

Humanity, Necessity, and the Rights of Soldiers

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Every human being has human rights. Those who are soldiers are human beings. So, soldiers must have human rights. But this is not the end of the story. Soldiers are not types of humans - rather they are roles that humans can occupy. And a role is not a human and hence cannot have human rights. True, the human being occupying a role has human rights. But soldiers, per se, do not have human rights. There is a difference between asking whether those who occupy the role of soldier have human (or other) rights, and asking whether soldiers per se have human rights. I shall argue that even though there is an important difference between human rights and humanitarian role-based rights, the humanitarian rights of soldiers should be seen to be much more significant than is normally acknowledged, as when soldiers are called mere cannon fodder.

In this essay, I will argue that we need to give more attention to, and support for, an expanded range of the rights of soldiers. In both morality and law, it is still common to say that soldiers' lives do not count for very much in assessments of whether or not a particular war or armed conflict is justifiably initiated and conducted. Even for those philosophers and lawyers who believe that soldiers forfeit some of their most basic rights, such as the right to life, the humanitarian rights of soldiers should be seen as nearly as strong as those of civilians. Specifically, I argue that soldiers should be acknowledged to have the humanitarian right not to be killed unnecessarily. Such a right is granted in many domestic contexts, even to those who are criminals. Yet there is an oddity in that many moral and legal theorists grant greater rights to fleeing bank robbers than to soldiers who are simply trying to do their jobs.

I will reflect on what the categories of humanitarianism and dignity entail when understood in the context of armed conflict – where taking a soldier-centered perspective is the overarching viewpoint since soldiers are the ones most directly affected by armed conflict. Also, I will argue that military necessity is best conceived as a form of practical necessity. I will argue for a strengthening of the principle of military necessity, so that a soldier's life can only be taken if it is practically necessary to achieve a needed military objective. If during armed conflict civilians have very extensive rights, qua civilians, it would be odd, I shall argue, that soldiers, qua soldiers, do not have extensive rights in armed conflict as well. I will then set out a new way to understand humanitarian norms that is in keeping with the idea that the humans who are soldiers should be treated with at least minimal dignity. But the rights of soldiers may not be properly human rights, or at least not understood in the unrestricted way that human rights often are understood. Instead, I shall support the need for an expanded view of humanitarian rights that takes account of the unique vulnerabilities that soldiers have.

Part A. Humanity and Humaneness

I. Humanity and Humane Treatment

The main focus of this section of the essay is to delineate the ways in which humanity can be understood, as a prelude to understanding some key moral and legal concepts today that are derived from the ideas of the human and humanity, namely, humaneness, humanitarianism, and human rights. I will then argue for a change in the way military is understood as well as for a corresponding right not to be killed unnecessarily for soldiers.

Humanity is perhaps most basically a shorthand way to refer to all humans, or alternatively to the special characteristic that makes humans what they are. Both etymologically and conceptually, humanity also refers to the characteristic (genetic, family resemblance, etc.) feature of those who are members of the group “human.” Being human is what is characteristic of all individuals called humans. How humans are indeed identified is not an easy matter to articulate in a simple formula. Genetic characteristics are perhaps the simplest, but identification by one member or another is rarely made on the basis of genetic composition, or at least not on this alone. Rather humans are identified on the basis of appearance and other recognizable features, such as the ability to speak a language.

Bernard Williams has argued that by using language in an especially sophisticated way humans interact, and these interactions enable them to engage in joint projects in a wide variety of forms. These institutional features of humanity point toward the characteristic of “intentionality” that humans display more than any other animal species. The use of language and the construction of dwellings is so complex and varied as to suggest a different inspiration than instinct.¹

Intentionality is itself very hard to characterize without making many controversial assumptions. But there is a sense of acting intentionally that is relatively uncontroversial in its application to humans. Humans can solve complex problems that require months or even years of goal directed activity. Humans can engage in “campaigns,” such as military campaigns, that bring very large numbers of fellow humans together in intricate arrangements, interacting with often highly complex technology, both for good as well as for bad ends.

Humanity is also a value and an ideal. Humanity is often referred to as a kind of principle, where the principle of humanity is the principle that all humans are deserving of respect because of the dignity that is found in each member of humanity. Dignity has been variously understood to be grounded in the idea of a will or soul that is unique to humans among all other creatures and is of ultimate value. Humans were seen to be special because they could do something that no other creatures could do and this was something that had high instrumental value, namely thinking and problem solving.

The concept of humanity has had an increasingly prominent role in the origination and justification of legal institutions. The most significant of these contemporary legal institutions is the United Nations. The Preamble of the Charter of the United Nations says:

We the People of the United Nations determined

¹ Bernard Williams, *Making Sense of Humanity*, Cambridge: Cambridge University Press, 1995, pp. 79-80.

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to promote social progress and better standards of life in larger freedom.²

This preeminent international legal institution declares as its grounding idea the faith in human rights and dignity. This founding goal has proven to be more important than the first mentioned goals, namely, to end war, or to promote social progress.

In addition to the United Nations, and quite a bit earlier, the idea of humane treatment during war was espoused at least as early as Hugo Grotius's seminal work, De Jure Belli ac Pacis (1625).³ Humaneness is the idea that people should act toward one another with restraint, especially with the restraint that would come from being compassionate or having sympathy for another person's plight. This idea was especially significant in the development of the laws of war that would restrain the activities that could bring suffering to soldiers and civilians alike.

The idea of humaneness spawned another idea that is at least as significant especially today, the idea of humanitarianism. Humanitarianism is the idea that people should be ready to go to one another's aid when human need exists due to such events as famine, natural disaster, or war. Michael Walzer has recently described humanitarianism as a "two in one, a gift that we have to give," combining aspects of charity and duty in a single concept.⁴ Humanitarianism is the key concept in the institutions that deal with relief efforts after major catastrophes like civil wars or typhoons. And humanitarianism has been especially prominent in discussions of whether there is a duty on States to go to the aid of people in other States who are being abused by their States. The term "humanitarian intervention" has been coined to refer to especially military operations to stop a civil war or an atrocity.

The idea of humanitarianism is also the guiding idea behind such organizations as the International Committee of the Red Cross and Doctors without Borders. These groups send their members into some of the most inhospitable situations in order to minister to fellow humans who have become incapable of providing for their own needs or fending for themselves. These organizations support human staff members who put themselves at great risk in order to help those who are especially vulnerable to dying or suffering greatly.⁵ And the staff of these humanitarian organizations put themselves in such risk simply because there are other humans who are in dire need, not people they know, but total strangers often living in countries as distant from the aid workers' home countries as possible. And the connection between these people who give and those who receive aid is merely that they are fellow humans, where human vulnerability is one of the key things that brings them together.

² Preamble, Charter of the United Nations (1945).

³ Hugo Grotius, De Jure Belli ac Pacis (1625) (On the Law of War and Peace) translated by Frances W. Kelsey, Oxford: Clarendon Press, 1925.

⁴ Michael Walzer, "On Humanitarianism," Foreign Affairs, vol. 90, 2011, pp. 69-80.

⁵ See Michael Barnett, Empire of Humanity: A History of Humanitarianism, Ithaca: Cornell University Press, 2011.

In addition, the idea of humanity has spawned the even larger source of contemporary institutions, the idea of human rights. Human rights are rights that individual humans have by virtue of being human. It is the proliferation of human rights institutions that has fueled some of the interest in figuring out what it means to be human such that one could have rights simply by satisfying the conditions for being human. Here there is a clear move to connect the descriptive status of being human with a normative status, being the bearer of rights.

As we will see as this essay proceeds, humanity is also importantly talked of as a principle: “the principle of humanity,” which stands in opposition to the military necessity of winning a battle or a war. The principle of humanity, while controversial, reminds us that the people whose lives are taken in battle are humans who have dignity that must be respected. Yet, the question that emerges is whether humans can intentionally kill other humans during war and still respect each other’s dignity as humans. This will be the overarching puzzle that this essay aims to solve.

The proposal I will be defending was seen by early Just War theorists who discussed the principle of necessity in *jus in bello* contexts. Aquinas held that “if a man in self-defense uses more than necessary violence, it will be unlawful.”⁶ And Hugo Grotius famously regarded the principle of necessity as a strongly restrictive principle: “War in defense of life is permissible only when the danger is immediate and certain... The danger again must be immediate (*praesens*) and imminent (*hic*).”⁷ And a bit later in the text, Grotius adds: “I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided.”⁸ Over the centuries the principle of military necessity has been considerably weakened with respect to the killing of soldiers. I will be defending a return to the Grotian understanding of the principle of necessity.

II. Human Rights and Role-Based Rights

The crucial feature of human rights is that they attach to every human person regardless of role or situation. And on many accounts, human rights also have the feature of being absolute or near-absolute norms – they cannot generally be overridden by even very compelling moral considerations. As Ronald Dworkin has argued, rights are trumps in that most other consequentialist considerations are trumped by claims of rights.⁹ But even for Dworkin there are different types of rights that have different weights even though the general category of rights is best understood as having overriding status when in conflict with consequentialist considerations.

Role-based rights, in contrast to human rights, are not only restricted to the class of people who occupy a certain role, say that of doctor or lawyer, but role-based rights also are not well-described as trumps against all consequentialist concerns. Instead, calling something a role-based right is primarily a means of indicating that that right is highly restricted both to its class of possible holders as well as its reach or extent.

⁶ Thomas Aquinas, *Summa Theologica*, II-II, Qu. LXIV, Art. 7, translated by Fathers of the English Dominican Province, NY: Benzinger Bros., 1948, p. 1465.

⁷ Hugo Grotius, *De Jure Belli ac Pacis* (1625) (*On the Law of War and Peace*) translated by Frances W. Kelsey, Oxford: Clarendon Press, 1925, p. 173.

⁸ *Ibid.*, p. 175.

⁹ Ronald Dworkin, *Taking Rights Seriously*, Cambridge, MA: Harvard University Press, 1976, Ch. 7.

Nonetheless, role-based rights are such that they will override certain consequentialist considerations within the context of the specific circumstances where they apply. A lawyer's right to maintain the confidences of his or her client trumps most specific consequentialist considerations concerning the good of such a disclosure, but this is not true of all consequentialist considerations, for instance when someone's life is at risk by nondisclosure.

Role-based rights and human rights can resemble each other, if those that occupy a given role are, or could be, nearly any human. It is my view that role-based rights of soldiers are of this sort. While it takes special training to be a soldier, very many humans could be trained to be soldiers. This is different from those who are lawyers or doctors, for instance. In these cases, most people could not become doctors or lawyers because of highly specialized skill that is involved and that is not something that it is easy, or even possible, for many people to learn without already having a special aptitude for it. Of course, the humans who occupy these various roles have human rights, but as "doctors" or "lawyers" they have role-based rights that differ in significant ways from their human rights and role-based rights also differ among the various roles that a person can assume.

I do not mean to diminish the importance or level of skill required to occupy the role of soldier here. Boot camp, where people are put through very rigorous physical training, is certainly not something that everyone could succeed at. But a very large percentage of the human population could succeed in boot camp and become competent soldiers, as has been seen in the two world wars of the Twentieth Century where very high percentages of people in many very diverse societies were transformed into reasonable soldiers in time of need. In this sense, most people could fill the role of soldier, in ways that are not true of other important roles. So, the range of application of some role-based rights that resemble human rights in terms of their extent, such as that of soldiers, is different from most role-based rights, and closer to the range of application of human rights than is true of most role-based rights.

Even as the range of some role-based rights is nearly as extensive as human rights, these role-based rights still can be distinguished in terms of the overridingness of these role-based rights. All role-based rights are restricted in terms of the range of what they can trump or override. Typically role-based rights only trump other, primarily consequentialist, concerns involving matters having to do with the role. In the case of human rights, by contrast, the domain over which these rights are trumps is considerably larger than for role-based rights. Indeed, as the domain over which role-based rights operate increases the corresponding overridingness will increase as well.

Role-based rights of soldiers are grounded in two conditions: the status of being a soldier and the value of having people serve in that role, on the one hand, and the various vulnerabilities that attach to those who occupy the role of soldier, on the other hand. While this will be explained in much more detail in Section B of this essay, let me here just say that the kind of vulnerabilities that soldiers are exposed to by occupying their role is also closer to that of those who have human rights than many other role-based rights holders. The vulnerabilities that soldiers experience are similar to the vulnerabilities of all humans who are exposed to situations of war and armed conflict. By this I mean that situations of war or armed conflict are artificially constructed situations that expose anyone in the area to extraordinary threats to life and liberty, although soldiers also have unique vulnerabilities here because of their role.

In Just War theory, the vulnerabilities of civilians during times of war or armed conflict have been well recognized. Indeed, most of the traditional rules of war in humanitarian law have followed ideas in the Just War tradition in that they are aimed at providing protection for vulnerable civilians caught up in the effects of war. But soldiers are not often thought to be vulnerable in the way in which civilians are, since soldiers carry weapons and have specialized training in self-defense not normally available to civilians. Indeed, rules such as those propounded by the International Committee of the Red Cross, especially the Geneva Conventions, are generally aimed at the protection of civilians who happen to take a direct part in armed conflict, or to soldiers who are no longer in battle because they have surrendered or become incapacitated by their injuries, not strictly to the soldiers who participate in armed conflict. Nonetheless, in what follows I will argue that it is a mistake to disregard the increased vulnerabilities that soldiers have in armed conflict and I will argue that we should extend to soldiers protections that are normally only afforded to civilians who are involved, or even just caught up, in armed conflict.

III. Humanitarianism and Human Dignity

The rights of soldiers are often described in international law as humanitarian rights. By this is meant, in part, rights to be treated humanely – where a soldier is not supposed to be subjected to unnecessary or overly severe treatment, even as it is generally acknowledged that in many situations soldiers can be killed without violating their rights. And in this sense, it is odd that humanitarian rights of soldiers are often defended on grounds of dignity since there are at least two major dignity considerations that would seem to apply to armed conflict. The first is how a soldier is treated in terms of his or her suffering, and the rules or laws of war have addressed this directly with what I consider to be proper restraints on tactics and weapons used during war. But the second aspect of the dignity of soldiers concerns how the right to life is regarded. For human beings generally, the right to life is normally thought to be the most significant of the human rights, rather than the right not to suffer, although certainly these two rights are very close to the top of any rights hierarchy. But traditionally a soldier in armed conflict is thought to have a much more heightened right not to suffer than a right to life. And the question is whether this is consistent with calling the rights of soldiers humanitarian.

As I said, the label “humanitarian” makes reference, among other things, to the idea of certain types of treatment being humane. In this sense, someone can be executed humanely even though that person is being intentionally killed. Here humaneness is seen as equivalent to “not cruel” or “not unnecessarily causing suffering among humans.” And these are laudable goals. But the question is whether promoting human dignity is exhausted by this relatively narrow understanding of humanitarianism. Why does humanitarianism and its cousin humaneness, not call for respecting the soldier’s right to life? Or if soldiers should not have their rights to life protected, aren’t there still related special rights that need to be recognized so that the dignity of soldiers can be protected.

It seems to me that the notion of humanitarian rights should extend beyond what is called for from a concern that people are humanely treated in the narrow sense of not suffering unnecessarily. In some respects all humans should be treated humanely, that is, they should be treated in a way that does not cause unnecessary suffering for them. But there are other special rights that are important for the protection of human dignity. I will

later explore the topic of the specific types of rights during war in more detail. Here I wish to begin to defend the general idea that dignity might require taking account of special roles and circumstances of humans beyond what is required for protecting the dignity of all humans.

Humans, qua humans, are vulnerable in many ways. As David Hume once pointed out, if humans had hard shells, like some other creatures, they would not be so vulnerable to so many kinds of bodily injury.¹⁰ If humans had a stronger sense of smell, they would not be vulnerable to factors that cause impaired vision since they would be better able to compensate for loss of one sense by the use of another. Humans are also uniquely intentional creatures whose dignity, or worth, is largely associated with the higher mental faculties. The Merriam-Webster Dictionary says this about dignity: “a way of appearing or behaving that suggests seriousness and self-control.” It is the self-control of the will associated with humans, and paradigmatically so, that makes them uniquely vulnerable to factors that would impair the ability to exercise their intentional decision-making.

Kant famously put the dignity of humans at the center of his moral philosophy. Here is a passage from his Metaphysics of Morals, Part II:

But man as a person, i.e., as the subject of a morally-practical reason, is exalted above all price. For such a one (*homo noumenon*) he is not to be valued merely as a means to the ends of other people, or even to his own ends, but is to be prized as an end in himself. This is to say, he possesses dignity (an absolute inner worth) whereby he exacts the respect of all other rational beings in the world, can measure himself against each member of his species, and can esteem himself on a footing of equality with them. The humanity in one’s person is the object of the respect which he can require of every human being, but which he must not forfeit.¹¹

For Kant, human dignity is the value of a human life as an end in itself. This value is premised on the idea that humans have a noumenal life, a certain kind of higher mental capacity including intentionality, which distinguishes them from all other animals.¹²

Interestingly, Kant does recognize that a person can, to a certain extent, forfeit his or her dignity: primarily by not fulfilling his or her moral duties. And many of these duties are grounded in showing respect for other humans as themselves having dignity in their humanity. Kant says that he has in mind the person who attempts suicide. So, we should be reluctant to jump too quickly to draw conclusions about the case of a soldier who takes up arms. Indeed, there is no reason to think that Kant has in mind that a soldier forfeits his or her dignity, because it is not immediately evident what duty it is that the soldier violates. Indeed it is somewhat notorious that serving in the military is often associated with paradigmatically doing one’s duty, rather than failing to do one’s duty.

¹⁰ David Hume, Treatise on Human Understanding.

¹¹ Immanuel Kant, The Metaphysics of Morals, Part II: Metaphysical Principles of Virtue (1797), in Immanuel Kant’s Ethical Philosophy, translated by James W. Ellington, Indianapolis, IN: Hackett Publishing Co., 1983, p. 97.

¹² It should be noted that while I often appeal to Kant in this essay I do so not because I am convinced that Kantianism is the best normative moral theory, but because Kant best captures the idea and importance of dignity, which itself has been crucial to contemporary debates about human rights as well as humanitarian considerations.

To treat people with dignity is to treat them as responsible agents. This means that we should not ignore the bad things that a person does, just as we should not ignore the good things that a person brings into the world. A society can punish a person and still respect that person's dignity; and a society might even be able to execute a person and still respect that person's dignity, if the means of execution minimizes suffering. It has sometimes been thought that it is sufficient in such cases that the society not make the person suffer unnecessarily for the society to show that it still respects the person's dignity. But I have been suggesting that a person's capacity for suffering, while important, is not the source of that person's dignity. From a Kantian perspective, and from other deontological perspectives, humanitarianism means more than not making people suffer unnecessarily – the life of the person also needs to be taken seriously.

In international law there is a movement in favor of strengthening the principle of humanity so that the domains of international humanitarian law and human rights law come closer together.¹³ Yoram Dinstein has challenged the idea that there is a principle of humanity that is a principle similar to the principle of distinction or the principle of proportionality. Instead he argues that:

There is no overarching, binding, norm of humanity, that tells us what we must do (or not do) in wartime. What we actually encounter are humanitarian considerations... these considerations do not by themselves amount to law: they are meta-judicial in nature... If benevolent humanitarianism were the only factor to be weighed in hostilities, war would have entailed no bloodshed, no human suffering, and no destruction of property; in short war would not be war. IHL [International Humanitarian Law] must be predicated on a subtle balance – and compromise – between conflicting considerations of humanity, on the one hand, and the demands of military necessity on the other.¹⁴

We find a major international legal theorist supporting the idea of balancing, even recognizing that combatants should be protected in such a balancing, and yet not willing to move away from the traditional idea that soldiers' rights to life count for very little.

There certainly is legal precedent for seeing a principle of humanity as a strong principle in international law. I would cite a decision by the High Court of Israel in 2005. Here the Israeli Court held that terrorists needed to be treated humanely. The High Court held that “a civilian taking part in direct hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed.”¹⁵ I cited the ICRC and the ICJ earlier as well. The idea is gaining strength that not only human rights norms but a principle of humanity should be held to be applicable to soldiers and other combatants.

Last, let me cite the famous Martens Clause, originally appended to the 1899 Hague Convention, and often incorporated into other international law documents, holds as follows:

¹³ See *Searching for a 'Principle of Humanity' in International Humanitarian Law*, edited by Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper, and Gro Nystuen, Cambridge: Cambridge University Press, 2013.

¹⁴ Yoram Dinstein, “The Principle of Proportionality,” in *Searching for a 'Principle of Humanity' in International Humanitarian Law*, edited by Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper, and Gro Nystuen, Cambridge: Cambridge University Press, 2013, pp. 72-85, p. 73.

¹⁵ *Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. Israel*, ILDC 597 (IL 2006), paragraph 40.

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience.¹⁶

As Dinstein and others have pointed out, the reference to the “principles of humanity” is rather vague and not defined. Yet the principle of humanity has become an entrenched part of international law.

The principle of humanity overlaps with various human rights principles, but I would suggest that we keep the idea of humanitarian rights separate from human rights during armed conflict. As I argued at the beginning of this essay, the rights of soldiers should be seen as role-based rights, since soldiers are not humans standing alone but humans occupying a specific social role. The rights and dignity afforded to fellow soldiers, as soldiers, is not the same as the more general rights and dignity afforded to fellow humans. The principle of humanity in wartime carries with it the idea of humanitarian rights not yet full-scale human rights. Yet, the humanitarian rights of soldiers should be expanded from the traditional model of understanding humanitarian law. And a minimum of dignity should be afforded to those who occupy the role of soldiers.

IV. Dignity and Vulnerability

At this stage, we have two important concepts on the table, vulnerability and dignity. Before moving to Parts B and C of this essay, which deal with more specific issues in the morality and legality of war, in this brief section I wish to explore the relationship between these two concepts that are so important in understanding the rules and laws of war. One way, explored in this section, is that humans are especially vulnerable because they have the ability to choose how to live their lives and are not constantly driven by instinct and other forces of natural necessity. The ability to choose how to lead a person’s life is at the center of both a person’s dignity understood as one’s ultimate worth (“beyond price,” as Kant put it) but also one’s uniquely human vulnerability.

The ability to make choices, concerning how one wants to live one’s life, has both positive and negative aspects. The positive aspect is obvious – humans are the only creatures that have this capacity, and it allows them to form intentions and act on those intentions to create short term and long term, individual and coordinated, enterprises as I discussed earlier. The negative side of making choices is that the human person is accountable for what he or she does in ways that are not true of the creatures that lack this ability. And so if humans make bad choices they are vulnerable in that they are responsible for the consequences of those choices, such as the death of other humans. In the context of war, this vulnerability is often described in terms of being liable to punishment, or even liability to be harmed or killed, because of what they have chosen to do on the battlefield.

¹⁶ See the Preamble to the 1907 Hague Regulations, all four Geneva conventions of 1949, the Preamble of the 1977 Additional Protocol II, Article 1, para. 2 of the 1977 Additional Protocol I, and the Preamble of the 1980 Conventional Weapons Convention.

Vulnerability for bad, or good, choices is especially important in the context of war and armed conflict. Even in cases of conscription, a person makes a choice of whether to resist or not. In cases of volunteering for military service, the person is responsible for what results from such a choice. The human person cannot claim to be relieved of liability or even from responsibility due to natural necessity, the forces of natural instinct etc., which would be the motivator for non-human animals.

And even in cases of volunteering for military service, we must investigate what considerations moved the person to volunteer. In some cases, the “volunteer” may have felt compelled by economic or family circumstances to join, seeing no other reasonable options at that point in his or her life. And similar things can be said about those who are conscripted. It will matter how severe the consequences were of resisting the conscription. In some cases, the penalty for resisting conscription may be so low that acquiescing in the conscription is closer to being a volunteer than in some cases of “volunteering” where there was intense pressure to enlist but no conscription.

In addition, part of a human’s vulnerable nature is that he or she can lose the capacity for choice in a myriad of injuries that would not have anything so nearly catastrophic if experienced by non-human animals. Head injuries are especially likely to affect capacity for choice, and yet humans are not well protected by nature in their heads. And once one realizes that the center of dignity for humans is connected to choice over how to live one’s life, there is a sense that humans are vulnerable to certain kinds of injury because those injuries affect choice and hence also the dignity of these humans.

The dignity of humans is not exhausted by considerations of their choices – the sheer capacity for choice, rather than the actualization of choice, may be sufficient for establishing the minimal dignity of a human life. But as one loses one’s ability to choose, there is a diminishment in the kind of dignity that Kant spoke of, and that has animated most discussions of this topic, including those at the time of the drafting of the United Nations Charter.

Dignity is also affected by a loss or diminishment of one’s ability to make choices for the better in one’s life. Soldiers who return from battle and who are “shell shocked” or suffering from a “post traumatic stress disorder” often feel incapable of making decisions about how to make their lives better.¹⁷ In addition, returning soldiers often have trouble adjusting to the mundane decisions of ordinary life after having spent a long time in a realm where all choices seemed extraordinary and consumed with basic survival. Here again dignity, as understood in first personal terms, is affected by vulnerabilities that are exacerbated by wartime situations.

Not all people who experience combat are adversely affected in the ways I have been indicating. What is important, though, is that anyone in combat is much more at risk, than they normally would be, of being so harmed due to the vulnerabilities that all humans have by virtue of being human. So, while soldiers qua soldiers should not be said to have general human rights, the special rights they have by virtue of their roles will warrant strong protections, even if the protections are not as sweeping as such things as the absolute human right to life.

It is in these ways that we can begin to see how vulnerability and dignity are linked, especially in the context of war and armed conflict. In Part B of this essay I will discuss how the dignity and vulnerabilities of humans affects how they are treated in

¹⁷ See Nancy Sherman, *Stoic Warriors*, Oxford: Oxford University Press, 2007.

terms of their human and humanitarian rights. These rights are supposed to protect people in the most vulnerable of circumstances. Yet, as we will see, humanitarian rights in particular have not lived up to the promise of protecting some of the most vulnerable during war, namely soldiers and other combatants.

Humanitarian rights protect the dignity of people, especially those who are in precarious situations in terms of vulnerability. This is because sentience is not the key consideration for human dignity. Humans are not unique in being able to suffer – for many non-human animals can also suffer. Rather humans are unique in terms of the capacity for intentional acts of willing, and it is the denial or abrogating of that feature that would be a paradigmatic assault on a person’s dignity. It is true that a human can experience suffering more deeply in some cases than is true for a non-human animal, because of the human’s capacity for self-reflection. But even this characteristic is not unique to humans, and in any event is not at the core of a human’s dignity, the person’s ultimate worth.

For dignity to be respected for those who assume certain highly vulnerable roles, there must in most cases be some specific right that is recognized and granted special protection in a given society. The reason for this is that there must be something dignity-enhancing that offsets the dignity-diminishing situation. The prisoner, who has had his or her liberty restricted, has had a dignity-diminishing experience. And while punishment may be justified in a host of ways including retribution, deterrence, expressivism, etc., in addition there must be something dignity-affirming that would not normally be extended to persons who are not imprisoned. Instead, what often happens is that the prisoner is treated in multiple ways that are dignity-diminishing, or there is no special consideration given so that the dignity of the prisoner is affirmed even as he or she has liberty restricted.

Some might argue that the prisoner has waived or forfeited his or her right to liberty.¹⁸ Even if this were true (which I would deny) the prisoner, or soldier, remains a human being whose dignity should not be unalterably transformed unless the person has somehow ceased to be human. I will have more to say about the forfeiture idea later. Here I merely wish to point out that even those who hold a forfeiture theory of rights, for the prisoner or soldier, need a separate argument to show that the person has forfeited the right to be treated, in whatever way that person is treated, as a person with dignity.

The problem that I wish to investigate in Part B is how to understand the principle of military necessity in light of the dignity and vulnerability of soldiers. And then in Part C, I will look specifically at the right not to be killed unnecessarily and the moral status of soldiers in a revised understanding of humanitarianism. Even those who seem to forfeit their rights temporarily must still be treated as persons having at least minimal dignity. The soldier, unlike the suicide-attempter, is not attempting to forfeit human rights forever. And so, while it might be true (although I think it is not) that someone who joins the military may forfeit some human rights temporarily, this certainly does not give others the right to treat the soldier as if the person occupying this role does not have dignity. As I will argue, while a person might forfeit certain rights it makes little sense to say that a person would ever forfeit their dignity by joining the military. We must

¹⁸ See Christopher Heath Wellman, “The Rights Forfeiture Theory of Punishment,” *Ethics*, vol. 122, no. 2, January 2012, pp. 371-393.

think about what limits remain on what can be done to a soldier despite, or perhaps because of, the soldier's participation in armed conflict.

Part B: Necessity and Humanitarianism

V. The Concept of Necessity

The idea that one should only use lethal force when it is necessary is one of the most important concepts in the humanitarian restrictions of action during war or armed conflict. Yet, for centuries necessity has been understood in the rules and laws of war in terms of “military necessity.” For many theorists and practitioners, the concept of military necessity has little to do with the common sense understanding of necessity. Rather military necessity means simply that there is some goal that a commander is pursuing, and that goal has some clear connection to the winning of a particular battle and the overall winning of the war. In this section, I wish first to give a sense of the different relevant meanings of the term necessity in debates about the humanitarian treatment of soldiers and civilians. But I will also argue in this section that the kind of necessity that warrants extraordinary treatment of various persons for a military objective is not the right kind of necessity to justify suspending or abrogating the humanitarian rights of the soldier.

To highlight the issue let me give several examples of attempts to explain what military necessity consists in. I begin with two judgments from the trials after the Second World War of Nazi German officials, where somewhat different standards of military necessity are set out. First, consider the Hostage Case. The American Military Tribunal rejected the argument of the legality of reprisal killings of civilians describing the general principle of military necessity and then describing its limits:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money... It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war.

Notice that this statement of the principle of military necessity does not set limits on the use of force needed to kill enemy soldiers, as long as those deaths are “incidentally unavoidable” to achieve military objectives.

The term “incidentally unavoidable,” bears some relationship to the common sense understanding of necessity. If something is unavoidable then it is fair to say that it is necessary, and necessity here seems to be an appropriate label. But the qualifying term “incidental” raises suspicions that military necessity here is not really necessity as it would be understood in common parlance (or by metaphysicians, as we will see in the next section). Something can be “incidental” in that it is part of one way of accomplishing something, not the only way to accomplish the objective, as would seemingly be true if it were really necessary.

Yet, there is a second part of the Hostage Case where it is made clear that military necessity protects civilians and civilian property more strictly than it protects the lives of soldiers. Military necessity

does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war... There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.¹⁹

Here we have the words “imperatively demanded” rather than “incidentally unavoidable” signaling that civilian life and property is to be valued more highly than the lives of soldiers, since “imperatively demanded” is much closer to the commonsense meaning of necessity than “incidentally unavoidable.”

Secondly, another case from Nuremberg uses different language from either of these parts of the Hostage Case. In the German High Command Case, military necessity is described as follows:

A bare declaration that what was done was militarily necessary has no more probative substance than a statement contained in an answer or other pleading. In order to make out a valid defense of destruction or pillage on the ground of military necessity, the defendant must prove that the facts and circumstances were such at the time he ordered these measures that he would be justified in believing them to be necessary to save his troops from an imminent disaster.²⁰

Here we have an account of military necessity that is much closer to common sense understandings of necessity. The situation has to be one where if lethal force were not used the commander’s troops would suffer “from an imminent disaster.”

The terminology employed in the German High Command Case sets the bar very high indeed, and seems to me to be quite close to what necessity should mean in military necessity if necessity were indeed the correct term, that is, some type of practical or normative necessity as explored in the next section. Notice the use of two terms. First, there is the idea that a disaster would ensue if the lethal action were not taken. We are not merely to contemplate accomplishing a military objective, but only of one that would save the lives of one’s own troops. And then there is also the term “imminent,” signaling that if this particular lethal action is not taken here, the lives of one’s troops will be lost.

Thirdly, in the Just War literature, imminence along with immediacy, have been employed for centuries to make sense out of the principle of necessity in *jus in bello* considerations. As I said earlier, in Hugo Grotius’s great work, *De Jure Belli ac Pacis*, he says that “The danger again must be immediate and imminent.”²¹ He follows this up by saying: “I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise

¹⁹ United States v. List (The Hostage Case), Case No. 7 (Feb. 19, 1948), reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950), p. 1253-1255. For a comment on this passage see Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,” Virginia Journal of International Law, vol. 50, no. 4, 2010pp. 795-839, Section I.A.

²⁰ U.S. v. Wilhelm Von Leeb and Thirteen Others, (The German High Command Case), United States Military Tribunal, Nuremberg, December 30th, 1947 – October 28th 1948, reprinted in The United Nations War Crimes Commission, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1949, Vol. XII, p. 125.

²¹ Hugo Grotius, *De Jure Belli ac Pacis* (1625) (On the Law of War and Peace) translated by Frances W. Kelsey, Oxford: Clarendon Press, 1925, p. 173.

avoided.”²² There are three standards of necessity articulated here. The first is the “imminence” standard just discussed. The second is “immediacy,” the temporal equivalent of the spatial category of imminence. And the third is the standard that there cannot be “any other way [the killing can] be avoided.”

The “no other way” standard is stronger than either the “incidentally unavoidable” standard, where incidental is the modifier, or the “imperatively demanded” standard which seems to be restricted to civilian deaths. In Grotius’s view, military necessity is not incidental but central to incidents of war, and military necessity is not restricted to lethal action taken against civilians, as it was for both of the Nuremberg cases. Normatively, as we will see in subsequent chapters, Grotius’s standard for military necessity seems to be more defensible than either of the two standards of military necessity that we can find in the Nuremberg proceedings. I will say more about this issue in the next section as well as at the end of Section X.

VI. Military Necessity as a Form of Practical Necessity

Let us next turn to several attempts to separate the various meanings of necessity in philosophical discourse in recent years. Kit Fine urges us to understand the varieties of necessity by beginning with logical necessity: “a proposition is necessary if it *must* be true.”²³ He then divides logical necessity into two further categories, narrow or broad logical necessity. In the narrow sense, a necessary proposition would be of the sort “red is red.” Logically necessary propositions are necessary because they are true by application of some law such as the law of identity, namely a thing must be identical to itself. In the broad sense, sometimes called “metaphysical necessity,” we begin from the identity of things, where one thing is necessarily not another thing; a red thing is not also a green thing.

Of somewhat more relevance for discussions of military necessity is what Fine calls conceptual necessity. “Conceptually necessary truths” are those that are logically “necessary relative to or conditional upon the basic conceptual truths.”²⁴ I am especially interested in seeing necessity as conditional, since that is clearly the way that we must understand military necessity if this term is to have any practical meaning at all. In a sense all necessities are conditional on something – logical necessity is conditional on the laws of logic, and metaphysical necessity is conditional on the laws of nature. But conceptual necessity is somewhat different than these other two in that it can be relative to what a particular person’s conceptual framework is, although this is clearly not the usage Kit Fine has in mind. Fine is thinking about fixed, objective conceptual truths that are “perhaps given by the definitions of the concepts.”²⁵ Yet, it seems to me, definitions are not utterly fixed the way that logic or nature is – indeed they can change every time a dictionary is updated. In the remainder of this section I will consider this idea and in so doing hopefully make progress on ascertaining a plausible notion of military necessity.

²² Ibid., p. 175.

²³ Kit Fine, “The Varieties of Necessity in *Conceivability and Possibility*,” Tamar Szabo Gendler and John Hawthorne, eds., Oxford: Oxford University Press, 2002, pp. 253-281, p. 254; and reprinted in his book *Modality and Tense: Philosophical Papers*, Oxford: Oxford University Press, 2005.

²⁴ Ibid., p. 255.

²⁵ Ibid., p. 255.

Of greatest relevance to our topic of military necessity is the category of “practical necessity.” Bernard Williams has posed a puzzle for the way that we understand the necessity of doing something because it is our duty to do it. In his essay, “Practical Necessity,” Williams is attempting to respond to a Kantian understanding of morality, where there are actions that are morally necessary for us to engage in, and where this takes on an objectivity that is independent of a person’s subjective standpoint. Williams says:

It is worth mentioning that there are important second- and third-person uses of what is in effect, this ought, in contexts of advice or of discussion of what it is reasonable for an agent to do. So used, this ought also reveals itself to be relative, in a broad sense, to the projects, motives, and so on of the agent in question.²⁶

Practical necessity is about what must be done, but where “must” is often relative to facts about the agent as well as facts about the external world.

Williams makes two points that I believe are importantly relevant to discussions of military necessity. First, on the question of what one must do, he says: “It is very rarely the case that there is only one thing I can do... Usually, the alternatives are vastly more costly, or are excluded by some moral restraint.”²⁷ Williams then follows with this comment:

The recognition of practical necessity must involve an understanding, at once of one’s powers and incapacities, and of what the world permits, and the recognition of a limit which is neither simply external to the self, nor yet a product of the will, is what can lend a special authority or dignity to such decisions.²⁸

Here we come back to the idea of dignity. Practical necessity involves restraint of one’s behavior at least partially in conformity with what is morally or legally required, but also in consideration of what a person understands of himself or herself. Practical necessity, and I want to say also military necessity, is based in both an external restraint and a subjective sense of what it is reasonable for one to do.

To return to the specific ways of cashing out the idea of military necessity, we can make progress in two respects. Remember the Grotian construal of military necessity that I endorsed above and that involves imminence and immediacy, as well as the third standard that there cannot be any other way the killing can be avoided. Our discussion of Kit Fine is relevant here in that we do not mean that it is inconceivable in an objective sense of what is a conceptual truth, but in a somewhat subjective sense of what the commander takes to be conceivable in the circumstances. Indeed, as Bernard Williams argued, one must have a recognition of one’s own powers as well as what seems to be accomplishable in the world at the moment. In addition, even among the options that are conceivable, it is fair to rule out those that are vastly more costly than what one contemplates doing. We are not in the realm of logical or metaphysical necessity.

Williams makes another point that will be important for our analysis of military necessity:

if A wants X, and if it is true that if he wants X he must do Y, it does not follow that he must do y; that will follow only if , further, X is the thing that he must

²⁶ Bernard Williams, “Practical Necessity,” Chapter 9 of his book, *Moral Luck*, Cambridge: Cambridge University Press, 1981, p. 125.

²⁷ *Ibid.*, p. 125.

²⁸ *Ibid.*, pp. 130-131.

pursue. So, in the first person: if I conclude that I must do Y, then it is because I have come to see not just that it is the only means to some end I have, but that it is the only thing I can do.²⁹

As we will see later, there is a double necessity in military necessity, understood in a morally plausible way. It needs to be necessary that I take this action to achieve this military objective; and it must be necessary that I achieve this military objective. And these assessments are to be made from the first person standpoint of the commander in a given situation

Military necessity, as a form of practical necessity, is the employment of objective legal standards by a person who must judge at the moment from a significantly subjective standpoint. Military necessity is a mixture of these objective and subjective factors, and cannot easily be reduced to merely one or the other perspective.³⁰ So, the 19th Century German doctrine of *Kreigraison*, which saw military necessity as a matter of what is perceived by a commander to be needed to win an important battle and that overrules all legal restraints, is wrong in that it only considered one component of the practical necessity of military necessity.³¹ But the very strict standard of necessity that may be employed by a pacifist, and that takes no account of the subjective considerations of the commander at the moment, is also mistaken – at least in part because it fails to understand what is reasonably conceivable in such situations. I will say more about this point in a later section.

One more thought might be helpful as we try to get a preliminary sense of what a reasonable understanding of military necessity might entail. Kit Fine asks us to consider two claims of normative necessity concerning the claim that “every war is wrong.”

For this might be meant in the sense that every war in the circumstances that actually prevail, is wrong; or it might be meant in the sense that every war, in whatever circumstances might prevail, is wrong. In the latter case, the claim is taken to be necessary – to hold unconditionally, or in all possible circumstances; while in the former, the claim is not taken to be necessary, but merely to hold conditionally upon the circumstances that actually obtain. The distinction between accidental and necessary generalizations in nature is often drawn in terms of the ability to sustain counterfactuals.³²

I think this distinction is quite useful for sorting out what is a reasonable understanding of military necessity. But the counterfactuals that should be employed do not ask about all possible worlds, but only about possible worlds that very closely resemble our current world. I set out the argument for this position in Section XI.

There may be a reasonable, and very strong, moral sense of necessity that asks about all possible worlds. But military necessity, as a concept of moral or legal necessity, cannot reasonably ask of a commander in a given situation that all possible alternative counterfactual situations be examined. But it does involve asking about many possible alternatives that are within what is conceived by the commander to be realizable. In this

²⁹ Ibid., p. 125.

³⁰ For a similar analysis of the principle of proportionality in armed conflict see Michael Newton and Larry May, *Proportionality and International Law*, NY: Oxford University Press, 2014, Chapter 2, section 5.

³¹ See Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,” *Virginia Journal of International Law*, vol. 50, no. 4, 2010, pp. 795-839, Section I.A.

³² Kit Fine, “Varieties of Necessity”, op. cit., beginning of section 4.

sense, military necessity does not merely require considering one or two alternatives, just as it does not require considering all possible alternatives. And when decisions are made that take into account a fairly rich set of alternatives there is also a sense, as Bernard Williams put it, that such decisions have a certain dignity that calls out for respect, just as such decisions must take many alternatives into account before using lethal force so that those against whom the lethal force is used are also treated as having dignity.

VII. The ICRC and Military Necessity

For a century and a half the International Committee of the Red Cross has seen its role as protecting the dignity of soldiers in war and armed conflict. When the founder of the ICRC, Henry Dunant, stumbled onto a mid-Nineteenth Century battlefield he was struck by how ill-treated soldiers on both sides were, even by their fellow comrades. There were more veterinarians at the battle site than there were medical doctors. And the soldiers, unlike the horses, were often left to die horrible deaths for lack of medical attention. Out of Henry Dunant's experience at the battle of Solferino, the ICRC was instituted with the specific mission of securing the dignity of soldiers' lives even on the battlefield where the lives of soldiers was constantly threatened.³³ Modern international humanitarian law was also codified in the Geneva Conventions, in the home city of the ICRC.

By 2009, the ICRC issued a controversial Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law. The most controversial and also most revealing recommendation is Part IX, which says this about military necessity:

IX. Restraints on the use of force in direct attack

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.³⁴

Notice the use of the term "actually necessary." In what follows over the next few sections I will argue that this standard should be understood as the appropriate standard of military necessity.

Another crucial component of the ICRC's Interpretive Guidance made a seemingly strong point in saying:

It would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situation, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets.³⁵

³³ See David P. Forsythe, The Humanitarians: The International Committee of the Red Cross, NY: Cambridge University Press, 2005.

³⁴ International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Part IX: Restraints on the Use of Force in Direct Attack, Geneva: ICRC, 2009.

³⁵ *Ibid*, p. 82.

The ICRC also cited Jean Pictet, one of its most important theoreticians, for the idea that “if we can put a soldier out of action by capturing him we should not wound him, if we can obtain the same result by wounding him, we must not kill him, if there are two means to achieve the same military advantage we must choose the one which causes the lesser evil.”³⁶

The idea here seems to be that military necessity is to be understood in a very restrictive way – “what is actually practically necessary” – instead of the very expansive way that military necessity was traditionally understood – serving any legitimate military objective – and would make this one of the chief documents to afford to soldiers what respecting their dignity seems to require. In the accompanying commentary, the ICRC makes the case for such a narrowed reading of the military necessity requirement:

Loss of protection against direct attack, whether due to direct participation in hostilities (civilians) or continuous combat function (members of organized armed groups), does not mean that the persons concerned fall outside the law. It is a fundamental principle of customary and treaty IHL that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.” Indeed, even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.³⁷

Again this document seems to say that even if the soldiers in question are your enemy and even if these soldiers are part of a force that is involved in a direct attack against your unit, what you can lawfully do, as a matter of military necessity, is greatly limited.

What the ICRC here seems to be calling for, or someone could argue in favor of, is the use of some human rights norms in battlefield situations. Although, it seems that the human rights understanding of necessity, often employed in speaking of domestic law enforcement situations where a police officer is confronted by someone acting in a threatening way, is not quite what the ICRC has in mind when addressing the rights of those who directly participate in armed conflict. One could conjecture that the reason that the ICRC might be moving toward incorporation of something like human rights norms into a traditional humanitarian norm setting is that there is a need to support human dignity and that the demand to respect the dignity of all parties during war seems not to be well supported merely by concentrating on the traditional humanitarian norm of military necessity.

After much criticism, in 2012 the ICRC convened an Expert Meeting to reassess its policy statement of 2009. A report was issued in November of 2013 in which the ICRC raises doubts about how the 2009 Interpretive Guidance should be understood. While the 2013 report begins by saying that “it does not purport to provide the ICRC’s legal position on these issues,”³⁸ nonetheless there seem to be significant differences between the 2013 Expert Meeting report and the 2009 Interpretive Guidance. This discrepancy can be seen in the following statement by an ICRC lawyer: “Killing

³⁶ Ibid.

³⁷ Ibid., Commentary on Part IX.

³⁸ ICRC Report of the Expert Meeting, The Use of Force in Armed Conflict, Geneva, November 2013, p. v.

combatants can be lawful in armed conflict unless there is manifestly no need to use lethal force, which is a pretty limited set of circumstances in armed conflict.”³⁹

Here is a relevant passage from the 2013 ICRC report, "The Interplay between the Conduct of Hostilities and Law Enforcement Paradigms":

Under the law enforcement paradigm, the presumption is that State agents must arrest persons and not kill them on sight (i.e. “capture rather than kill”). It is only if the arrest is at risk, and if the person poses an imminent threat to life, that the use of lethal force is authorized as a last resort. Under the conduct of hostilities paradigm, the presumption is the reverse. In the ICRC’s view, a legitimate target may be killed at any time, unless it is clear that he/she may be captured or otherwise rendered hors de combat without additional risk to the operating forces. This is so because “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.” This fundamental difference indicates that the determination of the applicable paradigm is crucial.⁴⁰ The ICRC appears now to be saying that it only defies notions of humanity to kill when one could capture an adversary if capturing had no additional risks, of any sort, for the soldier. Yet, this view seems not obviously justified by reference to the principle of humanity or more importantly to the principle of military necessity we have been exploring in normative terms.

If soldiers have forfeited their rights to life, at least as it would normally be understood for civilians, I will argue that there should be a heightened concern for how necessity is understood. In domestic law in many States, suspected criminals are treated as having forfeited the right to life or liberty, to at least a certain limited extent. But the police officer who would shoot at a fleeing suspected criminal has the burden of showing that shooting at the suspected criminal was (strictly practically) necessary. In the case of violating the right to liberty of the suspect, the police have the right to shoot to maim the suspect, and in the case of threats to the life of the police officer, the police can shoot to kill the suspect either to stop the criminal from fleeing or for the self-defense of the police officer. In either case, the goal of stopping the fleeing suspect or preventing the suspect from killing the police officer, the actions taken by the police must be necessary for accomplishing that goal, with no less violent means as a viable option that is reasonably conceivable by the police officer.

It is my view that such a view can be defended as a matter of international law, as also applied to wartime situations and decisions by commanders, and have attempted to do so.⁴¹ But in what follows I will offer a normative argument in support of linking the forfeiture of human rights by soldiers to a corresponding heightening of the necessity requirement. As I mentioned already, traditional humanitarian norms have largely only protected soldiers from unnecessary suffering, although not from death. Such traditional norms also protected soldiers in cases of capture or disabling injury. But soldiers have not been protected in terms of the right to life while functioning as soldiers in war or

³⁹ Private correspondence with Gary D. Brown, International Committee of the Red Cross, Deputy Legal Advisor, Regional Delegation for the United States and Canada, February, 2014, on file with the author.

⁴⁰ ICRC Report of the Expert Meeting, p. 17.

⁴¹ See Michael Newton and Larry May, Proportionality and International Law, NY: Oxford University Press, 2014, Chapter 5.

armed conflict.⁴² There is, though, a serious debate, spurred by the ICRC Guidance about applying various rights-protections to soldiers during war or armed conflict that have not previously been extended by international humanitarian law and the corresponding discussion among Just War theorists of the moral rights of soldiers.

The new understandings of necessity are meant to apply predominantly to the killing of non-combatants, but in my view they are clearly also applicable to at least some soldiers. If one focuses on protecting the dignity of people, it is hard to see how one can distinguish noncombatants who take a direct part in hostilities from combatants who operate in a similar manner. And while it is possible to distinguish the lives of combatants from those of noncombatants in many respects, the dignity of soldiers, at least in terms of the moral minimum that must be displayed so as not to deny dignity of a human, is on the same level for combatants and noncombatants. One thing this means practically is in some few cases it may be that the rights of combatants will outweigh the rights of noncombatants, perhaps in decisions about whether to send large numbers of soldiers into a civil war to try to stop what seems to be only a possibility of civilian loss of life.

There have been several significant criticisms of applying this idea to soldiers. I agree that the ICRC Guidance should make us all rethink the rights of soldiers and that it is now imperative to do so given the changing character of war and armed conflict, which has blurred the distinction between combatants and civilians. In the next section I will discuss three of the most important of those objections to the possible new model that the ICRC may be supporting, or that someone could advocate inspired by the ICRC Guidance. I remain convinced that the overwhelming interpretation of the original 2009 ICRC Guidance was on the right track.

VIII. Objections to the Reconfiguration of Military Necessity

In this section I want to consider three objections to the ICRC view of restricting the right to kill during war to those killings that are strictly necessary for accomplishing a needed objective. The first two objections argue, from different standpoints, that the expanded notion of necessity goes too far in that it makes armed conflict very difficult to justify in most cases. The third objection is that the ICRC has not gone far enough in that dignity cannot truly be protected unless a more robust sense of human rights is made applicable to armed conflict situations.

Jens Ohlin has argued that, as a matter of *lex lata* (the actual state of international law) the ICRC has little basis for its claims concerning how necessity should be understood in international humanitarian law or even in the case where international humanitarian law and international human rights law both apply.⁴³ Ohlin bases much of his initial argumentation on the Lieber Code, which in his interpretation permitted nearly all killing of combatants by other combatants during armed conflict. At one point he refers to the Lieber code as providing “the principle of necessity’s codified birth.”⁴⁴

⁴² See Chapter 5 of Michael Newton and Larry May, *Proportionality in International Law*, NY: Oxford University Press, 2014. For a discussion of the contrast between humanitarian norms and human rights norms, see Chapter 6 of this work.

⁴³ Jens David Ohlin, “The Duty to Capture,” *Minnesota Law Review*, vol. 97, 2013, 1268-1342.

⁴⁴ *Ibid.*, p. 1300.

I largely agree with Ohlin, but primarily if we look at the Lieber Code and not at other legal documents at the time. The Lieber Code was only codified law for the Union soldiers during the US Civil War in the middle of the Nineteenth Century. If one were to search for another contemporaneous modern statement concerning necessity it would be better, in my view, to look at the St. Petersburg Declaration, which speaks in terms of soldiers having the right to disable one another, not the right to deprive enemy soldiers of their right to life.

In one of the first modern international statements of the rules of war in modern times, the St. Petersburg Declaration stated:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity.

Notice that the proper aim of military operations is said to be to “disable the greatest possible number of men,” not to kill as many of the enemy as one can. And such a declaration was said to be important “in order...to conciliate the necessities of war with the laws of humanity.”

Unlike the St. Petersburg Declaration, the Lieber Code does more straightforwardly countenance killing during war:

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 contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor...Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.⁴⁵

Notice two things here. First, killing must be necessary for it to be legal. Second, the rules of war are thought to be intimately connected to what it means to be a moral soldier. Of course, there is also the wording “incidentally unavoidable” that was in the Hostage Case that I earlier criticized, although on normative grounds.

The Lieber Code was drafted by Francis Lieber for the Union Army during the US Civil War. Lieber set out to diminish the carnage of war and to provide rules that would be supported by legal practice and also by moral rules. Military necessity was the key component of the rules of war.

Yet, I would argue that for military necessity to make the most sense it should refer to what is non-incidentally indispensable to do in order to achieve legitimate military objectives. Limiting military activities on the battlefield to those activities that are militarily necessary was the key to humanizing war. So, while killing could be justified by military necessity there had to be a deliberative act concerning whether or not

⁴⁵ Lieber Code.

lethal force is strictly necessary that preceded the commander's order to kill enemy soldiers.

In addition, we should also consider other limits posed by military necessity on tactics and weaponry by the Lieber Code.

Military necessity does not admit of cruelty - that is, 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. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Again note two things. First, notice how extensive the rules are in terms of what is ruled out, contrary to the way that some theorists have characterized the permissiveness of the Lieber Code.

And second, from a normative perspective, notice that there is a special consideration in the Lieber code that deals with limitations based on *jus post bellum* considerations. Even if one thinks that other traditional rules of war do not need to be adjusted, one still might worry about the interpretations of the rules of war after war ends. Specifically I am thinking of the way the mass killing of soldiers will sometimes make it much harder for reconciliation at the end of war. When killing of one's comrades is not seen to have been necessary by the other side, hostility will often be so intense as to last into the peace process after war ends.⁴⁶

Ohlin maintains that in international humanitarian law today "the general principle of necessity... allows prosecution of the war effort with maximum speed."⁴⁷ Other than making sure that soldiers do not employ cruelty, which "a rational actor would have little reason to pursue" the attacking force does not need "to sacrifice more in order to comply with the principle" of necessity.⁴⁸ Ohlin puts much weight in responding to skepticism in providing a history of the use of the term military necessity, which in his view is utterly antithetical to what the ICRC Guidance calls for.

Yet, while I agree with Ohlin's restatement of the *lex lata* rules of war, I think there are serious normative reasons not to embrace this standard today.⁴⁹ It is odd to think that something called "the principle of necessity" would have so little to do today with any meaning of the word "necessity" available in the English language. In what follows in this section, let me offer some normative reflections on the ICRC Guidance and other documents that seem to support a new standard.

First let me say that the idea of necessity in law has a host of meanings, perhaps the most significant for our purposes is that concerning the restrictions on lethal use of force by police officers who are pursuing a criminal suspect. Here it is often assumed that the fleeing suspect has forfeited his or her rights and can be attacked, even lethally if this is necessary to prevent the suspect's escape or to protect the life of the police officer. Despite the suspect's having forfeited his or rights, including the right to life, to justify

⁴⁶ See Larry May, *After War Ends*, Cambridge: Cambridge University Press, 2012, Chapter 5.

⁴⁷ Ohlin, p. 1301.

⁴⁸ Ibid.

⁴⁹ I am not suggesting that Ohlin would disagree with me about the *lex ferenda* or normative thesis of this essay.

shooting the fleeing criminal suspect the police officer must establish that a rather strict level of necessity is met.

One might think that capturing the fleeing criminal suspect would justifiably allow for “prosecution of the criminal justice effort with maximum speed.” Indeed prosecuting someone for a criminal justice objective seems in many ways more important than prosecuting someone for a military effort or goal. Yet, it is uncontroversial that the police must only shoot at all if it is necessary to stop the fleeing suspect, where necessity here is a fairly strict notion – no other less violent means were available to achieve the objective. And even in cases where the safety of the police officer is in jeopardy, only that type of force can be used again that is strictly necessary to prevent the injury or death of the police officer.

So, here is the problem. We extend greater limitations of necessity on fleeing criminal suspects than we do on enemy soldiers. Even if we assume what is often not true, namely that all enemy soldiers are engaged in collective wrongdoing, we still treat these soldiers worse than we treat criminal suspects who have been engaged in individual wrongdoing. The worse treatment, as I have been arguing, comes in terms of the standards of necessity that are employed if we follow the traditional international humanitarian law model.

The reason for this disparity cannot be that the fleeing suspect is only suspected of doing wrong whereas the enemy soldier is known to be engaged in collective wrongdoing. Even the staunchest proponents of the international humanitarian law model would admit that it is often unclear whether a soldier is indeed engaging in culpable wrongdoing. In neither case has there yet been an authoritative determination of guilt – the fleeing suspect has not yet been tried, and the enemy soldier is rarely serving on the side of a war that has been authoritatively declared to be unjust.

The reason for the disparity also cannot be that soldiers participating in an unjust war have made themselves liable to attack and fleeing suspects have not, for many would agree that the suspect has indeed forfeited his or her rights by his or her intentional choice to join enterprises that are criminal in nature. And in other cases, the forfeiture of rights comes from the overwhelming evidence of having participated in wrongdoing that follows upon fleeing from the police. I do not subscribe to the forfeiture view of rights, as I have said. But the point I wish to make here is that even if one does subscribe to this view, it is difficult to claim that the enemy soldier has forfeited rights in a way that is more unfavorable to him or her than is true of the forfeiture of rights by a fleeing criminal suspect.

A second objection to the view I have endorsed is that applying a strict notion of necessity to armed conflict situations will mean that very few wars can ever be justified. This concern is directed primarily at the *jus in bello* branch of Just War theory. For wars to be justifiably fought commanders must be given sufficient latitude to launch attacks on enemy soldiers without satisfying the strong requirement of necessity. Indeed, I have suggested elsewhere that various forms of pacifism are made more tenable when one takes necessity more seriously as a strict requirement.⁵⁰ So, there is a basis of worry about the ICRC position if one wants to defend most wars in *jus in bello* terms, although certainly not a reason to rule out such conduct in advanced.

⁵⁰ See Larry May, “Contingent Pacifism,” book length manuscript currently under review.

There are nonetheless ways to understand even a fairly strict necessity requirement that would give commanders in the field enough latitude to do their jobs reasonably effectively. One reason this is true is that commanders will need not only to take the rights of enemy combatants more seriously than they used to, but they will also have to take the rights of their own soldiers seriously, as they were already doing in most cases. The fact that commanders already take the lives of their own soldiers into account in necessity and proportionality assessments is already to indicate that despite the way the laws of war are often characterized, soldiers' lives do matter. What I am adding that is not already part of the calculation as both a moral or legal matter, as well as a practical matter, is that the lives of soldiers count as well.

But just because the rights of enemy soldiers are to be scrutinized more carefully does not mean that the commander is stopped in his or her tracks. The commander can take lethal actions to advance a military objective as long as the tactics employed are no more lethal than necessary. Capture instead of killing enemy soldiers has to be contemplated. But in at least some situations, capturing large numbers of enemy soldiers is not a realistic option. Wounding rather than killing is perhaps a bit less practically problematic than the option of capture, but again not all cases are such that wounding will indeed achieve a needed military objective. Such considerations will, I admit, have a far greater affect on bombing campaigns than actions taken on the ground.

In bombing campaigns, the necessity requirement is sometimes offset by a concern for the safety of one's own troops. Low-flying, as compared with high-altitude, planes will be better able to determine the degree of lethal attack needed to accomplish a given military objective. But low-flying, as compared to high-altitude, planes are much more risky for the soldiers who are flying those planes, since they are so much more likely to be hit by low-tech missiles. For these and other reasons, commanders will still be able to engage the enemy in a reasonably effective way, but it remains true that they will have to show more self-restraint than is often true today.

A third objection is that the expanded and more stringent necessity requirement does not go far enough. Pacifists could argue that respect for human rights of soldiers should be seen as leading to the elimination of all war, since war involves the intentional attacking and killing of humans. I have endorsed such a model in other writings, and have nonetheless found the revised understanding of necessity to take us quite a ways toward the elimination of war, although this depends on how one understands the current conditions of war and armed conflict.

One response to this objection is that there may indeed be wars that need to be fought on human rights grounds, and so we should not opt for a conception of the rights of soldiers that makes such wars turn out always to be unjustified. In addition, in some cases it could matter that the soldiers fighting on one side are clearly unjustified in their actions and so again they should not be seen as vulnerable in the same way as those who are clearly justified in the war they fight. Once again, while I do not endorse this view, it seems prudent to keep the option open. In any event, I believe that the strengthening of the necessity principle in Just War theory and international humanitarian law will have quite beneficial offsetting results for diminishing the violence of war and especially the killing on a massive scale that has been characteristic of wars for millennia.

III. Humanitarianism and the Rights of Soldiers

IX. Humanitarian Rights

The idea behind humanitarianism is that people who are in special situations or roles, where they have a heightened vulnerability to risk, should be seen as having rights that protect them in their dignity. But these humanitarian rights are not the same as human rights, which apply to every human in every situation, which attach to humans qua humans, and which do not take account of special circumstances or roles. Indeed, for human rights, the only role that matters is being human. Yet, protecting the dignity of humans may need different or additional protection when these humans are in situations of increased vulnerability, where their vulnerability is not merely due to the fact that they are human.

Humanitarian rights should not be seen as a competing domain of rights to the domain of human rights. In my view a properly humanitarian view of war puts soldiers at the center of concern since soldiers and combatants are those most directly affected by war and armed conflict. The UN document that is most directly relevant to these issues sees civilians and noncombatants as those most directly affected by armed conflict. In the 1970 Report of the Secretary-General on Respect for Human Rights in Armed Conflict, there was a very strong statement about the intended effect of having the General Assembly examine armed conflicts in human rights terms.

It is an endeavor to provide a greater degree of protection for the integrity, welfare and dignity of those who are directly affected by military operations pending the earliest possible resolution of such conflicts.”⁵¹

Yet the United Nations’ examination of the effects of human rights in battlefield situations was mainly restricted to the protection of civilian lives, even though the lives of soldiers are certainly those that are most directly affected by military operations. While civilians are increasingly attacked, even targeted, in wars, the direct targeting of people is most often directed at soldiers rather than at civilians even in today’s asymmetric wars.⁵²

Even if it were true that soldiers forfeited some of their most basic rights by becoming soldiers, it may still be true that soldiers need extra protection due to assuming this role. On the assumption that soldiers can be killed, or are liable to be killed, because they have assumed a different, more dangerous status from other humans, what this also means is that soldiers are more vulnerable than all other humans who retain the right not to be killed. Because soldiers are at increased vulnerability to be killed, it would make sense also to say that soldiers should have special rights that minimize the harm that is likely to occur to them because of their loss, even if only temporarily, of basic rights. In some respects, this is what humanitarian law has traditionally sought to do: to provide a set of special rights not to suffer unnecessarily, that are especially apt for soldiers who are more vulnerable to such suffering since they lack the protections of basic human rights such as the right to life and the right not to be attacked.

There is a kind of special vulnerability that occurs for soldiers in wartime circumstances even if it is true that soldiers have forfeited basic general rights. But specifically how vulnerable soldiers are varies, as does the specific ways soldiers are

⁵¹ Respect for Human Rights in Armed Conflict. Report of the Secretary-General, A/8052, para 13 (1970).

⁵² See Michael Gross, *Moral Dilemmas of Modern War*, NY: Cambridge University Press, 2010.

vulnerable. This variability is due to the changing character of war and armed conflict over the ages. In traditional ways of thinking of humanitarian law, the key right is that soldiers not suffer unnecessarily. What counts as necessary, as I argued above, is and has been contentious. But what the specific vulnerabilities are is not so contentious.

Consider that now concern for the rights of civilians during war has meant that they can be directly attacked only if it is clear that these civilians pose a threat to other civilians or soldiers. It is my view that in such a situation the special rights of soldiers must also be expanded so as to protect the soldiers in their special vulnerabilities. This protection is needed due to the increased vulnerability that these soldiers face, which is itself due to the restrictions on the rules of engagement aimed at protecting civilians. Or consider a situation where the soldiers must first announce themselves before entering a building believed to be occupied by enemy warriors.⁵³ This restriction on the rules of engagement again would warrant an expanded set of role-based rights for soldiers aimed at protecting the soldiers in their now more vulnerable states.

In cases where soldiers face increased vulnerability, it would make sense to say that soldiers should only take on this increased risk if it were clear that taking on a risk of death was strictly necessary for achieving a legitimate military objective. And in this way we could see a strengthened principle of necessity, perhaps of the sort contemplated by the ICRC in its 2009 Interpretive Guidance. Indeed, the fact that soldiers are supposed to risk their lives while in combat does not make them have less special rights. Rather, their increased vulnerabilities should be seen as supporting increased special rights. The special rights are extended at least in part to compensate for the decrease in general rights that they face because of their supposed forfeiture of basic general rights when they assume the role of soldier.

This is an appropriate place to say again that the forfeiture idea is weakened in many cases where the soldier is coerced into taking on the dangerousness of fulfilling the soldier's role. The idea of forced forfeiture is itself peculiar. The idea of forfeiture makes the most sense in terms of the choices a person makes that are not coerced – where one is held responsible for one's choices and if those are especially bad choices then one loses some of one's previous rights or status in the society. But since many soldiers are conscripted, the idea that they could forfeit their rights, or their dignity, by these acts is to say the least hard to justify. Of course it will matter what the options were to acquiescing in one's conscription, but in general something seems suspicious about the idea that all soldiers, even those who have been conscripted, have by their own coerced acts forfeited their rights. In any event, my view is that even if one finds the forfeiture view plausible, this can still be seen as giving rise to special rights that are more extensive than those normally afforded to soldiers by traditional Just War theory and international humanitarian law.

X. The Right Not to be Killed Unnecessarily

If one recognizes the special vulnerability of soldiers, and the dignity of humans, one is led to the question of what rights soldiers have. In this section I will defend the idea that soldiers have the right, among others, not to be killed unnecessarily. This humanitarian right is crucial as counteracting the adverse effects of the duties that

⁵³ See Michael Walzer's fascinating discussion of this case in *Just and Unjust Wars*, NY: Basic Books, 1977.

soldiers have toward civilians and their property, as well as by the fact that soldiers are faced with lethal actors on the other side of an armed conflict. I will develop these points in this section. And I will argue that this right sits between an absolute right of soldiers not to be killed, which certain pacifists have espoused, and the traditional understanding of soldiers as having no right, of any sort, not to be killed.

Consider an example from the first Iraq War. On February 26-27, 1991, Iraqi soldiers mingled with a column of panicked civilians who had commandeered any form of transportation to leave Mutlai, Kuwait and escape to Basra, Iraq. Responding to Iraqi small arms fire, a five mile long column of retreating Hammurabi Division forces was attacked. As the coalition land assault began to the west, U.S. airpower disabled vehicles at the front and rear of the convoy thereby creating a 7 mile long traffic jam. Unknown numbers of Iraqi soldiers and civilians died in the seven hours of subsequent strafing along what became known as “the Highway of Death.”⁵⁴ General McCaffrey’s official report concluded that 34 tanks were destroyed along with 224 trucks, 41 armored personnel carriers, 43 artillery pieces, 319 anti-tank guns, and an estimated 400 Iraqi soldiers killed with no loss of American life.⁵⁵

It seems that it would be hard to defend such killings on the grounds of the self-defense rights of the coalition forces that killed these 400 Iraqi soldiers. Indeed, that there were no coalition casualties is partial support for this proposition. In addition, fleeing soldiers at the time they are fleeing do not pose a threat to anyone. And unlike the soldier taking a bath, fleeing soldiers are unlikely to reverse course in the immediate future. The question is whether or not these soldiers have the overall status of being without the right to be attacked in this situation.

One of the traditional defenses of actions such as occurred in the highway of death is that even fleeing soldiers could easily regroup at another place and launch an attack on one’s own soldiers. Killing as many enemy soldiers as one can conforms to the traditional view, associated with the Lieber Code, to shorten the war and hence shorten the amount of time where there will be the killing of soldiers. In most cases, the overall saving of life is best accomplished by granting to each combatant the right to kill as many enemy soldiers as possible in the shortest period of time. And in some respects, the Iraq War was probably shortened by the slaughter that took place on the highway of death. But notice that many commentators used the term slaughter, just as I did, not calling what occurred to be a normal exercise of pursuing a needed military objective.

Fleeing soldiers, and even soldiers taking a bath or playing games, are especially vulnerable. But it is true that they could pick up their weapons and put on their uniforms and become active threats again. In the case of the naked soldier, our moral intuitions would counsel that it would be in some sense wrong to kill the unarmed and naked “soldier.”⁵⁶ Intuitions can sometimes be unreliable guides to what should be done, especially in an all things considered context. But most people who have been faced with such a case, have thought that it was wrong to kill.⁵⁷

⁵⁴ See Carl Connetta “The Wages of War: Iraqi Combatant and Noncombatant Fatalities in the 2003 Conflict,” Project on Defense Alternatives Research Monograph # 8, Appendix 2 October 2003), [http://www.comw.org/pda/0310rm8ap2.html#5.TheHighway\(s\)of](http://www.comw.org/pda/0310rm8ap2.html#5.TheHighway(s)of).

⁵⁵ For more on this example also see Michael Newton and Larry May, *Proportionality in International Law*, NY: Oxford University Press, 2014, Chapter 4.

⁵⁶ See my book *War Crimes and Just War*, NY: Cambridge University Press, 2007, Chapter 5.

⁵⁷ See Michael Walzer, *Just and Unjust Wars*, NY: Basic Books, 2007.

In domestic legal contexts, fleeing suspects have the right not to be killed unnecessarily. So, one question to ask is whether there is some salient difference between fleeing suspects and fleeing enemy soldiers. One supposed difference concerns the different domains of everyday life and of wartime. Respect for the dignity of those who occupy the roles of soldier and bank robber would seem to require the same standard be used. Of course, this does not yet determine how stringent that standard should be. In the next section I take up the issue of how to understand the moral status of soldiers vis-à-vis each other. Before turning to that issue, let me explore a bit more what are the limits of the expanded notion of military necessity and the corresponding right of soldiers not to be killed unnecessarily.

In some respects, it seems as if one could easily accept the right not to be killed unnecessarily by appeal the traditional understanding of the killing of soldiers by looking to the long-term consequences and recognizing that all killing of enemy soldiers is in some sense necessary to ending the war. In response, I wish to return to the ideas of Grotius outlined above. Military necessity is best understood normatively if it is qualified by both temporal and spatial restrictions. The ideas of “imminence” and “immediacy” are crucial for a plausible understanding of the principle of military necessity. From a Grotian standpoint, for an action to conform to a plausible view of military necessity that action must be the least lethal means to accomplish a needed military objective at this point in time and in the current circumstances, or temporal and special conditions that are very close to the actual ones at the moment.

It is simply too easy to be allowed to say that sometime in the undetermined future this war, like all wars, will be for the best if it is ended more quickly than not. In some cases it may indeed be that a war is likely to be ended quite quickly if lethal means are used when they are not practically necessary at the moment. But, a principle that allowed for whatever is necessary to shorten a war would not be accepted by Just War theorists or international legal theorists either. It is possible simply to drop an atomic bomb on a region, or poison the water supply of a region, and obliterate all of the enemy soldiers therein. Yet, the use of atomic bombs or poisons are generally seen as illegal or immoral regardless of the fact that they will bring a war to a conclusion very quickly indeed.

And we certainly do not want a principle of military necessity that is so strong that makes it impossible to fight justified wars of any sort. Even many pacifists today (who call themselves contingent pacifists, just war pacifists, or conditional pacifists) would not argue for ruling out in advance the possibility of justifiably fighting in any war. There seem to be at least some conceivable worlds where it would be justified to kill enemy soldiers for a needed military objective.

The strategy that I have pursued is to try to find a reasonable principle of military necessity that neither permits every action in war, nor rules out every action in war. Of course, there are many points along the spectrum between these two extreme positions of the supporter of *Kreigsraison* and absolute pacifism. I will say more about this point in subsequent sections, but I remain open to precisely where to draw the line along this spectrum. What seems to me to be clear though is that the line needs to be drawn somewhere in the middle rather than at or near either end of this spectrum.

One other thing to say about the question of how a commander is to ascertain whether it is militarily necessary to kill an enemy soldier, is that the commander need

only consider possible worlds that are close to the actual here and now world the commander currently occupies. In this respect, I am adapting David Lewis's idea of counter-part analysis.⁵⁸ To ascertain if something is possible or necessary in a practical sense, we need only consider possible worlds that resemble our world "closely enough."⁵⁹

In a sense, to talk of what it is possible or necessary to do is to talk of what are vicarious experiences for a given agent here and now. To say that it is possible that I regain my fluency in Ancient Greek, is to say that it is vicariously so in some world that is close enough to the actual world that I occupy here and now. To say that it is necessary that I employ a certain tactic in an armed conflict is to say that it is vicariously so in all worlds that are close enough to the world that I occupy here and now. In the second case, the commander need not think beyond what is conceivable, understood in this way as close enough to the commander's actual world here and now.

This is to say that possible worlds are counterparts to this world insofar as they are vicarious worlds for me. And to say something practically relevant about what is possible or necessary for me is to say what is vicariously experienced in worlds that are close enough to my actual world here and now. This analysis has not yet said where on the spectrum to locate decisions about what is possible or necessary but it does locate the point along the spectrum as those points that are "close enough" to my actual world here and now. The "here and now" is a way to make a bit more conceptual sense of the Grotian dictum that what counts as militarily necessary is what satisfies imminence and immediacy.

The tricky questions of course are what "close enough" means and who is to make that decision. My answer to both questions is to restrict our domain to the commander on the ground and only to stipulate that while it is the commander who is to determine how to understand close enough, he or she is to do so bound by considerations of what a reasonable commander in this commander's shoes would agree to. The reasonableness constraint is aimed at ruling out utterly arbitrary characterizations of the realm of possible worlds in the assessment of military necessity. Appeal to a reasonableness standard is also supposed to not allow the determination of military necessity to be based completely on the commander's subjective considerations. Reasonableness is at least a partially objective standard, as I indicated earlier. How such a standard will be enforced is not part of the purview of this essay, but I envision commanders continuing to be under the purview of international criminal standards that would hold open the possibility of sanctions against those commanders who acted in disregard of the humanitarian rights of soldiers.

XI. Revisiting the Moral Equality of Soldiers

Since Michael Walzer's book, *Just and Unjust Wars*, many philosophers have argued that all soldiers, by virtue of their roles, have the same status: namely both the right to kill and the liability to be killed. Recently philosophers have argued that there is no equality among soldiers in armed conflict. Soldiers on the unjust side of a war have no right to kill, but are liable to be killed. Soldiers on the just side of a war have the right

⁵⁸ David K. Lewis, *Counterfactuals*, Cambridge, MA: Harvard University Press, 1973, pp. 39-43. I adapt Lewis's counterpart analysis so as to make it relevant for practical decision making since in this essay I am concerned with practical necessity not logical or metaphysical necessity.

⁵⁹ *Ibid.*, p. 39. I thank Jeffrey Tlumak for suggesting this line of argument.

to kill and no liability to be killed. My view is that soldiers all have roughly the same moral status, but not of the sort that Walzer argued for. Rather all soldiers have the right not to be killed unnecessarily, and also the liability to sanction if they violate the rights of other soldiers, even enemy soldiers. Since I argued in favor of that right in the previous sections, I will begin by arguing in this section that it is an equal right of all soldiers. I will then argue that there is also a corresponding equal liability for all soldiers who violate the right of soldiers not to be killed unnecessarily. The liability for soldiers is primarily a moral liability. The legal liability remains primarily on those commanders who make decisions about who to be attacked and with what level of force.

Many philosophers and legal theorists today deny that there is a moral equality of soldiers. One way to understand this position begins from the plausible assumption that one's moral status varies based on whether one is engaged in rightful or wrongful behavior. It matters whether one has a right to act a certain way, or fails to have such a right. Someone who robs a bank does not any longer have the strong self-defense right to kill a police person who is shooting at the robber.

My view is that all soldiers have roughly the same rights and liabilities because it is normally so difficult for a soldier to figure out if the war he or she is fighting in is a just or unjust war. There are cases where it may be easy to do this or even where a soldier has already figured it out, but as I have argued elsewhere these are very few cases indeed. In any event we should not merely attribute the injustice of a war to a soldier given that what made the war unjust was the decision of a State not a decision of that soldier.

The right not to be killed unnecessarily is important for showing respect for the person who occupies the role of soldier. Even if one were to think that some soldiers (who are on the unjust side of a war) have forfeited some of their basic general rights, there are two other considerations that are important. The first is something we have already discussed, namely that the soldier may have special rights connected to the soldier's vulnerability that must be taken into account. The second consideration is that while it is possible to forfeit one's basic rights, at least temporarily, one cannot forfeit one's dignity without ceasing to be human. I wish now to take up this second consideration.

At the beginning of this essay I distinguished between the general rights of all humans and the special rights of those who occupy various roles, such as that of being a soldier. Soldiers, qua soldiers, do not have human rights. But I want to argue now that since those who occupy the role of soldiers are humans, that they are humans sets a minimal standard for how they are to be treated as soldiers. The standard is that soldiers must be treated in a way that respects their dignity as humans.

My view is that recognizing the right of soldiers not to be killed unnecessarily is one of the best ways to respect the dignity of soldiers. It is not sufficient that soldiers be recognized as having the right not to be made to suffer unnecessarily, which is the traditional way to understand the humanitarian rights of soldiers. This is not sufficient given the vulnerabilities that soldiers face. It is true that humans are more than normally vulnerable to suffer when they occupy the role of soldier. But it is even more significant that humans are much more than normally vulnerable to be killed when they occupy the role of soldiers.

Killing in war is more significant for a soldier than suffering in most cases for soldiers because of the way war has been understood for centuries, namely in part as a conflict between groups that engage in lethal violence against each other. And while the attempt to kill an enemy soldier may wound that soldier instead and cause suffering, the killing of the soldier has been the objective. There are other cases where a soldier is intentionally made to suffer as a matter of retaliation, or as a way to cause the soldier to answer questions under interrogation, where the suffering is intentional and in most cases cruel since this suffering is not necessary for achieving the objective. Such cruelty can be as significant as death for the soldier. And it is also true that just as making soldiers suffer for retaliation is rarely necessary for securing a military objective, it is also true that intentionally killing an enemy soldier is rarely necessary for achieving a military objective either.

As I said in discussing the St. Petersburg Declaration, war has been sometimes understood as being primarily about incapacitating rather than killing since most frequently it is incapacity of enemy soldiers rather than killing them that is directly related to achieving needed military objectives. In any event, the key consideration that has made it nearly universally accepted that soldiers should not to be made to suffer unnecessarily is the fact that it is indeed unnecessary. If, as I have been arguing, it is also true that much killing in war is also unnecessary for achieving a needed military objective, then for similar reasons it should be universally accepted that soldiers should not be killed unnecessarily either.

The moral equality of soldiers turns on this issue of soldiers' heightened status as vulnerable to both suffering and death due to the nature of the role. All soldiers are humans, and minimally soldiers should be shown respect for their dignity by being recognized as having the right not to suffer unnecessarily or to die unnecessarily. The dignity of humans can be denied in at least two ways – by forcing them to suffer and by forcibly killing them. Because of the self-consciousness characteristic of human's intentionality, both suffering and death are very bad indeed even if they are not the absolute worst thing that creatures can suffer.

The moral equality of soldiers turns on the moral equality of these features of all humans. While soldiers may be treated differently from one another in many respects, due to what those soldiers deserve for instance, it is minimally required that soldiers not be treated differently from one another by virtue of their dignity. To treat them unequally in this respect, where one human or group of humans is denied the minimal moral treatment respecting their dignity requires us to treat this human or group of humans as not fully human.

For many centuries soldiers were referred to as cannon fodder, or by some equivalent expression. The idea was that soldiers were dispensable.⁶⁰ Soldiers could be killed at will by enemy soldiers because they were primarily only extensions of their king or their State. Notice that the rhetoric of the use of the term “cannon fodder,” displays the way that the traditional view of soldiers effectively denied their humanity. To respect soldiers, this practice needs to stop. My proposal to recognize the equal right of all soldiers not to suffer or be killed unnecessarily is aimed at just this objective.

⁶⁰ See Gabriella Blum, “The Dispensable Lives of Soldiers,” *Journal of Legal Analysis*, vol. 2, 2010, pp. 69-124

XII. Concluding Thoughts on the Principles of Humanity and Necessity

At the beginning of this essay, I discussed various meanings of the term humanity, one of which was that humanity is a source of norms and values. In this final section I will discuss one of the most significant norms associated with humanity, a principle that calls for people, especially during war or armed conflict, to exercise special vigilance in how fellow humans are treated. As I have been arguing in this essay, the special protections of humans during times of war should extend to soldiers and other combatants.

Kant characterized one of the versions of the categorical imperative as the “formula of the end in itself” or “the principle of humanity.” In Kant’s view, there is a practical imperative for all people, namely: “Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.”⁶¹ This principle is deeply connected to Kant’s notion of the dignity of a human person. To respect the dignity in each person, we must treat each person as an end in itself, not simply as a means to our own ends.

In situations of war or armed conflict, it is hard to understand how the various participants, especially the soldiers shooting at enemy soldiers, could still treat the enemy soldiers as ends in themselves. Indeed, the idea of military necessity that has been the subject of this essay, in its traditional formulation, saw the soldier’s role to be one of killing as many enemy soldiers as possible. It is also true that this military goal was related to the further goal of bringing the war to an end as soon as is possible so as to have the least number of casualties in the long run. But there is no denying that the traditional principle of military necessity was aimed at using enemy soldiers as a means to ending the war as quickly as possible, and did not see enemy soldiers as ends in themselves.

Yet, it is also part of the more modern understandings of military necessity that this principle is to be balanced against what international lawyers call the principle of humanity. Indeed, this is why Michael Schmitt gives his essay “Military Necessity and Humanity,” the subtitle “Preserving the Delicate Balance.”⁶² Schmitt characterizes the principle of humanity in international humanitarian law as an imperative “which operates to protect the population (whether combatants or noncombatants) and its property.”⁶³ Yet, the question to consider is whether these principles can indeed be balanced if the principle of military necessity contains such a strong presumption in favor of the right of soldiers to kill as many enemy soldiers as possible. How though can soldiers be treated humanely if they can be killed at will? Indeed, notice that the formulation that Schmitt gives for the principle of humanity calls for protection of combatants not only noncombatants.

I should note at this stage that I regard my proposal about extending to soldiers the right not to be killed unnecessarily as a moderate proposal. Some authors have recently argued for a more expansive principle, namely, the least harmful means principle. This principle would sweep across all decisions by commanders during war

⁶¹ Immanuel Kant, *Grounding for the Metaphysics of Morals* (1785), translated by James W. Ellington, Indianapolis, IN: Hackett Publishing Co., 1981, p. 36.

⁶² Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,” *Virginia Journal of International Law*, vol. 50, no. 4, 2010, p. 795.

⁶³ *Ibid.*, p. 799.

and would require that commanders only order that use of force that is the least harmful. My proposal only calls for less than lethal force when it is not necessary to use lethal force. My proposal will not affect non-lethal use of force and is hence not nearly as restrictive as the least harmful means principle.

Throughout this essay, I have attempted to defend a commonsensical way to think of humanitarian rights, namely as applying a strict necessity constraint on military actions that risk the killing of soldiers, our own or enemy soldiers. I have proposed a change in our understanding of the scope of the principle of humanity so that it is broadened. I have also proposed a restriction in the scope of the principle of military necessity so it is more strict. And I have proposed an expansion of the humanitarian rights of soldiers to include the right not to be killed unnecessarily.