# 1 Rules of War, Laws of War

## 1.0 Introduction

The study of the law of armed conflict (LOAC), sometimes referred to as international humanitarian law (IHL), is akin to building a house. First, one lays the foundation for the structure. Then the framework is erected and tied to the foundation. Next, outer walls and interior rooms are constructed, with the framework and foundation providing their support. Finally, firm walls are erected and finished, and furniture is added to those rooms. The study of LOAC is similar.

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

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

Next, the LOAC framework is erected: What is it that constitutes LOAC? What are its guiding principles and core values? Just as in building a house, the framework is essential for all that follows – for the many individual issues, large and small, that make up the numerous "rooms" of the LOAC house.

Finally, the walls become rooms and we furnish the house with laws and cases. Our case furnishings may be international laws, customary laws, or a state's (nation's, that is) domestic law. The "furnishing" laws may be derived from international forums, like the International Court of Justice, or the Nuremberg International Military Tribunal. They may come from ad hoc international forums, such as the International Tribunal for the Former Yugoslavia. In unusual instances, they may even arise from domestic courts, such as *Ex parte Quirin*, the World War II Nazi saboteurs' case. Whatever the source, our LOAC house requires case law furnishings for its completion. (We can fix minor building defects and paint over dings as we discover them.) We develop these house-building issues in this and succeeding chapters.

Not all armed conflict law is discussed in this single volume. "Complete" LOAC coverage would require several lengthy volumes. But the basics, the essentials, are here – a mile wide and an inch deep, as the aphorism goes, but they are here. In this chapter, we examine the rich history of LOAC. From where did it arise and when? Who was involved? Why is history even necessary? Where did all the names for the law of war come from?

## 1.1 The Law of War: A Thumbnail History

If Cicero (106 BC–43 BC) 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* that attempted to limit armed combat virtually from the time men began to fight in organized groups. As John Keegan writes,

> War may have got worse with the passage of time, but the ethic of 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.[1]

When did men begin to fight in groups? Cave art of the New Stone Age, 10,000 years ago, depicts bowmen apparently in conflict. Since then, there have been few periods in human history when there has not been an armed conflict someplace. Mesopotamia developed a military system of defense as early as 3000 BC. In approximately 2700 BC, Gilgamesh, who ruled the city of Uruk, apparently undertook one of history's first offensive military campaigns. So, warfare arose 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."[2]

No written Roman military code survives, although it is known that within the Roman legions' ranks, many of today's military offenses were recognized. In the early days of the empire, few rules applied to combat against non-Romans. Those that did apply were based largely on natural law. "The 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."[3]

With time, that changed, of course. Around 1400 BC, Egypt had agreements with Sumeria and other states regarding the treatment of prisoners. In about 200 BC, in Asia, a variety of Hindu texts describe numerous rules of war. The Mahabharata, an epic Sanskrit poem (200 BC–AD 200), reflected Hindu beliefs. The Hindu Code of Manu directs that treacherous weapons, such as barbed or poisoned arrows, be forbidden and a wounded enemy should not be killed.[4]

In the sixth century BC, Sun Tzu counseled limitations on armed conflict as well. "In 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 are mixed with ours and driven, their soldiers are treated kindly when given care."[5] 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.

[1] John Keegan, *War and Our World* (New York: Vintage Books, 2001), 26.
[2] James Hillman, *A Terrible Love of War* (New York: Penguin Books, 2004), 17.
[3] Robert C. Stacey, "The Age of Chivalry," in Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds., *The Laws of War* (New Haven, CT: Yale University Press, 1994), 27.
[4] K. P. Jayaswal, *Manu and Yâjñavalkya, A Comparison and A Contrast: A Treatise on the Basic Hindu Law* (Calcutta: Butterworth, 1930), 106.
[5] J. H. Huang trans., *Sun Tzu: The New Translation* (New York: Quill, 1933), 46.

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.[6] Yet, Abyssinian victors often cut off the right hands and left feet of vanquished foes.[7]

Under Innocent II, in 1139, crossbows were forbidden by the Catholic Second Lateran Council, as "deadly and odious to God." The Third Lateran Council prescribed humane treatment of prisoners of war.[8]

During the feudal period, in the twelfth and thirteenth centuries, knights observed rules of chivalry that became a major basis for LOAC.

> Chivalry 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.[9]

During this period no authority was recognized that could lay down universal rules of war. "The 'special law' of knights was the law of arms, and it was founded in the canon and civil laws. . . . These special laws were . . . extensions of the natural law."[10] Settling disputes of honor was left to the heralds and more experienced knights.[11] As a catalog of virtues and values, chivalry remains a model for honorable conduct in peace and in war. Commands to spare the enemy who asks for mercy, to aid women in distress, to act charitably and to be magnanimous, transcend any one particular historical period or sociological context.[12]

Chivalry's code only applied among Christians and knights. The Scottish nationalist Sir William Wallace – "Braveheart" – was no knight. He was executed in 1305, after being convicted by an English court of atrocities of war, "sparing neither age nor sex, monk nor nun."[13] 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.[14]

In 1415, England's Henry V defeated the French in the Hundred Years' War and conquered much of France. 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 enemy soldiers, gave a fateful order:

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

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

[8] 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). 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."

[9] Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (Oxford: Oxford University Press, 1998), 4–5.

[10] M. H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge & Keegan Paul, 1965), 15. *Jus gentium* refers to law established for all men by natural reason, as distinguished from *jus civile*, law particular to one state or people.

[11] Ibid., at 26. [12] Ibid., at 108, 118.

[13] Georg Schwarzenberger, "Judgment of Nuremberg," 21 *Tulsa L. Rev.* (1947), 330.

[14] Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, Vol. II (London: Stevens & Sons, 1968), 15–16.

KING HARRY: The French have reinforced their scattered men. Then very soldier kill his prisoners. (*The soldiers kill their prisoners.*)[15]

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 now?

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.[16]

Was Henry's order a violation of chivalry? Shakespeare's Fluellen and Gower plainly thought so. Nevertheless, chivalry remains a distant precursor to today's LOAC.

### 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.[17] He was tried by a tribunal of twenty-eight judges from Austria and its allied states, for murder, rape, and other crimes. Hagenbach's defense is one that echoes 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 transpire during a time of war and thus were not war crimes, strictly speaking. The event is nevertheless significant in representing one of the earliest trials resulting in personal criminal responsibility for the violation of international battlefield norms. (See this chapter's Cases and Materials for a full account of the case.)

### 1.1.2 *The Emergence of Battlefield Codes*

Meanwhile, battlefield rules and laws continued to sprout. In Europe, in 1590, the Free Netherlands adopted its Articles of War. 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 Articles of War. Those English Articles, in turn, became the basis for the fledgling United States' first Articles of War. The 1648 Treaty of Westphalia 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, established precedents for other states. In the second half of the nineteenth century, the previously common battlefield practices and restrictions 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 circulated.

By the mid-nineteenth century, states began writing codes that incorporated humanitarian ideals for their soldiers. During that period there were few multinational treaties that imposed limitations on battlefield conduct. Penalties for violations would have to wait until 1907 Hague Regulation IV.

[15] William Shakespeare, *Henry V*, IV.vi.35–8. [16] Ibid., vii, 1–10.
[17] Schwarzenberger, "Nuremberg," supra note 13, at 462–6.

## 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. 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. It is the law of war that differentiates war from riot, piracy, and generalized insurrection. It allows a moral acceptance of the 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."[18] 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.

An armed conflict might be compared to a stoplight at a busy intersection. Throughout the day, thousands of vehicles pass, stop, and turn at the intersection's constantly changing light, all without incident. Eventually, there will be an incident resulting in death or damage or both. So it is on a battlefield, where combatants, civilians, and unprivileged belligerents intersect many times a day. Eventually, there will be a law of war incident. As it pertains to individuals, LOAC, perhaps more than any other branch of law, is likely to fail. In a sense, its goals are 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."[19] In fact, LOAC does not "work" well at all. However, "[w]e should perhaps not so much complain that the law of war does not work well, as marvel that it works at all."[20]

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. War will always constitute suffering and personal tragedy, but rules of warfare are intended to prevent *unnecessary* suffering that yields 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. Law of armed conflict is hardly an imposition on states by faceless external authorities. It is molded through treaties argued and agreed upon by national delegates, including military officers.

In modern times, despite Clausewitz's assertion that the laws of war are "almost imperceptible and hardly worth mentioning,"[21] they remain the best answer to the opposing tensions of the necessities of war and the requirements of civilization. Today, any temporary advantage brought by breaching LOAC is far outweighed by its ultimate disadvantages.

A basic reason to comply with LOAC is reciprocity.

[18] Michael Walzer, *Just and Unjust Wars*, 3rd ed. (New York: Basic Books, 2000), 42.
[19] Geoffrey Best, *Humanity in Warfare* (London: Weidenfeld & Nicolson, 1980), 11. [20] Ibid., at 12.
[21] Carl von Clausewitz, *On War*, A. Rapoport, ed. (London: Penguin Books, 1982), 101.

> Reciprocity, a natural consequence of a system of states equal to one another, was one of the main justifications for the existence and the development of the law of war . . . In a world of armies, each agrees to follow the law for one overriding reason: the expectation that your enemies will follow the same law and give you the same protection that you afford them. Derived from the medieval tradition of chivalry, this version of legality guaranteed a modicum of fair play even during war.[22]

"Unnecessary killing and devastation should be prohibited if only on military grounds. It merely increases hostility and hampers the willingness to surrender."[23] An example was World War II in the Pacific. After an early series of false surrenders and prisoner atrocities by both sides, Pacific island combat was marked by an unwillingness of either side to surrender, and a savagery of the worst kind, by both sides, resulted. Eugene Sledge, in an iconic World War II memoir, *With the Old Breed*, wrote, "You became more callous . . . You developed an attitude of no mercy because they had no mercy on us. It was a no-quarter, savage kind of thing. . . . I've seen guys shoot Japanese wounded when it really was not necessary. . . . We were savages."[24] On Iwo Jima, of 21,000–23,000 Japanese combatants, 20,703 were killed. When the island was declared secure, only 212 Japanese surrendered – less than 2 percent – because marines and soldiers fearing that they would be murdered or mistreated if they surrendered, 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."[25]

The rapacious conduct of World War II Nazis as they crossed Russia toward Moscow and Stalingrad exacerbated a hatred in the Russian population that led to thousands of German deaths at the hands of partisans. "The best soldiers, the best fighting men, do not loot and . . . rape, do not wantonly kill civilians."[26] Strategically, battlefield crimes may lessen the prospect of an eventual cease-fire. War, then, should be conducted in the interest of peace.

Does LOAC end, or even lessen, the frequency of battlefield crimes? Or was Thucydides correct: "The strong do what they can and the weak suffer what they must"? Can we really expect laws to deter violations of LOAC? Josef Mengele, to cite but one example, was the World War II Nazi doctor at the Auschwitz extermination camp – the "Angel of Death" who conducted horrific "medical" experiments on prisoners. He escaped to a long and comfortable life in Paraguay and, in 1979, accidentally drowned while enjoying a day at the beach with his family, never tried for his war crimes.

No law will deter the lawless. No criminal code can account for every violator. No modern municipal or federal law puts an end to civilian criminality. Should we expect more from LOAC? "If international law is, in some ways, at the vanishing point of law,

[22] Theodor Meron, *The Making of International Criminal Justice* (Oxford: Oxford University Press, 2011), 54.
[23] 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.
[24] Eugene Sledge, *With the Old Breed, Breed at Peleliu and Okinawa* (Novato, CA: Presidio Press, 1981).
[25] Jordan J. Paust, letter, 25 *Naval War College Rev.* (Jan.–Feb. 1973), 105.
[26] Michael Walzer, "Two Kinds of Military Responsibility," in Lloyd J. Matthews and Dale E. Brown, eds., *The Parameters of Military Ethics* (McLean, VA: Pergamon-Brassey's, 1989), 69.

the law of war is, perhaps even more conspicuously, at the vanishing point of international law."[27] But that is no license to surrender to criminality.

Despite training and close discipline, as long as nations give guns to young soldiers, war crimes are going to happen. Why bother with 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 to become what we are fighting; because we cannot be heard to say that we fight for the right while we are seen to commit wrongs. We obey the law of war because it is the right thing to do.

Students, in the calm of a university seminar room, may find it easy to denounce the actions of those acting in armed combat – soldiers, marines, sailors, and airmen who lacked the luxury of discussion, or time for reflection before they acted. However, no combatant is likely to be prosecuted for a single law of war violation committed without premeditation in the heat of combat. When the battle is over, if the warfighter is found to have considered their 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* LOAC should be invoked.

### 1.2.1 *Difficult Issues*

Twenty-first-century armed conflicts often have no defined battlefield, in the traditional sense. Armed conflicts have become *intra-* rather than *interstate* affairs. Thugs or crooks seize 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." . . . War as a massive deciding event is 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. . . . Tactically the opponent often operates according to the tenets of the guerrilla . . . [He] seeks to provoke an over-reaction so as to paint the opponent in the colours of the tyrant and oppressor. . . . If you operate so that your measures during

[27] Best, *Humanity in Warfare*, supra note 19, at 12.

> 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.[28]

One may ask, why should our side observe LOAC when our opponents disregard it, or are even unaware that such restrictive battlefield 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."[29]

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.

In terms of international law, states that have ratified the 1949 Geneva Conventions – every existing state – have pledged to honor the four Geneva Conventions, including their common Article 1 which mandates that states "undertake to respect and to ensure respect for the present Convention in all circumstances." The post–World War II US Military Tribunal at Nuremberg, in the 1947–8 High Command Trial, rejected the defendants' argument that they were released from their obligation to respect the law of war because their adversary had violated it. The International Court of Justice (ICJ) in its 1971 *Namibia* case, and the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its 1996 *Martić* and 2000 *Kupreškić* cases, reached the same conclusion: Our enemies' violations of the law do not excuse our violations.

A 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."[30] Americans do not "accept" enemy war crimes; rather, we understand we are powerless to stop them when they are happening. We hope our soldiers, marines, 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. Moreover, the American public rightfully expects our own combatants to meet high standards on the battlefield.

## 1.3 Sources of the Law of Armed Conflict

Armed conflict has already changed dramatically in the twenty-first century but LOAC remains important for states that respect the rule of law. What are the sources of LOAC? What are its wellsprings?

The Statute – the establishing decree – of the ICJ specifies the sources of international law that the Court applies. The ICJ first looks to international conventions, and then to

[28] Toni Pfanner, "Interview with General Sir Rupert Smith," 864 *Int'l Rev. of the Red Cross* (Dec. 2006), 720.
[29] Michael H. Hoffman, "Rescuing the Law of War: A Way forward in an Era of Global Terrorism," *Parameters* (Summer 2005), 18, 34.
[30] Bob Woodward, *State of Denial* (New York: Simon & Schuster, 2006), 486.

international custom. Next, the Court considers "general principles of law recognized by civilized nations," then considers judicial decisions, and, finally, looks to "the teachings of the most highly qualified publicists of the various nations ... "[31] The 2015 US *Department of Defense Law of War Manual* (*DoD Law of War Manual*) cites LOAC sources very similar to those of the ICJ.[32]

### 1.3.1 *Domestic Law*

The 1949 Geneva Conventions were among the first multinational treaties requiring ratifying states to enact domestic legislation to enforce the treaty's mandates by penalizing or criminalizing certain violations in their domestic law. (See Chapter 3.8.2.1.) Multinational treaties have no inherent enforcement powers, but states that ratify such pacts have jurisdiction over their own citizens who are treaty offenders. Ratifying states may be required by treaties to which they are parties, to enact national legislation in furtherance of the treaty by 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."[33] The United States ratified the CAT in 1994. In compliance with Article 2.1, the United States has passed federal legislation prohibiting torture.

### 1.3.2 *Customary Law*

International legal customs, are commonly expressed as "customary international law," or simply "customary law." It is one of the two primary legal bases of LOAC, the other being treaties, such as the Geneva Conventions. Customary international law (sometimes abbreviated, "CIL") is described as "the confluence of two elements: (1) a practice among states that is relatively consistent (and thus a 'custom') and (2) the states engaging in the practice do so out of a sense of legal obligation ... more briefly, '*opino juris*.'"[34] The ICJ has, in several cases, identified these two requirements, state practice and *opino juris*, as the constituent elements of customary law.[35] "[I]t is admitted that the quest for custom is not a matter of exact science ... There is no mathematical formula that allows one to derive ... a customary rule from a specific quantity of practice in combination with a fixed degree of *opino juris*."[36] Yet CIL's

[31] Statute of the International Court of Justice, Article 38.1 (June 26, 1945).
[32] Office of the General Counsel, *Department of Defense Law of War Manual* (Washington, DC, 2015), discusses treaties at para. 1.7; custom at para. 1.8; judicial decisions at para. 1.9.1; and publicists at para. 1.9.2.
[33] [33] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
[34] Brian D. Lepard, ed., "Introduction," in, *Reexamining Customary International Law* (New York: Cambridge University Press, 2017), 1, 9.
[35] *Continental Shelf Case (Libyan Arab Jamahiriya* v. *Malta)*, Feb. 24, 1982 Judgment, 1982 ICJ Rpt 18, 29, para. 27; *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark)*; *Federal Republic of Germany* v. *Netherlands*, Feb. 20, 1969 Judgment, 1969 ICJ Rpt 3, 44, para. 77.
[36] Tom Ruys, *"Armed Attack" and Article 51 of the UN Charter* (Cambridge: Cambridge University Press, 2010), 30.

importance in the law of armed conflict cannot be over-emphasized. "Judge Theodor Meron … recently wrote that '[c]ustomary international law now comes up in almost every international court and tribunal, in almost every case, and frequently has an impact on the outcome.' Notwithstanding the extensive codification over the past seventy years … CIL continues to have vitality."[37]

Customary international law is binding on all states,[38] whether they signed on through a pact or treaty or not, and is "widely recognized as a fundamental source of international law."[39] It arises when a particular practice among similarly situated states is extensive and virtually uniform; a practice that 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.[40] Today, the time element is less important than it once was, and customary law can now arise in a very short time.[41]

An example of the formation of a customary law is the practice of sailing ships' use of running lights. Sometime in the mid-eighteenth century, to reduce the risk of collision, ships based in European ports began to show colored lights when under way at night as an anticollision expedient. 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 – years – 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 because they recognized it as a wise practice that enhanced the safety of all mariners, but because it was required by binding regulation. Usage begat custom, begat customary law, begat treaty.

So it is with the law of war. Bombing becomes more accurate with the use of laser-designated targets and global positioning system (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 law and, in time, when *opino juris* is considered to be established, it may be

[37] Michael P. Scharf, reviewing Curtis A. Bradley, *Custom's Future: International Law in a Changing World* (New York: Cambridge University Press, 2016, in 111–1 *American J. of Int'l L.* (Jan. 2017), 206, 207.

[38] Exceptions are states that consistently refuse to accept a custom during the process of its formation. Referred to as "persistent objection," the principle remains a tenet of international law. It is unlikely that a state could persistently object to a customary law, however. A failure of such an attempt occurred after World War II, at the Nuremberg International Military Tribunal (IMT), when the tribunal upheld provisions of 1907 Hague Regulation IV as having been customary international law by 1939, despite Germany's having persistently objected to the convention as a whole.

[39] Pierre-Hugues Verdier and Erik Voeten, "Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory," 108–3 *AJIL* 389 (July 2014).

[40] *Asylum Case*, ICJ Rpt 1959, 276–7.

[41] *North Sea Continental Shelf Cases*, supra note 35, at para. 74.