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978-1-107-06355-6 - Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe

Edited by Caroline Harvey, James Summers and Nigel D. White

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Introduction

JAMES SUMMERS

This edited collection in honour of Peter Rowe explores contemporary challenges to the laws of war. The title of the book is fitting as Peter has not only contributed extensively to the study of the law of armed conflict and related areas in his academic career but has also highlighted new frontiers in its development – especially in relation to human rights. With chapters from experts in the field, this book investigates many of the problems experienced by the law as it copes with new technologies and methods of warfare, as well as its interaction with other legal disciplines, including human rights. This introduction will briefly outline the laws of war and place the chapters in their context.

The structure of the laws of war

Most states, most of the time, exist in a peaceful condition. The very concept of a state encapsulates the idea of a government in control of a territory and a population. That government, in turn, is subject to human rights obligations that derive from custom and various treaty regimes. One of the most fundamental of these standards is the right to life, which cannot be taken by agents of a state arbitrarily and extrajudicially. The outbreak of war changes this. Human life in a conflict becomes subject to a special legal regime, variously known as the laws of war, international humanitarian law (IHL) or the law of armed conflict.¹ As described in *Tadić*, this ‘applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved’.² This *lex specialis*, the International

¹ See *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, ICJ Reports 2012, para. 81.

² *Prosecutor v. Dusko Tadić* (Interlocutory Appeal on Jurisdiction) IT-94-1-AR, 2 October 1995, para. 70.

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Court of Justice recognised, exists alongside human rights³ and changes the interpretation of the arbitrary deprivation in the right to life.⁴

The object of war, American General George S. Patton once noted, is not to die for your country, but to make someone else die for his. The laws of war do not fundamentally challenge this proposition, although they do seek to mitigate and contain it by ensuring that the conduct of warfare is not unlimited.⁵ Protections are provided for civilians, the sick and wounded, prisoners of war, the nationals of states not involved in the conflict, civilian property (especially that of cultural significance) and the environment. Indiscriminate killing and unnecessary suffering are expressly prohibited, though killing and suffering, as such, are an accepted part of war and can include protected individuals. The laws of war work within the messy reality of conflict in which even carefully targeted action can result in the deaths of civilians and the destruction of property. This reflects a very different idea of law from that of human rights, which prevails in peacetime, but now coexists with the laws of war in a sometimes difficult relationship.⁶ Lastly, IHL does not, by itself, restrict the ability of states to go to war. The decision to initiate a conflict is a separate legal matter (*jus ad bellum*) orientated around the UN Charter. Instead, the laws of war focus on the conduct of hostilities (*jus in bello*) – a legal war could be fought illegally and vice versa.⁷

The laws of war are contained in a series of treaties, as well as customary international law. The most prominent of these are the Hague and Geneva conventions, which have, respectively, given rise to ‘Hague Law’ and

³ See *Wall in Occupied Palestinian Territory* (Advisory Opinion), ICJ Reports 2004, para. 106; *Democratic Republic of Congo v. Uganda*, ICJ Reports 2005, para. 216.

⁴ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports 1996, para. 25. See also, *Juan Carlos Abella v. Argentina*, Report No. 55/97, Case 11.137, 1997, para. 16.

⁵ See Article 22 Hague Regulations 1907: ‘The right of belligerents to adopt means of injuring the enemy is not unlimited.’ Article 35(1) AP I: ‘In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited.’ See also, *Nuclear Weapons* (n. 4, above), para. 77.

⁶ See K. Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’, 98 *AJIL* (2004) 1.

⁷ A. Orakdelashvili, ‘Overlap and Convergence: The Interaction between *Jus ad Bellum* and *Jus in Bello*’, 12 *JCSL* (2007) 158. See Preamble AP I: ‘the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict’.

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‘Geneva Law’.⁸ In addition to these two treaty regimes, there are individual instruments that regulate specific weapons, including chemical and biological weapons and landmines.

Hague Law concerns the conduct of hostilities and the means and methods used to pursue them. It can be seen to originate with the St Petersburg Declaration 1868, which prohibited small projectiles under the principle that weapons which uselessly aggravated the sufferings of disabled men, or rendered their death inevitable, exceeded the object of warfare.⁹ However, the main instruments behind this law were concluded in two peace conferences in The Hague in 1899 and 1907, which, between them, produced twenty conventions and declarations.¹⁰ The legal status of these instruments differs, but the Hague Regulations attached to the Hague Convention IV 1907, in particular, have been recognised as custom.¹¹

Geneva Law is based on the protection of specific classes of individuals who are not engaged in hostilities. Its origins lie with the first Geneva Convention in 1864. This was on the initiative of Swiss businessman Henry Dunant, who, on witnessing the suffering of the wounded left untreated in the Battle of Solferino in 1859, founded the organisation that became the International Committee of the Red Cross (ICRC). The original Convention was updated in 1906 and again in 1929, when it was joined by a second instrument on prisoners of war. These two treaties, in turn, were replaced by the present four Geneva Conventions of 1949, which have 195 states parties.¹² The First Geneva Convention concerns the wounded and sick in armed forces in the field. The Second addresses them at sea, as well as the shipwrecked. The Third covers prisoners of war. The Fourth protects civilians in time of war. These are supplemented by three protocols. Additional Protocol I 1977 (173 parties) encompasses the conduct of hostilities, meaning that much of ‘Hague Law’ is now found in a Geneva instrument. In keeping with its contemporary setting (the tail-end of post-war decolonisation), the Protocol

⁸ See *Nuclear Weapons* (n. 4, above), para. 75.

⁹ Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles Under 400 Grammes Weight, 29 November/11 December 1868.

¹⁰ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd edn (Cambridge: Cambridge University Press, 2010), 14–15.

¹¹ *Wall in Occupied Palestinian Territory* (Advisory Opinion), ICJ Reports 2004, para. 89; *Democratic Republic of Congo v. Uganda*, ICJ Reports 2005, para. 217.

¹² On the status of the instruments, see the ICRC Geneva Conventions website: www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp.

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also extended international armed conflicts to include peoples fighting colonial domination, alien occupation and racist regimes. Additional Protocol II 1977 (167 parties) expands Geneva Law into non-international armed conflicts, beyond the minimum provisions of Common Article 3, and is the most comprehensive instrument to address this type of conflict. Finally, Additional Protocol III 2005 (63 parties) added an extra non-religious emblem for the Red Cross and medical services to use, the 'Red Crystal'.

There is a significant overlap between Hague and Geneva Law and not just from Additional Protocol I. This is most evident with civilians. Under Hague Law they are protected by limits on the selection of targets and the types of weapons used. Under Geneva Law there are specific protections attached to them as people. The goals are the same, preserving non-combatants from the devastation of conflict, though the approaches are quite different.

Behind the laws of war is a balance between the pursuit of military objectives and humanitarian protection, informed by the reciprocal interests of states. Belligerent states have an incentive to respect sick, wounded and captured soldiers and the civilians of an enemy state in the expectation that the same treatment will apply to their nationals. This has had an important effect on the structure of the law, creating a distinction between international and non-international armed conflicts. In the first, between two or more states, there is a clear reciprocal relationship between governments. However, in the second, where governments are fighting rebel movements, they have tended to deny such a relationship with groups that they may prefer to dismiss as terrorists or criminals. The result is that the laws of war are more developed for an international armed conflict, creating a notable dichotomy in legal protection.

The foundations of the law, though, clearly go beyond mere reciprocal interests and derive from a wider project to humanise the conduct of war. The independent non-governmental organisation (NGO), the ICRC, has been central to this. As Michael Meyer explains in Chapter 12, it has been integral in developing the laws of war, in particular, by preparing texts that have later been adopted by states. The development of the law is also influenced by the interaction between academics and military lawyers, recounted by Anthony Rogers and Gordon Risius in Chapter 2. But, the humanisation of war is not merely an external imposition. Military forces have, throughout history, sought to define themselves with basic standards by which war could be fought in a disciplined and honourable

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way.¹³ Carl von Clausewitz, writing in 1832, while belittling the international laws of war as they were then, nevertheless distinguished constraints on the devastation of cities and the execution of prisoners as a sign of intelligence and civilisation, as opposed to the impulsive acts of savages.¹⁴ However, what is acceptable in hostilities is open to different views and has evolved over time as methods of warfare and weaponry have changed. In an early work on international law in 1796, Prussian academic Johann G. Fichte condemned the use of snipers as cold-blooded murder and downright illegal.¹⁵ Similarly, as Bill Boothby notes in Chapter 10, aerial bombardment (from balloons) was banned by Hague declarations in both 1899 and 1907.¹⁶ Today, though, both would be seen as regular and lawful methods of combat. Maya Brehm reflects in Chapter 11 that horrific injuries can be accepted if they are seen as a 'normal' part of an armed conflict.

The need for international humanitarian law to be able continuously to adapt to new methods of warfare was specifically recognised in the Hague conventions of 1899 and 1907. With the Marten's Clause, proposed by the international lawyer F. De Martens, 'belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'.¹⁷ This refers to development by custom (usage), but also specifically incorporates moral humanitarian considerations.¹⁸ These inform the application of basic principles in the laws of war, such as distinction and the prohibition of unnecessary suffering in relation to legitimate military objectives.¹⁹

¹³ An excellent comparison between modern and ancient and medieval codes on warfare is L. C. Green, 'What is – Why is There – the Law of War?' (1994) 5 *Finnish Yearbook of International Law* 99.

¹⁴ C. von Clausewitz, *On War*, ed. and trans. M. Howard and P. Paret (Princeton, NJ: Princeton University Press, 1976), bk. 1, ch. 1, paras 2–3.

¹⁵ J. G. Fichte, *The Science of Rights*, trans. A. E. Kroeger (London: Routledge, 1970), 482.

¹⁶ Hague Declaration IV, 1 1899; Hague Declaration XIV 1907.

¹⁷ Preamble Hague Convention IV 1907. See also Preamble Hague Convention II 1899; Article 1(2) Geneva Conventions; AP I 1977.

¹⁸ On the interpretations of the clause, see T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *AJIL* (2000) 78.

¹⁹ See *Nuclear Weapons* (n. 4, above), para. 78. See also the ICTY in *Prosecutor v. Furundžija* (Trial) IT-95-17/1, 10 December 1998, paras 137 and 168; *Prosecutor v. Kupreškić* (Trial) IT-95-16-T, 14 January 2000, paras 525–7; *Prosecutor v. Martić* (Trial) IT-95-11-T, 12 June 2007, para. 467.

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Nonetheless, due to the considerations underpinning them, the laws of war do not form a smooth continuum of protection, but are fragmented into categories, both of conflicts and of individuals, which are, in turn, linked to particular instruments. Some of these distinctions have been mitigated by customary international law, but IHL must be approached through categories. The first is whether an armed conflict is international or non-international. The second is the people and property involved or caught up in the conflict.

The implementation of the laws of war

Another key aspect of the context of the laws of war is implementation. Despite the grave nature of the acts it covers, enforcement has been an area of weakness. As Michael Meyer explains in Chapter 12, the ICRC is currently engaged in consultations to strengthen monitoring states' compliance with IHL obligations. Nonetheless, IHL lacks its own distinct institutions and has been enforced, in particular, by international criminal tribunals in the prosecution of war crimes and also by human rights bodies. Those institutions, however, address the law from the perspective of their own particular legal cultures.

The implementation of the laws of war traditionally grew from the reciprocal relationship between belligerents. From ancient times it was acceptable to take (and kill) hostages and to engage in reprisals to induce enemy forces to comply with their obligations.²⁰ Hostage-taking was still recognised in the Second World War, but subsequently became a Grave Breach of the Fourth Geneva Convention.²¹ Reprisals were also prohibited against protected persons under the Geneva Conventions.²² In Additional Protocol I there were further protections for civilians, the environment, cultural artefacts, indispensable objects for civilian survival and installations containing dangerous forces.²³ In combination, the effect was to hollow reprisals out to the point of irrelevance as the only legal targets left were combatants, who could be targeted in any

²⁰ G. I. A. D. Draper, 'The Implementation of the Modern Law of Armed Conflicts' 8 *Israel Law Review* (1973) 7–9.

²¹ Articles 34 and 147 Fourth Geneva Convention 1949. See also Article 2 ICTY Statute 1993; Article 8(2)(a)(viii) ICC Statute 1998.

²² Article 46 First Geneva Convention 1949; Article 47 Second Geneva Convention 1949; Article 13 Third Geneva Conventions 1949; Article 33 Fourth Geneva Convention 1949.

²³ Articles 20, 51(6), 53(c), 54(4), 55(2), 56(4) AP I 1977.

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case.²⁴ In both these cases humanitarian considerations outweighed reciprocal enforcement. A further mechanism provided for in the Geneva Conventions is a commission of enquiry.²⁵ Additional Protocol I provides for an independent fact-finding commission and this was established in 1991, though its jurisdiction depends on the consent of the belligerent states.²⁶

A prominent mechanism in the implementation of the Geneva Conventions has been the appointment of neutral states as protecting powers to safeguard the interests of the parties to the conflict.²⁷ This role was first taken by Switzerland in the Franco-Prussian War, 1870, which it continued, along with Sweden, in the Second World War. If a state is unwilling to perform this role it can also be undertaken by an impartial organisation, notably the ICRC.²⁸ However, this system depends on the consent of the parties. In hostilities such as the China–India conflict, 1962–3 or the India–Pakistan war over Bangladesh in 1971, the role of a protecting power was rejected by belligerent states.²⁹

Looking at international bodies, international criminal institutions have played a prominent role in upholding the laws of war through the punishment of war crimes. In particular, the International Criminal Tribunal for the former Yugoslavia (ICTY), as well as trying individual war criminals, has significantly developed different areas of IHL. Nonetheless, there are limitations. War crimes involve breaches of the laws of war that entail individual criminal responsibility.³⁰ Moreover, they straddle both international humanitarian and international criminal law, which may pose questions over their source. International

²⁴ *Prosecutor v. Kupreškić*, IT-95-16-T, 14 January 2000, paras 527–36; see also T. Meron, 'The Humanization of Humanitarian Law', 94 *AJIL* (2000) 249–51; G. B. Roberts, 'The New Rules for Waging War: The Case against Ratification of Additional Protocol I', 26 *VJIL* (1985) 141–5.

²⁵ Article 52 First Geneva Convention 1949; Article 53 Second Geneva Convention 1949; Article 132 Third Geneva Convention 1949; Article 149 Fourth Geneva Convention 1949.

²⁶ Article 90 AP I 1977. See R. Wolfrum and D. Fleck, 'Enforcement of International Humanitarian Law', in D. Fleck (eds), *The Handbook of International Humanitarian Law*, 2nd edn (Oxford: Oxford University Press, 2008), 711–12.

²⁷ Article 8 First, Second and Third Geneva Conventions 1949; Article 9 Fourth Geneva Convention 1949.

²⁸ Article 10 First, Second and Third Geneva Conventions 1949; Article 11 Fourth Geneva Convention 1949.

²⁹ Draper, 'The Implementation of the Modern Law of Armed Conflicts', 14.

³⁰ *Prosecutor v. Duko Tadić* (Interlocutory Appeal on Jurisdiction) IT-94-1-AR, 2 October 1995, para. 94.

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criminal bodies derive their jurisdiction from their statutes, which contain specific lists of war crimes for that institution that may differ in their formulation from those in IHL instruments. As Robert Cryer outlines in Chapter 6, there is an internal tension within these tribunals as to whether their crimes are a self-contained regime, or whether they draw from the laws of war. The bodies also pose important questions in terms of their jurisdiction, which are examined by Alex Batesmith in Chapter 13 on corporate criminal responsibility, and their procedure, as explored by Caroline Harvey in Chapter 15 on self-representation before the ICTY.

The enforcement of a specific type of war crime, grave breaches of the Geneva Conventions, is based on the states parties to those conventions, who can, if their domestic law permits, exercise jurisdiction over them in their national courts. These include: killing, torture, inhuman treatment, wilfully causing great suffering or serious injury, unlawful deportation, transfer or confinement, and hostage-taking against protected persons; wilfully depriving a prisoner of war or other protected person of the right to a fair and regular trial and compelling them to serve in the forces of a hostile power; and extensive, unlawful and wanton destruction or appropriation of property, not justified by military necessity. States parties have a legislative obligation to provide effective sanctions for those offences and can try suspects in their national courts. The ICTY and International Criminal Court (ICC) can also exercise jurisdiction over these crimes, within the terms of their statutes.³¹ States also have the right to hand over the suspect to another state party that has made a *prima facie* case against the accused, though, significantly, they do not have an obligation to do so.³² A limitation in grave breaches is that they are restricted to international armed conflicts – there is no equivalent for non-international armed conflicts.

Human rights bodies have also played a significant and growing role in the interpretation of the law relating to military operations. This has been particularly significant for the law regarding international armed conflict through occupation.³³ Human rights bodies have extended their jurisdiction in situations where an occupier has control over a population, such as in the US invasion of Grenada³⁴ and the Israeli-occupied

³¹ Article 2 ICTY Statute 1993; Articles 5 and 8(2)(a)(viii) ICC Statute 1998.

³² Draper, 'The Implementation of the Modern Law of Armed Conflicts', 11.

³³ See P. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006), 122–33.

³⁴ *Coard et al. v. United States*, Report No. 109/99, Case 10.951 (1999), para. 37.

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Palestinian territories.³⁵ The European Court of Human Rights considered that an occupying power in effective control of an area has ‘the responsibility . . . to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional protocols which it has ratified’.³⁶ Internal conflicts fall within state territory and, therefore, also within the traditional scope of human rights jurisdiction. In this instance, though, states have been more reluctant to apply the laws of war. Neither the United Kingdom, in relation to Northern Ireland, nor Russia, regarding Chechnya, designated the violence in those regions as a non-international armed conflict, with the result that they were only addressed under human rights law.³⁷ However, human rights bodies have made the designation themselves. The Inter-American Commission of Human Rights in *Abella v. Argentina* (1997) considered an attack on a military barracks to amount to a brief non-international armed conflict.³⁸

The practice of human rights bodies has raised questions on interpretation of the relationship between human rights and IHL. A notable example is the *Al-Jedda v. UK* (2011) case in which the European Court considered that the internment of civilians was incompatible with the liberty and security of the person under Article 5(1) of the European Convention. In its view, the Fourth Geneva Convention, which, in Article 42, allows for internment based on ‘absolutely necessary’ security grounds, did not create an obligation that conflicted with this right.³⁹ However, in Chapter 8, Charles Garraway argues that this interpretation of the Convention, in terms of obligations, is to misread it.

The status of a conflict

The application of IHL depends on the existence of an ‘armed conflict’. These, in turn, come in two types: international, which involves two or more states, and non-international, which does not. The distinction is

³⁵ Concluding Observations of the Human Rights Committee, Israel, CCPR/CO/78/ISR (2003), para. 11; *Wall in Occupied Palestinian Territory* (Advisory Opinion), ICJ Reports 2004, paras 109–11.

³⁶ *Al-Skeini v. United Kingdom*, Application No. 55721/07 (2011), para. 138; *Cyprus v. Turkey*, Application No. 25781/94 (2001), para. 77.

³⁷ See W. Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ 16 *EJIL* (2005) 754.

³⁸ *Juan Carlos Abella v. Argentina*, Report No. 55/97, Case 11.137 (1997), paras 149–56, 160–61.

³⁹ *Al-Jedda v. United Kingdom*, Application No. 27021/08 (2011), para. 107.

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crucial as the two types of armed conflict correspond to different sets of legal provisions. Custom has softened this distinction,⁴⁰ but prisoner of war status and grave breaches of provisions of the Geneva Conventions, in particular, only apply in an international armed conflict.⁴¹ The two designations are not necessarily exclusive and can coexist within the same war.⁴² This was recognised by the International Court in *Nicaragua* (1986), which concerned hostilities between the Nicaraguan government and the Contra rebels within the country and external intervention by the USA. The Court found that both an international and a non-international conflict were simultaneously taking place.⁴³ Similarly, in *Thomas Lubanga Dyilo* (2012), the ICC considered that, while Uganda's occupation of Bunia airport in the Democratic Republic of the Congo created an international armed conflict, this existed alongside a separate non-international conflict involving rebel groups in the region.⁴⁴ This coexistence can highlight the sharp legal differences in the two conflicts so that captured soldiers from an intervening state could be entitled to prisoner of war status, but captured rebels would not.⁴⁵

The term 'armed conflict' is not defined in the Geneva Conventions, though it has been described by the ICTY as 'a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.⁴⁶ It should be noted, however, that the deployment of one country's military forces in another does not necessarily mean that an armed conflict is taking place. Peacekeeping missions, stationed with the consent of the receiving state, do not create an armed conflict. As Nigel D. White explores in Chapter 5, these armed forces are generally

⁴⁰ *Prosecutor v. Dusko Tadić* (Interlocutory Appeal on Jurisdiction) IT-94-1-AR, 5 October 1995, paras 96–127 (1995). See also L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), 134–60; T. Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 *AJIL* (1996) 239–49.

⁴¹ J. Pejic, 'Status of Armed Conflicts', in E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2007), 77–8.

⁴² Y. Dinstein, *War, Aggression and Self-Defence*, 5th edn (Cambridge: Cambridge University Press, 2012), 6–7.

⁴³ *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. US*), ICJ Reports 1986, para. 219.

⁴⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, paras 563–7.

⁴⁵ Pejic, 'Status of Armed Conflicts', 93.

⁴⁶ *Prosecutor v. Dusko Tadić* (Interlocutory Appeal on Jurisdiction) IT-94-1-AR, 5 October 1995, para. 70.