1 Rules of War, Laws of War

1.0. Introduction

The study of the law of armed conflict (LOAC), or international humanitarian law (IHL), is not unlike building a house. First, one lays the foundation for the structure. Then a framework is erected that is tied to the foundation. Finally, outer walls and interior rooms are constructed, with the framework providing their support. The study of the LOAC and IHL is much the same.

We begin by answering two foundational questions. We determine what LOAC applies in the conflict under consideration; that is, what is the conflict status? This requires that we know what LOAC and IHL are: what our building materials consist of and some of their history.

Our second foundational question is "What are the statuses of the various participants in our armed conflict?" What individual statuses are possible? When do those statuses apply, how are they determined, and who assigns them? With answers to these two questions, conflict status and individual status, a basic foundation is laid.

Then, the LOAC/IHL framework is erected. What constitutes LOAC and IHL? What are their guiding principles and core values? The framework is essential for all that follows – for the many individual issues, large and small, that make up the innumerable "rooms" of the LOAC/IHL house.

We develop these questions in this chapter and in succeeding chapters. Not all armed conflict law is considered in this single volume. However, the basics are here. In this chapter, we examine the rich history of LOAC. Where did it arise, and when? Who was involved? Why was it considered necessary?

1.1. The Law of War: A Thumbnail History

If Cicero (106–43 B.C.) actually said, "*inter arma leges silent*" – in time of war the laws are silent – in a sense, he was correct. If laws were initially absent, however, there were *rules* attempting to limit armed combat virtually from the time men began to fight in organized groups. Theodor Meron notes that, "Even when followed, ancient humanitarian rules were soft and malleable and offered little if any expectation of compliance."[1] Still, as John Keegan writes, "War may have got worse with the passage of time, but the ethic of

[1] Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (New York: Oxford University Press, 1998), 49.

restraint has rarely been wholly absent from its practice . . . Even in the age of total warfare when, as in Cicero's day, war was considered a normal condition, and the inherent right of sovereign States presided, there remained taboos, enshrined in law and thankfully widely observed."[2]

When did men begin to fight in groups? Cave art of the New Stone Age, 10,000 years ago, depicts bowmen apparently in conflict.[3] Since that time, there have been few periods in human history when there has not been an armed conflict someplace.[4] Keegan tells us that Mesopotamia developed a military system of defense as early as 3000 B.C. In approximately 2700 B.C. Gilgamesh, who ruled the city of Uruk, apparently undertook one of history's first offensive military campaigns.[5] Thus, warfare came to the world at least 5,000 years ago. Limitations on its conduct were close behind and, we are told, "during the five thousand six hundred years of written history, fourteen thousand six hundred wars have been recorded."[6]

No written early Roman military code survives, although it is known that within the Roman army's ranks, many of today's military criminal offenses were recognized.[7] In the early days of the Empire, few rules applied to combat against non-Romans. "[T]he conduct of [Roman] war was essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and noncombatants."[8]

With time, that changed. Around 1400 B.C., Egypt had agreements with Sumeria and other States regarding the treatment of prisoners.[9] In about 200 B.C., in Asia, a variety of Hindu texts describe numerous rules of war. The *Mahabharata*, an epic Sanskrit poem (200 B.C.–200 A.D.) reflected Hindu beliefs. It required that "a King should never do such an injury to his foe as would rankle the latter's heart."[10] It decreed that one should cease fighting when an opponent becomes disabled; that wounded men and persons who surrender should not be killed; noncombatants should not be engaged in combat; and places of public worship should not be molested.[11] The Hindu Code of Manu directs that treacherous weapons, such as barbed or poisoned arrows, are forbidden and that an enemy attempting to surrender, or one badly wounded, should not be killed.[12]

In the sixth century B.C., Sun Tzu counseled limitations on armed conflict as well. "[I]n chariot battles when chariots are captured, then ten-chariot unit commanders will reward the first to capture them and will switch battle standards and flags, their chariots

[2] John Keegan, *War and Our World* (New York: Vintage Books, 2001), 26.
[3] John Keegan, *A History of Warfare* (New York: Knopf, 1993), 119.
[4] A brief period from 100 to 200 A.D. is perhaps the only time the world has enjoyed peace. That period resulted from the Roman Empire's military ascendancy over all opposition.
[5] Keegan, *War and Our World*, supra, note 2, at 29.
[6] James Hillman, *A Terrible Love of War* (New York: Penguin Books, 2004), 17.
[7] Col. William Winthrop, *Military Law and Precedents*, 2d ed. (Washington: GPO, 1920), 17.
[8] Robert C. Stacey, "The Age of Chivalry," in Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds., *The Laws of War* (New Haven: Yale University Press, 1994), 27.
[9] Jean Pictet, *Development and Principles of International Humanitarian Law* (Leiden: Kluwer, 1985), 7–8.
[10] Cited in Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2d ed. (Manchester: Manchester University Press, 2000), 21.
[11] Suurya P. Subedi, "The Concept in Hinduism of 'Just War,'" 8–2 *J. of Conflict & Security L.* (Oct. 2003), 339, 355–6.
[12] K.P. Jayaswal, *Manu and Yâjñavalkya, A Comparison and A Contrast: A Treatise on the Basic Hindu Law* (Calcutta: Butterworth, 1930), 106.

are mixed with ours and driven, their soldiers are treated kindly when given care."[13] Sun Tzu did not suggest that his humanitarian admonitions constituted laws, or even rules of war. They were simply an effective means of waging war.

Roman Emperor Maurice, in the late sixth century A.D., published his *Strategica*. It directed, among other things, that a soldier who injured a civilian should make every effort to repair the injury, or pay twofold damages.[14]

In 621, at Aqaba, Muhammad's followers who committed to a *jihad* for Islam were bound to satisfy a number of conditions in its conduct. "If he has killed he must not mutilate," for example.[15] (Yet, Abyssinian victors often cut off the right hands and left feet of vanquished foes.[16])

Under Innocent II, use of the crossbow was forbidden as "deadly and odious to God" by the Catholic Second Lateran Council in 1139, and the Third Lateran Council prescribed humane treatment of prisoners of war.[17]

During the feudal period, in the twelfth and thirteenth centuries, knights observed rules of chivalry, a major historical basis for the LOAC. "[C]hivalry meant the duty to act honorably, even in war. The humane and noble ideals of chivalry included justice and loyalty, courage, honour and mercy, the obligations not to kill or otherwise take advantage of the vanquished enemy, and to keep one's word. . . . Seldom if ever realized in full . . . while humanizing warfare, chivalry also contributed to the legitimizing of war."[18] To today's war fighter, chivalry may seem an idealistically romantic notion.

> Nevertheless, as a catalogue of virtues and values, it remains an enviable model for honourable conduct in peace and in war. . . . Commands to spare the enemy who asks for mercy, to aid women in distress, to keep one's promise, to act charitably and to be magnanimous transcend any one particular historical period or sociological context. . . . The idea that chivalry requires soldiers to act in a civilized manner is one of its most enduring legacies.[19]

Doubters argue that "chivalric rules actually served to protect the lives and property of privileged knights and nobles, entitling them to plunder and kill peasant soldiers, non-Christian enemies, and civilians . . . ,"[20] but that seems a harsh view. It is true that chivalry's code only applied among Christians and knights. The Scottish nationalist Sir

[13] J.H. Huang trans., *Sun Tzu: The New Translation* (New York: Quill, 1933), 46.

[14] C.E. Brand, *Roman Military Law* (Austin: University of Texas, 1968), 195–6. Also see: Timothy L.H. McCormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime," in Timothy L.H. McCormack and Gerry J. Simpson, eds., *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997), 31–63, 35.

[15] Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins University Press, 1955), 87.

[16] Gerrit W. Gong, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984), 122–3.

[17] G.I.A.D. Draper, "The Interaction of Christianity and Chivalry in the Historical Development of the Laws of War," 5–3 *Int'l Rev. of Red Cross* (1965). The earliest crossbows date to 400 B.C. and the Chinese army. European crossbows date to about 1200, introduced from the East during the Crusades. Military effectiveness superceded theological concerns, for crossbows were widely employed until the seventeenth century. Still, Canon 29 of the Second Lateran Council held, "We forbid under penalty of anathema that that deadly and God-detested art of stingers and archers be in the future exercised against Christians and Catholics." Gregory M. Reichberg, Henrik Syse, and Endre Begby, eds., *The Ethics of War* (Malden, MA: Blackwell Publishing, 2006), 97.

[18] Meron, *Bloody Constraint*, supra, note 1, at 4–5.

[19] Id., at 108, 118.

[20] Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," 35–1 *Harvard Int'l L. J.* (1994), 49, 61.

William Wallace – "Braveheart" – was no knight. He was executed in 1305, after being convicted by an English court of atrocities in war, "sparing neither age nor sex, monk nor nun."[21] His conviction followed 1279's Statute of Westminster that authorized the Crown to punish "soldiers" for violations of "the law and customs of the realm."[22] In 1386, Richard II's *Ordinance for the Government of the Army* decreed death for acts of violence against women and priests, the burning of houses, and the desecration of churches.[23] Henry V's ordinances of war, promulgated in 1419, further codified rules protecting women and clergy.

At Agincourt, in 1415, England's Henry V defeated the French in the Hundred Years' War and conquered much of France. Henry's longbow men made obsolete many methods of warring in the age of chivalry. Shakespeare tells us that, at Agincourt, King Harry, believing that the battle was lost and that his French prisoners would soon join with the approaching French soldiers, gave a fateful order:

> King Harry: The French have reinforced their scattered men. Then every soldier kill his prisoners. (*The soldiers kill their prisoners.*)[24]
>
> Fluellen: Kill the poys and the luggage! 'Tis expressly against the laws of arms 'Tis as arrant a piece of knavery, mark you now, as can be offert. In your conscience now, is it not?
>
> Gower: 'Tis certain there's not a boy left alive. And the cowardly rascals that ran from the battle ha' done this slaughter. Besides, they have burned and carried away all that was in the King's tent; wherefore the King most worthily hath caused every soldier to cut his prisoner's throat. O 'tis a gallant king.[25]

Was Henry's order a war crime? Shakespeare's Fluellen and Gower plainly thought so.

1.1.1. *The First International War Crime Prosecution?*

The trial of Peter von Hagenbach in Breisach, Austria, in 1474 is often cited as the first international war crime prosecution.[26] He was tried by an ad hoc tribunal of twenty-eight judges from Austria and its allied states of the Hanseatic cities for murder, rape, and other crimes. Hagenbach's defense was one still heard today: He was only following orders. His defense met the same response it usually receives today: He was convicted and hanged. Hagenbach's offenses did not actually transpire during a time of war and thus were not war crimes, strictly speaking. It also may be asked whether the prosecuting allied states at von Hagenbach's trial constituted an "international" body.[27] The event is nevertheless significant in representing one of the earliest trials resulting in personal criminal responsibility for the violation of international criminal norms.

[21] Georg Schwarzenberger, "Judgment of Nuremberg," 21 *Tulsa L. Rev.* (1947), 330.
[22] Joseph W. Bishop, Jr., *Justice Under Fire: A Study of Military Law* (New York: Charterhouse, 1974), 4.
[23] Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, vol. II (London: Stevens & Sons, 1968), 15–16.
[24] William Shakespeare, *Henry V*, IV.vi.35–8.
[25] Id., vii.1–10
[26] Schwarzenberger, supra note 23, at 462–6.
[27] For a lengthier examination of von Hagenbach's case, see "Cases and Materials" at the end of this chapter. Further discussion of the case, and the early development of the law of war generally, are in McCormack, "From Sun Tzu to the Sixth Committee," in McCormack and Simpson, *Law of War Crimes*, supra, note 14, at 37–9.

1.1.2. *The Emergence of Battlefield Codes*

Meanwhile, battlefield rules and laws continued to sprout. In Europe, in 1590, the Free Netherlands adopted Articles of War and, in 1621, Sweden's Gustavus Adolphus published his *Articles of Military Lawwes to Be Observed in the Warres*, which were to become the basis for England's later Articles of War. Those English Articles in turn became the basis for the fledgling United States' first Articles of War. The Treaty of Westphalia, in 1648, was the first treaty between warring states to require the return, without ransom, of captured soldiers. Such early European codes, dissimilar and geographically scattered as they were, are significant.[28] They established precedents for other states and raised enforcement models for battlefield offenses – courts-martial, in the case of the British Articles of War. In the second half of the nineteenth century, the previously common battlefield practices and restrictions – customary law of war – began to coalesce into generalized rules, becoming codified and extended by treaties and domestic laws. Manuals on the subject, such as the 1884 British *Manual of Military Law*, were published.

By the mid-nineteenth century, states began writing codes that incorporated humanitarian ideals for their soldiers – the violation of which called for punishments; in other words, military laws. At the same time, there were few multinational treaties that imposed accepted limitations on battlefield conduct, with penalties for their violation. That would have to wait until the Hague Regulation IV of 1907. Even then, battlefield laws would lack norms of personal accountability for crimes in combat.

1.2. Why Regulate Battlefield Conduct?

All's fair in love and war? Hardly! Any divorce lawyer will attest that "all" is decidedly not fair in love. Just as surely, all is not fair in war. There are good reasons why warfare needs to be regulated. Simple humanitarian concerns should limit battlefield conduct. War is not a contest to see who can most effectively injure one's opponent. War cannot be simple blood sport. Indeed, modern LOAC has been largely driven by humanitarian concerns.

There are concrete, valid reasons to regulate battlefield conduct. LOAC differentiates war from riot, piracy, and generalized insurrection. It allows a moral acceptance of the sometimes repugnant acts necessarily done on battlefields and it lends dignity, even honor, to the sacrifices of a nation's soldiers. "War is distinguishable from murder and massacre only when restrictions are established on the reach of battle."[29] The idea of war as indiscriminate violence suggests violence as an end in itself, and that is antithetical to the fact that war is a goal-oriented activity directed to attaining political objectives. Even the view that all necessary means to achieving victory are permissible – a short step away from "all's fair in love and war" – implicitly recognizes that hostilities are limited to the means considered "necessary," further implying that violence superfluous to obtaining a military objective is *un*necessary and thus may be proscribed.

[28] Written European military codes, not necessarily reflecting the law of war, were many. In the fifth century, the Frankish Salians had a military code, as did the Goths, the Lombards, the Burgundians, and the Bavarians. The first French military law code dated from 1378, the first German code from 1487, the first Free Netherlands code from 1590. A Russian military code appeared in 1715. See Winthrop, supra, note 7, 17–8.

[29] Michael Walzer, *Just and Unjust Wars*, 3d ed. (New York: Basic Books, 2000), 42.

As it pertains to individuals, LOAC, perhaps more than any other branch of law, is liable to fail. In a sense, its goal is virtually impossible: to introduce moderation and restraint into an activity uniquely contrary to those qualities. At the best of times, LOAC is "never more than imperfectly observed, and at the worst of times is very poorly observed indeed."[30] In fact, one must admit that LOAC really does not "work" well at all. However, Geoffrey Best writes, "we should perhaps not so much complain that the law of war does not work well, as marvel that it works at all."[31]

It may seem paradoxical that war, the ultimate breakdown of law, should be conducted in accordance with laws. But so it is. Why would a state fighting for survival allow itself to be hobbled by legal restrictions? In fact, nations of the eighteenth and nineteenth centuries, when LOAC was in its formative stages, did not regard themselves as fighting for survival. Territory, not ideology, was the usual basis for war. Defeat meant the realignment of national boundaries, not the subjugation of the defeated population nor the dissolution of the vanquished state. "[A]nalysis of war prior to nineteenth-century industrialization and Napoleonic enthusiasm indicates that wars were less violent and less significant and were subject to cultural restraints."[32] War will always constitute suffering and personal tragedy, but rules of warfare are intended to prevent *unnecessary* suffering that bring little or no military advantage. Critics argue that, in war, states will always put their own interests above all else, and any battlefield law that clashes with those interests will be disregarded. As we shall see, LOAC has been created by states that have their own interests, particularly the interests of their own armed forces, in mind. LOAC is hardly an imposition on states by faceless external authorities.[33]

In modern times, despite Clausewitz's assertion that the laws of war are "almost imperceptible and hardly worth mentioning,"[34] they remain the best answer to the opposing tensions of the necessities of war and the requirements of civilization. "It is the function of the rules of warfare to impose some limits, however ineffective, to a complete reversion to anarchy by the establishment of minimum standards on the conduct of war."[35] The temporary advantages of breaching LOAC are far outweighed by the ultimate disadvantages.

"Unnecessary killing and devastation should be prohibited if only on military grounds. It merely increases hostility and hampers the willingness to surrender."[36] An example was World War II in the Pacific. After an early series of false surrenders and prisoner atrocities, Pacific island combat was marked by an unwillingness of either side to surrender, and a savagery of the worst kind by both sides resulted.[37] On Iwo Jima, of 21,000–23,000

[30] Geoffrey Best, *Humanity in Warfare* (London: Weidenfeld & Nicolson, 1980), 11.
[31] Id., 12.
[32] Hillman, *A Terrible Love of War*, supra, note 6, 168.
[33] Adam Roberts and Richard Guelff, *Documents on the Law of War*, 3d ed. (Oxford: Oxford University Press, 2000), 31.
[34] Carl von Clausewitz, *On War*, A. Rapoport, ed. (London: Penguin Books, 1982), 101. However, Clausewitz also wrote, "Therefore, if we find that civilized nations do not put their prisoners to death, do not devastate towns and countries, this is because their intelligence. . . taught them more effectual means of applying force than these rude acts of mere instinct." Id., at 103.
[35] Schwarzenberger, supra note 23, at 10.
[36] Bert V.A. Röling, "Are Grotius' Ideas Obsolete in an Expanded World?" in Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds., *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 287.
[37] See Eugene Sledge, *With the Old Breed at Peleliu and Okinawa* (Novato, CA: Presidio Press, 1981) for examples of savagery in the Pacific theater. Paul Fussell, *Wartime: Understanding and Behavior in the*

Japanese combatants, 20,703 were killed. When the island was declared secure only 212 Japanese surrendered[38] – less than 2 percent – because Marines and soldiers fearing that they would be murdered or mistreated if they surrendered simply put surrender out of mind and fought on, thereby increasing casualties to both sides. "Violations . . . can also result in a breakdown of troop discipline, command control and force security; subject troops to reciprocal violations on the battlefield or [in] P.W. camps; and cause the defeat of an entire army in a guerrilla or other war through alignment of neutrals on the side of the enemy and hostile public opinion."[39]

The rapacious conduct of World War II Nazis as they crossed Russia toward Moscow and Stalingrad exacerbated a hatred in the Russian civilian population that led to thousands of German deaths at the hands of partisans. Michael Walzer notes, "The best soldiers, the best fighting men, do not loot and . . . rape, do not wantonly kill civilians."[40] Strategically, battlefield crimes may lessen the prospect of an eventual cease-fire. War, then, must be conducted in the interest of peace.

Does LOAC end, or even lessen, the frequency of battlefield crimes? Was Thucydides correct in noting, "The strong do what they can and the weak suffer what they must"? Can we really expect laws to deter violations of IHL? Idi Amin, who robbed and raped Uganda into misery and poverty, ordered the deaths of 300,000 of his countrymen, and admitted having eaten human flesh, died in palatial comfort in Saudi Arabian exile, never brought to account for the butchery he ordered during his country's internal warfare. Josef Mengele, the World War II Nazi doctor at the Auschwitz extermination camp – the "Angel of Death" who conducted horrific "medical" experiments on prisoners – escaped to a long and comfortable life in Paraguay, and accidentally drowned while enjoying a day at the beach with his family in 1979. He was never tried for his war crimes.

No law will deter the lawless. No criminal code can account for every violator. No municipal or federal law puts an end to civilian criminality. Should we expect more from LOAC? Geoffrey Best writes, "If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law,"[41] but that is no license to surrender to criminality.

Battlefield violations have always occurred, continue to occur, and will occur in the future. Despite training and close discipline, as long as nations give guns to young soldiers, war crimes are going to happen. Recognizing that unpleasant truth is not cynicism so much as an acceptance of reality. Why bother with confining rules in combat, then? The answer: for reasons similar to those that dictate rules in football games – some violence is expected, but not all violence is permitted. Are rules and laws that are frequently violated worthless for their violation? Are speed limits without value because they are commonly exceeded? In the western world, are the Ten Commandments, which are commonly disregarded, therefore, of no worth? There always will be limits on acceptable conduct, including conduct on the battlefield. We obey LOAC because we cannot allow ourselves

Second World War (New York: Oxford University Press, 1989), relates similar accounts from the European theater.

[38] Stephen J. Lofgren, ed., "Diary of First Lieutenant Sugihara Kinryû: Iwo Jima, January – February 1945," 59–97. *J. Military History* (Jan. 1995).

[39] Jordan J. Paust, letter, 25 *Naval War College Rev.* (Jan–Feb 1973), 105.

[40] Michael Walzer, "Two Kinds of Military Responsibility," in Lloyd J. Matthews and Dale E. Brown, eds., *The Parameters of Military Ethics* (VA: Pergamon-Brassey's, 1989), 69.

[41] Best, *Humanity in Warfare*, supra, note 30, at 12.

to become what we are fighting and because we cannot be heard to say that we fight for the right while we are seen to commit wrongs. "Military professionals also have desires for law. For starters, they also turn to law to limit the violence of warfare, to ensure some safety, some decency, among professionals on different sides of the conflict."[42] We obey the law of war if for no other reason than because reciprocity tells us that what goes around comes around; if we abuse our prisoners today, tomorrow we will be the abused prisoners. We obey the law of war because it is the law and because it is the honorable path for a nation that holds itself up as a protector of oppressed peoples. We obey the law of war because it is the right thing to do. "When principle is involved, be deaf to expediency."[43]

In the calm of a college seminar room, it is easy to denounce the actions of others acting in a combat zone – soldiers, Marines, sailors, and airmen who did not have the luxury of discussion, or opportunity to study a treaty, or time for reflection before they acted. However, no armed service member is likely to be prosecuted for a single law of war violation hastily committed without thought in the heat of combat. When the battle is over, when the combatant is seen to have considered his/her actions before acting wrongly, when the action taken was patently contrary to the law of war, or when the violation was of a repeated nature, then it is reasonable to invoke LOAC.

1.2.1. *Difficult Issues*

Twenty-first-century armed conflicts often have no battlefield in the traditional sense. "Less and less do we see opposing armies take to the field while the Geneva Convention shields civilians on the sidelines. Television journalists show us every day the new characteristic engagement: brutal, neighbor-on-neighbor killing."[44] Armed conflicts have become *intra-*, rather than *inter-*, state affairs. Thugs seize national power; stateless terrorists attack national infrastructures; children are dragooned into "liberation" armies.

In a perceptive 2007 interview, retired British General Sir Rupert Smith, who commanded troops in Northern Ireland, Bosnia-Herzegovina, Kosovo, and the Gulf War, noted that,

> instead of a world in which peace is understood to be an absence of war and where we move in a linear process of peace-crisis-war-resolution-peace, we are in a world of continuous confrontation. . . . The new wars take place amongst the people as opposed to "between blocks of people", as occurred for instance in the Second World War . . . [in which] there was a clear division as to which side everybody belonged to and whether they were in uniform or not. This is not the case in "wars amongst the people". [Today] the people are part of the terrain of your battlefield . . . the event known as "war" is nowadays especially directed against non-combatants . . . [W]ar as a massive deciding event in a dispute in international affairs, such wars no longer exist. Take the example of the United States, a state with the largest and best-equipped military forces in the world, which is unable to dictate the desired outcome [in Iraq] as it did in the two world wars . . . The ends to which wars are conducted have changed from the hard, simple, destructive objectives of "industrial war" to the softer and more malleable objectives of changing intentions, to deter, or to establish a safe and secure environment. . . . The objective *is* the will of the people. Tactically the opponent often operates according to the tenets of the guerrilla . . . seeks to provoke an over-reaction so as to paint the

[42] David Kennedy, *Of War and Law* (Princeton NJ: Princeton University Press, 2006), 32.
[43] Attributed to Cmdr. Matthew Fontaine Maury, USN (1806–73), a groundbreaking oceanographer.
[44] Capt. Larry Seaquist, USN, "Community War," *Proceedings* (Aug. 2000), 56.

> opponent in the colours of the tyrant and oppressor. . . . Your objective is to capture the population's intentions, and the more you treat all the people as your enemy, the more all the people will be your enemy . . . [I]f you operate so that your measures during conflict are treating all these people as enemies . . . you are acting on behalf of your enemy; you are even co-operating with him, because that is what your opponent is aiming at with his strategy.[45]

How is LOAC to be applied and enforced in these circumstances, on nonbattlefields where the very aim of war has changed? Warfare is no longer as simple as in the mid-twentieth century. But David Kennedy goes too far when he writes, "The twentieth-century model of war, interstate diplomacy, and international law are all unraveling in the face of low-intensity conflict and the war on terror."[46] The law of war still applies and still can be applied. It still "works," but only through patient, intelligent, and resolute effort by states willing to live by the rule of law.

Why should our side observe LOAC when our opponents disregard it, or are even unaware that such laws exist? One writer points out, "There was once a legal notion, now archaic and never entirely accepted, that less-civilized opponents in effect waived the rules of war by their conduct, permitting the use of more brutal methods against them. That notion will never pass muster in the 21st century. There may be a temptation to think that a barbarous enemy deserves a like response, but this is an invitation to legal, moral, and political disaster."[47] Because there are criminals at large should we pursue them by becoming criminals? If terrorists film themselves beheading captives, shall we therefore behead our captives? We cannot allow ourselves to become that which we fight. Walzer writes, "They can try to kill me, and I can try to kill them. But it is wrong to cut the throats of their wounded or to shoot them down when they are trying to surrender. These judgments are clear enough, I think, and they suggest that war is still, somehow, a rule-governed activity, a world of permissions and prohibitions – a moral world, therefore, in the midst of hell."[48]

Former American Secretary of Defense Donald Rumsfeld was very wrong when he said, "There's something about the body politic in the United States that they can accept the enemy killing innocent men, women and children and cutting off people's heads, but have zero tolerance for some soldier who does something he shouldn't do."[49] Americans don't "accept" enemy war crimes; rather, we understand we are powerless to stop them when they are happening. We hope our soldiers and Marines and sailors and airmen will meet the killers in another time and place or that we may eventually capture and try the enemy for his crimes. And we rightfully expect our own combatants to meet high standards on the battlefield. As a nation we must be intolerant of lesser conduct.

1.3. Sources of the Law of Armed Conflict

Armed conflict has changed in the twenty-first century, but LOAC remains important, even inviolate, for states that respect the rule of law. Initially, battlefield rules were born

[45] Toni Pfanner, "Interview with General Sir Rupert Smith," 864 *Int'l Rev. of the Red Cross* (Dec. 2006), 720. Emphasis in original.
[46] Kennedy, *Of War and Law*, supra, note 42, at 12.
[47] Michael H. Hoffman, "Rescuing the Law of War: A Way Forward in an Era of Global Terrorism," *Parameters* (Summer 2005), 18, 34.
[48] Walzer, *Just and Unjust Wars*, supra, note 29, at 36.
[49] Bob Woodward, *State of Denial* (New York: Simon & Schuster, 2006), 486.

of a simple desire to conduct oneself honorably. Self-interest dictates an avoidance of needless cruelty lest that same cruelty be visited upon ourselves. So, from where are battlefield rules drawn? What are the sources of LOAC?

The Statute – the establishing decree – of the International Court of Justice (ICJ) relates the sources of international law that the Court applies. The ICJ, reads its Statute, first looks to international conventions, and then to international custom. Next, the Court will consider "general principles of law recognized by civilized nations," then to judicial decisions and, finally, to "the teachings of the most highly qualified publicists of the various nations. . . ."[50] International conventions – treaties – and custom are the ICJ's primary sources of law.[51]

The LOAC manual used by American armed forces, Field Manual (FM) 27–10, *The Law of Land Warfare*, was issued in 1956 and remains in effect today.* Taking its cue from the ICJ's Statute, the Field Manual notes that "The law of war is derived from two principle sources . . . Treaties (or conventions, such as the Hague and Geneva Conventions [and] Custom . . . This body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law."[52]

1.3.1. *Custom*

Custom is one of the two primary bases of the law of war. Customary international law is binding on all states.[53] Summarily stated, "the formation of customary law requires consistent and recurring action . . . by states, coupled with a general recognition by states that such action . . . is required . . . by international law."[54]

Customary law is the "general practice of states which is accepted and observed as law, i.e. from a sense of legal obligation."[55] It arises when state practice is extensive and virtually uniform. A prerequisite for an internationally binding custom is that ". . . the provision concerned should . . . be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[56] In other words, a practice begins, and then spreads to other states. The widening practice eventually is accepted by states not as an option but as a requirement, finally maturing into customary law. There is no bright-line time element for a practice to develop into binding custom, but there must be a "constant and uniform usage" practiced by states.[57] Article 38 of the Statute of the ICJ defines international custom as evidence of a general practice that

[50] Statute of the International Court of Justice, Article 38.1 (June 26, 1945).

[51] Article 38 is actually an instruction to ICJ judges. International lawyers and tribunals do employ other sources, such as *jus cogens*, equity, and even natural law, to determine the existence of customary law.

* A new edition will soon be available, if it is not already.

[52] Dept. of the Army, FM 27–10: *The Law of Land Warfare*, w/change 1 (DC: GPO, 1956), para. 4.

[53] Exceptions are states that consistently and unequivocally refuse to accept a custom during the process of its formation. Often referred to as "persistent objection," the principle remains a live, if not particularly strong, tenet of international law. Because customary law is based on general patterns of expectation and practice, rather than consent, it is unlikely that a state could persistently object to a customary law. A failure of such an attempt occurred after World War II, at the Nuremberg IMT, when the tribunal upheld provisions of 1907 Hague Regulation IV as having been customary international law by 1939, despite Germany having persistently objected to the convention as a whole.

[54] Roberts and Guelff, *Documents*, supra, note 33, at 7.

[55] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), 3.

[56] *North Sea Continental Shelf* Cases, ICJ Rep. 1969, 41–2.

[57] *Asylum* Case, ICJ Rep. 1959, 276–7.

is extensive and virtually uniform, coupled with a subjective belief by states that such behavior is required by law.

Take, for example, the practice of ships' use of running lights. In the eighteenth century, to reduce the risk of collision, ships based in European ports began to show colored lights when underway at night. To help other ships judge the distance and direction of oncoming ships' lights, a red light was shown on a ship's port side, a green light to starboard. Over time, this maritime safety measure became common, regardless of the ship's flag. Common usage in turn became an accepted custom, and the custom spread throughout the sailing world. The custom, with its clear utility, eventually became a rule, first formulated for British mariners, for instance, in 1862. Finally, the rules for ships' underway lights at night were the basis of the 1889 International Regulations for Preventing Collisions at Sea, adopted by virtually all maritime states. After that, ships no longer showed running lights merely because they recognized it as a wise practice that enhanced the safety of all mariners; now it was required by binding regulation. Usage begat custom begat customary international law begat treaty. So it is with the law of war. Bombing becomes more accurate with the use of laser-designated targets and global-position-satellite (GPS)-guided munitions, and collateral damage is dramatically reduced. Eventually, laser target designation and GPS munitions guidance will likely become not a targeting choice but an armed combat requirement of customary international law and, in time, the subject of treaty-made law.

SIDEBAR. General George Washington was well aware of the customary law of war. "In 1776, American leaders believed that it was not enough to win the war. They also had to win in a way that was consistent with the values of their society and the principles of their cause. . . . In the critical period of 1776 and 1777, leaders of both the Continental army and the Congress adopted the policy of humanity . . . Every report of wounded soldiers refused quarter, of starving captives mistreated in the prison hulls at New York, and of the plunder and rapine in New Jersey persuaded leaders in Congress and the army to go a different way, as an act of principle and enlightened self-interest. . . . Washington ordered that Hessian captives would be treated as human beings with the same rights of humanity for which Americans were striving. . . . [A]fter the battle of Princeton, Washington ordered one of his most trusted officers, Lieutenant Colonel Samuel Blachley Webb, to look after [British prisoners]: 'You are to take charge of [211] privates of the British Army. . . . Treat them with humanity, and Let them have no reason to Complain of our Copying the brutal example of the British Army . . . ' They [American leaders] set a high example, and we have much to learn from them."[58]

[58] David Hackett Fischer, *Washington's Crossing* (Oxford: Oxford University Press, 2004), 375, 376, 378, 379. Samuel Eliot Morison writes of John Paul Jones, while he was captain of the *Ranger*, sending a press gang ashore at St. Mary's Isle, England. Finding no suitable prospects, Jones allowed his sailors to loot the mansion of an English Count, taking, among other things, a large silver service. Jones wrote a regretful letter, to which the Count replied, "In your letter you profess yourself a Citizen of the World, and that you have drawn your sword in support of the Rights of Man . . . I doubt the laws of war and of nations would be very favorable to you as a citizen of the World." Jones purchased the silver service with his own funds and, after the war, returned it intact to the Count. Morison, *John Paul Jones: A Sailor's Biography* (Boston: Atlantic-Little Brown, 1959), 143–55.

A crucial issue in the formation of customary international law is part and parcel of international law itself: Who is to say when "custom" shades into "requirement"? Who decides when running lights are not just a good idea, but are required? That tipping point, known as *opino juris*, is often a matter of disagreement and dissent, driven, on one hand, by those wishing to force new levels of conduct or performance favoring them and, on the other hand, those wishing to retain maximum freedom of action. "*Opino juris* is thus critical for the transformation of treaties into general law. To be sure, it is difficult to demonstrate such *opino juris*, but this poses a question of proof rather than of principle."[59] Again, there is no bright line test, no predictable point where custom becomes law.

Formative issues aside, custom remains the basis of much of the law of war. In ancient times, custom arose, then was eventually considered a binding precept cum international customary law. In many instances, it was made law in the form of multinational treaties that dictated penalties for its violation. But customary international law, even when undocumented in treaty form, is no less binding on nations.

Custom and treaties may be discussed as if they were discrete entities, but in practice the two are interrelated in complex ways. Custom is often memorialized in treaty form; treaties may give rise to rules of customary law. In contrast, treaties may be defeated by contrary state practice. The shifting interrelation of the two gives rise, of course, to conflicts, sometimes resolved in international courtrooms, sometimes on battlefields. For our purposes it is sufficient to understand that custom and treaties constitute the two primary bases of LOAC and, like many international legal concepts, they are subject to disagreements and conflicting interpretation.

1.3.2. *Treaties*

Of the two primary sources of LOAC, custom and treaties, treaties are the easier to describe. Particularly since World War II, the binding quality of such pacts has increased. Among the first treaties bearing on battlefield conduct – *jus in bello* – was the 1785 Treaty of Amity and Commerce, between Prussia and the United States. It provided, *inter alia*, basic rules regarding prisoners of war and noncombatant immunity, should the parties war against each other. Roberts and Guelff note that, "multilateral treaties on the laws of war have been variously designated 'convention', 'declaration', 'protocol', 'procès-verbal' or 'statute'. . . . [T]he 1969 Vienna Convention on the Law of Treaties defines the term 'treaty' as 'an international agreement concluded between States in written form and governed by international law . . . '"[60]

There is no agreement as to what treaties constitute the body of *jus in bello*. In some cases, signed treaties are never ratified, or lengthy periods pass between signing and ratification. The 1925 Geneva Gas Protocol,[61] signed by the United States in 1925, was not ratified by the United States until 1975. The 1969 Vienna Convention on Treaties is signed by the United States but remains unratified, as do 1977 Additional Protocols I

[59] Theodor Meron, "The Geneva Conventions as Customary Law," 81–2 *AJIL* (April 1987), 348, 367. Footnotes deleted.

[60] Roberts and Guelff, *Documents*, supra, note 33, at 5.

[61] 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

and . . . II. Generally, a signed treaty that has not been ratified still imposes an obligation on the party to not defeat the object and purpose of the treaty. To escape even that obligation, the United States took the unique step of "un-signing" the 1998 Rome Statute of the International Criminal Court (ICC). A few significant LOAC-related multinational treaties (e.g., the 1923 Hague Rules of Aerial Warfare and the 1997 Ottawa Convention Prohibiting Anti-Personnel Mines) have never been signed by the United States.

In time of war the laws are silent? Perhaps in Cicero's time, but not today. The many multinational treaties bearing on battlefield conduct and the protection of the victims of armed conflict demonstrate that there is a large and growing body of positive law, IHL, bearing on armed conflict.

In American practice, the Constitution's Article VI mandates that "This Constitution, and the laws of the United States . . . and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land . . . " Treaties ratified by the U.S. Senate, such as the 1949 Geneva Conventions and many others, not only bind America's armed forces, but are also "the supreme Law of the Land."

1.3.3. *Legislation and Domestic Law*

The 1949 Geneva Conventions were among the first multinational treaties that required ratifying states to enact domestic legislation to enforce their mandates by penalizing or criminalizing certain violations. (See Chapter 3, section 3.8.2.) International treaties, in and of themselves, have no inherent enforcement powers, but states that ratify such pacts have jurisdiction over their citizen-treaty offenders. Those states may enact national legislation in furtherance of the ratified treaty, promulgating administrative or criminal enforcement provisions in their domestic law. Today, the requirements for such ratifying-state enforcement measures are routinely written into multinational treaties. For example, the 1984 Convention Against Torture (the CAT), in Article 2.1, directs that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[62] The United States ratified the CAT in 1994. In compliance with Article 2.1, the United States has passed federal legislation prohibiting torture.[63] Domestically, this legislation becomes a source of human rights and a LOAC and IHL guideline.

1.3.4. *Judicial Decisions*

In LOAC, "case law" refers to decisions of domestic courts, military tribunals, and international courts that relate to IHL and LOAC. Prior to 1945, other than a few unsatisfactory trials that followed World War I (Chapter 3, section 3.2.1), there was virtually no case law to interpret and flesh out the customary law of war, or to give life to its gray areas. The conclusion of World War II saw the initial efforts to remedy that lack.

[62] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

[63] See 28 U.S.C. §§ 1350, 2340(1) and 2340A. Also, the Armed Forces have issued DoD Directive 3115.09, dated Nov. 3, 2005, "DoD Intelligence Interrogations, Detainee Briefings, and Tactical Questioning," as well as 2007's Field Manual 2–22.3, *Human Intelligence Collection Operations*, both containing torture prohibitions.

The Nuremberg and Tokyo International Military Tribunals produced lengthy judgments and valuable case law. Those opinions are still studied. The judgments of the so-called "Subsequent Trials," also held in Nuremberg after the war, remain significant case law. Several thousand military commissions were conducted after World War II. The United States conducted roughly one thousand such commissions, and our Allied nations conducted their own military tribunals. As with the Nuremberg judgments, military commission decisions remain significant today, but those cases, judgments, and opinions still represented a relatively small body of case law. "The body of law that governed the enforcement of international humanitarian law in the mid 1990s was very rudimentary. The substantive law . . . did not benefit from well-developed jurisprudence."[64]

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have provided important interpretations of LOAC/IHL and the customs and usages of war. The international scope of the Tribunals, with their generally well-qualified judges, and their reasoned, nuanced judgments and appellate opinions, provide essential direction for students of LOAC/IHL. However, the Tribunals are international criminal courts in which elements of common law and civil law systems must be reconciled. For instance, in the common law tradition, the concept of *mens rea* is embodied in intention, recklessness, and criminal negligence. In the civil law tradition, "[n]egligence, however gross, does not carry criminal responsibility unless a particular crime provides for its punishment."[65] Instead, civil law jurisprudence speaks of *dolus directus*, which bears a similarity to the common law's *mens rea*. "Notwithstanding the different architecture of the criminal systems and the ensuing differences between the operative concepts, it can be asserted that for the question of *mens rea* there is substantial overlap of the notions . . . It may be concluded that the differences between the two systems in our context are real, but more conceptual than substantive."[66] The two systems' differing approaches to the mental state required for conviction illustrates one significant difference between ICTY and LOAC jurisprudence.

There is no system of precedent in international law or in LOAC.[67] (See *Prosecutor v. Kupreškić et al.*, Cases and Materials, this chapter.) Opinions of the ICTY, ICTR, and ICC bind only the litigants before the court, not U.S. courts or the domestic courts of any state. That U.S. position was recently made clear by Supreme Court Chief Justice Roberts: "[S]ubmitting to [the] jurisdiction [of an international court] and agreeing to be bound are two different things,"[68] but neither are the opinions of international courts

[64] Louise Arbour, "Legal Professionalism and International Criminal Proceedings," 4–4 *J. of Int'l Crim. Justice* (Sept. 2006), 674, 675.

[65] Kunt Dörmann, *Elements of War Crimes* (Cambridge: ICRC/Cambridge University Press, 2003), 491.

[66] Id., at 492–3. For a more complete discussion of the ICTY, ICTR, and ICC treatments of *mens rea*, see William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 292–6.

[67] Art. 38(1)(d) of the Statute of the ICJ provides that judicial decisions are a "subsidiary means for the determination of rules of law," subject to Art. 59, which holds, "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[68] *Medellin v. Texas*, 128 S Ct. 1346 (2008), at 1358. As Professor Mary Ellen O'Connell writes, however, "the majority in *Medellin* should have looked at the full range of international and foreign court and tribunal decisions that national courts regularly enforce either directly or under the terms of an enforcement treaty." *The Power & Purpose of International Law* (New York: Oxford University Press, 2008), 348.

simply ignored. The judgments and opinions of specialized international courts and tribunals that have gone before influence the judgments of later international and state courts considering similar issues.

1.3.5. *Publicists*

Custom and treaties are the primary sources of LOAC, with growing bodies of state legislation and international and domestic case law to interpret both. Publicists are another, lesser, LOAC source, as the ICJ indicates in its statute. Scholars and writers on the subject – "publicists" – discuss and write about LOAC – examining, molding, and reshaping international legal opinion, their views sometimes forming the bases of eventual state practice. If sufficiently widespread, state practice becomes custom, and so on. Publicists do not write LOAC, or influence it in a direct way, but their writings sometimes lend a cumulative intellectual and moral force to emerging LOAC/IHL concepts and practices. Because of their influence, particularly when the law of war was in its formative stages, a few publicists have been deeply influential in forming today's battlefield norms.

Francisco de Victoria was such an early publicist. Also known as Franciscus de Vitoria (c.1486–1546), he was a Spanish jurist and theologian when Spain was at the height of its international power, and he was one of the first of several prominent sixteenth-century law-of-war theorists. Victoria's lectures at the University of Salamanca reflected the Spanish experience in warring against Peruvian Indians in the New World. His lectures were collected in his text, *Reflectiones Teologicae* (1557). His writings constituted an outline of the law of nations of the day, early building blocks for the regulation of war.

Pierino Belli (1502–1575), born of a noble Italian family, was both a soldier and jurist, a military judge in the armies of Charles V and Phillip II. In 1563, after holding diplomatic posts and serving as commander-in-chief of the Holy Roman Empire's army in Piedmont, Belli wrote *De re Militari et de Bello Tractatus*. Almost seventy years before Grotius's seminal work, Belli offered a systematic treatment of the rules of war of his day.

Another early publicist was Balthazar Ayala (1548–1584), a Belgo-Spanish military judge and political theorist who wrote *De Jure de Officiis Bellicis et Disciplina Militari*, three volumes concerned with military discipline, the lawful causes of war, and just and unjust wars. Ayala was an officer and legal advisor to Phillip II's army in Flanders.

The most celebrated law of war publicist is the Dutch jurist and scholar, Hugo Grotius (1585–1645), sometimes called the father of international law.[69] Grotius's picaresque life could be the subject of novels. At age eleven he was enrolled in Leiden University and at fifteen began the study of law at Orléans. Prolific in philology, theology, and poetry, Grotius was appointed attorney general of the province of Holland, but later was imprisoned for his religious views. After almost three years' imprisonment, he escaped by hiding in a book chest. In exile in Paris, he eventually became the Swedish ambassador

[69] The beginnings of international law arguably began in the interstate system of Italian city–states and, particularly, with the writings of two Italian lawyers, Bartolo da Sassoferrato (1314–57) and Baldo degli Ubaldi (1327–1400). As influential as Grotius was, no single individual can fairly be called the father of international law.

to France, a noteworthy appointment for a Dutch fugitive. He earned such recognition through his writings, which were greatly admired by the Swedish king, Gustavus Adolphus.[70] Grotius's 1625 three-volume masterwork, *De Jure Belli ac Pacis* (*On the Law of War and Peace*) was published to international acclaim and is still cited as the first definitive international law text. He sought to limit war by interposing "just war" doctrine, with its stringent limitations on the initial resort to war, *jus ad bellum*, and by seeking humane limitations on the means by which war was waged, *jus in bello*.[71] "The plea made by earlier writers, including Gentili, but endorsed and fortified by Grotius, namely that limitations on warfare must be observed irrespective of the 'just' or 'unjust' nature of the initial resort to war . . . was and is a major contribution in legal ideas and forms part of the Grotian tradition."[72]

Through concepts of state sovereignty, the equality of sovereign states, "just war" theory, and stressing the self-defeating character of war, Grotius's text laid foundations of modern international law upon which later writers built. Although his just war doctrine was not accepted until long after his death, the concept persisted.[73] Grotius died in 1645, when shipwrecked on the Pomeranian coast.

Francisco Suárez, a sixteenth-century theologian and law of war scholar, was the author of *De Legibus ac Deo Legislatore*, in 1612. His moral and political philosophy stressed universal human custom in natural law, and its importance in warfare. He joined other law of war publicist adherents of natural law. "The teachings of Suárez show a manifest and unusually modern interest in the safeguarding and promotion of human rights. Freedom, justice . . . and peace lack a solid basis . . . unless the dignity and the equal and inalienable rights of the universal family are recognized."[74]

The Italian, Alberico Gentili (1552–1608), was a jurist and professor of civil law at Oxford. He was counsel in England to the King of Spain. In his 1598 book, *De Jure Belli Libri Tres*, Gentili found historical and legal precedents for battlefield constraints in natural law and, like Suárez, related them to just war theory.

A later prominent law of war publicist was the Swiss jurist Emmerich de Vattel (1714–1767), who published *Le Droit de Gens ou Principes de la Loi Naturelle* in 1758. His two-volume work was instrumental in modernizing international law, transforming it from a largely theoretical study to actual practice. He continued the line of publicists advocating natural law, his influence continuing into the nineteenth century. The U.S. Supreme Court, in *The Prize Cases*, cites Vattel, paraphrasing him in saying there are "common laws of war" which are "maxims of humanity, moderation and honor [which] ought to be observed by both parties . . . "[75]

[70] Adolphus was sufficiently impressed with Grotius's *De Jure Belli ac Pacis* that he is said to have slept with a copy under his pillow while fighting in Germany and to have ordered that Grotius be employed in the service of Sweden. Grotius served as Sweden's ambassador to France from 1635 until his death. Amos S. Hershey, "History of International Law Since the Peace of Westphalia," 6 *AJIL* (1912) 31, fn. 2.

[71] G.I.A.D. Draper, "Development of the Law of War," in Michael A. Meyer and Hilaire McCoubrey, eds., *Reflections on Law and Armed Conflict* (The Hague: Kluwer Law International, 1998), 49.

[72] Id., at 51.

[73] Id.

[74] Sergio M. Villa, "The Philosophy of International Law: Suárez, Grotius and Epigones," 320 *Int'l. Rev. of the Red Cross* (Oct. 1997), 324.

[75] 67 U.S. (2 Black) 635, 667, 17 L.Ed. 459 (1863).

These and other sixteenth- and seventeenth-century scholars and publicists set the doctrinal basis for the regulation of war by interpreting and generalizing the practices of centuries. Lassa Oppenheim, a British international law professor of the twentieth century, is a modern example of a law of war publicist who influenced national policy that led to customary international law.

In 1906, in a major shift from previous practice, Oppenheim postulated that a common defense to charges of violating the law of war, obedience to superior orders, constituted a complete and absolute defense to such charges. Anchoring his formulation on an interpretation of then-traditional concepts of international law, he held that there could be no personal responsibility in subordinates when superiors ordered criminal acts on the battlefield. Later, Oppenheim wrote Great Britain's 1912 handbook on the rules of land warfare. The new text incorporated Oppenheim's *dicta* that, for subordinates, obedience to orders constituted a complete defense to charges of violation of the law of war. In 1914, looking to Great Britain's example, America published its first manual on the law of war.[76] In treating defenses to law of war violations, the new American manual followed Oppenheim's lead: "Individuals of the armed forces," it read, "will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders."[77] This approach contradicted American military and civilian case law. Nevertheless, the defense prevailed in the U.S. military through World War I and into the interwar period, into a new 1934 edition of the *Rules of Land Warfare* manual, and into World War II. Even in that war, in yet another *Rules* edition of 1940, Oppenheim's formulation continued to govern, but, in 1942, the Allies announced that they would prosecute German and Japanese soldiers for obeying unlawful battlefield orders, and would deny them the superior orders defense. Such a stance clearly required a reevaluation of the American policy reflected in its field manual. The United States could hardly continue to sponsor for its own soldiers the defense it intended to deny the vanquished enemy.

In April 1944, in a complete about-face, the United Kingdom revised its law of war manual and rejected superior orders as a defense to war crimes charges. "Seven months later, on November 15, 1944, the United States similarly reversed and revised its field manual."[78] The United States returned to its pre-1914 position – obedience to orders was *not* a perfect defense – and Oppenheim's writing of thirty-eight years before was rejected – a rarity for so notable a scholar. The practices of Great Britain and the United States, altered by a leading publicist and adhered to through two world wars, had not been generally adopted, however, so it never approached customary international law. Oppenheim remains, however, an example of the authority exercised by law of war publicists.

The International Committee of the Red Cross (ICRC) – through its *Commentaries* to the 1949 Geneva Conventions and the 1977 Additional Protocols; its journal, *International Review of the Red Cross*; its wide-ranging Web site; and its excellent occasional pamphlets and books – has become a respected corporate publicist. Its 2005

[76] Donald A. Wells, *The Laws of Land Warfare: A Guide to the U.S. Army Manuals* (Westport, CT: Greenwood Press, 1992), 5.
[77] War Dept., *Rules of Land Warfare, 1914* (Washington: GPO, 1914), para. 366.
[78] Gary Solis, "Obedience of Orders and the Law of War: Judicial Application in American Forums," 15 *American U. Int'l L. R.* (2003), 481, 510.

two-volume *Customary Law Study*, should not be overlooked.[79] Although the *Study* has received considerable criticism,[80] and rejection by some governments,[81] it has much to offer scholars and readers.

Modern publicists continue to theorize, write, and advance international law and LOAC. Their scholarly and sometimes groundbreaking work will be judged by history for inclusion in the ranks of their publicist predecessors.

1.4. The Language of the Law of Armed Conflict

Like most disciplines, LOAC employs some unique terms. Although few in number, it is important that such terms be understood, for, "semantics are important and perhaps nowhere more so than in the study of the law, whether domestic or international."[82]

1.4.1. *"The Law of War" or "The Law of Armed Conflict"?*

We use the terms "law of war" and "law of armed conflict." Do the two phrases represent the same discipline? If not, how do they differ? If they do represent the same discipline, why do two similar terms describe the same circumstance?

Rules of war are not the same as laws of war. A law is a form of rule that, within a particular sphere or jurisdiction, must be obeyed, subject to sanctions or legal consequences. A rule does not necessarily involve either sanctions or legal consequences. There have been *rules* for the battlefield for thousands of years, but, with significant exceptions, there have been *laws* for the battlefield – LOAC – only in the past hundred years or so. LOAC is a relatively recent phenomenon.

What is "war"? Wars on drugs, on poverty, and on illiteracy are laudable political constructs but are not literally wars, of course. A state of war has wide-ranging

[79] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

[80] For example, Maj. J. Jeremy Marsh, "Lex Lata or Lex Ferenda? Rule 45 of the ICRC Study on Customary International Humanitarian Law," 198 *Military L. Rev.* (Winter 2008), 116. "... [M]ethodological flaws led its authors to declare as rules of CIL [customary international law] what can only be described as *lex ferenda* (what the law should be) as opposed to *lex lata* (what the law is).... elevating aspiration over empirical proof of actual state practice.... seem to conclude that if there is enough mention of the 'rule' in military manuals and other questionable sources of verbal practice, then the *opino juris* prong of CIL is met.... paid insufficient heed to two important CIL doctrines, specially affected states and persistent objection, in developing its rules..." at 117–20; and David Turns, "Weapons in the ICRC Study on Customary International Humanitarian Law," 11–2 *J. of Conflict & Security L.* (Summer, 2006), 201, 203: "Sometimes, conclusions are reached on the basis of official statements unsupported by actual 'battlefield practice'..."

[81] For example, U.S. Dept. of State, "Initial response of U.S. to ICRC study on Customary International Humanitarian Law with Illustrative Comments (Nov. 3, 2006)," available at http://www.state.gov/s/l/2006/98860.htm: "[P]laces too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict.... gives undue weight to statements of non-governmental organizations and the ICRC itself.... often fails to pay due regard to the practice of specially affected States... tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict...."

[82] Charles H.B. Garraway, "'Combatants' – Substance or Semantics?" in Michael Schmitt and Jelena Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff, 2007), 316–34, 316.

repercussions in contracts,[83] insurance, constitutional issues,[84] neutrality, and governmental wartime emergency powers, not to mention the life and death issues played out on the battlefield.[85] The "War on Terrorism" is not a war in the sense of Geneva Convention common Article 2,[86] although that view would not be shared by the widow or husband of a soldier killed in Iraq or Afghanistan. Still, the ICRC and LOAC publicists point out its nonwar character. (See Chapter 6, section 6.5.2.) In international law there is no accepted and binding definition of "war." The world has passed beyond Clausewitz's description of war as "an act of force to compel our enemy to do our will."[87] The U.S. Army's Judge Advocate General posits four required elements: a contention (one) between at least two nation-states (two) wherein armed force is employed with (three) an intent to overwhelm (four).[88]

Since World War II, there have been many intrastate armed conflicts not amounting to "wars." Was Korea a war or a police action (whatever that is)? Was the Vietnam conflict a war? Sometimes it is difficult even to distinguish between intra- and interstate conflicts. For example, the dissolution of Yugoslavia in the late twentieth century. What was initially a civil war evolved into a multistate conflict, with the original state, Yugoslavia, fragmenting into several new states. Was that conflict an intrastate war or a interstate war? An international or non-international armed conflict? Or both? Is this distinction any longer all that significant? Nor is the conflict always between the armed forces of two states, as in World War II when some Allied states declared war against Germany, yet shots in anger were never fired between the two. Do nonstate actors engage in warfare or criminal activity? "The centuries-old term 'war' is still in everyday use but has tended to disappear from legal language over the past decades, for 'war' has gradually been outlawed, even though resort to force, be it called 'war' or not, continues to exist. Thus, it is at present more correct to use the term 'armed conflict', as its very vagueness may be considered an advantage."[89] As the ICRC notes, "It is possible to argue almost endlessly about the legal definition of 'war' . . . The expression 'armed conflict' makes such arguments less easy."[90]

So, not all armed conflicts are wars, but all wars are armed conflicts. "War" has become more a descriptive term than a term of legal art. This text generally uses the term "law of armed conflict," recognizing that the matters discussed are also applicable where the faded term "war" may not strictly apply. "The term 'international law of armed conflict' has come to be used to describe this body of law. However, the older term 'laws of war' is also widely used and understood."[91]

[83] See, e.g., *Navios Corporation v. The Ulysses II*, 161 F. Supp. 932 (D. Md. 1958), in which contractual liability under a ship's charter depended upon the interpretation of a contractual clause providing that a declared war enabled the ship's owners to cancel the charter. In question was the character of the 1956 seizure of the Suez Canal from Egypt by France and the United Kingdom.

[84] Consider *Korematsu v. U.S.*, 323 U.S. 214 (1944) and its address of civil rights.

[85] Ingrid Detter, *The Law of War*, 2d ed. (Cambridge: Cambridge University Press, 2000), discusses (pp. 18–20) many international legal issues applying to LOAC.

[86] Common Article 2 requires an armed conflict between "two or more of the high Contracting Parties . . . "

[87] Carl von Clausewitz, *Vom Kriege*, 18th ed. (Bonn, 1972), Bk. 1, Ch. 1, 75.

[88] Judge Advocate General's Legal Center & School, Int'l & Operational Law Dept., *Law of War Handbook* (Charlottesville, VA: JAG School, 1997), 1–2.

[89] Stanislaw E. Nahlik, "A Brief Outline of International Humanitarian Law," *Int'l Rev. of the Red Cross* (July-August, 1984), 7.

[90] Jean S. Pictet, ed., *Commentary, IV Geneva Convention, 1949* (Geneva: ICRC, 1958), 20.

[91] Roberts and Guelff, supra, note 33, at 2. Footnote omitted.

A few scholars argue that both "law of war" and "law of armed conflict," are *passé* terms, replaced in the eyes of some internationalists by "international humanitarian law." The ICRC, for example, promotes the term "international humanitarian law," passing over the irony of how a body of law defining how noncombatants may lawfully be killed (i.e., collateral damage) is "humanitarian."[92]

In this text we examine only *jus in bello*, the rules and laws governing the conduct of armed conflict – battlefield law – as opposed to *jus ad bellum*, the rules and laws that govern the lawfulness of the resort to armed conflict.[93] This reflects "the cardinal principle that *jus in bello* applies in cases of armed conflict whether or not the inception of the conflict is lawful under *jus ad bellum*."[94] Emphasizing the point, the 1949 Geneva Conventions specify that LOAC "shall apply in all cases of declared war *or of any other armed conflict* which may arise . . . "[95] In sum, what was once commonly referred to as the law of war is today more correctly termed the law of armed conflict, although long usage and acceptance renders both terms acceptable.[96]

1.4.2. *International Humanitarian Law, and Human Rights Law*

LOAC encompasses another series of similar and potentially confusing terms. In the past sixty years, human rights and humanitarian goals have nudged their way onto the battlefield, encouraged by opinions of the ICJ and other human rights tribunals.[97] What is the difference between "humanitarian law," "international humanitarian law," "international human rights law," and "human rights law"?

"Humanitarian law" refers to international rules that attempt to "mitigate the human suffering caused by war."[98] It is an umbrella term for laws that aim to humanize armed conflict that, taken together, form the corpus of IHL and international human rights law (HRL). "It is hardly possible to find documentary evidence of when and where the first legal rules of a humanitarian nature emerged . . . For everywhere that [armed] confrontation . . . did not result in a fight to the finish, rules arose . . . for the purpose of limiting the effects of the violence."[99] Humanitarian law, as such, does not frequently arise when considering *jus in bello* issues. Still, "there is today no question that human rights law comes to complement humanitarian law in situations of armed conflict."[100]

[92] One writer notes that "the ICRC is making a surreptitious contribution to peace by so restricting the parties in the conduct of war [through use of language] as to make war impossible as a viable means of state policy." D. Forsythe, *Humanitarian Politics: The ICRC* (Baltimore: Johns Hopkins University Press, 1977), 122.

[93] *Jus* is pronounced "use," as in "make use of a weapon."

[94] Roberts and Guelff, supra, note 33, at 1.

[95] 1949 Geneva Conventions, common Art. 2. Emphasis supplied.

[96] The 1998 Rome Statute of the ICC refers to "international law of armed conflict" (Arts. 8(2)(e) and 21(1)(b).) "International humanitarian law" is the term used in the 1993 ICTY (Art. 1) and 1994 ICTR (Art. 1) statutes.

[97] See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory* (The Wall Advisory Opinion), [July 2004] ICJ Rep. 136; and, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (The Nuclear Weapons Advisory Opinion), [1996] ICJ Rep. 226; and, *Issa v. Turkey*, 2004 Eur. Ct. H.R. 71.

[98] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva: ICRC, 2001), 12.

[99] Hans-Peter Gasser, *International Humanitarian Law: An Introduction* (Berne: Paul Haupt Publishers, 1993), 6.

[100] Cordula Droege, "Elective Affinities? Human Rights and Humanitarian Law," 871 *Int'l Rev. of the Red Cross* (Sept. 2008), 501.

IHL is the body of international legislation that applies in situations of armed conflict. Like its fraternal twin, LOAC, IHL refers to the body of treaty-based and customary international law aimed at protecting the individual in time of international or non-international armed conflict – treaties, for example, such as 1949 Geneva Convention IV, for the protection of civilians. IHL is confined to armed conflict, both international and non-international.[101] It is intended to limit the violence of armed conflicts by protecting those taking no active part in hostilities, by protecting property not considered military objectives, and by restricting the combatants' right to use any methods of warfare they choose. Until the end of World War II, IHL was an unknown term.

Today, although the 1949 Geneva Conventions (and most military references) employ the term "law of armed conflict," IHL's invocation is widespread, particularly in civilian and academic circles. "The purpose of IHL is not to prevent war. More prosaically, it seeks to preserve an oasis of humanity in battle until resort to armed force . . . is no longer a means of settling differences between States."[102] "Law of armed conflict" and "international humanitarian law" have essentially the same meaning, particularly among academics and the influential ICRC – groups that would ideally like to see a narrowed range of options for combatants, by no means an unworthy goal. An Australian academic clearly thinks "IHL" rather than "LOAC" when she writes, "Written by the military, for the military, about the military, IHL (international humanitarian law) treaties, particularly the universally ratified *Geneva Conventions* . . . relate to bare survival during the most horrific condition humans can manufacture – armed conflict."[103] The same could be applied to LOAC.

The melding of battlefield laws and humanitarian goals is not without its critics. Jean Pictet, editor of the Geneva Convention *Commentaries*, writes that IHL has been "contaminated" by ethics and idealism,[104] appearing to combine concepts of different characters, one legal, the other moral.[105]

> A possible disadvantage of the term [IHL] is that it could be thought to exclude some parts of the laws of war (such as the law on neutrality) whose primary purpose is not humanitarian. Indeed, the term "international humanitarian law" could be seen as implying that the laws of war have an exclusively humanitarian purpose, when their evolution has in fact reflected various practical concerns of states and their armed forces on grounds other than those which may be considered humanitarian.[106]

The conflation of LOAC/IHL terminology reflects a desire of humanitarian-oriented groups and nongovernmental organizations to avoid phrases like "law of war" in favor of more pacific terms, perhaps in the hope that battlefield actions may someday follow that description. This desire is in keeping with recent efforts to circumscribe the means of armed conflict – treaties banning or restricting use of antipersonnel land mines, cluster

[101] ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," 867 *Int'l Rev. of the Red Cross* (Sept. 2007), 719, 722.
[102] Christophe Girod, DRAFT, *Storm in the Desert: The International Committee of the Red Cross and the Gulf War 1990–1991* (Geneva: ICRC, 2003), 26–7.
[103] Helen Durham, "International Humanitarian Law and the Gods of War: The Story of Athena Versus Ares," 8–2 *Melbourne J. of Int'l L.* (2007), 248, 253.
[104] Jean S. Pictet, *International Humanitarian Law* (Geneva: ICRC, 1985), 3.
[105] Jean S. Pictet, *Humanitarian Law and the Protections of War Victims* (Leyden: ICRC, 1975), 11.
[106] Roberts and Guelff, supra, note 33, 2.

munitions, and blinding lasers come to mind.[107] The ICJ has weighed in with its own slightly different take on IHL. "These two branches of the law applicable in armed conflict ["Hague Law" and "Geneva Law"] have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law."[108] (Actually, "a true convergence of the Hague law and the Geneva law came about only in 1977 [with the two Additional Protocols] . . . ")[109] Finally, with a nod to a sometimes publicity-driven antimilitary movement, Geoffrey Best wryly notes, "it is impossible realistically to discuss the uses of humanitarian and human rights law without taking note of the part they are made to play in the booming political business of public relations; something which includes the age-old concern of propaganda . . . "[110]

Another related term, "human rights law," applies in time of peace and, most contend, in armed conflict as well. The American (and Israeli[111]) positions are that HRL does not, or *should* not, apply in *jus in bello*. Many disagree,[112] particularly Europeans, the ICRC,[113] the ICJ,[114] and human rights activists from anywhere.[115] "Traditionally, human rights law and LOW [law of war] have been viewed as separate systems of protection."[116] The two have different subject matters and different roots. At some points the two do overlap, however. In the American view, in cases of overlap, LOAC, the *lex specialis* of the battlefield, trumps human rights law. Again, the European position is contrary. HRL, European scholars and publicists hold, *always* applies, hand in hand with LOAC on the battlefield.[117] In agreement, European Professor Frits Kalshoven argues, "Half a century ago, Jean Pictet, famous top lawyer of the ICRC, defended the separate existance of the two bodies of law . . . And since those early days, the awareness has grown that . . . human rights organs can contribute a great deal . . . To the U.S. Government, on the other hand, to pass from humanitarian law to human rights law appears to present an insurmountable hurdle. It is a cause of serious regret . . . "[118]

"This branch of international law did not really come into its own until after World War II. . . . International human rights law, as we know it today, begins with the Charter

[107] See Robert J. Mathews and Timothy L.H. McCormack, "The Influence of Humanitarian Principles in the Negotiation of Arms Control Treaties," 834 *Int'l Rev. of the Red Cross* (June 1999), 331.

[108] *The Nuclear Weapons Advisory Opinion*, 1996 ICJ 35 ILM 809, 827, at para. 75.

[109] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003), 247.

[110] Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon Press, 1994), 13.

[111] Françoise J. Hampson, "The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of A Human Rights Treaty Body," 871 *Int'l Rev. of the Red Cross* (Sept. 2008), 549, 550.

[112] Louise Doswald-Beck and Sylvain Vité, "International Humanitarian Law and Human Rights Law," 293 Int'l. Rev. of the Red Cross (April 1993), 94.

[113] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, *Rules*, supra, note 79, at 299–300. "Human rights law applies at all times . . . "

[114] *The Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Advisory Opinion), (1996), at para. 25.

[115] Yoram Dinstein proposes six variations of "wartime human rights" application, in which they apply, or not, according to situational factors. "Human Rights in Armed Conflict," in Theodor Meron, ed., *Human Rights in International Law* (Oxford: Clarendon Press, 1984), 345–68.

[116] Maj. Marie Anderson and Ms. Emily Zukauskas, eds., *Operational Law Handbook, 2008* (Charlottesville, VA: Int'l and Operational Law Dept., The Judge Advocate General's Legal Center and School, 2008), 40.

[117] An excellent recitation of the European view is: Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (New York: Cambridge University Press, 2006), reviewed at 101–1 *AJIL* (Jan. 2007), 252.

[118] Frits Kalshoven, *Reflections on the Law of War* (Leiden: Martinus Nijhoff, 2007), 925.

of the United Nations [Articles 1, 30, 55, and 56]."[119] HRL and its multinational version, international HRL, seek to guarantee the fundamental rights of persons vis-à-vis their own governments and to protect them against actors in the international community that might violate those rights.[120] The United Nations Charter was indeed the first authoritative expression of the modern human rights movement. Through conventions like the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966), the United Nations provided an institutional spur for continuing developments in the field.[121] HRL applies in time of armed conflict, as it does in peace, the ICJ has held.[122]

Most clearly, HRL applies in non-international armed conflicts where, as we shall see, LOAC, for the most part, does not apply. "[D]ue to an increase in the number of non-international armed conflicts and the rise of situations of prolonged belligerent occupation, these branches of public international law have been progressively brought together."[123] The 1949 Geneva Convention IV, dealing with civilians and with occupation, incorporates many provisions reflecting HRL.

Although the U.S. Army takes no official position,[124] the U.S. view is that LOAC generally prevails on the battlefield, to the exclusion of HRL. An Army officer writes, "Traditionally, the two were viewed as distinct legal regimes; human rights law applied during peacetime, and [international] humanitarian law applied during armed conflict."[125] That traditional view has greatly eroded. HRL is referred to, for example, in Articles 72 and 75 of 1977 Additional Protocol I, and in Article 6 of Additional Protocol II. Those provisions are drawn from the International Covenant of Civil and Political Rights, a basic HRL document. Nevertheless, as Theodor Meron notes, there are clear distinctions between HRL and LOAC:

> [I]t has become common in some quarters to conflate human rights and the law of war IHL (international humanitarian law). Nevertheless . . . significant differences remain. Unlike human rights law, the law of war allows . . . the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. . . . As long as rules of the game are observed, it is permissible [in armed conflict] to cause suffering, deprivation of freedom, and death.[126]

[119] Thomas Buergenthal, "The Evolving International Human Rights System," 100–4 *AJIL* (Oct. 2006), 783, 785.

[120] Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2d ed. (Oxford: Oxford University Press, 2001), 10.

[121] Henry J. Steiner and Philip Alston, *International Human Rights in Context*, 2d ed. (Oxford: Oxford University Press, 2000), 67.

[122] *Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory*, supra, note 97, at para. 106: "[T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict . . . "

[123] Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008), 269.

[124] Anderson and Zukauskas, *Operational Law Handbook, 2008*, supra, note 116. Chapter three of the Handbook, Human Rights, (pp. 39–46) merely states, at 40, "**The traditional/United States view**. Traditionally, human rights law and LOW [law of war] have been viewed as separate systems of protection. This classic view applies human rights law and LOW to different situations and different relationships respectively."

[125] Maj. Michelle A. Hansen, "Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict," 194 *Military L. Rev.* (Winter 2007), 1–65, 5.

[126] Theodor Meron, "The Humanization of Humanitarian Law," 94 *AJIL* (2000), 239, 240.

Other areas of conflict between HRL and LOAC include the use of force, requirements for self-defense, the detention and internment of prisoners, and security restrictions imposed on civilians. The war crime of torture is another distinguishing example. The 1984 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT) is a human rights–based treaty, whereas the ICTY is an IHL-based trial forum at which international crimes and war crimes are tried. The ICTY's jurisprudence has been "mindful to not confound . . . international human rights with international humanitarian law . . . "[127] and in ICTY judgments there is a significant departure from the CAT's definition of torture.[128]

Even respected international bodies do not always have the answer. The ICJ attempted to clarify the difference between HRL and humanitarian law. Some rights, the Court held, may be covered exclusively by each of the two, whereas others may be addressed by both. At this point, however, a clear differentiation between the two is not discernable in either customary humanitarian law or in treaty-based humanitarian law[129]: hardly a clarifying formulation.

There are significant differences between HRL and LOAC. HRL is premised on the principle that citizens hold individual *rights* that their state is bound to respect; LOAC imposes *obligations* on the individual. HRL largely consists of *general* principles; LOAC is a series of *specific* provisions. HRL enunciates *state* responsibilities; LOAC specifies *individual* responsibilities as well as state responsibilities. In HRL, rights are given to *all*; LOAC links many of its protections to nationality or specific statuses, such as combatants. HRL allows for state derogation; LOAC does not.

Nevertheless, the majority European view is that the two, LOAC and HRL, are coequal on the battlefield. "But one thing is clear: there is no going back to a complete separation of the two realms."[130]

Finally, we may say that the several terms used to describe the bodies of law applicable on the battlefield come down to three: the "law of war" and its successor term, the "law of armed conflict," which in popular usage has become virtually synonymous with "international humanitarian law." Although the descriptive term, "law of armed conflict" is favored in the Geneva Conventions, to use any of the three terms in relation to the topics in this text would not be incorrect.

1.5. Summary

For as long as armies have met in battle, there have been limits on soldiers' conduct in combat. Initially grounded in practices based on the code of chivalry, those practices became the custom, and custom evolved into rules and, in some armies, were incorporated in military codes – military law – with penalties for their violation. Such rules and laws have been based not only on national interests but on sound tactical

[127] Christoph Burchard, "Torture in the Jurisprudence of the Ad Hoc Tribunals," 6–2 *J. of Int'l Crim. Justice* (May 2008), 159, 166.

[128] See, e.g., *Prosecutor v. Kunarac, et al.*, IT-96–23 & 23/1-T (Feb. 22, 2001), para. 465–71; and *Kunarac*, IT-96–23 & 231-A (June 20, 2002), para. 147, in which both Chambers decline to apply the CAT's torture requirement that the act be inflicted by or at the instigation of or with the consent or acquiescence of a public official.

[129] Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 43 *ILM* (2004), 1009, para. 106.

[130] Droege, "Elective Affinities? Human Rights and Humanitarian Law," supra, note 100, at 548.

and strategic considerations, not the least of which is the danger of reciprocal violations of similar nature. "[G]ratuitous violence wastes resources, provokes retaliation, invites moral condemnation, and impedes post-war relations with the enemy nation."[131] World War II Nazi war crimes and predations in Russia remain a prime example of an army's counterproductive unlawful behavior. Today, most commanders understand that if they mistreat enemy prisoners, soon their soldiers will be subjected to the same mistreatment. Moreover, well-disciplined troops simply don't commit war crimes, for indiscipline in one aspect of soldiering may inevitably represent a general indiscipline.

Battlefield violations will never be entirely eliminated. In fact, upon close inspection, LOAC does not work all that well. The passions of war and the adrenaline rush of combat, combined with powerful weapons in the hands of young men and women, are a mix that assures occasional offenses. Former General Colin Powell writes, "The kill-or-be-killed nature of combat tends to dull fine perceptions of right and wrong."[132] Historian and combat veteran Paul Fussell adds, "You're going to learn that one of the most brutal things in the world is your average nineteen-year-old American boy."[133] Still, an armed force well-trained and disciplined in LOAC, led by responsible and educated noncommissioned and commissioned officers, is the best assurance of limiting violations.

Like all international law, LOAC is based on agreements between nations and on the practice of states. Publicists and scholars moderate the debate and shape arguments that eventually settle into state practice and multilateral treaties. That interrelated mix hopefully results in a framework that a combatant can understand. Whether called the law of war, IHL, or LOAC, the goal is to confine fighting as closely as possible to combatants and to spare noncombatants; to target those things having a military need for destruction and sparing property not necessary to achieve the military ends of the conflict. These aspirations are lofty, but they are goals worthy of civilized and caring peoples.

CASES AND MATERIALS

HELLENICA, BOOK II, BY XENOPHON

Introduction. *In Ancient Greece, the Peloponnesian War was fought between the two great powers of the time, Athens and Sparta. This brief extract is from a book written in* 380 B.C., *by Xenophon, who completed the work of Thucydides, who died before his history of the Peloponnesian War was complete.*

[131] Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," 35–1 *Harvard Int'l L. J.* (Winter 1994), 49, 54.
[132] Colin L. Powell, *A Soldier's Way: An Autobiography* (London: Hutchinson, 1995), 144.
[133] Paul Fussell, *Doing Battle: The Making of A Skeptic* (Boston: Little Brown, 1996), 124.

In 405 B.C., in the war's twenty-sixth year, the conflict reached an unanticipated climax on the shores of the Hellespont. Lysander, the great Lacedaemonian (Spartan) admiral, sailed from his base in Rhodes, entered the Hellespont, and captured Lamsacus, a city allied to Athens. Upon learning of the fall of Lamsacus, 180 Athenian ships immediately set sail, intent on recapturing Lamsacus and defeating Lysander's force. Instead, when the Athenians reached the Hellespont and beached their ships, Lysander's force fell upon them and captured their ships and most of the embarked soldiers.

Having decisively defeated the Athenians, Lysander considered what further action he should take.

As for Lysander, he took his prizes and prisoners and everything else back to Lampsacus, the prisoners including Philocles, Adeimantus, and some of the other generals . . . After this Lysander gathered together the allies and bade them deliberate regarding the disposition to be made of the prisoners. Thereupon many charges began to be urged against the Athenians, not only touching the outrages they had already committed and what they had voted to do if they were victorious in the battle, – namely, to cut off the right hand of every man taken alive, – but also the fact that after capturing two triremes, one a Corinthian and the other an Andrian, they had thrown the crews overboard to a man. And it was Philocles, one of the Athenian generals, who had thus made away with these men. Many other stories were told, and it was finally resolved to put to death all of the prisoners who were Athenians, with the exception of Adeimantus, because he was the one man who in the Athenian Assembly had opposed the decree in regard to cutting off the hands of captives . . . As to Philocles, who threw overboard the Andrians and Corinthians, Lysander first asked him what he deserved to suffer for having begun outrageous practices towards Greeks, and then had his throat cut.[134]

Conclusion. *Do we discern in these events the rough outlines of proceedings that were to occur 2,000 years later? Although he led the coalition of forces against the enemy, upon achieving victory Lysander took no action on his own. Instead, he gathered his allies in the victorious campaign against Athens. They publicly debated the disposition of the defeated enemy. Allegations that the Athenians had violated customs of war were raised and discussed. Specific charges were alleged against particular officers of the enemy forces, and individuals "testified." At the conclusion of the testimony a decision was resolved, or reached, and a sentence decided upon by the allies. All but one of the accused were determined to be guilty, and, but for that one, death was decided as the appropriate punishment. The sentence was promptly carried out, in one case personally by the victorious commander, Lysander.*

Two thousand years later, the procedure at Lampsacus finds faint echoes in the post–World War II Nuremberg IMT, in the courtrooms of the ICTY, and in other international tribunals.[135]

THE 1474 BREISACH TRIAL

Introduction. *What makes a tribunal an "international" tribunal? Have war crimes always been defined in terms similar to those of today? What were defenses to war crime charges before*

[134] Xenophon, *Hellenica*, Books I-V, Carlton L. Brownson trans. (London: William Heinemann, 1918), 101, 107.

[135] This idea derives from a 1951 speech by Greek Professor Georges S. Maridakis (1890–1979), republished in 4–4 *J. Int'l Crim. Justice* (Sept. 2006), 847.

the Nuremberg IMT? These and other questions are raised by a trial held in Europe more than 500 years ago.

"The trial in 1474 of Peter von Hagenbach deserves to be considered as a forerunner of contemporary international war crimes trials. It is all the more relevant because the oral proceedings at this trial centered on one of the most controversial issues of post-1945 war crimes trials: the defense of superior orders."[136]

Duke Charles of Burgundy had raised his country to international power through fierce armed struggles with territorial sovereigns. Charles's friends called him Charles the Bold, whereas his enemies knew him as Charles the Terrible. His 1472 massacre of the inhabitants of Nesle had surely earned him the latter title.

In 1469, financial difficulties forced the Archduke of Austria to pledge to Charles his possessions on the Upper Rhine, including the fortified town of Breisach, a city in what is today southwest Germany. Charles installed Peter von Hagenbach as his Governor.

As long as Charles held the pledged territories he was entitled under the agreement to exercise territorial jurisdiction, although he could not impair the liberties of their citizens. Actually, Charles had no intention of ever returning the pledged territories to the Archduke of Austria, intending instead to incorporate them into his Burgundian empire.

In forcing the citizens of Breisach to submit to Charles's rule, Governor von Hagenbach said he merely carried out his master's directions, but the brutality with which he acted was his personal contribution to Burgundian policy. His regime was one of arbitrariness and terror, extending to murder, rape, illegal taxation, and the confiscation of private property. The victims of his depredations included the inhabitants of neighboring territories, as well as Swiss merchants on their way to and from the Frankfurt fair.

Charles's ill-concealed ambition, to transform Burgundy into a kingdom and use it as a springboard to the Imperial Crown, made him powerful enemies. Yet, von Hagenbach's outrages, remarkable even by lax fifteenth-century standards, contributed to forging what had previously been considered impossible, alliances against Burgundy by her Holy Roman Empire neighbors, Austria, Berne, France, and the towns and knights of the Upper Rhine.

To strengthen their case against him, the Allies of the Holy Roman Empire authorized the Archduke of Austria to offer full repayment of his debt to Charles. On flimsy pretexts, Charles refused to accept repayment, but a subsequent revolt by the citizens, and by Hagenbach's German mercenaries at Breisach, enabled the Allies to seize Hagenbach and put him on trial. (This was before the Allies' later war with Burgundy, in which Charles was defeated and killed in the 1477 battle of Nancy.)

The Archduke of Austria, in whose territory Hagenbach had been captured, ordered his trial. Whereas an ordinary trial would have taken place in a local court, the Allies agreed on an ad hoc tribunal, consisting of twenty-eight judges from the Holy Roman Empire towns. Eight of these judges were nominated by Breisach, and two by each of the other allied Alsatian and Upper Rhenanian towns, Berne, a member of the Swiss Confederation, and Solothurn, allied with Berne. As Breisach's sovereign, Austria provided the presiding judge.

In the trial's early inquisitorial stages leading to his formal accusation, Hagenbach was subjected to severe torture. Given the clarity of his crimes, this was pointless, for it produced the predictable confessions which, just as predictably, Hagenbach recanted at trial.

[136] Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, vol. II (London: Stevens & Sons, 1968), 462. Citations omitted. Except where indicated, this account is a paraphrasing of Prof. Schwarzenberger's description of the trial, his footnotes omitted.

At the public portion of the trial, the Archduke was represented by a spokesman, Heinrich Iselin. Iselin argued on the Archduke's behalf that Hagenbach had "trampled under foot the laws of God and man." On a less secular level, Hagenbach was charged with murder, rape, perjury, and ordering mercenaries to kill the men in the houses in which they were quartered, so that the women and children would be at their mercy.

Hagenbach, defended by Hans Irmy, relied on the defense of superior orders: "Sir Peter von Hagenbach does not recognize any other judge and master but the Duke of Burgundy from whom he had received his commission and his orders. He had no right to question the orders which he was charged to carry out, and it was his duty to obey. Is it not known that soldiers owe absolute obedience to their superiors? . . . Had not the Duke by his presence subsequently confirmed and ratified all that had been done in his name?"

In his personal address to the tribunal, Hagenbach repeated that defense and asked for an adjournment to obtain confirmation of his assertions from his master. The tribunal refused the request on the grounds that to accept Hagenbach's defense would be contrary to the law of God, and that his crimes were established beyond doubt. With that, the tribunal found him guilty, stripped him of his knighthood, and condemned him to death. The executioner of Colmar was selected from among eight contenders. Finally, the marshal of the tribunal gave his order to the executioner, "Let justice be done."

Hagenbach's crimes were committed before the outbreak of open war between Burgundy and its enemies. Strictly speaking, then, they were not war crimes, although the borderline between peace and war in those times was more fluid than today. Nevertheless, the administration of Breisach and the Upper Rhine, in open breach of the treaty obligations of Charles of Burgundy, made the occupation more akin to a wartime rather than a peacetime occupation, and the trial was probably "the first genuinely international trial for the perpetration of atrocities."[137] The Breisach trial may be thought of as an experiment in medieval international justice, soon subsumed by the sanctity of state sovereignty as embodied in the 1648 Treaty of Westphalia. It remains a notable initial effort. In broad post–World War terms, Hagenbach's crimes would be termed crimes against humanity and war crimes.[138]

Conclusion. *Hagenbach's 1474 trial represents the first known interposition of the defense of obedience to orders. One hundred thirty years later, the guard commander at the execution of Charles I, Captain Axtell, raised the defense of superior orders as his defense to charges of traitorous conduct, with the same result as Hagenbach's.*[139] *Then, as now, from Hagenbach to Calley, it is a defense that rarely succeeds, yet remains the most frequently employed defense to war crime charges.*

UNITED STATES V. PLENTY HORSES*

Federal District Court, Sioux Falls, South Dakota (1891, not reported)

Introduction. *When does LOAC apply? What is a "war," and what are the legal implications of a finding of war? Who, and in what legal forums, are such issues decided? By the end of the*

[137] Schabas, *An Introduction to the International Criminal Court*, supra, note 66, at 1.
[138] Meyer and McCoubrey, *Reflections*, supra, note 71, at 3.
[139] *Roger L. DiSilvestro, A Report of Divers Cases in Pleas to the Crown*, 84 Eng. Rep. 1055, 1066 (K.B. 1708). *In the Shadow of Wounded Knee*, Copyright © 2005, Walker & Company, quoted with permission.

* The research assistance of the Office of the Sioux Falls, SD, U.S. District Clerk of Court in locating the case record is appreciated.

twentieth century, these questions were largely settled, but a hundred years ago the answers were less clear. A U.S. federal case, Plenty Horses, offers guidelines to answers to these questions. The case is little noted because an appellate opinion, used to study the legal issues raised at trial, was not produced.

In January 1891, the American Civil War had been over for twenty-six years, but the U.S. Army was still fighting Plains Indians in the country's rugged west and north.[140] The fighting was drawing to a close as the bonds of civilization were confining Indians to reservations. In the two-year-old state of South Dakota, word of a December 29, 1890 massacre at Wounded Knee Creek reached the Sioux Rosebud Reservation, twenty miles to the east of Wounded Knee. Ostensibly fearing an attack by soldiers similar to that at Wounded Knee, the Reservation's Brulé Sioux rebelled and took up defensive positions in the northwestern portion of the nearby Pine Ridge Reservation. The Sioux feared the worst for their own band and they formed small bands of young men to fight the U.S. soldiers.

One of the Sioux fighters was twenty-two-year-old Senika-Wakan-Ota, or Plenty Horses, as he was known to English speakers.* Among the Sioux, Plenty Horses was viewed with some suspicion. He had five years of schooling, forced upon him by the U.S. government, from age thirteen to eighteen, at the Indian boarding school at Carlisle Barracks, Pennsylvania. He had returned to the reservation burdened with the white man's ways and language, no longer considered fully an Indian, but clearly not a white man. "I was an outcast . . . I was no longer an Indian," Plenty Horses said.[141]

First Lieutenant Edward W. "Ned" Casey, West Point class of 1873,[142] had almost twenty years of Army service, including four years as a tactics instructor at the Military Academy. His father, Brevet Major General Silas Casey, was an author of the Army's infantry tactics manual, and his brother, Brigadier General Thomas L. Casey, was Chief of the Army Corps of Engineers.[143] A capable and popular officer of proven bravery in the Sioux campaigns of 1877, Ned Casey's lengthy time in grade as a lieutenant was a reflection of the Army's promotion-by-seniority system, rather than any lack of soldierly skills.

On the morning of January 7, Lieutenant Casey and two Cheyenne scouts approached the Brulé and Oglala camp at No Water, South Dakota. Casey intended to parley with the chiefs and see if a peaceful settlement of the Wounded Knee uprising could be achieved. At White Water Creek, Casey and his scouts were met by a band of approximately forty Brulé Sioux, including Plenty Horses. Handshakes were exchanged and Casey explained his desire to meet with their chiefs. He conversed briefly with Plenty Horses, whose English had deteriorated since his return from the Carlisle boarding school, years before. An emissary from the chiefs rode out and said that Casey should not go further because younger Indians in the camp remained agitated over Wounded Knee and, besides, the chiefs planned to confer with Casey's superior, General Nelson Miles, the next day. Casey turned his horse to depart. "Plenty Horses took his Winchester from under his blanket, calmly raised it to his shoulder, and fired one shot. The bullet tore into the back of Casey's head and came out just under

[140] This account is taken from: Roger L. DiSilvestro, *In the Shadow of Wounded Knee* (New York: Walker, 2005), and, Robert M. Utley, "The Ordeal of Plenty Horses," 26–1 *American Heritage* (Dec. 1974), 15.

* Some sources record his name as Tasunka Ota, and his age as twenty-one. Court records indicate otherwise.

[141] Id., DiSilvestro, at 3.

[142] *2002 Bicentennial Register of Graduates* (USMA: AOG, 2002), 4–57.

[143] MG Silas Casey, USMA class of 1826; BG Thomas Casey, first in the class of 1852. Id., at 4–14 and 4–38.

the right eye. The horse reared and pitched its rider from the saddle. Casey crashed to the ground on his face, dead."[144]

Unrelated to Casey's death, eight days later, on January 15, 1891, the Sioux leaders surrendered to General Miles and the last Plains Indian campaign was over. Miles, who would be promoted to full general twelve years later, had not forgotten Lieutenant Casey, however. He ordered Colonel William Shafter to arrest Plenty Horses for Casey's murder. The arrest was made and, in the civilian community, a Deadwood South Dakota grand jury indicted Plenty Horses for murder. He was released by military authorities for trial in the federal district court at Sioux Falls. The trial opened in late April, housed in the Sioux Falls Masonic Temple, where the court sat when it came to town.

From the outset, Plenty Horse's two lawyers, George Nock and David Powers, both working pro bono, made clear the defense strategy: the U.S. Army and the Sioux Indians viewed themselves as opposing belligerents in a state of war, they said. Under customary law of war, combatants of opposing belligerent armed forces are entitled to kill each other without criminal penalty – the combatant's privilege. The trial began. Evidence adduced over the first three days of trial made clear that Plenty Horses had killed Lieutenant Casey and that the Indians in No Water camp thought themselves at war with all U.S. soldiers. When Plenty Horses took the witness stand to testify, the two judges, Alonzo Edgerton, a former Army brigadier general, and Oliver Shiras, a Civil War veteran like Edgerton, would not allow him an interpreter. Angrily, Plenty Horse's lawyers closed the defense case then and there. Closing arguments followed, and Judge Shiras instructed the jury:

> Although the Sioux did not constitute an independent nation with legal authority to declare war, he said, they still had the power to go to war. If the jurors felt that a state of war existed in actual if not in legal fact, they should acquit the defendant. If they judged a war not to be in progress and Plenty Horses to have shot Casey with malice and deliberation, they should find him guilty of murder. If in the second circumstance the killing had occurred without premeditation and in a condition of great mental excitement, the verdict should be manslaughter.[145]

The jury, mostly local farmers, deliberated through the night and into the next day. Shortly before noon they informed the judges that after twenty-three ballots they remained deadlocked, six for murder, six for manslaughter. The judges declared a mistrial. Leaving the courtroom, Plenty Horses said in halting English, "I thought last night that they would hang me sure, but now I feel it will not be so . . . "[146]

Days later, on May 23, 1891, the second trial of Plenty Horses opened with essentially the same participants. The testimony, too, was much the same as in the first trial and the concept of the combatant's privilege was again the central issue. The prosecutor, William Sterling, had called on General Miles at his headquarters in Chicago, asking him to testify that the Army had not been in a state of war with the Sioux. Instead, Miles sent an officer from his staff, Captain Frank D. Baldwin, to Sioux Falls to testify not for the government but for the defense! Newspapers reported that General Miles advised the prosecutor, "My boy, it was a war." He added, "You do not suppose that I am going to reduce my campaign to a dress-parade affair?"[147] After all, Miles pointed out, until handed over to federal marshals

[144] Utley, "The Ordeal of Plenty Horses," supra, note 140.
[145] Id.
[146] Id.
[147] Id.

for trial, Plenty Horses was held at Fort Meade as a prisoner of war;[148] the Army's report of Lieutenant Casey's death indicated that he had been scouting a hostile camp; a written order from General Miles indicated that Plenty Horses was a "war prisoner." After meeting with General Miles, Prosecutor Sterling was powerless to stop the train bearing down on his case.

Miles's emissary, Captain Baldwin, had been awarded not one but two Medals of Honor. He had been a close friend of Lieutenant Casey's, and he testified in the defense case as General Miles predicted.[149] Baldwin also proffered Army documents proving who Lieutenant Casey's killer was, and additionally indicating the state of hostilities between the Army and the Sioux. Following Captain Baldwin's testimony, defense attorney Nock announced that the defense case was concluded. He turned to deliver his closing argument to the jury.

Judge Shiras raised his hand. "Wait a moment, gentlemen . . . If you have both concluded the presentation of testimony, I have something to say to the jury. . . . [I]t clearly appears that on the day when Lieutenant Casey met his death there existed in and about the Pine Ridge Agency a condition of actual warfare between the Army of the United States there assembled under the command of Major General Nelson Miles and the Indian troops occupying the camp on No Water and in its vicinity."[150] The judge went on to note that the trial turned on this question of war, which, he then opined, had been shown to exist beyond a reasonable doubt. He went on to say that Casey unquestionably was a combatant. Although the manner in which Plenty Horses killed him merited severe condemnation, Casey was engaged in legitimate warfare against the Sioux and, the judge said, with equal legitimacy, Casey could be killed by the enemy against whom he was fighting. If the attack on Wounded Knee was not a wartime event, Shiras reminded the court, then the soldiers who had participated should all be charged with murder.* If Lieutenant Casey were to have killed Plenty Horses while reconnoitering the Indian camp at No Water, the judge continued, surely he would not have been charged with murder. The killing of Casey could only be viewed as an act of war. Shiras directed the jury to so find, which they promptly did. The two trials of Plenty Horses were over.

During the trial, prosecutor Sterling had not asked witnesses why, if Plenty Horses was at war, he had immediately opened fire upon encountering the Casey group, or why he shot only Lieutenant Casey and not the scouts who accompanied him. Or why the scouts had not returned his fire. Or why the parties had engaged in conversation before the killing of Casey. Nor did Sterling point out that prior U.S. treaties with the Sioux and other Indians referred to them as "tribes," rather than "nations." Now those points were moot, as was the question of whether General Miles dispatched Captain Baldwin to testify for the defense to insure that no soldier could be charged for actions at Wounded Knee. The day's leading interpreter of military law, William Winthrop, wrote of Plenty Horses, "the laws of war justify the killing or disabling of members of the one army by those of the other in battle or hostile operations. In such operations would be included, with us, Indian hostilities."[151]

Following his acquittal, Plenty Horses, a combatant by decision of a U.S. District Court, returned to South Dakota's now peaceful Rosebud Reservation. He eventually married and

[148] National Archives and Records Administration, record group 73, items 1183, 1260, and 1264.

[149] Paul Drew Stevens, ed., *The Congressional Medal of Honor: The Names, the Deeds* (Forest Ranch, CA: Sharp & Dunnigan, 1984), 712.

[150] DiSilvestro, *In the Shadow of Wounded Knee*, supra, note 140, at 192, citing the *New York World*, May 29, 1891.

* There might also have been questions regarding the twenty Medals of Honor awarded for actions at Wounded Knee. Even in a day when the criteria for the award were relaxed, it seems a generous number.

[151] Winthrop, *Military Law and Precedents*, supra, note 7, at 778.

had a son, Charles. His return to obscurity was interrupted only by a personal appearance at the South Dakota exhibit of the Chicago World's Fair, in 1893. Never fully accepted by the Sioux and only tolerated by the white man, Plenty Horses died on June 15, 1933, a year after the deaths of his wife and son.

IN RE GÖRING AND OTHERS

Judgment of the International Military Tribunal (IMT) at Nuremberg (October 1, 1946)[152]

Introduction. *What is the nature of war? There is no settled answer but, fifty-five years after the Plenty Horses opinion, and its "seat-of-the-pants" decision by two judges seeking to do the right thing under the law as they understood it, four judges of the post–World War II IMT at Nuremberg discussed the nature of aggressive warfare with a deeper reference to international law. From this tribunal's Judgement:*

Crimes against Peace

(1) *War of Aggression as a Crime. The Principle of Retroactivity.* "The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole. The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia, and the first war of aggression charged in the Indictment is the war against Poland begun on the 1st September 1939. Before examining that charge it is necessary to look more closely at some of the events which preceded these acts of aggression. The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was premeditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the preordained scheme and plan. For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy.

"... To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression ...

[152] H. Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases – 1946* (London: Butterworth & Co., 1951), 203, 207–10, 212. Footnotes omitted.

(2) *General Treaty for the Renunciation of War of 1928 (Kellogg-Briand Pact).* "In the opinion of the Tribunal this Pact was violated by Germany in all the cases of aggressive war charged in the Indictment. It is to be noted that on the 26th January, 1930, Germany signed a Declaration for the Maintenance of Permanent Peace with Poland, which was explicitly based on the Pact of Paris [the Kellogg-Briand Pact], and in which the use of force was outlawed for a period of ten years. . . .

"The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. . . .

"In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the [1907] Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with the general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing. . . .

"All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal."

(3) *Aggression as a Method. Invasion of Austria and Poland.* ". . . . In the opinion of the Tribunal, the events of the days immediately preceding the 1st September, 1939, demonstrate the determination of Hitler and his associates to carry out the declared intention of invading Poland at all costs, despite appeals from every quarter. With the ever increasing evidence before him that this intention would lead to war with Great Britain and France as well, Hitler was resolved not to depart from the course he had set for himself. The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on the 1st September, 1939, was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war and against humanity."

Conclusion. *The Judgment goes on to discuss the element of premeditation involved in the Nazi invasions of Norway, Denmark, Belgium, the Netherlands, Luxemburg, Greece, Yugoslavia, and Russia, as well as the subject of crimes against humanity, slave labor, the plunder of public and private property, hostages, and other war crimes and crimes against humanity, including the persecution of Jews. The Judgment concludes by finding Hermann Göring and sixteen of his coaccused guilty of various crimes, including crimes against peace, crimes against humanity,*

and war crimes. Göring and eleven others were sentenced to death by hanging. The death sentences were quickly carried out for all but Göring, who, with the unwitting assistance of an American military police officer, committed suicide hours before his execution date.

PROSECUTOR V. KUPREŠKIĆ, ET AL.

IT-95-16-T (14 January 2000), footnotes omitted

Introduction. *The International Criminal Tribunal for the Former Yugoslavia, in a 2000 Trial Chamber Judgment, addressed the significance of case law to the Tribunal's findings. In doing so, it discusses the sources of international criminal law, the value and place of precedent and stare decisis in the Tribunal's jurisprudence, and the relation of national (domestic) law to the Tribunal's judgments.*

537. . . . The Tribunal's need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. In particular, there exist relatively few treaty provisions on the matter. By contrast, especially after World War II, a copious amount of case law has developed on international crimes . . . [I]t was difficult for international law makers to reconcile very diverse and often conflicting national traditions in the area of criminal law and procedure by adopting general rules capable of duly taking into account those traditions. By contrast, general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific cases. This being so, it is only logical that international courts should rely heavily on such jurisprudence. What judicial value should be assigned to this *corpus*?

538. The value to be assigned to judicial precedents to a very large extent depends on and is closely bound up with the legal nature of the Tribunal, i.e. on whether or not the Tribunal is an international court proper . . .

539. Indisputably, the ICTY is an international court, (i) because this was the intent of the Security Council, as expressed in the resolution establishing the Tribunal, (ii) because of the structure and functioning of this Tribunal . . . and (iii) because it is called upon to apply international law to establish whether serious violations of international humanitarian law have been committed in the territory of the former Yugoslavia. Thus, the normative *corpus* to be applied by the Tribunal *principaliter*, i.e. to decide upon the principle issues submitted to it, is international law. True, the Tribunal may be well advised to draw upon national law to fill possible *lacunae* in the Statute or in customary international law. . . .

540. Being international in nature and applying international law principaliter, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a "subsidiary means for the determination of rules of law" (to use the expression in Article 38 (1)(d) of the Statute of the International Court of Justice . . .). Hence, generally speaking . . . the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community.

Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law . . . [P]rior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight . . .

541. As noted above, judicial decisions may prove to be of invaluable importance for the determination of existing law. Here again attention should however be drawn to the need to distinguish between the various categories of decisions and consequently to the weight they may be given for the purpose of finding an international rule or principle. It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10, a legislative act jointly passed in 1945 by the four Occupying Powers and thus reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the courts called upon to rule on those crimes. These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law . . . Conversely, depending upon the circumstances of each case, generally speaking decisions of national courts on war crimes or crimes against humanity delivered on the basis of national legislation would carry relatively less weight.

542. In sum, international criminal courts such as the International Tribunal [for the former Yugoslavia] must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgments, as the latter are at least based on the same *corpus* of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.

Conclusion. *The Trial Chamber confirms that there is no stare decisis in international courts, and clarifies why the judgments of domestic courts have little impact on those of international courts, whereas those of other international forums enjoy greater weight. The informative and instructive remarks of the Tribunal are themselves dicta – observations in a judicial opinion not necessary for a decision in the case. Although they are probably representative, these remarks represent the views of but one of several ICTY Trial Chambers.*