The General Framework

I. Preliminary Definitions

A. Hostilities

1. The present book deals with the conduct of hostilities governed by the law of international armed conflict (LOIAC). The threshold of an international armed conflict (IAC) is crossed automatically once two or more States wage hostilities against each other, irrespective of the intensity or the length of the fighting.\footnote{See C. Hellestveit, ‘The Geneva Conventions and the Dichotomy between International and Non-International Armed Conflict: Curse or Blessing for the “Principle of Humanity”?’ \textit{Searching for a ‘Principle of Humanity’ in International Humanitarian Law} 85, 100–1 (K.M. Larsen, C.G. Cooper and G. Nystuen eds., 2013).} As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) pronounced in the \textit{Tadić} case, ‘an armed conflict exists whenever there is resort to armed force between States’.\footnote{\textit{Prosecutor v. Tadić} (Decision on Jurisdiction) (ICTY, Appeals Chamber, 1995), 35 \textit{ILM} 35, 54 (1996).} Depending on their scale, IAC hostilities may make the grade of a full-fledged war or they may amount to a ‘short of war’ clash of arms (namely, constitute a mere incident), but either way the military engagement between two or more States invites the application of LOIAC.

2. Euphemisms do not count in this context. Thus, the Russian–Ukrainian hostilities of 2022 have all the substance of an IAC, despite their designation by Russia as no more than a ‘Special Military Operation’. Common Article 2 (First Paragraph) of the four Geneva Conventions of 1949 for Protection of War Victims pronounces:

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.\footnote{Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, \textit{Laws of Armed Conflicts} 459, 461; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, \textit{ibid.}, 485, 487; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, \textit{ibid.}, 473, 475; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, \textit{ibid.}, 500, 501.}
The well-established (Pictet) Commentary of the International Committee of the Red Cross (ICRC) on Common Article 2 is adamant that it does not matter ‘how much slaughter takes place’ in an IAC, emphasizing that – even if there is ‘only a single wounded person as a result of the conflict’ – LOIAC will apply.\(^4\)

An updated (2016) ICRC Commentary on Common Article 2 underscores that an IAC (regulated by LOIAC) can be sparked off by ‘minor skirmishes between the armed forces, be they land, air or naval forces’.\(^5\)

3. The locution ‘hostilities’ is a portmanteau term ‘equivalent to the sum of singular “hostile acts” undertaken in relation to the conflict’.\(^6\) Hostilities are conducted through the employment of means and methods of warfare. ‘Means of warfare’ consist of weapons (defined infra 225) and matériel (such as means of communications and signalling devices). ‘Methods of warfare’ primarily relate to the manner in which means of warfare are employed; but they also cover other operational modes reviewed in Chapter 9.

4. The centre of gravity of hostilities is the planning and execution by all levels of command of attacks (defined infra 8) against the enemy, \(i.e\). acts of violence. Yet, hostilities have a broader sense than violence. They also embrace ancillary non-violent operations, such as the gathering of intelligence about the enemy; organizing logistics (in the sense of delivery to combatants of arms, equipment, transportation, food, fuel and other essential supplies); and running a network of communications (electronic or otherwise).\(^7\)

5. Violence as the core of hostilities excludes acts that cause only passing vexation or irritation. What it entails is (i) loss of life or other serious harm to human beings, and/or (ii) destruction of, or considerable damage to, property. That said, violence fits the matrix of any type of hostilities – from \textit{Blitzkrieg} to war of attrition – and it can be either large or small in scale. A specific act of violence need not take the form of a massive air bombardment or an artillery barrage: a single bullet fired by a sniper will do. The minimum amount of damage to property is frequently debated, especially in the modern setting of cyber operations (see infra 10). As for harm to human beings, severe mental trauma (such as shell shock) may count no less than serious physical injury.\(^8\)

6. The violent essence of an act must be understood in terms of consequences (death/injury to human beings or destruction/damage to property),


rather than the immediate cause. Violent ends may result from merely pressing a button or squeezing a trigger. For that reason, cyber operations may be considered violent when tapping on a keyboard, clicking a mouse or touching a screen produces sufficiently injurious or destructive consequences.9

7. An important caveat is that not all acts of violence committed during an IAC necessarily qualify as hostilities. Certain acts of violence, even when performed by organs of a Belligerent Party in the course of an IAC, are excluded from the range of hostilities. These acts, not related to military operations against the enemy, are especially apposite to law enforcement measures taken against common felons transgressing the domestic penal code while an IAC is ongoing.

B. Attacks

8. Large portions of this book are devoted to attacks and protection therefrom (see, in particular, Chapters 5–8). ‘Attacks’ are a form of hostilities. They are defined in Article 49(1) of the 1977 Protocol I, Additional to the 1949 Geneva Conventions (AP/I), as ‘acts of violence against the adversary, whether in offence or in defence’.10 In light of this definition, repelling an attack is also categorized as an attack. But, whether offensive or defensive in character, violence against the enemy is a condicio sine qua non of attack. In the words of an ICTY Trial Chamber, in the Kunarac case of 2001, ‘[a]n “attack” can be described as a course of conduct involving the commission of acts of violence’.11 That conduct must be carried out as part of military operations ‘against the adversary’ (whether the specific target or the mode of attack is lawful or unlawful).12

9. Non-violent acts tied to military operations, although subsumed under the overarching heading of ‘hostilities’ (see supra 4), do not come within the ambit of attacks. Recourse to psychological warfare; disruption of enemy communications; issuing false orders or using other ruses of war (see infra 952 et seq.); sleep-depriving sonic booms; airdropping of leaflets calling for surrender, etc., do not count as attacks. By itself, even the firing of warning shots may not be considered an attack.13

11 Prosecutor v. Kunarac et al. (ICTY, Trial Chamber, 2001), Paragraph 415.
10. Cyber attacks qualify as ‘attacks’ under the AP/I definition on condition that they engender violence through their effects (see supra 6). That is to say, cyber operations cannot be regarded as ‘attacks’ in the LOIAC sense if they merely break through a ‘fire wall’ or plant malware (such as a virus) in an enemy computer. They do amount to ‘attacks’ solely if they cause injury/death to persons or damage/destruction to property. Typical cyber attacks are those that shut down a life-sustaining software program or cause a destructive fire in an electric grid. A loss of functionality of target computers is usually viewed as sufficient for a cyber operation to be deemed an ‘attack’, provided that physical components of the hardware have been damaged and must be repaired or replaced; but a controversial issue is whether that is also the case when only software data have to be reinstalled. At the present juncture, in the absence of a clear practice of States in the matter, this is a purely academic debate.

II. The Two Major Premises

11. There are two major premises antecedent to any survey of LOIAC. These are:

(i) The means and methods of warfare can be subject to strict legal limitations.
(ii) The opposing Belligerent Parties are equal in the eyes of LOIAC, irrespective of their standing under the jus ad bellum and any built-in asymmetry in military capability.

A. Limitation of Means and Methods of Warfare

12. The first major premise of LOIAC, resonating across its whole spectrum, is that – although Belligerent Parties may wage hostilities fiercely and relentlessly – their freedom of action is susceptible to legal constraints. This construct is reflected in Regulation 22 Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907:

The right of belligerents to adopt means of injuring the enemy is not unlimited.16

Article 35(1) of AP/I rephrases the same precept under the heading ‘[b]asic rules’:

In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.\(^{17}\)

While the Hague formula is wholly concerned with ‘means’, AP/I adds ‘methods’ of warfare. It is wrong to suggest that, by adjoining the two expressions, Article 35(1) somehow blurs methods and means of warfare.\(^{18}\) What AP/I does is stress that not only arms and munitions (‘means’) but also modalities of behaviour (‘methods’) can run afoul of LOIAC (for examples, see Chapter 9).

B. Legal Equality of the Belligerent Parties

(a) No Connection between the Jus in Bello and the Jus ad Bellum

13. The international legal regulation of war is subdivided into the \textit{jus in bello} (LOIAC) and the \textit{jus ad bellum} (governing the legality of war). This branching-off leads to separate \textit{jus in bello} and \textit{jus ad bellum} solutions to legal problems, and it even spawns a different glossary. Thus, the idiom ‘attack’ in the \textit{jus in bello} (see \textit{supra} 8) must not be confused with the expression ‘armed attack’ featuring in Article 51 of the United Nations (UN) Charter;\(^ {19}\) just as the \textit{jus ad bellum} coinage ‘self-defence’ must not be mixed up with the \textit{jus in bello} term ‘defence’ as a subset of ‘attack’ (see \textit{supra ibid.}). But the dissonance goes beyond matters of vocabulary.

14. A fundamental postulate of the \textit{jus in bello} is the equal application of its legal norms to all Belligerent Parties, regardless of their respective standing in the eyes of the \textit{jus ad bellum}.\(^ {20}\) Unlike the \textit{jus ad bellum}, the \textit{jus in bello} does not distinguish between an aggressor State and a State resorting to self-defence or participating in an enforcement action ordained (or authorized) by the UN Security Council.\(^ {21}\) There may be some discrimination against an aggressor State where the law of neutrality is concerned.\(^ {22}\) But this does not affect the applicability of the \textit{jus in bello} in the conduct of hostilities between the

\(^{17}\) AP/I, supra note 10, at 730.


\(^{19}\) Charter of the United Nations, 1945, 9 \textit{Int.Leg.} 327, 346.


Belligerent Parties. Most critically, breaches of the *jus in bello* are not exculpated on the ground that the enemy is responsible for having commenced the hostilities in breach of the *jus ad bellum*.

15. There are commentators who would like to do away with the principle of the equality of the Belligerent Parties before the *jus in bello*. However, such a position would raise grave issues as regards the plight of both civilians and combatants who are on the wrong side in an aggressive war for which they are not responsible. In any event, notwithstanding doctrinal sideswipes, the general practice of States emphatically confirms the customary standing of the major premise of the parity of Belligerent Parties under the *jus in bello*.

16. Common Article 1 of the 1949 Geneva Conventions for the Protection of War Victims promulgates:

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

The words ‘in all circumstances’ engender a clear-cut conclusion spelt out in the two ICRC Commentaries on the text. The latest Commentary (dated 2016) states:

The undertaking to respect and to ensure respect ‘in all circumstances’ also reaffirms the strict separation of *jus ad bellum* and *jus in bello* as one of the basic safeguards for compliance with the Conventions.

The earlier (Pictet) Commentary of 1952 explained:

Whether a war is ‘just’ or ‘unjust’, whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected.

17. The Preamble to AP/I underlines the same point in a larger context:

the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those

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27 Geneva Convention (I), supra note 3, at 461; Geneva Convention (II), *ibid.*, 487; Geneva Convention (III), *ibid.*, 512; Geneva Convention (IV), *ibid.*, 580.


29 *Commentary, I Geneva Convention*, supra note 4, at 27.
instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.  

This clause should be read as applicable to LOIAC as a whole.

(b) **Inequality in Military Capabilities**

18. The equality of Belligerent Parties before LOIAC is also not dovetailed to their respective military capabilities. Occasionally, scholars raise the question of whether a departure from the fundamental principle of equal application of LOIAC to all Belligerent Parties ‘is warranted on the basis of disparities in power and capabilities’.  

The argument put forward is that, given a built-in asymmetry between the opposing armed forces in many an IAC – one Belligerent Party armed to the teeth with advanced weapons while its adversary is fighting with less effective means of warfare – the technologically impaired antagonist ought to get (as it were) a moral dispensation to abstain from following the tortuous path of LOIAC. The asymmetric warfare argument is designed to bolster ‘an enemy who seeks to gain an otherwise impossible military parity through exploitation of a deliberate disregard for humanitarian law’. The allegation is that, in order to survive, the weaker side in an IAC has no other choice but to resort to ordinarily unlawful methods, e.g., by screening military operations with civilian ‘human shields’ (see infra 607 et seq.) or using ‘suicide bombers’ (see infra 146).

19. This line of reasoning completely misses the mark both factually and legally. Historically, almost all IACs have been – in one sense or another – asymmetrical in nature (paradigmatically, when one side is a land-power while its opponent is a sea-power). As for technological imbalance, it does not necessarily portend defeat in battle: what the underdog has to do is look for lawful ruses and stratagems that overcome ostensible deficiencies. All great military leaders have left their mark on history by winning wars against the odds. In any event, there is no connection between military capabilities and legal obligations, and no concessions are made by LOIAC to any Belligerent Party on the ground that it lacks martial strength. LOIAC does not bestow on a ‘have-not’ Belligerent Party a prerogative to ignore the law vis-à-vis a ‘have’ enemy. Whatever the military discrepancy between Belligerent Parties is, and whether or not it can be surmounted in practice, LOIAC posits their equality before the law. That equality is the foundation stone of LOIAC.

(c) **The Issue of Reciprocity**

20. Whenever the norms of LOIAC are materially breached, the question arises whether the aggrieved Belligerent Party can regard itself as absolved

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30 AP/I, supra note 10, at 715.
from observing LOIAC by virtue of reciprocity. It is noteworthy that Article 60 of the 1969 Vienna Convention on the Law of Treaties – which (in Paragraphs 1 to 3) allows termination or suspension of the operation of a treaty as a consequence of its material breach – proclaims in Paragraph 5:

Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.33

21. The drafters of Article 60(5) of the Vienna Convention had in mind chiefly the 1949 Geneva Conventions.34 The customary standing of Article 60(5) may be inferred from the Advisory Opinion on Namibia, rendered by the International Court of Justice (ICJ) in 1971 (shortly after the adoption of the Vienna Convention),35 and most scholars accept it as such.36 Still, there are those who regard the proposition as ‘dubious’,37 and others who claim that Article 60(5) was ‘an innovation of the Conference’ that drew up the Vienna Convention.38

22. The Vienna Convention is subject to a non-retroactivity clause,39 and consequently the ICRC 2016 Commentary on Geneva Convention (I) states that Article 60(5) ‘does not apply retroactively to Article 46 of the First Convention’ (which prohibits reprisals against the wounded and sick, etc.; see infra 1046).40 Nevertheless, if a treaty provision reflects pre-existing customary international law, non-retroactivity fades into insignificance. Besides, Article 60(5) is clearly rooted in a presupposition that – regardless of the time of their adoption – humanitarian treaty obligations are unconditional and not subject to reciprocity.41

23. As noted (supra 16), Common Article 1 of the Geneva Conventions imposes an obligation to respect the Conventions ‘in all circumstances’. The 2016 ICRC Commentary propounds that these words ‘support the non-reciprocal nature of the Conventions, which bind each High Contracting

38 M. Gomaa, Suspension or Termination of Treaties on Grounds of Breach 107 (1996). But see ibid., 113.
40 Commentary on the First Geneva Convention, supra note 5, at 978.
Party regardless of whether the other Parties observe their obligations’. There is no doubt that there has been a marked erosion in the permissible role of reciprocity in LOIAC.  

24. While numerous belligerent reprisals are expressly forbidden by humanitarian treaty law spearheaded by the Geneva Conventions (see infra 1046 et seq.), certain belligerent reprisals are not perturbed by any treaty injunction and thereby remain lawful under customary LOIAC (subject to rigorous conditions; see infra 1050–1). As long as some belligerent reprisals continue to be lawful, even in prescribed circumstances, they have to be acknowledged as an exception to a general principle of non-reciprocity in the application of LOIAC. In deterring further breaches of LOIAC, belligerent reprisals are aimed at restoring parity between the Belligerent Parties.

III. The Two Driving Forces

25. There are two driving forces energizing the motion of LOIAC. These are: (i) military necessity and, moving largely in the opposite direction, (ii) humanitarian considerations.

A. Military Necessity

26. Military necessity lubricates the wheels of LOIAC. When new LOIAC treaty norms are crafted, the framers cannot be oblivious to the exigencies of war impelling each Belligerent Party to take the steps requisite to engaging the enemy and defeating it. Military necessity is the cause that sets in motion the measures taken towards the effect of gaining a military advantage over the enemy in the course of the IAC, which is to say that there must be a reasonable connection between those measures and the goal of ultimate victory. All action taken in the name of military necessity in an IAC must be leveraged to gaining a military advantage (on military advantage, see infra 342 et seq).

42 Commentary on the First Geneva Convention, supra note 5, at 62.
44 See Commentary on the First Geneva Convention, supra note 5, at 62.
46 It has been proposed to label these two driving forces as the pillars of LOIAC (see E. Winter, ‘Pillars not Principles: The Status of Humanity and Military Necessity in the Law of Armed Conflict’, 25 JCSL 1–31 (2020)). But the term ‘pillars’ may be misleading here, inasmuch as military necessity and humanitarian considerations tend to offset and counterbalance each other.
27. Three caveats are in order:

(i) Military necessity has to be gauged in terms of the objective needs of the warring State, and it is not to be confused with the subjective whim or caprice of an individual soldier (whatever his rank).

(ii) Legally speaking, the existence of military necessity to pursue a particular mode of action does not settle the matter: military necessity is not the sole catalyst of LOIAC (see infra 28). Consequently, admissibility of military necessity as an excuse for action has to be appraised on a norm-by-norm basis.

(iii) Even when openly admitted as an exception to a particular LOIAC injunction (see infra 35 with respect to destruction of property), military necessity must be dissociated from wanton acts (see infra 1035) that have no operational rhyme or reason.

B. Humanitarian Considerations

28. If military necessity were the sole beacon to guide the path of armed forces in wartime, no meaningful constraints would have been imposed on the freedom of action of Belligerent Parties. The likely result would have been a reversion to the outdated adage à la guerre comme à la guerre, negating the major premise that the choice of means and methods of warfare is not unlimited (see supra 12). But the determination of what action or inaction is permissible in an IAC does not rest on the demands of military necessity alone. There are also countervailing humanitarian considerations – shaped by a global Zeitgeist – that affect the general practice of States and goad the drafters of treaties (for an illustration, see infra 263–4).

29. Just as military necessity cannot be the sole guideline in wartime, humanitarian considerations – inspiring and instrumental as they are – cannot monopolize the configuration of LOIAC. If benevolent humanitarianism were the only factor to be weighed in hostilities, war would have entailed no bloodshed, no human suffering and no destruction of property; in short, war would not be war.

C. The Combination of the Two Driving Forces

30. In some rare instances, military necessity and humanitarian considerations practically converge. Thus, wanton destruction of property (see supra 27 (iii)) is condoned neither by humanitarian considerations nor by military necessity. But ordinarily LOIAC faces a stark choice between following the directives of either military necessity or humanitarianism. The normative solution is generally produced by a subtle equilibrium between these two diametrically opposed stimulants. By following an in-between road, LOIAC
allows Belligerent Parties much leeway (in keeping with the demands of military necessity) and nevertheless curbs their freedom of action (in the name of humanitarianism). The furnace in which all LOIAC norms are forged is stoked — in the words of an Introductory Clause to the St Petersburg Declaration of 1868 — by the impulse to establish when, and to what extent, ‘the necessities of war ought to yield to the requirements of humanity’. 48

31. To further reiterate the language of the same St Petersburg Declaration (quoted infra 230), the paramount goal of LOIAC, is ‘alleviating as much as possible the calamities of war’. The thrust is not absolute elimination of the ‘calamities of war’ (an aim that would manifestly be utopian), but relief from the tribulations of war ‘as much as possible’ bearing in mind that war is fought to be won. The St Petersburg dictum is closely linked to the major premise that the right of Belligerent Parties to choose means and methods of warfare is not unlimited (supra 12).

32. LOIAC amounts to a checks-and-balances system, aimed at minimizing human suffering without undermining the effectiveness of military operations. Military commanders are the first to appreciate the importance of avoiding pointless injury or destruction. Interestingly, the St Petersburg Declaration was drawn up by an international conference attended solely by military men. 49 The input of military experts to all subsequent landmark treaties regulating the conduct of hostilities has been enormous. As for customary international law, it is wrought in the crucible of State practice, predominantly through the actual conduct of armed forces during hostilities and the edicts of military manuals.

33. Every single norm of LOIAC is moulded by a parallelogram of forces, working out a compromise formula between military necessity and humanitarian considerations. While the outlines of the compromise vary from one LOIAC norm to another, it can be categorically stated that no part of LOIAC overlooks military necessity, just as no part of LOIAC loses sight of humanitarian considerations. All segments of this body of law are animated by a pragmatic (as distinct from a purely idealistic) approach to armed conflict.

34. An American Military Tribunal, in the ‘Subsequent Proceedings’ at Nuremberg, pronounced in the Hostage case of 1948:

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. 50

48 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868, Laws of Armed Conflicts 91, 92.
The pivotal words here are: ‘subject to the laws of war’. A Belligerent Party is entitled to do whatever is dictated by military necessity in order to win the war, provided that the act does not exceed the bounds of lawfulness set by LOIAC. This implies tangible operational latitude, but not lack of restraint. The requirements of military necessity are constantly sacrificed by Governments (pressed by public opinion) at the altar of humanitarianism.

D. Military Necessity as a Legal Justification

35. Often, when LOIAC is breached, the individual perpetrator invokes ‘military necessity’ as a justification for his acts. This is an admissible excuse only if the LOIAC prohibition of the act contains a built-in, overtly stated, exception of military necessity. The template is Hague Regulation 23(g) of 1899/1907, which forbids:

To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.\(^{51}\)

What the text signifies is that destruction of property in wartime is not illicit if justified by military necessity. Of course, that excludes destruction carried out wantonly (see supra 27 (iii), infra 1035). Again, in the words of the Hostage Judgment:

The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.\(^{52}\)

36. Hague Regulation 23(g) unbolts the door to demands of military necessity. But that is not a pervasive feature of LOIAC. Once LOIAC bans a particular conduct without hedging the prohibition with explicit limitative words concerning military necessity, the norm has to be obeyed in an unadulterated fashion. The working assumption must be that the framers of the norm have already weighed the demands of military necessity and (for humanitarian reasons) have rejected them as a valid exception. In these circumstances, it is impossible to rely on military necessity as an excuse for deviating from the norm. Otherwise, the whole yarn of LOIAC would unravel. Unqualified norms of LOIAC must be obeyed in an unqualified manner, even if military necessity militates in another direction. To quote once more the Hostage Judgment, ‘[m]ilitary necessity or expediency do not justify a violation of positive rules’.\(^{53}\)

\(^{51}\) Hague Regulations, supra note 16, at 235.

\(^{52}\) Hostage case, supra note 50, at 1253–4.

\(^{53}\) Ibid., 1256.
37. A good example of LOIAC rejecting military necessity in favour of humanitarian considerations pertains to the capture of prisoners of war (POW). Under Geneva Convention (III) of 1949, POW in custody must not be put to death;\(^{54}\) and, as soon as possible after capture, they have to be evacuated to camps situated in an area far from the combat zone.\(^{55}\) As a rule, this will be done by assigning an escort to carry out the process of evacuation, while ensuring that the POW will not be able to escape en route. A special problem arises, however, when enemy combatants are captured by a small raiding party – e.g., commandos or Special Forces – unable to detach guards for the proper evacuation of POW to the rear and unwilling to put at risk mission accomplishment (by being encumbered with the POW). Can the captured enemy combatants be shot by dint of military necessity?

38. The LOIAC answer to the query is a flat-out negative. Article 41(3) of AP/I addresses the issue forthrightly, promulgating that – in these unusual conditions – the persons entitled to protection as POW must be released.\(^{56}\) Long before the drafting of AP/I, customary international law has proscribed the killing of POW, ‘even in cases of extreme necessity’ when they slow up military movements or weaken the fighting force by requiring an escort.\(^{57}\) Military necessity cannot override the protection guaranteed to POW, since it has already been weighed and factored into the prohibition.\(^{58}\) The tension between military necessity and humanitarian considerations has been resolved in an option of either safeguarding the POW in custody or releasing them.

39. In Hague Regulation 23(g), as in some other texts, the term ‘military necessity’ is conjoined with the adverb ‘imperatively’. The value added of this modifier is ‘less than wholly clear’,\(^{59}\) especially when it is compared to similar phrases – such as the adjectives ‘absolute’,\(^{60}\) ‘urgent’\(^{61}\) or ‘unavoidable’\(^{62}\) – that are also in common use in diverse instruments adverting to military necessity. It is ‘difficult to discern any substantial difference between these expressions based on state practice’.\(^{63}\) Each of them is devised to accentuate

\(^{54}\) Geneva Convention (III), supra note 3, at 517 (Article 13, First Paragraph).
\(^{55}\) Ibid., 519 (Article 19, First Paragraph).
\(^{56}\) AP/I, supra note 10, at 731.
\(^{60}\) See Hague Regulation 54 of 1907, supra note 16, at 80.
\(^{61}\) See Articles 33–4 of Geneva Convention (I), supra note 3, at 472.
that military necessity has to be mulled over attentively and not adduced flippantly.\textsuperscript{64} But this is true even when the qualifying adjective/adverb is missing from the text.

IV. The Two Cardinal Principles

A. Distinction and the Prohibition of Unnecessary Suffering

40. From the major premise that the right of Belligerent Parties to choose the means and methods of injuring the enemy is not unlimited (see supra 12) flow two ‘cardinal principles contained in the texts constituting the fabric of humanitarian law’, as affirmed by the ICJ in its 1996 Advisory Opinion on Nuclear Weapons.\textsuperscript{65} The ICJ viewed the two cardinal principles as ‘intransgressible’ under customary international law.\textsuperscript{66} The adjective ‘intransgressible’ seems to imply that ‘no circumstances would justify any deviation’ from the principle, but the ICJ refrained from using the language of \textit{jus cogens} (see infra 61).\textsuperscript{67}

41. The first cardinal principle, in the words of the ICJ, ‘is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants’; whereas ‘according to the second principle, it is prohibited to cause unnecessary suffering to combatants’.\textsuperscript{68} We shall dwell upon the two cardinal principles in more detail \textit{infra} 125 \textit{et seq.}, 227 \textit{et seq.}.

B. The Martens Clause

42. In the context of the two cardinal principles, the ICJ cited the Martens Clause.\textsuperscript{69} This Clause was the brainchild of F. Martens, a leading international lawyer who served as a Russian Delegate to both Hague Peace Conferences of 1899/1907. It was first incorporated in the Preamble to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land.\textsuperscript{70} Imprints of the Martens Clause are recognizable

\textsuperscript{66} \textit{Ibid.}
\textsuperscript{68} Advisory Opinion on \textit{Nuclear Weapons}, supra note 65, at 257. \textsuperscript{69} \textit{Ibid.}
\textsuperscript{70} Hague Convention (II) with Respect to the Laws and Customs of War on Land, 1899, and Hague Convention (IV) Concerning the Laws and Customs of War on Land, 1907, \textit{Hague Peace Conferences} 207, 209–11.
elsewhere in the LOIAC treaty law (including the Geneva Conventions of 1949). A ‘modern version of that clause’, as the ICJ put it, is to be found in Article 1(2) of AP/I:

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.

The Martens Clause has been reiterated in the Preamble to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCCW). The ‘role of public conscience in furthering the principles of humanity’ is stressed in the Preamble to the Dublin Convention on Cluster Munitions (CCM).

43. The Martens Clause refers to customary law, and this is self-evident. But the core of the Martens Clause is an allusion to the ‘principles of humanity’ and to ‘the dictates of public conscience’. In the Corfu Channel case of 1949, the ICJ used the phrase ‘elementary considerations of humanity’, which has overtones of the Martens Clause. In the Advisory Opinion on Nuclear Weapons, the ICJ said about the Martens Clause that its ‘continuing existence and applicability is not to be doubted’.

44. The ‘principles of humanity’ and ‘the dictates of public conscience’ may, of course, foster the evolution of LOIAC. In that respect, one can lean back on the St Petersburg Declaration’s mention of ‘the requirements of humanity’ to which ‘the necessities of war ought to yield’ (supra 30). That said, the ‘principles of humanity’ and the ‘dictates of public conscience’ do not constitute strata of LOIAC (on these strata, see infra 51 et seq.).

45. It is notable that in the Nuclear Weapons Advisory Opinion, ‘the yardsticks used by the Court’ were the LOIAC cardinal principles of distinction and prohibition of unnecessary suffering, rather than ‘principles of humanity and dictates of public conscience’. General revulsion in the face of a

72 Advisory Opinion on Nuclear Weapons, supra note 65, at 257.
73 AP/I, supra note 10, at 715.
76 Corfu Channel case (Merits), [1949] ICJ Rep. 4, 22.
77 Advisory Opinion on Nuclear Weapons, supra note 65, at 260.
particular conduct during hostilities does not create ‘an independent legal criterion’ regulating means or methods of warfare.\textsuperscript{79} Even when the ‘principles of humanity’ and the ‘dictates of public conscience’ are referred to in so many words, they are generally interpreted as alluding to concrete LOAC norms derived from customary international law. For an illustration, see the 2007 ICTY Trial Chamber’s \textit{Martić} Judgment in the context of belligerent reprisals \textit{(infra 1051, condition (vii))}.

46. The vague concepts of the ‘principles of humanity’ and the ‘dictates of public conscience’ have been the subject of various exploratory scholarly searches concerning their significance.\textsuperscript{80} Some commentators dislike a restrictive, ‘narrowly positivistic’, approach to the Martens Clause.\textsuperscript{81} But the present writer detects no empirical evidence that the ‘principles of humanity’ or the ‘dictates of public conscience’ are relied upon in State practice independently of customary international law.\textsuperscript{82}

47. In its 2000 Judgment in the \textit{Kupreškić} case, a Trial Chamber of the ICTY conceded that the Martens Clause ‘may not be taken to mean that the “principles of humanity” and the “dictates of public conscience” have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice’.\textsuperscript{83} Still, the Chamber arrived at the following conclusion:

As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul \textit{per se} of the loose prescriptions of \ldots \textit{[AP/I]} (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law.\textsuperscript{84}

\textsuperscript{79} P.A. Robblee, ‘The Legitimacy of Modern Conventional Weaponry’, 71 \textit{Mil.LR} 95, 125 (1976).
\textsuperscript{81} See M. Salter, ‘Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause’, 17 \textit{JCSL} 403, 413 (2012).
\textsuperscript{83} \textit{Prosecutor v. Kupreškić et al.} (ICTY, Trial Chamber, 2000), Paragraph 525.
\textsuperscript{84} \textit{Ibid.}, Paragraph 526.
48. The proposition that a cluster of lawful acts (however grey their shade) may have an unlawful cumulative effect is quite startling. No wonder that it has not attracted much support. As the Final Report to the ICTY Prosecutor following the Kosovo Campaign clearly sets forth:

where individual (and legitimate) attacks on military objectives are concerned, the mere \textit{cumulation} of such instances, all of which are deemed to have been lawful, cannot \textit{ipso facto} be said to amount to a crime.

It may as well be added that the \textit{Kupreškić} Judgment is flawed not only in this respect (see \textit{infra} 1057). Indeed, the Appeals Chamber found that no less than a ‘miscarriage of justice’ had occurred in the case (on the facts) and some convictions were therefore reversed.

C. Neutrality

49. Together with the two cardinal principles applicable in IACs, the ICJ Advisory Opinion on \textit{Nuclear Weapons} identified a third fundamental principle of neutrality. At bottom, neutrality means that the States engaged in an IAC must respect the non-belligerent status of those countries that stay out of the armed conflict.

50. Blatantly, the exercise of some belligerent rights – particularly blockade and contraband control in the high seas (see \textit{infra} 901 et seq., \textit{infra} 1028 et seq.) – may be inimical to the interests of neutral countries. But the main thrust of the principle of neutrality is that, in the language of Article 1 of Hague Convention (V) of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in War on Land, ‘[t]he territory of neutral Powers is inviolable’. Consequently, Belligerent Parties are not allowed to conduct hostilities in neutral territory (covering land, waters and airspace). Neutral waters consist of internal waters, the territorial sea and archipelagic waters. They do not include the exclusive economic zone (where only due regard is owed to neutral installations; see \textit{infra} 428). Rights of transit passage by belligerent warships through, under or over international straits and neutral archipelagic sea lanes are retained in wartime.

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V. The Strata of the Law

51. The principal strata of LOIAC (as of other branches of international law) are custom and treaties. Usually, these strata are alluded to as the ‘sources’ of that law. Common as it is, the term ‘source’ – literally associated with a fountainhead from which a stream of water issues – does not do justice to the role that custom and treaties play within the international legal system. Rather than sources, custom and treaties are the very streams of international law (flowing either together or apart from each other). The idiom ‘strata of international law’ conveys the idea that custom and treaties are international law.91

A. Customary International Law

52. In large measure, the rules governing the conduct of hostilities have consolidated over the decades as customary international law. Norms of customary international law are attested by the ‘evidence of a general practice accepted as law’ (to repeat the well-known definition appearing in Article 38 (1)(b) of the Statute of the ICJ).92 Two constituent elements are condensed here, one objective and the other subjective: the objective component of the definition relates to general practice; and the subjective element is telescoped in the words ‘accepted as law’.

53. As for the objective ingredient of the definition of custom, it is ‘axiomatic’ – to quote the ICJ in the Libya/Malta Continental Shelf case of 1985 – that the general practice in question consists essentially of the practice of States.93 The subjective factor is often verbalized in the Latin expression opinio juris sive necessitatis, meaning (in the words of the ICJ, in the North Sea Continental Shelf Judgment of 1969) ‘a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’.94 Opinio juris is of vital importance bearing in mind that, in some instances, States comport themselves in a specific manner while maintaining that this is ‘done as “best practice” rather than out of a sense of legal obligation’95 (see infra 322).

54. The practice of States is comprised of the acts of commission or omission of all three branches of Government: executive, judicial and

93 Case Concerning the Continental Shelf (Libya/Malta), [1985] ICJ Rep. 13, 29.
legislative. Time and again, there is a mismatch between the acts of these branches. Hence, in the Tadić Decision, the Appeals Chamber of the ICTY pointed out that – in appraising State practice for the formation of customary LOIAC norms – ‘reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions’, rather than merely on the conduct of troops in the field (which may be unclear and perhaps pursued in disregard of the law).96

55. The reference to a ‘general’ practice of States calls for some brief remarks:

(i) ‘General’ is not to be confused with universal. In other words, not every State necessarily participates (explicitly or tacitly) in the general practice that is the bedrock of custom.97 As the ILC (International Law Commission) asserted, in its 2018 Draft Conclusions on Identification of Customary International Law, to count as ‘general’ the relevant practice has to be ‘sufficiently widespread and representative, as well as consistent’.98

(ii) Yet, it is not enough that State practice is ‘widespread and representative’: it must include – in the words of the ICJ – the practice of selected States ‘whose interests are specially affected’.99 The reason why the practice of ‘specially affected’ States is of such import becomes readily apparent, e.g., in naval law (considering that not every State is a significant participant in maritime affairs) or the law relating to outer space (where an even smaller portion of the international community is playing any role at all).

(iii) Although not every State contributes to the development of ‘a general practice accepted as law’, once a norm has solidified as a part of general customary international law, it is binding on all States, save only any ‘persistent objector’ that has adamantly opposed the new norm from the outset.100

(iv) When practice seems to develop in a new direction, much depends on the reaction of the international community. Silence can often be construed as acquiescence. But if – as happened in the course of the Russian–Ukrainian IAC of 2022 – the overwhelming majority of States repudiates and condemns dissonant modes of behaviour, these should be considered breaches of existing law rather than building-blocks of a new custom.

96 Prosecutor v. Tadić, supra note 2, at 63.
98 Draft Conclusions on Identification of Customary International Law, Report of the ILC, 70th Session (UN Doc. A/73/10, 2018), 76, 77 (Conclusion 8).
99 North Sea Continental Shelf cases, supra note 94, at 43.
100 See Dinstein, supra note 91, at 285–7.
Customary international law is not always general in scope. Some customary law is ‘particular’ in the sense that it has developed regionally or locally, and it applies only among a limited number of relevant States.\(^{101}\) Exceptionally, the application of customary norms may even be confined to the bilateral relations between two States.\(^{102}\) However, in this book, whenever a reference is made to customary international law, the premise will be that it is of a general nature and that it creates obligations for all States.

**B. Treaty Law**

56. A raft of LOIAC rules have been engraved in many multilateral treaties (see *infra* 72 *et seq*.). When taken together, these treaties contain much of the law regulating the conduct of hostilities. However, no single treaty – and no series of treaties – purports to extend across the whole span of LOIAC. As a result, customary law remains of immense significance in armed conflicts.

57. A treaty by whatever designation (be it Convention, Charter, Protocol, Statute, Declaration or any other appellation) is an agreement concluded between States in written form and governed by international law.\(^{103}\) A treaty may be multilateral or bilateral, but it is binding only on Contracting Parties: the legal nexus between States Parties to a treaty is derived from their consent to be bound by it (*ex consensu advenit vinculum*).\(^{104}\)

58. When a State expresses its consent to be bound by a treaty, it may add a reservation (however named) excluding or modifying the legal effect of certain provisions of the treaty in their application to itself.\(^{105}\) Some reservations are admittedly impermissible, either because they are prohibited by the treaty (which may allow no reservations at all or only specified ones) or because they are deemed incompatible with its object and purpose.\(^{106}\) But permissible reservations to treaties are abundant, and we shall refer in this volume to quite a few of them.

59. The bifurcation of LOIAC into treaty law and customary law does not preclude interaction between the two separate strata. The interaction exists on a

\(^{101}\) See *Draft Conclusions on Identification of Customary International Law*, *supra* note 98, at 79 (Conclusion 16(1)).

\(^{102}\) The construct of bilateral customary international law was confirmed by the ICJ in *Case Concerning Right of Passage over Indian Territory (Merits)*, [1960] *ICJ Rep.* 6, 39.

\(^{103}\) See Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties, *supra* note 33, at 141.


\(^{105}\) For a definition of the term ‘reservation’, see Article 2(1)(d) of the Vienna Convention on the Law of Treaties, *supra* note 33, at 141.

\(^{106}\) See *Guide to Practice on Reservations to Treaties*, adopted by the ILC in 2011, [2011] *II(3) ILC Yearbook* 23, 29 (3.1).
number of levels. First off, the framers of some treaty provisions may seek to attain a pure codification, reflecting pre-existing customary international law. That is to say, the authors may wish to give customary international law the imprimatur of *lex scripta* without altering its substance. There are also instances in which a treaty embodies customary rules that were only *in statu nascendi* at the starting point of drafting the written text but have crystallized as binding custom by the time of the final adoption of the treaty.\(^{107}\)

60. Whether a codification treaty enshrines mature customary norms or mirrors newly formed customary rules that have emerged in the very process of treaty making, it is for the international community as a whole – and not just the Contracting Parties – to acknowledge that the treaty provisions correspond to customary law. Once that correspondence is recognized, non-Contracting Parties too are bound by the norms encapsulated in the treaty. Not because these norms form part of a treaty (which, as such, binds solely Contracting Parties) but because they articulate customary international law.

61. Some treaty texts are aimed at creating specialized law in the relations between the Contracting Parties *inter se*, openly diverging from general international law. As a rule, States are at liberty to adopt treaties as they deem fit. But their contractual freedom is not unlimited. In case of a conflict between ordinary treaty obligations and obligations under the UN Charter, the Charter obligations will prevail (as per Article 103 of the Charter).\(^{108}\) Moreover, if there exists a conflict between a treaty and ‘a peremptory norm of international law’ (*jus cogens*), the treaty is or becomes void.\(^{109}\) There are only a few norms which are undeniably peremptory in nature (see *infra* 87, 106), but when a given norm acquires that hallmark its modification is hard to accomplish.\(^{110}\)

62. Assuming that a customary norm is not peremptory – but is merely *jus dispositivum* (as most customary norms are) – a treaty may effect a departure from that norm, it being understood that the treaty provisions will apply exclusively in the relations between Contracting States *inter se*. Then, one of two things can transpire:

(i) One option is that a long-lasting gap will be formed between the legal regime established by the Contracting Parties to a treaty and the customary legal regime, which will continue to regulate the relations between non-Contracting Parties as well as between Contracting and non-Contracting

\(^{107}\) On the difference between pure codification and the crystallization of custom in a treaty, see Dinstein, *supra* note 91, at 357 *et seq.*

\(^{108}\) *Charter of the United Nations*, *supra* note 19, at 361.


Parties. For a most glaring illustration in the domain of LOIAC, see the comments infra 79–80 about the ‘Great Schism’.

(ii) An obverse possibility is that the treaty may gradually gain momentum even among non-Contracting Parties. As a result, the general practice of States may gravitate towards the (originally innovative) treaty provisions, and these will generate new customary international law (at variance with the custom existing when the treaty was first formulated). For a striking example of new LOIAC custom generated by treaty, see the case of the Hague Regulations mentioned infra 73.

63. In every IAC, it is indispensable to determine whether a Belligerent Party whose conduct is at issue has expressed its consent to be bound by any innovative relevant treaty. But that is not enough. A treaty may include a general participation clause (clausula si omnes), whereby its provisions apply ‘only if all the belligerents are parties to the Convention’ (the quotation is from Article 2 of Hague Convention (IV) of 1907). In such a setting, if any Belligerent Party in a specific IAC declines to be a Contracting Party to a treaty, the instrument would become inoperative even between other Belligerent Parties (notwithstanding the fact that they are bound by the treaty). The purpose of a general participation clause is to avoid a situation where two legal regimes coexist in a single war fought by coalitions of States. But ‘[t]he clause may seriously impair the effectiveness of conventional obligations as a treaty will not apply whenever a single belligerent, regardless of its significance, is not party to it’.

64. By contrast, a LOIAC treaty may stipulate that – if one of the Belligerent States is not a Contracting Party – the others ‘shall remain bound by it in their mutual relations’ (the quotation is from Common Article 2, Third Paragraph, of the four Geneva Conventions of 1949). Evidently, such a measure will have no practical repercussions in a bilateral armed conflict where one of the Belligerent States is not a Contracting Party to the treaty (thus leaving no room for any remaining mutual treaty relations). Even in a widespread IAC, the treaty cannot be truly operative unless at least two opposing Belligerent States are Contracting Parties, so that they are capable of applying the treaty ‘in their mutual relations’.

65. If a treaty is declaratory of customary international law, it is immaterial whether any Belligerent State is a Contracting Party to it. Nor does it matter if

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111 On custom generated by treaty, see Dinstein, supra note 91, at 371 et seq.
113 See P. Gautier, ‘General Participation Clause (Clausula si omnes)’, IV MPEPIL 368, 369.
114 Geneva Convention (I), supra note 3, at 461; Geneva Convention (II), ibid., 487; Geneva Convention (III), ibid., 512; Geneva Convention (IV), ibid., 580.
such a treaty is legally in force or if it has a general participation clause. Irrespective of the juridical status and reach of the treaty text *per se*, the general obligations of customary international law (as reflected in the instrument) are binding on every warring State. These obligations must be complied with unstintingly, not because they are laid down in the treaty but because they are independently embedded in customary international law.

66. Any treaty promulgating rules of LOIAC would carefully be consulted by all Belligerent States (including non-Contracting Parties), as well as by international fora and tribunals, in order to determine whether or not it mirrors customary international law. Arriving at the conclusion that the text matches custom may be alluring in light of the relative clarity of the written word. For all that, from the standpoint of non-Contracting Parties, the dominant consideration must be evidence that treaty provisions coincide with the general practice of States accepted as law. A non-Contracting Party that is unhappy with the drift of a treaty will inevitably contest the customary character of some or all of its clauses. Even when a treaty perspicuously enshrines basic tenets of customary international law, the text may be challenged on the ground that it adds embellishments to the pre-existing law by sharpening the image (lending it, as it were, higher resolution) and often polishing the edges of the picture.

C. The Semantics

67. As far as semantics are concerned, the present writer has opted to employ the umbrella term ‘Law of International Armed Conflict’ – and its acronym LOIAC – to describe the *jus in bello* regulating the conduct of hostilities, whether in the form of treaty or customary law. The designation recurrent in the past used to be ‘The Laws of Warfare’ (a translation from the Latin trope *jus in bello*) has largely run out of favour, inasmuch as the same body of law is actually applicable both in full-fledged wars and in incidents ‘short of war’ (see *supra* 1).

68. Another popular coinage, having the stamp of approval of the ICJ (see *infra* 78), is ‘International Humanitarian Law’ (IHL). The present writer’s preference for LOIAC over IHL must not be misconstrued as having any consequences concerning the substance of the law.115 The expressions LOIAC and IHL are synonymous, and the choice between them is purely lexical. The reason why LOIAC is deemed a better linguistic fit than IHL is twofold:

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115 It is wrong to suggest (as done by D. Luban, ‘Military Necessity and the Cultures of Military Law’, 26 *LJIL* 315, 316 (2013)) that there is a LOIAC version versus an IHL version of the laws of war.
(i) The emphasis on the adjective ‘humanitarian’ in IHL tends to create the false impression that all the rules governing the conduct of hostilities are — and have to be — truly humanitarian in nature, whereas in fact some of them reflect the countervailing constraints of military necessity (see supra 26 et seq.).

(ii) The use of the adjective ‘humanitarian’ occasionally misleads the uninitiated to confuse IHL with human rights law (see infra 88 et seq.).

D. LOIAC and Rules of Engagement

69. LOIAC consists of treaty or customary international legal norms that are binding on Belligerent Parties. LOIAC must be differentiated from Rules of Engagement (ROE). ROE are issued as a guide to the armed forces of a State (sometimes separately by diverse commands), a military alliance (such as the North Atlantic Treaty Organization (NATO)) or an international organization (such as the UN). ROE can be apposite to a particular military operation or outlined for wider application. Both the San Remo Institute and the US Naval War College published Handbooks on Rules of Engagement reflecting the unclassified ‘best practice’ of many States.116 But it must be taken into account that many ROE are prone to be classified.

70. ‘ROE may be framed to restrict certain actions or they may permit actions to the full extent allowable under international law.’117 Frequently, a Belligerent Party – animated by policy reasons of its own – may opt to set down ROE instructing its armed forces not to employ some destructive weapons the use of which is lawful under LOIAC (see Chapter 3), to avoid attacking specific lawful targets (see Chapter 4) or not to resort to given lawful methods of warfare (see Chapter 9). Notably, ROE ‘procedures and requirements for vetting and validation of targets’ may apply ‘mission specific requirements that are stricter’ than those prescribed by LOIAC.118 As long as a Belligerent Party is acting within the purview of LOIAC, it may at its discretion indulge in a large degree of self-restraint that may redound to its credit both at home and abroad. However, under no circumstances can any armed forces – through ROE or otherwise – be authorized to commit acts that are incompatible with the international obligations of a Belligerent Party. If ROE approved by a military alliance (which is engaged in a multinational operation) are not attuned to the obligations of one of the Member States, that

State may have to come up with ‘caveats’ indicating that its national contingents cannot exceed the framework of binding legal undertakings.\footnote{See M. Zwanenburg, ‘International Humanitarian Law Interoperability in Multinational Operations’, 891–2 IRRC 681, 702 (2013).}

VI. \textbf{The Principal General LOIAC Treaties}

\textit{A. The Origins}

71. The drafting of general treaties concerning the conduct of hostilities in IACs goes back to the mid-nineteenth century. The earliest instrument is the Paris Declaration of 1856 Respecting Maritime Law (adopted at the end of the Crimean War).\footnote{Paris Declaration Respecting Maritime Law, 1856, \textit{Laws of Armed Conflicts} 1055.} An important later landmark was the aforementioned \textit{(supra} 30–2, 44) St Petersbourg Declaration of 1868 Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight. Notwithstanding its narrowly bordered theme, the St Petersbourg Declaration broadly proclaims in the Preamble that ‘the progress of civilization should have the effect of alleviating as much as possible the calamities of war’ \textit{(supra 31, infra} 230).

\textit{B. ‘Hague Law’}

72. The two main series of general treaties governing LOIAC have traditionally been referred to as ‘Hague Law’ and ‘Geneva Law’.\footnote{See H.-P. Gasser and D. Thürer, ‘Geneva Conventions I–IV’, IV \textit{MPEPIL} 386, 387–8.} ‘Hague Law’ is composed of the Hague Conventions of 1899 and 1907 (which had some progenies in earlier drafts, primarily the Brussels Declaration of 1874\footnote{Brussels Project of an International Declaration Concerning the Laws and Customs of War, 1874, \textit{Laws of Armed Conflicts} 23.}). These Conventions, adopted by the two Hague Peace Conferences, laid down the law for multiple facets of the conduct of hostilities on land, at sea and even in the air (through the use of balloons). Several texts framed in 1899 were revised in 1907, at which time further instruments were added on. Altogether, six Conventions and Declarations were signed at The Hague in 1899, and no less than fourteen in 1907.\footnote{For the lists of the instruments, see the Final Acts of the two International Peace Conference of 1899 and 1907, \textit{Hague Peace Conferences} 61, 63–5.}

73. Some Hague treaties of 1899/1907 have not stood the test of time and have fallen by the wayside in light of the subsequent practice of States. But other texts have developed a patina of customary international law.
Prominently, the International Military Tribunal (IMT) at Nuremberg held, in 1946, that – although innovative at its genesis, and despite a general participation clause appearing in the instrument (see supra 63) – Hague Convention (IV) of 1907 (including the Regulations attached to it) has acquired over the years the lineaments of custom:

The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But ... by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.124

The International Military Tribunal for the Far East (IMTFE) in Tokyo echoed this ruling in its majority Judgment of 1948:

Although the obligation to observe the provisions of the Convention as a binding treaty may be swept away by operation of the ‘general participation clause’, or otherwise, the Convention remains as good evidence of the customary law of nations.125

C. ‘Geneva Law’

74. ‘Geneva Law’ stands for the Geneva Conventions for the Protection of War Victims, also known as the ‘Red Cross Conventions’. The original Geneva Convention, relating to the wounded in armies in the field, was concluded in 1864126 (with the impetus of the foundation of the Red Cross movement on the initiative of H. Dunant127). It was revised and replaced in 1906,128 and then again in 1929,129 at which time a second Convention on POW was added.130 In 1949, both instruments were superseded by four Conventions for the Protection of War Victims (cited supra 1), dealing with the wounded and sick in armed forces in the field (Geneva Convention (I)); wounded, sick and shipwrecked members of armed forces at sea (Geneva Convention (II)); POW (Geneva Convention (III)); and civilians (Geneva Convention (IV)).

130 Geneva Convention Relative to the Treatment of Prisoners of War, 1929, Laws of Armed Conflicts 421.
D. The Fusion of ‘Hague Law’ and ‘Geneva Law’

75. The impression that ‘Hague Law’ and ‘Geneva Law’ are two separate branches of LOIAC (broadly representing conduct of hostilities versus protection of victims of war) has never been entirely accurate. ‘Hague Law’ and ‘Geneva Law’ have always been intertwined, and a large number of norms have percolated from one string of treaties to the other. Initially, Hague Convention (III) of 1899 adapted to maritime warfare the principles of the original Geneva Convention of 1864. Following the revision of the 1864 Geneva Convention in 1906, Hague Convention (X) of 1907 introduced a new adaptation to maritime warfare based on the revised Geneva text. In 1949, Geneva Convention (II) expressly replaced Hague Convention (X), bringing the subject back to the Geneva fold. Moreover, rules pertaining to POW were first incorporated in Chapter II of the Regulations Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907. Supplementary provisions, in much greater detail, appear in the POW Geneva Convention of 1929, supplanted by Geneva Convention (III) of 1949.

76. The two embroideries of ‘Hague Law’ and ‘Geneva Law’ have never exhausted the tapestry of the treaty law guiding the conduct of hostilities. Numerous other LOIAC treaties have been concluded, some of which – while not associated either with ‘Hague Law’ or with ‘Geneva Law’ – were also drawn up in Geneva or at The Hague. It is worthwhile mentioning in particular three instruments:

(i) In 1925, a Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (cited infra 290), was formulated by a conference held in Geneva under the auspices of the League of Nations.

(ii) In 1954, under the aegis of the United Nations Educational, Scientific and Cultural Organization (UNESCO), a Convention for the Protection of Cultural Property in the Event of Armed Conflict was done at The Hague (CPCP) (cited supra 39). Two Protocols (one contemporaneous and the other emerging much later) have been appended.

132 Hague Convention (X) for the Adaptation of the Principles of the Geneva Convention to Maritime War, 1907, ibid.
133 Geneva Convention (II), supra note 3, at 502 (Article 58).
135 Geneva Convention (III), supra note 3, at 558, explicitly states that it replaces (in the relations between Contracting Parties) the 1929 Convention (Article 134), but it is complementary to Chapter II of the Hague Regulations (Article 135).
In 1980, a conference organized by the UN produced in Geneva the CCCW (cited supra 42). This is a framework instrument to which several substantive Protocols are attached, their roster growing in the following decades.

These and other relevant treaties will be addressed in their proper place in the scheme of this book.

77. Whatever its past merits may have been, the distinction between ‘Hague Law’ and ‘Geneva Law’ became obsolete in 1977, when the Geneva Conventions were supplemented by AP/I (cited supra 8) jointly with another Additional Protocol (AP/II) dealing with non-international armed conflicts (NIACs). AP/I goes beyond the previous bounds of ‘Geneva Law’ – protection of war victims – and deals with key issues directly relating to the actual conduct of hostilities, thus protruding into what used to be considered the reserved domain of ‘Hague Law’.

78. In its 1996 Advisory Opinion on Nuclear Weapons, the ICJ had this to say about ‘Hague Law’ and ‘Geneva Law’:

These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

The expression IHL, as indicated by the Court, is an amalgam of both ‘Hague Law’ and ‘Geneva Law’. In this book, as explained (supra 68), the preferred phrase is LOIAC.

E. The ‘Great Schism’

(a) Controversial Treaties

79. Whereas the four Geneva Conventions have by now gained universal acceptance, in that every State in the world is currently a Contracting Party to them, this is not the case with AP/I. Admittedly, AP/I has been ratified or acceded to by a large majority of States. However, a determined minority, led by the US, has vehemently repudiated salient portions of the instrument. In 1987, the US went out of its way to formally announce that it would not ratify AP/I, since the instrument is ‘fundamentally and irreconcilably flawed’.


137 Advisory Opinion on Nuclear Weapons, supra note 65, at 256.

The international community has thus been split by what may be regarded as a ‘Great Schism’.

80. To be sure, even the US does not dispute every provision of AP/I.139 To the extent that customary international law is embraced in the text, it is binding on all States. A comprehensive study, one of the main objectives of which was to identify those provisions of AP/I that reflect customary international law, was undertaken by the ICRC.140 Unfortunately, the study has toed the line of AP/I in too many instances, thus failing to secure US consent.141 Poignant elements of the controversy shrouding AP/I will be critiqued contextually when specific stipulations are cited in the following chapters.

(b) Legal Interoperability

81. The ‘Great Schism’, aggravated by additional LOIAC treaties that have been rejected by the US and like-minded States, has created thorny problems in the practical application of the law. The ‘Great Schism’ affects not only the relations between friends and foes clashing in an IAC. It also raises questions of legal interoperability in the relations between partners in a combined operation against a common enemy. When Contracting and non-Contracting Parties to AP/I (or a similarly polarizing instrument) fight under the umbrella of a coalition-of-the-willing or a military alliance like NATO, they have to face the reality of different sets of applicable legal obligations. It is consequently noteworthy that Article 21(3) of the CCM – one of the contested treaties – expressly allows Contracting Parties to engage in combined operation, notwithstanding the fact that their non-Contracting allies carry out activities that are prohibited by the treaty text.142 Without such dispensation, joint military operations by Contracting and non-Contracting Parties might have been completely stymied.143 With it, a commander may adhere to a ‘troops to task’ formula by assigning certain missions only to those national contingents that can lawfully execute them.

82. Issues of legal interoperability may emanate not merely from acceptance or rejection of controversial treaty texts. They may be triggered by divergent interpretations of an otherwise accepted text or even of customary LOIAC. All too familiar examples would be the diverse conceptual approaches concerning

139 See ibid.
141 See Joint Letter by the Legal Adviser of the US Department of State and the General Counsel of the Department of Defense to the President of the ICRC, 2006, 46 ILM 511 (2007).
142 CCM, supra note 75, at 369.
‘war-sustaining’ military objectives (see infra 358 et seq.) or direct participation in hostilities (see infra 587 et seq.).

(c) Restatements

83. The ‘Great Schism’ has had a chilling effect inhibiting any current desire to formulate new general LOIAC treaties relating to methods of warfare (in contradistinction to means of warfare; see Chapter 3). But a partial substitute for LOIAC treaties may be found in authoritative – albeit informal – restatements of the law, prepared by international groups of experts in the format of guiding manuals. Such restatements/manuals are supposed to enunciate existing customary law, adding definitions and interpretations, eliminating uncertainties, and introducing methodical systematization. When successful, restatements/manuals – while not endowed with any binding force per se – may influence the future general practice of States and even pave the road perhaps for eventual treaties.

84. There are quite a few restatements/manuals devoted to specific spheres of LOIAC. The ones that will be repeatedly cited in this book are:

(i) The 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, adopted by a group of international lawyers and naval experts convened by the San Remo International Institute of Humanitarian Law. Since then, ‘a considerable number of States’ have incorporated ‘most of the San Remo rules in their respective manuals or instructions for their naval armed forces’. Still, after a quarter of a century’s experience and development, an Update Project has been initiated.

(ii) The 1923 Hague Rules of Air Warfare, drafted by a Commission of Jurists tasked by the 1922 Washington Conference on the Limitation of Armaments. The (non-binding) Hague Rules have left deeply etched marks on the evolution of customary international law, but it is impossible to forget that they were penned in 1923, i.e. at the dawn of military aviation and prior to the exponential growth in importance of air warfare.

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144 See Zwanenburg, supra note 119, at 690–5.
The 2009/10 Manual on International Law Applicable to Air and Missile Warfare, composed by a group of experts sponsored by a Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) on the initiative of Switzerland.\textsuperscript{150}

The 2012 Talinn Manual on the International Law Applicable to Cyber Warfare, prepared by a group of experts at the invitation of NATO.\textsuperscript{151}

The 2019 Oslo Manual on Select Topics of the Law of Armed Conflict, undertaken by a group of experts under the aegis of the Norwegian Ministry of Defence, initially with a view to updating certain aspects of the HPCR Manual and then going beyond the areas of air and missile warfare.\textsuperscript{152}

VII. Special Agreements between Belligerent Parties

Belligerent Parties may adopt in the course of an IAC special agreements relating to the conduct of hostilities between them. General LOIAC treaties commonly encourage Belligerent Parties to conclude special agreements that would secure better protection, e.g., to civilians or the wounded and sick. This can particularly be done through their agreed removal from besieged or encircled areas (see \textit{infra} 892) or the establishment of neutralized zones (see \textit{infra} 427).

If special agreements are concluded between States in written form, and consent to be bound by the texts is expressed in the proper manner, these are treaties in the sense discussed \textit{supra} 57. Yet, some special agreements – pre-eminently, for the collection of the wounded and the dead from a battleground – are signed by field commanders, and (albeit binding) they do not qualify as treaties in the formal sense of the term.\textsuperscript{153}

Not every agreement between Belligerent Parties, even if it is a treaty, will be valid. It must be recalled (see \textit{supra} 61) that a treaty is void if it runs counter to \textit{jus cogens}. It is not quite clear what basic rules of LOIAC can be characterized as peremptory in nature, but it is irrefutable that the prohibition of torture qualifies as \textit{jus cogens} (see \textit{infra} 106). Consequently, if State A and State B were to sign a bilateral treaty purporting to absolve each other from the prohibition of torture, such an asseveration would founder on the rock of a peremptory norm. Of course, the example is purely hypothetical: ‘As a matter of practice, States do not conclude agreements to commit torture.’\textsuperscript{154}

\textsuperscript{150} See \textit{HPCR Manual on International Law Applicable to Air and Missile Warfare} (published 2013).

\textsuperscript{151} See \textit{Talinn Manual}, \textit{supra} note 14, at 1.

\textsuperscript{152} \textit{Oslo Manual}, \textit{supra} note 95, at v.

\textsuperscript{153} On such agreements, see \textit{Commentary on the First Geneva Convention}, \textit{supra} note 5, at 684–5.

\textsuperscript{154} T. Meron, \textit{The Humanization of International Law} 392 (2004).
VIII. Humanitarian Law and Human Rights

A. Human Rights and State Rights

88. When LOIAC is referred to as IHL (‘International Humanitarian Law’), it is easy to assume — wrongly — that it is ‘a law concerning the protection of human rights in armed conflicts’.

This is a misconception. Although the adjectives ‘human’ and ‘humanitarian’ strike a cognate chord, any temptation to regard them as interchangeable must be resisted. The attribute ‘human’ in the term ‘human rights’ points at the subject in whom the rights are vested: human rights are conferred directly on human beings as such (without the interposition of States). By contrast, the modifier ‘humanitarian’ in the figure of speech ‘International Humanitarian Law’ merely indicates the considerations that may have steered those responsible for crafting the legal norms in question. IHL – or LOIAC – is the law disposing of conduct during IAC, with a view to ‘alleviating as much as possible the calamities of war’ (supra 31, infra 230).

89. There are multiple ingrained differences between the two legal regimes of human rights law and LOIAC. As phrased by the Trial Chamber of the ICTY in the Kunarac Judgment:

Firstly, the role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities.

And then:

Moreover, international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved, and its agents.

90. Whereas most rights established by LOIAC are granted exclusively to States and not to individual human beings as such, it can scarcely be contested that some LOIAC norms create human rights. The nature of the right depends not on ‘two fundamentally opposed visions’ of LOIAC, but on the type of specific protection that LOIAC wishes to accord. A comparison of a few

156 Prosecutor v. Kunarac et al., supra note 11, Paragraph 470. 157 Ibid.
provisions of the Geneva Conventions of 1949 (the nucleus of IHL) easily demonstrates that they cover both State rights and human rights.

91. Article 7 of Geneva Convention (I) sets forth:

Wounded and sick, as well as members of the medical personnel and chaplains, may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.159

Parallel stipulations appear in Geneva Convention (II) (embracing the same categories plus shipwrecked);160 Geneva Convention (III) (relating to POW);161 and Geneva Convention (IV) (pertaining to ‘[p]rotected persons’).162 The phrase ‘rights secured to them’ patently denotes that these rights are bestowed directly on individuals belonging to the categories indicated, and that they are not merely State rights from which individuals derive benefit.163

92. Contrarily, Article 16 of Geneva Convention (I) imposes the following obligation in its Fourth Paragraph, dealing with enemy dead persons:

Parties to the conflict shall prepare and forward to each other through the same bureau [Information Bureau], certificates of death or duly authenticated lists of the dead.164

The clause then goes on to enjoin Belligerent Parties to collect and forward to one another itemized personal effects of the deceased. A matching duty appears in Geneva Convention (II).165 Plainly, the right to receive death certificates and personal effects – the corollary of the obligation to prepare and forward them – is accorded not to individual human beings, but to other Parties to the conflict (i.e. States). Human beings, in this instance the next of kin, will benefit from the implementation of the provision. But the right is not granted directly to them.

93. These illustrations admittedly represent cases of unusual clarity. At times, it is not so easy to determine whether entitlements created by LOIAC amount to human rights or to State rights. Moreover, a duty incurred by a Belligerent Party may engender corresponding rights both for the enemy (State right) and for an individual affected (human right). This is exemplified by Article 33, First Paragraph, of Geneva Convention (IV) with respect to civilians:

159 Geneva Convention (I), supra note 3, at 463.
160 Geneva Convention (II), supra note 3, at 489 (Article 7).
161 Geneva Convention (III), supra note 3, at 515 (Article 7).
162 Geneva Convention (IV), supra note 3, at 582 (Article 8).
163 See Commentary, I Geneva Convention, supra note 4, at 82–3.
164 Geneva Convention (I), supra note 3, at 467.
165 Geneva Convention (II), supra note 3, at 493 (Article 19).
No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.\footnote{166}  

The first sentence is glaringly couched in human rights terminology. But the second sentence, cast in general terms, is no less relevant to the legal relations between the Belligerent Parties. The existence of dual rights (a State right and a parallel human right), corresponding to a single obligation devolving on the enemy State, is conducive to a better protection regime. The individual may stand on his human right without necessarily relying on the goodwill of his Government (representing the Belligerent Party), and at the same time the Belligerent Party is possessed of a self-sustaining State right. Each has a \textit{jus standi} and is empowered to take whatever steps are available and deemed appropriate by virtue of the separate (State or human) right, and neither one is capable of waiving the other’s independent right.

\subsection*{B. Derogations}

94. All LOIAC rights (whether State rights or human rights) and their corresponding duties come into play upon the outbreak of an IAC, and they remain fully applicable throughout the armed conflict. Being especially geared by their very nature to the concrete demands of armed conflict (in the form of war or ‘short of war’; see \textit{supra} 1), LOIAC norms do not wane or get suspended on account of the hostilities. Derogation from LOIAC rights is possible in some extreme and rare instances,\footnote{167} but only as regards specific persons or situations and no others (see \textit{infra} 138, 873).  

95. Ordinary (peacetime) human rights are frequently subject to built-in limitations placed on their exercise ‘in the interests of national security or public safety’.\footnote{168} Even more significantly, irrespective of such limitations, the application of ordinary (peacetime) human rights can usually be derogated from in wartime. In this crucial respect, LOIAC rights are utterly different from ordinary (peacetime) human rights.  

96. A dispensation to derogate from ordinary (peacetime) human rights is incorporated in Article 4(1) of the 1966 International Covenant on Civil and Political Rights:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take

\footnote{166}{Geneva Convention (IV), \textit{supra} note 3, at 590.}
\footnote{167}{See Article 5 of Geneva Convention (IV), \textit{ibid.}, 581–2; and Article 54(5) of API, \textit{supra} note 10, at 738.}
\footnote{168}{For instance, freedom of assembly and freedom of association, as per Articles 21 and 22(2) of International Covenant on Civil and Political Rights, 1966, [1966] \textit{UNJY} 178, 184–5.}
measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.\(^\text{169}\)

Such a derogation must be ‘officially proclaimed’, and it cannot be ‘implied merely from the fact that the State is engaged in an international armed conflict’.\(^\text{170}\)

97. Notwithstanding the fact that Article 4(1) of the Covenant avoids a direct reference to war, there is general recognition that war ‘represents the prototype of a public emergency that threatens the life of the nation’.\(^\text{171}\) Indeed, the *travaux préparatoires* of the Covenant reveal that war was uppermost in the minds of the framers of the derogation clause.\(^\text{172}\) It is further worth noting that Article 15(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, in laying down a comparable derogation clause, adverts expressly to a ‘time of war or other public emergency threatening the life of the nation’.\(^\text{173}\) Article 27(1) of the 1969 American Convention on Human Rights similarly refers to a ‘time of war, public danger, or other emergency that threatens the independence or security of a State Party’.\(^\text{174}\) Of course, when derogation from ordinary (peacetime) human rights occurs, LOIAC (war-oriented) human rights fill much of the vacant space. This is of particular import if peacetime judicial guarantees are derogated from in wartime: LOIAC injects other minimum guarantees in their place.\(^\text{175}\)

98. Derogation of peacetime human rights in an IAC is a right and not a duty: for reasons of policy, States often choose to not avail themselves of that right. But, more significantly, not all peacetime human rights are derogable: Article 4(2) of the Covenant forbids any derogation from itemized human rights.\(^\text{176}\) These are the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment (including non-subjection to medical or scientific experimentation without free consent); freedom from slavery or servitude; freedom from imprisonment on the ground of inability to fulfil a


\(^{176}\) International Covenant on Civil and Political Rights, *supra* note 168, at 180.
contractual obligation; freedom from being held guilty of any act or omission which did not constitute a criminal offence at the time of its commission, or being subject to a heavier penalty than the one applicable at that time; the right to recognition as a person before the law; freedom of thought, conscience and religion. There are additional non-derogable human rights recognized by other treaties, and the Human Rights Committee (established by the Covenant) expressed the non-binding view that the list of non-derogable rights – as it appears in Article 4(2) – is not exhaustive, and that there can be no derogation (in particular) from judicial guarantees.

99. Some of the non-derogable rights enumerated in Article 4(2) have little or no special resonance in wartime, as attested by the freedom from imprisonment on the ground of inability to fulfill a contractual debt. The right to life is more directly apposite, but it does not protect persons from the ordinary consequences of hostilities: an exception to the non-derogation clause ‘in respect of deaths resulting from lawful acts of war’ is explicitly made in Article 15(2) of the European Convention. The reference is not to any acts of war but only to those acts of war that are lawful. Still, even from the perspective of human rights law, the lawfulness of acts causing death in wartime has to be looked for in LOIAC.

C. Lex Specialis and Symbiotic Coexistence

(a) Lex Specialis

100. In the Advisory Opinion on Nuclear Weapons, the ICJ held that – in the conduct of hostilities – the test of an (unlawful) arbitrary deprivation of life is determined by the lex specialis of LOIAC. The lex specialis construct of LOIAC has been reaffirmed by the ICJ in its 2004 Advisory Opinion on the Wall. Comments have been made in the legal literature about the fact that the ICJ had an opportunity to reiterate the same proposition in its 2005 Judgment in the Armed Activities case, yet failed to do so.

177 For the complete list of non-derogable rights, see Y. Dinstein, The International Law of Belligerent Occupation 84–5 (2nd edn, 2019).
181 Advisory Opinion on Nuclear Weapons, supra note 65, at 240.
However, by itself, this lapse does not prove much. In any event, the special status of LOIAC in relation to human rights law was also endorsed by the Trial Chamber of the ICTY, in the Kunarac Judgment, where the ICTY Trial Chamber cautioned that ‘notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law’.\footnote{Prosecutor\textit{ v.} Kunarac et al., supra note 11, Paragraph 471.}

101. References to LOIAC as \textit{lex specialis} ought to be perceived against the background of the ancient adage \textit{lex specialis derogat lex generali}. What is meant here is that LOIAC trumps human rights law in wartime if the two legal regimes are too discordant to be reconciled with each other. That is to say, in the exceptional circumstances of an IAC, the general law – human rights law, which is normally applicable\footnote{Some scholars deny that ‘general’ can be understood in the sense of ‘normal’ (see G. Oberleitner, \textit{Human Rights in Armed Conflict: Law, Practice, Policy} 96 (2015)). But the present writer sees nothing wrong in conflating the two adjectives.} – gives ground to conflicting LOIAC rules. LOIAC rules prevail because they are the \textit{lex specialis} in wartime.

102. The full connotations of the \textit{lex specialis} standing of LOIAC can best be appreciated in the context of the fundamental right to life, broached by the ICJ in the \textit{Nuclear Weapons} Advisory Opinion. In allowing lethal attacks against enemy combatants (see \textit{infra} 129–30), LOIAC runs counter to the basic tenets of human rights law concerning extra-judicial deprivation of life.\footnote{See C. Droegge, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’, \textit{40 Is.LR} 310, 344–6 (2007).} Nevertheless, in the event of an IAC, LOIAC \textit{lex specialis} prevails over the \textit{lex generalis} of human rights. The deprivation of an enemy combatant’s life may become unlawful even under LOIAC, but that calls for aberrant circumstances; for instance, (i) attacks against enemy combatants after they have become \textit{hors de combat} (see \textit{infra} 628 et seq.);\footnote{Cf. A.H. Robertson and J.G. Merrills, \textit{Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights} 312 (4th edn, 1996).} or (ii) killing combatants by resorting to perfidy (see \textit{infra} 915 et seq.).

103. Dissonance between LOIAC and human rights law as regards deprivation of life is not limited to combatants. The protection from deprivation of life afforded to civilians by LOIAC does not cohere with that provided by human rights law.\footnote{See C.P. Trumbull IV, ‘Re-Thinking the Principle of Proportionality Outside of Hot Battlefields’, 55 \textit{Vir.JIL} 521, 544–5 (2014–15).} Under LOIAC, innocent civilians can bear the brunt of hostilities by losing their lives as an incidental – albeit fully predictable – consequence of a permissible attack directed against lawful targets (see \textit{infra} 505 et seq. about collateral damage). In the words of T. Meron, ‘[u]nlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in hostilities,
such as civilian victims of lawful collateral damage. This egregious digression from ordinary human rights law can be explained only by the *lex specialis* character of LOIAC.

104. The *lex specialis* standing of LOIAC compared to human rights law is not circumscribed to the single issue of deprivation of life. If we take deprivation of liberty as another example, it is striking that LOIAC permits – indeed, compels – treating captured lawful combatants as POW. What this denotes in practical terms is that POW are subjected to administrative detention that may last years (until the cessation of active hostilities) in a manner incompatible with human rights law. A prolonged detention of POW – without trial and without any wrongdoing on their part – can stand up to scrutiny solely on the basis of the *lex specialis* nature of LOIAC aimed at precluding their further participation in hostilities (see infra 135).

**(b) Parallels and Coexistence**

105. The ILC, in its 2001 Draft Articles on State Responsibility, pointed out correctly that ‘[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them’. When it occurs (as in the illustrative instances discussed so far), the lack of harmony between LOIAC and human rights law attracts a lot of attention. But outright conflict is not that common in reality, and the relations between LOIAC and human rights law are by no means characterized by constant friction. Indeed, in the words of the Human Rights Committee, ‘both spheres of law are complementary, not mutually exclusive’. Most non-derogable human rights actually coincide with rights that are established by LOIAC (independently of human rights law).

106. Torture is emblematic in this respect. It has been explicitly forbidden by a large number of LOIAC treaties: both in general and in the

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195 Human Rights Committee, General Comment No. 31 [80], Doc. CCPR/C/21/Rev.1/Add.13 (2004), Paragraph 11.
196 AP/I, *supra* note 10, at 748 (Article 75(2)(a)(ii)).
specific contexts of wounded, sick and shipwrecked;\textsuperscript{197} POW;\textsuperscript{198} and civilians.\textsuperscript{199} An ICTY Trial Chamber held, in the \textit{Furundzija} case of 1998, that the prohibition of torture ‘has evolved into a peremptory norm or \textit{jus cogens}, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules’.\textsuperscript{200} In 2012, the ICJ confirmed – in the \textit{Questions Relating to the Obligation to Prosecute or Extradite} case – that ‘the prohibition of torture is part of customary international law and it has become a peremptory norm (\textit{jus cogens})’.\textsuperscript{201} The \textit{jus cogens} nature of the prohibition of torture unites peacetime human rights law and LOIAC.

107. It should be observed that LOIAC may exceptionally guarantee certain human rights to a greater extent than ordinary human rights law. A case in point is freedom from medical experimentation. Article 7 of the Covenant (a non-derogable provision) states that ‘no one shall be subjected without his free consent to medical or scientific experimentation’.\textsuperscript{202} Geneva Conventions (III) and (IV) go beyond the condition of consent: they forbid subjecting (i) POW to ‘medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest’;\textsuperscript{203} and (ii) civilians to ‘medical or scientific experiments not necessitated by the medical treatment of a protected person’.\textsuperscript{204} AP/\textit{I – in ruling out medical or scientific experiments carried out on detainees and other persons who are in the power of the enemy – expatiates on the subject, disallowing for example removal of organs or tissue (except blood transfusion or skin grafting) for transplantation even with the consent of donor.\textsuperscript{205} There is a good reason for the extra caution manifested in AP/\textit{I, in light of the special vulnerability of detainees.}\textsuperscript{206} Without disparaging the non-derogable stipulation of the Covenant, LOIAC is emphatically more advanced in this specific field.

108. The continued operation in wartime of non-derogable or non-derogated human rights, side by side with LOIAC norms, may prove of signal

\begin{itemize}
\item \textsuperscript{197} Geneva Convention (I), \textit{supra} note 3, at 465 (Article 12, Second Paragraph); Geneva Convention (II), \textit{ibid.}, 491 (Article 12, Second Paragraph).
\item \textsuperscript{198} Geneva Convention (III), \textit{supra} note 3, at 518 (Article 17, Fourth Paragraph).
\item \textsuperscript{199} Geneva Convention (IV), \textit{supra} note 3, at 590 (Article 32).
\item \textsuperscript{200} \textit{Prosecutor v. Furundzija}, Judgment (ICTY, Trial Chamber, 1998), Paragraph 153.
\item \textsuperscript{201} \textit{Questions Relating to the Obligation to Prosecute or Extradite} case (Belgium v. Senegal), [2012] \textit{ICJ Rep.} 422, 457.
\item \textsuperscript{202} International Covenant on Civil and Political Rights, \textit{supra} note 168, at 181.
\item \textsuperscript{203} Geneva Convention (III), \textit{supra} note 3, at 517 (Article 13, First Paragraph).
\item \textsuperscript{204} Geneva Convention (IV), \textit{supra} note 3, at 590 (Article 32).
\item \textsuperscript{205} AP/\textit{I, supra} note 10, at 720–1 (Article 11).
\item \textsuperscript{206} See Y. Sandoz, ‘Article 11’, \textit{Commentary on the Additional Protocols} 150, 156.
\end{itemize}
benefit to some individual victims of breaches. The advantage is double-barreled:

(i) LOIAC does not deal with every aspect of life in the course of armed conflict. Thus, the treatment of deserters from its own army by a Belligerent Party would be governed by human rights law rather than LOIAC.\(^{207}\)

(ii) When it comes to seeking remedies for failure to comply with the law (such as financial compensation), human rights law may offer effective channels of redress to individuals, whereas no equivalent avenues are opened by LOIAC.\(^{208}\) This is particularly transparent when human rights instruments set up supervisory organs (epitomized by the European Court of Human Rights (ECHR)) vested with jurisdiction to provide adequate remedies to victims of violations. But the human rights road is not free of obstacles. In the 2001 \textit{Banković} case, the Grand Chamber of the ECHR declared inadmissible applications by relatives of civilians killed or injured in a NATO bombing of the Belgrade Television and Radio Station (during the 1999 Kosovo air campaign) owing to lack of ‘any jurisdictional link’ between the alleged victims and the acts in complaint.\(^{209}\) The Judgment concluded that the jurisdiction of States under the European Convention on Human Rights is essentially territorial, not covering acts of war outside their territories.\(^{210}\) In the 2021 case of \textit{Georgia v. Russia (II)}, the Grand Chamber of the ECHR added that ‘this does not mean that States can act outside any legal framework’, inasmuch as ‘they are obliged to comply with the very detailed rules of international humanitarian law in such a context’.\(^{211}\)

IX. The Inter-State Nature of IACs

A. Inter-State and Intra-State Armed Conflicts

109. This book is confined to IACs, that is to say, inter-State armed conflicts in which a minimum of two sovereign States are pitted against each other (see \textit{supra} 1). The separate topic of intra-State armed conflicts is regulated by a different set of rules, and it is dealt with in a companion volume.\(^{212}\) The line of demarcation between inter-State and intra-State armed conflicts has to be assiduously kept in mind, although sketching it may not be simple. There are amorphous situations in which the two types of armed conflicts are mixed, either horizontally (spatially) or vertically (temporally).

\(^{207}\) See C. Greenwood, \textit{Essays on War in International Law} 87 (2006).
\(^{208}\) See Provost, \textit{supra} note 180, at 45.
\(^{210}\) \textit{Ibid.}, 526.
\(^{211}\) Case of \textit{Georgia v. Russia (II)} (ECHR, Grand Chamber, 2021), 60 \textit{ILM} 716, 751 (2021).
\(^{212}\) Y. Dinstein, \textit{Non-International Armed Conflicts in International Law} (2nd edn, 2021).
110. Horizontally, within the territory of a single State, there may be elements of both inter-State hostilities (between two or more Belligerent Parties opposing one another) and intra-State hostilities (between insurgents and an incumbent Government, or between rival armed groups vying for power in a State where the Government has vanished). The dual armed conflicts, IAC and NIAC, may commence simultaneously or consecutively (the IAC may be preceded by the NIAC or vice versa). But the point is that the hostilities (synchronized or unsynchronized) have disparate inter-State and intra-State strands. For instance, there was a NIAC in East Ukraine in 2014, but in 2022 (if not earlier) the area was engulfed in a more comprehensive inter-State war with Russia. The Taliban regime in Afghanistan, having fought a long-standing NIAC with a ‘Northern Alliance’, became embroiled in an inter-State war with an American-led coalition as a result of providing shelter and support to the Al-Qaeda terrorists who had launched the notorious attacks against the US on 11 September 2001 (9/11).

111. The fact that the incumbent Government of a State is beset by enemies from both inside and outside the national territory does not mean that the IAC and NIAC necessarily merge. Some hostilities may be waged exclusively between the domestic foes, whereas other hostilities may take place on the inter-State plane. LOIAC governs only the inter-State military operations. As the ICJ pronounced in the Nicaragua case of 1986:

The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is ‘not of an international character’. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.

112. A NIAC arising in State A may also have spill-over horizontal effects within a neighbouring country (State B). In this scenario, insurgents against the Government of State A find a temporary haven within the territory of State B and may even kindle another NIAC against the Government of State B. NIACs in neighbouring countries may be interconnected, but they remain separate armed conflicts. The legal position is reconfigured only if States become entangled in combat with each other. Then, and only then, the character of the armed conflict is converted from a NIAC into an IAC.

216 See Dinstein, supra note 212, at 30–1.
113. Vertically, armed conflicts may be mixed in two ways. First, an armed conflict may commence as a NIAC but later segue into an IAC. This can happen through the military intervention of a foreign State on the side of insurgents against the incumbent Government (although not if the intervention is in support of the incumbent Government against the insurgents). Once there are two States locked in combat with one another, the armed conflict becomes an IAC.

114. An alternative vertical development is the implosion of an existing State, which plunges into a NIAC and then fragments into two or more sovereign States fighting each other. Such implosion and fragmentation occurred in Yugoslavia in the 1990s. As the Appeals Chamber of the ICTY held in the Tadić case, in 1999, the participation of the Federal Republic of Yugoslavia (Serbia-Montenegro) in hostilities in Bosnia-Herzegovina – once the latter seceded from Yugoslavia and emerged as an independent State in 1992 – denoted that an IAC existed between them.

115. In addition, there are two anomalous situations in which LOIAC will apply in intra-State armed conflicts as if they were international in character:

(i) Under Article 1(4) of AP/I, armed conflicts in the exercise of the right of self-determination are subject to the application of AP/I and the Geneva Conventions, although they do not involve two States. However, this is a very controversial provision that dominated the first session of the Diplomatic Conference engaged in drawing up AP/I (and, for a while, blocked any progress). Naturally, Article 1(4) does not bind non-Contracting Parties to AP/I.

(ii) If insurgents in a NIAC obtain from the incumbent Government ‘recognition of belligerency’, the conflict has to be treated as if it were an IAC and consequently all the norms of LOIAC become applicable.

B. Formalities and Recognition

116. LOIAC relates to hostilities carried out between States, regardless of any declaration of war. Apart from the fact that the hostilities may be ‘short of war’ (see supra 1), there is no need for recognition of a formal state of war

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217 On foreign intervention in a NIAC, see Dinstein, supra note 212, at 96–126.
219 AP/I, supra note 10, at 715.
221 On ‘recognition of belligerency’, see Dinstein, supra note 212, at 142–8.
222 See Dinstein, supra note 21, at 13.
(see Common Article 2 (First Paragraph) of the four Geneva Conventions, quoted *supra* 2). The reason is that war can exist either in the technical sense (commencing with a declaration of war by one State against its adversary) or in the material sense (namely, as a result of the comprehensive use of armed force in the relations between two States, irrespective of any formal declaration).223

117. The application of LOIAC to inter-State hostilities is not even conditioned on any formal recognition of the enemy entity as a State.224 As long as the enemy satisfies objective criteria of statehood under international law,225 the armed conflict between the two Belligerent Parties has to be characterized as inter-State.

118. In the same vein, no formal recognition of a particular regime as the Government of the enemy State is necessary. The most glaring example is that of the Taliban regime in Afghanistan in 2001. The failure of the regime to gain recognition as the Afghan Government by most of the international community at that time (see *infra* 207) was counterbalanced by the fact that the Taliban were in control of the bulk of the Afghan territory. Recognized or not, the regime’s actions had to ‘be treated as the actions of the state of Afghanistan’.226

C. The UN

119. The mere use of force by UN peacekeepers against non-State parties (like insurgents or rioters) will not trigger an IAC, but there is no denial that UN troops can – and, on occasion, have – become entangled in hostilities with State forces.227 If and when engaged in combat situations with the armed forces of States, UN forces are obligated to respect the norms of LOIAC.228

120. When that comes to pass, much depends on any binding directives that may be issued to UN forces by the Security Council. As a result of such directives, ‘some deviation from well established international humanitarian law principles may be called for during United Nations (authorized) operations’.229 Once binding decisions of the Security Council are adopted, the

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223 On the distinction between war in the technical and in the material sense, see *ibid.*, 11–13.
225 For these criteria, see J. Crawford, *The Creation of States in International Law* 37 et seq. (2nd edn, 2006).
ensuing obligations of Member States under the Charter prevail over their obligations under any LOIAC international treaty (or customary rules). This is the combined effect of two Charter provisions: Articles 25 and Article 103 (cited supra 50).

X. Dissemination, Training and Legal Advisers

121. LOIAC stands out compared to most other branches of international law in that incalculable infractions and abuses can be perpetrated by an extraordinary number of persons acting on behalf of a State, wearing its uniform or otherwise placed in a position to wield its powers. All combatants, as well as most civilians, are at least potentially capable of contravening some of the norms of LOIAC. It is therefore requisite that every combatant, and as many civilians as possible, will be familiarized with these norms. Only the widest possible dissemination of LOIAC, bolstered by institutional programmes of instruction (especially in the form of training of armed forces) – pursued in peacetime but intensified in wartime – can produce an atmosphere in which respect for LOIAC is gradually implanted in combatants, with a view to becoming a conditioned reflex.

122. The duty to disseminate LOIAC and include its study in programmes of military (and, if possible, civilian) instruction is accentuated in the four Geneva Conventions, AP/I, the CPCP and the CCCW. This is customary international law today. As early as 1899/1907, Article 1 of Hague Conventions (II) and (IV) established the obligation of States to issue instructions to their armed forces in conformity with the Regulations annexed to the (respective) instrument. Geneva Conventions (I) and (II) prescribe that each Contracting Party must ensure the detailed execution of their texts and even provide for unforeseen circumstances (commensurate with general principles of the Conventions). Under Article 80(2) of AP/I, orders and instructions ascertaining the observance of the Geneva Conventions and AP/I

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230 On the combined effect of Articles 25 and 103 of the Charter as regards Security Council resolutions, see Dinstein, supra note 21, at 372–5.
232 Geneva Convention (I), supra note 3, at 476 (Article 47); Geneva Convention (II), ibid., 500–1 (Article 48); Geneva Convention (III), ibid., 556 (Article 127); Geneva Convention (IV), ibid., 623–4 (Article 144).
233 AP/I, supra note 10, at 753 (Article 83).
234 CPCP, supra note 62, at 1008 (Article 25).
235 CCCW, supra note 74, at 186 (Article 6).
237 Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, supra note 70, at 211.
238 Geneva Convention (I), supra note 3, at 476 (Article 45); Geneva Convention (II), ibid., 500 (Article 46).
must be given by the Contracting Parties who are required to ‘supervise their execution’. 239

123. Article 82 of AP/I promulgates that Contracting Parties (even in peacetime) and Belligerent Parties (in wartime) must ensure that legal advisers are available, when necessary, to counsel military commanders at the appropriate level, in order to facilitate the application of the Geneva Conventions and AP/I (as well as tender advice on the appropriate instruction to be given to the armed forces). 240 Prevalent State practice confirms this to be a reflection of customary international law. 241 Article 82 leaves it open to each Contracting Party to determine the tier of command to which legal advisers would be assigned. 242 The operational level considered most suitable in common practice is that of the headquarters of a division or a larger unit, although sometimes legal advisers are assigned to brigades. 243 Smaller military formations, acting independently, are also apposite. 244

124. Whatever the operative layer of command, the duty of a legal adviser is to offer skilled professional counsel in real time on all LOIAC issues encountered by the unit to which he is seconded. Legal advisers acting pursuant to Article 82 are there ‘to advise military commanders’ and ‘not to replace them’. 245 At the end of the day, the decision-making is left in the hands of the military commander. That being the general rule, it is within the prerogative of a State to reduce the discretion of military commanders and grant more powers to the legal advisers. 246

239 AP/I, supra note 10, at 752. 240 Ibid., 753.
241 See I Customary International Humanitarian Law, supra note 140, at 500.