

The Law of War in the 21st Century



The author contemplating the law of war,
Cambodia, May, 1970.

The Law of War in the 21st Century

Evan J. Wallach



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Dedication

This book is respectfully dedicated to my old boss, mentor, teacher and friend COL W. Hays Parks, USMC Ret. He has forgotten more about the law of war than the rest of the world knows, and even though he won't agree with everything I say in this book, I hope he'll approve of its motivation. This book is also dedicated to the JAGs. To all those dedicated, hard-working, under-paid and oft-deployed military lawyers who work so hard to ensure we get the job done effectively and legally, and win the battle the right way.

This book is also dedicated to two Presidents from opposing political parties, both of whom epitomized how a national leader should regard the law of war; Jimmy Carter and George H.W. Bush. Each faced national challenges which required the use of armed force; both strove to comply with the law governing that use; each succeeded.

Finally, to the warriors who shaped my life; my Dad, Albert Wallach who commanded an explosive ordnance demolition company in the invasion of the South of France, in the Bulge, and across the Rhine; my Uncle Seymour Wallach who made glider assaults in Sicily, Normandy and Holland; my Brother Leslie who spent several years in Vietnam as a civilian engineer for the Army; my Sister-in-law Susan who went to Vietnam to serve as a civilian as well, and my Brother Andrew, who enlisted in the USMC, volunteered for Vietnam, served as a CAP Rifleman, completed his tour and volunteered to go back. This is for all of you, with my love and gratitude.

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And, as always, to my wife, Dr. Katherine C. Tobin.

This book represents solely the opinion of the author, and of no other person or government entity.

Combat Assault

Beating over the gray-white ocean of
Clouds, spread like curdled custard, caverns and
Canyons, our flashing rainbow, from above
A lovely sight, from below, death's own hand.
Huddled in the doorway, our boots swinging
In the breeze, rifles gripped, knuckles white.
What eyes beneath, seeing our bird singing
Death songs, feel the wrench of guts gripped tight?
Fingers on triggers, searching squinting eyes,
We strain, intent, afraid, scared our fear
Will show. We know the hate, we know the lies
Told us. But now, the beat is all we hear.
You down there, terrified, as scared as we.
Why must I kill you? Why must you kill me?
Evan Wallach, Cambodia, 1970.

Foreword

In 1999, when I began the website which was the precursor to this book, there was very little interest in the law of war outside a tight knit community of military scholars and practitioners. The 9/11 attacks changed the interest level, but it did not increase the knowledge base. There was suddenly a flood of “experts,” mostly law professors, very smart people indeed, who were often experts in public international or criminal law, opining about the uses and application of the laws of armed conflict.

Their suggestions included revising the 1949 Geneva Conventions to deal with “new realities,” classifying persons captured on the battlefield using means other than those provided by established military regulations, and the most outré of all, the issuance of “torture warrants” by U.S. federal courts to authorize authorities to use facially illegal interrogation techniques.

At the same time, and over the ensuing years, the types of enemies faced on the battlefield, while legally no different than past *francs tireurs*, guerillas, partisans and pirates, had expanded their reach and capabilities to a point where they constituted a threat to international order. Simultaneously, the means and methods for fighting those enemies did change radically, particularly with the increase in use of remotely operated delivery systems, precision guided munitions, and more recently, the hesitant introduction of fully autonomous weapons systems. In addition, that *intrabellum* period has seen vastly expanded societal reliance on computers, and a concomitant shift to cyberwarfare capabilities, and the rise of new questions about regulation of that mode of warfare.

In the long run, all law is about the application of theory to reality in a fashion which fosters predictability. The law of war is no different, albeit perhaps harder to apply and enforce. Nevertheless, the law student reading this book should have no difficulty deriving governing legal principles, and as I tell my own students, every week’s newspapers will provide plenty of examples to which to apply that law. I hope this book will prove useful to students and their professors, but I also have tried to make it accessible to military professionals, and to interested people outside the common law tradition. If you familiarize yourself with the elemental analysis in Chapter One and the basic principles in Chapter Two, the discussion in any ensuing chapter should be accessible.

To all of you; thank you for reading.

EVAN WALLACH
Washington, D.C.
December, 2016

