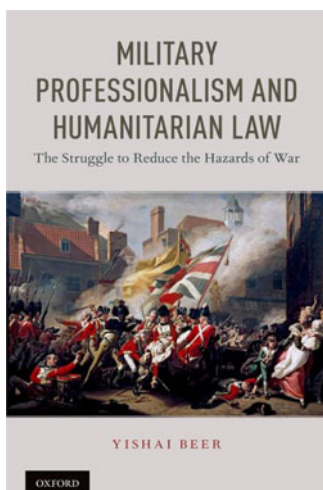


BOOK REVIEW



Military Professionalism and Humanitarian Law: The Struggle to Reduce the Hazards of War

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With large-scale wars currently ravaging the Middle East, South Asia and Africa, often with limited regard for the lives of civilians, one may legitimately ask the question: are the United Nations (UN) Charter, Geneva Conventions and other relevant treaties of international law governing warfare effective? Could it be that the “lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us live in”?² Having both commanded an army corps and served as president of the Israeli Court of Appeals, retired major-general Yishai Beer is eminently placed to comment on the sizeable gulf between the law and the actual practice of States. *Military Professionalism and Humanitarian Law* challenges some of the very underpinnings of the law that practitioners and academics hold dear, and it does so with a combination of passion, strategic acuity and balance. The author recommends harnessing the inherent responsibility of a competent military chain of command with the aim of increasing compliance with both the *jus ad bellum* and *jus in bello*. In so

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doing, he challenges some of the very precepts of the law, including the traditional international humanitarian law (IHL) concepts of military necessity and military advantage, and the UN Charter-based definition of self-defence, and questions whether they are fit for purpose.

Military necessity versus humanity?

Beer first takes issue with the concept of “military necessity”, a cardinal principle of IHL that is traditionally treated as diametrically opposed to, and therefore counter-balanced against, the concept of “humanity”. As an expert in military strategy he makes the excellent point that a disciplined armed force will in fact embrace humanitarian protections precisely as a function of military necessity, and that this terminology has created a false dichotomy which serves to alienate both sides of the military–civil society divide.³ He argues that the principle of military necessity is essentially hollow, as even the International Committee of the Red Cross (ICRC) admits that it is unlikely to restrict targeting which otherwise complies with the IHL rules governing the conduct of hostilities.⁴ In contrast, a professional armed force views military necessity as a strategic pillar, based in part on the economy of warfighting—an unusual example of the law’s permissibility relative to State practice.⁵ Beer further states that “[i]n order to effectively subdue an adversary, there is absolutely no need to kill all of its soldiers”,⁶ and that military force “should be lawful only to the extent that it is effectively necessary for achieving a given military advantage”.⁷ Viewed through his lens, the relevant question is whether a given unit of the opposing armed forces represents a threat, present or future. For example, he asks whether it was necessary to kill strategically unimportant and retreating Iraqi soldiers on the “highway of death” in Kuwait;⁸ the legal officer who made that call may have qualified the move as “lawful but awful”. Beer is also surprised that IHL’s proportionality equation ignores the strategic notion of military necessity and thereby allows a greater number of civilian casualties based on a greater number of unnecessary targets. In other words, military necessity not only drives the sword, it dictates restraint. Giving legal substance to such a doctrine is indeed a

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2 *Military Professionalism and Humanitarian Law*, p. 14.

3 *Ibid.*, Chap. 1.

4 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2019, p. 40.

5 *Military Professionalism and Humanitarian Law*, p. 35.

6 *Ibid.*, p. 47.

7 *Ibid.*

8 *Ibid.*, p. 50.

persuasive nod to the inherent effectiveness of military strategy, and could well help to narrow the divide between the law and State practice.

Beyond imminence? Credibly timing self-defence

Beer then moves from the *in bello* to the *ad bellum*, addressing limitations in the prevailing law of self-defence under the UN Charter. Despite the 2003 Bush Doctrine and other attempts to enlarge the scope of self-defence to the point of rendering the prohibition on the use of force meaningless, the Charter is centred around the Security Council and only exceptionally allows self-defence in response to an armed attack, a term that has been defined by the International Court of Justice (ICJ) based in part on the General Assembly's 1974 "Definition of Aggression".⁹ The current right of the defending State extends to employing military force to halt an *imminent* attack – the precise meaning of which is the subject of serious debate, but which in the mainstream is characterized by manifest belligerent intent. Acknowledging the *lex lata*, the author goes on to suggest a novel standard *de ferenda*: "the last reasonable point, according to the self-defendant's military circumstances and doctrine, at which it can successfully face the aggressor's threat and still operationally defend itself – including, when necessary, by taking the initiative in its own self-defence".¹⁰ Given the relative ineffectiveness of the Chapter VII system of international peace and security, Beer wishes to give victim States the latitude to take more rationally proactive measures of anticipatory self-defence rather than waiting as a "sitting duck" for a first blow for which the aggressor may bank on the law guaranteeing a strictly necessary and proportionate response (and arguably score a military advantage through other elements of military strategy, such as initiative, surprise or concentration of power). His proposed framework is designed to deter such aggression. However, as he admits, the suggested standard "might be subject to mistakes, abuse and manipulation".¹¹ Indeed, existing State practice on Article 51 of the UN Charter is based on prudence and the tendency of States to misinterpret military signals from their neighbours. Just as a violation of Article 2(4) falling short of an armed attack does not trigger the victim State's right of self-defence (and the requirement to "turn the other cheek" is clear from the Charter's construction), in cases where self-defence is allowed, the intention of the drafters was to keep it circumscribed but credible, and then refer the matter back to the Security Council. Beer's logic is reasonably based on the dysfunction of the UN system combined with his country's crowded Middle Eastern military environment, in which a first blow could be fatal to any notion of self-defence. However, my fear is that in any environment, the risks of escalation brought on by a more permissive anticipatory response outweigh the benefits of more

9 UNGA Res. 3314, "Definition of Aggression", UN Doc. A/RES/3314, 14 December 1974.

10 *Military Professionalism and Humanitarian Law*, p. 72.

11 *Ibid.*, p. 114.

credible deterrence. What needs to be fixed is the UN system of international peace and security—but given the current P5 dynamic at the Security Council, is that plausible?¹²

Connecting strategic aims to the legal test of military advantage

Beer's third and most ambitious suggestion for improving the law goes to the very heart of his expertise: military strategy.¹³ This is where we see the retired major-general frustrated with IHL's affinity for the tactical level of warfare—i.e., the face of battle and its immediate humanitarian implications—and equally frustrated with strategic commanders' tendency in modern campaigns to expand their target list based on a “total war” logic, even when the actual aims of modern, self-defence-focused war are limited. Observing the humanitarian effects of current warfare, he expresses frustration that the law defines military objectives more expansively than is purely necessary to achieve those aims. He points to the voluntary “winning hearts and minds” focus of the US Department of Defense's counter-insurgency doctrine in Afghanistan¹⁴ as an example of the potential moderating influence of strategy on targeting, and asks whether existing IHL could be amended to harness the natural restraining force of a competent military chain of command. As it stands, the *jus in bello* allows for the complete decimation of an opponent's armed capability, subject only to the limitations on means of warfare causing unnecessary suffering and the protections afforded to those who are not taking part in hostilities; whereas modern war aims are generally much more limited—i.e., removing a particular threat. Indeed, “governing an adversary's land and people, once considered a desirable prize for the victor in war, has become a strategic burden and legal liability”.¹⁵ Beer's view is that this new, restricted warfare requires a legal paradigm shift from the tactical to the strategic level of decision-making. The IHL concept of military advantage—whether as a component of the definition of military objective or as counterweight to collateral civilian damage in the legal test for targeting—should therefore be connected to the limited strategic aim of a campaign.

Following this logic, States would be “required to publicly declare their concrete aims when engaging in war, and to adjust the targeting rules of their

12 See irli.net for my own organization's approach to that issue, which revolves around empowering the UN General Assembly in the event of a Security Council veto that is not exercised in accordance with the purposes and principles of the UN.

13 *Military Professionalism and Humanitarian Law*, Chap. 3.

14 In a policy known as “courageous restraint”, US armed forces were required to minimize civilian casualties, even if it necessitated incurring greater casualties. The general thinking was that fewer civilian casualties would equate to winning the support of the Afghan people. See, for example, Karl Eikenberry, “The Limits of Counterinsurgency Doctrine in Afghanistan: The Other Side of the COIN”, *Foreign Affairs*, Vol. 92, No. 5, 2013.

15 *Military Professionalism and Humanitarian Law*, pp. 135–136.

war to its specific aims”,¹⁶ thereby reducing the potential number of military targets as well as incidental harm to civilian persons and objects. This is where the author’s analysis collides with *realpolitik*: would sovereign States willingly tie their hands, with legally binding effect, through a public statement of aims? If the IHL principle of equality of belligerents is followed, can we reasonably expect that non-State armed groups would make a similar public statement at the outset of their campaign to oust said governments? The author admits that his logic intertwines the existing *in bello* targeting principles with the *ad bellum* and inherently political question of resort to armed force. This is a potentially hazardous move in the already over-politicized domain of IHL application. Furthermore, it is unlikely that the international community would trust a government faced with an existential threat to craft its political war aims so as to ultimately minimize incidental civilian casualties.

Deterrence-centred self-defence

Beer’s final substantive argument¹⁷ is aimed at increasing the credibility of military deterrence with a view to preserving international peace and security. While designed to de-escalate tensions (“halt and repel”) to the extent possible, the current *ad bellum* law of self-defence does not in his view sufficiently deter potential aggressors from carrying out an armed attack in the first instance. He argues that the strategic initiative and gain of a calculated first blow are not counter-balanced in the law by any credible advantage bestowed upon the victim State, with the current self-defence limits of necessity and proportionality thereby incentivizing rather than deterring the aggressor. Accordingly, he recommends “professionally tailored and culturally based deterrence” to be exercised by a potential victim State, based on extensive intelligence that it would necessarily collect on its adversary. This would include the right to respond to an armed attack with unpredictable magnitude and dimensions of force, as practiced by General Colin Powell during the First Gulf War.¹⁸ Beer suggests a range of defensive deterrent measures unconstrained by the existing law, admitting that some may be mistakenly perceived as preparatory to aggression in and of themselves, leading to escalation rather than prevention of conflict.

The logic of the UN Charter, and of the law of self-defence in particular, is one of restraint, as reaffirmed by its *travaux préparatoires*, several General Assembly resolutions and the ICJ. Self-defence is neither punitive nor retaliatory, as a function of the Charter’s aim to promote peaceful settlement and avoid or minimize the use of force. Any attempt to loosen those restrictions in favour of a more credible deterrent effect against would-be aggressors is likely to enable potential self-defendants to send all of the wrong signals in the tit-for-tat escalation that tends

¹⁶ *Ibid.*, p. 152.

¹⁷ *Ibid.*, Chap. 4.

¹⁸ *Ibid.*, pp. 193–194.

to characterize State-on-State disputes. Add to this volatility the very subjective process of profiling the aggressor State with a view to tailoring an appropriate response, and the scope for fatal misunderstanding is wide. Although Beer is articulately responding to the gulf between the prohibition on the use of force and practice, he admits that deterrence may either serve as a pretext for aggression or lead to miscalculation.

Conclusion

The rules-based international order has been under sustained threat since 9/11, and has ebbed and flowed since its inception after the Second World War. “The wide consensual basis of the law of armed conflict is being eroded”, according to Beer, “partly due to its rejection by states and partly due to its unilateral extension by tribunals and NGOs”.¹⁹ His book has made an extraordinary normative effort to restore the law’s relevance and effectiveness, at the levels of preventing armed conflict and mitigating its humanitarian effects. Despite his nuanced and balanced approach to the substance of his arguments, however, he oversimplifies the state of international law itself as being torn between what he describes as utopians (NGOs) and apologetics (the executive level of States). Neither side of the divide is so predictable. The problem is that civil society and armed forces lawyers have different “clients” (civilian population versus military operations), emphasize different sources (treaties versus operations orders/rules of engagement) and speak different languages (IHL versus the law of armed conflict). It is only once both sides acknowledge those cultural differences that they will be able to move past them and to seek common ground. Given the current state of international affairs, redesigning the laws of war to appeal to the inherent structure and incentives of professional armed forces is a Herculean task—as Beer wisely posits, it can only be accomplished with the consent of both those who pull the trigger and those representing the civilians caught in the crossfire. As the pendulum of international relations has swung far to the side of State sovereignty, is meaningful compromise achievable in today’s world? Beer has valiantly made the case for re-examining some of the key presumptions underlying the international law governing warfare through his book.

¹⁹ *Ibid.*, p. 10.