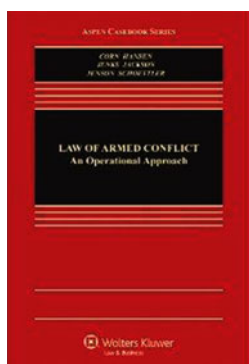


## BOOKS AND ARTICLES



## The law of armed conflict: an operational approach

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Any author who decides to embark on writing a textbook will be confronted by many considerations in terms of materials as well as demands from students and academics. The materials presented must be coherent, relevant and sound. Professors will scrutinise these as they look for ‘the’ book that will help them successfully teach and structure a course. A textbook must obviously also be of interest to students, digestible and ideally stimulating, even if the subject matter cannot always be so. Indeed, a bored student is one of the least wanted audiences for professors. Beyond the lecture halls and seminar rooms, textbooks can also serve as useful references for other academics and practitioners in the field. Their needs will be more pointed, and, even if they are not seen as the prime audience for the book, their endorsement can do no harm.

The recently published textbook, entitled ‘*The Law of Armed Conflict: An Operational Approach*’, succeeds in meeting most, if not all, of these goals. It is a timely addition to the teaching of the law of armed conflict (LOAC), also known as international humanitarian law (IHL).<sup>1</sup> Written from an ‘operational’ perspective and very much influenced by United States practice and policy, it provides important insight into the thinking of military lawyers in applying the laws of war.

\* An Aspen Casebook Series, Published by Wolters Kluwer, Law & Business, 2012. The views expressed here are those of the book reviewer alone and not of the International Committee of the Red Cross.

The textbook is well written, substantive and thought-provoking; and takes a practical approach by submersing students in the world of operational lawyers.

Until the mid-1990's, the laws of war were given relatively scant attention by universities and law schools, in particular in the United States. Those most familiar with the laws of war, compared to today, were few, and traditionally limited to members either of the armed forces or of international humanitarian organisations such as the International Committee of the Red Cross (ICRC) and Non Governmental Organizations (NGOs). Experts from these groups could speak eloquently and at length on such fundamental principles as distinction, proportionality and precaution, balancing military necessity with humanitarian considerations and debating such concepts as unnecessary suffering.

However, with the experiences in Somalia, Rwanda, Darfur and the former Yugoslavia, recurring hostilities in Gaza and Israel, the advent of international criminal tribunals, 9/11, the subsequent conflicts in Afghanistan and Iraq, and detention in Guantanamo, all amplified by 24/7 media coverage, this body of law has become of interest to a growing number of policy makers, judges, lawyers, students and academics. Indeed, debates about the applicability of Common Article 3 to detainees made front-page news, the Geneva Conventions appeared in *Vanity Fair Magazine*<sup>2</sup>, drones stretched the battlefield for everyone to see, and cyber warfare left the confines of Silicon Valley to become actuality. These days, everyone can have an opinion on the laws of war, their relevance and meaning in modern-day armed conflicts. In many ways, as a consequence of the shifting of the debate from the battlefield to the mainstream, the laws of war have now become a subject of particular interest in Universities and many Law Schools.

Thus, the first challenge with any new textbook on the laws of war is to bring to the fore all of these issues whilst not omitting the fundamentals. This book does not fail in this regard. It is divided into 14 main chapters covering everything from the legal bases for use of force (chapter 1) and the history and sources of the law of armed conflicts (chapter 2), the triggering of the law of armed conflict (chapter 3) before delving into the core of the subject and discussing all of the core concepts of the laws of war. There is also a fine Chapter on Naval Warfare and the Law of Neutrality (chapter 12), subjects which are often neglected in most mainstream academic treatise.

Building on solid foundations, the authors have also given themselves the room to consider those areas of the law that are being tested by modern armed conflicts. Many questions, as the authors demonstrate, remain contentious and in many ways unresolved. Whilst not every reader will necessarily agree with some of the viewpoints expressed by the authors, by tackling these more litigious issues and presenting the various sides of the debates in a balanced manner, the textbook is suitably enriched.

1 For the purposes of this review, the term laws of war will be used to cover the Law of Armed Conflict 'LOAC' (a label generally preferred by military lawyers) and International Humanitarian Law (a label generally preferred by civilian humanitarian lawyers).

2 See for instance Philippe Sands, 'The Green Light', in *Vanity Fair*, available at <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805>.

Chapters 3–6, and 10, are noteworthy in this regard. In Chapter 3, which considers the triggering of LOAC, traditionally seen as the existence of either an international or a non-international armed conflict, the authors also allow for a discussion of the concept of ‘transnational armed conflicts against non-state actors’, underscoring both the legal as well as operational complexities of the issues at stake. A forceful argument is made in this section of this book in favour of this concept, even though it has not been fully endorsed elsewhere.<sup>3</sup>

Chapter 5 considers *inter alia* the concept of direct participation in hostilities, which, as we know, still gives rise to some unsettled issues, despite the efforts of the ICRC and many of the best intellects, practitioners as well as academics in this field. Some of the responses to the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, which were published notably in the *New York Journal of International Law and Politics* bring to light the areas of divergence.<sup>4</sup> The authors of the book could have rekindled many of the emotive disagreements, yet to their credit, they have tackled the issues dispassionately. Similarly, in Chapter 6, room is made for discussion on the concept of ‘unprivileged belligerent’, a category of individuals which the authors recognise is ‘controversial and currently rejected by a majority of states’. And Chapter 10 highlights the controversies surrounding the legal basis for detention of individuals arrested in the framework of the so called ‘global war on terror’.

The inclusion and discussion of these somewhat more sensitive concepts, even if there is no universal consensus on their meaning, enriches the book. There is a sufficient breadth of references in the book so as to allow the students to read the diverse views on such issues, and to form their own opinion.

3 See for instance ICRC, ‘International Humanitarian Law and the challenges of contemporary armed conflicts’, Report prepared by the ICRC, 31<sup>st</sup> International Conference of the Red Cross and Red Crescent, December 2011, available at: <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> (all last visited October 2011).

4 The ICRC Guidance is available at: <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. See also in *New York University Journal of International Law & Politics*, Vol. 42, No. 3, Spring 2010: Ryan Goodman & Derek Jinks, ‘The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Introduction to the Forum’, pp. 637–640, available at: [http://www.law.nyu.edu/ecm\\_dlv4/groups/public/@nyu\\_law\\_website\\_journals\\_journal\\_of\\_international\\_law\\_and\\_politics/documents/documents/ecm\\_pro\\_065929.pdf](http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065929.pdf); Kenneth Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’, pp. 641–695, available at: [http://www.law.nyu.edu/ecm\\_dlv4/groups/public/@nyu\\_law\\_website\\_journals\\_journal\\_of\\_international\\_law\\_and\\_politics/documents/documents/ecm\\_pro\\_065932.pdf](http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065932.pdf); Michael N. Schmitt, ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’, pp. 697–739, available at: [http://www.law.nyu.edu/ecm\\_dlv4/groups/public/@nyu\\_law\\_website\\_journals\\_journal\\_of\\_international\\_law\\_and\\_politics/documents/documents/ecm\\_pro\\_065931.pdf](http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065931.pdf); Bill Boothby, ‘“And for Such Time As”: The Time Dimension to Direct Participation in Hostilities’, pp. 741–768, available at: [http://www.law.nyu.edu/ecm\\_dlv4/groups/public/@nyu\\_law\\_website\\_journals\\_journal\\_of\\_international\\_law\\_and\\_politics/documents/documents/ecm\\_pro\\_065933.pdf](http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065933.pdf); W. Hays Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect’, pp. 769–830, available at: [http://www.law.nyu.edu/ecm\\_dlv4/groups/public/@nyu\\_law\\_website\\_journals\\_journal\\_of\\_international\\_law\\_and\\_politics/documents/documents/ecm\\_pro\\_065930.pdf](http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065930.pdf); Nils Melzer, ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’, pp. 831–916, available at: [http://www.law.nyu.edu/ecm\\_dlv4/groups/public/@nyu\\_law\\_website\\_journals\\_journal\\_of\\_international\\_law\\_and\\_politics/documents/documents/ecm\\_pro\\_065934.pdf](http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065934.pdf).

The second challenge for any book is to make it intellectually accessible to students and practical for professors. As a teaching tool, the authors have opted for a more 'hands-on', rather than a purely theoretical, approach. Throughout the chapters, the book develops on an 'overarching hypothetical scenario . . . loosely based on the 1989 U.S. Military Operations in Panama', code named Operations Just Cause and Promote Liberty. Students are expected to take on the role of a junior JAG officer participating in the various operations, advising their commander and staff on legal issues in the 'planning and execution of a wide array of combat and post-combat operation.' As the scenario evolves, it builds on the knowledge that the students acquire chapter by chapter. From having to advise on different military operations, the legal obligations of U.S. forces, and on collateral damage assessments, to receiving briefings at the Pentagon, and deciding when to terminate hostilities, there is little respite for the students as they work through the materials. Questions abound, testing the reader's understanding of the law and operational challenges, in a very dynamic fashion.

From the opening volley of questions, where the President asks, 'all right, we have been watching this situation pretty close for a while. I want to know what everyone thinks', after having been briefed on assaults against U.S. servicemen by members of the Panamanian Defence Force, the student is drawn into a page turning law of war thriller, where s/he can play a lead role. As a teaching tool therefore, this book is not only intellectually stimulating but also pushes the students to think practically about the law, which, in many ways, is an essential exercise in the honing of work skills.

Lastly, if a book is to stand out from others on the same subject, it needs to bring something different to the table. Here, it is the fact that the authors have proffered an 'operational approach' to their material. As they explain, 'it is the ability to apply the law to the problems presented during military operations that defines success, and an appreciation of the complexity of this intersection of law and operations will contribute to positive development in the law.'

With over 120 years combined U.S. military experience, the authors have a privileged vantage point, of having first-hand experience in the application by the U.S. of the laws of war during armed conflicts. The injection of their insights and fruits of their operational experience into the materials makes the book unique. To be sure, some readers may feel that the book comes across as overly U.S.-centric. However, this is actually one of the strong elements of this book, in that it provides invaluable insight into U.S. thinking and operational law, which have influenced the U.S. military and policy makers over the past few years. The authors have not sought to argue that the U.S. position should always be the standard-bearer. Instead, they have succeeded in finding the right balance between theory and the practice, and to bring to light the operational realities of the laws of war, with a focus on U.S. policy and military doctrine.

In conclusion, this book is an important addition to today's teaching on the laws of war. The authors have taken the time and space to review objectively the development and status of the laws of war, whilst also managing effectively to bring to the fore the many challenges and dilemmas faced by operational military lawyers.