

CONTENTS

<i>Foreword</i>	<i>xxiii</i>
<i>Acknowledgments</i>	<i>xxv</i>
<i>Introduction</i>	<i>xxvii</i>
<i>Iraq Scenario</i>	<i>xxxvii</i>
Chapter 1: Legal Bases for Use of Force	1
I. Introduction	1
II. Historical Background	3
III. The United Nations Charter Paradigm	4
A. General Assembly	5
B. Security Council	7
1. Chapter VI—Pacific Settlement of Disputes	7
2. Chapter VII—Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression	9
C. International Court of Justice	13
IV. The Use of Force	15
A. Consent	18
B. Security Council Authorization	19
C. Self-Defense and Other Uses of Force	20
1. Self-Defense	20
a. Principles	21
(1) Necessity	21
(2) Proportional Response	22
(3) Timeliness	22
b. “Inherent Right” of Self-Defense	23
(1) No Action Before Armed Attack	24
(2) Anticipatory Self-Defense	24
(3) Interceptive Self-Defense	24
(4) Preventive Self-Defense	25
c. Collective Self-Defense	26

d. Armed Attack	26
e. “Until the Security Council Has Taken Measures”	27
2. Other Uses of Force	28
a. Protection of Nationals	28
b. Humanitarian Intervention and the Responsibility to Protect	29
D. Some Contemporary Challenges	31
1. Non-State Actors	31
2. Drones	33
3. Cyber Operations	34
Study Questions	35
Chapter 2: History, Sources, and Principles of the Law of Armed Conflict	37
I. The LOAC Tradition	38
II. Historical Foundations	42
III. LOAC Principles	46
A. Importance of Principles	47
B. Defining the Principles	49
1. Military Necessity: The First Principle of Authority	50
2. Humanity: The First Principle of Restraint	53
3. Distinction: The Essential Requirement for Lawful Targeting	55
4. Proportionality: The Balancing Principle	57
5. Precautions: The Precondition for All Combat Operations	59
IV. Treaty Law	61
A. Hague Law	61
B. Geneva Law	64
C. Additional Protocols of 1977: Merging of Hague and Geneva Law	68
D. Other LOAC Treaties	70
1. Cultural Property	70
2. Weapons	72
E. Treaties Outside the Scope of the LOAC	73
V. Customary International Law	76
VI. Other Sources of the LOAC	82
A. Decisions of Courts and Tribunals	82
B. “Soft Law”	84
C. Statutes, Regulations, and Policies Affecting LOAC	86

1. Laws and Executive Orders	87
2. Military Doctrine	87
3. Rules of Engagement	89
Study Questions	91
Chapter 3: Triggering the Law of Armed Conflict	93
I. Introduction	94
II. Origins of the Conflict Classification Paradigm	95
III. The 1949 Geneva Conventions and the Advent of a Law Trigger	99
A. The Triggers—Common Articles 2 and 3	99
B. The Existence of an Armed Conflict	103
C. The Nature of the Armed Conflict	113
IV. The 1977 Additional Protocols to the Geneva Conventions: Clarifying or Confusing the Law Applicability Assessment?	120
V. A Few Wrinkles	127
A. External Intervention in an Internal Armed Conflict	127
B. Transnational Armed Conflicts?	132
VI. Conclusion	137
Study Questions	137
Chapter 4: Classification and Status of Persons	141
I. Combatants and Civilians	143
A. A Problem of Definition	143
B. Civilians	144
C. Combatants	145
D. Presumptions	147
II. Prisoners of War	148
A. Historical Development	148
B. Civilians Accompanying the Force	150
C. Retained Personnel	150
III. Additional Protocol I	151
IV. Unlawful Combatants	152
A. Historical Development of the Terms	152
B. A Gap in Coverage?	154
C. Habeas Corpus Litigation	155
V. Non-International Armed Conflicts	157
VI. Organized Armed Groups	158

VII.	Civilians Directly Participating in Hostilities	161
	A. The ICRC Interpretive Guidance	162
	B. An Alternative Definition of DPH	164
	C. Human Shields	165
	D. Detention	166
VIII.	Conclusion	166
	Problems	167
 Chapter 5: Belligerent Detention		169
I.	Introduction to Detention	171
II.	Authority for Detention	173
III.	International Armed Conflict Detainee Categories	175
	A. Prisoners of War and Civilians	175
	B. Unprivileged Belligerents	177
IV.	Detainees in Non-International Armed Conflict	178
V.	What Process Is Due	180
	A. Article 5 Tribunals	180
	B. Procedural Safeguards in the Civilians Convention	183
	C. Detention Process in Non-International Armed Conflict	184
	D. Supplemental Standards for Detention Review: Contemporary U.S. Practice	186
	E. Ongoing Enhancement of “Law of War Detention” Process	189
VI.	Standard of Treatment	190
	A. Prisoners of War	190
	B. Civilians	196
	C. Treatment in Non-International Armed Conflict	197
VII.	Interrogation	198
	A. Interrogation in International Armed Conflict	198
	B. Interrogation in Non-International Armed Conflict	199
	C. Historical Limitations on Interrogation	200
	D. Interrogation in the War on Terror	202
	Study Problems	212
 Chapter 6: Civilian Protection Law		213
I.	Introduction	215
	A. The Concept of Civilian	218
	B. Who Is a Civilian Within the Meaning of LOAC?	219
II.	LOAC Shields of Protection for Civilians	220

A.	Shield from the Harmful Consequences of Attack	221
B.	Shield from Maltreatment at the Hands of a Party to the Conflict	221
C.	General Shield of Protection for Civilian Populations	225
D.	Shield of Special Protection for Especially Vulnerable Civilians	227
E.	Maximum Shield of Protection: Protected Persons	227
1.	Protected Persons in the Territory of Their Enemy	230
2.	Protected Persons in Occupied Territory	230
F.	Shield of Protection for Private Property	232
1.	Destruction of Private Property	232
2.	Taking Possession of Private Property	234
G.	Shield of Protection for Interned Civilians	236
1.	Basis for Civilian Detention	236
2.	Civilian Detention Treatment Protections	237
3.	Civilian Detention Review and Release Protections	240
III.	The Role of Human Rights Law	240
IV.	Conclusion	243
	Study Questions	244
 Chapter 7: Targeting		247
I.	Introduction	249
II.	The Targeting Process	249
III.	Applying the General Principles in Targeting	252
A.	Military Necessity	252
1.	Distinction	252
a.	Persons	253
(1)	Combatants	254
(2)	Civilians	254
(3)	Unprivileged Belligerents	256
(4)	Other Protected Persons	257
(a)	Persons Who are “ <i>Hors de Combat</i> ”	257
i.	Persons in the Power of an Adverse Party	257
ii.	Persons Who Have Clearly Expressed an Intention to Surrender	258
iii.	Persons Who Have Been Rendered Unconscious or are Otherwise Incapacitated by Wounds or Sickness, and Therefore are Incapable of Defending Themselves	258
(b)	Medical Personnel	258
(c)	Auxiliary Medical Personnel of the Armed Forces	259
(d)	Medical Transport	259

(e) Relief Societies	259
(f) Chaplains	259
(g) Civilian Medical and Religious Personnel	259
(h) Personnel Engaged in the Protection of Cultural Property	260
(i) Journalists	260
b. Objects	261
(1) Military Objectives	261
(a) Nature	262
(b) Location	262
(c) Purpose	263
(d) Use	263
(e) “Make an Effective Contribution to Military Action”	264
(f) “Offers a Definite Military Advantage”	264
(g) Examples	265
(2) Civilian Objects	267
(3) Protected Objects or Places	267
(a) undefended Places	268
(b) Hospitals or Safety Zones for the Sick or Wounded	268
(c) Cultural Property	268
(d) Works and Installations Containing Dangerous Forces	269
(e) Objects Indispensable to the Survival of the Civilian Population	270
(f) Natural Environment	270
2. Proportionality	272
3. Current Controversy	275
a. Money and Revenue-Generating Objects	275
b. Targeting Individuals Who Are Outside “Areas of Active Hostilities”	276
c. Application of Targeting Principles to NIAC	277
B. Humanity and Unnecessary Suffering	278
IV. Review of Targeting Decisions	279
V. Non-Lethal Targeting	280
VI. Rules of Engagement	280
VII. The Legal Advice	281
Study Questions	281

Chapter 8: Weapons and Tactics	285
I. Introduction to Means and Methods of Warfare	286
A. Humanity	287
B. Chivalry	288
II. Legal Reviews of Weapons or Weapons Systems	289
A. The Requirement for Legal Review	289
B. Unnecessary Suffering	290
C. Illegal Use in Customary Law and Treaty Law	291
III. Specific Prohibitions on Weapons and Ammunition	293
A. Exploding Bullets	293
B. Expanding Bullets	294
C. Convention on Certain Conventional Weapons	294
1. Plastic Fragments and Incendiaries	295
2. Blinding Lasers	296
3. Anti-Personnel Land Mines	296
D. Biological Weapons	299
E. Chemical Weapons	299
F. Riot Control Agents	300
IV. Specific Weapons	301
A. Cluster Munitions	301
B. Shotguns	302
C. Small Arms and Small Arms Ammunition	302
D. Edged Weapons	303
E. .50 Caliber Rounds	303
F. Explosive Munitions	304
G. Depleted Uranium	304
H. Snipers	305
I. Silencers	305
J. Non-Lethal Weapons	306
K. Cyber Weapons	307
V. Employment of Weapons	307
VI. Methods of Warfare	308
A. Ruses	309
B. Perfidy	310
C. Assassination	310
D. Espionage	312
E. Reprisals	312
Study Problems	318

Chapter 9: Wounded and Sick	319
I. Background	320
II. International Armed Conflict	324
A. Wounded and Sick	324
1. When Are Individuals Wounded or Sick?	326
2. How Are the Wounded and Sick Protected?	328
a. Respect and Protect	328
(1) Respect	328
(2) Protect	328
b. Obligation to Search and Collect	329
c. Obligation to Provide Medical Care	330
d. Obligations to the Dead	332
e. Obligation to Provide Information	333
A. Care Providers, Equipment, and Facilities	334
1. Personnel Aiding the Wounded and Sick	336
a. Exclusively Engaged Medical Personnel and Staff of the Armed Forces, Chaplains, and Members of National Relief Organizations	338
b. Auxiliary Medical Support Personnel of the Armed Forces	340
c. Members of Societies from Neutral Countries	341
2. Medical Units, Establishments, and Transportation	342
a. Facilities and Vehicles	342
b. Medical Aircraft	345
III. Protecting the Wounded and Sick in Non-International Armed Conflicts	349
IV. Violations	351
V. Conclusion	351
Study Questions	352
Chapter 10: Occupation, Termination of Hostilities, and Transition	357
I. Introduction	360
II. Triggering the Law of Belligerent Occupation	362
A. Essential Criteria	362
B. Other Types of Operations	363
C. Relationship to Non-International Armed Conflict	365
III. Terminating Hostilities: Transition to Occupation	367

IV.	Features of Occupation	370
	A. Commencement	370
	B. Direct and Indirect Control	372
	C. Is There an Obligation to Take Control?	373
	D. Distinguishing Invasion from Occupation	374
	E. Occupation vs. Annexation	375
V.	Implications of Being an Occupying Power	375
VI.	Applicable Law	377
	A. 1907 Hague IV	378
	B. 1949 Geneva Convention Relative to the Protection of the Civilian Population	379
VII.	Fundamental Obligations of the Occupying Power	383
	A. Ensuring Public Order and Safety	383
	B. Obligations Not Balanced with Military Necessity	384
	C. Protection of Basic Human Rights	386
	D. Protection of Property	386
VIII.	Restoring Order	387
	A. The Duty of Obedience	387
	B. Use of Existing Personnel to Continue Public Services	388
IX.	Addressing Threats to Security	390
	A. Preventive Detention	390
	B. Procedural Requirements for Detention	391
	C. Treatment Standards for Internment	392
	D. Assigned Residence	395
	E. Generally Applicable Treatment Standards	396
	F. Prohibited Treatment	397
X.	Meeting the Needs of the Civilian Population of the Occupied Territory	397
XI.	Governing the Occupied Territory	400
XII.	Managing the Property of the Occupied Territory	403
XIII.	Transformational Occupation: Expanding the Permissible Scope of an Occupation	410
XIV.	Transition to Post-Conflict Phase and Termination of Occupation	412
	A. Conflict Termination	412
	B. Cessation of Occupation	415
	Study Questions	419

Chapter 11: Naval Warfare and Neutrality	421
I. Introduction	423
II. Sources of the Law Applicable to Naval Warfare	426
III. The Law of Sea	427
A. The Division of the World's Waters	427
B. The Exercise of Maritime Freedoms in National and International Waters	430
1. National Waters	430
2. International Waters	433
C. Status of Vessels and Aircraft Under International Law	434
IV. The LOAC Applicable to Naval Warfare	436
A. Sources	436
B. Rights to Engage in Warfare at Sea	439
C. General Rules Regarding Attacks on, or Captures of, Vessels	440
1. Vessels Subject to Attack	440
2. Vessels Subject to Capture	442
D. Disposition of Crews and Passengers	444
E. Blockade	445
F. Zones and Control of Immediate Area of Naval Operations	447
G. Submarine Warfare	450
H. Mines and Torpedoes	451
I. Protection of Persons <i>Hors de Combat</i> in Naval Operations	454
V. The Law of Neutrality	459
A. Sources of the Law of Neutrality	459
B. Rights and Obligations of Neutral States	461
C. Rights and Obligations of Belligerents Regarding Neutrals	464
D. Rules Governing Neutral Shipping	466
E. Neutrality and Non-International Armed Conflicts	469
Study Questions	472
Chapter 12: Air, Space, and Cyber Warfare	477
I. Introduction	478
II. Air Warfare	480
A. Sources	480
1. General International Law	480
2. Customary and Treaty LOAC	482
B. General Framework	486

1. Definition of Airspace	486
2. Types of Aircraft	486
3. Rights and Obligations of Belligerents and Neutrals	491
a. Areas Open for Air Operations by Belligerents	491
b. Neutral Airspace	492
4. Methods of Warfare	493
a. Conduct of Hostilities	493
b. Interception and Capture	498
i. Enemy Aircraft	498
ii. Neutral Aircraft	500
iii. Destruction of Captured Aircraft	502
c. Other Air Operations	502
5. Air Warfare in a Non-International Armed Conflict	505
III. Space Warfare	506
1. Space Warfare Legal Framework	508
a. Where Does Space Begin?	508
b. Treaty Obligations Regarding Outer Space	508
c. LOAC Applicable to Hostilities Involving Outer Space	514
2. LOAC Issues in Space Warfare	515
a. Dual Use Space Objects	516
b. Collateral Effects Resulting from Attacks on Space Objects	518
IV. Cyber Operations	521
1. Defining Cyberspace	522
2. Legal Paradigms	522
a. Domestic Law	522
b. International Law	523
3. <i>Jus ad Bellum</i>	523
a. Armed Attack	524
b. Use of Force	525
c. Prohibited Intervention	526
d. Sovereignty	527
4. <i>Jus in Bello</i>	528
a. LOAC General Principles	528
i. Distinction	529
ii. Proportionality	530
b. Precautions in the Attack	531
i. Constant Care	531
ii. Military Objective	531
iii. Indiscriminate Attacks	532
c. Precautions Against the Effects of Attacks	532
d. Neutrality	533

e. Non-State Actors	534
f. Conclusion	534
V. Emerging Technologies	534
Study Questions	535
Chapter 13: War Crimes	537
I. Introduction to War Crimes	538
A. Why Follow the LOAC?	539
B. What Is a War Crime?	541
C. Historical Background	542
II. Sources of Contemporary War Crimes	545
A. Geneva Conventions and Grave Breaches	546
1. Duties of Signatory States	547
2. IAC Trigger	551
3. “Simple Breaches”	552
B. Common Article 3 as a Source of War Crimes	553
C. Customary Law	555
D. Other Sources and Other Laws	556
1. Aggression	556
2. Genocide	557
3. Crimes Against Humanity	558
4. War Crimes Codified by Specialized Tribunals	559
5. War Crimes Codified by the ICC	560
D. <i>Nulla Crimen sine Lege</i>	564
III. Jurisdiction	565
IV. Recent Developments in War Crimes Prosecutions	568
A. Use of Specialized Tribunals	568
B. Blurring the Lines of IAC and NIAC	569
V. The U.S. Approach to War Crimes Prosecution	571
A. A Subject Matter Jurisdiction	571
1. Uniform Code of Military Justice Structure	571
a. Punitive Articles	572
b. Article 18 Jurisdiction over War Crimes	573
2. The War Crimes Act	576
a. Punishable Offenses	576
b. Modifications by the DTA and MCA	578
VI. Personal Jurisdiction	580
A. Jurisdiction over Soldiers	580

B. Jurisdiction over Former Soldiers	581
C. Jurisdiction over Civilians	582
D. Jurisdiction over Enemies and Former Enemies	583
VII. Defenses to War Crimes	584
A. Obedience to Superior Orders	585
B. Duress	585
C. Self-Defense	586
D. Lack of Mental Responsibility	587
E. Head of State and Official Acts Immunity	587
VIII. Emerging LOAC Issues	588
A. Applicability of the Law of War to Non-State Actors	589
B. Accountability Norms	591
Study Questions	593
Chapter 14: Command Responsibility and Compliance Mechanisms	595
I. Introduction	596
A. The Role of the Commander	596
B. A Commander's Involvement or Complicity in LOAC Violations	597
II. Command Responsibility	599
A. Definition	599
B. Pre-World War II History of Command Responsibility	601
C. World War II War Crimes Tribunals: The Doctrine Evolves	602
1. The Yamashita Military Tribunal	603
a. Scope of Authority	605
b. Mens Rea of Command Responsibility	605
c. Actus Reas of Yamashita Command Responsibility	606
d. Causation	606
e. Imputed Liability	607
2. <i>In re Yamashita</i>	607
3. Other World War II Tribunals	608
D. International Developments after the World War II Tribunals	611
1. Additional Protocol I	612
2. Implementing Command Responsibility: Contemporary International Criminal Tribunals	615
III. U.S. Practice and the Accountability of Responsible Commanders	620
A. Accountability of U.S. Commanders	620
1. My Lai and Command Responsibility	622

2. Article 92 Dereliction of Duty	623
3. Gap in U.S. Military Law	624
B. Accountability of Enemy Commanders	625
IV. Other Compliance Mechanisms	628
A. Investigating War Crimes	628
1. Investigation Procedures: The Army Example	629
a. Commander's Inquiry	630
b. Investigations Under Army Regulation 15-6	631
c. Criminal Investigations	632
d. Inspector General Investigations	633
2. Investigation Oversight and Review	634
B. Ensuring Compliance with the LOAC	635
Further Reading	637
Study Questions	638
<i>Glossary of Terms</i>	641
<i>Table of Cases</i>	649
<i>Index</i>	651