 2 (2000), p. 6

⁴ See for example J R Cerami and J F Holcomb jr. (eds) *U.S. Army War College Guide to Strategy* (2001), pp. 204-7 [hereinafter Guide to Strategy] for an account of the military-strategic complex. In other strands

responsibilities encountered at the tactical, and lowest, level being different than those of the operational and strategic levels 'above' it. However, having said that, the tactical level is not disconnected from the two aforementioned levels, but, on the contrary, integral to them. The levels build upon each other insofar as a chain of command from the top dictates the next lower level, while information can travel upwards to inform decisions. Thus, as levels are 'descended', one gets closer to concrete on-the-ground implementation of what has been devised in the abstract at a higher level.⁵

A strategy that is being devised, then operationalised and subsequently executed, consequently is the point of departure with this discourse. The definition of strategy is, even when restricted to purely military matters, not without contention.⁶ I will follow a common strand in using a broad definition, as the connecting of military ways and means to a policy goal which is being pursued and which is set outwith of the remit of the military.⁷ This definition falls more in the classic Clausewitzian mould, with its focus on military ways and means and a clear separation of military strategy from the policy goals they seek to achieve. Consequently this narrower definition entails more of a focus on military ways and means and is not necessarily congruent to all modern definitions of strategy, which often involve references to Grand Strategy.⁸ In this context the term military means also explicitly implies the *ultima ratio*, that is to say the last resort to outright war beyond the mere threat of the use of force in the pursuit of a political goal. Once the strategy has been set, determining what military means are appropriate in the

of the strategic literature the operational aspect is not necessarily recognised at its own functional level. There is also often a separation between the strategic level and a grand strategic level, encompassing means outwith the military remit for example of an economic or diplomatic nature, whose horizon extends further into peace time than conventional strategy. For a clarity's sake and a clearer separation from other discourses discussed in subsequent chapters, I opted for the representation included here. For a good overview on the matter see W Murray et al. (eds.) *The Shaping of Grand Strategy: Policy, Diplomacy, and War* (Cambridge: Cambridge Univ. Press, 2011), or M Howard, "Grand Strategy in the Twentieth Century", *Defence Studies* 1, No. 1 (2001).

⁵ Guide to Strategy, pp. 149ff., 204-7.

⁶ See for instance Hew Strachan's contribution on the lost meaning of the term Strategy and the contemporary propensity to use the term in almost every context, but the military-political realm. He also, correctly, points out that often when 'strategy' as a concept is deployed, its meaning is often inverted - policy following strategy and not vice versa. H Strachan, "The Lost Meaning of Strategy", *Survival* Vol. 47, No. 3 (2005), pp.33-54.

⁷ I do not follow one particular definition here. The definition used here, centred on the connection of military means to policy goals, follows a minimum consensus among strategists and strategic theorists see for example C S Gray, *Strategy and History: Essays on theory and practice* (London: Routledge, 2006) where Colin Gray defines strategy as "the bridge between military power and political purpose" in the very first sentence of the book.

⁸ H Strachan, "Strategy and Contingency", *International Affairs* 87, No. 6 (2011), p. 1285-1292.

pursuit of a given goal, the operational level seeks to translate this strategy into a set of concrete military orders that can be transferred to the tactical level and executed.⁹ Thus, as much as strategy serves as a go-between for the political and the military spheres, the operational level can be described as the go-between for the general's planning board and the 'boots on the ground'.¹⁰

Taken together, these three levels describe the strategic complex, which connects the political, military and public realms. As mentioned above, these levels constitute ideal representations of the organisational structure of military forces, wherein all three levels integrate well and operate in lockstep. In reality, as the remainder of this chapter will show, the respective goals set for each level are often at odds with one another. Charles Krulak, former Commandant of the US Marine Corps, highlighted the tension between tactical necessities and operational or strategic goals, in turn necessitating what he dubbed the 'strategic corporal'.¹¹ In this concept he describes the requirement for high quality training of even 'simple' tactical units in order for them to gain an appreciation of how their tactical goals have to fit with operational and strategic needs. Ultimately, these lower levels have to fit with, and indeed serve the overarching strategic goal.

At this highest, strategic level, as mentioned above, the overall military means are selected that can be successfully employed in the pursuit of policy goals. These goals are supposed to be determined, largely independently, in the political realm.¹² However in reality there is all too often some level of interaction between both the political and the strategic realm in this regard. Without wanting to go into too much detail, the nature of conflict situations is such that the information traveling up through the functional levels can in turn lead to adjustments in the goals set in the political domain, turning the intended relationship on its head. This has, of course, a bearing on the political domain and its connection to the public it seeks to represent. This complex interdependence between all three spheres in relation to war and conflict is an underpinning of strategic insight that has been popularised through

⁹ Guide to Strategy, pp. 149ff.

¹⁰ Ibid.

¹¹ C C Krulak, *The strategic corporal: Leadership in the three block war* (Center for Army Lessons Learned, Fort Leavenworth Virtual Research Library, 1999).

¹² Again, this does not follow from any specific strategic theory, but falls under a minimum consensus on the separation of strategy and policy. See eg. C S Gray, *The Strategy Bridge: theory for practice* (Oxford: Oxford Univ. Press, 2010), in particular ch. 3 and J B Bartholomees jr., ed., *U.S. Army College Guide to National Security Policy and Strategy*, 2nd edition, 2006 [hereinafter Guide to National Security Policy], for accounts on the separation but interplay of the strategic and policy realms.

Carl von Clausewitz's account of the 'trinity'¹³ - interactions between the military, the political and the public – which he spelled out in his treatise *On War*.¹⁴ Clausewitz's continued importance – he has been described as the “prism through which we have come to look at war” - stems in large part from his ability to draw together disparate spheres in his theory of war.¹⁵

Our present day conception of strategy as a means-ends relationship was shaped strategic thinkers, who maintained that the political purpose of war had to be addressed before any other consideration.¹⁶ Linking military considerations to seemingly separate spheres of politics and the public reveals the 'triangle' within which necessity has to be conceptualised at the strategic level. This knowledge community has been marked by the thought and writings of influential strategists who have, in one way or another, dealt with this complex relationship between competing spheres, thus rendering this diachronic element an important component for the present investigation.¹⁷ Accounting for the public, the political and military spheres and their interactions on the matter of war and conflict, strategists like Clausewitz have not only provided a lasting theoretical framework, but also showed the interaction between inter-related discourses relevant to our inquiry into the understanding of the concept of necessity.

The question of how necessity is understood and indeed invoked within this knowledge community, hinges on its stratification and ultimately on the connection of the strategic domain to the political and the public, as the remainder of the chapter will show. Another though less relevant factor to be taken into account, however, is the more pronounced distinction between theorists and practitioners in this knowledge community. This applies to the way war and conflict themselves are conceptualised, but also, ultimately, to how

¹³ Andreas Herberg-Rothe has extensively written on Clausewitz and in particular on the trinity and its importance in his theory of war. See for example “Clausewitz's Concept of Strategy - Balancing Purpose, Aims and Means”, *Journal of Strategic Studies* 37, No. 6-7 (2014).

¹⁴ C von Clausewitz, “Vom Kriege” (1832), in W Hahlweg (ed) *Vom Kriege: Hinterlassenes Werk des Generals Carl von Clausewitz. Vollständige Ausgabe im Urtext, Drei Teile in einem Band*, 19th ed. (Bonn: Dümmler, 1980). Citations of Clausewitz's *Vom Kriege* will follow the format Book: Chapter, Section. The page numbers provided are specific to the edition cited here. Translations are my own.

¹⁵ H Strachan and A Herberg-Rothe “Introduction”, in H Strachan and A Herberg-Rothe, eds., *Clausewitz in the Twenty-First Century* (Oxford: Oxford Univ. Press, 2007), p.1.

¹⁶ See for example Clausewitz, “Vom Kriege”, I: 2, 1, p.214.

¹⁷ Most works on the history of strategy provide accounts of the main theorists considered to be among the classics, see for example Heuser, *The Evolution of Strategy*, as well as L Freedman, *Strategy: A History* (Oxford: Oxford Univ. Press, 2013) and E M Earle, ed., *Makers of Modern Strategy: Military Thought from Machiavelli to Hitler* (Princeton: Princeton Univ. Press, 1943).

necessity is understood within them. This is in rather stark contrast to the preceding knowledge communities discussed in the first two chapters. In international law, like all law, most if not all theorists and academics writing on the matter are also trained to practice law. In the context of strategy and the military there is a fairly pronounced split between academic theorists and military practitioners.¹⁸ While there can obviously be ‘crossovers’, by and large their respective accounts in particular on the matter of necessity in war and conflict start from different premises. A theorist with a military background may have encountered first-hand what the invocation of necessity entails. This can conceivably have a bearing on how the knowledge community at large understand necessity, however the discussion below will focus on an overall understanding of necessity in strategy, grounded in the abstract basic principles that make up the discourse.

Necessity in Tactics - The Concept in the Field

The examination of necessity at the tactical level provides an account of how the concept is used ‘on the ground’ by soldiers in the field and in the realisation of concrete strategies devised at higher levels.¹⁹ In order to elucidate the invocation of the concept on this level our examination will focus on the instruction soldiers receive with regard to the invocation of necessity in the context of military operations and the laws of armed conflict more broadly. The general instruction every soldier receives is usually supplemented by so-called Rules of Engagement (ROE), which further stipulate what conduct and use of force is deemed acceptable or not in a specific conflict theatre.²⁰ Aspects of these rules do vary from conflict to conflict, but can also vary between theatres within a given conflict, depending on the strategic and tactical context. The analysis below will examine field manuals of the US, the UK and Germany, in which the general rules of conflict are stipulated and on whose basis soldiers are instructed. They will reveal an understanding of necessity at the tactical level closely mirroring the prescriptive version of *in bello*

¹⁸ See Gray, *The Strategy Bridge*, pp. 202-211. Gray also notes that “when professional military persons introduce a strategist as a ‘defence intellectual’, or an ‘academic strategist’, the intention usually is to express disdain, not to flatter. The adjective employed might as well have been ‘armchair’, for the full ironic treatment” (p. 229, note 24).

¹⁹ The usage of the term “soldier” in this context should be read to include airmen, sailors and maritime military conduct in general. In the following I will, for brevity’s sake, use the term soldier to refer to armed forces personnel generally, irrespectively of any branches within said armed forces.

²⁰ The Judge Advocate General’s Legal Center & School, U.S. Army, *Operational Law Handbook*, 16th ed. (2016), chapter 5.

international law outlined in the previous chapter.

With the formalisation and codification of the laws of armed conflict, as discussed in chapter two, militaries started to issue field manuals to their soldiers and to instruct them on the laws regulating military force and conduct. The first manual of this kind, which would be so recognisable to contemporary soldiers, also provided the first codification of the concept of military necessity was probably the so-called Lieber Code issued during the American Civil War.²¹ Today, field manuals are commonplace among regular military forces and, just like the Lieber Code, they also address the concept of necessity in the context of the use of force. For the United States armed forces this guidance comes in the form of the ‘Law of War Manual’ (LoWM) issued by the Office of General Counsel in the Department of Defense (DoD).²² In subsection 2.2 of the LoWM, the concept of military necessity is defined as “the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war”.²³ It is immediately clear that this definition, not altogether unexpectedly, mirrors the definition enshrined in extant *in bello* international law outlined in the previous chapter. This is readily apparent from the definition itself, but also from the fact that this specific field manual is dedicated to the laws of war and thus, essentially, contains legal doctrine for military application.

The above definition also shows a resemblance to the codification of necessity in the Lieber Code, where it is ultimately, historically rooted in. This point is also acknowledged in the LoWM, which explicitly details ‘sources’ for its definition of military necessity, such as judicial decisions and scholarly works. In addition to these, its long roots of military conventions in military conduct, as well as historical precedents of its application are cited as sources for the conceptualisation of military necessity.²⁴ In placing the justification for the understanding and invocation of the concept not purely on doctrinarian grounds, but also in its conventional application, is another important point where the understanding of military necessity in this knowledge community seems to align with the *in bello*

²¹ B M Carnahan, “Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity”, *American Journal of International Law* 92, No. 2 (1998); See also chapter three of this thesis for an overview of the topic.

²² United States Department of Defense, Office of General Counsel, *Law of War Manual* (June 2015), pp. 52-8 [hereinafter Law of War Manual].

²³ *Law of War Manual*, p.52

²⁴ *Ibid.*

international law discourse. The understanding of necessity on the tactical level, as exhibited by US armed forces, is therefore congruent to the international legal definition, as well as the justification for said conceptualisation. The similarities do not end there however. At least on the tactical level, the understanding and invocation of military necessity also entails the same prescriptive-axiomatic nature that is exhibited in the *in bello* international law discourse.

The way the concept of military necessity is embedded on the tactical level traces its counterpart in international law. It is axiomatic insofar as the field manual details the same hierarchy of legal rules and norms in which the concept is embedded. The understanding of necessity in this knowledge community accepts the legal framework outlined in chapter three.²⁵ As such, the understanding of military necessity fundamentally hinges on the competing demands between material military necessity - “a given course of action required for the accomplishment of a particular military goal” - and humanitarian concerns.²⁶ On the one hand we have the prudential argument that the military has to employ all necessary means in pursuit of their stated goal, which mostly stands in opposition to, on the other hand, humanitarian considerations that seek to ameliorate the effects of war on soldiers as well as civilians.²⁷ Thus, at this level, conflict is between orders handed down from superordinate levels and the legal and ethical limits to military actions. The British field guide on the laws of armed warfare, for instance, acknowledges that military necessity has to be understood and applied in the context of other concepts such as humanity and distinction among others.²⁸ This axiomatic structure underlines how the tactical understanding is essentially a transposition of the legalistic understanding of the concept into the military-strategic discourse. Military necessity is defined in the same way and also embedded into the same general structure as in the legal discourse.

²⁵ Importantly, though the tactical level is connected and subject to higher hierarchical levels, “the requirement of necessity should be assessed from the vantage point of the local command. That is to say, alternative courses of action [...], can only be weighed as a matter of tactics rather than grand strategy”, see Y Dinstein, *War, Aggression and Self-Defence* (Cambridge: Grotius Publications Limited, 1988), p. 202.

²⁶ N Hayashi, “Contextualising Military Necessity”, *Emory International Law Review* 27, No.1 (2013), p. 195.

²⁷ This prudential reading of necessity requires to apply all necessary force, but no more than that, as this could be potentially wasteful. This prudential quality traces back through military and strategic history and can be found, for example in Clausewitz’s writing, see *Vom Kriege*, VII, 6, p. 881 [nur soviel zu vernichten, als der Gegenstand des Angriffs erfordert;].

²⁸ Joint Doctrine and Concepts Centre, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383, 2004 Edition, pp. 21-6.

Beyond this, the tactical understanding of military necessity also exhibits the same prescriptive character, within this axiomatic structure, as in the *in bello* discourse of international law. The LoWM, for example, clearly states the legal principle underpinning the law of armed conflict, that the concept of military necessity can not be invoked to justify actions that are prohibited under the law of war or that violate *jus cogens* norms.²⁹ It can therefore only be reiterated that, at the tactical level, the understanding of necessity is next to identical to how it is understood *in bello* international law knowledge community. The restrictive nature of necessity is identical, given that the legal definition is ‘imported’ from the legal context. Regarding the balance between material necessity and humanitarian concerns, i.e. how the law is actually applied, the knowledge community may put more emphasis on the argument of military prudence than on restraint grounded in law or ethics. As previously outlined, the widespread application of this legal definition is owed to the development of the post-World War II UN legal regime and, more generally, due to the primacy of positivist law. This understanding is consequently not confined to the English-speaking world, exemplified here by the American and British military field guides on the law of armed conflict, but extends beyond it.

The widespread acceptance of the legal understanding of military necessity is also reflected in the official NATO glossary, where it is equally defined.³⁰ Thus, at this most basic military level, the legal understanding of necessity prevails, which provides license and increases the scope of available means to achieve the pre-defined aims up to the point where this would violate any laws of war. This is reflected, for instance, in the German code of conduct for armed forces personnel [*Zentrale Dienstvorschrift (ZDv)*] where the understanding of necessity, at this level, is grounded in the legalistic understanding of the concept of necessity. Moreover, this demonstrates how the legalistic understanding extends to other military cultures.³¹ The guide issued for the German armed forces makes use of the

²⁹ *Law of War Manual*, pp.53-5; The Manual makes here also specific reference to the rejection of the legal interpretation of *Kriegsräson vor Kriegsmanier*, prevalent in German legal thought from the late 19th century until the end of WWII, which was highlighted in the previous chapter.

³⁰ AAP-06 (2017 Edition), “NATO Glossary of Terms and Definitions (English and French)”, p.73.

³¹ The concept of military or strategic culture is a rather contentious one. I merely seek to highlight that the understanding of military necessity extends even to Germany, a country that was marked in its military outlook by the experience of WWII and retained constitutionally enshrined restrictions on the use of military power, and as such constitutes something akin to a least-likely case in this context. On the contentious nature of the concept of strategic culture see for example A J Echevarria II, “American Strategic Culture: Problems and Prospects”, in H Strachan and S Scheipers, eds., *The Changing Character of War* (Oxford: Oxford Univ. Press, 2011).

same definition of military necessity as in the aforementioned countries' militaries and as can be found in the established international legal norm. Thus, while *Militärische Notwendigkeit* makes the same allowance for military use of force in the pursuit of the aims of war, it is equally bounded by the established laws of war and set in opposition to the *Humanitätsgebot*, the humanitarian imperative established as counteracting concept in international law doctrine.³²

The fact that the legalistic understanding of necessity prevails at the tactical level is not altogether surprising. As this section has shown, at the tactical level an appreciation of this understanding can be primarily gained through the examination of military field guides and manuals, issued as a guide for the behaviour of soldiers in the field. The understanding on tactical level follows along the legal lines, striking a balance between material military needs and humanitarian concerns.³³ It provides a prescriptive guide to the usage of the concept of necessity on the tactical level, embedded in the wider, axiomatic rules of armed conflict. What is important at this level is this prescriptive nature that merely delineates the boundaries of how force and military means can be used in the pursuit of the ends of war. The way that necessity is conceptualised at this level, however, does not offer any form of inquiry into the relationship between the ends of war and the means employed beyond the prescriptions of legal doctrine. What does not form part of the understanding of necessity at the tactical level is any form of strategic consideration regarding the definition of the aims of war and the question what about of force is used how to reach said goals. These questions are answered at the operational and strategic levels.

Operational Art - Negotiating Inter-Level Necessity

The operational level can be described as a go-between situated between the strategic and tactical levels. This is not just by virtue of where the operational level is positioned on an organisational chart, but due to the functions and responsibilities located at this level.³⁴ Strategies devised at the level 'above' are here translated into concrete and distinct military steps, which can encompass the large-scale moving of divisions or whole armies, but also

³² Bundesamt der Verteidigung, ZDv 15/2: *Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch*, 2013, pp.23-5.

³³ See Hayashi, "Contextualising Military Necessity".

³⁴ See Guide to Strategy

the provision of further, smaller objectives handed down to the tactical level. This ‘transmission’ position between strategy and tactics can also be observed in the understanding of necessity that it reveals. Thus, the operational level understanding of necessity is characterised by a trade-off between the pursuit of strategic goals and the requirements to win individual, tactical engagements as part of the overall conflict or war. The understanding and invocation of necessity in relation to the means of war, and force more generally, is thus influenced by a determination of what component in this trade-off relationship ought to be favoured. In order to illustrate the understanding of necessity, this section will use the example of the counter-insurgency (COIN) approach adopted by the United States and other countries in Afghanistan and Iraq.³⁵ The COIN example will show how the understanding of necessity at this level is marked by the trade-off between goals of the functional structure is embedded in.³⁶

With the relatively quick end of the ‘main’ hostilities as part of the wars in both Afghanistan and Iraq, the attention of officials turned to longer-term pacification in each country. Common to both cases, though happening at different times and rooted in different socio-political circumstances, is the emergence of armed insurgencies against the occupying forces after the end of outright hostilities. In Iraq the insurgents made use of guerrilla tactics, unleashing force in ambushes before quickly melting back into the general populace. This mode of war was of course not a new one, with many precedents across history, such as the Malayan Emergency, often cited as a successful example of counter insurgency.³⁷ Winning a war “amongst the people”, as former British General Rupert Smith dubbed it, complicates the translation of strategies into concrete military steps down to tactical instructions.³⁸ Every war, conflict or military engagement presents the problem of determining what amount and level of force is required to defeat the enemy in the Clausewitzian sense. Clausewitz, as mentioned above, defined a war as an act of violence

³⁵ There is a debate as to whether a COIN approach describes a strategy, operational art, or whether it is merely a tactical instruction. For the purposes of this argument, which seeks to elucidate the understanding of necessity in this knowledge community, we examine COIN on the operational level. Colin Gray, for instance subsumes COIN approaches generally and the US COIN field manual specifically under the rubric of historically specific strategies, which, however, have no bearing on the time-invariant lessons of strategy, see Gray, *The Strategy Bridge*, pp.59-60.

³⁶ The focus herein lies on COIN field manuals and what they reveal about operational level understanding of necessity. The example will however not feature a detailed analysis of the wars in Afghanistan and Iraq.

³⁷ K Hack, “The Malayan Emergency as Counter-Insurgency Paradigm”, *Journal of Strategic Studies* 32, No. 3 (2009).

³⁸ R Smith, *The Utility of Force: The Art of War in the Modern World* (London: Penguin Books, 2005).

to compel the enemy to do our will. In this context Clausewitz talks of *niederwerfen*, literally throwing down, a term that implies the defeat and breaking of resistance, but not necessarily the destruction of the enemy, as wars are conventionally thought of.³⁹ In the context of insurgencies, or ‘wars amongst the people’, this problem becomes all the more pressing, as it is difficult to determine who exactly the enemy is and how they can be compelled to do our will, to again use Clausewitz’s words, without alienating the general populace, amongst which they are hiding, through the overzealous use of force.⁴⁰

The quote at the outset of this chapter, concerning the bombing of Ben Tre during the Vietnam War, is illustrative of this problem - the destruction of a town was deemed necessary to save it in the longer run. The desire to win an engagement on a tactical level can obstruct the view of the strategic goal of the conflict. This in turn can obfuscate the determination of an adequate usage of the means of war and selecting an appropriate level of force with respect to the overall strategic goals. In the context of our inquiry, this raises the question of how necessity is understood and used, when having to coordinate between the formulated ways on strategic and the application of means on the tactical levels. Firstly, it raises the question of what force is necessary in relation to the goals of war as such, given that the aim may not be the total destruction of the opposition. But beyond that, it also points at the problem of tactical success at the expense of strategic defeat - that is winning an engagement by destroying the enemy, but nevertheless losing the war, in the context of our example by increasing resistance in the populace and failing to compel the enemy to do our will.

Rupert Smith largely captures this issue when he discusses the issue of deployment v. employment of force.⁴¹ The former refers to the mere act of deployment of force into the theatre of operations. However, this does not necessarily translate into an effective employment of said force. Tanks and large mechanised units were successfully used in the initial military confrontation with Iraqi force at the outset of the Iraq War in 2003. In the

³⁹ Clausewitz, “Vom Kriege”, I: 1, 2, p.191.

⁴⁰ The ostensible increase in the number of insurgencies and ‘small wars’ during the Cold War era and beyond made some military historians and strategic thinkers question the wisdom of Clausewitz’s theory of war. Above all Mary Kaldor is associated with the emerging maxim of a modern warfare marked by ‘new wars’, distinct from the old Clausewitzian ones. See M. Kaldor, *New and Old Wars* (Oxford: Policy Press, 2001). See also C. M. Fleming, “New of Old Wars? Debating a Clausewitzian Future”, *Journal of Strategic Studies* 32, No. 2 (2009).

⁴¹ Smith, *The Utility of Force*, p. 4-5.

subsequent COIN campaign however, they could scarcely contribute to the attainment of the strategic goals set for the war. In Smith's dichotomy, these forces were still deployed, but ceased to be effectively employed in the pursuit of lasting changes in the country.⁴² The distinction between de- and employment of force in the strategic sense speaks to the understanding of necessity within this knowledge community.

The invocation as to what specific means and what force is necessary in conflicts, hinges on the functional level from which the purpose of said force is defined. The understanding of the concept of necessity is therefore not prescriptive, as on the tactical level, but has an 'inbuilt' allowance for an either more licensing or more restraining conception of necessity. COIN operations offer an interesting example where the overall military success is not solely defined through a succession of maximum impact tactical defeats.⁴³ A case such as this can help to illustrate this difference and its effect on the understanding of necessity at this level within the strategic nexus. Insurgencies of the kind experienced by the US and other nation's armed forces in Iraq and Afghanistan is the application of a guerrilla or small wars approach to an insurrection - in this case against the occupying forces.⁴⁴ The name guerrilla warfare was coined due to "the tactics of ambush and harassment used during the 'little war' fought by Spaniards against French occupation forces".⁴⁵ This form of warfare tends to afford insurgent forces the advantage of having familiarity of the terrain, people and culture. This they can use to their advantage in carefully selecting the battles with their enemies before retreating and hiding among the general populace. Thus, "though a strategically defensive concept, the tactics of guerrilla warfare" are offensive and aimed at surprising the enemy.⁴⁶

The counter-insurgency approach used by the US and its partners in Afghanistan and used by the US in Iraq was thus a response to the violent resistance of insurgent forces to the occupying forces and the legitimacy and authority of new governments and their

⁴² Ibid. p. 271.

⁴³ Which of course is in itself a very simplistic characterisation of 'conventional' military engagements. I merely seek to highlight the different military rationale that underpins COIN approaches.

⁴⁴ Freedman, *Strategy*, p. 179. See also D Galula, "Counterinsurgency warfare: Theory and practice", in , T G Mahnken and J A Maiolo, eds., *Strategic Studies: A Reader* (Oxon: Routledge, 2008), pp. 287-307.

⁴⁵ Freedman, *Strategy*, pp. 178-9; See also B Heuser, *Rebellen, Partisanen, Guerrilleros: Asymmetrische Kriege von der Antike bis heute* (Paderborn: Schöningh, 2013) for a more general overview of Guerilla and insurgent warfare.

⁴⁶ Freedman, *Strategy*, p. 179.

institutions in both respective countries. The adoption of a COIN approach entailed the oft-cited formula of winning ‘hearts and minds’ of the local population, through “military, paramilitary, political, economic, psychological and civic actions taken by the government to defeat insurgency”.⁴⁷ In general, the dichotomy of insurgency and counter-insurgency can be essentially boiled down to a fight over the aforementioned ‘hearts and minds’ and the population more generally.⁴⁸ Counter-insurgency was of course not a new, ground-breaking invention of military conduct. Rather, it has been a well-established approach that had to be relearned by the US armed forces at several points in history.⁴⁹ Nevertheless, the essentials of COIN operations had to be learned again in Afghanistan and Iraq. One of the basic principles is the aforementioned negotiation between tactical necessities and the strategic prerogatives of winning ‘hearts and minds’, the latter of which would not deem it necessary to destroy a village in order to save it. COIN operations show how the operational level conceptualisation of necessity is less prescriptive than the tactical level. The question of what force is deemed necessary in conflict, in particular in the COIN approach, may be more restrictive than it would otherwise be through the constraints set by international law. The reason for this being that even legal uses of coercion and force may be perceived as over-zealous by the general populace and thus “adherence to the conventions of civilized warfare [is] important for its own sake, and is an important component of any strategic contest in which the so-called ‘hearts and minds’ of the local population are the prize”.⁵⁰

As part of the COIN approaches in Afghanistan and Iraq such restrictions were introduced in both countries on a tactical level. Again, this was not a new or revolutionary change, but in accordance with the general COIN framework, which has been shaped by military⁵¹ and academic strategists over the years.⁵² On the military-administrative side, concomitant

⁴⁷ Headquarters of the Army, *Counterinsurgency, Field Manual, FM 3-24/MCWP 3-33.5* (2006), p. 1-1 [hereinafter COIN Field Manual]. The inclusion of measures outside the military domain further highlights the conceptually different military rationale that underpins COIN operations.

⁴⁸ Guala, *Counterinsurgency warfare*, in particular p. 289.

⁴⁹ See Foreword of the *COIN Field Manual*.

⁵⁰ C Enemark, “Drones over Pakistan: Secrecy, Ethics, and Counterinsurgency”, *Asian Security* 7, No. 3 (2011), p. 222.

⁵¹ See for example D H Petraeus, “Lessons of History and Lessons of Vietnam”, *Parameters* 40, No. 4 (2010) and H R McMaster, “On War: Lessons to be Learned”, *Survival* 50, No. 1 (2008) for two examples of high-ranking officers writing about counter insurgency warfare from a point of lessons (to be) learned. Both examples are also notable as their authors in their military capacity became synonymous with the adoption of counter insurgency warfare and the COIN campaign in Iraq. Both became later high political appointees within the US national security apparatus.

⁵² See for example D Kilcullen, *Counter Insurgency* (London: C. Hurst & Co Publishers, 2010) as a recent

with the adoption of the COIN approach, this was accompanied with the issuing of a new and revised counter-insurgency field manual jointly by the US Army and Marine Corps. In addition to a general outline of COIN principles, it concretely addressed the problematic discussed above. The demands of a COIN approach run counter to a lot, if not all, of traditional military principles instilled in soldiers from their earliest training, in particular regarding the use of force in the pursuit of a military goal. Counter insurgencies demand that during regular military operations, the use of force is often severely restricted in order to not antagonise the local population and subsequently jeopardise legitimacy. However, for the soldiers carrying out the COIN approach, this often entails more policing than military operations and a shift to training and advising from taking action is also commonplace.⁵³ As mentioned above, in a counter-insurgency situation the ‘fight’ is for legitimacy first and foremost. This does not stop with the general characterisation of operations, but also extends to more classical military scenarios, such as battles and firefights where the scope or use of force may be restricted.

An example for such a restriction, and also a contentious subject among soldiers and officers, were new rules for the request of Close Air Support (CAS). The new rules introduced this way, which were part of wider restriction on the rules of engagement, restricted the ability of ISAF soldiers in Afghanistan to request CAS when they were engaged in firefights and the form of support this would take.⁵⁴ The restrictions specified that soldiers had to be already under fire before being able to request CAS and that rather than engaging with lethal means the supporting aircraft would first conduct a so-called ‘show of force’ unless it was paramount to engage. The changes were introduced because,

example of a COIN guide that especially focuses on ground-level aspects by an author who falls in the academic category though he has had a more direct impact as policy advisor.

⁵³ COIN Field Manual, ch. 6; It should be added that COIN operations, while often transferring military into policing operations, also tend to incorporate a substantial unconventional warfare component on the other hand. In Afghanistan and Iraq this element was represented, for example, by special operations forces carrying out raids in the hunt for the insurgency leaders and terrorist cells. The Afghan theatre and the bordering Pakistan, which was important in the context of the insurgency in Afghanistan, was also characterised by an extensive campaign of targeted killings through drones, raising ethical concerns and potentially adverse consequences for the COIN campaign, see for example Enemark, “Drones over Pakistan”. Thus while regular forces were largely restricted in the use of force to appease the local population, the special operations raids and targeted killings represent a more ‘classic’ kinetic element in pursuit of a strategic goal.

⁵⁴ See L M Dadkhah, “Close Air Support and Civilian Casualties in Afghanistan”, *Small Wars Journal*, retrieved from <http://smallwarsjournal.com/jrnl/art/close-air-support-and-civilian-casualties-in-afghanistan>, accessed on 06.09.18. See also D Read, “Airpower in COIN: Can Airpower make a significant Contribution to Counter-Insurgency?”, *Defence Studies* 10, Nos. 1-2 (2010) lists restrictions across different COIN campaigns. Some of the restrictions mentioned have been lifted again in the meantime, see: <https://www.militarytimes.com/flashpoints/2017/10/03/mattis-reveals-new-rules-of-engagement/>

according to the authors of the COIN Field Manual, “bombs delivered by fixed-wing close air support may effectively destroy the source of small arms fire from a building in an urban area; however, direct-fire weapons may be more appropriate due to the risk of collateral damage to nearby buildings and noncombatants”.⁵⁵ This reacquaintance with the categories of proportionality and discrimination, prominently encountered in the previous chapter on international law, further underlines the difference between tactical and operational levels. At the operational level in the military-strategic nexus, these are not defined through legalistic limitations, but rather constitute prudential categories. Given the nature of COIN operations, the restrictions associated with these categories were actually more severe, because it was deemed to be strategically valuable. In other words, at the operational level necessity is not solely understood as a prescriptive legal restriction but is more freely invoked and incorporates an element of military prudence.

Another, rather more graphic example is the practice of Australian SAS soldiers identifying enemy Taliban fighters which were killed in action in Afghanistan. The identification of enemies killed in action (EKIAs) was common practice and required soldiers to gather finger prints of dead Taliban fighters for the usage in a central database.⁵⁶ During an operation in 2017, a SAS corporal proceeded to sever the hands of EKIAs in the aftermath of a firefight for later fingerprinting, rather than taking the fingerprints at the scene.⁵⁷ The ensuing investigation, after the incident became public knowledge, revealed that the corporal in question, like other soldiers of the SAS, believed their practice to be sanctioned as a “tactical necessity”.⁵⁸ The report in turn found that “the soldier exercised poor judgement, in that he failed to adequately appreciate the possible strategic consequences of those actions...”.⁵⁹ This example highlights clearly the tension between tactical and overall strategic objectives and how differing perspectives can affect the conceptualisation and understanding of necessity.

This not only underlines the operational level role in the military-strategic complex of negotiating between tactical and strategic goals, but also how this has a bearing on the

⁵⁵ *COIN Field Manual*, p. 7-7

⁵⁶ D Oakes and S Clark, “‘What the f*** are you doing’ Chaos over severed hands”, *ABC News*, retrieved from: <https://www.abc.net.au/news/2017-07-11/afghan-files-shed-light-on-notorious-severed-hands-case/8496654>, accessed on 05.06.2019.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

understanding of necessity. What military assets and what level of force are deemed necessary in an engagement is to be negotiated at this stage and not immediately curbed by other parameters. Whereas the tactical level has very prescriptive parameters set by the restrictions of the laws and conventions of war on the one hand and the requirements ‘handed down’ from the strategic and operational level on the other, the operational level has more freedom to configure the concept based on the concrete situation under consideration. While this leaves the operational level more leeway, it is restricted as well insofar as it has to take strategic prerogatives into account. As part of the operational decisions to adopt and implement the counter insurgency approach, a corresponding understanding of necessity was adopted in relation to the conflict. While this did not necessarily affect if the term necessity is used for the concept as such and how the concept is demarcated, it certainly affected its configuration and the importance apportioned to it. Thus, overall, the concept of necessity becomes more prudential as we go away from the tactical level, where it remains largely prescriptive. Concomitantly, necessity also becomes more abstract in its configuration when compared to the tactical level where purpose and effect are very much related to the concrete situation at hand. Both of these observed changes have their origin in the strategic level, which sets the overall framework for the understanding of necessity.

Strategy and Policy - Do what is necessary

Sitting ‘atop’ the three levels, the strategic level is where the overall shape for the military strategy is decided and handed down to the operational and tactical levels. As mentioned in the overview section above, this, however, does not happen in isolation. The strategic framework that is set is in turn dependent on the policy that is decided upon with respect to the military and security more generally. In principle, the policy process is largely self-contained with minimal expert input from the military side.⁶⁰ In the modern liberal democratic and bureaucratic states of the ‘western world’, this translates into politicians, political appointees and civil servants working in the bureaucratic national security apparatus developing policies on all aspects of national security. Nevertheless, due to its position as an interface between the military and the political and policy areas, strategy

⁶⁰ Gray, *The Strategy Bridge*, in particular ch. 3

does interact with the latter on matters of war and conflict.⁶¹ This becomes evident in the broad scope that strategy takes in comparison to its two subordinate levels. While the lower two levels concern themselves with the operationalisation and realisation of concrete military steps, with an accompanying understanding of necessity, strategy conceptualises necessity on more abstract terms, albeit with a focus on military ways and means and hence still more concretely than it is conceptualised in policy.⁶²

It is important to stress this latter point and to further expand on it. At the strategy level, the necessity for a given course of action is conceived of in more abstract terms, with “strategic necessity” broadly defined.⁶³ Despite this breadth, these terms are still restricted to matters of military power and force and do not extend into other areas. In practice, the separation between the military aspects of strategy, policy and the political domain are obviously not as clear cut. War is presumed to largely follow the cues set by politics via policy goals. Thus, for example, Clausewitz noted in his theory of war that if politics turns grander [großartig] and more forceful [mächtiger] in its character, the military prosecution of political goal can turn war into its absolute form [absoluten Gestalt].⁶⁴ Indeed, this notion is underpinned by an analysis of two events during the Second World War - the Sportpalast speech and the Casablanca Conference - where the political leaderships of two of the opposing parties made it clear in their own ways that the conflict was about a total victory over the enemy and that a return to a limited war was out of the question.⁶⁵ Based on this political impetus, the understanding of necessity that military strategists apply would be influenced accordingly.

An absolute or total war allows for different demands on the understanding of necessity for example regarding scope effects. The decision-making process in the American

⁶¹ See for example *Guide to Strategy*, or *Guide to National Security and Strategy*, for an overview of how strategy should be separate from politics, despite a requirement for both domains to interact.

⁶² This can be seen in theoretical approaches such as Gray, *The Strategy Bridge*, wherein Gray builds an exhaustive theoretical framework for the conception and execution of strategy, but is also evidence by guiding documents by the military for its senior officers eg. Joint Chiefs of Staff, *Strategy Joint Doctrine Note 1-18*, 2018 [hereinafter Strategy Doctrine Note] and *Guide to Strategy*, both of which devote a lot more space to theoretical aspects of strategy compared to the usual military guidelines and manuals.

⁶³ For a brief treatment see D J Lonsdale, “A View from Realism”, in D Whetham, ed., *Ethics, Law and Military Operations* (Houndmills: Palgrave MacMillan, 2011), p.39-40.

⁶⁴ Clausewitz, “Vom Kriege”, VIII: 6, B, p.992.

⁶⁵ M Rauchsteiner, “Betrachtungen über die Wechselbeziehung von politischem Zweck und militärischem Ziel”, in *Freiheit ohne Krieg: Beiträge zur Strategie-Diskussion der Gegenwart im Spiegel der Theorie von Carl von Clausewitz*, ed., Clausewitz Gesellschaft (Bonn: Dümmler, 1980), p. 57. Rauchsteiner also remarks that in a total war it becomes difficult to separate political and military goals, as they become congruent.

government to use the atom bomb during WWII further illustrates this point. It was considered a decision on a strategic objective - to defeat the Japanese and end the war - which was debated between the political and military leadership. The question of whether the weapon could be used and how it should be deployed, that is to say the question of scope, was framed as a strategic necessity in an absolute conflict.⁶⁶ This example clearly illustrates how the political purpose cascades into the formulation of strategy, the selection of military ways and means and then further down into operational and tactical decisions. Prospective staff officers are sensitised to this problematic. The training of staff officers includes learning about other conceptualisations of necessity anchored in other discourses such as statecraft and *raison d'état*, as well as the just war tradition and how the value basis in politics can impact military strategic considerations.⁶⁷ The influence of policy and politics should not be overestimated either, however as it scarcely directly stretches below the strategic level. Again, this restriction is also present in Clausewitz's theory, when he rather sardonically comments that no sentry patrol route has yet been chosen according to political considerations.⁶⁸

The strategic level follows the lead set by the political realm through policy goals, but in turn governs the levels below it in the military strategy complex. The policy goals may be too broad and have to be translated into military strategic terms.⁶⁹ The example used in the previous section illustrates this point. The design and implementation of the COIN campaigns were operational matters. The decision to not just beat the opposition in the conventional military sense, but to win the peace was a political decision. The step in between happened at the strategic level, where the overall decision was taken that militarily this goal could be realised by taking a COIN approach. Once the ends were formulated on the strategic level, this was then handed to the operational and tactical levels for implementation. The understanding of necessity at this level is linked to the formulation of military ends, the primary function of the strategic level. Setting the framework of military ends is essentially guided by a notion of military prudence vis-à-vis the policy goals that the conflict seeks to achieve. What is understood to be necessary

⁶⁶ See P P O'Brien, "The Joint Chiefs of Staff, the atom bomb, the American Military Mind and the end of the Second World War", *Journal of Strategic Studies*, DOI: [10.1080/01402390.2018.1559150](https://doi.org/10.1080/01402390.2018.1559150)

⁶⁷ See for example *Guide to Strategy*, in particular chs. 3 and 6.

⁶⁸ Clausewitz, "Vom Kriege", VIII: 6, B, p.992. During the waning years of the Obama administration there were reports that the White House was micromanaging details of the military's Afghanistan on-going operations, which would speak to a more elaborate influence stretching beyond the strategic level.

⁶⁹ *Strategy Doctrine Note*, in particular p. I-5

within this conceptualisation, is then largely guided by what is considered to be militarily prudent and is thus variable in purpose and effect.

However, even though strategy on the military side operates in more abstract notions in contrast to the ‘lower’ functional levels outlined above, it does not mean that they are not subject to some of the same restrictions. Aspects of proportionality and discrimination, dedicated to the avoidance of non-combatant casualties and imported through the application of *in bello* international law find their way also into the guidance reserved for military leaders operating at the strategic level.⁷⁰ Thus, while necessity is invoked much more freely, guided by the notion of what is militarily prudent, it is not limitless in particular with respect to scope effects. These are also curbed by legal and conventional restrictions of war and conflicts. Nevertheless, with respect to the understanding of necessity, the strategy level is the ultimate arbiter within this discourse given the hierarchical make-up of the levels that comprise this knowledge community. However, at least in the extant form of the discourse, this is not blank cheque of interpretation as to what is militarily necessary in a conflict or war. Though operating more in the abstract, the conventions and laws of war still restrain the strategic level in its understanding and invocation of the concept.

The restraints set by the conventions and laws of war and military prudence as captured by the concept of necessity do not, however, need to be mutually exclusive. The concept can also be understood and invoked to the effect that it considers what restraint is necessary, because it is militarily prudent. Thus, while it was mostly the aforementioned humanitarian concerns which “trigger[ed] the negotiation of treaties prohibiting the use of certain weapons, as well as arms control treaties, [...] strategic considerations - such as fear of proliferation, the need or lack for specific weapons and the difficulty of effective defense - have played” a key part in setting some of the restraints set for the waging of war.⁷¹ The key point here is that the conceptualisation of a necessity restraint in the laws of war emerged out of strategic considerations and prudence. Agreeing to this limitation as an international standard was not self-inflicted harm through the limitation of strategic

⁷⁰ Joint Chiefs of Staff, *Joint Operations*, Joint Publication 3-0 (2017), in particular at III-32 on necessity in the context of proportionality as a consideration to take into account for fire mission and the use of lethal force by commanders [hereinafter *Joint Operations*].

⁷¹ T Meron, “The Humanization of Humanitarian Law”, *The American Journal of International Law* 94, No. 2 (2000), p.239.

options.⁷² The underpinning for the conceptualisation of necessity in this regard was a sense of military prudence. It is this notion of prudence that essentially encapsulates the conceptualisation of necessity at the strategy level and by extension - due to the aforementioned hierarchical organisation of levels which comprise this discourse - the conceptualisation of the knowledge community as a whole. The self-image of members of this knowledge community follows the pragmatic description of strategy as a simple ends-means relationship. Adherents to this discourse solve problems and do what needs to be done militarily. What military and strategic prudence renders necessary will be conceptualised, operationalised and tactically realised.

Analysis

The preceding sections in this chapter have provided an overview of the strategy knowledge community and examinations of the three respective functional levels it is comprised of. While each level has a slightly different understanding of necessity, ranging from the prescriptive-axiomatic at the tactical level to the abstract and prudential at the political-strategic level. Nevertheless, this knowledge community is considered as a single entity with respect to its understanding and usage of necessity in contrast to, for example, the international law discourse, which was split into two separate knowledge communities. The reason for this lies in the interconnectedness of the three levels of the discourse and, more importantly, their interdependence as chains of command and information. Even though the levels differ slightly in their understanding and invocation of necessity, the understanding and usage of the concept is ultimately determined by the 'highest', the strategic level, as we might expect in a military setting.

The tactical level may largely follow the prescriptive nature of *in bello* international law from outside the discourse, but in the end, it is subject to directives from the operational level, where strategic and tactical requirements are weighed against each other. Said strategic requirements derive, of course, from the strategic goals determined at the superordinate strategic level, where the military interfaces with the political realm. Thus, ultimately it is the strategic level that determines the exact understanding and usage of the

⁷² On a broader level Colin Gray has conducted a more general investigation of the ethical dimension in Strategy, stating that "it does not pay strategically, to be ethically challenged", see C Gray, "Moral Advantage, Strategic Advantage?", *The Journal Of Strategic Studies* 33, No. 3 (2010), p. 358.

concept of necessity, which is then cascaded down through the discourse.

Consequently, this analysis section will focus on this overall strategic conceptualisation of necessity, without, however, ignoring the functional subtleties that this knowledge community offers across the analytical categories and in particular in the context of the configuration of the concept.

Terms v Concept

When it comes to the question of congruence between the concept of necessity, as it is understood and used in this discourse, and the term ‘necessity’, the differences between the levels of the strategy knowledge community become apparent. At the tactical level, focusing on the individual or comparably small groups of soldiers, concept and term are largely congruent. As mentioned above, at this level the understanding and invocation of necessity largely follows the template of *in bello* international law. This is a result of the importing of the term ‘military necessity’ from legal doctrine for application in the military domain. Thus, at this level the match between term and concepts extends to congruence with another discourse in this respect. This changes once we consider the operational and strategic levels within the discourse. As has been outlined over the course of this chapter, the higher the level under consideration, the further the conceptualisation of necessity moves away from the concretely defined to a more abstract notion thereof. This is mirrored in the language used to denote the concept. At the operational level, where tactical considerations are still taken into account and weighed against competing concerns, military necessity still finds mentioning, albeit only sparingly. There and at the strategic level above, the concept is more often denoted through expressions such as requirements of conflict and similarly broad categories, rather than the term necessity itself.⁷³ In particular among practitioners necessity is scarcely mentioned, though ‘strategic necessity’ occasionally finds its way into theoretic discussions. The overall pattern remains - the hierarchically higher the level, the broader and more abstract the conceptualisation of necessity and consequently less specific its linguistic denotation.

Demarcation and Contrast

⁷³ Though it is more often denoted through requirements of conflict or strategic requirements, the term strategic necessity also appears, see for example Lonsdale, “A view from Realism”, pp. 39-40.

This element of the configuration of the concept of necessity is, again, influenced by the import of military necessity from international law doctrine. At the tactical level, field manuals issued to soldiers and used for their training make use of the same demarcation and contrast as the *in bello* international law discourse does. Material military necessity is set in contrast to the principle of humanity, against which it must be weighed. Apart from this however, there are no other similar concepts, which necessity would require to be demarcated from, nor other concepts which are used as antonyms to necessity. This applies all the more beyond the tactical level, where the conceptualisation of necessity becomes more abstract. An explanation for this is that the less axiomatic and more abstract and prudential character in the conceptualisation of necessity at these levels simply does not require the sharp demarcations and contrasts that it does in a more exacting and prescriptive setting such as international law.

Configuration

The assessment of the configuration of the concept in this knowledge community is the most complex of all four analytical guiding categories. Similarly to the two already discussed categories above, this is a direct result of the make-up of this knowledge community. The functional separation into three levels is nonetheless not a complete division. There is still a hierarchical element that renders all 'lower' levels ultimately beholden to the highest of said levels - the strategy level. This set up has implications for the configuration of the concept within this discourse. While lower functional levels would favour a different configuration, it is however the strategic imperative that cascades down to determine its profile in the final analysis.

The impact of the functional separation is most apparent at the operational level, which sits in between the levels where the configuration analysis would conventionally distinguish between micro - tactical - and macro - strategy - levels. Given the organisation of the knowledge community itself into three distinct but interdependent parts, an additional analytical bifurcation into micro and macro levels seems arduous. With its three functional levels this discourse covers of course both the macro as well as the micro level, among which this analysis distinguishes. The tactical level corresponds to the micro level, while the strategy level concerns itself with macro considerations. The operational level is, as has

been mentioned above, takes the role of a transmission level, negotiating between competing macro and micro concerns. In this knowledge community, the macro level can co-determine aspects of the micro level understanding of necessity, but not vice versa. The relationship between the functional levels is hierarchical, though superordinate levels rely on information traveling up the chain for decision making. Thus, despite the interdependence between level, the understanding of necessity in this discourse ultimately has to be regarded to operate at a macro level.

Regarding the intended effect of an invocation of necessity, the configuration of the concept is far less affected by the trifurcation of the community. Irrespectively of level, the concept is being used by this knowledge community to cause temporal, as well as effects of scope. That is to say, the concept is being invoked at all levels to affect the perception of timeliness with respect to a certain course of action, arguing for urgency more often than the opposite. Thus, while it can be invoked to effect 'necessary delays' in action, it is far more likely that members of the knowledge community try to use the concept to induce urgency and haste. Both possibilities can be illustrated with an example from this chapter, the COIN campaigns in Afghanistan and Iraq. When it came to special forces component of the approach, hunting for insurgency leaders and terrorist cells, action often had to be taken with little time for further deliberation. The strategic and operational imperatives necessitated urgent action. The conventional COIN elements of the campaigns, often involving policing and community relations, on the other hand necessitated the avoidance of rash decisions.

An almost identical observation can be made with respect to the intention of influencing the scope of available actions by an invocation of necessity. This effect aims at either expanding the available scope beyond what would be deemed acceptable in the absence of an invocation of necessity, or to limit the scope of action to only that what is deemed to be strictly necessary, according to the subject invoking the concept. It is fairly safe to say that the intended effect of invoking necessity in this knowledge community is mostly related to affecting scope, rather than timeliness. Strategy, as has been explained towards the beginning of this chapter, is in essence about the connection of ends and means in relation to conflict. Invoking necessity to affect the scope, and thus essentially the means component in said connection, is a major aspect of this discourse. As this chapter has shown, this aspect can also vary across the discourse's functional levels. Again, the

example of the COIN campaigns illustrates this effect. While there may be a determination by a platoon in the field being engaged by insurgents that CAS is required, the operational and strategic levels may not agree with this tactical determination. Indeed, as part of the campaigns the availability of CAS was restricted because it was deemed necessary to limit the scope of lethal and destructive means in the fight for legitimacy.⁷⁴

The example of the Free French Air Force bombing raids over occupied France mentioned in chapter one also exhibits the restraining application of necessity. As mentioned in chapter one, these forces took on greater personal risk to run their bombing raids at lower altitude in order to minimise casualties among their compatriots, thus weighing restraint against effective destruction in their understanding of necessity.⁷⁵ Outside of this concrete example other potential rationales for limiting the scope of actions are to enforce a strategic limitation of a conflict, for example, to keep a conventional conflict from becoming nuclear, or simply as a principle of vocational skill of the military commander, that is to say to avoid wastefulness and to preserve economy of force.⁷⁶

The last element of the configuration of the concept of necessity is similar in nature to the effect outlined above. With respect to the purpose of invocation, necessity can be regarded as function of strategic prudence, rather than the invocation having a purpose strictly of itself. Generally, we have distinguished between licensing and restraining purposes to which subjects invoke the concept of necessity. Both purposes do feature in invocations within this knowledge community, a fact that is not altogether surprising given that the above analysis has shown that both types of scope effects are also present. Thus, necessity can be - and indeed is - invoked in this discourse for the purposes of licensing actions and effecting a larger scope of available actions in this regard. Vice versa it is also invoked to restrain through a limitation in scope. Likewise, this combination of licensing and restraining is used in conjunction with a temporal effect, causing an urgency or delay in actions.

What all of these purpose-effect combinations do have in common is the fact that the

⁷⁴ See Read, "Airpower in COIN".

⁷⁵ See M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), p. 157; as well as chapter one of this thesis.

⁷⁶ See Hayashi, "Contextualising Military Necessity", pp.204-8. On economy of force see *Joint Operations*, in particular at VII-2.

nature of their invocation is ultimately not axiomatic-prescriptive in nature - though it can be, for example at the tactical level - but is a function of military prudence. The determination of the understanding of what is necessary is therefore coupled to the notion of what is militarily prudent and expedient, rendering the strategic discourse instrumental in nature. If circumstances require, for instance, the increased application of force, then licensing a greater scope of actions becomes necessary. If the strategic situation requires restraint, then necessity is interpreted accordingly, as the example of COIN campaigns above has shown. Even the adherence to restrictions of international law, an area outwith of the purview of military strategy, can be subsumed under the rubric of prudence. The expectation of reciprocity in the adherence to laws and conventions of war, render some aspects of conflicts more calculable. Moreover, the limitation of war in its ways and means can be strategically desirable and thus be deemed necessary from a military perspective, as the aforementioned example of the limitation of a war to conventional means demonstrates.⁷⁷ Thus, overall, the configuration reveals a concept whose understanding is determined at the top level of its functional hierarchy and is therefore coupled to the notion of what is militarily prudent, that is to say expedient in the pursuance of the overall military-strategic goals, rendering the strategic discourse instrumental in nature.

Importance

The importance apportioned to the concept of necessity follows from its configuration. Within the discourse, the concept appears only to be of cursory importance. At the tactical level, the knowledge community essentially imports the conceptualisation from the international law knowledge community. In this regard necessity works as an important boundary. This is however, not a proper expression of how the concept is generally understood in this knowledge community, as it only reflects one level within the military-strategy complex. In the 'purest' form of strategy, necessity describes the self-image of the military strategy knowledge community has of itself. Here, necessity is an expression of the military prudence that members of this knowledge community like to ascribe to themselves. Strategy is viewed in instrumental terms as being all about realising a set goal and deciding on the right means to do so. This instrumental view prevalent in this discourse is reflected in the language used by theorists and practitioners alike. The very

⁷⁷ See Meron, "The Humanization of Humanitarian Law", p. 239.

choice of terminology in Rupert Smith's *The Utility of Force* hints at a technical understanding of force and its usage that is instrumental in nature. This is also exhibited in the treatment on the strategic deliberation on the usage of force.⁷⁸ This is underpinned by concepts such as the aforementioned economy of force - doing what is necessary with strictly only the means required to do so, as defined by Hayashi.⁷⁹ It is, in the self-image of the discourse, about the *raison d'être* of the knowledge community - getting the job done and doing what is necessary in the process. Understood in this way, necessity as a concept is obviously ascribed a central role and thus is as a concept not just of central importance, but a prerequisite of the discourse as a whole.

Conclusion

The preceding analysis in this chapter on the conceptualisation of necessity in the military strategy knowledge community has shown how it connects to other discourses, but also revealed that the nature of this knowledge community and its understanding of necessity is fundamentally different. The knowledge community is comprised of three functionally different, but hierarchically ordered levels. The understanding of necessity and the way in which it is invoked can differ depending on the functional level under consideration. While at the tactical level, the lowest in the hierarchy, the prescriptive understanding of military necessity is more or less 'imported' from international law, the strategic level, sitting atop the hierarchical order, exhibits a much more abstract notion of necessity in relation to war and the use of force. The operational level meanwhile takes the role of a transmission that connects the competing demands of either level and negotiates between these competing demands. The example of the COIN campaigns illustrates this trade-off between tactical and strategic necessities. Overall however, given the hierarchical ordering of levels where superordinate levels govern the rungs below, the strategy level and its conceptualisation are of key importance for the discourse at large. Based on military organisation, strategic decisions are implemented at the operational and realised at the tactical level. Thus, it is the strategy level atop that ultimately defines the understanding within this knowledge community.

⁷⁸ See Smith, *The Utility of Force*.

⁷⁹ See Hayashi, "Contextualising Military Necessity", p.205; as well as *Joint Operations*, p.A-2.

The military strategy knowledge community is therefore rather unusual when contrasted to the discourses analysed in the preceding chapters. Despite a functional separation and somewhat different conceptions of necessity, there is still a single bounded rationality in strategy, owed to the fact that there is a chain-of-command hierarchy. Beyond this however, the strategic conceptualisation of necessity is not just the ultimate arbiter in this course, but also an expression of the self-understanding of the members of the knowledge community - certainly of its practitioners. Strategy has a long history and a diachronic element has to be taken into account in examining the understanding of necessity. The self-image follows a rather instrumental notion of the strategy discourse as a 'mere' ends-means relationship, in which military strategists are more or less isolated from the political and its setting of policy goals. As noted above, in reality civil-military relations are far more complex though and not as easily and clearly separable as strategic theory and the discourse's self-understanding purport. Nevertheless, this notion has long been anchored in the knowledge community from notable past theorists like Carl von Clausewitz up until today - not least because Clausewitz still constitutes a major component of strategic teaching. This self-image of what strategy does obviously also has a bearing on the understanding of necessity.

In its extant form, this knowledge community regards strategy as 'doing what is necessary' and therefore identifies with the notion of military prudence. Military strategy is positioned between policy goals usually framed in terms of national security on the one hand and the restraints set by international law on the other. Within these boundaries, strategy finds military solutions to achieve the stipulated goal within the given constraints. Hence the understanding of necessity is really a function of this notion of military prudence - doing what is required to achieve the goals. As shown in this chapter, there is a more prescriptive conceptualisation of necessity at the tactical level, which is 'imported' from international law. Though these legal restraints naturally apply to all levels within this discourse, the hierarchically and functionally higher levels take more freedom in their invocation of necessity beyond the prescriptive legal kind. The reason for this is that in this discourse necessity is not inevitably about actual or perceived transgression against the backdrop of the exceptional, but merely an expression of the self-understanding of this knowledge community, which is imbued by a notion of prudence that underpins all actions - licensing or restraining - at all levels.

This instrumental self-image also finds expression in the discourse's connection to other knowledge communities. Though it has points of connection with international law and is subject to the legal restrictions residing in it, strategy is more pragmatic than the prescriptive-axiomatic international law discourses. Likewise, even though the goals for the strategy knowledge community are set by politics, and hence there is a connection, strategic theorists and practitioners alike espouse a separation between politics and strategy. Strategists see their community instrumentally as a transmission mechanism that realises policy goals, which are determined through political processes and for whom they are not responsible. Senior officers, despite being atop their own chain of command and in charge of designing military strategy, have for the most part no problem in deferring to policy choices made by others outside their knowledge community - though mostly with some of their input. Thus, "just as soldiers defer the work of conscience to their commander, the general defers policy determinations to those who have the responsibility for the common good".⁸⁰ They regard the responsibilities and objectives of their community as the pragmatic realisation of these goals. Necessity, however, does not refer to the substance of the policy or why there is a political requirement to set them in the first place. Rather, the discourse as such is imbued with a notion of necessity. Given the pragmatic and instrumental self-image, necessity has to be seen as the *raison d'être* of the knowledge community - doing what is necessary, without too much concern for the 'what'.

⁸⁰ G S Davis, *Warcraft and the fragility of virtue* (Eugene, Oregon: Wipf & Stock, 1992), p.101.

Chapter 5: *Staatsräson* - Necessity as Decisiveness and Exception

“The laws of necessity, of self-preservation, of saving our country when in danger, are of a higher obligation...”

Thomas Jefferson

“All politicians will allow, and most philosophers, that reasons of state may in particular emergencies dispense with the rules of justice...But nothing less than the most extreme necessity”

David Hume

Introduction

Just as necessity in military strategy, discussed in chapter four, maps onto *in bello* international law, the notion of a necessity of state, in turn, pertains to *ad bellum* considerations. Geoffrey Best described both of the aforementioned as “blood-brother[s]” based on their close conceptual kinship, calling the combination of both “twin progeny of the general concept of ‘necessity’ *tout court* which finds its place in the analysis and definition of Statecraft”.¹ This chapter will focus on political necessity invoked in the name of the state, as an expression of the requirement of the political community to take a certain course of action. This, of course, evokes notions of political Realism - one of the principal theories of International Relations and probably the primary way of theorising international politics in policy circles. The conceptualisation of *Staatsräson* used in this chapter describes a logic by which the actions of a state and its decision makers are not only guided by concern for the survival of the state and, more generally, the pursuit of its interests, but also by the notions of decisiveness and exception that go hand in glove with it.² The focus of this examination will lie on policy documents illustrating the praxis of *Staatsräson* and the historiography of *Staatsräson* itself.

¹ G Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld and Nicolson, 1980), p. 47. Emphasis quoted from original.

² This broader conception distinguishes it from ‘conventional’ IR realism, see for example D Bell, “Introduction: Under an Empty Sky - Realism and Political Theory”, in D Bell (ed) *Political Thought and International Relations: Variations on a Realist Theme* (Oxford: Oxford Univ. Press, 2008), p. 2.

This chapter is divided into four parts. The first section of this chapter will provide an illustrative example of the usage of the concept in contemporary security policymaking. To this end, the first section will investigate how necessity has been incorporated into the National Security Strategy of the present and past US administrations. This will not only reveal a varied usage of the concept in current policy making, but hint at an understanding of the concept that will be laid bare in the remaining sections of the chapter. The second section will then investigate the diachronic element in the understanding of necessity in this discourse. This discourse is characterised by notions of reason of state, which in its modern usage of the concept has been subsumed under different terms such as *Realpolitik*. It is reason of state and its understanding over time which will be the focus of this chapter though the origins of meaning on *Realpolitik* will be touched upon as well, highlighting their different roots, which in turn helps to explain the complex conceptualisation of necessity in this discourse today.³ While this helps to further our understanding of the origins of the understanding of necessity, it does not necessarily contribute to a sharper definition. To this end, the third section will attempt to delineate a clear conceptualisation of necessity and provide a theoretical underpinning building on the foundations laid by Friedrich Meinecke's concept of state necessity [*Staatsnotwendigkeit*], combined with Schmittian notions of the prerogatives of states with respect to decisiveness and exception. With this last component, the chapter will provide the usual analysis in its last section before concluding.

This chapter will show that in this knowledge community necessity can be seen as a function of the logic of *Staatsräson* and its underlying value basis prizing the survival of political community. Thus, the invocation of necessity in this knowledge community seeks to provide exceptions to rules, that is to say permission for the derogation of norms, which are in turn based on the principle motivation of preserving political community and pursuing the interests of the state. While the knowledge community is wider and less defined than those discussed in the preceding chapters, it is nevertheless defined as a community through the common understanding of necessity as an expression of the logic of reason of state. As the quotes at the outset of this chapter indicate, this logic demands whatever action is required - deemed necessary - to preserve the state, its territorial,

³ See for example G Lenz, "Zur Lehre von der Staatsräson", *Archiv des öffentlichen Rechts* 48 (N.F.9), No. 3 (1925), in which his inquiry takes the form of a simple conceptional history of reason of state.

political and social integrity.

Contemporary Reason of State

As starting point, this first section of this chapter will examine how the concept of necessity is used in the formulation of policy within this discourse. As the examination in this thesis focuses on the understanding of the concept of necessity in relation to war and conflict, this will be achieved specifically through the examination of policy documents on national security. Given its availability and the importance apportioned to this document, this will be done through the examination of the National Security Strategy (NSS) of the United States. The NSS is a policy document that has been produced and released at least once by each of the past four presidential administrations and details their respective views on national security, how security can be achieved and where the priorities lie therein. Though some administrations produced more than one NSS during their presidential term(s), the NSS is for the most part a carefully crafted document that sets out the long-term strategic outlook and beliefs of the respective administrations and does not denote day-to-day security whims. Neither the type of document, nor the concrete example of the United States is meant to provide insights in and of themselves. Rather, the example was chosen for illustrative purposes of the above outlined discourse and the understanding of necessity we can encounter therein. Thus, this is not meant to be a fully-fledged case study analysis, but as a heuristic device that helps to illustrate how political necessity in relation to war and conflict is broadly conceived by states and political communities, which in turn informs the unfolding examination and analysis of this chapter. This section will look at what each administration declared as necessary in terms of its national security strategy, where there are overlaps and where there are differences.

Starting with the NSS of the current administration of President Trump, we can see immediately how the notion of political necessity is woven into the expression of security policy. In its introduction of this policy statement is described as an “America First National Security Strategy”, clearly stipulating the guiding principle, which in turn determines possible courses of action that may be deemed to be necessary. More importantly, the document also characterises the strategy as “principled realism that is

guided by outcomes, not ideology”.⁴ The Realism in question here pertains to an outlook on international politics encapsulated in the International Relations (IR) theory of the same name, which is associated with the pursuit of security and self-interest of states in an anarchic international system. The political necessity in the Trump NSS follows in that mould, advocating the preservation of “peace through strength” with the expressed notion that military force will be used if necessary.⁵ The section of the NSS dedicated to the above is led by a Donald Trump quote, which highlights the need for well-equipped armed forces to be able to act on political necessity. He is quoted as saying that the military will act “quickly and decisively, and, when necessary, to fight, to overpower, and to always, always, always win”.⁶ Thus, the NSS of the Trump administration clearly expresses two things; firstly, it provides the general outlook of the administration on international politics through their stated priority of ‘America First’ and its concomitant self-ascribed realism. It is this realism, seeing things for what they are, that provides the basis on which to decide on what is necessary. Thus, secondly, the NSS repeatedly makes clear that the administration reserves the right to use military force when the aforementioned political outlook deems it as necessary, highlighting the decisiveness element of the concept.

In some ways, the Trump NSS is not that different from the security policy of his predecessor. The Obama administration also repeatedly states in its first, as well as in its second NSS that the United States reserves her right to use force when deemed necessary.⁷ Where both respective security strategies differ is that the Obama administration did provide much more specific political context that would cause them to invoke necessity, such as “to defend [the United States] and allies or to preserve broader peace and security including by protecting civilians facing a grave humanitarian crisis”.⁸ Additionally, the Obama administration went to greater length to make clear that the use of force, while sometimes necessary, would be a last resort that will be carefully considered against its

⁴ White House, National Security Strategy of the United States, December 2017 [hereinafter Trump NSS], p.1, accessed at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>, retrieved on 19.12.18.

⁵ Trump NSS, p. 4.

⁶ Ibid., p. 25.

⁷ White House, National Security Strategy of the United States, May 2010 [hereinafter Obama NSS], pp. 12-3, 22, accessed at <http://nssarchive.us/national-security-strategy-2010/>, retrieved on 19.12.18 and White House, National Security Strategy of the United States, February 2015 [hereinafter Obama NSS 2], see eg. p.8, accessed at <http://nssarchive.us/national-security-strategy-2015/>, retrieved on 20.12.18. In the following I will rely primarily on the first NSS of the Obama administration, given that the second document was only in force for the last year of the administration.

⁸ Obama NSS, p.4.

costs.⁹ Therefore, while the Obama administration did stipulate a form of political necessity in its NSS, it differed on the substantive foundation of what constitutes such political necessity. Whereas the Trump administration is expressly orienting its security priorities along the (perceived) self-interests of the United States and concomitantly defining political necessity as decisively pursuing the same, its preceding administration was at pains to qualify the security and self-interest of the United States as being aligned with allies and the international community. In short, while either administration represents different policy positions and though they are situated at different ends of the political spectrum, both reserve the right to act on a (perceived) political necessity rooted in their respective policy positions.

This can also be found when comparing the NSS documents created by the George W. Bush and Bill Clinton administrations respectively. While the former, in the aftermath of the 9/11 attacks, highlighted that it reserved the right to use force unilaterally if necessity demanded it in the pursuit of security and state interest, the latter, though still reserving the right to invoke necessity for the use of force, repeatedly points out its commitment to multilateralism and exhausting all other options before the use of force.¹⁰ Here, again, we can observe that allusions to necessity in the name of political and state interests are not restricted to a single political position or constrained to parts of the political spectrum. Rather, necessity can be found across the spectrum, where different administrations have stipulated when force would become necessary in the pursuit of a political objective. One important difference becomes apparent in both of the aforementioned examples however. When necessity is invoked in a power political and national interest context - that is to say in the context of what is broadly termed reason of state - the invocation of necessity is linked to timeliness and decisiveness, both of which are important signifiers as to how necessity is understood and how it is invoked in this context.

In both instances the invocation of necessity is meant to render a particular course of action not only possible but also as required, either because it is prudent to make such a political

⁹ Ibid.

¹⁰ White House, National Security Strategy of the United States, September 2002 [hereinafter Bush NSS], accessed at <http://nssarchive.us/national-security-strategy-2002/>, retrieved on 19.12.18; White House, National Security Strategy for a Global Age, December 2000 [hereinafter Clinton NSS], accessed at <http://nssarchive.us/national-security-strategy-2000/>, retrieved on 19.12.18. The Clinton administration was the last administration to produce a National Security Strategy each year (bar 1999). The above-cited NSS is deemed a representative example of the administration's overall approach for the purposes of this discussion.

decision, or because it is deemed to be of utmost urgency to adopt said course of action. Thus, in almost all cases, necessity denotes a perceived political requirement to act in a certain way that would otherwise - without the declaration of it being necessary - be either deemed beyond a reasonable course of action or not of sufficient importance to be addressed immediately. The difference then lies in the emphasis that is put on when this course of action is implemented and how the decision is arrived at. The Clinton and Obama NSS documents both contain repeated commitments to the exhaustion of all other means before resorting to the use of force.¹¹ Likewise, both documents also have commitments to multilateral action in concert with allied states, despite reserving the right to act unilaterally.¹² Of course these elements do contrast with the notion of timeliness and decisiveness, as exhausting other options before acting and coordinating multilateral approaches speak to neither. The current administration and the Bush administration put different emphases in their respective NSS documents. The Bush administration made decisive action, in the form of the pre-emptive use of force, one of the principles of its security strategy.¹³ The Trump administration on the other hand values unilateral action in its national security, premised on an America First policy that shuns away from spending time on building consensus in multilateral action.

In the name of the state, their policy priorities have to be acted on in a timely and decisive manner. In this form of political necessity, it is the needs of the state that require decisiveness and urgency and those provide exceptions for courses of action that would otherwise be deemed beyond the pale. In this rationale it is the state as locus of political power and community that prescribes this requirement to act. In other words, this particular form of political necessity follows the logic of Realism and reason of state, and, in its contemporary usage of *Realpolitik*. That is to say, they follow the logic that the self-interest and security of the state are primary goals and can be achieved through amassing power. This then renders the concept of necessity a political one in which it is invoked in relation to war and conflict in the name of the state. Unfortunately, this is not a clearly

¹¹ See Clinton NSS subpoena “The Decision to Employ Military Forces”, and Obama NSS for example p. 22.

¹² Ibid.

¹³ President Bush also highlighted the importance of pre-emptive action in his administration’s security policy in a speech at the West Point Military Academy, where he stated: “If we wait for threats to materialize, we will have waited too long” and then to declare that “our security will require all Americans [...] to be ready for preemptive action when necessary to defend our liberty and defend our lives”, thereby linking the invocation of necessity to the survival of the state. Quoted in F E Wester, “Preemption and Just War: Considering the Case of Iraq”, *Parameters* 34 (2004-5), p. 23.

delineated discourse with a concomitantly clearly delimited knowledge community.

Though the terms reason of state, *Realpolitik* and Realism are often used interchangeably, they do take on different meaning and have in particular historically represented different concepts.

Realpolitik, Staatsräson and Necessity of State - The Concept through History

Contemporary policy documents invoke necessity in the context of national security and as such in the context of the use of force, conflict and war. This form of political necessity emerges out of a logic and rationale of the (nation) state, centred around its interests and security. In contrast to previous chapters, there is however no clear-cut definition of this form of political necessity. It is usually broadly delineated as reason of state or *Realpolitik*, two terms that are today, mistakingly, used interchangeably to indicate an understanding of zero-sum power politics regarding the relations between states. To provide a rough working definition, in this perception, states are ultimately not restricted in their actions and can choose them according to what is deemed to be necessary. Whether that is an America First approach to security policy or to choose unilateral and pre-emptive action to ensure security. As mentioned above, however, the usage of these two terms does not follow a clear definition of what they are supposed to imply. Rather, they just provide a rough outlook on the importance of the state as a political unit and locus of community. In order to elucidate their meaning and in order to sharpen the outline of the discourse and knowledge community at hand, this section will explore the diachronic dimension of this conceptualisation of political necessity. The origins of reason of state and *Realpolitik* will be examined and how their respective meanings have evolved to its contemporary usage, adding depth to this understanding of necessity in relation to war and conflict.

Classical World

The notion of reason of state - that is to act in the name of interests and survival of the state - dates as far back as the Greek city states and the Roman Empire.¹⁴ Thucydides' account of the Peloponnesian War, for example, offers insights on the understanding and invocation

¹⁴ G Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton: Princeton Univ. Press, 1964), p. 242.

of necessity by the Athenians that follows the logic of reason of state.¹⁵ The Athenians justified their behaviour through a value-understanding of their (city-) state and what it represents. Based on this understanding they were compelled to act in the state's interests and to preserve it against perceived threats. Roman law also made allowances for necessity in the form of *ius necessitatis*, or law of necessity, from which many Renaissance thinkers later borrowed - more on this in due course.¹⁶ Therefore, the earliest roots of the reason of state logic can be traced back to the classical world. More importantly, the understanding and invocation of necessity evident in our contemporary policy context is also found during this period. The state was of paramount value due to it being the locus of political power and the principle means by which societies and communities were delineated. As such the aims and needs of the state, in this conceptualisation, are qua definition a political necessity of the state, which in turn implies that said necessities determine the unimpeded actions chosen by the state.

Middle Ages

This logic of reason of state can also be found in the medieval European state system, although not in identical fashion to the classical world. The Middle Ages saw "Christian ethics and Germanic jurisprudence" as obstacles "to the growth of the State and its 'reason'".¹⁷ While the overall logic of the reason of state still existed in essence, it was morphed around the different obligations demanded by political communities and the broader 'tent' of the Catholic community, which encompassed several political entities in its own right. The emerging jurisprudence and a well-developed canon of Christian ethical principles served as an impediment to the outright exercise of reason of state during the high Middle Ages. The notion of reason of state was however no better defined than in either the classical, or today's world. Generally, it was still seen as the preservation of the common welfare mostly enshrined in political community, but also expanded to the Christian religious community transcending the individual, territorial state.¹⁸ It was

¹⁵ P J Ahrensdoerf, "Thucydides' Realistic Critique of Realism", *Polity* 30, No. 2 (Winter 1997), pp. 241-244.

¹⁶ M Viroli, *From politics to reason of state: The acquisition and transformation of the language of politics 1250-1600* (Cambridge: Cambridge Univ. Press, 1992), p. 271. Viroli is building on Alberto Fabri here, who also wrote that "Reason of state [...] was born with governments, and as long as there are governments there will be reason of state" (p.271).

¹⁷ Post, *Medieval Legal Thought*, p. 242; see also F Meinecke, *Die Idee der Staatsräson in der neueren Geschichte* (München: Oldenbourg, 1924), pp. 33-36.

¹⁸ Post, *Medieval Legal Thought*, 301ff.

therefore the latter part of the concept of reason of state which was differently conceptualised. Rather than having an understanding of state that strictly delimits the membership of political community, community was a more encompassing concept. Following from this, it was not strictly considerations for the state that determined what ‘reason’ to follow, but an idea of general welfare going beyond this construct.

Nevertheless, the overarching idea of adopting required means and courses of action in order to preserve and defend a community - albeit more broadly defined than just the state - was indeed one of the medieval world as well. This was enshrined in the concepts of *utilitas regni* and *necessitas regni*, on which basis the “notion that the public authority of a realm had the right to demand contributions in case of emergency” was justified.¹⁹ Thus, political necessity, in this understanding, is also rooted in adopting a course of action in response to an emergency threatening the welfare of the community. More so, necessity thusly invoked, allows the course of action adopted in response to be an exception to any prevailing norms and thus ties in with the contemporary conceptualisation of necessity outlined above. In the same mould, “the papacy itself admitted that war in defense of the *patria* was lawful even during Lent” as this was considered to be “a case of urgent necessity”.²⁰ This example not only demonstrates how the concept was extended beyond the state to religious communities, but also that the invocation of necessity not only renders courses of action admissible that otherwise would not be, but also that their timely adoption is encapsulated in the invocation of the concept.

This understanding of reason of state and by extension of the concept of necessity, largely rested on the advancement of Thomist propositions on laws and the state serving the common good, with the added caveat that “in exception cases”, when the strict adherence to laws would be “injurious to the common weal, discretion must be exercised”.²¹ Building on this foundation, William of Ockham established his “doctrine of necessity”, which in turn provided the “basis for extraordinary measure by the public authority in time of emergency” and which was “based on the conviction that the general welfare was overriding consideration in all state activity”.²² This of course lies at the heart of the rationale

¹⁹ J B Morrall, *Political Thought in Medieval Times*, 3rd ed. (London: Hutchinson & Co, 1971), pp. 60-1.

²⁰ Post, *Medieval Legal Thought*, pp. 436-7. Emphasis quoted from original.

²¹ C C Bayley, “Pivotal Concepts in the Political Philosophy of William of Ockham”, *Journal of the History of Ideas* 10, No. 2 (1949), p. 200

²² Ibid., 201. It should be added that while Ockham frequently employed the trinity of *epieikeia*, *bonum*

espoused in some of the policy documents examined above. This rationale follows the ‘reason of state’, the logic that the welfare of the state, or, more generally, of a community, dictates what can be deemed a reasonable course of action in its defence. An integral component of this logic is that this reasoning goes beyond restraints from ethics, laws and regulations. The necessity enshrined in this reasoning supplies the exception that permits actions otherwise not available. In the medieval world, the application of this reasoning was somewhat different, as outlined above, but the abstract logic was retained. As the concept we know today, reason of state was properly formed during the power struggles of the *Renaissance*, but the above clearly demonstrates that the “doctrine had medieval antecedents; the idea that the sovereign can take extraordinary emergency measures for the common good is a step on the way to Machiavellianism”.²³

Renaissance

In Machiavellianism this logic was put to the extreme - it was not only about actions being legitimised with reference to reason of state, through weighing them against ethical and legal impediments to such actions, but it was regarded as an explicit rejection thereof.²⁴ Machiavelli’s use of the concept of reason of state [*Ratio Status*], as well as of necessity, is in keeping with how they are understood today. I will not proffer an argument here on whether Machiavelli was an advocate of Republicanism or rather the purveyor of a theory of pure power politics. Important to this diachronic examination of necessity in the context of reason of state is how Machiavelli contributed through his writings to the latter - intentionally or not.²⁵ In the first place this hinges on Machiavelli’s account of necessity, an element which complements *virtù*, a form of prudence, and *Fortuna* which he also employs in his political theory. In his conception, necessity is what makes men do good, as a situation with little or no options forces them to act,²⁶ going so far as to say that the justness of a war hinges on the question whether one was compelled to use force.²⁷ It is

commune and necessitas, as arguments of license to the state and its authority, he did also consider the possibility that the same trinity of concepts could restrain imperial authority, see Ibid. 206.

²³ Morrall, *Political Thought in Medieval Times*, p. 135.

²⁴ M Viroli, *From politics to reason of state*, p. 272.

²⁵ Bain and Nardin refer to Machiavelli as a “theorist of necessity and reason of state”, see W Bain and T Nardin, “International relations and intellectual history”, *International Relations* 31, No. 3 (2017), p. 214.

²⁶ N Machiavelli, *Discourses*, I, 3, “Machiavelli: The Chief Works and Others”, Vol I, translated by Allan Gilbert (Durham: Duke Univ. Press, 1989), p. 201f.

²⁷ *Discourses*, III, 12, p.461. “A war has justice for those to whom it is necessary”.

this emphasis on decisiveness that is characteristic of his conceptualisation. This essence is captured by David Boucher who states: “Necessity focuses the mind and restricts choices to essentials”.²⁸

Applying this understanding of necessity to the political realm and specifically to the state yields the conceptualisation of reason of state in Machiavelli’s writings. Necessity is the element that urges decisiveness in action in order to follow what the logic of reason of state dictates. The above-mentioned restriction in choice in this context has to be understood as relative to the moment of decision. In general,

“[n]ecessity will often require courses of action that ordinary morality abjures. The prudent man of virtù, ambitious for glory and the betterment of the common good, seizing the opportunities that fortune presents, will do what is necessary for the preservation and promotion of the welfare of the state”.²⁹

In this succinct summary of Machiavelli’s conceptualisation of reason of state, Boucher also provides a generic definition of reason of state that can be more or less applied to the understanding of the concept during subsequent time periods up until the present day. Boucher touches on the key elements in the understanding of the concept, as examinations by Jonathan Haslam or Herfried Münkler have shown to be present in most time periods and historical-political contexts.³⁰

The medieval state, centred on the maintenance of justice [*Rechtsbewahrstaat*], was transformed to a power state [*Machtstaat*] through the works of Renaissance thinkers, and in particular through Machiavelli.³¹ Concomitantly, a new political idea developed in which “reason of state [is] understood as unconditional imperative of state self-preservation”.³² This is very much the understanding of the concept conventionally held today and has become synonymous with his name itself. Thus, Machiavellianism has become the expression of pure self-interested power politics either in the name of a single ruler, or, more broadly, in the interest of the state whereby the self-interest supersedes any

²⁸ D Boucher, *Political Theories of International Relations: From Thucydides to the Present* (Oxford: Oxford Univ. Press, 1998), p. 132.

²⁹ Ibid., 138.

³⁰ See J Haslam, *No Virtue like Necessity: Realist Thought in International Relations since Machiavelli* (New Haven: Yale Univ. Press, 2002) and H Münkler, *Im Namen des Staates: Die Begründung der Staatsraison in der Frühen Neuzeit* (Frankfurt a. M.: S Fischer Verlag, 1987).

³¹ Münkler, *Im Namen des Staates*, p. 49

³² Ibid. Translation is my own.

restraints by rules, laws or conventions. The understanding of necessity is then linked to this conceptualisation of the state as ‘reason’, that is to say the determination of ‘what is necessary’ is derived from the logic of the reason of state. The development towards the power state and its associated reading of necessity and reason of state developed further from the Renaissance onwards towards the modern, sovereign power state acting according to its own reason culminating in modern notions thereof discussed below.³³ The outlook that comes with this understanding of reason of state and the usage of necessity is therefore closely associated with the International Relations theory of Realism. As the name indicates it purports a realistic view of international politics free from idealistic misconceptions. As such, it posits that this broad understanding of reason of state - self-preservation and resolute pursuit of the state’s self-interest - is required in an anarchic international system. Consequently, the usage of the term reason of state has become mixed together with Realism and the concept of *Realpolitik*.

Modern Notions of Reason of State and Realpolitik

The notion of *Realpolitik* is often used interchangeably with the above-mentioned conceptualisation of reason of state. Though its usage has become synonymous with this underlying idea of state self-preservation dictating the actions of states above any concerns or restraints thereon and associated with power-focused statesmen such as Bismarck, the roots of the concept reveal a very different understanding. Not only is the term itself German in origin, but the concept originally was also intricately linked to German history, more specifically to the revolution of 1848.³⁴ The term was coined by Ludwig von Rochau in his work *Grundsätze der Realpolitik* as a counterweight to the idealist - if not utopian - streaks within the left-liberal block at the time. Von Rochau set his vision of more realism and pragmatism and of more *Realpolitik* against it.³⁵ He was not propagating a reactionary

³³ This expression of the sovereign state as one of near untrammelled freedom and power can be found in Jean Bodin’s conceptualization of the state and subsequently in German thinkers such as Fichte and Hegel. See J Bodin, *On Sovereignty: Four chapters from The Six Books of the Commonwealth*, transl. J H Franklin (Cambridge: Cambridge Univ. Press, 1992); J G Fichte, *Foundations of Natural Right: According to the Principles of the Wissenschaftslehre*, transl. M Baur (Cambridge: Cambridge Univ. Press, 2000); and G W F Hegel, *Elements of the Philosophy of Right*, transl. H B Nisbet (Cambridge: Cambridge Univ. Press, 1991).

³⁴ J Bew, *Realpolitik: A History* (Oxford: Oxford Univ. Press, 2016), pp. 17-35.

³⁵ A L von Rochau, *Grundsätze der Realpolitik, Angewendet auf die staatlichen Zustände Deutschlands*, Vol. 1 (Stuttgart: Karl Göpel, 1859) and A L von Rochau, *Grundsätze der Realpolitik, Angewendet auf die staatlichen Zustände Deutschlands*, Vol. 2 (Heidelberg: J.C.B. Mohr, 1868). For coining of the term see Bew, *Realpolitik*, part I; and also D Kelly, “August Ludwig von Rochau and Realpolitik as historical political theory”, *Global Intellectual History* 3, No. 3 (2018).

worldview, but tried to provide a more realistic approach with which liberal goals should be pursued.³⁶ Though his conception of *Realpolitik* was connected to liberal goals, his account of the concept foregrounds the importance of the state as sovereign entity in politics. Sovereignty in turn is not regarded as a natural occurrence nor a right, but a reflection of the state's power.³⁷ It is this focus on the 'ugly' facts of politics that hints not only at its later synonymous usage with reason of state, but also its connection to the International Relations theory of Realism.

Von Rochau's account of *Realpolitik* was quickly taken out of its original context and its understanding changed accordingly from a very specific set of propositions in the pursuit of liberal politics during a time of political upheaval, to an abstract notion of power politics conducted by the state. The concept was subsequently picked up by other thinkers and theorists who saw in this nascent emphasis on realism over idealism and the associated cold power politics a concept that could be further developed. In particular Heinrich von Treitschke was influential in transforming the understanding of the concept of *Realpolitik* from von Rochau's very historically specific focus to a more general proposition on the importance of the power of the state and its preservation in the mould of Machiavellianism.³⁸ This understanding was also explicitly expressed in relation to war, in which Treitschke saw "civilizational power" and hence deemed war to be a necessity.³⁹ By way of theorists such as von Treitschke and later Meinecke⁴⁰, whose understanding of the concept will be further discussed below, the concept eventually entered the English-speaking world via E.H. Carr, one of the foremost realist thinkers in International Relations theory.⁴¹ Thus, a concept focused on the necessity for power considerations in the pursuit of (liberal) political goals, had become a globally recognised concept denoting the primacy of power politics, the state and its interests over any ethical or legal restraints.

³⁶ Kelly, "August Ludwig von Rochau", p. 304.

³⁷ Bew, *Realpolitik*, pp. 31-5.

³⁸ Ibid. pp. 68-76.

³⁹ Ibid. p.121.

⁴⁰ von Treitschke linked the concept to the necessity of war, see H von Treitschke, *Politics*, Vol. 1, transl. B Dugdale and T de Bille (New York: MacMillan, 1916), p. 14 and that war is integral to the existence of states, *ibid.*, p. 65. In a letter to his editor Salomon Hirzel, discussing the possible production of a volume on the Count of Cavour, Treitschke exclaimed that an essay on Cavour would show the audience "what brilliant *Realpolitik* is" [translation my own], see M Cornicelius (ed.), *Heinrich von Treitschkes Briefe*, Vol. 2 (Leipzig: S Hirzel, 1913), pp. 437-8. See also more generally Bew, *Realpolitik*, pp.76-81, p. 121.

⁴¹ Ibid., pp. 150-81.

The above-outlined diachronic dimension to both, *Realpolitik* and reason of state therefore offers intriguing insights into how each respective concept is understood today and, more importantly, why and how they came to be used interchangeably, to denote crude forms of power politics. Moreover, this brief historical survey further helps to chart the understanding of political necessity and why this knowledge community understands and invokes the concept the way it does. What becomes equally apparent is that the interchangeable nature with which the terms *Realpolitik* and reason of state are employed speaks to the only coarsely defined underlying concept. Both notions are frequently deployed today to express either an abstract sense of cold power politics, the adoption of a realist over an idealist worldview, or the trumping of interests of the state over ethical and legal restraints, or even an amalgamation of all of the aforementioned. In order to provide a more coherent usage for the discourse and this knowledge community, the following section will distil from theoretical works the understanding of the concept still prevalent in the extant discourse.

Politics, States, Necessity and War & Conflict

The two preceding sections on necessity in contemporary policy and the historical development of reason of state have shown that the underlying basis of this discourse and this knowledge community are only insufficiently defined. Examining the concept of necessity in the context of politics as it pertains to war and conflict inevitably leads one to consider the theory of political Realism prevalent in the study of international politics as a well-defined theoretical underpinning to the discourse. Realism in its various guises has dominated the academic discipline of International Relations almost since its inception and continues to do so even to this day. As with the discipline of IR itself, Realism is also mostly preoccupied with the question of how conflicts and wars emerge within the international political system. The explanation proffered by Realism is based on states as the principle actors in the international domain. All of these factors seemingly make it relevant to the present investigation into the understanding of political necessity in relation to war and conflict as invoked by states.

As has been pointed out in the preceding sections however, while this chapter does examine political necessity as an expression of the state, it will not rely on a realist theoretical underpinning - at least not in the prevalent variants of IR theory. Rather, this

chapter will examine the understanding of necessity in the context of a broader discourse, which encompasses a wider set of factors relevant to the conceptualisation of necessity. This section of the chapter will outline the broader discourse of reason of state and how the concept of necessity is understood and invoked within it. After a brief outline of Realism, exhibiting its insufficiency as theoretical model for this discourse, the remainder of this section will discuss Friedrich Meinecke's conception of *Staatsräson* and how it encapsulates necessity, before turning to Carl Schmitt's political theory delivering on other aspects of the understanding of necessity.

Realism is acknowledged, by most introductory text books on the subject and even by critics of its rationale, to be the theory that has dominated the study of international politics since International Relations became a separate discipline of academic inquiry.⁴² The theoretical foundation of Realism is broad and comes in various theoretical strands. Common to all forms of realist theorising is an emphasis on the state as principle unit of investigation and the focus on order, power and security in the international system of individual states. Among its variants, it is probably Neo- or structural Realism that has been the most prevalent in IR scholarship in recent years.⁴³ In this form, Realism almost exclusively highlights structural reasons in explaining the behaviour of states vis-à-vis each other, in particular with respect to power and security as its main currency, ultimately pertaining to the area of conflict and war focused on in this inquiry.⁴⁴ This stands in contrast to classical Realism, which is not as parsimoniously constructed in its theoretical set up and, thus, much more permissive with respect to other explanatory factors of actions in international politics not situated at the international level. Such factors include domestic politics and the influence of some individual agency for example through

⁴² See e.g. Dunne et al. (eds.) *International Relation Theories: Discipline and Diversity*, 2nd ed. (Oxford: Oxford Univ. Press, 2010), or M Griffiths (ed.) *International Relations Theory for the Twenty-First Century* (Oxon: Routledge, 2007) for just two examples of textbooks that prominently discuss the importance of realism for the discipline of IR (and beyond). For critics acknowledging its importance see e.g. M C Williams, *The Realist Tradition and the Limits of International Relations* (Cambridge: Cambridge Univ. Press, 2005), a critical re-examination of some of the core realist theorists, which acknowledges that "Realism remains at the heart of theoretical and political dispute in world politics" (p. 1). Equally, Ken Booth, a noted critic of realist thought, acknowledges the influence and role of the theory in the introduction to his edited volume *Realism and World Politics* (London: Routledge, 2011).

⁴³ For the two principle works in structural realism see K Waltz, *Theory of International Politics* (New York: Random House, 1979), who established the focus on structural factors in realism and JJ Mearsheimer, *The Tragedy of Great Power Politics* (New York, W. W. Norton & Company, 2001) for a more recent, 'offensive' variation of structural realism.

⁴⁴ J Donnelly, "Twentieth-Century Realism", in T Nardin and D R Mapel (eds.) *Traditions of international ethics* (Cambridge: Cambridge Univ. Press, 1992), which provides a good and concise overview of the main tenets of structural realist theory.

political leaders.⁴⁵ Corresponding to its dominance in the academic discourse, realist theories have also undergirded the conceptualisation of international politics among foreign policy practitioners and in the practice of statecraft more generally and thus underlies most decision-making processes in this regard and in particular in relation to decisions on war and conflict.⁴⁶

The above is neither meant to offer a full account of the theory of IR Realism nor as a full discussion of the history of the realist tradition. What is relevant to the present inquiry, however, is that the various guises of realist IR theory are not sufficiently equipped to provide an account of the conceptualisation of necessity in this discourse - in terms of theory as well as considering the praxis of invoking necessity in the knowledge community. In the realist view, necessity is derivative of the forces of the international system that compel states to act in certain ways. What is absent is a broad account of power politics that includes the factors identified above - urgency and exception. Rather, the broader view of *Realpolitik* and *Staatsräson* offers a more compelling notion of how necessity is understood and invoked. Many realist thinkers and otherwise self-described realists like to think their views in the tradition of *Realpolitik* and reason of state [*Staatsräson*] with its general notion of the importance of the state and power of the state.⁴⁷ In staking out the relevant, extant knowledge community, this tradition of reason of state and *Realpolitik*, with its links to the Machiavellian conception of the concept, is the more relevant one.

The discourse of political necessity in this knowledge community - that is the invocation of

⁴⁵ S Forde, "Classical Realism", in T Nardin and D R Mapel (eds.) *Traditions of international ethics* (Cambridge: Cambridge Univ. Press, 1992). The theoretical strand that comes closest to consider all theoretical aspects (but still does not fit in terms of the praxis in this knowledge community) is Neoclassical realism, see G Rose, "Neoclassical Realism and Theories of Foreign Policy", *World Politics* 51, No. 1 (1998) for an overview.

⁴⁶ See eg Rose, "Neoclassical Realism" and S M Walt, "International Relations: One World, Many Theories", *Foreign Policy* 110 (Spring, 1998), who highlights the importance of realist thought in foreign policy making. For a critical examination of realist foreign policy analysis and its limitations see A Wivel, "Explaining why state X made a certain move last Tuesday: the promise and limitations of realist foreign policy analysis", *Journal of International Relations and Development* 8, No. 4 (2005). It also bears mentioning that even though specific policies are often justified with recourse to realist tenets by their architects, they are then often subsequently criticised as being in contravention of those very principles by self-proclaimed realist thinkers. See D Zarnett, "What does Realist Foreign Policy Activism tell us about Realist Theory?", *Foreign Policy Analysis* 13 (2017) on this phenomenon.

⁴⁷ On the link between 'modern' realist International Relations theories and the broader tradition enshrined in the conceptions of *Realpolitik* and *Staatsräson* see e.g. Bell, "Introduction" and R N Lebow, *Tragic Vision of Politics: Ethics, Interests and Orders* (Cambridge: Cambridge Univ. Press, 2003), in particular chapter two.

the concept of necessity in the political domain - is characterised by the departure point for said invocation - the state. The state, as the principal organisational form of political community and locus of political power, is integral to the rationale of reason of state and the principle lens through which everything is being examined. As mentioned above, Realist theories do not provide an account of the knowledge community entailed in the examination of political necessity. Reason of state not only provides a broader conception of how power and security shape state behaviour in the international system, it also accounts at the same time for those who would invoke the concept of necessity in the name of the state. The knowledge community under investigation here, and thus the focus of this chapter, are self-ascribed *Realpolitiker* who, somewhat crudely put, do what is necessary to preserve the state and pursue its interests. Here, the understanding of necessity and how it is invoked constitutes its own bounded rationality and is contained in a knowledge community, which, in its extant form, is comprised of politicians, policy makers, commentators and academics who identify with the tenets of *Staatsräson*.

The basis of understanding necessity in this knowledge community is premised on Friedrich Meinecke's conception of necessity of state [*Staatsnotwendigkeit*], which he provided in the context of his survey of the development of the idea of *Staatsräson*.⁴⁸ Despite the close to one hundred years since the publication of Meinecke's work, his conceptualisation has aged well and offers a suitable backdrop against which the discourse can be staked out. Indeed, Jonathan Haslam remarks in his *tour d'horizon* of realist thought that Meinecke's influence extends far beyond his own times and that "[a]ll the key realists who followed, consciously or not, built their structure on the foundations he laid".⁴⁹ This statement can be extended to the notion of *Staatsräson* specifically, which Meinecke examined and subsequent generations of scholars referenced.⁵⁰ According to Richard Sterling, Meinecke's conception of the state follows in a tradition of German historicism that at the time was dominated by the question of unification and thus privileged the international over the domestic.⁵¹ In doing so, Meinecke sought to go beyond mere

⁴⁸ Meinecke, *Idee der Staatsräson*. At another point he also talks about a realpolitical necessity [realpolitische Notwendigkeit], p.8.

⁴⁹ J Haslam, *No Virtue like Necessity*, p. 185.

⁵⁰ Meinecke's work on *Staatsräson* has been referenced in a number of works in International Relations and international political scholarship more generally, see e.g. R B J Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge Univ. Press, 1993), p. 33 and H Münkler, *Im Namen des Staates*, for just two very different examples of works referencing the importance of Meinecke's work.

⁵¹ R W Sterling, *Ethics in a World of Power: The Political Ideas of Friedrich Meinecke* (Princeton: Princeton Univ. Press, 1958), pp. 7-8.

utilitarian conceptions of power politics “to comprehend the whole state in terms of its internal composition and its external environment”.⁵² For the purposes of the present investigation we will focus on this very notion of necessity of state within Meinecke’s wider account. It offers, as mentioned above, a concise starting point for an examination of the understanding of necessity in this discourse and to gain an appreciation of how this knowledge community invokes the concept.

Meinecke’s argument starts out by linking the necessity of state [*Staatsnotwendigkeit*] to reason of state [*Staatsräson*], with the former directly telling the ruler “to act in such a way as to preserve the power of the state lying in your hands” and that they “are allowed to act in this way because there is no other way to reach this goal”.⁵³ In just this short quote Meinecke exhibits a number of the factors that make his account different from most strands of Realism and closer to what has been revealed in the policy section above and, thus, all the more pertinent to the present investigation. Firstly, linking both concepts in itself develops his conceptualisation further and provides a useful starting point for the examination of this knowledge community. Meinecke further specifies it as “causal necessity” and describes it as “belonging to the innermost essence of acting according to reason of state”.⁵⁴ Beyond this however, he also makes a reference to a ruler, thereby linking a rather abstract political concept to the concrete practice of statecraft. This, again, is an important aspect in relating the concept of necessity to the usage within this specific discourse and this knowledge community. Lastly, Meinecke also provides the underlying understanding of necessity in this discourse in stating that said ruler is allowed to act to preserve the power of the state “because there is no other way to achieve this goal”.⁵⁵ This implies that the circumstances that compel the ruler to act - that is to say the necessity of state - works as an exception to the rule. What is necessary to preserve the state becomes legitimate by definition.

Necessity of state, in Meinecke’s conception, is characterised by an “exigency” [*Zwangslage*] that compels the state to adopt “defensive and fighting means” in order to protect against threats aimed at the power of the state.⁵⁶ While he defines the necessity of

⁵² Ibid., p. 203.

⁵³ Meinecke, *Idee der Staatsräson*, p. 13. All translations are my own.

⁵⁴ Ibid., p. 7.

⁵⁵ Ibid., p. 13.

⁵⁶ Ibid., p. 6.

state to be arising out of compulsion of circumstance, Meinecke also stipulates that it is always teleological in nature, connected to a purpose and never as an end in itself. This, he also makes clear, is not just an important aspect for the abstract conceptualisation of necessity of state or reason of state but is also evident in the concrete and practical implementation of actions by political leaders.⁵⁷ Thus, Meinecke again makes sure to signal that he believes his conceptualisation to have purchase in the ‘real world’ of politics, rather than merely existing in abstract theories. As mentioned above, because Meinecke does keep one eye on actual practitioners in his theoretical underpinning, and therefore does not neglect an important part of the knowledge community, his approach is the best starting point for providing a coherent underpinning to the understanding of this variation of political necessity. The element of the ruler who has to act on a situation of necessity of state provides the other main line of investigation into the invocation of the concept in this discourse - decisiveness. In this discourse, the understanding of necessity is implicitly linked with the ability of political leaders to arrive at decisions in order to act on the circumstances causing a necessity of state.

Both of these two main lines - exception and decisiveness - in understanding the conceptualisation of necessity in this discourse are in turn related to the dichotomy that Meinecke identifies to be underlying his notion of reason of state. He outlines how *Staatsräson* bridges the divide between the power of the state [*Kratos*] and its ethical conduct [*Ethos*].⁵⁸ Within this dichotomy of power and ethical conduct, Meinecke states that necessity of state is the force that compels the state to shed “the shackles of law and decency” but at the same time contains an “ethical and elementary side”, thus rendering the state and “amphibious” being existing between both domains.⁵⁹ This understanding of necessity renders the concept as an exception to rules and conventions, be they of ethical or legal nature. This conception is, however, not without restrictions. Meinecke conceived of it as a dichotomy that explicitly included *Ethos* and not just in pure terms of *Kratos*, or power.⁶⁰ Moreover, his conceptualisation accounts for the decision maker or ruler that has

⁵⁷ Ibid., p. 7.

⁵⁸ Ibid., pp. 5-6, 12-13.

⁵⁹ Ibid., p. 20.

⁶⁰ While Meinecke always considered it to be prudent not to hide the uglier sides of power politics for fear that concealment of this sort could seduce “the practitioner into ever more reckless violations of moral values” (p. 158), by his own admission he shifted his position over time. In his earlier publications Meinecke was closer to the nationalist position of Treitschke, but the experience of the First World War led him to a more internationalist outlook, rebalancing *Kratos* somewhat towards *Ethos* again, see Sterling, *Ethics in a World of Power*, pp. 10-15 and 202-3.

to arrive at a decision of action. Necessity of state compels action and reason of state guides the charting of the course of action, but the decision for action is the responsibility of said ruling figure. Despite the age of Meinecke's work, the conceptualisation of necessity has not lost its relevance. Indeed, elements of this conceptualisation can be found in other, later theorists and to policy makers of the twentieth century, as has been shown above.⁶¹

Building on this foundation provided by Meinecke, the theoretical conception of political necessity of the state requires further developing. To this end, the works and thought of Carl Schmitt help to expand on the foundation laid out so far. While there has been a recent revival of interest in Carl Schmitt in IR and international political theory, his works are still largely neglected when it comes to theorising of international politics.⁶² Carl Schmitt is of course a controversial person and thinker for a variety of reasons who has been heavily criticised. On the one hand his historic proximity to national socialism, extending so far as him being described as their 'crown jurist', largely rendered him and his theories an afterthought in post-WWII scholarship.⁶³ In addition to this, the substantive aspects of his theories on the state and executive power as well as his anti-liberal stance and his method have also been criticised in and of themselves, independent of the person Carl Schmitt and the historical context of their creation.⁶⁴ It is however precisely Schmitt's account of executive power, sovereignty and the state more generally that help to furnish the theoretical underpinning of the conceptualisation of necessity - in particular with respect to the notions of decisiveness and exception - in this discourse. Given, for example, the notion of pre-emptive action in the security policy of the Bush administration, Schmitt's

⁶¹ Nicholas Rengger, for instance, has picked up on this aspect, stating that "all realist accounts of politics depict the political realm as a realm of 'recurrence and repetition' where the dichotomies between human moral self-image and the necessities of successful political action are unavoidably confronted to the detriment of the former or the collapse of the latter", see N Rengger, "Realism, tragedy, and the anti-Pelagian imagination in international political thought", in M C Williams, ed., *Realism Reconsidered: The Legacy of Hans J. Morgenthau in International Relations* (Oxford: Oxford Univ. Press, 2007), p. 118.

⁶² For recent works on Schmitt's thought in the context of international politics see e.g. W Hooker, *Carl Schmitt's International Thought: Order and Orientation* (Cambridge: Cambridge Univ. Press, 2009); L Odysseos and F Petito (eds), *The International Political Thought of Carl Schmitt: Terror, liberal war and the crisis of global order* (London: Routledge, 2007) and B G Teschke, "Fatal attraction: a critique of Carl Schmitt's international political and legal theory", *International Theory* 3, No. 2 (2011).

⁶³ See the first two chapters of J-W Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven: Yale Univ. Press, 2003) and more generally G Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000).

⁶⁴ See W E Scheuermann, *Carl Schmitt: The End of Law* (Lanham: Rowman & Littlefield, 1999) and Müller, *A Dangerous Mind*, in particular chapter two. For method criticism see J Müller, "Carl Schmitt's method: between ideology, demonology and myth", *Journal of Political Ideologies* 4, No. 1 (1999).

account of decisive action and transgression as exception complements Meinecke's otherwise well-rounded theoretical foundation. Of particular help in elucidating how necessity came to be used in this way, is the 'offensive' usage of concepts, as Schmitt himself liked to frame "concepts as weapons to be mobilized in specific political conflicts".⁶⁵

Schmitt's thought is the next logical step in the theoretical underpinning of the understanding of necessity in this discourse for two main reasons. Firstly, though he hardly ever touches directly on the notion of reason of state, he commented on Meinecke's book on *Staatsräson* and thus created a direct link between both thinkers and, more importantly, between their respective theoretical approaches.⁶⁶ Secondly, Schmitt's work on the state and the political helps to further the theoretical foundation of the conceptualisation of necessity in this discourse. In particular with respect to the two main elements of exception and decision, Schmitt's theory is a logical complement to furnish the theoretical foundation of this discourse of necessity. Schmitt emphasised both the notion of the exception and that of decision and concomitant political authority in his account of the nature of sovereignty of the state and in the fundamental dynamic of the political.⁶⁷ Both of these notions are important to gain an understanding of the conceptualisation of necessity. As mentioned above, Meinecke provides a basis to this end by introducing both notions in the context of necessity of state. For Schmitt, the very idea of political authority is revealed "[i]n moments of crisis (i.e., siege, war, dictatorship or revolution) [...] through the very process of their transgression".⁶⁸ Thus, Schmitt's theory helps to further expand on necessity in relation to exception, decision and political authority. Therefore, from a theoretical point of

⁶⁵ R N Lebow, "Weber's tragic legacy", *Journal of International Political Theory* 13, No. 1 (2017), p. 42. See also R Mehring, "'Die Waffen sind das Wesen der Kämpfer selbst': Form und Sinn des Krieges nach Carl Schmitt", in T Jäger and R Beckmann, eds., *Handbuch Kriegstheorien* (Wiesbaden: VS Verlag, 2011), p. 250 on this point, where he states that Schmitt understands concepts as weapons and that "language is not a harmless tool to him but a form of action and a weapon in battle" (translation my own).

⁶⁶ C Schmitt, "Zu Friedrich Meineckes 'Idee der Staatsräson' (1926), reprinted in Carl Schmitt, *Positionen und Begriffe: im Kampf mit Weimar - Genf - Versailles*, 4th ed. (Berlin: Duncker & Humblot, 2014). See also B A Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (Oxford: Oxford Univ. Press, 2017) in particular pp. 76-79 on Schmitt's analysis of Meinecke's work.

⁶⁷ The notion of exception and transgression of rules and norms points towards a broader literature on Emergencies, for example N C Lazar, *States of Emergency in Liberal Democracies* (Cambridge: Cambridge Univ. Press, 2009) and B Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton Univ. Press, 2009). For reasons of scope this can not be further elaborated on and the focus here is on Schmitt, who did not merely examine emergency powers, but advocated their offensive use against enemies.

⁶⁸ D Kelly, "Reconfiguring Reason of State in Response to Political Crisis", in D Dyzenhaus and T Poole, eds., *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge: Cambridge Univ. Press, 2015), p. 189. Parenthesis quoted from original.

view, these aspects of Schmitt's thought will help to 'round off' the conceptualisation of necessity with respect to the extant discourse.

Schmitt only ever directly touches on the concept of reason of state on two occasions - when discussing Meinecke's book and in *Dictatorship*.⁶⁹ Schmitt criticises Meinecke's account of reason of state as an irreconcilable dichotomy between *Kratos* and *Ethos*, reasoning that it is the wrong focus and not asking the right question. In his mind, reason of state, as the underlying logic of statecraft, is about making and being able to make the decision. Therefore, Schmitt does not entirely reject Meinecke's theoretical account or dismiss its core components. Rather, Schmitt sees the principle issue this account brings to the fore as the starting point to raise the question of the scope of state action and who can legitimately decide on it. This ties in with Schmitt's theory of the state, in which the political is a precondition for the state, which also implies the friend-enemy distinction of the political. This, according to Schmitt, means that the state, as an expression of the political, decides on who its enemies are and, as a consequence, may result in war as the "ultimate expression of enmity".⁷⁰ The notion of the decision of the state, the locus of political community, is a central element of Schmitt's overall political theory. Constraints on the state's ability to do so through artificial political or legal constructs undermine this 'natural' order and ability of states.⁷¹ This is also reflected in Schmitt's conceptualisation of sovereignty, in which he states that "sovereign is he who decides on the exception [*Ausnahmezustand*]"'.⁷² While primarily intended as a critique of liberalism it again shows the importance of states to have and retain the ability to act and decide on their own accord and, according to Schmitt, it goes to the very fabric of what renders a state a state and is echoed in his theory of an international state system.⁷³

⁶⁹ Schmitt, *Zu Friedrich Meinecke*; and C Schmitt, *Dictatorship* (Cambridge: Polity Press, 2014), pp.9-10.

⁷⁰ C Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin, Duncker & Humblot, 1963), p.33; and the earlier, shorter draft of the same title from 1927 reprinted in *Positionen und Begriffe: im Kampf mit Weimar - Genf - Versailles 1923-1939*, C Schmitt (ed.) 4th ed. (Berlin: Duncker & Humblot, 2014), pp. 75-83.

⁷¹ Though Schmitt would argue that artificial constraints of this nature can never truly be political. As already mentioned, in his view and his usage of the term, the political is a precondition of the state and the friend-enemy distinction merely an expression of it. I use the term 'political constraint' in a more colloquial sense.

⁷² C Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, 7th ed. (Berlin: Duncker & Humblot, 1996).

⁷³ See C Schmitt, *Der Nomos der Erde: im Völkerrecht des Jus Publicum Europaeum*, 5th ed. (Berlin: Duncker & Humblot, 2011). Schmitt mostly bemoans how modern positivist international legal strictures restrict the political prerogative of states to apply the friend-enemy distinction and act according to it. He contrasts this with a rather idealised European state system in which individual states could operate in accordance with his notion of the political. See also his shorter treatises on this topic collected in parts III and IV of C Schmitt, *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969* (Berlin: Duncker &

Both of these components of his political theory tie in with the understanding and conceptualisation of political necessity distilled from the policy documents above. The ability of the state and its officials to decide and declare her enemies and the ability to defend against them with force, if deemed necessary. As threats to the state may constitute an emergency and thus a situation of exception, it lies within the sovereign powers of the state to declare it as such and act accordingly, as highlighted in the discussion on the NSS of the United States. As mentioned above, this understanding of the political maps onto Meinecke's theory of reason of state bridging between ethics and power. As Schmitt makes abundantly clear, the state is the locus of political community and as such a necessary expression of the concept of the political. The way that the state makes decisions and is the final arbiter on the exception speaks to it exercising its power, but also to the implicit ethical prerogative to do so to protect said political community. It is this conceptualisation from which the understanding of necessity is derived in this discourse. The necessity to protect and preserve the political community, but unlike in run-of-the-mill realist theories this comes concomitant with an understanding of the state and its powers of decision and exception. This is very much in keeping with the understanding of political necessity prevalent in the practitioner part of the knowledge community under discussion here.

Indeed, another important aspect of Schmitt's continuation of this conceptualisation of necessity is his influence on real life *Staatsräson*. Though any direct influence of Schmittian thought is usually (vehemently) denied, given his reputation as 'crown jurist' during the Third Reich, the influence of his thought and his theories is apparent. Through his personal connections to such thinkers as Leo Strauss and Hans Morgenthau, to name just two prominent examples, at least aspects of this Schmittian thought found its way into the higher echelons of foreign policy making and statecraft more generally.⁷⁴ Schmitt came to know Morgenthau when the latter invited the former to provide comments on his doctoral thesis, but Morgenthau felt slighted by Schmitt at a subsequent personal meeting.⁷⁵ Although they were never close, either personally or professionally, scholars

Humblot, 1995).

⁷⁴ To what extent Schmitt and his theories had any significant and lasting impact in particular on Morgenthau is debated however. See eg. C Brown, "'The Twilight of International Morality'? Hans J. Morgenthau and Carl Schmitt on the end of the *Jus Publicum Europaeum*", in Michael C. Williams, ed., *Realism Reconsidered: The Legacy of Hans J Morgenthau in International Relations* (Oxford: Oxford Univ. Press, 2008).

⁷⁵ See W E Scheuerman, "Carl Schmitt and Hans Morgenthau: Realism and beyond", in Michael c Williams,

argue that Morgenthau carried forward aspects of Schmitt's thought in his own works and thus, ultimately, into foreign policy making in which he worked later in life.⁷⁶ Similarly, Schmitt's engagement with Leo Strauss highlights the extent to which the former's influence extended, albeit only indirectly.⁷⁷ This is not to infer a causal chain between Schmitt, Morgenthau and foreign policy practitioners or even to say that modern statecraft is Schmittian. Simply put, the theoretical model outlined above is not just an abstract construction but captures an understanding of necessity that has gone beyond the academy. Indeed, this underlines the statement mentioned above, that the knowledge community at hand is not restricted to theorists and thinkers conceptualising necessity but comprises practitioners and how they invoke it as well.

The theoretical basis outlined in this section of the chapter captures the real-life political understanding and invocation of necessity presented at the outset of this chapter. Where 'conventional' IR Realism falls short in capturing the conceptualisation of necessity in this knowledge community, the theoretical basis grounded in Meinecke and Schmitt's understanding of the political, the state and, as a subset to both, political necessity maps closely to its actual usage in this discourse. Political necessity is premised on the state as the principal expression of political community and political power. As such states have, and indeed need to have, the ability to declare their enemies - even if in the abstract sense of security concerns as done in the NSS analysed above. Schmitt saw this as a fundamental component of political conduct and a requirement for the survival of political communities. In line with this he saw the need for states to be able to decide on the exception to be fully sovereign - that is to say states need the ability to transgress rules and laws if they perceive this as required for the survival of the community and the rendition of its sovereignty. This in turn ties in with Meinecke's conception of reason of state as the bridging element between the poles of power and ethics. Meinecke equally acknowledges that states and

ed., *Realism Reconsidered: The Legacy of Hans J Morgenthau in International Relations* (Oxford: Oxford Univ. Press, 2008), in particular pp. 62-64. See also C Brown, "The Twilight of International Morality", pp. 42-44.

⁷⁶ Richard N Lebow, while not seeing a direct link between Schmittian thought and Morgenthau's work, states that "[b]ecause of Morgenthau, realism became the dominant paradigm in the field and maintained this position throughout the Cold War", *The Tragic Vision of Politics*, p. 216. This influence does not just encapsulate the study of international politics itself, but also actual foreign policy making.

⁷⁷ See e.g. S B Drury, *Leo Strauss and the American Right* (Houndmills: MacMillan Press, 1997) in particular pp. 81-96 detailing the intellectual connection between Schmitt and Strauss concerning the former's concept of the political. The book goes on to detail the influence Strauss had on the political right in the United States.

their political leaders will have to breach laws and conventions in certain situations because it is the only reasonable course of action - or simply put - because it is the reason of state emanating from necessity of state [*Staatsnotwendigkeit*].

Analysis

The preceding examination of the concept of political necessity, specifically in the context of power politics and reason of state, has shown that this is a very diverse discourse. In comparison to the other knowledge communities I have examined, it is rather disparate. Accordingly, the understanding of the concept of necessity it issues is broad and varied. This section will now provide an analysis of this understanding of the concept with respect to the four familiar analytical categories established over preceding chapters.

Term vs Concept

As outlined in the above examination of this discourse, the concept of necessity is not invoked in and of itself. Rather, this knowledge community understands and uses the concept of political necessity always with respect to the state. Thus, this form of political necessity is always ‘packaged’ with the related concept of *Staatsräson* and, mistakenly, with *Realpolitik* as well. Both of these concepts start from the premise that the state is the primary form of representation of political community and the principal unit in (international) politics, which is expressed through its sovereign status and ensured through power that ensures its survival. Consequently, necessity takes the state always as its point of departure. The concept is understood and indeed invoked through the above-mentioned related concepts which focus on the state and its (perceived) necessities. What is deemed to be necessary in this context is therefore derived from the logic of reason of state. The term necessity is therefore rarely used directly and never on its own. In Meinecke’s usage, he talks about the necessity of state [*Staatsnotwendigkeit*], which also connects the concept of necessity to the determinant of said necessity - the state.⁷⁸

Demarcation and Contrast

⁷⁸ Meinecke, *Idee der Staatsräson*, p. 8.

While the invocation and understanding of the concept of necessity is marked by the usage of synonyms, there are not really antonyms as such which are used to demarcate or contrast the concept. As necessity is a secondary concept in this discourse and only a function of the underlying logic of the concepts of reason of state and *Realpolitik*, there is no direct way of delimiting or demarcating necessity from other concepts. Given however that necessity is intricately linked to reason of state, this concept in turn helps to provide a way of demarcating the understanding of necessity and how it is invoked, albeit only indirectly.

In the reading identified above, both reason of state and *Realpolitik* are understood to be expressions of political necessity that are pitted against 'idealistic' conceptions of politics. Insofar as the use of force is concerned, reason of state emphasises doing what is necessary in order for the state to survive. Consequently, any forms of restrictions on actions that help to self-preserve are to be disregarded, be they ethical conventions or positive (international) laws. This implies that both concepts can be seen in contrast to conceptions of politics that (human) rights and international law, rather than the state, at its centre. Likewise, reason of state emphasises that actions should be taken whenever they are necessary and not when it is too late. Thus, multilateral and institutionalist conceptions of International politics can be very much regarded as contrasts if not antonyms to this understanding of political necessity.

Configuration

As the previous two analytical categories have shown, necessity is a secondary concept in this discourse and as such mainly conceptualised as a function of the related concept of reason of state. This general set up in the conceptualisation of necessity therefore can also be observed in the configuration of the concept. The level at which the concept is understood to operate, and indeed at which it is invoked, is the macro level. By virtue of being tied to conceptualisation of reason of state, necessity is necessarily also operating at the macro level. It is actions of the state that are being tried to effect through an invocation of necessity. Said invocation is then used as the rationale on which basis the state (and its decision makers) adopt a course of action deemed to be suitable. But despite it being individuals who ultimately invoke necessity, they do so in the name or on behalf of the state. As mentioned above, it is the state as sovereign entity in international politics and the

principle unit of political community that lies at the heart of the reasoning in this knowledge community. The understanding of necessity in this discourse therefore decidedly operates at the macro level.

Building on this, the analysis of the intended effect of an invocation of necessity is closely related to the understanding of the concept being a function of reason of state. When the state, as principle unit of political community and sovereign entity in international politics, becomes the *raison d'être* of political conduct, its survival and the pursuit of its interests dictate the conduct of statecraft. When necessity is being invoked in this mould, the intended effect of said invocation is meant to be conducive to the aforementioned goals. Therefore, the intended effect associated with the understanding and invocation of necessity in this knowledge community is both, to affect the scope of available actions as well as influence the temporal element in their adoption. With respect to the former this implies that a certain course of action is usually deemed to be necessary as the survival or vital interests of the state are at stake. To ensure the security of the state or the pursuit of key interests even actions otherwise not available to decision makers are intended to be made available and deemed acceptable through the invocation of necessity. Likewise, and relatedly, the adoption of a course of action in this regard is intended to be regarded as urgent, which may entail the foregoing of usual processes in order to ensure the timely adoption of said action. Whatever actions a situation of necessity of states requires should be adopted without delay.

The intended effect associated with the understanding of necessity in this discourse also foreshadows the purpose for which the concept is invoked. In particular with respect to the scope of actions a state can adopt out of considerations of necessity the purpose of the invocation becomes clear. Any state, or individuals acting on behalf of the state, invoking necessity in connection to the logic of *Staatsräson* seek to provide license through enlarging the scope of actions it may adopt. This, of course, also applies to the use of force and the resort to war by a state, as the National Security Strategy of the Bush administration and its emphasis on the pre-emptive use of force has shown.

It is also licensing with respect to the temporal effect mentioned above. If the logic of reason of state dictates that an action is necessary, it will also be deemed to be urgent, given that the key interests or the survival of the state itself are (or perceived to be) at stake. Thus, the adoption of a given course of action is a matter of urgency and normal

protocols or coordination with other states becomes a secondary consideration. This, to some extent, finds expression in the attitude towards multilateralism of the current US administration and also the Bush administration's attitude to the use of pre-emptive force against perceived threats.⁷⁹

Importance

The importance of the concept of necessity vis-à-vis other concepts is, again, determined through the link of necessity with the concept of *Staatsräson*. The latter provides the 'value basis' for the political decisions in relation to the use of force and war and conflict more generally. Necessity itself is only a secondary concept and has to be thought of as a function of the aforementioned value basis encapsulated in the logic of reason of state. Through this connection necessity becomes very important if not crucial in this discourse. Survival and the interest of the state are the drivers of this logic and invocations of necessity are made to enable all courses of action that can help achieve these goals.

Conclusion

The discourse of political necessity relates to the exercise of power politics and entails an understanding of necessity premised on the logic of reason of state. In this logic, through the need for preservation of the state, any and all actions in defence of political community becomes necessary. Here, necessity becomes an expression of the moral category and importance of political community. While the examples of national security policy examined in this chapter of course do not exhibit any traits of this kind of cold *Staatsräson* of Machiavellian calibre, they do exhibit an understanding of the state and the need for its survival that is premised on ultimately the same foundation. Though the knowledge community, following this understanding of necessity, is much wider and less clearly

⁷⁹ To provide a rare counter example to the outlined analysis of reason of state, Angela Merkel declared Israel's security part of Germany's reason of state [*Staatsräson*] in her speech in front of the Knesset. This concern for another state, in this context out of historical responsibility, would speak for Ethos trumping Kratos and somewhat goes against the purpose and effect outlined in this analysis. Usually, in the conceptualisation of this knowledge community, a declaration of this kind still has an underlying, ulterior motive of self-interest. The example cited here seems to be a rare if not unique occurrence where this is not the case. See <https://www.bundesregierung.de/breg-de/service/bulletin/rede-von-bundestkanzlerin-dr-angela-merkel-796170>, accessed 18.02.19. For an English translation see: https://www.knesset.gov.il/description/eng/doc/speech_merkel_2008_eng.pdf, accessed 18.02.19, though here it was translated as *raison d'être* rather than reason of state.

defined than in past chapters, their invocations of the concept follow this common underlying theoretical basis. As this chapter has shown, the combination of theoretical positions by Meinecke and Schmitt provides a good foundation for the understanding of necessity that is exhibited in the praxis of national security policy and the wider knowledge practices.

Given that this discourse is concerned with the security and survival of the state, as the principal expression of political community, necessity is only invoked at the macro level. This form of necessity seeks to effect a greater scope for actions, both in terms of the available courses of actions as well as their temporality. On the former, the invocation of necessity seeks to render actions permissible in the name of state defence that would have otherwise be abjured, based on ethical or legal restrictions. Relatedly, these actions can be rendered more urgent through the same invocation of the concept. The purpose for which it is then invoked is licensing in nature. As explained in relation to the intended effects, invoking the concept provides the state at large with a greater scope of available options in a short time span. What is crucial to the understanding of necessity in this discourse however is the fact that it is intricately linked to the aforementioned logic of reason of state. As such, necessity is only a secondary concept, whose usage is dictated by the logic of *Staatsräson*. This does however not count against the importance of the concept, nor against the importance of appreciating how necessity is invoked in this discourse in general.

Conclusion: Necessity in War & Conflict - A Cacophony in Five Discourses

Humpty Dumpty: "When I use a word, it means just what I choose it to mean - neither more nor less."

Alice: "The question is whether you can make words mean so many different things?"

Lewis Carroll, *Through the Looking Glass*

Introduction

War and conflict, the organised use of violence and force, is familiar territory for arguments of necessity. This thesis has examined how the concept of necessity is invoked in the context of war and conflict. Specifically, each of the preceding chapters has focused on one of five discourses in which the concept of necessity is employed in arguments regarding the use of force. Said discourses are comprised of a community whose association is defined through its common knowledge practices with respect to necessity. Thus, for example, though both the second and third chapter pertained to international law, with respect to their usages of necessity they constitute two separate discourses under this paradigm. The research question prompting this inquiry sought to examine whether the understanding and usage of the concept of necessity in relation to war and conflict is uniform in nature, or, indeed, dependent on the context, that is to say the discourse, in which it is invoked. The motivation behind the research question was the desire to elucidate whether politicians, military men, lawyers and philosophers who invoke necessity actually be talking about the same concept. Put differently, do the aforementioned knowledge communities form discrete discourses, each of which has its own account of necessity, or do they form a single coherent discourse in which necessity occupies the same understanding?

The introductory chapter to this thesis has offered a few examples of the usage of the

concept is used in the practice of international politics, as well as how the concept is dealt with in the academic study thereof. The examples given suggested that rather than being a concept with a uniform meaning, necessity gets invoked differently in the various contexts. The aim of this investigation was to ascertain whether actors making recourse to necessity arguments in relation to war and conflict speak of the same concept, or if it is derivative of its discourse and knowledge practices, causing knowledge communities to speak past one another. This concluding chapter will present the key findings of the preceding chapters and summarise them. More importantly, it will draw out where the usage of the concept converges or diverges across discourses. The principle frame through which this assessment is carried out is the methodological concept of *asynchronicities of use* mentioned in the introduction chapter.¹ This frame contends that “members of different communities and participants in different knowledge practices will invest concepts with temporal structures and experiences, depending on what they want to achieve with it”.² The configuration component of the analytical framework applied in each chapter aims precisely at this, to establish the purpose and effect for which necessity is used. This conclusion will show that the discourses under discussion in this thesis exhibit such asynchronicities of use with respect to the concept of necessity. That is to say, the conceptualisation of necessity in each of the knowledge communities emerges out of the parameters of the discourse in which they are embedded. Thus, in the discourses discussed in this thesis there is no shared notion of necessity, but a multitude of voices that invoke the concept with its frayed meaning.

The remainder of the chapter is organised in four sections. Firstly, a short section on the methodological underpinnings of this thesis will be offered, as it serves as the principle frame for the conclusion. Based on this frame, the second section will interrogate the findings of the individual chapters. It will outline how each knowledge community posits necessity, if and where there is convergence in their usages of the concept, where there are connecting points and where there are discontinuities and asynchronicities of use, thereby drawing out the conclusion that there is no common basis in how the discourses understand and invoke necessity. Rather than a broad conversation, we can observe a cacophony of

¹ H Jordheim, “Europe at Different Speeds: Asynchronicities and Multiple Times in European Conceptual History”, in *Conceptual History in the European Space*, ed. W Steinmetz, M Freeden and J Fernández-Sebastián (New York: Berghahn, 2017), pp. 53-55. See also the methodology section in the introduction chapter of this thesis.

² Jordheim, “Europe at Different Speeds”, p. 54.

voices that posit necessity in line with knowledge practices restricted to a particular community and not the building of a broad discourse centred on a single meaning. As this thesis did not contend that there is one true meaning of necessity with respect to war and conflict, there can only be approximations between different communities, their knowledge practices and the resultant conceptualisation of necessity. The third section will offer one possible framework of reducing the complexity in understandings of necessity through the binary understanding of necessity as inevitable and indispensable. This will lead into the last section of this conclusion, a summary of the findings of this thesis, its contribution to the literature and where there are limitations and what future research emerges from it.

Asynchronicities of Use

The investigation of the understanding of necessity in relation to war and conflict was organised around discourses made up of communities which exhibit specific, distinguishable knowledge practices with respect to necessity. The methodology section in the introduction to this thesis has set out the methodological underpinnings grounded in *Begriffsgeschichte*. In order to elucidate the conceptualisation of necessity, synchronic as well as diachronic perspectives have to be taken into account.³ Likewise, in order to appreciate the understanding of necessity has to go beyond semasiological access to the concept and account for onomasiological aspects as well.⁴ That is to say, in order to gain an understanding of the concept, one has to examine other terms that enshrine the same conceptual meaning. The analytical framework applied in each of the chapters was built on this methodological approach. The framework examined how the understanding of necessity related to other concepts through the establishment of synonyms and antonyms, and how the necessity itself was conceived through the categories of configuration and importance ascribed to it. In this way each community and their respective knowledge practice of necessity was assessed. In short, the analytical frame examined the understanding of necessity in each community on its own.

However, the application of uniform categories in each discourse allows for a cross-cutting

³ See R Koselleck, “Begriffsgeschichte und Sozialgeschichte”, in *Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten*, ed. R Koselleck, 10th ed. (Frankfurt a M.:Suhrkamp, 2017), pp. 114ff. See also the methodology section in the Introduction of this thesis.

⁴ Koselleck, “Begriffsgeschichte und Sozialgeschichte”, p. 121.

comparison, which, in turn, enables us to address the core research question whether there is one uniform understanding of necessity in relation to war and conflict, or multiple. The comparison also utilises all four analytical categories, but it is especially the configuration of the concept that shines a light on how necessity is posited in different discourses. Here, Jordheim's notion of *asynchronicities of use* proves a helpful frame. He conceived of it as "asynchronicities between fields of practice", making it particularly relevant to knowledge practices in communities as diverse as international law, the military and politics, to name but three.⁵ Jordheim further elaborates that "members of different communities and participants in different knowledge practices will invest concepts with temporal structures and experiences, depending on what they want to achieve".⁶ Thus, while the following section will compare the chapter findings across all relevant analytical categories, particular emphasis will be put on the intended effects and the purposes for which necessity is invoked. Consequently, the configuration of necessity in each individual discourse and the potential for asynchronicities of use across discourses will be of particular importance.

Chapter Findings

The five discourses discussed in chapters one to five while very different in terms of their respective knowledge communities and practices, all, in one way or another, engage with the issue of war and conflict and, more importantly, with the concept of necessity in this regard. Each of these chapters has not only elaborated on how necessity is understood in the respective discourse but, through the examinations in the five chapters, this thesis has also provided an answer to the key question whether there is conformity in the understanding of the concept and how it is invoked. This section will summarise the key chapter findings and, through comparing them across discourses, show that there is no common basis of understanding in necessity and rather that the concept is invoked to serve different purposes and to different effects.

⁵ Jordheim, "Europe at Different Speeds", p. 53.

⁶ Ibid., p. 54.

Just War

The first chapter of this thesis contains the first discourse under consideration, just war, which in many ways constitutes the ‘broadest church’, connecting to all subsequent discourses in one way or another. This, however, does not prevent this knowledge community from forging its own path in terms of how its members posit necessity in relation to war and conflict and vis-à-vis other discourses. The just war tradition as a knowledge community is probably more diverse and disparate than those of other discourses, which is to some extent reflected in how the concept of necessity is understood. In its extant form it is more rights-based than in previous formulations of the tradition, but what has been retained is an outlook of justice on war and conflict. War, specific actions in war and, by extension, the necessity for either are therefore also posited along the lines of conceptions of justice. Michael Walzer organises his ‘War Convention’, that is his *in bello* just war account, around the rights of those involved and affected by war. This account falls into the *regular war* account, present also in Alberico Gentili’s writings, where war is not regarded as juridical act but as competition in which more than one side can have justice on their side and thus the conduct of war should be regulated. Walzer’s argument for ‘supreme emergency’ as an *ad bellum* justification on the other hand is more in line with classic formulations of just war such as Francesco di Vitoria’s, in which justice is of central importance.

As the examples show, the conceptualisation of necessity has not developed in a linear fashion in the just war discourse, nor has it been settled in the extant understanding of the knowledge community given the so-called just war revisionists. Despite this fraying of the concept, the invocation of a necessity to resort to war, or of particular actions in war, is always deemed a tragic occurrence from this discourse’s perspective. Even where this may be considered to serve justice, the costs of warfare - the evil, to express it in medieval just war language - is always accounted for in the ‘calculation’ that precedes an invocation of necessity. This tragic element characterises the positing of necessity in the just war discourse, irrespectively of what specific constituency - regular war, just war, or revisionists - within it is considered. As such, necessity is understood to license and affect the scope of available actions should it come to this tragic necessity. Otherwise, the necessity lies on the side of restraining against the costs of warfare.

Ad bellum International Law

Legal and juridical notions of concepts that relate to war and conflict are, not altogether unsurprisingly, different from political conceptualisations of the same. What is however somewhat surprising is that with respect to necessity, international law offers two very different discourses at the *ad bellum* and *in bello* levels in terms of how necessity is posited, its historical development and the details of the configuration of the concept. Chapter two of this thesis examined the former, *ad bellum* international law, the discourse of necessity relating to international law and the resort to the use of force, defined by its knowledge practices. The chapter showed that the extant international legal regime is characterised by the legal norms and understandings introduced with the establishment of the United Nations and its charter. Moreover, there have been increasing efforts to codify international law, which also concerns the legal definition of necessity and consequently its understanding. The understanding of necessity is on the one side bracketed by the restrictions on the use of force by states set by the UN Charter and on the other side by the codified definition set by the International Law Commission (ILC) and adopted by the General Assembly, as well as through precedents set by international courts.

The understanding of necessity in this community is premised on this tightly confined reading of the concept. The reasons for this lie of course in the historical usage of the concept, pre-dating the UN legal regime. In its current form, necessity is inscribed as such into legal doctrine, without the use of a synonym. The definition of necessity is concomitantly clearly demarcated to other familiar concepts featuring in other articles of the same legal document. The general direction of the development of the concept in this discourse becomes even more apparent when considering its configuration and the general analysis of the concept. In terms of its configuration, though the legal framework it is embedded in curtails the intended effect, the concept is still affecting the scope of available courses of actions and by and large licensing in nature. This is also reflected in the importance apportioned to the concept. With its tightly constraining definition of necessity within the larger legal framework, the ILC and knowledge community at large exhibit how important and how seriously the concept and its usage is taken. Thus, necessity, in this discourse, is a reflection of the knowledge community at large and, more importantly, a reflection of the general knowledge practices prevalent in the legal community. As such,

necessity has been given a tightly defined legal corset through which its invocation restricted to fit its intended usage in the general UN legal regime.

In bello International Law

The third chapter of this thesis focused on the closely related yet distinct usage of necessity in *in bello* international law, concerning the conventions, norms and laws of warfare. This branch of international law's understanding of necessity could scarcely be more different than the one established in chapter one. The historical development of the concept within this discourse, its configuration and, crucially, the fundamental split at the core of this knowledge community render the positing of the concept almost entirely different, despite belonging to the same broad category of international law. Historically, rather than exhibiting discontinuation, the *in bello* conceptualisation of necessity has been comparably linear, with customary rules of conduct of warfare increasingly being formalised, especially alongside codification and formalisation of law in general. The greatest and most apparent difference between the two international law knowledge communities lies in the fissure in the *in bello* community itself. Alongside the 'classic' Law of International Armed Conflict (LOIAC), International Human Rights Law (IHRL) has become in some readings a body of law competing for the application in war and conflict scenarios, in other interpretations it merely complements LOIAC.

The positing of the two respective bodies of law within the *in bello* knowledge community are rather different - a further contrast to the *ad bellum* discourse. Regarding the onomasiological aspect of the concept, in LOIAC necessity is encapsulated in the legal term of military necessity, while in IHRL it is bundled up in a proportionality assessment and least restrictive means test. That is to say, in the former it was aptly labelled for its origin in the regulation of military conduct, while in the latter, given the makeup of human rights law, it forms only part of overall proportionality concerns. The different origins and developments of these two bodies of law are also exhibited with respect to antonyms, the configuration of necessity and the importance apportioned to the concept. Thus, while there is on the whole more coherence within the *in bello* discourse than between the two domains of international law, there is nevertheless somewhat of a split on the *in bello* side. What this discourse brings into stark relief is that the question of how necessity is posited strongly hinges on the knowledge community in question and their associated knowledge

practices. For the *in bello* international law discourse this means that the conceptualisation of necessity depends at least to some extent on what kind of lawyer or legal scholar is consulted on the matter.⁷

Military Strategy

The LOIAC definition of military necessity is the connecting point to the military strategic discourse discussed in chapter three, where this legal conceptualisation of necessity guides decisions and behaviour, in particular at the tactical level. This is however where any connections or even overlaps with respect to how necessity is posited within this knowledge community end. Though different in how necessity is conceptualised and invoked within them, both international law discourses have their juridical nature in common. Compared with this tight quasi-axiomatic legal system in which necessity is embedded, the hierarchical structure of the military strategy community - excluding academic scholars for the moment from the community - renders their positing of necessity categorically distinct despite their import of the legal definition of military necessity. Where the knowledge practice regarding necessity is concerned, different usages of the concept become apparent within the military strategy discourse, given the functionally separated but hierarchically integrated levels of responsibility within it. As pointed out, at the tactical level the necessity argument follows largely the *in bello* legal definition and practice. This shifts however as we go to higher levels of hierarchy, where tactical and strategic necessities can clash. Given the hierarchical organisation of the knowledge community, at least in principle the strategic level conceptualisation of necessity should always ultimately prevail over how necessity is mapped at hierarchically lower functional levels.

Another aspect where the military strategic knowledge community differs starkly from either international law discourse in their mapping of necessity, is the self-understanding of the role the knowledge community plays as a non-political instrument to wield power. In their own view, the whole knowledge community - military practitioners as well as civilian scholars and civil servants etc. - regards itself as apolitical where politically set policy

⁷ D Luban, "Military Necessity and the Cultures of Military Law", *Leiden Journal of International Law*, Vol. 26, No. 2 (2013).

goals are instrumentally translated into military-achievable objectives. The understanding and indeed the invocation of necessity flows from this self-understanding of the knowledge community. Again, on the tactical level, the positing and invocation of necessity is analogue to the *in bello* discourse, whereas at higher levels, the understanding of necessity becomes more abstract. There it is often conceived of as ‘requirements of conflict’ and, less often, as ‘strategic necessity’, categories that denote a prudential understanding of the concept. The same applies to how the concept is demarcated. While the legal definition is well-defined and delimited, at higher hierarchical levels the demarcation becomes blurrier as necessity is bundled with strategic thought. The configuration, likewise, reflects this instrumental-prudential self-understanding of the knowledge community. The concept is invoked at the micro as well as macro level and can be licensing or restraining in terms of the temporal aspects of actions as well as the scope of available actions itself. In short, necessity can be posited any way it needs to be posited, bringing it in line with the self-understanding of the knowledge community, which regards itself as a mere tool of politics. The attitude of ‘doing what is necessary’ describing this self-image also shows the importance attributed to necessity in this community. As was pointed out in the respective chapter, this self-image of the knowledge community does not necessarily correspond to the actual praxis exhibited by this community.

Realpolitik

In a more colloquial sense, the military strategy discourse could be described as ‘neither here nor there’ with respect to the understanding and usage of the concept of necessity. To put it differently - the discourse sits between the strictures - at least by comparison - of international legal understandings of necessity on the one hand and the knowledge communities that are more explicitly political in their domains on the other. Of those, the knowledge community that subscribes to a view of *Realpolitik* and reason of state, examined in chapter five of this thesis, forms yet another contrast to the already elaborated on discourses. The way this community understands necessity can be described as the inverse of the military strategy discourse. Whereas the latter views itself as merely instrumental and has an almost neutral conception of necessity that can be moulded to whatever the circumstances demand, for the *Realpolitik* knowledge community the concept of necessity becomes an instrument to serve its underlying communitarian outlook centred on the state. The principle of reason of state, through which the community and indeed its

knowledge practices define themselves, contains this outlook in its very name. Meinecke saw this as the balancing between power and ethical considerations, exhibiting parallels to the *in bello* international law understanding of military necessity, where demands of war are weighed against humanitarian concerns. The concerns of the political community - the reason of state - was therein, however, mostly the driving force in how necessity was posited and invoked.

Another point where the knowledge practices of this community significantly contrast to those of other discourses is the non-neutral usage of the concept. Whereas the legal discourses follow the quasi-axiomatic structures embedded in bodies of laws and the strategy community views itself as a neutral relay between means and ends, this discourse considers concepts such as necessity as a tool that should be purposefully used.

Conceptualised in this way, the invocation of necessity is not only concerning transgression of rules if circumstances demand it but also about decisiveness of action. This is where Schmittian notions of the decision on the exception and the friend-enemy distinction are useful illustrations of how the knowledge practices of this community are guided.

Necessity - A Cacophony rather than Symphony

The results outlined in the previous section exhibit a landscape of knowledge communities and their practices, which, while all dealing in war and conflict, offer a disparate and fraying picture with respect to the understanding of necessity. This is to say, that despite all knowledge communities making invocations to the same concept, there is no shared conceptual vocabulary.⁸ Each understanding of necessity is embedded in a specific community and hinges on its structures and conceptualisations of values. The international law discourses on necessity are organised around the logical structures underlying international law and centred on a legalistic conception of justice. Similarly, the just war knowledge community conceptualises necessity through notions of justice, though they are not necessarily legalistic in character. Moreover, there are different notions of how justice

⁸ I use conceptual vocabulary here not in the sense of shared terms, but onomasiological, denoting a multitude of terms - a vocabulary - attached to the same conceptual meaning.

can be achieved in war within the discourse. This contrasts starkly to a reason of state position on the same matter. Here the understanding and usage of necessity is informed by a communitarian value basis which is centred on one's own political community - the state. Here, there are no universal conceptions of justice or rights, but of prudence and advantage. The disparity in how each respective community conceives of these values which underlie necessity, invariably results in a frayed concept without a common thread.

These underlying value bases also, in turn, define the knowledge practices regarding necessity in each community. The purpose and effect to which necessity is employed is premised on an understanding of values for which it is invoked. Thus, for example, if the resort to the use of force is declared necessary in the name of the state and its interests, it is the moral value of political community, namely the state, which drives the practical use of the invocation of necessity. Here, necessity may be used for licensing purposes, to legitimate the use of force. The effect in such a scenario could be intended to affect both, the scope of available courses of action as well as the temporal aspect in their execution. The intention may be that that an invocation gives rise to the immediate resort to force, or to taking an immediate action in war. This significantly contrasts with, say, an invocation in the context of *ad bellum* international law, where the usage of the concept through law is guided by the underlying conceptions of justice rather than values centred on the maintenance of political community. Thus, the different knowledge practices that define the communities as they were examined in this thesis also define the usage and understanding of the concept of necessity within them.

Each community has their own knowledge practices with respect to necessity which emerge out of their underlying conceptions of values that are constitutive of the separation into different communities. The usage of the concept consequently differs with each respective discourse. This is in line with Jordheim's notion of *asynchronicities of use* of concepts as outlined in the methodology section in the introduction to this thesis and reiterated earlier in this chapter. The understanding and usage of necessity is asynchronous between communities as both have varied historically from community to community and still do so today, in their extant forms. Similarly to an example Jordheim provides of 'progress' and 'future' "contain[ing] and deploy[ing] very different temporal meanings and structures when used in the context of art and aesthetics than in the context of social and political organization", the concept of necessity can exhibit very different configurations,

containing aspects such as level, effect and purpose, deepening on whether it is invoked in the context of a legal, moral or power political argument.⁹ Thus, again, when considering the concept of necessity in relation to war and conflict, we find a concept that is highly variegated with respect to how it is understood and used.

If we were thus to carry out a thought experiment, imagining representatives of each knowledge community commenting about the same course of action in relation to a war or conflict, we would, on the whole, get a jumble of opinions without common basis for a conversation. The first point of contention would be surrounding the question of whether the course of action in question pertains to the resort of war or an action in war. The distinction between aspects of *ad bellum* and *in bello* can be found in a number of knowledge practices and is therefore also prevalent in a number of knowledge communities. *Ad bellum* international lawyers or legal scholars would not comment on a matter that concerns the Law of International Armed Conflict, that is to say an *in bello* aspect and vice versa. Similarly, the Just War tradition has different sets of criteria to examine *ad bellum* and *in bello* questions, which, however, are different from the legal perspectives mentioned above.

If the conversation were to be about the resort to war, *ad bellum* legal scholars would be constrained by the very narrow reading of necessity in international law, drawing sharp distinctions to other, similar concepts such as self-defence. For military commanders broader, more instrumental concerns would prevail in arguing on the question whether resort to war is truly necessary. As a political goal has been set, it is the task to match military means to those political ends and break this down into operational and tactical tasks. The understanding of what is therein regarded as necessary follows prudential considerations such as economy of force – making sure that there is enough military force to win an engagement, but at the same time not using too much force if this could be better employed elsewhere in pursuit of the overall goal of the war. Rather than a narrow legal reading, we encounter a practical, instrumental and prudential understanding of necessity. In the realm of reason of state, a broad understanding of necessity driven by the security of political community would contribute to said conversation. Here necessity is characterised by decisiveness of action and exception to any prevailing norms or laws.

⁹ Jordheim, “Europe at Different Speeds”, p. 54.

The conversation these representatives of their professions or knowledge communities would have with respect to the same action therefore is bound to be a cacophony of voices, each grounding their understanding of necessity – the subject of the conversation – in different knowledge practices and differing conceptualisations of necessity. On the above example of the *ad bellum* question of resorting to war, this ranges from a narrow legal reading of a clearly defined and demarcated concept of necessity embedded in a quasi-axiomatic system of bodies of international law to a broad understandings of necessity driven by decisiveness in taking action erring on the side of licensing the use of lethal force as part of a war or conflict. The basic understanding with which these representatives would enter the conversation would lead to misunderstandings and participants talking past each other, resulting in a cacophony of competing voices, premised on competing conceptualisation what necessity implies in relation to war and conflict.

The research questions of this thesis sought answers on how necessity is understood in relation to war and conflict and, more importantly, if there is a single consistent understanding or rather multiple different understandings. Each chapter has addressed the first question within the confines of a specific discourse as defined for the purposes of this investigation. The second research question is answered through comparing the analyses carried out in each chapter. As the preceding sections of this conclusion have shown, there are significant differences in how necessity is understood and invoked depending on the person or community who is invoking the concept. Their knowledge practices and underlying value conceptions impact the understanding of necessity and the way the concept is and can be invoked. As a consequence of this, there is a multitude of conflicting and competing voices with respect to the necessity of wars and the necessity of specific actions in wars. Rather than a symphony, that is a harmonious use of necessity among the different communities and their respective knowledge practices, the extant as well as historic usage of the concept resemble a cacophony of voices steeped in disparate conceptual vocabularies. Thus, there is no argument to be had, in the Oakeshottian sense, between the different communities and their conceptualisations of necessity, and only a conversation at best.¹⁰

¹⁰ See M Oakeshott, “The Voice of Poetry in the Conversation of Mankind”, in M Oakeshott, ed., *Rationalism in Politics and Other Essays* (London: Methuen & Co, 1962), pp. 197-247 and M Walzer, “Interpretation and Social Criticism: The Tanner Lectures on Human Values”, retrieved from

Conceptualising Necessity - Inevitable and Indispensable

This thesis has shown that there is little to no conformity in the usage of the concept of necessity across different discourses, despite there being connecting points and even overlaps in the membership of knowledge communities and their associated practices. At first sight, this incongruence is not altogether surprising given the makeup of the different knowledge communities, their associated practices and the disparate purposes they serve. As the answer to the research questions that there is no common usage of necessity in relation to war and conflict, I would like to offer a simple heuristic in this section in order to facilitate some amount of understanding across communities and knowledge practices. This heuristic is built on an etymological distinction of the dual meaning of necessity that Michael Walzer identified in *Just and Unjust Wars*, but which he unfortunately does not further develop. To clarify the intention of this heuristic and this section - it will not artificially create a single understanding of necessity among disparate knowledge practices and associated communities, nor will it be the only such heuristic. Rather, it offers one way of reducing the complexity of different understandings of necessity - of different voices rendering it a cacophony - and limit it to a dichotomy, which can be employed to negotiate between different practices and communities.

Very early on in his key contribution to just war thought, drawing on Fowler's dictionary, Walzer states that "[i]n the Greek as in the English language, the word *necessity* 'doubles the parts of indispensable and inevitable'".¹¹ He specifically introduces these two meanings as a means of interrogating the Melian Dialogue as part of his argument against Realism in his opening chapter. Walzer contends that the Athenian generals "mixed the two of these" meanings when invoking necessity, "stressing the last".¹² Walzer goes on to discuss the two meanings in the context of this example to link it to notions of risk and foresight discussed in the chapter on just war in this thesis.¹³ The meaning of inevitable in

<https://tannerlectures.utah.edu/documents/a-to-z/w/walzer88.pdf>, accessed on 18 June 2019, who draws and comments on Oakeshott's piece. See also C O'Driscoll, *Renegotiation of the Just War Tradition and the Right to War in the Twenty-First Century* (London: Palgrave MacMillan, 2008), ch. 5 for a use of Oakeshott's notion of argument and conversation in the context of the Just War tradition.

¹¹ M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), p. 8. Emphasis quoted from original.

¹² Ibid.

¹³ See in particular the section on Walzer and contemporary just war thought in the previous chapter.

particular, Walzer links with the notion of a judgement that could only realistically be made ex-post or with foresight. He states that “the claim [of inevitability] can only be made afterwards”, since the charge “is mediated by a process of political deliberation and Thucydides could not know what was inevitable until that process had been completed”.¹⁴

As mentioned above, Walzer unfortunately does not develop this distinction further at any point in the chapter or the rest of *Just and Unjust Wars*. It is unfortunate because the distinction of meaning along the lines of indispensable and inevitable allows us to further parse the way necessity is posited, in particular if done for licensing purposes. As Walzer outlines, necessity understood as inevitability implies that a course of (in)action is not only necessary based on prudential considerations, but a borderline imperative. The imperative arises out of the certainty about circumstances which render the course of (in)action in question a necessity. This in turn licenses and legitimates a course of action even if this entails the transgression of ethical rules or laws. The other possible meaning of necessity - indispensable - contrasts with this. Indispensable is then understood not as a certain determination of how circumstances will pan out, but a judgement that under the conditions present at the point of invoking necessity, a certain course of (in)action is deemed necessary. A transgression of rules or laws is equally implicit in this understanding of necessity. However, there is an acknowledgement of the rule or norm being transgressed, which, in light of the circumstances, is deemed indispensable.

Conceived of this way, this provides a framework with which invocations of necessity in the various knowledge communities under discussion can be further examined. Specifically, this framework can help to elucidate the motivation behind and underlying value basis for a positing of necessity for licensing purposes. Thus, for example, the licensing invocation of necessity observed in the *Realpolitik* knowledge community exhibits an understanding of necessity as ‘inevitable’. The importance attached to the political community, mostly the state, paired with the assumptions made about the nature of politics - sovereignty conceived of as the decision over what constitutes an exception and the importance of the friend-enemy distinction - lead to an outlook in which strife, conflict and war are bound to occur.¹⁵ This in turn means that any course of (in)action that

¹⁴ Walzer, *Just and Unjust Wars*, p. 8.

¹⁵ This assumption goes to the heart of the argument of International Relations realism and *Realpolitik*, see the chapter on this discourse above.

maintains the integrity of the political community and furthers her aims is deemed necessary. In this worldview, any transgression of ethical norms or international laws is not really regarded as transgression at all, but seen as necessary in the sense of such (in)actions being inevitable.

In contrast to that, Walzer's conception of the 'supreme emergency' implies an acknowledgement of committing a transgression. There is an admission of wrongdoing, which is justified with recourse to the argument that the situation constitutes an emergency in which the fundamental survival of a community is at stake.¹⁶ Under these circumstances, the argument goes, the violation of ethical norms and laws is indispensable. Therefore, understanding necessity as indispensable, in this framework, does not operate under the assumption of certainty, but makes an assessment on the given circumstances.

While this framework does not resolve the disparate character of the discourses at hand and their different respective understandings of necessity in relation to war and conflict, it reduces the disparate mappings of necessity to a simple binary - inevitable and indispensable - at least where the concept is used for licensing purposes. Thus, this binary framework is merely a heuristic with which the complexity of understandings can, at least somewhat, be reduced, as necessity has to fall into one or the other category. This still does not render the positing of necessity among the various knowledge communities a conversation, but the argument, that it still is, is being simplified. In other words, heuristic frameworks like this one will not resolve the fundamental disparity between the knowledge communities when it comes to their respective conceptualisations of necessity. What it can offer however is a reduction of the ensuing cacophony.

Summary: Contributions, Limitations and Future Research

The central research question underlying this thesis seeks to elucidate whether the concept of necessity is posited and invoked in a consistent manner in relation to war and conflict. Necessity is liberally invoked by politicians, policy- and decision makers, as well as in the academic discourses pertaining to war and conflict. The manner in which it is invoked by

¹⁶ For supreme emergency see Walzer, *Just and Unjust Wars*, pp. 255-68 and the chapter five on Just War in this thesis.

these different groups of people in somewhat different contexts - though always in relation to war and conflict - suggests that the understanding of the concept and, consequently, the way it is invoked, differ substantially from context to context. Indeed, this thesis has shown through the examination of the five most relevant discourses, that the way in which necessity is posited depends on the discourse within in which it is invoked.

International law concerning the resort to war, as well as the laws of war, each offer different legal orthodoxies with respect to necessity from each other, but also from other knowledge communities such as in the reason of state, military strategy and just war discourses.

What this thesis has therefore shown is that despite the common thread of war and conflict running across all the examined discourses and associated knowledge communities, in the central concept of necessity they diverge. Put differently, rather than forming a single discourse on necessity in war and conflict, the five knowledge communities examined each posit necessity along the knowledge practices and traditions of their own discourses. Rather than a symphonic tune we find a cacophony of individual discursive voices.

There are however limitations to the present study, mostly by design and even deliberate. The purpose of this thesis was to examine the understanding of necessity in each discourse and provide a comparative analysis across discourses. Thus, this thesis provides breadth of analysis across different (sub-)fields of knowledge. Future studies could focus one specific community or field of knowledge and thus provide a narrower, but more focused analysis of the understanding of necessity within said field. As a consequence of the methodological choices laid out in the introduction to the thesis, the analyses contained in the above chapters take synchronic as well as some diachronic aspects into account. Again, a future study could establish a narrower, but more detailed conceptual history, that is to say diachronic account, of the usage of necessity in a particular context. In both cases, the nature of inquiry in this thesis lead to a broader purview in the analysis, which sacrifices some depth for comparison and overview. Following from this, future research may wish to focus on particular discourses and knowledge communities and their usage of necessity. As chapters one and two have shown, within international law scholarship the concept of necessity has been an object of inquiry, particularly in recent years. However, the other knowledge communities in question largely ignore the concept, mostly because necessity itself is subsumed under other concepts and often only indirectly addressed. This in turn

leaves these discourses as a fertile ground for further, more focused and hence more detailed research.

The short heuristic framework offered in the preceding section of this chapter is also an invitation to find similar ways of reducing the complexity of disagreement of how necessity, as a concept, should be posited with respect to war and conflict. Such frameworks could be more focused, possibly on a single discourse, in line with the above suggestion for future research. Lastly, an important aspect for future research lies in the next step of the necessity sequence, once the concept has successfully been invoked in connection to war and conflict. It appears that events and developments after such an invocation are often attributed to circumstances beyond the control of the invoking party, when in actuality they are often the direct result of the usage of a necessity argument. In other words, the consequences of the invocation of necessity require further study as they may well impact the understanding and usage of the concept over time.¹⁷ Such future research can build on the foundations laid in this examination, concluding that though each respective community invokes necessity in relation to the same social phenomenon - war and conflict- their understanding of the concept differs according to knowledge practices and underlying value considerations, rendering necessity overall a frayed concept.

¹⁷ This point is made by Friedrich Hayek in the context of policies that are described as ‘inevitable’, which is to say necessary. F A Hayek, *Law, Legislation and Liberty: A new statement of the liberal principles of justice and political economy* (London: Routledge, 1982), Vol. 1, p. 59.

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