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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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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.

CAROLINE HARVEY is a solicitor specialising in international law and obtained her PhD under Professor Peter Rowe's supervision.

JAMES SUMMERS is Lecturer in Law at the University of Lancaster, where he teaches international law, peoples' rights and the law of international institutions.

NIGEL D. WHITE is Professor of Public International Law at the University of Nottingham.

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explosive weapons, including cluster munitions, for the United Nations Institute for Disarmament Research (UNIDIR) and authored the study *Protecting Civilians from the Effects of Explosive Weapons: An Analysis of International Legal and Policy Standards* (2012). Previously, she was a protection delegate with the International Committee of the Red Cross, and worked with civil society organisations and think tanks in the field of arms control and disarmament.

ROBERT CRYER is Professor of International and Criminal Law at the University of Birmingham. His major teaching and research interests are in international law and criminal law. In addition to a number of articles and book chapters he is the author of *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005) and co-author (with Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst) of *An Introduction to International Criminal Law and Procedure*, 2nd edn (Cambridge University Press, 2010) and (with Neil Boister) *The Tokyo International Military Tribunal: A Reappraisal* (2008). He also co-edited (with Neil Boister) *Documents on the Tokyo International Military Tribunal* (2008). He is co-editor of the *Journal of Conflict and Security Law*.

DIETER FLECK is former Director, International Agreements and Policy, Federal Ministry of Defence, Germany; Honorary President, International Society for Military Law and the Law of War; member of the advisory board of the Amsterdam Centre for International Law; and member of the editorial board of the *Journal of International Peacekeeping*.

CHARLES GARRAWAY served for thirty years as a legal officer in the UK Army Legal Services, initially as a criminal prosecutor but latterly as an adviser in the law of armed conflict and operational law. He represented the Ministry of Defence at numerous international conferences and was part of the UK delegations to the First Review Conference for the 1981 Conventional Weapons Convention, the negotiations on the establishment of an International Criminal Court and the Diplomatic Conference that led to the 1999 Second Protocol to the 1954 Hague Convention on Cultural Property. He was also the senior army lawyer deployed to the Gulf during the 1990–1 Gulf conflict. Whilst still serving, he taught international humanitarian law at King's College London as well as acting as Course Director on the military

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courses run by the International Institute of Humanitarian Law, San Remo. On retirement, he spent three months in Baghdad working for the Foreign Office on transitional justice issues and six months as a senior research fellow at the British Institute of International and Comparative Law before taking up the Stockton Chair in International Law at the United States Naval War College, Newport, Rhode Island in August 2004 for the year 2004/5. He was a visiting professor at King's College London from 2002 to 2008, teaching the law of armed conflict, and an associate fellow at Chatham House from 2005 to 2012. He is currently a fellow at the Human Rights Centre, University of Essex and was awarded an honorary doctorate by the university in 2012. In December 2006, he was elected to the International Humanitarian Fact-Finding Commission under Article 90 of Additional Protocol I to the Geneva Conventions of 1949, of which he is now a Vice-President. He worked for the British Red Cross from 2007 to 2011 and now works as an independent consultant. He was appointed CBE in 2002. He has worked on a number of expert groups including the ICRC projects on 'direct participation in hostilities' and 'occupation' as well as the Harvard program on humanitarian policy and conflict research project on air and missile warfare. He is currently General Editor of the *United Kingdom Manual on the Law of Armed Conflict* and carries out a number of consultancies for government and international organisations, including the Commonwealth Secretariat. In 2011, he chaired the Commonwealth Working Group that updated the Commonwealth Model Law on the International Criminal Court.

CAROLINE HARVEY studied law at the universities of Keele and Lancaster. She completed both her LLM and PhD under the inspiration and supervision of Peter Rowe, and was his last doctoral candidate. Caroline qualified as a solicitor in 2008 after interning with the ICTY and the Gulf Region Advocacy Center in Houston, Texas and is in private practice. She has published on a variety of issues, including the decisions of German-speaking courts on war crimes, procedural fairness in arbitration proceedings and is the UK correspondent to the *Yearbook of International Humanitarian Law*. Caroline recently completed a post-doctoral fellowship at the Institute of European and Comparative Law at the University of Oxford, in the course of which she published an article in the *European Review of Contract Law* and a book chapter, both on the subject of comparative contract law.

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NICHOLAS MERCER was educated at St Andrews University and Oxford University. Admitted as a solicitor in 1990 and commissioned into the Army Legal Service in 1991, he served in Northern Ireland, Bosnia Herzegovina, Cyprus and Germany and was the Command Legal Adviser for the Iraq War 2003 with the HQ 1st (UK) Armoured Division. He has been a member of the teaching staff of the International Institute of Humanitarian Law, San Remo since 2001. He left the Army in 2011 as a Lieutenant Colonel and was ordained in Salisbury Diocese a week after leaving the Army. He has extensive experience in the law of armed conflict and human rights both on the battlefield and in the classroom and has lectured extensively on the subject at defence academies and other forums. He was named the Liberty Human Rights Lawyer of the Year 2011–12 for ‘integrity and courage in the face of the dissembling and denial of human rights abuses in Iraq 2003’.

MICHAEL MEYER OBE is head of international law at the British Red Cross. He has worked for the British National Society for over thirty years and is a specialist in international humanitarian law as well as in the protective emblems and in principles and laws relevant to the International Red Cross and Red Crescent Movement. Michael has served on government and Red Cross/Crescent delegations to international meetings, and represents the British Red Cross on the United Kingdom Inter-departmental Committee on International Humanitarian Law. He has also been a member of the governing bodies of the International Institute of Humanitarian Law and of the UK Group of the International Society for Military Law and the Law of War.

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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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and head of the Department of Law from 1988 to 1993. He has been chairman of the UK Group of the International Society for Military Law and the Laws of War. He was the Inaugural Sir Ninian Stephen Visiting Scholar at the Asia Pacific Centre for Military law, Faculty of Laws, University of Melbourne (June–July 2003). His main research interests lie in the fields of military law and the international laws of war, and the relationship between them on which he has published a number of articles and book chapters. His latest book is *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006). He has given lectures to military legal officers over many years, both in the UK and abroad.

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Military Deployments under International Law (2009). He recently co-authored *Collective Security: Law, Theory and Practice* (2013) with Nicholas Tsagourias. He is also editor and co-editor of eight collections, including *The UN, Human Rights and Post-Conflict Situations* (2005), *European Security Law* (2007), *International Law and Dispute Settlement* (2010), *International Organizations and the Idea of Autonomy* (2011) and *Counter-Terrorism: International Law and Practice* (2012). He is co-editor of the *Journal of Conflict and Security Law*, which is in its eighteenth year.

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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

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FOREWORD



Peter Rowe, Emeritus Professor in the Law School, University of Lancaster

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

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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.

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PREFACE

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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PREFACE

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.

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ABBREVIATIONS

AC	Appeals Cases
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACLU	American Civil Liberties Union
<i>AJIL</i>	<i>American Journal of International Law</i>
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
<i>BYBIL</i>	<i>British Yearbook of International Law</i>
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
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports

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<i>EJIL</i>	<i>European Journal of International Law</i>
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
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
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
<i>ILM</i>	<i>International Legal Materials</i>
<i>ILR</i>	<i>International Law Reports</i>
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
INEW	International Network on Explosive Weapons
INTERFET	International Force for East Timor
<i>IRRC</i>	<i>International Review of the Red Cross</i>
ISAF	International Security Assistance Force
ISO	International Organisation for Standardisation
JCE	joint criminal enterprise
<i>JCSL</i>	<i>Journal of Conflict and Security Law</i>

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LIST OF ABBREVIATIONS xxiii

JDN	Joint Doctrine Note
<i>JICJ</i>	<i>Journal of International Criminal Justice</i>
KFOR	Kosovo Force
LAR	lethal autonomous robot
<i>LJIL</i>	<i>Leiden Journal of International Law</i>
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

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UNIDIR	United Nations Institute for Disarmament Research
UNOCI	United Nations Operation in the Ivory Coast
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
VJIL	<i>Virginia Journal of International Law</i>
YIHL	<i>Yearbook of International Humanitarian Law</i>
WLR	Weekly Law Reports