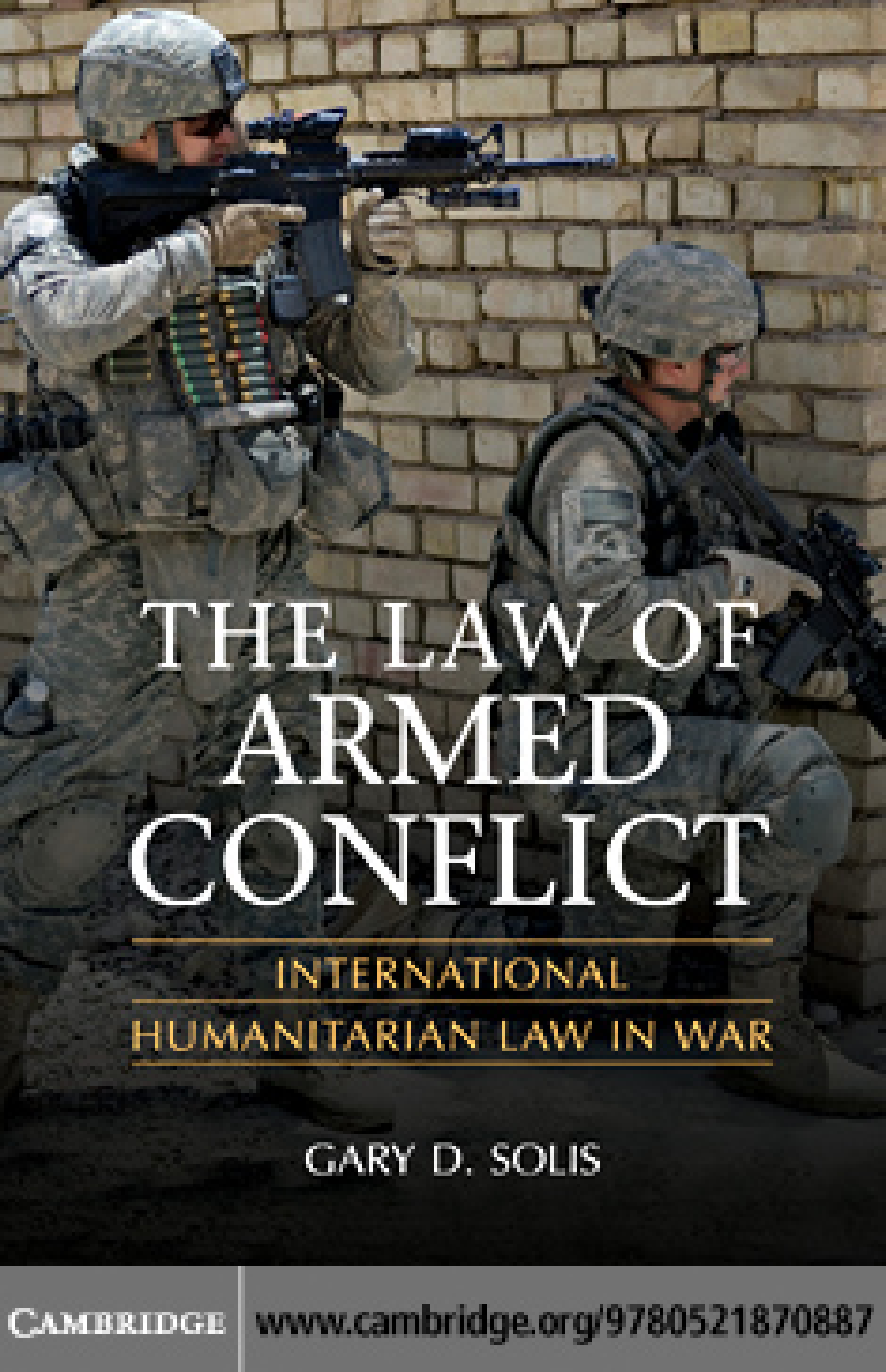

THE LAW OF ARMED CONFLICT

INTERNATIONAL HUMANITARIAN LAW IN WAR

GARY D. SOLIS

CAMBRIDGE www.cambridge.org/9780521870887

This page intentionally left blank

THE LAW OF ARMED CONFLICT

The Law of Armed Conflict: International Humanitarian Law in War introduces law students and undergraduates to the law of war in an age of terrorism. Which law of armed conflict (LOAC) or its civilian counterpart, international humanitarian law (IHL), applies to a particular armed conflict? Does that law apply to terrorists? Can terrorists be obliged by the international community to abide by that law? What is the status of the participants in an armed conflict? What constitutes a war crime? What (or who) is a lawful target and how are targeting decisions made? What are "rules of engagement" and who formulates them? Which weapons are unlawful and what renders them such? What is the status of land mines, cluster munitions, and white phosphorus in LOAC, in international law, and in American law? This book takes the student through these LOAC/IHL questions and more, employing real-world examples, moving from the basics to the finer points of battlefield law. The book is a United States–weighted text that incorporates lessons and legal opinions from jurisdictions worldwide. From Nuremberg to 9/11, from courts-martial to the U.S. Supreme Court, from the nineteenth to the twenty-first centuries, the law of war is explained, interpreted, and applied.

Gary D. Solis is a retired Professor of Law of the United States Military Academy, where he directed West Point's Law of War program for six years. He was a 2007 Library of Congress scholar in residence. He is a retired U.S. Marine Corps Lieutenant Colonel, having twice served in Vietnam, where he was a company commander. He holds law degrees from the University of California at Davis and George Washington University. He has a doctorate in the law of war from the London School of Economics and Political Science. He currently teaches the law of war at Georgetown University Law Center and the International Institute of Humanitarian Law in Sanremo, Italy. His books include *Marines and Military Law in Vietnam* (1989) and *Son Thang: An American War Crime* (1997).

The Law of Armed Conflict

INTERNATIONAL HUMANITARIAN LAW IN WAR

Gary D. Solis
United States Military Academy

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521870887

First published in print format 2010

ISBN-13 978-0-511-71761-1 eBook (Adobe Reader)

ISBN-13 978-0-521-87088-7 Hardback

Contents

Table of Cases *page* xv
Table of Treaties xxi
Foreword xxv
Preface xxix
Acknowledgments xxxi

LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR

1. Rules of War, Laws of War 3
1.0. Introduction 3
1.1. The Law of War: A Thumbnail History 3
1.1.1. The First International War Crime Prosecution? 6
1.1.2. The Emergence of Battlefield Codes 7
1.2. Why Regulate Battlefield Conduct? 7
1.2.1. Difficult Issues 10
1.3. Sources of the Law of Armed Conflict 11
1.3.1. Custom 12
1.3.2. Treaties 14
1.3.3. Legislation and Domestic Law 15
1.3.4. Judicial Decisions 15
1.3.5. Publicists 17
1.4. The Language of the Law of Armed Conflict 20
1.4.1. "The Law of War" or "The Law of Armed Conflict"? 20
1.4.2. International Humanitarian Law, and Human Rights Law 22
1.5. Summary 26
Cases and Materials 27
Hellenica, Book II, by Xenophon 27
The 1474 Breisach Trial 28
United States v. Plenty Horses 30
In Re *Göring and Others* 34
Prosecutor v. Kupreškić, et al. 36

2. Codes, Conventions, Declarations, and Regulations 38
2.0. Introduction 38
2.1. A Basic Rule of Warfare 38
2.2. Francis Lieber 39

2.3. Writing the Lieber Code 39
2.3.1. The Combatant's Privilege 41
2.3.2. Parsing the Lieber Code 42
2.4. Lieber's Legacy 46
2.5. A First Geneva Convention 46
2.5.1. A *Memory of Solferino* and the International Committee of the Red Cross 47
2.5.2. The 1864 Geneva Convention 48
2.6. The 1868 St. Petersburg Declaration 49
2.7. The 1899 and 1907 Hague Peace Conferences 51
2.7.1. The First Hague Peace Conference 51
2.7.2. The Second Hague Peace Conference 53
2.7.3. Parsing 1907 Hague Regulation IV 54
2.7.4. Parsing 1899 Hague Declaration 3 55
2.7.5. The Peace Conferences' Legacy 56
2.8. Summary 57
Cases and Materials 58
The Trial of Captain Henry Wirz 58
The Court-Martial of General Jacob H. Smith 63
United States v. Pvt. Michael A. Schwarz 65
United States v. Major Edwin F. Glenn 67

3. Two World Wars and Their Law of Armed Conflict Results 73
3.0. Introduction 73
3.1. The 1906 Geneva Convention 73
3.2. World War I (1914–1918) 73
3.2.1. The Leipzig Trials 75
3.3. The League of Nations 76
3.4. The 1928 Kellogg–Briand Pact 77
3.5. The 1929 Geneva Conventions 78
3.6. The Spanish Civil War (1936–1939) 79
3.7. World War II (1939–1945) 80
3.8. The 1949 Geneva Conventions 81
3.8.1. A Geneva Conventions Roadmap 83
3.8.1.1. Common Articles 84
3.8.2. Enact Domestic Penal Legislation for Grave Breaches 85
3.8.2.1. Charging One's Own Soldiers: The Uniform Code of Military Justice 86
3.8.2.2. Charging Civilians I: The 1996 War Crimes Act 87
3.8.2.3. Charging Civilians II: The Military Extraterritorial Jurisdiction Act 89
3.8.2.4. Charging Civilians III: Another Route 91
3.8.3. Search Out and Try Grave Breaches: *aut dedere aut judicare* 91
3.8.4. "Grave Breaches" 93
3.8.4.1. Crimes, War Crimes, and Grave Breaches 95
3.8.5. Genocide, Crimes against Humanity, and Crimes against Peace 96
3.8.6. Common Article 3 96
3.8.6.1. Does Common Article 3 Apply? 98
3.8.7. War Crimes in Non-international Armed Conflicts 99

3.8.8. Deciding When Common Article 3 Applies 102
3.8.9. Are the Geneva Conventions "Quaint" and "Obsolete," Requiring Change? 104
3.9. Summary 107
Cases and Materials 109
The Trial of Lieutenant-General Karl Stenger and Major Benno Crusius 109
"The High Command Case," *United States v. Wilhelm von Leeb, et al.* 112
The Trial of Heinz Hagendorf 116

4. Protocols and Politics 119
4.0. Introduction 119
4.1. Why New Law of Armed Conflict? 119
4.2. The 1977 Additional Protocols 120
4.2.1. 1977 Additional Protocol I 121
4.2.1.1. New Grave Breaches in Additional Protocol I 121
4.2.1.2. Advances in Additional Protocol I 122
4.2.1.3. Objections to Additional Protocol I 123
4.2.1.3.1. "CARs" 123
4.2.1.3.2. Modification of POW qualifications 125
4.3. 1977 Additional Protocol II 129
4.3.1. Advances in Additional Protocol II 130
4.3.2. Objections to Additional Protocol II 131
4.4. 1977 Additional Protocols I and II in U.S. Practice 132
4.5. 2005 Additional Protocol III 136
4.6. Summary 137
Cases and Materials 139
The United Kingdom's *Manual of the Law of Armed Conflict* 139
Prosecutor v. Tadić 142
Commentary to 1949 Geneva Convention I 142
Letter of Transmittal: 1977 Additional Protocol II 143

LAW OF ARMED CONFLICT AND INTERNATIONAL HUMANITARIAN LAW: A FRAMEWORK

5. Conflict Status 149
5.0. Introduction 149
5.1. Determining Conflict Status 149
5.1.1. Common Article 2 International Armed Conflicts 150
5.1.2. Armed Conflicts Short of War 151
5.1.3. Common Article 3 Non-international Armed Conflicts 152
5.1.4. "Transformers": Common Article 3 Conflict, to Common Article 2, and Back 154
5.1.5. Dual Status Armed Conflicts 156
5.2. Nonstate Actors and Armed Opposition Groups Are Bound by LOAC/IHL 157
5.2.1. Cross-border Terrorist Attacks by Nonstate Actors 159
5.3. Criminal Justice Model or Military Model? 164
5.4. U.S. Military Practice 167
5.5. Summary 167

Cases and Materials 170
Determining Conflict Status: An Exercise 170
Prosecutor v. Fatmir Limaj 172
Prosecutor v. Dusko Tadić 174
Case Concerning Military and Paramilitary Activities in and Against Nicaragua 177
Hamdan v. Rumsfeld 179
Osirak: Armed Conflict? 180
Security Council Consideration of a Complaint by Iraq 183

6. Individual Battlefield Status 186
6.0. Introduction 186
6.1. Individual Status 187
6.2. Lawful Combatants/Prisoners of War 187
6.2.1. Retainees 191
6.3. Others Whose Status upon Capture is POW 195
6.3.1. Members of Other Militias and Members of Other Volunteer Corps 195
6.3.1.1. Additional Conditions for POW Status? 197
6.3.2. Regular Armed Forces Professing Allegiance to an Unrecognized Authority 198
6.3.3. Persons Who Accompany the Armed Forces without Being Members Thereof 198
6.3.4. Merchant Marine and Civilian Aircraft Crews 199
6.3.5. *Levée en Masse* 200
6.3.6. Demobilized Military Personnel and Military Internees in Neutral Countries 202
6.4. Direct Participation in Hostilities 202
6.4.1. Criteria for Direct Participation in Hostilities 203
6.4.2. Organized Armed Groups 205
6.4.3. Continuous Combat Function 205
6.5. Unlawful Combatants/Unprivileged Belligerents 206
6.5.1. The Status of Taliban Fighters 211
6.5.2. The Status of al Qaeda Fighters 216
6.6. World War II Allied Resistance Fighters: Historical Aside or Modern Preview? 220
6.6.1. Out of Uniform, Out of Status? 220
6.7. Detainee, Enemy Combatant, and Unlawful Enemy Combatant 224
6.7.1. Detainee 225
6.7.2. Enemy Combatant 225
6.7.3. Unlawful Enemy Combatant 227
6.8. Article 5 "Competent Tribunals" 228
6.8.1. U.S. Military Practice 231
6.9. Civilians 232
6.10. Protected Persons 234
6.11. Minimum *jus in bello* Protections Due Captured Individuals 237
6.12. Summary 238

Cases and Materials 239
In Re Buck and Others 239
Military Prosecutor v. Omar Mahmud Kassem and Others 240

"The Ĉelebići Case," *Prosecutor v. Delalić, et al.* 244
Geneva Convention III, Article 5 Hearing: A Guide 245

7. Law of Armed Conflict's Four Core Principles 250
7.0. Introduction 250
7.1. Distinction 251
7.1.1. The Al Firdos Bunker 257
7.2. Military Necessity 258
7.2.1. *Kriegsraison* 265
7.3. Unnecessary Suffering 269
7.4. Proportionality 272
7.4.1. What Proportionality Is *Not* 280
7.4.2. Proportionality and Force Protection 284
7.5. Summary 285
Cases and Materials 286
The United States v. Wilhelm List, et al. 286
Shimoda et al. v. State 290
Kupreškić and Others 295
Prosecutor v. Kunarac, et al. 296
Prosecutor v. Galić 298

8. What Is a "War Crime"? 301
8.0. Introduction 301
8.1. Defining War Crimes 301
8.2. War Crimes in Recent History 303
8.3. Grave Breaches and Universal Jurisdiction 305
8.3.1. Prosecuting War Crimes: The Required Nexus 307
8.3.2. Prosecuting War Crimes: Who? 309
8.4. Rape and Other Gender Crimes 310
8.5. War Crimes or Not? 313
8.5.1. Escaping Prisoners of War 314
8.5.2. Firing on Mosques 316
8.5.3. Hostages 317
8.5.4. Human Shields 319
8.5.5. Explosive Vests and Burning Bodies 321
8.5.6. Photos of POWs 323
8.5.7. Burying the Enemy Alive 325
8.5.8. Pillage 326
8.5.9. "Double-tapping" 327
8.6. U.S. Military Policy 330
8.7. Summary 331
Cases and Materials 332
Prosecutor v. Dusko Tadić 332
Prosecutor v. Kunarac, et al. 333
"The Zyklon B Case" 335
Prosecutor v. Furundžija 336
In Re *Amberger* 337
"Double-tapping" 338

LAW OF ARMED CONFLICT AND INTERNATIONAL HUMANITARIAN LAW: BATTLEFIELD ISSUES

9. Obedience to Orders, the First Defense 341
9.0. Introduction 341
9.1. A History of the First Defense 342
9.1.1. The Twentieth Century's Evolving Standard 345
9.1.2. Genesis of the Current American Standard 349
9.1.3. World War II and an Old "New" Standard 351
9.2. The Standard Applied: The Nuremberg IMT 354
9.2.1. The Standard Applied: The "Subsequent Proceedings" 356
9.3. What Orders Should Not Be Obeyed? Manifestly Illegal Orders 358
9.4. Upon Receiving a Manifestly Illegal Order 360
9.5. The First Defense in Foreign and International Forums 362
9.6. Summary 363
Cases and Materials 364
Attorney-General of the Government of Israel v. Adolf Eichmann 364
"The *Einsatzgruppen* Case," *The United States v. Ohlendorf, et al.* 366
United States v. Private Michael A. Schwarz 369
Regina v. Finta 372
Prosecutor v. Erdemović 373
United States v. Staff Sergeant Raymond L. Girouard 378

10. Command Responsibility and *Respondeat Superior* 381
10.0. Introduction 381
10.1. Command Responsibility and *Respondeat Superior*: A Brief History 382
10.1.1. My Lai and *Respondeat Superior* 388
10.2. Recent Command Responsibility and *Respondeat Superior* Cases 390
10.3. A Commander's Seven Routes to Trial 391
10.4. When Officers Disobey 396
10.5. Command Responsibility and *Respondeat Superior* Today 399
10.5.1. Recent Evolutionary Changes 402
10.6. Summary 404
Cases and Materials 405
Yamashita v. Styer 405
Theater Judge Advocate's Review: *The United States v. General Tomoyuki Yamashita* 407
Prosecutor v. Halilović 410
"The Ĉelebići Case," *Prosecutor v. Delalić, et al.* 410
Prosecutor v. Blaškić 413
Prosecutor v. Hadžihasanović 415
Prosecutor v. Kristić 417

11. Ruses and Perfidy 420
11.0. Introduction 420
11.1. Perfidy 420
11.1.1. The Trial of Captain Jack 425
11.2. Ruses 426
11.3. Perfidy Problems 429

11.4. Summary 431
Cases and Materials 432
Trial of Otto Skorzeny and Others 432
Medal of Honor Citation: Thomas R. Norris 434

12. Torture 436
12.0. Introduction 436
12.1. Torture Background 439
12.2. Defining Torture 441
12.2.1. Defining Torture as a LOAC Violation 446
12.3. Why Torture? 448
12.3.1. Torture Does Not Produce Actionable Intelligence 449
12.3.2. Intelligence Gained through Torture Is Unreliable 452
12.3.3. Torture Can Accompany and Promote Other Battlefield Misconduct 454
12.3.4. Torture Is Counterproductive on an International Level 456
12.3.5. Torture Endangers Warfighters 461
12.4. Waterboarding Is Torture 461
12.5. The Ticking Time Bomb 466
12.6. Torture: Never, or Sometimes, Maybe? 468
12.7. U.S. Military Practice 469
12.8. Summary 473
Cases and Materials 474
Prosecutor v. Vasiljevic 474
"The Ĉelebići Case," *Prosecutor v. Delalić, et al.* 475
Prosecutor v. Kunarac, et al. 478
The Lieutenant Colonel and the Mock Execution 483
From a "Top Secret" CIA Torture Memorandum 485

13. Rules of Engagement 490
13.0. Introduction 490
13.1. A Brief History of ROE 491
13.1.1. Standing Rules of Force (SRUF) 494
13.2. What Are "Rules of Engagement"? 495
13.3. When SROE/ROE Apply 498
13.4. Formulating Mission-Specific ROE 499
13.5. ROE Content 501
13.5.1 The Right to Self-Defense 502
13.5.1.1. A Legal Fine Point: Self-Defense in Human Rights Law and in LOAC/IHL 503
13.5.2. Escalation of Force 504
13.5.3. Hostile Act 505
13.5.4. Hostile Intent 506
13.5.5. Declared Hostile 507
13.5.6. Positive Identification 508
13.6. ROE Issues 510
13.7. Summary 512
Cases and Materials 512
The Death of Mr. Esequiel Hernandez 512

ROE Cards 515
MNC-I ROE CARD 516
Desert Storm ROE 517

14. Targeting 519
14.0. Introduction 519
14.1 Defining a Lawful Objective 519
14.2 Interpreting "Military Objective" 520
14.3. Targets by Virtue of Nature, Location, Purpose, or Use 524
14.3.1. Military Objectives Are Limited to Objects Which, by Their *Nature* . . . 524
14.3.2. Military Objectives Are Limited to Objects Which, by Their *Location* . . . 525
14.3.3. Military Objectives Are Limited to Objects Which, by Their *Purpose* . . . 525
14.3.4. Military Objectives are Limited to Objects Which, by Their *Use* . . . 526
14.4. Dangerous Forces 528
14.5. Making Targeting Decisions 530
14.6. Dual-Use Targets 534
14.7. Indiscriminate Attacks 536
14.8. Targeted Killing 538
14.8.1. Characteristics of Targeted Killing 542
14.8.2. Direct Participation in Hostilities 543
14.8.3. Does Targeted Killing Broaden the Meaning of "Direct Participation"? 544
14.9. Summary 547
Cases and Materials 547
"The Einsatzgruppen Case," *The United States v. Otto Ohlendorf, et al.* 547
ICTY Committee Report on NATO Bombing of the Federal Republic of Yugoslavia 549
Prosecutor v. Kordić and Čerkez 552
Wired for War 554

15. Attacks on Cultural Property 556
15.0. Introduction 556
15.1. Background: 1954 Hague Convention for the Protection of Cultural Property 557
15.2. The 1954 Hague Convention for Protection of Cultural Property 559
15.2.1. First Protocol to the 1954 Cultural Property Convention 563
15.2.2. Second Protocol to the 1954 Cultural Property Convention 564
15.3. Protected Cultural Property in the 1977 Additional Protocols 565
15.4. Summary 567
Cases and Materials 568
Property versus Combatant Lives 568
Prosecutor v. Jokić 569
Prosecutor v. Prlić, et al. 572
Prosecutor v. Strugar 574

16. The 1980 Certain Conventional Weapons Convention 577
16.0. Introduction 577
16.1. The 1980 U.N. Certain Conventional Weapons Convention 578
16.1.1. CCW Protocol I, Concerning Nondetectable Fragments 580
16.1.2. CCW Protocol II, Concerning Mines and Booby-Traps 581
16.1.2.1. CCW Amended Mines Protocol II 583
16.1.2.2. The 1997 Ottawa Convention 584
16.1.2.3. U.S. Antipersonnel Landmines Policy 584
16.1.3. CCW Protocol III, Concerning Incendiary Weapons 585
16.1.4. CCW Protocol IV, Concerning Blinding Laser Weapons 586
16.1.5. CCW Protocol V, Concerning Explosive Remnants of War 588
16.2. Cluster Munitions 590
16.2.1. 2008 Convention on Cluster Munitions 592
16.2.2. U.S. Cluster Munitions Policy 593
16.3. A Legal Review of Weapons 594
16.4. Summary 595
Cases and Materials 595
Prosecutor v. Martić 595
White Phosphorus Munitions 597

17. Gas, Biological, and Chemical Weapons Treaties 600
17.0. Introduction 600
17.1. The 1925 Geneva Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare 601
17.1.1. Parsing the 1925 Gas Protocol 602
17.2. The 1971 UN Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction 605
17.2.1. Parsing the 1971 BWC 607
17.2.2. Negotiating the BWC 610
17.3. The 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons 611
17.3.1. Parsing the 1993 CWC 611
17.4. CS Gas 615
17.5 Summary 616
Cases and Materials 616
The United Kingdom's *Manual of the Law of Armed Conflict* 616
Prosecutor v. Tadić 618
The Moscow Theater Hostage Crisis and the Chemical Weapons Convention 619

References 623
Index 653

Table of Cases

War Crimes Trials following the First World War

Dover Castle Case (Commander Karl Neumann), Imperial Court of Justice, Leipzig (1922), at 347–8, 359
Llandovery Castle Case, Imperial Court of Justice, Leipzig (1921), at 348
Trial of Lt. Gen. Karl Stenger and Maj. Benno Crusius, Imperial Court of Justice, Leipzig, (1921), at 109–12

War Crimes Trials following the Second World War

In re *Amberger*, British Military Court (1946), at 337
Trial of Christian Baus, French military tribunal (1947), at 304, 307, 308
Trial of Gustav Becker, Wilhelm Weber and 18 Others, French military tribunal (1947), at 304, 307, 308
In re *Buck and Others*, British Military Court (1946), at 239–40
The Dostler Case, L.R.T.W.C., vol. I (1947), at 357
Trial of Kapitänleutnant Heinz Eck and Four Others ("The Peleus Trial") I TWC, at 268, 357
U.S. v. Farben, VII TWC (1948), at 357
U.S. v. Flick, VI TWC (1947), at 356, 357
Trial of Grumpelt ("The Scuttled U-Boats Case") (1946), L.R.T.W.C., vol. I (1947), at 357
Trial of Heinz Hagendorf, U.S. Military Government Court (1946), at 116–18, 303
Trial of Erich Heyer, et al. ("The Essen Lynching Case") (1945), at 385, 393
In re *Hirota*, 15 Ann. Dig. (1948), at 56
Trial of Masaharu Homma, U.S. Military Commission (1946), at 384
Trial of Kriminalassistent Karl-Hans Hermann Klinge, S. Ct. of Norway (8 Dec. 1945 and 27 Feb. 1946), at 464
Trial of Kramer, et al. ("The Belsen Trial") (1945), L.R.T.W.C., vol. II (1947), at 357
U.S. v. Krupp, IX TWC (1949), at 268
U.S. v. Wilhelm von Leeb ("The High Command Case"), at 78, 112–15, 261, 349, 356–7, 386–9, 395, 400–1, 410
Trial of Karl Lingenfelder, French Permanent Military Tribunal at Metz (11 March 1947), at 558
U.S. v. Wilhelm List, et al. ("The Hostage Case") (1948), XI TWC 1253–54, at 259, 265, 280–1, 286–90, 318, 346, 357–8, 386–9, 394–5, 400–1, 411, 509
Trial of the Major War Criminals (Nuremberg IMT Judgment, 1947), at 34, 56, 220, 315, 353–4
Trial of Masuda, et al. (1945), U.S. Mil. Comm., Marshall Islands, I L.R.T.W.C., I, at 355, 394–5
Trial of Kurt Meyer ("The Abbaye Ardenne Case") (1945), at 385
Trial of Mineno (Yokohama, 1946), at 464
Trial of Nakamura, Asano, Hata and Kita (Yokohama, 1947), at 464
U.S. v. Ohlendorf, et al. ("The Einsatzgruppen Case"), IV TWC (1948), at 268, 346, 355–7, 359, 366–8, 373, 377, 547–9
Rex v. Perzenowski, et al., Canada, Supreme Ct. of Alberta (App. Div.) (1946), at 190
Trial of Major Karl Rauer and Six Others, British Military Court, at 316
Trial of Sandrock, et al. ("The Almelo Trial") L.R.T.W.C., vol. I (1947), at 357
Trial of Shigeru Sawada and Three Others (1946), at 385, 394, 464
Trial of Max Schmid, U.S. Military Government Court (1947), at 94, 194
Trial of Otto Skorzeny and Others, Military Government Court (1947), at 222, 423, 432–4
Trial of Kurt Student, British Military Court (1946), at 319

Trial of Bruno Tesch and Two Others (The Zyklon B Case) British Military Court (1946), at 310, 335–6
Trial of Albert Wagner, French Military Tribunal (1946), at 57
Trial of Max Wielen, et al. (The Stalag Luft III/ "The Great Escape" Case) (Sept. 1947), at 314
In re *Yamashita*, 327 U.S. 1, 14 (1946), at 96, 354, 386–8, 392, 405–10
Trial of Chinsaku Yuki (Manila, 1947), at 464

U.S. Domestic Cases Involving LOAC/IHL-Related Charges

U.S. v. Roy M. Belfast (a.k.a. Chuckie Taylor) (S.D. Fla.) (2008), at 440
U.S. v. Bevans, 24 F.Cas. 1138 (C.C.D. Mass. 1816), at 343
U.S. v. Bright, 24 F.Cas. 1232 (C.C.D. Pa., 1809), at 342
Brown v. United States, 12 U.S. (8 Cranch) 110, 122–23 (1814), at 44, 260
Calley v. Callaway, 519 F.2d 184, 191 fn. 6 (1975), at 87
Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. 165, 55 A. 952 (1903), at 345
Demjanjuk v. Petrovsky, 776 F. 2d 571 (6th Cir. 1985), at 93, 337
Demjanjuk v. Petrovsky, 10 F. 3d 338 (6th Cir. 1993), at 93
United States v. Demjanjuk, 367 F.3d 623 (6th Cir. 2004), at 93
Demjanjuk v. Mulkasey No. 07–3022 (30 Jan. 2007), at 93
Dow v. Johnson, 100 U.S. 158 (1879), at 344
In re *Fair, et al.*, 100 Fed. 149 (D.Neb. 1900), at 345
Feres v. United States, 340 U.S. 135 (1950), at 350
Filártiga v. Pena-Irala, 630 F. 2d 876 (1980), at 479–80
Ford v. Garcia, 289 F. 3d 1283 (11th Cir., 2002), at 402
Graham v. Connor, 490 U.S. 386 (1989), at 509, 514
Grisham v. Hagan, 361 U.S. 278 (1960), at 88
Hamdan v. Rumsfeld, 344 F Supp 2d 152 (2004), at 169
Hamdan v. Rumsfeld, 415 F.3d 33 (2005), at 169
Hamdan v. Rumsfeld, 548 U.S. 557 (2006), at 56, 57, 169, 179–80, 215
Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), at 226
Hamilton v. McClaughry, 136 F. 445, 450 (C.C.D. Kan. 1900), at 151
Hately v. State, 15 Ga. 346 (1854), at 345
Illinois v. Lafayette, 462 U.S. 640 (1983), at 505
U.S. v. Jones, 26 F. Cas. 653 (C.C.D. Pa., 1813), at 343
Kadic v. Karadzic, 70 F. 3d 232 (2nd Cir., 1995), cert Den., 64 U.S. 3832 (1996), at 402, 480
Kinsella v. U.S. ex rel. *Singleton*, 361 U.S. 234 (1960), at 88
Korematsu v. U.S., 323 U.S. 214 (1944), at 21, 264
Latney v. Ignatius, 416 F.2d 821 (1969), at 89
U.S. v. Lee, 744 F.2d 1124 (5th Cir. 1984), at 465
Little et al. v. Barreme et al., 6 U.S. (2 Cranch) 170 (1804), at 343–4, 354
In re *Estate of Ferdinand E. Marcos, Human Rights Litigation*, 910 F. Supp. (1995), at 465
McCall v. McDowell, 15 Fed. Cas. 1235 (C.C.D. Cal. 1867), at 344, 360
McElroy v. Guagliardo, 361 U.S. 281 (1960), at 88
Medellin v. Texas, 128 S.Ct. 1346 (2008), at 16
Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851), at 344
Neu v. McCarthy, 309 Mass. 17, 33 N.E.2d 570 (1941), at 343, 351
U.S. v. David A. Passaro, case # 5:04-CR-211–1-BO (E.D. N. C.2006), at 91
U.S. v. Plenty Horses, U.S. District Court, Sioux Falls, SD, acquittal (1891), at 30–5
Prize Cases, 67 U.S. 635 (1863), at 18
Shafiq Rasul et al. v. General Richard Meyers, et al., 512 F3d 644 (C.A.D.C., 2008), at 440
Reid v. Covert, 354 U.S. 1, 35 (1957), at 88, 90
Riggs v. State, 43 Tenn. 85 (1886), at 345
The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch.) 116 (1812), at 349
Scott v. Henrich, 978 F.2d 481 (9th Cir. 1992), at 514
State v. Roy, 64 S.E.2d 840 (1951), at 351
Tennessee v. Garner, 471 U.S. 1, 11 (1985), at 514
Thomas v. State, 134 Ala. 126, 33 So. 130 (1902), at 345
Toth v. Quarles, 350 U.S. 11 (1955), at 88
Underhill v. Hernandez, 168 U.S. 250 (1897), at 97
Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129–30, 131 (1849), at 343
U.S. v. Ramzi Yousef and Others, 327 F. 3rd 56 (2nd Cir., 2003), at 306

U.S. Military Cases Involving LOAC/IHL-Related Charges

Ex Parte Quirin, 317 U.S. 1 (1942), at 226, 408
Unger v. Ziemniak, 27 M.J. 349 (CMA 1989), at 349
U.S. v. Mohammad Ali (Iraq, 2008), at 89
U.S. v. Averette, 19 USCMA 363 (1970), at 89
U.S. v. Bumgarner, 43 CMR 559 (1970), at 308
U.S. v. Calley, 48 CMR 19 (1973), at 87, 236, 388, 392
U.S. v. Captain Jack, aka Kientpoos, Military Commision, Ft. Klamath, Oregon (1873), at 425–6

U.S. v. Cherry, 22 M.J. 284, 286 (CMA 1986), at 360
U.S. v. Chessani (Camp Pendleton, CA, 2008). Charges dismissed, at 393
U.S. v. Coffey, Unreported, pet. for rev. den. (2005), at 327
U.S. v. Compton (North Africa, 1943). Acquitted, at 27–8
U.S. v. Conde (USMC, SpCM, Mogadishu, 1993), at 490
U.S. v. Dykes, 6 M.J. 744 (NCMR 1978), at 360
U.S. v. Finsel, 33 M.J. 739 (ACMR, 1991), at 490
U.S. v. Gatlin, 216 F.3d 207 (2d Cir. 2000), at 90
U.S. v. John Getz, Unreported, pet. for rev. den. (2005), at 327
U.S. v. Girouard (Fort Campbell, KY, 2007). Acquitted, at 378–80
U.S. v. Glenn, Samar, P.I. (1902), at 463
U.S. v. Green, 22 M.J. 711 (ACMR 1986), at 360
U.S. v. Griffen, 39 C.M.R. 586 (ACMR, 1968), at 360
U.S. v. Huet-Vaughn, 43 M.J. 105, 107 (1995), at 359
U.S. v. Keenan, 39 C.M.R. 108 (CMA, 1969), at 371
U.S. v. Kinder, 14 C.M.R. 742, 750 (AFBR, 1954), at 349, 359–60, 392
U.S. v. Kotouc (1971). Acquitted, at 86
U.S. v. Latney, Navy Court-Martial #68–1965 (1965), at 89
U.S. v. Lloyd, (U.S. Army So. European T. F. and 5th Support Cmd, Vicenza, Italy) (1985), at 360
U.S. v. McMonagle, 34 M.J. 825 (ACMR, 1992), at 490
U.S. v. Medina, C.M. 427162 (1971). Acquitted, at 388–90
U.S. v. Milldebrandt, 25 CMR 139 (C.M.A. 1958), at 360
U.S. v. Mowris, GCM (Fort Carson, CO, 1993), at 511
U.S. v. Potter, 39 CMR 791 (NBR, 1968), at 308
U.S. v. Rockwood, 52 M.J. 98 (CAAF, 1999), at 398
U.S. v. Ronghi, 60 M.J. 83 (ACMR, 2004), cert. den., 543 U.S. 1013 (2004), at 309
U.S. v. Saville (Fort Hood, TX, 2005), at 456
U.S. v. Schreiber, 18 CMR 226 (C.M.A., 1955), at 360, 392
U.S. v. Schwarz, 45 C.M.R. 852 (NCMR, 1971), at 65–7, 369–73
U.S. v. BGen. Jacob H. Smith, (Manila, 1902), at 63
U.S. v. Tiggs, 40 CMR 352 (A.B.R. 1968), at 349
U.S. v. Waller (Manila, Special Order No. 54, March 1902), unreported, at 345
U.S. v. Sgt. Ryan G. Weemer (Camp Pendleton, CA, 2009). Acquitted, at 89
U.S. v. West (North Africa, 1943), at 385
U.S. v. Wilson, 30 CMR 165 (C.M.A. 1961), at 360
U.S. v. Wirz, Military Commission (1865), at 58–63
U.S. v. Wysong, 26 CMR 29 (C.M.A. 1958), at 360

International Criminal Tribunal for the Former Yugoslavia Cases

Prosecutor v. Aleksovski, IT-95-14/1-A (24 March 2000), at 236, 396, 401, 485
Prosecutor v. Blagojević, IT-02-60-T (17 Jan. 2005), at 101
Prosecutor v. Blaškić IT-95-14-T (3 March 2000), at 257, 413–15
Prosecutor v. Blaškić, IT-95-14-A (29 July 2004), at 57, 309, 403
Prosecutor v. Brdjanin, IT-99-36-A (3 April 2007), at 298
Prosecutor v. Delalić (aka *Mucić*/ "Čelebici"), IT-96-21-T (16 Nov. 1998), at 86, 101, 168, 201, 208, 244–5, 311–12, 327, 403–4, 410, 413, 438, 448, 475–8
Prosecutor v. Delalić (aka *Mucić*/ "Čelebici"), IT-96-21-A (20 Feb. 2001), at 99–100, 169, 236, 401, 438, 448
Prosecutor v. Delić, IT-04-85-T (15 Sept. 2008), at 393
Prosecutor v. Erdemović, IT-96-22 Indictment (1996), at 373
Prosecutor v. Erdemović, IT-96-22-T (1996), at 373
Prosecutor v. Erdemović, IT-96-22-T bis (1998), at 356, 373
Prosecutor v. Erdemović, IT-96-22-A (1997), at 341, 363
Prosecutor v. Furundžija, IT-95-17/1-T (10 Dec. 1998), at 101, 311, 363, 447, 480–1
Prosecutor v. Galić, IT-98-29-T (5 Dec. 2003), at 101, 253, 257, 259, 283
Prosecutor v. Hadžihasanović, IT-01-47-T (15 March 2006), at 101, 415–17
Prosecutor v. Hadžihasanović, IT-01-47-A (22 April 2008), at 393, 416
Prosecutor v. Halilović, IT-01-48-T (16 October 2005), at 403, 410, 456
Prosecutor v. Haradinaj, et al., IT-04-84-T (3 April 2008), at 301
Prosecutor v. Jelisić, IT-95-10-T (14 Dec. 1999), at 101, 327, 448
Prosecutor v. Jokić, IT-02-60-T (17 Jan. 2005), at 569–72
Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T (21 May 1999), at 396
Prosecutor v. Kordić and Čerkez, IT-95-14-T, (26 Feb. 2001), at 168, 264, 298, 575

Prosecutor v. Kristić, IT-98-33-T (2 Aug. 2001), at 101, 363, 417–19
Prosecutor v. Krnojelac, IT-97-25-T (15 March 2002), at 101, 401, 448
Prosecutor v. Krnojelac, IT-97-25-A (17 Sept. 2003), at 101
Prosecutor v. Kunarac, IT-96-23 & IT-96-23/1-A-T (22 Feb. 2001), at 26, 233, 296, 311–13, 442, 447, 478
Prosecutor v. Kunarac, IT-96-23 & IT-96-23/1-A (12 June 2002), at 22, 101, 313, 333
Prosecutor v. Kupreškić et al., IT-95-16-T (14 Jan. 2000), at 16, 36, 101, 115, 166, 232–3, 275, 295, 391–2
Prosecutor v. Kvočka, 98–03/1-A (28 Feb. 2003), at 101, 311–13
Prosecutor v. Limaj, IT-03-66-T (30 Nov. 2005), at 168, 172
Prosecutor v. Mucić, IT-96-1-A bis (8 April 2003), at 363
Prosecutor v. Musema, ICTR-96-13-A (27 Jan. 2000), at 126
Prosecutor v. Martić, IT-95-11-T (12 June 2007), at 95, 595–7
Prosecutor v. Milošević, IT-98-29/1-T (12 Dec. 2007), at 392
Prosecutor v. Milošević, IT-02-54, Charge in 1st Amended Indictment (23 Oct. 2002), at 95
Prosecutor v. Mrkšić, et al., IT-95-13/1-T (27 Sept. 2007), at 168
Prosecutor v. Naletilic and Martinović, IT-98-34-T (31 March 2003), at 233, 575
Prosecutor v. Nikolić, IT-02-60/1-T (2 Dec. 2003), at 431
Prosecutor v. Orić, IT-03-68-T (30 June 2006), at 57, 101, 381
Prosecutor v. Pavel Struger et al., IT-01-42 (22 Nov. 2002), at 101, 394
Prosecutor v. Prlić, et al., IT-04-74-T, Second Amended Indictment (11 June 2008), at 572–4
Prosecutor v. Rajić, IT-95-12-T (8 May 2006), at 265
Prosecutor v. Rajić, IT-95-12, Review of Indictment (13 Sept. 1996), at 154
Prosecutor v. Stakić, IT-97-24-T (31 July 2003), at 101
Prosecutor v. Strugar, IT-01-42-T (31 Jan. 2005), at 101, 574–6
Prosecutor v. Tadić, IT-94-1, Trial Chamber Decision on Defense Motion on Jurisdiction (10 Aug. 1995), at 96
Prosecutor v. Tadić, IT-94-1-A, Defense Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995), at 100, 103, 129, 142, 158, 168, 174–7, 217, 301, 618
Prosecutor v. Tadić, IT-94-1-T, Judgment (7 May 1997), at 101, 142, 153, 155, 333, 448
Prosecutor v. Tadić, IT-94-1-A (15 July 1999), at 57, 155, 168, 236
Prosecutor v. Tadić, IT-94-1, Judgment in Sentencing appeals (26 Jan. 2000), at 95
Prosecutor v. Vasiljević, IT-98-32-T (29 Nov. 2002), at 101, 448, 474–5

International Criminal Tribunal for Rwanda Cases

Prosecutor v. Akayesu, ICTR-96-4-T (2 Sept. 1998), at 311–13, 381, 478
Prosecutor v. Bagilishema, ICTR-95-1A-A (2002), at 392
Prosecutor v. Gacumbitsi, ICTR-2001-64-T (17 June 2004), at 313
Prosecutor v. Kajelijeli, ICTR-98-44A-T (1 Dec. 2003), at 402
Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-A (2001), at 97
Prosecutor v. Musema, ICTR-95-13-T (27 Jan. 2000), at 196, 310
Prosecutor v. Nahimana, et al., ICTR-99-52-A (28 Nov. 2007), at 400
Prosecutor v. Semanza, ICTR-97-20-T (15 May 2003), at 101

International Court of Justice Cases

Armed Activities on the Territory of the Congo, (2005), at 159
Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), (2002), at 305
Asylum Case (1959), at 12
The Corfu Channel Case, Merits, (1949), at 296
Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), (1986), at 82, 99, 103, 155, 159, 161, 177–9, 296
Iran v. U.S. (Oil Platforms Case) (2003), at 281
North Sea Continental Shelf Cases (1969), at 12
The Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Advisory Opinion) (1996), at 22, 269, 272, 296, 527
Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory (The Wall Advisory Opinion) (2004), at 22, 25–6, 162

Israeli Cases

A and B v. State of Israel, Supreme Court of Israel sitting as the Court of Criminal Appeals, No. 6659/06 (11 June 2008), at 208
Attorney-General of the Government of Israel v. Adolf Eichmann (Israel, Dist. Ct. of Jerusalem, 1961), Judgment; 36 ILR 277 (Isr. S. Ct. 1962), at 306, 364

Demjanjuk v. Attorney General of Israel (29 July 1993), at 306
Israel v. The State of Israel ("The Five Techniques case") (HCJ 5111/94), 1999, at 208
Kafr Kassen case App. 279–83 (1958), at 197, 360
Military Prosecutor v. Omar Mahmud Kassem and Others, Israel, Military Court (1969), at 240–3
Public Committee Against Torture in Israel v. The State of Israel (1999) H.C. 5100/94, at 439, 457
Public Committee Against Torture in Israel v. Israel (The Targeted Killing Decision) (2006) HCJ 769/02, at 207

United Kingdom Cases Involving LOAC/IHL-Related Charges

A and others v. Secretary of State for the Home Department (the "Northern Ireland Case") [2005] UKHL 71, at 457
Axtell's Case (1661), Kelng 13; 84 E.R. 1060, at 30, 342
Campbell and Cosans v. U.K. (Feb. 1982) 4 EHRR 293, at 446
Chahal v. United Kingdom, App. No. 22414/93, Judgment (1996), at 467
The *Dover Castle* Case (U.K., 1920), at 347–8, 359
Case of Ireland v. United Kingdom, App. no. 5310/71, Judgment (1978) 2 EHRR 25, ECtHR, at 441, 467
McCann and Others v. the United Kingdom (1995) 18984/91, at 504
Public Prosecutor v. Mohamed Ali et al. (1968), [1969] AC 430, at 223
Public Prosecutor v. Ooi Hee Koi, et al. [1968] A.C. 829, at 197, 223, 229
Regina v. Bartle and the Commissioner of Police for the Metropolitan District and Others, ex Parte Pinochet (House of Lords, Nov. 1998 and March 1999), at 306
Regina v. Smith, 17 Cape Reports 561 (S. Africa 1900), at 345

Other Cases Involving LOAC/IHL–Related Charges

Abella v. Argentina (Tablada), Inter-American Commission on Human Rights, Case # 11.137, Report # 55/97 (1997), at 282, 288
Askoy v. Turkey (1996) 23 EHRR 533, at 441
Prosecutor v. Alex Tamba Brima, Special Court for Sierra Leone-04-16-T (20 June 2007), at 313
Border Guards Prosecution Case (1996), 5 StR 370/92 [BGH] [Supreme Court] (FRG) (West Germany), at 341
Regina. v. Finta [1994] (Canada), at 357, 372
Germany v. N, Decision No. 2 WD 12.04., *Bundesverwaltungsgericht* (German Federal Administrative Court), 21 June 2005, at 359, 397
Gilboa v. Uruguay, Communication No. 147/1983, Rpt of Human Rts. Cmty, UN Doc. A/41/40, pp. 128 ff., at 485
LJN: AU4373, Rechtbank's-Gravenhage, 09/751005–04, and *09/756–05*, Hague District Court (Oct. 2005), unreported, at 488
Niyonteze v. Public Prosecutor, Tribunal militaire de cassation (Switzerland), at 92
France v. Papon, unpublished (18 Sept. 1996), *Cour d'appel de Bordeaux, Chambre d'accusation Arrêt du*, no. 806, at 341
McCann and Others v. United Kingdom, No. 18984/91, 31 ECt HR (1995), at 504
Muteba v. Zaire, Communication No. 124/1982, Rpt. of Human Rts. Cmty, UN Doc. A/39/40, pp. 182 ff.; 79 ILR 253, at 485
Prosecution v. Refik Saric, unpublished (Denmark High Ct., 1994), at 307
Selmouni v. France, ECtHR (28 July 1999), at 447
Ryuichi Shimoda et al. v. State, Tokyo District Court, 1963 (32 ILR 494), at 290–4
Streletz, Kessler and Krenz v. Germany, ECt HR (2001), at 341, 391
Tomasi v. France, Series A, No. 241-A, App. No. 12850/87, 15 EHRR 1 (1992), at 467

Table of Treaties

1279 Statute of Westminster, 6
1648 Peace of Westphalia, 7, 30, 96
1785 Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America, 14
1794 Jay Treaty (The Treaty of London), 51
1864 Geneva Convention for the Amelioration of the Condition of the Wounded on the Field of Battle, 48, 136, 252
1868 St. Petersburg Declaration Renouncing the Use in War of Certain Explosive Projectiles, 39, 43, 49–51, 53, 57, 83, 251, 260, 270, 293, 578
Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 260
1874 Brussels Declaration concerning the Laws and Customs of War, 54, 270
1889 International Regulations for Preventing Collisions at Sea, 13
1899 Hague Convention (II) Respecting the Laws and Customs of War on Land Preamble (the Martens Clause), 38, 53, 202
1899 Hague Declaration (IV, 2) Concerning Asphyxiating Gases, 53, 600–2, 611, 617
1899 Hague Declaration (IV, 3) Concerning Expanding Bullets, 55, 271, 578
1906 Geneva Convention for the Amelioration of the Condition of the Wounded on the Field of Battle, 73, 78, 85, 107
1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annexed Regulations (also known as "Hague Regulation IV")
Arts. 1–3, at 78, 125
Art. 1, at 393, 406
Art. 3, at 54
Art. 4, at 446
Art. 14, at 73
Art. 22, at 38, 57, 260, 273
Art. 23, at 44, 270, 433, 600, 611
Art. 23(a), at 293
Art. 23(b), at 421–2
Art. 23(e), at 271, 293, 617
Art. 23(f), at 116, 429–30
Art. 23(g), at 44, 258–9, 309
Art. 24, at 426
Art. 25, at 524, 526, 542
Art. 27, at 316, 527, 566
Art. 28, at 327
Art. 29, at 224
Art. 31, at 430
Arts. 42–56, at 125
Art. 46, at 478
Art. 47, at 327, 572
Art. 53, at 309
Art. 56, at 557
1919 Versailles Treaty of Peace with Germany, 74–5, 382
1919 Covenant of the League of Nations, 76–7
1920 Sévres Treaty of Peace with the Ottoman Empire, 74
1922 Washington Conference Naval Treaty, 350
1923 Draft Hague Rules of Aerial Warfare, 15, 209, 291–2, 520–1, 527, 536
1925 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 14, 556, 601–6, 608, 616
1928 General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg–Briand Pact of Paris), 35, 77–8
1929 Geneva Convention Relative to the Treatment of Prisoners of War, 78–9, 81–4, 113, 136, 239
Art. 7, 8, at 117, 193
Art. 22, at 105

Arts. 31–32, at 114
Art. 79, at 84
Art. 81, at 200
1945 Charter of the United Nations, 24
1945 Statute of the International Court of Justice (Annexed to the Charter of the United Nations), 12
1945 London Agreement for the Establishment of an International Military Tribunal, 302
1945 Charter of the International Military Tribunal – Nürnberg (Annexed to the London Agreement for the Establishment of an International Military Tribunal), 302, 478
1948 Universal Declaration of Human Rights, 25, 80, 441, 480
1948 Convention on the Prevention and Punishment of the Crime of Genocide, 92
1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 83
common Art. 1, at 84, 166
*common Art. 2
*common Art. 3
Art. 8, at 85, 259
Art. 12, at 85, 329
Art. 13, at 192, 212
Art. 15, at 327
Art. 19, at 319, 524
Art. 22, at 192, 193
Art. 25, at 192
Art. 28, at 192
Art. 29, at 192
Art. 30, at 192, 259, 268
Art. 33, at 259, 269
Art. 34, at 259, 268
Art. 41, at 192
common Art. 47/48/127/144, at 331, 361
common Art. 49/50/129/146, at 85, 92, 94–5, 303, 332
common Art. 50/51/130/147, at 93–4, 309, 446
common Art. 63/62/142/158, at 82
Art. 50, at 259
Art. 65, at 192
1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 83
Art. 8, at 85, 259
Art. 18, at 327
Art. 28, at 259, 269
Art. 51, at 259
1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, 81, 83
Art. 4A, at 195, 241, 244, 245, 295
Art. 4A.(1), at 213, 232, 240, 244, 299
Art. 4A.(2), at 125, 220, 240–1, 244, 299
Art. 4A.(3), at 195, 198, 240–1, 244, 299
Art. 4A.(4), at 198, 240, 244
Art. 4A.(5), at 244
Art. 4A.(6), at 200, 240–1, 245, 299
Art. 4B, at 202
Art. 5, at 214, 228–31, 235, 238, 245–9
Art. 8, at 85, 259
Art. 13, at 323–5
Art. 17, at 104–5
Art. 18, at 309
Art. 23, at 319
Art. 33, at 192
Art. 35, at 192
Art. 42, at 314
Art. 44, at 105
Art. 76, at 259, 268
Art. 85, at 221
Art. 94, at 303
Art. 96, at 303
Art. 120, at 322
Art. 123, at 73, 84
Art. 126, at 259, 268
Art. 130, at 259
Art. 141, at 323
1949 Geneva Convention (IV) Relative to the Protection of Civilians in Time of War, 23, 25, 44, 83, 106
Art. 4, at 106, 109, 126, 219, 235–6, 245
Art. 5, at 268
Art. 9, at 85, 259
Arts. 13–26, at 234, 252
Art. 16, at 327
Art. 18, at 527, 552
Art. 19, at 295, 527
Art. 27, at 95, 106, 311, 477
Art. 28, at 319
Art. 32, at 95
Art. 33, at 106, 214, 327
Art. 34, at 317
Art. 49, at 106, 259, 268
Art. 53, at 44, 259, 268, 552–3
Art. 55, at 259
Art. 70, at 106
Arts. 71–75, at 106
Art. 108, at 259, 268
Art. 112, at 259, 268
Art. 123, at 84
Art. 130, at 322
Art. 140, at 73, 84
Art. 143, at 259, 268
Art. 147, at 95, 259, 317, 320, 477, 552, 567

* Common Articles 2 and 3 appear throughout the text, too frequently to list individually. Basic coverage of common Article 2 is provided on pages 180 and 218, common Article 3 on pages 96–104.

1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 457, 467, 478, 480
1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 316, 536, 556–76
Art. 1, at 559, 571
Art. 4, at 560, 575
Art. 7, at 560
Art. 8, at 560–1
Art. 11, at 560
Art. 16, at 561
Art. 25, at 560
1954 First Protocol, at 563
1999 Second Protocol, at 561, 564–5
1966 International Covenant on Civil and Political Rights, 25, 237, 476, 480
1968 United Nations Convention on the Non-Application of Statutory Limitations to War Crimes and Crimes Against Humanity, 303
1969 Vienna Convention on the Law of Treaties, 14
1971 United Nations Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 556, 605–11, 616
1976 United Nations Convention on the Prohibition of Military Or Other Hostile Use of Environmental Modification Techniques, 526, 556
1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 14
Art. 1.1, at 123
Art. 1.3, at 150
Art. 1.4, at 123, 141, 150
Art. 3, at 542
Art. 4.2, at 327
Art. 10, at 213
Art. 11, at 94, 121, 213
Art. 12, at 317
Art. 13.1, at 317, 527
Art. 13.2, at 192
Art. 23, at 44
Art. 24, at 122
Art. 34, at 322
Art. 35.2, at 122, 269
Art. 35.3, at 526–7
Art. 36, at 271, 594
Art. 37, at 129, 420, 422–3, 426, 430
Art. 38, at 422
Art. 39, at 222, 422, 428, 430, 432–3
Art. 40, at 44, 329
Art. 41, at 329
Art. 42, at 122, 524
Art. 43, at 299
Art. 43.1, at 126, 212–13
Art. 43.2, at 42, 188, 193
Art. 44, at 126–7, 129, 430
Art. 44.3, at 126–7, 129, 254
Art. 44.4, at 126, 209
Art. 45.1, at 214, 228
Art. 45.3, at 233
Art. 47, at 123
Art. 48, at 122–3, 209, 252, 254, 520, 532, 534, 536
Art. 49, at 520
Art. 50, at 232, 238, 299, 542, 565, 572
Art. 51, at 537
Art. 51.2, at 122, 214, 256, 274, 299
Art. 51.3, at 202, 255, 539, 541–6
Art. 51.4, at 523, 536
Art. 51.5, at 122, 273
Art. 51.7, at 319–20
Art. 52, at 299, 547
Art. 52.2, at 520, 524
Art. 52.3, at 527, 534
Art. 53, at 309, 316, 563, 565–7, 571
Art. 54, at 259, 269
Art. 55, at 526–7
Art. 56, at 530
Art. 56.1, at 528
Art. 56.2, at 529
Art. 57, at 122, 273, 520
Art. 57.2 (a), at 520
Art. 57.2 (b), at 122, 273
Art. 58, at 275, 285, 296
Art. 59, at 526
Art. 62, at 259, 268
Art. 67, at 123, 259, 269
Art. 71, at 259, 268
Art. 72, at 25
Art. 75, at 25, 166, 208, 214, 219, 233–4, 237, 317, 446, 481–2
Art. 76, at 477
Art. 79, at 429
Art. 82, at 122, 400
Art. 85, at 94, 122, 253, 296, 299, 420, 422, 537, 566–7
Art. 86.1, at 399
Art. 86.2, at 122, 399, 400
Art. 87, at 122, 331, 400
Art. 88, at 92
Art. 96, at 128, 168
1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol II), 14

Art. 1.1, at 131, 219
Art. 1.2, at 130, 172
Art. 2, at 214, 234
Art. 4, at 214, 482
Art. 4.1, at 130, 477
Art. 4.2, at 317, 446, 448, 477
Art. 4.3, at 130
Art. 6, at 25, 131
Art. 11, at 527
Art. 12, at 422
Art. 13, at 214, 252
Art. 14, at 131
Art. 15, at 528
Art. 16, at 309, 563, 565, 567, 571
Art. 17, at 259, 268

1979 United Nations International Convention Against the Taking of Hostages, 318
1980 Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 271, 556, 577–99
1980 Protocol I, Concerning Non-detectable Fragments, at 580–1
1980 Protocol II, Concerning Mines and Booby-traps, 581–3
1996 Amended Mines Protocol II, at 424, 524, 579, 583–4
1980 Protocol III, Concerning Incendiary Weapons, at 524, 585–6, 599
1995 Protocol IV, Concerning Blinding Laser Weapons, at 586–8
2003 Protocol V, Concerning Explosive Remnants of War, at 588–90, 595
1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 15, 26, 237, 440, 466, 475–8, 481
Art. 1, at 441, 446, 480
Art. 2, at 15, 72, 442
Art. 7, at 92
Art. 17, at 457
Optional Protocol Establishing a Sub-committee for the Prevention of Torture (effective 2006), at 440
1987 Inter-American Convention to Prevent and Punish Torture, 476
1990 Turku/Åbo Declaration of Minimum Humanitarian Standards, 618
1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons, 556, 599, 605, 610–16, 620–1
1993 Statute of the International Criminal Tribunal for the Former Yugoslavia, S/Res/808 (1993), U.N. Doc. S/25704 (May 3, 1993)
Art. 2, at 474
Art. 3, at 474
Art. 4, at 448, 482
Art. 5, at 311, 474, 478
Art. 7, at 400, 402, 410
Art. 18, at 535
Art. 86, at 410
1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 15, 556, 584
1998 Rome Statute of the International Criminal Court, 15, 317
Art. 5, at 297–8
Art. 8 (2), at 302
Art. 8 (2)(a), at 318, 447
Art. 8 (2)(b), at 22, 56, 274, 311, 319, 327, 421, 526, 558, 602
Art. 8 (2)(c), at 100, 318, 447
Art. 8 (2)(e), at 22, 100–1, 311, 421, 558
Art. 28, at 400
Art. 31, at 378
2005 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Additional Protocol III), at 136–7, 422
2006 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Optional Protocol, 440
2008 Convention on Cluster Munitions (Dublin), at 592–3

Foreword

In 1998, after arriving at West Point for assignment as the United States Military Academy's Staff Judge Advocate, I was selected to be Professor and Head of West Point's Department of Law. That's when I had the good fortune of meeting Professor Gary Solis, with whom I began a personal and professional relationship that has been one of the highlights of my career.

Professor Solis, a retired United States Marine, had revitalized a moribund Law of War program in the Department of Law and created the first elective at the Military Academy on that topic. Because I had come from recent operational law assignments, the subject area was of great interest to me, and we frequently talked about related issues, both historical and contemporary. After I moved to the Department of Law, we continued to develop our shared interest and, on occasion, we had the chance to teach the elective together. When Gary left his professorial position in the summer of 2001, I took over the teaching of the course, building on the great foundation he had laid.

Over the next few years, the department asked Professor Solis to return to West Point as Visiting Professor, normally a one-year arrangement. Because of his remarkable contributions, including devising and coordinating an overall cadet program in the law of armed conflict (LOAC) that included practical training exercises as well as classroom instruction, he was asked to stay on as our Visiting Professor for a second year, until he again retired. He continues to return to West Point every semester, and we team teach the introductory class in this essential area that all cadets attend.

During our discussions and teaching, Gary and I would occasionally lament the lack of organized textual material necessary for teaching a course in LOAC, particularly the lack of a good textbook. Anyone involved with international humanitarian law (IHL) – academics, commanders and soldiers, cadets, and concerned citizens – should be delighted that Professor Solis has devoted his expertise to writing that textbook. There is no one more qualified.

Gary Solis has not only studied and taught these principles, he has lived them and advocated their practical application. This textbook reflects an academic apprenticeship that includes a master of laws in criminal law from George Washington Law School and a doctorate in the law of war from the London School of Economics and Political Science. He has previously published two outstanding books on law of war issues related to Vietnam, as well as numerous articles on LOAC topics. He is in demand as a lecturer, commentator, and expert witness on these issues.

This book is shaped by Professor Solis's years of experience in teaching this subject at both the undergraduate and law school levels, and reflects classroom lessons learned.

Professor Solis has created a book with a clearly stated approach to learning the subject, a textbook organized to lead students from the most basic issues to the more difficult and complex. He includes commonly raised classroom issues, using real-world examples. His military career has provided him with an appreciation and understanding of the material he addresses, rarely found in a textbook. He combines academic rigor and expertise with his experience as a combat Marine to communicate how these issues unfold on the ground.

Before he went to law school, Gary Solis was a young officer in Vietnam, commanding Marines in combat during two tours of duty and serving as a company commander after his predecessor was killed in action. His understanding of LOAC issues is informed not only by those experiences but also by his experience as a judge advocate, which included serving as chief prosecutor in two of the Marine Corps' three divisions, as a military judge, and as the staff judge advocate of a major command. He has participated in more than 700 courts-martial (several involving allegations of violations of the law of war). His active-duty service culminated in a position in which he headed the military law section of the Marine Corps worldwide that earned him recognition for his role in modernizing the *Manual for Courts-Martial*. No one who works on these issues, no one who thinks about them, or has taught them matches Professor Solis's combination of academic thought and scholarship, teaching, and practical experience. He is exactly the person who should write a textbook on law of armed conflict.

As you read this book, you will appreciate that the chapters on conflict status and individual status could only be written by an individual with academic experience in IHL and LOAC. The chapters on command responsibility and rules of engagement could only be composed by a soldier or Marine who has experienced these issues in more than a theoretical setting.

This is a work of mature scholarship, a clearly written guide to IHL and LOAC for the student who comes to the classroom knowing little or nothing of these topics. When Professor Solis and I first discussed these issues, we were greatly interested in them because of our prior experiences, and they were topical because of war crime trials in The Hague. That was prior to September 11, 2001, when the world changed. The events that have occurred in the intervening years, from Iraq to Afghanistan, from Abu Ghraib to Guantanamo, from torture allegations to the treatment of detainees, demonstrate the need for an understanding of the principles of IHL. This book provides that understanding.

Professor Solis's work is historical as well, describing hundreds of cases – in the United States and internationally. He traces the history of concepts, concentrating on significant cases from ancient times to the war on terrorism. He artfully mixes legal and military history, recognizing that we can't know where we are without understanding where we've been. The thousands of footnotes, which allow interested readers to locate further readings on almost any topic discussed, include a wide range of source materials, from law review articles to academic texts and military documents, and even a reference to *Dr. Strangelove*. This textbook also includes material from Professor Solis's personal files and unpublished trial records and military reports not available anywhere else.

In his approach to difficult issues, Professor Solis never soft-pedals miscalculations by the political and military leaders of the United States or excuses their often poorly considered positions in the so-called war on terrorism. The chapter on torture should be a guide to military and civilian leadership.

Every professor and teacher with classes in international law, national security law, or any aspect of the war on terrorism – in undergraduate institutions to graduate programs to law schools – will profit by using this book. The broad coverage of essential IHL should make this book a *vade mecum* for upper-division undergraduate students, as well as those in law school. This book is an excellent resource for military officers of all grades and is absolutely indispensable for every deployed judge advocate. Any tactical legal advisor should make sure that this book is the first item packed in the rucksack. Legal advisors and other users can take advantage of the comprehensive table of contents, which allows the reader to quickly locate significant points of law of war and IHL.

Any textbook covering complex and emerging questions, with issues and answers still being argued and formed, is bound to include arguable points and occasional errors. Professor Solis does not shy away from gray or unsettled areas. He takes clearly stated positions based on experience, expertise, and best interpretations of the law. In doing so, he provides clear guidelines to students and other users.

Professor Gary Solis made a lasting impact on the Law of War program at the United States Military Academy at West Point, ensuring that the next generation of our Army's leaders understand and appreciate LOAC and IHL. His efforts enabled those young men and women to realize and inculcate the guidelines that control our actions in armed conflict and the essential principles and values that underpin these laws and requirements. Because of his contributions, Professor Solis is one of the very few honorary members of West Point's Association of Graduates. With this outstanding textbook, Professor Solis makes a broad contribution to the study of an area of the law that is critical to the manner in which countries, armed forces, and individuals conduct themselves. It is likely to have an impact that will last for decades.

Patrick Finnegan
Brigadier General, United States Army
Dean of the Academic Board
United States Military Academy
West Point, New York

Preface

> It used to be a simple thing to fight a battle. . . . In a perfect world, a general would get up and say, "Follow me, men," and everybody would say, "Aye, sir" and would run off. But that's not the world anymore. . . . [Now] you have to have a lawyer or a dozen.[1]
>
> General James L. Jones, U.S. Marine Corps, while Supreme Allied Commander, Europe

This is a textbook for law students and upper-division undergraduates. A military background is not required. The text takes the interested reader from the essentials of the law of armed conflict (LOAC) to an awareness of some finer points of battlefield law. The text refers to hundreds of cases, including American courts-martial. Many are dealt with in detail, most only in passing, but all contribute to an understanding of LOAC or, as civilians refer to it, international humanitarian law (IHC). (I often follow the lead of the Geneva Conventions in referring to it as the law of armed conflict.) The text concentrates exclusively on *jus in bello* – law on the battlefield – to the exclusion of *jus ad bellum*, the lawfulness of the resort to force. It does not include law of war at sea or law of air warfare.

This is not a national security law text nor a history book, nor an ethics study. Elements of those are inextricably included, particularly history, but they are not the main focus. The essentials are here: Exactly, what are "the law of armed conflict" and "international humanitarian law"? What LOAC/IHL applies to particular armed conflicts? What is the legal status of the participants in an armed conflict? What constitutes a war crime? What is a lawful target, and how are targeting decisions made? What are rules of engagement, and what role do they play on the battlefield? Torture is defined and its futility explained. The text is liberally footnoted so that readers will have a broad reference base if they wish to study an issue more deeply.

The book was born in the classrooms of the United States Military Academy and shaped in Georgetown University Law Center seminars. At West Point, knowing that my cadet students would soon put these lessons into practice in combat gave focus to the book's formation. Discussing and arguing LOAC/IHL issues with soldiers and Marines fresh from duty in Iraq, Afghanistan, Kosovo, and Africa honed arguments and conclusions in the text. My twenty-six-year Marine Corps career provided insights as well.

[1] Lyric Wallwork, "A Marine's toughest mission," *Parade Magazine*, Jan. 19, 2003.

Some will disagree with interpretations included here. Occasionally, conclusions are drawn when international consensus may not be fully formed – little in public international law is clearly black or white. That is not to suggest that one should form conclusions merely for the sake of dispelling ambiguity. Where the weight of authority in my view indicates a conclusion in an unsettled area, that conclusion is stated. Appellate opinions and legal materials are included to illustrate how *jus in bello* concepts have been applied.

LOAC/IHL is not particularly arcane or complex but, contrary to the expectations of some, neither is it merely instinctive. One cannot "know" the law of war through a cursory presumption of what sounds morally right or wrong. In a few courses offered at some universities and law schools, LOAC/IHL is little more than an international law course with a couple of lessons on the Geneva Conventions added to it. It's not that easy. Still, in its general outlines, LOAC/IHL is a relatively narrow aspect of public international law, not particularly arduous or opaque.

In a world where combat is broadcast worldwide in real time, warfighters are expected to meet a high standard of conduct and judgment. In unclear situations, when death is the rule and violence the norm, how do combatants decide, instantly and under fire, what is right and what is wrong – not only morally, but legally? A knowledge of LOAC/IHL provides some of the answers.

The text is heavily United States weighted, but it is more than a statement solely of American positions. It incorporates lessons from the British, Dutch, Israelis, and others. Cases from around the world are included. Some recent U.S. LOAC/IHL positions have been, to phrase it gently, open to question. Those are discussed as well.

My hope is that this textbook will contribute to the betterment of armed forces everywhere and to the intellectual understanding of students, civilian and military, who read it.

Acknowledgments

Thank you to my good friend and mentor, Brigadier General Patrick Finnegan, West Point's Academic Dean. His unwavering support of the United States Military Academy's Law of War instruction, his experience in applying that law in combat zones around the world, and his expert teaching of the subject set the moral climate and academic tone for a generation of Army officers-to-be.

Colonels Dave Wallace and Fred Borch have been unwaveringly supportive and the best of brothers. My frequent advisor, Colonel Hays Parks, LOAC scholar, prolific writer, shooter of anything with a trigger, and Marine Corps friend for more than thirty years, is in a singular class.

In writing this text, I could not have had a better guide and advisor than John Berger, Cambridge University Press Senior Editor. I also thank my editor, Eleanor Umali, and copy editor, Susan Sweeney. Their patient, insightful, and painstaking work greatly improved my writing. And to Andrea, ever patient, always understanding, and endlessly supportive, "thank you" will never be enough.

Institutions that have supported me and encouraged the broader teaching of law of armed conflict/international humanitarian law (LOAC/IHL) include the United States Military Academy, which understands the critical need to teach young officers the law of war and continually presses for its advancement, and Quantico's Marine Corps University, which strives to ensure that Marine combat leaders understand and follow the law of war. The International Institute of Humanitarian Law, in Sanremo, Italy, and the Army's Judge Advocate General's Center and School provide a teaching platform and a bully pulpit for me. The International Committee of the Red Cross, with advice and materials, has generously supported my teaching efforts and those of many others who seek to get the IHL word out. Thank you all.

I do not have a research assistant. Any mistakes in this text are mine alone.

Law of Armed Conflict: International Humanitarian Law in War

1 Rules of War, Laws of War

1.0. Introduction

The study of the law of armed conflict (LOAC), or international humanitarian law (IHL), is not unlike building a house. First, one lays the foundation for the structure. Then a framework is erected that is tied to the foundation. Finally, outer walls and interior rooms are constructed, with the framework providing their support. The study of the LOAC and IHL is much the same.

We begin by answering two foundational questions. We determine what LOAC applies in the conflict under consideration; that is, what is the conflict status? This requires that we know what LOAC and IHL are: what our building materials consist of and some of their history.

Our second foundational question is "What are the statuses of the various participants in our armed conflict?" What individual statuses are possible? When do those statuses apply, how are they determined, and who assigns them? With answers to these two questions, conflict status and individual status, a basic foundation is laid.

Then, the LOAC/IHL framework is erected. What constitutes LOAC and IHL? What are their guiding principles and core values? The framework is essential for all that follows – for the many individual issues, large and small, that make up the innumerable "rooms" of the LOAC/IHL house.

We develop these questions in this chapter and in succeeding chapters. Not all armed conflict law is considered in this single volume. However, the basics are here. In this chapter, we examine the rich history of LOAC. Where did it arise, and when? Who was involved? Why was it considered necessary?

1.1. The Law of War: A Thumbnail History

If Cicero (106–43 B.C.) actually said, "*inter arma leges silent*" – in time of war the laws are silent – in a sense, he was correct. If laws were initially absent, however, there were *rules* attempting to limit armed combat virtually from the time men began to fight in organized groups. Theodor Meron notes that, "Even when followed, ancient humanitarian rules were soft and malleable and offered little if any expectation of compliance."[1] Still, as John Keegan writes, "War may have got worse with the passage of time, but the ethic of

[1] Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (New York: Oxford University Press, 1998), 49.

restraint has rarely been wholly absent from its practice . . . Even in the age of total warfare when, as in Cicero's day, war was considered a normal condition, and the inherent right of sovereign States presided, there remained taboos, enshrined in law and thankfully widely observed."[2]

When did men begin to fight in groups? Cave art of the New Stone Age, 10,000 years ago, depicts bowmen apparently in conflict.[3] Since that time, there have been few periods in human history when there has not been an armed conflict someplace.[4] Keegan tells us that Mesopotamia developed a military system of defense as early as 3000 B.C. In approximately 2700 B.C. Gilgamesh, who ruled the city of Uruk, apparently undertook one of history's first offensive military campaigns.[5] Thus, warfare came to the world at least 5,000 years ago. Limitations on its conduct were close behind and, we are told, "during the five thousand six hundred years of written history, fourteen thousand six hundred wars have been recorded."[6]

No written early Roman military code survives, although it is known that within the Roman army's ranks, many of today's military criminal offenses were recognized.[7] In the early days of the Empire, few rules applied to combat against non-Romans. "[T]he conduct of [Roman] war was essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and noncombatants."[8]

With time, that changed. Around 1400 B.C., Egypt had agreements with Sumeria and other States regarding the treatment of prisoners.[9] In about 200 B.C., in Asia, a variety of Hindu texts describe numerous rules of war. The *Mahabharata*, an epic Sanskrit poem (200 B.C.–200 A.D.) reflected Hindu beliefs. It required that "a King should never do such an injury to his foe as would rankle the latter's heart."[10] It decreed that one should cease fighting when an opponent becomes disabled; that wounded men and persons who surrender should not be killed; noncombatants should not be engaged in combat; and places of public worship should not be molested.[11] The Hindu Code of Manu directs that treacherous weapons, such as barbed or poisoned arrows, are forbidden and that an enemy attempting to surrender, or one badly wounded, should not be killed.[12]

In the sixth century B.C., Sun Tzu counseled limitations on armed conflict as well. "[I]n chariot battles when chariots are captured, then ten-chariot unit commanders will reward the first to capture them and will switch battle standards and flags, their chariots

[2] John Keegan, *War and Our World* (New York: Vintage Books, 2001), 26.
[3] John Keegan, *A History of Warfare* (New York: Knopf, 1993), 119.
[4] A brief period from 100 to 200 A.D. is perhaps the only time the world has enjoyed peace. That period resulted from the Roman Empire's military ascendancy over all opposition.
[5] Keegan, *War and Our World*, supra, note 2, at 29.
[6] James Hillman, *A Terrible Love of War* (New York: Penguin Books, 2004), 17.
[7] Col. William Winthrop, *Military Law and Precedents*, 2d ed. (Washington: GPO, 1920), 17.
[8] Robert C. Stacey, "The Age of Chivalry," in Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds., *The Laws of War* (New Haven: Yale University Press, 1994), 27.
[9] Jean Pictet, *Development and Principles of International Humanitarian Law* (Leiden: Kluwer, 1985), 7–8.
[10] Cited in Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2d ed. (Manchester: Manchester University Press, 2000), 21.
[11] Suurya P. Subedi, "The Concept in Hinduism of 'Just War,'" 8–2 *J. of Conflict & Security L.* (Oct. 2003), 339, 355–6.
[12] K.P. Jayaswal, *Manu and Yâjñavalkya, A Comparison and A Contrast: A Treatise on the Basic Hindu Law* (Calcutta: Butterworth, 1930), 106.

are mixed with ours and driven, their soldiers are treated kindly when given care."[13] Sun Tzu did not suggest that his humanitarian admonitions constituted laws, or even rules of war. They were simply an effective means of waging war.

Roman Emperor Maurice, in the late sixth century A.D., published his *Strategica*. It directed, among other things, that a soldier who injured a civilian should make every effort to repair the injury, or pay twofold damages.[14]

In 621, at Aqaba, Muhammad's followers who committed to a *jihad* for Islam were bound to satisfy a number of conditions in its conduct. "If he has killed he must not mutilate," for example.[15] (Yet, Abyssinian victors often cut off the right hands and left feet of vanquished foes.[16])

Under Innocent II, use of the crossbow was forbidden as "deadly and odious to God" by the Catholic Second Lateran Council in 1139, and the Third Lateran Council prescribed humane treatment of prisoners of war.[17]

During the feudal period, in the twelfth and thirteenth centuries, knights observed rules of chivalry, a major historical basis for the LOAC. "[C]hivalry meant the duty to act honorably, even in war. The humane and noble ideals of chivalry included justice and loyalty, courage, honour and mercy, the obligations not to kill or otherwise take advantage of the vanquished enemy, and to keep one's word. . . . Seldom if ever realized in full . . . while humanizing warfare, chivalry also contributed to the legitimizing of war."[18] To today's war fighter, chivalry may seem an idealistically romantic notion.

> Nevertheless, as a catalogue of virtues and values, it remains an enviable model for honourable conduct in peace and in war. . . . Commands to spare the enemy who asks for mercy, to aid women in distress, to keep one's promise, to act charitably and to be magnanimous transcend any one particular historical period or sociological context. . . . The idea that chivalry requires soldiers to act in a civilized manner is one of its most enduring legacies.[19]

Doubters argue that "chivalric rules actually served to protect the lives and property of privileged knights and nobles, entitling them to plunder and kill peasant soldiers, non-Christian enemies, and civilians . . . ,"[20] but that seems a harsh view. It is true that chivalry's code only applied among Christians and knights. The Scottish nationalist Sir

[13] J.H. Huang trans., *Sun Tzu: The New Translation* (New York: Quill, 1933), 46.

[14] C.E. Brand, *Roman Military Law* (Austin: University of Texas, 1968), 195–6. Also see: Timothy L.H. McCormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime," in Timothy L.H. McCormack and Gerry J. Simpson, eds., *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997), 31–63, 35.

[15] Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins University Press, 1955), 87.

[16] Gerrit W. Gong, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984), 122–3.

[17] G.I.A.D. Draper, "The Interaction of Christianity and Chivalry in the Historical Development of the Laws of War," 5–3 *Int'l Rev. of Red Cross* (1965). The earliest crossbows date to 400 B.C. and the Chinese army. European crossbows date to about 1200, introduced from the East during the Crusades. Military effectiveness superceded theological concerns, for crossbows were widely employed until the seventeenth century. Still, Canon 29 of the Second Lateran Council held, "We forbid under penalty of anathema that that deadly and God-detested art of stingers and archers be in the future exercised against Christians and Catholics." Gregory M. Reichberg, Henrik Syse, and Endre Begby, eds., *The Ethics of War* (Malden, MA: Blackwell Publishing, 2006), 97.

[18] Meron, *Bloody Constraint*, supra, note 1, at 4–5.

[19] Id., at 108, 118.

[20] Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," 35–1 *Harvard Int'l L. J.* (1994), 49, 61.

William Wallace – "Braveheart" – was no knight. He was executed in 1305, after being convicted by an English court of atrocities in war, "sparing neither age nor sex, monk nor nun."[21] His conviction followed 1279's Statute of Westminster that authorized the Crown to punish "soldiers" for violations of "the law and customs of the realm."[22] In 1386, Richard II's *Ordinance for the Government of the Army* decreed death for acts of violence against women and priests, the burning of houses, and the desecration of churches.[23] Henry V's ordinances of war, promulgated in 1419, further codified rules protecting women and clergy.

At Agincourt, in 1415, England's Henry V defeated the French in the Hundred Years' War and conquered much of France. Henry's longbow men made obsolete many methods of warring in the age of chivalry. Shakespeare tells us that, at Agincourt, King Harry, believing that the battle was lost and that his French prisoners would soon join with the approaching French soldiers, gave a fateful order:

> King Harry: The French have reinforced their scattered men. Then every soldier kill his prisoners. (*The soldiers kill their prisoners.*)[24]
>
> Fluellen: Kill the poys and the luggage! 'Tis expressly against the laws of arms 'Tis as arrant a piece of knavery, mark you now, as can be offert. In your conscience now, is it not?
>
> Gower: 'Tis certain there's not a boy left alive. And the cowardly rascals that ran from the battle ha' done this slaughter. Besides, they have burned and carried away all that was in the King's tent; wherefore the King most worthily hath caused every soldier to cut his prisoner's throat. O 'tis a gallant king.[25]

Was Henry's order a war crime? Shakespeare's Fluellen and Gower plainly thought so.

1.1.1. *The First International War Crime Prosecution?*

The trial of Peter von Hagenbach in Breisach, Austria, in 1474 is often cited as the first international war crime prosecution.[26] He was tried by an ad hoc tribunal of twenty-eight judges from Austria and its allied states of the Hanseatic cities for murder, rape, and other crimes. Hagenbach's defense was one still heard today: He was only following orders. His defense met the same response it usually receives today: He was convicted and hanged. Hagenbach's offenses did not actually transpire during a time of war and thus were not war crimes, strictly speaking. It also may be asked whether the prosecuting allied states at von Hagenbach's trial constituted an "international" body.[27] The event is nevertheless significant in representing one of the earliest trials resulting in personal criminal responsibility for the violation of international criminal norms.

[21] Georg Schwarzenberger, "Judgment of Nuremberg," 21 *Tulsa L. Rev.* (1947), 330.
[22] Joseph W. Bishop, Jr., *Justice Under Fire: A Study of Military Law* (New York: Charterhouse, 1974), 4.
[23] Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, vol. II (London: Stevens & Sons, 1968), 15–16.
[24] William Shakespeare, *Henry V*, IV.vi.35–8.
[25] Id., vii.1–10
[26] Schwarzenberger, supra note 23, at 462–6.
[27] For a lengthier examination of von Hagenbach's case, see "Cases and Materials" at the end of this chapter. Further discussion of the case, and the early development of the law of war generally, are in McCormack, "From Sun Tzu to the Sixth Committee," in McCormack and Simpson, *Law of War Crimes*, supra, note 14, at 37–9.

1.1.2. *The Emergence of Battlefield Codes*

Meanwhile, battlefield rules and laws continued to sprout. In Europe, in 1590, the Free Netherlands adopted Articles of War and, in 1621, Sweden's Gustavus Adolphus published his *Articles of Military Lawwes to Be Observed in the Warres*, which were to become the basis for England's later Articles of War. Those English Articles in turn became the basis for the fledgling United States' first Articles of War. The Treaty of Westphalia, in 1648, was the first treaty between warring states to require the return, without ransom, of captured soldiers. Such early European codes, dissimilar and geographically scattered as they were, are significant.[28] They established precedents for other states and raised enforcement models for battlefield offenses – courts-martial, in the case of the British Articles of War. In the second half of the nineteenth century, the previously common battlefield practices and restrictions – customary law of war – began to coalesce into generalized rules, becoming codified and extended by treaties and domestic laws. Manuals on the subject, such as the 1884 British *Manual of Military Law*, were published.

By the mid-nineteenth century, states began writing codes that incorporated humanitarian ideals for their soldiers – the violation of which called for punishments; in other words, military laws. At the same time, there were few multinational treaties that imposed accepted limitations on battlefield conduct, with penalties for their violation. That would have to wait until the Hague Regulation IV of 1907. Even then, battlefield laws would lack norms of personal accountability for crimes in combat.

1.2. Why Regulate Battlefield Conduct?

All's fair in love and war? Hardly! Any divorce lawyer will attest that "all" is decidedly not fair in love. Just as surely, all is not fair in war. There are good reasons why warfare needs to be regulated. Simple humanitarian concerns should limit battlefield conduct. War is not a contest to see who can most effectively injure one's opponent. War cannot be simple blood sport. Indeed, modern LOAC has been largely driven by humanitarian concerns.

There are concrete, valid reasons to regulate battlefield conduct. LOAC differentiates war from riot, piracy, and generalized insurrection. It allows a moral acceptance of the sometimes repugnant acts necessarily done on battlefields and it lends dignity, even honor, to the sacrifices of a nation's soldiers. "War is distinguishable from murder and massacre only when restrictions are established on the reach of battle."[29] The idea of war as indiscriminate violence suggests violence as an end in itself, and that is antithetical to the fact that war is a goal-oriented activity directed to attaining political objectives. Even the view that all necessary means to achieving victory are permissible – a short step away from "all's fair in love and war" – implicitly recognizes that hostilities are limited to the means considered "necessary," further implying that violence superfluous to obtaining a military objective is *un*necessary and thus may be proscribed.

[28] Written European military codes, not necessarily reflecting the law of war, were many. In the fifth century, the Frankish Salians had a military code, as did the Goths, the Lombards, the Burgundians, and the Bavarians. The first French military law code dated from 1378, the first German code from 1487, the first Free Netherlands code from 1590. A Russian military code appeared in 1715. See Winthrop, supra, note 7, 17–8.

[29] Michael Walzer, *Just and Unjust Wars*, 3d ed. (New York: Basic Books, 2000), 42.

As it pertains to individuals, LOAC, perhaps more than any other branch of law, is liable to fail. In a sense, its goal is virtually impossible: to introduce moderation and restraint into an activity uniquely contrary to those qualities. At the best of times, LOAC is "never more than imperfectly observed, and at the worst of times is very poorly observed indeed."[30] In fact, one must admit that LOAC really does not "work" well at all. However, Geoffrey Best writes, "we should perhaps not so much complain that the law of war does not work well, as marvel that it works at all."[31]

It may seem paradoxical that war, the ultimate breakdown of law, should be conducted in accordance with laws. But so it is. Why would a state fighting for survival allow itself to be hobbled by legal restrictions? In fact, nations of the eighteenth and nineteenth centuries, when LOAC was in its formative stages, did not regard themselves as fighting for survival. Territory, not ideology, was the usual basis for war. Defeat meant the realignment of national boundaries, not the subjugation of the defeated population nor the dissolution of the vanquished state. "[A]nalysis of war prior to nineteenth-century industrialization and Napoleonic enthusiasm indicates that wars were less violent and less significant and were subject to cultural restraints."[32] War will always constitute suffering and personal tragedy, but rules of warfare are intended to prevent *unnecessary* suffering that bring little or no military advantage. Critics argue that, in war, states will always put their own interests above all else, and any battlefield law that clashes with those interests will be disregarded. As we shall see, LOAC has been created by states that have their own interests, particularly the interests of their own armed forces, in mind. LOAC is hardly an imposition on states by faceless external authorities.[33]

In modern times, despite Clausewitz's assertion that the laws of war are "almost imperceptible and hardly worth mentioning,"[34] they remain the best answer to the opposing tensions of the necessities of war and the requirements of civilization. "It is the function of the rules of warfare to impose some limits, however ineffective, to a complete reversion to anarchy by the establishment of minimum standards on the conduct of war."[35] The temporary advantages of breaching LOAC are far outweighed by the ultimate disadvantages.

"Unnecessary killing and devastation should be prohibited if only on military grounds. It merely increases hostility and hampers the willingness to surrender."[36] An example was World War II in the Pacific. After an early series of false surrenders and prisoner atrocities, Pacific island combat was marked by an unwillingness of either side to surrender, and a savagery of the worst kind by both sides resulted.[37] On Iwo Jima, of 21,000–23,000

[30] Geoffrey Best, *Humanity in Warfare* (London: Weidenfeld & Nicolson, 1980), 11.
[31] Id., 12.
[32] Hillman, *A Terrible Love of War*, supra, note 6, 168.
[33] Adam Roberts and Richard Guelff, *Documents on the Law of War*, 3d ed. (Oxford: Oxford University Press, 2000), 31.
[34] Carl von Clausewitz, *On War*, A. Rapoport, ed. (London: Penguin Books, 1982), 101. However, Clausewitz also wrote, "Therefore, if we find that civilized nations do not put their prisoners to death, do not devastate towns and countries, this is because their intelligence. . . taught them more effectual means of applying force than these rude acts of mere instinct." Id., at 103.
[35] Schwarzenberger, supra note 23, at 10.
[36] Bert V.A. Röling, "Are Grotius' Ideas Obsolete in an Expanded World?" in Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds., *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 287.
[37] See Eugene Sledge, *With the Old Breed at Peleliu and Okinawa* (Novato, CA: Presidio Press, 1981) for examples of savagery in the Pacific theater. Paul Fussell, *Wartime: Understanding and Behavior in the*

Japanese combatants, 20,703 were killed. When the island was declared secure only 212 Japanese surrendered[38] – less than 2 percent – because Marines and soldiers fearing that they would be murdered or mistreated if they surrendered simply put surrender out of mind and fought on, thereby increasing casualties to both sides. "Violations . . . can also result in a breakdown of troop discipline, command control and force security; subject troops to reciprocal violations on the battlefield or [in] P.W. camps; and cause the defeat of an entire army in a guerrilla or other war through alignment of neutrals on the side of the enemy and hostile public opinion."[39]

The rapacious conduct of World War II Nazis as they crossed Russia toward Moscow and Stalingrad exacerbated a hatred in the Russian civilian population that led to thousands of German deaths at the hands of partisans. Michael Walzer notes, "The best soldiers, the best fighting men, do not loot and . . . rape, do not wantonly kill civilians."[40] Strategically, battlefield crimes may lessen the prospect of an eventual cease-fire. War, then, must be conducted in the interest of peace.

Does LOAC end, or even lessen, the frequency of battlefield crimes? Was Thucydides correct in noting, "The strong do what they can and the weak suffer what they must"? Can we really expect laws to deter violations of IHL? Idi Amin, who robbed and raped Uganda into misery and poverty, ordered the deaths of 300,000 of his countrymen, and admitted having eaten human flesh, died in palatial comfort in Saudi Arabian exile, never brought to account for the butchery he ordered during his country's internal warfare. Josef Mengele, the World War II Nazi doctor at the Auschwitz extermination camp – the "Angel of Death" who conducted horrific "medical" experiments on prisoners – escaped to a long and comfortable life in Paraguay, and accidentally drowned while enjoying a day at the beach with his family in 1979. He was never tried for his war crimes.

No law will deter the lawless. No criminal code can account for every violator. No municipal or federal law puts an end to civilian criminality. Should we expect more from LOAC? Geoffrey Best writes, "If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law,"[41] but that is no license to surrender to criminality.

Battlefield violations have always occurred, continue to occur, and will occur in the future. Despite training and close discipline, as long as nations give guns to young soldiers, war crimes are going to happen. Recognizing that unpleasant truth is not cynicism so much as an acceptance of reality. Why bother with confining rules in combat, then? The answer: for reasons similar to those that dictate rules in football games – some violence is expected, but not all violence is permitted. Are rules and laws that are frequently violated worthless for their violation? Are speed limits without value because they are commonly exceeded? In the western world, are the Ten Commandments, which are commonly disregarded, therefore, of no worth? There always will be limits on acceptable conduct, including conduct on the battlefield. We obey LOAC because we cannot allow ourselves

Second World War (New York: Oxford University Press, 1989), relates similar accounts from the European theater.

[38] Stephen J. Lofgren, ed., "Diary of First Lieutenant Sugihara Kinryû: Iwo Jima, January – February 1945," 59–97. *J. Military History* (Jan. 1995).

[39] Jordan J. Paust, letter, 25 *Naval War College Rev.* (Jan–Feb 1973), 105.

[40] Michael Walzer, "Two Kinds of Military Responsibility," in Lloyd J. Matthews and Dale E. Brown, eds., *The Parameters of Military Ethics* (VA: Pergamon-Brassey's, 1989), 69.

[41] Best, *Humanity in Warfare*, supra, note 30, at 12.

to become what we are fighting and because we cannot be heard to say that we fight for the right while we are seen to commit wrongs. "Military professionals also have desires for law. For starters, they also turn to law to limit the violence of warfare, to ensure some safety, some decency, among professionals on different sides of the conflict."[42] We obey the law of war if for no other reason than because reciprocity tells us that what goes around comes around; if we abuse our prisoners today, tomorrow we will be the abused prisoners. We obey the law of war because it is the law and because it is the honorable path for a nation that holds itself up as a protector of oppressed peoples. We obey the law of war because it is the right thing to do. "When principle is involved, be deaf to expediency."[43]

In the calm of a college seminar room, it is easy to denounce the actions of others acting in a combat zone – soldiers, Marines, sailors, and airmen who did not have the luxury of discussion, or opportunity to study a treaty, or time for reflection before they acted. However, no armed service member is likely to be prosecuted for a single law of war violation hastily committed without thought in the heat of combat. When the battle is over, when the combatant is seen to have considered his/her actions before acting wrongly, when the action taken was patently contrary to the law of war, or when the violation was of a repeated nature, then it is reasonable to invoke LOAC.

1.2.1. *Difficult Issues*

Twenty-first-century armed conflicts often have no battlefield in the traditional sense. "Less and less do we see opposing armies take to the field while the Geneva Convention shields civilians on the sidelines. Television journalists show us every day the new characteristic engagement: brutal, neighbor-on-neighbor killing."[44] Armed conflicts have become *intra-*, rather than *inter-*, state affairs. Thugs seize national power; stateless terrorists attack national infrastructures; children are dragooned into "liberation" armies.

In a perceptive 2007 interview, retired British General Sir Rupert Smith, who commanded troops in Northern Ireland, Bosnia-Herzegovina, Kosovo, and the Gulf War, noted that,

> instead of a world in which peace is understood to be an absence of war and where we move in a linear process of peace-crisis-war-resolution-peace, we are in a world of continuous confrontation. . . . The new wars take place amongst the people as opposed to "between blocks of people", as occurred for instance in the Second World War . . . [in which] there was a clear division as to which side everybody belonged to and whether they were in uniform or not. This is not the case in "wars amongst the people". [Today] the people are part of the terrain of your battlefield . . . the event known as "war" is nowadays especially directed against non-combatants . . . [W]ar as a massive deciding event in a dispute in international affairs, such wars no longer exist. Take the example of the United States, a state with the largest and best-equipped military forces in the world, which is unable to dictate the desired outcome [in Iraq] as it did in the two world wars . . . The ends to which wars are conducted have changed from the hard, simple, destructive objectives of "industrial war" to the softer and more malleable objectives of changing intentions, to deter, or to establish a safe and secure environment. . . . The objective *is* the will of the people. Tactically the opponent often operates according to the tenets of the guerrilla . . . seeks to provoke an over-reaction so as to paint the

[42] David Kennedy, *Of War and Law* (Princeton NJ: Princeton University Press, 2006), 32.
[43] Attributed to Cmdr. Matthew Fontaine Maury, USN (1806–73), a groundbreaking oceanographer.
[44] Capt. Larry Seaquist, USN, "Community War," *Proceedings* (Aug. 2000), 56.

> opponent in the colours of the tyrant and oppressor. . . . Your objective is to capture the population's intentions, and the more you treat all the people as your enemy, the more all the people will be your enemy . . . [I]f you operate so that your measures during conflict are treating all these people as enemies . . . you are acting on behalf of your enemy; you are even co-operating with him, because that is what your opponent is aiming at with his strategy.[45]

How is LOAC to be applied and enforced in these circumstances, on nonbattlefields where the very aim of war has changed? Warfare is no longer as simple as in the mid-twentieth century. But David Kennedy goes too far when he writes, "The twentieth-century model of war, interstate diplomacy, and international law are all unraveling in the face of low-intensity conflict and the war on terror."[46] The law of war still applies and still can be applied. It still "works," but only through patient, intelligent, and resolute effort by states willing to live by the rule of law.

Why should our side observe LOAC when our opponents disregard it, or are even unaware that such laws exist? One writer points out, "There was once a legal notion, now archaic and never entirely accepted, that less-civilized opponents in effect waived the rules of war by their conduct, permitting the use of more brutal methods against them. That notion will never pass muster in the 21st century. There may be a temptation to think that a barbarous enemy deserves a like response, but this is an invitation to legal, moral, and political disaster."[47] Because there are criminals at large should we pursue them by becoming criminals? If terrorists film themselves beheading captives, shall we therefore behead our captives? We cannot allow ourselves to become that which we fight. Walzer writes, "They can try to kill me, and I can try to kill them. But it is wrong to cut the throats of their wounded or to shoot them down when they are trying to surrender. These judgments are clear enough, I think, and they suggest that war is still, somehow, a rule-governed activity, a world of permissions and prohibitions – a moral world, therefore, in the midst of hell."[48]

Former American Secretary of Defense Donald Rumsfeld was very wrong when he said, "There's something about the body politic in the United States that they can accept the enemy killing innocent men, women and children and cutting off people's heads, but have zero tolerance for some soldier who does something he shouldn't do."[49] Americans don't "accept" enemy war crimes; rather, we understand we are powerless to stop them when they are happening. We hope our soldiers and Marines and sailors and airmen will meet the killers in another time and place or that we may eventually capture and try the enemy for his crimes. And we rightfully expect our own combatants to meet high standards on the battlefield. As a nation we must be intolerant of lesser conduct.

1.3. Sources of the Law of Armed Conflict

Armed conflict has changed in the twenty-first century, but LOAC remains important, even inviolate, for states that respect the rule of law. Initially, battlefield rules were born

[45] Toni Pfanner, "Interview with General Sir Rupert Smith," 864 *Int'l Rev. of the Red Cross* (Dec. 2006), 720. Emphasis in original.
[46] Kennedy, *Of War and Law*, supra, note 42, at 12.
[47] Michael H. Hoffman, "Rescuing the Law of War: A Way Forward in an Era of Global Terrorism," *Parameters* (Summer 2005), 18, 34.
[48] Walzer, *Just and Unjust Wars*, supra, note 29, at 36.
[49] Bob Woodward, *State of Denial* (New York: Simon & Schuster, 2006), 486.

of a simple desire to conduct oneself honorably. Self-interest dictates an avoidance of needless cruelty lest that same cruelty be visited upon ourselves. So, from where are battlefield rules drawn? What are the sources of LOAC?

The Statute – the establishing decree – of the International Court of Justice (ICJ) relates the sources of international law that the Court applies. The ICJ, reads its Statute, first looks to international conventions, and then to international custom. Next, the Court will consider "general principles of law recognized by civilized nations," then to judicial decisions and, finally, to "the teachings of the most highly qualified publicists of the various nations. . . ."[50] International conventions – treaties – and custom are the ICJ's primary sources of law.[51]

The LOAC manual used by American armed forces, Field Manual (FM) 27–10, *The Law of Land Warfare*, was issued in 1956 and remains in effect today.* Taking its cue from the ICJ's Statute, the Field Manual notes that "The law of war is derived from two principle sources . . . Treaties (or conventions, such as the Hague and Geneva Conventions [and] Custom . . . This body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law."[52]

1.3.1. *Custom*

Custom is one of the two primary bases of the law of war. Customary international law is binding on all states.[53] Summarily stated, "the formation of customary law requires consistent and recurring action . . . by states, coupled with a general recognition by states that such action . . . is required . . . by international law."[54]

Customary law is the "general practice of states which is accepted and observed as law, i.e. from a sense of legal obligation."[55] It arises when state practice is extensive and virtually uniform. A prerequisite for an internationally binding custom is that ". . . the provision concerned should . . . be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[56] In other words, a practice begins, and then spreads to other states. The widening practice eventually is accepted by states not as an option but as a requirement, finally maturing into customary law. There is no bright-line time element for a practice to develop into binding custom, but there must be a "constant and uniform usage" practiced by states.[57] Article 38 of the Statute of the ICJ defines international custom as evidence of a general practice that

[50] Statute of the International Court of Justice, Article 38.1 (June 26, 1945).

[51] Article 38 is actually an instruction to ICJ judges. International lawyers and tribunals do employ other sources, such as *jus cogens*, equity, and even natural law, to determine the existence of customary law.

* A new edition will soon be available, if it is not already.

[52] Dept. of the Army, FM 27–10: *The Law of Land Warfare*, w/change 1 (DC: GPO, 1956), para. 4.

[53] Exceptions are states that consistently and unequivocally refuse to accept a custom during the process of its formation. Often referred to as "persistent objection," the principle remains a live, if not particularly strong, tenet of international law. Because customary law is based on general patterns of expectation and practice, rather than consent, it is unlikely that a state could persistently object to a customary law. A failure of such an attempt occurred after World War II, at the Nuremberg IMT, when the tribunal upheld provisions of 1907 Hague Regulation IV as having been customary international law by 1939, despite Germany having persistently objected to the convention as a whole.

[54] Roberts and Guelff, *Documents*, supra, note 33, at 7.

[55] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), 3.

[56] *North Sea Continental Shelf* Cases, ICJ Rep. 1969, 41–2.

[57] *Asylum* Case, ICJ Rep. 1959, 276–7.

is extensive and virtually uniform, coupled with a subjective belief by states that such behavior is required by law.

Take, for example, the practice of ships' use of running lights. In the eighteenth century, to reduce the risk of collision, ships based in European ports began to show colored lights when underway at night. To help other ships judge the distance and direction of oncoming ships' lights, a red light was shown on a ship's port side, a green light to starboard. Over time, this maritime safety measure became common, regardless of the ship's flag. Common usage in turn became an accepted custom, and the custom spread throughout the sailing world. The custom, with its clear utility, eventually became a rule, first formulated for British mariners, for instance, in 1862. Finally, the rules for ships' underway lights at night were the basis of the 1889 International Regulations for Preventing Collisions at Sea, adopted by virtually all maritime states. After that, ships no longer showed running lights merely because they recognized it as a wise practice that enhanced the safety of all mariners; now it was required by binding regulation. Usage begat custom begat customary international law begat treaty. So it is with the law of war. Bombing becomes more accurate with the use of laser-designated targets and global-position-satellite (GPS)-guided munitions, and collateral damage is dramatically reduced. Eventually, laser target designation and GPS munitions guidance will likely become not a targeting choice but an armed combat requirement of customary international law and, in time, the subject of treaty-made law.

SIDEBAR. General George Washington was well aware of the customary law of war. "In 1776, American leaders believed that it was not enough to win the war. They also had to win in a way that was consistent with the values of their society and the principles of their cause. . . . In the critical period of 1776 and 1777, leaders of both the Continental army and the Congress adopted the policy of humanity . . . Every report of wounded soldiers refused quarter, of starving captives mistreated in the prison hulls at New York, and of the plunder and rapine in New Jersey persuaded leaders in Congress and the army to go a different way, as an act of principle and enlightened self-interest. . . . Washington ordered that Hessian captives would be treated as human beings with the same rights of humanity for which Americans were striving. . . . [A]fter the battle of Princeton, Washington ordered one of his most trusted officers, Lieutenant Colonel Samuel Blachley Webb, to look after [British prisoners]: 'You are to take charge of [211] privates of the British Army. . . . Treat them with humanity, and Let them have no reason to Complain of our Copying the brutal example of the British Army . . . ' They [American leaders] set a high example, and we have much to learn from them."[58]

[58] David Hackett Fischer, *Washington's Crossing* (Oxford: Oxford University Press, 2004), 375, 376, 378, 379. Samuel Eliot Morison writes of John Paul Jones, while he was captain of the *Ranger*, sending a press gang ashore at St. Mary's Isle, England. Finding no suitable prospects, Jones allowed his sailors to loot the mansion of an English Count, taking, among other things, a large silver service. Jones wrote a regretful letter, to which the Count replied, "In your letter you profess yourself a Citizen of the World, and that you have drawn your sword in support of the Rights of Man . . . I doubt the laws of war and of nations would be very favorable to you as a citizen of the World." Jones purchased the silver service with his own funds and, after the war, returned it intact to the Count. Morison, *John Paul Jones: A Sailor's Biography* (Boston: Atlantic-Little Brown, 1959), 143–55.

A crucial issue in the formation of customary international law is part and parcel of international law itself: Who is to say when "custom" shades into "requirement"? Who decides when running lights are not just a good idea, but are required? That tipping point, known as *opino juris*, is often a matter of disagreement and dissent, driven, on one hand, by those wishing to force new levels of conduct or performance favoring them and, on the other hand, those wishing to retain maximum freedom of action. "*Opino juris* is thus critical for the transformation of treaties into general law. To be sure, it is difficult to demonstrate such *opino juris*, but this poses a question of proof rather than of principle."[59] Again, there is no bright line test, no predictable point where custom becomes law.

Formative issues aside, custom remains the basis of much of the law of war. In ancient times, custom arose, then was eventually considered a binding precept cum international customary law. In many instances, it was made law in the form of multinational treaties that dictated penalties for its violation. But customary international law, even when undocumented in treaty form, is no less binding on nations.

Custom and treaties may be discussed as if they were discrete entities, but in practice the two are interrelated in complex ways. Custom is often memorialized in treaty form; treaties may give rise to rules of customary law. In contrast, treaties may be defeated by contrary state practice. The shifting interrelation of the two gives rise, of course, to conflicts, sometimes resolved in international courtrooms, sometimes on battlefields. For our purposes it is sufficient to understand that custom and treaties constitute the two primary bases of LOAC and, like many international legal concepts, they are subject to disagreements and conflicting interpretation.

1.3.2. *Treaties*

Of the two primary sources of LOAC, custom and treaties, treaties are the easier to describe. Particularly since World War II, the binding quality of such pacts has increased. Among the first treaties bearing on battlefield conduct – *jus in bello* – was the 1785 Treaty of Amity and Commerce, between Prussia and the United States. It provided, *inter alia*, basic rules regarding prisoners of war and noncombatant immunity, should the parties war against each other. Roberts and Guelff note that, "multilateral treaties on the laws of war have been variously designated 'convention', 'declaration', 'protocol', 'procès-verbal' or 'statute'. . . . [T]he 1969 Vienna Convention on the Law of Treaties defines the term 'treaty' as 'an international agreement concluded between States in written form and governed by international law . . . '"[60]

There is no agreement as to what treaties constitute the body of *jus in bello*. In some cases, signed treaties are never ratified, or lengthy periods pass between signing and ratification. The 1925 Geneva Gas Protocol,[61] signed by the United States in 1925, was not ratified by the United States until 1975. The 1969 Vienna Convention on Treaties is signed by the United States but remains unratified, as do 1977 Additional Protocols I

[59] Theodor Meron, "The Geneva Conventions as Customary Law," 81–2 *AJIL* (April 1987), 348, 367. Footnotes deleted.

[60] Roberts and Guelff, *Documents*, supra, note 33, at 5.

[61] 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

and . . . II. Generally, a signed treaty that has not been ratified still imposes an obligation on the party to not defeat the object and purpose of the treaty. To escape even that obligation, the United States took the unique step of "un-signing" the 1998 Rome Statute of the International Criminal Court (ICC). A few significant LOAC-related multinational treaties (e.g., the 1923 Hague Rules of Aerial Warfare and the 1997 Ottawa Convention Prohibiting Anti-Personnel Mines) have never been signed by the United States.

In time of war the laws are silent? Perhaps in Cicero's time, but not today. The many multinational treaties bearing on battlefield conduct and the protection of the victims of armed conflict demonstrate that there is a large and growing body of positive law, IHL, bearing on armed conflict.

In American practice, the Constitution's Article VI mandates that "This Constitution, and the laws of the United States . . . and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land . . . " Treaties ratified by the U.S. Senate, such as the 1949 Geneva Conventions and many others, not only bind America's armed forces, but are also "the supreme Law of the Land."

1.3.3. *Legislation and Domestic Law*

The 1949 Geneva Conventions were among the first multinational treaties that required ratifying states to enact domestic legislation to enforce their mandates by penalizing or criminalizing certain violations. (See Chapter 3, section 3.8.2.) International treaties, in and of themselves, have no inherent enforcement powers, but states that ratify such pacts have jurisdiction over their citizen-treaty offenders. Those states may enact national legislation in furtherance of the ratified treaty, promulgating administrative or criminal enforcement provisions in their domestic law. Today, the requirements for such ratifying-state enforcement measures are routinely written into multinational treaties. For example, the 1984 Convention Against Torture (the CAT), in Article 2.1, directs that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[62] The United States ratified the CAT in 1994. In compliance with Article 2.1, the United States has passed federal legislation prohibiting torture.[63] Domestically, this legislation becomes a source of human rights and a LOAC and IHL guideline.

1.3.4. *Judicial Decisions*

In LOAC, "case law" refers to decisions of domestic courts, military tribunals, and international courts that relate to IHL and LOAC. Prior to 1945, other than a few unsatisfactory trials that followed World War I (Chapter 3, section 3.2.1), there was virtually no case law to interpret and flesh out the customary law of war, or to give life to its gray areas. The conclusion of World War II saw the initial efforts to remedy that lack.

[62] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

[63] See 28 U.S.C. §§ 1350, 2340(1) and 2340A. Also, the Armed Forces have issued DoD Directive 3115.09, dated Nov. 3, 2005, "DoD Intelligence Interrogations, Detainee Briefings, and Tactical Questioning," as well as 2007's Field Manual 2–22.3, *Human Intelligence Collection Operations*, both containing torture prohibitions.

The Nuremberg and Tokyo International Military Tribunals produced lengthy judgments and valuable case law. Those opinions are still studied. The judgments of the so-called "Subsequent Trials," also held in Nuremberg after the war, remain significant case law. Several thousand military commissions were conducted after World War II. The United States conducted roughly one thousand such commissions, and our Allied nations conducted their own military tribunals. As with the Nuremberg judgments, military commission decisions remain significant today, but those cases, judgments, and opinions still represented a relatively small body of case law. "The body of law that governed the enforcement of international humanitarian law in the mid 1990s was very rudimentary. The substantive law . . . did not benefit from well-developed jurisprudence."[64]

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have provided important interpretations of LOAC/IHL and the customs and usages of war. The international scope of the Tribunals, with their generally well-qualified judges, and their reasoned, nuanced judgments and appellate opinions, provide essential direction for students of LOAC/IHL. However, the Tribunals are international criminal courts in which elements of common law and civil law systems must be reconciled. For instance, in the common law tradition, the concept of *mens rea* is embodied in intention, recklessness, and criminal negligence. In the civil law tradition, "[n]egligence, however gross, does not carry criminal responsibility unless a particular crime provides for its punishment."[65] Instead, civil law jurisprudence speaks of *dolus directus*, which bears a similarity to the common law's *mens rea*. "Notwithstanding the different architecture of the criminal systems and the ensuing differences between the operative concepts, it can be asserted that for the question of *mens rea* there is substantial overlap of the notions . . . It may be concluded that the differences between the two systems in our context are real, but more conceptual than substantive."[66] The two systems' differing approaches to the mental state required for conviction illustrates one significant difference between ICTY and LOAC jurisprudence.

There is no system of precedent in international law or in LOAC.[67] (See *Prosecutor v. Kupreškić et al.*, Cases and Materials, this chapter.) Opinions of the ICTY, ICTR, and ICC bind only the litigants before the court, not U.S. courts or the domestic courts of any state. That U.S. position was recently made clear by Supreme Court Chief Justice Roberts: "[S]ubmitting to [the] jurisdiction [of an international court] and agreeing to be bound are two different things,"[68] but neither are the opinions of international courts

[64] Louise Arbour, "Legal Professionalism and International Criminal Proceedings," 4–4 *J. of Int'l Crim. Justice* (Sept. 2006), 674, 675.

[65] Kunt Dörmann, *Elements of War Crimes* (Cambridge: ICRC/Cambridge University Press, 2003), 491.

[66] Id., at 492–3. For a more complete discussion of the ICTY, ICTR, and ICC treatments of *mens rea*, see William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 292–6.

[67] Art. 38(1)(d) of the Statute of the ICJ provides that judicial decisions are a "subsidiary means for the determination of rules of law," subject to Art. 59, which holds, "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[68] *Medellin v. Texas*, 128 S Ct. 1346 (2008), at 1358. As Professor Mary Ellen O'Connell writes, however, "the majority in *Medellin* should have looked at the full range of international and foreign court and tribunal decisions that national courts regularly enforce either directly or under the terms of an enforcement treaty." *The Power & Purpose of International Law* (New York: Oxford University Press, 2008), 348.