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 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.[3]

[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

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 *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),

War, 1949, *ibid*., 507, 512; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *ibid*., 575, 580.

4 *Commentary, I Geneva Convention* 32 (ICRC, J.S. Pictet ed., 1952).

5 *Commentary on the First Geneva Convention* 86 (ICRC, J.-M. Henckaerts *et al*. eds., 2016).

6 N. Melzer, *Targeted Killing in International Law* 273 (2008).

7 See R. Otto, *Targeted Killings and International Law with Special Regard to Human Rights and International Humanitarian Law* 273–5 (2012).

8 See *Talinn Manual 2.0 on the International Law Applicable to Cyber Operations* 417 (M.N. Schmitt ed., 2017).

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]

[9] See M.N. Schmitt, 'Cyber Operations and the *Jus in Bello*: Key Issues', 41 *Is.YHR* 113, 119 (2011).
[10] 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.
[11] *Prosecutor* v. *Kunarac et al*. (ICTY, Trial Chamber, 2001), Paragraph 415.
[12] See W. Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit', 49 *CWRJIL* 75, 79 (2017).
[13] See N. Neuman, 'Challenges in the Interpretation and Application of the Principle of Distinction during Ground Operations in Urban Areas', 51 *Van.JTL* 807, 821 (2018).

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.[14] 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.[15] 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]

[14] See *Talinn Manual on the International Law Applicable to Cyber Warfare*, 2012, 106 (Rule 30) (M.N. Schmitt ed., 2013).
[15] See M.N. Schmitt, 'Wired Warfare 3.0: Protecting the Civilian Population during Cyber Operations', 910 *IRRC* 333, 338 (2019).
[16] Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, *Hague Peace Conferences* 207, 219, 233.

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 *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 legal 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;[19] just as the *jus ad bellum* coinage 'self-defence' must not be mixed up with the *jus in bello* term 'defence' as a subset of 'attack' (see *supra ibid*.). But the dissonance goes beyond matters of vocabulary.

14. A 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*.[20] Unlike the *jus ad bellum*, the *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 *jus in bello* in the conduct of hostilities between the

[17] AP/I, *supra* note 10, at 730.
[18] 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).
[19] Charter of the United Nations, 1945, 9 *Int.Leg*. 327, 346.
[20] 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).
[21] See Y. Dinstein, *War, Aggression and Self-Defence* 177–85 (6th edn, 2017).
[22] See A. Orakhelashvili, 'Overlap and Convergence: The Interaction between *Jus ad Bellum* and *Jus in Bello*', 12 *JCSL* 157, 185–93 (2007).

Belligerent Parties.[23] 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*.[24] 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.[25] 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*.[26]

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.[27]

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.[28]

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.[29]

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

[23] See K. Okimoto, 'The Relationship between *Jus ad Bellum* and *Jus in Bello*', *The Oxford Handbook of International Law in Armed Conflict* 1209, 1214 (A. Clapham and P. Gaeta eds., 2014).
[24] See M. Mandel, 'Aggressors' Rights: The Doctrine of "Equality between Belligerents" and the Legacy of Nuremberg', 24 *LJIL* 627–50 (2011).
[25] See A. Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure', 872 *IRRC* 931, 957–8 (2008).
[26] See V. Koutroulis, 'And Yet It Exists: In Defence of the "Equality of Belligerents" Principle', 26 *LJIL* 449, 457–60 (2013).
[27] Geneva Convention (I), *supra* note 3, at 461; Geneva Convention (II), *ibid*., 487; Geneva Convention (III), *ibid*., 512; Geneva Convention (IV), *ibid*., 580.
[28] *Commentary on the First Geneva Convention*, *supra* note 5, at 61.
[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.[30]

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'.[31] 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'.[32] 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

[30] AP/I, *supra* note 10, at 715.
[31] G. Blum, 'On a Different Law of War', 52 *Har.ILJ* 163, 166 (2011).
[32] M.A. Newton, 'Reconsidering Reprisals', 20 *DukeJCIL* 361, 381 (2009–10).

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

[33] Vienna Convention on the Law of Treaties, 1969, [1969] *UNJY* 140, 156.
[34] See A. Aust, *Modern Treaty Law and Practice* 260 (3rd edn, 2013).
[35] 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.
[36] See P. Reuter, *Introduction to the Law of Treaties* 155 (1989).
[37] See S. Watts, 'Reciprocity and the Law of War', 50 *Har.ILJ* 365, 424 (2009).
[38] M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* 107 (1996). But see *ibid*., 113.
[39] Vienna Convention on the Law of Treaties, *supra* note 33, at 142 (Article 4).
[40] *Commentary on the First Geneva Convention*, *supra* note 5, at 978.
[41] See I. Sinclair, *The Vienna Convention on the Law of Treaties* 190 (2nd edn, 1984).

Party regardless of whether the other Parties observe their obligations'.[42] There is no doubt that there has been a marked erosion in the permissible role of reciprocity in LOIAC.[43]

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.[44] In deterring further breaches of LOIAC, belligerent reprisals are aimed at restoring parity between the Belligerent Parties.[45]

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.[46]

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.[47] 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.
[43] See D. Schindler, 'International Humanitarian Law: Its Remarkable Development and Its Persistent Violation', 5 *JHIL* 165, 183 (2003).
[44] See *Commentary on the First Geneva Convention*, *supra* note 5, at 62.
[45] See M. Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* 57 (2009).
[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.
[47] See S.R. Johansen, *The Military Commander's Necessity: The Law of Armed Conflict and Its Limits* 32–6 (2019).

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