This chapter begins by introducing the concepts of ‘armed conflict’, 'hostilities', and ‘military necessity’, each of which is intrinsically linked to the paradigm of hostilities. It then identifies the normative frameworks from which that paradigm is derived. The various conditions and modalities governing the use of lethal force during the conduct of hostilities, and the influence of human rights law on these conditions and modalities are examined. The results obtained shall provide the basis for a concluding analysis of the international permissibility of targeted killing as a method of conducting hostilities.

Military Necessity, Proportionality, and Double Effect: This chapter explores the system of normative beliefs and international law — including the Geneva Conventions and the Additional Protocols — that is concerned with civilian immunity, military necessity and force protection. The chapter describes the moral reasoning that creates and excuses the category of collateral damage and asks whether foreseeable deaths ought to be excused. In the cases of Afghanistan, Iraq and Pakistan, the U.S. has taken important measures to reduce the effect of war on civilians. The current U.S. wars illustrate the uneven balance, or
what may be better described as a deep tension between protecting noncombatant civilians, force protection, and military necessity. The notion of “necessary” military operations can be understood too broadly and that because deaths may often be foreseeable, we should not allow the doctrine of double effect to excuse unintended civilian deaths. Thus, while “collateral damage” might well be legal, there is still a moral problem that points to a legal lacuna.

Permissibility of Targeted Killing as a Method of Conducting Hostilities
Nils Melzer

in Targeted Killing in International Law
Published in print: 2008 Published Online: January 2009
DOI: 10.1093/acprof:oso/9780199533169.003.0014
Item type: chapter

This chapter examines as to what extent the resort to targeted killings can be regarded as permissible under each of the conditions and modalities that govern the use of lethal force under the international normative paradigm of hostilities. Topics discussed include the applicability of the paradigm of hostilities, requirement of military necessity, requirement of distinction, requirement of proportionality, requirement of precaution, prohibition of denial of quarter, prohibition of perfidy, and prohibition or restriction of certain weapons. It is argued that the international normative paradigm of hostilities does not prohibit, but imposes extensive restraints on the method of targeted killing.

Military Necessity and Lincoln’s Concept of the War
Burrsus M. Carnahan

in Act of Justice: Lincoln's Emancipation Proclamation and the Law of War
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DOI: 10.5810/kentucky/9780813124636.003.0008
Item type: chapter

This chapter discusses Lincoln's use of the emancipation weapon and the restrained response of the South to the First Confiscation Act, which was mentioned in the previous chapter. It also highlights the military necessity for emancipation that would also have to be strong enough to have at least a chance of withstanding judicial scrutiny. As such, the Second Confiscation Act, as finally adopted, indirectly recognized the
humanity of escaped slaves by declaring them to be “captives of war”, and not merely human property.

Military Government Doctrine, Training, and Organization, 1940–1941
Walter M. Hudson

Chapter 2 establishes how formal US Army doctrine influenced eventual planning for and implementation of US military government. Most notably, the publication of US Army doctrine, primarily in the form of Field Manual (FM) 27–5: Military Government, provided the seminal guidance on how to train, to plan, and eventually to implement military government. In particular, FM 27–5’s unyielding insistence on military necessity as the guiding principle for postwar occupation governance profoundly informed and influenced subsequent military governments. Doctrine led to training, and FM 27–5 served as the official basis for establishing the School of Military Government where thousands of military government officials were trained during the war years in anticipation of postwar occupation roles. Finally, along with the development of doctrine and education came the formation of military government units that would administer postwar American occupation and the creation of a military government bureaucracy within the War Department that would influence postwar occupation decision making within and outside the army.

Accountability for Killing
Neta Crawford

United States officials argued during America’s post-9/11 wars that the US took every precaution to prevent unintended civilian death and injury — known as collateral damage — due to US military operations. Yet, during the first years of the wars, officials accepted the inevitability of the harm, and tens of thousands of civilians were killed and injured by the US and its allies. The book explores moral responsibility for three
kinds of collateral damage incidents. Accidents were unforeseen and sometimes unforeseeable, and arguably they were comparatively rare. More numerous were systemic collateral damage deaths, the foreseeable consequence of rules of engagement, weapons choices, standard operating procedures and military doctrine. Proportionality/double effect collateral damage is foreseeable, and foreseen, yet anticipated military advantages are said to excuse this unintentional killing. Both systemic collateral damage, and proportionality/double effect collateral damage are produced in part by expansive and permissive conceptions of military necessity. The other causes of systemic collateral damage are found in the organization of warmaking — the institutionalized rules, procedures, training, and stresses of war. Depending on choices that are made at the organizational and command level, the likelihood of causing civilian casualties may rise or fall. When those factors, including beliefs about military necessity, change the incidence of collateral damage also changes. This book offers a new way to think about moral agency and accountability. The dominant paradigm of legal and moral responsibility in war stresses both intention and individual accountability. Yet that framework is inadequate for cases of systemic and proportionality/double effect collateral damage because the causes of those deaths and injuries lie at the organizational level — where doctrine, tactics, and weapons are decided. The author supplements theories of individual agency and accountability with a theory of collective moral responsibility, treating organizations as imperfect moral agents. The US military exercised moral agency when it began, mid-way through the Post-9/11 wars, to change its organizational procedures in order reduce collateral damage deaths. The book offers ways to increase political and public moral responsibility for conduct in war.

The Foundations of Necessity in IHL
Jens David Ohlin and Larry May

in Necessity in International Law

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This chapter extends the analysis of the previous chapter but shifts from philosophical inquiry to legal analysis. The goal is to determine how much of our philosophical understanding of necessity maps onto the current legal landscape, and whether this book’s philosophical position suggests that legal doctrines should be revised or maintained without alteration. To the extent that necessity remains a salient category in today’s scholarly debates about military action, the question is how
it should be applied to factual scenarios that could not have been imagined by the natural law theorists or even Francis Lieber. This chapter starts by analyzing the definition of jus in bello necessity offered by the International Committee of the Red Cross and explains how contemporary explanations of necessity owe much to Lieber and his historical antecedents. It then provides a normative defense of Lieber’s version of jus in bello necessity.

Army Diplomacy
Walter M. Hudson

Army Diplomacy demonstrates how, in the immediate aftermath of World War II, the United States Army became the principal agent of American foreign policy. The army designed, implemented, and administered the occupations of the defeated Axis powers Germany and Japan, as well as many other nations. Generals such as Lucius Clay in Germany, Mark Clark in Austria, and John Hodge in Korea presided over these territories as proconsuls, and at the beginning of the Cold War more than 300 million people lived under some form of US military authority. This massive occupation effort had roots in a century of army practice, especially influenced by the army’s Rhineland occupation. The army policies in the occupied nations also represented the culmination of more than a century of military doctrine. Army Diplomacy relies upon institutional history, military sociology, and international relations theory to show how the army’s institutional history and doctrine led to development of post–World War II occupation governance that reflected the particular imperatives of the US Army, especially the army’s requirement that all matters of governance be subordinate to requirements of military necessity. Army Diplomacy further shows the army’s bureaucratic skill in winning the intergovernmental debate over postwar governance against other US government rivals. Finally, Army Diplomacy reveals how the implementation of military government in postwar Germany, Austria, and Korea not only informed but also profoundly influenced early US Cold War policy.
This chapter challenges the status-based distinction of the laws of war, calling instead for revised targeting doctrines that would place further limits on the killing of enemy soldiers. The chapter argues that the changing nature of wars and militaries casts doubts on the necessity of killing all enemy combatants indiscriminately. The chapter proposes two amendments. The first is a reinterpretation of the principle of distinction, suggesting that the status-based classification be complemented by a test of threat. The second is a reinterpretation of the principle of military necessity, introducing a least-harmful-means test, under which, whenever feasible, an alternative of capture or disabling of the enemy would be preferred to killing.

Our critical thesis is that although Jeff McMahan is critical of Michael Walzer, they both mistakenly adopt the same crucial presupposition, namely that the form of laws of war must be explained by underlying retention or forfeiture of moral rights by individual persons: equal retention on both sides for Walzer and asymmetrical forfeiture (by combatants on opposing sides) for McMahan. Both Walzer and McMahan assume that legal rights granted to combatants ought to mirror directly each individual’s moral rights, a moralization of laws that is impossible to implement within combat. The constructive thesis is the radical suggestion that the immunity of civilians to attack—principle of discrimination—can be understood as an extension of the principle of military necessity, provided the crucial frame of reference for determination of military necessity is what we call the ‘St Petersburg assumption’: the only acceptable goal for war is weakening enemy military forces.
This chapter provides a new account of jus in bello proportionality. An attack that inflicts incidental harm on civilians is objectively proportionate only if it prevents opposing forces from inflicting substantially greater harm on attacking forces or civilians in current or future military operations. An attack is epistemically proportionate only if the attacker reasonably believes-on the basis of decisive epistemic reasons-that the attack will prove objectively proportionate. This account reflects the moral asymmetry between doing harm and allowing harm while looking beyond discrete tactical engagements to the broader operational picture. This account does not compare incommensurable values but instead compares immediate losses to civilians with future losses to civilians and to attacking forces. However, any account must grapple with predictive uncertainty. The chapter concludes with decision procedures and rules of engagement that will help combatants make the best possible decision given the limited information available to them.

This chapter discusses the final form of the Emancipation Proclamation, which was based on two of the belligerent rights of the government under the law of war. It relied on the right to seize and destroy enemy property for reasons of military necessity, and on the right to seek allies through promising liberty to an oppressed people.
A series of challenges in the courts sought to invalidate the Army’s suspension of the privilege of the writ of habeas corpus. Initially, in the federal district court in Hawai`i, Judge Delbert Metzger declared that he was “under duress” by dint of the Army’s order and declined to hear the habeas petition of a German-American citizen, Hans Zimmerman, who had been arrested and interned on suspicion of disloyalty. Zimmerman appealed Metzger’s action to the U.S. Ninth Circuit court, which denied habeas relief but released Zimmerman rather than face the possibility of an adverse decision on appeal. In July 1943 Judge Metzger precipitated a crisis for the Army by reopening his court for habeas petitions and prompting a dramatic clash with General Robert Richardson. By this time, Justice Department attorney Edward Ennis was becoming convinced that the Supreme Court, given the case, would rule against the Army and possibly dismantle much of the martial law regime, so the petitioners were again released using the mooting tactic. Meanwhile, the territorial attorney general and Governor Stainback continued to demand a restoration of civil liberties, including at minimum review by the civilian courts of the legitimacy of the Army’s policies.

The next phase of the legal challenge was initiated by three prisoners who were not internees but had been convicted for ordinary crimes by the provost courts. The most celebrated of all the Hawai`i cases was that of a civil shipyard worker, Lloyd Duncan, convicted of assault on two military sentries. Judge Metzger presided in spring 1944 over an extended habeas hearing in which General Richardson and Admiral Nimitz reasserted the absolute need for the revised martial law regime as it then stood, including denial of the habeas privilege. Metzger ruled flatly against the Army’s authority to try civilians in provost courts for
ordinary crimes. Meanwhile in the other federal district court, Judge J. Frank McLaughlin similarly granted habeas and released two prisoners, in one case on general grounds that the military's full seizure of power was unconstitutional, and in the other on finding the prisoner had been blatantly denied even the rudiments of a fair trial. Again the Army appealed the district court rulings to the Ninth Circuit, and again the habeas decisions were overruled—thus setting the stage in November 1944 for a test in the U.S. Supreme Court.

How Transformative Was the Civil War?
Kristopher A. Teters

in Practical Liberators: Union Officers in the Western Theater during the Civil War

The process of emancipation played out in a more comprehensive way in the western theater than in the eastern. Western officers were forced to deal with huge numbers of slaves across a vast region and implement appropriate policies and programs to carry out emancipation. In particular, the Border South proved especially difficult in managing the legal and political questions surrounding emancipation. At the war’s beginning, the government in Washington had clearly stated that its goal was to preserve the Union and not free the slaves, a view shared by many western officers. But as the war dragged on into its second year, the armies and the government became more emancipationist. Many officers also came to support emancipation and even the use of black troops. However, most officers only embraced emancipation out of pragmatism and military necessity, and their policies reflected their lack of moral idealism. Officers in the western armies liberated slaves for the army’s benefit. As Reconstruction began, many in the North were not very concerned about securing political equality for former slaves. While the war had pushed Northerners to emancipate the slaves, it did not transform them into racial egalitarians.

Necessity in Human Rights Law and IHL
Jens David Ohlin and Larry May

in Necessity in International Law
This chapter contrasts jus in bello necessity with necessity as the concept is used in human rights thinking. The task here is to explain what is distinctive about jus in bello necessity and to explain why conceptions of necessity that reign in other areas of international law cannot be automatically grafted onto the laws of war without reflection and deliberation. Indeed, any attempt to transplant a more restrictive version of necessity will result in a substantial alteration of the legal architecture of jus in bello. Although this is not necessarily a bad thing, it can only be accomplished if one offers a separate normative defense for that alteration. It cannot be presumed.

Military Professionalism and Humanitarian Law
Yishai Beer

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This book seeks to revitalize the humanitarian mission of the international law governing armed conflict, which is being frustrated due to states’ actual practice. In order to achieve its two aims—creating an environment in which full abidance by the law becomes an attainable norm, thus facilitating the second and more important aim of reducing human suffering—it calls for the acknowledgment of realpolitik considerations that dictate states’ and militaries’ behavior. This requires recognition of the core interests of law-abiding states, fighting in their own self-defense—those that, from their militaries’ professional perspective, are essential in order to exercise their defense. Internalizing the importance of existential security interests, when drawing the contours of the law, should not automatically come at the expense of the core values of the humanitarian agenda—for example, the distinction rule. Rather, it allows more room for the humanitarian arena. The suggested tool to allow for such an improved dialogue is the standards and principles of military professionalism. Militaries function in a professional manner; they respect their respective doctrines, operational principles, fighting techniques, and values. Their performances are not random or incidental. The suggested paradigm surfaces and leverages the constraining elements hidden in military professionalism. It suggests a new paradigm in balancing the principles of military necessity and humanity, it deals with the legality of a preemptive strike and the leveraging of military strategy as a constraining tool, and it offers a normative framework for introducing deterrence within the current contours of the law.
Autonomous Weapons and Moral Responsibility
Seumas Miller

in Shooting to Kill: The Ethics of Police and Military Use of Lethal Force

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In this chapter the question addressed is whether autonomous robotic weapons necessarily compromise the moral responsibility of human combatants and their leaders. In order to answer this question, a novel argument is developed: the moral ramification argument. The conclusion of this argument is that it is highly improbable that the moral jus in bello principles of military necessity, discrimination, and proportionality could ever be programmed into robots. The argument utilizes theoretical descriptions of the key notions of military necessity, and individual and collective moral responsibility. Crucially, it relies on the inability of computers to detect and respond to moral—as opposed to physical—properties.

Military Use of Lethal Force
Seumas Miller

in Shooting to Kill: The Ethics of Police and Military Use of Lethal Force

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In this chapter, just war theory is outlined, including jus ad bellum and jus in bello, and a version provided that accommodates wars fought by and against nonstate actors (e.g., terrorist groups). The concept of war is framed in terms of such theoretical notions as joint actions, multilayered structures of joint action, and institutional roles. It is argued that (1) despite the moral difference between combatants fighting a just war and those fighting an unjust war, compliance with the doctrine of the moral equality of combatants is morally justified, but the institutional rights and duties constitutive of that doctrine are merely prima facie moral rights and duties; (2) the principle of military necessity is to be understood in terms of nested collective ends (e.g., the collective end of winning the war depends on winning various battles); and (3) the application of the principle of military necessity involves the rules of engagement.
Aleppo, Syria—a city that will join the infamous likes of Nanking, Stalingrad, Manila, Berlin, Hue, Panama City, Mogadishu, Grozny, and Donetsk as one of modern history’s worst urban war zones. Much of the destruction in this city is the result of indirect fires and air-delivered munitions. Indeed, this is the case in Aleppo; the now-infamous “barrel bomb” has become synonymous with indiscriminate Syrian government attacks against rebel-held areas of the city. In response to the humanitarian dangers associated with the use of such weapons in urban and built-up areas, there is a growing trend among international humanitarian law advocates to severely restrict—or even ban outright—the use of fires, high-explosive munitions, and associated weapons systems in built-up civilian population centers. These humanitarian initiatives reveal that for proponents of such restraint, the “problem” of high explosives in populated areas, whether delivered by indirect fire systems or air assets, is critical. The core premise of this chapter is that new restrictions on urban fires may actually exacerbate civilian risk and that fires in support of urban operations are not only operationally essential, but may, when properly employed, actually reduce risk to civilians and civilian property. Accordingly, civilian risk mitigation efforts should continue to focus on enhancing commitment to and compliance with already existing attack precautions and law of armed conflict (LOAC) targeting obligations.