

BOOK REVIEW
THE LAW OF ARMED CONFLICT¹

REVIEWED BY FRED L. BORCH III*

This book is a masterpiece of scholarship. Not only does it cover all the legal issues that undergraduate and graduate students, and lawyers and academics would expect to see in a text, but it addresses legal issues in the Law of Armed Conflict (LOAC) that are still evolving. No other book adequately examines the legality of autonomous weapons, drones, or the targeted killing of U.S. civilians overseas. No other work comparably discusses cross-border counter-attacks, the concept of “continuous combat function” developed by the International Committee of the Red Cross (ICRC), or examines the legal basis for “security detention.” Well-written and superbly organized, this new edition of *The Law of Armed Conflict* will see wide use in the classroom. It also belongs on the shelf of every judge advocate and anyone interested in the LOAC.

Author Gary D. Solis, a retired U.S. marine who spent two combat tours as an armor officer in Vietnam, served as a lawyer in the Marine Corps, taught law for seven years at the United States Military Academy, and is now an adjunct professor at Georgetown University.² He is ideally

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¹ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* (2d ed. 2016). (Full disclosure: Solis and I have known each other for many years and I am thanked in the acknowledgements).

² Gary D. Solis, *GEORGETOWN LAW*, <http://www.law.georgetown.edu/faculty/solis-gary-d.cfm#> (last visited May 16, 2016).

suites to write about the law of war because he has experienced combat firsthand and, as a lawyer and academic, has a thorough knowledge of the nuances of the laws regulating armed hostilities.³

The real value of *The Law of Armed Conflict* is that it is a book for both the generalist and the specialist. Since it is written in the format of a standard teaching text, and intended for use by undergraduate, graduate, and law students, an individual with little knowledge of LOAC will find it easy to use. Solis begins by examining the history of the law in warfare. He then looks at nation-state practice, conventions and treaties, and declarations and regulations before discussing a wide variety of issues and concepts. These concepts include the following: the legal status of prisoners of war and Taliban and al-Qaeda fighters; the principles of distinction, military necessity, unnecessary suffering, proportionality; obedience to orders and command responsibility; targeting and rules of engagement; and ruses and perfidy.⁴

As he did in the first edition of this book, Solis devotes considerable space to a discussion of war crimes,⁵ including an examination of the practice of “double-tapping” used by some U.S. soldiers and marines in Afghanistan and Iraq.⁶ Double-tapping, also known as a dead check, is the “shooting of wounded or apparently dead insurgents to ensure that they are dead.”⁷ *The Law of Armed Conflict* explains that, while it is a war crime to *indiscriminately* shoot a wounded or apparently dead enemy combatant—because this is simply murder on the battlefield—it is lawful to shoot a wounded insurgent who appears to be reaching for a weapon.⁸ The value of this book, however, is that it illuminates the issue of double-tapping and other thorny subjects. Using the following poem reportedly written by an enlisted soldier in the 101st Airborne Division, the author demonstrates how some soldiers feel about these topics:

You media pansies may squeal and squirm
But a fighting man knows that the way to confirm
That some jihadist bastard is finally dead

³ SOLIS *supra* note 1, at i.

⁴ *Id.* at 268–309.

⁵ *Id.* at 328–62.

⁶ *Id.* at 358–61.

⁷ *Id.* at 358.

⁸ See generally *The Means and Methods of Warfare*, LIBRARY OF CONGRESS ch. 9 (2015), http://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2015_Ch9.pdf (discussing *hors de combat* and the loss of protection therefrom).

Is a brain-tappin' round fired into his head
To hell with you wimps from your Ivy League schools
Sitting far from the war telling me about rules
And preaching to me your wrong-headed contention
That I should observe the Geneva Convention.”⁹

As this poetry makes clear, not all soldiers are accepting of the laws of war, and Solis is to be commended for using this real-world example to underscore this reality.

Perhaps more importantly, Solis's exploration of double-tapping demonstrates why *The Law of Armed Conflict* also is a book for the specialist: double-tapping, like the legality of drones in combat, the targeting of enemy commanders, and the lawfulness of cross-border counter-attacks, are all real-world issues that practitioners today must address. In exploring these and other issues that are still evolving in the LOAC, Solis's book provides much needed guidance that will be found in no other book.

The new edition of *The Law of Armed Conflict* has new chapters that bring the law of war coverage up to date. There is a new chapter on cyber warfare, and an insightful discussion of what constitutes a “cyber-attack.”¹⁰ As Solis explains, there is nothing inherently unlawful about a cyber-attack.¹¹ On the contrary, it is simply a weapon and, provided the cyber-attack is on a lawful target in an on-going armed conflict, is permitted under LOAC.¹² The more interesting issue is deciding what would be a lawful response to a cyber-attack that resulted in death and destruction on the magnitude of the Japanese attack on Pearl Harbor in December 1941.¹³ Solis suggests a reprisal, and looks to U.S. presidential directives and the law of reprisal as limited in the 1949 Geneva Conventions.¹⁴

There also is a chapter on security detention.¹⁵ Nothing could be timelier for practitioners, especially as it appears that as many as fifty

⁹ SOLIS *supra* note 1, at 368–69.

¹⁰ *Id.* at 673–709.

¹¹ *Id.* at 674.

¹² *Id.*

¹³ Jennifer Rosenberg, *Pearl Harbor*, ABOUT EDUCATION, <http://history1900s.about.com/od/worldwarii/a/Attack-Pearl-Harbor.htm> (last visited May 16, 2016).

¹⁴ SOLIS *supra* note 1, at 701–02.

¹⁵ *Id.* at 817–41.

detainees now held by the United States at Guantánamo Bay will not be released in the foreseeable future. *The Law of Armed Conflict* explains that this type of internment, also referred to as “administrative detention” or “preventive detention,” is a long-recognized aspect of armed conflict.¹⁶ Solis discusses how Geneva Convention IV permits security detention as long as there is an on-going armed conflict, and as long as other specified requirements are satisfied.¹⁷ When that conflict ends, however, the legal authority for continued security detention must be found in domestic law. For U.S. practitioners, this is Executive Order (EO) 13567, “Periodic Review of Individuals Detained at Guantánamo Bay Naval Station,” which President Obama signed in 2011.¹⁸ This EO outlines standards for the initial detention, and *continued* detention, of Guantánamo detainees, sets requirements for ongoing periodic reviews of continued detention, and specifies procedures to be followed in the reviews.¹⁹ It lays out a standard for confinement of indefinite duration: “Continued law of war detention is warranted for a detainee . . . if it is necessary to protect against a significant threat to the security of the United States.”²⁰

As *The Law of Armed Conflict* shows, an additional legal basis for security detention is to be found in the 2012 National Defense Authorization Act, which codifies U.S. security detention authority, essentially repeating the standards announced in EO 13567, and broadening the category of potential detainees to include not only Guantánamo detainees, but anyone who “was a part of or substantially supported” al Qaeda, the Taliban, or associated forces.²¹ Few Americans, much less judge advocates, know that there is both an EO and statutory authority for security detention, and yet this book contains a chapter that discusses these provisions and their role in what is certain to be an evolving issue in LOAC.²²

¹⁶ *Id.* at 820–23.

¹⁷ *Geneva Convention IV*, LAW IN.ORG (Aug. 2012), <http://lawin.org/geneva-convention-iv/> (last visited May 16, 2016).

¹⁸ *Executive Order 13567*, WHITE HOUSE, <https://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba> (last visited May 16, 2016).

¹⁹ *Id.*

²⁰ SOLIS *supra* note 1, at 826.

²¹ *Id.* at 828.

²² *Id.* at 817–41.

The lawfulness of cross-border counter-attacks is dealt with in another new chapter.²³ Today, enemy fighters who are members of non-state armed opposition groups routinely attack U.S. and Allied forces, and then retreat into neighboring states that either cannot or will not control the unlawful activities of these fighters sheltering within their borders.²⁴ *The Law of Armed Conflict* argues that cross-border counter-attacks against these enemy fighters, which the United States and its close Allies have been employing for several years in Pakistan and other places, are lawful.²⁵

A related issue is the lawfulness of attacking enemy operational commanders in a non-international armed conflict. Assume this scenario:

American soldiers are on patrol in a small village in Afghanistan. They recognize a Taliban leader, whom they know exercises operational command authority over subordinate enemy fighters, buying fruit at the village market. He sees them and starts to run. It is not possible to capture this leader but they have a clean shot at him. May they kill him, even though he is not directly taking part in hostilities at the moment?

As *The Law of Armed Conflict* explains, the LOAC concept of “continuous combat function” addresses this very practical situation.²⁶ Developed by the ICRC, and arguably now part of customary international law, the idea is that if an individual exercises “operational command,” then he has a “continuous combat function” and may be targeted.²⁷ In this regard, the fact that the individual is not directly participating in hostilities at the moment of targeting is no longer relevant.²⁸ Consequently, in the scenario, the Taliban leader may be killed because he has been positively identified as an enemy operational

²³ *Id.* at 589–602.

²⁴ Frontline, *Return of the Taliban*, PUB. BROADCASTING SERV. (Oct. 3, 2006), <http://www.pbs.org/wgbh/pages/frontline/taliban/etc/synopsis.html> (discussing Taliban retreat into Pakistan as a method of avoidance early in the conflict).

²⁵ SOLIS *supra* note 1, at 589–602.

²⁶ *Id.* at 584–86.

²⁷ *Direct participation in hostilities: questions & answers*, INT’L COMM. RED CROSS (Feb. 6, 2009), <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> (answering questions concerning “direct participation in hostilities” and the International Committee of the Red Cross’s (ICRC) Interpretive Guidance).

²⁸ SOLIS *supra* note 1, at 584.

commander.²⁹ The real world example? The targeting of Nasser Al-Aulaqi in Yemen.³⁰ Since the Yemenis were either unwilling or unable to exercise control over Al-Aulaqi's activities, it was lawful for the United States to attack him, even though Al-Aulaqi was not participating in hostilities at the time.³¹ But, as Solis makes clear in his book, state sovereignty sometimes may trump the "continuous combat function" rule: if Al-Aulaqi had been present in France, the United States could not lawfully kill him on sight because France has a functioning system of police, arrest, trial and extradition.³² Again, *The Law of Armed Conflict's* discussion of this evolving issue in LOAC is what makes the book so valuable.³³

Finally, Solis does not shy away from controversy. In a chapter on military commissions, he examines the lawfulness of using such military tribunals to prosecute non-state actors for war crimes.³⁴ The continuing employment of military commissions by the United States has been a contentious topic among both policy makers and lawyers, and Solis's analysis of tribunals' place in LOAC is important. Some readers will take issue with his conclusion that using military commissions to try al Qaeda terrorists may ultimately fail, but his reasoning is thought-provoking.³⁵

The first edition of *The Law of Armed Conflict* was 660 pages. This new edition is 890 pages and not only has new chapters (some of which have been discussed in this review) but an expanded "Table of Cases" and "Table of Treaties."³⁶ As a resource, Solis's book is unrivaled because it has more than two thousand footnotes, an extensive bibliography, and a superb index. The work deserves to reach a wide

²⁹ *Id.* at 585–86.

³⁰ Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. TIMES (June 23, 2014), <http://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html> (linking to the Justice Department memo deeming it "lawful to target Anwar al-Awlaki, an American-born Muslim cleric accused of becoming a terrorist").

³¹ SOLIS *supra* note 1, at 598–602.

³² *Id.* at 598.

³³ *Id.* at 599–601. Solis' view has been confirmed by the D.C. Circuit Court of Appeals in *Nasser Al-Aulaqi v. Leon C. Panetta, et al.*, Civil Action No. 12-1192 (RMC), U.S. District Court for D.C. (Apr. 4, 2014).

³⁴ *Id.* at 793–806.

³⁵ *Id.*

³⁶ *Id.* at x–xiv.

audience, if for no other reason than it is tomorrow's LOAC in today's textbook.