

Conflict Law

William H. Boothby

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The Influence of New Weapons Technology,
Human Rights and Emerging Actors



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*To my parents and to my wife
Thank you for everything*

Preface

In this, the second decade of the twenty-first century, the law relating to conflict is confronted by a number of challenges that this book seeks to identify and to discuss. It was a deliberate decision that the book should cover the whole spectrum of conflict from general war to situations below the armed conflict threshold. The title 'Conflict Law' should be seen in that light.

Old legal certainties based on a bi-polar system of war and peace have given way to ambiguities as we apply the current, more extensive legal spectrum of conflict to contemporary transnational conflicts involving loosely affiliated armed groups. Gaps in treaty law governing armed conflict seem unlikely to be filled in the short term, so what is the legal status of the numerous writings of Experts that we have seen in recent decades? The Internet offers a new environment in which hostilities can be conducted and for which there are no treaty rules of the game. Technological advance seems likely to produce, in both the real and virtual environments, increasing numbers of automated and, in due course, autonomous weapons that make their own attack decisions, which the machine then implements. How does a body of law written on the implicit premise of human decision-making cope with the onward march of the empowered machine?

Weapons technology continues to advance at a rapid pace, but states are obliged to apply existing legal principles when determining the legitimacy of the new tools of war. Determining how the rules should be applied to cutting edge technologies, such as autonomous, cyber, nanotechnology and outer space weapons, is going to be an important undertaking. Remote attack techniques that render the attacker invulnerable, effects-based operational thinking that seeks to expand the envelope of permissible targeting, the persistent issues associated with asymmetry and a likely depopulation of the battlefield seem likely to cause some to question deep-rooted legal principles. Despite these technological developments, however, people will remain central to the conduct of hostilities, although their roles may change over time and increasing involvement of civilians may become legally problematic.

Detention operations have attracted more than their fair share of controversy in recent years. Though many prescriptive rules regulate important detention matters, this is arguably an area where gaps in the treaty law of armed conflict bite and there are useful initiatives designed to achieve a common understanding as to the rules that are to be applied. While the International Courts have pronounced on the

relationship between human rights law and the law of armed conflict, aspects of their collective judgments may be expected to pose practical difficulties for commanders and other decision-makers. While the terminology describing that relationship increases, the pressing need is for a clear expression of the rules that are to be applied in foreseeable circumstances.

If these challenges and controversies were not enough, battles these days are fought in the glare of a media and legal spotlight. Instant reporting by mass and individual media coupled with legal challenges before a broad selection of courts and other fora ensure that the decisions of commanders and others, often undertaken in the heat of battle and with minimal opportunity for reflection and advice, will be publically debated and criticised soon after the event with all the attendant strategic implications.

These are just some of the issues that caused me to write this book. Academic discussion of the finer points of the law is a legitimate pursuit; indeed, the reader will find any amount of such discussion in the following pages. However, the law relating to conflict is of vital practical importance as a protector of the victims, the wounded, the sick, the civilians, the prisoners and so on. This is its essential function and academic debate must not be allowed to obscure that purpose. The book therefore seeks to adopt a practical approach to the numerous complex problems it tackles and, where possible, seeks operable solutions.

It would not have been possible to write this book without the encouragement, assistance and guidance of many people and I thank them all. Particular thanks are due to Prof. Rain Ottis of Tallinn University for his instructive and most helpful comments on numerous technical issues associated with cyber operations and to Prof. Françoise Hampson of the University of Essex for her most helpful comments on aspects of the human rights discussion. My thanks also go to Merel Alstein for inspiring me to write the book and for her clear and helpful advice as to its content and direction.

While these various comments and suggestions have been of enormous assistance to the author and have undoubtedly greatly improved the book, it must be stressed that any errors remain entirely the author's responsibility.

Finally, the author wishes to thank his wife for her patience and reassurance at numerous pivotal moments during the writing of the book.

October 2013

William H. Boothby

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