

## An introduction to the international law of armed conflicts

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### Abstract

This book provides a modern and basic introduction to a branch of international law constantly gaining in importance in international life, namely international humanitarian law (the law of armed conflict). It is constructed in a way suitable for self-study. The subject-matters are discussed in self-contained chapters, allowing each to be studied independently of the others. Among the subject-matters discussed are, inter alia: the Relationship between jus ad bellum / jus in bello; Historical Evolution of IHL; Basic Principles and Sources of IHL; Martens Clause; International and Non-International Armed Conflicts; Material, Spatial, Personal and Temporal Scope of Application of IHL; Special Agreements under IHL; Role of the ICRC; Targeting; Objects Specifically Protected against Attack; Prohibited Weapons; Perfidy; Reprisals; Assistance of the Wounded and Sick; Definition of Combatants; Protection of Prisoners of War; Protection of Civilians; Occupied Territories; Protective Emblems; Sea Warfare; Neutrality; Implementation of IHL.

### Reference

KOLB, Robert, HYDE, Richard. *An introduction to the international law of armed conflicts*. Oxford ; Portland : Hart Publishing, 2008, 348 p.

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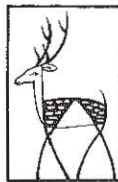


UNIVERSITÉ  
DE GENÈVE

# An Introduction to the International Law of Armed Conflicts

Robert Kolb and Richard Hyde

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2008



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PUBLISHING

GRWA 59651

OXFORD—PORTLAND OREGON  
2008



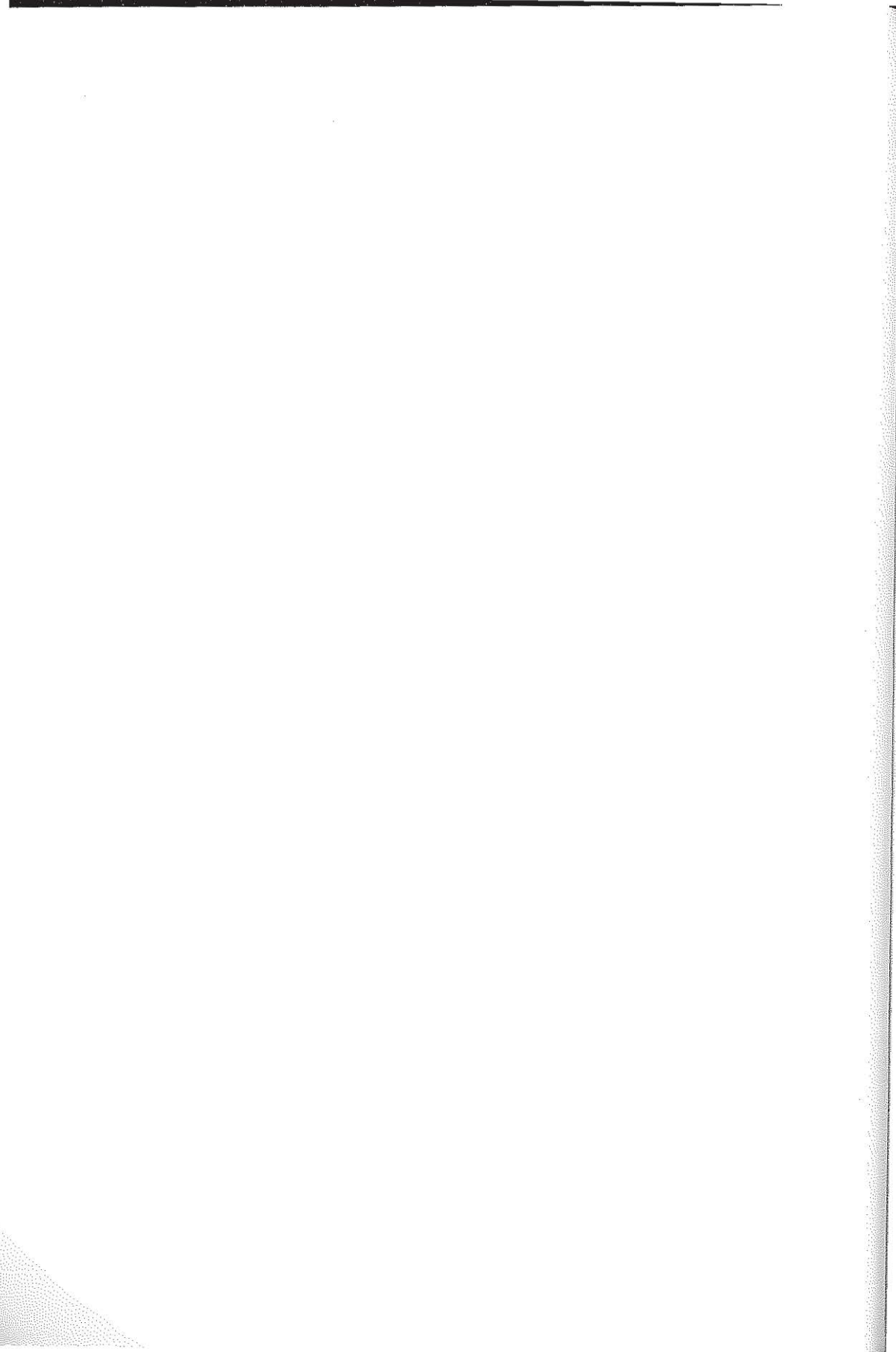
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# THE LAW OF ARMED CONFLICT AS A BRANCH OF PUBLIC INTERNATIONAL LAW

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**Learning objectives:** To understand the concept of public international law (PIL) and its relationship with the law of armed conflict (LOAC).

1. Since time immemorial, humans have divided themselves into innumerable groups, variously known as, amongst others, tribes, collectivities and states. Each of these groups gave themselves, more or less independently from each other, a certain form of public organisation. Thus, some groups were loosely organised as non-sedentary assemblages of family clans. Others were strictly militarily groupings, with a strong hierarchical element. Others became settled on a certain territory and developed forms of monarchy, republicanism or federalism. Over centuries, these groups have tended to evolve, and the current stage of this evolution is the modern state, with its complex relationship between legislative, executive and judicial branches. The groups that were not conquered or subjugated by another group retained their sovereignty and remained in a condition of relative independence from each other. These groups are not subject to any higher entity with the right to decide policy to be applied within their territory.

2. Since the beginnings of their existence, all groups and public collectivities have engaged in relations with one another. These relations can be categorised as either relations of peace or relations of war. Contact between groups was unavoidable. One of the first forms of contact was belligerent: the groups came to struggle for control over a certain territory or resources, or over the primacy of their own gods when compared with foreign ones. War is perhaps the most ancient form of inter-group relationship. However, soon peaceful relations also came into play. Embassies were exchanged; agreements were concluded in order to protect commercial exchanges or to enable the extradition of fugitives; the erection of common installations such as irrigation aqueducts was organised. With the passing of time, the peaceful relations between states developed considerably, mirroring the increase in their general interdependence and the increase in globalisation. Thus, today, there is hardly any question which is not regulated by some rules of conduct agreed between different states. It is not only traditional inter-state questions, such as war, diplomacy, treaties and the peaceful settlement of disputes that are matters of international regulation, but also subjects such as labour, human rights, crimes,



#### 4 PART I: INTRODUCTION

intellectual property, protection of the environment, financial policy and immigration. At the same time, belligerent relationships have not been erased from the face of the earth. States still use force in their dealings with foreign entities and this use of force, whether legal or illegal, legitimate or illegitimate, needs some regulation.

3. We have seen that the various groups that comprise humanity have not remained isolated from one another. They engage in relations, ranging from hostile to cooperative. All human relations need some form of regulation. Humanity cannot live in anarchy; without some form of shared expectations, proper relations are impossible. One could thus say, '*ubi societas, ibi regula*'; where there is society, there must be rules; without rules, there is no social compact of any kind. The common feature shared by any 'regulation' is that it sets out rules of behaviour. A rule tells you that in a given set of circumstances, you may or must do this and/or that, or that in these circumstances you may or must not do this and/or that. Hence, the expression *pacta sunt servanda* or 'treaties must be observed' embodies a rule.<sup>1</sup> Why? Because the expression tells you that, as long as certain circumstances exist, for example if there is no duress, something, in this case the execution of the agreement, ought to be done. This is the core of any rule. Regulation can take different forms, since rules can be of different natures.

4. A rule can express a moral, religious, social, political or any other form of imperative or counsel. Thus, the rule 'I should behave as socially expected when I am invited somewhere' is an imperative expression of the behaviour I should engage in when interacting with my hosts and other guests, and also an indication of what I should do if I want to be invited again. For if I bring no present where it is expected, or put my feet on the table where that is considered unsuitable, it is certain that I will not to be invited again. The rule that we have considered so far appears to us as a moral and a social rule. However, human groups also use another form of rules to encapsulate their relations: legal rules. These rules characteristically regulate matters concerning the external dealings of subjects, rather than internal morality; they concentrate on matters important for a proper functioning of society which cannot simply be left to the personal judgement of any single member of the society, so-called socially relevant matters of importance; and they are obligatory on the persons concerned. In other words, legal norms are compulsory. The last element is the most well known. Law is binding on its subjects; it is compulsory; its rules are coercive.

Whether a matter is regulated only by moral or social rules, or also by legal rules, depends on the choices of a particular society at a given time. Homosexual relations were for a long time only the object of moral and religious rules; only later did they become the object of legal rules, originally rules of prohibition and criminal sanction, and today rules of family law.

5. We have seen that any society has rules, and that among these rules there will be legal rules. In the world of today, there are innumerable societies: the family, the football club, the county, the trade union, the Church, and so on. However, only

<sup>1</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 Art 26.



two large and important societies are of interest to us here: first, the society of individuals organised in the form of a state, which will be examined in this paragraph; and secondly, the society of states, which will be examined in the paragraph below. These are the two greatest and most inclusive societies. First, there is the state: it binds together all the people linked by a common nationality, and to a large extent all of the other people present on a territory, in a form of social compact. To this end, the state is organised by a series of legal rules. These rules can be found in the constitution, statutes, regulations of the public administration and case law of judicial tribunals. These legal norms are mainly concerned with the regulation of mutual dealings among the private citizens and corporations situated on the territory of the state: marriage, labour contracts, investment, wrongful acts, and so on. They will also regulate the relationship between private persons and the public organs of the state, as well as the relationships between the public organs themselves. Here one may mention tax law, which governs the relations between private individuals and the state, or the separation of powers between the various organs of the state, which governs the relationship between state organs.

6. However, relationships do not stop at the boundary of the state. States have relations among themselves; they conclude treaties in order to regulate their action in a given field, for example the treatment they will accord to foreign investment. The law of one state alone cannot pretend to regulate these dealings. To be sure, each state could claim that its internal law should apply to the investment. However, how would it be possible to choose one of the two concurrent municipal laws without compromising the equality of the two states, without subjugating one to the other? Here, a common law which is external to both states and which applies equally to them, being superior to the internal law of each of them, is needed. This common law, which regulates the relations between states and is independent from the internal legal order of each of them, is called public international law (PIL).

7. We must now understand the definitions which are given to PIL. One of these definitions is that PIL is that body of law which is composed for its greater part of the principles and rules of conduct which states (and some other subjects) feel themselves bound to observe, and therefore, do commonly observe in their relations with each other.<sup>2</sup> Why is the term 'some other subjects' included? Another definition makes this point clearer:

International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law. International organizations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law.<sup>3</sup>

The rules of international law that envisage individuals as subjects are mainly those pertaining to human rights law and to international criminal law. International law grants the individual some fundamental rights, but also subjects him or her to some fundamental duties, the transgression of which can be criminally sanctioned. To

<sup>2</sup> I Shearer, *Starke's International Law*, 11th edn (Oxford, OUP, 1994) 3.

<sup>3</sup> R Jennings and A Watts (eds), *Oppenheim's International Law Volume 1: Peace*, 9th edn (Harlow, Longman, 1992) 4.

international organisations and individuals one can add subjects such as insurgents, the International Committee of the Red Cross (ICRC) and the Holy See, all of which participate to international law transactions, albeit that their participation is limited to a particular sector. Hence, PIL regulates not only the relations between states, but also the dealings of some other subjects, such as international organisations.<sup>4</sup>

8. 'Public international law' must be distinguished from 'private international law'. We have seen that the internal law of the state is mainly responsible for the regulation of relationships between individuals. Of course, these relationships do not stop at the boundary of states; they straddle across such boundaries. For example, there are today millions of marriages between citizens of different states. The question then arises as to which law should be applicable to such a mixed nationality marriage. Is it the law of the husband's state of origin or that of the wife's state of origin? Should the marriage and the family arising from it be subjected to the law of the husband or the bride, to the law of the place of celebration of the marriage or to the law of the habitual residence of the couple? This collision of different internal laws will be solved by the application of particular rules. These rules indicate which internal law shall apply to what cases and when a particular internal law will have preference. The point here is not to subject these dealings to a common superior law, such as PIL; it is rather to decide which municipal law applies. This is the proper object of private international law rules. Private international law is a province of the internal law of each state which indicates which law, foreign or domestic, shall apply in a given set of circumstances, where some dealing involving foreign elements is at stake: transnational contracts, transnational company mergers, transnational inheritance, or transnational marriage are examples of situations where some consideration of private international law is necessary. Obviously, if questions of private international law are regulated by treaties between states, a public international law element is introduced into the question: the treaty itself will be regulated by public international law, and questions regarding its conclusion or modification must be dealt with by considering the applicable PIL norms, but its content will remain one of private international law.

9. What are the main provinces of public international law? In other words: what is public international law composed of? As we have seen, PIL can be used to regulate any matter of common interest among states: it can regulate the recognition of marriages or of intellectual property patents, as it can regulate the status of the moon or other celestial bodies. There is thus no point in trying to define PIL from the point of view of its possible content: it can encompass any question and its possible content is limitless. The line between what is left to the states, the so-called domestic jurisdiction, and what is regulated by international law is substantially open-ended and varies over time. However, there are some core areas that PIL has always, to some extent, regulated, because these areas of common concern can only

<sup>4</sup> See, eg: Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) UN Doc A/CONF.129/15 available at <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf)> accessed 14 May 2008.

be regulated at that level of a common law binding all of the states. What are these core matters that must be regulated by PIL? One may list the following:

- a) *The sources of the law*, that is, the recognised means through which PIL may be created and modified.<sup>5</sup>
- b) *The subjects of the law*, that is, the persons and entities to which the legal order grants rights and on which it imposes duties. For example, PIL applies to states, international organisations, insurgents, and so on. Each of these subjects must be defined and its rights and duties examined.
- c) *The relationship between municipal and international law*. We have seen that all of the states possess an internal legal order, and that states in their mutual dealings obey PIL rules. The relationship between these two legal orders, the municipal and the international, must be defined. For example, in cases of contradiction between a rule of internal law and a rule of international law, which one should prevail?
- d) *International responsibility*. The question here concerns the consequences of wrongful acts by the subjects of the law. What happens if a state breaches a rule of PIL? The law of state responsibility responds to that question.<sup>6</sup>
- e) *Peaceful settlement of disputes*. In every relationship between human beings or entities, there will at some stage emerge some disputes or differences of opinion. These may need to be solved if they hamper the normal and friendly relationship between the members of a society. The law relating to the peaceful settlement of disputes regulates the means and methods of solving disputes.
- f) *The regime applicable to common spaces*, namely the high seas, Antarctica, the Arctic and outer space. There are some spaces which are not subjected to the sovereignty of a single state. These spaces are common to all states. Thus, it falls to the common law applicable between the states, namely PIL, to define their precise status and to set out the rules governing activities in these common spaces.<sup>7</sup>
- g) *Diplomacy*. This is the oldest means of intercourse between states. It is regulated by international law rules.<sup>8</sup>
- h) *The law of warfare or the LOAC*. If armed conflict breaks out, be it legally or illegally, legitimately or illegitimately, some rules must be applicable in order to regulate the relationship between the states engaged in hostility. For example, some regulation is needed in order to provide for armistices and truces; in order to protect and facilitate the exchange of prisoners; in order to ban certain weapons and means of warfare considered to be far too

<sup>5</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCTAD 355 Art 38(1).

<sup>6</sup> ILC Articles on Responsibility of States for Internationally Wrongful Acts UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, available at: <[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)> (last accessed 24th May 2008).

<sup>7</sup> See, eg: United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (adopted 25 January 1967, entered into force 10 October 1967) 610 UNTS 205.

<sup>8</sup> See, eg: Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.



destructive to be permitted; and in order to protect the rights of the states that do not participate in the war.

10. We thus see that PIL covers questions relating to peacetime and questions relating to war. The title of the classical book by Hugo Grotius, the celebrated Dutch jurist, *De jure belli ac pacis* or 'Of the law of war and of the law of peace',<sup>9</sup> first published in 1625, shows this indissoluble link, which permeates the body of PIL. The LOAC is thus a branch of PIL. More precisely, it is that branch which regulates the conduct of warfare, the protection of persons and of goods and the conditions of the states not participating in a war, known as neutrals. This branch of the law is set in motion every time the peace breaks down and hostilities take place.

**Comprehension check:**

- a) What is PIL? What are its main provinces?
- b) How does PIL differ from the internal law of a state?
- c) What is the difference between PIL and private international law?
- d) To which legal order does the LOAC belong to? Why?

**Answers:** (these are just typical answers).

- a) PIL regulates the legal relations between states and some other subjects. Alternatively: PIL is the legal order which regulates those relationships among states and some other subjects. The main provinces of PIL are sources, subjects, relationship of PIL to municipal law, responsibility, settlement of disputes, rules applicable to common spaces, diplomacy and warfare.
- b) PIL is the law regulating the relationships *between* the states, or other subjects, whereas internal law mainly regulates the relationships between individuals and corporations *within* a state.
- c) PIL is a legal order regulating inter-state relations, whereas private international law is a part of the internal law of the states deciding which of local or foreign law will apply to an inter-individual relationship that transcends the boundaries of a state. For example, private international law will apply to mixed marriages and will provide the rules by which a decision can be made as to whether Swiss or French law will apply to a Swiss-French mixed marriage.
- d) The LOAC is a part of PIL. This is so because the LOAC contains legal norms which regulate the dealings of states when they are at war. The LOAC thus concerns inter-state relations in a particular context. Moreover, it concerns legal inter-state relations, since it posits binding norms. Hence, it is a part of PIL, which is the legal order regulating inter-state relations.

<sup>9</sup> H Grotius, *De Jure Belli ac Pacis* (Buffalo, Hein, 1995 [1625]).