
The International Law Governing a U.S.-China “Great Power” Armed Conflict in Taiwan

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China has refused to rule out the possibility of a military invasion of Taiwan. In such an event, the United States has suggested that it stands poised to use defensive force against China. The circumstances of a military clash between the United States and China over Taiwan could come in many forms. This article examines these potential scenarios under the Law of Armed Conflict (LOAC). It begins by establishing the threshold condition for the LOAC's operability, namely the existence of an "international armed conflict." It then examines the potential scenarios in which military conflict between the United States and China would constitute international armed conflict, thus triggering the LOAC's operability. The article then addresses questions about the LOAC's precise role and function in armed conflict. It seeks to dispel common misunderstandings, including notions about the

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LOAC's capacity to prevent war or make it "clean" or "humane." In correcting these misunderstandings, the article notes the LOAC's general ambivalence about how wars start, as well as its deep structural compromise between warfighting states' humanitarian interests and military operational interests. The hope is that these clarifications can permit a better appreciation of the LOAC's limited but important function—to minimize, to the greatest possible extent, the suffering of war victims.

INTRODUCTION

The United States has shifted its national defense focus from asymmetric, low-intensity warfare against non-state armed groups to competition and potential conflict between peer and near-peer state adversaries. There is no doubt that China's emergence in recent decades as a global economic and military power played a substantial role in the U.S. shift. The outbreak of armed conflict in Ukraine has reinforced the need for this new paradigm, often referred to as "great power competition."

China poses a particularly acute national security dilemma to the United States, especially given China's increasingly assertive global posture. Its economic strength extends its reach, allowing China to compete with the U.S. for influence on a broad array of matters closely related to the latter's security interests. A prominent example of this is China's increasingly adversarial relationship with Taiwan. In recent years, China has emphasized its intention to bring Taiwan—which it views as a breakaway province—into its de facto political control.

Many believe China could seek to subdue Taiwan forcefully by military invasion. Indeed, Chinese President Xi Jinping, while calling for a peaceful "reunification" of China and Taiwan, has refused to rule out China's use of military force.¹ The United States, while not officially supporting Taiwan's independence, insists on peaceful relations between China and Taiwan and opposes "unilateral changes to the status quo by either side."² Notwithstanding the recent U.S. military "pivot" toward the Pacific,³ it remains an open question whether and to what extent the United States would use military force to defend Taiwan and repel a Chinese invasion.

However, it appears that the United States may be hardening its stance against a Chinese invasion of Taiwan. In 2021, when asked if the United States would defend Taiwan in the event of a Chinese attack, President Joe Biden replied, "Yes, we have a commitment to do that."⁴ In May 2022, Biden made similar comments suggesting a U.S. commitment to defending Taiwan militarily against a Chinese invasion.⁵ The possibility of an exchange of military force between the United States and China is

sobering. Furthermore, the recent reemergence of interstate warfare in Europe has roused the globe to the immense humanitarian and other costs of war between powerful and well-resourced state armed forces such as the United States and China.

This article addresses the international legal implications of an exchange of military force between the United States and China in Taiwan. In particular, it examines the role of the Law of Armed Conflict (LOAC) in such an exchange.⁶ When would the LOAC become operable between the United States and China, thus triggering the state parties’ legal obligations under that body of law? What should be our expectations of the LOAC’s potential to prevent or control such a conflict? How would it preserve humanitarian interests such as the protection of war victims and civilian infrastructure? In addressing each of these questions, this article aims to clarify misconceptions about the LOAC’s role concerning war and temper expectations about what humanitarian aims it can achieve.

“ARMED CONFLICT” BETWEEN THE UNITED STATES AND CHINA IN TAIWAN

The LOAC is a *lex specialis* (in Latin, “a special law”)—its norms, principles, and rules do not operate generally, but rather become operable by exception if certain legal conditions are satisfied.⁷ This section establishes the condition that would activate the LOAC with respect to a military clash in Taiwan between the United States and China—namely, the existence of an international armed conflict. It will become clear that, while some scenarios would unambiguously trigger U.S. and Chinese LOAC obligations, the LOAC’s operability in some circumstances remains ambiguous.

Common Article 2 of the 1949 Geneva Conventions: “International Armed Conflict”

Common Article 2 of the 1949 Geneva Conventions (“common” because it is identical in each of the four Geneva Conventions) asserts that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more” state parties to the Conventions.⁸ Thus, Common Article 2 contains the threshold condition for the operability of the four Geneva Conventions, which constitute the most significant source of LOAC rules. Other LOAC treaties have co-opted the language of Common Article 2 as a condition of operability,⁹ including the 1977 First Additional Protocol to the Geneva Conventions¹⁰ and several

treaties on particular means and methods of warfare.¹¹ As Common Article 2 conditions the LOAC's operability on the existence of armed conflict between two or more states, these armed conflicts are referred to as "international armed conflicts."¹²

Yet, the Geneva Conventions do not define the term "armed conflict."¹³ In its influential 1952 commentary to the Geneva Conventions, the International Committee of the Red Cross (ICRC) asserted, "any difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of [Common] Article 2" of the Geneva Conventions.¹⁴ Additionally, in 1995, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated, in an influential passage, that "an armed conflict exists whenever there is a resort to armed force between states."¹⁵ States routinely refer to the ICRC and ICTY assertions in identifying the "armed conflict" standard, which suggests states view these texts as reflecting authoritative legal status.¹⁶ For example, the U.S. Department of State has defined "armed conflict" in similar terms, including "any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting."¹⁷

The Common Article 2 reference to "any other" armed conflict between two or more states—as well as the ICRC and ICTY analysis noted above—suggests a relatively low-intensity or violence threshold for the existence of an international armed conflict. The ICRC Commentary to the Geneva Conventions corroborates this by asserting that questions of length and intensity are mostly immaterial. Armed conflict exists when states resort to armed force against one another, regardless of "how long the conflict lasts, or how much slaughter takes place."¹⁸ The LOAC "become[s] applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it automatically into operation."¹⁹ Ultimately, a lower intensity or violence threshold for international armed conflict has important practical consequences. It means that the LOAC becomes operable in a broader and more diverse set of situations involving interstate force.

International Armed Conflict Scenarios

Having established the "armed conflict" standard under international law, we can now apply it to scenarios involving the United States' military response to a Chinese invasion of Taiwan. Many direct confrontations between American and Chinese armed forces in Taiwan would

unambiguously give rise to international armed conflict between the two states, therefore triggering the applicability of the LOAC. For instance, the United States deploying land forces traditionally used in large-scale combat operations to Taiwan to fight against a Chinese military invasion would definitely give rise to an international armed conflict between the United States and China.²⁰ A military clash of this scope between global powers would undeniably trigger the application of the LOAC.

At least in the short term, a large-scale armed conflict of this kind seems unlikely. Factors such as the maritime location of Taiwan, its geography and terrain, and current U.S. force posture in the Pacific make a large-scale military conflict between China and the United States in Taiwan unlikely. However, the potential for such a conflict must not be dismissed. As we have learned from the events in Ukraine, armed conflict situations between states can develop and escalate rapidly. Indeed, in the U.S.-China context, reports have noted a growing U.S. military presence in and around Taiwan,²¹ a trend that is expected to continue.²²

Even military clashes between U.S. and Chinese armed forces that are far less intense than large-scale combat would still establish an international armed conflict. Such scenarios are innumerable and have been explored in depth elsewhere.²³ They include, for example, isolated naval battles in the sea surrounding Taiwan or air force altercations in Taiwanese or surrounding airspace.²⁴ Significant but isolated exchanges of military force between U.S. and Chinese air or naval forces are plausible and would give rise to an international armed conflict.

Legal Ambiguity

Some potential scenarios of a U.S.-China military conflict are “legal gray areas” in which it is unclear whether an international armed conflict would arise. For example, consider an isolated exchange of military force between the United States and China or a relatively small number of U.S. troops engaging in isolated combat against Chinese forces as part of a larger military conflict between China and Taiwan.²⁵ Recent reports suggest that the United States has begun deploying small groups of special operations forces to train Taiwanese troops and shore up defenses against a potential Chinese invasion.²⁶ The presence of such U.S. troops increases the likelihood of more minor clashes between U.S. and Chinese armed forces in Taiwan.

Considering the previous discussion, minor and isolated U.S.-China exchanges of military force would appear to meet the international armed

conflict threshold. However, at times states have seemed to call into question the low-intensity threshold detailed above. There are prominent instances of military conflict between states that were not recognized as international armed conflict. For example, in 2017, the United States conducted a missile attack against Syrian government air bases in response to the Syrian government's use of chemical weapons.²⁷ Another recent example is the June 2020 clash between Chinese and Indian military forces at the Line of Actual Control—the (disputed) border between the two states.²⁸

In the wake of these incidents, which involved significant exchanges of interstate force, the states involved refused to acknowledge the existence of international armed conflict. This was in opposition to assertions by prominent legal commentators that the situations met the standard.²⁹ These and other examples of states' failure to recognize small-scale interstate military clashes as international armed conflict led the International Law Association, in a 2010 report, to reject a *de minimis* intensity threshold for international armed conflict. Rather, according to the report, existence of armed conflict requires "fighting of some intensity."³⁰ Thus, the precise legal threshold for international armed conflict remains unclear.

Another prominent LOAC "gray area" is military operations in the cyber domain. Given their capabilities, a cyber altercation between the United States and China in connection with Taiwan is plausible. It is fairly settled that the LOAC regulates the conduct of hostilities in the cyber domain as it does in the conventional warfighting domains of land, sea, and air.³¹ As a result, U.S.-China cyber operations directed against each other in connection with an ongoing international armed conflict would be subject to LOAC norms, principles, and rules.³²

Much less clear are the circumstances under which cyber operations *alone* would give rise to an international armed conflict between the United States and China. The most prominent and significant academic work in this area is the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, a study prepared by a group of prominent international legal experts.³³ While the group of experts asserted that "cyber operations alone have the potential for crossing the threshold of international armed conflict,"³⁴ they were divided on precisely what kinds of cyber operations would give rise to international armed conflict. For example, these experts discussed the 2010 Stuxnet operation against Iranian SCADA systems, which resulted in the physical damage of nuclear fuel processing centrifuges.³⁵ Notwithstanding the physical damage caused by the operation and assuming the Stuxnet operation could be attributed to a particular state, the experts nonetheless could not agree on whether it gave rise to international

armed conflict.³⁶ For their part, states have not reached a consensus on precisely what kinds of cyber operations and what resulting harm can meet the international armed conflict threshold.³⁷ It remains an area of intense legal ambiguity.

THE LOAC'S NORMATIVE ROLE IN A U.S.-CHINA ARMED CONFLICT IN TAIWAN

Next, this article will consider what may be expected of the LOAC in a situation of armed conflict resulting from the United States' use of military force to counter a Chinese invasion of Taiwan. The LOAC is generally ambivalent toward how wars begin and thus is not centrally concerned with the legal responsibility of states for beginning wars. Moreover, given the LOAC's structural compromise between humanitarianism and military operational effectiveness, expectations regarding how the LOAC protects victims of war should be measured.

Separation of Jus ad Bellum and Jus in Bello

Foundational to the structure of international law is its separation into two independent legal regimes: the *jus ad bellum* (the law governing states' resort to force) and the *jus in bello* (the law regulating the conduct of hostilities during armed conflict).³⁸ The *jus ad bellum*, deriving from the United Nations Charter,³⁹ governs the circumstances in which states can use military force against each other's territory and sovereign interests. The starting point for the *jus ad bellum* is the general prohibition against the use of force. Article 2(4) of the UN Charter prohibits states from threatening or using "force against the territorial integrity or political independence" of another state.⁴⁰ There are two exceptions to the general prohibition against the threat or use of force. First, Chapter VII of the UN Charter provides a framework of collective security through which the UN Security Council may authorize the use of force in the case of a threat to or breach of the peace or an act of aggression to maintain or restore international peace and security.⁴¹ Second, Article 51 of the UN Charter preserves states' inherent right of individual or collective self-defense against an armed attack.⁴²

In contrast, the *jus in bello*—what this article refers to as the LOAC—is the legal regime governing the conduct of hostilities. As discussed in the last section, the LOAC's norms, principles, and rules become operable between states at the inception of an international armed conflict. When it becomes operable, the LOAC applies to warring states *irrespective* of the

status of the parties under the *jus ad bellum*. The LOAC avoids questions of which state is the (unlawful) aggressor and which is using force (lawfully) in self or collective defense. Rather, each state party to the armed conflict is bound by the LOAC's rules and requirements without regard to its legal status under the *jus ad bellum*.

Altogether, the LOAC is generally ambivalent about which state is legally responsible for the existence of armed conflict. In a U.S.-China armed conflict, the LOAC would not account for the justness or overall legality of either state's war efforts. The LOAC sets these questions aside—leaving them to the *jus ad bellum*—and focuses on regulating the *conduct* of warfare and minimizing, to the greatest extent possible, the suffering of war victims. Therefore, properly understood, the LOAC cannot be expected to prevent a war between the United States and China in Taiwan.

Balance between Humanity and Military Necessity

The nature of warfare involves the belligerent states' use of violence against one another. As such, the object of war is "to bring about the complete submission of the enemy as soon as possible by means of regulated violence."⁴³ This logic makes it clear that suffering is "an unfortunate and tragic, but unavoidable consequence of war."⁴⁴

The LOAC accounts for the violent nature of war by reflecting a structural compromise between two interests—humanitarianism and military operational effectiveness.⁴⁵ Humanitarian interests are apparent in many LOAC rules. For example, the principle of distinction requires armed conflict parties to distinguish between the adversary's armed forces and the civilian population, and to direct attacks only against the former.⁴⁶ Notwithstanding any perceived or actual military advantage a state may derive from intentionally attacking civilians and civilian objects, distinction generally prohibits such attacks.

However, the humanitarian interests behind these rules are tempered by states' interests in ultimately defeating the adversary state.⁴⁷ Thus, civilians who directly participate in hostilities—for example, by arming themselves and joining the fight or by collecting key intelligence and relaying it to friendly forces—lose the protection against direct attacks and may be targeted while they are fighting.⁴⁸ Furthermore, while the LOAC prohibits attacks against civilians not directly participating in hostilities, it tolerates some "collateral harm" to civilians. A potential attack against enemy troops that is likely to result in civilian death and injury, or damage to civilian objects, is not unlawful if the anticipated collateral civilian harm is

proportionate—that is, “not excessive”—in relation to the expected military advantage the attack confers.⁴⁹

The compromise at the foundation of the LOAC between military and humanitarian interests must inform our expectations about the LOAC’s role in regulating a potential armed conflict between the United States and China. Any military altercation between great powers will inevitably cause significant harm to civilians and combatants. We need only look to the ongoing war in Ukraine for a reminder of the awful toll paid by war victims. Thus, it is essential to temper expectations about the LOAC’s ability to prevent and minimize harm during war. The LOAC’s rules and requirements, when followed, can reduce the harm to war victims, but it cannot make war “clean” or “humane” in an absolute sense.

CONCLUSION

A proper understanding of the LOAC reveals that it cannot prevent war—or preserve peace—between China and the United States. Rather, it acknowledges the nature of war and seeks to minimize harm to the extent possible given the armed conflict parties’ interests in defeating one another. It disregards the legal and moral responsibility of the states that caused the war and focuses instead on providing a mutually applicable set of protective norms, principles, and rules designed to reduce war victims’ suffering. When the LOAC becomes operable, it can effectively regulate the conduct of hostilities. However, it is counterproductive, and perhaps dangerous, to expect the LOAC to prevent war or make it humane. Preventing war between the United States and China in Taiwan is a task reserved for other bodies of law and for the judgment, skill, and prudence of political leaders.*f*

ENDNOTES

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<https://www.washingtonpost.com/politics/2022/05/23/biden-japan-taiwan-china>.

- 6 The Law of Armed Conflict is also known as International Humanitarian Law or the Law of War. For purposes of this article, these terms may be considered synonymous.
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- 8 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, August 12, 1949, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, August 12, 1949, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, August 12, 1949, 6 U.S.T. 3316; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, August 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention IV].
- 9 Such has been the influence of Common Article 2 that over time States have recognized “international armed conflict” as the trigger for operability of a broad set of customary international legal norms, principles, and rules governing the conduct of hostilities. See for example Department of the Army, *The Law of Land Warfare* (Washington, D.C.: Headquarters, Department of the Army, July 18, 1965, Change No. 1 July 15, 1976), Field Manual 27-10, para. 8(b) (quoting Common Article 2 verbatim as the trigger for the application of the customary international law governing armed conflict and the conduct of hostilities). Customary international law consists of those norms, principles, and rules that arise from “established international practices,” as opposed to formal written treaties and conventions; “Customary International Law,” *Legal Information Institute*, https://www.law.cornell.edu/wex/customary_international_law. A norm exists under customary international law when it constitutes a “general and consistent practice of states that they follow from a sense of legal obligation.”
- 10 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, December 7, 1977, United Nations Treaty Series Online v. 1125, 3. China is a party to the Protocol and therefore bound by its provisions. The United States is not party to the Protocol, although it does consider many—but far from all—of its provisions to be reflected in customary international law.
- 11 The Convention on Certain Conventional Weapons provides for its application “in situations referred to in Article 2 common to the” 1949 Geneva Conventions. 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 art. 1, October 10, 1980, UN Treaty Series v. 1342, 137. Both the United States and China are parties to the Convention and some (but not all) of its protocols.
- 12 International armed conflict must be distinguished from non-international armed conflict, which is armed conflict between a state and a non-state armed group or between non-state armed groups. The operability condition for non-international armed conflict is contained in Common Article 3 to the 1949 Geneva Conventions. Geneva Convention IV, art. 3. The distinction between international and non-international armed conflicts is important—the LOAC’s norms, principles, and rules apply differently between the two types of armed conflicts.
- 13 The 1949 Geneva Conventions introduced the term “armed conflict” to international law. Before 1949, the body of law now known as the Law of Armed Conflict

became operable only upon satisfaction of certain traditional formalities and technical elements of interstate war, including, for example, formal declaration of war and pre-war diplomatic conferences. *See* Commentary To The Geneva Convention I For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field 28 (Jean Pictet ed., 1952). A formal declaration of war remains sufficient—but not necessary—to trigger the applicability of the law of armed conflict. *See for example* Geneva Convention IV, art. 2.

- 14 *See* Commentary to the Geneva Convention III Relative to the Treatment of Prisoners of War (Jean Pictet ed., 1960), 23. He continues, “It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Conventions are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.”
- 15 *Prosecutor v. Tadić*, ICTY, Appeals Chamber, Case No. IT-94-1, Decision On Defence Motion For Interlocutory Appeal On Jurisdiction, October 2, 1995, https://h2o.law.harvard.edu/text_blocks/6511.
- 16 U.K. Ministry of Defence, Director-General: Joint Doctrine and Concepts Centre, *The Joint Service Manual on the Law of Armed Conflict* 383, July 1, 2004, 29. Non-treaty legal norms often are sourced in customary international law, which consists of those norms, principles, and rules that arise from “established international practices,” as opposed to formal written treaties and conventions.
- 17 U.S. Department of Defense, Office of General Counsel Department of Defense, *Law of War Manual*, June 2015, updated December 2016, 82.
- 18 Commentary To The Geneva Convention I For The Amelioration Of The Condition Of The Wounded And Sick In Armed Forces In The Field 32 (Jean Pictet ed., 1952).
- 19 *Ibid.*, 32.
- 20 U.S. Department of the Army, “*Unified Land Operations*,” U.S. Department of the Army document ADP 3-0, July 2019, 1-5.
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- 25 This article concerns solely a legal analysis of a military conflict between U.S. and Chinese military forces. It sets aside the additional legal considerations presented by a simultaneous military altercation between Chinese and Taiwanese armed forces, as well as the legal implications of U.S. military support for Taiwan against China.
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- 30 *The Use of Force*, International Law Association, 2010, 2, and Dieter Fleck, *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2021), 50–80.
- 31 Lieber Institute, “Year in Review – 2021,” *Articles of War*, December 30, 2021, <https://lieber.westpoint.edu/year-in-review-2021/>.
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- 34 *Ibid.*, 384.
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- 36 Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 384.
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- 38 Adam Roberts, “The Equal Application of the Laws of War: A Principle under Pressure,” *International Review of the Red Cross*, 2008, <http://international-review.icrc.org/articles/equal-application-laws-war-principle-under-pressure>, and Marc 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?” in Michael N. Schmitt and Jelena Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff: The Hague, 2007), 241–64.
- 39 Much of the *jus ad bellum* is considered also to have crystalized into customary international law. The complex interplay between the UN Charter rules and their counterparts in customary law are beyond the scope of this article.
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- 41 UN Charter ch. 7.
- 42 UN Charter art. 51.
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- 44 U.S. Department of Defense, *Law of War Manual*, 17.
- 45 Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,” *Virginia Journal of International Law* 50 (4) (May 4, 2010), 795.
- 46 U.S. Department of Defense, *Law of War Manual*, 62.
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- 48 Protocol Additional to the Geneva Conventions of 12 August 1949, art. 51(3).
- 49 *See Ibid.*, arts. 51(5)(b), 57(2)(a)(iii), and 57(2)(b).