

# Taming the Untameable: The Role of Military Necessity in Constraining Violence

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## I Introduction

### 1 Introductory Thoughts

According to Cicero's 2000-year-old maxim,<sup>1</sup> *'Silent enim leges inter arma,'* laws are silent among arms. Nonetheless, looking back at the course of history and luckily for us, this maxim proved to be false. Laws, especially the laws of war, are far from being silent. Law not only makes itself heard (loud and clear), but it seems to speak multiple languages, and instead of whether it is applicable in wartime or not, it is the question of which set of rules apply to wars that should be asked.

Although the Law of Armed Conflict (LOAC) has gone through an organic development in the past millennia, with military thinkers and lawmakers developing and shaping its content, its relevance (and sometimes existence) needed to be justified again and again. The principle of Military Necessity is one of the cornerstones of LOAC. Nevertheless, it is more than that. It indicates the recognition of the need for rules in times of armed conflict, which protect those willingly or unwillingly exposed to the adverse effects of hostilities, and it is also proof of the ability of humankind to constraint itself and surrender short-term (military) advantages in order to secure the possibility and conditions of stability and peace in the end.

The conception of Military Necessity may have ancient roots but it is not in any sense obsolete at the dawn of the twenty-first century. The 9/11 attacks and subsequent events (invasion of Afghanistan (2001) and Iraq (2003), the declaration of the 'War on Terror') and the recent military intervention in Crimea (2014-present) by Russia and the resulting clashes all underline the demand for universally applicable (and applied) rules and principles to ensure the viability of a civilised and liveable future.<sup>2</sup> In the light of the ongoing conflicts in the

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\* Viola Vincze (LL.M.) is legal advisor at the Ministry of Defense, Legal Department and a Ph.D. Candidate at ELTE Law School. The views and opinions expressed in this article are those of the authors.

<sup>1</sup> Marcus Tullius Cicero's speech in defence of Titus Annius Milo in April 52 B.C. (Pro Milone) <<http://sabidius.blogspot.hu/2012/08/cicero-pro-milone.html>> accessed 25 April 2017.

<sup>2</sup> The former Deputy Supreme Allied Commander Europe has recently depicted a chilling fictional account of a fully-fledged war started by Russia. General Sir Richard Shirreff, *War with Russia* (Coronet 2016).

Middle East, in Ukraine and in Africa, an assessment of the applicable principles is topical and relevant since there is a large amount of media coverage of the apparent breaches of the applicable law (e.g. bombing hospitals or places of worship). Operational principles, such as the principle of Military Necessity, are vital to facilitate and ensure that the law is observed and the conduct of hostilities involves the least possible injury and damage – only those actions which are inherently militarily necessary in order to subdue the enemy forces should be carried out.

The principle of Military Necessity cannot be sacrificed in order to gain (national) security or certain military advantages. On the one hand, it is not only a moral imperative to alleviate the injuries and damage inherent to conflicts, it is also a principle of humanitarian law deeply embedded in both written and customary norms. On the other hand, notwithstanding the official or unofficial propaganda, national security and the much-sought military advantage cannot be but illusory and short-lived if achieved at the expense of the foundational principles. The international community should therefore keep the operational principles of LOAC in the highest regard, as undermining them would possibly mark the beginning of an era where democratic values, the rule of law and universally recognised principles are not respected and military decisions are made arbitrarily, based on ill-perceived advantages to gain.

Complementing this picture with the recent developments in technology and weaponry, as well as the appearance of cyber space as a new domain of warfare,<sup>3</sup> further complicates the applicability of LOAC.

This essay gives an account of the development and content of the principle of Military Necessity and argues that compliance with it is more important than ever if the international order is to be maintained as we know it today.

## 2 The General Principles of Law of Armed Conflict

The most important purposes of LOAC are to regulate the conduct of hostilities and to protect the victims of armed conflicts. In the light of the ongoing conflicts in the Middle East and in Africa, the assessment of the principles applicable to these conflicts is topical, relevant and underlined by a large number of apparent breaches of the applicable law (e.g. bombing hospitals or places of worship). In the event of international armed conflicts (IAC), armed forces are obliged to apply the basic principles of LOAC, which are vital in order to ensure that the conduct of hostilities involves the least possible injury and damage – only those actions which are (inherently) militarily necessary in order to subdue the enemy forces should be taken.

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<sup>3</sup> In February 2017 the NATO Cooperative Cyber Defence Centre of Excellence has released the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, a comprehensive analysis of how existing rules of International Law applies to cyber operations. <<https://ccdcoe.org/tallinn-manual-20-international-law-applicable-cyber-operations-be-launched.html>> accessed 26 April 2017.

The main sources of LOAC are conventional treaty law and rules of customary law. The latter are generally accepted as carriers of *opinio juris* and manifested in widespread state practice;<sup>4</sup> however, some of them are subject to debate among legal experts and not crystallised yet as universally accepted customary rules. The rules of customary law and general or specific treaty law provisions often happen to overlap – further strengthening ‘the moral claim of the international community for their observance.’<sup>5</sup>

The body of customary LOAC has integrated the ‘cardinal principles’ of distinction and prohibition of unnecessary suffering,<sup>6</sup> as well as the principle of proportionality and the principle of military necessity and humanity as standards guiding and governing the conduct of hostilities. According to para 79 of the ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (*Nuclear Weapons*), the fundamental rules (distinction and prohibition of unnecessary suffering) ‘are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’.

Similarly to customary rules, there is no general agreement regarding the principles applicable in IAC. As of today, no exhaustive list of principles has been agreed upon and sources refer to different combination. Many contemporary writers suggest, for example, that humanity and precaution shall be considered as emerging principles, as opposed to those who regard them as already existing ones.<sup>7</sup> The task of considering and ‘measuring’ state practice and *opinio juris* is performed by scholars, lawyers and military experts and therefore it is always somewhat subjective reflecting the views and judgment of the evaluator. Consequently, the analysis of the usage and the psychological aspect attached to it always calls for a critical assessment.<sup>8</sup>

The customary principles of LOAC are important, not only because they facilitate the interpretation of the applicable law but also because they guide drafters and policy makers in

<sup>4</sup> According to the *North Sea Continental Shelf, Judgment* [1969] ICJ Reports 3, ‘...in order to achieve this [*opinio juris*] result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough’ 44.

<sup>5</sup> Theodor Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 *American Journal of International Law* 348, 350.

<sup>6</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226, para 78.

<sup>7</sup> Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, Cambridge University Press 2016) 308.

<sup>8</sup> According to Luban, ‘[...] no way exists to tell if a rule has attained customary status’ and ‘[...] customary international law exists (or not) in the pronouncements of experts reading the tea leaves of diplomatic practice’. David Luban, ‘Military Necessity and the Cultures of Military Law’ (2013) 26 *Leiden Journal of International Law* 315, 325.

the course of legislation and the application of law. They are the legal and moral foundation of LOAC, universal values against which military conduct is measured.<sup>9</sup>

According to Green, in the conduct of hostilities adversaries should be guided by three long-standing principles of armed conflicts: necessity, humanity and chivalry.<sup>10</sup> Dinstein on the other hand (following the reasoning of the ICJ in *Nuclear Weapons*<sup>11</sup>) distinguishes between cardinal principles (distinction and the prohibition of unnecessary suffering) and driving forces (military necessity and humanitarian considerations) ‘energizing the motion of LOIAC’ and examines the Martens Clause in the context of the cardinal principles.<sup>12</sup> Similarly, Solis’ core concepts include distinction, military necessity, unnecessary suffering, and proportionality.<sup>13</sup>

The development of these principles and humanitarian rules unquestionably supported the improvement of the conditions of IACs.

In the system of core concepts, military necessity and humanity can be regarded as the fundamental principles and inspirations of LOAC, together offering a golden path that serves as the ultimate limit and restraint on the battlefield in the course of gaining military advantage. Nonetheless, military necessity shall be analysed in a wider context, including the relevant military issues of IACs (e.g. tactical advantage or anticipated collateral damage), normative control, and the ethical implications, decision-making context, intended political strategy and public opinion.

### 3 The Concept of Military Necessity

Military necessity is the concept of legally using only that kind and degree of force that is required to overpower the enemy. At the heart of the concept lies the criterion that no defence shall be provided in the event of unlawful actions; on the contrary: a balanced principle of military necessity fosters gaining military advantage while also manifesting the humanitarian requirements of law. This author shares Luban’s opinion that the licensing function of LOAC is not as fundamental as the constraining function.<sup>14</sup> The US Department of Defense Law of War Manual (US DoD Manual) also underlines the prohibitive nature of the law of war, meaning that it forbids rather than authorises actions.<sup>15</sup>

<sup>9</sup> When no specific rule applies, the principles of the law of war ‘provide a general guide for conduct during war’. United States Department of Defense Law of War Manual (12 June 2015) 51. <<http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf>> accessed 5 February 2017.

<sup>10</sup> L. C. Green, *The Contemporary Law of Armed Conflicts* (3rd edn, Manchester University Press 2008) 151.

<sup>11</sup> *Nuclear Weapons* (n 6) para 78.

<sup>12</sup> Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts* (3rd edn, Cambridge University Press 2016) 8.

<sup>13</sup> Solis (n 7) 269.

<sup>14</sup> Luban (n 8) 320.

<sup>15</sup> US Department of Defense (DoD) Law of War Manual (12 June 2015) 13. <<http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf>> accessed 5 February 2017.

The precise content and practical feasibility of military necessity can be blurred nonetheless, as it can convey different implications. Traditionally, one concept indicates using the notion in exceptional circumstances (in connection with lawful acts); another implies the justification of acts which are otherwise considered unlawful. By now the latter interpretation has lost its footing. Today lawmakers, scholars and military experts generally agree that lawful acts will become unlawful when they are devoid of the requirement of military necessity.<sup>16</sup> Military necessity shall not be confused with military convenience either;<sup>17</sup> it can never allow for illegal acts and atrocities committed in bad faith and not connected to specific military objectives.

In the conduct of hostilities, the fundamental objective is to accomplish certain political and military purposes. This concept supports the defeat of the adversary's military forces but it does not necessitate full obliteration. Military necessity determines the available room for manoeuvre and at the same time also limits it. The conduct of hostilities is required to meet the legality criteria at all times and it can be regarded as legal only to the extent that military necessity justifies it. When hostile acts overstretch the requirement of military necessity, they become war crimes according to the Rome Statute of the International Criminal Court (ICC).<sup>18</sup>

Scholars and military thinkers have long been divided over military necessity, with military lawyers supporting the application of the LOAC and Rules of Engagement with minimal restraints posed by considerations of human rights and humanitarian concerns. On the other hand, academics supporting extensive humanitarian considerations promote more stringent limitations regarding the conduct of hostilities and stringent application of human rights in the course of armed conflicts.<sup>19</sup>

Scholarly opinion is of great importance in interpreting law but military actions, tactics and strategies eventually stem from and are inseparable from political decision-making, representing the people as the ultimate source of political power.<sup>20</sup> The great orchestra of warfare therefore involves the armed forces, political decision makers (governments) with a complex system of interests, the voters and the general public, whose views on armed conflict are influenced not only by political rhetoric, but also by constant media coverage of armed conflicts.

<sup>16</sup> 'The law of war has been developed with special consideration of the circumstances of war and the challenges inherent in its regulation by law. Thus [...] the exigencies of armed conflict cannot justify violating the law of war.' US DoD Manual (n 15) 9.

<sup>17</sup> W. Hays Parks, 'Special Forces' Wear of Non-Standard Uniforms' (2003) 4 Chicago Law Journal 493, 543.

<sup>18</sup> Article 8 2. (b).

<sup>19</sup> As Luban puts it rather diplomatically, '[...] those who see peace as the normal condition of human life will regard respect for peacetime human rights as a baseline, and the normative requirements in war as an aberration. And, of course, vice-versa: those who regard war as regrettable but not aberrational will grant equal normative rank to the laws of war, and won't be inclined to interpret them through human rights thinking. Precisely because the arguments about the natural baseline of human existence are impossible to resolve, this clash of normative commitments will be as well. David Luban, 'Human Rights Thinking and the Laws of War' (2015) 19. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2589082](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589082)> accessed 6 February 2017.

<sup>20</sup> For more on the role of public opinion see Luban (n 8) and James Gow, *War and War Crimes* (Hurst and Company 2013, London).

## II The Short History of the Concept

In accordance with the previously said, there had been two blocs regarding the interpretation of the principle. According to a German minority faction,<sup>21</sup> military necessity can override the application of positive law and it can serve as a justification for the breach of the law of war. In the reading of the majority concept, however, the circumstances in which military necessity occurs are governed by the rules of LOAC and therefore military necessity cannot justify acts that are non-compliant with the positive rules of LOAC.

The origin of the debate in the modern era goes back to the eighteenth century. In 1795 France signed the Treaty of Basel with Prussia,<sup>22</sup> inspiring Immanuel Kant to write his pamphlet *Perpetual Peace* (1795), in which he collected the concepts providing the prerequisites for any lasting peace among states. Kant believed that permanent peace cannot be achieved following the complete destruction of the adversary ('war of extermination') and 'the use of all means leading to it,' and therefore these shall be forbidden (Preliminary Article 6).<sup>23</sup>

A whole different concept (the late eighteenth century Prussian tradition of *Kriegsräson*)<sup>24</sup> is represented by Carl von Clausewitz, one of the most convincing nineteenth century proponents of considering warfare as a political instrument. In *On War* (1832) he regards war as merely 'the continuation of policy by other means,'<sup>25</sup> in other words an extended hand of policy makers. It presupposes an established political end, in the attainment of which war plays the role of means. Military conduct therefore cannot be viewed in isolation; it is always intertwined with and determined by the underlying political objectives. The means have to match the purpose, i.e. the degree of force used has to be adjusted to the political purpose anticipated. As to the conduct of warfare, Clausewitz is clear that the aim of warfare is to destroy the enemy forces; that is 'they must be put in such a condition that they can no longer carry on the fight.'<sup>26</sup>

In Clausewitz's reading, humanitarian concerns are entirely subjugated to gaining victory over the enemy forces:

Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force [...] is thus the means of war; to impose our will on the enemy is its object.<sup>27</sup>

<sup>21</sup> Solis (n 7) 285.

<sup>22</sup> At the starting point of the War of the First Coalition (1792–1797), France declared war on Austria in April 1792 and other states had joined the conflict on the Austrian side (England, Prussia, the Netherlands, Spain and Russia). According to the Treaty of Basel, France and Prussia were pledged to neutrality and Prussia recognized the French occupation of the left bank of Rhine.

<sup>23</sup> Immanuel Kant, *Perpetual Peace* (first published 1795, Filiquarian Publishing 2007) 10–11.

<sup>24</sup> For more on *Kriegsräson* see Solis (n 7).

<sup>25</sup> Carl von Clausewitz, *On War* (first published 1832, Princeton University Press 1989) 7.

<sup>26</sup> *Ibid* 90.

<sup>27</sup> *Ibid* 75.

In Horton's analysis, 'clausewitzian military necessity – *Kriegsräson*<sup>28</sup> – will justify any militarily expedient measure, including a contravention of otherwise defined laws of armed conflict.<sup>29</sup>

Thirty years following the completion of *On War*, on the other coast of the Atlantic Ocean, the United States descended into war.<sup>30</sup> The calamities and atrocities committed in the course of the conflict facilitated a General Order regulating the conduct of hostilities. The 1863 Lieber Code<sup>31</sup> promulgated by President Lincoln is one of the cornerstones of the development of the concept of military necessity. Its proponents wanted to provide soldiers with a military code of conduct in order to prevent atrocities and abuses during the conflict and humanize the conduct of hostilities as much as circumstances allowed.<sup>32</sup>

According to Article 14 of the Lieber Code, military necessity 'consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.' The document admits the destruction not only of enemy combatants, but also of those whose destruction is unavoidable in the course of war.<sup>33</sup> Article 16 (resonating Kant to a certain extent) states that

military necessary does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, [...] and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.<sup>34</sup>

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<sup>28</sup> According to Horton, 'Prussia, and then Germany, embraced an unrestrained Clausewitzian view of the doctrine, as exemplified in the maxims "*Kriegsräson geht vor Kriegsmanier*" (Kriegsräson takes precedence before the laws of war) and "*Not kennt kein Gebot*" ("Necessity knows of no legal limitation"). Scott Horton, 'Kriegsräson or Military Necessity? The Bush Administration's Wilhelmine Attitude towards the Conduct of War' (2006) 30 *Fordham International Law Journal* 576, 585.

<sup>29</sup> *Ibid* 580.

<sup>30</sup> American Civil War 1861–1865.

<sup>31</sup> Instruction for the Government of Armies of the United States in the Field promulgated as General Orders No. 100 by President Lincoln, 24 April 1863 in Yale Law School, The Avalon Project [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>32</sup> For more on the Lieber Code see Burrus M. Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 *American Journal of International Law* 213–231; Michael A. Newton, 'Modern Military Necessity: The Role and Relevance of Military Lawyers' (2007) 12 *Roger Williams University Law Review* 877–903.

<sup>33</sup> Article 15 of the Lieber Code.

<sup>34</sup> According to Article 15, '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; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. 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.'

The Lieber Code has strongly influenced the treaties that followed. One of the most important among them was the St Petersburg Declaration,<sup>35</sup> which was conducted with the aim of prohibiting the use of certain weapons<sup>36</sup> in times of armed conflicts. The Declaration states that, for the purpose of weakening the military forces of the enemy, it is sufficient to disable the greatest possible number of men and that this purpose would be exceeded by employing arms which ‘uselessly aggravate the suffering of disabled men, or render their death inevitable’; as such, it would be contrary to the laws of humanity. The parties also vowed to reconcile the necessities of war with the laws of humanity, underlining the link between the two, which is considered one of the most important achievements of the Declaration.

### III Military Necessity and the Body of Modern LOAC

#### 1 Early Development

The War of Italian Unification (especially the battle of Solferino)<sup>37</sup> and the American Civil War had turned public attention to the tragedies of conflicts and initiatives started to lessen the suffering by codifying the (customary) laws of war. In 1874, a conference took place in Brussels with the participation of the European states and Russia in order to draft an agreement (Brussels Declaration) on this matter. Even though the Declaration was not agreed upon in the end, it served as an important precursor for the Hague Conventions adopted in 1899 and 1907, which were regarded as declaratory of the laws and customs governing armed conflicts.

The 1899 First Hague Peace Conference convened with the purpose *inter alia* of reviewing the 1874 Brussels Declaration. As a result, Hague Convention II on land warfare<sup>38</sup> was adopted. In its preamble, the High Contracting Parties declared that the provisions of the Convention, ‘the wording of which has been inspired by the desire to diminish the evils of war so far as military necessities permit,’<sup>39</sup> shall serve as general rules of conduct for the belligerents taking part in the hostilities. Eight years later (in the Second Hague Peace Conference) states adopted Hague Convention IV.<sup>40</sup> The adoption of Hague Convention IV

<sup>35</sup> *St Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles* (signed and entered into force 11 December 1868).

<sup>36</sup> Any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances.

<sup>37</sup> 24 June 1859.

<sup>38</sup> *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, adopted 29 July 1899 (entered into force 4 September 1900).

<sup>39</sup> Preamble.

<sup>40</sup> *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, adopted 18 October 1907 (entered into force 26 January 1910).

took place after a thorough review of the 1899 Hague Convention II<sup>41</sup> and the document repeated that the wording of the provisions ‘has been inspired by the desire to diminish the evils of war, as far as military requirements permit.’<sup>42</sup> Hague Convention II and IV are still in force<sup>43</sup> and Green underlines the fact that the rules embodied in these documents have been adopted and adjusted to military requirements (‘in the light of military needs’); therefore ‘the mere plea of military necessity, *raison de guerre* or *Kriegsräson* is not sufficient to evade compliance with the laws of war.’<sup>44</sup>

During World War I and World War II, the military maxim of *Kriegsräson* served as a legal justification for political and military decision makers.<sup>45</sup> Criminal conduct was held to be acceptable in the event of necessity, indicating that exceptional circumstances might exist in which military commanders can be allowed to resort to unlawful military conduct in order to achieve certain military advantage. *Kriegsräson* however is not a synonym for military necessity, although there were attempts to interpret it as such, and to blur the difference between the generally accepted ‘mainstream’ concept and the minority theory of *Kriegsräson*.

## 2 A Maturing Concept (the Death of *Kriegsräson*)

The judgment of the Nuremberg Military Tribunal in the *Hostage Case*<sup>46</sup> provides further important references to the development of the concept. In the case, the United States prosecuted German military commanders charging the defendants with ‘unlawfully, wilfully and knowingly committing war crimes and crimes against humanity’. The basis of the indictment was Control Council Law No. 10 (20 December 1945) whose Article 11 defines

<sup>41</sup> For those countries which ratified the 1907 Hague Convention IV too, this substituted Convention II, though the 1899 document remained in force for those state parties which have not signed the 1907 Hague Convention IV.

<sup>42</sup> Preamble.

<sup>43</sup> Articles 22 and 23 of Convention II and IV limit the belligerents’ right to adopt means of injuring the enemy and forbade certain means of injuring the enemy during the hostilities.

<sup>44</sup> Leslie C. Green, *The Contemporary Law of Armed Conflict* (3rd edn, Juris Publishing, Manchester University Press 2008) 147.

<sup>45</sup> The speech of Chancellor von Bethmann-Hollweg of 4 August 1914 in the Reichstag: ‘Gentlemen, we are now in a state of necessity, and necessity knows no law! Our troops have occupied Luxemburg, and perhaps are already on Belgian soil. Gentlemen, that is contrary to the dictates of international law. It is true that the French Government has declared at Brussels that France is willing to respect the neutrality of Belgium as long as her opponent respects it. We knew, however, that France stood ready for the invasion. France could wait, but we could not wait. A French movement upon our flank upon the lower Rhine might have been disastrous. So we were compelled to override the just protest of the Luxemburg and Belgian Governments. The wrong – I speak openly – that we are committing we will endeavor to make good as soon as our military goal has been reached. Anybody who is threatened, as we are threatened, and is fighting for his highest possessions can have only one thought – how he is to hack his way through (*wie er sich durchhaut*)!’ James Brown Scott, ‘Editorial comments – Germany and the neutrality of Belgium’ (1914) 8 *American Journal of International Law* 877, 880.

<sup>46</sup> *Hostage Case, United States v List* (Trial Judgment) (Nuremberg Military Tribunal, Trial Chamber, Case No 7, 19 February 1948) 8 LRTWC 34 in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume XI/2*.

war crimes and crimes against humanity. The defendants were indicted *inter alia* for ‘participating in a deliberate scheme of terrorism and intimidation [...] unjustified by military necessity.’<sup>47</sup> The fact that the Tribunal was set up by the Allies and the applicable law had been enacted after committing the crimes (strictly speaking in breach of the *nullum crimen sine lege* principle) is still a source of debate among scholars,<sup>48</sup> although it is clearly stated in the judgment that the acts committed by the defendants violated ‘international conventions, the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations’<sup>49</sup> and that Article 11 of Control Council Law No. 10 only recognised and defined already existing international law.<sup>50</sup>

The defendants invoked the concept of military necessity in order to justify killing and destruction; however, the judgment refused to admit necessity as a ground for defence and stated that the extent of practice exceeded ‘the most elementary notions of humanity and justice’<sup>51</sup> and concluded that the defendants confused the notion of military necessity with ‘convenience and strategical interests.’ Military necessity cannot be invoked when violation of positive rules occurs<sup>52</sup> and accordingly, the judges found that the notion of military necessity could only be used in relation to lawful acts (as belligerents are subject to the laws of war). The judges opined the theory of *Kriegsräson* had superseded the rules embedded in international law.<sup>53</sup> Destruction cannot be an end in itself; there has to be some connection with defeating hostile forces. The judgment allows military forces ‘to apply any amount and kind of force’ but only with the least possible destruction.<sup>54</sup>

To complement the conclusion regarding military necessity, another concept emerged as a result of the trial, the so-called Rendulic Rule, according to which situations, circumstances and evidence have to be judged as they appeared to the defendant at the time (the question being whether the defendant could ‘honestly conclude that urgent military necessity warranted the decision made’<sup>55</sup>).

### 3 The Geneva Conventions and Additional Protocol I

The horrors of World War II gave an impetus for the review and reconfirmation of the protection accorded by LOAC to persons not taking direct part in hostilities.

<sup>47</sup> *Hostage Case* (n 46) 1230.

<sup>48</sup> For more on the debate see James Gow, *War and War Crimes* (Hurst and Company 2013, London).

<sup>49</sup> *Hostage Case* (n 46) 1234.

<sup>50</sup> *Hostage Case* (n 46) 1234.

<sup>51</sup> *Hostage Case* (n 46) 1252.

<sup>52</sup> *Hostage Case* (n 46) 1252-1253, 1256.

<sup>53</sup> *Hostage Case* (n 46) 1272.

<sup>54</sup> ‘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 war.’ *Hostage Case* (n 46) 1253.

<sup>55</sup> *Hostage Case* (n 46) 1297.

The Geneva Conventions of 1949<sup>56</sup> hardly contain any reference to the principle of military necessity, because the rules regarding the conduct of hostilities were considered part of customary LOAC, and therefore the Conventions have not encompassed these (apart from a few references)<sup>57</sup>. Solis points out however that military necessity being ‘uncodified customary law’ does not make the concept less enforceable.<sup>58</sup> Following World War II, military lawyers and academics generally agreed that the minority *Kriegsräson* interpretation had no place in rebuilding Europe. According to Horton, ‘one of the animating purposes of the 1949 reinstatement of the Geneva Conventions was to put the last nails in the coffin of the doctrine of *Kriegsräson*’.<sup>59</sup> The Commentary of Protocol I Additional to the Geneva Conventions (Additional Protocol I) also confirms that the concept of *Kriegsräson* is discredited and ‘totally incompatible with the wording of Article 35, paragraph 1, and with the very existence of the Protocol.’<sup>60</sup>

There have been many conflicts in the post-World War II era (most notably the Vietnam War) which propelled new developments in international warfare. The changing conditions and political environment made it necessary to clarify and amend LOAC again. As a result, Protocol I<sup>61</sup> and II<sup>62</sup> Additional to the Geneva Conventions have been adopted in 1977, supplementing rather than replacing the Geneva Conventions.<sup>63</sup> Originally, the ‘Hague Law’ (Hague Conventions and Declarations) regulated the rules and customs regarding the conduct of hostilities and the Geneva Law (Geneva Conventions) concerned the protection of the civilian victims of warfare and combatants *hors de combat*. There have been many overlaps between Hague Law and Geneva Law throughout the development of LOAC, from the late nineteenth century on, and with the adoption of the Geneva Conventions of 1949 and the Additional Protocols in 1977, these branches have inseparably melded.<sup>64</sup> Additional Protocol

<sup>56</sup> *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, adopted 12 August 1949 (entered into force 21 October 1950); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, adopted 12 August 1949 (entered into force 21 October 1950); *Geneva Convention (III) relative to the Treatment of Prisoners of War*, adopted 12 August 1949 (entered into force 21 October 1950); *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, adopted 12 August 1949 (entered into force 21 October 1950).

<sup>57</sup> Geneva Convention (IV) contains references to military necessity in Articles 49, 53, 55, 108, 143, 147.

<sup>58</sup> Solis (n 7) 278.

<sup>59</sup> Horton (n 28) 589.

<sup>60</sup> *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 17 October 1987, para 1386.

<sup>61</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, adopted 8 June 1977 (entered into force 7 December 1978).

<sup>62</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, adopted 8 June 1977 (entered into force 7 December 1978).

<sup>63</sup> Adam Roberts, Richard Guelff (eds), *Documents on the Laws of War* (3rd edn, Oxford University Press 2009) 419.

<sup>64</sup> It is important to note that the provisions of the 1977 Protocol I Additional to the Geneva Conventions shall apply ‘to all cases of declared war or of any other armed conflict’ between parties to the Protocol and even when one of the parties to a conflict is not a party to Additional Protocol I, those parties who are will remain bound by it in their relations (Common Article 2).

I embodies rules relating to the treatment and protection of the civilian population, as well as the wounded, sick and shipwrecked, combatant and prisoner of war status, and more importantly from the military necessity point of view, it also addresses the methods and means of warfare.

The Geneva Conventions and the Additional Protocols are the most important sources of the LOAC regarding the conduct of hostilities and, although they do not include any explicit provision on the principle of military necessity as such, many direct and indirect references can be found in the texts. Among the Basic rules regarding the methods and means of warfare,<sup>65</sup> Additional Protocol I limits the parties to any armed conflict in arbitrarily employing any means or methods of warfare irrespective of the injury and damage they would cause.<sup>66</sup> This provision can be regarded as the most straightforward translation of military necessity that can be found in the Protocol.<sup>67</sup> The feasible precautionary measures in the choice of means and methods of attack, as well as advance warning of attacks unless circumstances do not permit are both admissions of situations where military necessity can override the main rules.<sup>68</sup> Considerations of military necessity can be found behind provisions dealing with the protection of the civilian population and objects too. In the first case, protection will cease at such a time as civilians take a direct part in hostilities<sup>69</sup> and even deadly force can be used against them. In the latter case, military objectives are limited to those objects, which make an effective contribution to military action (in case of doubt, it must be assumed that they do not).<sup>70</sup> In this case, the balance between military necessity and humanitarian considerations has been tipped towards the latter in order to prevent unnecessary destruction. Additional Protocol I also includes special provisions in order to protect works and installations containing dangerous forces.<sup>71</sup> This special protection against attacks however also cease to exist in the event of an overriding military necessity i.e. where these dams, dykes, nuclear electrical generating stations (and other military objectives located at or in the vicinity of these works and installations) are used 'in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support'.<sup>72</sup>

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<sup>65</sup> Article 35 1.

<sup>66</sup> According to Article 35 1. 'in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.'

<sup>67</sup> Articles 54, 62, 67 and 71 also contain references to military necessity.

<sup>68</sup> Article 57 2–3.

<sup>69</sup> Article 51 3.

<sup>70</sup> Article 52 2–3.

<sup>71</sup> Article 56.

<sup>72</sup> Article 56 2.

#### 4 Military Necessity in the Reading of International Court of Justice (Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons)

On the request of the General Assembly of the United Nations,<sup>73</sup> the International Court of Justice (ICJ) handed down in 1996 the *Nuclear Weapons* Advisory Opinion.<sup>74</sup> The question the ICJ had to answer was whether the threat or use of nuclear weapons was in any circumstance permitted under international law. Decided by the casting vote of the President of the Court, the Court failed to give an unambiguous answer to a clear question, stating that

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.<sup>75</sup>

With its subject being so closely linked to military necessity, the otherwise extensive document is remarkably ignorant of the notion. It refers to military necessity only in the context of environment protection<sup>76</sup> but it does not analyse it in connection with the threat or use of nuclear weapons.

This has been a vastly debated opinion.<sup>77</sup> The notion of military necessity is disregarded throughout the text<sup>78</sup> even though the judges refer to a situation threatening a nation as a whole (as opposed to, for example, the population of a city or a region), and the Court draws up a potential constellation of the most extreme circumstances for testing the possibility of the threat or use of nuclear weapons. Initiating and conducting hostilities in such an event

<sup>73</sup> Resolution A/RES/49/75 K, adopted by the General Assembly on 15 December 1994 (Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons.)

<sup>74</sup> *Nuclear Weapons* (n 6).

<sup>75</sup> *Nuclear Weapons* (n 6) para 105.

<sup>76</sup> '30. States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.'

<sup>77</sup> Dinstein (n 12) 96, Solis (n 7) 289; Michael N. Schmitt, 'The International Court of Justice and the Use of Nuclear Weapons' [1998] Spring NWC Review 1–21, <<https://www.hsdl.org/?view&did=444281>> accessed 24 April 2017; Louis Maresca, 'Nuclear weapons: 20 years since the ICJ advisory opinion and still difficult to reconcile with international humanitarian law' 8 July 2016, <<http://blogs.icrc.org/law-and-policy/2016/07/08/nuclear-weapons-20-years-icj-opinion/>> accessed 25 April 2017.

<sup>78</sup> Judge Higgins admits that the question of military necessity remains unanswered. According to her, 'if the suffering is of the sort traditionally associated with the use of nuclear weapons [...] then only the most extreme circumstances [...] could conceivably "balance" the equation between necessity and humanity'. *Nuclear Weapons* (n 6) para 18 (Dissenting Opinion of Judge Higgins).

should have invoked the thorough assessment of the basic principles of both *jus ad bellum* and *jus in bello*.

Regarding the prerequisites of the recourse to self-defence, the Court found that ‘the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law’.<sup>79</sup> However, military necessity as a core principle of LOAC is fundamentally a notion of *jus in bello* and it should not be confused with the notion of necessity in self-defence (in the context of *jus ad bellum*). The lawfulness of self-defence depends on whether the measures taken were necessary and proportionate to the attack.<sup>80</sup> Necessity in this case refers to actions necessary to deter an attack; the threat must be imminent with no available peaceful alternatives. Unfortunately, the Court has not used the above considerations unambiguously. The Advisory Opinion does not contain any clear reference to military necessity (as understood by *jus in bello*) but points out that ‘the overriding consideration of humanity’<sup>81</sup> lies at the very heart of the principles of LOAC (which is understood by many as the counterbalance of military necessity).

Advisory Opinions are not binding legal instruments, although they possess a persuasive power and are regarded influential statements regarding relevant legal questions.<sup>82</sup> The opinion is indeed unique and tentative with a surprising finding of *non liquet*; one should remember however that this opinion had been delivered in 1996, only a few years after the Cold War ended, in an era which was still characterised by exploratory talks and rapprochement, and the overwhelming political sensitivity can be one of the reasons for the Court being unable to reach an agreement.

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<sup>79</sup> ‘41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: there is a “specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law” (ICJ Reports 1986, 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.’

<sup>80</sup> The right of self-defence has fostered the so-called Webster formula following the Caroline incident in 1837 involving the destruction of the small steamer *Caroline* by British forces, which later spiraled into a diplomatic crisis between the British and the Americans. According to the Webster formula, the necessity of self-defence is ‘instant, overwhelming, leaving no choice of means, and no moment of deliberation’ British-American Diplomacy, The Caroline Case in Yale Law School, The Avalon Project <[http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp)> accessed 24 April 2017.

<sup>81</sup> *Nuclear Weapons* (n 6) para 95.

<sup>82</sup> ‘Contrary to judgments, and except in rare cases where it is stipulated beforehand that they shall have binding effect (for example, as in the Convention on the Privileges and Immunities of the United Nations, in the Convention on the Privileges and Immunities of the specialized agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court’s advisory opinions have no binding effect. [...] Although without binding effect, the advisory opinions of the Court nevertheless carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and have peace-keeping virtues. Advisory opinions also, in their way, contribute to the elucidation and development of international law and thereby to the strengthening of peaceful relations between States.’ Advisory Jurisdiction ICJ website <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> accessed 25 April 2017.

## 5 Recent Progress

The Rome Statute<sup>83</sup> was adopted just two years following *Nuclear Weapons*. It encompasses provisions on war crimes with direct reference to military necessity; the notion is used as justification in cases of destruction and appropriation of properties and the Statute renders its infringement prosecutable.<sup>84</sup> Its provisions are closely related to some of the articles of Additional Protocol I on civilian objects (Chapter III).<sup>85</sup>

The 2005 UK Joint Service Manual of the Law of Armed Conflict (UK Joint Service Manual) points out that LOAC was composed with the concept of military necessity in mind and therefore it is not available as a defence for those accused of war crimes ‘unless express allowance is made for military necessity within the provision allegedly breached.’<sup>86</sup> This can be said to be aligned with the above provisions of the Rome Statute.

Among the recent developments, the 2009 ICRC Guidance on the Notion of Direct Participation in Hostilities (Interpretive Guidance)<sup>87</sup> sparked debate among scholars and military experts<sup>88</sup> regarding the loss of civilian status and the constitutive elements of direct participation in hostilities. According to the Interpretive Guidance, the key objectives of LOAC are the protection of the victims of armed conflicts and the regulation of the conduct of hostilities ‘based on a balance between military necessity and humanity’. The Interpretive Guidance confirms the restrictive function of military necessity regarding the use of force in direct attacks. The force permitted by LOAC shall not exceed that considered necessary to achieve a specific military purpose.<sup>89</sup> The decision on the kind and degree of force that can

<sup>83</sup> *Rome Statute of the International Criminal Court*, adopted 17 July 1998 (entered into force 1 July 2002).

<sup>84</sup> Article 8 (2) (a) (iv): For the purpose of this Statute, ‘war crimes’ means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; Article 8 (2) (b) (xiii): For the purpose of this Statute, ‘war crimes’ means: (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (xiii) Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.

<sup>85</sup> Article 52 (1), Article 54 (2) and (4), as well as Article 56 (1) of Additional Protocol I.

<sup>86</sup> *The UK Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383, 2004, Edition 16.44. <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf)> accessed 6 February 2017.

<sup>87</sup> Nils Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (2009) ICRC <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed 6 February 2017.

<sup>88</sup> Dinstein (n 12) 175, Dapo Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’ 4 June 2009, <<https://www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/>> accessed 25 April 2017; Ryan Goodman, ‘The Detention of Civilians in Armed Conflict’ (2009) 103 AJIL 48, 51. Michael N. Schmitt: ‘Deconstructing Direct Participation in Hostilities: the Constitutive Elements’ (2010) 42 International Law and Politics 697, 698; Bill Boothby, ‘“And For Such Time As”, the Time Dimension to Direct Participation in Hostilities’ (2010) 42 International Law and Politics 741, 743.

<sup>89</sup> ‘[...] the principles of military necessity and of humanity reduce the sum total of permissible military action from that which international humanitarian law does not expressly prohibit to that which is actually necessary

be regarded as necessary in an attack involves a complex assessment based on a wide variety of operational and contextual circumstances. Although the above findings are sound, others are strongly questionable. Instead of ‘classic large-scale confrontations’ the Interpretive Guidance ties the restraining function to forces operating ‘against selected individuals in situations comparable to peacetime policing.’<sup>90</sup> Even more remarkable and counterintuitive to a realistic assessment of the conduct of warfare is the recommendation to refrain from killing enemy combatants or giving them ‘an opportunity to surrender where there manifestly is no necessity for the use of lethal force.’<sup>91</sup> There is no supporting evidence in the conduct of hostilities that the majority of states would regard it as a customary rule of LOAC.

It is this author’s belief that even though understanding the general principle behind such a recommendation, one can never lose sight of the fact that violence, destruction and killing are inherent characteristics of warfare. Naive restrictions would not only impose unrealistic expectations on combatants but they would also make it almost impossible for LOAC to fulfil its purpose of effectively limiting the adverse effects of armed conflicts. Furthermore, the preliminary analysis of military necessity is indispensable prior to an attack, but overregulation of conduct with regard to individual combatants would without doubt make it impossible to monitor and control adherence and would eventually lead to possible breaches.

Disputing the approach recommended by the 2009 Interpretive Guidance does not mean that humanitarian considerations should be overshadowed. Military necessity and humanitarian considerations are not distinct concepts, but the manifestation of balancing viewpoints: those participating in armed conflict would like to gain the best possible military advantage with the least casualties, injuries and damages suffered. Therefore, an acceptable common ground is necessary in order to ensure the effectiveness of both approaches.

Compared to the ICRC approach, the wording of the 2015 US DoD Manual offers a more balanced perspective, carrying the possibility of resorting to non-lethal means without overregulating the required military conduct when it states that ‘military necessity may justify not only violence and destruction, but also alternative means of subduing the enemy. For example, military necessity may justify the capture of enemy persons, or non-forcible measures such as propaganda and intelligence-gathering.’<sup>92</sup> In line with the 2009 Interpretive Guidance, Reeves and Thurnher<sup>93</sup> note through illustrative examples<sup>94</sup> that legal and public

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for the accomplishment of a legitimate military purpose in the prevailing circumstances.’ Interpretive Guidance (n 87) 79.

<sup>90</sup> Ibid 80.

<sup>91</sup> Ibid 82.

<sup>92</sup> US DoD Manual (n 9) 53.

<sup>93</sup> Shane R. Reeves, Jeffrey S. Thurnher, ‘Are We Reaching A Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity – Humanity Balance’ (2013) Harvard Law School National Security Journal <[http://harvardnsj.org/wp-content/uploads/2013/06/HNSJ-Necessity-Humanity-Balance\\_PDF-format1.pdf](http://harvardnsj.org/wp-content/uploads/2013/06/HNSJ-Necessity-Humanity-Balance_PDF-format1.pdf)> accessed 6 February 2017.

<sup>94</sup> (1) Attempt to capture enemy combatants before employing deadly force, (2) autonomous weapons systems to be pre-emptively banned, (3) using lethal kinetic response in the cyber context.

discourse points towards a 'potential tipping point that could upend the historical framework by disproportionately favouring humanitarian consideration.'<sup>95</sup>

## IV Definition and Application of Military Necessity

### 1 The Definition and Elements of Military Necessity

There are many existing definitions of military necessity crafted by academics<sup>96</sup> or found in available military manuals.<sup>97</sup> Among the manuals, one of the most detailed and comprehensive concepts can be found in the UK Joint Service Manual, according to which

military necessity permits a state [...] engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.<sup>98</sup>

As follows from the definition, the circumstances and limits of a certain military situation and considerations of LOAC shall be taken into account when planning military engagement. The notion reconfirms that military necessity cannot provide a defence for unlawful actions ('not otherwise prohibited').

The UK Joint Service Manual also establishes the basic elements of military necessity,<sup>99</sup> which can be split up into four cumulatively applicable features:

- (1) use of controlled force,
- (2) necessity cannot excuse a departure from the law of armed conflict,<sup>100</sup>
- (3) use of force not otherwise prohibited is legitimate if it is also necessary to achieve, as quickly as possible, the complete or partial submission of the enemy, and
- (4) the use of force which is not necessary is unlawful.<sup>101</sup>

Based on these elements, military necessity shall be assessed on a case-by-case basis,

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<sup>95</sup> Ibid 3.

<sup>96</sup> Solis (n 7) 278; Dinstein (n 12) 8.

<sup>97</sup> For examples see the US DoD Manual (n 9) 52; Canadian Forces Joint Publication CFJP 01 Canadian Military Doctrine (April 2009) <[http://publications.gc.ca/collections/collection\\_2010/forces/D2-252-2009-eng.pdf](http://publications.gc.ca/collections/collection_2010/forces/D2-252-2009-eng.pdf)> 2–15; Manuel du droit des conflits armés Édition 2012 Ministère de la Défense <[http://www.cicde.defense.gouv.fr/IMG/pdf/20130226\\_np\\_cicde\\_manuel-dca.pdf](http://www.cicde.defense.gouv.fr/IMG/pdf/20130226_np_cicde_manuel-dca.pdf)> 10.

<sup>98</sup> UK Joint Service Manual (n 86) para 2.2.

<sup>99</sup> UK Joint Service Manual (n 86) para 2.2.1.

<sup>100</sup> 'Not otherwise prohibited by the law of armed conflict.'

<sup>101</sup> Hayashi split up the requirements of exceptional military necessity into the following four elements:

- 1) the measure was taken primarily for some specific military purpose;
- 2) the measure was required for the attainment of the military purpose;
- 3) the military purpose for which the measure was taken was in conformity with international humanitarian law; and

taking into account and balancing between the achievable military advantage and the anticipated destruction it may involve.

## 2 The Notion of Military Advantage

Force shall be used to achieve the intended military objectives and generally, the defeat of the enemy forces, but the degree and duration cannot overreach what is necessary, taking into account that enemy forces do differ in terms of their preparedness, size, available arms, etc., which will require parties to adjust their efforts to the circumstances.

It is normally suggested to interpret military necessity in the circumstances prevailing at the time. This however cannot entail a narrow reading (as suggested by the 2009 ICRC Interpretive Guidance) according to which the aim is to injure and capture the enemy combatants rather than making them targets of the attacks (with the possibility of killing them) and today no provisions exist in the body of LOAC to suggest otherwise.<sup>102</sup> Rather, military commanders shall make their decisions in good faith and based on all available information. Military necessity analysis shall be carried out on a case-by-case basis and it shall cover, *inter alia*, the nature of the target and the reason for targeting it, the possible estimation of collateral damage (civilians and civilian objects) and the means and methods intended to be used. Any analysis has to be extended to include the assessment of other possible targets and weapons, which may be more feasible bearing in mind the obligation to mitigate casualties and destruction.

In a wider context, the proportionality of the planned actions shall (also) be considered before permitting and beginning the operations.<sup>103</sup> The principle of proportionality require military commanders to ensure that the injury, damage and losses resulting from a military action are not excessive compared to the expected direct military advantage.<sup>104</sup> Military advantage therefore has a strong connection to military necessity, as it has to ensue directly from the military conduct (adhering to the principle of military necessity).

According to the 2013 US Joint Targeting document (US Joint Targeting),<sup>105</sup> military advantage 'refers to the advantage anticipated from an attack when considered as a whole, and

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4) the measure itself was otherwise in conformity with international humanitarian law.

Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 Boston University International Law Journal 39, 62.

<sup>102</sup> For more see the 2009 ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities (n 87).

<sup>103</sup> According to Mayorga, '... military necessity permits belligerents to use lethal force and attack lawful targets, including members of armed groups, so long the principles of distinction, proportionality, and precaution are observed.' Ofilio Mayorga, 'Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations' (2013) Policy Brief, Program on Humanitarian Policy and Conflict Research, Harvard University, 4. <[http://www.hpcrresearch.org/sites/default/files/publications/081213%20ARBITRATING%20WAR%20\(final\).pdf](http://www.hpcrresearch.org/sites/default/files/publications/081213%20ARBITRATING%20WAR%20(final).pdf)> accessed 6 February 2017.

<sup>104</sup> Article 51. 5 (b) of Additional Protocol I.

<sup>105</sup> Joint Targeting, Joint Publication 3-60 (31 January 2013) A-4 <[http://www.bits.de/NRANEU/others/jp-doctrine/jp3-60\(13\).pdf](http://www.bits.de/NRANEU/others/jp-doctrine/jp3-60(13).pdf)> accessed 6 February 2017.

not only from its isolated or particular parts.' The United States' interpretation of the 'definite military advantage' seems much wider than what can be derived from the wording of Additional Protocol I. As stated by the US Joint Targeting,<sup>106</sup> military commanders may meet the criterion of definite military advantage in the event of seizing or destroying 'objects with a common purpose in order to deny their use to the enemy'.<sup>107</sup> Additional Protocol I on the other hand is more restrictive, limiting the possible objects of attacks to those which (based on a specific attribute) further military action.<sup>108</sup>

The definite military advantage has been translated into the language of the Rome Statute (and its Elements of Crimes) in a slightly different manner: when assessing proportionality, the incidental loss of life, injury or damage has to be measured against the 'concrete and direct overall military advantage anticipated'.<sup>109</sup> According to the Elements of Crimes, 'concrete and direct overall military advantage' indicates a military advantage that is foreseeable by the perpetrator at the time of the attack.<sup>110</sup>

### 3 Military Necessity and Legality

Military necessity and legality are inherently linked. As already said, military necessity cannot be invoked to justify departure from LOAC. This is reflected in the judgment of the Nuremberg Military Tribunal in the *Hostage Case* and found in Downey's definition from the early fifties, according to which military necessity is

an urgent need, admitting of no delay, for the taking by a commander of measures, which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of regulated violence, and which are not forbidden by the laws and customs of war.<sup>111</sup>

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<sup>106</sup> Ibid A-3.

<sup>107</sup> For more on targeting see Marco Roscini, 'Targeting and Contemporary Aerial Bombardment' (2005) 54 *International and Comparative Law Quarterly* 411–444.

<sup>108</sup> According to Article 52 2. of Additional Protocol I, 'attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'

<sup>109</sup> Article 8 (2) (b) iv.

<sup>110</sup> The Elements of Crimes goes on by stating that 'such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to jus ad bellum. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.' *Elements of Crimes*, International Criminal Court (ICC), 2011, 19.

<sup>111</sup> William G Downey, 'The Law of War and Military Necessity' (1953) 47 *American Journal of International Law* 251, 254.

His definition bears a strong resemblance to the one found in the Lieber Code<sup>112</sup> in the sense that both refer to indispensable measures, which is missing from the definition of the UK Joint Service Manual. The UK Joint Service Manual and the US DoD Manual both confirm the legality criterion, stating that ‘armed conflict must be carried on within the limits of international law, including the restraints inherent in the concept of necessity’<sup>113</sup> and ‘military necessity does not justify actions that are prohibited by the law of war.’<sup>114</sup>

What is also common is that all these definitions indicate humanitarian considerations, whether directly or indirectly. (In the UK Joint Service Manual, it is the reference to the minimum expenditure of life or the requirement of achieving the objective as soon as possible.) These criteria limit the way military necessity works and compel military commanders to balance military necessity with humanitarian considerations.

Military objectives and actions not justified by military necessity are not accepted by LOAC. The concept acknowledges however the actuality of circumstances which can tolerate certain amount of flexibility if there are admissible military reasons. LOAC cannot fulfil its purpose if it does not correspond to the realities of the front line and if it cannot ensure that situations and scenarios not foreseen at the time of adopting its relevant documents can still be covered by the rules and principles contained in them. Regarding the application of the principle, the US DoD Manual highlights the importance of the following:

- (1) permitting consideration of the broader imperatives of winning the war as quickly and efficiently as possible;
- (2) recognizing that certain types of actions are, as a general matter, inherently militarily necessary; and
- (3) recognizing that persons must assess the military necessity of an action in good faith based on the information available to them at the relevant time and that they cannot be judged based on information that subsequently comes to light.<sup>115</sup>

The last requirement can be regarded as one of the modern translations of the Rendulic Rule.

## **V Balancing Military Necessity and Humanitarian Considerations**

### **1 The Complementarity of Requirements**

In the course of warfare, all parties have a vested interest in suffering the fewest deaths and injuries and least damage when being exposed to the adverse effects of hostilities. This demanded from the beginning the existence of uniform norms equally applicable to every

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<sup>112</sup> According to Article 14, military necessity ‘consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.’

<sup>113</sup> UK Joint Service Manual (n 86) para 2.3.

<sup>114</sup> US DoD Manual (n 9) 53.

<sup>115</sup> US DoD Manual (n 9) 56.

party's conduct (*jus in bello*). To this end, the protection of the victims of armed conflict and the effective regulation of the conduct of hostilities as the most important objectives of LOAC shall be based on a delicate balance between military and humanitarian considerations. Humanitarian considerations and the principle of humanity are often used interchangeably, but both imply respect for human life, physical security, dignity and human rights, as well as compassion; although no universal definition exists (the meaning of '(not) humane' is far from being clear).<sup>116</sup>

Military necessity and humanitarian considerations are not competing, distinct rules; they complement and strengthen each other.<sup>117</sup> Together with the principle of distinction and the prohibition of unnecessary suffering they are considered to be elements of the principle of proportionality. As principles, they support the interpretation of positive rules and serve as guidance when no specific rule exists to regulate certain circumstances. They form an essential and autonomous part of LOAC in their own right and shall always be observed concurrently.

A notable manifestation of the principle of humanity can be found in the already mentioned 1996 *Nuclear Weapons* Advisory Opinion. According to para 25, 'the protection of the International Covenant on Civil and Political Rights<sup>118</sup> does not cease in times of war' (except in times of national emergency when certain provisions may be derogated from).<sup>119</sup> Considering whether a particular loss of life is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the Law of Armed Conflict (as *lex specialis*) and not deduced from the terms of the Covenant. The jurisdiction clause<sup>120</sup> of the Covenant states that parties 'undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction' the rights recognised in the Covenant.

The UK Joint Service Manual also includes humanitarian considerations when stating that 'humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes'<sup>121</sup> and the 2015 US DoD Manual's definition of humanity is very similar: 'the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.'<sup>122</sup>

<sup>116</sup> For more on the principle of humanity see Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 *Virginia Journal of International Law* 795–839; Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *International Law and Politics* 831–916; Larry May, 'Humanity, Necessity, and the Rights of Soldiers' <<https://www.law.upenn.edu/live/files/3026-larry-may-humanity-necessity-and-the-rights-of>> accessed 6 February 2017.

<sup>117</sup> 'The principles of necessity and humanity are complementary, seeking to adjust the means essential to realise the purpose of the conflict with the minimisation of human suffering and physical destruction' Green (n 10) 151.

<sup>118</sup> *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>119</sup> Article 4.

<sup>120</sup> Article 2 1.

<sup>121</sup> UK Joint Service Manual (n 86) para 2.4.

<sup>122</sup> US DoD Manual (n 9) 58.

We can conclude that military necessity is a concept inherently saturated with humanitarian concerns. Combatants are simultaneously trained military professionals and moral beings, who cannot and must not put aside respect for human life (and human rights) in the conduct on hostilities although some experts question their applicability in armed conflicts.<sup>123</sup> The question arises of what happens if the balance is compromised by disproportionately favouring any of these 'meta-principles'.<sup>124</sup>

Military necessity seems to have been used for justifying obtrusive deviations from the application of the rules of LOAC. Giving space to the superseded concept of *Kriegsräson* (where military necessity overrides humanitarian considerations) could ultimately lead to lawless societies, where adversaries would eventually stray from observing positive law upon experiencing that opponents are invoking the notion of military necessity justifying unlawful acts which would clearly threaten not only the observance of positive law but the generally rule of law, too.

Conflicts and violence are inherent to human nature and stem from the most basic instinct of survival. It was recognised long ago however that unconstrained aggression may be a double edged sword. It may allow a party to reach its (military) objectives, but it might also drive the adversary to resort to a degree of force it would not use otherwise to overpower the enemy forces. The ultimate goal of LOAC is to protect adversaries and victims participating in or exposed to armed conflicts and it performs this function by regulating and limiting the means and methods to be employed. It is undeniable that, by curbing the possible ways of military engagement as a result of the development of LOAC, warfare became more civilized than before although it is important to understand that warfare has never been and will never be humane as it goes against the very nature of armed conflict. One can only infer more humane means and methods than others.

## 2 The Importance of Finding the Right Balance

Military necessity and humanitarian considerations function as each other's checks and balances.<sup>125</sup> Complete realisation of either of these perspectives would wipe out the application of the other. As opposed to wanton destruction, applying human rights in their entirety would manifest a paradox of armed conflict without violence.

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<sup>123</sup> According to Luban, military lawyers 'see little conceptual or historical connection between human rights law and LOAC'. Luban (n 8) 328.

<sup>124</sup> For more on the balance between the principles see Shane R. Reeves, David Lai, 'A Broad Overview of the Law of Armed Conflict in the Age of Terror' in Lynne Zusman (ed), *The Fundamentals of Counterterrorism Law* (ABA Book Publishing 2014).

<sup>125</sup> '[...] military necessity exists in equipoise with the principle of humanity, which seeks to limit the suffering and destruction incident to warfare. This symbiotic relationship determines in which direction, and at what speed, International Humanitarian Law evolves.' Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 *Virginia Journal of International Law* 795, 796.

The Martens Clause of Additional Protocol I demonstrates both the significance attributed to the principle of humanity and the elusive nature of the concept.<sup>126</sup> Even though the Martens Clause underlines the requirement that parties to an armed conflict shall not fight without certain limitations imposed on them, Additional Protocol I does not clarify the notions of ‘principles of humanity’ and ‘dictates of public conscience’ which therefore can be subject to endless arguments. According to Cassese, ‘the clause essentially served as a diplomatic ploy’<sup>127</sup> and was ‘part of a diplomatic manoeuvring to overcome political difficulties.’<sup>128</sup>

The ambitious but undefined concepts of humanity and public consciousness cannot prevent the prevalence of the idea that acts not expressly prohibited are actually permissible<sup>129</sup> which goes against the core idea of humanity and implies an unjustifiably wide interpretation. Although these notions were considered in many decisions, it is very unlikely that any court would choose to base its decision solely on these elusive arguments.<sup>130</sup>

When assessing the required balance between military necessity and humanity, a holistic approach shall be applied.<sup>131</sup> Humanity shall be regarded as *lex generalis*, a notion to be respected both in times of peace and warfare. However, in times of IAC, a wider room for consideration should be ensured for military commanders, implying that military objectives shall allow acts which might not be or are not tolerated by (human rights) law in peace time.<sup>132</sup> To provide the greatest achievable protection, those human rights treaty provisions that are not addressed by LOAC will continue to rule during hostilities.

The minimum standards set by humanitarian considerations cannot be relieved by exhaustive positive law<sup>133</sup> since law cannot fully cover all aspects of warfare. As Piancastelli puts it, ‘insisting on the ideal of a rule of law to limit discretion and to tame the exception is

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<sup>126</sup> The general provisions of Additional Protocol I lay down the principles and the scope of application. The contemporary definition of the Martens clause [Article 1 (2) of Additional Protocol I] extends the protection provided by the Protocol and any other international agreement when it concludes that ‘in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.’

<sup>127</sup> Antonio Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ (2000) 11 *European Journal of International Law* 187, 198.

<sup>128</sup> *Ibid* 216.

<sup>129</sup> Schmitt (n 116) 800.

<sup>130</sup> It has to be noted though that the ICJ referred to the Martens Clause as ‘an effective means of addressing the rapid evolution of military technology’. *Nuclear Weapons* (n 6) para 78.

<sup>131</sup> For more on the balance between military necessity and humanity see Shane R. Reeves and Robert E. Barnsby, ‘The New Griffin of War: Hybrid International Armed Conflicts’ (2013) 34 *Harvard International Review* 16–18.

<sup>132</sup> Dinstein also underlines that LOAC norms as *lex specialis* will prevail over the *lex generalis* of human rights in times of armed conflict. Dinstein (n 12) 32.

<sup>133</sup> According to Piancastelli, ‘if law cannot regulate life without exception, it cannot restrain warfare without concurrently enabling it’. Luis Paolo Bogliolo Piancastelli de Siqueira, ‘Rethinking Military Necessity in the Law of Armed Conflict’ (2012) 19. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2201129&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201129&download=yes)> accessed 6 February 2017.

inadequate, as it does not satisfactorily capture the way the exception works within the international legal regime.<sup>134</sup>

Although the majority of the roles law-makers and military personnel play are linked to regulating and applying military necessity and humanity, Schmitt also underlines the role of international tribunals (ICTY) and NGOs (e.g. Amnesty International, Human Rights Watch, Goldstone Report) in influencing the balance between necessity and humanity.<sup>135</sup>

## VI Future Challenges

LOAC has to be functional but also humane enough to fulfil its declared purposes. Only an operational concept of military necessity can ensure the legality of military conduct and decision-making. Recent state practice shows that even when a state is generally following the Geneva Conventions, precedents of unlawful conduct still exist. In a world of insecurity and unpredictability propelled by rapid political and technological changes, law represents the desired safety, stability, and predictability. Nevertheless, in times of crisis and political pressure, human rights and basic values may tremble.

There is a growing trend of disregard towards and misinterpretation of LOAC, which can undermine its authority and credibility in the long run. It is crucial to recognize and acknowledge the role of law in creating values. When the law can no longer perform this function (effectively), its review is necessary, because regulations, mechanisms and institutions must always correspond to the actualities, bearing in mind the possible circumstances that have not yet occurred.

Historically, LOAC has been hardwired to cover the conduct of states in the course of conventional warfare. The changing nature of the conduct of hostilities and the new challenges posed by the advent of asymmetric warfare and new weapon systems that are being developed, *inter alia*, require LOAC to adjust and evolve. Asymmetric warfare surfaced as a new type of conflict based on armed forces (of states and non-state actors) with significant difference in their size, military equipment, preparedness and capabilities. It is becoming increasingly rare to come across 'pure' conventional warfare between state parties; states (both policy makers and military personnel) therefore need to be prepared for the new challenges posed by the new methods of warfare. Terrorists often claim *extra legem* legitimacy in order to justify their obviously illegal violence and gain advantage from the fact that states respect and adhere to the obligations derived from LOAC, although the number of recent counter-examples is steadily growing. According to Van Bergen and Gittings, 'the [Bush] Administration always insists that it is following Geneva, except to the extent that "military

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<sup>134</sup> Ibid 18.

<sup>135</sup> Schmitt (n 116).

necessity” requires otherwise.<sup>136</sup> It seems that although the notion of *Kriegsräson* had been transcended for some time now, some state actors still believe that the crimes committed by terrorists may in certain cases justify reactions not in line with the requirements of LOAC.<sup>137</sup> Developing more effective weapons has always been an integral part of warfare. The research and progress in using drones, autonomous weapons systems, cyber abilities or nano-technology has exponentially accelerated in the past decade, further deepening the gap between the law adopted and the recent developments.

The ultimate purpose of LOAC is to limit the adverse effects of armed conflicts but it cannot deliver when new developments and phenomena are ignored. Military necessity is essential as a restricting factor in the conduct of hostilities, in resorting to certain means and methods of warfare. LOAC has to ensure the operability of its rules and principles by guiding the changes in a safe(r) direction by the thorough review and possible amendment of the existing framework in order to be able to regulate the realities rather than just trying to catch up with history.

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<sup>136</sup> Jennifer Van Bergen, Charles B. Gittings Jr, 'Bush War: Military Necessity or War Crimes?' (2003) <[http://www3.alternet.org/story/16396/bush\\_war%3A\\_military\\_necessity\\_or\\_war\\_crimes](http://www3.alternet.org/story/16396/bush_war%3A_military_necessity_or_war_crimes)> accessed 6 February 2017.

<sup>137</sup> Reeves, Lai (n 124) 141.