

## BOOK REVIEW

J.D. Ohlin, L. May and C. Finkelstein (eds.), *Weighing Lives in War*, Oxford University Press, 2017, 366pp., ISBN 978-0-198-79617-6, €95.  
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The protection of combatants on the battlefield has been a topic of long-standing debate for international law scholars, especially in light of continuing controversies about how to classify individuals who are members of non-state armed groups in asymmetric armed conflict situations. Jens David Ohlin, Larry May and Claire Finkelstein's edited collection is, therefore, timely. The editors have brought together an anthology of essays by specialists in the field of international humanitarian law that attempts to address key issues on the concept of the combatant in a systematic, synthetic and critical fashion. A principal merit of the editors is their approach – Ohlin, May and Finkelstein embark on the factual and legal context from which the interaction between international humanitarian law and human rights has developed, thereby rendering the volume a superb addition to the existing body of research in this area. The collection achieves this by combining a philosophical analysis with normative legal theory, which have a shared cynicism about whether conventional approaches in law have afforded sufficient protection to combatants during armed conflict. To date, other responses based on human rights law have proven disappointing in engaging with the challenges faced by combatants on the battlefield.<sup>1</sup> A proper understanding of these challenges is imperative for reasonable analysis of whether the lives of combatants should be given more priority in the current legal regime.

Gabriella Blum's contribution, in the first part of the volume, challenges the predominant view of the dispensable lives of soldiers. Some scholars have relied on their own acuity of humanity, dignity or compassion to propel the argument that soldiers who do not pose a threat at a particular time and place should have their lives spared. Blum reflects that, beyond any moral stance, there is also another 'case to be made that the legitimate scope of combatant targetability should be narrowed as a matter of legal obligation, one that would be incorporated into the military's rules of engagement'.<sup>2</sup> As she points out, the difference in targeting standards under Article 52(1) of Additional Protocol I to the Geneva Conventions can be 'justified on the account that there is often more time to assess the nature of an immovable target than the identity of moving human beings'.<sup>3</sup> Moreover, Blum suggests that this is not always the case since the Protocol does not

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<sup>1</sup>For commentary on these responses see J. Kleffner, 'Section IX of the ICRC Interpretative Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?', (2012) 45 *Israel Law Review* 35; D. Akande, 'Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities', (2010) 59 *Int'l & Comp. L. Q.* 180; W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', (2010) 42 *NYU J. Int'l L. & Pol* 769, at 828; T. Meron, *The Humanization of International Law* (2006), 9.

<sup>2</sup>G. Blum, 'The Dispensable Lives of Soldiers', in J.D. Ohlin, L. May and C. Finkelstein (eds.), *Weighing Lives in War* (2017), 17, at 20.

<sup>3</sup>*Ibid.*, at 29.

'limit the obligation to engage in case-by-case evaluation to instances where the assessment can be made at leisure'.<sup>4</sup> Alternative interpretations of the principles of military necessity and distinction have so far met with resistance but there is no reason why they should be rejected as improbable or unrealistic. Blum concludes with the observation that international humanitarian law continues to evolve as public preferences require them to and this could lead to further change to replicate an increasing care for the enemy combatant.<sup>5</sup>

Jens David Ohlin re-examines the epitome of the 'sharp wars are brief' statement considered in earlier writings<sup>6</sup> and argues that it captures the essence of the Lieber Code whose author believed that the over-regulation of the battlefield could lead to protracted armed conflict situations.<sup>7</sup> He suggests that what was potentially a legal instrument which restricted killing during armed conflict has become quite the opposite and as a result '[t]he value of combatant lives appears to count for very little, though they are protected from purely vengeful or sadistic killings – although that is not saying much'.<sup>8</sup> Ohlin iterates that there is some value to comprehending the rights of war in collective terms and therefore, the central question is not whether the principle of necessity recognizes the deontological rights of soldiers but whether the law of armed conflict observes the rights of states that are engaged in hostilities.<sup>9</sup> Moreover, Ohlin advocates in favour of two strategies which could make armed conflict more humane and enable the rights of soldiers to be respected on the battlefield. Firstly, he points out that *jus ad bellum* and *jus ex bello* restrict the use of force against soldiers who are unable to defend themselves in circumstances where the armed conflict should have been deemed as ended.<sup>10</sup> Secondly, armed forces should be compelled to use non-lethal force in situations where doing so will fulfil the aims and objectives of the military operation without the need for undertaking any unnecessary risks.<sup>11</sup> Ohlin concludes his essay by suggesting that:

[i]f the conditions for the acceptable killing of enemy combatants were sharply curtailed . . . maybe wars would become more exceptional and less frequent, in part because the constrained nature of warfare would make states less likely to resort to armed conflict.<sup>12</sup>

Larry May's excellent critique, in the first part of the volume, considers how the principle of military necessity can be strengthened so that a combatant's life can only be extinguished if it is practically necessary to accomplish a military objective.<sup>13</sup> May argues that during hostilities civilians have wide-ranging protections qua civilians and thus, it seems anomalous that soldiers do not have broadly similar rights as well.<sup>14</sup> He agrees with Ohlin's restatement of the *lex lata* rules of war but he cautions that there remain important normative reasons for not embracing the standard in modern times.<sup>15</sup> In particular, May contends that the fact that those who are soldiers are also humans should provide the minimal standard for how they are treated as soldiers.<sup>16</sup> Ultimately,

<sup>4</sup>Ibid.

<sup>5</sup>Ibid., at 57.

<sup>6</sup>F. Lieber, Instructions for the Government of Armies of the United States in the Field, General Order No 100, art. 29 (24 April 1863). J. Witt, *Lincoln's Code: The Law of War in American History* (2012), 235–6; J. Dill, 'The American Way of Bombing and International Law: Two Logics of Warfare in Tension', in M. Evangelista and H. Shue (eds.), *The American Way of Bombing: Changing Ethical and Legal Norms, From Flying Fortresses to Drones* (2014), 131.

<sup>7</sup>J.D. Ohlin, 'Sharp Wars are Brief', in J.D. Ohlin, L. May and C. Finkelstein (eds.), *supra* note 2, at 58.

<sup>8</sup>Ibid., at 63.

<sup>9</sup>Ibid., at 73.

<sup>10</sup>Ibid., at 74.

<sup>11</sup>Ibid.

<sup>12</sup>Ibid., at 74, 75.

<sup>13</sup>L. May, 'Humanity, Necessity, and the Rights of Soldiers', in J.D. Ohlin, L. May and C. Finkelstein (eds.), *supra* note 2, at 77.

<sup>14</sup>Ibid., at 85.

<sup>15</sup>Ibid., at 99.

<sup>16</sup>Ibid., at 108.

the standard should be that soldiers are treated in such a way that shows consideration for their dignity as human beings.<sup>17</sup>

Michael Gross's essay swings the book in a different direction by considering how subordinating superfluous injury and unnecessary suffering to military necessity has left commanders on the battlefield with the ultimate decision on what type of weapons to use.<sup>18</sup> As a result, he argues that there are two challenges to establishing criteria independent of military necessity. The first is that many states oppose fixed criteria for the development of new weapons technology as observed with the unsuccessful Superfluous Injury and Unnecessary Suffering Project (SIrUS) undertaken by the International Committee of the Red Cross (ICRC) whose recommendations were largely rejected.<sup>19</sup> The second challenge is that independent criteria are often triggered by appalling suffering that is inherently subjective.<sup>20</sup> No international treaty or convention has defined the concept of 'severe suffering', despite the existence of some soft rules. Although new developments in weaponry may help to avoid suffering, debate still remains in the context of nano-weapons and neuro-weapons.<sup>21</sup> Eventually state-armed forces will lose the monopoly on more technologically advanced weaponry but even so the potential to reduce casualties on the battlefield will further bolster the argument for the continued development and use of these weapons.<sup>22</sup>

The second part of the volume featuring Jeff McMahan's, Jovana Davidovic's, Saba Bazargan-Forward's, Adil Haque's and Ariel Colonomos's superb essays respectively shift the focal point of the edited collection from the value of combatant lives in *jus in bello* to the value of lives on the battlefield more broadly. In particular, Bazargan-Forward argues that because civilians will inevitably suffer harm during armed conflict they are owed compensation – not only for disproportionate attacks but also for proportionate attacks.<sup>23</sup> He believes that since the unjust aggressor is unlikely to pay compensation the duty then falls on the just defender in the hostilities.<sup>24</sup> However, the just defender is also unlikely to pay compensation and as a result victims of proportionate collateral damage will go uncompensated.<sup>25</sup> One solution that Bazargan-Forward suggests is that when the proportionality estimations are being conducted before the attack military leaders need to take into account the fact that the harm caused to civilians will likely be uncompensated.<sup>26</sup>

The third part of the volume provides a useful discussion of the implications of humanitarian law for the protection of combatants during asymmetric armed conflict. Claire Finkelstein's contribution on the challenges posed to the principle of distinction by asymmetric armed conflict evaluates the concept which she believes is at the core of the issue, the idea of role responsibility.<sup>27</sup> She posits that any soldier who performs an act on behalf of the state is not an autonomous decision-maker and so should not bear individual responsibility for that act.<sup>28</sup> Ultimately, it is only the soldier's responsibility to implement the decision of his commanding officer. Role immunity is derived from legitimacy, which would 'explain why membership in a criminal organisation [such as ISIS] can only inculcate, whereas membership in a state [organization] in an official capacity can exculpate'.<sup>29</sup>

<sup>17</sup>*Ibid.*

<sup>18</sup>M. Gross, 'The Death of Combatants', in J.D. Ohlin, L. May and C. Finkelstein (eds.), *supra* note 2, 110, at 111.

<sup>19</sup>*Ibid.*

<sup>20</sup>*Ibid.*, at 127.

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.*, at 128.

<sup>23</sup>S. Bazargan-Forward, 'Compensation and Proportionality in War', in J.D. Ohlin, L. May and C. Finkelstein (eds.), *supra* note 2, 173, at 182.

<sup>24</sup>*Ibid.*, at 183.

<sup>25</sup>*Ibid.*, at 184.

<sup>26</sup>*Ibid.*, at 187.

<sup>27</sup>C. Finkelstein, 'The Equality of Combatants in Asymmetric War', in J.D. Ohlin, L. May and C. Finkelstein (eds.), *supra* note 2, 242, at 243.

<sup>28</sup>*Ibid.*, at 253.

<sup>29</sup>*Ibid.*

Jon Todd's compelling review of the continuing effectiveness of the 2001 Authorization for Use of Military Force (AUMF) follows a similar theme while Andrew Forcehimes's excellent analysis on the desert-adjusted account of weighing the lives of combatants in war has major implications for just-war theory. Forcehime's presents a convincing argument that by instilling desert-sensitive norms 'we incentivize non-culpable behaviour and disincentivize culpable behaviour'.<sup>30</sup> Desert-sensitive norms provide a significant justification for weighing just and unjust lives differently. In the absence of another rationale, he contends that the lives of just and unjust combatants should have equal value on the battlefield.<sup>31</sup>

The final essay in the edited collection by Michael Schmitt, Jeffrey Biller, Sean Fahey, David Goddard and Chad Highfill analyzes how military leaders make decisions about the permissibility of conducting a particular military attack with the prerequisite of avoiding collateral damage as much as possible. The authors' contribution is particularly important because it will help researchers to not only understand how contemporary military operations are conducted but also enable them to formulate normative proposals to change the conduct of such operations in the future. An interesting revelation is the fact that the manner in which military leaders make decisions about the permissibility of launching military attacks not only varies from state to state, but is also inconsistent across the different branches of the armed services of those states.<sup>32</sup> The findings of the authors in this essay are especially noteworthy for researchers, including myself, who have no military experience.

Over time, the conduct of hostilities, together with the restrictions on how combatants can be killed, has continued to evolve. The assessment whether enhancing the protection of soldiers' lives will lead to further restrictions on how hostilities are conducted remains to be seen. However, the definition of terms such as 'armed conflict', 'civilian' and 'combatant' continues to muddy the waters in this area. This superb collection of essays provides clarity on these interpretive issues and suggests approaches for overcoming the challenges that humanitarian law poses for determining who is responsible for loss of both civilian and combatant life during armed conflict. This book will be useful not only for academics but also for legal practitioners and postgraduate students, who are invited to reflect on the complex challenges affording protections to combatants under international humanitarian law.

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<sup>30</sup>A. Forcehimes, 'Weighing Unjust Lives', in J.D. Ohlin, L. May and C. Finkelstein (eds.), *supra* note 2, 285, at 297.

<sup>31</sup>*Ibid.*

<sup>32</sup>M. Schmitt et al., 'Joint and Combined Targeting: Structure and Process', in J.D. Ohlin, L. May and C. Finkelstein (eds.), *supra* note 2, 298, at 320–2.

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