BASIC PRINCIPLES

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1. Introduction

This chapter illustrates the normative process through which the law of armed conflict (LOAC) creates its rules. It does so by identifying major ‘ingredients’ of the process, elucidating their interplay, and reflecting on the consequences that the interplay entails *vis-à-vis* positive LOAC rules. In addition to military necessity and humanity, chivalry and sovereignty will also be considered where appropriate.

Key to this inquiry is the idea that LOAC has been developed with a view to striking a realistic balance between military necessity and humanity and that, accordingly, the law ‘accounts for’ them.1 What it means to say so has remained obscure, however, and this obscurity has given rise to different opinions.

2. Reason-Giving Considerations in LOAC Norm-creation

2.1 Military Necessity2

In its material context, military necessity embodies a two-fold truism. It is in the belligerent’s self-interest to do what is militarily necessary and to avoid what is unnecessary. Conversely, it is against its self-interest to let go of necessities of war or encumber itself with non-necessities. Material military necessity is a matter of calculating the degree of cogency between the means taken or considered, on the one hand, and the ends sought, on the other, under the circumstances prevailing or anticipated at the relevant time. To say that ‘Doing this is militarily necessary’ is simply to signify that the act conduces towards the materialisation of a given military end to some degree.

A given act’s military necessity *vis-à-vis* its goal depends on the availability of other reasonably attainable goals and other reasonably conducive acts, as well as the prevailing circumstances. For the Allies during World War II, the destruction of the Monte Cassino Abbey

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was, all else being equal, arguably more militarily necessary in order to conquer the monastery hill than if the goal had been to compel the German forces to divert their resources from the Anzio beachhead. An act is also capable of military necessity assessments given enough pertinent facts. Allied commanders drew reasonable though dissimilar conclusions about the military necessity of the Abbey’s destruction based on the facts then available to them. An act’s military necessity or non-necessity is susceptible neither to being taken out of its particular circumstances nor to being generalised. Whatever one’s assessment of the destruction of the Monte Cassino Abbey may be, one cannot determine in general and a priori whether destroying a building sitting atop a topographically dominant elevation is militarily necessary or unnecessary.

In the context of LOAC norm-creation, military necessity embodies indifference. Conduct is normatively indifferent where the two propositions ‘It is permitted to perform it’ and ‘It is permitted to refrain from it’ are both true simultaneously. Military necessity permits the performance of what is militarily necessary and the forbearance of what is militarily unnecessary. It also tolerates the former’s forbearance and the latter’s performance, however, because neither victory nor defeat is per se of concern to LOAC. The law does not make it its business to ensure that each belligerent maximise its prospect of success or minimise its prospect of failure. LOAC’s framers have no reason to oblige militarily necessary behaviour or prohibit militarily unnecessary behaviour.

As reason-giving considerations, military necessity is generalised and stipulatory. The material question was whether a given act was or would be militarily necessary, in view of its particular purpose and circumstances. The question here is what LOAC should do about this kind of act, once it is agreed that it would generally be militarily necessary or unnecessary vis-à-vis an otherwise legitimate kind of military purpose. There may well be no military necessity to intern prisoners of war (POW) in certain specific cases. Nevertheless, interning POWs is generally deemed militarily necessary. Normative military necessity prompts LOAC’s framers to leave the belligerent at liberty to intern or decline to intern its POWs.

In the juridical context of positive LOAC, military necessity operates exclusively as an exception. Military necessity clauses attached to certain LOAC rules, such as that which prohibits property destruction in occupied territory, exceptionally authorise behaviour deviating from the rules’ principal prescriptions as long as such behaviour fulfils four cumulative requirements. First, the measure must be taken primarily for some specific military purpose. Second, the measure must be required for the purpose’s attainment. Third, the purpose must be in conformity with LOAC. Fourth, the measure itself must otherwise be in conformity with LOAC. If not, or no longer, in fulfilment of these requirements, the deviant conduct reverts to being governed by the principal prescriptions, and it becomes unlawful. The con-

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4 Marten Blumenson, The Mediterranean Theater of Operations: Salerno to Cassino (US Army Center of Military History 1993) 403 (Gen. Tucker in favour), 404 (Gen. Freyberg in favour), 405-406 (Gen. Clark against), 413 (Gen. Walker against), 415 (President Roosevelt in favour).


6 G.H. von Wright, ‘Deontic Logic’ (1951) 60 Mind 1, 3-4.


8 Article 5, HR; Article 21, GCIII. But see Article 41(3), API.

9 Article 53, GCIV.

duct’s unlawfulness emanates from its breach of the principal rule, not its lack of military necessity or the now inoperative exceptional clause.

Assessing juridical military necessity involves interpreting the relevant rules and clauses vis-à-vis the particular set of facts at issue. In the Hostages Case, the U.S. Military Tribunal at Nuremberg applied Article 23(g) of HR to the ‘scorched earth’ policy to which the German forces resorted in Finmark, northern Norway, in 1944. It was found that ‘[t]here is evidence in the record that there was no military necessity for this destruction and devastation.’

Various perspectives on military necessity have been proposed. It was once argued that military necessity pleas are, or should be, admissible de novo in support of conduct at odds with unqualified LOAC rules. Thus, the material military necessity of given belligerent conduct overrides any LOAC provisions that prescribe contrary action. The Kriegspräson doctrine, so named after the German maxim ‘Kriegspräson geht vor Kriegsmänner’ (‘Necessities of war override rules of war’), remained influential among German military and international lawyers until the end of World War II. Since its rejection at post-war trials, Kriegspräson has been thoroughly discredited. It is widely accepted today that military necessity has no place outside specific exceptional clauses.

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11 United States vs. List (Hostages), 11 TWC 757, 1296-7 (1950).
12 Id., 1296. Nevertheless, the tribunal declined to find the accused guilty of the crime charged. It did so on the ground that he honestly, albeit erroneously in retrospect, believed Finmark’s devastation to be militarily necessary. See id., 1296-7. For what has come to be known as the ‘Rendulic rule’ of no second guessing, see Brian J. Bill, ‘The Rendulic “Rule”: Military Necessity, Commander’s Knowledge, and Methods of Warfare’ (2009) 12 YBIHL 119.
14 In re Rauter (1949) 16 ADIL 526, 543; In re Burghoff, (1949) 15 ADIL 551, 554-7; Hostages (n 11) 1255-1256, 1272-1273, 1296; von Manstein (n 1) 512-513; United States vs. Krupp von Bohlen und Halbach (Krupp), 9 TWC 1340 (1950); United States vs. von Leeb (High Command), 11 TWC 1, 541 (1951).
Some authorities go further. In their view, military necessity functions as a layer of normative restraint additional to positive LOAC.\(^\text{17}\) This position – let us call it ‘counter-Kriegsräson’ – entails two major assertions. First, as reason-giving considerations, military necessity condemns militarily unnecessary conduct. Second, these considerations survive the process of LOAC norm-creation. Consequently, an act otherwise lawful according to positive LOAC nevertheless becomes unlawful on account of its lack of material military necessity. As seen below, neither assertions are correct.

Military necessity has occasionally been equated with military objective, particularly in international criminal law.\(^\text{18}\) This equation is unhelpful, since the former pertains to conduct whereas the latter pertains to objects.\(^\text{19}\) Where given conduct is militarily necessary or unnecessary, LOAC’s framers have reason to permit it or tolerate it. Where an object constitutes a military objective or a civilian object, it becomes principally liable to or immune from attacks.\(^\text{20}\)

Military necessity has also been treated synonymously with proportionality.\(^\text{21}\) When calculating material military necessity, something approximating proportionality may characterise the measures taken vis-à-vis the goal sought. It is unclear, however, whether proportionality constitutes distinct reason-giving considerations in LOAC norm-creation. Nor would it operate as a clause exceptionally modifying the normative content of a principal LOAC rule. It is rather an element in the LOAC rule that establishes the lawfulness or unlawfulness of an attack directed at a military objective.\(^\text{22}\)

Any difference between military necessity and military advantage or convenience might be seen as one of degrees. The former might involve the act’s indispensability, whereas the latter might encompass indispensability as well as mere gain, superiority or expediency. It is doubtful whether the indispensability of belligerent conduct is a viable distinguishing feature here.\(^\text{23}\) Could it be, alternatively, that military advantage compares the belligerent’s position vis-à-vis its adversary’s but military necessity does not? Here, too, although military advantage may certainly be construed in this manner, it does not follow that the notion cannot be understood without reference to such comparisons. Normatively, military advantage could easily function as reason-giving considerations in LOAC norm-creation. The law’s framers

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19 Article 52(2), API.

20 Id., Article 52(1).


22 Article 51(5)(b), API.

23 Arguably, no conditio sine qua non characterises military necessity. See Hayashi, ‘Contextualising Military Necessity’ (n 2).
would have very good reasons to leave militarily advantageous conduct permitted and militarily disadvantageous conduct tolerated. The clearest difference between the two notions lies in their juridical significance. No positive LOAC rules expressly admit military advantage or convenience as an exception to their principal prescriptions. Acts not in fulfilment of the four aforementioned requirements may be regarded as military advantage or convenience ineligible for deviation from LOAC rules that envisage military necessity pleas.

2.2 Humanity

It has been observed that humanity is difficult to define. Humanity has been described as: a notion that ‘forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes’; a synonym with the prohibition of superfluous injury and unnecessary suffering; an equivalent to the Martens Clause; a vehicle through which international human rights law has made its way into the regulation of armed conflicts; and an equivalent to what the ICJ in its Corfu Channel judgement referred to as ‘elementary considerations of humanity.

Perhaps it is easier to consider what humanity does in relation to LOAC. It would appear that specific belligerent acts can be described as humane or inhumane (just as they can be described as militarily necessary or unnecessary). Frank Richards, a WWI veteran, recalled his November 1914 action at a village called Englefontaine:

When bombing dug-outs or cellars it was always wise to throw bombs into them first and have a look around them after. But we had to be very careful in this village as there were civilians in some of the cellars. We shouted down them to make sure. Another man and I shouted down one cellar twice and receiving no reply were just about to pull the pins out of our bombs when we heard a woman’s voice cry out and a young lady came up the cellar steps. As soon as she saw us she started to speak rapidly in French and gave both of us a hearty kiss. She and the members of her family had their beds, stove and everything else of use in the cellar which they had not left for some days. They guessed an attack was being made and when we first shouted down had been too frightened to answer. If the young lady had not cried out when she did we would have innocently murdered them all.

25 Roger O’Keefe, The Protection of Cultural Property in Armed Conflict (CUP 2006) 122-3 (referring to Eisenhower’s General Order No. 68, Dec. 29, 1943); von Manstein (n 1) 522; Draper (n 1) 134; Melzer, Targeted Killing (n 1) 291-2; Solis (n 1) 264.
27 UK Ministry of Defence (n 1) 23.
It seems clear that Richards acted humanely in this episode. Had he chosen to throw the bombs into the cellar, he would have acted inhumanely albeit perhaps ‘wisely.’

In LOAC norm-creation, acts such as assuming some risks of self-endangerment in favour of civilians, and caring for the wounded and sick, would be deemed consistent with humanity and affirmatively demanded by it. Humanity would unhesitatingly condemn – i.e., demand that one refrain from – plunder, torture and the like as inhumane. Elsewhere, however, humanity may exhibit indifference. Examples include the conclusion of agreements recognising hospital zones and localities, and the censoring of communications between POWs and the exterior. Philosophers acknowledge that morality in society encompasses not only duties and obligations but also those qualities that go beyond them. The same may be said *mutatis mutandis* of humanity in LOAC norm-creation.

The ‘pointer’ at which the ‘humanity of duty’ ends and the ‘humanity of aspiration’ begins is a highly contentious matter. In the Englefontaine episode, Richards considered it ‘wise’ to ‘throw bombs into cellars first and have a look around them after.’ He also clearly found it morally troubling to do so, however. In fact, he found it so morally troubling that he decided *not* to do the wise thing. Instead, Richards, together with his colleague, chose to risk self-endangerment by shouting into the cellar. Michael Walzer observes:

*Innocently murder*, because they had shouted first; but if they had not shouted, and then killed the French family, it would have been, Richards believed, murder simply. And yet he was accepting a certain risk in shouting, for had there been German soldiers in the cellar, they might have scrambled out, firing as they came. It would have been more prudent to throw the bombs without warning, which means that military necessity would have justified him in doing so … And yet Richards was surely doing the right thing when he shouted his warning. He was acting as a moral man ought to act; he is not an example of fighting heroically, above and beyond the call of duty, but simply of fighting well. It is what we expect of soldiers.

Contemporary thinkers debate whether the risk of self-endangerment of the kind assumed by Richards is what humanity only permits, or what it demands. Juridically, humanity functions as an exception. There are positive LOAC rules, e.g. Article 49 of GCIV, which expressly admit exceptions on humanitarian grounds or, at any rate, on grounds that are arguably analogous. Deviating from the principal prescriptions of these rules is lawful insofar as it is in fact humane to do so in the manner specified by the exceptional clauses. The question is whether humanity may also function as a justification or excuse *vis-à-vis* positive LOAC. Can humanity be invoked *de novo* in support of belligerent

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33 This humane conduct nevertheless remains a manner of humanitarian permission. See Raymund T. Yingling and Robert W. Ginnane, ‘The Geneva Conventions of 1949’ (1952) 46 AJIL 393, 400.
34 Similarly, this inhumane conduct nevertheless remains a matter of humanitarian toleration.
36 Fuller has conceded as much, at least in relation to the ‘pointer’ at which the ‘morality of duty’ yields to the ‘morality of aspiration.’ See *id.*, 9-13, 27-30.
37 Walzer, *Just and Unjust Wars* (n 32) 152, 154 (emphasis in original).
39 Article 49, GCIV (principally prohibiting forcible transfers of residents in occupied territory yet exceptionally authorising their temporary evacuations ‘if the security of the population … so demand[s]’).
behaviour deviating from an unqualified LOAC rule, à la ‘Humanitätsträson’? Or, for that matter, can there be a ‘counter-Humanitätsträson’ whereby humanity operates as an additional layer of normative restraint over positive LOAC? We will address these questions below.

2.3 Chivalry and Other Considerations

Chivalry is a third and sometimes overlooked ‘ingredient’ in the process of LOAC norm-creation. As with humanity, it appears more fruitful to focus on chivalry’s normative and juridical functions in relation to LOAC than to decipher its content.41

Chivalry appears indifferent regarding certain kinds of belligerent conduct but not so regarding others. Thus, it prompts LOAC’s framers to tolerate certain techniques of deception as ruses of war and yet condemn certain others as perfidy or treachery. One may ask whether chivalry is admissible de novo as a justification or excuse for deviation from positive LOAC (a ‘Ritterlichkeitsträson’?) or an additional layer of normative restraint thereon (a ‘counter-Ritterlichkeitsträson’?).

Sovereignty also functions as reason-giving considerations in LOAC norm-creation. They may exhibit indifference in some matters, e.g., the regulation of non-international armed conflicts, whereas they demand specific behaviour and condemn others on matters of neutrality.

3. Dynamics of Considerations Interplay

Reason-giving considerations interact with one another in three distinct ways. They are: (a) where all the relevant considerations permit or demand the same behaviour (‘norm alignment’); (b) where one set of considerations permits particular behaviour, whereas another set demands contrary behaviour (‘norm contradiction’); and (c) where two or more sets of considerations demand mutually incompatible behaviour (‘norm conflict’). This chapter primarily examines the binary interplay between military necessity and humanity.

3.1 Norm Alignment and Joint Satisfaction

It has been suggested that military necessity and humanity find themselves in ‘diametrical opposition’ and that its resolution involves ‘dialectical compromise.’ In fact, they can and do align themselves; moreover, their alignment is far more pervasive than ‘rare.’

That performing certain conduct is deemed both inhumane and militarily unnecessary is a widely accepted notion indeed. For Carl von Clausewitz, committing needless brutalities – e.g., putting prisoners to death and devastating cities and countries – was, first and foremost, a sign of ineffective and unintelligent fighting.46 Similar observations have been made re-

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40 ‘Humanitätsträson geht vor Kriegsmanier’ (‘Necessities of humanity override rules of war’), so to speak. This author is indebted to Mareile Kaufmann for her assistance in German.
42 Similarly, ‘Ritterlichkeitsträson geht vor Kriegsmanier’ (‘Necessities of chivalry override rules of war’).
44 Schmitt, ‘Military Necessity’ (n 1) 801.
garding pillaging indiscriminately, murdering POWs, plundering private or public property, raping women and ill-treating populations of occupied territories, attacking civilians, abusing detained persons during counter-insurgency operations, sadistic acts of cruelty and bombarding undefended localities.

Where military necessity permits and humanity demands the conduct’s forbearance, the belligerent satisfies both considerations by refraining from it. LOAC may ‘account for’ this possibility by validly positing a rule unqualifiedly prohibiting the said behaviour. This rule extinguishes all liberties to perform the conduct that military necessity may otherwise tolerate. Examples include LOAC rules unqualifiedly prohibiting killing POWs, bombing undefended localities, shooting persons descending from aircraft in distress and generally maltreating persons hors de combat.

Joint satisfaction can also be performance-based. The idea that it is strategically expedient to fight ethically in counterinsurgency with a view to earning the support of local residents is hardly new. The same has been said of certain measures taken during belligerent occupation and a doctrine of aerial warfare known as effects-based operations. Here, too, LOAC ‘accounts for’ this possibility when it validly posits rules unqualifiedly obligating the conduct’s performance. The law thereby extinguishes any contrary liberties on the belligerent’s part to behave otherwise as may be tolerated by military necessity.

The fact that some belligerent acts are amenable to joint satisfaction of this character does not mean that LOAC’s framers always validly posit rules unqualifiedly obligating its pursuit. It is, as noted earlier, not per se of concern to LOAC whether the belligerent fights competently or incompetently. Where this type of joint satisfaction is available, military necessity permits its pursuit and only tolerates its non-pursuit. The relative scarcity of these rules can also be explained by the fact that the framers may let third considerations permitting its non-pursuit, such as sovereignty, prevail.

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47 Henry Sidgwick, *The Elements of Politics* (Macmillan 1891) 256.
48 Brandt (n 46) 154-155.
50 Brandt (n 46) 155.
53 Doswald-Beck and Vité (n 49) 99.
55 Brandt (n 46) 154-155.
56 Article 13, GCIII.
57 Article 25, HR.
58 Article 42(1), API.
59 Id., Article 41(1).
63 Article 57(3), API (obligating the attacking party to choose the least injurious amongst those military objectives offering similar military advantage); Brandt (n 46) 155.
64 The *si omnes* clauses exemplify strictly historical instances where considerations of sovereignty amongst adversarial powers resulted in the non-application in certain circumstances of LOAC rules which would otherwise have created unqualified obligations. Similarly, in 1949, the ICRC failed to rally states in its effort to expand the
3.2 Norm Contradiction and Joint Satisfaction

Where given conduct is a matter of indifference, there is neither any duty to perform it nor any duty to refrain from it. If, then, one norm stipulating such indifference regarding particular behaviour is juxtaposed vis-à-vis another norm stipulating a duty to perform it – or to refrain from it, as the case may be – the two norms contradict each other. They do so because both cannot be true simultaneously. Joint satisfaction nevertheless results where the addressee acts according to the duty. Norm contradiction becomes problematic if, but only if, the addressee avails him or herself of the liberty and thereby leaves the contrary duty unsatisfied.

At issue here is a situation where humanity demands what military necessity only tolerates or the former condemns what the latter permits. The belligerent jointly satisfies both sets of considerations by acting in accordance with humanity. LOAC norm-creation deals with joint satisfaction of this kind in five ways. In one, LOAC validly posits a rule unqualifiedly obligating its pursuit. Thus, the law categorically bans the denial of quarter; attacks on the civilian population or on individual civilians not directly participating in hostilities; deliberate infliction of terror amongst civilians; their starvation as a method of combat; recruitment of children into the armed forces and their use in hostilities; use of POWs or protected persons as human shields; hostage-taking, and permanent forcible transfers and deportations. Those framing these rules have elected to let humanity’s condemnation trump military necessity’s contrary permission. Similarly, LOAC unqualifiedly obligates the release of POWs with provisions in unusual conditions of combat. By validly positing this rule, the law extinguishes any liberty on the belligerent’s part to act otherwise as may be permitted by military necessity.

Second, a LOAC rule may principally obligate the pursuit of joint satisfaction but exceptionally authorise its non-pursuit. Consider, e.g., those rules principally prohibiting yet exceptionally authorising the destruction of property; the destruction of captured enemy and
neutral merchant vessels; and temporary evacuations of residents in occupied territories. Conversely, the following acts are principally obligatory yet exceptionally optional: the Detaining Power allowing internees to receive shipments which may meet their needs; combatants distinguishing themselves from the civilian population; attacking parties giving effective advance warning, and belligerents allowing civil defence organizations to work. Here, LOAC’s framers have elected, in principle, to let humanitarian condemnations and demands take precedence over contrary liberties permitted by military necessity. Where these rules apply, the belligerent is obligated to pursue the joint satisfaction demanded by humanity and tolerated by military necessity – unless, and to the extent that, non-pursuit proves militarily necessary in a particular situation.

Third, certain LOAC rules indeterminately obligate the pursuit of joint satisfaction. Examples arguably include those rules concerning proportionality in attacks and the use of weapons of a nature to cause superfluous injury and unnecessary suffering, as well as those obligating humane but militarily unnecessary action ‘as far as military considerations permit,’ ‘whenever circumstances permit,’ and ‘to the maximum extent feasible.’ The process of their norm-creation has left the priority between military necessity and humanity unsettled. The non-pursuit of joint satisfaction is authorised to the extent permitted by military necessity, while its pursuit is obligated to the extent demanded by humanity. The rules themselves do not specify the point at which the former gives way to the latter. Their framers effectively transfer the burden of discovering this point to the rules’ addressees and adjudicators.

Fourth, there are some types of belligerent conduct over which LOAC rules only exceptionally obligate the pursuit of joint satisfaction. Take, e.g., the declaration and establishment

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78 Article 49, GCIV.
79 Id., Article 108. This provision envisages situations where ‘military necessity require[s] the quantity of such shipments to be limited,’ implying that otherwise impermissible limitations are exceptionally permissible insofar as they actually happen to be militarily necessary.
80 Article 44(3), API. This duty is partially waived when, ‘owing to the nature of the hostilities an armed combatant cannot … distinguish himself’ in accordance with it.
81 Article 26, HR; Article 57(2), API; Julius Stone, Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law (Rinehart & Co. 1954) 622-3; Rogers (n 1) 88. Belligerents need not give such warning if ‘circumstances do not permit’ (such as assault requiring an element of surprise).
82 Article 62(1), API. That is, ‘except in cases of imperative military necessity.’
84 St. Petersburg Declaration (n 1); Article 23(e), HR. See also Nuclear Weapons (n 31) 586-587 (Judge Higgins, dissenting); Yves Sandoz, ‘International Humanitarian Law in the Twenty-First Century’ (2003) 6 YBIHL 3, 8; Parks (n 24) n 25; Program on Humanitarian Policy and Conflict Research, Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare (Harvard University 2010) 66.
85 That is, e.g., leaving a part of a party’s medical personnel and materiel with the wounded and sick to assist in the latter’s care should the party in question be compelled to abandon them to the enemy. See Article 12, GCI. See also Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906) Schindler/Toman (3rd edn) 301, 303 (‘so far as military conditions permit’); Article 1, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929) Schindler/Toman (3rd edn) 325, 326 (‘as far as military exigencies permit’); GCI Commentary, 141-142.
86 That is, e.g., searching, collecting and evacuating the wounded, sick, shipwrecked and dead. See Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (CUP 2005) 396, 406; Article 15, GCI; Article 18, GCII; Doswald-Beck and Vité (n 49) 100.
87 That is, e.g., removing movable cultural property from the vicinity of military objectives and avoiding locating military objectives near cultural property. See Article 8, Hague Cultural Property Protocol II.
of a blockade and the denial by the blocking party of free passage of essential goods to blockaded ports. The framers of these rules have principally elected to let military necessity’s permission trump humanity’s contrary demands. The belligerent is at liberty to act as permitted by military necessity not only where it is in fact militarily necessary to do so; the same liberty remains in place even if it is not. This liberty not to pursue joint satisfaction exceptionally ceases where its pursuit does in fact prove humane.

Fifth, LOAC may decline or fail to oblige the pursuit of joint satisfaction altogether. It may decline to do so by validly positing rules unqualifiedly authorising non-pursuit. Such is the case regarding the Detaining Power interning POWs, the belligerent searching and controlling medical vessels, and the Occupying Power confiscating state property in occupied territory which may be used for military operations. The belligerent also remains at liberty to disable eligible enemy combatants, deliberately inflict terror amongst them or starve them as a method of combat. As regards these acts, LOAC’s framers have elected to grant permissions of military necessity unfettered precedence over contrary demands of humanity. It in no way matters whether, at a given moment, availing oneself of the former permission is militarily necessary or unnecessary; nor does it matter whether contrary action happens to be humane or inhumane. Acting as demanded by humanity, and thereby acting in joint satisfaction, is now entirely optional.

As for the law’s failure, one may look to the ICJ’s agnosticism regarding the lawfulness or otherwise of nuclear weapons in certain circumstances; and the ICRC’s concession that it is unclear whether customary LOAC prohibits belligerent reprisals against civilians during hostilities. Similarly, no LOAC rule appears to oblige civilians taking a direct part in hostilities, continuously or otherwise, to distinguish themselves from those taking no such part.

Is there a generally liberal or prohibitive presumption for conduct not specifically regulated by positive LOAC? A conservative reading of the Martens clause would hold that it merely safeguards the continued application of customary LOAC rules. Read more progressively, the clause would represent a framework through which LOAC rules are to be interpreted. As seen below, while indifferent considerations such as military necessity do not create additional layers of normative significance, affirmative considerations may.

Norm contradiction also occurs between permissions of military necessity and demands of chivalry. It has led to the adoption, inter alia, of LOAC rules prohibiting improper use of enemy uniforms; direct participation in hostilities by paroled or repatriated POWs and by

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88 That is, unless the blockade has the sole purpose of starving the civilian population or is disproportionately injurious to the civilian population. See San Remo Manual (n 77) paras 93, 102.
89 That is, unless the denial leaves the civilian population inadequately supplied. See San Remo Manual (n 77) para 103.
90 Article 5, HR; Article 21, GCIII.
91 Article 31, GCII.
92 Article 53, HR.
93 Nuclear Weapons (n 31) para 97.
98 Article 23(f), HR; Article 39(2), API. See also Bordwell (n 16) 283.
those sick, wounded or shipwrecked who have been returned\textsuperscript{99}; and treachery.\textsuperscript{100} The military necessity-chivalry interplay also underlies LOAC rules authorising the detention and search of parlementaires,\textsuperscript{101} and the absence of prohibition against espionage \textit{per se}.\textsuperscript{102}

### 3.3 Norm Conflict

Two norms conflict with each other where one obligates its addressee to perform a given act and the other prohibits the same act. The logical impossibility of joint obedience to which two conflicting norms give rise does not preclude the logical possibility of their valid co-existence. Conflicting norms may validly co-exist, even within one legal system.\textsuperscript{103} It would nevertheless be a functional shortcoming of a legal system if it contained valid yet conflicting norms.\textsuperscript{104}

Similarly, it would be seriously detrimental to LOAC’s functionality if two conflicting sets of reason-giving considerations involved in its norm-creation led to the adoption of conflicting rules. The law endeavours to avoid them by letting one set trump the other or by devising a compromise between them. Indifferent considerations, such as military necessity, do not obligate conduct and therefore do not become involved in norm conflicts. At stake here are those considerations that are \textit{not} indifferent. For instance, one set of humanitarian considerations demands that the Detaining Power not medically intervene with a POW, whereas another set of humanitarian considerations arguably demands such intervention in certain circumstances. Article 13 of GCIII embodies a compromise struck between them. The same may be said \textit{mutatis mutandis} of Article 78(1) of API. This article principally prohibits evacuations of children to a foreign country yet arguably obligates their temporary evacuations where ‘compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require.’

### 4. Consequences of Considerations Interplay

To what consequences does the interplay between reason-giving considerations in the process of LOAC norm-creation give rise? In particular, do these considerations operate as unlawfulness criteria in addition to positive LOAC?

As noted earlier, unqualified LOAC rules extinguish all contrarary liberties permitted or tolerated by indifferent considerations. The latter considerations have thus been ‘accounted for’ and, consequently, do not modify an act’s unlawfulness or otherwise established by the former rules. It is arguable, however, that the same may not be said so readily of conflicting demands and condemnations.

#### 4.1 Military Necessity – Kriegsräson and counter-Kriegsräson

\textsuperscript{99} Articles 10, 12, HR; L. Oppenheim, \textit{International Law: A Treatise} (Ronald F. Roxburgh ed, 3rd edn, Longmans 1921) 192; Article 16, GCII.

\textsuperscript{100} Article 23(b), HR; Articles 8(2)(b)(xi), 8(2)(e)(ix), Rome Statute.

\textsuperscript{101} Articles 33, 34, HR.


\textsuperscript{104} Hart, ‘Kelsen’s Doctrine’ (n 103) 325-326.
Kriegsräson asserts that, although LOAC does account for military necessity, it cannot be construed so that the belligerent is denied the option to do what it needs to succeed. Where rules are formulated without an express military necessity exception, it merely means that military necessity and the law are considered generally in agreement over the normative content of these rules. Whenever there is a collision, the former prevails over the latter.

Kriegsräson is unacceptable because it purports to justify all militarily necessary conduct even where it is already unqualifiedly outlawed in positive LOAC. Rejecting Kriegsräson amounts to rejecting the idea that military necessity somehow ‘rights’ or ‘repairs’ the unlawfulness of such conduct. Variations of the same theme, e.g., self-preservation, self-defence and impracticality, are to be rejected for the same reason.

Counter-Kriegsräson is perhaps most forcefully stated in the following passage:

… a direct attack against an otherwise legitimate military target constitutes a [LOAC] violation … if that attack is not required for the submission of the enemy with a minimum expenditure of time, life and physical resources … [T]he fact that [LOAC] does not prohibit direct attacks against combatants does not give rise to a legal entitlement to kill combatants at any time and any place so long as they are not hors de combat within the meaning of Article 41(2) AP I. Strictly speaking, although the absence of such a prohibition is undisputedly intentional, it constitutes no more than a strong presumption that, in a situation of armed conflict, it will generally be militarily necessary to kill, injure, or capture combatants of the opposing armed forces in order to bring about the submission of the adversary with a minimum expenditure of time, life and physical resources. It does not permit the senseless slaughter of combatants where there manifestly is no military necessity to do so, for example where a group of defenceless soldiers has not had the time to surrender, but could clearly be captured without additional risk to the operating forces.

On this view, the mere fact that LOAC accounts for military necessity does not leave the belligerent at liberty to do what is, in fact, militarily unnecessary. Where LOAC rules are unqualifiedly formulated, it simply means that whatever these rules authorise is deemed generally militarily necessary – ‘no more than a strong presumption,’ in other words. Where there is a collision between conduct being militarily unnecessary, on the one hand, and it being otherwise lawful according to positive LOAC, on the other, the former ‘wrongs’ or ‘vitiates’ the latter. Where the military necessity for particular belligerent conduct does not exist or ceases to exist, the law, all things considered, prohibits it.

Counter-Kriegsräson is predicated on two perceptions of military necessity qua reason-


106 Nuclear Weapons (n 31) 262-263. But see id. 590 (Judge Higgins, dissenting), 513-520 (Judge Weerman, dissenting); Luigi Condorelli, ‘Le droit international humanitaire, ou l’exploration par la cour d’une terra à peu près incognita pour elle’ in Laurence Boisson de Chazournes and Philippe Sands (eds), International Law, the International Court of Justice and Nuclear Weapons (CUP 1999) 229, 244-245; Christopher Greenwood, ‘Jus in bellum and Jus in bello in the Nuclear Weapons Advisory Opinion’ in id., 247, 264; Judith Gardam, ‘Necessity and Proportionality in Jus ad Bellum and Jus in Bello’ in id., 275, 292; Marcelo G. Kohan, ‘The Notion of “State Survival” in International Law’ in id., 293, 310; Nishimura Hayashi (n 13) 143-4; Dinstein, Conduct of Hostilities (2010) (n 16) 85-6; Solis (n 1) 269; Greenwood, ‘Historical Development’ (n 1) 36-37.


108 Melzer, Targeted Killing (n 1), 287-288 (emphasis in original; footnotes omitted).
giving considerations in LOAC norm-creation. First, some aspects of military necessity survive the process and act as a residual lawfulness modifier. Put differently, LOAC does not fully account for military necessity. Second, those aspects that remain unaccounted for are not indifferent. As seen above, these perceptions are both erroneous. Counter-Kriegsräson remains unconvincing.109

4.2 Humanity – Humanitätsräson and counter-Humanitätsräson?

It stands to reason that pleas arising de novo from indifferent considerations of humanity are inadmissible. Holding otherwise would amount to accepting the idea that, like Kriegsräson, acting as permitted yet not demanded by humanity somehow ‘repairs’ or ‘rights’ the act’s unlawfulness. In other words, a strictly indifferent Humanitätsräson is untenable. Nor, for that matter, is a strictly indifferent counter-Humanitätsräson: the belligerent’s failure to do what is permitted by humanity would not render that failure unlawful if it otherwise remains lawful in positive LOAC.

Humanity’s demands and condemnations are perhaps more complex. These aspects may in fact survive the process through which LOAC validly posits its rules. It is possible that a LOAC rule unqualifiedly obligating or prohibiting given conduct does not resolve such genuine norm conflicts as may exist with contrary humanitarian demands.110 Article 118 of GCIII stipulates that ‘[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.’111 That this provision creates an unqualified obligation finds support in its drafting history112 as well as some scholarly writings.113 A situation may arise where a Detaining Power finds itself torn between Article 118 and a humanitarian demand of non-reparation. This dilemma arose in the aftermath of the Korean War,114 the Iran-Iraq War115 and the Gulf War.116

Has Article 118’s adoption compulsorily resolved the norm conflict by letting the duty of repatriation trump the conflicting humanitarian demand that may arise in specific cases? Neither lex specialis117 nor jus cogens118 offers a satisfactory alternative here, as it is unqualified LOAC rules themselves that supposedly account for military necessity and humanity,

110 In truth, genuine norm conflicts are by no means unique LOAC. On the contrary, they are a fact of life generally. The specific manner in which solutions are found for the norms’ addressees varies from one body of positive law to another.
111 Article 118, GCIII.
113 Horst Fischer, ‘Protection of Prisoners of War’ in Fleck (ed) (n 1) 367, 416.
114 GCIII Commentary 543-546.
117 Repatriating or not repatriating POWs after the cessation of hostilities is possibly one area where international human law and international refugee law prohibiting repatriation in certain situations would function as the lex specialis relative to LOAC obligating repatriation in all situations.
and it is this fact that supposedly renders military necessity and humanity pleas inadmissible de novo. Nor does the argument that the subsequent custom has modified Article 118, with the result that the provision now has an implicit exceptional humanity clause, remedy the difficulty. This remedy would not have been available to those during the Korean War grappling with the norm conflict created when Article 118 was validly posited in 1949.

An affirmative Humanitätsräson offers an arguably more cogent explanation. The mere fact that Article 118 unqualifiedly obligates post-hostilities POW repatriation has not resolved the norm conflict. It is not clear whether, all things considered, the unqualifiedness of the prescriptions contained in Article 118 vis-à-vis conflicting humanitarian demands was, in 1949, or has since been, conclusive for LOAC. The idea that the latter demands may have survived the process of LOAC norm-creation accommodates the possibility that humanitarian pleas de novo in support of non-repatriation are not inadmissible vis-à-vis Article 118.

Nor, for that matter, is an affirmative counter-Humanitätsräson inconceivable. A LOAC rule may decline or fail to obligate what humanity demands or, in any event, unqualifiedly oblige less than what humanity demands. Where this occurs, acting in accordance with humanitarian demands entails pursuing, and exceeding, the joint satisfaction envisaged in the rule. If it were agreed that humanity demands ‘capture rather than kill,’ and if it were true that the process of LOAC norm-creation through which the lawfulness of ‘killing rather than capturing’ has come to be validly secured does not fully account for such demands, then it might be argued that killing rather than capturing is, all things considered, unlawful under LOAC.

4.3 Chivalry – Ritterlichkeitsräson and counter-Ritterlichkeitsräson?

For the same reasons, both an indifferent Ritterlichkeitsräson and an indifferent counter-Ritterlichkeitsräson are safely rejected. What may not are their affirmative variations, and especially an affirmative counter-Ritterlichkeitsräson.

5. Conclusion

The precise content of military necessity, humanity, chivalry and the like will continue to stir debate. This chapter nevertheless shows that their functions relative to LOAC can be illuminated. The normative characteristics of these notions shape the dynamics of their interplay in the context of LOAC norm-creation, as well as the consequences of such interplay vis-à-vis positive LOAC. The fact that military necessity is always indifferent not only confirms the fallacy of Kriegsräson but also invalidates the idea that belligerent conduct consistent with positive LOAC becomes unlawful by virtue of its lack of military necessity alone. In contrast, affirmative aspects of humanity and chivalry may survive the process of

120 There is a standing ‘invitation to exceed that minimum’ established in common Article 3. See GCI Commentary 52.
LOAC norm-creation and operate as additional layers of lawfulness determination over positive LOAC. In view of its potentially far-reaching ramifications, the latter idea requires further careful scrutiny.