Moderator: Welcome to the Western Way of War, a weekly podcast that tries to understand the issues around how to fight and succeed against adversaries in the 2020s. I'm Peter Roberts, Director of Military Sciences at the Royal United Services Institute on Whitehall, and every week I talk to a guest, posing a question that seeks to enlighten us about the western way of war. Does it remain fit for task today, and how might it need to adapt in the future? The podcast is kindly sponsored and enabled by the good people at Raytheon UK, a subsidiary of Raytheon Technology, a British company that creates jobs in England, Wales and Scotland, contributing over £700 million to the UK economy. Over the past 40 shows, many of our guests have hinted at changing legal frameworks in warfare, and we've also had some discussions about the contrasting moral values between the west and competitors. Yet all of these discussions seem to have been almost passing comments, rather than the more substantive discussion that such musings deserve. I really wanted to get at this issue, our moral compass, in order to trigger a better conversation within national security about legal, moral and ethical dilemmas in conflict, but also in how these interact with adversaries, who hold different values and will not necessarily abide by our norms and behaviours.

There are lots of people who could have helped us through this, but only one who is properly qualified and accessible to the likes of you and me, dear listener. Professor Janina Dill is the John G Winant Associate Professor of US Foreign Policy at the Department of Politics and International Relations at the University of Oxford. She is also a Professorial Fellow at Nuffield College and Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict. Her research concerns international law and ethics in international relations, specifically in war. Janina investigates how legal and moral imperatives interact with strategic thinking and technological developments to explain conduct in war and the development of armed conflict. Several of her current projects investigate the role of legal and moral principles in informing mass attitudes towards war. Her first book, Legitimate Targets? Social Construction, International Law and US Bombing, appeared in 2015. It was runner-up for the Birks Prize for Outstanding Legal Scholarship of the Society of Legal Scholars in 2016, and it's received an honourable mention by the Theory Section of the International Studies Association. Janina's second, co-authored, book, Law Applicable to Armed Conflict, appeared with Cambridge University Press in 2020. It proposes a moral division of labour between human rights and humanitarian law and examines under what empirical circumstances each body of law should prevail over each other. There ain't nobody better to help us dig into this topic a bit. Janina, welcome to the show. I'd like to start by asking this first question, which helps us all situate you in our wider conversation, what does the western way of war mean to you?

Janina Dill: Thank you, Peter. Thank you for the kind introduction and for the invitation to come on the programme. I'm afraid I'm going to start off on somewhat of a heretical note, in the sense that, from the point of view of research, it isn't entirely clear to me that there is such a thing as the western way of war. If we think about the question how law and morality affect how wars are conducted, and affect how soldiers perceive their tasks and how the public perceives war-making, then I would propose to you that there isn't
enough that all western militaries have in common, that also jointly distinguishes them from non-western militaries and from non-western populations, to say that there is such a thing as the western way of war. The contemporary law of armed conflict originates in the west, it takes its roots in medieval Christian just war theory, but if we just take a snapshot, or look at the contemporary reality as we find it, then it seems to me that there's too much heterogeneity in how western militaries operate under the law and with moral imperatives, and how publics perceive warfare, and there's quite a lot that some western militaries have in common with some non-western militaries. Would you like me to give you some examples?

Moderator: Yes, can you really? I think what's fascinating is how you frame that. Everything that we've heard so far in many of our conversations over the past 40-odd episodes is all about the just war is owned as a theory by the west, is the way we perceive it. You challenge that in a brilliant way, so can you please do some illustrations for me?

Janina Dill: Yes, let's start with how soldiers draw on law and morality to do their jobs, so to speak. I've done interviews with soldiers in 4 countries, in the US, the UK, in Israel and in Afghanistan. We would expect there to be a lot of commonalities between British and American soldiers. There's obviously cross-fertilisation in military culture, there's a lot of coalition warfare, and nonetheless, there are meaningful differences in how British and American soldiers report what law and morality mean for them and how they use legal concepts to do their jobs. One of the things that is quite prevalent in the British armed forces is worries about human rights law, particularly in detention contexts, but also in the context of the conduct of hostility. This is not something that American soldiers worry very much about, this has to do with a different position that the United States takes on the applicability of human rights law, but it also seems to be a cultural matter to some extent. Another example, and quite a different example in some ways, is that British soldiers talk a lot about the common law right to self-defence that they carry with them into the context of hostilities. That is something that is fairly alien to many American service members, where there are obviously ideas about defending the troops, defending yourself, force protection, but there's simply not this idea of a common law right to self-defence that adheres to you.

When I did interviews with Afghan military practitioners, particularly Afghan military lawyers, in 2015, their questions towards the law and their concerns actually evoked quite a lot of the questions that British soldiers had around human rights law. 'How do we protect civilians? How do we do justice to the individual civilian in urban warfare?' That reminded me quite a lot of the interviews I did with British service members, more so than maybe the interviews I did with American service members. Then there's the IDF. There's first the question, would you consider them a western military? In some ways, the very concept of a western way of war requires some amount of deconstruction of where we draw the line, but the IDF is special in many different ways. On some sense, it's special in the sense that fairly sophisticated legal knowledge goes further down the chain of command than I've encountered elsewhere. IDF members of lower military ranks have not only a lot of training in law, but are also very well-versed in using legal arguments. How they use them and the practices that attach to these legal arguments, so the way in which law is implemented, often pushes the boundary of what I would consider to be compliant conduct. In some ways, there are certain practices in the IDF that push the boundaries of law, and at the same time, legal discourse is, if anything, even more omnipresent in the military ranks than in other western militaries. All in all, there is a lot of heterogeneity in how soldiers in western armed forces think about law and how they take law with them on the battlefield, and then there are commonalities between non-western soldiers and non-western military lawyers, like in Afghanistan and those in western military forces.

Moderator: I love the way you've explained that. This just reinforces to me the importance of the armed forces engaging with research. I have never come across, in all my work with the US, this idea of a differentiation in self-defence, because we've never really discussed it. At (mw 08.25), we understand what force protection is, we understand what self-defence is, or we think we do, the Caroline case, we understand proportionality, we understand how we and they would react, we think, and yet, we've never
gone into this detail before, we've never really grasped this. I hadn't picked up the nuance. I think I might have done in Afghanistan, but certainly not with the IDF, which I think is fascinating. The question for me is, why do you think these pieces of differentiation have come about? Is it because of legal frameworks? Is it something more cultural? Is it something of a history? Have these evolved from recent experiences in conflict and interventions?

Janina Dill: I think all of the above is the right answer. The countries that we're talking about here take slightly different positions on certain legal questions, and that filters down into how military lawyers make decisions and that filters down how soldiers are trained. The issue of human rights law, for instance, is one that we can trace back to the fact that, even though this is changing now, the US has for a long time very openly resisted the applicability of human rights law to active hostilities, particularly to combat operations. Here, it's clear where this is coming from, but I think there is more complexity here that we can talk about. The organisation of militaries matters, for sure. In the IDF, for instance, military lawyers are not integrated into the chain of command, whereas they are in the UK and in the United States. Several of my interviewees have stressed that that gives them more freedom. Some of them have suggested (TC 00:10:00) that it also means it's sometimes harder for them to get heard and to get their point across, so how this cuts exactly, I haven't studied in any detail, but there clearly are organisational differences. Then the type of combat military space and the type of structural complaints on implementing legal demands probably also differs. When talking to Israeli service members, they stress that, unlike the United States, they fight at home. For them, they're not fighting what they call wars of choice. In their view, they’re fighting wars of survival, they’re protecting their own, they’re fighting at their doorstep. These are things that IDF members will tell you and that there's therefore more pressure on how they implement the law, particularly when it comes to a law not always allowing a military to do exactly what it wants. I think there are structural constraints, there are differences in the types of wars these militaries fight, there are organisational differences and there are differences in the legal position from which military lawyers who advise soldiers and advise decision-makers work.

Moderator: That does come back to constitutional rights and enablement of individual armed servicemen. Do you think therefore we could draw some comparisons, for example, Ukrainians might find themselves more aligned, perhaps, in this cultural experience of combat that they've got with the IDF than perhaps they would do with either British or Americans? Do you think that those things might come across?

Janina Dill: I haven’t studied the Ukrainian military at all, so I don’t know exactly where they fall on any of these variables in terms of organisation and culture. One of the conditions of possibility for law to shape conduct on the battlefield is that military decision-makers feel that this is conducive to victory or at least not prohibitive of victory. The type of war that a military is fighting, the type of political goal that actualises victory and the type of chances it stands compared to their adversary, all of this matters hugely in the extent to which militaries draw on law and how they draw on law. In that sense, I would say that possibly a Ukrainian military struggling for self-determination, for self-defence, on their own territory, probably has more in common with the IDF fighting what they call at their doorstep than with the United States fighting in Iraq, but that's a stretch in terms of a comparison.

Moderator: It's drawn out this really important point. We think of the relationship with law through all our professional military education. We teach all our soldiers, sailors, aviators that law is a foundational absolute, that there’s no deviation from it, and yet what you’re explaining is the different relationships that militaries have with it, depending on a number of variables. The type of war you're in, whether it's counterinsurgency or whether it’s high-intensity conflict, whether it's deemed a war of survival, an existential conflict or a war of choice, there are a number of these variables that sit in there that actually should make us doubt our relationship with the law and should allow us to understand that it’s a little bit more nuanced than this absolute that we give it credit for. Is that about right?

Janina Dill: Law is very open-ended. All law is open-ended, even our domestic family law and tort law is open-ended, but the laws of war, some of the crucial principles that we’re operating with are quite indeterminate,
so how they are interpreted is very important for how restrictive they are in terms of conduct. Even one military, like the United States military, will interpret the law slightly different in different theatres of operation and will interpret law slightly differently in one theatre of operation over time. For instance, the rule of proportionality asks you to never cause civilian casualties that are excessive in relation to the definite concrete military advantage of an attack. In my interviews, I heard time and time again that there are really genuine questions about that means, not only what it means to have a concrete and direct military advantage, but also how you weigh that up against the loss of human life, the loss of civilian life. The way in which militaries concretise that in operational law, in rules of engagement and in special instructions, is to put certain thresholds on expected collateral damage. Past a certain number of expected civilian casualties, the authorisation for an attack travels up the chain of command. Where these thresholds are and how high this goes in the chain of command differs over time and it differs across theatres of war and it differs by military. Obviously, most of the time, I’m not being told where these thresholds are, this is classified, for very good reason, but while I think sometimes this (inaudible 15.10) can push the law, the law is open-ended enough, indeterminate enough to require this kind of concretisation in special instructions and to allow different concretisations in different military contexts.

Moderator: I was just reflecting, as you were talking then, about the more I learned about law when I was serving, and you were making operational decisions, made me think about it less as a restriction and more as an enabler to what I wanted to do. The less I knew about it, the more I had regarded it as a restriction. It was tying my hands behind my back, it wouldn’t let me do things. The more you get to grips with the detail, the nuance that sits behind it, you realise that actually there is considerable freedom in there if you want to have it, we just don’t explain it. I wonder if that goes to the centrality of what you’re saying about the IDF, is because on an individual level, they understand it better in many ways because they have to, because they’re under a greater level of scrutiny in their operations, under the media spotlight, that they do understand it better at a lower level. That relates to all this discussion that we have about chain of command, about this decision-making, of proportionality and thresholds, etc., which I think you articulated so well, is giving people a better understanding of law allows them to make better decisions. That surely sits as a common element across all, I would call them, western militaries, which goes against what you were saying right at the start.

Janina Dill: Law is enabling, for sure, otherwise we wouldn’t see the legalisation of armed conflict. Even though the laws of war are very old, it is a fairly recent phenomenon that state militaries train their soldiers in law, that they send lawyers to the battlefield, that they institutionalise legal decision-making in war and that they draw on legal argument publicly to defend both resorting to war and how they conduct wars. That is a contemporary phenomenon. We wouldn’t see this if militaries didn’t find law useful and politicians didn’t find useful to make legal arguments. No one ever looks at law out of disinterested curiosity, the answer that law may give you, ‘Can I do A, or can I do B?’ It is very clear that there is a strategic element and there is a political usefulness, there’s a political utility to making legal arguments about war. That is, to some extent, that law confers legitimacy, that it makes appear something that is brutal and morally problematic as a professional, political endeavour. Law has all of these traits, and I think, to some extent, it has to have these traits, it has to be permissive in order for it to be drawn on in the first place. Someone like me, I worry about this to some extent because I also hope for law to be an instrument of furthering moral values. Not everyone thinks that law should be furthering values in the first place, but personally that is the position I take on law. The fact that law is enabling of violence and war means that any moral conversation we have about war should never be exhausted by us talking just about law, because law does enable violence, it is permissive in some sense.

Moderator: In many ways, you might get people from the Armed Forces saying that your morals forcibly commit you to violence where you believe that something could be done. There is a sort of hierarchy that we’re always trying to figure out over the moral, ethical and legal dilemmas that military units face when they’re on operations. ‘What is right?’ effectively comes out. Sometimes, that’s not supported by law,
depending on your interpretation of it and that subjective, objective chain-of-command, thresholds, and all that sort of stuff. The real foundation has often been called (ph 19.07), for western military action, of the moral and ethical dilemmas that you face, what is right? Trying to breed in to militaries this feeling of moral and ethical values that underpin whatever action they have, how strong do you think those are? You've interviewed 4 militaries, UK, US, IDF and Afghanistan military. Do you think that they have strong moral values? Were there noticeable differences?

Janina Dill: What is true across the board is that soldiers as individuals, so when we're not talking about the institutional level, but we're talking about why individuals draw on law, that it is fairly universal that they do so to protect their moral integrity. People look towards law for answers to their moral and ethical (TC 00:20:00) questions. I think that is legitimate. This is good, this is one of the strongest compliance pulls that law has, if it promises that it can give you the answers to pressing moral questions. From the point of view of a moral philosopher, this is a little problematic because this law permits, or at least doesn't prohibit, many morally problematic actions in law. A perfectly legalised war can still be implying (ph 20.27) a lot of morally unjustified killing. This is why I say that, on some level, it is very important that law has the function and provides that service to people, that it helps them figure out their moral questions and work through very difficult ethical questions that are involved in being a soldier. On the other hand, I think it's not enough. Law can never be enough, in that sense. It can't perform that on its own. I haven't interviewed people about their moral values per se, in these militaries. It's a characteristic that I associate with the American armed forces, that many soldiers will bring up their own values when they talk about their jobs, particularly also religious values, that is often foregrounded by American forces. Again, as just a matter of observation, that hasn't been my experience as much in the British, Afghan or Israeli contexts, that people talk very much in terms of their own religious beliefs. I think religion, personal morality and understanding of what it means to be a professional, and interwoven with all of that, the understanding that we're legally trained, these are ways in which soldiers in these militaries set themselves apart from their adversaries, who they perceive as thugs, criminals, not professional soldiers, not basing their conduct in ethics and law.

Moderator: For those people that you have interviewed and talked to, they come from countries where their moral and ethical frameworks have evolved. It's almost unrecognisable the values and attitudes that a US or a British soldier holds today than they held 70 years ago. They are very different. The law has not evolved at the same rate. In many ways, it's only our interpretation of the law that has changed, but our morals definitely have. Surely that's almost quantifiable?

Janina Dill: It rings true what you say, but I think it rings true because we think of things like culture wars, that our tolerance towards same-sex marriage or gender expression, these things changed very radically, and they have changed very radically over short periods of time. I think when it comes to conduct in war, we are thrown back at questions like when is it permissible to take life, when is violence permissible? While this has also changed over time, I think there are certain fundamental moral questions about that that also transcend time. When is it ever justified to use violence to further a political aim? That question has existed for a long time, and our answers to it may differ over time, but the parameters within which we ask that question are fairly stable, I'd say. That being said, there are pressure points on the laws of war to evolve with the times, and the introduction of human rights law into questions about how we fight wars is an expression of changing morals over time, I would submit to you. Human rights law has much more of an aspiration to do justice to the individual qua individual. It's the idea that there are certain rights that are inherent in you as a person. It's less collectivising than the laws of war.

The laws of war are comfortable dividing a society into civilians and combatants and your status and what comes to you is a matter of which group you are in, it isn't immediately a matter of your moral liability or desert. Even your conduct only has limited implications for whether you're a civilian or whether you're a combatant or whether you're immune from attack or not under the laws of war. There's a collectivising element in the traditional law of war, and we have, particularly in the west, but this is, I think, a broader
phenomenon, undergone something that I would call a moral individualisation, where we think that each individual has a right to self-realisation and that mostly we should be treated according to what we are morally deserving of. I think that very broad and subtle cultural shift towards individualisation is related or is in some ways a causal driver for the introduction of human rights law into questions about how we should fight wars.

**Moderator:** You're just going to have to unpack that for me, just a little bit, the moral individualisation of law.

Janina Dill: Basically, the individualisation is a broader phenomenon. It's not just of law or of war. We associate this with the west, but there are some studies that suggest this is simply a phenomenon of the 20th and 21st century, that across different cultures and contexts, we think that what happens to individuals should be determined by how they conduct themselves, by their own moral status, by what they deserve, by what they are liable to. A de-collectivisation. We treat individuals according to what they deserve, not according to their membership in a group, be it their nation or their tribe or their religion or their family. We want to do justice to the individual. That's a very broad, and in some senses subtle, but quite a fundamental moral shift over the last 50 years or so. I propose in my research that that shift is visible in war, and particularly in how we parse war ethically and legally. The laws of war are collectivising, they don't treat each individual as an end in itself. You're a civilian or a combatant as that status was given to you by your state, end of story. Civilians may be guilty of aiding and abetting an unjust war, combatants may be conscripted or forced, and completely innocent, unthreatening, nonetheless, they're treated as combatants, civilians are treated as civilians under the law. That collectivising element is somewhat or out of touch with this individualising trend. Human rights law takes care of that to some extent, because human rights law demands that we treat each individual according to their conduct.

Under human rights law, you really can only ever harm a person if they are threatening, not just because they are a combatant. That individualising element is what gives normative appeal to human rights law, and I think that has fuelled the introduction of human rights law into questions of how we fight wars. If you had asked someone 25 years ago whether we should be under an obligation to deliver human rights in war, they would have not really understood what you're saying, because obviously we have the laws of war, and you're either a civilian or a combatant, and that determines your status in war.

**Moderator:** This idea of laws codifying greater behaviours that's come out through human rights law as a reflection of how societies now understand rights and enablements of individual people, do you see this being reflected as a greater willingness to almost take on new laws, to try and increasingly govern behaviours, not through a change in ethical understandings and frameworks, but through the codification of actual behaviours demanding that these things happen? Do you see human rights law being the first in what might be an increasing pace of international law for armed conflict?

Janina Dill: No. I think human rights law and the arguments that we should obey it even in war is a reflection of the underlying moral shift. There is a demand for legitimacy. Politicians who start wars, soldiers who fight wars want to be perceived as legitimate. The world has an unprecedented view onto the battlefield, it has an unprecedented view onto civilian suffering, onto the devastating consequences of warfare. How do we meet the demand to be perceived as legitimate? We, in some ways, have to addresses the moral concerns that people actually have. As these moral concerns shift towards the idea that each individual has a right to life, each individual is an end in itself, we shouldn't just collectivise the civilians of Iraq as one mass of people and not care about the individual, this is simply a moral shift. The fact that we, in response, make arguments about human rights law, that we claim we're going to endeavour to uphold the human rights of these people, is simply a reaction to the fact, the notion that we treat them as civilians and that's it, is just not enough. This is the argument that I make in my book, that basically true legitimacy in the 21st century means in some ways doing justice to the individual. There's a limit to how much we can collectivise human beings. If we want to be perceived as legitimate in the conduct of war, then in some ways, human rights law provides
answers that humanitarian law doesn’t. It has huge complications attached to it, I’m quite worried about some of the implications as well, but in the first instance, introducing human rights law into the conduct of war isn’t some kind of bureaucratic overreach of lawyers gone wild, it is simply responding to the demand of legitimacy in the 21st century, which the laws of war themselves on their own cannot meet.

Moderator: There is something that says we can do this individualisation, of civilians particularly, in conflict, where we're talking about very limited acts of aggression. A drone strike which hits a wedding, for example, you can personalise that. You can understand the individual implications of how that happens. You can separate it from the collective. (TC 00:30:00) That doesn't work where you're engaged in a conflict where something is significantly larger, where you have very large numbers of warring parties. Then, breaking and individualising the collective is an impossible task, even with AI computers and singularities working for you, not even the decision-making, but just the number of potential targets and incidents that you’re dealing with means that that's almost an impossible ask, isn’t it?

Janina Dill: I entirely agree, and that's where I said my worries come in. Drone strikes outside areas of active hostilities are really a phenomenon of attempting to individualise war. It's the American President saying, 'We're not even waging war against a country, we're waging war against a particular individual, and trust us, we have determined that individual is guilty, they are an imminent threat. We can take out that one person. We're not even waging war against the country. The country is consenting to us doing this.' This is the case par excellence of individualised war. In that instance, I think actually human rights law is the appropriate framework of governing violence, and in some ways I think we need more restrictions on that, drone strikes outside areas of active hostilities. In my book, I argue that appropriate moral division of labour between human rights and the laws of war is that, past a certain level of intensity of warfare, the laws of war should take over. I worry that if we attempt to individualise warfare in all-out highly intense conflict, it could have morally perverse consequences. Human rights law asks you to make judgements about individual threat, about mental states of the people that you have in front of you. I don't think soldiers can actually do that in war, and if they are invited to do it, I think it could just be more enabling and less restraining than the laws of war. I agree that, in some ways, in different empirical contexts, in different types of wars, different law can be morally appropriate, and I think in very intense war, attempting to de-collectivise and to individualise conduct in war can be problematic, morally speaking.

Moderator: Janina, we’ve run out of time, unfortunately, because I could talk to you about this forever. For our listeners, if you've not got a copy of Janina’s books, they're available at all good bookshops, on Amazon and elsewhere, please do look them up, because it's almost your duty as a member of the profession of arms to engage with this topic. I'd like thanks the producers, Peppi Vaananen and Kieron Yates, and our sponsors, Raytheon UK. I'd also like to thank you, the listeners, who've provided some really useful feedback. I am somewhat behind in responding to many of you. I apologise. I will get to each of those kind emails and letters, and the abusive ones, but it's taking a while to get through them right now. Finally, I'd like to take this opportunity to remind you that RUSI is a membership organisation and a charity. We receive no core funding from the UK government, and we can't legally make a profit, so you know that every penny of your membership is spent on improving the level of debate in defence and security in the UK. Members effectively fund our work, allowing us to challenge the orthodoxy of military thinking and decision-making, whilst gaining benefits from our insights that can put them, as members, ahead of their peers. If you consider yourself connected to the profession of arms, you might consider becoming a member. Details are at rusi.org/membership. If you need an independent view on that, RUSI won the Prospect magazine Think Tank of the Year for this year. Recommendations don’t come better than that. Thanks for listening.