

THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH

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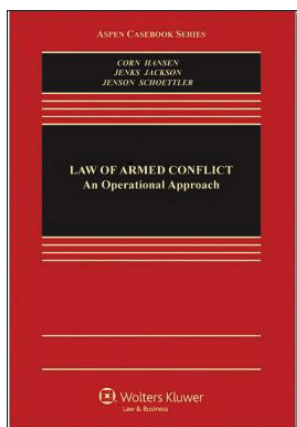
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The Law of Armed Conflict: An Operational Approach

by Geoffrey S. Corn, Victor Hansen,
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Towards the end of his memoir, *Known and Unknown*, former Secretary of Defense Donald Rumsfeld paused to observe that:

As never before in history, today lawyers and legal considerations pervade every aspect of U.S. military operations. Besides contending with enemy bullets and bombs, the men and women in our nation's military and intelligence services must also navigate legal traps set by our enemies, by some of our fellow citizens, by some foreigners, and even by some members of Congress and officials at international institutions such as the United Nations. The rules, regulations, and consequences in legal venues have to be and are taken into account on every corner of the battlefield. American military personnel have found themselves named in lawsuits across Europe and in the United States. The mere threats of lawsuits and legal charges effectively bullies American decision makers, alters their actions, intimidates our security forces, and limits our country's ability to gather intelligence and defend the American people. This is a new kind of asymmetric war waged by our enemies—"lawfare." ...

We cannot yet know what the full consequences of lawfare will be, but the trend is troubling. At home, judges—not elected representatives in Congress or in the executive branch—increasingly determine how a president can operate during wartime against our nation's enemies.

Secretary Rumsfeld has himself been the defendant in many lawsuits over the conduct of the wars in Afghanistan and Iraq, and *Hamdi v. Rumsfeld* (2004) and *Hamdan v. Rumsfeld* (2006) are landmark Supreme Court decisions. Most of this litigation was generated by the application of the law of war, which is now generally known in academic legal circles as the "law of armed conflict," a web of rights and obligations placed upon the United States by the U.S. Constitution, international treaties, customary international law, and statutes enacted by Congress. The law of armed conflict is complex and sophisticated, always evolving, and almost always controversial. For these reasons, the appearance of a new and comprehensive one-volume treatise, *The Law of Armed Conflict: An Operational Approach*, should be warmly welcomed by all who must implement this body of law as well as those who teach it. The authors have

considerable experience in the theory and practice of the law of armed conflict, and the book is crisply and authoritatively written, with generous excerpts from the relevant legal materials, including many that are not well known, even to lawyers.

As its introduction notes, “this book strives to educate those who want to learn this law and how it is applied.” The book is divided into 14 chapters covering, in depth, such topics as the legal bases of the use of force, the historical sources of the law of armed conflict, the principles undergirding “conflict regulation,” the status and protections of belligerents and combatants and civilians, the law of military targeting, legal and illegal weapons and tactics, the protections afforded the wounded and sick, the detention and permissible interrogation of detainees, the evolving concept of command responsibility, the termination of hostilities, and the identification and prosecution of war crimes. Each chapter is prefaced by a scenario based on U.S. military operations in Panama in 1989 and concludes with a set of questions that are intended to place the law of armed conflict in an actual operational context.

The law of war evolved slowly over the centuries, from ancient times, when Cicero could observe that *silent leges enim inter arma*—the laws fall mute in the times of war—to the present day when most nationstates are bound to one another in the observance of a legal regime that governs the use of military force. Starting with the Hague Conventions

of 1899 and 1907 (which adopted a comprehensive set of rules to regulate the conducts of hostilities) and the Geneva Conventions of 1949 (which established rules for the amelioration of the condition of the wounded and sick in the field and at sea, and the protection of civilians and prisoners of war), the United States has ratified or entered into many law of war treaties, protocols, and other binding commitments. In addition, the United States is also a founding member of the United Nations, whose charter prohibits the use of force by individual states, subject only to the right of each state to defend itself against an armed attack. *The Law of Armed Conflict* discusses all these sources of the law and relates them to the problems that military commanders will face when hostilities begin.

And what of the U.S. Constitution and the role of Congress? Article I, Section 8 provides that the Congress shall have the power to define and punish “Offenses against the Law of Nations” and “to make Rules for the Government and Regulations of the land and naval Forces.” Exercising these powers, the Congress has enacted several military codes, the most recent being the Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq.*, whose punitive articles have been used to prosecute and punish violations of the law of war, as well as recent legislation that prohibits the use of torture and sets forth the penalties that can be imposed for violating its restrictions “outside the United States” (18 U.S.C. § 2340). Indeed, “war crimes,” now defined

as a “grave breach of The Hague and Geneva Conventions (including common Article 3),” have been a federal criminal offense since 1996 (18 U.S.C. § 2441).

Military courts-martial have jurisdiction over war crimes committed by members of the armed forces, and the federal courts have exercised war crimes jurisdiction over civilians and government contractors. War crimes have also been prosecuted by special courts established after World War I and World War II, and there are ongoing prosecutions in the International Criminal Tribunal for the former Yugoslavia. The controversy over war crimes allegedly committed by U.S. military forces in Vietnam shows no sign of abating, and, if the past is prologue, the debate over post-Sept. 11 military conflicts is just beginning.

To cope with this body of law, military commanders—and their lawyers—must include law of armed conflict principles and objectives in the planning of all military operations. In the absence of a long-anticipated Department of Defense *Law of War Manual*, which would have taken into account the many changes in the law that have taken place since the *Law of Land Warfare* was published in 1956, military commanders and their lawyers require a lucid and comprehensive description of the laws of armed conflict, and I believe that *The Law of Armed Conflict: An Operational Approach* will fill that need.