# 1 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.[1] As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) pronounced in the *Tadić* case, 'an armed conflict exists whenever there is resort to armed force between States'.[2] Depending on their scale, IAC hostilities may make the grade of a fully-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. 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.[3]

The authoritative Commentary of the International Committee of the Red Cross (ICRC) on Common Article 2 is adamant that it does not matter 'how much

[1] See C. Hellestveit, 'The Geneva Conventions and the Dichotomy between International and Non-International Armed Conflict: Curse or Blessing for the 'Principle of Humanity'?', *Searching for a 'Principle of Humanity' in International Humanitarian Law* 85, 100–1 (K.M. Larsen, C.G. Cooper and G. Nystuen eds., 2013).

[2] *Prosecutor* v. *Tadić* (Decision on Jurisdiction) (ICTY, Appeals Chamber, 1995), 35 *ILM* 35, 54 (1996).

[3] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, *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, *ibid.*, 485, 487; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *ibid.*, 507, 512; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *ibid.*, 575, 580.

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]

3. The locution 'hostilities' is a portmanteau term embracing all forms of hostile acts undertaken against the enemy.[5] Hostilities are conducted through the employment of means and methods of warfare. 'Methods of warfare' are operational modes reviewed in essence in Chapter 8. They primarily involve attacks (defined *infra* 8), but also include some ancillary measures (see *infra* 4). 'Means of warfare' consist chiefly of weapons and *matériel* (such as means of communications and signalling devices). 'Weapons' – examined in Chapter 3 – include any arms (for instance, missile launchers, artillery, machine guns and rifles), munitions (for example, missiles, bombs, mines, shells and bullets) and other devices, components or mechanisms striving to (i) kill, disable or injure enemy personnel; or (ii) destroy or damage *matériel* or property.[6] Weapons encompass also weapon systems (with diverse external guidance means) and platforms carrying weapons. Military platforms not carrying weapons, such as military aircraft designed for transport or refuelling, qualify as means of warfare.[7]

4. The centre of gravity of hostilities is the planning and execution by all levels of command, from top to bottom, of violence against the enemy (see *infra* 5–6). But not all acts of hostilities necessarily involve violence. Hostilities also consist of ancillary non-violent operations, such as gathering intelligence about the enemy; logistics (delivering to combatants armaments, equipment, transportation, food, fuel and other essentials); and running a network of communications (electronic or otherwise).

5. Violence transcends acts that cause only passing vexation or irritation. Violence entails (i) loss of life or other serious harm to human beings; and/or (ii) destruction of, or tangible damage to, property. Violence can fit the matrix of any type of hostilities – from *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. As for harm to human beings, severe mental trauma (such as shell shock) may count as much as a serious physical injury (e.g., shrapnel wounds).

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

[4] *Commentary, I Geneva Convention* 32 (ICRC, J.S. Pictet ed., 1952).
[5] See N. Melzer, *Targeted Killing in International Law* 273 (2008).
[6] See W.H. Parks, 'Conventional Weapons and Weapons Review', 8 *YIHL* 55, 115–16 (2005).
[7] See *HPCR Manual on International Law Applicable to Air and Missile Warfare* 31 (published 2013).

squeezing a trigger. For that reason, cyber operations may be considered violent when touching a keyboard or a screen (or using an alternative data input device) produces injurious or destructive consequences.[8]

7. An important caveat is that not all acts of violence committed during an IAC necessarily qualify as hostilities. Certain acts of violence, 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.

### *B. Attacks*

8. Large portions of this book are devoted to attacks and protection therefrom (see, in particular, Chapters 5–7). The expression 'attacks' is narrower than the term 'hostilities'. 'Attacks' 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'.[9] Clearly, repelling an attack is also categorized as an attack in light of this definition. But, whether the act is offensive or defensive in mode, violence is a *condicio sine qua non* of attack. Non-violent acts tied to military operations – although subsumed under the overarching heading of 'hostilities' – do not come within the bounds of attacks. Thus, non-violent recourse to psychological warfare; disruption of enemy communications; issuing false orders or using other ruses (see *infra* 754 *et seq.*); sleep-depriving sonic booms; airdropping of leaflets calling for surrender, etc., do not count as attacks.

9. Cyber attacks qualify as 'attacks' under the AP/I definition, provided that they engender violence through their effects (see *supra* 6). That is to say, cyber attacks cannot be regarded as 'attacks' in the LOIAC sense if they only break through a 'fire wall' or plant malware (such as a virus) in an enemy computer. By contrast, they amount to 'attacks' if they cause injury/death to persons or damage/destruction to property.[10] As a graphic illustration, it is possible to point at a cyber attack that shuts down a life-sustaining software program or causes a destructive fire in an electric grid.

[8] See M.N. Schmitt, 'Cyber Operations and the *Jus in Bello*: Key Issues', 41 *Is. YHR* 113, 119 (2011).

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (AP/I), 1977, *Laws of Armed Conflicts* 711, 735.

[10] See *Talinn Manual on the International Law Applicable to Cyber Warfare*, 2012, 106 (Rule 30) (M.N. Schmitt ed., 2013).

## II. The two major premises

10. There are two major premises antecedent to any survey of LOIAC. These are: (i) the means and methods of warfare must be kept within bounds; and (ii) the opposing Belligerent Parties are equal in the eyes of LOIAC.

### *A. Limitation of means and methods of warfare*

11. As long as hostilities are waged within the perimeters of LOIAC, they may be pursued fiercely and relentlessly. But a major premise of LOAC, resonating across its whole spectrum, is that there are constraints on this freedom of action. The 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.[11]

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.[12]

It is wrong to suggest that, by adjoining in the newer text both methods and means of warfare (defined *supra* 3), Article 35(1) blurs the conceptual approach.[13] As a matter of fact, it is critically important to stress that not only arms and munitions but also modalities of behaviour may run afoul of LOIAC (for examples, see Chapter 8).

### *B. Legal equality of the Belligerent Parties*

#### *(a) No connection between the* jus in bello *and the* jus ad bellum

12. The international legal regulation of war is subdivided into the *jus in bello* (LOIAC) and the *jus ad bellum* (governing the legality of war). This branching-off leads to separate *jus in bello* and *jus ad bellum* solutions to problems, and it even spawns a different glossary. Thus, the idiom 'attack' in the *jus in bello* (see *supra* 8) must not be confused with the expression 'armed attack' featuring in Article 51 of the United Nations (UN) Charter,[14] just as the *jus*

[11] Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, *Laws of Armed Conflicts* 66, 72.
[12] AP/I, *supra* note 9, at 730.
[13] See N. Sitaropoulos, 'Weapons and Superfluous Injury or Unnecessary Suffering in International Humanitarian Law: Human Pain in Time of War and the Limits of Law', 54 *RHDI* 71, 91 (2001).
[14] Charter of the United Nations, 1945, 9 *Int. Leg.* 327, 346.

*ad bellum* coinage 'self-defence' must not be mixed up with the *jus in bello* term 'defence' (see *supra ibid.*). But the dissonance goes beyond matters of vocabulary.

13. The fundamental postulate of the *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 *jus ad bellum*.[15] There may be some discrimination against an aggressor State where the law of neutrality is concerned.[16] But, in the conduct of hostilities, the *jus in bello* does not distinguish between the armed forces or civilians of an aggressor State as compared to those of a State resorting to self-defence or participating in an enforcement action ordained (or authorized) by the UN Security Council.[17] Moreover, 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*. There are critics who would like to do away with the principle of the equality of the Belligerent Parties before the *jus in bello*.[18] However, such a position would raise grave issues as regards the plight of both civilians and soldiers who are on the wrong side in an aggressive war for which they are not responsible.[19] 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*.[20]

14. 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.[21]

The crucial words here are the last: 'in all circumstances'. They spark the following conclusion, in the words of the ICRC Commentary on Geneva Convention (I):

[15] See M. Sassòli, *'Ius ad Bellum* and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?', *International Law and Armed Conflict: Exploring the Faultlines* 241, 246 (Essays in Honour of Yoram Dinstein, M.N. Schmitt and J. Pejic eds., 2007).

[16] See A. Orakhelashvili, 'Overlap and Convergence: The Interaction between Jus ad Bellum and Jus in Bello', 12 *JCSL* 157, 185–93 (2007).

[17] See Y. Dinstein, *War, Aggression and Self-Defence* 167–75 (5th edn, 2011).

[18] See M. Mandel, 'Aggressors' Rights: The Doctrine of "Equality between Belligerents" and the Legacy of Nuremberg', 24 *LJIL* 627–50 (2011).

[19] See A. Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure', 872 *IRRC* 931, 957–8 (2008).

[20] See V. Koutroulis, 'And Yet It Exists: In Defence of the "Equality of Belligerents" Principle', 26 *LJIL* 449, 457–60 (2013).

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

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.[22]

Any lingering doubts should be removed by the Preamble to AP/I:

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 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.[23]

*(b) Inequality in military capabilities*

15. The equality of Belligerent Parties before LOIAC is 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'.[24] The argument put forward is that, in light of a built-in asymmetry between the opposing armed forces in many an IAC – one armed to the teeth with advanced weapons while its adversary is fighting with inadequate or obsolete means of warfare – the technologically-impaired Belligerent Party may get (as it were) a moral dispensation to abstain from following the 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'.[25] 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* 486 *et seq*.) or using 'suicide bombers' (see *infra* 129).

16. 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 basically a land-power while its opponent is a sea-power). Technological inferiority does not necessarily portend defeat in battle. Instead of breaching international law, the underdog has to look for lawful ruses and stratagems that overcome ostensible disparities. All great military leaders have left their mark on history by winning wars against the odds. In any event, LOIAC does not bestow on a 'have-not' Belligerent Party a prerogative to ignore the law *vis-à-vis* a 'have' enemy: no legal concessions are made to any Belligerent Party on the ground of being weaker in military strength. Whatever the military discrepancy between

[22] See *Commentary, I Geneva Convention, supra* note 4, at 27.
[23] AP/I, *supra* note 9, at 715.
[24] G. Blum, 'On a Different Law of War', 52 *Har. ILJ* 163, 166 (2011).
[25] M.A. Newton, 'Reconsidering Reprisals', 20 *Duke JCIL* 361, 381 (2009–10).

Belligerent Parties is, and whether or not it can be surmounted, LOIAC is predicated on their equality before the law. That equality is the foundation stone of LOIAC.

*(c) The issue of reciprocity*

17. Whenever the norms of LOIAC (sometimes, its most basic tenets) are materially breached, the question arises whether the aggrieved Belligerent Party can regard itself as absolved 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.[26]

The drafters had in mind the Geneva Conventions, although the text would also apply to any other treaty of a humanitarian character.[27] The clause is rooted in the presupposition that humanitarian obligations are unconditional and not subject to reciprocity.[28] Technically, paragraph 5 was 'an innovation of the Conference' that drew up the Vienna Convention.[29] Yet, the customary standing of paragraph 5 may be inferred from the Advisory Opinion on *Namibia*, rendered by the International Court of Justice (ICJ) in 1971.[30] Many scholars view paragraph 5 as reflecting a pre-existing customary (even peremptory) rule.[31] But some commentators regard this customary status as 'dubious'.[32]

18. Even assuming that paragraph 5 has a customary nature, its text – which refers to humanitarian treaty 'provisions prohibiting any form of reprisals' – does not rule out the existence of other LOIAC treaty stipulations that do not ban reprisals. The fact of the matter is that not all belligerent reprisals are excluded by LOIAC treaties: while numerous specific belligerent reprisals are forbidden by certain treaties (see *infra* 812–13), some belligerent reprisals are not perturbed by the injunctions (see *infra* 814). When lawful,

[26] Vienna Convention on the Law of Treaties, 1969, [1969] *UNJY* 140, 156.
[27] See A. Aust, *Modern Treaty Law and Practice* 260 (3rd edn, 2013).
[28] See I. Sinclair, *The Vienna Convention on the Law of Treaties* 190 (2nd edn, 1984).
[29] M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* 107 (1996). But see *ibid*., 113.
[30] Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] *ICJ Rep*. 16, 47.
[31] See P. Reuter, *Introduction to the Law of Treaties* 155 (1989).
[32] See S. Watts, 'Reciprocity and the Law of War', 50 *Har. ILJ* 365, 424 (2009).

reprisals are intended to secure reciprocity: in deterring further breaches of LOIAC, they aim at restoring parity between the Belligerent Parties.[33]

19. We have quoted (*supra* 14) Common Article 1 of the Geneva Conventions. The ICRC propounds that '[t]he obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity'.[34] Its Commentary on Geneva Convention (IV) specifically argues that the instrument has the special character of a treaty not concluded on the basis of reciprocity.[35] In more general terms, there has been a marked erosion in the role of reciprocity in modern LOIAC:[36] wartime atrocities cannot justify counter-atrocities. All the same, in practice, LOIAC obligations do not really apply in an entirely unconditional manner. The expectation of reciprocity has decidedly not disappeared from the scene of military action.

## III. The two driving forces

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

### A. *Military necessity*

21. Military necessity lubricates the wheels of LOIAC. When LOIAC norms are crafted, the law-makers cannot be oblivious to the exigencies of war impelling each Belligerent Party to take the requisite steps to engage the enemy and defeat it. Military necessity is associated with the attainment of some discernible military advantage over the enemy. Differently put, the measures taken in an IAC must be leveraged to gaining a military advantage – in the circumstances ruling at the time – as a direct result of their use (cf. Article 52(2) of AP/I, quoted *infra* 275). All the same:

(a) The fact that there is a military necessity to pursue a particular mode of action is not the end of the matter. Military necessity is not the sole catalyst of LOIAC (see *infra* 22).
(b) The objective need of a Belligerent Party to win an IAC is not to be confounded with the subjective whim or caprice of an individual soldier (whatever his rank).
(c) Military necessity must be dissociated from wanton acts (see *infra* 800) that have no operational rhyme or reason.

[33] See M. Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* 57 (2009).
[34] I *Customary International Humanitarian Law* 498 (ICRC, J.-M. Henckaerts and L. Doswald-Beck eds., 2005) (Rule 140).
[35] *Commentary, IV Geneva Convention* 15 (ICRC, O.M. Uhler and H. Coursier eds., 1958).
[36] See D. Schindler, 'International Humanitarian Law: Its Remarkable Development and Its Persistent Violation', 5 *JHIL* 165, 183 (2003).

### B. *Humanitarian considerations*

22. 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. A reversion to the outdated adage *à la guerre comme à la guerre* would have negated the major premise that the choice of means and methods of warfare is not unlimited (see *supra* 11). But the determination of what action or inaction is permissible in wartime 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* 222–3). These considerations are both inspiring and instrumental, yet they 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*

23. LOIAC is, and must be, predicated on a subtle equilibrium between the two diametrically opposed stimulants of military necessity and humanitarian considerations. In following a middle 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 wrought is stoked – in the words of the Preamble to the St Petersburg Declaration of 1868 (see *infra* 60) – by the desire to fix 'the technical limits at which the necessities of war ought to yield to the requirements of humanity'.[37]

24. The paramount goal of LOIAC – to reiterate the language of the same St Petersburg Declaration (quoted *infra* 191) – is 'alleviating as much as possible the calamities of war'. The thrust is not absolute elimination of the calamities of war (a goal which 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 methods or means of warfare is not unlimited (*supra* 11).

25. 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 that their professional duties can, and should, be discharged without causing pointless distress to their own

[37] St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868, *Laws of Armed Conflicts* 91, 92.

troops. It is noteworthy that the St Petersburg Declaration was drawn up by an international conference attended solely by military men.[38] 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 forged in the crucible of State practice during hostilities, predominantly through the action of armed forces.

26. Every single norm of LOIAC is moulded by a parallelogram of forces, working out a compromise formula between the demands of 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 requirements, 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.

27. 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.[39]

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 dynamics of the law are such that whatever is required by military necessity, and is not excluded on the ground of humanitarianism, is permissible.

### *D. Military necessity as a legal justification*

28. 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, explicitly 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.[40]

[38] See L. Renault, 'War and the Law of Nations in the Twentieth Century', 9 *AJIL* 1, 3 (1915).
[39] *Hostage* case (*US* v. *List et al.*) (American Military Tribunal, Nuremberg, 1948), 11 *NMT* 1230, 1253.
[40] Hague Regulations, *supra* note 11, at 73.