

# Contents

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

## LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR

<b>1. Rules of War, Laws of War</b> . . . . .	<b>3</b>
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
<b>Cases and Materials</b> . . . . .	<b>27</b>
<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
<b>2. Codes, Conventions, Declarations, and Regulations</b> . . . . .	<b>38</b>
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
<b>Cases and Materials</b> . . . . .	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
<b>3. Two World Wars and Their Law of Armed Conflict Results</b> . . . . .	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

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
<b>Cases and Materials</b> . . . . .	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
<b>4. Protocols and Politics</b> . . . . .	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
<b>Cases and Materials</b> . . . . .	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**

<b>5. Conflict Status</b> . . . . .	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

<b>Cases and Materials</b> . . . . .	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
<b>6. Individual Battlefield Status</b> . . . . .	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>ius in bello</i> Protections Due Captured Individuals	237
6.12. Summary	238
<b>Cases and Materials</b> . . . . .	239
<i>In Re Buck and Others</i>	239
<i>Military Prosecutor v. Omar Mahmud Kassem and Others</i>	240

“The Čelebići Case,” <i>Prosecutor v. Delalić, et al.</i>	244
Geneva Convention III, Article 5 Hearing: A Guide	245
<b>7. Law of Armed Conflict’s Four Core Principles . . . . .</b>	<b>250</b>
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 <i>Not</i>	280
7.4.2. Proportionality and Force Protection	284
7.5. Summary	285
<b>Cases and Materials . . . . .</b>	<b>286</b>
<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
<b>8. What Is a “War Crime”? . . . . .</b>	<b>301</b>
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
<b>Cases and Materials . . . . .</b>	<b>332</b>
<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
<b>Cases and Materials . . . . .</b>	<b>364</b>
<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
<b>Cases and Materials . . . . .</b>	<b>405</b>
<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

11.4. Summary	431
<b>Cases and Materials</b> . . . . .	432
<i>Trial of Otto Skorzeny and Others</i>	432
Medal of Honor Citation: Thomas R. Norris	434
<b>12. Torture</b> . . . . .	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
<b>Cases and Materials</b> . . . . .	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
<b>13. Rules of Engagement</b> . . . . .	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
<b>Cases and Materials</b> . . . . .	512
The Death of Mr. Esequiel Hernandez	512

ROE Cards	515
MNC-I ROE CARD	516
Desert Storm ROE	517
<b>14. Targeting</b> . . . . .	<b>519</b>
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
<b>Cases and Materials</b> . . . . .	<b>547</b>
“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
<b>15. Attacks on Cultural Property</b> . . . . .	<b>556</b>
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
<b>Cases and Materials</b> . . . . .	<b>568</b>
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

<b>16. The 1980 Certain Conventional Weapons Convention . . . . .</b>	<b>577</b>
16.0. Introduction	577
16.1. The 1980 U.N. Certain Conventional Weapons Convention	578
16.1.1. CCW Protocol I, Concerning Nondetectable Fragments	580
16.1.2. CCW Protocol II, Concerning Mines and Booby-Traps	581
16.1.2.1. CCW Amended Mines Protocol II	583
16.1.2.2. The 1997 Ottawa Convention	584
16.1.2.3. U.S. Antipersonnel Landmines Policy	584
16.1.3. CCW Protocol III, Concerning Incendiary Weapons	585
16.1.4. CCW Protocol IV, Concerning Blinding Laser Weapons	586
16.1.5. CCW Protocol V, Concerning Explosive Remnants of War	588
16.2. Cluster Munitions	590
16.2.1. 2008 Convention on Cluster Munitions	592
16.2.2. U.S. Cluster Munitions Policy	593
16.3. A Legal Review of Weapons	594
16.4. Summary	595
<b>Cases and Materials . . . . .</b>	<b>595</b>
<i>Prosecutor v. Martić</i>	595
White Phosphorus Munitions	597
<b>17. Gas, Biological, and Chemical Weapons Treaties . . . . .</b>	<b>600</b>
17.0. Introduction	600
17.1. The 1925 Geneva Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare	601
17.1.1. Parsing the 1925 Gas Protocol	602
17.2. The 1971 UN Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	605
17.2.1. Parsing the 1971 BWC	607
17.2.2. Negotiating the BWC	610
17.3. The 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons	611
17.3.1. Parsing the 1993 CWC	611
17.4. CS Gas	615
17.5. Summary	616
<b>Cases and Materials . . . . .</b>	<b>616</b>
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

