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<p>“LESSER EVIL” – A CASE EVALUATION ON OPERATIONAL LEVEL</p> <p><u>ABSTRACT:</u></p> <p>In war military necessity to some extent justifies breaches to some international humanitarian law rules. However, there is no justifiable causes for breaching rules with the objective to reduce humanitarian suffering. Professor Gabriella Blum is the creator of the humanitarian necessity theory which investigates the possibility for humanitarian necessity as a ground for freedom from responsibility in armed conflicts.</p> <p>By applying the humanitarian necessity theory to the Moscow Theater Hostage Crisis case this thesis strives to investigate how a humanitarian necessity theory would affect international humanitarian law on an operational level of war.</p> <p>The result of the analysis shows that the theory would weaken existing international humanitarian law and have high risks of blurring the limits between legitimate targets and protected persons. The implementation of the theory could result in creating an even more complex environment where the humanitarian necessity theory causes negative humanitarian effects instead of decreasing humanitarian suffering.</p> <p><u>Keywords:</u> Lesser evil, Humanitarian Necessity, Gabriella Blum, International Humanitarian Law</p>			

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1. Introduction

The phrase “lesser evil” comes with a dark and still positive tone. It resonates with the humanitarian strive to do good since it implies the inevitable choice between one evil and another, while pointing to the least evil one. At the same time the phrase contains the simple but charged word evil which emphasizes that even though the choice is lesser it still remains evil. To achieve lesser evil is a constant struggle in international humanitarian law (IHL) that desperately tries to limit the effects of armed conflicts with the help of core principles such as humanity and military necessity.¹ From the core principles, rules that all parties to a conflict must abide to is extracted. For example the rule to distinguish between civilians and combatants in order to spare the civilian population. Or that parties don’t have unrestricted rights to choose methods or means of warfare.²

Even though military necessity to some extent justifies breaches to some IHL rules, as for example targeting of cultural property which is forbidden unless there is an unavoidable military necessity.³ There are still no justifiable causes for breaching rules with the objective to reduce humanitarian suffering. If the choice is between one lawful evil and another unlawful evil you must choose the lawful evil even if the humanitarian outcome would have been greater by choosing the other. The possibility to choose on the basis of humanitarian necessity, that is to carry out an unlawful act that is deemed lesser evil, and therefore allowing for breaches in IHL is argued by Professor Gabriella Blum. She is the creator of the humanitarian necessity theory and investigates the possibility for humanitarian necessity as a ground for freedom from responsibility in armed conflicts.⁴ Her article focuses on, besides the creation of a new theory, a strategic level of understanding from a humanitarian necessity perspective. The main focus is not to find out when it would be right to ignore the law, but instead why the law is such that it does not allow for its violation under circumstances that may seem just. In an overall research Blum specifically excludes testing the appropriateness of specific rules in IHL,⁵ thus leaving the operational level unexplored. This article examines how lower levels of war are affected by introducing the humanitarian necessity theory.

¹ International Committee of the Red Cross. ‘International Humanitarian Law: Answers to your Questions’ (ICRC 2002) P. 6.

² Ibid. P. 6-7.

³ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*. (adopted 14 May 1954, entered into force 7 August 1956) The Hague. UNTS 249. Article 11(2).

⁴ Gabriella Blum, ‘The Laws of War and the “Lesser Evil”’ [2010] *The Yale Journal of International Law* 1. P. 2-4.

⁵ Ibid. P. 6.

As the lesser evil argument is examined the reader will come to an understanding that different means of war will affect the outcome of how “evil” one action is. On the operational level of war the commander’s choice of what weapon to use when must be weighted on the one hand the military objective and on the other hand the affect one’s choice will do to the surroundings. Lethal force is no longer the obvious choice as for example the Active Denial System, that creates the feeling of burning without causing permanent damage, has been introduced to the battlefield.⁶ If a commander possess these alternative weapons the likelihood of ending up in a lesser evil situation increases. Acting within the scope of humanitarian necessity such a situation could also increase the blurring of legitimate targets, arguably more than with lethal weapons. This increases the risk of civilians being targeted as a consequence of commanders knowledge that humanitarian necessity is a ground for freedom from liability. Eve Massingham, IHL officer, comments the subject and concludes that:

In light of this, it is imperative to the preservation of the rules proposed by Dunant (which have served humanity over the past 150 years) that the prohibitions against any weapon, including those of a non-lethal nature, being targeted against non-combatants in armed conflict not be weakened. This is so even if it is thought that a moral ‘greater good’ justification can be formulated. The potential for abuse of this slippery slope is just too great.⁷

The extremes that non-lethal weapons (NLWs) create in combination with the humanitarian necessity theory forms the right forum for testing the theory on operational level. Even though NLWs will be used in this article for analysing the humanitarian necessity theory it is important to highlight the possibility to recreate similar research but with a different type of weapon as the analysis function.

In previous research David Fidler writes about legal implications on NLWs where he argues that NLWs are a way forward in reducing the suffering and destruction of war. However, he thinks that such a technological approach to humanizing war is regarded as wishful thinking.⁸

⁶ Department of Defense, ‘Active Denial Technology Fact sheet’ (DoD, 2016).

⁷ Eve Massingham, ‘Conflict without casualties . . . a note of caution: non-lethal weapons and international humanitarian law’ [2012] *International Review of the Red Cross* 673. P. 685.

⁸ David P Fidler, 'The International Legal Implications of Non-Lethal Weapons' [1999] *Michigan Journal of International Law* 51. P 98.

However, there have been many developments since his article was written in 1999. He highlights military necessity and humanitarian concern regarding NLWs as a subject that needs balanced judgments. When summarizing his article he proposes general principles for evaluating and developing NLWs as he sees a need to fill the gap in international law for these kinds of weapons.⁹

A discussion that touches upon humanitarian necessity is led by Chris Mayer. He writes that the availability of NLWs may weaken the non-combatant immunity. Especially since using NLWs against non-combatants may in some cases actually save the non-combatants lives.¹⁰ As an example a case about a Special Forces team and if it would be morally permissible to use NLWs (tranquilizer is brought up as example) against children who compromised the teams position. Which, if they tell their elders, potentially could result in a deadly gunfight. Mayer's understanding of breaching the non-combatants immunity is that it should never be done even if NLWs are introduced to the battlefield. He concludes that non-combatant immunity does not simply protect from death, but it directs military forces to treat non-combatants differently from soldiers. Yet, he urges military forces to put a great deal of effort into determining how best to use NLW's on the battlefield.¹¹

In 2015 an article about laws and ethics was published in relation to NLWs.¹² It is argued that development and use of new technologies raises a number of ethical issues. One of these issues is brought up to debate by referring to Michael Gross, an Israeli political science professor. Gross writes about a lesser evil test that compares a small amount of intentional harm with greater level of non-intentional harm. The example of using NLWs and deliberately targeting civilians in a manner that avoids using explosives which in turn would cause non-intentional harm to the same civilians is lifted. He argues that in such a case there would be moral grounds for targeting civilians with NLWs.¹³ Coleman comments this as a view that seem to advocate

⁹ Ibid. P.97-98.

¹⁰ Chris Mayer, 'Nonlethal weapons and noncombatant immunity: Is it permissible to target noncombatants?' [2007] *Journal of Military Ethics* 221. P. 221.

¹¹ Ibid. P. 225-229.

¹² Stephen Coleman, 'Possible Ethical Problems with Military Use of Non-Lethal Weapons' [2015] *Case Western Reserve Journal of International Law* 185. See Coleman explaining the relationship between law and ethics on page 187.

¹³ Michael Gross, 'The Second Lebanon War: The Question of Proportionality and the Prospect of Non-Lethal warfare' [2008] *Journal of Military Ethics* 1. P. 15-16.

the use of NLWs in a manner that applies the principle of discrimination after using force, rather than before.¹⁴

Previous research regarding NLWs and the choice of lesser evil has delivered a consensus that NLWs is a contested subject in IHL. Even if the subject of humanitarian necessity is not explicitly mentioned before Blum's theory was created it is still touched upon, but with other words, both by Mayer and Coleman as something that could be morally right but dangerous as it challenges IHL. The fact that both NLWs and a humanitarian necessity theory alone has the character of challenging IHL is something that also must be adhered to in this article. This appears most clearly when it comes to non-combatant immunity and a lesser evil approach. It is rare to find articles that actively promotes breaching the non-combatant immunity, but Michael Gross does show tendencies in that direction. Arguments has been raised in different spheres during the last decades both before and after Blum's theory which underlines that it is a disputed subject. NLWs will be in focus for testing the humanitarian necessity theory. And by this, the following research question will be central throughout the article:

Would the theory of humanitarian necessity, particularly as applied to non-lethal weapons, weaken existing IHL resulting in negative humanitarian effects?

The method used in this article is doctrinal legal research. In the first part I will explain Gabriella Blum's theory of humanitarian necessity and her view on lesser evil. This is followed by a short analysis of contemporary NLWs and the legal frameworks closely related to them. In the last part a modification of the 'Moscow Theater Hostage Crisis' case where NLWs are dominant, will be examined from a humanitarian necessity perspective. By examining this case the article hopes to assess how a theoretical implementation of the humanitarian necessity theory would affect IHL on operational level.

¹⁴ Coleman (n 12). P. 192.

2. The Humanitarian Necessity theory

Gabriella Blum argues that contemporary IHL demands an excessive sacrifice of lives and that certain war crimes might actually lead to saving innocent lives. She acknowledges that this is widely rejected by IHL. Examples such as assassinating the Iraq president Saddam Hussein in 1990 as a quick way to avoid the Gulf War or the more controversial example of bombing Hiroshima and Nagasaki in 1945 in order to force Japan to surrender, thus avoiding a land operation against Japanese mainland are both pointed out as cases where a humanitarian necessity justification could be current. Even though the first example never happened, it represents breaches of IHL as it is dubious to kill a foreign leader outside an ongoing conflict. As with the second case one would argue that it is outrageous to intentionally kill civilians as in Hiroshima and Nagasaki which is indisputably a war crime.¹⁵ In the Hiroshima and Nagasaki case the lesser evil argument is rendered down to sheer numbers of lives. The lawful planned land offensive (Operation Downfall) against Japan was estimated by one account to exceed the corresponding number for Germans killed in Europe which in turn was calculated to between 5 and 10 million dead.¹⁶ These numbers are from an American consultant named W.B. Shockley, and should be considered with caution due to his possible bias. The numbers dead from the unlawful atomic bombings direct impact was approximately 90 000, but it is difficult to determine the actual number due to radiation damage and the probability that this causes premature deaths long after the blast.¹⁷ Blum defends her argument by referring to this case as an extreme case of a more general dilemma. She asks if there could ever be circumstances in which the deliberate killing of civilians, in violation of IHL, should be upheld as morally and legally justified.¹⁸ Another case that Blum refers to is *The "Early Warning Procedure"*, and is arguably easier to relate to from a humanitarian necessity perspective.¹⁹ Here the Israeli Defense Force (IDF) used Palestinian civilians in occupied territory as contractors to warn residents in buildings of interest and grant the wanted individuals inside to turn themselves in without bloodshed, before it became necessary to use force. This was deemed unlawful by the Israeli High Court of Justice as they referred to the prohibition on using the civilian population

¹⁵ Blum (n 4). P. 2-3, 31.

¹⁶ Memorandum from W.B. Shockley, Expert Consultant, Office of the Sec'y of War, to Edward L. Bowles on the Estimated Casualties in an Invasion of Japan (July 21, 1945), *reprinted in* Michael Kort, *The Columbia Guide To Hiroshima And The Bomb* (Columbia University Press 2007) P. 223.

¹⁷ The research is ongoing on deaths caused by radiation damage in Japan and how many generations this has affected. For further information read: Alex Wellerstein, 'Counting the dead at Hiroshima and Nagasaki' (2020) <<https://thebulletin.org/2020/08/counting-the-dead-at-hiroshima-and-nagasaki/>>, accessed 2020-12-22.

¹⁸ Blum (n 4). P 24, 28, 30.

¹⁹ Ibid. P. 15-16.

for the military needs of the occupying army, and also the obligation to distance innocent civilians from the zone of hostilities. Before it was forbidden, using civilians for the early warning procedures was estimated by the IDF to only have one exceptional incident where a resident was killed being mistaken as an IDF official by the suspect. After the procedures were forbidden, according to the Israeli human rights organisation *B'Tselem*, fifty Palestinians were killed, nineteen of whom were not the intended target of arrest. As Blum concludes, it is impossible to assess how many of the nineteen could have been spared had the early warning procedure been applied, it is conceivable that some might have been.²⁰

Before further explaining the theory it is important to understand that Blum regards domestic law as a useful subject for comparison but not for direct transposition onto international level. Here the domestic necessity defence is taken into consideration which offers exemption from criminal liability where violating the law caused a lesser harm than following it would have. Of course the characteristics of domestic law vary in different countries. As for example English common law where necessity never could provide a defence to intentional homicide as compared to France where it theoretically could be applied to any crime.²¹ Further as an example of necessity formulation, in the Swedish Criminal Code *an act committed by a person out of necessity only constitutes an offence if, in view of the nature of the danger, the damage caused to another, and the other circumstances, it is unjustifiable. Necessity exists when a danger threatens life, health, property or some other, important interest that is protected by the legal order.*²² With this in mind domestic law draws the line between choosing a lesser evil that does not involve the killing of another human being and the evil that involves the killing of another human being. As opposed to IHL that draw the line between the intentional killing of civilians (forbidden) and the unintentional, even if foreseen, killing of civilians (allowed). This is to be seen as a difference in proportionality whereas in domestic law a necessity situation is extraordinary while it is commonplace in war to choose between evils.²³

In the field of international criminal law Blum argues that the implementation of a lesser evil justification can make the difference between innocence and guilt.²⁴ The Rome Statute

²⁰ Blum (n 4). P.15-19

²¹ Ibid. P. 31-33.

²² The Swedish Criminal Code 1962. Chapter 24, Section 4.

²³ <https://www.government.se/4a8349/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf>, accessed 2020-12-22.

²⁴ Blum (n 4). P. 34-36.

²⁴ Ibid. P. 3.

recognizes a variation of military necessity as justifying exemption from liability.²⁵ Here it is required that the defendant act in response to circumstances that were imposed upon her. These actions must be either brought about by other persons or constituted by circumstances beyond the defendants control. Article 31 explicitly rules out the possibility of successfully invoking a humanitarian necessity justification in other cases. This is not the pure humanitarian necessity that is the subject of Blum's study.²⁶

The fact that military necessity is parent to humanitarian needs is another reason why Blum sees a demand for her theory. As an example she highlights advanced warnings. These must be given before launching an attack which may affect the civilian population *unless circumstances do not permit*. Here the protection of civilians fade in the face of military needs and the distance between foreseen and intentional harm is narrowed down.²⁷ The purpose with the humanitarian necessity theory is to allow for humanitarian driven violations in wars. Mostly, parties violate IHL because they have a military interest in doing so or because they are indifferent or cruel toward the enemy. Blum assumes that being labelled war criminal in cases where a lesser evil situation is actual reduces the incentives to care for the enemy. The theory aspires to balance the ambition to encourage states to promote humanitarian welfare and the risk of unjustified exploitations of any exemptions from liability. As the theory does not strive to change IHL in its core but instead add a new layer of justification it is designed in a post facto necessity justification similar to domestic law. The following elements is implemented in this design: (1) measuring "lesser evil"; (2) timing of the assessment; (3) motivations; (4) imminence and fault; (5) legislative intent; (6) causal connection; (7) less harmful alternatives; and (8) burden and standard of proof.²⁸

This is implemented in what Blum calls a blueprint for humanitarian necessity justification and is described as a workable definition. In this article it is the core of what I refer to as the humanitarian necessity theory:

A person shall not be criminally responsible if, at the time of that person's conduct:

²⁵ *Rome statute of the International Criminal Court* [1998] ICC, Article 31(1).

²⁶ *Blum* (n 4). P. 14.

²⁷ *Ibid.* P. 42-43.

²⁸ *Ibid.* P.53-55.

*The conduct that is alleged to constitute a crime was designed to minimize harm to individuals other than the defendant's compatriots, the person could reasonably expect that his or her action would be effective as the direct cause of minimizing the harm, and there were no less harmful alternatives under the circumstances to produce a similar humanitarian outcome.*²⁹

2.1 Critique

Blum's own critique against the theory focuses partly on the deontological ethics view of law, which is the furthest away one arguably could come from a humanitarian necessity theory. Here the cost-benefit calculation on human lives is against its fundamental view which is that one's actions itself should be right or wrong rather than if the action is right based on the consequences of that action. She also includes the risk of humanitarian necessity to be speculative and often inaccurate. As for example the earlier mentioned example about the bombings of Japan. The result could as well have ended up with an even more furious Japanese Empire and by that resulting in a drawn out war and more casualties. The slippery slope argument against the theory is also important. It implicates that if the humanitarian necessity justification is implemented the risk is high that, even if it is appropriate in some cases, it will be a gate that opens up for abuse. As for example the slippery slope of accepting deliberate targeting of civilians, justifying it only by the consequences and not the action.³⁰

Further critique to the theory, that Blum acknowledges, is the fact that it analyses the meaning of lesser evil from a strategic level without deeper analysing the operational and tactical perspective. Situations perceived as easy to comprehend in a post facto justification analysis could in fact be very hard as the decision by the people on the ground must be made in the fog of war. The danger of adding yet another tool of justification to an already complex environment is that the disadvantages could outweigh the benefits. Also, a lesser evil analysis is easier to complete when time is not critical as it often is in combat situations as contrary to strategic level where the planning process permits commanders to make well balanced decisions.

²⁹ Blum (n 4). P. 67.

³⁰ Ibid. P. 39-48.

3. Non-lethal weapons

IHL does not address NLWs as a certain class of weapons and does not have any rules covering NLWs as a whole. Specific weapons that would be categorized under NLWs are however regulated, these will be addressed later in this section. NLWs are defined by the US department of defense as ‘weapons, devices, and munitions that are explicitly designed and primarily employed to incapacitate targeted personnel or materiel immediately, while minimizing fatalities, permanent injury to personnel, and undesired damage to property in the target area or environment. Non-lethal weapons are intended to have reversible effects on personnel and materiel’.³¹ When looking at the NATO definition it is of similar character: ‘Non-Lethal Weapons are weapons which are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimal undesired damage or impact on the environment’.³² The concept non-lethal is commented by William Boothby, a former Royal Air Force officer, as an inappropriate description. He finds that the words ‘minimize’ and ‘low’ from the definitions indicates that these weapons, even though they have lower probability of causing death or serious injury, clearly possess the capacity to cause fatal injury.³³ The question if these weapons are non-lethal or not is debated. Less-lethal might be more accurate but this article will refer to them as non-lethal while this is used in most policy documents and other related sources.

Examples of present day NLWs are the Active Denial System, which uses radio frequency millimetre waves at a frequency of 95 gigahertz. Traveling at the speed of light, the millimetre-wave directed energy engages the subject, penetrating the skin to a depth of only about 1/64th of an inch, or the equivalent of three sheets of paper. The beam produces an intolerable heating sensation, compelling the targeted individual to instinctively move.³⁴ Another example is the kinetic impact projectile, also known as rubber bullets. These are mainly used for crowd control purposes and the weapon fires a projectile consisting of a bean bag or a rubber bullet that does not penetrate the body.³⁵

³¹ Department of Defense, ‘Executive Agent for Non-Lethal Weapons (NLW), and NLW Policy’ (DoD 2013). P. 12.

³² North Atlantic Treaty Organization, ‘NATO Policy on non-lethal weapons’ (NATO 1999). <https://www.nato.int/cps/en/natohq/official_texts_27417.htm?selectedLocale=en> accessed 2020-12-25.

³³ William H. Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press 2009). P.233-235.

³⁴ *Active Denial Technology Fact sheet* (n 6).

³⁵ Physicians for Human Rights, ‘Lethal in Disguise: The Health Consequences of Crow-control Weapons.’ (PHR 2016). <https://s3.amazonaws.com/PHR_Reports/lethal-in-disguise.pdf> accessed 2020-12-30.

Other more futuristic examples include a refinement of the now existing categories of NLWs such as electromagnetic weapons, anti-traction materials, mechanical or kinetic devices, chemical field control agents and biochemicals.³⁶ The development of new technologies are at full tilt. Only our imagination would be the limit of what the future holds regarding NLWs. As Colonel George Fenton told New Scientist in an interview: 'I would like a magic dust that would put everyone in a building to sleep, combatants and non-combatants. He adds that this type of technology would mean reviewing the agreements aimed at ending chemical and biological warfare'.³⁷

Specifically prohibited NLWs are non-deadly poison or poisoned weapons, riot control-agents, chemical weapons, biological weapons and blinding laser weapons. The only restricted non-lethal weapon is herbicides.³⁸ The cluster of prohibited NLWs are regulated in the Prohibition of Gases and other Bacteriological methods of warfare,³⁹ Biological Weapons Convention,⁴⁰ Convention on Environmental Modifications,⁴¹ Certain Conventional Weapons - Protocol IV,⁴² and the Chemical Weapons Convention.⁴³

The general framework of IHL applies to NLWs as it does to all weapons. The principles of unnecessary suffering, distinction and not to use weapons in an indiscriminate manner is applicable, as well as proportionality and precaution when choosing a weapon.⁴⁴ However, this is best understood from states perspective by reading their policy regarding NLWs. Questions may arise if there are any circumstances where states that possess NLWs would be obliged to use the non-lethal option in the course of armed conflict. The NATO policy on NLWs declare:

³⁶ Boothby (n 32). P. 234-235.

³⁷ Rob Edward, 'War without tears' [2000] New Scientist. <<https://www.newscientist.com/article/mg16822690-300-war-without-tears/>>, Full text available at: <https://eurekalert.org/pub_releases/2000-12/NS-Wwt-1212100.php> accessed 2020-04-12.

³⁸ International Committee of the Red Cross, *Handbook on International Rules Governing Military Operations* (ICRC 2013). P. 179.

³⁹ *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*. (adopted 17 June 1925, entered into force 8 February 1928) Geneva.

⁴⁰ *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* (adopted 10 April 1972, entered into force 26 March 1975) UNTS 1015. (BWC).

⁴¹ *Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques* (adopted 10 December 1976, entered into force 5 October 1978) UNTS 1108 (ENMOD).

⁴² *Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects* (adopted 10 October 1980, entered into force 2 December 1983). UNTS 1342. (CCW)

⁴³ *Convention On The Prohibition of The Development, Production, Stockpiling And Use of Chemical Weapons And on Their Destruction* (adopted 3 September 1992, entered into force 29 April 1997) UNTS 1975 (CWC).

⁴⁴ Study on Customary International Humanitarian Law, Rule 11-14, 17, 45, 70-71. <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul> accessed 2020-12-05.

Neither the existence, the presence nor the potential effect of Non-Lethal Weapons shall constitute an obligation to use Non-Lethal Weapons, or impose a higher standard for, or additional restrictions on, the use of lethal force. In all cases NATO forces shall retain the option for immediate use of lethal weapons consistent with applicable national and international law and approved Rules of Engagement.⁴⁵

From their perspective lethal force is the centre of gravity in armed conflicts, and NLWs does not change the course of action or threshold regarding proportionality, precaution in attack or unnecessary suffering.

For this article NLWs is of importance due to its occurrence in the ‘Moscow Theatre Hostage Crisis’ case where it plays a crucial part in the outcome of the case.

⁴⁵ *NATO Policy on non-lethal weapons* (n 31).

4. Moscow Theater Hostage Crisis

In this section I will examine the ‘Moscow Theater Hostage Crisis’ case (Theater crisis from now on) from the perspective of the humanitarian necessity theory. The basic facts of the case will first be explained and then analyzed through the lens of the theory. After the explanation, it will be assessed from the commander’s perspective with the humanitarian necessity theory as potential freedom from liability from otherwise unlawful acts in war. Next, the case will be examined in a post facto situation as could be expected when a potential war crime has been committed. The case itself is debated if it occurs during an armed conflict or not, in order to avoid such a discussion I will assume that it does take place in an armed conflict.⁴⁶ The core of the events that occur in Moscow is something that has a plausible risk of repeating itself both in and outside armed conflicts. The case is therefore of interest for this research but will be tweaked into a strict military fictional case with the Theater crisis as inspiration. This is done in order to examine how the humanitarian necessity theory works in an operational environment and investigate if this would weaken IHL.

4.1 Original and fictional Moscow Theater Hostage Crisis case

In the actual Theatre crisis case the goal of the Chechen terrorists was to force Russia to retreat their armed forces out of Chechenia by capturing about 900 hostages inside of the theater on 23 October 2002.⁴⁷ The Chechen group consisted of 53 armed commandos with a declared desire to die and become martyrs.⁴⁸ As the theater was being seized the terrorists planted about 30 different explosives around the theater with the largest made out of 110 pounds of TNT. The main charge was placed in the middle of the theater with a detonator guarded by one of the terrorists. Also, suicide belts was worn by eighteen members of the group. If Russian authorities were to storm the building they threatened to blow up the structure.⁴⁹ The terrorist was well armed with semi-automatic rifles, pistols, grenades, and a homemade grenade launcher.⁵⁰ The fictional case, which I will refer to as ‘the fictional case’, is a case that takes place in an

⁴⁶ In the second Chechen war Russia managed to early on defeat the conventional Chechen force and capture their capital Grozny. Between 2000 and 2009 it is conceivable to consider the remaining Chechen resistance as Guerrilla warfare thus making the conflict an non-international armed conflict. For further information read: Jakob Hedenskog, ‘Russia and International Cooperation on Counter Terrorism: From the Chechen Wars to the Syria Campaign’ [2020] Swedish Defence Research Agency (FOI).

⁴⁷ Adam Dolnik and Richard Pilch, ‘The Moscow Theater Hostage Crisis: The Perpetrators, their Tactics, and the Russian Response’ [2003] *International Negotiation* 577. P. 590, 595.

⁴⁸ *Ibid.* P. 592.

⁴⁹ *Ibid.* P. 582.

⁵⁰ *Ibid.* P. 587.

international armed conflict. Here the terrorists will be called fighters and are subordinates to the armed forces of an enemy state. The fighters has the same goal as the terrorists had in the Theater crisis case. It is also assumed in the fictional case that the Russians have no intentions to meet the fighter's demands and retreat out of their country. The broad outcome of the actual case is that the theatre was stormed by a Spetsnaz Special Forces team on the fourth day, killing the majority of the terrorists and causing the deaths of almost 130 hostages. The chemical gas named fentanyl was used before the assault in order to control the terrorists and was also the main reason for the deaths of the hostages.⁵¹ This will be valid for the fictional case as well.

4.2 Humanitarian Necessity – the commander's perspective

Before analysing the commander's perspective it is important to highlight the commander's basis of decision. This includes the enemy threat, the own forces capabilities to deal with this threat, time available, the terrain and how that could affect the operation and a clarification of the mission. The following part briefly explains the commander's basis of decision in the fictional case.

The estimated commander's situational awareness of the enemy threat is portrayed by an article about lessons learned from the Nord-Ost terrorist attack (another name for the Moscow Theatre crisis). Here it is stated that the following scenario emerged in the operational central trying to understand the situation: About 1000 hostages were being held by a group of 35-40 terrorists in the auditorium of the theatre. Two powerful explosive devices had been placed in the centre of the hall and on the balcony, and mines had been placed on the stage and aimed into the auditorium. Some 15-18 female suicide bombers wearing belts with explosive devices were deployed around the perimeters. Terrorists armed with automatic rifles were located on the stage and in the balconies.⁵² The commander's own force capabilities is a chemical NLW agent named fentanyl that causes the target to rapidly go into analgesia and unconsciousness.⁵³ Also, three Spetsnaz special forces teams for assault operations are available (roughly estimated to vary between 6-12 soldiers).⁵⁴ In addition to this the commander in the fictional case has a battalion sized unit (500 soldiers) securing the perimeter and isolating the theatre, this is to

⁵¹ Debra Javeline and Vanessa Baird, 'Who Sues Government?: Evidence From the Moscow Theater Hostage Case' [2007] *Comparative Political Studies* 858. P. 864.

⁵² Yevgeny A. Kolesnikov, 'Lessons Learned from the Nord-Ost Terrorist Attack in Moscow from the Standpoint of Russian Security and Law Enforcement Agencies' [2004] *Terrorism: Reducing Vulnerabilities and Improving Responses: U.S.-Russian Workshop Proceedings* 26. P. 29.

⁵³ *Dolnik and Pilch* (n 46). P. 601-602.

⁵⁴ *Ibid.* P. 584.

function as the military equivalent of the support in the actual Theater crisis that consisted of police units and emergency personnel.⁵⁵ The exact time frame regarding how much time the commander has for solving the situation is impossible to determine. However, early statements from the terrorists indicated that they would start killing hostages if Russia did not withdraw troops from their country within a week.⁵⁶ The theatre is located in urban terrain in the south east part of Moscow and the inside of the theatre consists of a big auditorium with connecting hallways and a balcony area. A nightclub share wall with the theatre.⁵⁷ Finally, the mission for the commander is to negate the terrorists capacity to detonate their explosives, neutralize the terrorists and free the hostages. After the Spetsnaz raid in the actual case it was declared that the primary objective was to negate the rebels capacity to detonate their explosives, in order to avoid a “total loss” situation in which all hostages would have been killed. Limiting the overall number of casualties among the hostages was only a secondary objective.⁵⁸

For full details of the case read the articles *Lessons Learned from the Nord-Ost Terrorist Attack in Moscow from the Standpoint of Russian Security and Law Enforcement Agencies* and *The Moscow Theater Hostage Crisis: The Perpetrators, their Tactics, and the Russian Response*. Both referred to in the above paragraph.

4.2.1 Analysis – the commander’s perspective

From a commander’s perspective one will soon realise that the different courses of actions are plenty. I will narrow them down for the sake of being manageable for this analysis. Firstly I will discuss the case with today’s legal framework as the perspective. Secondly, I will analyse the case from the perspective of a system where humanitarian necessity is a valid freedom from liability.

In a contemporary IHL system it is clear that it would not be legal to use gas in the theatre as it is challenging the prohibition on indiscriminate attacks,⁵⁹ the prohibition against targeting civilians,⁶⁰ and the prohibition on chemical weapons.⁶¹ Therefore it would leave the commander with two other main courses of actions seen from a resources available perspective. One

⁵⁵ *Kolesnikov* (n 51) P. 27.

⁵⁶ *Dolnik and Pilch* (n 46). P. 582.

⁵⁷ *Ibid.* P. 582-584.

⁵⁸ *Ibid.* P. 599.

⁵⁹ *Study on Customary International Humanitarian Law* (n 43), Rule 11.

⁶⁰ *Ibid.* Rule 6.

⁶¹ *Ibid.* Rule 74.

offensive and one defensive as they could either use the Spetsnaz special forces team or the battalion sized unit. The Spetsnaz team, trained in hostage situations, has the main task to commence an assault on the fighters, neutralising them as they did in the actual case. A battalion sized unit is a blunt weapon of choice in such an operation and unlikely trained in hostage situations. This leaves the commander with using the battalion as a cordon security force with the main task to commence a siege of the theatre. Subsequently, the first course of action would be characterized as the offensive one. Assaulting the theatre as they did in the actual case, but without using the gas as the commander is obligated to follow the rules of war. As a consequence there is probably a greater risk of ending up in a total loss situation. This is if the fighters manage to detonate the main explosives as they will not be affected by any kind of chemical gas. Course of action two or the defensive action would be to resolve into a siege of the theatre with the battalion sized unit. Here the commander's option is to wait out the fighters so that they run out of supplies and surrender or try to fight their way out. Time is against the commander in this course of action as the fighters claim to start executing hostages within one week. Even though these two courses only represent a small part in a sea full of options they serve as a reminder that the choices often come with great risks and potential disasters. The not mentioned option to negotiate with the fighters and achieve a peaceful ending is indeed the best option from a humanitarian perspective. It is however not of interest in this article as the objective is to analyse how regulations of violence is affected by the humanitarian necessity theory.

Acting as a commander in a system where humanitarian necessity could be used as freedom from liability the course of action has a clear tendency to lean against what we in the previous paragraph described as illegal. To rephrase the humanitarian necessity theory as we analyse the case it states that *the conduct that is alleged to constitute a crime was designed to minimize harm to individuals other than the defendant's compatriots*. As the hostages in the fictional case is of high value and there is no explicit high value target amongst the fighters the gas is arguably used to save as many hostages as possible. There is no clear evidence that there is a military necessity argument that would put the focus on the fighters, instead the mission is focused on freeing the hostages. The hostages would arguably also fit in the category *individuals other than the defendant's compatriots*. As an argument opposed to this, one could highlight the fact that the safety of the Spetsnaz team increases drastically by using a NLW in an indiscriminate manner and that they are doing this out of care for their own lives. Simply put, that the conduct is in fact designed to minimize harm to the defendant's compatriots (the

Spetsnaz team). However, this opposing argument is far-fetched and from my point of view not valid as the Spetsnaz team either way goes in with great risks for their own safety. Also, protecting one's own forces does not take away the lawfulness of a humanitarian necessity act. It is just that it should not be done only in order to protect the defendant's compatriots (the Spetsnaz team). Further discussion about how to categorise the hostages in relation to the defendant's compatriots is implemented in chapter 4.3.1 below. However, from the commander's perspective the least bloody way undoubtedly seems to be the NLW choice in combination with an assault.

In the humanitarian necessity theory it also reads that *the person could reasonably expect that his or her action would be effective as the direct cause of minimizing the harm*. Here it is clear that harm must be minimized if it were to be considered a just freedom from liability. In the fictional case there are strong arguments that the two lawful options (the defensive and offensive one) would result in the deaths amongst the hostages. Nevertheless, there are arguments to strengthen both the first and second lawful course of action as there is no guarantee that the fighters actually would proceed with detonating the bomb in case of an attack on the theatre. Additionally, who are we to say that the fighting spirit is still high amongst the fighters after six or seven days of isolation, and that they actually will start executing hostages? These statements tend to be abstract but they still need attention as it is a core critique to the humanitarian necessity theory. How do we assess *if an action is effective as the direct cause of minimizing the harm* and how do we conclude that the original course of action wouldn't have been better? The consequence from the actual case was that 126 civilians lost their lives because of the gas.⁶² This is partly blamed on the commanders failure to notify the medical units in the area of its use beforehand.⁶³ But it does not take away the fact that a big amount of the hostages lost their lives, which brings us back to the question if any of the lawful courses of actions would have been better? This is considered in the last part of the humanitarian necessity theory as it concludes that for a person to not be criminally responsible she must meet the demand that *there were no less harmful alternatives under the circumstances to produce a similar humanitarian outcome*. A quick glance at the two lawful options explained in the first paragraph implies that there are high risks, but also high rewards if they play out well. If a high risk, high reward scenario was excluded and if that in fact would satisfy a court as a valid situation where a commander would be freed from liability in a case where he or she argues that a lesser but

⁶² Dolnik and Pilch (n 46). P. 585.

⁶³ Ibid. P. 603.

illegal evil was chosen is impossible to say. This strengthens the difficulty to imply such a theory as it relies much on perceptions, possibly giving a false and self-perceived possibility for the commander to breach the laws of war.

The NLW in the actual case also raises some questions. As it was used on subjects that were both physically and psychologically affected it is believed that they were more susceptible to the effects of the gas causing respiratory depression.⁶⁴ This alongside the alleged fact that medical units in the area were not prepared to deal with individuals exposed to the gas gives us a scenario with high numbers of dead hostages. This might or might not have been something that the commanders knew about before using the gas. But, in a similar scenario using a fail proof gas with a guarantee that everyone would be restored to normal could likely change the perception of its usage. It is clear that what kind of NLW is used and how good its characteristics are will change the potential outcome in a theoretical situation where the humanitarian necessity theory is current. A commander that is able to state “I knew that no one would be harmed” as opposed to a commander saying “I estimated that no one would be harmed” would make a big difference in front of a court. This is a question for the future to tell, as there are no known modern weapons to this day that meet this characteristics.

4.3 Humanitarian Necessity – post facto perspective

In this part the outcome of the Theater crisis case will be examined in a post perspective. What has happened and if that outcome could be deemed lawful according to the humanitarian necessity theory is in focus here.

The outcome of the actual case was that the Russian Spetsnaz team pumped gas through the theaters ventilation system on the 4th day, putting a majority of the hostages and terrorists to sleep. The team then stormed the building and shot all the Chechens dead. They then carried the hostages out one by one. Over 100 hostages died, most of them by breathing deprivation.⁶⁵ Applying the theory to the concrete case is done in order to examine the lawfulness of these actions and hopefully give us insight in how the theory would be implemented, which in turn gives us a background to how it would affect the conduct of combatants. The earlier mentioned elements that are implemented in the design of the humanitarian necessity theory will function

⁶⁴ *Dolnik and Pilch* (n 46). P. 602.

⁶⁵ *Javeline and Baird* (n 50). P. 864.

as the tool of examination. The elements are (1) measuring “lesser evil”; (2) timing of the assessment; (3) motivations; (4) imminence and fault; (5) legislative intent; (6) causal connection; (7) less harmful alternatives; and (8) burden and standard of proof. Legislative intent will not be part of the case analysis below as it focuses on the intent of the theory as a whole and cannot be used for assessing specific cases.

4.3.1 Measuring “lesser evil”

When measuring “lesser evil” a cost-benefit calculation is the essence of the justification. Two questions are raised in the theory; (1) who should be taken into account when making the calculation and; (2) how much less is lesser? Firstly, the different participants accounted for in a lesser evil situation is for example a state’s own civilians or enemy civilians and enemy combatants or a state’s own combatants.⁶⁶ For the Theater crisis case the main focus is on the Russians own civilians and the enemy soldiers. In the humanitarian necessity theory it is assumed that a state is going to take actions to protect its own civilians and Blum asks the question whether those civilians would benefit further from a humanitarian necessity justification.⁶⁷ As noted by Blum IHL does not make explicit distinction between enemy civilians and one’s own civilians and instead uses the generic term civilian throughout. However, in the theory it is argued that it should not be an acceptable humanitarian motivation if a state’s concern only extends to one’s own nationals (this includes both combatants and civilians). Blum is willing to accept a humanitarian motivation if the concern is mixed for both one’s own and the opposing sides nationals.⁶⁸ This indicates that Blum did not have this specific type of case in mind when writing the theory which further complicates assessment of cases with these kinds of characteristics. As the theory wants to exclude a sole or overriding concern for one’s own combatants or civilians it is arguably hard to fit the theory to situations where hostages are the center of attention. In these situations the hostages by obvious reasons becomes the overriding concern for those that aims to set them free. However, staying loyal to the theory a commander must abide by these facts and show a mixed concern for both hostages and hostage takers in order to enjoy freedom from liability if that commander were to use illegal methods such as a chemical NLW gas. In the Theater crisis case it is hard to motivate that the commanders had mixed concern for both terrorists and the hostages as the Spetsnaz team shot

⁶⁶ *Blum* (n 4). P. 55-56.

⁶⁷ *Ibid.* P. 58.

⁶⁸ *Ibid.* P. 59-60.

the unconscious terrorists dead after they had been affected by the gas.⁶⁹ Contradictory, in the theory it is noted that in certain cases where there is a substantial benefit for one's own nationals in comparison to the harm it could be motivation enough for a humanitarian necessity defense. The question if this is considered to be a substantial benefit or not leads us to the second part. Namely, how much less harm the usage of gas contributed to as opposed to other methods. Here the theory advocates a "significant" requirement which signals that a violation of IHL is justified only in extreme cases.⁷⁰ As for the Theatre crisis the outcome of over 100 civilians dead could undoubtedly be summarized as a huge loss. However, in comparison to a total loss situation with over 900 civilians dead it could instead be described as a lesser evil outcome. I acknowledge that there are many uncertainties concerning a total loss situation which was discussed in chapter 4.2.1 but in both the alternative cases there was undoubtedly an impending risk of such an outcome.

To summarize, when measuring lesser evil in the Theater crisis case it partly achieves what the theory considers to be a valid humanitarian necessity motivation. This is when we turn our attention to sheer numbers of lives. The weakness is the fact that it is Russia's own nationals that is the main concern (the hostages). It is disputed in the theory if a substantial benefit of lesser harm would override the fact that the concern is solely of one's own nationals. However, this is mentioned as a possible exception from the otherwise clear position Blum takes regarding humanitarian necessity and that it is excluded to only show concern for a state's own nationals and still enjoy freedom from liability.

4.3.2 Timing of the assessment

Here the timing of the assessment is analyzed and balanced. Blum has not decided what path is the best as she concludes that a domestic system often requires that the defendant reasonably believed she was choosing the lesser-evil path, thus it is possible for an actor to enjoy protection even if her acts ultimately resulted in greater harm. She also concludes that there are good reasons not to follow the same test in IHL as a situation where there is no need to show actual lesser harm could result in uncertainty, slippery slopes and spillover costs. Opposite to this, Blum argues that there are good reasons to use the domestic system as well. For example where actors are determined to prove success, this might drive their transgressions further if milder

⁶⁹ *Javeline and Baird* (n 50). P. 864.

⁷⁰ *Blum* (n 4). P. 60-62.

one's did not produce lesser harm.⁷¹ Following paragraph will discuss the timing of assessment from Blum's discussion but will not be able to determine any rights or wrongs as the theory is not complete on this part itself.

In the Theater crisis case it is hard to find clear indications how the commanders assessed the NLW fentanyl gas and its effect. The gas did work to some extent, but not all terrorists was disabled by it and a lot of hostages lost their lives. As a result of the deaths of some of the hostages, critique was directed towards the decision makers that they had not notified medical units and hospitals in the vicinity about their usage of fentanyl.⁷² A possibility is that the commanders did not believe that the fentanyl would affect the civilians in such a manner that excessive deaths would be the consequence. This theory gives us a reality where they reasonably made the assessment that the gas would not harm civilians in any permanent manner and that this would enable the freeing of hostages. How the formulation of a humanitarian necessity theory would affect their assessment in an alternate reality is difficult to determine. But it is fair to say that the demand for proof of lesser harm would increase caution as the effects of an attack would be the important proof a commander needs to declare that it was humanitarian necessary. Here the survival of hostages would be crucial which might result in further precautions, as for example a thorough analysis of one's own weapon of choice, potential consequences of that weapon and the conclusion that medical units must be prepared for these consequences.

4.3.3 Motivations

There must be a genuine humanitarian intention that drives an actor's actions for it to be considered a humanitarian necessity. The evidentiary question of how to assess the real motivations behind an individual's choice of action is no different in this context than in any other case that requires proof of mens rea to find a defendant guilty or innocent.⁷³ The intentions of the commanders involved in the Theater crisis cannot in full be revealed in texts written by outsiders but it can be interpreted to some extent. As it was a genuine effort to avoid a total loss situation where a majority of the hostages would lose their lives one could argue that the intentions of the commanders were motivated by humanitarian values. The Russian security agency is also said to have a pre-set maximum number of casualties for the raid which was

⁷¹ Blum (n 4). P. 62.

⁷² *Javeline and Baird* (n 50). P. 864.

⁷³ Blum (n 4). P. 63.

150.⁷⁴ The number itself tells us not only that calculations were done by the commanders in charge but also that their intention was to save the bigger part of the hostages. The acceptance that lives would be lost was weighed against the total loss situation which made their reasoning to hold. However, no mercy was shown towards the terrorists and no official statements revealed how they would treat them once they were unconscious. As all the terrorists were shot dead in the attack it is unclear how many were actually *hors de combat*. Some carried suicide-belts which might have made it a military necessity to take them out despite the fact that they appeared unconscious, as they still constituted a threat. Although, one could assume that at least some were *hors de combat* from the effects of the gas. This brings us back to the previous discussion (chapter 4.3.1 *measuring "lesser evil"*) about mixed concern for both parts in a conflict or sole concern for one's own nationals. Here the theory concludes that it is easier to motivate humanitarian necessity if the commander's concern is mixed, which is not the case here.

4.3.4 Imminence and fault

Imminence of harm stands for an urgent need to break the law rather than leisurely pursuing alternative lawful means to avert the harm. Imminence also implies that the individual's decision had to be made quickly, under a sense of looming threat, not necessarily in consideration of all possible alternatives. But in war, all actions have a sense of imminence and urgency to it. Emergency is not a rarity, but a common occurrence. Contradictory, higher levels of war also tend to have a thoroughly deliberate decision-making which in fact takes away the imminence of harm. As for fault and the requirement that the defendant did not contribute to the evils situation, any battlefield situation is the result of the strategic interaction between parties to a conflict. Thus, making every action the result of the parties contributory fault.⁷⁵ The imminence and fault is therefore not a factor that decides if the action is qualified to be considered humanitarian necessity but will still be examined in order to determine where the Theater crisis case would end up from this perspective.

The Theater crisis case has a high imminence of harm as the terrorists claim to start executing hostages within one week. As the operation against the terrorist started on the 4th day the commanders had three days to spare.⁷⁶ However, the fault of the situation could as the theory

⁷⁴ Dolnik and Pilch (n 46). P. 599.

⁷⁵ Blum (n 4). P. 63-64.

⁷⁶ Javeline and Baird (n 50). P. 864.

suggests be backtracked to the fact that the war at some point was started between the fighting parties, therefore both parties are active parts of the fault.

4.3.5 Causal connection

There must be a direct causal connection between the violation and the harm in order for the action to be addressed as a humanitarian necessity.⁷⁷ Here the causal connection is not defined in time or space but instead measured in effects. Is the connection between the commander's action (indiscriminate use of NLW against the theater) and the end of the hostage situation directly linked together? Everything points to that this is the case as the gas enabled the Spetsnaz team to commence the assault on the theater thus avoiding a potential "total loss" situation.

4.3.6 Less harmful alternatives

The earlier mentioned alternative courses of action discussed in the second paragraph of chapter 4.2.1 is valid here when analyzing if there are any less harmful alternatives. The conclusion is that there are potentially less harmful alternatives with high risks embedded in them that could jeopardize the military success, consequently resulting in a total loss situation. This is a matter of opinion but one could argue that high risk alternatives also raises the bar for how harmful it is considered.

As mentioned before, negotiating with the hostages for a peaceful situation is the least evil solution but not an area of research in this article. Furthermore, as this article focuses on operational level any strategic solutions such as meeting the fighters demands and withdrawing Russian troops from the fighters area of interest is also of topic.

4.3.7 Burden and standard of proof

The burden of proof should according to Blum be placed on the actor seeking to invoke the humanitarian necessity justification.⁷⁸ I will not examine any further hypothetical evidence that could work as a defense for the commanders as this is partly mentioned above but mainly the work for a court.

⁷⁷ *Blum* (n 4). P. 64-65.

⁷⁸ *Ibid.* P. 67.

4.3.8 Outcome – post facto perspective

From the above analysis, and from the perspective of the fictional case it is clear that the Russian commanders would struggle to motivate humanitarian necessity as freedom from liability for breaching IHL and engaging chemical NLWs against non-combatants and the fighters. This is partly because of the obvious overriding concern for Russia's own nationals which is a disputed subject in the theory. I am not the one to determine how the theory should be designed and can only establish that there could have been greater losses of life's if one or more bombs were to detonate. Avoiding total loss could, if the theory chooses such a path be enough to be considered as "avoiding substantial harm". In that case it would be a valid humanitarian necessity motivation. Here we must accept loose ends as this article cannot state an answer to this question. How the combatants in the theater are treated once *hors de combat* would also undermine a potential humanitarian necessity motivation as they used the NLW on the fighters as a force multiplier instead of a force reducer. Also, why medical personnel was not prepared for a mass casualty situation from the fentanyl effects (the gas used in the attack) remains a mystery. Maybe the commanders considered that distributing this information would compromise the assault. However, this is something that could have negative effects on a humanitarian necessity motivation as the commander's absence of precautions against the effects of the attack arguably contradicts such a motivation. Both high and low imminence of harm could be attributed to valid humanitarian necessity. Therefore this does not answer the question if the action is deemed a humanitarian necessity motivation, but it does help us to further understand the commander's course of action. As there was a high imminence of harm in relation to the one week execution of hostages threat we get a better picture of the urgency to act from the Russian side. This implies that the commander's decision had to be made quickly under a sense of looming threat, not necessarily in consideration of all possible alternatives for action.⁷⁹ A conclusion to draw from this is that higher imminence of harm could, as in a domestic law system, milder the view on a commander's choices and if that choice actually was "the best" from a lesser evil perspective.

As we have established that there is a causal connection between the violation of IHL and the harm we can conclude that this part is fulfilled. Also, the question if there are any less harmful alternatives must be balanced against the imminence of harm and how we measure lesser evil. Still, by doing so much is left unattended for individual perceptions which might contribute to

⁷⁹ Blum (n 4). P. 63.

complications such as how post perception tends to differ from the perception of what is happening during the incidents.

5. Conclusion

5.1 Answer to the research question

Concluding remarks on the theory and how it would affect IHL is characterized by complications. These conclusions will be introduced by answering the research question for this article:

Would the theory of humanitarian necessity, particularly as applied to non-lethal weapons, weaken existing IHL resulting in negative humanitarian effects?

This article concludes that the theory would weaken existing IHL and have high risks of blurring the limits between legitimate targets and protected persons. If allowing for targeting of civilians in even the most unique setting of circumstances the risk arguably increases drastically for misunderstandings and misinterpretations in the lower levels of war. This could result in creating an even more complex environment where the humanitarian necessity theory causes negative humanitarian effects instead of decreasing humanitarian suffering. A clear conclusion of this article is that targeting civilians should never be justified for above mentioned reasons. As described by Chris Mayer; ‘non-combat immunity does not simply protect from death, but it directs military forces to treat non-combatants differently from soldiers’.⁸⁰ The risk of a slippery slope for breaching IHL in a lesser evil situation does not only affect protected persons but also the basics of how war is conducted. Even though there is no known weapon to this day that have a guarantee of being non-lethal it would be legitimate to presume that there will be in the future. In such a future these weapons further rises the risks of being used even more frequently as force multipliers instead of force reducers as seen in the Theater crisis case and how the Russians treated the terrorists. Also, the concept non-lethal has a tendency to fool its reader to be something harmless. This in combination with a humanitarian necessity theory (or a similar concept) could give a false sense of being the most humane solution in war.

5.2 Discussion

In the article we have examined how the humanitarian necessity theory would affect IHL from an operational perspective. Here commanders could end up with a false sense that their breach of IHL would be permissible. This follows from the fact that the theory is abstract and it is hard

⁸⁰ Mayer (n 10). P. 229.

to determine if one course of action actually contributes to *direct cause of minimizing the harm*. Additionally, questions such as ‘how do we conclude that another course of action wouldn’t have been better?’ or ‘how do we assess likelihood of success in different courses of actions?’ is raised. If we for example have a course of action that could result in zero casualties but has a success rate of one in a million, should it still be considered as a lesser evil option? As for example to sneak in the Spetsnaz team with the mission to change places with hostages and then simultaneously disarm all the fighters. Here, the risk of failure is almost certain, but if it would succeed it might be the ultimate both lawful and “least evil” option. This helps us highlight an extreme example of a more general problem and is also consistent with Blum’s concern about her own theory to be speculative and inaccurate. We can conclude that too speculative options (near to impossible) probably won’t be up for debate when it comes to determining the lawfulness of breaching IHL in accordance with a humanitarian necessity motivation. But the question of where to draw the line still stands.

The improvement of future NLWs is something that might affect the acceptance of something that would resemble a humanitarian necessity theory. A futuristic chemical that puts the target to sleep with a guaranteed outcome of everyone’s well-being might in the future change the way IHL is perceived and how war is conducted. But as we discussed earlier this also rises the risks of a slippery slope of who is a valid target. Such a weapon also possesses the risk to be used as a violence multiplier instead of decreasing the violence. This in combination with the humanitarian necessity theory could launch a debate to implement a humane warfare with zero casualties. Before jumping to conclusions one must understand the risks when implementing this in combination with existing means and methods of warfare.

Moreover, the theory could potentially contribute to a more careful approach if the theory were to demand proof that the actions that are breaching the law resulted in a better humanitarian outcome. As for example the Russian failure to offer required medical attention to those affected by the fentanyl gas. The commanders might have reflected more thoroughly upon potential consequences of the gas if there was an actual demand of proof that their course of action was a humanitarian success. With this in mind it is important to remember that, in a humanitarian necessity situation, for proof of a better humanitarian outcome to exist one part has beforehand breached IHL. If this is not the case it would not be up for discussion in a humanitarian necessity context.

Another issue that arise is the humanitarian necessity theory's non-existent management of already forbidden weapons and means of warfare. How should this be attended to if they are used in a lesser evil situation as they were forbidden in the first place (and therefore should not even have been constructed or available on the battlefield). Or should that be permissible as part of a humanitarian necessity theory?

The potential risk of the humanitarian necessity theory to be abused is also something that is clarified when applying it to operational level. Depending on how the final draw of the theory would be like, it could cause systematic abuse as means to achieve dubious end states. If the theory were to demand proof of a better humanitarian outcome, the risk of staging proofs in order to fool the system could become a problem. And on the other hand, if a demand for proof would not be an element of the theory other issues such as how to assess that the intentions for breaching the law actually was an attempt to achieve the least evil outcome arises.

The final words for this article is that to assess a situation from a humanitarian necessity perspective is both hard and time consuming, partly as the theory is still a working progress but also because of its speculative nature. As we have concluded that the humanitarian necessity theory by nature challenges the basic rules of IHL, consequently resulting in negative humanitarian effects it is not said that the basic idea to further humanise war is unfounded. The subject of a humanitarian motivated necessity will likely continue to be debated, not at least as the advancing technology of weapons has the potential of changing our perception of how war should be waged.

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