

The Evolution of the Laws of War

Dr. Sharon D. Jumper

Introduction

In the modern world, "nations active in international politics are continuously preparing for, actively involved in, or recovering from organized violence in the form of war" (Morgenthau, 1978, p. 42). As a result, war and its avoidance have a pre-eminent role in political debate and strategic policy planning.

The anti-legalist school of policymakers contends that "the best prospects for peace depend upon maintaining a balance between the capabilities and commitments of antagonistic countries and ideologies" (Falk, 1975, p. 29). Modern legalists argue to the contrary, that "world peace depends on enlarging the scope and range of legal rules, the growth of habitual respect for law, and the creation of international institutions capable of interpreting and enforcing the law" (Falk, p. 29). These themes will be explored as this essay traces the development and application of the laws of warfare.

International law

International law "is a body of conventions, treaties, and standards that play a central role in promoting economic and social developments, as well as international peace and security, among the nations of the world" (Dufour, 2001, p. 441). International law has become quite complex in the past two decades due to globalization. There are international laws governing patents, transportation, customs, trade, immigration, human rights, war crimes, contracts, securities, financial transactions, sovereignty, and immunity (Franck, 1997, p. 5). This essay will limit its analysis of international laws to those that pertain to war and national security issues.

One overriding theme that recurs throughout historical consideration of the laws of war is that of reality versus morality. Legal realists in international affairs see the world in

terms of power struggles and national interests, rather than through the more pure prisms of ethics, law, morality, and ideology (Boyle, 1999, p. 7). Legal and political realists contend that human behavior is motivated by three factors: fear, self-interest, and honor (Kaplan, 2002, p. 47).

Legal moralists contend that international affairs should not be based on Machiavellian power struggles, but rather on a body of law that promotes collective security, cooperative development, and common interests (Boyle, 1999, p. 9). Boyle has characterized the difference between the realists and the moralists in international law as being the difference between what “is” and what “should be” (p. 16).

Laws governing warfare apply to both individual and state conduct. The laws of war attempt to

Limit the *grounds* for initiating hostilities and also the *means* by which hostilities are initiated and conducted. Both of these efforts to impose limits on the use of force derive at least in part from a concept of fairness. Both deploy normative constraints: first to define limits, and secondly to institutionalize a pull to compliance (Franck, 1997, p. 245).

International laws pertaining to warfare may be more formalized in modern times, but, as historian Henry Maine (1887) noted:

At all times, amid truculent wars ever reviving, there are signs of a conscious effort to prevent war or to mitigate it. Man has never been so ferocious, or so stupid, as to submit to such an evil as war without some kind of effort to prevent it (Lecture 1).

Acts defined as war crimes impose criminal sanctions upon individuals for violations of the laws of war or international human rights laws (Dufour, 2001, p. 441). Individual soldiers are not held responsible for the overall justice of the war; individual soldiers are liable only for the prohibited acts that they or their subordinates commit in combat (Walzer, 2000, p. 304).

War crimes have a variety of causes. One common cause is the “perceived conflict

between a commander's responsibility to see to the safety of enemy noncombatants and the survival of his own troops in the course of successfully prosecuting his country's war aims” (Kellogg, 2000, p. 1). Another is the unfortunate fact that sometimes soldiers will blame others for the loss, pain, and suffering that they have endured in combat and lash out in retributive rage (Walzer, 2000, p. 36). Other contributing sociological causes are the failure of leadership, the collapse of primary groups within the low-level command structure, alienation, and desperation (Watson, 1997, pp. 156-163).

Ancient origins of norms regarding warfare

War is defined as “organized violence carried on by political units against each other” (Best, 1997, p. 4). In primitive times, the causes of wars were often based on some offense to honor requiring vindication, rather than a strategic or materialistic objective (Dawson, 1996, p.16). Ancient civilizations developed mores that distinguished between offensive and defensive war (Franck, 1997, p. 246). As populations grew, competition for territory and resources often led to war (Dawson, p. 18).

As nation-states evolved, legal norms developed within them that led to systemic pre-conditions for declarations of war (Dawson, p. 37). Beginning with the Greek city-states in the 5th Century B.C.E., strategic warfare began to evolve in Western Civilization (Dawson, p. 58). Debates between utilitarian and humanitarian leaders directed the development of the laws of warfare (Krauss and Lacey, 2002, p. 74).

One early set of *mores* developed around the right of conquest, *i.e.*, “the right of the victor, in virtue of military victory or conquest, to sovereignty over the conquered territory and its inhabitants” (Korman, 1996, p.8). The right of conquest was justified for centuries as a legitimate means of war reparations to the victorious party, as well as a means of ensuring

greater stability following the cessation of armed hostilities (Korman, p. 26). The acquisition of territory as fruits of war was outlawed by the international community after World War I (Korman, p.12). Following World War I, the letter of this law was usually followed, but the spirit of the law was often not.

Rules of war and post-war treaties regarding return of captured combatants and reparations can also be dated back to ancient times. Speed (1990) notes that “the fate of the prisoner of war has been a function of his value in a financial, political, or military transaction” (p. 1). During the period of 1800-600 B.C.E., the Babylonians, Hittites, and Assyrians made treaties and agreements with each other regarding the post-war exchange of captured prisoners in Mesopotamia (Bederman, 2001, p.141). The Hittites likewise made post-war treaties regarding prisoners after their war with the Egyptians in 1200 B.C.E. (Bederman, p. 148).

Treatises pertaining to limits on conduct during warfare existed in China as early as the 6th Century B.C.E. (Dufour, 2001, p. 441). During the Peloponnesian Wars of the 4th Century B.C.E., there is evidence of the Greek city-states making post-war treaties regarding prisoner exchange, ceasefires, dismantling of defensive walls, and war reparations (Bederman, pgs. 154-55). Following the Punic Wars of the 3rd Century B.C.E., the Romans exchanged prisoners with the Carthaginians (Bederman, p. 119).

The evolution of the “just war” doctrine

The aforementioned post-war practices arose out of developed law and customs, as well as religious treatises. The Israelites had rules to govern the conduct of *mitzvah* (holy war) derived from the Torah and *reshut* (optional war) derived from rabbinical law (Bederman, 2001, pgs. 209-10). One such formal code for laying siege to cities and how to

treat prisoners of war and occupied civilian areas was set forth in Deuteronomy 20:10-18

(Revised Standard Version):

When you draw near to a city to fight against it, offer terms of peace to it. And if its answer to you is peace and it opens to you, then all the people who are found in it shall do forced labor for you and shall serve you. But if it makes no peace with you, but makes war against you, then you shall besiege it; and when the Lord your God gives it into your hand you shall put all its males to the sword, but the women and the little ones, the cattle, and everything else in the city, all its spoil, you shall take as booty for yourselves; and you shall enjoy the spoil of your enemies, which the Lord your God has given you. Thus you shall do to all the cities which are very far from you, which are not cities of the nations here. But in the cities of these peoples which the Lord your God gives you for an inheritance, you shall save alive nothing that breathes, but you shall utterly destroy them . . .

The Romans developed a doctrine of *bellum jus* (just war) that was codified in the 1st Century B.C.E. by Cicero (Bederman, p. 222). In the 5th Century, St. Augustine of Hippo defined “just war” as being those wars that “avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs by its own citizens, or to restore what has been unjustly taken by it” (Franck, 1997, p. 247).

Ancient Roman codes were married with Aristotle’s ethics and knightly codes of chivalry in the Middle Ages (Dawson, 1996, p. 175). The doctrine of just war as refined by the Catholic Church was delineated into two concepts: *jus ad bello* (just cause for war) and *jus in bello* (just conduct during war) (Calhoun, 2001, p. 41). The requirements for *jus ad bello* were: (1) a public and formal declaration of war, (2) by a legitimate authority, (3) for a just cause, (4) in the interest of peace, (5) issued only after all non-violent means to resolution of the dispute have failed (Calhoun, p. 41). The “just cause” for any war “must be sufficiently grave to warrant recourse to deadly force” (Calhoun, p.41).

The doctrine of *jus in bello* prevents the targeting of non-combatants, protects captured combatants, and requires that the means deployed in battle be proportional to the

intended end (Calhoun, 2001, p.41). The *jus ad bello* doctrine was used to justify the Crusades and the Inquisition (Best, 1997, p. 19).

There are differing views as to the means by which legal norms concerning the rules of war were developed and the extent to which they have been honored during actual conflicts. It has been noted that, “War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt” (Franck, 1997, p. 245).

Just as people and groups with common interests will agree on rules and norms to regulate their conduct, nations with common interests do likewise through treaties, alliances, and international organizations (Bederman, 2001, p. 17). Treatises of law concerning human rights, *i.e.*, “those rights and amenities that every individual is supposed to be able to enjoy simply by virtue of being a member of the human species” have evolved as a result of centuries of conflict (Brown, 1996, p. 95). History demonstrates that military necessity has often conflicted with these ideals (Frey-Wouters and Laughner, 1986, p. 269).

A historical overview of American views on international law and treaties

America has had leaders of both the realist and moralist schools during its history. The nation’s Founding Fathers were a blend of moralists and realists; although idealistic guarantees were written into the Constitution and Bill of Rights, the power of government and its leaders were checked by powers of co-equal branches and impeachment (Kaplan, 2002, p. xxi). Although the early leaders of the U.S. encouraged international commerce, they disfavored international treaties and alliances. Near the turn of the 20th Century, when American exceptionalism was manifested with American conquests in the Caribbean and Pacific.

In the United States, all treaties relating to the conduct of war are negotiated by the Executive Branch, and then must be ratified by the Senate in order to have the full force of law. Modern American history is replete with examples wherein the Senate reigned in a president's foreign policy prerogatives by refusing to consent to international agreements.

Presidents who have had foreign policy defeats suffer in terms of perceptions of greatness and relative power, domestically and internationally, as well as contemporaneously with events and in terms of their historical legacy. A president's "need for power, need for achievement, party affiliation, assassination attempts, war, military interventions, vetoes, and cabinet turnover" are closely correlated with their achievements (Simonton, 1981, p. 307). Two recurring themes appear when debates about international law pertaining to war occur – (1) whether the U.S. should assume the role of "world policeman," and (2) whether U.S. sovereignty is threatened by assent to international governing bodies.

President Woodrow Wilson was one of the staunchest advocates for the League of Nations, but the Senate refused to ratify the admission of the U.S. to the League. President Truman signed the 1948 Convention on the Prevention and Prevention of Genocide, but the Senate did not actually ratify the treaty until 1988, during the Reagan Administration. During the Clinton Administration, the Senate refused to ratify the Comprehensive Test Ban Treaty (CTBT). President Clinton also fought hard for the establishment of the International Criminal Court (ICC), but likewise, the Senate failed to ratify the admissions treaty, and his successor, George W. Bush, abrogated any further attempts at ratification and membership in the ICC.

Generally speaking, agreements involving trade and economic issues are less likely to meet Senate resistance than those which affect issues of sovereignty and national security

(Auerswald & Maltzman, 2003, p. 1103). In recent years, presidents have sought to overcome the perceived infringement upon their power by the Senate; one tactic used is to refer to the product of international negotiations as “Executive Agreements” rather than treaties (Auerswald & Maltzman, p. 1107). While this may accomplish short-term objectives, it can lead to long-term uncertainty and instability, as the agreements do not enjoy the full force of law and can be easily abandoned. Within the United Nations, the U.S. has also generally preferred working within the parameters of the Security Council, where it is guaranteed a leadership role and absolute veto power by virtue of its status as one of the five permanent members (Forsyth, 2000, p. 36).

Early America and isolationism

In his *Farewell Address* (1796), President George Washington warned Americans to avoid the development of “inveterate antipathies” or “passionate attachments” to other nations as a means of avoiding war. A few years later, President Thomas Jefferson expressed gratitude for the oceans that kept America separated from the rest of the world, thus making it easier to avoid “foreign entanglements” that often lead to war (Jefferson, 1801).

As European nations endured wars and revolutions in the early 19th Century, President James Madison became concerned that these battles could spill over into the Americas, threatening both the national security and international trade of the U.S. (Madison, 1809). In 1823, President James Monroe pronounced that further colonization in the Americas by the European powers would no longer be tolerated (Monroe, 1823). During the first century of America’s history, the nation had little or no desire to engage with the world beyond its shores, save for commerce. (Judis, 2004, p. 27).

During the U.S. Civil War, agents of the British government assisted the

Confederacy, providing aid, training and materials. In 1871, reparations for damage to U.S. commerce during the Civil War were paid by the British to the U.S. pursuant to the Treaty of Washington (Boyle, 1999, p. 26). The resolution of grievances between these two nations laid the foundation for subsequent international conferences at Geneva and The Hague concerning laws of war and resolution of international disputes (Boyle, p. 26).

The Lieber Code

During the U.S. Civil War, the Union hired Columbia University law professor Franz Lieber to formally codify rules of war for its soldiers, because President Lincoln “determined that hostilities should be conducted with all possible propriety, in order to raise no avoidable obstacles to the restoration of peace and amity” (Best, pgs. 40-41; Canestaro, 2004, p. 433; Lieber, 1863). The Lieber Code was implemented by Lincoln as U.S. Army General Order No. 100 (Canestaro, p. 433; Lieber). It is considered the first formal codification of the laws of war (Krauss and Lacey, 2002, p. 75).

The Lieber Code (1863) covered a broad range of issues that arise in armed conflict and insurgencies, including martial law (Articles 1-30), property rights of the enemy (Articles 31-47), deserters and prisoners of war (Articles 48-80), enemy combatants not belonging to a formal military force (Articles 81-85), spies and traitors (Articles 86-104), prisoner exchange (Articles 105-118), parole (Articles 119-134), armistice and surrender (Articles 135-147), assassination (Article 148), and insurrection, civil war, and rebellion (Articles 149-157). One of the guiding principles of the Lieber Code was that “men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God” (Article 15). Torture and “wanton devastation” were expressly prohibited (Article 16). It was forbidden to “murder, enslave, or carry off” non-

combatants in conquered territory (Article 23). “Unjust or inconsiderate retaliation” was deemed to be savage and violative of the tenets of just war (Article 28).

The Lieber Code permitted the seizure of public property by a conquering army in an enemy territory, as well as the use of said property for the benefit of the conquering party (Article 31). Private property could be taxed (Article 37) but not seized unless there was a military necessity to do so (Article 38). Acts of murder, rape, pillaging, or wanton violence committed by soldiers during occupation were deemed to be punishable by death (Article 44). The Lieber Code held that while “collateral damage” in the form of unintentional non-combatant deaths was inevitable in war, such casualties must be avoided or minimized as much as possible (Canestaro, 2004, p. 434; Articles 18, 19, 22).

The Lieber Code defined a prisoner of war as being a captured “public enemy armed or attached to the hostile army” (Article 49). Civilians, such as journalists or contractors, who accompany the enemy force into battle were likewise defined as prisoners of war upon capture (Article 50). Captured chaplains and medical personnel of the enemy forces were declared to not be prisoners of war unless they requested to remain with their captured comrades in arms (Article 53). Prisoners of war were to be fed, provided medical treatment, and treated humanely (Articles 76 and 79).

The International Committee of the Red Cross, St. Petersburg Declaration, First and Second Geneva Conventions, and Hague Conventions

Contemporary codification of the international laws governing warfare, treatment of combatants and civilians, reparations, and post-war occupation began with a series of international agreements in the 19th Century which established the International Committee of the Red Cross (1863), set international norms for humanitarian relief (The Geneva Convention of 1864), and set limitations on the use of weapons (The St. Petersburg

Declaration of 1868, which prohibited the use of incendiary or exploding bullets) (Best, 1997, pp. 18, 43). These treatises were humanitarian, rather than utilitarian, in their underlying philosophy (Krauss and Lacey, 2002, p. 76). Among the problems addressed in the Geneva Conventions of 1864 and 1899 were: (1) defining rights and obligations of occupation forces, (2) separating legitimate combatants from non-military force belligerents, and (3) delineating the rights and treatment of prisoners of war (Chesterman, pp. 13-14).

The Geneva Convention of 1864 (the 1st Geneva Convention) focused on prisoners of war (Chesterman, 2001, p. 12). The protection and status of medical personnel during war was also addressed in the 1st Geneva Convention (Articles I-IV, VII). The U.S. did not sign and ratify the 1st Geneva Convention until 1882.

The Lieber Code (1863) in the U.S. was extrapolated and expanded to serve as the basis for the 1st and 2nd Hague Conventions in 1899 (Best, p. 41). One major outcome of the Hague Conventions of 1899 was the legal recognition between the rights of and duties owed to civilian non-combatants by military and occupying forces (Chesterman, 2001, p.16). Signatories to the Conventions agreed not only that their leadership would be bound by the rules therein, but also that their soldiers would be trained in the laws of warfare and held responsible for non-compliance (Frey-Wouters and Laufer, 1986, p. 263).

The institutionalization of international norms for combat conduct did not prevent atrocities from happening, but rather, set standards for condemnation and ensured that there was a mechanism in place to punish and hold violators accountable once the conflict was over (Best, p. 21). While these advances in law were being made, the U.S. had an additional agenda, embarking on America's first international forays into imperialism, gaining territory from its victory in the Spanish-American War. Theodore Roosevelt is reported to have

remarked during one of his pre-presidency political campaigns, “No triumph of peace is quite so great as the supreme triumphs of war” (Nathan, 2002, p. 108). As President, Theodore Roosevelt proclaimed America to be “the arsenal of democracy” (Reiter & Stam, 2002, p. 8). The conflict between America’s power on the world stage and its idealism Century continues to this day.

The impact of World War I on the laws of warfare

Significant advancements in the formal codification of the laws of war occurred following World War I. The uses of gas, automatic weapons, artillery, submarines, and airplanes in that war caused human and property casualties at a high rate, and gave countries a greater incentive to reach consensus on rules of engagement (Best, 1997, p. 49; McKercher & Henessy, 1996, p.11). The United States participated in the negotiation of many such treaties and laws in the decade following World War I; few of these treaties were ever actually ratified by the U.S. Senate.

In 1918, President Wilson gave a speech enunciating “The Fourteen Points” that he proposed to govern international relations in the post-war era; most prominent among the points was the establishment of The League of Nations (Boyle, 1999, p. 8). The League of Nations was subsequently created by Articles 1-26 of the Versailles Treaty (1919). A key provision of the *Versailles Treaty* declared that:

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations (Art. 11).

Article 16 of the Treaty further stated that “Should any Member of the League resort to war in disregard of its covenants . . . it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League.”

Additional provisions of the *Versailles Treaty* provided for the orderly repatriation of prisoners of war and the marking of graves for soldiers and sailors killed in the war in foreign lands (Arts. 214-226). Reparations by Germany and its allies to other nations were ordered in Articles 231-247 of the Treaty.

Despite the fact that the formative idealist of the organization was American President Woodrow Wilson, in 1921, the United States Senate refused to actually join the League of Nations (Bassett, 1930, p. 36). The United States likewise failed to ratify the 1925 Geneva Protocol regarding the prohibition of chemical and biological warfare after participating in its negotiation and giving presidential assent thereto (Moritz, 1961, p. 25).

The signatories of the *Kellogg-Briand Pact* (1928), to which the United States became a signatory, “renounced war as an instrument of national policy” (Preamble). The Pact sought to make illegal all wars except for those waged in self-defense (Falk, Kolko, & Lifton, 1971, p. 31). While the sentiment was nice, the Pact had neither sanctions nor enforcement mechanisms (Bosch, 1970, p. 7). It is perhaps because of (1) the lack of enforcement mechanism and (2) the fact that the definition of “self-defense” was left up to each individual nation to determine, that the U.S. Senate actually did ratify the *Kellogg-Briand Pact* in 1929 (Kellogg-Briand Hearings, 1929).

World War II and its impact on the power of the American Presidency

During the first two years of World War II, the U.S. was not a combatant, but did give major amounts of military support to Great Britain and the Allies. In 1940, President Franklin Delano Roosevelt borrowed a phrase from his cousin, former President Theodore Roosevelt, and proclaimed once again that the U.S. was the “arsenal of democracy” (Reiter & Stam, 2002, p. 99). Americans, having endured a decade of economic depression, were in

no rush to actually fight the war until the Japanese attacked Pearl Harbor, Hawaii, on December 7, 1941. The American contribution prior to active engagement should not be under-estimated; from 1939 until the end of World War II, the U.S. produced more war materials and armaments than all other Allies combined (Reiter & Stam, p. 114).

In 1942, President Roosevelt entered a series of Executive Orders which sought to limit *habeas corpus* relief and establish military tribunals for the trial of certain types of crimes relating to war and espionage. In the case of *Ex parte Quirin* (1942), eight German nationals who were captured in the U.S. soon after they came ashore for espionage activities attempted to challenge their detention and trial by military, rather than civilian authorities (317 U.S. at 22). The Defendants claimed that the President was without jurisdiction to deny them the rights to trial in American courts and to establish the military tribunals (317 U.S. at 21).

In *Quirin*, the U.S. Supreme Court upheld the acts of the President with respect to these Defendants, noting that

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war (317 U.S. at 29).

As to the Defendants' status, the *Quirin* Court ruled

Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals (317 U.S. at 31).

The rulings in *Quirin* later became a foundation for the enemy non-combatant detention policies deployed by the Bush Administration after 9/11.

The President's authority to unilaterally detain and try persons acting against the U.S. abroad during World War II also was an issue tested in American civilian courts in the case of *Johnson v. Eisentrager* (1950). In 1945, subsequent to the unconditional surrender of Germany to the Allied powers, but prior to the surrender of Japan, 21 German nationals were captured by American soldiers in China. At first, these Germans claimed that they were soldiers; later, they claimed to be civilian employees of the German government. They were accused of committing acts of war against U.S. forces by monitoring American troop movements and reporting the same to the Japanese. The Germans were detained and tried in China by a military tribunal of the U.S. Army, with no international involvement in the proceedings; those convicted were transferred to an American military base in Germany to serve their sentences.

In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the U.S. Supreme Court denied the *habeas corpus* petitions of the Germans in question, noting:

The nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy (339 U.S. at 776).

The Court's ruling hinged on the fact that the Germans were not, and had never been, present in the U.S., thus distinguishing them from resident aliens, who were afforded substantial rights under American law. This case has been reviewed recently in light of the detention of enemy combatants by the U.S. at Guantanamo Bay, Cuba.

Another World War II case in which the U.S. Supreme Court reviewed the power to the Executive Branch to try and sentence persons by military commission was *In re*

Yamashita, 327 U.S. 1(1946). Yamashita was Commanding General of the Fourteenth Imperial Army Group of Japan; he surrendered to U.S. forces in the Philippines in September of 1945 after WWII ended (327 U.S. at 5). Yamashita was charged by a U.S. military tribunal in the Philippines with numerous violations of the laws of war; in December 1945, he was sentenced to death by hanging (327 U.S. at 6).

In an expedited *habeas corpus* proceeding, the Supreme Court refused to vacate Yamashita's trial and sentence by the military commission, noting that its jurisdiction was limited to determining whether or not the tribunal was lawfully constituted, and that it had jurisdiction over neither the Defendant nor the crimes with which he was charged (327 U.S. at 7). The Court concluded that

Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. . . The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions (327 U.S. at 8).

The ruling in *Yamashita* has also been relied upon by the Bush Administration regarding the detention and trial of enemy combatants.

One of the most criticized uses of Executive power during World War II was that of the forced internment of American citizens of Japanese ancestry. In Executive Order 9066 (1942), President Roosevelt delegated the authority to military commanders within the United States to impose curfews and/or forcibly intern "all persons of Japanese ancestry in prescribed West Coast military areas." In *Korematsu v. U.S.*, 323 U.S. 214 (1944), the U.S. Supreme Court upheld the actions of the President and the military in forcibly removing Mr. Korematsu and his family from their home and placing them in an internment camp,

justifying their decision

because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders-as inevitably it must-determined that they should have the power to do just this (323 U.S. at 223).

Four decades later, in the Civil Liberties Act of 1988, the U.S. Congress apologized to Mr. Korematsu and all others of Japanese ancestry who were interned and ordered the payment of reparations to those affected and their heirs.

Germany and Italy surrendered to the Allied forces in May of 1945, but the war with Japan continued. The cost of World War II in American lives and treasure up to the Summer of 1945 weighed heavily on the minds of Americans and their leaders in the decision to shorten the war and save American lives by dropping two atomic bombs on Japan (Reiter & Stam, 2002, p. 166). To date, the U.S. remains the only nation in the world to have deployed an atomic bomb in combat.

World War II and its impact on international laws of war

Although World War II began in 1939, the U.S. avoided formal entry into the conflict until after the Japanese attacks on Pearl Harbor in December 1941. Those attacks gave American soldiers and the public an unequivocal belief that they were “engaged in a just cause,” which, in turn, made “total victory” possible (Bass, 1998, p. 2).

In the final year of World War II, the leaders of the U.S. and U.S.S.R. met at Yalta and signed an agreement relating to the release of prisoners of war and the treatment of civilians in the former Axis and Axis-occupied territories; the agreement came to be known as “The Yalta Accord” (1945). The short-term provisions of the Accord required the U.S. and

the U.S.S.R. to provide food, shelter, clothing, and transportation (if necessary) to detainees' and relocated civilians' points of origin. The Accord also set the terms for the initial meeting of the United Nations in New York

Under the long-term provisions of the Yalta Accord, the Soviet Union occupied much of Eastern Europe for over four decades. Contemporary critics of the Yalta Accord, such as President George W. Bush, assert that the agreement was unjust and a "betrayal of freedom" that subjugated millions to totalitarian rule caused global instability (AP Wire, 2005).

Following World War II, the Yalta Accord further stipulated that Germany was to be divided into zones to be patrolled by the U.S., U.K., France, and the U.S.S.R. Provision for reparations and war crime trials were also contained therein. In exchange for land concessions in Asia made at Yalta, the U.S.S.R. agreed to declare war on Japan and to help liberate China.

The London Agreement and Charter of 1945 established an International Military Tribunal (IMT) to try Nazis accused of war crimes (Bosch, 1970, p. 11). The Charter established three categories of crimes to be tried – crimes against peace, war crimes, and crimes against humanity (Bosch p. 11). The tribunal at Nuremburg was composed of jurists from the United States, France, Great Britain, and the Soviet Union (Dufour, 2001, p. 443). Out of the 21 defendants tried by the International Military Tribunal at Nuremburg, 10 were sentenced to death, three were acquitted, and 8 received prison terms ranging from ten years to life imprisonment (Bosch, p. 13). In addition to the IMT, the U.S. Army set up a separate army tribunal at Dachau which tried Germans accused of committing war crimes against American soldiers and airmen (Ferencz, 2002, p. 456).

The trials at Nuremburg were the culmination of threats that President Franklin D.

Roosevelt began issuing in 1942 to Axis leaders that they would eventually be tried and punished for their crimes once the war was over (Bosch, p. 21). It was the first time in history that an international trial for war crimes was held (Dufour, 2001, p. 443). The lasting lessons of the Nuremburg trials are:

- (1) The human rights of individuals and groups are a matter of international concern;
- (2) The international community's interest in preventing or punishing offenses against humanity committed within a state can supersede any concept of national sovereignty;
- (3) Not just states but also individuals can be held accountable under international law for their role in genocide and other atrocities; and
- (4) "Following orders" is no defense of such accountability (Dufour, p. 443).

While there may be some concern about 20/20 hindsight unfairly tainting the assessments of those who sit in judgment of combatants on war tribunals, it should be noted that one consideration is whether in fact there were actual moral choices available at the time the alleged act was committed (Frey-Wouters and Laufer, 1986, p. 261).

International war tribunals were also held in Tokyo in 1946 and 1948 to try those accused on war crimes in the Far East theatre during World War II (Dufour, 2001, p. 444). The International Military Tribunal for the Far East (IMTFE) was composed of 11 jurists from 11 nations - Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, the United Kingdom, and the United States (IMTFE indictment, 1946, p.1).

The preliminary dicta in the Indictment accused various political and military leaders of Japan of systematically poisoning the minds of the Japanese people with “harmful ideas of the alleged racial superiority of Japan over other peoples of Asia and even of the whole world” (p.1). The Indictment further alleged a general conspiracy with the leaders of Germany and Italy to “dominate and exploit the rest of the world” and to “encourage the

commission of crimes against peace, war crimes, and crimes against humanity. . . thus threatening and injuring the basic principles of liberty and respect for the human personality” (p.2).

Specific offenses alleged in the Indictments by the IMTFE were classified as crimes against peace, conventional war crimes, and crimes against humanity (IMTFE judgment, p. 7). Twenty-five defendants were tried by the IMTFE and each was found guilty; only 7 of the 25 were ordered to be executed by hanging (Dufour, 2001, p. 444).

Following World War II, the United Nations was created, and with it came further development of international laws regarding human rights, warfare, and post-war conduct (Best, 1997, p.67). In 1948, the Convention on the Prevention and Punishment of Genocide was proposed, with an effective date of January 12, 1951; while the U.S. was one of the original signatories in 1948, the U.S. Senate refused to ratify the treaty for 40 years due to concerns about usurpation of American sovereignty and subrogation of American superiority to lesser nations (Forsyth, 2000, p. 48).

The Geneva Conventions of 1949 sought to establish laws regarding the treatment of those who were sick and injured during both land and sea warfare, as well as general treatment of civilians during times of war and regulations for the treatment of all prisoners of war (Dufour, 2001, p. 444). The Geneva Conventions of 1949 were negotiated by the international community in order to prevent the atrocities and harm to civilians that was seen during the “total war” of World War II (Chesterman, 2001, p. 11). “Total war” is defined as “a war in which no distinction is made between combatant and noncombatant or as general war at the highest level of escalation possible” (Wakin, 1986, p. 222).

In 1948, the General Assembly of the United Nations passed Conventions on the

Prevention and Punishment of the Crime of Genocide. Article II of the Convention defined genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Article IV of the Convention stripped leaders of the defenses of official act and sovereign immunity if they were charged with crimes of genocide. Enforcement and adjudication of the Convention was left to “a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction” (Article VI).

In the 1949 Geneva Conventions, prisoner-of-war (POW) status was conferred upon irregular forces, so long as their members had a chain of command, operated in a paramilitary fashion, were visible “from a distance” as members of a fighting force, and followed the laws of war (Article 4A). Most of the post-World War II conflicts involved have involved irregular forces operating as guerillas that did not fall within the precise definitions aforementioned; as a result, the conferral of POW status was often tenuous (Aldrich, 1981, p. 769).

In 1977, a four-year process of revising the Geneva Conventions to reflect the realities of undeclared wars and non-conventional conflict began (Aldrich, 1981, p. 764). The revisions sought to give guerrilla forces the incentives to comply with the rules of war by extending additional protections to non-conventional combatants (Aldrich, p. 770). Under the new provisions, POW status was conferred upon all who persons who fought within an operational chain of command (as opposed to acting individually) and asserted a claim as a POW upon capture or detention (Aldrich, p. 772). Mercenaries and spies were exempted

from the new requirements (Aldrich, p. 773).

The revisions began in 1977 also sought to regulate combat operations. Articles 51-56 sought to restrict destruction of cities and infrastructure that would result in direct or indirect death and/or suffering of non-combatants. (Aldrich, 1981, p. 778). Affirmative duties to protect the civilian population and provide humanitarian relief were also imposed. (Aldrich, p. 781). To date, the U.S. has not ratified the Geneva Protocols of 1977, initially because of President Reagan's concerns "that it would legitimate various liberation movements that would upset. . . the balance of power, and endanger the security of some of our allies, like Israel and South Africa" (Krauss and Lacey, 2002, p. 79).

In 1980, the Certain Conventional Weapons (CCW) Treaty was proposed, seeking to ban the use of incendiary and laser weapons; the U.S. has repeatedly declined to join the treaty because it was unwilling to agree to such limitations on its military power (Krauss and Lacey, p. 80). In 1997, the Ottawa Convention sought to ban landmines; the U.S. has likewise declined to assent to its provisions, again because of the tactical limitations that it would place on American military operations (Krauss and Lacey, p. 80).

One problem that emerged with 20th Century technology was that it increased the distance between combatant and target, which in turn decreased man's natural sensitivity to killing, especially when the munitions deployed resulted in particularly gruesome deaths or casualties in large numbers (Bourke, 1999, p. xvii). It is ironic in that as the legal protection for civilians in war became more formal and codified, the percentage of civilian deaths in conflict has risen: in World War I, civilians only accounted for 5% of all war deaths; in World War II, civilians constituted 50% of all war deaths; in conflicts from the 1990's to the present, over 90% all war deaths have been civilians (Chesterman, 2001, p. 2).

Power struggles during the Cold War

The international power struggle following World War II, which came to be termed as “The Cold War,” transformed the world into a series of allies, client states, and satellites of the U.S. and the U.S.S.R. In the first few decades following World War II, the primary paradigm of U.S. power was the Cold War struggle between the U.S.S.R. and its satellites and allies and the U.S. and its beneficiaries and allies. The specter of “Mutually Assured Destruction” (MAD) served as the ultimate check upon the territorial and imperial ambitions of the Superpowers (Falk, 1975, p. 13). A common mantra of Cold War-era presidents was that “policies of appeasement” with respect to Communist states were akin to the pre-World War II appeasements of fascism that empowered the leaders of Germany, Italy, and Japan (Falk, p. 57). The increased vigilance necessitated by the perceived communist threat led to heightened US presidential powers during the Cold War era.

Training of the American military following World War II

In addition to international laws, nations have their own laws and regulations that govern the conduct of their military operations (Bourke, 1999, p. 164). While maintaining military decorum and the chain of command is critically important in war, the U.S., Britain, and many other nations only require that its soldiers obey all lawful orders – unlawful orders should be disobeyed and failure to do so will result in punishment (Bourke, p. 165). The Nuremburg Principles (1946) likewise hold that obeying an unlawful order is not a defense to violation of international laws of warfare so long as “the moral choice was in fact possible” (Bourke, p. 166). The inherent dilemma is that “a soldier is often in no position to establish the legality or illegality of an order, and that the very nature of military service requires prompt obedience” (Frey-Wouters and Laufer, 1986, p. 284). One of the primary objectives

of military combat instructors and battlefield leaders is “transforming fear into anger” (Bourke, 1999, p. 72).

Prior to the My Lai incident (March 1968), American soldiers only received one hour of training on the laws of war during basic training (Frey-Wouters and Laufer, 1986, p. 266). In the 1970’s each branch of the military began a transformation, seeking to increase retention by developing and educating cadres of professionals (McKercher & Henessy, 1996, p. 147). In the post-Vietnam era, the instruction time on the laws of war have been increased in basic training, as well as occupational, continuing professional development, and pre-deployment training; additionally, troops deploying to combat or peacekeeping zones are given instructional cards to remind them of the key rules regarding the treatment of prisoners of war, enemy combatants, and civilians (Frey-Wouters and Laufer, p. 267). Officers and non-commissioned officers receive more training on the laws of war than do their subordinates, and land-based military units receive more training than do naval or air force units (Frey-Wouters and Laufer, p. 267).

One interesting study of Vietnam veterans showed that the perception of the causes of violations of laws of war and rules of engagement varied depending on the military branch of the veteran respondent (Frey-Wouters and Laufer, 1986, p. 272). Respondents from the Army, Navy, and Air Force tended to attribute blame for atrocities and abuse on “orders from above”; the Marine respondents tended to attribute blame for atrocities to the “evil of combat” and the enemy “fighting dirty” (Frey-Wouters and Laufer, p. 272). The discrepancies of causation tended to also break down along the lines of combat experience, with the veterans of heavy combat tending to be more inclined to blame “orders from above” and those with less combat experience trending more toward the “evil of combat” excuse

(Frey-Wouters and Laufer, p. 274).

It is important to also consider civilian leaders within the chain of command when studying the operational decisions made during times of war, crisis, and heightened security concerns. The political style and agenda of the president dictates the level of involvement and interaction between the civilian and military leaders. Civilian leaders far from combat zones often react to reports of alleged war crimes with denial or resignation or denial followed by resignation (Rourke, 1999, p. 181).

In 1976, U.S. military doctrine began taking initial steps towards integration of air, sea, and land operations (FM100-5, 1993, p. 6). During the last two decades, as threats to national security changed, joint operations and rapid deployment via more mobile forces has become the cornerstone of strategic military planning (McKercher & Henessy, 1996, p. 153).

Unconventional wars and international law

The Lieber Code, Hague Conventions, and Geneva Conventions I-IV were designed with conventional warfare and regular military forces in mind. The U.S. military has deployed to armed conflicts more than 100 times since the last time Congress declared war (World War II), often fighting irregular forces and insurgents. This is not to say that unconventional war is a “new” modern tactic – it is not (Echevarria, 2005, p. 1). The use of irregular forces dates back to ancient times. In the 5th Century BCE, Sun-Tzu recommended this tactic, telling readers, “If you are formless, the most penetrating spies will not be able to discern you, or the wisest counsels will not be able to do calculations against you” (Sun-Tzu, Ch. 6).

In an unconventional war, the full panoply of political, societal, economic, and military pressures are employed by irregular forces (also known as insurgents, rebels,

fighters, guerrillas, jihadists, terrorists, etc.) “to convince the enemy's decision makers that their strategic goals are either unachievable or too costly for the perceived benefit” (Echevarria, 2005, p. 1). The combatants can be a rag-tag band of fighters or a sophisticated organization that extends its tentacles into legitimate humanitarian, educational, social, religious, and political bodies, and not be limited to subversion of military and security operations (Eschevarria, p. 3). This too is not a new or modern idea. Clausewitz opined on the interconnectivity between war and politics centuries ago, noting, “War is only a part of political intercourse, therefore by no means an independent thing in itself” (Clausewitz, Bk. 8, Ch.6).

American forces have fought in several unconventional wars. During the Spanish-American War, American forces quickly defeated the Spanish fleet and took over the Philippines, but a nationalist insurgency raged for three years afterward, resulting in thousands of American and Filipino deaths (Linn, 1989, p. 163). In Vietnam, the blurring of the lines between combatants and non-combatants was used by the North Vietnamese and their sympathizers to (1) cause division within the American political and military ranks and (2) generate anti-American sentiment (Kellogg, 2000, p.1).

War crimes allegations, tribunals, and the International Court of Justice (ICJ) in the 1980's and 1990's

During the past two decades, most armed conflicts have been caused by terrorist incidents or internal strife, rather than the traditional notion of “aggressive war” (McShane, 2002, p. 60). One notable exception to this period of reduced “war” was Iraq’s invasion of Kuwait and the subsequent Persian Gulf War, in which the U.S. led an international coalition of forces to liberate Kuwait. During the 1990’s the U.S. also deployed forces to Kosovo, Somalia, Haiti, Bosnia, the Philippines, and elsewhere as part of multi-national peacekeeping

efforts to stave off civil war and insurgency. The American government has also provided economic and military aid to a number of nations, as well as to “liberation” groups in Iraq, Iran, Nicaragua, and elsewhere.

In 1984, Nicaragua brought an action before the International Court of Justice (ICJ) in which it accused the United States of violating several treaties by providing arms and support to insurgents during that nation’s civil war (Maier, 1987, p. 77). The U.S. denied that the ICJ had any jurisdiction in the matter, as it was "an inherently political problem that is not appropriate for judicial resolution" (Maier, p. 77). The ICJ ultimately found that the U.S. had been “training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua” contrary to “customary international law” and ordered the U.S. to cease and desist such activities, but had no means by which to enforce its judgment (Maier, p. 79).

In 1993, the United Nations passed UN Resolution 827, which alleged “serious violations of international humanitarian law” in the former Yugoslavia and established the International Criminal Tribunal for the former Yugoslavia (ICTY) at The Hague, Netherlands, to investigate and try all persons accused of such crimes (ICTY info, 2006). To date, 161 individuals have been charged by the ICTY and 46 of these defendants have been convicted and sentenced to prison terms ranging from 5 years to life imprisonment (ICTY figures, 2006). The former President of the former Yugoslavia, Slobodan Milosevic, died in March, 2006, prior to the conclusion of his trial for multiple counts of war crimes and crimes against humanity (ICTY figures).

In 1994, via Resolution 955, the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, to try persons for crimes of

genocide committed in Rwanda and to begin the process of national reconciliation (ICTR info, 2006). It is estimated that in the year 1994 alone, over 800,000 members of the Tutsi tribe within Rwanda were killed – and that over 100,000 members of the Rwandan population were involved or implicated somehow in these killings (Dufour, 2001, p. 445). The ICTR began trial persons accused of genocide, including the Prime Minister and several cabinet members, in 1997; through 2005, 23 such persons have been tried, with 20 being convicted and 3 acquitted (ICTR achievements, 2006). At the present time, 27 defendants are being tried by the ICTR, and an additional 15 defendants are awaiting trial (ICTR cases, 2006).

The International Criminal Court

Having created two *ad hoc* tribunals to try crimes against humanity in the post-Cold War era, many members of the United Nations felt that it was necessary to create a permanent body to adjudicate similar claims in the future (Dufour, 2001, p. 446). In 1998, the Rome Statute of the International Criminal Court (ICC) was enacted, with an effective date of July 1, 2002 (ICC, 2006). The Rome Statute declared that the permanent seat of the ICC be at The Hague, Netherlands (Art. 3).

The jurisdiction of the ICC is limited to crimes of war and aggression, genocide, and crimes against humanity (Art. 5). Article 6 of the Rome Statute defines the crime of genocide as being:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7 of the Rome Statute defines the far broader term, crimes against humanity, as including:

Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 8 characterizes war crimes and crimes of aggression punishable by the ICC as being those acts proscribed by the Geneva Conventions of August 12, 1949, as well as “serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.”

The territorial jurisdiction of the ICC is limited to those states that have ratified the Rome Statute and assented thereto (Art. 12). The ICC has jurisdiction over all individuals within the member states who have committed the acts proscribed by the Rome Statute (Art. 25), with the exception of those individuals who were under age 18 at the time the alleged acts were committed (Art. 26). Heads of state or others acting in an official capacity are denied the use of defenses related to immunity by virtue of their position (Art. 27). There are

no statutes of limitations applicable to acts committed within the jurisdiction of the ICC (Art. 29). Common law defenses pertaining to intent, knowledge, and mental state (*mens rea*) of Defendants may be presented (Arts. 30-31). Prison terms up to life imprisonment may be imposed upon a Defendant who is convicted by the ICC, however, the sanction of capital punishment is specifically excluded from the sentencing provisions (Art. 77).

President Clinton was actually a driving force behind the Rome Statute, which created the ICC, giving a major speech to the UN in 1997, at which he called for the ICC to be in place and hearing cases before the year 2000 (Ferencz, 1999, p. 459). Clinton was very involved in the negotiation and drafting of the Rome Statute; he was a signatory to the statute, but failed to obtain ratification by the Senate prior to the expiration of his term of office (Dufour, 2001, p. 448). Opponents to U.S. membership in the ICC argue that the Rome Statute would unduly undermine American sovereignty as well as destroy the balance of power that has existed within the United Nations for over 50 years through the functioning of the Security Council (Rosenthal, 2004, p. 33). Additional oppositional arguments are that “US troops will not be sufficiently protected under the treaty and that US soldiers could be subjected to politically motivated charges” (Krauss and Lacey, 2002, p. 82).

Power in the post-Cold War era

Since the end of the Cold War, the United States has seen many changes in its role on the world stage. The world is no longer divided into satellite states and allies of two major powers. Global relationships are no longer polar, but rather, are more akin to a series of Venn diagrams in which limited alliances are formed based on mutual interests in certain areas. Divergence leads to situations in which one’s opponent on one issue becomes an ally on another.

Increased interdependence has led to numerous multinational peacekeeping deployments by American forces since 1988 about which there has been much debate as to utility and relative costs (Fox, 2001, p.3). Multinational peacekeeping forces may sound ideal, but such deployments raise significant legal, political, and sovereignty concerns. Mays (2000) notes, “the multinational nature of peacekeeping scenarios can blur the lines of command structures, soldiers' national loyalties, occupational jurisdiction, and raise profound questions as to which countries' moral sense/governmental system is to be the one upheld” (p. 201).

Summary

Throughout history, there have existed arguments about the rules of warfare that can be classified as utilitarian versus humanitarian (Krauss & Lacey, 2002, p. 73) or as realist vs. moralist (Boyle, 1999, p, 7). Although formal codification of international laws pertaining to war did not begin until the mid-19th Century, laws of war, both explicit and implicit, have existed since at least 1800 B.C.E. Laws of war seek to prevent war and mitigate its impact by limiting lawful reasons for initiating warfare and regulating the conduct of its participants.

The United States has been a leader in many of the efforts to formalize international laws of war. The Lieber Code (1863), promulgated during the American Civil War, served as the model for the protocols of the Geneva and Hague Conventions pertaining to the laws of war. There have been many instances in which presidents and the U.S. Senate disagreed as to whether treaties and protocols pertaining to war should be binding on the U.S. The disagreements arose due to concerns over the infringement of American sovereignty and the desire to avoid the U.S. becoming the world's policeman.

During times of war and heightened security concerns, the U.S. has modified policies

and practices based on perceived needs to protect the nation. Lincoln suspended *habeas corpus* during the Civil War. Franklin Roosevelt created military tribunals to summarily try suspected spies caught within U.S. borders and ordered the forced internment of American citizens of Japanese descent. Truman became the only leader to ever attack another nation with atomic bombs. George W. Bush has created military tribunals, set up offshore detention facilities, and attempted to indefinitely detain American citizens suspected of terrorist activities without charging them with crimes. Barack Obama has continued these policies and strategies.

References

- Agreement relating to prisoners of war and civilians liberated by forces operating under the Soviet command and forces operating under the American command* ("The Yalta Accord.") (1945). Retrieved October 24, 2005, from <http://www.yale.edu/lawweb/avalon/diplomacy/soviet/sov007.htm> and <http://www.yale.edu/lawweb/avalon/wwii/yalta.htm>.
- Aldrich, G. H. (1981). New life for the laws of war. *American Journal of International Law*, 75(4), 764-783. Retrieved December 30, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=79272384>.
- Associated Press (AP) Wire. (2005, May 8). Bush concedes U.S. role 'wrong': President singles out FDR and Yalta Accord. *The Columbia Daily Tribune [electronic edition]*. Retrieved December 30, 2005, from <http://www.showmenews.com/2005/May/20050508News010.asp>.
- Auerswald, D., & Maltzman, F. (2003). Policymaking through advice and consent: Treaty consideration by the United States Senate, *Journal of Politics*, 65, 1097.
- Bass, B. M. (1998). *Transformational leadership: Industrial, military, and educational impact*. Mahwah, NJ: Lawrence Erlbaum Associates. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=9659281>.
- Bassett, J. (1930). *The League of Nations: A chapter in world politics*. New York, NY: Longmans. Retrieved May 28, 2006, from <http://www.questia.com/PM.qst?a=o&d=10521299>.
- Bederman, D. J. (2001). *International law in antiquity*. Cambridge, England: Cambridge University Press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=105008836>.
- Best, G. (1997). *War and law since 1945*. Oxford: Clarendon Press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=12379546>.
- Bosch, W. J. (1970). *Judgment on Nuremberg: American attitudes toward the major German war-crime trials*. Chapel Hill, NC: University of North Carolina Press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=8523898>.
- Bourke, J. (1999). *Face-to-face killing in twentieth-century warfare*. New York: Basic Books. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=98927391>.
- Boyle, F. A. (1999). *Foundations of world order: The legalist approach to international relations (1898-1922)*. Durham, NC: Duke University Press. Retrieved October 25,

- 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=17831664>.
- Brown, S. (1996). *International relations in a changing global system: Toward a theory of the world polity* (2nd ed.). Boulder, CO: Westview Press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=82359210>.
- Calhoun, L. (2001). Regarding war realism. *International Journal on World Peace*, 18(4), 37+. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=5000951285>.
- Canestaro, N. A. (2004). Legal and policy constraints on the conduct of aerial precision warfare. *Vanderbilt Journal of Transnational Law*, 37(2), 431+. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=5005792348>.
- Chesterman, S. (Ed.). (2001). *Civilians in war*. Boulder, CO: Lynne Rienner. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=105965002>.
- Civil Liberties Act of 1988*. Retrieved June 20, 2006, from <http://www.children-of-the-camps.org/history/civilact.html>.
- Clausewitz, C. (1832). *On war*. Graham, J. (trans., 1873). Retrieved June 21, 2006, from http://www.clausewitz.com/CWZHOME/On_War/ONWARTOC.html.
- Convention on the prevention and punishment of the crime of genocide*. (1948). Retrieved October 24, 2005, from http://www.unhchr.ch/html/menu3/b/p_genoci.htm.
- Dawson, D. (1996). *The origins of western warfare: Militarism and morality in the ancient world*. Boulder, CO: Westview Press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=91512091>.
- Dufour, J. M. (2001). War crimes: An end in Sight? *Social Education*, 65(7), 441+. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=5000922291>.
- Eschevarria, A. (2005, November). *Fourth-generation war and other myths*. Carlisle Barracks, PA: U.S. Army Strategic Studies Institute. Retrieved June 21, 2006, from <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA442343&Location=U2&doc=GetTRDoc.pdf>.
- Falk, R. A. (1975). *A global approach to national policy*. Cambridge, MA: Harvard University Press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=8964686>.
- Falk, R. A., Kolko, G., & Lifton, R. J. (Eds.). (1971). *Crimes of war: A legal, political-*

- documentary, and psychological inquiry into the responsibility of leaders, citizens, and soldiers for criminal acts in wars* (1st ed.). New York: Random House. Retrieved October 25, 2005, from Questia database:
<http://www.questia.com/PM.qst?a=o&d=61867511>.
- Ferencz, B. (1999). A prosecutor's personal account: From Nuremberg to Rome. *Journal of International Affairs*, 52(2), 455. Retrieved October 25, 2005, from Questia database:
<http://www.questia.com/PM.qst?a=o&d=5001891544>.
- Fisher, L.(2000). Unchecked presidential wars. *University of Pennsylvania Law Review*, 148(5), 1637-73.
- Forsythe, D. P. (Ed.). (2000). *Human rights and comparative foreign policy*. New York: United Nations university press. Retrieved October 25, 2005, from Questia database:
<http://www.questia.com/PM.qst?a=o&d=102658875>.
- Fox, J. (2001). Enforcing the *Pax Americana* on the frontiers of empire: Three reforms for the twenty-first century. *Journal of Power and Ethics*, 2(1), 1. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=5001028827>.
- Franck, T. M. (1997). *Fairness in international law and institutions*. Oxford: Oxford University Press. Retrieved October 25, 2005, from Questia database:
<http://www.questia.com/PM.qst?a=o&d=12349426>.
- Frey-Wouters, E., & Laufer, R. S. (1986). *Legacy of a war: The American soldier in Vietnam*. Armonk, NY: M. E. Sharpe. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=582502>.
- The Geneva Convention of 1864*. Retrieved October 24, 2005, from
<http://www.yale.edu/lawweb/avalon/lawofwar/geneva04.htm> .
- The Geneva Convention of 1928*. Retrieved October 24, 2005, from
<http://www.yale.edu/lawweb/avalon/lawofwar/geneva01.htm> .
- The Geneva Convention of 1929*. Retrieved October 24, 2005, from
<http://www.yale.edu/lawweb/avalon/lawofwar/geneva02.htm> .
- The Geneva Convention of 1949*. Retrieved October 24, 2005,
<http://www.yale.edu/lawweb/avalon/lawofwar/geneva05.htm>.
- The Hague Conference of 1899 (Hague I)*. Retrieved October 24, 2005, from
<http://www.yale.edu/lawweb/avalon/lawofwar/hague01.htm>.
- The Hague Conference of 1899 (Hague II)*. Retrieved May 4, 2006, from
<http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>

- The Hague Conference of 1907*. Retrieved October 24, 2005, from <http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm> .
- Huntington, S. (1986). *The Military Mind: Conservative Realism of the Professional Military Ethic*. In *War, morality, and the military profession*. Wakin, M. (ed.) Boulder, CO: Westview Press. Retrieved June 26, 2006, from Questia database: <http://www.questia.com/PM.qst?a=o&d=98921581>.
- International Criminal Court (ICC). (2006). *About the Court*. Retrieved May 28, 2006, from <http://www.icc-cpi.int/about.html>.
- International Criminal Tribunal for Rwanda (ICTR). (2006). *Achievements*. Retrieved May 28, 2006, from <http://69.94.11.53/ENGLISH/factsheets/achievements.htm>.
- International Criminal Tribunal for Rwanda (ICTR). (2006). *Cases*. Retrieved May 28, 2006, from <http://69.94.11.53/ENGLISH/cases/status.htm>.
- International Criminal Tribunal for Rwanda (ICTR). (2006). *General information*. Retrieved May 28, 2006, from <http://69.94.11.53/ENGLISH/geninfo/index.htm>.
- International Criminal Tribunal for the former Yugoslavia (ICTY). (2006, May 8). *General information*. Retrieved May 27, 2006, from <http://www.un.org/icty/glance-e/index.htm>.
- International Criminal Tribunal for the former Yugoslavia (ICTY). (2006, May 8). *Key figures of ICTY cases*. Retrieved May 27, 2006, from <http://www.un.org/icty/cases-e/factsheets/procfact-e.htm>.
- International Military Tribunal of the Far East (IMTFE). (1946). *Indictment*. Retrieved May 27, 2006, from <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A6.html>.
- International Military Tribunal of the Far East (IMTFE). (1946). *Judgment*. Retrieved May 27, 2006, from <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-1.html>.
- Jackson, R. H. (1949). *Report of Robert H. Jackson: United States Representative to the International Conference on Military Trials, London, 1945*. Washington, DC: U.S. Govt. Print. Off. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=34264944>.
- Jefferson, T. (1801, March 4). *First inaugural address*. Retrieved March 15, 2006, from <http://www.bartleby.com/124/pres16.html>.
- Johnson v. Eisentrager*, 339 U. S. 763 (1950). Retrieve June 17, 2006, from <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=339&invol=763>.
- Judis, J. (2004). *The folly of empire: What George W. Bush could learn from Theodore*

- Roosevelt and Woodrow Wilson*. New York, NY: Scribner's.
- Kaplan, R. (2002). *Warrior politics: Why leadership demands a pagan ethos*. Vintage Books: New York, NY.
- The Kellogg-Briand Pact*. (1928). Retrieved October 24, 2005, from <http://www.yale.edu/lawweb/avalon/kbpact/kbpact.htm> .
- The Kellogg-Briand Pact: Hearing before the Committee on Foreign Relations, Senate, 70th Congress*. Retrieved May 28, 2006, from <http://www.yale.edu/lawweb/avalon/kbpact/kbhear.htm>.
- Kellogg, D. (2000). Guerrilla warfare: When taking care of your troops leads to war crimes. *Journal of Power and Ethics*, 1(1), 50. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=5001810932>.
- Korematsu v. United States*, 332 U.S. 214 (1944). Retrieved June 20, 2006, from <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=323&invol=214>.
- Korman, S. (1996). *The right of conquest: The acquisition of territory by force in international law and practice*. Oxford: Clarendon press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=26330746>.
- Krauss, E. S., & Lacey, M. O. (2002). Utilitarian vs. Humanitarian: The battle over the law of war. *Parameters*, 32(2), 73-85. Retrieved June 20, 2006, from <http://www.carlisle.army.mil/usawc/Parameters/02summer/lacey.htm>.
- Lieber, F. (1863, April 24). *General Orders No. 100 (The Lieber Code)*. Retrieved May 7, 2006, from <http://www.yale.edu/lawweb/avalon/lieber.htm>.
- Linn, B. M. (1989). *The U.S. Army and counterinsurgency in the Philippine war, 1899-1902*. Chapel Hill, NC: University of North Carolina press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=105754457>.
- Madison, J. (1809). *First inaugural speech*. Retrieved March 16, 2006, from <http://www.bartleby.com/124/pres18.html>.
- Maier, H. G. (1987). Appraisals of the ICJ's decision: Nicaragua vs. United States. *American Journal of International Law*, 81(1), 77-183. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=95686815>.
- Maine, Henry. (1887). *International law*. Cambridge, UK: University Press. Retrieved October 24, 2005, from <http://www.yale.edu/lawweb/avalon/econ/intintro.htm>.
- Mallaby, S. (2000, January/February). The bullied pulpit: A weak chief executive makes worse foreign policy. *Foreign Affairs*, 79(1): 2-8.

- Mays, A. (2000). War and peace: Of law, lawlessness, and sovereignty. *Journal of Power and Ethics*, 1(2), 201. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=5001811028>.
- McKercher, B. J. & Hennessy, M. A. (Eds.). (1996). *The operational art: Developments in the theories of war*. Westport, CT: Praeger Publishers. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=15647033>.
- McShane, T. W. (2002). Blame it on the Romans: Pax Americana and the rule of law. *Parameters*, 32(2), 57+. Retrieved June 24, 2006, from <http://www.carlisle.army.mil/usawc/Parameters/02summer/mcshane.htm>.
- Monroe, J. (1823, December 2). *Seventh annual message to Congress*. Retrieved March 17, 2006, from <http://www.ushistory.org/documents/monroe.htm>.
- Morganthau, H. (1978). *Politics among nations: The struggle for power and peace*. New York, NY: Knopf.
- Moritz, G. (1961). The common application of laws of war within NATO forces. *Military Law Review, DA Pamphlet 27-100-13*. Retrieved May 29, 2006, from [http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/MilitaryLawReview.nsf/20a66345129fe3d885256e5b00571830/481353f1469f32d285256e5b00584848/\\$FILE/MLR%2027-100-13%2019610701.pdf](http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/MilitaryLawReview.nsf/20a66345129fe3d885256e5b00571830/481353f1469f32d285256e5b00584848/$FILE/MLR%2027-100-13%2019610701.pdf).
- Nathan, J. A. (2002). *Soldiers, statecraft, and history : Coercive diplomacy and international order*. Westport, CT: Praeger. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=102080084>.
- Protocol for the Prohibition of Poisonous Gas and Bacteriological Warfare*. (1925). Retrieved May 28, 2006, from <http://www.lib.byu.edu/~rdh/wwi/1918p/bactpois.html>.
- Ex parte Quirin*, 317 U.S. 1 (1942). Retrieved June 17, 2006, from <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=317&invol=1>.
- Reiter, D., & Stam, A. C. (2002). *Democracies at war*. Princeton, NJ: Princeton University Press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=99846298>.
- The Rome Statute of the International Criminal Court* (1998). Retrieved May 28, 2006, from http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.
- Rosenthal, J. (2004). A lawless global court: How the ICC undermines the UN system. *Policy Review*, (123), 29+. Retrieved May 28, 2006, from Questia database:

- <http://www.questia.com/PM.qst?a=o&d=5002104501>.
- Selden, M. (1991). The United States, Japan and the atomic bomb. *Bulletin of Concerned Asian Scholars*, 23(1), 3-12. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=97786672>.
- Simonton, D. (1981, September). Presidential greatness and performance: Can we predict leadership in the White House. *Journal of Personality*, 49(3): 306-324.
- Speed, R. B. (1990). *Prisoners, diplomats, and the Great War: A study in the diplomacy of captivity*. New York: Greenwood. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=28588494>.
- Sun-Tzu. (5 B.C.E.) *The Art of War*. Retrieved June 21, 2006, from <http://www.sonshi.com/suntintro.html>.
- United States Army Field Manual 100-5* (1993). Retrieved June 24, 2006, from http://www.vsente.com/battlecommandfm100_5.pdf.
- United States military deaths in Southeast Asia, by calendar year*. (2006). Retrieved June 24, 2006, from <http://thewall-usa.com/stats/#year>.
- The Versailles Treaty*. (1919). Retrieved May 28, 2006, from <http://history.acusd.edu/gen/text/versaillestreaty/vercontents.html>.
- Wakin, M. M. (1986). *War, morality, and the military profession*. Boulder, CO: Westview Press. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=98921581>.
- Walzer, M. (2000). *Just and unjust wars: A moral argument with historical illustrations* (3rd ed.). New York: Basic Books. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=91218904>.
- Washington, G. (1796). *Farewell address*. Retrieved March 15, 2006, from <http://www.yale.edu/lawweb/avalon/washing.htm>.
- Watson, B. A. (1997). *When soldiers quit: Studies in military disintegration*. Westport, CT: Praeger Publishers. Retrieved October 25, 2005, from Questia database: <http://www.questia.com/PM.qst?a=o&d=27639175>.
- Wilson, W. (1918, January 8). *Presidential address to Congress: The Fourteen Points*. Retrieved April 10, 2006, from <http://www.lib.byu.edu/~rdh/wwi/1918/14points.html>.
- In re Yamashita*, 327 U. S. 1 (1946).