

# The Legal Basis and Fundamental Principles of LOAC

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“If I’m in command when war breaks out I shall issue my first order – ‘the essence of war is violence, moderation in war is imbecility. Hit first, hit hard and hit everywhere.’”

- Admiral Lord Fisher (1841 – 1920), First Sea Lord of the Royal Navy

“The idea of war as indiscriminate violence suggests violence as an end in itself, and that is antithetical to the fact that war is a goal-oriented activity directed to attaining political objectives.”

- Gary D. Solis, United States Military Academy

# *Jus ad bellum* and *jus in bello*

- *Jus ad bellum*: the right to wage war, or the law that determines situations in which it is permissible to enter into war
  - Articles 2(4) and 51 of the UN Charter: no use of force unless authorised by the UN Security Council; only exception – self-defence against an armed attack
- *Jus in bello*: the law that governs the way in which warfare is conducted (= law of armed conflict or international humanitarian law)

# *War and armed conflict*

- Although the words 'war' and 'armed conflict' are used interchangeably, they do have slightly nuanced meanings – with armed conflict being understood to be broader than war
- The Geneva Conventions of 1949 intentionally moved from using the word *war* to using *armed conflict* in its place
- In changing the terminology from war to armed conflict, the Conventions were *attempting to ensure that no State could argue that the treaties did not apply to them due to the absence of a formally declared and acknowledged state of war*

# Scope and application of LOAC

International: ensuring that rules on the conduct of hostilities apply to all conflicts between States, and all victims benefit equally from them

Non-international: protecting persons against fellow citizens within the geographic confines of a single State

- As such, the law of armed conflict binds States, non-State actors and individuals
- The law of armed conflict applies to the whole territories of the belligerent States, even areas where no active hostilities take place and areas where there is no armed resistance to occupation

# Hague Law and Geneva Law

- A rough and somewhat imprecise division of two strands of the law of armed conflict...
- Hague Law: the law which regulates the conduct of hostilities (e.g. what armed forces can and cannot do, or what weapons can or cannot be used in war) – various Hague Conventions 1907
- Geneva Law: the law which generally relates to the rights of those *hors de combat* (out of combat), e.g. wounded and incapacitated soldiers, prisoners of war, civilians in occupied territory – four Geneva Conventions 1949

- An effective merging of Hague and Geneva laws occurred with the adoption of the 1977 Additional Protocols
  - specifically AP I which covers rules regarding the means and methods of warfare as well as rules on the protection of civilians
- But the Additional Protocols to the GC are not universal and ‘rogue’ States are not bound

# The Hague Conventions 1907

Forty-four States were represented at the 1907 Hague conference. They revised the 1899 Hague Conventions and adopted several more:

- Hague I – on the pacific settlement of international disputes
- Hague II – on the limitation of employment of force for recovery of contract debts
- Hague III – on the opening of hostilities
- **Hague IV – on the laws and customs of war on land**
- Hague V – on the rights and duties of neutral powers and persons in case of war on land



- Hague VI – on the status of enemy merchant ships at the outbreak of hostilities
- Hague VII – on the conversion of merchant ships into warships
- Hague VIII – on the laying of submarine mines
- Hague IX – on bombardment by naval forces in time of war
- Hague X – on the adaptation of the principles of the Geneva Convention to maritime war
- Hague XI – on restrictions to the exercise of the right of capture in naval war

- Hague XII – on the creation of an international prize court
- Hague XIII – on the rights and duties of neutral powers in naval war
- Declaration (XIV) – on prohibiting the discharge of projectiles and explosives from balloons

Many (but not all) of these Hague regulations remain core rules on the conduct of armed conflict today

# The Geneva Conventions 1864-1929

- Single treaty, 1864, dealing with the injured on the battlefield; revised in 1906
- The *Geneva Gas Protocol* 1925 prohibited the use of asphyxiating and poisonous gases and also bacteriological warfare
- A new treaty in 1929 which, among other provisions, recognised the Red Crescent and the Red Lion and Sun symbols in addition to the Red Cross
- A second 1929 treaty was also concluded relating to the treatment of prisoners of war

# The Geneva Conventions 1949

The four Geneva Conventions of 1949, each dealing with a distinct topic, have received universal acceptance

- The first, (GC I), concerns the *the wounded and sick in armed forces in the field* and replaces the 1864, 1906 and 1929 conventions on the same subject
- The second, (GC II), deals with the *sick and shipwrecked members of armed forces at sea*
- The third, (GC III), deals with the *treatment of prisoners of war*, replacing, in more detail, the 1929 Convention on the same subject

- GC III also deals with the labour of prisoners of war, their financial resources, the relief they receive, and judicial proceedings instituted against them
- The fourth convention (GC IV) concerns *protection of civilians* (mainly in occupied territories), and defines the obligations of the Occupying Power towards civilians
- It also includes provisions on humanitarian relief for populations under occupation and contains a specific regime for the treatment of civilian internees

- The four 1949 Geneva Conventions have a number of articles in common, of which **Common Article 3** is particularly noteworthy – extending a number of humanitarian protections to non-international armed conflicts
- It requires humane treatment for all persons in enemy control, prohibiting murder, mutilation, torture, humiliating and degrading treatment, the taking of hostages and unfair trial
- As most armed conflicts today are non-international, applying Common Article 3 is of the utmost importance

# The 1977 Additional Protocols

- In response to the increase in anti-colonial and non-international armed conflicts in the 1950s and after, two Protocols Additional to the Conventions were adopted in June 1977
- Additional Protocol I (AP I) relaxes the requirements for combatant and PoW status for those engaged in wars of national liberation
- It covers conflicts in which peoples are fighting against colonial domination (e.g. UK, France...), alien occupation (Israel, Morocco...), and racist regimes (South Africa under apartheid, Israel) in the exercise of their right of self-determination

- Additional Protocol II (AP II) increases the protection of victims of *non-international* armed conflicts but is narrower in scope than Common Article 3
- It only applies to conflicts occurring between a State's armed forces and the forces of dissident groups organised under responsible command who actually exercise control over a part of the State's territory
- AP II does not apply to internal disturbances such as riots or isolated acts of violence



- The 1977 Additional Protocols have not received the universal acceptance of the 1949 Geneva Conventions: AP I has 174 State parties and AP II only 168
- The United States, Israel, Turkey and Myanmar are examples of States that have refused to adhere to the stricter humanitarian standards of both Additional Protocols

# The fundamental principles of the law of armed conflict

- The principle of distinction (distinguishing between civilians and combatants) and discrimination (prohibition of indiscriminate attacks)
- The principle of military necessity (only adopt *necessary* measures to weaken the enemy and achieve its surrender)
- The principle of proportionality (the military advantage obtained by an operation *must outweigh* the damage caused to civilians)
- The prohibition on causing unnecessary suffering and superfluous injury (creating limitations on the lawful means and methods of warfare)
- The principle of humanity

# The principle of humanity / *the Martens clause*

All people remain under the protection and empire of international law, resulting from “the laws of humanity, and the requirements of the public conscience.”

*Fyodor Martens*, Russian Delegate to the 1899 Hague Conference

- The principle of humanity remains a ‘soft law’ principle without legally binding force

# Finally,...

- Although the Geneva Conventions confer universal jurisdiction on States to prosecute grave breaches of the Conventions, this does not guarantee that alleged war criminals will actually be tried
- A number of *ad hoc* courts/tribunals have been established to deal with crimes of war (e.g. the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone)
- The International Criminal Court has jurisdiction over genocide, war crimes, crimes against humanity and aggression but has, so far, been shown to be less-than-competent