



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.

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MAYA BREHM is researcher on weapons law at the Geneva Academy of International Humanitarian Law and Human Rights and works as an independent consultant on disarmament issues. She holds an MA in international relations and an LLM in international humanitarian law. Prior to joining the Geneva Academy, she conducted research on

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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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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.

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.

A. P. V. ROGERS was Director of Army Legal Services from 1994 to 1997 and was awarded the OBE in 1985. He is an honorary president of the International Society for Military Law and the Law of War. Following retirement from the Army, he became a fellow, later a senior fellow, of the Lauterpacht Centre for International Law at the University of Cambridge until he retired from the Centre in 2011. He lectured on the law of armed conflict in the LLM course at the Cambridge Law Faculty from 2000 to 2009 as an affiliated lecturer, and held the title Yorke Distinguished Visiting Fellow from 2003 to 2009. He was also a fellow, later visiting fellow, of the Human Rights Centre at the University of Essex from 1999 to 2007. He was a member of the International Humanitarian Fact-Finding Commission from 2001 to 2006, becoming a vice-president. Having drafted many of its chapters and been involved in much of its revision over the years, he was eventually appointed the general editor of the UK Ministry of Defence *Manual of the Law of Armed Conflict* (2004). He has published many articles on the law of armed conflict, but his principal publication is the prize-winning *Law on the Battlefield*, currently in its 3rd edition (2012).

PETER ROWE is Professor Emeritus at the University of Lancaster. He has also taught at the University of Liverpool where he was professor

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.

JAMES SUMMERS is a graduate of Helsinki University and is a lecturer in international law at the University of Lancaster. A second edition of his book *Peoples and International Law* was published in 2013. He is also the editor of *Kosovo: A Precedent?* (2011). He is currently working on a text, cases and materials book to be published in 2015.

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NIGEL D. WHITE is Professor of Public International Law at the University of Nottingham and formerly Professor of International Law at the University of Sheffield. He has held a chair since 2000 and an academic post since 1987. In addition to publishing over sixty articles and essays, many in leading journals and collections, he is co-author and author of eight books. He is sole author of *Keeping the Peace* (1997), *The UN System: Toward International Justice* (2002), *The Law of International Organisations* (2005) and *Democracy Goes to War: British*

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.

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



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

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.

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.