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978-1-107-13560-4 - The Law of Armed Conflict: International Humanitarian Law in War: Second Edition

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Excerpt

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*Law of Armed Conflict: International  
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## 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 and foundation providing their support. The study of 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.

Next, a 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 our 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.”<sup>1</sup> Still, as John Keegan writes, “War may have got worse with the passage of time, but the

<sup>1</sup> Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (New York: Oxford University Press, 1998), 49.

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."<sup>2</sup>

When did men begin to fight in groups? Cave art of the New Stone Age, ten thousand years ago, depicts bowmen apparently in conflict.<sup>3</sup> Since that time, there have been few periods in human history when there has not been an armed conflict someplace.<sup>4</sup> 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.<sup>5</sup> Thus, warfare entered the world at least five thousand 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."<sup>6</sup>

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.<sup>7</sup> 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."<sup>8</sup>

With time, that changed. Around 1400 B.C., Egypt had agreements with Sumeria and other states regarding the treatment of prisoners.<sup>9</sup> 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."<sup>10</sup> It decreed that one should cease fighting when an opponent becomes disabled; that wounded men and persons who surrender should not be killed; that noncombatants should not be engaged in combat; and that places of public worship should not be molested.<sup>11</sup> 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.<sup>12</sup>

In the sixth century B.C., Sun Tzu counseled limitations on armed conflict as well. "In chariot battles when chariots are captured, then ten-chariot unit commanders will

<sup>2</sup> John Keegan, *War and Our World* (New York: Vintage Books, 2001), 26.

<sup>3</sup> John Keegan, *A History of Warfare* (New York: Knopf, 1993), 119.

<sup>4</sup> 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.

<sup>5</sup> Keegan, *War and Our World*, supra, note 3, at 29.

<sup>6</sup> James Hillman, *A Terrible Love of War* (New York: Penguin Books, 2004), 17.

<sup>7</sup> Col. William Winthrop, *Military Law and Precedents*, 2d ed. (Washington: GPO, 1920), 17.

<sup>8</sup> 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.

<sup>9</sup> Jean Pictet, *Development and Principles of International Humanitarian Law* (Leiden: Kluwer, 1985), 7–8.

<sup>10</sup> Cited in Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2d ed. (Manchester: Manchester University Press, 2000), 21.

<sup>11</sup> Suurya P. Subedi, "The Concept in Hinduism of 'Just War,'" 8–2 *J. of Conflict & Security L.* (Oct. 2003), 339, 355–6.

<sup>12</sup> K. P. Jayaswal, *Manu and Yājñavalkya, A Comparison and A Contrast: A Treatise on the Basic Hindu Law* (Calcutta: Butterworth, 1930), 106.

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.”<sup>13</sup> 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.

The 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.<sup>14</sup>

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.<sup>15</sup> (Yet, Abyssinian victors often cut off the right hands and left feet of vanquished foes.)<sup>16</sup>

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.<sup>17</sup>

During the feudal period, in the twelfth and thirteenth centuries, knights observed rules of chivalry, a major historical 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.”<sup>18</sup> No authority was recognized that laid down universal rules of war during this period. “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 two great written laws (just as they in turn were extensions of the natural law and the *jus gentium*), adding particular rules binding only on persons of a particular class.”<sup>19</sup> Settling disputes of honor was left to the opinions of heralds and more experienced knights. Formal disputes over matters such as ransoms and prisoners were decided by “persons [who] had been appointed to try just that kind of matter. . . . knights,

<sup>13</sup> J. H. Huang trans., *Sun Tzu: The New Translation* (New York: Quill, 1933), 46.

<sup>14</sup> 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.

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

<sup>16</sup> Gerrit W. Gong, *The Standard of “Civilization” in International Society* (Oxford: Clarendon Press, 1984), 122–3.

<sup>17</sup> 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 superseded 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.

<sup>18</sup> Meron, *Bloody Constraint*, *supra*, note 1, at 4–5.

<sup>19</sup> M. H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge & Keegan Paul, 1965), 15. In legal theory, *jus gentium* refers to that law established for all men by natural reason, as distinguished from *jus civile*, the law particular to one state or people.

men who would understand just what difficulties [the individual] was in and what his arguments meant.”<sup>20</sup> 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.<sup>21</sup>

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,”<sup>22</sup> but that seems a harsh view. It is true that 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 in war, “sparing neither age nor sex, monk nor nun.”<sup>23</sup> His conviction followed 1279’s Statute of Westminster, which authorized the Crown to punish “soldiers” for violations of “the law and customs of the realm.”<sup>24</sup> 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.<sup>25</sup> 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.*)<sup>26</sup>

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.<sup>27</sup>

Was Henry’s order a war crime? Shakespeare’s Fluellen and Gower plainly thought so. Nevertheless, chivalry remains a valuable, if distant, precursor to today’s LOAC.

<sup>20</sup> *Id.*, at 26.      <sup>21</sup> *Id.*, at 108, 118.

<sup>22</sup> Chris of 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.

<sup>23</sup> Georg Schwarzenberger, “Judgment of Nuremberg,” 21 *Tulsa L. Rev.* (1947), 330.

<sup>24</sup> Joseph W. Bishop Jr., *Justice under Fire: A Study of Military Law* (New York: Charterhouse, 1974), 4.

<sup>25</sup> Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, Vol. II (London: Stevens & Sons, 1968), 15–16.

<sup>26</sup> William Shakespeare, *Henry V*, IV.vi.35–8.      <sup>27</sup> *Id.*, vii.1–10

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### 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.<sup>28</sup> 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.<sup>29</sup> The event is nevertheless significant in representing one of the earliest trials resulting in personal criminal responsibility for the violation of international criminal norms.

### 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.<sup>30</sup> 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

<sup>28</sup> Schwarzenberger, *supra*, note 23, at 462–6.

<sup>29</sup> For a lengthier examination of von Hagenbach's case, see "Cases and Materials," this chapter. Further discussion, and the early development of the law of war, are in McCormack, "From Sun Tzu to the Sixth Committee," in McCormack and Simpson, *Law of War Crimes*, *supra*, note 14, at 37–9.

<sup>30</sup> Written European military codes 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, at 17–8.

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."<sup>31</sup> 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.

An armed conflict might be compared to a stoplight at a busy intersection. Through the day, thousands of vehicles pass, stop, and turn at the intersection's constantly changing light, all without incident. Eventually, however, 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 a thousand 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 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."<sup>32</sup> 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."<sup>33</sup>

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. "Analysis 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."<sup>34</sup> 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,

<sup>31</sup> Michael Walzer, *Just and Unjust Wars*, 3d ed. (New York: Basic Books, 2000), 42.

<sup>32</sup> Geoffrey Best, *Humanity in Warfare* (London: Weidenfeld & Nicolson, 1980), 11. <sup>33</sup> *Id.*, 12.

<sup>34</sup> Hillman, *A Terrible Love of War*, *supra*, note 6, at 168.



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particularly the interests of their own armed forces, in mind. LOAC is hardly an imposition on states by faceless external authorities.<sup>35</sup>

In modern times, despite Clausewitz's assertion that the laws of war are "almost imperceptible and hardly worth mentioning,"<sup>36</sup> 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."<sup>37</sup> The temporary advantages of breaching LOAC are far outweighed by the ultimate disadvantages. A basic reason to comply with LOAC is reciprocity.

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.<sup>38</sup>

"Unnecessary killing and devastation should be prohibited if only on military grounds. It merely increases hostility and hampers the willingness to surrender."<sup>39</sup> 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.<sup>40</sup> Eugene Sledge, author of 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 . . . . It was so savage. We were savages."<sup>41</sup> On Iwo Jima, of 21,000–23,000 Japanese combatants, 20,703 were killed. When the island was declared secure, only 212 Japanese surrendered<sup>42</sup> – 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. After the 1943 battle for Tarawa, of the defending Japanese force of roughly 5,000 combatants,

<sup>35</sup> Adam Roberts and Richard Guelff, *Documents on the Law of War*, 3d ed. (Oxford: Oxford University Press, 2000), 31.

<sup>36</sup> 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.

<sup>37</sup> Schwarzenberger, *supra*, note 23, at 10.

<sup>38</sup> Theodor Meron, *The Making of International Criminal Justice* (Oxford: Oxford University Press, 2011), 54.

<sup>39</sup> 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.

<sup>40</sup> 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 Second World War* (New York: Oxford University Press, 1989), relates similar accounts from the European theater.

<sup>41</sup> Sledge, *With the Old Breed*, *id.*

<sup>42</sup> Stephen J. Lofgren, ed., "Diary of First Lieutenant Sugihara Kinryû: Iwo Jima, January – February 1945," 59–97. *J. Military History* (Jan. 1995).

a mere 146 prisoners were taken, all but 17 of those being Korean laborers. Of the military defenders, 99.4 percent were killed.<sup>43</sup> “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.”<sup>44</sup>

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.”<sup>45</sup> 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 called 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,”<sup>46</sup> 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 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

<sup>43</sup> Matthew Hughes, “War without Mercy? American Armed Forces and the Deaths of Civilians during the Battle for Saipan, 1944,” 75–1 *J. of Military History*, 93, 96 (Jan. 2011).

<sup>44</sup> Jordan J. Paust, letter, 25 *Naval War College Rev.* (Jan.–Feb. 1973), 105.

<sup>45</sup> 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.

<sup>46</sup> Best, *Humanity in Warfare*, supra, note 32, at 12.