

Cambridge University Press
978-0-521-87088-7 - The Law of Armed Conflict: International Humanitarian Law in War
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Excerpt
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*Law of Armed Conflict: International
Humanitarian Law in War*

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 somewhere.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 Yājñavalkya, 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.

1.1.1.1. *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.

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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 *unnecessary* 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*

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Japanese combatants, 20,703 were killed. When the island was declared secure only 212 Japanese surrendered³⁸ – 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 Kinryū: 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.