The Conduct of Hostilities under the Law of International Armed Conflict

Yoram Dinstein
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A companion volume to the author’s seminal textbook *War, Aggression and Self-Defence*, Third Edition, Cambridge (2001), this book focuses on issues arising in the course of hostilities between States, with an emphasis on the most recent conflicts in Iraq and Afghanistan. The main themes considered by Yoram Dinstein are lawful and unlawful combatants, war crimes, including command responsibility and defences, prohibited weapons, the distinction between combatants and civilians, legitimate military objectives, and the protection of the environment and cultural property. Numerous specific topics that have attracted much interest in recent hostilities are addressed, such as human shields, feigned surrenders, collateral damage and proportionality, belligerent reprisals and weapons of mass destruction.

Yoram Dinstein is Professor of International Law at Tel Aviv University. He is a Member of the Institute of International Law, a former Stockton Professor of International Law at the US Naval War College and a former Humboldt Fellow at the Max Planck Institute for International Law. Professor Dinstein is editor of the *Israel Yearbook on Human Rights* and has published extensively in the field of international law.
The Conduct of Hostilities under the Law of International Armed Conflict

Yoram Dinstein
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The concept and scheme of this book have emerged from constant encounters – in and out of the classroom – with officer-students in the US Naval War College (in Newport, R.I.) during my two terms there (in 1999/2000 and 2002/3) as Stockton Professor of International Law. I also had the benefit of intellectually enriching dialogues with the members of the faculty of what is now called the International Law Department (headed by Professor Dennis Mandsager). The problems addressed in class and in extracurricular discussions, the theoretical issues that were debated, and the practical challenges that surfaced in the actual experience of aviators, sailors, marines and army commanders, have all forced me to see the law relating to the conduct of hostilities in a new (much more realistic) light.

I was fortunate to have the opportunity of spending more than a year (2000/1) as a Humboldt Fellow at the Max Planck Institute of International Law at Heidelberg (Germany). In that pleasant and research-oriented ambiance, I could converse, compare notes and occasionally argue with a fairly large number of scholars, headed by the Institute’s Director, Professor Rüdiger Wolfrum. Moreover, I had free access to the vast collections of the peerless library of international law which is the bedrock of the Institute. Most of the book was researched and written in Heidelberg.

Since then, I have put the final touches to the manuscript, and have constantly updated the text as well as the footnotes against the background of events in progress and the spate of recent relevant publications. Additionally, I have addressed some new questions that have come up, especially since the horrendous events of 11 September 2001.
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### Abbreviations

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<td>AASL</td>
<td>Annals of Air and Space Law</td>
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<td>AC</td>
<td>Appeal Cases [United Kingdom]</td>
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<td>AD</td>
<td>Annual Digest and Reports of Public International Law Cases</td>
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<td>AFDI</td>
<td>Annuaire Français de Droit International</td>
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<td>AFLR</td>
<td>Air Force Law Review</td>
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<td>AIDI</td>
<td>Annuaire de l’Institut de Droit International</td>
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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>ALJ</td>
<td>Australian Law Journal</td>
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<td>ALR</td>
<td>Alberta Law Review</td>
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<td>ASILSILJ</td>
<td>ASILS International Law Journal</td>
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<td>AUILR</td>
<td>American University International Law Review</td>
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<td>AUJILP</td>
<td>American University Journal of International Law and Policy</td>
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<td>AULR</td>
<td>American University Law Review</td>
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<td>Ar.V.</td>
<td>Archiv des Völkerrechts</td>
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<td>BCEALR</td>
<td>Boston College Environmental Affairs Law Review</td>
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<td>BJIL</td>
<td>Buffalo Journal of International Law</td>
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<td>BPP</td>
<td>Bulletin of Peace Proposals</td>
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<td>BUILJ</td>
<td>Boston University International Law Journal</td>
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<td>BYBIL</td>
<td>British Year Book of International Law</td>
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<td>CILJ</td>
<td>Cornell International Law Journal</td>
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<td>CJTL</td>
<td>Columbia Journal of Transnational Law</td>
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<tr>
<td>CLR</td>
<td>California Law Review</td>
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<td>CWILJ</td>
<td>California Western International Law Journal</td>
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<td>CWRJIL</td>
<td>Case Western Reserve Journal of International Law</td>
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<td>CYIL</td>
<td>Canadian Yearbook of International Law</td>
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<td>DJCIL</td>
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<td>DJIL</td>
<td>Dickinson Journal of International Law</td>
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<td>DJILP</td>
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<td>DSB</td>
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<td>ENMOD</td>
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<td>George Washington Journal of International Law and Economics</td>
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<td>GYIL</td>
<td>German Yearbook of International Law</td>
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<td>HHRJ</td>
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<td>HICLR</td>
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<td>HILJ</td>
<td>Harvard International Law Journal</td>
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<td>HJLPP</td>
<td>Harvard Journal of Law &amp; Public Policy</td>
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<td>HRQ</td>
<td>Human Rights Quarterly</td>
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<td>Handbook</td>
<td>The Handbook of Humanitarian Law in Armed Conflicts (D. Fleck ed., 1995)</td>
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<td>ICC</td>
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<td>Reports of the International Court of Justice</td>
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<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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List of abbreviations

IHL  International Humanitarian Law
IJCP  International Journal of Cultural Property
ILM  International Legal Materials
ILR  International Law Reports
ILS  International Law Studies
IMT  International Military Tribunal
IMTFE  International Military Tribunal for the Far East
IRRC  International Review of the Red Cross
IYHR  Israel Yearbook on Human Rights
Int.Aff.  International Affairs
Int.Law.  International Lawyer
Int.Leg.  International Legislation (M. O. Hudson ed., 1931–50)
Int.Org.  International Organization
Int.Rel.  International Relations
JACL  Journal of Armed Conflict Law
JCST  Journal of Conflict & Security Law
JPR  Journal of Peace Research
JSS  Journal of Strategic Studies
LJIL  Leiden Journal of International Law
LLAICLJ  Loyola of Los Angeles International & Comparative Law Journal
LOIAC  Law of International Armed Conflict
LRTWC  Law Reports of Trials of War Criminals
MJIL  Michigan Journal of International Law
MPYUNL  Max Planck Yearbook of United Nations Law
Merc.LR  Mercer Law Review
Mich.LR  Michigan Law Review
Mil.LR  Military Law Review
NATO  North Atlantic Treaty Organization
NCLR  North Carolina Law Review
NILR  Netherlands International Law Review
NJIL  Nordic Journal of International Law
NLR  Naval Law Review
NMT  Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10
NTIR  Nordisk Tidsskrift for International Ret
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<td>NYUJILP</td>
<td>New York University Journal of International Law and Politics</td>
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<td>PASIL</td>
<td>Proceedings of the American Society of International Law</td>
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<td>RCADI</td>
<td>Recueil des Cours de l’Académie de Droit International</td>
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Once it was believed that when the cannons roar, the laws are silent. Today everybody knows better. In fact, the sheer number of international legal norms governing the conduct of hostilities is phenomenal. Legal themes like proportionality, indiscriminate warfare or the prohibition of mass destruction weapons (to cite just a few prime examples) are bruited about – not necessarily in legal terminology – by statesmen, journalists and lay persons around the globe. The public posture seems to be that, if wars are too important to be left entirely to generals and admirals, so are the laws applicable in war.

The growing public interest in the law of international armed conflict – like the increasing desire to see those who breach it criminally prosecuted – attests to a radical change in the Zeitgeist, compared to yesteryear. The reasons for the change are immaterial for the present volume. Perhaps the evolution is simply due to the fact that, in the electronic era, the horrors of war can be literally brought home to television screens thousands of miles away from the battlefield. Be it as it may, everybody feels more than ever affected by any armed conflict raging anywhere. By the same token, almost everybody seems to have ideas and suggestions as to how to augment the humanitarian component in the law of international armed conflict. This is a laudable development. But it is important to keep constantly in mind the sobering thought that wars are fought to be won.

Some people, no doubt animated by the noblest humanitarian impulses, would like to see zero-casualty warfare. However, this is an impossible dream. War is not a chess game. Almost by definition, it entails human losses, suffering and pain. As long as it is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities. The law of international armed conflict can and does forbid some modes of behaviour, with a view to minimizing the losses, the suffering and the pain. But it can do so only when there are realistic alternatives to achieving the military goal of victory in war. Should nothing be
Theoretically permissible to a belligerent engaged in war, ultimately everything will be permitted in practice – because the rules will be ignored.

The present volume deals with the conduct of hostilities in international (inter-State) armed conflict, i.e., armed conflicts raging between two or more sovereign States. The international legal norms dealing with internal (intra-State) armed conflict – once negligible in number and range – have constantly grown in recent years and, in many respects, now emulate the rules pertaining to inter-State hostilities. But, both legally and pragmatically speaking, there are still crucial aspects of dissimilarity between international (inter-State) and internal (intra-State) armed conflicts. Here we shall focus exclusively on the law of international armed conflict (hereinafter: LOIAC), applicable chiefly in wartime but also in clashes ‘short of war’.

The book will not address all legal issues related to inter-State armed conflicts, and will concentrate on the conduct of hostilities. En passant, some peripheral references will be made to subjects like neutrality, belligerent occupation or the treatment of prisoners of war in custody, but that will be done solely in order to illuminate a point or to draw a comparison. In particular, this volume avoids all questions of the legality of recourse to the use of inter-State force in accordance with the *jus ad bellum*, a major topic addressed by the present writer in another book.

The nine chapters of the book will examine the themes of general framework, lawful combatancy, prohibited weapons, legitimate military objectives, protection of civilians and civilian objects from attack, measures of special protection, protection of the environment, other methods and means of warfare, and war crimes (including command responsibility and defences). Numerous specific topics – ranging from ‘collateral damage’ to belligerent reprisals, from ‘target area’ air bombings to attacks against merchant vessels at sea, from the legality of nuclear weapons to individual targeting of enemy commanders – will be analysed against the background of customary international law and treaties in force.

The book is designed not only for international lawyers, but also as a tool for the instruction of military officers. There is a manifest need to train officers at all levels of command in the principles and rules of international armed conflict. This must be done in advance, namely, already in peacetime. Decisions in wartime – especially in the electronic era – are often split-second, and must be predicated on instinct as developed in training. Just as every military service is seeking to have officers and other ranks thoroughly prepared for the eventualities of combat likely to be encountered on the operational side, it is indispensable to imbue

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soldiers, sailors and aviators with the sense of duty to comply with legal requirements.

It goes without saying that laymen cannot be expected to know all the intricacies of a system of law. Yet, all those going through military training must familiarize themselves with the salient rules of LOIAC, understanding the legal implications of commands issued and obeyed in combat conditions. That is the only way to guarantee that no serious violations of LOIAC will be perpetrated, and that no charges of war crimes will be instigated. It is also the only way to ensure that no gap will develop between legal norms and reality: the ‘ought’ and the ‘is’.
The general framework

The present volume deals with the contemporary norms of LOIAC (the law of international armed conflict) under customary international law and treaties in force. The purpose is to present – and analyse – LOIAC neither as it was practised in the past nor as it may evolve in the future, but only as it is legally prescribed and actually implemented at present.

LOIAC constitutes a branch of international law, and as such it is binding on all belligerent States. LOIAC must be differentiated from Rules of Engagement (ROE) issued by various countries (sometimes by diverse commands in the same country), or by international organizations, and altered at will. ‘ROE may be framed to restrict certain actions or they may permit actions to the full extent allowable under international law’.\(^1\) Accordingly, a belligerent State – animated by political or other reasons of its own – may opt not to employ in given hostilities some destructive weapons the use of which is lawful under LOIAC (see infra, Chapter 3), or to avoid attacking singular targets constituting legitimate military objectives (see infra, Chapter 4). As long as it is acting within the powers vested in it by LOIAC, a belligerent State may at its discretion indulge in a degree of self-restraint. However, under no circumstances can a belligerent State – through ROE or otherwise – authorize its armed forces to commit acts which are incompatible with international obligations imposed by LOIAC.

It must be emphasized at the outset that LOIAC (also known as the *jus in bello*) is predicated on the postulate of equal application of its legal norms to all Parties to the conflict, irrespective of any belligerent State’s standing from the viewpoint of the *jus ad bellum*. That is to say, LOIAC does not distinguish between the armed forces (or civilians) of the aggressor State(s), on the one hand, and those of the State(s) resorting to self-defence or participating in collective security operations enforced or authorized by the UN Security Council, on the other.\(^2\) Breaches of


LOIAC cannot be justified on the ground that the enemy is responsible for commencing the hostilities in flagrant breach of the *jus ad bellum*. In the words of the Preamble to Protocol I of 1977, Additional to the Geneva Conventions for the Protection of War Victims:

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.\(^3\)

Even United Nations forces (when engaged as combatants in situations of armed conflicts) are obligated to respect the principles and rules of LOIAC.\(^4\)

A few explanatory comments are called for to set out (a) the sources of the international legal norms forming the underlying strata of the ensuing discourse; (b) the semantics of this *materia*; (c) caveats relating to the inter-State character of the conflicts in which the legal norms operate; (d) the balance between military necessity and humanitarian considerations; (e) the interrelationship between LOIAC and human rights law; and (f) the dissemination of LOIAC.

I. The sources

A. Customary international law and treaty law

Most of the rules of LOIAC governing the conduct of hostilities have consolidated over the decades in customary international law. Customary international law crystallizes when there is ‘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).\(^5\)

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’. The subjective factor is often phrased in the Latin expression *opinio juris sive necessitatis*, meaning ‘a belief that

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this practice is rendered obligatory by the existence of a rule of law requiring it'.

As for State practice, it consists primarily of actual conduct (acts of commission or omission), but additionally of declarations and statements (often explaining the conduct of the acting State or challenging the conduct of another State). Special importance in the context of LOIAIC is attached to military manuals and operational handbooks.

The reference to a ‘general’ practice calls for four brief observations:

(i) Not every State need necessarily participate (expressly or tacitly) in the general practice. In other words, ‘general’ is not to be confused with universal.

(ii) In certain fields, the practice of some States – which are most directly active – is of overriding import. This is true, for example, of naval law (considering that not every State is a significant actor in maritime affairs). It is true all the more where it comes to esoteric areas of State activities.

(iii) Even where not all States have contributed to the emergence of a particular norm, once that norm has solidified as an integral part of general customary international law (as evidenced by ‘a general practice accepted as law’), it is binding on all States.

(iv) Customary international law is not always general in scope. The application of some customary norms is confined to a particular region of the world (say, Latin America) or even to the bilateral relations between two States.

Many of the rules governing the conduct of hostilities in international armed conflict have been incorporated in a host of multilateral treaties (see infra, B). When taken together, these treaties encompass much of LOIAIC. Yet, no single treaty – and no cluster of treaties – purports to cover the whole span of LOIAIC. Hence, customary international law remains of immense significance. As pronounced in Article 1(2) of Additional Protocol 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.

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6 North Sea Continental Shelf cases, [1969] ICJ Rep. 3, 44.
8 See ibid.
9 The construct of bilateral customary international law was confirmed by the International Court of Justice in Case Concerning Right of Passage over Indian Territory (Merits), [1960] ICJ Rep. 6, 39.
10 Protocol I, supra note 3, at 627.
This is a modern version of the so-called Martens Clause, which will be examined infra (Chapter 3, I).

A treaty – by whatever designation (including Convention, Charter, Protocol, Declaration, etc.) – is an agreement concluded between States in written form and governed by international law.\(^{11}\) A treaty (in force) is binding only on contracting Parties: the legal nexus between such States and the treaty is derived from their consent to be bound by it (\textit{ex consensu advenit vinculum}).\(^{12}\)

The bifurcation of LOIAC into treaty law and general customary international law does not preclude interaction between the two sources of law. The interaction exists on several levels:

(i) The framers of some treaty provisions seek to attain a genuine codification, reflecting customary international law. That is to say, the authors of the relevant texts wish to give customary international law the imprimatur of \textit{lex scripta} without altering its substance, and the international community as a whole (not merely States Parties) acknowledges that the effort has been crowned with success. That being so, a non-contracting Party will also be bound by the norms encapsulated in the treaty, not because they form part of a treaty (which as such binds solely contracting Parties) but because they articulate customary international law.

(ii) Some treaty provisions are adopted with a view to creating new law, openly diverging from pre-existing customary international law. As a rule, a treaty can modify customary international law. The only exception is a conflict between a treaty and ‘a peremptory norm of international law’ (\textit{jus cogens}), in which case the treaty is or becomes void.\(^{13}\) There are few norms which are undeniably peremptory in nature, but when a given norm acquires that hallmark – for example, freedom from torture (see infra, V) – modification by treaty (or even by custom) is hard to accomplish.\(^{14}\) Assuming that the customary norm is not peremptory (\textit{jus dispositivum}), the treaty will effect a departure from that norm, it being understood that the treaty will apply exclusively in the relations between contracting States \textit{inter se}. Then, one of two things can transpire: either (aa) a long-lasting gap will be formed between the legal regime created by contracting Parties to the treaty and that applicable – under customary international


\(^{13}\) See Articles 53 and 64 of the Vienna Convention, supra note 11, at 154, 157.

\(^{14}\) See Dinstein, supra note 2, at 96–8.
law – in the legal relations between non-contracting Parties (as well as between contracting and non-contracting Parties); or (bb) over the years, the general practice of States will gravitate towards the (originally innovative) treaty provisions, thereby turning them into a true mirror image of customary international law: not the law as it was at the time when the treaty was first formulated, but the law as it has evolved since. For a prominent illustration, see infra, B.

In every international armed conflict, it is indispensable to determine whether a belligerent State whose conduct is at issue has expressed its consent to be bound by any germane treaty in force. But that is not enough. It must be appreciated that:

(i) The treaty may include a general participation clause (or clausula si omnes), whereby its provisions will apply ‘only if all the belligerents are parties to the Convention’ (the quotation is from Article 2 of Hague Convention (IV) of 1907\(^\text{15}\)). In such a setting, if a single belligerent State in an international armed conflict declines to be a contracting Party to a treaty, the instrument would become inoperative even between all other belligerent States (notwithstanding the fact that they are all contracting Parties and therefore bound by the treaty). The purpose of a general participation clause is to avoid a dual legal regime in wars between coalitions, but the result can be ‘especially onerous’ when one small State precludes the application of a treaty in a major war.\(^\text{16}\)

(ii) The treaty may mandate 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 for the Protection of War Victims\(^\text{17}\)). Evidently, such a stipulation 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 ‘mutual relations’). Even in a multipartite armed conflict, the treaty cannot be applied unless at least two opposing belligerent States are contracting Parties, so that they are capable of applying the treaty ‘in their mutual relations’.

\(^\text{15}\) Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, \textit{Laws of Armed Conflicts} 63, 71. Cf. Hague Convention (II) with Respect to the Laws and Customs of War on Land, 1899, \textit{ibid.}

\(^\text{16}\) See W. K. Geck, ‘General Participation Clause’, 2 \textit{EPIL} 510, \textit{id.}

(iii) Conversely, if the treaty is declaratory of customary international law, it is immaterial whether any belligerent State in an international armed conflict is a contracting Party. Nor does it matter if the treaty is legally in force or if it has a general participation clause. Whatever the juridical status of the treaty \textit{per se} happens to be, the general obligations of customary international law (enunciated in the text) are binding on every belligerent State. These obligations must be complied with unstintingly, not because they are incorporated in the treaty but – regardless of that fact – because they are independently embedded in customary international law.

Any treaty promulgating rules of LOIAC would usually be consulted by belligerent States (as well as by international fora and tribunals), in order to determine whether or not it impinges upon customary international law. Arriving at the conclusion that the text is in conformity with customary international law is alluring, given the relative clarity of the written word. Nevertheless, as far as customary international law is concerned, the dominant consideration must be evidence that the text coincides with the general practice of States accepted as law. In reality, every treaty codification – even when broadly reflecting pre-existing customary international law – inevitably sharpens the image (lending it, as it were, higher resolution) and often polishes the edges of the picture.

\textbf{B. The principal treaties}

The formulation of treaties pertaining to the conduct of hostilities goes back to the mid-nineteenth century.\textsuperscript{18} An important landmark was the 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, which – notwithstanding its narrowly defined theme – proclaims in the Preamble that ‘the progress of civilization should have the effect of alleviating as much as possible the calamities of war’.\textsuperscript{19} This Declaration has been followed, in the main, by two series of treaties often referred to as the ‘Hague law’ and the ‘Geneva law’:

(i) The Hague Conventions of 1899 and 1907. These Conventions, adopted by the Peace Conferences of those years, are apposite to multiple facets of the conduct of hostilities on land, sea and even the air (through the use of balloons). Various texts adopted in 1899 were revised in 1907, at which time further instruments were added:

\textsuperscript{18} The earliest instrument is the Paris Declaration Respecting Maritime Law, 1856, \textit{Laws of Armed Conflicts} 787.

\textsuperscript{19} St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868, \textit{Laws of Armed Conflicts} 101, 102.
altogether, six Conventions and Declarations were adopted in 1899, and fourteen in 1907. Some have not really stood the test of time and have fallen by the wayside. But others have become part and parcel of customary international law. Indeed, the International Military Tribunal at Nuremberg held, in 1946, that – although innovative at its genesis, and notwithstanding the above-mentioned general participation clause appearing in the instrument – Hague Convention (IV) of 1907 has acquired over the years the lineaments of customary international law:

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.

The International Military Tribunal for the Far East 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.

(ii) 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 adopted in 1864 (with the impetus of the foundation of the Red Cross movement on the initiative of H. Dunant). It was revised and replaced in 1906, and then again in 1929, at which time a second Convention on prisoners of war was added. In 1949, both instruments

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were superseded by four Conventions dealing with the wounded and sick in armed forces in the field (Convention (I)), wounded, sick and shipwrecked members of armed forces at sea (Convention (II)), prisoners of war (Convention (III)), and the protection of civilians (Convention (IV)).  

In 1977, a Protocol relating to international armed conflicts (Protocol I) was added to the Geneva Conventions, jointly with another instrument (Protocol II) dealing with non-international armed conflicts. The two Additional Protocols do not supersede the four Geneva Conventions of 1949: the new texts merely complement the original ones. Protocol I goes beyond the traditional bounds of the Geneva Conventions (protection of victims) and addresses many issues directly related to the actual conduct of hostilities. However, whereas the four Geneva Conventions have gained virtually universal acceptance – in that almost every State in the world is a contracting Party to them – several sections of the Protocol are implacably objected to by the United States and by an array of other countries. Much of the Protocol may be regarded as declaratory of customary international law, or at least as non-controversial. Unfortunately, the provisions which have proved to be bones of contention are too poignant to be glossed over. The contested provisions will be critiqued in their context, in the following chapters of the present volume.

The two legislative embroideries of the ‘Hague law’ and the ‘Geneva law’ by no means exhaust the tapestry of the treaty law guiding the conduct of hostilities in inter-State armed conflicts. There are numerous other treaties, some of which – while not associated with the ‘Hague law’ or the ‘Geneva law’ – were also adopted either in Geneva or at The Hague. It is worthwhile to mention 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, was drawn up by a conference held in Geneva under the auspices of the League of Nations.

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29 Geneva Convention (I), supra note 17, at 373; Geneva Convention (II), ibid., 401; Geneva Convention (III), ibid., 423; Geneva Convention (IV), ibid., 495.
30 Protocol I, supra note 3, at 621.
33 This is not denied by the United States. See ibid. A comprehensive project, attempting to identify the provisions of the Protocol reflecting customary international law, is in progress under the aegis of the ICRC.
34 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925, Laws of Armed Conflicts 115.
(ii) In 1954, under the aegis of UNESCO (United Nations Educational, Scientific and Cultural Organization), a Convention for the Protection of Cultural Property in the Event of Armed Conflict was concluded at The Hague. Additional Protocols have been appended subsequently.

(iii) In 1980, a conference organized by the United Nations produced in Geneva a 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. This is a framework instrument to which several substantive Protocols are attached, their roster growing since 1980.

Other relevant treaties will be mentioned in their proper place in the scheme of this volume. Treaties must not be confused with restatements of the law prepared by groups of experts and having no binding force per se. All the same, such restatements may at times be perceived as accurate replicas of customary international law, and in their innovative parts may have a lot of influence on future treaties and on the practice of States. Two such texts stand out:


(ii) The 1995 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, formulated by a group of international lawyers and naval experts sponsored by the San Remo International Institute of Humanitarian Law.

II. The semantics

For a long time, it used to be fashionable to juxtapose the ‘Hague law’ and the ‘Geneva law’ as if they were two different branches of LOIAC (broadly representing conduct of hostilities versus protection of victims). Such an approach was never really justified, inasmuch as the ‘Geneva law’ and the ‘Hague law’ have always intersected, and a large number of norms switched back and forth between the two strings of treaties. Initially, Hague Convention (III) of 1899 adapted to maritime warfare

the principles of the original Geneva Convention of 1864.\textsuperscript{39} Subsequent to 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.\textsuperscript{40} In 1949, Geneva Convention (II) expressly replaced Hague Convention (X),\textsuperscript{41} bringing the subject back to the Geneva fold. Furthermore, rules pertaining to prisoners of war were first incorporated in Chapter II of the Regulations Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907.\textsuperscript{42} Supplementary provisions, in much greater detail, appear in the Prisoners of War Geneva Convention of 1929, superseded by Geneva Convention (III) of 1949.\textsuperscript{43}

Other examples may also be cited, but upon the adoption of Additional Protocol I, the entire distinction between ‘Hague law’ and ‘Geneva law’ became conspicuously outdated. In its Advisory Opinion of 1996 on the \textit{Legality of the Threat or Use of Nuclear Weapons}, the International Court of Justice had this to say about the ‘Hague law’ and the ‘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.\textsuperscript{44}

Semantically, the term ‘International Humanitarian Law’ (IHL) – as indicated by the Court – is an amalgam of both ‘Hague law’ and ‘Geneva law’. Despite its popular usage today, and the stamp of approval of the International Court of Justice, ‘International Humanitarian Law’ as an umbrella designation has a marked disadvantage. This is due to the fact that the coinage IHL is liable to create the false impression that all the rules governing hostilities are – and have to be – truly humanitarian in nature, whereas in fact not a few of them reflect the countervailing constraints of military necessity (see \textit{infra}, IV). An alternative appellation,

\begin{itemize}
\item \textsuperscript{39} Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 1899, \textit{Laws of Armed Conflicts} 289.
\item \textsuperscript{40} Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 1907, \textit{Laws of Armed Conflicts} 313.
\item \textsuperscript{41} Geneva Convention (II), \textit{supra} note 17, at 419 (Article 58).
\item \textsuperscript{42} Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907, \textit{Laws of Armed Conflicts} 75, 76–82 (Articles 4–20).
\item \textsuperscript{43} Geneva Convention (III), \textit{supra} note 17, at 477, explicitly states that it replaces (in relations between contracting Parties) the 1929 Convention (Article 134), but it is complementary to Chapter II of the Hague Regulations (Article 135).
\item \textsuperscript{44} Advisory Opinion on the \textit{Legality of the Threat or Use of Nuclear Weapons}, [1996] ICJ Rep. 226, 256.
\end{itemize}
14 The Conduct of Hostilities

popular in the past – ‘the Laws of Warfare’ (or *jus in bello*) – is equally unsatisfactory, because it is irreconcilable with the reality that the norms in question are also in effect in international armed conflicts falling short of full-fledged wars (see *infra*, III). In this volume, therefore, it is proposed to use the term LOIAC (law of international armed conflict) instead of either IHL or *jus in bello*. Naturally, this is a semantic preference, which has no impact on the substance of the law.

III. Inter-State armed conflicts

The present volume will be confined to international (inter-State) armed conflicts, that is to say, armed conflicts in which two or more sovereign States are engaged. No attempt will be made to address the separate issue of intra-State (civil) wars, which are regulated by a different set of rules (such as Additional Protocol II of 1977). It must be conceded, however, that drawing the line of demarcation between inter-State and intra-State armed conflicts may be a complicated task in two amorphous situations:

(i) Armed conflicts may be mixed horizontally in the sense that they incorporate elements of both inter-State hostilities (between two or more belligerent States) and intra-State hostilities (between two or more clashing groups within the territory of one of the belligerent States where a civil war is raging). The dual conflicts, internal and international, may commence simultaneously or consecutively (the international armed conflict preceded by the internal armed conflict or vice versa). But the point is that the armed conflict has disparate inter-State and intra-State strands. This is what happened, for instance, in Afghanistan in 2001: the Taliban regime, having fought a long-standing civil war with the Northern Alliance, got itself 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 attack against the United States on September 11th of that year.

The fact that a belligerent State is beset by enemies from both inside and outside its territory does not mean that the international and the internal armed conflicts necessarily merge. Specific hostilities may be waged exclusively between the domestic foes (e.g., between the Taliban forces and the Northern Alliance), whereas other hostilities

may take place on the inter-State plane (e.g., between the Taliban forces and the Americans). LOIAC will control only the international military operations. As the International Court of Justice 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.47

(ii) Armed conflicts may also be mixed vertically in the sense that what has started as an intra-State armed conflict evolves into an inter-State armed conflict. One potential development is that the intra-State armed conflict would spawn an inter-State armed conflict through the military intervention of a foreign State on the side of rebels against the central Government. Another possibility is the implosion of a State which has plunged into a civil war, and has then fragmented into two or more independent States. Such implosion and fragmentation occurred in Yugoslavia in the 1990s. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia 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 a state of international armed conflict existed between them.48

LOIAC relates to hostilities carried out between belligerent States, regardless of a declaration of war.49 This is due to two considerations:

(i) War between sovereign States can exist either in the technical sense (commencing with a formal declaration of war by one State against another) or in the material sense (i.e., the comprehensive use of armed force in the relations between two States, irrespective of any formal declaration).50

(ii) LOIAC is brought to bear upon the conduct of hostilities between sovereign States, even if these hostilities fall short of war, namely,

50 On the distinction between war in the technical and in the material sense, see Dinstein, supra note 2, at 9–10.
The Conduct of Hostilities

constitute a mere incident.\textsuperscript{51} Article 2 common to the 1949 Geneva Conventions for the Protection of War Victims appropriately proclaims in its first Paragraph:

[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.\textsuperscript{52}

The application of LOIAC to inter-State hostilities is not conditioned on any formal recognition of the enemy either as a State or as a Government:

(i) No formal recognition is required by a belligerent State as to the statehood of the opposing side.\textsuperscript{53} As long as the adversary satisfies objective criteria of statehood under international law,\textsuperscript{54} any armed conflict between the two belligerent Parties would be characterized as inter-State.

(ii) In the same vein, no formal recognition of a particular regime as the Government of the enemy State is necessary. Consequently, in the 2001 hostilities, it did not matter that the Taliban regime failed to gain recognition as the Government of Afghanistan by the international community at large (and specifically by the United States). The fact that the Taliban regime was in control of most of the territory of Afghanistan meant that (recognized or not) it was the \textit{de facto} Government, and the regime’s actions had to ‘be treated as the actions of the state of Afghanistan’.\textsuperscript{55}

IV. Military necessity and humanitarian considerations

LOIAC in its entirety is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations. If military necessity were to prevail completely, no limitation of any kind would have been imposed on the freedom of action of belligerent States: \textit{à la guerre comme à la guerre}. Conversely, if benevolent humanitarism were the only beacon to guide the path of armed forces, war would have entailed no bloodshed, no destruction and no human suffering; in short, war would not have been war. In actuality, LOIAC takes

\begin{itemize}
\item \textsuperscript{51} See \textit{ibid.}, 16.
\item \textsuperscript{52} Geneva Convention (I), \textit{supra} note 17, at 376; Geneva Convention (II), \textit{ibid.}, 404; Geneva Convention (III), \textit{ibid.}, 429; Geneva Convention (IV), \textit{ibid.}, 501.
\item \textsuperscript{53} See Greenwood, \textit{supra} note 49, at 45.
\item \textsuperscript{54} For these criteria, see J. Crawford, \textit{The Creation of States in International Law} 36 ff (1979).
\item \textsuperscript{55} Greenwood, \textit{supra} note 46, at 312–13.
\end{itemize}
a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism). The challenge whenever a LOIAC norm is fashioned is – in the words of the 1868 St Petersburg Declaration – to fix ‘the technical limits at which the necessities of war ought to yield to the requirements of humanity’.  

The paramount precept of LOIAC – to reiterate again the language of the St Petersburg Declaration (quoted supra, I, B) – 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 mitigation of the calamities of war (which would be utterly impractical), but relief from the tribulations of war ‘as much as possible’: that is to say, as much as possible considering that war is prosecuted for military ends, and the ascendant objective of each belligerent State is to win the war. The St Petersburg dictum is bolstered by the affirmation in Article 22 of the Hague Regulations of 1899/1907, 57 as well as Article 35(1) of Additional Protocol I of 1977, 58 that the right of belligerents to choose methods or means of warfare ‘is not unlimited’.

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 understand that their duties can be discharged without causing pointless torment. It is noteworthy that the St Petersburg Declaration was crafted by an international conference attended solely by military men. 59 The input of military experts to all subsequent efforts to draft treaty law 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).

Every single norm of LOIAC is moulded by a parallelogram of forces: it confronts a built-in tension between the relentless demands of military necessity and humanitarian considerations, working out a compromise formula. The outlines of the compromise vary from one LOIAC norm to another. Still, in general terms, it can be stated categorically 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 stimulated by a realistic (as distinct from a purely idealistic) approach to armed conflict.

56 St Petersburg Declaration, supra note 19, at 102.
57 Hague Regulations, supra note 42, at 82. 58 Protocol I, supra note 3, at 644.
Often, when LOIAC is breached, the individual perpetrator claims ‘military necessity’ as a justification for his acts. Is this an admissible excuse? 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.\(^\text{60}\)

The key words here are ‘subject to the laws of war’. What ensues is:

(i) A belligerent 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 legitimacy pursuant to LOIAC. This implies a tangible operational latitude. The dynamics of the law are such that whatever is required by military necessity, and is not prohibited by LOIAC, is permissible.

(ii) Occasionally, the very prohibition of a certain act by LOIAC contains a built-in exception in case of military necessity. The template is Article 23(g) of the Hague Regulations of 1899/1907, by which it is forbidden:

To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.\(^\text{61}\)

What this signifies is that destruction of property is illicit when unjustified by military necessity, i.e., when carried out wantonly (see *infra*, Chapter 8, III, D). 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.\(^\text{62}\)

(iii) Once LOIAC bans a particular conduct without hedging the prohibition with limiting words, it must be grasped that the framers of the norm have already taken into account the exigencies of military necessity and (for humanitarian reasons) have rejected it as a valid exception. In such circumstances, it is illegitimate to rely on military necessity as a justification for deviating from the norm. Otherwise, the whole fabric of LOIAC would unravel. Unqualified norms

\(^{\text{60}}\) *Hostage case (USA v. List et al.)* (American Military Tribunal, Nuremberg, 1948), 11 *NMT* 1230, 1253.

\(^{\text{61}}\) *Hague Regulations*, *supra* note 42, at 83.

of LOIA 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’.  

A good example relates to the capture of prisoners of war. Under Geneva Convention (III), prisoners of war in custody must not be put to death, and, as soon as possible after capture, they have to be evacuated to camps situated in an area far from the combat zone. 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 and, at the same time, that they will be protected from any extraneous danger. 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 encumber itself with prisoners of war nor detach guards for their proper evacuation. Can the prisoners of war be killed out of military necessity? The answer is unequivocally negative. Article 41(3) of Additional Protocol I addresses the issue forthrightly, laying down that – in these unusual conditions – the prisoners of war must be released. 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’, e.g., when they slow up military movements or weaken the fighting force by requiring an escort. Military necessity cannot override the rule, since ‘it is an integral part of it’. 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.

Article 23(g) of the Hague Regulations adds to military necessity the adverb ‘imperatively’, as do some other texts. The ‘precise significance’ of this addition ‘is less than wholly clear’, especially when it is recalled that diverse adverbs and adjectives are also in common use, such as ‘absolute’, ‘urgent’ or ‘unavoidable’ military necessity. The addition

63 Ibid., 1256.
64 Geneva Convention (III), supra note 17, at 435 (Article 13).
65 Ibid., 437 (Article 19).
66 Protocol I, supra note 3, at 646.
70 See Article 54 of the 1907 Hague Regulations, supra note 42, at 91.
71 See Articles 33–4 of Geneva Convention (I), supra note 17, at 387.
of the adverb/adjective indicates that when military necessity is weighed, this has to be done with great care. But great care in the application of LOIAC must be wielded at all times.

V. Humanitarian law and human rights

When LOIAC is referred to as ‘International Humanitarian Law’ (IHL), it is easy to assume – wrongly – that it is ‘a law concerning the protection of human rights in armed conflicts’. This can be a misconception. Although the expressions ‘human’ and ‘humanitarian’ strike a similar chord, it is essential to resist any temptation to regard them as intertwined or interchangeable. The adjective ‘human’ in the phrase ‘human rights’ points at the subject in whom the rights are vested: human rights are conferred on human beings as such (without the interposition of States). In contrast, the adjective ‘humanitarian’ in the term ‘International Humanitarian Law’ merely indicates the considerations that may have steered those responsible for the formation and formulation of the legal norms. IHL – or LOIAC – is the law channelling conduct in international armed conflict, with a view to mitigating human suffering.

Undeniably, LOIAC (or IHL) contains norms protecting human rights. However, many of the rights established by LOIAC are granted exclusively to States and not to individual human beings. A comparison of some provisions of the Geneva Conventions of 1949 (the core of IHL) easily demonstrates that they cover both State rights and human rights.

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.

Parallel stipulations appear in Geneva Convention (II) (embracing the same categories plus shipwrecked persons); Geneva Convention (III) (relating to prisoners of war); and Geneva Convention (IV) (pertaining to ‘[p]rotected persons’). The phrase ‘rights secured to them’ palpably denotes that these rights are bestowed directly on individuals belonging

75 Geneva Convention (I), supra note 17, at 377.
76 Geneva Convention (II), supra note 17, at 405 (Article 7).
77 Geneva Convention (III), supra note 17, at 432 (Article 7).
78 Geneva Convention (IV), supra note 17, at 504 (Article 8).
to the categories indicated, and that they are not only State rights from which individuals derive benefit.\(^79\)

On the other hand, Article 16 of Geneva Convention (I) includes 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.\(^80\)

The clause then goes on to ordain that the Parties to the conflict are to collect and forward to one another itemized personal effects of the deceased.\(^81\) A matching duty appears in Geneva Convention (II).\(^82\) Indisputably, the right to receive death certificates and personal effects – corresponding to the obligation to prepare and forward them – is accorded not to individual human beings, but to belligerent States. Human beings, in this instance the next of kin, will benefit from the implementation of the provision, but the right is not conferred directly on them.

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

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.\(^83\)

The first sentence is glaringly couched in individual human rights terminology. But the second sentence, cast in general terms and affecting groups of people – perhaps even the civilian population as a whole – is more relevant to the legal relations between the two adversary Parties. The existence of dual rights (a State right and an individual 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 right without necessarily relying on the goodwill of his belligerent State, and symmetrically the belligerent State has a *jus standi* of its own. Each is empowered to take whatever steps are available and deemed appropriate.

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\(^80\) Geneva Convention (I), *supra* note 17, at 381.

\(^81\) *Ibid.*

\(^82\) Geneva Convention (II), *supra* note 17, at 410 (Article 19).

\(^83\) Geneva Convention (IV), *supra* note 17, at 511.
by virtue of the separate (State or individual) right, and neither one is capable of waiving the other’s independent right.

It ought to be stressed that all rights and duties created by LOIAC (including human rights and their corresponding duties) come into play upon the outbreak of an international armed conflict, and they remain fully applicable throughout the conflict. LOIAC human rights – like LOIAC State rights – are in force, in their full vigour, in wartime (as well as in hostilities short of war), inasmuch as they are directly engendered and shaped by the special demands of the armed conflict. Derogation from LOIAC rights is possible in some extreme instances, but it is limited to specific persons or situations and no others (see infra, Chapter 2, II; Chapter 5, VIII, A).

In this crucial respect, LOIAC human rights are utterly different from ordinary (peacetime) human rights. Ordinary (peacetime) human rights are frequently subject to restrictions, which can be placed on their exercise ‘in the interests of national security or public safety’. Even more significantly, the application of ordinary (peacetime) human rights – whether or not restricted – can usually be derogated from in time of an international armed conflict.

The derogation from ordinary (peacetime) human rights is authorized, e.g., 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 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.

Although Article 4(1) 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’. Indeed, the travaux préparatoires divulge that war was uppermost in the minds of the drafters of the derogation

84 See Article 5 of Geneva Convention (IV), ibid., 503; and Article 54(5) of Protocol I, supra note 3, at 653.
85 For instance, freedom of assembly and freedom of association, as per Articles 21 and 22(2) of the International Covenant on Civil and Political Rights, 1966, [1966] UNJY 178, 184–5.
86 Ibid., 180.
87 M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary 78 (1993).
It is 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’.\textsuperscript{89} When derogation from ordinary (peacetime) human rights occurs, one can say that LOIAC (war-oriented) human rights fill much of the vacant space. This is of particular import if due process of law is imperilled. Peacetime judicial guarantees may be derogated from in wartime, yet LOIAC introduces other minimum guarantees in their place.\textsuperscript{90}

Not all peacetime human rights are derogable in wartime (or in any other public emergency). Article 4(2) of the Covenant forbids any derogation from itemized human rights.\textsuperscript{91} 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 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.

Some of the non-derogable rights enumerated in Article 4(2) have little or no special impact in wartime, as attested by the right to recognition as a person. The right to life is more directly apposite, but it does not protect persons from the ordinary consequences of hostilities (which can lead to catastrophic losses of human lives). 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.\textsuperscript{92} As for the Covenant, the International Court of Justice held in the Advisory Opinion on Nuclear Weapons that, in the conduct of hostilities, the test of an (unlawful) arbitrary deprivation of life is determined by the \textit{lex specialis} of LOIAC.\textsuperscript{93} In time of international armed conflict, the right to life is


\textsuperscript{91} International Covenant on Civil and Political Rights, \textit{supra} note 85, at 180.

\textsuperscript{92} [European] Convention, \textit{supra} note 89, at 232.

\textsuperscript{93} Advisory Opinion on Nuclear Weapons, \textit{supra} note 44, at 240.
tied to ‘acts such as the killing of prisoners [of war] and the execution of hostages’,\textsuperscript{94} which are specifically prohibited by LOIAC.

Other non-derogable human rights usually coincide with rights established directly by LOIAC. Thus, torture in international armed conflicts is forbidden by LOIAC treaties: both in general\textsuperscript{95} and in the specific contexts of the wounded, sick and shipwrecked;\textsuperscript{96} prisoners of war;\textsuperscript{97} and civilians.\textsuperscript{98} The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia held in the \textit{Furundzija} case, in 1998, that the LOIAC prohibition of torture constitutes a peremptory norm of customary international law \textit{(jus cogens)}\textsuperscript{99} (see \textit{supra}, I, A). This LOIAC interdiction operates independently of non-derogable human rights.

Torture is by no means the only activity detrimental to human rights banned directly by LOIAC. By and large, assuming that a belligerent State has issued the proclamation that is a prerequisite to the derogation from ordinary (peacetime) human rights, most of the substantive protection of human rights in the course of an international armed conflict stems from LOIAC and not from the continued operation of non-derogable (peacetime) human rights.

LOIAC may even guarantee human rights to a greater extent than is done by a non-derogable human right under the Covenant. 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{100} The Geneva Conventions go beyond the issue of consent and forbid subjecting a prisoner of war 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{101} or a civilian to ‘medical or scientific experiments not necessitated by the medical treatment of a protected person’.\textsuperscript{102} Additional Protocol I – in dealing with internees, detainees and other persons who are in the power of the adverse Party – expatiates on the theme, ruling out for instance removal of tissue or organs for transplantation even with the consent of the donor (except in


\textsuperscript{95} Protocol I, \textit{supra} note 3, at 665 (Article 75(2)(a)(ii)).

\textsuperscript{96} Geneva Convention (I), \textit{supra} note 17, at 379 (Article 12, second Paragraph); Geneva Convention (II), \textit{ibid.}, 408 (Article 12, second Paragraph).

\textsuperscript{97} Geneva Convention (III), \textit{supra} note 17, at 436 (Article 17, fourth Paragraph).

\textsuperscript{98} Geneva Convention (IV), \textit{supra} note 17, at 511 (Article 32).


\textsuperscript{100} International Covenant on Civil and Political Rights, \textit{supra} note 85, at 181.

\textsuperscript{101} Geneva Convention (III), \textit{supra} note 17, at 435 (Article 13, first Paragraph).

\textsuperscript{102} Geneva Convention (IV), \textit{supra} note 17, at 511 (Article 32).
The general framework 25 cases of blood transfusion or skin grafting). Of course, there is a good reason for the extra caution shown by the framers of the Protocol, since ‘the persons concerned here are especially vulnerable in this field’. But, without disparaging the non-derogable clause of the Covenant, the fact remains that LOIAC is more advanced on this specific issue.

The continued operation in wartime of non-derogable human rights – side by side with LOIAC norms – may prove of signal benefit to some individual victims of breaches. The reason is that, 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 action to individuals, whereas no equivalent avenues are opened by LOIAC. This is particularly manifest when human rights instruments set up supervisory organs (epitomized by the European Court of Human Rights) vested with jurisdiction to provide adequate remedies to victims of breaches. On the other hand, the European Court of Human Rights – in the 2001 Bankovic case – 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), because of lack of ‘any jurisdictional link’ between the alleged victims and the acts in complaint. The Court concluded that the responsibility of States under the European Convention on Human Rights is essentially territorial, not covering acts of war outside their territories. Such acts, removed from the protection of human rights instruments, are the main thrust of LOIAC regulation.

VI. Dissemination

LOIAC is different from most other branches of international law in that incalculable infractions and abuses can be committed by an extraordinary number of persons acting on behalf of the State, wearing its uniform or placed by it in a position of power or responsibility. 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 the norms of LOIAC, as well as their study and instruction – pursued in peacetime but intensified in wartime, pre-eminently in the training of armed forces – can produce an

107 Ibid., 526.