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# The Law of War

Third Edition

Ingrid Detter



JUSTICE,  
INTERNATIONAL LAW  
AND GLOBAL SECURITY

# The Law of War

Third Edition

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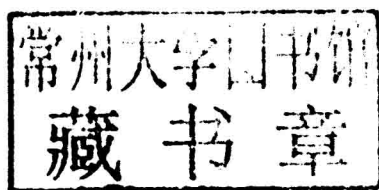
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## THE LAW OF WAR

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# Preface to the First Edition

The cosmic dust ... changes the colours of the sky ... colours the sunlight with a bloody line ... penetrates our dwellings and our lungs ... (and) acts injuriously upon living organisms.

This is not a description of any nuclear holocaust. The words are those of an author, writing 85 years ago, about the nature of the 'wish for war' which pervades the mind of statesmen like 'penetrating cosmic dust'.<sup>1</sup>

The known horrors of war do not have to be described; but one should remember that they are the implementation of an at least oblique wish for war, or, since many wars are generated spontaneously and may appear 'unavoidable', a wish to *allow* war. Others hold that wars have ceased to exist, now that they are theoretically outlawed. Whatever disturbances that now occur must, they say, therefore be given another name, such as armed conflicts.

But conflicts that are factually very similar to traditional war still occur in the international society. It is important to regulate the behaviour of parties to any such conflict. Efforts have been made to this effect in various fields. Numerous treaties and conventions have been concluded and certain general and specific rules can be discerned.

There is no modern treatise on these rules. Older works cannot be used by simple updating as the very nature of war has changed, especially in view of the increased number of internal conflicts. The present work attempts to fill that gap. However, the work covers an immense area of problems and must necessarily balance the importance of different subjects by stringent selection.

The title of this work, the 'Law of War', using a singular rather than the more common term 'laws of war', is intended to indicate there is now a homogeneous body of rules applicable to the modern state of war. The term 'laws of war', as applied to the subject as a whole, tends to convey an image of fragmentary regulation of matters of diverging nature and importance. The 'Law of War' comprises such

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1 Bloch, I.S., *Modern Weapons and Modern War*, London, 1900, p. lxiii.

different matters and provides the framework inside which problems and rules can be systematically ordered.

However, the expression 'laws of war' will also be used in this work, but then to refer to the various components of the law, for example the various legal instruments, declarations and treaties, which form part of the legal system devised for war.

The contents and the ambit of the Law of War have changed drastically in modern times, particularly in the last few decades. Matters which were once at the centre of attention in warfare are now of less pertinence. For example, blockade was always assumed to be of paramount importance to naval warfare but, in recent naval conflicts, few close or long-distance blockades have been imposed and the strategy of blockades have fallen into disuse. Furthermore, the law of prize represents another area of declining importance in modern warfare, and can perhaps now, along with angary, be more conveniently viewed as a derogation from the protection that property otherwise might enjoy in hostilities, rather than a practice specially pertinent to naval warfare.

Because of this change, this work has devoted proportionally less space to relevant rules in fields as these than earlier textbooks and sought to deal more with problems of modern importance. Some such topical problems concern the extension of the application of the Law of War to internal disputes which will be discussed in detail in various contexts throughout the book. For the reader to be aware of the place of such modern problems in a coherent system of law, this book will, albeit briefly, set out the conceptual framework of the law of prohibition of force in general in international society in Part I. Rules on belligerence and humanitarian rules will be analysed in Part II and Part III is devoted to the effects of war and various methods of securing, or avoiding, the application of the Law of War. The present book attempts, in its conclusions, to evaluate the contemporary Law of War in legal and political terms.

St. Antony's College, Oxford, 1987

## Preface to the Second Edition

When this book was first published, at the end of 1987, the world was still governed by bipolarity. There was little to indicate – whatever scholars now claim to have foreseen – that communism would fall and that the political pattern would change. In a way, the divided world was accepted and perhaps even supported, by western political leaders, as a stable system, albeit suffering from tension.

At the time of publication, the theme was highly original among titles on international law and international relations: no book had been published on the Law of War since 1952. War was, according to many of my colleagues at the time, thought to be a non-subject since war was technically outlawed; the war in Vietnam was finished and the war in the Falklands was seen as a minor affair; war was of little topical interest. What was more studied at this stage by international relations scholars was deterrence and various aspects of the arms race, the Strategic Defence Initiative, and its implications. And international lawyers were devoting most of their time to the Law of the Sea and, possibly, to problems of investment in the Third World.

The ink in my book was barely dry when the Gulf War broke out. Six months later Croatia and Slovenia had to fight a war of independence and another year after that, Bosnia became the war theatre of major battles. The transition from communism was not without bloodshed; what was shocking was the indifference of the world to war in a region less than two hours' flight from London. Then war flared up again, this time in Cambodia. In Africa there were numerous conflicts: in Somalia, Mozambique, Rwanda, Angola and the Congo; in 1999, twenty of the forty-five sub-Saharan States were involved in war. New armed conflicts followed in Ethiopia, Eritrea, Kosovo and East Timor. War suddenly became of major political importance.

However, it is not only that wars have become more frequent since the first edition of this book. There have been other drastic changes. Ten years ago most wars were 'liberation wars' of nations seeking independence from more or less oppressive 'colonial' regimes. There were also a number of 'vicarious' conflicts between the then superpowers, where the United States and the former Soviet



Union supported different sides in local wars in Africa, Asia and Central America. Since the demise of the bipolar system, wars tend more to concern secession from larger federations, like the war in Chechnya in Russia, and in the constituent States of former Yugoslavia. Other new types of war appear to be fuelled by uncontrolled ethnic tension, often in the aftermath of the fall of communism which left a number of countries economically destitute.

This second edition of this book is highly topical in the light of the military action of NATO against Yugoslavia (Serbia and Montenegro), a sovereign State which had not invited such action, in an unprecedented attempt to stifle humanitarian cruelties. This is a dramatic change from the State-centred paradigm of earlier decades with ensuring reduction of the 'reserved domain', that is to say the internal area over which a State has exclusive rights. This development forms a part of the Law of War: action by military force can only be effectively studied and analysed in the context of rules for the waging of war and of rules concerning legitimate defence.

The Law of War and its branches of laws on weaponry and on humanitarian law are of major importance to mankind. It is clearly vital to produce this second edition to cover the additions to the Law of War that can now be made in view of developments during the last decade. There are also some new problems, for example the status of international forces and the responsibility of organisations. Major international organisations, like the United Nations, the European Union and the Red Cross, have been subjected to biting criticism for bureaucratic and operational mistakes in certain wars and appear to be in need of adaptation.

In the last few years there has been a flood of books on war, both on legal and political aspects. However, it is still correct to claim that there is no other treatise that deals with the major legal aspects in a systematic manner.

At the turn of the Millennium, we note that, unfortunately, wars and armed conflicts still occur. Unless international law sets firm limits and clarifies rules that apply in such situations, warring factions may resort to formless and lawless behaviour, including excesses and atrocities. Conversely, if clear rules are crystallised in a homogeneous and systematic analysis, setting out also sanctions which may follow deviations from such rules, States and groups may consider other options than armed force to voice their differences. It is the aspiration of this work precisely to contribute to such clarification of relevant rules of the Law of War.

St. Antony's College, Oxford, 2000

## Preface to the Third Edition

The first edition of this book was published in 1987 when the world looked different: half of Europe and many countries elsewhere were suffering under communism. The Iron Curtain seemed certain to remain for decades or even forever. In what can only be described as a political miracle, however, all changed in 1990. Communism fell, within a very short space of time, perhaps within six months, and the world, and international law and international relations, changed.

The second edition of this work sought to describe the entirely different post-communist scenario. But then there were further profound changes: after the attack on the Twin Towers, the 9/11 tragedy, it became apparent that the main belligerents are no longer States but individual terrorist groups. On one side we still have States involved in war and armed conflict; but on the other side, more often than not, it is a terrorist organization that is 'the enemy'. The proliferation of terrorist groups means that we now live in a very dangerous era as we no longer know where the enemy is or where and when the enemy will strike next.

This is a work that will seek to map this important transformation of international society. Without knowledge of relevant rules, statesmen cannot take appropriate decisions; leaders of the armed forces cannot give correct and lawful orders; and scholars of international law and international relations cannot advance in their analysis of the contemporary order.

There are, at present, other works which claim to deal with rules of armed conflict but the vast majority of these deal with 'humanitarian rules' which form but a part of the Law of War. They often leave out what is treated in this work: the rules concerning which weapons may be used and which targets may be attacked, justification for the use of force, rules on ethics and sanctions for breaches.

Although some scholars now claim to have predicted this transformation of international society, it must be admitted that few could have foreseen, or did foresee, that a communist system that had dominated many countries in Eastern Europe for some 45 years suddenly disappeared. The Soviet Union that had been communist for over 70 years also succumbed, with apparent joy, to the new order and renamed itself Russia. Leningrad became again St Petersburg, statues of Lenin

were removed and most streets and squares named after communist heroes were given new names, often reverting to what they had been called pre-1917.

Apart from superficial changes of names, Russia adopted far-reaching measures to ensure true democracy and adopted an economic system that was no longer controlled by the State but guided by the market economy. Most State enterprises were privatised. Churches were repaired and opened. The whole of Eastern Europe and all the former satellite countries of the USSR in Eastern Europe followed suit and, with greater or lesser success, also adopted the Western economic system.

When the second edition of this work was prepared, long sections on communist views of armed conflict were removed from this book as irrelevant or obsolete and other new chapters were revised to take account of the far going changes in international society. More attention was given to emerging rules on secession, much guided by the experience of the dismantling of the Soviet empire and by the independence of the new States in Central and in South-East Europe. Other sections were considerably enlarged, for example chapters on terrorism and relevance of acts of non-State actors. There were also tentative efforts to deal with cyber crimes and militarisation of space. Because of these drastic changes, the second edition of this work was effectively a totally different book and not merely an updating of the first edition.

No one could foresee, in 2000, a further dramatic change of international society caused by the atrocious attack on the Twin Towers in New York, rapidly referred to just as '9/11'. This was an attack of unparalleled dimension on 9 September 2001 by Muslim terrorists flying aeroplanes into the Twin Towers in New York, killing some 4,000 people. Another plane attacked the Pentagon in a similar fashion. These attacks caused President George W. Bush to declare a 'War on Terror'.

Few could have foreseen, or did foresee, that the State-centric system that had dominated the entire international society since the rise of the nation-States in the sixteenth century, would virtually disappear. Terrorist groups became belligerents, to some extent replacing States, in real 'wars'. There was now a 'War of Terror'.

Many academics then said that this is not a 'real war' but only a euphemism for new troubles in the world. But as time went on it became apparent that the Al-Qaeda terrorists are indeed the new belligerents, waging what is very similar to what in history has been called 'war'. But the situation is different: we no longer know when and where a further attack may be expected and, worse, we do not even know exactly where to find the enemy.

The declaration of the War on Terror by the United States, in turn, changed much of the contents of the Law of War. Now there had been an attack of such magnitude that it warranted unprecedented acts of military intervention in countries assumed to bear at least a part of the responsibility for 9/11. Some countries were likely to harbour the Muslim fundamentalists who had been behind the attack. The group called Al-Qaeda, then led by the extremist Osama bin Laden, was widely believed to have planned and executed the attack.

With some considerable stretch of legal arguments for justification, Iraq was invaded in 2003 and Saddam Hussein deposed and then tried and executed. One reason said to legitimise this action was that Saddam was thought to have

weapons of mass destruction (WMDs) although inspectors later did not find any. Yet, inspections and searches were largely limited to a search of traditional weapons of mass destruction, such as nuclear missiles. It would have been almost impossible to establish whether Iraq actually held any depots of biological or chemical weapons: these can be disguised and stored in a very small area indeed.

In any event – as a dramatic change of the international legal system – it was now widely held that it had become legitimate to depose a dictator and an ‘undemocratic’ regime.

In spite of other more or less spurious grounds of justification for the war, such as connections with Al-Qaeda, it was never made quite clear what links Iraq might have had with this organisation or, indeed, with any other terrorists.

But military force led to military force. As the third edition of this work is being prepared there is one major war still going on, in Afghanistan, and troops are still stationed in Iraq where fighting is continuing. Osama bin Laden was captured and killed but Al-Qaeda survives as an organisation, with numerous regional sub-sets. Al-Qaeda appears to still be encouraging Muslims to attack Western – especially American – targets through suicide attacks, sacrificing themselves for the fundamentalist cause. There were further atrocious attacks on innocent civilians, after 9/11, such as the attacks in London (‘7/7’), in Madrid, and in numerous other places.

Further calls for democratisation came from northern African in 2011. This was the so-called ‘Arab Spring’ which caused one dictator after another to be deposed, starting with President Mubarak in Egypt and continuing with the capture and shooting of Colonel Gaddafi in Libya.

War used to involve a clear ‘enemy’. But when terrorists – now a major problem in the world – are involved, it is no longer clear where the ‘enemy’ is or, indeed, who is the ‘enemy’. In the earlier editions of this work it was suggested that terrorists, with their largely unexpected attacks, could be compared to pirates and that, as such, terrorists should also be considered to be *hostes gentium*, enemies of all people, and therefore outlaws.

But one could not foresee that real pirates would also re-emerge, taking innocent people on yachts and ships hostage and demand ransom for their release and in many cases taking the vessel and killing its owners. The practice became a new profitable way of warlike practices off the coast of Somalia, endangering private yachts and commercial vessels. So now the world is facing double threats and dangers by both terrorists and by pirates.

Another new development shows that the Law of War does not only concern armed conflict between States but also between other entities. Not only is a kind of war waged by terrorists, on the one hand, but also, rather than by States, by military companies, on the other. The emergence of such entities is a new and serious development in international society. These companies, often run by very experienced soldiers, engage in war-like actions similar to what in previous times was carried out by mercenaries on behalf of States or by private armies. Yet, some of these companies are often authorised by States to carry out certain military

operations. In many cases they no longer appear to be carrying out illegitimate tasks and, in such cases, they no longer appear to deserve to be outlawed.

In the transformation of international society since the publication of the first edition of this work 25 years ago, there are two trends that have become increasingly obvious, especially in the context of the Law of War. First, there appear to be some 'inherent' rules that the State has no power to displace. These rules are very few but without respecting them no society can survive. The State, that is every State, must respect that individuals have the right to be spared genocide, torture, slavery and, at least nowadays, apartheid. Again, at least nowadays, individuals appear to be ensured also some basic democratic rights. Furthermore, other intrinsic rules that operate in war and in armed conflict also bind States to such a degree that States no longer have any power to change them. These rules are not necessarily identical to those that belong to *jus cogens* but probably represent a narrower but clearer field, that is to say rules without which international society cannot survive.<sup>1</sup>

Some such 'intrinsic' rules concern the duty of any combatant to clearly show insignia, or a uniform, to indicate that he is a member of armed forces. If he fails to do that he will be an 'illegal combatant'. Thus a civilian who takes up arms and goes into battle loses all privileges to be treated as a civilian under the Law of War. Other such 'intrinsic' rules concern the minimum standard afforded to all, whether captured dictators or suspected detainees.

All these rules are derived immediately from international law, and operate as overriding 'intrinsic' rules, whatever national legislation may prescribe. Such an ideology on 'intrinsic' rights that the State cannot alter was clearly abhorrent to the communist system: one of the core rules in that order is precisely that the State is omnipotent. Such views were also reflected in what academics could, or would, write about in certain countries. There are remnants of this attitude even in some post-communist States and even in other academic circles, influenced by previous ideologies in Eastern Europe.

The second trend – perhaps a consequence of the above – is the move away from the exclusive State paradigm as ordinary individuals, terrorist groups and mercenary companies become more visible in armed conflict. Above all, the individual is becoming more and more prominent as an actor in international society. To some extent this development may vindicate the proposition in the 1987 edition of this work (and even earlier in my other works) that, at least in a number of situations, the individual is an immediate subject of the international legal order. But many academics were unprepared for the rapid transition and changes in international practice and now find difficulties in explaining what now is called 'non-State actors'. Yet, in the system presented in the present work, such actors, above all individuals, emerge as clear subjects, immediate bearers of rights and duties, under international law.

As a subject of international law in certain situations, the individual, be it a soldier or a civilian or even a terrorist, enjoys rights under international law but

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<sup>1</sup> See Detter, I., *The Concept of International Law*, 2nd edn (Stockholm, 1994), Ch. One, and Detter, I., *The International Legal Order*, 2nd edn (London, 1993), Ch. III, on 'the hypothetical goal' of international society.

he is, above all, also subject of strict duties under that legal system (as shown in the war crimes cases). Because of duties imposed by international law on the individual, the terrorist, or the soldier who exceeds what he is entitled to do, or the statesman who kills his own people, cannot escape responsibility for his actions.

Only by accepting that the individual is at the centre of international law can we make sense of what is actually happening in State practice: terrorists are tried by military commissions or by other courts; soldiers – or politicians – who commit excesses are tried by war crimes tribunals; and dictators, who do not respect basic rules of democracy, are deposed, by their own people or even by outside intervention, or they too are tried by international criminal courts. In the modern world, the individual (the soldier, the civilian, the dictator, the terrorist or the pirate) can no longer behave as he wishes and will have to face the consequences if he violates the rules of international law.

St. Antony's College, Oxford, 2013  
Ingrid Detter Doimi de Lupis Frankopan

*To my son Nicholas*

# Abbreviations

ABA	American Bar Association
ABM	Anti-ballistic missile
AC	Appeal Cases
AD	<i>Annual Digest</i>
AFDI	<i>Annuaire français de droit international</i>
AFL Rev	<i>Air Force Law Review</i>
AJIL	<i>American Journal of International Law</i>
<i>Annals Am Acad Pol &amp; Soc Sci</i>	<i>Annals of the American Academy of Political and Social Science</i>
APM	anti-personnel landmine
APPF	Afghan Public Protection Force
AQMI	<i>Al-Qaeda au Maghreb islamique</i>
AR	<i>United Nations Repertory of Arbitration Awards</i>
ASATs	Anti-satellite weapons
ASDI	<i>Annuaire suisse de droit international</i>
ASIL	American Society of International Law
ASJG	<i>Acta Scandinavia Juris Gentium</i>
AT	Advanced Tactics
AVR	<i>Archiv des Völkerrecht</i>
<i>Berk J Intl L</i>	<i>Berkeley Journal of International Law</i>
BFSP	<i>British and Foreign State Papers</i>
BGH	<i>Bundesgerichtshof</i>
BIICL	British Institute for International and Comparative Law
BTWC	Convention on Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction
<i>BU Intl L J</i>	<i>Boston University International Law Journal</i>
BWs	Biological weapons



BYIL	<i>British Year Book of International Law</i>
C	<i>Clunet</i>
<i>Cal W Intl L J</i>	<i>California West International Law Journal</i>
CNA	computer network attacks
CANWFZ	Central Asian Nuclear Free Zone
<i>Can YB Intl L</i>	<i>Canadian Yearbook of International Law</i>
<i>Cardozo J Intl &amp; Comp Law</i>	<i>Cardozo Journal of International &amp; Comparative Law</i>
<i>Case W Res J Intl L</i>	<i>Case West Reserve Journal of International Law</i>
CBMs	Confidence building measures
CBWs	Chemical and biological weapons
CCD	Committee of the Conference of Disarmament
CD	United Nations Conference on Disarmament
CDDH	Steering Committee of Human Rights of the Council of Europe
CECA	<i>Communauté européenne du charbon et de l'acier</i>
CEE	<i>Communauté économique européenne</i>
CEEA	<i>Communauté européenne de l'énergie atomique</i>
CERN	<i>Organisation européenne pour la recherche nucléaire</i>
<i>Chic J Intl L</i>	<i>Chicago Journal of International Law</i>
CICR	<i>Comité International de la Croix Rouge</i>
CIS	Commonwealth of Independent States
Civpol UN	United Nations Civilian Police
CL	<i>Current Law</i>
CLJ	<i>Cambridge Law Journal</i>
CLP	<i>Current Law Problems</i>
CML Rev	<i>Common Market Law Review</i>
<i>Colum L Rev</i>	<i>Columbia Law Review</i>
CSCE	Conference on Security and Cooperation in Europe
CWC	Chemical Weapons Convention
CWs	Chemical weapons
D	<i>Dalloz</i>
DGVR	<i>Deutsche Gesellschaft für Völkerrecht</i>
<i>Denv J Intl L &amp; Poly</i>	<i>Denver Journal of International Law and Policy</i>
<i>Dodson</i>	<i>Reports of Cases argued and determined in the High Court of Admiralty</i>
DÖV	<i>Die öffentliche Verwaltung</i>
<i>Duke J Comp &amp; Intl L</i>	<i>Duke Journal of Comparative and International Law</i>
EAPC	Euro-Atlantic Partnership Council
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECCC	The Extraordinary Chambers in the Courts of Cambodia