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978-0-521-87088-7 - The Law of Armed Conflict: International Humanitarian Law in War

Gary D. Solis

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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.

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INTERNATIONAL HUMANITARIAN LAW IN WAR

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United States Military Academy



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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

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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

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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.

Cambridge University Press

978-0-521-87088-7 - The Law of Armed Conflict: International Humanitarian Law in War

Gary D. Solis

Frontmatter

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Foreword

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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.