

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).

Cambridge University Press
978-0-521-87088-7 - The Law of Armed Conflict: International Humanitarian Law in War
Gary D. Solis
Frontmatter
[More information](#)

The Law of Armed Conflict

INTERNATIONAL HUMANITARIAN LAW IN WAR

Gary D. Solis
United States Military Academy



Cambridge University Press
978-0-521-87088-7 - The Law of Armed Conflict: International Humanitarian Law in War
Gary D. Solis
Frontmatter
[More information](#)

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

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9780521870887

© Gary D. Solis 2010

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2010

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Solis, Gary D.

The law of armed conflict : international humanitarian law in war / Gary D. Solis.
p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-87088-7 (hardback)

1. War (International law) 2. Humanitarian law I. Title.

KZ6385.S65 2010

341.6 - dc22 2009027819

ISBN 978-0-521-87088-7 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Contents

Table of Cases	<i>page</i> xv
Table of Treaties	xxi
Foreword	xxv
Preface	xxix
Acknowledgments	xxxii

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
<i>Hellenica</i> , Book II, by Xenophon	27
The 1474 Breisach Trial	28
<i>United States v. Plenty Horses</i>	30
<i>In Re Göring and Others</i>	34
<i>Prosecutor v. Kupreškić, et al.</i>	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. <i>A Memory of Solferino</i> 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
<i>United States v. Pvt. Michael A. Schwarz</i>	65
<i>United States v. Major Edwin F. Glenn</i>	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: <i>aut dedere aut judicare</i>	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

Contents	vii
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,” <i>United States v. Wilhelm von Leeb, et al.</i>	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 <i>Manual of the Law of Armed Conflict</i>	139
<i>Prosecutor v. Tadić</i>	142
<i>Commentary to 1949 Geneva Convention I</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
<i>Prosecutor v. Fatmir Limaj</i>	172
<i>Prosecutor v. Dusko Tadić</i>	174
<i>Case Concerning Military and Paramilitary Activities in and Against Nicaragua</i>	177
<i>Hamdan v. Rumsfeld</i>	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. <i>Levée en Masse</i>	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 <i>jus in bello</i> Protections Due Captured Individuals	237
6.12. Summary	238
Cases and Materials	239
<i>In Re Buck and Others</i>	239
<i>Military Prosecutor v. Omar Mahmud Kassem and Others</i>	240

Contents	ix
“The Čelebići Case,” <i>Prosecutor v. Delalić, et al.</i>	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. <i>Kriegsraison</i>	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
<i>The United States v. Wilhelm List, et al.</i>	286
<i>Shimoda et al. v. State</i>	290
<i>Kupreškić and Others</i>	295
<i>Prosecutor v. Kunarac, et al.</i>	296
<i>Prosecutor v. Galić</i>	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
<i>Prosecutor v. Dusko Tadić</i>	332
<i>Prosecutor v. Kunarac, et al.</i>	333
“The Zyklon B Case”	335
<i>Prosecutor v. Furundžija</i>	336
<i>In Re Amberger</i>	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
<i>Attorney-General of the Government of Israel v. Adolf Eichmann</i>	364
<i>"The Einsatzgruppen Case," The United States v. Ohlendorf, et al.</i>	366
<i>United States v. Private Michael A. Schwarz</i>	369
<i>Regina v. Finta</i>	372
<i>Prosecutor v. Erdemović</i>	373
<i>United States v. Staff Sergeant Raymond L. Girouard</i>	378
10. Command Responsibility and <i>Respondeat Superior</i>	381
10.0. Introduction	381
10.1. Command Responsibility and <i>Respondeat Superior</i> : A Brief History	382
10.1.1. My Lai and <i>Respondeat Superior</i>	388
10.2. Recent Command Responsibility and <i>Respondeat Superior</i> Cases	390
10.3. A Commander's Seven Routes to Trial	391
10.4. When Officers Disobey	396
10.5. Command Responsibility and <i>Respondeat Superior</i> Today	399
10.5.1. Recent Evolutionary Changes	402
10.6. Summary	404
Cases and Materials	405
<i>Yamashita v. Styer</i>	405
Theater Judge Advocate's Review: <i>The United States v. General Tomoyuki Yamashita</i>	407
<i>Prosecutor v. Halilović</i>	410
<i>"The Čelebići Case," Prosecutor v. Delalić, et al.</i>	410
<i>Prosecutor v. Blaškić</i>	413
<i>Prosecutor v. Hadžihasanović</i>	415
<i>Prosecutor v. Kristić</i>	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

Contents	xi
11.4. Summary	431
Cases and Materials	432
<i>Trial of Otto Skorzeny and Others</i>	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
<i>Prosecutor v. Vasiljevic</i>	474
“ <i>The Čelebići Case</i> ,” <i>Prosecutor v. Delalić, et al.</i>	475
<i>Prosecutor v. Kunarac, et al.</i>	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

xii	Contents
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 <i>Nature</i> . . .	524
14.3.2. Military Objectives Are Limited to Objects Which, by Their <i>Location</i> . . .	525
14.3.3. Military Objectives Are Limited to Objects Which, by Their <i>Purpose</i> . . .	525
14.3.4. Military Objectives are Limited to Objects Which, by Their <i>Use</i> . . .	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,” <i>The United States v. Otto Ohlendorf, et al.</i>	547
ICTY Committee Report on NATO Bombing of the Federal Republic of Yugoslavia	549
<i>Prosecutor v. Kordić and Čerkez</i>	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
<i>Prosecutor v. Jokić</i>	569
<i>Prosecutor v. Prlić, et al.</i>	572
<i>Prosecutor v. Strugar</i>	574

Contents	xiii
16. The 1980 Certain Conventional Weapons Convention	577
16.o. 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
<i>Prosecutor v. Martić</i>	595
White Phosphorus Munitions	597
17. Gas, Biological, and Chemical Weapons Treaties	600
17.o. 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 <i>Manual of the Law of Armed Conflict</i>	616
<i>Prosecutor v. Tadić</i>	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
Llandoverly 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 Lingensfelder, 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 Sandroek, 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. McClaghry*, 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 Commission, Ft. Klamath, Oregon (1873), at 425–6

Table of Cases

xvii

- 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. Naletilić 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

Table of Cases

xix

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
Kafir 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. 23(a), at 293 | Art. 28, at 327 |
| Art. 1, at 393, 406 | Art. 23(b), at 421–2 | Art. 29, at 224 |
| Art. 3, at 54 | Art. 23(c), at 271, 293, 617 | Art. 31, at 430 |
| Art. 4, at 446 | Art. 23(f), at 116, 429–30 | Arts. 42–56, at 125 |
| Art. 14, at 73 | Art. 23(g), at 44, 258–9, | Art. 46, at 478 |
| Art. 22, at 38, 57, 260, | 309 | Art. 47, at 327, 572 |
| 273 | Art. 24, at 426 | Art. 53, at 309 |
| Art. 23, at 44, 270, 433, | Art. 25, at 524, 526, 542 | Art. 56, at 557 |
| 600, 611 | Art. 27, at 316, 527, 566 | |
- 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 | Art. 25, at 192
Art. 28, at 192
Art. 29, at 192 | 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. 2 | Art. 30, at 192, 259, 268 | common Art. 63/62/142/158, at
82 |
| *common Art. 3 | Art. 33, at 259, 269 | common Art. 63/62/142/158, at
82 |
| Art. 8, at 85, 259 | Art. 34, at 259, 268 | Art. 50, at 259 |
| Art. 12, at 85, 329 | Art. 41, at 192 | Art. 65, at 192 |
| Art. 13, at 192, 212 | common Art. 47/48/127/144, at
331, 361 | |
| Art. 15, at 327 | | |
| Art. 19, at 319, 524 | | |
| Art. 22, at 192, 193 | | |
- 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.(6), at 200, 240–1, 245,
299 | Art. 42, at 314
Art. 44, at 105 |
| Art. 4A.(1), at 213, 232,
240, 244, 299 | Art. 4B, at 202 | Art. 76, at 259, 268 |
| Art. 4A.(2), at 125, 220,
240–1, 244, 299 | Art. 5, at 214, 228–31, 235, 238,
245–9 | Art. 85, at 221
Art. 94, at 303 |
| Art. 4A.(3), at 195, 198,
240–1, 244, 299 | Art. 8, at 85, 259 | Art. 96, at 303 |
| Art. 4A.(4), at 198, 240,
244 | Art. 13, at 323–5 | Art. 120, at 322 |
| Art. 4A.(5), at 244 | Art. 17, at 104–5 | Art. 123, at 73, 84 |
| | Art. 18, at 309 | Art. 126, at 259, 268 |
| | Art. 23, at 319 | Art. 130, at 259 |
| | Art. 33, at 192 | Art. 141, at 323 |
| | Art. 35, at 192 | |
- 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. 28, at 319 | Art. 108, at 259, 268 |
| Art. 5, at 268 | Art. 32, at 95 | Art. 112, at 259, 268 |
| Art. 9, at 85, 259 | Art. 33, at 106, 214, 327 | Art. 123, at 84 |
| Arts. 13–26, at 234, 252 | Art. 34, at 317 | Art. 130, at 322 |
| Art. 16, at 327 | Art. 49, at 106, 259, 268 | Art. 140, at 73, 84 |
| Art. 18, at 527, 552 | Art. 53, at 44, 259, 268,
552–3 | Art. 143, at 259, 268 |
| Art. 19, at 295, 527 | Art. 55, at 259 | Art. 147, at 95, 259, 317, 320,
477, 552, 567 |
| Art. 27, at 95, 106, 311,
477 | Art. 70, at 106 | |
| | Arts. 71–75, at 106 | |

* 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.

Table of Treaties

xxiii

- 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. 43.1, at 126, 212–13 Art. 55, at 526–7
 Art. 1.3, at 150 Art. 43.2, at 42, 188, 193 Art. 56, at 530
 Art. 1.4, at 123, 141, 150 Art. 44, at 126–7, 129, 430 Art. 56.1, at 528
 Art. 3, at 542 Art. 44.3, at 126–7, 129, 254 Art. 56.2, at 529
 Art. 4.2, at 327 Art. 44.4, at 126, 209 Art. 57, at 122, 273, 520
 Art. 10, at 213 Art. 45.1, at 214, 228 Art. 57.2 (a), at 520
 Art. 11, at 94, 121, 213 Art. 45.3, at 233 Art. 57.2 (b), at 122, 273
 Art. 12, at 317 Art. 47, at 123 Art. 58, at 275, 285, 296
 Art. 13.1, at 317, 527 Art. 48, at 122–3, 209, 252, 254, 520, 532, 534, 536 Art. 59, at 526
 Art. 13.2, at 192 Art. 49, at 520 Art. 62, at 259, 268
 Art. 23, at 44 Art. 50, at 232, 238, 299, 542, 565, 572 Art. 67, at 123, 259, 269
 Art. 24, at 122 Art. 51, at 537 Art. 71, at 259, 268
 Art. 34, at 322 Art. 51.2, at 122, 214, 256, 274, 299 Art. 72, at 25
 Art. 35.2, at 122, 269 Art. 51.3, at 202, 255, 539, 541–6 Art. 75, at 25, 166, 208, 214, 219, 233–4, 237, 317, 446, 481–2
 Art. 35.3, at 526–7 Art. 51.4, at 523, 536 Art. 76, at 477
 Art. 36, at 271, 594 Art. 51.5, at 122, 273 Art. 79, at 429
 Art. 37, at 129, 420, 422–3, 426, 430 Art. 51.7, at 319–20 Art. 82, at 122, 400
 Art. 38, at 422 Art. 52, at 299, 547 Art. 85, at 94, 122, 253, 296, 299, 420, 422, 537, 566–7
 Art. 39, at 222, 422, 428, 430, 432–3 Art. 52.2, at 520, 524 Art. 86.1, at 399
 Art. 40, at 44, 329 Art. 52.3, at 527, 534 Art. 86.2, at 122, 399, 400
 Art. 41, at 329 Art. 53, at 309, 316, 563, 565–7, 571 Art. 87, at 122, 331, 400
 Art. 42, at 122, 524 Art. 54, at 259, 269 Art. 88, at 92
 Art. 43, at 299
- 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. 4.2, at 317, 446, 448, 477 | Art. 14, at 131 |
| | Art. 1.2, at 130, 172 | Art. 4.3, at 130 | Art. 15, at 528 |
| | Art. 2, at 214, 234 | Art. 6, at 25, 131 | Art. 16, at 309, 563, 565, 567, |
| | Art. 4, at 214, 482 | Art. 11, at 527 | 571 |
| | Art. 4.1, at 130, 477 | Art. 12, at 422 | Art. 17, at 259, 268 |
| | | Art. 13, at 214, 252 | |
| 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.

Foreword

xxvii

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 (IHL). (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.