



Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe ed. Caroline Harvey, James Summers, and Nigel D. White.

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As weapon systems and the nature of warfare have changed in recent years, the laws of war have been tested more and more often. The public expectation that the damage inflicted during war can exclude civilians or unintended targets has led to the condemnation of nearly every targeting error as a war

crime. The use of such seemingly impersonal, lethal, and often transnational weapons as, for example, Unmanned Aerial Vehicles (UAVs) or drones has raised difficult questions. Are non-state actors like Al-Qaeda, ISIS, Al Shabab, or other terrorist groups entitled to the protections of the laws of war? Can their members morph between the protected status of civilians and the relatively unprotected status of combatants as they please?

Contemporary Challenges to the Laws of War gathers essays by practitioners and academics to honor Peter Rowe (Lancaster Univ. Law School), an emeritus professor of international law and specialist in the laws of war.¹

The aim of this book is to consider the continuing role and relevance of the laws of war in the twenty-first century. To understand this we need to re-examine the purposes of the laws of war and ask questions as to whether the existing laws found in treaties and customs work or do we need a wholesale revision? (xix)

The overarching question here is “whether the laws of war are *fit for purpose*” (xx; my emphasis). While the contributors offer no definitive answer, their consensus is that the laws of war are in fact fit for the purpose, despite rapidly changing weapons technologies and the challenge of countering non-state actors.

In chapter 1, editor James Summers (Univ. of Lancaster), a specialist in international law, offers a useful introductory précis of the laws of war, including international humanitarian law and the law of armed conflict. He discusses when and to whom such laws apply and their origins in international treaties and customary international law. At their core, they are meant to protect civilians, the wounded, and POWs. But the parameters and methods of modern warfare are not those current at the time of the Hague Conference (1907) or the post-Second World War Geneva Conventions. For instance, when if ever do the laws of war supplant human rights laws that protect the sanctity of human life? When does an internal conflict rise to the level of an international conflict subject to the laws of war? Are non-state combatants ever protected by such laws and how are legitimate targets to be discriminated from noncombatants? Such questions are the focus for the book.

In chapter 2, military lawyer A.P.V. Rogers (Univ. of Cambridge) and Justice Gordon Rius (Oxford Crown Court) provide “a short history of the relationship between serving or retired officers of the Army Legal Services ... and academic lawyers” (30). They argue that the collaboration of military and academic lawyers in the United Kingdom has advanced our ability to apply the laws of war under present-day conditions. They warn that “Society ignores this body of law at its peril and to the detriment of humanity. No wholesale revision is necessary; modification should continue to be done slowly, carefully and expertly, as the need arises” (48).

The next section of four chapters concerns the laws of war in the wider international context. In chapter 3, Dieter Fleck (Amsterdam Center for Int'l. Law) discusses whether the laws of war may serve more than one purpose. He argues that international humanitarian law applies not only to armed conflicts between states but also to “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”² Given the range of disputes around the world that fit this description, yet have not been recognized as “armed conflicts,” it is extremely difficult to define precisely the scope and relevance of international humanitarian law.

1. Author of *Defence: The Legal Implications: Military Law and the Laws of War* (Washington: Brassey's, 1987), *The Impact of Human Rights Law on Armed Forces* (NY: Cambridge U Pr, 2006), and *Legal Accountability and Britain's Wars 2000–2015* (NY: Routledge, 2016).

2. Prosecutor v. Tadić, Appeal Chamber Decision, Intl. Criminal Tribunal for the Former Yugoslavia, 2 Oct. 1995, ¶ 170.

In chapter 4, Lindsay Moir (Univ. of Hull) seeks to discriminate between armed conflicts that are international in character (thus subject to the laws of war) and those that are non-international (thus not so subject). American or coalition battles against the Taliban or Al-Qaeda are ready examples of transnational conflicts. But Moir specifies that “Cross-border hostilities occurring between a state and an independent non-state party are ... non-international in character” (90). Hence, in his view, non-state actors do not have combatant status in such conflicts.

In chapter 5, Nigel White (Univ. of Nottingham) then considers whether the laws of war apply to the use of lethal force by peacekeepers under a UN mandate. He concludes that peacekeepers are bound to follow human rights laws even when protecting civilians. However, this is more a matter of “a lack of military capability” (116) than of human rights laws preventing peacekeepers from accomplishing their tasks. The laws of war do not need revision. Rather, peacekeepers need to be more fit for their purpose.

Chapter 6, by Robert Cryer (Univ. of Birmingham), addresses the law of armed conflict in the context of international criminal tribunals. Cryer notes that international humanitarian law is not exactly coextensive with the law of war crimes. He traces the development of international criminal tribunals from Nuremberg to the special courts relating to the former Yugoslavia, Rwanda, Sierra Leone, and the International Criminal Court in Rome (ICC). Such courts have attempted to tie their decisions closely to the laws of war, but have been criticized for seldom recognizing military necessity as a defense.

The next set of chapters is devoted to the relationship between the laws of war and international criminal and human rights law, especially with regard to targeting, UAVs, the status of combatants, and protection of civilians. “The aim is not to cover all areas, but to take a sample of contentious areas where the protections provided by the laws of war are under pressure, in order to test the law’s workability” (xx).

In chapter 7, Nicholas Mercer (British Red Cross) discusses the difficulties experienced by the British Army in Iraq in conducting tribunals to determine whether a POW was entitled to the protections of the Geneva Conventions. The difficulties of holding proper and timely hearings led some prisoners to claim that their protracted detentions violated the European Convention on Human Rights, with which Great Britain was required to comply.³ This illustrates the complexities involved in deciding whether international humanitarian law or human rights law applies to persons in a war zone lacking a clear status as either combatants or noncombatants.

In chapter 8, former UK Army legal officer Charles Garraway (Univ. of Essex) explores the tricky distinction between combatants and noncombatants in an era when conflicts around the world very often involve non-state actors. During the night, for example, a combatant may be lawfully killed under the laws of war, but in daylight may appear to be an ordinary civilian, entitled to the protections of human rights law. Garraway analyzes the effort of the International Committee of the Red Cross (ICRC) to offer guidance on the question of what particular conduct forfeits a given actor’s civilian status and for how long. He finds that the ICRC’s Interpretive Guidance has “raised as many questions as it has answered” (183).

The principle of distinction is fundamental to the law of armed conflict. It guides us between the Scylla of all-out war, where all the adversary population contribute to the war effort and are, therefore, legitimate targets, and the Charybdis of pacifism, where nothing can be targeted at all.... The need is to ensure a balance: one that reflects the reality of war, but at the same time seeks to protect the innocent. This involves compromise. In war, innocent lives will inevitably be lost—that is embedded in the principle of

3. See *Al-Skeini v. United Kingdom*, No. 55721/07, 53 Eur. H.R. Re589 (2011): the European Convention on Human Rights applies to prisoners taken by Great Britain during the invasion and occupation of Iraq.

proportionality. Not every civilian death is a war crime. Not to accept that is not to accept the reality of war. That way lies the divorce of war and law, a divorce where there will be no winners. (190)

The next essay, by David Turns (Cranfield Univ.), considers the use of UAVs/drones, a topic of growing urgency as their prevalence and lethality have increased. Turns draws a parallel with Germany's use of the *Paris-Geschütz* (Paris Gun) in World War I. This lawful weapon was fired from positions out of sight of its target. He concludes that the use of UAVs in war is lawful if it complies with current international humanitarian law, particularly regarding targeting of civilians vs. combatants. He also foresees fully autonomous weapon systems operated without human intervention; these will inevitably raise the thorny issue of separating civilian from combatant targets.

In chapter 10, William Boothby (Univ. of London and Australian Nat'l. Univ.) reviews the historical development of the law of targeting and considers whether nanotechnology and autonomous attack systems fall within the purview of current international conventions. He thinks gaps in international humanitarian law will be addressed "only ... if the dangers posed by a particular technology or method of warfare are shown, to the satisfaction of the international community, to justify treaty provision" (234). Until then, the laws of war will have to be flexible.

The essay by Maya Brehm (Geneva Acad. of Int'l. Humanitarian Law) concerns the protection of civilians from explosive weapons, which have the potential to inflict "indiscriminate or disproportionate effects" (244). Unlike most of the book's contributors, Brehm argues that the law of armed conflict "fails adequately to articulate the serious risk of harm inherent in the use of explosive weapons in populated areas.... In view of its devastating humanitarian impact there is an urgent need critically to question the acceptability of the use of explosive weapons in populated areas, and reframe conventional attitudes towards this practice" (265-66).

In chapter 12, Michael Meyer (British Red Cross) examines the ICRC's initiative to increase the legal protection for victims of armed conflicts, especially non-international conflicts. While present international humanitarian law remains relevant, further dialogue is needed to increase protections for civilians and improve compliance with the laws of war.

The book's final section comprises three essays on corporate criminal responsibility for war crimes, the conduct of POW trials by military tribunals, and the tension between the right to conduct one's own defense and the need for fair and speedy trials. In chapter 13, Alex Batesmith (British Inst. of Int'l. and Comparative Law) first looks at the potential liability of business enterprises for violations of international humanitarian law. The post-World War II International Military Tribunals did not prosecute businesses involved in war crimes per se, but rather their leaders. "Concepts of corporate and associational criminal liability were seriously explored, but were rejected for political, rather than legal, reasons" (289). Corporate violations of the laws of war are, in Batesmith's view, most likely to be prosecuted under domestic laws, despite significant barriers to successful criminal or civil proceedings in a national court. Human rights movements have striven to hold corporations criminally responsible for war crimes or violations of international humanitarian law. "It is only a matter of time before victims bring a successful criminal case in a domestic jurisdiction against a high-profile company accused of complicity in international crimes" (312).

Peter Rowe (Univ. of Lancaster), the book's honorand, tackles the issue of captors' trials of their POWs. Article 102 of Geneva Convention III (1949) requires that prisoners be tried by "the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." Rowe reviews the requirements for determining whether a captive is entitled to POW status, arguing that military tribunals must "offer the essential guarantees of independence and impartiality as

generally recognized.”⁴ He discusses the interplay of international humanitarian law with human rights law, including the applicability of the European Convention on Human Rights. He recommends action to ensure states can meet their obligations under Geneva Convention III, even if they seem unlikely to take part in an international conflict.

Solicitor Caroline Harvey (Rowe’s last doctoral candidate) concludes the volume by considering the conflict between a prisoner’s right to conduct his own defense and the requirement of a just and speedy trial in the context of the UN’s International Criminal Tribunal for the Former Yugoslavia (ICTY). When, for instance, Slobodan Milošević and Radovan Karadžić’s decisions to represent themselves caused long delays and other difficulties, prosecutors sought limits on their defense tactics. But the ICTY Appeals Chamber found that “any restrictions on Milošević’s right to represent himself must be limited to the minimum extent necessary to protect the Tribunal’s interest in ensuring a *reasonably expeditious trial*” [my emphasis].⁵ In the end, Milošević died of ill health before a verdict could be rendered. Harvey suggests that the ICC should rule out any presumptive right of self-defense in order to avoid infringing the need for a just and expeditious trial, “for only by ensuring fairness is it possible to ensure a legitimate and sustainable system of international criminal justice” (360).

The fifteen papers in *Contemporary Challenges to the Laws of War* make clear the difficulties of applying long-standing international conventions and customs to modern warfare. While the consensus here is that the present laws of war are “fit for the purpose,” many issues will continue to force our thoughtful re-examination of that judgment. The cutting-edge essays in this volume will instruct and guide anyone whose research touches on questions of justice and warfare.

4. Geneva Convention III, Article 84.

5. Milošević v. Prosecutor, IT-02-54-AR73.7: Decision on Interlocutory Appeal, 1 Nov. 2004, ¶ 17.