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978-1-107-11840-9 - The Conduct of Hostilities Under the Law of International Armed Conflict:

Third Edition

Yoram Dinstein

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The Conduct of Hostilities under the Law of International Armed Conflict

Written by the leading commentator on the subject, this is the seminal text-book on the law of international armed conflict. Focusing on recent issues arising in the course of hostilities between States, it explores the dividing line between lawful and unlawful combatants, the meaning of war crimes and command responsibility, the range of prohibited weapons, the distinction between combatants and civilians, the parameters of targeting and proportionality, the loss of protection from attack (including ‘direct participation in hostilities’), and special protection (granted, pre-eminently, to the environment and to cultural property). In a completely revised and updated text, the author expertly covers the key principles and examines important new issues, such as the use of autonomous weapons and the complexities of urban warfare. The subtleties and nuances of the international law of armed conflict are made accessible to the student and practitioner alike, whilst retaining the academic rigour of previous editions.

YORAM DINSTEIN is Professor Emeritus at Tel-Aviv University. He is a former President of the University (1991–98), 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, 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 Third Edition

This is a completely revised and updated edition of a book originally published in 2004 and revised in 2010. 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 and drones), but perennial issues – like urban warfare – also tend to raise novel complex issues.

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 general spectrum of the law of armed conflict in its various aspects. 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.

* Y. Dinstein, *War, Aggression and Self-Defence* (5th edn, 2011)

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

*** Y. Dinstein, *Non-International Armed Conflicts in International Law* (2014)

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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 – as much as the increasing desire to see those who breach it criminally prosecuted – attests to a radical change in the *Zeitgeist*, compared to yester-year. 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 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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xvi Preface

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 – analyzed 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 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-grounds are characterized by split-second decisions, which 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 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. 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’.

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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>AI</i>	artificial intelligence
<i>AIDI</i>	Annuaire de l'Institut de Droit International
<i>AILJ</i>	Australian International Law Journal
<i>AJIL</i>	American Journal of International Law
<i>ALJ</i>	Australian Law Journal
<i>ALR</i>	Alberta Law Review
<i>Annotated Supplement</i>	<i>Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 73 ILS</i> (US Naval War College, A.R Thomas and J.C. Duncan eds., 1999)
<i>API</i>	Additional Protocol I [to the Geneva Conventions]
<i>APII</i>	Additional Protocol II [to the Geneva Conventions]
<i>APIII</i>	Additional Protocol III [to the Geneva Conventions]
<i>Ar. V.</i>	Archiv des Völkerrechts
<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>Berk. JIL</i>	Berkeley Journal of International Law
<i>Bos. CEALR</i>	Boston College Environmental Affairs Law Review

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<i>Bos. UILJ</i>	Boston University International Law Journal
<i>BPP</i>	Bulletin of Peace Proposals
<i>Buff. JIL</i>	Buffalo Journal of International Law
BVR	beyond visual range
BWC	Biological Weapons Convention
<i>BYBIL</i>	British Year Book of International Law
<i>Cal. LR</i>	California Law Review
<i>Can. YIL</i>	Canadian Yearbook of International Law
CCM	Cluster Munitions Convention
CCCW	Convention on [Prohibitions or Restrictions on the Use of] Certain Conventional Weapons
<i>Chi. JIL</i>	Chicago Journal of International Law
CIA	Central Intelligence Agency
<i>CLF</i>	Criminal Law Forum
<i>Col. JTL</i>	Columbia Journal of Transnational 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>Cor. ILJ</i>	Cornell International Law Journal
CPCP	Convention for the Protection of Cultural Property
CWC	Chemical Weapons Convention
<i>CWILJ</i>	California Western International Law Journal
<i>CWRJIL</i>	Case Western Reserve Journal of International Law
<i>Den. JILP</i>	Denver Journal of International Law and Policy
<i>Dick. JIL</i>	Dickinson Journal of International Law
DSB	Department of State Bulletin
<i>Duke JCIL</i>	Duke Journal of Comparative and International Law
ECHR	European Court of Human Rights
<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>Env. L</i>	Environmental Law
<i>EPL</i>	Environmental Policy and Law
<i>EPLJ</i>	Environmental and Planning Law Journal
ERW	explosive remnants of war
<i>FILJ</i>	Fordham International Law Journal