

Cambridge University Press

0521617324 - The Impact of Human Rights Law on Armed Forces

Peter Rowe

Frontmatter

[More information](#)

THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES

This book considers those aspects of human rights law which may become relevant to the activities of armed forces whether they remain in barracks, undertake training or are deployed in military operations within their own State or outside it. The unique nature of military service and of military courts gives rise to human rights issues in respect both of civilians and soldiers, whether volunteers or conscripts, who find themselves before these courts. Rowe examines these issues as well as the application of international humanitarian law alongside the human rights obligations of the State when forces are training for and involved in armed conflict; where armed forces are deployed in situations of civil disorder; and where States contribute armed forces to multinational forces.

This is a timely study in light of the allegations of ill-treatment by soldiers of civilians following the war in Iraq and the detention of 'unlawful combatants' in Guantanamo Bay. It will have broad appeal, for scholars in human rights, international law and military studies, and anyone concerned with policy relevant to the armed forces.

PETER ROWE is Professor of Law at the University of Lancaster. He has been Chairman of the United Kingdom Group of the International Society for Military Law and the Law of War, and has published widely in these areas.

Cambridge University Press

0521617324 - The Impact of Human Rights Law on Armed Forces

Peter Rowe

Frontmatter

[More information](#)

THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES

PETER ROWE

University of Lancaster



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

0521617324 - The Impact of Human Rights Law on Armed Forces

Peter Rowe

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521617321

© Peter Rowe 2006

This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2006

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this book is available from the British Library

ISBN-13 978-0-521-85170-1 hardback

ISBN-10 0-521-85170-X hardback

ISBN-13 978-0-521-61732-1 paperback

ISBN-10 0-521-61732-4 paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this book, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press

0521617324 - The Impact of Human Rights Law on Armed Forces

Peter Rowe

Frontmatter

[More information](#)

This book is dedicated to Anne, Tim and Katherine.

CONTENTS

Preface *page ix*

1 **Human rights within the context of members of armed forces** 1

 Human rights in the armed forces 5

 The volunteer soldier 9

 The conscript soldier 12

 Non-nationals as members of the armed forces 23

 Ethnic minorities as members of the armed forces 23

 Women members of the armed forces 23

 Individuals with disabilities 25

 Child soldiers 26

2 **The human rights of members of the armed forces** 30

 The right to life 30

 Torture, degrading or inhumane treatment 36

 Deprivation of liberty 39

 Right to privacy 41

 Freedom of thought, conscience and religion 50

 Freedom of assembly and association 53

 Freedom of expression 55

 The soldier's human rights during wartime 59

3 **Human rights and the disciplinary process** 60

 What is military discipline? 63

 Armed forces subject to a disciplinary system under international law 67

 The influence of human rights on the disciplinary systems of the armed forces 68

4 **Civilians before military courts** 94

 What is a military court? 95

	The theoretical basis for the trial of civilians by military courts within their own State	97
	Trial of civilians who are nationals by a military court abroad	104
	The trial of civilians by military court in time of an international armed conflict	109
5	Human rights and international armed conflict	114
	Are human rights treaties applicable during an international armed conflict?	118
	The role of national law	133
	Applying human rights treaties during an international armed conflict	134
	Amnesty	161
6	Human rights, non-international armed conflict and civil disorder	163
	The legal effects of a non-international armed conflict	166
	The role of national law	176
	The right to life	180
	Torture, inhuman or degrading treatment	188
	The right to liberty	190
	Right to a fair trial	192
	Destruction of property	194
	Movement of individuals	196
	The position of the rebels	197
	Disorder not amounting to an armed conflict within a State	203
	Other situations	216
	Amnesty	220
7	Human rights during multinational operations	224
	International law applicable to a national contingent	228
	Liability of the state when its armed forces are part of a multinational contingent	235
	The killing of an attacker	236
	A civilian in the hands of the foreign armed forces	238
	Have soldiers a duty to intervene?	246
	Humanitarian missions	247
	Derogations	248
	<i>Index</i>	250

Cambridge University Press

0521617324 - The Impact of Human Rights Law on Armed Forces

Peter Rowe

Frontmatter

[More information](#)

PREFACE

This book attempts to consider those aspects of human rights law which may become relevant to the activities of armed forces whether they remain in barracks, undertake training or are deployed in military operations within their own State or outside it. In particular, it considers, from a human rights perspective, the position of members of those armed forces and those with whom they will come into contact during some form of military operation.

The unique nature of military service and of military courts gives rise to human rights issues in respect of those who serve in armed forces, whether as volunteers or as conscripts, and of civilians who find themselves placed before military courts. Chapters 1 to 4 explore the application of human rights standards in this military context.

It is often, however, part of the function of armed forces to take part in armed conflict, or at least to train for such a possibility. In this case international humanitarian law will also apply alongside the human rights obligations of the State in certain circumstances. Since the former body of law draws a distinction between international and non-international armed conflicts, whilst the latter does not, I have considered it appropriate to make such a distinction in order to consider the different nature of, and issues involved in, such conflict from both a human rights and an international humanitarian law standpoint. Chapters 5 and 6 respectively tackle these different types of armed conflict but the latter chapter deals also with issues involved in civil disorder which does not reach the threshold of an armed conflict.

The practice of States in deploying contingents of their armed forces to multinational forces has become a common feature of modern international relations. By its very nature armed forces will be acting outside their own territory and they may be involved in the arrest and detention of civilians. Particular issues of the application of human rights and, possibly, international humanitarian law will arise in addition to the law of sending and receiving States, matters which are explored in chapter 7.

Cambridge University Press

0521617324 - The Impact of Human Rights Law on Armed Forces

Peter Rowe

Frontmatter

[More information](#)

X

PREFACE

This book does not set out to compare different military legal systems throughout the world. To attempt to do so would not only have involved some form of selection and but it would also have run the risk of inaccuracies since the military legal systems are usually embedded within the national law of the State concerned and an understanding of that law would have been required. Nor does it attempt to describe all modern non-international armed conflicts. Instead, issues have been explored which, it is hoped, will find resonance in the armed forces of most States.

This concentration on issues has enabled consideration to be given to the various human rights instruments without an over-concentration on any one of them. There are, of course, many differences among them, both in procedural and in substantive terms. For these reasons a decision of one human rights body could be followed by another but it may not be. Moreover, the context in which they operate will also have some bearing on their significance to the role of armed forces. Professor Harris summed up the position when he concluded (in D. Harris 'Regional Protection of Human Rights: The Inter-American Achievement'; in D. Harris and S. Livingstone (eds.), *The Inter-American System of Human Rights* (Oxford: Clarendon, 1998), p. 2) that 'human rights issues in the Americas have often concerned gross, as opposed to ordinary, violations of human rights. They have much more to do with the forced disappearance, killing, torture and arbitrary detention of political opponents and terrorists than with particular issues concerning, for example, the right to a fair trial or freedom of expression that are the stock in trade of the European . . . Court.' It is not, therefore, surprising to see decisions of the Inter-American system taking a prominent role in chapter 6 while those of the European Court appear more relevant to chapters 1 to 3.

Senior members of armed forces may take the view that the whole idea of human rights is a dangerous one if it gets a hold on those responsible for discipline and for ensuring those armed forces are able to discharge their duties. I hope that this work will dispel such an idea and show that, in a military context, the relevant norms of human rights law can lead, like those of international humanitarian law, to a control on the actions of soldiers and a resulting enhancement of military discipline.

This book will, it is hoped, prove of interest to those who direct the policy of the armed forces within individual States, to those who apply it and to scholars who seek an understanding of how armed forces may be subject to control by international (and national) legal norms.

I should like to acknowledge my gratitude to a number of people who have widened my horizons and who have helped me to formulate my

Cambridge University Press

0521617324 - The Impact of Human Rights Law on Armed Forces

Peter Rowe

Frontmatter

[More information](#)

PREFACE

xi

views. Discussions over many years with military lawyers have, I hope, led me to take a realistic view of the issues faced by law in the context of armed forces. Professor Timothy McCormack invited me to become the inaugural Sir Ninian Stevens Visiting Scholar to the Asia-Pacific Centre for Military Law at the Faculty of Law, University of Melbourne for part of the 2002–3 academic year. While there I benefited greatly from discussions with him and with his colleagues, Bruce Oswald, CSC, and John Tobin. John also read and commented on a draft of chapter 6. Errors remaining are my responsibility.

I am grateful also to Lorna Pimperton of the University of Lancaster Law Library who assisted me to place the text in the form required by my publishers, to my colleagues in the Law School who have helped me in many ways and to Finola O’Sullivan of Cambridge University Press who helped me to transform an idea for a book into this final form.

I have attempted to state the law as at 1 January 2005, although where possible some later cases have been added since that date.