The US Army War College Quarterly: Parameters

Volume 32
Number 2 *Parameters Summer 2002*

Article 6

5-14-2002

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From *Parameters*, Summer 2002, pp. 73-85.

American soldiers "are not just warriors, they are humanitarians."[1]
— Former Secretary of Defense William Cohen

A battle rages over the future of the law of war. It pits those who must plan and fight wars against those committed to reducing the suffering caused by war; it is a battle between the utilitarians or warriors, on one side, and the humanitarians on the other. The outcome of this battle may determine the future course of US defense, foreign, and security policy. It will certainly affect the legitimacy of our use of force. It will definitely affect our influence in the world.

The law of war has developed and will continue to develop driven by two radically different perspectives, that of the utilitarian or warrior and that of the humanitarian.[2] These two schools of thought have long battled for preeminence among policymakers, the political elite, and the society that they both serve. Unfortunately, each side views the other as the enemy. It may be only a slight oversimplification to suggest that the utilitarian sees the humanitarian as intent upon shattering the national defense, while the humanitarian views the utilitarian as unconcerned with the killing of innocent civilians.

From the beginning of the recorded history of combat, the rules regulating the conduct of warriors on the battlefield have been written by the utilitarians for the warriors. As recently as 1977, there were only limited challenges to the military professionals making the rules that determine what tactics, weapons, and conduct were considered acceptable on the battlefield. The utilitarians, responsible for the survival of the state or the monarch, were able to ignore or at least overrule any humanitarian voices raised in opposition to their development of the law of war. The minority humanitarian opposition was poorly organized,

had little access to public opinion or policymakers, and was often viewed as a threat to the security of the state or to the lives of the soldiers protecting the state.

In recent decades, however, the tide has begun to turn. The humanitarians are now taking the lead. Unless those who profess to take the side of the warrior take notice, there is a serious risk that the utilitarian's perspective will be increasingly ignored, with potentially dire consequences for the power and influence of the United States.

A significant number of influential conservative figures continue to deny the effective existence of international law, let alone the law of war.[3] Those conservatives who do recognize the actuality of international law warn against the

undue influence of nongovernmental and international organizations on the national security of the United States. Regardless of these views, however, there can be little doubt of the growing influence of actors outside the government of the United States. In addition, there can be no doubt of the failing influence of the United States in relation to such organizations.[4]

The law of war does indeed exist.[5] Denial of its existence or the extent to which it affects combat operations is foolish. Resistance to its study and application to our operations is counterproductive. In order to triumph, the US Army must advance the cause of the law of war, and in order to advance this cause, members of the US Army must participate in the development and enforcement of the law of war. To do otherwise is to surrender the initiative to groups and states whose interests may be antithetical to our nation's.

To understand the full scope of the conflict it is necessary to study the dual purposes of the law of war through history, the relationship between the two, and the present state of affairs. Doing so will reveal the nature and effects of this conflict between humanitarians and warriors.

Historical Basis

The conflict between humanitarians and utilitarians in the law of war is nothing new. The Old Testament of the Bible describes several instances in which humanitarian values contradict the mission orientation of the utilitarians. Various passages from the Pentahcuh instruct the Israelites to slay their conquered enemies'

women and children.[6] Later books approach the same problem from a humanitarian perspective and instruct the King of Israel to show mercy to his captives.[7]

Similar conflict existed between the utilitarian warriors of Sparta and the humanitarian Athenians of ancient Greece. After accepting the surrender of the besieged city of Platea, the Spartans not only executed the men for their cowardly act, but took the women as slaves.[8] The Athenians, however, developed a list of a dozen rules of engagement, one of which forbade the execution of captives.[9]

The utilitarian/humanitarian conflict was also present in the early Catholic Church. The same Church that sanctioned the utilitarian concept of Saint Augustine's just war[10] displayed its humanitarian side by attempting to restrain violence by restricting the use of certain weapons, such as the crossbow (although one might see such efforts as being matters of preemptive defense). Though the motivation to restrain violence was prompted primarily by concern over intra-Christian warfare, important expressions of noncombatant immunity evidence the continued concern leaders had for the simple sake of humanity. These Church efforts in conjunction with the rise of a professional warrior class of knights led to the Age of Chivalry.

Although the utilitarian continued to dominate the shaping of the law of war in the mid-19th century, at least one former warrior was instrumental in stressing humanitarian concerns in his important codification of the law of war. When General Henry Halleck was looking for an individual to create the first statement of the laws of warfare during the American Civil War, he turned to a scholar and former soldier, Francis Lieber. Professor Lieber had fought as a young man with the Prussian army at the battle of Waterloo in 1815, and was teaching law at Columbia University when commissioned by General Halleck. Lieber was a man who understood the warrior's utilitarian perspective and goals. But he also was touched personally by the war. His eldest son had died fighting for the Confederacy, and two other sons were serving in the Union Army. He was determined to lessen the suffering of the conflict.

The Lieber Code produced for the US Army in 1863, General Orders No. 100, is generally considered the first modern codification of the law of war

and its humanitarian purposes. The Lieber Code stressed the protection not only of noncombatants (Article 19), their

property (Article 22), and hospitals and churches (Article 34), it also prohibited the use of poison (Article 70) and the declaration of no quarter (Article 60). However, Lieber realized he was writing for a utilitarian master. Therefore, his code acknowledged the supremacy of the warrior's utilitarian requirements even though explicitly referring to the need to balance military necessity with humanitarian concerns. Indeed, Lieber codified the flexibility necessary for the preeminence of the utilitarian's perspective in modern times: "Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war."[11]

At about the same time that Lieber was developing his Code, the greatest advocate to that time of the humanitarian perspective was coming into prominence—Jean Henri Dunant. A Swiss citizen, not a warrior, Dunant witnessed such horrible suffering among the soldiers at the Battle of Solferino in 1859 that he embarked on a mission to alleviate suffering in war. His efforts led to the creation of the International Committee of the Red Cross.

Dunant's work also led to the first International Conference at Geneva, Switzerland, in 1864. Although this first Geneva Convention dealt only with the treatment of the sick and wounded on the battlefield, for the first time the humanitarians were setting rules on how the utilitarians could conduct themselves on the battlefield. It was the significant beginning of a trend.

The Geneva Convention was followed by the conferences on the law of war and disarmament called by the Tsars of Russia, leading to the Hague Convention IV of 1899 and 1907 concerning the Laws and Customs of War on Land. The famous Martens preamble to that Convention signifies "the classical attempt to accommodate military requirements to the principle of humanity in war."[12]

It was not until after the carnage of the First World War, however, that the humanitarians made significant progress in imposing their will upon the utilitarians. The 1925 Geneva Gas Protocol, which outlawed the use of poison gas (but not its production or stockpiling), stands as the first successful attempt by the humanitarian school to deprive the utilitarians of one of their specific weapons used in warfare.

Similarly, the 1929 Geneva Convention represented another humanitarian victory. The 1929 Convention contained specific provisions dealing with the protection of prisoners of war. These restrictions and requirements imposed significant burdens upon the utilitarians.

Although the Hague Air Rules of 1923 were never formally adopted by any nation, they represented what many humanitarians hoped would be the standard for air warfare in World War II. The rules contained such novel humanitarian concepts as target lists, with Articles 22 and 23 banning terrorizing civilians and damaging private nonmilitary property, injuring noncombatants, and bombing to collect funds.[13] However, during World War II, when the survival of the state was at

stake, the utilitarians still dominated the military decision process. As a result, the full force of air power was unleashed on such targets as Rotterdam, London, Hamburg, Dresden, Tokyo, and of course Hiroshima and Nagasaki. Regardless of the pre-war successes of the humanitarians, in total war the utilitarians would guide the application of the law of war to achieve their own ends.

As a result of the degree of inhumanity experienced in World War II and subsequently in Vietnam, humanitarianism catapulted to the forefront in the development of the law of war. The four Geneva Conventions of 1949 and their 1977 Protocols are considered by most to be almost entirely humanitarian in nature. The Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War was developed in response to the atrocities committed upon the civilian populations in occupied territories. The Convention placed significant burdens upon a conquering army to care for the safety, welfare, and health of any civilians in occupied territory.[14] The passage of this Convention represented a major victory for the humanitarian school over the warriors. Previous conventions had forced the utilitarians to deal with issues such as the treatment of the sick and wounded and prisoners of war—duties which most utilitarians saw as part of their "warrior code" anyway. The Civilian Convention for the first time placed affirmative obligations upon the

utilitarian warrior class to address the food, shelter, and health-care needs of civilians in an occupied area. Other humanitarian victories would follow.

The Increased Influence of Nongovernmental Organizations

Nongovernmental organizations (NGOs) now play a greater role in international relations than ever before.[15] Their participation in the development of the law of war is not new—various NGOs around the world have participated in international affairs for more than 200 years. But only recently have their humanitarian agendas attempted to usurp the development of the law of war.

The most influential nongovernmental organization in history is the one begun by Henri Dunant, the International Committee of the Red Cross (ICRC). Beginning in the 1860s, the ICRC has initiated and influenced the conclusion of practically all major developments in the law of war relative to the protection of the victims of war. Historically the ICRC has held a lesser role in the development of the law of war relative to the means and methods of warfare. However, its role in that respect has recently increased dramatically.

During the Persian Gulf War, the US Joint Chiefs of Staff (JCS) prepared and distributed a memorandum to the ICRC and the coalition allies expressing the US understanding of the applicable law of war under Geneva Protocol I.[16] This memorandum was written in response to an ICRC memorandum delivered to the Joint Chiefs describing its understanding of the applicable rules. The JCS memorandum was especially important since many of our coalition partners had ratified the Protocol while the United States had not.

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Another example of the ICRC's increased role in the development of law related to the conduct of warfare is its efforts to prevent or control the use of certain weapon systems. In conjunction with a number of other NGOs and intergovernmental agencies, the ICRC played a significant role in the movement to conclude a protocol on blinding laser weapons and a convention on antipersonnel landmines. More recently, the ICRC initiated the SIrUS Project (Superfluous Injury or Unnecessary Suffering). The SIrUS Project is an attempt to bring objectivity to the legal notion of "superfluous injury or unnecessary suffering" and so aims to facilitate a review of the legality of specific weapons. The proponents of SIrUS believe that the legality of certain weapons should be determined by an international organization or committee, instead of the current practice of leaving such determinations up to individual nations.

Perhaps most indicative of the growing influence of NGOs in international relations was the International Campaign to Ban Landmines. On no other issue of public concern have NGOs achieved so spectacular a success as on the issue of banning landmines. This campaign was embraced and promoted by several NGOs, including the ICRC, Human Rights Watch, Vietnam Veterans of America Foundation, and Physicians for Human Rights.

An important and overlooked aspect of the growing influence of NGOs, however, is their willingness to work with the military. Far from being the unrealistic romantics envisaged by many US service members, many NGOs and their constituents are realistic about the political, economic, social, and military interests at play in the development of the law of war. They also recognize the fact that both the humanitarian and the warrior share the same ultimate goals. They recognize that their success depends upon cooperation and mutual respect.

The US Role

The United States once led the development of the law of war in order to further our national interest and the interests of humanity.[17] Now, however, the United States is viewed by much of the world as a reactionary force impeding further development of the law of war. Our position has become dominated by a utilitarian/warrior outlook, while the humanitarian perspective has gained greater currency across much of the globe.

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The Geneva Protocols

The United States has yet to ratify either of the Geneva Protocols of 1977. President Ronald Reagan enunciated our objection to ratification of Protocol I in a letter to the Senate in 1987.[18] Although he did ask the Senate to give its advice and consent to Protocol II, the Senate has not done so because it has treated the Protocols as a package.[19]

President Reagan refused to endorse Protocol I because of concerns that it would legitimate various liberation movements that would upset, from his point of view, the balance of power, and endanger the security of some of our allies, like Israel and South Africa. Because of the "perception of Protocol I as proterrorist, and . . . because of military objections by the Joint Chiefs of Staff, the President concluded that the Protocol was 'fundamentally and irreconcilably flawed.'"[20]

The military "argued that the Protocol's humanitarian tilt would thwart quick victories in war and would pose additional dangers to members of the armed forces."[21] Though the United States acknowledged that most of the Protocol's provisions reflected customary international law, the political and military concerns with the remaining provisions prevented our ratification. The United States tried to persuade its friends and allies not to ratify the Protocol, but the vast majority of states—including almost all of our allies—have ratified it.

Theodor Meron was recently nominated by US Secretary of State Colin Powell to become the next US judge on the International Criminal Tribunal for the Former Yugoslavia. In Meron's analysis of Protocol I in 1994, he stated:

> What is particularly worrisome about the past US posture is that the United States may already have wasted much of its vast potential for shaping the customary law of war. Ultimately, we may find ourselves bound by rules that may not best serve US national interests.[22]

Meron balanced military concerns with humanitarian considerations and concluded that ratification of Protocol I would serve our national interest. His analysis recognizes an "ever-present humanistic strand in US foreign policy."[23] This humanistic trend frustrates the military because it contradicts the doctrine that "require[s] that wars be ended as quickly as possible by the massive use of force."[24] Nevertheless, Meron believes that full military participation in the further review of both Protocol I and other humanitarian developments in the law of war can reestablish the United States as a leader in the field.

Meron's criticism and warning in 1994 appear to have been correct. Eight years later, the United States is more alienated from its allies and the international community than ever. A treaty banning antipersonnel landmines has been approved by a large number of our allies, over our objection, and a statute establishing a permanent International Criminal Court was adopted by a great number of our allies in spite of our objections. It is also interesting to note that almost all of the discussion relative to the Geneva Protocols in the relevant litera-

ture is silent about US objections.[25] One is left with the impression that the world cares less and less about what the United States thinks regarding the law of armed conflict and more and more about the fact that the United States seems to behave as if it can dictate the law but is not subject to the law.[26]

The 1980 Certain Conventional Weapons Treaty

The position of the United States in relation to the Certain Conventional Weapons Treaty (CCW)[27] exemplifies its persistent adherence to a utilitarian or warrior perspective in the face of continued humanitarian gains. The CCW consists of three Protocols attached as part of the original Convention in 1980. These Protocols are on nondetectable fragments; prohibitions or restrictions on the use of mines, booby-traps, and other devices; and prohibitions or restrictions on the use of incendiary weapons, respectively. A fourth Protocol on blinding laser weapons was attached in 1995 and an amended Protocol II was attached in 1996.[28] The United States ratified only the Convention and its first two Protocols in 1995.[29] Though President Bill Clinton submitted the remaining protocols for ratification in 1997, the Senate has yet to render its advice and consent.[30]

President Clinton's submission to the Senate reflected the military reservations and objections to the limits housed in the CCW. They illustrated the warrior's resistance to blanket prohibitions on the use of certain weapons and reasserted the demand for flexibility in the use of the weapons if required by military necessity.

Though Protocol III "does not prohibit the use of incendiary weapons, per se," it does prohibit "attacks on the civilian population or civilian objects, and places limits on attacks on military objectives located within a concentration of civilians."[31] The United States has made plain its position that it should be legitimate to use incendiary weapons in civilian areas if that is the best munition to use under the circumstances.[32]

The Protocol on Blinding Lasers prohibits the use of lasers "whose combat function causes permanent blindness," but "recognizes the legitimate use of lasers for other military purposes" such as precision targeting. Nevertheless, the United States again has made plain its desire to employ lasers that may blind, explicitly. Similarly, in relation to the Amended Protocol II, the United States has carefully expressed its comprehension of the legitimate use of such weapons in order to avoid any potential interpretation of the Protocol adverse to its military interests.

The 1997 Ottawa Convention

The success of the campaign to ban landmines in spite of US opposition to the 1997 Ottawa Convention[33] is evidence of the diminished authority the United States enjoys in world affairs and the development of the law of war. In essence, it typifies a growing trend of humanitarian victory over warrior concerns. The US opposition to the treaty is based on the perceived need for such mines to

block a North Korean invasion of South Korea and to defend anti-tank minefields, and the desire to legitimize the continued use of remotely delivered anti-personnel mines. However, not only have our allies rejected such reasons for US exemption from the treaty, at least one NATO ally—Norway—has called for the removal of US mines from its territory under the treaty.[34]

The triumph of humanitarian interests is evident in the Convention's preamble:

> The States Parties, *Determined* to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement, . . . *Wishing* to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims, . . . *Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines, and numerous other non-governmental organizations around the world, *Basing* themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants, Have agreed as follows: . . .[35]

In addition, there is no mention of "military necessity" anywhere in the body of the treaty. There is no balance between the competing purposes of the law of war.

Utilitarians are quick to defend former President Clinton's decision not to sign the treaty. That defense is based entirely on the principle of military necessity, a concern rejected by the parties to the treaty, including most of our allies.

The International Criminal Court

In an article in *The National Interest*, Senator Jesse Helms wrote:

> The . . . supporters [of the establishment of a permanent international criminal court] argue that Americans should be willing to sacrifice some of their sovereignty for the noble cause of international justice. This, frankly, is laughable. International law did not defeat Hitler, nor did it win the Cold War. What stopped the Nazi march across Europe, and the communist march across the world, was the principled projection of power by the world's great democracies. And that principled projection of force is the only thing that will ensure peace and security on the international scene in the future.
>
> Indeed, more often than not, "international law" has been used as a make-believe justification for hindering the advance of freedom.[36]

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To the contrary, however, on the heels of the humanitarian triumph in the Ottawa Convention came the 1998 Rome Statute of the International Criminal Court, another step in favor of humanitarian concerns:

> The States Parties to this Statute, *Conscious* that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, *Mindful* that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, *Recognizing* that such grave crimes threaten the peace, security and well-being of the world . . .[37]

The treaty will come into force on 1 July 2002, after it was ratified by the 60th signatory on 11 April 2002.[38] One hundred thirty-nine states have signed the treaty, but at this writing only 66 have ratified it. Although former President Clinton finally signed the Statute on 31 December 2000, he did so with numerous reservations. In addition, it is highly doubtful that the Bush Administration will work to ensure US ratification of the Statute. Senator Helms has made clear his refusal to support the International Criminal Court. Secretary of State Colin Powell similarly made clear in his confirmation hearings that he will not support US participation in the Court.

The US Department of Defense also objects to US participation in the Court: "The . . . military's objections have played a significant role in shaping the treaty because it is more involved globally than any other nation's armed forces, with hundreds of thousands of US troops operating in dozens of nations every day."[39] The Pentagon is concerned that US troops will not be sufficiently protected under the treaty and that US soldiers could be subjected to politically motivated charges.

Conclusion

The history of humanity is one of war and frequent acts of unlimited brutality. The history of humanity also reveals a persistent and growing effort to limit the nature of warfare. This conflict is a manifestation of humanity's will to survive. Human beings fight to survive and flourish. They also endeavor to protect the life

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of humanity by constraining the methods of fighting. One can posit that all humans possess the characteristics of the warrior and the humanitarian. The conflict between the two is apparent in the individual choices people make and the efforts of states and groups. The law of war reflects one aspect of that conflict.

This conflict between utilitarian/warrior and humanitarian is reflected also in US foreign policy. The United States tends to adhere to the principle of military necessity as superior to humanitarian concerns. As a result, the United States is itself in conflict with a general trend in the development of the law of war along stronger humanitarian lines, and in doing so the United States distances itself from the rest of the world. That fulfills the criticisms of our allies and enemies alike that we are self-serving to the extreme and arrogantly blind to the consequences of our acts.

The United States now refuses to participate in the establishment of a permanent international criminal court unless

promised that such a court could never exercise jurisdiction over Americans. The United States refuses to sign or ratify a treaty banning anti-personnel land mines because we deem them necessary to defend against an invasion by North Korea to South Korea, as well as because of our desire to remotely deploy anti-armor minefields interspersed with anti-personnel mines. The United States continues to refuse to sign the 1977 Protocols to the Geneva Conventions almost universally ratified otherwise.

The US military is responsible to fight and win the nation's wars. It is thus in the best interests of the military for the United States to lead the world in the development and enforcement of the laws of war, the very rules by which the permissible methods and means of warfare are defined. Instead, the United States has surrendered the means by which we can best fulfill our responsibilities. The reason for this, in part, is our dominant utilitarian/warrior viewpoint and how we perceive the rest of the world.

As suggested in the introduction, the utilitarian tends to see the humanitarian as a hopeless idealist, either too naive or unwilling to participate in the warrior's very real, very important calling, the survival of the state. Given this perception of the humanitarian, the utilitarian/warrior will seek to either ignore or ridicule any advances proposed by an international community representing a humanitarian agenda. This is a mistake. Gone are the days when the utilitarian could ignore the simple protests of an unorganized humanitarian minority. Now the humanitarian voice is represented by many of our closest allies and a majority of the rest of the world, and the voice gets louder with every passing year. It would be ironic indeed if the utilitarians' stoic refusal to even consider détente with the humanitarians led to the ultimate failure to accomplish the warrior's mission.

To wrest the initiative from our competitors and our enemies, the United States should embark on a dedicated course of involvement in the development of the law of war. In light of the increasing role of nongovernmental organizations in this respect, the United States will be better served by active consultation and cooperation with organizations such as the International Committee of

the Red Cross, the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR).

Permanent liaison and participation with such organizations will facilitate the definition of common goals and therefore defuse further conflict between utilitarians and humanitarians. Such cooperation will ensure the protection of US national security interests in the maintenance of world order.

Only through understanding and appreciating each other's perspective and mission can the conflict between utilitarians and humanitarians be reconciled. The future of the law of war will be dictated by the conflict between these two important schools of thought. It is in the interest of both the utilitarian/warrior and the humanitarian for the United States to reassume leadership in the development of the law of war on the international scene.

NOTES

1. William Cohen, Secretary of Defense under President Clinton, speaking about the US armed forces at an event entitled a Town Hall Meeting on America's Future, held in Washington, D.C., on 29 January 2001 and broadcast on C-SPAN. The meeting was chaired by Tom Brokaw and included Robert Reich and Doris Kearns Goodwin as panel members in addition to Secretary Cohen.

2. Throughout this paper the terms "utilitarian" and "humanitarian" will be used to describe the two vastly different perspectives on the purpose of the law of war. This is not meant to imply that an individual who prescribes to the utilitarian (or warrior) perspective has no humanitarian concerns, nor that the individual who focuses on humanitarian concerns is not interested in stressing the value of practical over humane qualities. Indeed, this paper will assert that the common values shared by both schools can provide a foundation for overcoming differences.

3. See, e.g., Jesse Helms, "American Sovereignty and the UN," *The National Interest*, No. 66 (Winter 2000/01), p. 32.

4. See, e.g. Theodor Meron, "The Time has come for the United States to Ratify Geneva Protocol I," 88 *A.J.I.L.* 678 (1994).

5. The law of war defines, permits, and prohibits various activities that relate to the conduct of armed conflict. It is generally divided into two categories, jus ad bellum and jus in bello. Jus ad bellum is that category of the law of war relating to the justification for resorting to armed conflict. Jus in bello is that category of the law of war relating to the manner in which armed conflict is conducted. See, e.g., Adam Roberts and Richard Guelff, *Documents on the Laws of War* (3d ed.; New York: Oxford Univ. Press, 2000). Hereinafter *Documents*.

6. Numbers 31:7, 10, 15-19; Deuteronomy 20: 10-14, 1920; Revised Standard Version of the Bible.

7. 2 Kings 6:21-2; Proverbs 24:21.

8. Robert B. Strassler, ed., *The Landmark Thucydides, A Comprehensive Guide to the Peloponnesian War* (New York: Free Press, 1996), p. 185.

9. Ibid., p. 193.

10. This is not to imply that St. Augustine was a utilitarian. The author of such important early Christian works as *The City of God* and *The Confessions of Saint Augustine,* Augustine was one of the strongest voices for restraint in warfare and the protection of noncombatants. Interestingly, however, other early Church writers, such as Thomas Aquinas, took basic St. Augustine principles such as the Just War theory and put a strong utilitarian spin on them. For example, if the early Church found the conflict to be just (blessed by God), any tactic to accomplish the ultimate aim was authorized. This could include the slaughter of the infidel prisoner of war or the local population that refused to convert to Christianity. The more just the cause—such as freeing the holy land—the more latitude was allowed for the conduct of the warrior, a very utilitarian view on what originally was a humanitarian concept.

11. Michael Howard, et al., eds., *The Laws of War* (New Haven, Conn.: Yale Univ. Press, 1994), p. 143, Tami Davis Biddle, quoting Article 15 of Lieber Instructions.

12. Ibid., p. 71.

13. Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* (Brookfield, Vt.: Ashgate, Dartmouth, 1998), p. 28.

14. See Articles 55, 56, 57, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

15. In the Vienna Declaration Programme of Action, adopted at the Vienna World Conference on Human Rights in 1993, the contribution of NGOs was especially acknowledged:

> The World Conference on Human Rights recognizes the important role of non-governmental organizations in the promotion of all human rights and in humanitarian activities at national, regional, and international levels. The World Conference on Human Rights appreciates their contribution to increasing public awareness of human rights issues, to the conduct of education, training, and research in this field, and to the promotion and protection of all human rights and fundamental freedoms. While recognizing that the primary responsibility for standard-setting lies with States, the Conference also appreciates the contribution of non-governmental organizations to this process. In this respect, the World Conference on Human Rights emphasizes the importance of continued dialogue and cooperation between governments and non-governmental organizations.

Michael N. Schmitt and Leslie C. Green, eds., *The Law of Armed Conflict: Into the Next Millennium* (Newport, R.I.: Naval War College, 1998), p. 338, citing UN Doc. A/CONF.157/24 (1993), reprinted in 32 *I.L.M*. 1661 (1993).

16. Meron, p. 681.

17. For example, the publication of the Lieber Code, President Theodore Roosevelt's call for the 1907 Hague Conference, and our instrumental role in the prosecution of war crimes after World War II.

18. Meron, p. 678.

19. Ibid.

20. Ibid.

21. Ibid., p. 679.

22. Ibid., pp. 678, 681-82.

23. Ibid., p. 686.

24. Ibid., p. 685.

25. McCoubrey, pp. 211-52.

26. A typical report expressing such sentiments can be found in the 31 January 1999 edition of *The Sun* (Baltimore) under the headline, "Nuremberg-style Trial becoming an Anomaly; U.S. Duality on Concept has Contributed to Decline":

> While Secretary of State Madeleine K. Albright continues to express a commitment to the enforcement of international criminal law, there is a growing duality in American foreign policy. Much more significant than the obvious gap between words and deeds is a growing tension between America's much vaunted ethical and legal principles and the practical policy interests of a world power. This became evident last summer during the Rome conference where the United States joined pariah nations such as China, Iraq, and Yemen and refused to sign the Rome Treaty creating a permanent international criminal court.

27. The complete title is The 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and Protocols.

28. *Documents*, pp. 515-51.

29. Ibid., pp. 515, 551.

30. Ibid., p. 551; Marian Nash (Leigh), "Contemporary Practice of the United States Relating to International Law," 91 *A.J.I.L*. 325 (1997).

31. *Documents*, p. 517.

32. Nash.

33. The full name of the treaty is the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.

34. See, e.g., "The Ottawa Treaty and its Impact on U.S. Military Policy and Planning," 25 *Brooklyn Journal of International Law* at 185.

35. *Documents*, pp. 648-49.

36. Helms, p. 32. Senator Helms, Chairman of the US Senate Committee on Foreign Relations, complaining of the ICJ

condemnation of the US mining of Nicaragua's harbors and the recent investigation of alleged NATO war crimes during the Kosovo campaign by the chief prosecutor of the ICTY, among other things.

37. *Documents*, p. 671.

38. Rome Statute of the International Criminal Court, internet, http://www.un.org/law/icc/, accessed 25 April 2002.

39. Thomas E. Ricks, "U.S. Signs Treaty on War Crimes Tribunal; Pentagon, Republicans Object to Clinton Move," *The Washington Post*, 1 January 2001, p. A1.

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Reviewed 13 May 2002. Please send comments or corrections to carl_Parameters@conus.army.mil