

LAW APPLICABLE TO ARMED CONFLICT

Which law applies to armed conflict? This book investigates the applicability of international humanitarian law and international human rights law to armed conflict situations. The issue is examined by three scholars whose professional, theoretical and methodological backgrounds and outlooks differ greatly. These multiple perspectives expose the political factors and intellectual styles that influence scholarly approaches and legal answers, and the unique dialogical format encourages its participants to decentre their perspectives. By focusing on the authors' divergence and disagreement, a richer understanding of the law applicable to armed conflict is achieved. The book, first, provides a detailed study of the law applicable to armed conflict situations. Secondly, it explores the regimes' interrelation and the legal techniques for their coordination and prevention of potential norm conflicts. Thirdly, the book moves beyond the positive analysis of the law and probes the normative principles that guide the interpretation, application and development of law.

Ziv Bohrer is Senior Lecturer at the Faculty of Law, Bar-Ilan University. His main areas of research are in international criminal law and international humanitarian law. His chapter in this book was a winner of Israel's Junior Law Faculty Workshop Competition. Bohrer has previously held visiting positions at the University of Michigan (as a Fulbright Fellow), Hebrew University, University of Georgia and the University of Cambridge.

Janina Dill is Associate Professor of US Foreign Policy at Nuffield College, University of Oxford. Her previous publication, *Legitimate Targets? International Law, Social Construction and U.S. Bombing*, was included in the Cambridge Studies in International Relations series in 2015. The book was Runner-Up for the Birks Prize for Outstanding Legal Scholarship of the Society of Legal Scholars, and has received an Honourable Mention by the Theory Section of the International Studies Association.

Helen Duffy holds the Gieskes Chair in International Humanitarian Law and Human Rights at the Grotius Centre, Leiden University, and is Honorary Professor of International Law at the University of Glasgow. She also runs 'Human Rights in Practice', a law practice providing legal advice, legal representation and support in strategic human rights litigation before international and regional courts and bodies. Her previous publications include *The 'War on Terror' and the Framework of International Law* (Cambridge, 2015) and *Strategic Human Rights Litigation* (2018).

MAX PLANCK TRIALOGUES ON THE LAW OF PEACE AND WAR

In a *Max Planck Dialogue*, three authors discuss one topic within the international law surrounding armed conflict. Each trio is composed so as to engage different modes of legal thinking, intellectual paradigms, regional backgrounds and professional specialisation. By bringing the pluralism of premises and methods to the fore, the *Dialogues* facilitate the emergence and global refinement of common legal understandings.

Series Editors

Professor Anne Peters

Max Planck Institute for Comparative Public Law and International Law

Dr Christian Marxsen

Max Planck Institute for Comparative Public Law and International Law

A list of books in the series can be found at the end of this volume.

Law Applicable to Armed Conflict

ZIV BOHRER

Bar-Ilan University, Israel

JANINA DILL

University of Oxford

HELEN DUFFY

Leiden University



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-48158-8 — Law Applicable to Armed Conflict
Ziv Bohrer , Janina Dill , Helen Duffy
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India
79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108481588

DOI: 10.1017/9781108674416

© Ziv Bohrer, Janina Dill and Helen Duffy 2020

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2020

Printed in the United Kingdom by TJ International Ltd. Padstow Cornwall

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-48158-8 Hardback

ISBN 978-1-108-72298-8 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

	Introduction: International Law Governing Armed Conflict	
	<i>Christian Marxsen and Anne Peters</i>	1
	I. The Application of International Humanitarian Law	2
	II. The Emergence and Influence of Human Rights	5
	III. A Clash of Paradigms?	7
	IV. Three Voices in a Trialogue	10
1	Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication	
	<i>Helen Duffy</i>	15
	I. Introduction	15
	A. Practice, Politics and Positioning of Parties	16
	B. The Complexity of Conflict	17
	C. Co-applicability Confirmed	19
	D. Applicability in an Age of Adjudication	20
	II. Applicability of IHL and IHRL, and Outstanding Controversies	22
	A. Applicability <i>Ratione Materiae</i>	22
	B. Applicability <i>Ratione Personae</i> : Personal Applicability	40
	C. Applicability <i>Ratione Loci</i> : the Question of Geographic Scope	44
	D. Applicability <i>Ratione Temporis</i>	53
	III. Co-applicability and Human Rights Litigation	54
	A. Context: Increased Engagement across Diverse Treaties and Treaty-body Functions	54

	B. Evolving Approaches to Co-applicability in Human Rights Adjudication	59
IV.	Co-applicability and Interplay: Harmonious Interpretation, <i>Lex Specialis</i> and Beyond	71
	A. Harmonious Interpretation	72
	B. <i>Lex specialis</i> ! The Harry Potter Approach?	74
	C. Weighted Co-applicability and Prioritisation	77
	D. Interpretative Approaches to IHRL of Relevance to Co-applicability	78
	E. Conclusions on Contextual Co-Applicability: Norms and Context	79
V.	Examples of Interplay and Outstanding Questions	83
	A. Detention (and Review of Lawfulness) in Non-International Armed Conflict?	84
	B. Lethal Force and ‘Targeted Killings’	90
	C. Cyberspace	93
	D. Investigation and Accountability	95
VI.	Conclusion: Leaning In	99
2	Divisions over Distinctions in Wartime International Law	
	<i>Ziv Bohrer</i>	106
	I. Classification Crisis and Novel Wars	109
	A. Blurred Wartime–Peacetime Divide	112
	B. Blurred Principle of Distinction	119
	C. The Demise of Battles	127
	D. Unprecedented Wars	133
	II. Normative Novelty	139
	A. Westphalia	143
	B. NIAC Law	149
	C. <i>Lotus</i>	160
	III. Core Jurisdiction Struggle: the Actual Crisis	164
	A. US and International Law	168
	B. The Second Eye of the Storm: IHRL	171
	IV. Conclusion	195
3	Towards a Moral Division of Labour between IHL and IHRL during the Conduct of Hostilities	
	<i>Janina Dill</i>	197
	I. Introduction	197

Contents

vii

II.	The Human Right to Life and the Permissibility of Killing according to IHL	202
A.	IHL and the Rights of Individuals in War	202
B.	IHL and Civilians' Human Right to Life during Hostilities	206
C.	IHL and Soldiers' Human Right to Life during Hostilities	213
D.	IHL's Authorisation of Conduct that Amounts to a Human Rights Violation	216
III.	The Moral Right to Life and the Legal Permissibility of Killing in War	220
A.	The Law's Moral Tasks in War	220
B.	IHRL and the Moral Right to Life	226
C.	IHL and the Moral Right to Life	230
IV.	Six Types of Armed Conflict	235
A.	When is a Violent Confrontation an Armed Conflict?	235
B.	When does Intensity Matter?	239
V.	Discharging the Law's Moral Tasks in Armed Conflicts	242
A.	The Use of Force across International Borders and the Law's First Moral Task	243
B.	The Intensity of Hostilities and the Law's First Moral Task	246
C.	The Legal Context and the Law's First Moral Task	249
D.	The Use of Force across International Borders, the Intensity of Hostilities and the Law's Second Moral Task	257
VI.	Conclusion	263
Conclusions: Productive Divisions		
<i>Christian Marxsen and Anne Peters</i>		266
I.	Classifying Armed Conflicts	266
II.	Norm Conflict between IHL and IHRL	268
III.	Legal Mechanisms of Coordination	270
IV.	Normative Perspectives	273
V.	Concluding Reflections	278
	<i>Index</i>	280

Cambridge University Press
978-1-108-48158-8 — Law Applicable to Armed Conflict
Ziv Bohrer , Janina Dill , Helen Duffy
Frontmatter
[More Information](#)
