CONTEMPORARY CHALLENGES TO THE LAWS OF WAR

The laws of war are facing new challenges from emerging technologies and changing methods of warfare, as well as the growth of human rights and international criminal law. International mechanisms of accountability have increased and international criminal law has greater relevance in the calculations of political and military leaders, yet perpetrators often remain at large and the laws of war raise numerous normative, structural and systemic issues and problems. This edited collection brings together leading academic, military and professional experts to examine the key issues for the continuing role and relevance of the laws of war in the twenty-first century. Marking Professor Peter Rowe’s contribution to the subject, this book re-examines the purposes of the laws of war and asks whether existing laws found in treaties and customs work to achieve these purposes and, if not, whether they can be fixed by specific reforms or wholesale revision.

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CONTEMPORARY CHALLENGES TO THE LAWS OF WAR

Essays in Honour of Professor Peter Rowe

Edited by

CAROLINE HARVEY
JAMES SUMMERS
and
NIGEL D. WHITE
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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Gordon Risius was Tony Rogers’ successor as Director of Army Legal Services from 1997 to 2003. Following the court martial reforms introduced by the Armed Forces Act 1996, he also became in 1997 the first Prosecuting Authority for the Army, and was appointed CB in 2000. Having been authorised in 1992 to sit in the Crown Court as a Recorder, he became a Circuit Judge in 2003 on his retirement from the Army, when he was seconded temporarily to the Immigration Appeal Tribunal in London as a Vice-President, before moving in 2005 to Reading Crown Court to sit in crime. He is currently the Resident Judge at Oxford Crown Court following his appointment there in 2010. The following year he was elected the Honorary Recorder of Oxford. He is also a senior judge of the Sovereign Base Areas Court in Cyprus. He was active from 1988 in the UK Group of the International Society for Military Law and the Law of War and latterly in its parent Society, of which he is now an Honorary President, and additionally as an instructor at the International Institute of Humanitarian Law in San Remo. He was also Deputy Colonel Commandant of the Adjutant General’s Corps from 2004 to 2009.

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FOREWORD BY JUDGE SIR CHRISTOPHER GREENWOOD

It is a great pleasure to contribute this brief foreword to the present collection of essays. There are at least three reasons why that is so. First, the collection honours Peter Rowe, a friend and colleague for many years. Peter Rowe’s contribution to the laws of war has been of enormous value. His book *Defence: The Legal Implications* broke new ground in the academic writing on the subject by bringing together in one volume a consideration of the international law of war and UK military law, thereby anchoring the consideration of international law in the legal framework within which the practitioners of that law – the servicemen and women called upon to apply it in combat – are required to operate. That essentially practical approach is also evident in Peter Rowe’s own contribution to the present volume, which considers the relationship between the legal framework for the trial by a state of its own service personnel and the way in which such a state complies with its international law obligations regarding the trial of prisoners of war for war crimes and offences committed after capture. His later book, *The Impact of Human Rights Law on Armed Forces*, again went to the heart of important practical issues, including the relationship between international human rights law and the laws of war (a subject which the International Court of Justice has had to face three times in the last twenty years). At the time that book appeared, I was counsel for the Secretary of State for Defence in two cases arising out of the conflict in Iraq (*Al-Skeini* and *Al-Jedda*) then pending before the House of Lords. The book was much used by all the legal teams.

Secondly, a glance at the list of contributors to the present volume shows that the editors have succeeded in bringing together authors from academic, military and Red Cross backgrounds, as well as other walks of life. The different perspectives thus brought to bear enhance the value of this volume. It is also particularly fitting in a tribute to Peter Rowe, who was one of those who were instrumental in creating a series of seminars...
in which academics and practitioners with a shared interest in the laws of war took part. One product of that series was the book *The Gulf War 1990–91 in International and English Law*, which Peter Rowe edited and which contained contributions from a range of authors similar to that found in the present volume. It is in part due to that continuing dialogue between the military and academic lawyers that discussion of the laws of
war in the United Kingdom has never been detached from reality in the way that it has sometimes been in other communities.

Lastly, the present volume contains a wonderfully rich discussion of the most important issues confronting all of those involved with the laws of war today: whether those laws are capable of coping with the conditions of modern warfare, what relationship they have with international human rights law and other branches of international law, how can their application be strengthened and what role they play in the various operations undertaken with Security Council authorisation. Sixty years ago Sir Hersch Lauterpacht famously remarked that ‘if international law is at the vanishing point of law, the laws of war are at the vanishing point of international law’. This collection of essays is a timely reminder that those laws have not vanished yet and it holds the promise that they are unlikely to do so in the immediate future, however great the challenge they face. Lauterpacht would have been delighted.
The increase in violence and conflict in the twenty-first century has emphasised the importance of the laws of war, but has also raised the issue of their impotence as we witness increased unaddressed violations of the laws, many of them shocking and horrific. First fashioned in an age of chivalry, can the laws of war continue to apply in an age of extremes?

Although international mechanisms of accountability have increased and international criminal law has greater relevance in the calculations of political and military leaders when conducting warfare, perpetrators often remain at large; an ever-present reminder of a cycle of violence that, without some form of reckoning, will not be broken.

Nevertheless, the laws of war are not coterminous with international criminal law, nor are they subsumed by human rights law. As lex specialis applicable in armed conflicts the laws of war raise numerous normative, structural and systemic issues and problems, the most significant of which are discussed in this book by a range of military, academic and professional experts, brought together to mark Professor Peter Rowe’s contribution to the subject. Initial discussions and debates were held during a workshop at Lancaster University in September 2012.

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 to achieve these purposes; if not, can they be fixed by specific reforms or do we need a wholesale revision? These questions are addressed by the contributors, some by focusing on specific issues of the protections provided by the laws of war, others on broader structural and systemic issues. The contributors are drawn from both academia and practice, bringing their different perspectives to bear on the subject matter, and it is fitting that the book starts with an account of the interface between these two branches.

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Following from an Introduction, which contains an overview of the laws of war and places the contributions within that framework, the book contains a number of chapters examining the role of the *jus in bello* and its place within the wider international legal order. These are followed by an examination of aspects of the relationship between the laws of war on the one hand, and international criminal law and human rights law on the other. There then follow some specific chapters considering issues of the protections provided by the laws of war by looking at targeting, weapons, the use of drones, combatant status and the 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. The book then closes by looking at the issues of responsibility and accountability for violations of the laws. By these means we will endeavour to find answers to one of the most pressing issues of international law: whether the laws of war are fit for purpose?

The editors would like to thank Lydia Davies-Bright for her editorial work on the chapters.
ABBREVIATIONS

AC Appeals Cases
ACHPR African Charter on Human and Peoples’ Rights
ACHR American Convention on Human Rights
ACLU American Civil Liberties Union
AJIL American Journal of International Law
ALS Army Legal Services
AMISOM African Union Mission in Somalia
AO area of operations
AOAV Action on Armed Violence
AP I Additional Protocol I to the Geneva Conventions
AP II Additional Protocol II to the Geneva Conventions
ATS Alien Tort Statute
AU African Union
BOI board of inquiry
BWC Biological Weapons Convention
BYBIL British Yearbook of International Law
CCR Center for Constitutional Rights
CCW Convention on Certain Conventional Weapons
CERD Convention on the Elimination of All Forms of Racial Discrimination
COMCAPREPS Common Capture Reports
CoW coalition of the willing
CWC Chemical Weapon Convention
DALS Director of Army Legal Services
DIME dense inert metal explosive
DPH direct participation in hostilities
DPKO Department of Peacekeeping Operations
DRC Democratic Republic of the Congo
DU depleted uranium
DUF directive on the use of force
ECCH Extraordinary Chambers in the Courts of Cambodia
ECHR European Convention on Human Rights
ECCHR European Court of Human Rights
EHRR European Human Rights Reports
LIST OF ABBREVIATIONS

EJIL European Journal of International Law
ENMOD Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
ERW explosive remnant of war
EWCA England and Wales (reports) Court of Appeal
EWHC England and Wales (reports) High Court
FOIA Freedom of Information Act
GAOR General Assembly Official Records
GC Geneva Conventions
GC III Third Geneva Convention Relative to the Treatment of Prisoners of War
GC IV Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War
HMSO Her Majesty’s Stationery Office
HPCR Humanitarian Policy and Conflict Research
HRC Human Rights Council
ICC International Criminal Court
ICCPR International Covenant on Civil and Political Rights
ICJ International Court of Justice
ICL international criminal law
ICLQ International and Comparative Law Quarterly
ICRC International Committee of the Red Cross
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the former Yugoslavia
ICTY RPE Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
IED improvised explosive device
IFOR Implementation Force
IHL international humanitarian law
IHRL international human rights law
ILC International Law Commission
ILM International Legal Materials
ILR International Law Reports
IMT International Military Tribunal
IMTFE International Military Tribunal for the Far East
INEW International Network on Explosive Weapons
INTERFET International Force for East Timor
IRRC International Review of the Red Cross
ISAF International Security Assistance Force
ISO International Organisation for Standardisation
JCE joint criminal enterprise
JCSL Journal of Conflict and Security Law
LIST OF ABBREVIATIONS

JDN Joint Doctrine Note
JICJ Journal of International Criminal Justice
KFOR Kosovo Force
LAR lethal autonomous robot
LJIL Leiden Journal of International Law
MLRS multiple launch rocket system
MNC multinational corporation
MOAB massive ordnance air blast
MOD Ministry of Defence
MONUSCO United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo
MRL multiple rocket launcher
NATO North Atlantic Treaty Organization
NGO non-governmental organisation
NPT non-proliferation treaty
OECD Organisation for Economic Cooperation and Development
OIOS Office of Internal Oversight Services
ONUC United Nations Operation in the Congo
OTP Office of the Prosecutor
PDT pre-deployment training
PJHQ Permanent Joint Headquarters
PKO peacekeeping operation
PMSC private military and security company
POW prisoner of war
RoE Rules of Engagement
RPE Rules of Procedure and Evidence
SALW small arms and light weapons
SCSL Special Court for Sierra Leone
SNCO senior non-commissioned officer
SOFA Status of Forces Agreement
STL Special Tribunal for Lebanon
TCN troop-contributing nation
TNC transnational corporation
UAV unmanned aerial vehicle
UCAV unmanned combat aerial vehicle
UKSC United Kingdom Supreme Court
UNAMA United Nations Assistance Mission in Afghanistan
UNAMSIL United Nations Assistance Mission in Sierra Leone
UNDP United Nations Development Programme
UNDPKO United Nations Department of Peacekeeping Operations
UNEF United Nations Emergency Force
UNGA United National General Assembly
### List of Abbreviations

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<td>UNIDIR</td>
<td>United Nations Institute for Disarmament Research</td>
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