

## THE LAW OF ARMED CONFLICT

### *International Humanitarian Law in War*

*The Law of Armed Conflict: International Humanitarian Law in War* introduces law students, undergraduates, and other interested readers, to the law of war in an age of terrorism. What law of armed conflict (LOAC), or its civilian analog, international humanitarian law (IHL), applies in a particular armed conflict? Are terrorist groups legally bound by that law? What constitutes a war crime? Who is a lawful target in a conflict involving nonstate terrorist groups? What are “rules of engagement” and who formulates them? Are nuclear weapons contrary to the law of war? What are “gray zone” conflicts? How are targeting decisions made? How can an autonomous weapon system be bound by law of armed conflict? Has anyone been convicted at Guantánamo and why have US military commissions failed? This textbook takes students and other interested readers through these law of armed conflict questions, and more, explaining each of them in nontechnical terms, with real-world examples and legal opinions from the United States, the United Kingdom, Germany, Yugoslavia and other jurisdictions. From the nineteenth century to today, from courts-martial to the US Supreme Court, from Nuremberg to 9/11, today’s law of war is clearly explained, interpreted, and applied, in nontechnical terms.

**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 is a retired US Marine Corps lieutenant colonel, having twice served in Vietnam, where he was company commander. He holds law degrees from the University of California at Davis, and George Washington University, and a Ph.D. in the law of war from the London School of Economics and Political Science. Following West Point retirement he was an adjunct law professor at Georgetown University Law Center for twelve years, teaching the law of armed conflict.



# The Law of Armed Conflict

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Third Edition

**Gary D. Solis**

United States Military Academy (Retired)



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## Foreword

Should anyone doubt the persistent importance of rules that govern violence on the modern battlefield, one only need scan the atrocities of ISIS in the battle of Mosul. Forcibly crowding civilians into buildings used by ISIS commanders not only evinced an unspeakably callous disregard for the helpless civilians, it showed the depths of modern barbarism. Execution of a Jordanian pilot by placing him in a cage and filming his death as he was burned alive magnified the vicious inhumanity. This perverse brutality not only violated the most basic norms of a civilized world, it also violated the international moral consensus that originally prompted states to regulate the conduct of armed conflict. These atrocities represent (we hope) the outer edges of the depravity of man. Such abhorrent conduct reminds us as well of the role of rules that not only set the outer limits of conduct on the battlefield but mandate the path to accountability for such actions.

As a practitioner in the rules of war for over thirty years – from the Cold War to actions in Somalia to Iraq and Afghanistan – I remain keenly attuned to that which simply appears as authoritative commentary on the rules of war, and that which accurately captures the law. From “full up” unforgiving combat between nation states – to the brutal but highly complex and nuanced fight against nonstate actors meting out their twisted and amoral brand of violence – this book is, indeed, the high ground of legal clarity.

So, as a Soldier-lawyer focused on knowing what the law actually says – and calling out those who disguise their personal preferences for the law as “statements of law” – it is a great honor to introduce this magnificent third edition textbook on the law of armed conflict.

I have known Professor Gary Solis for several years, first meeting him when he regularly lectured at the Army’s Judge Advocate General’s Legal Center and School in Charlottesville, Virginia, when I was the School’s Commanding General. Besides being a retired Marine with tours of duty in Vietnam, he is a retired United States Military Academy professor of law, where he continues to periodically teach as an adjunct professor. He often lectures on the law of armed conflict at the Marine Corps’ Command and Staff College, the US Naval Academy, the US Air Force Academy, the Smithsonian Institution, and many civilian academic forums, domestically and abroad – as well as at the Central Intelligence Agency’s headquarters.

This is an outstanding textbook. Among many noteworthy alternatives, I myself used it when I taught a law of war course at the George Washington University Law School. The second edition was both my guide and the course textbook. My students appreciated the book’s breadth of topics, its clarity of writing, and its footnote guidance to further research. As a judge advocate, I appreciate its comprehensive and accurate coverage of

a broad spectrum of battlefield law, relevant whether the reader is a military command legal advisor or an interested reader who simply wants to know more about the law of war.

I know that today's battlefield legal issues seem novel and seemingly more complex – though I do not concede they are more complex in fact. Indeed, in my view we must resist this notion – and simply embrace our problem sets as *our* complexity. In doing so, we avoid the intellectual comfort zone that somehow our problems are harder to solve than our predecessors'.

This textbook addresses and clarifies a great many of those legal issues. The onus of making difficult law of war decisions always remains with the commander, but guidance provided by this text can be very helpful in educating those who must make hard choices in armed conflict, as well as those in academic seminars.

Like its predecessors, this third edition does not attempt to be a comprehensive examination of the innumerable nuances of the law of war, and wisely so. Any effort so ambitious would require multiple volumes with annual updates. Instead, it is a well-considered, deeply researched, and finely written survey course – a topical overview for students new to the law of armed conflict, as well as more experienced legal practitioners. A problem for the author of such a text is how to balance coverage of the basics of complex topics with the need to make such explanations accessible and interesting to a broad readership that includes lawyers, law students, undergraduates, and lay personnel. This edition of Professor Solis's award-winning textbook elegantly achieves that challenging balance.

The new edition is no mere light revision of the second edition. The basic themes discussed in that edition, significant as they are, remain. The difference is in the details. Every chapter has been revised, to one degree or another. Some changes are consequential but unapparent to most readers. For example, military orders that are cited in the second edition that have been superseded by newer versions, in this edition are replaced by the current versions. New sub-chapters on nuclear weapons and hybrid warfare are now included, shedding light on formerly unexamined issues and discussing new aspects of the law of armed conflict. This edition gives increased recognition to national and international politics that sometimes play significant roles in making basic law of war decisions involving, for instance, conflict classification, cyber counterattacks, and “cannot or will not” determinations.

Based on my classroom use of this textbook, confirmed by my own real-world combat zone experience, I believe that any student of the law of armed conflict at *any* level will profit from its guidance. Students will appreciate a writing style which, although often casual, is always concise and, sometimes, even entertaining. Professors will value how readers are guided, chapter-by-chapter, through topics of increasingly more challenging subject matter. Any reader will appreciate a text rich in historical and present-day law of war examples, with thoughtful lessons that are drawn from them. I often found myself using the author's references for further reading – and yes, adding to my library!

I have observed Professor Solis in the classroom and have enjoyed our lengthy conversations dissecting battlefield law. I know the depth of his experience in the law of armed conflict; his London School of Economics and Political Science doctorate in the law of war; his many years teaching the subject at West Point, and at top-level law schools including Georgetown University, the University of California, Davis, and George Washington University. His expertise is also informed by a twenty-six-year Marine Corps career, during which he commanded Marines at the platoon and

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company levels in Vietnam combat before he attended law school. He returned to the Marines, serving as a judge advocate, where he led many of the court-martial prosecutions of Vietnam war crimes. Few equal his academic accomplishment, scholarly writings, teaching experience, and battlefield application of the law of armed conflict. That expertise and experience is evident in this edition of his widely respected textbook.

It is a pleasure to recommend this edition of *The Law of Armed Conflict*, without reservation, not only to students newly undertaking the study of law in war, but to uniformed judge advocates, as well.

**Charles N. Pede**  
*Lieutenant General, United States Army*  
*Judge Advocate General*  
*Washington, DC*



## Preface and Acknowledgments

“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.”

General James L. Jones, US Marine Corps, while Supreme Allied Commander, Europe

Since publication of the second edition, armed conflicts have changed substantially. Combat operations are more technically oriented, more “wired,” more lethal. Seemingly every soldier and marine has a camera. Platoon leaders carry computers, laptops, notebooks, or iPads. Drones the size of your hand relay live images of targets on the other side of the hill. The law of armed conflict has evolved, as well, to reflect today’s warfare realities. Hybrid warfare, unheard of a few years ago, is familiar turf today; pursuit of armed opposition groups across the border of an adjacent state is becoming settled law of armed conflict (LOAC); we Americans have learned to live with our Additional Protocol I objections, and we kill generals of states with which we are not at war. But the law of armed conflict, or as civilians often refer to it, international humanitarian law, still applies, even if sometimes a bit unfocused at the edges.

This textbook is a survey of today’s LOAC, meant for law students and upper-division undergraduates. No military background is required. It takes readers from LOAC basics to an understanding of more complex battlefield law. Legal cases, American and foreign, are referred to. The text focuses exclusively on *jus in bello*, law on the battlefield, to the exclusion of *jus ad bellum*, the lawfulness of the initial resort to force. It does not include law of war at sea, or law of aerial warfare. No single text, including this one, can cover all of LOAC in any depth.

This is not a national security law text, nor a history book, nor an ethics study. Elements of those subjects are inevitably included, particularly history, but they are not the book’s focus. The text is liberally footnoted so that readers have a broader reference base, should they wish to study an issue more deeply. Appellate opinions and other materials are included to illustrate the application of *jus in bello* in courts and tribunals worldwide.

This book was born in the classrooms of West Point and further shaped in Georgetown University Law Center seminars. Knowing my West Point students would soon put these lessons into practice in foreign combat gave focus and immediacy to the book’s content. Discussing and debating LOAC with soldiers and marines fresh from combat in Iraq, Afghanistan, and Africa, honed its viewpoints.

Some will disagree with interpretations voiced here. Little in public international law is clearly black or clearly white. Occasionally, conclusions are drawn when international

consensus is not yet fully formed. Conclusions are not made for the sake of dispelling ambiguity but where the weight of authority indicates a conclusion in an unsettled area, that conclusion is stated.

The law of armed conflict is not arcane or complex but, contrary to the expectations of some, neither is it instinctive. One cannot know the law of war through personal presumptions of what sounds morally right or wrong. Were that it was that easy. In a world where combat is broadcast in real time, warfighters and their commanders are expected to meet a high standard of conduct and judgment. But, in unclear situations, when violence is the rule and death is the norm, how do young combatants decide, instantly and under fire, what the right or wrong course of action is – not only tactically, but legally? A knowledge of basic LOAC provides some of the answers.

The text is heavily US weighted, but it is more than a statement of American positions. It incorporates lessons from British, Dutch, Israeli, and other combatant forces. My hope is that this textbook will contribute to military and civilian students' understanding of the law of armed conflict, whatever their nationality.

A style note. *Everything* is available on the Internet. Instead of footnote-listing a source's Internet address, or repeatedly writing, "available online," I presume that, today, readers know that footnoted sources are inevitably available online. Accordingly, throughout this book's footnoting, where a source – a book or article – is not cited, the reader may presume that it is indeed available online.

Bound as I am by the *Chicago Manual of Style*, I do not capitalize the words "Marine," "Army," "Navy" or "Air Force." Forgive me, warfighters.

Finally, I thank US Army Colonel Fred Borch, a gifted writer and the Army JAG Corps' deeply talented historian and archivist, for his close friendship, advice, suggestions for this text, and law of war insights over many years. I also thank my good friend, Brigadier General Dave Wallace, now-retired Head of West Point's Department of Law, for our years of discussions of LOAC's arcane points, in and out of our classrooms. Fred and Dave steadfastly support my writing and my teaching at the Army's JAG School, and at West Point. We laugh a lot, too. They are the best of brothers. This edition would not have come to pass without Ms. Debbie Jimenez, an expert and highly conscientious court reporter. Her work-up of this edition's draft was outstanding. I value her work, and more, her friendship. I was most fortunate to have as my editor Ms. Alice Stoakley. Through her suggestions for improvement and painstaking attention to linguistic detail she made it a better book.

For my wife, Andrea, encyclopedic, expert proofreader, ever patient, and always helpful and supportive, "thank you" will never be enough. I couldn't have done it without her.

I have no research assistant. Any mistakes in this text are mine alone.

Semper Fidelis  
GDS

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- 1980 Protocol I, Concerning Non-detectable Fragments, at 588–89, 598
- 1980 Protocol II, Concerning Mines and Booby-traps, at 401, 589–93
- 1996 Amended Mines Protocol II, at 401, 590–92, 594, 598
- 1980 Protocol III, Concerning Incendiary Weapons, at 594–97, 607
- 1995 Protocol IV, Concerning Blinding Laser Weapons, at 596–98
- 2003 Protocol V, Concerning Explosive Remnants of War, at 598–600, 602
- 1982 United Nations Convention on the Law of the Sea, at 224
- 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at 500, 513
- Art. 1, at 501
- Art. 2, at 9, 66, 502
- Art. 3, at 520
- Art. 7, at 85
- 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons, at 562, 585, 607–08, 621–25, 632, 638–39
- 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, S/Res/808 (1993), U.N., at 271, 302
- 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, at 12, 562, 592–94
- 1998 Rome Statute of the International Criminal Court, at 12, 88, 249, 628
- 2004 Budapest Convention (aka, Convention on Cybercrime), at 532
- 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 122–24
- 2008 Convention on Cluster Munitions (“Dublin Convention”), at 602–04
- 2017 Treaty on the Prohibition of Nuclear Weapons, at 631