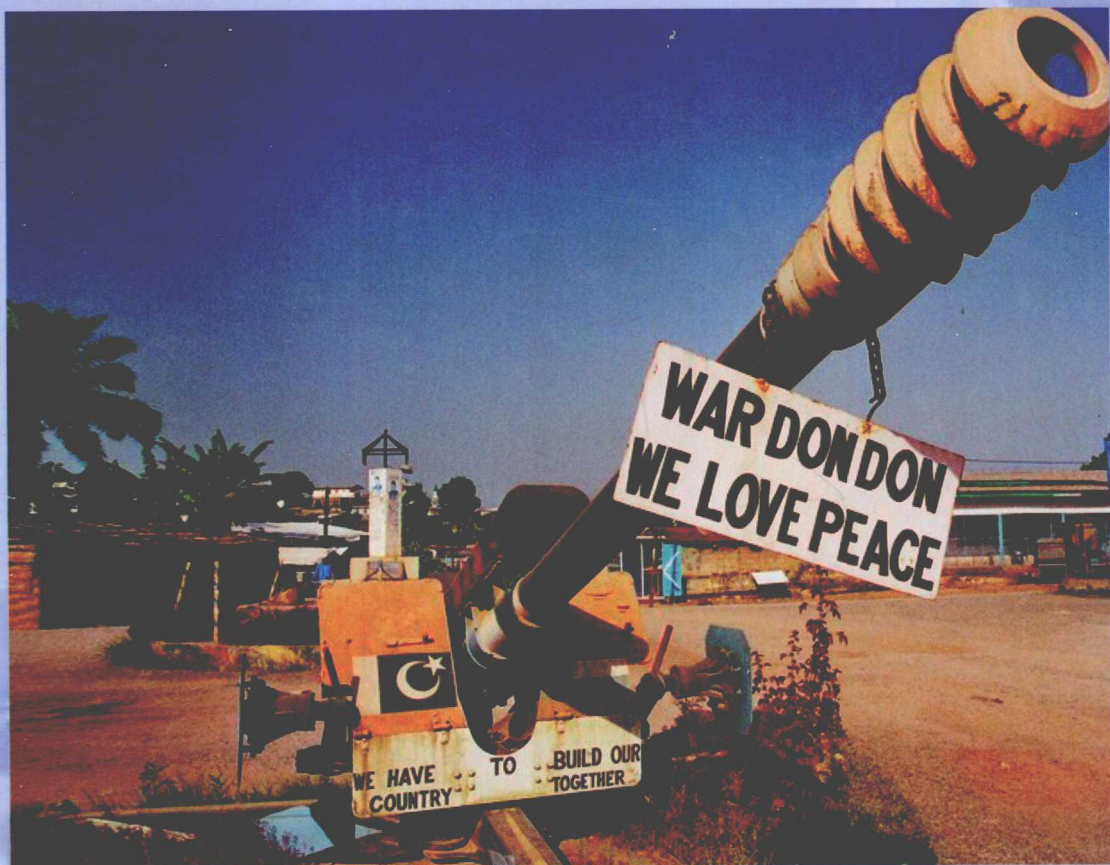


International Law and Armed Conflict

Challenges in the 21st Century



Edited by
Noëlle Quénivet
Shilan Shah-Davis

T • M • C • ASSER PRESS

INTERNATIONAL LAW AND ARMED CONFLICT

CHALLENGES IN THE 21ST CENTURY

edited by

Noëlle QUÉNIVET & Shilan SHAH-DAVIS



T•M•C•ASSER PRESS

Cover photograph © Patrick Kuebart

ISBN 978-90-6704-311-3

All rights reserved.

© 2010, T·M·C·ASSER PRESS, The Hague, The Netherlands and the Authors

<www.asserpress.nl>

No part of the material protected by this copyright notice may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without written permission from the copyright owner.

PRINTED IN THE NETHERLANDS

PREFACE AND ACKNOWLEDGEMENTS

Traditionally, when reference was made to international law and armed conflict, the primary focus was on the use of force and international humanitarian law. However, increasingly other legal regimes are being used to regulate situations that may be categorised as armed conflicts. In addition, the nature of armed conflict has also changed, partially due to the emergence of new actors who partake in such situations. Furthermore, our perception of what is acceptable behaviour (and what is not) in armed conflict has evolved. Similarly, greater attention is being paid to the assistance provided in post-conflict settings. Bearing all this in mind, there is an urgent need to rethink the legal framework relating to armed conflict and ensure that the reforms suggested are realistic so as to entice compliance.

In a quest to test the validity of the aforementioned assertions we convened a Symposium on International Law and Armed Conflict in September 2008 at the University of the West of England (UK). The discussions during the Symposium not only confirmed our suppositions, but also brought to light other key challenges facing international law and armed conflict. The book presents some of the issues and challenges addressed during the discussions.

This book adopts a thematic approach and aims to provide a broader picture of international law and armed conflict and the current challenges it is facing. Moreover, this approach allows us to highlight the complexities, intricacies, and the interrelationship of the different regimes that may be rendered applicable to armed conflicts. Also, in taking a more inclusive approach, this book offers a new perspective on both existing and emerging themes in this field.

We would like to thank Cátia Lopes, Amy Man, Adam Mercer and Pamela Williams for their assistance with the proof reading. Our acknowledgements also go to our colleague Sabine Hassler for reading and commenting on certain chapters of this book and to Patrick Kuebart for providing the photo used on the cover of this book. Finally, we are very grateful to Prof. Ademola Abass, Prof. Bill Bowring, Dr. Gerd Hankel, Prof. William Schabas and Prof. Nigel White for taking time out from their busy schedules to write the commentaries.

November 2009

Noëlle QUÉNIVET and Shilan SHAH-DAVIS
Bristol Law School
University of the West of England

LIST OF ABBREVIATIONS

AA	African Affairs
ACHSC	Anuario colombiano de historia social y de la cultura
ADFJ	Australian Defence Forces Journal
AFRC	Armed Forces Revolutionary Council
AI	Amnesty International
AJICL	Arizona Journal of International and Comparative Law
AJIL	American Journal of International Law
AJLS	African Journal of Legal Studies
AL	Army Lawyer
All ER	All England Law Reports
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
ASIL	American Society of International Law
ASIO	Australian Security Intelligence Organisation
ASP	Assembly of State Parties
ASR	African Security Review
ATCA	Alien Tort Claims Act
AUC	Autodefensas Unidas de Colombia
AUILR	American University International Law Review
AUJILP	American University Journal of International Law and Policy
BBC	British Broadcasting Corporation
BCEALR	Boston College Environmental Affairs Law Review
BCICLR	Boston College International and Comparative Law Review
BHRC	Bar Human Rights Committee
BJC	British Journal of Criminology
BJIL	Berkeley Journal of International Law
BJWA	Brown Journal of World Affairs
BP	British Petroleum Plc
BS	BioScience
BTC	Baku-Tbilisi-Ceyhan
BYIL	British Yearbook of International Law
CAVR	Commission for Reception, Truth and Reconciliation
CCC	Colombian Criminal Code
CCM	Cluster Munitions Convention
CDF	Civil Defence Forces
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEO	Chief Executive Officer
ChiJIL	Chicago Journal of International Law
CI	Colombia Internacional
CILJ	Cornell International Law Journal
CivPol	Civilian Police
CJEL	Columbia Journal of Environmental Law

CJIELP	Colorado Journal of International Environmental Law and Policy
CJIL	Connecticut Journal of International Law
CJTL	Columbia Journal of Transnational Law
CLF	Criminal Law Forum
CLP	Current Legal Problems
CLR	Columbia Law Review
CLSC	Crime, Law and Social Change
CNN	Cable News Network
CNRR	Comisión Nacional de Reparación y Reconciliación
ColUP	Columbia University Press
CP	Comparative Politics
CPA	Coalition Provisional Authority
CRP	Community Reconciliation Processes
CSO	Central Selling Organization
CUP	Cambridge University Press
CWLJ	Cardozo Women's Law Journal
CWRJIL	Case Western Reserve Journal of International Law
DJIL	Dickinson Journal of International Law
DJILP	Denver Journal of International Law and Policy
DO	Diario Oficial
DoP	Declaration of Principles
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
DS	Defence Studies
DULJ	Dublin University Law Journal
EAW	European Arrest Warrant
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EE	Energy and Environment
EHRLR	European Human Rights Law Reports
EHRR	European Human Rights Report
EIA	Ethics and International Affairs
EITI	Extractive Industries Transparency Initiative
EJIL	European Journal of International Law
EJIR	European Journal of International Relations
EL	Environmental Law
ELJ	Emory Law Journal
ELN	Ejército de Liberación Nacional
EMT	Environmental Modification Techniques
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
EnvU	Environment and Urbanization
EPIL	Encyclopaedia of Public International Law
EPL	Ejército Popular de Liberación
ERG	Ejército Revolucionario Guevarista
ERW	Explosive Remnants of War
ESPR	Environmental Science and Pollution Research
EU	European Union
EUSA	European Union Studies Association

EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
FA	Foreign Affairs
FARC	Fuerzas Armadas Revolucionarias de Colombia
FC	Federal Court of Canada
FI	Foro Internacional
FILJ	Fordham International Law Journal
FJIL	Florida Journal of International Law
FLEGT	Forest Law Enforcement, Governance and Trade
FMR	Forced Migration Review
FPIFM	Foreign Policy In Focus Magazine
GATT	General Agreement on Tariffs and Trade
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 the 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
GG	Global Governance
GIC	Governing Iraqi Council
GIELR	Georgetown International Environmental Law Review
GJIL	Georgetown Journal of International Law
GLJ	German Law Journal
GYIL	German Yearbook of International Law
HC	House of Commons
HdC	Historias del Callejón
HHRJ	Harvard Human Rights Journal
HICLR	Hastings International and Comparative Law Review
HIR	Harvard International Review
HJD	The Hague Journal of Diplomacy
HLR	Harvard Law Review
HMSO	Her Majesty's Stationery Office
HPCR	Harvard Program on Humanitarian Policy and Conflict Research
HRC	Human Rights Committee
HRDY	Human Rights in Development Yearbook
HRL	Human Rights Law
HRQ	Human Rights Quarterly
HRR	Human Rights Review
HUP	Harvard University Press
IA	International Affairs
IAEA	International Atomic Energy Agency
IBA	International Bar Association
IBLF	International Business Leaders Forum
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law

ICLQ	International and Comparative Law Quarterly
ICLR	International Community Law Review
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDFLR	Israeli Defense Forces Law Review
IHL	International Humanitarian Law
IICLR	Indiana International and Comparative Law Review
IJ	International Journal
IJGLS	Indiana Journal of Global Legal Studies
IJTJ	International Journal of Transitional Justice
IL	International Lawyer
IL.RCDI	International Law. Revista colombiana de derecho internacional
ILA	International Law Association
ILM	International Legal Materials
ILO	International Labour Organization
ILP	International Law and Politics
ILR	International Law Reports
IMF	International Monetary Fund
IMT	International Military Tribunal
IN	International Negotiations
IO	International Organization
IP	International Peacekeeping
IPCC	Inter-Governmental Panel on Climate Change
IPE	International Protection of the Environment
IPIS	International Peace Information Service
IRRC	International Review of the Red Cross
IS	International Security
IsrLR	Israel Law Review
ISSJ	International Social Science Journal
IYHR	Israel Yearbook on Human Rights
JACL	Journal of Armed Conflict Law
JAG	Judge Advocate General
JAJ	Judge Advocate Journal
JCH	Journal of Contemporary History
JCLC	Journal of Criminal Law and Criminology
JCSL	Journal of Conflict and Security Law
JDI	Journal of Drug Issues
JIA	Journal of International Affairs
JICJ	Journal of International Criminal Justice
JID	Journal of International Development
JLAS	Journal of Latin American Studies
JLME	Journal of Law, Medicine and Ethics
JLS	Journal of Law and Society
JMA	Journal of Mine Action
JPR	Journal of Peace Research
JSAL	Journal of South African Law
JSF	Journal of Sustainable Forestry
JTEH	Journal of Toxicology and Environmental Health

KFOR	Kosovo Force
KP	Kimberley Process
KPCS	Kimberley Process Certification Scheme
LAP	Latin American Perspectives
LASO	Latin American Security Operation
LCP	Law and Contemporary Problems
LICLE	Low Intensity Conflict and Law Enforcement
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LQN	Law Quad Notes
LRA	Lord's Resistance Army
LTTE	Liberation Tigers of Tamil Eelam
MAPP	Mission to Support the Peace Process in Colombia
MGLJ	McGill Law Journal
MICLR	Miami International and Comparative Law Review
MILR	Military Law Review
MIT	Massachusetts Institute of Technology
MJGT	Minnesota Journal of Global Trade
MJIL	Michigan Journal of International Law
MLJ	Manitoba Law Journal
MLR	Modern Law Review
MM	Marines Magazine
MNC	Multinational Company
MoD	Ministry of Defence
MONUC	United Nations Mission in the Democratic Republic of Congo
MoU	Memorandum of Understanding
MP	Member of Parliament
MPYUNL	Max Planck Yearbook of United Nations Law
MR	Military Review
MUP	Manchester University Press
NATO	North Atlantic Treaty Organisation
NDYD	New Directions for Youth Development
NGO	Non-Governmental Organisation
NILR	Netherlands International Law Review
NJIHR	Northwestern Journal of International Human Rights
NJIL	Nordic Journal of International Law
NSAIL	Non-State Actors and International Law
NTIR	Nordisk Tidsskrift for International Ret
NUJIHR	Northwestern University Journal of International Human Rights
NYLSR	New York Law School Review
NYUJILP	New York University Journal of International Law and Policy
NYULR	New York University Law Review
NZAFLR	New Zealand Armed Forces Law Review
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OGP	Office of the General Prosecutor
OHCHR	United Nations Office of the High Commissioner for Human Rights

OIC	Organisation of the Islamic Conference
OIOS	Office of Internal Oversight Services
OJPCR	Online Journal of Peace and Conflict Resolution
OLR	Ottawa Law Review
OPCV	Office of Public Counsel for Victims
OPT	Occupied Palestinian Territories
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
OUP	Oxford University Press
PA	Palestinian Authority
PAC	Partnership Africa Canada
PCDMB	Post-Conflict and Disaster Management Branch
PCIJ	Permanent Court of International Justice
PG	Political Geography
PHR	Physicians for Human Rights
PILR	Pace International Law Review
PL	Public Law
PLO	Palestine Liberation Organisation
PMC	Private Military Company
POW	Prisoner of War
PP	Papel Político
PR	Policy Review
PS	Politics and Society
PSO	Peace Support Operation
PUP	Princeton University Press
RCADI	Recueil des Cours de l'Académie de Droit International
RDMDG	Revue de Droit Militaire et de Droit de la Guerre
RDPC	Revista de derecho penal y criminología
RDPDH	Revue de droit pénal et des droits de l'homme
REEI	Revista Electronica de Estudios Internacionales
RIAA	Reports of International Arbitral Awards
RIS	Review of International Studies
RPE	Rules of Procedure and Evidence
RUF	Revolutionary United Front
RUP	Rutgers University Press
SA	Social Analysis
SADR	Sahrawi Arab Democratic Republic
SAS	Special Air Service
SCC	Supreme Court of Canada
SCSL	Special Court for Sierra Leone
SCT	Studies in Conflict and Terrorism
SCU	Serious Crimes Unit
SIPRI	Stockholm International Peace Research Institute
SIULJ	Southern Illinois University Law Journal
SJ	Social Justice
SJIL	Stanford Journal of International Law
SOFA	Status of Forces Agreement
SR	Social Research
SSI	Strategic Studies Institute

SSRC	Social Science Research Council
STLP	Studies in Transnational Legal Policy
SWI	Small Wars and Insurgencies
TAR	Third Assessment Report
TFV	Trust Fund for Victims
TICLJ	Temple International and Comparative Law Journal
TILJ	Texas International Law Journal
TLCP	Transnational Law and Contemporary Problems
TNC	Transnational Corporations
TRC	Truth and Reconciliation Commission
TWQ	Third World Quarterly
UCDJILP	University of California Davis Journal of International Law and Policy
UChiP	University of Chicago Press
UCMJ	Uniform Code of Military Justice
UCP	University of California Press
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCC	United Nations Compensation Commission
UNCED	United Nations Conference on Environment and Development
UNCRC	United Nations Convention on the Rights of the Child
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNITA	National Union for the Total Independence of Angola
UNJY	United Nations Juridical Yearbook
UNMIS	United Nations Mission in Sudan
UNP	University of Nebraska Press
UNSWLJ	University of New South Wales Law Journal
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
UNU	United Nations University
UP	Patriotic Union
UPJIEL	University of Pennsylvania Journal of International Economic Law
UPK	University Press of Kansas
US	United States of America
USNWCR	US Naval War College Review
USTS	United States Treaty Series
UTP	University of Toronto Press
VCLT	Vienna Convention on the Law of Treaties
VELJ	Virginia Environmental Law Journal
VJIL	Virginia Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law
VLR	Vanderbilt Law Review
WD	World Politics
WDC	World Diamond Council
WEU	Western European Union

WFDB	World Federation of Diamond Bourses
WG	Working Group
WLR	Weekly Law Reports
WMO	World Meteorological Organization
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation
YIHL	Yearbook of International Humanitarian Law
YILC	Yearbook of the International Law Commission
YIMEL	Yearbook of Islamic and Middle Eastern Law
YJIA	Yale Journal of International Affairs
YJIL	Yale Journal of International Law
YLJ	Yale Law Journal
YUN	Yearbook of the United Nations

SUMMARY OF CONTENTS

Preface and Acknowledgements	V
Table of Contents	XI
List of Abbreviations	XXI

Introduction

Chapter 1: Confronting the Challenges of International Law and Armed Conflict in the 21st Century	3
Noëlle QUÉNIVET and Shilan SHAH-DAVIS	

Chapter 2: Myths of ‘Lawfare’ and ‘Legal Encirclement’	31
Christopher P.M. WATERS	

Section 1: *Accountability*

Chapter 3: Issues of the Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission	57
Melanie O’BRIEN	

Chapter 4: Internationalising the Colombian Armed Conflict through Humanitarian Law and Transitional Justice	76
Rafael A. PRIETO SANJUÁN	

Chapter 5: Criminal Accountability or Civil Liability: Which Approach Most Effectively Redresses the Negative Environmental Consequences of Armed Conflict?	95
Tara SMITH	

Commentary on: Accountability	115
Bill BOWRING	

Section 2: *Environment and Natural Resources*

Chapter 6: The Impact of Armed Conflict on Sustainable Development: A Holistic Approach	123
Onita DAS	

Chapter 7: A Darker Shade of Green: Is it Time to Ecocentrise the Laws of War?	142
Karen HULME	

Chapter 8: Targeted Economic Measures to Curb Armed Conflict? The Kimberley Process on the Trade in ‘Conflict Diamonds’	161
Jan Erik WETZEL	

Commentary on: Environment and Natural Resources	182
William SCHABAS	

Section 3: *Privatisation and Armed Conflict*

Chapter 9: Business under Fire: Transnational Corporations and Human Rights in Conflict Zones	189
Olga MARTIN-ORTEGA	
Chapter 10: The Influence of Non-Governmental Actors on Compliance with International Law – Compliance with United Nations Security Council Decisions on Angola’s Conflict Diamonds	208
Pini Pavel MIRETSKI	
Chapter 11: Private Regulation of Private Military Companies: A Potentially Private Solution to a Commercial Problem?	227
Dewi WILLIAMS	
Commentary on: Privatisation and Armed Conflict	241
Ademola ABASS	

Section 4: *Children and Armed Conflict*

Chapter 12: Children and the International Criminal Court	245
Cynthia CHAMBERLAIN	
Chapter 13: Child Terrorists: Why and How Should they Be Protected by International Law	262
Hilly MOODRICK-EVEN KHEN	
Commentary on: Children and Armed Conflict	283
William SCHABAS	

Section 5: *Implementation of International Humanitarian Law*

Chapter 14: Today’s Quest for International Criminal Justice – A Short Overview of the Present State of Criminal Prosecution of International Crimes	289
Sascha-Dominik BACHMANN	
Commentary on: Implementation of International Humanitarian Law	309
Bill BOWRING	
Commentary on: Implementation of International Humanitarian Law	313
Gerd HANKEL	

Section 6: *Reforming the Laws of War*

Chapter 15: Bridging the Gaps in the Laws of Armed Conflict? International Criminal Tribunals and the Development of Humanitarian Law	319
Shane DARCY	
Chapter 16: Devising New Rules for Regulating International Terrorism Warfare and Engaging Non-State Actors in the Negotiations	338
Konstantinos D. MAGLIVERAS	
Commentary on: Reforming the Laws of War	356
Gerd HANKEL	

Section 7: *Peace, Security and Justice*

Chapter 17: ‘In the Interest of Peace and in the Interest of Justice’: Security Council Deferrals as a Constructive Tool for Conflict Resolution	363
Yassin A. M’BOGE	

Chapter 18: Procedural Aspects of the Relationship Between the International Criminal Court and Future Truth Commissions. Lessons Learned from the Cases of Sierra Leone and East Timor	380
Madalena PAMPALK	

Chapter 19: The Impact of the Legal Right to Self-Determination on the Law of Occupation as a Framework for Post-Conflict State Reconstruction	398
Matthew SAUL	

Commentary on: Peace, Security and Justice	417
Ademola ABASS	

Commentary on: Peace, Security and Justice	420
Nigel WHITE	

Conclusion

Chapter 20: Conclusion	425
Noëlle QUÉNIVET and Shilan SHAH-DAVIS	

Index	431
--------------	-----

TABLE OF CONTENTS

Preface and Acknowledgements	V
Summary of Contents	VII
List of Abbreviations	XXI

Introduction

Chapter 1: Confronting the Challenges of International Law and Armed Conflict in the 21st Century	3
Noëlle QUÉNIVET and Shilan SHAH-DAVIS	
1. Introduction	3
2. Armed Conflict	5
2.1 The law	5
2.2 Challenges to the definition of 'armed conflict'	6
2.2.1 Transnational or extra-state conflicts	6
2.2.2 Conflicts in failing/failed states	7
2.2.3 'Newest' armed conflicts	7
2.2.4 Settings of insurgency, terrorism and criminality	8
2.2.5 Complex humanitarian emergencies	9
3. Combatancy	10
3.1 Notion of combatancy	10
3.2 The increasing level of participation of new entities in armed conflicts	13
3.2.1 International organisations	13
3.2.2 Multinational corporations	14
3.2.3 NGOs	14
3.2.4 Illegal networks	15
3.3 Changing perceptions of who is a combatant	15
4. Relevance of Other Regimes	17
4.1 Human rights law	17
4.1.1 Human rights provisions protecting all individuals	17
4.1.2 Human rights provisions protecting certain categories of individuals	19
4.1.2.1 Women	20
4.1.2.2 Children	21
4.2 Environmental law	23
4.2.1 The protection of the environment in armed conflict	23
4.2.2 Remedies for damages caused to the environment	24
4.2.3 Environmental damages and unleashing armed conflicts	25
4.2.4 Natural resources and armed conflict	26
4.3 International criminal law	27
4.3.1 International criminal law as a means of enforcement of international humanitarian law	27
4.3.2 Prosecutions as a means to foster peace, security and justice	28

5.	Conclusion	30
Chapter 2: Myths of ‘Lawfare’ and ‘Legal Encirclement’		31
Christopher P.M. WATERS		
1.	Introduction	31
2.	Militaries under Pressure	32
3.	The Sources of Encirclement	35
4.	Lifting the Legal Siege Perception	37
4.1	The long march of civilianisation	38
4.2	International humanitarian law as enabler	40
4.3	The legal system’s soft touch	42
5.	Beyond Slogans	47
6.	Conclusion	52
 Section 1: Accountability		
Chapter 3: Issues of the Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission		57
Melanie O’BRIEN		
1.	Introduction	57
2.	Draft Convention on the Criminal Accountability of UN Officials and Experts on Mission	61
2.1	Article 1: Definitions	62
2.2	Article 2: Scope of application	63
2.3	Article 3: Crimes committed during United Nations peacekeeping operations	66
2.4	Article 4: Establishment of jurisdiction	68
2.5	Article 6: Investigations and the taking into custody of an alleged offender	69
2.6	Article 7: Prosecution of offenders	70
2.7	Article 9: Conduct which is not a crime under the law of the host state or the state party	70
2.8	Article 18: United Nations privileges and immunities	72
3.	Conclusion	73
 Chapter 4: Internationalising the Colombian Armed Conflict through Humanitarian Law and Transitional Justice		76
Rafael A. PRIETO SANJUÁN		
1.	Introduction	76
2.	The Colombian Armed Conflict	77
2.1	The roots of the conflict	78
2.2	The insurgency or guerrilla struggle	79
2.3	Why does the armed conflict continue?	80
3.	The <i>Mise-en-Scène</i> of International Humanitarian Law, Genocide and Crimes of War	82
3.1	Characterising the crime of genocide and crimes against humanity	82
3.2	The criminalisation of violations of international humanitarian law	84
3.3	The ratification of the ICC Statute	86