Revue de droit de l'Université de Sherbrooke

RDUS

LA GUERRE ET LE DROIT — LE DROIT DES CONFLITS ARMÉS

L. C. Green

Volume 16, Number 1, 1985

URI: https://id.erudit.org/iderudit/1109194ar
DOI: https://doi.org/10.17118/11143/19755

See table of contents

Publisher(s)

Revue de Droit de l'Université de Sherbrooke

ISSN

0317-9656 (print)
2561-7087 (digital)

Explore this journal

Cite this review

Green, L. C. (1985). Review of [LA GUERRE ET LE DROIT — LE DROIT DES CONFLITS ARMÉS]. *Revue de droit de l'Université de Sherbrooke*, *16*(1), 479–493. https://doi.org/10.17118/11143/19755

Article abstract

The authors of *La guerre et le droit* pose two questions: Whether the law of war belongs to the past, and whether there is any such thing as humanitarian law in war. They recognize that law can never replace war and acknowledge that 'total war' means the rejection of law. While accepting that armed conflict law still exists among developed States, they emphasize that the new States have a tendency to look on humanitarian law as something of a joke. The answers they give to both their questions tend to be affirmative.

Professor Rousseau is concerned with the totality of the law of war, examining it in its present 'black letter' form while providing instances from the past which exphasize both the relevance of the law and its antiquity. Moreover, he does not hesitate to render judgment and reminds us of the intimacy between active hostilities and cold war.

The works complement each other, constituting reminders of the fact that the law of war serves as a compromise between the demands of military necessity and those of humanity.

Note bibliographique

LA GUERRE ET LE DROIT* LE DROIT DES CONFLITS ARMÉS**

par L. C. GREEN***

Les auteurs de La guerre et le droit *posent deux questions: le droit de la guerre est-il dépassé; le droit humanitaire est-il illusoire? Ils affirment que c'est impossible pour le droit de remplacer la guerre, et la guerre totale implique le rejet de toute règle. Le droit de la guerre est un fait pour les pays développés, mais pour les états nouveaux le droit humanitaire est imprégné d'une humeur malséante. Les réponses des auteurs aux questions posées sont positives.*

L'étude du professeur Rousseau porte sur le droit du conflit armé en totalité. Il explique les données du droit positif d'aujourd'hui et donne aussi les incidents du passé pour accentuer sa pertinence et son antiquité. D'ailleurs, il n'hésite pas à émettre des opinions et il nous rappelle la relation étroite entre les hostilités actives et la guerre froide.

Les deux livres sont complémentaires. Ils servent comme aides-mémoire du fait que le droit de la guerre est le produit d'un compromis entre des impératifs militaires et les sentiments humanitaires.

The authors of La guerre et le droit *pose two questions: Whether the law of war belongs to the past, and whether there is any such thing as humanitarian law in war. They recognize that law can never replace war and acknowledge that 'total war' means the rejection of law. While accepting that armed conflict law still exists among developed states, they emphasize that the new States have a tendency to look on humanitarian law as something of a joke. The answers they give to both their questions tend to be affirmative.*

---

* by FURET, Marie-Françoise, MARTINEZ, Jean-Claude and DORANDEU, Henri, Paris, Éditions Pedone, 1979, 335 pp.

** by ROUSSEAU, Charles, Paris, Éditions Pedone, 1983, XII and 629 pp.

*** University Professor, University of Alberta.

Professor Rousseau is concerned with the totality of the law of war, examining it in its present 'black letter' form while providing instances from the past which exphasize both the relevance of the law and its antiquity. Moreover, he does not hesitate to render judgment and reminds us of the intimacy between active hostilities and cold war.

The works complement each other, constituting reminders of the fact that the law of war serves as a compromise between the demands of military necessity and those of humanity.

SUMMARY

INTRODUCTION

Immediately after the end of the Second World War and the establishment of the United Nations there was a tendency among writers on international law to ignore the law of armed conflict and adopt an attitude that, while the 1914 war may not have justified its title as 'the war to end war', now that we had the United Nations things were going to be different. It did not take long, however, before it became clear that this attitude was nothing more than a vain hope and by 1949 no one was surprised that the world was ready to adopt the four Geneva Conventions aiming to improve humanitarianism in future wars. Writings relative to the law of armed conflict began to reappear and this trend has intensified since the adoption of the 1977 Protocols additional to the 1949 Conventions. Among the most recent of these works are those by Mme Furet and her colleagues and by Professor Rousseau, the *doyen* of French international lawyers.

LA GUERRE ET LE DROIT

La guerre et le droit is divided into two parts, the first dealing with 'Les Hommes en Guerre: Le Droit de la Guerre est-il depassé?', and the second concerned with 'L'Homme en Guerre: Le Droit Humanitaire est-il Illusoire?'. The book opens with a statement that might well be posted in the office of every commander-in-chief, every judge advocate general and every minister of defence: "La guerre n'est plus ce qu'elle était. Le droit n'est toujours pas ce qu'il devrait. L'une progresse dans la force de destruction, l'autre persiste dans la faiblesse des protections"[1]. The authors question whether law can ever replace war, for they point out that war has been of significance in assisting both national and regional integration, as well as playing a role in the advancement of international society — "Il a fallu deux guerres mondiales pour organiser les Nations Unies et intégrer les États européens dans une Communauté économique"[2]. They also remind us that, in practice, the law tends to follow war, that is to say "Dépassé par l'événement, toujours en retard d'un conflit, le droit

1. FURET, Marie-Françoise, MARTINEZ, Jean-Claude et DORANDEU, Henri, *La guerre et le droit*, Paris, Éditions Pedone, 1979, p. 5.

2. *Ibid.*

de la guerre serait à ranger au rang des instruments inutiles ou périmés"[3].

The authors' contention that "en droit la notion de recours à la force n'est pas synonyme d'état de guerre"[4] is perhaps still correct in the most formal of senses, but since the adoption of Protocol I in 1977 with the substitution of the term 'armed conflict' for that of 'war' this contention probably lacks any practical significance, especially since modern conflicts tend to begin without the declaration which in the past denoted a legal war. Less doubtful perhaps is their comment that "La fin des hostilités ne signifie pas en droit la fin de la guerre"[5], a statement which reflects the judgment in *Kuechenmeister* ([1974] K.B. 41) or *Hourigan* ([1946] N.Z.L.R. 1), while the Middle East, for example, emphasises the fact that nowadays armistice agreements frequently serve as substitutes for peace treaties[6].

At times one may question whether the authors are not being excessively formalistic. Thus, maintaining that the *jus ad bellum* has disappeared, other than by way of self defence, they go on to state "l'abandon de la notion de *debellatio* [— complete subjugation and disappearance as an independent entity of a vanquished state —] aurait dû en découler naturellement.... Mais en réalité la place de la *debellatio* dans les institutions internationales *n'est que celle de* la reconnaissance d'un état de fait"[7], and thus has as much reality in international relations as it ever did. Equally recognizing a state of fact, they point out that "Les règles qu'elle édicte ont été forgées pour répondre aux exigences d'un type de conflit qui n'existe plus aujourd'hui: la guerre du XIX^{e} siècle"[8]. It must not be forgotten, however, that the judgments of war crimes tribunals, the Geneva Conventions of 1949 and the Protocols of 1977 have all sought to bring these rules up to date and potentially applicable to modern war.

The authors provide an easily-comprehensible summary of the 'black letter law' of armed conflict and add thereto explanations as to why particular rules prove inadequate, but they do

3. *Id.*, 7.
4. *Id.*, 13.
5. *Id.*, 26.
6. *Id.*, 32.
7. *Id.*, 38.
8. *Id.*, 47.

not sufficiently pursue the manner in which even these inadequate rules and regulations have been adapted in practice or treated as customary law. Thus while it is true that technological and strategic developments have made the distinction between military and non-military objectives somewhat blurred[9], it still did not really require Article 52(2) of Protocol I to remind us that only military objectives were legitimate targets in war. In reply to the query whether international law permits total war, they themselves point out that "La guerre totale implique le rejet de toute règle, de tout principe de conduite. Elle est donc la négation même du droit. La jurisprudence des juridictions chargées de la répression des crimes de guerre a toujours refusé de retenir cette notion comme exception ou moyen de défense"[10]. In addition, post-1945 treaties have confirmed that acts of violence may only be directed against military objectives, while recognizing that non-military objectives may be incidental victims of such acts. Today the essential feature of a military objective is that it must 'make an effective contribution to military action and [its] ... destruction ... offer a definite military advantage', and these requirements are cumulative[11]. According to the authors a belligerent must now determine "non ce qui peut être librement détruit, mais ce qui doit être légitimement protégé"[12].

From the point of view of the man in the street, perhaps the most pressing issue in regard to the law of war is the legality of weapons of mass destruction, particularly the nuclear family, as well as chemical and bacteriological weapons. The authors point out that the ban on terrorisation would include the use of massive weaponry in accordance with the general principles of law, but they remind us that it is not enough to look at weapons merely from the point of view of their physical characteristics, for we are in the realm of degree; nevertheless it remains important to consider whether there are weapons that may be considered illegal *per se*[13], although it is essential to bear in mind that any general ban is likely to prove ineffective because of its imprecision and the possibility of further technical advan-

9. *Id.*, 67.
10. *Id.*, 68-70.
11. *Id.*, 75.
12. *Ibid.*
13. *Id.*, 90.

ces[14]. It is also important to remain aware of the difficulty of discriminating between those 'terror' weapons which are intended to create massive destruction and those which are not, for the latter may well be consistent with the requirements of customary law, even though there is the constant dread that any use of such weapons is likely to result in unrestrained escalation[15]. Even if one accepts the idea that aggression is the supreme crime justifying any means of repression, hope for the future appears to lie not in any form of general treaty condemning the use of these weapons, but in the proliferation of unilateral commitments so long as such commitments are associated with efforts to reduce the tensions which cause states to feel they require such weapons for the ultimate defence of their security. Moreover, it should not be forgotten that even if all such weapons were destroyed there remains the possibility of their creation in the event of some grave crisis[16].

In so far as the promulgation of a humanitarian law relating to warfare is concerned, there is a tendency to talk of the modern world as being more humane than that of the past. But "la guerre était un art qui avait ses esthètes. Elle est devenue une science qui a ses savants. La guerre était l'affaire des professionnels, le privilège d'une aristocratie de 'guerriers'. Elle est devenue l'affaire de tous, en devenant 'guerre populaire'. Le conflit classique, presqu'à dimension humaine, a ainsi cédé le pas à une 'guerre sauvage', de plus en plus savante"[17], and with this development war has ceased to be an affair of gentlemen with 'club rules' and become one that requires external regulation to keep it within bounds. Moreover, we cannot overlook the fact that "la guerre contemporaine est moins l'affaire des militaires que des politiques"[18]. In addition, during the second half of this century war has tended to disappear being replaced by non-international conflicts, both those in the name of self-determination and national liberation, as well as those which have always been considered as civil wars, a reality that is reflected in the adoption of the two Protocols of 1977[19]. Of the present position it may

14. *Id.*, 95.
15. *Id.*, 98.
16. *Id.*, 101.
17. *Id.*, 107-108.
18. *Id.*, 110.
19. *Id.*, 111.

well be said: "Le combat pour le pouvoir tend à échapper à l'humanisation du droit, au moment précisément où il ne le faudrait pas, tant l'importance de l'enjeu rend ces conflits internes sauvages"[20].

While the 1977 Protocols are of general application, the Resolutions of the General Assembly relating to the humanitarian rules of conflict have tended to be restricted to liberation and decolonisation issues[21], their general significance is therefore somewhat minimal, while the ideology underlying these Resolutions played a major role in the adoption of many of the provisions that appear in Protocol I[22]. It is because of their ideological approach and "au regard de leur sous-développement, les États nouveaux ne sont pas loin de voir certaines exigences du droit humanitaire comme imprégnées d'un humour malséant"[23]. Equally however, the developed states may look at some of the provisions of Protocol I in exactly the same manner. In the meantime we probably must accept that "*Le droit humanitaire risque alors d'apparaître*, aux États en voie de développement, *comme un luxe, ou un superflu de pays riches*. Pour un État développé, c'est un standard minimum. Pour un pays sous-developpé, c'est quelquefois une situation inaccessible"[24] (italics in original). Perhaps this is further ground for arguing that we have now reached a period in history which cannot speak of universal international law, and if international law is to have substance and meaning it may be time for some states to enter into arrangements that do not seek universality but which are the more likely, therefore, to have meaning. If one ignores these ideological problems, one will agree that the major contribution made by Protocol I lies in the protection of the civil population[25], which probably outweighs doubts and hesitancies with regard to such political matters as the recognition of wars of national liberation as international conflicts, the relaxation of the uniform rule with regard to those engaged in such conflicts[26] and the

20. *Ibid.*
21. *Id.*, 114.
22. *Id.*, 115.
23. *Id.*, 116.
24. *Id.*, 117.
25. *Id.*, 123.
26. *Id.*, 140-146.

denial of combatant status to mercenaries[27], issues which to some extent at least derogate from the basic principle of equality and reciprocity which in the past has underlain the law of armed conflict. This deviation is obvious in the manner in which the Protocol provides for protection of guerrillas who, by their conduct, lose the status of prisoners of war but remain entitled to equal treatment as prisoners of war, a situation which leads to the comment "Kafka a dû inspirer les rédacteurs du texte"[28].

La guerre et le droit is essentially a commentary upon and analysis of the principal requirements of international humanitarian law during armed conflict and much of the second half of the book is devoted to analysing the provisions of the 1977 Protocols, indicating the way in which compromise and concessions often produced agreement, as, for example, in regard to the prisoner-of-war and combatant status of guerillas[29] or — a far more complex issue in many ways — the non-combatant status of mercenaries[30]. It is in relation to the latter that we find the ideology of the Third World most significant in its rejection of a basic issue of humanitarian law, namely universality and non-discrimination. It is true that Article 3 common to the four Geneva Conventions forbids any form of adverse distinction, while Article 45 of Protocol I provides that any person "who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war", nevertheless Article 47(1) states that "a mercenary shall not have the right to be a combatant or a prisoner of war". The analysis of the debate in this work shows how difficult it is at the present time to secure universal acceptance of any rule when there is a clash of ideologies. In such case we have to be satisfied with the fact that "le texte ne donne aucune indication sur le régime juridique applicable"[31]. Equally interesting and enlightening is the account of the manner in which compromise was necessary in order to achieve Protocol II relating to non-international conflicts[32].

---

27. *Id.*, 156-161.
28. *Id.*, 133.
29. *Id.*, 143-154.
30. *Id.*, 156-162.
31. *Id.*, 161.
32. *Id.*, 169-182, 186-188.

For the main part *La guerre et le droit* presents an account of the development of humanitarian law in armed conflict with particular reference to the adoption of the 1977 Protocols, emphasising the extent to which the final texts were the product of compromise and political reality. For those who do not wish to examine the text of the debates in the *procès verbaux*, or Levie's[33] summary thereof, or the discursive account provided by Solf[34] and his collaborators, this work will prove a useful substitute as well as providing an interesting summary for those who find the reading of official documents somewhat heavy going. Since we have had but little opportunity to assess the impact of the 1977 Protocols in practice, one may question the authors' response to the problem they have set themselves: "Le droit de la guerre est-il dépassé? Le droit humanitaire est-il illusoire? Si l'on entend souligner par là le caractère vétuste ou inadapté du bon nombre de leurs dispositions, on doit sans aucun doute répondre par l'affirmative à cette double question"[35]. On the other hand, one dare not ignore the final point they make in their conclusion: "... le droit humanitaire est par ses origines un droit européen, occidental, inspiré par une philosophie chrétienne et humaniste qui n'est pas toujours celle des nouveaux États. Comme beaucoup d'entre elles, le droit de la guerre doit faire face à des situations nouvelles, nées des progrès de la technique et des transformations du monde moderne, imprévisibles au moment de de son élaboration. Enfin, comme le droit international dans son ensemble, ce corps de règles se trouve confronté au difficile problème de sa sanction. Refuser de l'admettre serait fermer la porte aux perspectives d'adaptation d'un système juridique dont la nécessité s'impose aujourd'hui comme par le passé"[36].

LE DROIT DES CONFLITS ARMÉS

Unlike the work just commented upon Professor Rousseau's *Le Droit des Conflits Armés* is a comprehensive survey of the whole of the law of war as customarily understood, with the relevance of the 1977 Protocols worked into the general text. It

33. LEVIE, H.S., *Protection of War Victims*, 4 vol., 1979-81, Dobbs Ferry, N.Y., Oceana.

34. BOTHE, M., PARTSCH, K.J. and SOLF, W.A., *New Rules for Victims of Armed Conflicts*, 1982, The Hague, Martinus Nijhoff.

35. *Id.*, 300.

36. *Id.*, 301.

serves, therefore, to provide us with a comprehensive survey of the law of armed conflict *in toto*. In fact, this text is intended, as the author explains in his preface, as the armed conflict volume of his five-volume *Traité de droit international public*. To this end, the volume is divided into two parts, the first[37] expounding le droit de la guerre, and the second[38] concerned with le recours à la force dans un système de sécurité collective. For those who seek the authority for postulating any statement, Rousseau cites cases as well as literature from a multitude of sources and jurisdictions. However, it is somewhat disconcerting to a common lawyer to find judicial decisions referred to by citation of the court and the date of decision, rather than by name, and the source given is usually the *Annual Digest* or the *International Law Reports*. In light of some of these decisions, the author states "Normalement c'est à l'Exécutif qu'il appartient de déterminer s'il y a ou non un état de guerre et les tribunaux sont liés par sa décision.... Mais il arrive que le gouvernement ne se prononce pas ou qu'il ne donne pas de réponse catégorique. C'est alors aux tribunaux qu'il revient de trancher le problème. [Mais] ceux-ci ne l'ont pas fait d'une manière uniforme"[39].

Professor Rousseau's account is so meticulous that he is able to remove some of our misconceptions with a stroke of the pen. Thus, it has become popular to talk of both World Wars as if the number of belligerents was relatively small. He reminds us, however, that "la guerre totale contemporaine se caractérise d'abord par son extension dans l'espace. C'est une guerre universelle (38 États belligérants en 1914-18, 55 en 1939-45)..."[40]. Moreover, today "la guerre totale se prolonge après la fin des hostilités avec la guerre froide"[41]. As a result, modern war, unlike those of old, is not confined to the combatants, but "elle apparaît comme un phénomène affectant la société internationale tout entière, tant sur le plan de l'assistance mutuelle contre l'agresseur que sur celui de la répression du crime international auquel elle se ramène"[42]. The author also emphasises, as do the authors

37. ROUSSEAU, Charles, *Le droit des conflits armés*, Paris, Éditions Pedone, 1983, pp. 1-524.

38. *Id.*, 525-601.

39. *Id.*, 6.

40. *Id.*, 18.

41. *Ibid.*

42. *Id.*, 19.

of *La guerre et le droit*, that "le droit de la guerre est le produit d'un compromis en perpétuelle adaptation entre les impératifs de l'efficacité militaire et les exigences des sentiments d'humanité"[43]. The care with which Professor Rousseau has done his research brings to light some strange phenomena which would otherwise probably be regarded as apocryphal. Thus, he points out that for some time during the first World War French interests in Turkey were protected by Austria-Hungary, a power with which France was herself at war[44] — an arrangement which is not likely to recur, although with widening of the geographical area of modern war it is by no means unusual to find the same neutral representing opposing belligerents[45].

At a time when there is agitation in many places to make mercenarism an international crime, coupled with claims that national states should declare those of their nationals who serve in foreign forces criminal, it is useful to be reminded that foreign volunteers have always been accepted as legitimate combatants, and that "l'intervention de volontaires dans un conflit armé international ne constitue un manquement à la neutralité que dans la mesure où c'est l'État neutre lui-même qui organise sur son territoire la formation et le rassemblement des corps de volontaires"[46]. It is purely a matter of national foreign enlistment legislation whether such activities are tolerated. However, Protocol I, 1977, has altered this situation and seeks to deny protected status to those defined as mercenaries, although the language of Article 47 renders it relatively easy to evade its prohibitions. Moreover, as the Diplock Commission, 1976, showed, states may not be very willing to render service as a mercenary a criminal offence, despite the Angola trial of 1976. These realities lead Professor Rousseau to remark upon "l'insuffisance du droit positif sur ce point"[47].

In view of the care with which Professor Rousseau has examined the various documents relating to the law of armed conflict and his detailed analysis of their provisions, it is somewhat

43. *Id.*, 21.
44. *Id.*, 37.
45. *Ibid.*
46. *Id.*, 71.
47. *Id.*, 80.

surprising to find him stating that "les prisonniers de guerre sont libres de refuser leur rapatriement"[48].

Article 118 of the 1949 Prisoners of War Convention states "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities", while Article 7 provides that "prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention ...", and the purpose of Article 118 was to prevent delayed repatriation. The Convention does not give prisoners the right to refuse repatriation, even though holding powers may, in breach of the Convention, grant such a right.

While one must agree with Professor Rousseau and his citation of the *Mergé* claim (1955) that "l'armistice est essentiellement — sinon exclusivement — une convention militaire"[49], one is inclined to ask whether, regardless of the signature of the Camp David Agreements, the armistice agreements between Israel and her Arab neighbours have not, by virtue of prescription, come to be regarded as political as well as military agreements?

At a time when the International Court of Justice has upheld its jurisdiction to hear Nicaragua's case concerning the alleged 'illegal' laying of mines in its waters by the United States, it is of value to note that Professor Rousseau contends, regarding the laying of mines by United States aircraft off Hanoi in 1972, that "l'illégalité de ces mesures, qui visaient à établir un blocus par mines sous-marins, n'était pas douteuse"[50], even though they were laid in the course of an armed conflict involving the two parties concerned. It will be interesting to see the extent to which the world Court will regard the Nicaraguan incident as compatible with international law, particularly when the mines have been laid by a non-combatant state in the absence of an armed conflict, and apparently without notification to third parties.

Equally topical, in view of the debates in the United Kingdom concerning the sinking of the Argentine capital ship *Belgrano*, is the reminder that the high seas constitute a legitimate zone of operations[51], while "les navires ayant le droit de combat-

48. *Id.*, 105.

49. *Id.*, 194.

50. *Id.*, 243.

51. *Id.*, 216.

tre sont exclusivement les navires de guerre au sens de droit international"[52] — and if they have the right to engage in combat they are clearly subject to a similar right on the part of their adverse party.

Immediately after the establishment of the United Nations it was not uncommon to find textbooks on international law the writers of which appeared to believe that, with the establishment of the new 'world order', war had ceased to be of significance, with many of the books completely ignoring the *jus bellum*. Even when it became clear that such an approach was artificially idealistic, there was a tendency to ignore the fact that, since neutrality had virtually disappeared during the second world war and that the rights of neutrals were more commonly honoured in the breach than the observance, there might still be occasions when knowledge of the law of neutrality might be significant. It is to Professor Rousseau's credit that he has not fallen prey to this failing, and just over 150 pages[53] are devoted to an exposition of the present law on this aspect of the law of armed conflict.

By way of contrast, he devotes a mere 75 pages to consideration of recourse to force within a collective security system, dividing his material into renunciation of the use of force[54], arms limitations[55] and repression of recourse to unlawful force[56], primarily concerned with such matters as the definition of aggression, sanctions under the League and the United Nations, and the like. In this connection, perhaps many of Professor Rousseau's readers will be attracted by the discussion concerning war crimes[57], for in the world as we know it today it is in this arena rather than the former that anything in the nature of an effective sanction is likely to be found.

CONCLUSION

For those interested in seeking a detailed analysis of the *lex lata* regarding armed conflict, accompanied by examples illus-

52. *Id.*, 219.

53. *Id.*, 370-524.

54. *Id.*, 528-536.

55. *Id.*, 537-571.

56. *Id.*, 572-601.

57. *Id.*, 170-187.

trative of the law in practice, including instances of breaches thereof, they can do no better than to consult Professor Rousseau's *Le droit des conflits armés*. On the other hand, those seeking a more philosophical discussion of the relationship of law and war, paying greater attention to the impact of the 1977 Protocol and the background of its adoption, then their needs are more likely to be met by *La guerre et le droit* prepared by Furet, Martinez and Dorandeu. This means that serious students of the law of armed conflict will find the two works complement each other. Personnel concerned with the law as it affects them in the event of conflict, as well as legal advisers to the armed forces, will probably find Rousseau more than sufficient for their purposes.