

ARMED CONFLICTS
AND THE LAW

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(eds.)



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Armed Conflicts and the Law

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“*Armed Conflicts and the Law* is a book of impressive scope and depth. Ranging deftly across the spectrum of armed conflict and the law that governs it, this impressive work draws together new voices and world-renowned experts from the academy, military and the ICRC to examine the normative nuances of contemporary conflict. At the same time both scholarly and practical, *Armed Conflicts and the Law* will prove an invaluable resource for anyone dealing with the complex, synergistic, and evolving relationship between law and armed conflict.”

Prof. Michael N. Schmitt, Director, Stockton Center for the Study of International Law, U.S. Naval War College

“How to qualify the various situations of violence we face today? Are the current rules clear enough and still adequate? Is the relation between the *jus ad bellum* and the *jus in bello* always relevant? How best to defend the fundamental principles of these corpuses of international law? Is it justified to revisit some of them? The great merit of this excellent book is precisely not to address these issues in isolation but to show us the relations between them and with the current realities of our world, through a wise choice of contributions. The high quality of these contributions must be greeted as well as the fact that eminent representatives of the academic world surround young researchers, paving the way for the future generations.”

Yves Sandoz, Honorary member and former Director of International Law and Policy, International Committee of the Red Cross, Honorary professor of International Humanitarian Law

“Today armed conflicts change continuously as does the world in which they are conducted. There is therefore a need for analysis of the application of the law to these dynamics. This book stands out in connecting the law with the real world of armed conflicts. It will help students, academics and practitioners to better understand the response of the law to armed conflicts.”

Prof. Dr Liesbeth Zegveld, University of Amsterdam

“The multifaceted character of modern armed conflicts and ever increasing atrocities to victims call for a continuing assessment of the law of the books in the light of the practice of States and non-State actors. Jan Wouters, Philip De Man and Nele Verlinden, together with their excellent co-authors, have offered innovative insights to salient features of existing rights and responsibilities. They convincingly go beyond the *jus in bello* by including topical issues of the *jus ad bellum* and the *jus post bellum*, thus showing important interrelationships between these independent branches of international law.”

Dr Dieter Fleck, Former Director, International Agreements & Policy, German Ministry of Defence

“An important, rigorous volume, comprehensively covering some of the most relevant issues of contemporary armed conflicts.”

Dr Marko Milanovic, University of Nottingham

“This new book provides a very accessible way to look at the intersection between law and war in context. It addresses contemporary concerns and gives the reader a marvellous overview of the relevant legal regimes.”

Prof. Dr Andrew Clapham, Professor of International Law, Graduate Institute of International and Development Studies, Geneva

“*Armed Conflicts and the Law* provides an in-depth analysis and coverage of the humanitarian law of armed conflict from a contemporary perspective. The book covers a wide range of topics including the regulation of hostilities, protected persons, protection of cultural property, law of occupation and criminal prosecution of war crimes. It is written by an eminent group of scholars, many of whom have international reputations in their respective fields of expertise. This volume will provide both critical analysis of current issues and controversies as well as serving as a potentially useful reference for anyone interested in this topical body of law for academic or professional reasons. I am happy to recommend it.”

Prof. Dr Terry Gill, University of Amsterdam

FOREWORD

This is not an international humanitarian law (IHL) textbook. It covers much more ground. However, readers of the core Chapters 5–14 will come away with a very good overview of IHL – accurate down to the finest detail – and an in-depth understanding of some of the most pressing questions in the field today. The discussion of those issues is often placed within their broader historical and factual contexts, without too much emphasis on controversial debates among scholars. The contributors speak with their different voices, reflecting a diversity of styles and approaches. Some of them are respected authorities in the field of IHL, while their contributions show the others to be very promising young scholars. The editors have succeeded in bringing together academics and practitioners, all united in the belief that the existing rules of IHL are still fit for purpose (although one could certainly dream of better rules, it remains that in the world of dreams, IHL would anyway be irrelevant as there would be no armed conflicts). The contributors do not seek to deconstruct the law, rather they show what it can offer if correctly understood and interpreted in conformity with its object and purpose. They do not hide, however, from the difficulties encountered in obtaining respect for the law in many contemporary armed conflicts.

Even established IHL experts will find new arguments and food for thought in these pages. For example, Chapter 7 explains how provisions in recent weapons treaties can fill the gap between the well-developed rules on the conduct of hostilities in international armed conflicts and their near absence in treaty law applicable to non-international armed conflicts.

In dealing with implementation and enforcement, the book's exclusive focus on criminal repression and on the International Committee of the Red Cross (ICRC) (the mandate, role and activities of the latter being discussed with admiration in Chapter 13, which also presents the attendant difficult dilemmas and criticisms made by some scholars) is very unorthodox. This focus may, however, be justified, all the more so considering that states have very recently rejected (once again) new mechanisms for strengthening the respect of IHL during armed conflicts.¹ First, the other existing mechanisms either do not work (e.g. the International

¹ See the refusal of States to agree, after four years of extensive consultations, at the 32nd International Conference of the Red Cross and the Red Crescent, on a new mechanism proposed by the ICRC and Switzerland to strengthen compliance with IHL: ICRC, News release, "No agreement by States on mechanism to strengthen compliance with rules of war" (10 December 2015), available at: <https://www.icrc.org/en/document/no-agreement-states-mechanism-strengthen-compliance-rules-war>, and the very disappointing resolution

Humanitarian Fact-Finding Commission) or they have a largely unclear legal meaning (e.g. the obligation to ensure respect under Article 1 common to the Geneva Conventions). Second, preventive action to generate respect for the law – such as dissemination, training and implementation of national legislation – is actually discussed in Chapter 13 in relation to the ICRC. Third, the editors and the author of Chapter 13 seem to have taken the view that, despite the increasing role they play, UN bodies cannot be considered implementation mechanisms of IHL (the role of the UN Security Council being discussed in relation with conflict prevention and the law on the use of force in Chapters 2 and 4), and that their efficacy depends greatly on the political will of States rather than being driven by the rule of law. Fourth, while the increasing role of human rights bodies in enforcing IHL may be criticised but not denied, the legal basis on which such a role rests lies in the fact that human rights apply in armed conflicts and interact, in a manner that is still the subject of much debate, with IHL – an issue which is given very subtle and refreshing treatment in Chapter 6.

Around the core chapters dealing with IHL, several broader, relevant elements are arranged. The reader encounters in Chapter 1 a description of the evolution of warfare, in which the authors highlight certain armed conflicts to draw attention to some significant wider phenomena (for example, total war, struggles over decolonisation or identity, wars of ideology, conflicts that perpetuate themselves, asymmetric wars and so-called “global wars”). The core chapters are also surrounded by others on conflict prevention and post-conflict reconstruction and by two comprehensive overviews; the first dealing with the law of neutrality, showing how and why it is still relevant today, and the second covering the *jus contra bellum* – the international rules governing the use of force. The latter chapter constitutes an excellent, nuanced and concise summary of this branch of international law. It provides impressive coverage of the scholarly debates on certain controversial questions as well as a successful attempt to deduce law from often inconsistent, if not selective, state practice. Reading those 43 pages may spare experts and students from having to go through thousands of pages elsewhere. In those chapters that go beyond IHL (but also some of the others), a particular emphasis is placed on the role of the European Union, without attempting to idealise it.

This book will certainly contribute to a better and more accurate understanding of IHL and of the legal regulation of problems arising in contemporary armed conflicts.

Prof. Marco Sassòli
University of Geneva

which was finally adopted, available at: http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-AR-Compliance_EN.pdf.

INTRODUCTION BY THE EDITORS

Understanding the increasingly complex nature of international and internal armed conflicts requires an accessible approach in which the law of the books is complemented by pertinent examples from modern practice. The current handbook sets out to bring this approach to life by bringing together a concise and comprehensible set of contributions with an integrated coverage of international humanitarian law. It aims to situate traditional topics of the law on armed conflicts in a broader legal and societal perspective. All chapters in the present collection have been drafted anew, specifically with this goal in mind.

The broad scope of crisis management operations in the 21st century alone is testament to the evolving parameters of conflict in recent years. These operations combine short-term military interventions with long-ranging support for the reconstruction of civil society, and call on all capable global players to cooperate with local actors. For this reason, this handbook not only addresses the traditional issues and actors of international humanitarian law, it also covers the role of new and emerging players in the field of international peace and security, such as the European Union. The Union's integration in the global patchwork of armed conflict actors is reflected by highlighting its role among other players in various chapters of the present collection.

The structure of the handbook is conceived so that it follows the lifecycle of a conflict, from the outbreak of hostilities to the repression of war crimes, bookended by chapters on prevention and post-conflict reconstruction. Authors of the contributions are either vested authorities in the field of international humanitarian law or promising young scholars. Their views are supplemented by the experience of practitioners, ensuring a lively debate on the at times complex issues arising in or around armed conflict. In addition to the broad scope and accessible nature of the collection, this combination of experience and ambition makes the present volume a unique reference tool for students, scholars, practitioners, civil servants, diplomats and human rights workers around the globe.

A first selection of contributions is dedicated to a comprehensive overview of the legal rules applicable during international and internal armed conflict. These cover such traditional topics as the law of neutrality (Chapter 3); the use of force (Chapter 4); the distinctions between international and non-international armed conflict (Chapter 5) and between combatants and civilians (Chapter 8); old and new means and methods of combat (Chapters 9 and 10); the position of protected

persons (Chapter 11); and occupation (Chapter 12). To properly understand these core aspects of international humanitarian law, however, they should be placed in a broader context. This context is provided by contributions of broader legal and societal relevance, including a general typology of wars (Chapter 1); conflict prevention (Chapter 2) and post-conflict reconstruction (Chapter 15); human rights in armed conflict (Chapter 6); the role of custom in warfare (Chapter 7); the role of the International Committee of the Red Cross (Chapter 13); and the repression of humanitarian violations (Chapter 14).

Prof. Dr Jan Wouters
Dr Philip De Man
Nele Verlinden

* *
*

A personal word of gratitude is appropriate here. This handbook is the fruit of many years of teaching and scholarly investment and cooperation. I conceived and started to teach the course “Armed Conflicts and the Law” at the KU Leuven Faculty of Law 13 years ago, in the academic year 2002–2003. From the outset, the structure of the course resembled the approach reflected in this handbook. It was wonderful to involve in the handbook process many of the assistants, scholars and practitioners who lectured over all these years in the course, which is currently entitled “Humanitarian and Security Law from a European Perspective”. I am proud to say that no less than six of the authors obtained their PhD in Law under my supervision at KU Leuven, whereas two others are in the process of writing a doctoral thesis. Since 2012, we have used as a companion for the course J. Wouters and Ph. De Man, *Humanitarian and Security Law. A Compendium of International and European Instruments*, Antwerp – Oxford, Intersentia, 2012, xiv + 998 p., to which the footnotes in this handbook make ample references. It was a joy, and an honour, to work with all of them, and to teach so many generations of students. This book is dedicated to our past and current students, in the hope that they will contribute to a more humane and peaceful world.

Prof. Dr Jan Wouters

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ACP States	African, Caribbean and Pacific States
ALA	Asia and Latin America
AMM	Aceh Monitoring Mission
AMW Manual	HCPR Manual on International Law applicable to Air and Missile Warfare
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts
AP III	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem
ASEAN	Association of South East Asian Nations
Biological Weapons Convention	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
BWC	<i>see</i> Biological Weapons Convention
CARDS	Community Assistance for Reconstruction, Assistance and Development
CCA	Country Conflict Assessment
CCL 10	Allied Control Council Law No. 10
CCW	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
CCW Amended Protocol II	Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996
CEB	United Nations System Chief Executives Board for <i>Coordination</i>
CFSP	Common Foreign and Security Policy

Chemical Weapons Convention	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction
CHG	Civilian Headline Goal
CHOD	Chief of Defence
CIVCOM	Committee for Civilian Aspects of Crisis Management
CivMil Cell	Civilian-Military Cell
CPC	Conflict Prevention Centre
CPCC	Civilian Planning and Conduct Capability
CPN	Conflict Prevention Network
CPR Unit	Conflict Prevention and Reconstruction Unit
CRC	Convention on the Rights of the Child
CRC Protocol	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
CRT	Civilian Response Team
CSBM	Confidence and Security Building Measure
CSCCE	Conference on Security and Co-operation in Europe
CSDP	Common Security and Defence Policy
CSP	Country Strategy Paper
CUP	Cambridge University Press
CWC	<i>see</i> Chemical Weapons Convention
DAC	Development Assistance Committee
DDA	Department for Disarmament Affairs
DDR	Disarmament, Demobilization and Reintegration
DFS	United Nations Department of Field Support
DoD	Department of Defence
DPA	Department of Political Affairs
DPKO	Department of Peacekeeping Operations
EAR	European Agency for Reconstruction
EC	European Community
ECAP	European Capability Action Plan
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHO	European Commission's Humanitarian Aid Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECPS	Executive Committee for Peace and Security
ECSC	European Coal and Steel Community
ECTHR	European Court of Human Rights
EECC	Eritrea-Ethiopia Claims Commission

EGF Treaty	Treaty establishing the European Gendarmerie Force
ENDA	Emergency Natural Disaster Assistance
ENI	European Neighbourhood Instrument
ENMOD Convention	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
ENPI	European Neighbourhood and Partnership Instrument
EPCA	Emergency Post-Conflict Assistance
ESDC	European Security and Defence College
ESDP	European Security and Defence Policy
ESS	European Security Strategy
EU	European Union
EUAM	European Union Advisory Mission
EUBG	European Union Battlegroup
EUMC	European Union Military Committee
EUMS	European Union Military Staff
EUPM	European Union Police Mission
EUROGENDFOR	European Gendarmerie Force
FIDC	Financing Instrument for Development Cooperation
First Geneva Convention	<i>see</i> GC I
GC I	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC II	Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GC III	Geneva Convention (III) relative to the Treatment of Prisoners of War
GC IV	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War
Geneva Gas Protocol	Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
Hague Cultural Property Convention	Hague Convention on the Protection of Cultural Property in Time of Armed Conflicts
Hague Regulations	Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land
HCNM	High Commissioner on National Minorities

HEWSweb	Humanitarian Early Warning System of the Inter-Agency Standing Committee Sub-Working Group on Preparedness and Contingency Planning
HPCR	Harvard University Program on Humanitarian Policy and Conflict Research
HRC	Human Rights Committee
HUP	Harvard University Press
IAC	International armed conflict
IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBRD	International Bank for Reconstruction and Development
ICA	Incapacitating Chemical Agent
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
IcSP	Instrument contributing to Stability and Peace
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDA	International Development Agency
IDF	Israel Defence Forces
IED	Improvised Explosive Device
IFC	International Finance Corporation
IFI	International financial institution
IfS	Instrument for Stability
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMF	International Monetary Fund
IMT	International Military Tribunal
IPA	Instrument for Pre-Accession Assistance
IRCRCM	International Red Cross and Red Crescent Movement
IS	Islamic State

ISAF	International Security Assistance Force
ISN	Interim Strategy Note
IUP	Indiana University Press
JIU	United Nations Joint Inspection Unit
LICUS TF	Low-income Countries Under Stress Trust Fund
MC	Macedonian Command of UNPROFOR
MEDA	Mediterranean Economic Development Area
MICT	International Residual Mechanism for Criminal Tribunals
MIGA	Multilateral Investment Guarantee Agency
MilRep	Military Representative
MINURCA	United Nations Mission in the Central African Republic
MONUC	United Nations Mission in the Democratic Republic of Congo
Movement	International Red Cross and Red Crescent Movement
MSF	Médecins Sans Frontières
MSU	Mediation Support Unit
MUP	Manchester University Press
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
NIAC	Non-international armed conflict
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
ONUC	United Nations Operation in Congo
OP	Operational Policy
OPCFC	Fragile and Conflict-Affected Countries Group
OPT	Occupied Palestinian Territories
OSCE	Organisation for Security and Co-operation in Europe
Ottawa Convention	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction
OUP	Oxford University Press
PBC	Peacebuilding Commission
PBF	Peacebuilding Fund
PbP	Peace-building Partnership
PBSO	Peacebuilding Support Office
PCF	Post Conflict Fund
PCIJ	Permanent Court of International Justice
PCU	Post Conflict Unit

PMC	Private Military Contractor
PMSC	Private Military and Security Company
POW	Prisoner of War
PSC	Political and Security Committee
PUP	Princeton University Press
RFI	Rapid Financing Instrument
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
RRM	Rapid-Reaction Mechanism
RSP	Regional Strategy Paper
SAA	Stabilization and Association Agreement
SCSL	Special Court for Sierra Leone
SICT	Supreme Iraqi Criminal Tribunal
SPF	State- and Peace-building Fund
SSR	Security Sector/System Reform
TCC	Troop Contributing Country
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TEU-L	Treaty on European Union, as amended by the Treaty of Lisbon
TFEU	Treaty on the Functioning of the European Union
TSS	Transitional Support Strategy
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNEF I	First United Nations Emergency Force
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFIL	United Nations Interim Force in Lebanon
UNIOSIL	United Nations Integrated Office in Sierra Leone
UNIPSIL	United Nations Integrated Peacebuilding Office in Sierra Leone
UNMIK	United Nations Mission in Kosovo
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventive Deployment Force
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General

UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
UN Torture Convention	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UP	University Press
VCLT	Vienna Convention on the Law of Treaties between States
WBG	World Bank Group
WEU	Western European Union
WGLL	Working Group on Lessons Learned
World Bank	<i>see</i> IBRD
YUP	Yale University Press

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