

The Conduct of Hostilities under the Law of International Armed Conflict

The book serves as a companion to three other volumes published by Cambridge University Press, dealing respectively with the *jus ad bellum*, the law of belligerent occupation and non-international armed conflicts. 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 in inter-State armed conflicts – analysed against the background of customary international law and treaties in force. The book deals with both means and methods of modern warfare. It addresses issues of general non-combatant protection, the principle of proportionality in collateral damage to civilians and special protection, especially of the environment and cultural property. It also considers the relevant dimensions of international criminal law and deals with controversial matters such as unlawful combatancy, direct participation of civilians in hostilities and the use of ‘human shields’. Case law and legal literature are cited throughout.

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The Conduct of Hostilities under the Law of International Armed Conflict

Fourth Edition

Yoram Dinstein



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Introduction to the Fourth Edition

This is a completely revised and updated edition of a book originally published in 2004 and revised twice before: in 2010 and in 2016. In the interval, the law of international armed conflict has not stood still. State practice has grown, new case law has emerged, and there has been a constant outflow of additional books, essays and notes about the conduct of hostilities. There is growing interest in developing weapon technologies (such as cyber, drones and advanced robotics), but perennial issues – like urban warfare – also tend to raise novel complex issues.

At the time of writing, the *jus in bello* – that is, the law regulating the conduct of hostilities in inter-State armed conflicts – is facing an unprecedented crisis owing to vast civilian carnage and devastation caused unremittingly by a major Power (Russia), in its 2022 international armed conflict with the Ukraine, in a manner that seems to be disdainful of the existing legal canon. It can only be hoped that these overt derelictions of duties will be regarded in time merely as a passing tremor rather than a convulsive shake of the grounds on which the *jus in bello* rests. If there is hope for the future, it is sustained by the worldwide revulsion with which the sight of atrocities (visibly recorded by the media) was met by world public opinion.

The book has greatly benefited from being used as a teaching tool in a number of classrooms, both in law schools and in military colleges, in several countries. This has led to substantial feedback by way of comments and queries pressing for further elucidation of contentious points. It is hoped that the present edition will provide adequate answers and shed further light on the *lex lata*.

By now, the present volume serves as a companion to three other books printed by Cambridge University Press, dealing respectively with the *jus ad bellum*,* the law of belligerent occupation,** and non-international armed conflicts.*** Broadly speaking, between them, the four publications cover the

* Y. Dinstein, *War, Aggression and Self-Defence* (6th edn, 2017).

** Y. Dinstein, *The International Law of Belligerent Occupation* (2nd edn, 2019).

*** Y. Dinstein, *Non-International Armed Conflicts in International Law* (2nd edn, 2021).

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general spectrum of the law of armed conflict in its various aspects (save conditions of detention). Every effort has been made to minimize repetition, and matters explored in detail in the complementary works are not rehashed here.

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 military objectives, 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, neither should the laws applicable in war be entrusted exclusively to international lawyers.

The growing public interest in the law of international armed conflict, as much as the increasing desire to see those who breach it criminally prosecuted, attest to a radical change in the *Zeitgeist* compared to yesteryear. The reasons for the change are immaterial for the present volume. In part, the evolution may simply be due to the fact that in the electronic era the horrors of war can literally be brought home to television and computer 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 predisposed to be drenched in blood.

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 of property. 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 certain 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.

The present book is devoted to the core of the *jus in bello*, that is, the conduct of hostilities in inter-State armed conflicts – on land, at sea and in the air – analysed against the background of customary international law and treaties in force. 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. In essence, the purpose is to dissect the *jus in bello* neither as it was perceived in the past nor as it may be desired in terms of the future (*lex ferenda*), but as it is legally prescribed and actually observed by States 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. Battlefields are characterized by split-second decisions, which are 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 is required to impress upon soldiers, sailors and aviators the constraints imposed by law on their freedom of action.

It goes without saying that laymen cannot be expected to be familiar with every intricacy of a system of law. Yet, all those going through military training must become acquainted with the salient rules of the law of international armed conflict, understanding the legal implications of commands issued and obeyed in combat conditions. 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 – is to ensure that military personnel are on a steep learning curve. It is also the only way to prevent a gap from developing between legal norms and reality: the ‘ought’ and the ‘is’.

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