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978-0-521-12131-6 - The Conduct of Hostilities under the Law of International Armed Conflict, Second Edition

Yoram Dinstein

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The Conduct of Hostilities under the Law of International Armed Conflict

This is the seminal textbook on the law of international armed conflict, written by a leading commentator on the subject. The new edition has been thoroughly revised and updated, taking into account new developments in combat, numerous recent judicial cases (especially decisions rendered by the International Criminal Tribunal for the Former Yugoslavia), as well as topical studies and instruments. The text clarifies complex issues, offering solutions to practical combat dilemmas that have emerged in present-day battlefield situations. Several current (and controversial) subjects are examined in depth, including direct participation in hostilities, human shields, and air and missile warfare. Useful definitions and explanations have been added, making intricate problems easier to comprehend.

The book is designed not only for students of international law, but also as a tool for the instruction of military officers. It makes the topic more accessible to the reader while retaining the academic rigour which was a hallmark of the first edition.

YORAM DINSTEIN is Professor Emeritus at Tel-Aviv University. He is a former President of the University (1991–9), as well as former Rector and former Dean of the Faculty of Law. He served twice as the Charles H. Stockton Professor of International Law at the US Naval War College in Newport, RI. He was also a Humboldt Fellow at the Max Planck Institute of International Law in Heidelberg, Germany, a Meltzer Visiting Professor of Law at New York University and a Visiting Professor of Law at the University of Toronto. He is a Member of the Institute of International Law.

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Introduction to the Second Edition

This is a thoroughly revised and updated edition of a book originally published in 2004. In the stretch of time since the first edition came out, interest in the law applicable in the conduct of hostilities in international (as well as non-international) armed conflicts has grown apace, and there has been a veritable spate of new books, articles and studies relating to diverse dimensions of this branch of international law. Even more significantly, the case law – especially, but not exclusively, that of the International Criminal Tribunal for the Former Yugoslavia – has become more abundant. There are also new texts: not only treaty texts but also restatements of the law.

While the main contours and theses of the first edition have been retained, countless changes have been introduced in the book to reflect new developments, address issues not fully explored before, and – based on lessons learned from actual teaching and training in a number of countries – add useful definitions and explanations. There are some new substantive sections (pre-eminently, direct participation in hostilities and ‘human shields’). Others have been considerably augmented.

To complement the changes in the text, the table of contents has been expanded. The new edition also has an easier cross-referencing system, to enable a closer look at the way in which similar rules mesh in different contexts. The numerical cross-references are to paragraphs and not to pages.

To facilitate syntax, generic pronouns relating to individual combatants or civilians are usually drawn in masculine form. This must not be viewed as gender specific.

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Preface

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 that 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 warfare without bloodshed. However, this is an impossible dream. War is not a game of chess. Almost by definition, it entails human losses, suffering and pain, as well as destruction and devastation. As long as war is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities. The law of international armed conflict does forbid some means and methods of warfare, with a view to minimizing the losses, the suffering, the pain and the destruction. But it can do so only when there are realistic alternatives to achieving the military goal of victory in the war. Should nothing be theoretically permissible to Belligerent Parties, ultimately everything will be permitted in practice – because the rules will be brushed aside.

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The present book serves as a companion to two other volumes published by Cambridge University Press, dealing respectively with the *jus ad bellum** and with the law of belligerent occupation.** It is devoted to the core of the *jus in bello* – that is, the conduct of hostilities on land, at sea and in the air – analysed against the background of customary international law and treaties in force. The study will be limited to 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. Yet, 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, applicable chiefly in wartime but also in inter-State clashes short of war.

The conduct of hostilities will be examined in this volume in light of contemporary norms. While some past practices and future prospects will be mentioned briefly, it is the present time that we shall concentrate on. Largely speaking, the purpose is to dissect the *jus in bello* neither as it was perceived in the past nor as it may be desired in the future (*lex ferenda*), but as it is legally prescribed and actually complied with at the time of writing (*lex lata*).

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 the law of international armed conflict. This must be done in advance, namely, already in peacetime. Battle decisions – especially in the electronic era – are often split-second, and they must be predicated on an instinctive response developed in hard training. Just as every military service is seeking to instil into officers and other ranks a remarkable acumen as regards eventualities likely to be encountered during combat operations, it has to impress upon soldiers, sailors and aviators the constraints on their freedom of action imposed by law.

It goes without saying that laymen cannot be expected to know every intricacy of a system of law. Yet, all those going through military training must become familiarized with the salient rules of the law of international armed conflict, understanding the legal implications of commands issued and obeyed in combat conditions. That is the only way to guarantee that no serious breaches of the law 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’.

* Y. Dinstein, *War, Aggression and Self-Defence* (4th edn, 2005).

** Y. Dinstein, *The International Law of Belligerent Occupation* (2009).

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Abbreviations

<i>AASL</i>	Annals of Air and Space Law
<i>AC</i>	Appeal Cases [United Kingdom]
<i>AD</i>	Annual Digest and Reports of Public International Law Cases
<i>AFDI</i>	Annuaire Français de Droit International
<i>AFLR</i>	Air Force Law Review
<i>AIDI</i>	Annuaire de l'Institut de Droit International
<i>AJIL</i>	American Journal of International Law
<i>ALJ</i>	Australian Law Journal
<i>ALR</i>	Alberta Law Review
<i>ASILSILJ</i>	ASILS International Law Journal
<i>AUILR</i>	American University International Law Review
<i>AUJILP</i>	American University Journal of International Law and Policy
<i>AULR</i>	American University Law Review
<i>Annotated Supplement</i>	<i>Annotated Supplement to the Commander's Handbook on the Law of Naval Operations</i> , 73 <i>ILS</i> (US Naval War College, A. R Thomas and J. C. Duncan eds., 1999)
<i>Ar.V.</i>	Archiv des Völkerrechts
<i>BCEALR</i>	Boston College Environmental Affairs Law Review
<i>BJIL</i>	Buffalo Journal of International Law
<i>BPP</i>	Bulletin of Peace Proposals
<i>BWC</i>	Biological Weapons Convention
<i>BYBIL</i>	British Year Book of International Law
<i>CCM</i>	Cluster Munitions Convention
<i>CCW</i>	Convention on Conventional Weapons
<i>CILJ</i>	Cornell International Law Journal
<i>CJIL</i>	Chicago Journal of International Law
<i>CJTL</i>	Columbia Journal of Transnational Law
<i>CLR</i>	California Law Review

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CNA	Computer Network Attacks
CWC	Chemical Weapons Convention
<i>CWILJ</i>	California Western International Law Journal
<i>CWRJIL</i>	Case Western Reserve Journal of International Law
<i>CYIL</i>	Canadian Yearbook of International Law
<i>Commentary on the Additional Protocols</i>	<i>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949</i> (ICRC, Y. Sandoz <i>et al.</i> eds., 1987)
<i>DJCIL</i>	Duke Journal of Comparative and International Law
<i>DJIL</i>	Dickinson Journal of International Law
<i>DJILP</i>	Denver Journal of International Law and Policy
<i>DSB</i>	Department of State Bulletin
<i>EILR</i>	Emory International Law Review
<i>EJCCLCJ</i>	European Journal of Crime, Criminal Law and Criminal Justice
<i>EJIL</i>	European Journal of International Law
ENMOD	Environmental Modification
<i>EPIL</i>	<i>Encyclopedia of Public International Law</i> (R. Bernhardt ed., 1992–2000)
<i>EPLJ</i>	Environmental and Planning Law Journal
<i>Env.L</i>	Environmental Law
<i>EPL</i>	Environmental Policy and Law
ERW	Explosive Remnants of War
<i>FIJL</i>	Fordham International Law Journal
<i>FJIL</i>	Florida Journal of International Law
<i>GIELR</i>	Georgetown International Environmental Law Review
<i>GJICL</i>	Georgia Journal of International and Comparative Law
<i>GLJ</i>	Georgetown Law Journal
<i>GWILR</i>	George Washington International Law Review
<i>GWJILE</i>	George Washington Journal of International Law and Economics
<i>GYIL</i>	German Yearbook of International Law
<i>HHRJ</i>	Harvard Human Rights Journal
<i>HICLR</i>	Hastings International and Comparative Law Review
<i>HILJ</i>	Harvard International Law Journal
<i>HJIL</i>	Houston Journal of International Law
<i>HJLPP</i>	Harvard Journal of Law and Public Policy

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HPCR	Program on Humanitarian Policy and Conflict Research at Harvard University
<i>HRQ</i>	Human Rights Quarterly
<i>Handbook</i>	<i>The Handbook of Humanitarian Law in Armed Conflicts</i> (2nd edn, D. Fleck ed., 2008)
<i>Hum.V.</i>	Humanitäres Völkerrecht
ICC	International Criminal Court
<i>ICJ Rep.</i>	Reports of the International Court of Justice
<i>ICLQ</i>	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
<i>IJCP</i>	International Journal of Cultural Property
<i>ILM</i>	International Legal Materials
<i>ILR</i>	International Law Reports
<i>ILS</i>	International Law Studies
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
<i>IRRC</i>	International Review of the Red Cross
<i>IYHR</i>	Israel Yearbook on Human Rights
<i>Int.Aff.</i>	International Affairs
<i>Int.Law.</i>	International Lawyer
<i>Int.Leg.</i>	<i>International Legislation</i> (M. O. Hudson ed., 1931–50)
<i>Int.Org.</i>	International Organization
<i>Int.Rel.</i>	International Relations
<i>Is.LR</i>	Israel Law Review
<i>JACL</i>	Journal of Armed Conflict Law
<i>JICJ</i>	Journal of International Criminal Justice
<i>JCSL</i>	Journal of Conflict and Security Law
<i>JPR</i>	Journal of Peace Research
<i>JSS</i>	Journal of Strategic Studies
<i>Laws of Armed Conflicts</i>	<i>The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents</i> (D. Schindler and J. Toman eds., 4th edn, 2004)
<i>LJIL</i>	Leiden Journal of International Law
<i>LLAICLJ</i>	Loyola of Los Angeles International and Comparative Law Journal
LOIAC	Law of International Armed Conflict
<i>LRTWC</i>	Law Reports of Trials of War Criminals
<i>MPYUNL</i>	Max Planck Yearbook of United Nations Law

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<i>Mel.JIL</i>	Melbourne Journal of International Law
<i>Mich.JIL</i>	Michigan Journal of International Law
<i>Mer.LR</i>	Mercer Law Review
<i>Mich.LR</i>	Michigan Law Review
<i>Mil.LR</i>	Military Law Review
NATO	North Atlantic Treaty Organization
<i>NCLR</i>	North Carolina Law Review
<i>NILR</i>	Netherlands International Law Review
<i>NJIL</i>	Nordic Journal of International Law
<i>NLR</i>	Naval Law Review
<i>NMT</i>	Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10
<i>NTIR</i>	Nordisk Tidsskrift for International Ret
<i>NYIL</i>	Netherlands Yearbook of International Law
<i>NWCR</i>	Naval War College Review
<i>NYUJILP</i>	New York University Journal of International Law and Politics
<i>New Rules</i>	<i>New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949</i> (M. Bothe, K. J. Partsch and W. A. Solf eds., 1982)
<i>PASIL</i>	Proceedings of the American Society of International Law
PGM	Precision-Guided Munitions
<i>RCADI</i>	Recueil des Cours de l'Académie de Droit International
<i>RDMDG</i>	Revue de Droit Militaire et de Droit de la Guerre
<i>RDSC</i>	Resolutions and Decisions of the Security Council
<i>RGDIP</i>	Revue Générale de Droit International Public
<i>RHDI</i>	Revue Hellénique de Droit International
ROE	Rules of Engagement
SAR	Search and Rescue
<i>SIULJ</i>	Southern Illinois University Law Journal
<i>SJICL</i>	Singapore Journal of International and Comparative Law
<i>SJIL</i>	Stanford Journal of International Law
<i>SJLR</i>	St. John's Law Review
<i>SMLJ</i>	St. Mary's Law Journal
<i>Ste.LR</i>	Stetson Law Review

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<i>Syd.LR</i>	Sydney Law Review
Supp.	Supplement
<i>TIL</i>	Theoretical Inquiries in Law
<i>TJICL</i>	Tulane Journal of International and Comparative Law
UAV	Unmanned Aerial Vehicle
<i>UCLAPBLJ</i>	UCLA Pacific Basin Law Journal
UK	United Kingdom
UN	United Nations
UNCC	United Nations Compensation Commission
UNESCO	United Nations Educational, Scientific and Cultural Organization
<i>UNJY</i>	United Nations Juridical Yearbook
<i>UNTS</i>	United Nations Treaty Series
<i>URLR</i>	University of Richmond Law Review
US	United States
<i>USAFJLS</i>	United States Air Force Academy Journal of Legal Studies
<i>VJIL</i>	Virginia Journal of International Law
<i>VJTL</i>	Vanderbilt Journal of Transnational Law
<i>VLR</i>	Virginia Law Review
<i>WILJ</i>	Wisconsin International Law Journal
WP	White Phosphorous
<i>YBWA</i>	Year Book of World Affairs
<i>YIEL</i>	Yearbook of International Environmental Law
<i>YIHL</i>	Yearbook of International Humanitarian Law
<i>YJIL</i>	Yale Journal of International Law
<i>YUN</i>	Yearbook of the United Nations
<i>ZaöRV</i>	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht