

Gary D Solis, *Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010)  
ISBN 978-0-521-87088-7, 350 pages

REVIEWED BY BEN CLARKE\*

Until recently, military officers often regarded the battlefield as no place for lawyers. Today, few would be brave enough to plan or conduct military operations without legal advice.<sup>1</sup> Solis's text demonstrates why this revolution in military practice has taken place. Drawing upon decades of academic and military experience, the author offers straightforward explanations of how essential norms of International Humanitarian Law (IHL) operate on the battlefield. The book also offers guidance on a range of contemporary IHL controversies. However, it is the abundance of practical illustrations that make Solis's book compelling reading. Through battlefield examples, Solis demystifies the process of interpreting and applying IHL during armed conflict. For this reason alone, the book is an invaluable resource for military officers of all ranks.

With an index longer than this review, only a few aspects of Solis's work can be discussed here. The first section of the book deals with the rules of war. Chapter 1 provides an interesting historical survey of military case studies drawn from: the Peloponnesian War (380BC); the Breisach Trial (1474); the trial of Plenty Horses (1891) that followed the massacre at Wounded Knee (1890); the trial of Göring and Others (Nuremberg, 1946); and the trial of Kupreškić and others (International Criminal Tribunal for the former Yugoslavia (ICTY), 2000). Collectively, these case examples refute the notion that battlefield rules of conduct are a modern development. They also lay the foundation for Solis's discussion of the perennial question: 'Why Regulate Battlefield Conduct?' After addressing that issue, Solis critiques the emergence and development of international instruments on the laws of war (Chapter 2) and armed conflict (Chapter 3).

In Chapter 4, Solis considers the normative impact of the 1977 *Additional Protocols*.<sup>2</sup> Of particular interest is the author's perspective on the new rules on guerrilla warfare. Solis acknowledges that the four standard requirements for lawful combatancy are 'a recipe for guerrilla suicide'. He emphasises the point by asking 'has any guerrilla group ever complied with the four requirements?' Yet Solis is no fan of the more flexible rules under Article 44.3, *Additional Protocol I* (API). While acknowledging they are an attempt to 'protect those who engage in armed resistance', Solis casts doubt on their logic and morality. After noting the irony that Article 44.3 allows feigning civilian status which Article 37 prohibits, he

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<sup>1</sup> See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) 8 June 1977, Article 82.

<sup>2</sup> *Protocol I*; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977.

expresses doubt that relaxing the uniform and open arms requirement would give irregular forces an incentive to comply with other parts of the laws of war. While this is the view of many States and commentators, Solis's failure to acknowledge contrary legal doctrine is disappointing.<sup>3</sup> This doctrinal debate has practical importance. Consider, for example, members of the Jewish underground organisations who resisted the Germans in the 1943 Warsaw Ghetto uprising. Had the 1949 rules applied, where would they have left these resistance fighters? Compliance with the four standard requirements would have been suicidal. The more flexible rules under Article 1(4) and Article 44.3 of API would have afforded Jewish partisans greater (legal) protection.

The second part of the book presents the law of armed conflict and international humanitarian law as a framework for understanding: conflict status; individual battlefield status; core principles of IHL; war crimes; and related battlefield issues. Chapter 8 ('What is a war crime') is particularly compelling. It addresses numerous topical and sensitive issues, including:

1. **Firing upon mosques**—prohibited unless the mosque is actually used by the adversary as a weapons collection location, sniper firing position or command post, as frequently occurred in Iraq (Solis 319);
2. **Hostage taking**—unethical and illegal, notwithstanding a US Defence intelligence agency memo that reportedly justified the practice with respect to family members of Iraqis targeted in raids. Hostage taking under any guise during armed conflict is a grave breach (Solis 319);
3. **Burning the bodies of dead insurgents still wearing explosive vests**—not a war crime where: explosives experts are unavailable; there is a need to withdraw from the area; there is a danger that enemy insurgents may retrieve and use the bombs against friendly forces; and the close proximity of potential non-combatant victims requires detonation of the explosive vests *in situ* (Solis 322);
4. **Photographing POWs**—permissible for evidence gathering, but publication to cause humiliation is a violation (Solis 323-25);
5. **Burying the enemy alive**—not prohibited by the Law of Armed Conflict (LOAC) and not a war crime (Solis 325-26);
6. **Pillage**—a violation of the laws of war but not a grave breach (Solis 327);
7. **Double-tapping**<sup>4</sup>—indiscriminate double tapping is a grave breach of the LOAC and IHL. A wounded enemy is only a lawful target if he/she displays an offensive intent. While some enemy fighters may feign death with intent to kill or wound an unsuspecting enemy (perfidy), such intent may not be presumed as a matter of

<sup>3</sup> See for example: Georges Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 165 *Recueil des cours* (IV) 353.

<sup>4</sup> Double-tapping is the shooting of wounded or apparently dead insurgents to insure they are dead and not feigning death in order to later shoot their adversaries in the back).

course. The mere possibility of perfidy is not an excuse to violate the LOAC. Indiscriminate double tapping 'to save American lives' is *kriegsraison*. 'It is murder on the battlefield.' (Solis 327-30);

8. **Torture**—a war crime and a futile exercise. While US Department of Defence instructions forbid torture, a Bush era presidential decree gave commanders chilling guidance: if you consider that military necessity requires it, disregard Geneva (Solis 445). Solis highlights General Sanchez's remarks placing partial responsibility for the 'torture culture' on senior political leadership in Washington.
9. **Human Shields**—employing human shields is a war crime. In the case of voluntary human shields located within military targets, the principle of proportionality becomes the central issue (Solis 319-20).

Solis's position on other contentious IHL issues also warrants attention. On *obedience to orders*, Solis notes the case of a German major in the *Bundeswehr* who successfully appealed his demotion to captain for refusing to participate in a military software project. The appellant had sought—but failed to receive—assurances that the software would not be used to support US combat operations in Iraq. However, Solis warns US service personnel against such conduct ('do not try this at home'). His rationale—based on the case of a US Army captain who demanded entry to a prison that he believed was being run in deplorable conditions—is not entirely convincing. In contrast to the German officer—who was relieved of command without incident and later persuaded the appellate court that he was right to have considerable doubts about the legality of the war against Iraq—the US Army captain abandoned his post and demanded entry to a prison whilst armed with an M16 (Solis 397). Aren't these cases distinguishable? Solis does not address this possibility. Nor does he explain why a US court marshal, hearing a case similar to the Germany one, would reach the opposite conclusion.

Solis is more convincing in his analysis of *the soldier's duty upon receiving a manifestly illegal order*. According to Solis, a subordinate's duty is fulfilled when he refuses to obey and reports the incident to any higher authority or a military lawyer. Any subsequent action should be left to the higher authority. The issue is important for two reasons: 'superior orders' are no defence to war crimes; and US army studies reveal that, despite IHL training, there is a significant hesitation to report fellow soldiers (Solis 361).

On the legal controversy regarding the scope of *direct participation in hostilities*, Solis adopts a narrow view. Accordingly, mere membership of a terrorist organisation without more is *not* sufficient to render a member the lawful target of an opposing military armed force. That said, Solis concedes that 'state practice in current anti-terrorism armed conflicts continues to edge towards the countervailing position without notable objection' (Solis 544).

On *targeted killing*, Solis notes that the process is gradually gaining legitimacy as a method of counter-terrorism and surgical warfare, with several governments (including the UK, Germany, Switzerland, Pakistan, the US and Israel) acknowledging—expressly or implicitly—that they have resorted to the practice (Solis 541).

On the protection afforded by wearing '*distinctive red cross insignia*', Solis notes that too often such insignia becomes 'an enemy aiming point rather than a protective emblem'

(Solis 192). Consequently, many US corpsmen and medicos in Afghanistan and Iraq forego such markings, while Israel directs its uniformed medical personal to not wear any protective sign. As for the new red crystal symbol, Solis notes that ‘in an era of transnational terror, un-uniformed insurgency and frequent disregard for LOAC’, the red crystal may (like the other emblems) become merely a convenient aiming point (Solis 139).

## **Conclusion**

For a range of reasons, Solis’s book represents a significant contribution to legal scholarship on the law of armed conflict. These reasons include the author’s straightforward approach to the law; skilful analysis of ‘grey areas’ of IHL; and ability to demystify both the rules of IHL and their application to the battlefield. These strengths are particularly evident in his discussion of war crimes (Chapter 8). Solis’s analysis of the law is augmented by compelling, real world, battlefield examples and references to salient scenes from films such as *Saving Private Ryan*. Solis’s book is not just of interest to military commanders and students of military law. It is also a valuable resource for legal ethicists, moral philosophers, military and legal historians and general readers with an interesting in the law governing the conduct of hostilities.