Book Review
War

—Atul Alexander and Sanyam Jha*

Book: *War* **Author:** *Andrew Clapham* **Year:** *2021* **Format:** *Digital*
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The book 'War' authored by doyen Professor of International Law at the Graduate Institute of International and Development Studies in Geneva, Prof. Andrew Clapham, provides an accurate picturisation of the concept of war and its application. The book opens up the multi-faceted dimensions of war and its conception in terms of rights and obligations in national and international law. A minute analysis of the book reveals that the author has espoused the idea of outlawing war by a detailed reference to international legal instruments.[1] However, the paradox is, as the author puts it, States no longer declare war yet claim belligerent rights to acquire territory and neutral ship, and, in fact, war has survived when it should have been buried.[2] One of the fundamental questions the author attempts to advance in the book is whether claiming war gives anyone the license to kill and destroy things.

The first chapter of the book discusses the multiple meanings of 'war'. According to the author, the term 'war' assumes meaning according to the context it is used in. For instance, a state of war exists only if States recognise each other. Furthermore, its invocation is necessary for fixing environmental liability in times of armed conflict, and enforcement of contract depends on the existence or absence of war. Moreover, the concept of war varies in national and international settings. Despite providing myriad instances on the application of war, the author does not provide a straightjacket definition of 'war'.

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1 Geneva Academy, 'New Book by Professor Andrew Clapham Examines how the Concept of War Affects the Application of the Law' <https://www.geneva-academy.ch/news/detail/455-new-book-by-professor-andrew-clapham-examines-how-the-concept-of-war-affects-the-application-of-the-law> accessed 15 November 2021.

2 Andrew Clapham, War (Oxford University Press 2021) 513.

Further, the author traces the evolution of the concepts of 'war' and 'just war'. While in this section the author cogently frames an understanding of war as conceptualised in Hinduism and the Roman era, one facet not revealed fully is the meaning of war in Islam. The author covers the nooks and crannies of the Roman practice of just war and pious wars. The author amplifies the scope of just war from a western standpoint, while referring to the works of Francisco de Victoria and Francisco Suarez.[3]

The author could have problematised the influence of religion in the evolution of 'war'. Notwithstanding, the author presents an expansive commentary on the evolution of 'just war', as put by Markram Abbes –

> *"..although it is based on the numerous works of research that compare jihad and just war, this contribution takes as its starting point the criteria of just war as they have been formulated in the Western tradition".*[4]

Chapter 2, titled 'Declarations of War and Neutrality', discusses the copious positive law instruments and the ancient practice of declaration of war.[5] According to the author, unlike the modern era, war in ancient times existed in the absence of any formal declaration and the authority to declare war differed from nation to nation. The second part of this chapter presents an exhaustive scrutiny into the concept of 'neutrality' in war. It offers a fresh approach to the concept of neutrality in international law as this lacks any comprehensive treaty or judicial decision, albeit some major contentions on 'neutrality' are left open to the readers.[6]

Chapter 3, titled 'Outlawing War', traces the various legal instruments which have outlawed 'war', such as the Hague Convention II, 1899,[7] and the Drago-Porter Convention, 1907 (which nullified debt as a justification for the 'use of force').[8] However, it was the Covenant of the League of Nations, 1920, which formally codified the procedure to be complied with before states could take recourse to war.[9] Yet, as the author puts it, the League of Nations system

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[3] For a detailed exposition on the Christian just war tradition and the contribution of Francisco de Vitoria and Francisco Suárez, See Melvin Endy, Francisco de Vitoria and Francisco Suárez on Religious Authority and Cause for Justified War: The Centrality of Religious War in the Christian Just War Tradition (essay), 2018, Journal of Religious Ethics.

[4] Makram Abbès, 'Can We Speak of Just War in Islam?', [2014] 35(2) History of Political Thought.

[5] Clapham (n 2) 41.

[6] ibid 41-79.

[7] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.

[8] Drago-Porter Convention, 1907 <ihttps://encyclopedia2.thefreedictionary.com/Drago-Porter+Convention+1907> accessed 19 November 2021.

[9] Art 12 of the Covenant of the League of Nations reads as: "The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they

faltered because the sanctions were ineffective and failed to outlaw measures short of war.[10] Although subsequently, the Kellogg-Briand Pact, 1928 outlawed war as a national policy,[11] the author observes, there was no mechanism for settling disputes in the pact.[12] The author sums up the development on the outlawing of war in the pre-charter era clearly by stating that "between 1816–1928 and 1929–1948, the average amount of land that was permanently seized each year declined by 86 per cent. After 1948, it fell another 59 per cent."[13] In a sense, the author's understanding is that the development in the pre-charter era set the ball rolling in outlawing the war in the subsequent years.

Chapter 4, titled 'The Use of Force after the UN Charter', demystifies the contours of the phrase 'use of force', coupled with the shift in nomenclature from 'war' to 'use of force'.[14] In providing clarity as to the contents of 'use of force', reference is made to the term 'armed attack'. Further, the author lays out a detailed account of the tests developed by the International Court of Justice (ICJ) to shed light on the modern approach to 'armed attack'.[15] In the second section of this chapter, the author opens up the debate on the exception to the use of force, i.e., self-defence, authorisation of United Nations Security Council ('UNSC'), and invitation of other governments. While discussing self-defence, the author contends that the elements of self-defence viz necessity and proportionality apply to individual acts in self-defence and not to the overall level of what is needed to win the war.[16] According to the author, the authorisation of the UNSC to deploy force is only to the extent of maintaining peace and not to the destruction of the State.[17] Invitation of other Governments, albeit an exception to the use of force, can trigger an armed attack if assistance is provided to the non-state actor fighting in the internal armed conflict.[18] However, mere supply of funds or training would not constitute self-defence.

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agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute."

10 Clapham (n 2) 96.

11 The Kellogg-Briand Pact, 1928 <https://history.state.gov/milestones/1921-1936/kellogg>accessed 20 November 2021.

12 Clapham (n 2) 105.

13 ibid 117.

14 In addition, the practice of art 2(4) in international law is summed up in Michael Wood, 'International Law and the Use of Force: What Happens in Practice?' Indian Journal of International Law 53 (2013).

15 Clapham (n 2) 128; *Nicaragua v United States of America*, 1986 ICJ 14.

16 Clapham (n 2) 142.

17 For instance, reference could be made to United Nations Security Council Resolution 678, the language of the resolution authorizes the UN Member States "to use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area." The purpose of the resolution was to restore peace and security and destruction of Iraq under the auspice of 'use of force'.

18 Clapham (n 2) 154.

The subsequent section outlines the crime of 'aggression'.[19] During the First World War, aggression was viewed from the prism of 'waging war'. Further, the crime of aggression is also identified by its gravity and scale. In defining 'aggression' under the Rome Statute of the International Criminal Court, the author criticises its 2010 Kampala Amendment of the Rome Statute.[20] The author lists out the following shortcoming regarding the crime of aggression: "First, the need to find a manifest violation of the Charter rules out clearly lawful uses of force in self-defence, or force authorized by the UN Security Council under Chapter VII. Second, mistakes and minor incidents involving any of the enumerated acts would not normally qualify as crimes of aggression due to the qualifier that the act through its 'character, gravity and scale, constitutes a manifest violation of the Charter'. Third, the definition refers to the 'use of armed force' and makes no mention of the 'threat' of force, which is separately outlawed under the UN Charter. So a simple threat of force, including even a Declaration of War, would not qualify as the crime of aggression under this definition. Fourth, the crime is limited to certain leaders of states, those 'in a position effectively to exercise control over or to direct the political or military action of a State."

The final segment of the chapter covers the recently developed concepts of humanitarian intervention and responsibility to protect. The conversation on humanitarian intervention is split as countries such as the United Kingdom ('UK') have backed for its customary international law nature;[21] however, only a handful of states have endorsed humanitarian intervention.[22] On the other hand, the responsibility to protect emerged as a reaction to the failure of the international community to prevent the Rwanda Genocide. It was later endorsed by the International Commission on Intervention and State Sovereignty ('ICISS'), as the sovereign is responsible towards its people, and hence the principle of non-intervention has to yield to the population suffering serious harm.

The fifth chapter deals with the formal institution of the Declaration of War when specifically provided for in the country's constitutional framework. The Declaration of War has been a pre-requisite as per the Hague Convention III relative to the Opening of Hostilities, 1907[23] ('Hague Convention III') to warn the other side.[24] However, in the absence of any United Nations ('UN') authorisation or of an armed attack, a Declaration of War involving a direct threat of

[19] For the definition of crime of Aggression see UNGA Res 3314 (XXIX) (14 December 1974).

[20] Clapham (n 2)158.

[21] Edward Newman, 'Exploring the UK's Doctrine of Humanitarian Intervention' International Peacekeeping (2021).

[22] Azerbaijan 'Baku Non-Aligned Movement Summit: a Chance for a Reboot' <https://azertag.az/en/xeber/Baku_Non_Aligned_Movement_Summit_a_chance_for_a_reboot-1315489> accessed 28 November 2021.

[23] *The Hague Convention (III) of 1907 Relative to the Opening of Hostilities*, 1915.

[24] Clapham (n 2) **169.**

force becomes a violation of the UN Charter.[25] Therefore, there have been rare instances of Declarations of War. The author then delves deep into the constitutional role of the Congress of the United States of America ('US') in declaring war and the President's power in the same. Outlining the provisions of the US Constitution, there is a deep discussion on the power symmetry regarding who can declare war in the first place. Post-1942, there has been no declaration of war by the US. Its campaigns in countries like Libya have been given either statutory authorisation or declared as no active state of war. Further, there are the binding provisions of the US War Powers Resolution 1973, setting a 60-day cap on the President exercising military powers to protect the nation's security.[26] This chapter also draws insights from other nations, specifically the UK, analysing their parliamentary functioning and mandate when it comes to war or active conflict, primarily drawing the conclusion that democratising the decisions of war have been kept on the back burner in most nations.

In the second half of the fifth chapter, the author details legal effects in the national law of declared war. He criticises the procedural incapacity of enemy aliens to sue in UK courts.[27] The definition of "enemy alien" has been questioned with the judicial precedent allowing to treat even a UK national voluntarily residing in an enemy nation as an enemy alien. An analogy has then been drawn with the US where the enemy alien would also suffer such legal paralysis disabling them from approaching courts as per the Alien Enemy Act, 1798.[28] The chapter further deals with the nuances of trade with enemy nations and treason before drawing a cautionary conclusion about the lack of democratic values in case of war declaration.

The sixth chapter examines the International Law of Armed Conflict and its application to the actual conduct of war. To distinguish what exactly entails a condition of war so as to trigger international law, the author has analysed them under seven different heads. The first is declared wars, where the author has given an overview of why nations have actively avoided designating conflicts as wars to avoid triggering international legal obligations. Examining the Geneva Conventions of 1949, the author finds that the threshold to treat a conflict as war has been extremely high. In case there is a doubt in the legal-technical sense as to whether the situation is a war or not, the answer has been sought to be negative rather than affirmative. The author concludes that laws of armed conflict can only be invoked in an actual conflict between states rather than a supposed declared war. When analysing armed conflicts between states, the author has discussed the

[25] ibid.
[26] Clapham (n 2) **175.**
[27] Clapham (n 2) **194.**
[28] Clapham (n 2) **200.**

universal application of the Geneva Conventions.[29] The question analysed here is simply what the threshold of application of law is in such a situation.

The author draws inferences from the Geneva Convention to conclude that the threshold lays extremely low. If two nations intend to engage in armed conflict, the provisions of humanitarian laws apply – this has been concluded from the analysis of Article 2 of the Geneva Convention. Further, the author analyses Article 42 of the 1907 Hague Regulation to define armed resistance by government forces to an occupation by another as an international armed conflict.[30]

In the second half of the chapter, the author has analysed provisions for recognised belligerency when states go into conflict with groups rather than states. The author has extended the application of recognised belligerency to Wars of National Liberation under Additional Protocol I and finally has dealt with non-international armed conflict. Finally, the author analyses how the UN Peacekeeping Force or other such intergovernmental forces cannot be bound by humanitarian law and fall under the law of armed conflict.

The seventh chapter analyses the idea of conduct of hostilities. The author argues that generally, if an activity is outlawed, such as slavery, all ancillary laws relating to slavery should also fall, such as contracts for slavery. However, when it comes to war, even though the act of war has been outlawed, the conduct of war remains to be an important consideration considering nations still engage in war or warlike activities. The first in-depth analysis is of the role of combatants and the idea of them having the 'license to kill'.[31] The author has argued that the immunity combatants enjoy in killing enemies should also be extended to rebels. However, the author draws the conclusion that, as per human rights, any killing has to be a necessity. Arbitrary killing has no legal recognition. This concept has been applied to combatant immunity, and the author goes into an analysis of its implications.

Further, there is an extensive analysis of the distinction between military and civilian objects as per the Additional Protocol I. The author has referred US Commander's Handbook on the Law of Navy Operations to determine the valid distinction to describe the variety of opinions on the same. The author has gone into an analysis of necessity concerning various applications. Necessity has been rejected in submarine warfare against merchant ships, and the author has called upon documents such as War Order 154 to analyse the prospective ideas.[32] Further, the author talks about weapons of war, analysing provisions from

[29] International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land,* art 42, 18 October 1907.

[30] Clapham (n 2) 246.

[31] Clapham (n 2) 262.

[32] Clapham (n 2) 308.

the Chemical Weapons Convention, 1993 and Treaty on Prohibition of Nuclear Weapons to distinguish permissible and non-permissible weapons under the international legal framework.

The eighth chapter analyses the belligerent rights and the prospective future of naval economic warfare. The idea of economic war and established belligerent rights propounded by strong naval states seem asymmetric in a world where war has been outlawed. The author analyses the concepts of Angary, Booty, Bounty and Prize. The author has analysed the legality of blockade comprehensively, arguing that justification has to flow from the UN Charter to gain legal recognition, taking examples from 1999 Kosovo and Yugoslavia. The author has referred to restrictions by the UN Group of Eminent Persons concerning the blockade of Yugoslavia.[33] The author has further argued the idea of economic warfare in the paradigm where wars are outlawed as an absurd ordeal.[34]

The ninth chapter analyses the Geneva Law with respect to victims of war. The author has stressed the need to treat international and non-international conflicts separately for victims of war. The author also draws distinctions for protected persons and properties in armed international conflict. The International Committee of the Red Cross ('ICRC') has access to these protected persons almost universally. In international armed conflicts, protection is provided for medical personnel, equipment, the wounded, the sick and the shipwrecked. The protection offered to prisoners of war arguably extends only to inter-state armed conflicts as per the third Geneva Convention, which deals with the treatment of prisoners of war.[35] Further, the protection of civilians either on enemy territory or on unoccupied territory has been analysed as per the Geneva Convention provisions. The author has highlighted the extreme roles of ICRC in cases of non-international armed conflicts and the uses and misuses of emblems as per the additional protocol I.

The tenth and penultimate chapter deals with accountability for violations of the laws of war. The chapter starts with an overview of the First World War, where the idea that loser pays was first practically upheld. Post the First World War, the victors of war not only imposed fines and liabilities but were supposed to conduct trials. However, political hesitance did not let that happen.[36] On the other hand, the Second World War was concluded by conducting the Nuremberg Trials in order to avoid a situation similar to the treaty of Versailles. There is a question as to the right of individuals to claim compensation in contemporary times. This comes in the most considered form in the

[33] Clapham (n 2) 371.
[34] ibid.
[35] 'Geneva Convention Relative to the Treatment of Prisoners of War', August 12, 1949, 75 UNTS 135.
[36] Clapham (n 2) 444.

International Law Association's Declaration of International Law Principles on Reparation for Victims of Armed Conflict, 2010.[37] Article 6 of the said declaration states, "Victims of armed conflict have a right to reparation from the responsible parties."[38] Finally, the author has analysed the provisions and standings of the UN Compensation Commission and draws an analogy with the Eritrea-Ethiopia Claims Commission. The author has dissected the deeper functioning of Nuremberg and Tokyo Military Tribunals and draws parallels in both cases.[39] War Crimes and grave breaches have been laid down in Geneva Conventions and Protocol I.[40] The author has quoted the provisions to dissect the functioning of the convention and accountability measures, though the author propounds a clearer division of war crimes. The author interprets provisions of genocide and belligerent reprisals individually to conclude that a clearer distinction between international and non-international conflicts is necessary for a safer and more transparent accountability mechanism.

The book stands out as it comprehensively focalises on the legal dimension of war, whereas previous writings on war have covered its application in terms of policy instrument, rationalising planning and conduct of hostilities. Professor Clapham explains, "The point I want to highlight is that old ideas about what is permissible in war have survived when many of them should have been buried along with the legal institution of War". This is, in fact, true, mainly in the aftermath of 9/11, with states discovering exceptions to engage in hostilities. It is indeed worth recollecting that scholars have agreed that the book

> "*is a kind of modern encyclopedia on law and war, bringing new research, sources and perspectives to the table, analysing case law and drawing on political speeches, literature, memoirs and film. At the same time, the disparate strands of analysis are skillfully brought together to provide an overarching evaluation of the legal consequences of a state of war in modern times.*[41]"

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37 Clapham (n 2) 447.

38 ibid.

39 Clapham (n 2) 477.

40 International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

41 http://opiniojuris.org/2021/11/01/conversation-on-war/.