# American Journal of International Law

January 2005 Vol. 99 No. 1



Published by

The American Society of International Law

### LAW ON THE BATTLEFIELD

- ZND FDITION

Just Published

## BY MAJOR GENERAL A. P. V. ROGERS

**\$90.** 1 Hardcover Volume. 275 pages. Index. **ISBN 1-929446-57-8** 

\$52. 1 Softcover Volume. ISBN 1-929446-58-6

Author: Major General A. P. V. Rogers is Yorke Distinguished Visiting Fellow, Faculty of Law, University of Cambridge, Fellow of the Lauterpacht Research Centre for International Law, University of Cambridge, Fellow of the Human Rights Centre, University of Essex, and member of the International Fact-Finding Commission. He is the Former Director of Legal Services of the British Army and is General Editor of the UK Armed Forces Manual of Armed Conflict

### Praise for "Law on the Battlefield"

"This book makes a most useful contribution to the understanding of the law of war. It takes key provisions of the 1977 Geneva Protocol I and explains their context, their negotiating history as well as their meaning and relevance today. I commend it not only to military lawyers but also to those who plan and conduct operations of peacekeeping and war. The book will also appeal to those who would like to resolve in their own minds the apparent incompatibility between law and war."

- General Sir Michael Rose, Former Commander of the UN Protection Force in Bosnia. General Sir Michael Rose KCB CBE DSO QGM, following service with the SAS in Malaya and Oman, commanded the 22nd SAS Regiment (1979-82) during which time it was involved in the London Iranian Embassy siege and the Falklands War. From January 1994 to January 1995 he assumed command of the UN Protection Force in Bosnia after which he became Adjutant General and a member of the Army Board.

"Critical observers, whether among the military, media or in academe, are in need of expert exposition of the intricacies of battlefield law as it has evolved over time. For these reason this book is to be warmly welcomed."

- Frits Kalshoven, Professor Emeritus of Public International Law and International Humanitarian Law, University of Leiden. He took part in the conferences that drafted the 1977 Additional Protocols and the 1981 Conventional Weapons Convention, and acted as first chairman of the UN Commission of experts on war crimes in the former Yugoslavia (1992-1993).

"Law on the Battlefield proves an important addition to the understanding and dissemination of the law of armed conflict. It is well-written and well-documented, covers the ground it intended to in a comprehensive fashion, is replete with relevant examples from actual operations of the principles discussed, and evidences a keen grasp by the author of the practicalities involved when combat confronts law. General Rogers is to be complimented, and thanked, for narrowing the gap between practitioner and commentator. There is little doubt that Law on the Battlefield should be included in the library of anyone-academic, judge advocate, or operator-concerned with the conduct of armed conflict."

- **Professor Michael N. Schmitt** is the Director of the Program in Advanced Security Studies and Professor of International Law in the College of International and Security Studies, George C. Marshall European Center for Security Studies, Garmisch-Partenkirchen, Germany.

"Law on the Battlefield may prove most useful for the army legal adviser, but those in the legal services of both the air force and the navy will find sufficient material to help them in their duties as advisers. They will often be able, without undue effort, to adapt them to their own specific problems. "

- Leslie C. Green Charles H. Stockton Chair of International Law Naval War College

Jp

Juris Publishing, Inc. 71 New Street, Huntington, NY 11743 (USA)

Telephone: 1-631-351-5430 Fax: 1-631-351-5712 Email: info@jurispub.com

## AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 99 Janua	iry 2005		NO. I
CON	TENTS		PAGI
Agora: ICJ Advisory Opinion on Construction	of a Wall in the Oc	cupied Palestinian	
Territory			
	ori Fisler Damrosch and		J
The "Wall" Decisions in Legal and Political C The ICJ's Advisory Jurisdiction and the Crur		Geoffrey R. Watson	(
the Political and the Judicial		Michla Pomerance	26
Toward Authoritativeness: The ICJ Ruling on The ICJ Advisory Opinion on the Israeli Secu		Richard A. Falk	42
Limits of Self-Defense		Ruth Wedgwood	52
Self-Defense and the Israeli Wall Advisory O	oinion: An Ipse Dixit		
from the ICJ?		Sean D. Murphy	62
Words My Mother Never Taught Me—"In D	efense of the Internat	ional	
Court" The Advisory Opinion: The Light Treatment	of International	Iain Scobbie	76
Humanitarian Law Critical Reflections on the International Hun	nanitarian Law Aspect	David Kretzmer	88
of the ICJ Wall Advisory Opinion Application of Human Rights Treaties Extra		Ardi Imseis	102
of Armed Conflict and Military Occupation		Michael J. Dennis	119
Notes and Comments		v	
The Judicial Effects of the "Completion Strat	egies" on the Ad Hoc		
International Criminal Tribunals	0	Daryl A. Mundis	142
Closing an International Criminal Tribunal W	hile Maintaining Inte		
national Human Rights Standards and Exc		Larry D. Johnson	158
The Security Council as World Legislature	0 1 /	Stefan Talmon	175
Current Developments		·	
The UN Convention on Jurisdictional Immu	nities of States and		
Their Property		David P. Stewart	194
The Fifty-sixth Session of the International L	aw Commission	Michael J. Matheson	211
International Decisions		ed by David D. Caron	
Assanidze v. Georgia (Alexander Orakhelashvil			222
European Court of Human Rights judgmen and to a fair hearing		y and security	
Biret International SA v. Council of the Europea	ın Union; Etablissemen	ts Biret & Cie SA v.	
Council of the European Union (Patricia Egli)			230
European Court of Justice ruling on whether	er EC beef hormone im	port violation	
of the WTO SPS Agreement gives rise to p		law	
Republic of Austria v. Altmann (Charles H. Brow			236
U.S. Supreme Court decision on applicabili			
ings seized by the Nazis or expropriated sh	ortly after World War	II	

Ferrini v. Federal Republic of Germany (Andrea Bianchi)	242
Italian Court of Cassation ruling on immunity from suit for damages for deporta-	
tion and forced labor during World War II	
Airport Linz v. United States (Stephan Wittich)	248
Austrian Supreme Court decision on immunity from suit for landing fees for Air	7-0
Force planes supporting NATO humanitarian operations in Bosnia	
Contemporary Practice of the United States Relating to International Law	
Edited by John R. Crook	0.0
United States Lifts Some Sanctions on Libya	253
U.S. Relations with Republic of Macedonia U.S. Responses to Alleged Abuse of Oil for Food Program	254
U.S. Responses to Alleged Abuse of Oil-for-Food Program Nongeremmental Redice Standardire Bar Codes	254
Nongovernmental Bodies Standardize Bar Codes United States Whaling Policy	255
United States Whaling Policy U.S. Market-Based Partnership to Reduce Methane Emissions	255
Arctic Council Policy Document on Global Warming	256 256
Repeal of U.S. Tax Benefit for Exporters	250 257
Requests for Safeguards on Apparel from China	257
U.S. Policy Regarding Internet Governance	257 258
Updated U.S. Model BIT	259
New BIT Model Followed in New Treaty with Uruguay	259
Paris Club Agrees to Substantial Debt Relief for Iraq	260
United States, Australia Settle Disputes Blocking U.SAustralian Free Trade Agreement	260
Treatment of U.S. Detainees at Guantánamo Bay	261
Supreme Court Litigant Released to Return to Saudi Arabia	262
Proceedings Involving Possible Offenses Against Protected Persons in Iraq and Afghanistan	262
ICRC Report Alleges Interrogation Techniques "Tantamount to Torture"	264
Religious Freedom Report Cites Eight Countries, Including Saudi Arabia	264
Human Trafficking: Proposal to Criminalize the Patronization of Prostitutes by U.S. Service Members	264
Reported Removal of Prisoners from Iraq	265
Efforts to Ban Human Cloning	266
President and Secretary of State Characterize Events in Darfur as Genocide	266
United States Supports Security Council Anti-terrorism Resolution	268
United States Vetoes Resolution to Condemn Israeli Incursion in Gaza	268
Legality of U.SLed Invasion of Iraq	269
Iran's Nuclear Program	270
U.S. Initiates Arbitration Against India over OPIC Claims for the Dabhol Power Project	271
U.S. Appeals Adverse NAFTA Panel Ruling on Softwood Lumber	272
Recent Books on International Law Edited by Richard B. Bilder	
Book Reviews	
Rosenne, Shabtai. The Perplexities of Modern International Law (Anne Orford)	274
Benvenisti, Eyal. Sharing Transboundary Resources: International Law and Optimal	
Resource Use (Daniel Bodansky)	280
Volger, Helmut (ed.). A Concise Encyclopedia of the United Nations (Ruth Wedgwood)	284
Bassiouni, M. Cherif. Introduction to International Criminal Law (Mark A. Drumbl)	287
Shaffer, Gregory C. Defending Interests: Public-Private Partnerships in WTO	
Litigation (William J. Davey)	290
Macedo, Stephen (ed.). Universal Jurisdiction: National Courts and the Prosecution	
of Serious Crimes Under International Law (Kenneth C. Randall)	293
Weeramantry, C. G. Universalising International Law (Roger S. Clark)	298
Baderin, Mashood A. International Human Rights and Islamic Law (Ann Elizabeth Mayer)	302
Keal, Paul. European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness	001
of International Society (S. James Anaya)	306
Briefer Notice	300
Schermers, Henry G., and Niels M. Blokker (eds.). International Institutional Law: Unity	010
Within Diversity (4th rev. ed.) (Kelly Vinopal)	310
Books Received	311
International Legal Materials. Contents, Vol. XLIII, No. 6 (November 2004); Vol. XLIV,	
No. 1 (January 2005)	315

### **BOARD OF EDITORS**

Editors in Chief

LORI FISLER DAMROSCH Columbia University School of Law University of Miami School of Law

JOSÉ E. ALVAREZ

Columbia University School of Law

DAVID J. BEDERMAN

Emory University School of Law

DANIEL BODANSKY

University of Georgia School of Law

DAVID D. CARON

Univ. of California (Berkeley) School of Law

HILARY CHARLESWORTH

Australian National University

STEVE CHARNOVITZ

George Washington Univ. Law School

CHRISTINE M. CHINKIN

**London School of Economics** 

JAMES R. CRAWFORD

University of Cambridge

JOHN R. CROOK

Potomac, Maryland

**JACK L. GOLDSMITH** 

Harvard Law School

BENEDICT KINGSBURY

New York University School of Law

DAVID A. MARTIN

University of Virginia School of Law

BERNARD H. OXMAN

MICHAEL I. MATHESON

George Washington Univ. Law School

SEAN D. MURPHY

George Washington Univ. Law School

STEVEN R. RATNER

University of Michigan Law School

DINAH L. SHELTON

George Washington Univ. Law School

BETH A. SIMMONS

Harvard University

RICHARD H. STEINBERG

Univ. of California (LA) School of Law

JANE E. STROMSETH

Georgetown University Law Center

JOEL P. TRACHTMAN

Fletcher School of Law and Diplomacy

RUTH WEDGWOOD

Johns Hopkins University

**EDITH BROWN WEISS** 

Georgetown University Law Center

DIANE P. WOOD

Chicago, Illinois

JAMES H. CARTER

ex officio

CHARLOTTE KU

### Honorary Editors

GEORGE H. ALDRICH

The Hague, the Netherlands

RICHARD B. BILDER

University of Wisconsin Law School

CHARLES N. BROWER

The Hague, the Netherlands

THOMAS BUERGENTHAL

The Hague, the Netherlands

RICHARD A. FALK

University of California at Santa Barbara

TOM J. FARER

University of Denver

THOMAS M. FRANCK

New York University School of Law

LOUIS HENKIN

Columbia University School of Law

ROSALYN HIGGINS

The Hague, the Netherlands

JOHN H. JACKSON

Georgetown University Law Center

FREDERIC L. KIRGIS

Washington and Lee Univ. School of Law

ANDREAS F. LOWENFELD

New York University School of Law

THEODOR MERON

The Hague, the Netherlands

JOHN NORTON MOORE

University of Virginia School of Law

COVEY T. OLIVER

Easton, Maryland

W. MICHAEL REISMAN

Yale Law School

STEPHEN M. SCHWEBEL

Washington, D.C.

LOUIS B. SOHN

George Washington Univ. Law School

ERIC STEIN

University of Michigan Law School

DETLEV F. VAGTS

Harvard Law School

BURNS H. WESTON

University of Iowa College of Law

Associate Editor

STEPHEN SCHER

Senior Associate Editor ANNA ASCHER

Managing Editor CARA M. SMITH

DOREEN G. YAMAMOTO

JOSEPH V. McGrath

Assistant Editors

### THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law was organized in 1906 "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice." Society membership is open to all persons of any nationality and profession who are interested in its objectives. Dues are: regular, \$165; special category, \$110; new professional, \$85; retired, \$110; student, \$30. Sustaining Memberships—contributing (\$275) and patrons (\$10,000)—are also available. Corporations may join ASIL as institutional members (\$2,000). The Society is incorporated by Act of Congress approved September 20, 1950 (64 Stat. 869).

### OFFICERS OF THE SOCIETY, 2004-2005

Honorary PresidentTHOMAS BUERGENTHALPresidentJAMES H. CARTERVice PresidentsLUCINDA LOW, DAVID A. MARTIN, LUCY REEDExecutive Vice President and Executive DirectorCHARLOTTE KU
Past Presidents: Charles N. Brower, Thomas M. Franck, Louis Henkin, Covey T. Oliver, William D. Rogers, Arthur W. Rovine, Anne-Marie Slaughter, Louis B. Sohn, Peter D. Trooboff, Edith Brown Weiss
Honorary Vice Presidents: THOMAS M. FRANCK, ARTHUR W. ROVINE, ANNE-MARIE SLAUGHTER
Counsellors: James Bacchus, Rosemary Barkett, Richard B. Bilder, Ian Brownlie, Hilary Charlesworth, Lori Fisler Damrosch, Pierre-Marie Dupuy, Tom J. Farer, John King Gamble, Conrad Harper, Rita E. Hauser, Rosalyn Higgins, John H. Jackson, Susan L. Karamanian, Martti Koskenniemi, Michael J. Matheson, Donald McRae, Sandra Day O'Connor, W. Michael Reisman, Stephen M. Schwebel, Dinah L. Shelton, Jerome Shestack, Patricia Wald, Edwin D. Williamson
Secretary FREDERIC L. KIRGIS Treasurer NANCY L. PERKINS Assistant Treasurer KENT BRESSIE

### PATRONS OF THE SOCIETY

GERALD AKSEN ARTHUR R. ALBRECHT GEORGE H. ALDRICH TEYMOUR A. ALIREZA JOSÉ ALVAREZ AND SUSAN DAMPLO JAMES G. APPLE MAHNOUSH H. ARSANJANI FRANK A, BAUMAN MRS. RICHARD BAXTER\* DAVID J. BEDERMAN AND LORRE B. CUZZE DANIEL L. BETHLEHEM RICHARD B. BILDER IOHN A. BOYD CHARLES N. BROWER IAN BROWNLIE THOMAS BUERGENTHAL RODMAN R. BUNDY William J. Butler SUSANA AND HUGO CAMINOS CHARLES H. CAMP DAVID D. CARON IAMES H. CARTER JAMES RICHARD CRAWFORD JOHN R. CROOK ANTHONY D'AMATO LORI FISLER DAMROSCH AND JEAN BAUER FISLER ARTHUR H. DEAN ELI WHITNEY DEBEVOISE II SARAH WHITCRAFT DEFORD EDWARD DUMBAULD\* RICHARD W. EDWARDS, JR. ALONA E. EVANS BENJAMIN B. FERENCZ

DOMINGO E. ACEVEDO

ALEXANDER FREEMAN ARTHUR K. KUHN

THOMAS M. FRANCK ALWYN V. FREEMAN JOHN KING GAMBLE RONALD E. M. GOODMAN KATHERINE GOROVE CHRISTOPHER J. GREENWOOD JOHN LAWRENCE HARGROVE VICTORIA M. HARIRI RITA E. HAUSER JOHN N. HAZARD ALICE AND LOUIS HENKIN KEITH HIGHET HOWARD M. HOLTZMANN CHARLES A. HUNNICUTT JOHN H. JACKSON MARK R. JOELSON RICHARD A. JOHNSON SUSAN L. KARAMANIAN FREDERIC L. KIRGIS CHARLOTTE KU JENNIFER LAKE AND DONALD FRANCIS DONOVAN **IEFFREY LANG** ELIHU LAUTERPACHT ROY S. LEE JEREMY I. AND CANDACE C. LEVITT CYNTHIA CRAWFORD LICHTENSTEIN MRS. RICHARD LILLICH A. VAUGHAN LOWE ANDREAS F. LOWENFELD BRUNSON MACCHESNEY\* ROBERT MACCRATE RONALD ST. JOHN MACDONALD EDWARD WATSON MCWHINNEY

HUSAM MESHAL W. ROBERT MORGAN\* VED P. NANDA ANDRE NEWBURG BERNARD H. OXMAN NANCY L. PERKINS HERMAN PHLEGER LUCY F. REED W. MICHAEL REISMAN ANDRÉS RIGO DAVIS R. ROBINSON WILLIAM D. ROGERS ARTHUR W. ROVINE SEYMOUR J. RUBIN\* PHILIPPE J. SANDS OSCAR SCHACHTER STEPHEN M. SCHWEBEL ANNE-MARIE SLAUGHTER ABBY COHEN SMUTNY EARL A. SNYDER BARBARA STARK ERIC STEIN IOHN R. STEVENSON\* Enrique P. Syquia GENEVIEVE E. TILLAR\* PETER D. TROOBOFF DETLEV F. VAGTS CHARLES O. VERRILL, JR. IILL McClanahan Watson RUTH WEDGWOOD **EDITH BROWN WEISS** BURNS H. WESTON EDWIN D. WILLIAMSON BASIL S. YANAKAKIS NASSIB G. ZIADÉ

ROBERT F. MEAGHER

### In Memoriam

HENRY C. MORRIS

JAMES BROWN SCOTT STANLEY P. SMITH

### PATRONAGE, GIFTS, AND BEQUESTS

Upon donation to the Society of \$10,000 or more, any member of the Society or individual eligible for membership may be elected a Patron of the Society. Upon donation of at least \$10,000 in the name of a deceased person, such person may be elected a Patron posthumously. Bequests or other estate gifts are also accepted independently of the Patrons program. Gifts and bequests may be made in the name of the American Society of International Law, Washington, DC. Such contributions may be tax-deductible to the extent allowed by law.

### ORDERS AND INQUIRIES

Subscriptions, Back Issues, and Cumulative Indexes: The American Journal of International Law (ISSN 0002-9300) is published quarterly, in January, April, July, and October, and is supplied to all members of the American Society of International Law. The annual subscription rate for nonmembers is \$180 (\$220 outside U.S.). Inquiries should be sent to the American Journal of International Law, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864; fax (202) 797-7133. Annual subscription orders should be sent to P.O. Box 164, Washington, DC 20055-0164. Order forms and other information are available online at <a href="http://www.asil.org">http://www.asil.org</a>. Claims for undelivered issues must be made in writing to the Society within three months of the mailing date specified online at <a href="http://www.asil.org/claims.htm">http://www.asil.org/claims.htm</a>. Volumes 1 (1907) to date are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209-1987, USA, toll-free (800) 828-7571. Cumulative indexes are also available from Hein: 1941–1960, 1961–1970, 1971–1980, and 1981–1990.

### AJIL is also available in nonprint forms:

- Online, through: Hein Online, a service of William S. Hein & Co., Inc., at <a href="http://www.heinonline.org">http://www.heinonline.org</a>; Mead Data Central, Inc., provider of the LEXIS®/NEXIS® services, P.O. Box 933, Dayton, OH 45401, USA, toll-free (800) 227-9597; and West Publishing Company, provider of WESTLAW®, P.O. Box 64526, St. Paul, MN 55164-0526, USA, toll-free (800) 937-8529.
- On the Web in JSTOR, the archive/database of scholarly journals, either through individual subscriptions by ASIL members only ((202) 939-6000), or through institutional subscriptions (JSTOR, 149 Fifth Avenue, 8th Floor, New York, NY 10010, (212) 358-6400). See <a href="http://www.jstor.org">http://www.jstor.org</a> for a current list of institutional subscribers.
- On microform, from: William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209, USA, toll-free (800) 828-7571; and University Microfilms, 300 North Zeeb Road, Dept. P.R., Ann Arbor, MI 48106, USA, toll-free (800) 521-0600; or 30–32 Mortimer Street, Dept. P.R., London WIN 7RA, England.
- On CD-ROM format, from: University Microfilms.

**Authorization to photocopy** items for internal or personal use (beyond that permitted by sections 107 and 108 of the U.S. Copyright Law), or for the internal or personal use of specific clients, is granted by the American Society of International Law for users registered with the Copyright Clearance Center (CCC) Transactional Reporting Service, provided that the base fee of \$5 per copy, plus 25¢ per page, is paid directly to CCC, 222 Rosewood Drive, Danvers, MA 01923. For organizations that have been granted a photocopy license by CCC, a separate system of payment has been arranged. The fee code for users of the Transactional Reporting Service is: 0002-9300/02 \$5.00+.25. Educational copying is permitted. Please address requests to CCC Academic Permission Service: tel. (978) 750-8400; fax (978) 750-4744.

**Advertising**: Inquiries should be sent to the Marketing Manager, ASIL, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864, tel. (202) 939-6000; fax (202) 797-7133.

\* \* \* \*

Periodicals postage paid at Washington, DC, and at additional mailing office. POSTMASTER: Send change of addresses to American Journal of International Law, 2223 Massachusetts Ave., NW, Washington, DC 20008-2864.

### AMERICAN JOURNAL OF INTERNATIONAL LAW

The views expressed in the articles, editorial comments, book reviews, and all other contributions to the *AJIL* are those of the individual authors and are not to be taken as representing the views of the Board of Editors or the American Society of International Law.

### SUBMISSION OF MANUSCRIPTS

**Manuscripts** may be sent to the American Journal of International Law, at the American Society of International Law, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864, USA, or by e-mail to AJIL@ASIL.org. Authors are requested to submit their manuscripts on computer disc or by e-mail attachment. If the manuscript is unavailable in electronic form, four paper copies should be submitted. Manuscripts and discs submitted will not be returned to the author. Please do not submit manuscripts via facsimile. The AJIL will not consider submissions whose content has been, or will be, published before it appears in this *Journal*.

The AJIL uses WordPerfect 9 and can convert manuscripts created in other word-processing programs into that program. Please specify the word-processing program used for manuscripts submitted in electronic form.

**Book reviews** are by invitation: suggestions may be made to the Book Review Office, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864. **Books for review** should be sent to the same office.

Format and style guidelines: All manuscripts should be double-spaced, with double-spaced footnotes. Our full Author Style Sheet is available online at <a href="http://www.asil.org/styledoc.htm">http://www.asil.org/styledoc.htm</a>. Subject to variations noted in that document, the *AJIL* conforms to *The Bluebook: A Uniform System of Citation* (17th ed. 2000) and the *Chicago Manual of Style* (14th ed. 1993). The style document can also be obtained via e-mail; please send e-mail requests to AJIL@ASIL.org. *The Bluebook* can be obtained from the Harvard Law Review Association, Gannett House, 1511 Massachusetts Avenue, Cambridge, MA 02138.

### INDEXES CARRYING AJIL

The American Journal of International Law is included in: ABC POL SCI: A Bibliography of Contents: Political Science and Government; Current Law Index; IBR—International Bibliography of Book Reviews of Scholarly Literature; IBZ—International Bibliography of Periodical Literature; Index to Foreign Legal Periodicals; Index to Legal Periodicals; International Political Science Abstracts; Public International Law: A Current Bibliography of Books and Articles; Social Sciences Index.

Copyright © 2005 by The American Society of International Law Printed by Cadmus Professional Communications, Linthicum, MD 21090