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# 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 locution 'hostilities' is a portmanteau term embracing the employment of means and methods of warfare. 'Methods of warfare' are operational modes – illustrated in Chapter 8 – used by the Parties to an international armed conflict (hereinafter: the Belligerent Parties) and involving attacks (defined *infra* 4), as well as some ancillary measures (e.g., detention or capture) against persons or property. '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 guns and rifles), munitions (for example, missile, bombs, mines, shells and bullets) and other devices, components or mechanisms intended to destroy, disable or injure enemy personnel, *matériel* or property.[1] Weapons encompass also weapon systems (with diverse external guidance means) or platforms. A particular reference must be made to warships (defined *infra* 273), military aircraft (defined *infra* 285) and tanks.

2. Acts of violence – committed by or on behalf of Belligerent Parties – constitute the centre of gravity of hostilities. 'Violence', as a vital ingredient of hostilities, means acts that cause injury to human beings – either loss of life or other harm, whether physical or mental – or destruction of (or damage to) property. For a specific act of violence to fit this matrix in warfare, it need not take the form of a massive air bombardment or an artillery barrage: a small-scale attack (such as a single bullet fired by a sniper) will do. The violent essence of an act must be understood in terms of consequences (injury or destruction), rather than the nature of the act triggering them (which, by itself, may appear to be innocuous).[2]

[1] See W. H. Parks, 'Conventional Weapons and Weapons Review', 8 *YIHL* 55 115–16 (2005).
[2] See M. N. Schmitt, 'Wired Warfare: Computer Network Attack and the *Jus in Bello*', 76 *ILS* 187, 194 (*Computer Network Attack and International Law*, M. N. Schmitt and B. T. O'Donnell eds., 2002).



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3. Hostilities enfold acts of violence of all types, subject to two caveats:

(i) On the one hand, hostilities exclude some acts of violence committed by Belligerent Parties in the course of an international armed conflict, which are not related to military operations. The exclusion is particularly apposite to law enforcement measures taken against common felons.

(ii) On the other hand, hostilities cover also certain non-violent acts, provided that they are directly connected to military operations against the enemy (e.g., logistics or the gathering of intelligence about the enemy).[3]

### *B. Attacks*

4. Large portions of this volume are devoted to attacks and protection therefrom (see, in particular, Chapters 5–7). The expression 'hostilities' is broader than the phrase 'attacks'. 'Attacks' are defined in Article 49(1) of the 1977 Protocol I, Additional to the Geneva Conventions (hereinafter: Additional Protocol I), as 'acts of violence against the adversary, whether in offence or in defence'.[4] Clearly, repelling an attack is also categorized as an attack in terms of this definition. Conversely, 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 psychological warfare – in the form of sonic booms, airdropping of leaflets calling for surrender, etc. – does not count as an attack.

5. 'Computer network attacks' (CNA) qualify as 'attacks' for our purposes only if they engender violence through their effects. That is to say, CNA cannot be regarded as 'attacks' only because they break through a 'firewall' or plant a virus in an enemy computer. Yet, they do if they cause human casualties by shutting down a life-sustaining software programme or bring about serious damage to property (as a minimum, by completely disabling the target computer).[5]

## II. The major premises

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

6. As long as hostilities are waged within the perimeters of LOIAC, they may be pursued fiercely and relentlessly. But there are two major premises

[3] For a detailed discussion of the concept of hostilities, see N. Melzer, *Targeted Killing in International Law* 269–78 (2008).

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

[5] See K. Dörmann, 'The Applicability of the Additional Protocols to Computer Network Attacks: An ICRC Viewpoint', *International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law* 139, 142–3 (K. Byström ed., 2005).

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that resonate across the whole spectrum of LOIAC. The first major premise 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.[6]

Article 35(1) of Additional Protocol I rephrases the same concept 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.[7]

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

## *B. Equality of the Belligerent Parties*

7. The law of war in its totality is subdivided into the *jus in bello* (LOIAC) and the *jus ad bellum* (governing the legality of war). This compartmentalization of the law of war leads to disparate *jus in bello* and *jus ad bellum* glossary. Thus, the idiom 'attack' in the *jus in bello* (see *supra* 4) must not be confused with the expression 'armed attack' featuring in Article 51 of the United Nations (UN) Charter,[9] just as the counterpart *jus ad bellum* coinage 'self-defence' must not be mixed up with the *jus in bello* term 'defence'. But the separation goes beyond matters of vocabulary. 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*.[10] There may be some discrimination against an aggressor State where the law of neutrality is concerned.[11] But, in the conduct of hostilities, LOIAC 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

[6] 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.
[7] Additional Protocol I, *supra* note 4, at 730.
[8] 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).
[9] Charter of the United Nations, 1945, 9 *Int.Leg*. 327, 346.
[10] 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).
[11] See A. Orakhelashvili, 'Overlap and Convergence: The Interaction between *Jus ad Bellum* and *Jus in Bello*', 12 *JCSL* 157, 185–93 (2007).

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action ordained (or authorized) by the UN Security Council.[12] Breaches of the *jus in bello* cannot be exculpated on the ground that the enemy is responsible for having commenced the hostilities in breach of the *jus ad bellum*. In the words of the Preamble to Additional Protocol 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.[13]

## III. The driving forces

### A. *Military necessity and humanitarian considerations*

8. LOIAC cannot be oblivious to the exigencies of war and to the military necessity impelling each Belligerent Party to take the requisite measures to defeat the enemy. Still, military necessity must be dissociated from wanton acts that have no operational rhyme or reason. The objective need to win the war is not to be confounded with the subjective whim or caprice of an individual soldier (whatever his rank). Lawful violence in war must be leveraged to the attainment of some discernible military advantage as a direct result. Article 52(2) of Additional Protocol I (quoted *infra* 220) restricts attacks to those objects ‘whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’. The notion of military advantage also plays a crucial role in the application of the principle of proportionality (see *infra* 318, 321).

9. The fact that there is military advantage in pursuing a particular mode of action is not the end of the matter. Had it been the end, if military necessity were the sole beacon to guide the path of armed forces in wartime, no limitation of any significance would have been imposed on the freedom of action of Belligerent Parties. Such a reversion to the outdated adage *à la guerre comme à la guerre* would negate the major premise that the choice of means and methods of warfare is not unlimited (see *supra* 6). 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 the global Zeitgeist – that affect the general practice of States and goad the drafters of treaties (for an illustration, see *infra* 174–5). These considerations are both inspiring and instrumental, yet they too cannot monopolize the course of warfare. If benevolent humanitarianism were the only factor to be weighed in hostilities, war would have entailed no bloodshed, no human suffering and

[12] See Y. Dinstein, *War, Aggression and Self-Defence* 156–63 (4th edn, 2005).
[13] Additional Protocol I, *supra* note 4, at 715.

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no destruction of property; in short, war would not be war. LOIAC must be predicated on a subtle equilibrium between the two diametrically opposed stimulants of military necessity and humanitarian considerations. In doing that, LOIAC takes a middle road, allowing Belligerent Parties much leeway (in keeping with the demands of military necessity) and nevertheless curbing 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* 34) – by the desire to fix 'the technical limits at which the necessities of war ought to yield to the requirements of humanity'.[14]

10. The paramount precept of LOIAC – to reiterate the language of the same St Petersburg Declaration (quoted *infra* 144) – is 'alleviating as much as possible the calamities of war'. The humanitarian desire to attenuate human anguish in any armed conflict is natural. However, the thrust of the concept is not absolute elimination of the calamities of war (a goal which would manifestly be beyond reach), 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* 6).

11. LOIAC amounts to a checks-and-balances system, intended to minimize human suffering without undermining the effectiveness of military operations. Military commanders are often the first to appreciate that their professional duties can, and should, be discharged without causing pointless distress to the troops. It is noteworthy that the St Petersburg Declaration was crafted by an international conference attended solely by military men.[15] The input of military experts to all subsequent landmark treaties governing 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.

12. Every single norm of LOIAC is moulded by a parallelogram of forces: it confronts an inveterate tension between the demands of military necessity and humanitarian considerations, working out a compromise formula. 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.

[14] St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868, *Laws of Armed Conflicts* 91, 92.
[15] See L. Renault, 'War and the Law of Nations in the Twentieth Century', 9 *AJIL* 1, 3 (1915).

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13. An American Military Tribunal, in the 'Subsequent Proceedings' at Nuremberg, proclaimed 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.[16]

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 total freedom of action. 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.

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

14. Often, when LOIAC is breached, the individual perpetrator invokes 'military necessity' as a justification for his acts. This is an admissible excuse only when the very prohibition of a certain act by LOIAC contains a built-in exception applicable in case 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.[17]

What this signifies is that destruction of property in wartime is illicit only when unjustified by military necessity, i.e. when carried out wantonly (see *infra* 633–4). 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.[18]

15. Once LOIAC bans a particular conduct without hedging the prohibition with limitative words concerning military necessity, the norm has to be obeyed in its unadulterated form. The presupposition 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 such circumstances, it is impossible to rely on military necessity as a justification 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

[16] *Hostage* case (*USA* v. *List et al.*) (American Military Tribunal, Nuremberg, 1948), 11 *NMT* 1230, 1253.
[17] Hague Regulations, *supra* note 6, at 73.
[18] *Hostage* case, *supra* note 16, at 1253–4.

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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'.[19]

16. A good example for LOIAC rejecting military necessity in favour of humanitarian considerations pertains to the capture of prisoners of war. Under Geneva Convention (III) of 1949, prisoners of war in custody must not be put to death,[20] and, as soon as possible after capture, they have to be evacuated to camps situated in an area far from the combat zone.[21] As a rule, this will be done by assigning an escort to carry out the process of evacuation, ensuring that the prisoners of war will not be able to escape en route. The question is what happens when enemy combatants are captured by a small light unit (of, e.g., commandos or Special Forces), which can neither handicap the mission by encumbering itself with prisoners of war nor detach guards for their proper evacuation. Can the prisoners of war be shot by dint of military necessity? The answer is unequivocally negative. Article 41(3) of Additional Protocol I addresses the issue forthrightly, prescribing that – in these unusual conditions – the prisoners of war must be released.[22] This had actually been the law long before the Protocol was adopted. Customary international law proscribes the killing of prisoners of war, 'even in cases of extreme necessity', when they slow up military movements or weaken the fighting force by requiring an escort.[23] Military necessity cannot override the rule, since it is already factored into it.[24] The legally binding compromise between military necessity and humanitarian considerations has been worked out in such a way that prisoners of war must either be kept safely in custody or released.

17. Hague Regulation 23(g) adds to the term 'military necessity' the adverb 'imperatively', as do some other texts. The implications of this addition are 'less than wholly clear',[25] especially when it is recalled that other modifiers (such as 'absolute',[26] 'urgent'[27] or 'unavoidable'[28]) are also in common use in diverse instruments adducing military necessity. Each of these adverbs or adjectives is

[19] Ibid., 1256.
[20] Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *Laws of Armed Conflicts* 507, 517 (Article 13, first paragraph).
[21] Ibid., 519 (Article 19, first paragraph).
[22] Additional Protocol I, *supra* note 4, at 731.
[23] M. Greenspan, *The Modern Law of Land Warfare* 103 (1959).
[24] See C. Greenwood, 'Historical Development and Legal Basis', *Handbook* 1, 38.
[25] See H. McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity', 30 *RDMDG* 215, 234 (1991).
[26] See Hague Regulation 54 of 1907, *supra* note 6, at 80.
[27] See Articles 33–4 of 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, 472.
[28] See Article 11(2) of Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, *Laws of Armed Conflicts* 999, 1004.

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devised to stress that military necessity has to be mulled over attentively and not acted upon flippantly.[29] But this is true of all LOIAC strictures.

## IV. The cardinal principles

### A. *Distinction and unnecessary suffering*

18. 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* 6) flow two 'cardinal principles contained in the texts constituting the fabric of humanitarian law', as affirmed by the International Court of Justice in its 1996 Advisory Opinion on *Nuclear Weapons*.[30] The Court viewed the two cardinal principles as 'intransgressible' under customary international law.[31] The adjective 'intransgressible' seems to imply that 'no circumstances would justify any deviation' from the principle.[32]

19. The first cardinal principle, in the words of the Court, 'is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants'; whereas '[a]ccording to the second principle, it is prohibited to cause unnecessary suffering to combatants'.[33] The concrete application of the two cardinal principles often encounters pragmatic obstacles, and we shall return to these issues in context (see *infra* 142 et seq.). Nevertheless, the idea that – owing to difficulties in implementation – one or the other of the cardinal principles 'must be abandoned'[34] is specious. In many ways, the two cardinal principles are the red threads weaving through the whole tissue of LOIAC.

### B. *The Martens Clause*

20. In the context of the two cardinal principles, the Court cited the Martens Clause.[35] This clause was the brainchild of F. de 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 of Hague Convention (II) of 1899 and Hague Convention (IV) of 1907 Respecting the Laws and Customs

[29] See E. Rauch, 'Le Concept de Nécessité Militaire dans le Droit de la Guerre', 19 *RDMDG* 205, 216–18 (1980).
[30] Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, [1996] *ICJ Rep.* 226, 257.
[31] Ibid.
[32] E. de Wet, *The Chapter VII Powers of the United Nations Security Council* 215 (2004).
[33] Advisory Opinion on *Nuclear Weapons*, *supra* note 30, at 257.
[34] G. Swiney, 'Saving Lives: The Principle of Distinction and the Realities of Modern War', 39 *Int.Law*., 733, 737 (2005).
[35] Advisory Opinion on *Nuclear Weapons*, *supra* note 30, at 257.

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of War on Land.[36] A 'modern version of that clause' – as the Court put it[37] – is to be found in Article 1(2) of Additional Protocol I (quoted *infra* 26). 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 International Court of Justice used the phrase 'elementary considerations of humanity',[38] which has overtones of the Martens Clause. In the Advisory Opinion on *Nuclear Weapons*, the Court said about the Martens Clause that its 'continuing existence and applicability is not to be doubted'.[39] The clause has also been relied upon (on more than one occasion) by the International Criminal Tribunal for the Former Yugoslavia (ICTY) (see *infra* 653),[40] and it is reiterated in the Preamble of 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 (hereinafter: the CCW).[41]

21. While the 'principles of humanity' and 'the dictates of public conscience' may foster the evolution of LOIAC, they do not constitute additional standards for judging the legality of means or methods of warfare.[42] It is notable that 'the yardsticks used by the Court were the principle of distinction and prohibition of unnecessary suffering, rather than principles of humanity and dictates of public conscience'.[43] General revulsion in the face of a particular conduct during hostilities (even if it transcends fluctuations of public opinion) does not create 'an independent legal criterion regulating weaponry' or methods of warfare.[44]

## *C. Neutrality*

22. Together with the two cardinal principles applicable in armed conflicts, the International Court of Justice – in the *Nuclear Weapons* Advisory

[36] Hague Convention (II) with Respect to the Laws and Customs of War on Land, 1899, *Laws of Armed Conflicts* 55, 70; Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, ibid.

[37] Advisory Opinion on *Nuclear Weapons*, *supra* note 30, at 257.

[38] *Corfu Channel* case (Merits), [1949] *ICJ Rep*. 4, 22.

[39] Advisory Opinion on *Nuclear Weapons*, *supra* note 30, at 260.

[40] See, e.g., *Prosecutor* v. *Furundzija*, Judgment (ICTY, Trial Chamber, 1998), 121 *ILR* 213, 255; *Prosecutor* v. *Kupreškić et al*. (ICTY, Trial Chamber, 2000), paras. 525–6; *Prosecutor* v. *Martić* (ICTY, Trial Chamber, 2007), paras. 466–7.

[41] Geneva 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 (CCW), 1980, *Laws of Armed Conflicts* 181, 184.

[42] See Greenwood, *supra* note 24, at 34–5.

[43] T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *AJIL* 78, 87 (2000).

[44] P. A. Robblee, 'The Legitimacy of Modern Conventional Weaponry', 71 *Mil.LR* 95, 125 (1976).

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Opinion – identified a third fundamental principle: the principle of neutrality.[45] At bottom, this principle means that Belligerent Parties must respect the neutrality of any State which is not taking part in their international armed conflict. Consequently, Belligerent Parties may not conduct hostilities within neutral territories: no incursions by their armed forces are permitted into neutral lands, waters[46] or airspace; and the effects of weapons used against the enemy must be contained accordingly.

## V. The strata of the law

### *A. Customary international law*

23. Most of the rules of LOIAC governing the conduct of hostilities have consolidated over the decades as norms of customary international law. Customary international law is attested by the 'evidence of a general practice accepted as law' (to repeat the well-known formula appearing in Article 38(1)(b) of the Statute of the International Court of Justice).[47] Two constituent elements are condensed here, one objective and the other subjective: the objective component of the definition relates to the (general) practice of States; and the subjective element is telescoped in the words 'accepted as law'.[48] The subjective factor is often verbalized in the Latin expression *opinio juris sive necessitatis*, meaning (in the words of the International Court of Justice, 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'.[49]

24. As for State practice, it consists primarily of actual conduct (acts of commission or omission) – including domestic legislation and military manuals (namely, binding instructions issued to the armed forces) – but additionally it comprises declarations and statements (often explaining the conduct of the acting State or challenging the conduct of another State).[50]

45 Advisory Opinion on *Nuclear Weapons*, *supra* note 30, at 261–2.
46 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). Rights of transit passage through, under or over international straits and archipelagic sea lanes are retained. See *UK Manual of the Law of Armed Conflict* 351–4 (UK Ministry of Defence, 2004).
47 Statute of the International Court of Justice, Annexed to Charter of the United Nations, 1945, 9 *Int.Leg*. 510, 522.
48 See Y. Dinstein, 'The Interaction between Customary International Law and Treaties', 322 *RCADI* 243, 293 (2006). The entire theme of this section is developed in some detail ibid., *passim*.
49 *North Sea Continental Shelf* cases, [1969] *ICJ Rep*. 3, 44.
50 See Dinstein, *supra* note 48, at 269–81.

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