

DETECTING *JUS IN BELLO* VIOLATIONS OF SUPERIORS AS A FOUNDATION FOR MILITARY JUSTICE REFORM

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I. INTRODUCTION

Congress introduced the Military Justice Improvement Act of 2013 on November 20, 2013, with the foremost intention of “reform[ing] procedures for determinations to proceed to trial by court-martial for

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certain offenses under the Uniform Code of Military Justice.”¹ The salient bill is still pending.² Two fall 2013 seminars at Yale Law School involved topics essential to addressing the present angst over the commission of war crimes.³ First, Yale Law held a “Global Seminar on Military Justice Reform” that appraised the need to address the incidence of private criminal activity and battlefield crime and to assure the availability of due process and rule of law protections in military courts.⁴ The second topic was a “Conference on the Legacy of Stanley Milgram,” which considered Stanley Milgram’s book *Obedience to Authority* and his findings that hierarchical organizations can impel the members of institutions to execute raffish directives that would not otherwise be perpetrated without elements of organizational persuasion.⁵

Premised on a reflection of the overlay between the Military Justice Improvement Act of 2013 and Yale’s timely conference topics, this Article emphasizes that a decisive query to both curbing battlefield crimes, and to cultivating favorable behavior within existing hierarchical dynamics, should center on examining whether there are effectual deterrents to illicit acts during armed combat in the form of anticipated punishment for perpetrators *throughout* the military hierarchy and whether there are sensible remedies for victims. Expectations about the law and remedies may heighten vigilance when officials issue chain of command directives and may curtail warfare transgressions by subordinates through exemplars of laudatory behavior. By contrast, excessively elastic precedential conceptions of military necessity approaching impunity may pare the success of achieving the policy intent of substantive and procedural reforms.

Part II introduces the quandary, which is that U.S. military orders in warfare are presumed to be legal and that actions of military subordinates are punishable, ostensibly because of the implicit assumption that troops acted *ultra vires* to official hierarchical directives when committing criminal acts.⁶ Moreover, when the U.S. government provides restitution to victims, compensation is bestowed generally without impugning the

1. Military Justice Improvement Act, S. 1752, 113th Cong. (2013), available at <http://www.govtrack.us/congress/bills/113/s1752/text>.

2. *Id.*

3. 2013 Conferences, YALE LAW SCHOOL, <http://www.law.yale.edu/news/2013conferences.htm> (last visited Oct. 22, 2014) (citing conferences listed on Oct. 19, 2013 and Oct. 26, 2013).

4. 2013 Global Seminar on Military Justice Reform, YALE LAW SCHOOL, <http://www.law.yale.edu/news/gsmjr13.htm> (last visited Dec. 19, 2014).

5. Conference on the Legacy of Stanley Milgram, YALE LAW SCHOOL, <http://www.law.yale.edu/news/stanleymilgram.htm> (last visited Dec. 19, 2014).

6. See *infra* Part II.A.

lawfulness of the military combat directives that were issued by superiors.⁷ Part III explains how the result in Part II—premising that hierarchical military directives are legal—may not, on application, be conspicuously consistent with the international law duty to compensate under *jus ad bellum* and *jus in bello* rules, the balance between humanitarian protection and military necessity, and itemized rules on weapon systems that have not adjusted to technological prowess.⁸ Given that the events that transpired during the Iraq War and occupation placed military justice issues and chain of command authority at the forefront of attention, events that occurred in Iraq will be referenced to assess the remedial outcome-deterrence postulation.

II. SUPERIOR DIRECTIVES ARE PRESUMED TO BE LEGAL

A. *Illegal Subordinate Acts Are Ultra Vires*

Commentators have held varying perceptions on the degree to which U.S. military forces committed international humanitarian law violations during the Iraq War.⁹ There were ongoing pertinent indications of occasion to be more conscientious because the number of Iraqi civilian deaths aggregated to approximately 10,000 during the first year

7. See *infra* Part II.B.

8. See *infra* Part III.

9. See LARRY SIEGEL, CRIMINOLOGY, THEORIES, PATTERNS, AND TYPOLOGIES 275 (2012) (referencing the debate inherent in questions raised by Scott Bonn's book, *Mass Deception* (2010), which contends "[t]he Bush administration perpetrated state crimes and war crimes as well as violations of international criminal law when they invaded Iraq"); see also Andrew Morgan, *War Crimes Allegations*, JURIST (July 20, 2013, 9:39 PM), <http://jurist.org/feature/2013/07/war-crimes-allegations.php> (stating that "[t]he Iraq War was plagued with accusations of war crimes and atrocities, aimed at the different parties and countries involved in the conflict"); Girardeau A. Spann, *Terror and Race*, 45 WASHBURN L.J. 89, 96 (2005) (opining that "[m]any foreign victims of the United States . . . are likely to view the United States itself as a practitioner of terrorist acts in its infliction of collateral damage"); Karima Bennouna, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 172–73 (2004) ("There have been serious allegations that both the U.S./U.K. forces and the Iraqi defenders committed grave violations of international humanitarian law (IHL) during the conflict. It is also clear, but less publicized, that fundamental principles of human rights law were trampled in the course of this war . . ."). However, violations may be relative or less intense than a foe's violations. See W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 332 (2006) (contending "whether by exaggerating the tragedies of war or by creating fraudulent violations of international law, asymmetric warriors may be able to exploit the processes" of human rights abuses).

following the invasion¹⁰ and continued to escalate thereafter.¹¹ Some percentage of civilian casualties was attributable to U.S. military actions, and some percentage was caused by insurgent attacks.¹² The Pentagon investigated hundreds of cases of troop misconduct,¹³ but not all allegations resulted in punishment.¹⁴ To incorporate an initial configuration that correlates troops' acts to sovereign initiatives, assume that potential wrongs can be classified into three categories with an increasing association to chain of command orders.

First, there are examples of distinctly *ultra vires* acts committed by subordinates in a zone of occupation, such as perpetrating an armed robbery, stealing an Iraqi vehicle,¹⁵ beating an Iraqi hotel clerk to death,¹⁶ and sexually assaulting and killing an Iraqi teenager and murdering her family.¹⁷ The latter case was egregiously heinous and eventually resulted

10. AMNESTY INT'L, IRAQ: ONE YEAR ON THE HUMAN RIGHTS SITUATION REMAINS DIRE 4 (2004), available at <http://www.amnesty.org/en/library/asset/MDE14/006/2004/en/abb12f40-d601-11dd-bb24-1fb85fe8fa05/mde140062004en.pdf>.

11. *The Toll of War*, NPR (Aug. 4, 2009), <http://www.npr.org/news/specials/tollofwar/tollofwarmain.html> (noting that from the invasion until July 2006, estimates of Iraqi deaths ranged from the Bush Administration estimates of 30,000 to the Johns Hopkins School of Public Health estimates of 650,000); Spann, *supra* note 9, at 94 (noting that in the early years, attacks on Afghanistan led to an estimated 3,000 civilian casualties and the attack on Iraq led to an estimated 25,000 civilian deaths).

12. AMNESTY INT'L, *supra* note 10, at 4–7.

13. Colin H. Kahl, *How We Fight*, FOREIGN AFF., Nov.–Dec. 2006, at 99 (noting that the Pentagon reportedly investigated more than six hundred cases of soldier misconduct through the first three years following the invasion).

14. Mark Kukis, *Should Iraq Prosecute U.S. Soldiers*, TIME (Aug. 26, 2008), <http://content.time.com/time/world/article/0,8599,1836217,00.html> (expressing that “[t]he U.S. military presence in Iraq since 2003 has produced, in the eyes of many Iraqis, a lengthy list of alleged crimes by U.S. troops with scant signs of justice”); Douglas Jehl, *Pentagon Will Not Try 17 G.I.'s Implicated in Prisoners' Deaths*, N.Y. TIMES (Mar. 26, 2005), [http://www.nytimes.com/2005/03/26/politics/26abuse.html?_r=1&pagewanted=all&posit](http://www.nytimes.com/2005/03/26/politics/26abuse.html?_r=1&pagewanted=all&position=) ion=.

15. Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 98 (2005) (noting that Sergeant First Class James H. Williams was sentenced to a bad-conduct discharge).

16. Christopher Waters, *Beyond Lawfare: Juridical Oversight of Western Militaries*, 46 ALBERTA L. REV. 885, 906 (2009) (stating that there was an implication of a cover-up surrounding the investigation and all of the defendants were acquitted except for the corporal who acknowledged or admitted to inhumanely treating the detainee).

17. Steven Green and other soldiers raped Abeer Kassem Hamza Al-Janabi, a teenage girl, and murdered her family in their home in Mahmoudiyah. Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 726–31 (2007).

in convictions in U.S. military¹⁸ and federal courts,¹⁹ but Iraqis were so appalled by the crime that they swiftly captured and beheaded two Army soldiers as revenge.²⁰ No superior directives can possibly be associated with such an execrable non-combat atrocity.

A second type of case borders on operational directives, such as if troops were dispatched on patrol missions and discharged weapons while mistakenly believing that lethal force was essential to thwarting a perceived threat.²¹ For example, in *United States v. Nazario*, the defendant was charged with voluntary manslaughter for allegedly killing

18. See Olivia Zimmerman Miller, Comment, *Murder or Authorized Combat Action: Who Decides? Why Civilian Court is the Improper Forum to Prosecute Former Military Service Members Accused of Combat Crimes*, 56 LOY. L. REV. 447, 464 (2010); see also *Soldier Admits Lesser Crimes in Iraq Killings*, N.Y. TIMES (July 31, 2007), <http://www.nytimes.com/2007/07/31/world/middleeast/31soldier.html?fta=y>; Ryan Lenz, *Soldier Sentenced to 110 Years for Attack*, WASH. POST (Aug. 5, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/04/AR2007080401631.html>; *Soldier Sentenced for Rape and Death of Iraqi Girl*, N.Y. TIMES (Feb. 23, 2007), http://www.nytimes.com/2007/02/23/us/23rape.html?_r=0; *Soldier Gets 100 Years in Iraq Rape and Murders*, WASH. POST (Feb. 23, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/22/AR2007022202206.html>. In the end, Sergeant Cortez was sentenced to 100 years in a military prison, Specialist Barker was sentenced to 90 years, Lieutenant Colonel Richard Anderson to life with the eligibility for parole, and Specialist James Barker to 20 years with the possibility of parole. *Iraq Rape Soldier Given Life Sentence*, THE GUARDIAN (Nov. 17, 2006, 5:57 AM), <http://www.theguardian.com/world/2006/nov/17/iraq.usa1>; Ewen MacAskill & Michael Howard, *U.S. Soldier Sentenced to 100 Years for Iraq Rape and Murder*, THE GUARDIAN (Feb. 23, 2007, 4:15 AM), <http://www.theguardian.com/world/2007/feb/23/usa.iraq>.

19. Steve Almasy, *Former Soldier at Center of Murder of Iraqi Family Dies After Suicide Attempt*, CNN (Feb. 18, 2014, 8:41 PM), <http://www.cnn.com/2014/02/18/us/soldier-steven-green-suicide/>.

20. John M. Hackel, *Planning for the "Strategic Case": A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine*, 57 NAVAL L. REV. 239, 258 (2009).

21. John R. Crook, *Contemporary Practice of the United States Relating to International Law: International Criminal Law: Continued UCMJ Proceedings Involving Civilian Deaths in Iraq*, 101 AM. J. INT'L L. 215, 215 (2007) (reporting that four members of a marine squad pled guilty to killing an unarmed Iraqi civilian in Hamdaniya in April 2006 and dragging him in his house and planting an AK-47 near his body); Ohman, *supra* note 15, at 95–96 (stating that Sergeant Michael P. Williams shot an Iraqi man twice and attempted to cover up the killing, but he was convicted of one count each of premeditated and unpremeditated murder, dishonorably discharged, and sentenced to life with the possibility of parole); *id.* at 93–94 (reporting that Staff Sergeant Johnny Home Jr. pled guilty to unpremeditated murder for shooting a 16-year-old Iraqi in August 2004, was sentenced to three years confinement, was required to forfeit pay, and was dishonorably discharged, and that Staff Sergeant Jonathan J. Alban-Cardenas was convicted of murder for his role in the killing of an Iraqi teen, and he was sentenced to one year in confinement and subject to a bad-conduct discharge).

four unarmed detainees during military combat operations in Fallujah in 2004.²² In 2008, a civilian jury acquitted Nazario because the prosecutors could produce no bodies and Marines present refused to testify and were incarcerated for contempt of court, but this was the first district court case to prosecute a defendant for battlefield crimes under the Military Extraterritorial Jurisdiction Act.²³ The Abu Ghraib interrogation-torture abuses implicated chain of command directives, but only several low-level military police officers were criminally convicted.²⁴ In both of the first two categories, had the troops not been situated in stressful conditions of a war and occupation, crimes would not have occurred, but this may not be a compelling exonerating defense for the individuals charged. However, situational circumstances may impact the reasonableness of the action in the second and third types of offenses.

The third category involves subordinate actions that are clearly linked to military directives, such that the troop is an agent to a superior-principal's official orders.²⁵ Even if an unjustified war is waged, troops are not legally culpable for executing state directives that are not war crimes, because military combatants are granted deference when following orders in obedience to the state.²⁶ U.S. troops are required to discharge orders, and the Military Rules of Engagement (ROE) specify "what, when, and where [soldiers] can shoot"²⁷ to ostensibly cap how

22. *Ex-Marine Accused of War Crime Speaks Out*, CBS NEWS (Aug. 17, 2008, 11:28 PM), <http://www.cbsnews.com/news/ex-marine-accused-of-war-crime-speaks-out-17-08-2008/>.

23. Eugene R. Fidell, *Criminal Prosecution of Civilian Contractors by Military Courts*, 50 S. TEX. L. REV. 845, 846-47 (2009).

24. See generally Robert Bejesky, *The Abu Ghraib Convictions: A Miscarriage of Justice*, 32 BUFF. PUB. INT. L.J. 103 (2014).

25. Dakota S. Rudesill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT'L L. 517, 532 (2007); David Kennedy, *Modern War and Modern Law*, 36 U. BALT. L. REV. 173, 177 (2007) (stating that "[i]n principle, no ship moves, no weapon is fired, no target selected without review for compliance with regulation"). U.K. chain of command directives and responsibility have become a recent controversy as human rights groups have submitted a dossier to the International Criminal Court alleging that the British Ministry of Defence "knew or should have known of the widespread patterns of abuse, and turned a blind eye to them." Estelle Shirbon, *Campaigners Ask ICC to Investigate Alleged UK War Crimes in Iraq*, REUTERS (Jan. 12, 2004, 1:22 PM), <http://uk.reuters.com/article/2014/01/12/uk-britain-iraq-icc-idUKBREAO8R20140112>.

26. Michael W. Brough, *Dehumanizing the Enemy and the Moral Equality of Soldiers*, in RETHINKING THE JUST WAR TRADITION 149 (Michael W. Brough, John W. Lango & Harry van der Linden eds., 2007).

27. See Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 4 (1994); see also U.S. DEP'T OF DEF., DIRECTIVE NO. 5210.56, CARRYING OF FIREARMS AND THE USE OF FORCE BY DoD PERSONNEL ENGAGED IN SECURITY, LAW AND ORDER, OR COUNTERINTELLIGENCE

military personnel operations are executed and to more fully parameterize legality.²⁸ For example, in exchange for having involuntary manslaughter and aggravated assault charges dropped, in 2012, U.S. Marine Sergeant Frank Wuterich pled guilty to providing “negligent verbal instructions” when he told Marines under his command to “shoot first and ask questions later,” which was not consistent with ROEs and were instructions that preceded a massacre that killed 24 Iraqi civilians in Haditha in 2005.²⁹ Wuterich was punished with demotion and a pay cut, and none of the Marines firing weapons were criminally convicted.³⁰

ACTIVITIES 2, 10 (2011), available at <http://www.dtic.mil/whs/directives/corres/pdf/521056p.pdf> (in the case of “DoD military and DoD civilian personnel engaged in security, law and order, or counterintelligence activities[.]” but not “DoD military personnel engaged in military operations subject to rules of engagement . . . [d]eadly force is justified only under conditions of necessity and may be used only when lesser means cannot be reasonably employed or have failed and the risk of death or serious bodily harm to innocent persons is not increased by its use.”); TERRY D. GILL & DIETER FLECK, *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 425 (2010) (stating that the U.S. Joint Chiefs of Staff Standing Rules of Engagement provides for an “inherent right of self-defense” as a response to hostile acts (e.g., “[a]n attack or other use of force”) and “demonstrated hostile intent” (e.g., “[t]he threat of imminent use of force”) and further noting that NATO Rules of Engagement had different terminology, stating “[t]he terms themselves were used in the same operational contexts and concepts”); U.S. DEP’T OF DEF., *DIR. 5210.56, USE OF FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES* 9 (2001) (stating in the case of security duties, deadly force is authorized when there has been an exhaustion of lesser methods, there is not a significant increase in the likelihood of “risk of death or serious bodily harm to innocent persons,” and there is a need to use self-defense, defend others, protect national security, prevent escape, or procure arrest).

28. OFFICE OF THE SURGEON MULTI-NATIONAL FORCE-IRAQ & OFFICE OF THE SURGEON GENERAL UNITED STATES ARMY MEDICAL COMMAND, MENTAL HEALTH ADVISORY TEAM (MHAT) V: OPERATION IRAQI FREEDOM 06-08, at 36, 63 (2008), available at <http://armymedicine.mil/Documents/Redacted1-MHATV-OIF-4-FEB-2008Report.pdf> (tabulating that 55% of military personnel respondents with combat experience in 2006 (and 41% in 2007) had elevated acute stress scores due to being in a threatening situation and noting anecdotal evidence about concerns that ethics training seemed overly restrictive in the event of real world combat dangers).

29. Mary Slosson, *Marine Pleads Guilty, Ending Final Haditha Trial*, REUTERS (Jan. 23, 2012, 5:45 AM), <http://in.reuters.com/article/2012/01/24/iraq-usa-haditha-idINDEE80M0I620120124>.

30. *Id.* (noting that “[s]ix of the eight Marines originally accused in the case had their charges dismissed by military judges, and a seventh was cleared of criminal wrongdoing”); Stan Wilson & Michael Martinez, *Marine in Haditha, Iraq, Killings Gets Demotion, Pay Cut*, CNN (Jan. 24, 2012, 11:05 PM), <http://www.cnn.com/2012/01/24/justice/california-iraq-trial/> (reporting that the original charges could have imposed 152 years in prison and that Khalid Salman, head of the Haditha local council, stated that “the judicial system in America is unjust” and “we will continue pursuing those soldiers legally through the international courts”).

There may be a perception that executing military directives that result in atrocities will eventuate into significant punishment³¹ because the military cannot authorize troops to use force that exceeds a state's treaty obligations under laws of war,³² or there can be discipline or criminal punishment.³³ However, as JAG Attorney Martin White wrote: "Prosecuting U.S. servicemembers for war crimes committed under violations of treaties is uncharted territory. In My Lai [during the Vietnam War], perhaps the most publicized American war crime, American Soldiers killed between 150 and 400 noncombatants, '[h]owever, there was only one conviction, that of Lieutenant Calley.'"³⁴ Calley was commuted by President Nixon.³⁵ Similarly, not a single troop was indicted for firing a weapon in operations during the first three years of the Iraq War and occupation.³⁶ The lack of prosecutions under the

31. U.S. law punishes war crimes. See 18 U.S.C.A. § 2441 (West 2013). See generally W.G.L. Mackinlay, *Perceptions and Misconceptions: How are International and UK Law Perceived to Affect Military Commanders and Their Subordinates on Operations?*, 7 DEF. STUDIES 111, 134 (2007) (noting that in a recent poll, 77% of British military respondents believe that "[m]ilitary commanders and their subordinates are much more likely to be investigated and charged with war crimes than ever before"); Poll: *Most Still Think Iraq War a Mistake*, CNN (June 12, 2006, 10:38 PM), http://www.cnn.com/2006/US/06/12/iraq.poll/index.html?section=cnn_us (citing polls finding that 27% of Americans believed "U.S. troops are very likely to have committed war crimes in Iraq," and 30% believed it was "fairly likely").

32. See FRANCIS ANTHONY BOYLE, *PROTESTING POWER: WAR, RESISTANCE, AND LAW* 176 (2008) (noting that the United States must issue field manual directives and orders in a way that is consistent with the Geneva Conventions, Hague Conventions, and customary international law); see also YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 4 (2004); C. Peter Dungan, *Rules of Engagement and Fratricide Prevention: Lessons from the Tarnak Farms Incident*, 9 UCLA J. INT'L L. & FOREIGN AFF. 301, 305 (2004).

33. See 10 U.S.C.A. §§ 890(2)–891(2) (West 2013) (punishing willful disobedience of orders); 18 U.S.C.A. § 2441 (West 2013) (punishing war crimes).

34. Martin N. White, *Charging War Crimes: A Primer for the Practitioner*, 2006 ARMY LAW. 1, 11 (2006); see also M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 408 (2006).

35. Bassiouni, *supra* note 34, at 408.

36. Waters, *supra* note 16, at 905–06; Andrew Tilghman, *Shifting Guidelines Prompt Calls for ROE Reform*, ARMY TIMES (Apr. 23, 2012), <http://www.armytimes.com/article/20120423/NEWS/204230316/Shifting-guidelines-prompt-calls-ROE-reform> (emphasizing the ambiguity in rules of engagement and that punishment for transgressions have often consisted of superior reviews of unsatisfactory and also noting that "[e]arly in the Iraq War, troops were given broad discretion to use lethal force" and that aggressive rules caused civilian casualties). In the case of the high profile My Lai massacre during the Vietnam War, one of the most heinous war crimes with individual culpability attached, there are questions of not adequately addressing harms within the chain of command. The massacre was attributed to failures "at all levels, from division down to platoon." Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L.

third category evidently purports that military combat orders from superiors are generally assumed to be legal but that troops may not always act reasonably within those directives or may commit crimes not within the scope of directives. There is a complementary presumption in laws pertaining to remedial relief.

B. Remedies During War and Occupation

1. Rules That Avoid Liability for Military Directives

Under general international law, a state that causes damage to another state through illegal acts owes reparation to the victim state.³⁷ More specifically, an aggressor state should pay restitution to the victim state for illegal wars.³⁸ Even if a war is legal, Article 3 of the 1907 Hague Convention states “that a belligerent state shall pay compensation for violations of the laws of war and shall be held responsible for all acts of its armed forces.”³⁹ However, sovereign immunity and other practical restrictions can hamper legal claims against a perpetrator state in domestic fora⁴⁰ and international tribunals.⁴¹ A victim state may need to

REV. 153, 169 (1993). However, only Lt. William Calley and Capt. Ernest Medina were prosecuted, and Calley was convicted, but the secretary of defense had Calley’s sentence reduced from life to ten years and Medina was acquitted. M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 800 (2008); MICHAEL R. BELKNAP, *THE VIETNAM WAR ON TRIAL* 245 (2002).

37. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

38. S.C. Res. 687, para. 16, U.N. Doc. S/RES/687 (Apr. 8, 1991) (specifying that Iraq was required to provide compensation for invading Kuwait); HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 334 (Anders Wedberg trans., 3d ed. 2009) (noting that Germany was required to pay restitution for damages from an illegal war). See generally Brian Orend, *Justice After War*, 16 ETHICS & INT’L AFF. 43, 48 (2002).

39. RENE PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 45 (2002).

40. 28 U.S.C.A. § 1604 (West 2013); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1987). Iraqi courts were not a viable forum to enforce criminal or civil law against military personnel or private contractors. COALITION PROVISIONAL AUTHORITY, ORDER NO. 17 (REVISED), STATUS OF THE COALITION PROVISIONAL AUTHORITY, MNF-IRAQ, CERTAIN MISSIONS AND PERSONNEL IN IRAQ 4, 5 (2004), *available at* http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (“All MNF, CPA, and Foreign Liaison Missions[] . . . shall be immune from [the] Iraqi legal process.” Further, “[c]ontractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts

obligatorily accede to the dominant perpetrator state's interpretation of war crimes, violations of humanitarian law, and military necessity.⁴² Akin to the previous section's assessment of criminal punishment and the fact that individual transgressions of troops are generally presumed to be outside the scope of lawful superior directives, U.S. law and the administrative remedy system also presume that superior directives are legal.⁴³

Applicable to legal cases filed in the U.S., the Federal Tort Claims Act provides for a waiver of U.S. sovereign immunity, but also itemizes a list of exceptions that maintain sovereign immunity.⁴⁴ The two main exceptions that retain immunity for military activities are the discretionary function and combatant-activity exceptions.⁴⁵ Consequently, if military directives are executed properly, resulting harm within a war zone will not beget liability, and a military necessity test is assumed to be met for the legitimacy of military operation directives.⁴⁶ However, compensation could be available for accidents and noncombatant activities, perhaps including those military personnel wrongs comparable to type I harm (personal misconduct), type II harm

... [and] shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”).

41. An international tribunal, such as the International Court of Justice (ICJ), might be petitioned, but this is not possible for claims against the United States because the Reagan Administration revoked the United States' acceptance of the ICJ's contentious jurisdiction following the ICJ ruling against the U.S. for supporting the Contra insurgents against the Nicaraguan government. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 251–52 (June 27); see Symposium, *A New Legal Frontier in the Fight Against Global Warming: Panel II*, 16 FORDHAM ENVTL. L. REV. 335, 346 (2005).

42. INTERNATIONAL LAW 850 (Malcolm D. Evans ed., 4th ed. 2014) (“[W]ar crimes trials are often derided as ‘victor’s justice,’ in the sense that the defeated party does not have a chance to hold its enemies to account for ill-conduct.”); ALETTE SMEULERS & FRED GRÜNFELD, INTERNATIONAL CRIMES AND OTHER GROSS HUMAN RIGHTS VIOLATIONS: A MULTI- AND INTERDISCIPLINARY TEXTBOOK 47 (2011) (“In war the winner takes all and often (re)writes history to his own benefit . . . Trials are often described as victor’s justice. The crimes of those who’ve won the war are seldom if ever exposed.”); PETER M.R. STIRK, THE POLITICS OF MILITARY OCCUPATION 6 (2009) (“Justice under conditions of military occupation is inevitably the victor’s justice.”).

43. *United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005).

44. 28 U.S.C.A. § 1346 (West 2013).

45. *Id.* § 2680(a)(j).

46. This default assumption was particularly clear in the Air Force position for the Iraq War, which would be applicable to bombing operations and missile strikes, because it emphasized that “[a]ll [FCA] claims arising within the . . . boundaries of Iraq during the period of the war, are automatically classified as combat activity claims, and therefore are prohibited.” CTR. FOR LEGAL & MILITARY OPERATIONS, JUDGE ADVOCACY GENERAL LEGAL CTR. & SCHOOL, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 179 (2004), available at <http://fas.org/irp/doddir/army/clamo-v1.pdf>.

(troop harm that straddles directives), or accidents and negligence perpetrated while executing military directives.⁴⁷

With the stated policy of endeavoring to improve and maintain peaceful relations, the Foreign Claims Act (FCA) provides for a payment of up to \$100,000 to a foreigner against the U.S. for “damage, loss, personal injury, or death [that] occurs outside the United States . . . [from the U.S. military’s] noncombat activities.”⁴⁸ A military claims commission normally assesses the validity of claims.⁴⁹ The FCA claim is unavailable if an innocent individual is injured during U.S. combat operations,⁵⁰ harm was due to actions of an enemy,⁵¹ the claim is not in the best interest of the United States,⁵² or if the claim is tolled by the two-year statute of limitations.⁵³

The FCA’s policy for excluding liability and not employing tort law standards of reasonable care was befittingly articulated by the Ninth Circuit when it held that it would be inappropriate to mandate “our military personnel to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces.”⁵⁴ The D.C. Circuit held that the “traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors” are unsuitable in military combat situations.⁵⁵

47. 10 U.S.C.A. § 2734(b) (West 2013) (stating that claims are only compensable if they are made within two years and “did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission”).

48. *Id.* § 2734(a); *Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992) (“Society believes tortfeasors should suffer for their sins.”). “Noncombat activity” involves “activity, other than combat, war or armed conflict, that is particularly military in character and has little parallel in the civilian community.” 32 C.F.R. § 842.41(c) (2012).

49. 10 U.S.C.A. § 2734(a).

50. *Id.* § 2734(b)(3); *Koohi*, 976 F.2d at 1336 (“The combatant activities exception applies whether U.S. military forces hit a prescribed or an unintended target, whether those selecting the target act wisely or foolishly [I]t simply does not matter for purposes of the ‘time of war’ exception whether the military makes or executes its decisions carefully or negligently, properly or improperly.”).

51. 10 U.S.C.A. § 2734(b)(3).

52. Michael D. Jones, *Consistency and Equality: A Framework for Analyzing the “Combat Activities Exclusion” of the Foreign Claims Act*, 204 MIL. L. REV. 144, 177–78 (2010).

53. Field offices in some countries have a two-year statute of limitations under the FTCA and MCA. Douglas Dribben, *Foreign Claims—Not Just for Overseas Offices*, 2010 ARMY LAW. 34, 35 (2010).

54. *Koohi*, 976 F.2d at 1334–35.

55. *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009).

2. Compensation Granted by the U.S. Government

In short, the FCA excludes the U.S. from liability for anything that resembles a military combat mission,⁵⁶ which would credibly preclude the category of acts that derive from superior directives and are passed down the chain of command to be executed by subordinates. Claims unrelated to combat can be permitted under certain circumstances under the FCA, the Military Claims Act, and the Posse Comitatus Act.⁵⁷ Yet combat is apt to be the type of act most prone to violate the laws of war and inflict the gravest harm.⁵⁸ If combat-related losses derive from hierarchical directives, but no liability can be assessed on the execution of orders, there may not be a substantial deterrent on military commanders to impede the issuance of directives that might produce war crimes under international law.

Compensation provided for lost lives and destroyed infrastructure and property in Iraq, ensuing from military combat directives, was not awarded under the terms of the FCA, but as solatia payments.⁵⁹ For the U.S. invasion of Iraq and Afghanistan, maximum compensation for solatia payments was fixed at \$2,500 for a wrongful death, \$1,000 for a serious injury, and \$500 for property damage.⁶⁰ The Pentagon accepted

56. 10 U.S.C.A. § 2734(b)(3); *United States v. Skeels*, 72 F. Supp. 372, 374 (W.D. La. 1947) (“[T]he phrase [combat activities] was used to denote actual conflict, such as where the planes and other instrumentalities were being used, not in practice and training, far removed from the zone of combat, but in bombing enemy occupied territory, forces or vessels, attacking or defending against enemy forces, etc.”).

57. U.S. ARMY, JUDGE ADVOCATE GENERAL’S LEGAL CTR. AND SCHOOL, OPERATIONAL LAW HANDBOOK 301 (2013) [hereinafter JAG OLH 2013], available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2013.pdf (citing 10 U.S.C.A. § 2733, 31 U.S.C.A. § 3721); see also 32 C.F.R. § 536.77 (2013).

58. Afghanistan: Is There Hope for Peace?: Hearings Before the Subcommittee on Near Eastern and South Asian Affairs of the Committee on Near Eastern and South Asian Affairs of the Committee on Foreign Relations, 104th Cong. 169 (1996) (statement of Professor Nake M. Kamrany) (stating that Soviet damages in Afghanistan during the 1980s war amounted to \$644 billion); ROUTLEDGE HANDBOOK OF MODERN ECONOMIC HISTORY 109 (Robert Whaples & Randall E. Parker eds., 2013) (estimating \$11 trillion in damages during World War I); GABRIEL KOLKO, CENTURY OF WAR 207 (1994) (stating that the French official estimate was that there was over 1.6 trillion in 1938 francs in war damage in France during World War II). Damages outside of combat and war should be more prosaic and typical of everyday harms because the destructive potential of weapons is not used.

59. JAG OLH 2013, *supra* note 57, at 301.

60. U.S. ARMY, JUDGE ADVOCATE GENERAL’S LEGAL CTR. AND SCHOOL, OPERATIONAL LAW HANDBOOK 270 (2007), available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2007.pdf.

over 20,000 claims and awarded over \$26 million,⁶¹ but solatia payments expressly excluded admitting legal responsibility and were offered out of feelings of remorse.⁶² There is no admission of civil responsibility for potential war crimes.⁶³

Commentators mentioned that Iraqis faced considerable hurdles when seeking compensation. The U.S. military, the actor employing the agents who executed acts leading to the claim, decided whether misconduct was compensable, and this association could have produced biased or inequitable decisions.⁶⁴ Only about thirty to forty percent of Iraqis received some type of compensation, and those receiving compensation had to agree that “the amount tendered is accepted by the claimant in full satisfaction”⁶⁵ even if allocations were miserly.⁶⁶ Another

61. GOV'T ACCOUNTABILITY OFFICE, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 50–51 (2007), available at <http://www.gao.gov/new.items/d07699.pdf> (noting \$26 million for 21,450 claims in Afghanistan and Iraq under the FCA through 2007). The Commander's Emergency Response Program (CERP) also provided some compensation to Iraqis. CERP initiated with cash confiscated from the Ba'ath Party and continued with congressional funding. Jones, *supra* note 52, at 147–48. Compensating Iraq with money that already belongs to them when claims derived from a separate actor's liability is assuredly not equitable.

62. Jones, *supra* note 52, at 148; Ganesh Sitaraman, *Counterinsurgency, The War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1792 (2009); John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455, 1463 (2008) (calling the “solatia” payments typically nominal); John R. Crook, *UCMJ Proceedings Against U.S. Personnel Accused of Offenses Against Civilians in Afghanistan and Iraq*, 101 AM. J. INT'L L. 663, 664 (2007) (reporting on a massacre that a U.S. Army colonel called a “terrible, terrible mistake,” in which U.S. operations caused the deaths of sixty-nine Afghans, and nineteen families were paid two thousand dollars in solatia payments); David Zucchino, *U.S. Addresses Iraqis' Losses with Payments*, L.A. TIMES, Mar. 10, 2005, at A8 (stating that in mid-2003, the U.S. established a system by which the military would compensate Iraqis for injuries, but the system “does not admit guilt or acknowledge liability or negligence . . . [but provides] a gesture that expresses sympathy in concrete terms”); *id.* (noting that for the first year, the program doled out \$2.2 million in compensation for aggrieved Iraqis).

63. See Zucchino, *supra* note 62, at A8.

64. Jones, *supra* note 52, at 145–46 (noting that some claimants received compensation and other claimants were denied compensation on similar facts); Laura N. Pennelle, Comment, *The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?*, 36 CAL. W. INT'L L.J. 303, 340 (2006) (citing contentions of bias and reporting that Occupation Watch believed that “missing files, extensive delays, frequent procedural changes, and requests to ‘come back next week’” were “strategic” responses by the commission).

65. Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 BYU L. REV. 371, 377 (2005); 10 U.S.C.A. § 2734(e) (West 2013) (“Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.”); *Report: Army Denies Most*

view maintains that increasing the value of civilian items destroyed beyond replacement or market value or imposing a punitive amount are modes of elevating the level of vigilance exercised by combatants during war and occupation.⁶⁷ There was astonishingly disparate treatment of liability following the 1991 Gulf War.

3. *Comparative Compensation Following the 1991 Gulf War*

In addition to the Axis powers being required to provide extensive monetary compensation after World War II,⁶⁸ following the first Gulf War, Security Council Resolution 687 stated, "Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."⁶⁹ The Security Council constituted a subsidiary organ to determine "direct losses, damages, and injuries caused by Iraq's 1990 invasion of Kuwait" and structured a tribunal with inquisitorial (rather than adversarial) investigative standards.⁷⁰ The commission placed claims into four categories that were quite analogous to tort law—"A" claims assessed damages of \$2,500 to \$8,000 to those required to evacuate, and "B," "C," and "D" claims involved those who "suffered personal injury" or damage as a result of Iraq's invasion and occupation, which often ranged into the hundreds of thousands of dollars.⁷¹ From 1985 to 1990, Kuwait's annual Gross Domestic Product (GDP) averaged \$41.3 billion,⁷² but the astounding Kuwaiti claims⁷³

Compensation Claims by Iraqis, NBC NEWS.COM (Oct. 24, 2004, 9:18 PM), <http://www.nbcnews.com/id/6323083/> (stating that most Iraqi claims were denied).

66. Major Frank J. McGovern described his experience in dealing with the FCA in Iraq and investigating and providing compensation to claimants who met the elements of a compensable claim: "It is important to realize that the average Iraqi earns approximately \$1,500 to \$2,000 per year [I]t gives us great pleasure to be able to compensate them for damages or injuries caused by our negligence." Frank J. McGovern, *Letter from Iraq: Paying the Claims of War: Amid Violence and Destruction, the Routine of Necessary Legal Work Goes On*, PENNSYLVANIA LAW., July–Aug. 2009, at 42–44.

67. Lea Brilmayer & Geoffrey Chepiga, *Ownership or Use? Civilian Property Interests in International Humanitarian Law*, 49 HARV. INT'L L.J. 413, 413, 419 (2008).

68. *Am. Ins. Ass'n v. Garamendi*, Ins. Comm'n, 539 U.S. 396, 420 (2003).

69. S.C. Res. 687, para. 16, U.N. Doc. S/RES/687 (Apr. 8, 1991).

70. John J. Chung, *The United Nations Compensation Commission and the Balance of Rights Between Individual Claimants and the Government of Iraq*, 10 UCLA J. INT'L L. & FOREIGN AFF. 141, 145 (2005).

71. *Id.* at 149–50.

72. *World Economic Outlook Database*, INT'L MONETARY FUND, <http://www.imf.org/external/pubs/ft/weo/2008/01/weodata/weoselgr.aspx> (last visited

attributable to Iraq's invasion exceeded eight times the country's entire annual production as individuals and entities filed 2.68 million claims, seeking more than \$350 billion in compensation.⁷⁴ Damage claims were tendered, but Iraq had marginal ability to refute plaintiffs who frequently lacked substantiating evidence to verify losses.⁷⁵

An Iraqi family with a wrongful death claim might be paid \$2,500, while a Kuwaiti citizen might have been entitled to hundreds of thousands of dollars. In the category of compensation for fleeing homes, hundreds of millions of U.S. taxpayer dollars and international funds were spent on assisting Iraqi refugees.⁷⁶ However, if the same \$2,500 to \$8,000 damage amount that was awarded by the United Nations Gulf War tribunal was also awarded to the 60,000 Iraqis who became refugees every month following the 2003 U.S. invasion of Iraq,⁷⁷ Iraqis should have been granted between \$150 million to \$480 million every month. With respect to abused detainees in U.S. detention facilities, the U.S. government awarded compensation to only two Iraqis through 2009, but several others sued in federal court⁷⁸ and entered into a substantial settlement agreement with a private contractor-defendant in 2013, even though the imposition of liability under U.S. law was unprecedented.⁷⁹

Dec. 19, 2014) (using "Gross domestic product based on purchasing-power-parity (PPP) valuation of country GDP" totals to \$248.036 billion over the six-year period).

73. Kuwait's GDP rose to \$37.57 billion the year after Iraq was expelled (1992) and to \$51.4 billion in 1993. *Id.* (using "Gross domestic product based on purchasing-power-parity (PPP) valuation of country GDP"); CHARLES TILLY, *THE POLITICS OF COLLECTIVE VIOLENCE* 58 (2003) (noting that violence in Kuwait had a comparatively small death toll and damage relative to other conflicts).

74. Chung, *supra* note 70, at 147–50, 153–55, 162–63; Kevin H. Anderson, *International Law and State Succession: A Solution to the Iraqi Debt Crisis?*, 2005 UTAH L. REV. 401, 433 (2005).

75. Moreover, Hussein's teetering and internationally-ostracized regime would seem uninterested in the state's future financial accounts or in responding to abuse accusations.

76. U.S. DEP'T OF STATE OFFICE OF THE SPOKESPERSON, U.S. SURPASSES GOAL OF ADMITTING 12,000 IRAQI REFUGEES IN FISCAL YEAR 2008; ASSISTANCE REACHES NEW HEIGHTS (2008), available at <http://2001-2009.state.gov/r/pa/prs/ps/2008/sept/109544.htm>. See generally Randall Fenlon, *Developments in the International Arena: Creation of a New Iraq Refugee Task Force*, 21 GEO. IMMIGR. L.J. 333, 335 (2007).

77. Roberta Cohen, *Iraq's Displaced: Where to Turn?*, 24 AM. U. INT'L L. REV. 301, 303 (2008).

78. *II. Compensating Victims of Wrongful Detention, Torture, and Abuse in the U.S. War on Terror*, 122 HARV. L. REV. 1158, 1158 (2009); Julie Long, *What Remedy for Abused Iraqi Detainees?*, 187 MIL. L. REV. 43, 45–46 (2006).

79. *Defense Contractor Paid \$5M to Iraqis over Abu Ghraib*, USA TODAY (Jan. 8, 2013, 6:51 PM), <http://www.usatoday.com/story/news/world/2013/01/08/abu-ghraib-payments-5-million/1818945/> (noting that L-3 Services, the merged organization of private military contractors accused of abusing Iraqi prisoners, had maintained during

This part underscored that hierarchical military directives are ostensibly presumed to be legal, but subordinates may not execute those orders reasonably or may depart from standards of proper conduct outside of those directives, which could occasion criminal liability.⁸⁰ Likewise, standard restitution awards under U.S. law were not overly-generous or punitive, and recompense was not available for combat operations with an admission of wrongdoing.⁸¹ Yet, if major combat operations ultimately derive from orders issued by military superiors, deterrence mechanisms for wrongdoing seem absent at the command levels even though this is where they might be most availing and crucial. As Stanley Milgram found in his research on *Obedience to Authority*, superiors in hierarchical organizations can vitally impact the behavior of subordinates and urge them to engage in controversial activities that they would not otherwise discharge without hierarchical directives.⁸² Viewed more benignly, implementing measures that stimulate auspicious superior conduct could pressure subordinates in a favorable manner. Part III emphasizes that there are clear international rules that apply to armed conflict, but postulates that U.S. rules lamentably may not effectively sustain international standards.⁸³

four years of litigation that it was immune from suit because the same claims could not be brought in U.S. courts against the federal government, but, in January 2013, the firm settled with 71 former detainee-plaintiffs by paying \$5.28 million while explaining to the federal court that “[n]o court in the United States has allowed aliens—detained on the battlefield or in the course of postwar occupation and military operations by the U.S. military—to seek damages for their detention”). By comparison, in July 2003, three dozen American families won a default judgment for \$959 million against the Iraqi government in U.S. district court for holding American POWs during the 1991 Gulf War. John R. Crook, *United States Supports Dismissal of U.S. POWs’ Billion-Dollar Default Judgment Against Iraq; U.S. Supreme Court Denies Certiorari*, 99 AM. J. INT’L L. 699, 699–700 (2005). The POW award was eventually rejected by the U.S. administration, vacated by the district court, and the suit was dismissed in the courts. *Id.* at 699–700. However, even to entertain such a lawsuit for nearly one billion dollars in one’s own court system when there was a prolonged and an incomparable degree of harm to Iraqi civilians during war is staggering.

80. See *supra* Part II.B.1.

81. See *supra* Part II.B.2–3.

82. PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 226–27 (2007) (demonstrating that system power within an institutional structure can endow higher authority with prerogatives to act in ways that “would ordinarily be constrained by pre-existing laws, norms, morals, and ethics”); DENISE WINN, *THE MANIPULATED MIND: BRAINWASHING, CONDITIONING AND INDOCTRINATION* 101, 108 (2d ed. 2000) (citing Milgram on the principle of hierarchical power).

83. See *infra* Part III.A. Another problem with FCA exclusions is that there is no perspicuous legal liability positively assumed in the case of destruction caused by sophisticated weapons. See *infra* Part III.C.

III. INCONSISTENCY BETWEEN INTERNATIONAL LAW AND U.S. RULES AND REMEDIES

A. Jus Ad Bellum: A String of Wrongs or Isolated Stages?

There are three distinct rule frameworks applicable to armed conflict—*jus ad bellum*, which is the justification for war; *jus in bello*, which is military conduct during war;⁸⁴ and *jus post bellum*, which pertains to post-war operations and occupation rules as codified in the Hague Regulations, the Geneva Conventions, and other human rights documents.⁸⁵ The stages can be interpreted in isolation of each other,⁸⁶ such that a just war might be fought unjustly, or an unjust war could be fought without breaching rules of *jus in bello*.⁸⁷ Perhaps the most natural case in which to construe the stages distinctly is when military force complies with *jus ad bellum* but violates *jus in bello*,⁸⁸ because irrespective of *ad bellum* legality, military force *in bello* must be proportional to reasonably comply with military necessity standards.⁸⁹

Alternatively, one can emphasize that the three stages interact without equating the terms,⁹⁰ such that a war waged in violation of *jus ad bellum* could have integral ramifications on *jus in bello*⁹¹ because the justification for war may conceive a distinct interpretation of the legitimacy and intensity of force during armed conflict. For example, *jus ad bellum* requires a country to initiate war for an appropriate reason,⁹²

84. Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L. J. 367, 370 n.10 (2004).

85. See generally Jennifer S. Easterday, Jens Iverson & Carsten Stahn, *Exploring the Normative Foundations of 'Jus Post Bellum': An Introduction*, in JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 1–5 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014); Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384, 392 (2004); *War*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/fall2007/entries/war/> (last visited Nov. 21, 2014).

86. Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 290 (2005) (noting typical bifurcation of the terms).

87. MICHAEL WALTZER, *JUST AND UNJUST WARS* 21 (4th ed. 2006).

88. Boon, *supra* note 86, at 290.

89. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 74 (2009) ("In IHL, *in bello* proportionality instead deliberately tries to specify a conception of military necessity that is conceptually removed from *ad bellum* judgments about the legality of justice of the ultimate objectives of force.").

90. *Id.* at 56.

91. Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUD. 221 (1983).

92. See generally Mark Woods, *The Nature of War and Peace: Just War Thinking, Environmental Ethics, and Environmental Justice*, in RETHINKING THE JUST WAR

with legitimate authority, and to attack by proportionate ends,⁹³ which may mean that an aggressor state's *jus in bello* conduct must be all the more reasonable when a war is illegal.⁹⁴ More than three hundred years ago, Hugo Grotius stated:

If the reason for the war is unjust, all activities resulting from this war are unjust because of their intrinsic injustice The obligation of restitution lies with the persons who perpetrated the war, either by starting it, being rulers themselves, or by giving advice to rulers. This obligation extends to all wrongdoings that result from war.⁹⁵

Observing this view, a war perpetrated in violation of *jus ad bellum* may generate overwhelming opposition within the defending population even as obligations to that victim population continue. Additionally, *jus in bello* only permits the level of force during war that is necessary and proportional, while also honoring humanitarian principles.⁹⁶

TRADITION 17, 26 (Michael A. Brough, John W. Longo & Harry Van der Linden eds., 2007) (noting to satisfy *jus ad bellum* criteria, war must be waged on "legitimate authority just cause, right intention, macro-proportionality, last resort, and likelihood of success"); Note, *War, Schemas, and Legitimation: Analyzing the National Discourse About War*, 119 HARV. L. REV. 2099, 2103–06 (2006).

93. Won Kidane, *The Status of Private Military Contractors Under International Humanitarian Law*, 38 DENV. J. INT'L L. & POL'Y 361, 373 (2010); James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law*, 44 VAND. J. TRANSNAT'L L. 285, 316–17 (2011) (categorizing increasingly more significant uses of force in relation to threats to use force, assuming that threats are more lawful than employing varying levels of force, and noting that less grave uses of force will be more lawful than a graver use of force). These limitations historically corresponded to the phrase "just war" and contemporarily relate to actions consistent with UN Charter Article 51 self-defense or pursuant to a Security Council authorization for the use of force. U.N. Charter, arts. 42, 51; Sloane, *supra* note 89, at 58 (noting Aquinas and Augustine were the two primary early just war advocates).

94. Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 59 (2004) (noting that liability can extend to the indirect harms caused as a result of an illegal war); Jeff McMahan, *The Ethics of Killing*, 114 ETHICS 693, 714 (2004) (stating that a state acting in violation of *jus ad bellum* "cannot satisfy the proportionality requirement, and satisfaction of this requirement is a necessary condition of permissible conduct in war").

95. John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL'Y J. 1, 28 (2004) (citing 3 HUGO GROTIUS, DE JURE BELLI ET PACIS LIBRI TRES 192–94 (W. Wherwell trans., Cambridge ed. 1853) (1646)).

96. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 13–26, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention IV] (affirming that these limits can include restricting types of weapons, conduct and targets during war,

Consequently, if one side violates rules of warfare, intensified self-defense and reciprocal retaliation could be more legitimate⁹⁷ because an exigent use of self-help with a reasonable level of force is justified, perhaps also with the reasonableness being contoured by the extent that the war was legitimate.⁹⁸ These stages can be applied to the events in Iraq.

With respect to *jus ad bellum*, the Security Council did not authorize the Iraq War, it was called illegal by many international authorities,⁹⁹ and the war or prolonged occupation became controversial to the American public,¹⁰⁰ members of the U.S. Congress,¹⁰¹ American troops,¹⁰² and Iraqi

and protection of civilians); see also GARY DORRIEN, *THE OBAMA QUESTION: A PROGRESSIVE PERSPECTIVE* 145–46 (2012); Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55 (1984).

97. Eric A. Posner, *Terrorism and the Laws of War*, 5 CHI. J. INT'L L. 423, 429 (2005).

98. Joshua Getzler, *Use of Force in Protecting Property: In Memoriam J.W.H.*, 7 THEORETICAL INQUIRIES IN L. 131, 133–35 (2006) (expressing that the doctrine of self-defense under criminal law permits a “right to use force, even deadly force, to repel those who attack one’s property, in particular the invader of one’s home”).

99. *Desmond Tutu Calls for War Crimes Charges for Blair, Bush*, CBS NEWS (Sept. 2, 2012, 2:06 PM), <http://www.cbsnews.com/news/desmond-tutu-bush-blair-should-face-trial-for-iraq-war> (noting that Nobel Laureate Desmond Tutu “call[ed] for Tony Blair and George Bush to face prosecution at the International Criminal Court for their role in the 2003 U.S.-led invasion of Iraq”); Gethin Chamberlain, *Court ‘Can Envisage’ Blair Prosecution*, SUNDAY TELEGRAPH (Mar. 18, 2007, 12:01 AM), <http://www.telegraph.co.uk/news/uknews/1545876/Court-can-envisage-Blair-prosecution.html> (noting that Luis Moreno-Ocampo, the International Criminal Court’s chief prosecutor, stated that President Bush or British Prime Minister Tony Blair might one day have to answer investigations on war crimes charges). There were 116 Non-Aligned Movement countries and 57 Organization of the Islamic Conference members opposed to the use of force against Iraq. U.N. SCOR, 58th Sess., 4726th mtg. at 17, 28, U.N. Doc. S/PV.4726 (Mar. 26, 2003) (including the Brazilian delegation remarking that it “profoundly deplore[s] the initiation of military action and, in particular, the fact that force has been used without the express authorization of the Security Council”). One week into the invasion, the 22 members of the Arab League held an emergency summit in Cairo and adopted a unanimous resolution, with only Kuwait abstaining, that “demanded the immediate and unconditional withdrawal of U.S. and British forces from Iraq” and pronounced that the attack was a “‘violation of the United Nations Charter’ and a ‘threat to world peace.’” *Arab States Line Up Behind Iraq*, BBC NEWS (Mar. 25, 2003 4:09 GMT), http://news.bbc.co.uk/2/hi/middle_east/2882851.stm; *Final Communique of the Thirty-First Session of the Islamic Conference of Foreign Ministers*, in REPORT OF THE SECRETARY-GENERAL ON THE WORK OF THE ORGANIZATION, UN DOC. A/58/856-S/2004/582, at 6, 13 (2004) (stating that the Conference adamantly rejected “the principle of preemptive military strikes against any country under any pretext whatsoever”).

100. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 31 (2011) [hereinafter Bejesky, *Politico*] (citing to polls that revealed George Bush departed office with the lowest presidential approval ratings since Gallup began conducting surveys more

citizens.¹⁰³ United Nations Secretary-General Kofi Annan remarked that “from our point of view, [and] from the Charter point of view, it was illegal.”¹⁰⁴ The war and occupation resulted in 4,488 U.S. military deaths and 134,000 Iraqi civilian deaths and a cost to American taxpayers of \$2.2 trillion dollars.¹⁰⁵

The war was waged based upon the Bush Administration contending that the Security Council, weapons inspectors, and international dissenters were wrong on the law with respect to the legality of using military force, and incorrect on the evidence with regard to Iraq possessing prohibited weapon programs.¹⁰⁶ However, there were no prohibited weapons, and after the Senate Select Committee on

than seventy-five years ago, and the 22% ratings were largely due to Iraq and poor U.S. economic conditions); Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT’L L. & COM. 295, 342–44, 346–50 (2011) [hereinafter Bejesky, *Weapon Inspections*] (reporting polls from the international community that indicated overwhelming opposition to the invasion and international sources that called the war illegal); Curtis F.J. Doebbler & Michael P. Scharf, Debate, “Will Hussein Get a Fair Trial,” 37 CASE W. RES. J. INT’L L. 21, 23–24 (2005) (Professor Doebbler noting that during his discussions with international lawyers and political representatives from sixty countries, all called the aggression “illegal” and the only arguments came from U.S. lawyers); CBS Evening News (CBS television broadcast Apr. 9, 2013) (news clip on file with author) (noting that a majority of Americans regretted the decision to go to war, emphasizing opposing viewpoints about the efficacy of the invasion, and noting that the “debate will go on”).

101. Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 816–17 (2011) [hereinafter Bejesky, *Intelligence Information*] (reporting that 2007 ABC News surveys of the congresspersons who had voted for the October 2002 Authorization for the Use of Military Force Against Iraq (AUMF) found that a substantial percentage would have reversed their voting positions in hindsight, and therefore, the resolution would have been rejected with more accurate information about the alleged threat).

102. Robert Bejesky, Support the Troops: Renewing Angst over *Massachusetts v. Laird* and Endowing Service Members with Effectual First and Fifth Amendment Rights (April, 2014) (unpublished manuscript) (on file with author).

103. Bejesky, *Politico*, *supra* note 100, at 102–07 (citing regularly conducted polls over several years confirming that between 75% and 90% of Iraqis opposed continuing occupation).

104. *Iraq War Illegal, Says Annan*, BBC (Sept. 16, 2004, 9:21 GMT) <http://new.bbc.co.uk/1/hi/3661134/stm>; Felicity Barringer, *Annan Warns of World ‘Crisis,’* N.Y. TIMES, July 31, 2003, at A16 (calling the action a threat to the U.N.’s viability that placed the Security Council system in “crisis”).

105. CBS Evening News (CBS television broadcast Mar. 19, 2013) (news clip on file with author). See generally JOSEPH E. STIGLITZ & LINDA J. BILMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT (2008) (estimating even more dire economic costs to \$3 trillion by including derivative expenditures); Bejesky, *Politico*, *supra* note 100, at 84–91 (addressing a chronology of how the Administration avoided discussion of expenses and negative ramifications on the American economy).

106. See generally Bejesky, *Weapon Inspections*, *supra* note 100.

Intelligence (SSCI) concluded its five-year investigation, the SSCI Chair stated that “the Bush Administration led the nation into war under false pretenses.”¹⁰⁷ Congress only granted an authorization to use force because of an alleged arsenal of prohibited weapons inside Iraq and did not condition the use of force on displacing a foreign government.¹⁰⁸ Professors Ackerman and Hathaway emphasize that Congress provided the Executive with a limited authorization to use force, conditioned on an actual imminent threat, which means that when the White House began offering additional rationalizations after the war, particularly of humanitarian intervention, “such talk was blatantly inconsistent with the plain language of the 2002 resolution.”¹⁰⁹

Jus post bellum—the surrender and restitution period during occupation¹¹⁰—can also be viewed separately from the reason for war and the conduct during war,¹¹¹ and it generates separate grounds of illegality because an occupier still “bears continuing post-war responsibility” following a legal war.¹¹² However, there is overlap because actions executed under *jus in bello* or *jus ad bellum* might not have been conducted legitimately, such that an occupied population may not be obliged to be obedient to the occupier under international law.¹¹³ Perhaps this would be the case when the population was subjected to devastating and impermissible harm during war. As Professor Rouen explains, an occupation is “illegal if it involves the violation of a

107. Press Release, U.S. Senate Select Committee on Intelligence, Press Release of Intelligence Committee (June 5, 2008), <http://intelligence.senate.gov/press/record.cfm?id=298775> (quoting committee chairman John D. Rockefeller).

108. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114 § 3, 107th Cong. (2002) (enacted).

109. Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 464 (2011); Bejesky, *Weapon Inspections*, *supra* note 100, at 350–69.

110. Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 134–37 (2005).

111. Boon, *supra* note 86, at 290–91.

112. Brown, *supra* note 94, at 26.

113. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 140 (2012) (stating that there is debate in that “[s]ome scholars have argued that an aggressor is not entitled to all the powers that international law recognizes for the occupant” but the majority disagrees); INGRID DETTER, *THE LAW OF WAR* 102–03 (2d ed. 2000) (stating that “some have claimed that resistance against an occupying force is illegal by an *e contrario* conclusion of what follows from the right of a *levée en masse*, whereas others consider all population to have asserted a right to resistance if an occupation is not ‘effective’”). For other analyses of this debate, see 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 438–39 (H. Lauterpacht ed., 7th ed. 1952); GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 193 (1994).

peremptory norm of international law," including a "violation on the use of force, or is maintained in violation of the right to self-determination."¹¹⁴ The influential French philosopher Jean Jacques Rousseau wrote that if an occupation is unlawful, it is impossible to have a legal obligation of obeisance from the occupied populace.¹¹⁵ General Assembly resolutions have expressly mandated restitution and reparations for "illegal occupation[s]" that eventuated from an illegal use of force.¹¹⁶

Applying these interpretations to Iraq, the war might be called illegal, either because of the lack of a compelling justification under international law or because the assertions of Iraq possessing prohibited weapons were false. Adhering to this view and an interpretation that punctuates doctrinal interaction among stages of conflict would mean that continued participation in an illegal war and occupation would be criminal¹¹⁷ and that terminating illegalities would require ending the

114. Yael Rouen, *Illegal Occupation and Its Consequences*, 41 ISRAEL L. REV. 201, 201, 244 (2008); Lene Bomann-Larsen, *License to Kill? The Question of Just v. Unjust Combatants*, 3 J. MIL. ETHICS 142, 148 (2004) ("If U.S. troops had no warrant to be in Vietnam in the first place, how can any killing and destruction in the pursuit of their unjust cause be morally justified?").

115. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 8–9 (G.D.H. Cole trans., 1950). In the 1960s, Krishna Menon, the Indian Defense Minister, contended that a many centuries-long colonial occupation might not be viewed with a right as an occupying power but should be viewed as a continuous "permanent aggression." Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 27 (2004). This connotes that an occupied population would have a right to self-defense. Alternatively, an occupied population can only invoke a right of self-defense if the occupation is illegal. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 178 (4th ed. 2002); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 102 (2000); Rouen, *supra* note 114, at 241. For example, if an individual takes up arms to defend one's family from invasion by enemy soldiers, the person would not likely be considered a belligerent if it was a reasonable use of force.

116. G.A. Res. 2542 (XXIV), U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630, at art. 26 (Dec. 11, 1969); G.A. Res. 42/22, para. 10, U.N. GAOR, 42nd Sess., Supp. No. 49, U.N. Doc. A/RES/42/22 (Nov. 18, 1987). In 1968, the Security Council and General Assembly called South Africa's presence in Namibia an "illegal occupation;" in 1973, the General Assembly called the Portuguese military presence in Guinea-Bissau an "illegal occupation;" in a series of resolutions from 1975 to 1980, the General Assembly called Israeli occupations of Arab and Palestinian territories illegal; and in 1990, the Security Council called Iraq's occupation of Kuwait illegal. Rouen, *supra* note 114, at 213–18, 223–24.

117. See generally Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) ("[T]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter."); Declaration on the Strengthening of

occupation.¹¹⁸ However, in the case of the Iraq War, the U.N. Security Council sundered the stages. After there was an effective occupation,¹¹⁹ Security Council Resolution 1483 authorized the U.S. and U.K. occupation of Iraq.¹²⁰ At this early stage, six weeks into the war, the government was displaced, the Iraqi people were destitute, and it was not yet publicly known whether the allegations against Iraq of allegedly possessing prohibited weapons were true.¹²¹ Resolution 1483 authorized a long-term search for prohibited chemical, biological, and nuclear weapons programs, which the Iraq Survey Group did for over a year,¹²² and permitted occupation and assistance to the Iraqi people in forming a democratic government.¹²³

Nonetheless, if controversy over *jus ad bellum* and the offensive attacks during *jus in bello* facilitated intense civil war-like conditions and

International Security, G.A. Res. 2734, para. 5, U.N. Doc A/RES/25/2734 (Dec. 16, 1970); Alan Cooperman, *Prelate Reassures Catholic Soldiers: Service in Iraq War Sanctioned*, WASH. POST, Apr. 2, 2003, at A28 (reporting that a Catholic Bishop wrote that “[a]ny participation in and support of this war against the people of Iraq is objectively grave evil . . . [and] any killing associated with it is unjustified and, in consequence, unequivocally murder”). *Contra* BENVENISTI, *supra* note 113, at 140 (noting disagreement among scholars regarding the rights of the occupier following an illegal war).

118. Rouen, *supra* note 114, at 227–28.

119. Convention Respecting the Law and Customs of War on Land art. 42(1), Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention 1907] (“[T]erritory is considered occupied when it is . . . placed under the authority of the hostile army.”); U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 351 (1976), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf (reiterating art. 42 of the Hague Convention 1907 and stating that legal occupation exists in regions where “authority has been established and can be exercised”).

120. Rouen, *supra* note 114, at 203, 244.

121. S.C. Res. 1472, U.N. Doc. S/RES/1472 (Mar. 28, 2003) (calling on the international community to assist in resolving the humanitarian crisis).

122. See generally CENTRAL INTELLIGENCE AGENCY, COMPREHENSIVE REPORT OF THE SPECIAL ADVISOR TO THE DCI ON IRAQ’S WMD (2004), available at <http://www.gpo.gov/fdsys/pkg/GPO-DUELFERREPORT/content-detail.html>. The full report is three volumes and documents and speculates about decades of presently irrelevant information when the only key conclusion is whether there were any weapons of mass destruction or WMD programs. *Report: No WMD Stockpiles in Iraq*, CNN (Oct. 7, 2004, 10:50 AM), http://articles.cnn.com/2004-10-06/world/iraq.wmd.report_1_nuclear-weapons-charles-duelfer-iraq-s-wmd?_s=PM:WORLD (reporting that the core conclusion from the ISG report was that Iraq “did not possess stockpiles of illicit weapons at the time of the U.S. invasion in March 2003 and had not begun any program to produce them”).

123. S.C. Res. 1483, at preface, ¶ 13, U.N. Doc. S/RES/1483 (May 22, 2003).

insurgencies during the occupation,¹²⁴ then a more discerning assessment should have been conducted into the superior-level military directives that formulated battle plans for *jus in bello*. Subordinate troops execute combat operations, but as emphasized in Part II, U.S. law does not seem to favor imputing liability on superiors who issue combat directives.¹²⁵ This occasion might have had excessively detrimental ramifications on the lowest levels of the military hierarchy because subordinates may have bore the enemy's retaliatory brunt aroused by anteceding superior military directives.¹²⁶ Those conditions may incite U.S. troops to react less reasonably, as those decisions are construed under military law and rules of engagement.¹²⁷ To assess this possibility, humanitarian protections are considered in Part III.B, and a few of the military offensives that evoked consternation are considered in Part III.C.

124. Duncan Kennedy, *Iraq: The Case for Losing*, 31 BROOK. J. INT'L L. 667, 669–70 (2006) (discussing conflict between Sunni and Shia); *Can a Lull be Turned into Real Peace*, ECONOMIST, Dec. 13, 2007, at 28.

125. See *supra* Part II.A.

126. Orders for combat are issued at the top of the military hierarchy, are relayed down the chain of command, and military department heads interact with combat commanders. HAROLD BROWN & JOYCE WINSLOW, *STAR SPANGLED SECURITY: APPLYING LESSONS LEARNED OVER SIX DECADES SAFEGUARDING AMERICA* 10 (2012). Iraqis sought vengeance for suppression and fatalities. MOHAMMED M. HAFEZ, *SUICIDE BOMBERS IN IRAQ: THE STRATEGY AND IDEOLOGY OF MARTYRDOM* 44 (2007) (expressing that a “development contributing to protracted insurgency relates to the prosecution of the initial phase of counterinsurgency in late 2003 and early 2004,” which led “many ordinary citizens to seek vengeance against the coalition”); NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 45 (2004) (stating that Sunnis became alienated when they “lost relatives in the fighting, whose homes were invaded by American soldiers”). The “Iraq insurgency began in May 2003, following President Bush’s declaration of an end to major combat operations.” Douglas Jehl & Thom Shanker, *For the First Time Since Vietnam, the Army Prints a Guide to Fighting Insurgents*, N.Y. TIMES (Nov. 13, 2004), http://www.nytimes.com/2004/11/13/politics/13army.html?_r=0. The Iraqi insurgency started shortly after death tolls mounted. Database of Documented Civilian Deaths from Violence, IRAQ BODY COUNT, <https://www.iraqbodycount.org/database/> (last visited Oct. 28, 2014) (using parameters of “All Iraq by US-led coalition, no Iraqi state forces” and finding that nearly 4,000 Iraqi civilians were killed in March 2003 and approximately 3,200 Iraqi civilians were killed in April 2003).

127. Daniel J. Sennott, *Interpreting Recent Changes to the Standing Rules for the Use of Force*, 2007 ARMY LAW. 52, 58, 62 (2007) (noting that the “meaning and proper application of deadly force is the central issue in any set of [rules on the use of force]” and emphasizing that in Iraq or Afghanistan, “U.S. forces must consider the totality of the circumstances, including the level of force used and the importance of the mission”).

B. Military Necessity and Collateral Damage

1. Historical Development of Humanitarian Protection

Theological and philosophical restrictions existed on warfare for centuries¹²⁸ and these foundations influenced states to agree to limit the level of ruthlessness during combat.¹²⁹ Yet safeguarding civilians, maintaining economic viability, promoting humanitarian well-being, and averting the intensification of combat that would fuel perduring animosity and preclude the possibility of peaceful sovereign relations between belligerents were balanced with rules that countenanced the prerogative of combatants to impose a level of force essential to achieving victory.¹³⁰ Nonetheless, principles of international law have progressively solidified humanitarian rights relative to military necessity since the nineteenth century.¹³¹

In the U.S., the Lieber Code (1863) was the first official codification of restrictions on warfare that obligated participants in armed conflict to distinguish combatants from civilians, protect civilians, and reduce humanitarian atrocity.¹³² The Lieber Code followed from a reflection on the violence during the American Civil War, which was a context that was ripe for according an indispensable policy goal of cultivating future peaceful relations. Britain, France, Germany, and other countries assented to similar standards at the Brussels Convention (1874) and at the Hague Congresses in 1899 and 1907, which were the first binding rule frameworks.¹³³ The 1899 and 1907 Hague Conventions were well-

128. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, bk. III, chs. 1–5 (Archibald Colin Campbell trans., 1901) (1625); Kidane, *supra* note 93, at 366–68.

129. COLM McKEOGH, *INNOCENT CIVILIANS: THE MORALITY OF KILLING IN WAR* 21–28, 88 (2002); DETTER, *supra* note 113, at 152–53.

130. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 53 (1994); Michael G. Cowling, *The Relationship Between Military Necessity and the Principle of Superfluous Injury and Unnecessary Suffering in the Law of Armed Conflict*, 25 S. AFRICAN YEARBOOK INT'L L. 131, 136 (2001); ADJUTANT GEN'S OFFICE, DEP'T OF THE ARMY, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* GENERAL ORDER NO. 100 [The Lieber Code] arts. 1–47 (1863).

131. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 805 (2010).

132. ADJUTANT GEN'S OFFICE, *supra* note 130, art. 22 (emphasizing the need to separate “private individuals belonging to a hostile country and the hostile country itself, with its men in arms” and to secure the former from harm).

133. DONALD A. WELLS, *THE LAWS OF LAND WARFARE: A GUIDE TO THE U.S. ARMY MANUALS* 5 (1992); David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 998 (2009) (referencing the aspirational Brussels Declaration and the binding subsequent rules frameworks).

received agreements that injected international humanitarian law into the international law of warfare, and the humanitarian protection norms became even more universally accepted pursuant to the Geneva Conventions after World War II.¹³⁴ Later human rights agreements fortified international human rights in non-war contexts for government-citizen relations.¹³⁵

While the specific provisions of the Geneva Conventions are not incorporated into the U.S. Uniform Code of Military Justice (UCMJ),¹³⁶ U.S. policy does consistently affirm the importance of the law of armed conflict.¹³⁷ In 1956, the Army's Law of Land Warfare Field Manual affirmed that conduct for military operations are "regulated by the law of land warfare," which is derived from the Hague, the Geneva Conventions, other treaties, and custom.¹³⁸ Department of Defense Directive 5100.77 of 1998 required every branch of the military to develop training programs to ensure that U.S. troops observe the Geneva

134. See Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Geneva Convention III]; Geneva Convention IV, *supra* note 96; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol]; *Treaties and States Parties to Such Treaties*, ICRC, <http://www.icrc.org/ihl.nsf/INTRO?OpenView> (last visited Dec. 20, 2014); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 35, U.N. Doc. S/25704 (May 3, 1993) (stating that "conventional international humanitarian law . . . has beyond doubt become part of international customary law" and listing the treaties); S.C. Res. 827, ¶ 1, U.N. Doc. S/RES/827 (May 25, 1993) (approving of a tribunal to punish for violations of humanitarian law).

135. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9) (holding that "elementary considerations of humanity" infuse international law). Many human rights agreements guarantee an international right to life. See, e.g., International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, 15(2), Nov. 4, 1950, Europ. T.S. No. 44, available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm> (guaranteeing a right to life that can only be deprived under specific circumstances such as "lawful acts of war").

136. Ohman, *supra* note 15, at 77.

137. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 2 (2005).

138. UNITED STATES ARMY, THE LAW OF LAND WARFARE FIELD MANUAL 27-10, ¶¶ 6, 8, 370 (1956), available at <https://ia801506.us.archive.org/18/items/Fm27-101956/Fm27-101956.pdf>.

Convention and the laws of war during military combat.¹³⁹ Internal rules may create a presumption that international standards are observed,¹⁴⁰ but specifying clear standards for punishment and remedies for victims could further deter infractions of laws of war.¹⁴¹

2. Distinguishing Civilians and Combatants

The term “international humanitarian law” specifically pertains to the rules that protect civilians and non-combatants.¹⁴² Article 48 of the Additional Protocol I to the Geneva Convention requires states to always “distinguish between the civilian population and combatants and between civilian objects and military objectives,”¹⁴³ which is a customary international law norm applicable to international and non-international armed conflict.¹⁴⁴ The macro corollary to this combatant-civilian distinction that prohibits those who do not participate in hostilities from being the object of an attack is to impede armed conflict from immersing entire societies into barbarous chaos simply because of national affiliation.¹⁴⁵

139. DEPARTMENT OF DEFENSE, DIRECTIVE NO. 5100.77, at 1–3 (1998), *available at* <http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d510077p.pdf> (stating that the purpose is to “update policy and responsibilities in the Department of Defense for a program to ensure DoD compliance with the law of war obligations of the United States” and that the obligations apply to “all armed conflicts, however such conflicts are characterized”).

140. The presumption of compliance may exist even if there is a deviation in fact during combat. Bennoun, *supra* note 9, at 196–97 (explaining that many have noted the difficulties of reconciling general human rights law and how humanitarian law is applied during the course of combat).

141. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, IMPLEMENTATION OF THE DoD LAW OF WAR PROGRAM I (2002), *available at* <http://ussliberty.org/report/exhibit%25201.pdf> (noting that “the United States will comply with the law of war during all armed conflicts” but that the directives can be circumvented if the Joint Chiefs of Staff permits “competent authorit[y]” to deviate from law of war “principles”); *see supra* Part II.

142. *See* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3 (2005), *available at* <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

143. Additional Protocol, *supra* note 134, art. 48, 51(2).

144. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 142, at 3.

145. Distinguishing between combatants and civilians and protecting the latter from indiscriminate killing prevents unrestrained war and widespread brutality. *Id.* at xxv–xxvi; FRITS KALSHOVEN, THE LAW OF WARFARE: A SUMMARY OF ITS RECENT HISTORY AND TRENDS IN DEVELOPMENT 38–39 (1973); J.M. SPAIGHT, WAR RIGHTS ON LAND 37 (1911).

Organized armed forces can be attacked and have a reciprocal right to collective self-defense¹⁴⁶ and POW status if captured.¹⁴⁷ Contentions recently chafed over the terms “unlawful combatant” and “unprivileged belligerent” and what level of humanitarian rights should be afforded to individuals who may have either participated in or were suspected of participating in combat without meeting Geneva POW criteria or were suspected of engaging in terrorism or planning acts of terrorism.¹⁴⁸ This interpretation maintains that hybrid classes of unlawful combatants and belligerents may exist, but the Additional Protocol I specifies only two classes of individuals—civilians and combatants¹⁴⁹—and military necessity can accommodate peculiar contexts without shearing the legitimacy of designations.¹⁵⁰

As traditionally understood, armed conflict, under international law, requires organized armed groups to be involved in combat for the state, but terrorism is a sporadic crime and is not a form of armed conflict.¹⁵¹ There is a distortion of the law in assuming that terrorists, who by definition attack civilians, are engaged in armed combat, or by deducing that organized individuals, who possibly do not formally meet the Geneva POW elements while attacking another state’s armed forces, are

146. ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 27 (3d ed. 2000) (“Armed hostilities should as far as possible be between organized armed forces, not entire societies: hence the efforts to maintain a ‘firebreak’ distinguishing legitimate military targets from civilian objections and people not involved in armed hostilities.”); GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* 54, 58 (2002) (stating that combatants on one side become aggressors to the other side, which makes the aggressors subject to lethal retaliation under collective self-defense because of the status of the affiliated combatants).

147. Geneva Convention III, *supra* note 134, art. 4(A).

148. Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 519, 522 (2005); Nathan A. Canestaro, “Small Wars” and the Law: Options for Prosecuting the Insurgents in Iraq, 43 COLUM. J. TRANSNAT’L L. 73, 79–81 (2004) (emphasizing that difficulty in identifying combatants from noncombatants).

149. Kenneth Watkin, *Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 664–65 (2010); Glazier, *supra* note 133, at 997 (stating that “[i]nternational law indisputably recognizes two legal classifications for participants in armed conflict, combatants and civilians, while some commentators argue for the existence of unlawful combatants as a discreet third group”).

150. Glazier, *supra* note 133, at 997 (describing that the Bush Administration seemed to have disregarded legal developments to create law-free zones that were once inhabited by “nineteenth century pirates and slave traders” and stating that “anyone remotely familiar with the law of war recognizes that military necessity is already incorporated into its provisions and can never justify departure from its rules”).

151. Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SECURITY L. POL’Y 343, 355 (2010).

equivalent to terrorists.¹⁵² Moreover, adding classes of hybrid combatants to strip humanitarian protections may not jive with Geneva Convention rules that ensure civilians are protected from attack “unless and *for such time* as they take a direct part in hostilities,”¹⁵³ which indicates that the only restriction on regaining a non-combatant status is refraining from involvement in hostilities.¹⁵⁴

Based on these classifications, a civilian is anyone who is not a combatant, and ambiguities should be resolved by assuming that the individual is a civilian.¹⁵⁵ There are also additional international law rules and human rights conventions that ensure no one is subject to egregious abuse at the hands of enemy forces.¹⁵⁶ Likewise, even though there are the uncertainties inherent in one side breaching obligations to adhere to laws of war,¹⁵⁷ *reprisals* to deter an enemy from engaging in

152. Christopher Greenwood, *War, Terrorism and International Law*, 56 CURRENT LEGAL PROBLEMS 505, 529 (2003) (ICJ Judge remarking that terrorist groups are only bands of criminals and “cannot be a belligerent,” which “risks distorting the law while giving that group a status which to some implies a degree of legitimacy”).

153. Additional Protocol, *supra* note 134, arts. 43–44, 50–51 (emphasis added); LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 75 (2002).

154. HENCKAERTS & DOSWALD-BECK, *supra* note 142, at 21 (“It is clear that the lawfulness of an attack on a civilian depends on what exactly constitutes direct participation in hostilities and, related thereto, when direct participation begins and when it ends.”); ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS ¶ 1944 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987) (noting that when the individual “ceases to participate [in hostilities], the civilian regains the right to the protection”); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 704 (2010) (noting debate over what are preparatory acts prior to participation in fighting and when the civilian suspends fighting).

155. Additional Protocol, *supra* note 134, art. 50; Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. OF LEGAL ANALYSIS 115, 128 (2010).

156. Second Hague Peace Conference Convention Regarding the Laws of and Customs of Land Warfare, Oct. 18, 1907, pmbl., 36 Stat. 2277, 3 Martens (3d) 461 (“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”); Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. 821, 829–36 (2012) (noting general human rights protections).

157. DETTER, *supra* note 113, at 395 (expressing the uncertainty over whether an opposing side would adhere to law of war restrictions and that this dilemma can lead to a prisoner’s dilemma situation that might place a military that strictly adheres to limitations at a military disadvantage); WALTZER, *supra* note 87, at 207 (noting the possible lack of reciprocity in adherence to law of war restrictions).

wrongful actions¹⁵⁸ cannot exceed what is proportional in order to deter an enemy,¹⁵⁹ and the Geneva Convention and customary international law prohibit the use of the reprisals against civilians.¹⁶⁰ In short, belligerents take risks by engaging in hostilities in civilian-occupied areas where they believe combatants hide among civilians, and the invention of hybrid distinctions blurs the importance of the status and policies underlying the language of humanitarian rules.¹⁶¹

3. *Balancing Military Necessity and Humanitarian Protection*

Humanitarian law dictates that civilian infrastructure and property be safeguarded, combat casualties be minimized,¹⁶² civilians be protected

158. Andrew D. Mitchel, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155 (2001).

159. Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, arts. 22, 49–54, U.N. Doc. A/56/10; Supp. No. 10 (2001) (references to “States”); GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 57 (2008) (noting that reprisals are a common occurrence in international law); N. Jansen Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue*, 42 VAND. J. TRANSNAT'L L. 1393, 1421–23 (2009) (remarking that the concept of countermeasures in the ILC Report are similar to the Vienna Convention on the Law of Treaties, which treats the possibility of an “injured state” as a reason for questioning interdependent obligations).

160. Additional Protocol, *supra* note 134, arts. 51–52; William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 558–59 (1997). It may also be uncertain at what point a legitimate Iraqi government emerged, making the allegiance of individuals to the previous regime inconsequential. *See infra* Part III(C)(4) (explaining that the war was reportedly over but there was massive fighting between the U.S. military and individuals in Falluja and that as many as 3,000 civilians were killed).

161. Gershon Shafir & Cynthia E. Schairer, *The War on Terror as Political Moral Panic*, in *LESSONS AND LEGACIES OF THE WAR ON TERROR* 20 (Gershon Shafir, Everard Meade & William J. Aceves eds., 2013) (emphasizing that the Bush Administration's “novel category of unlawful enemy combatant” was an “exploitation of legal grey zones in semi-secretive fashion” and further writing that eventually the category expanded to include “al Qaeda members, Taliban fighters, [and] terrorist suspects captured anywhere in the world”); Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in *INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES* 27 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007) (stating that a combatant can attack a belligerent, who can lose protected status because of aggression, hiding in a civilian area but cannot cause excessive collateral damage relative to the military advantage).

162. Geneva Convention III, *supra* note 134, art. 3 (stating that “persons taking no active part in the hostilities,” including fighters who cease fighting must be treated “humanely”); Hans-Peter Gasser, *Humanitarian Law*, in 1 *ENCYCLOPEDIA OF HUMAN RIGHTS* 462 (David P. Forsythe ed., 2009). *See generally* JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 16–17 (2004) (“States are allowed

from unnecessary and extreme violence,¹⁶³ cultural property be respected,¹⁶⁴ distinctions between legitimate military targets and civilians be honored,¹⁶⁵ and non-combatants not be attacked in violation of the principle of necessity.¹⁶⁶ Humanitarian law endeavors to avert unnecessary suffering, but humanitarian aegis can conflict with military actions taken that are decisive to procuring victory and to reducing the costs of war,¹⁶⁷ which is the balance inherent in the doctrine of military necessity.¹⁶⁸ Professor Francis Lieber defined military necessity as “those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.”¹⁶⁹ The

the minimum that is required to defend themselves against an aggressor [while adequately protecting civilian objects].”).

163. HEALTH AND HUMAN RIGHTS IN A CHANGING WORLD 255 (Michael A. Grodin, Daniel Tarantola, George J. Annas & Sofia Gruskin eds., 2013) (noting that IHL requires that states must take special measures for civilian protection when there are situations of heightened vulnerability). See generally W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 514 (2003); Gabrielle Kirk McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 MIL. L. REV. 30, 48 (1998).

164. Hague Convention 1907, *supra* note 119, art. 56. See generally ROGER O'KEEFE, *Protection of Cultural Property*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 428–29 (Dieter Fleck ed., 2013); David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1 (2004); Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277 (1997).

165. Jochnick & Normand, *supra* note 130, at 53; DINSTEIN, *supra* note 32, at 82.

166. Marco Sassoli, *Targeting: The Scope and Utility of the Concept of “Military Objectives” for the Protection of Civilians in Contemporary Armed Conflict*, in NEW WARS, NEW LAWS? 202 (David Wippman & Matthew Evangelista eds., 2005). See generally ANICÉE VAN ENGELAND, CIVILIAN OR COMBATANT?: A CHALLENGE FOR THE 21ST CENTURY 160 (2011) (stating that “the military also tries to dodge international humanitarian rules by invoking the concept of military necessity, or rather an extended and all-encompassing version of military necessity”).

167. MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 267 (2009) (stating that one interpretation is that “military ‘necessity’ . . . seems to justify everything” as the unnecessary harm to civilians can increase as war lasts longer); Gabriella Venturini, *Necessity in the Law of Armed Conflict and in International Criminal Law*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 2010: NECESSITY ACROSS INTERNATIONAL LAW 54 (2010) (reporting that General Dwight D. Eisenhower remarked of military necessity: “[T]he phrase ‘military necessity’ is sometimes used where it would be more truthful to speak of military convenience or even personal convenience.”); Blum, *supra* note 155, at 124 (noting that military necessity permits the level of force necessary that will result in victory and methods that will reduce costs of war).

168. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 17 (2d ed. 2004).

169. ADJUTANT GENERAL'S OFFICE, *supra* note 130, art. 14; *id.* art. 22 (stating that “the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”); see also Sitaraman, *supra* note 62, at 1753–54; Samuel Vincent

concern was clearly to curb unrestricted warfare¹⁷⁰ and limit needless violence,¹⁷¹ as the restrictive word “indispensible” represents.

The obligation of moderation parallels the international law doctrines for the lawful use of force, which requires necessity—such that a given situation justifies the use of armed force¹⁷²—and proportionality, which confines the level and type of force to that which is essential to actualizing the authorized aims for the use of force.¹⁷³ Necessity and proportionality are critical to any assessment of the legality to use of force,¹⁷⁴ but necessity and proportionality are also standards that are open to interpretation¹⁷⁵ and rhetorical argument in the same manner that military necessity ostensibly pares the exhaustive application of humanitarian law.¹⁷⁶

Specific Geneva Convention rules punctuate constraints with language stipulating that occupying powers cannot destroy public or private property “except where such destruction is rendered *absolutely*

Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between the Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT’L L. 249, 273 (2006).

170. Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 1, 30–31 (Dieter Fleck ed., 1995).

171. Sitaraman, *supra* note 62, at 1754.

172. GARDAM, *supra* note 162, at 2; Dr. Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT’L L. 119, 139–140 (2010) (affirming that self-defense is lawful only to the extent that the use of force was necessary and proportionate to thwarting an armed attack).

173. GARDAM, *supra* note 162, at 3, 11–14; Greenwood, *supra* note 170, at 1, 30.

174. GARDAM, *supra* note 162, at 2–4; British Attorney General Goldsmith, Iraq Legal Advice, ¶ 36 (Apr. 28, 2005, 1:46 PM), <http://www.theguardian.com/politics/2005/apr/28/election2005.uk1> (referring to an attack on Iraq, “the lawfulness of military action depends not only on the existence of a legal basis, but also on the question of proportionality”).

175. Charles A. Allen, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC’Y INT’L L. PROC. 39, 39 (1992) (“[C]enturies of discussion by philosophers and jurists about the meaning of necessity and proportionality in human affairs do not seem to have produced general definitions capable of answering concrete issues.”).

176. Laurent R. Hourcade, *Environmental Law of War*, 25 VT. L. REV. 653, 662, 667–68 (2001) (stating that necessity and proportionality require discriminating lawful from unlawful targets to give respect to humanitarian concerns); Jochnick & Normand, *supra* note 130, at 50–57, 66–67 (stating that the Lieber Code contains humane provisions that can be undermined by open-ended definitions of military necessity and expressing that later convention language has seemed to marginally weaken humanitarian protections).

necessary by military operations.”¹⁷⁷ Article 52(2) limits the target of attacks “strictly to military objectives,” which are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a *definite* military advantage.”¹⁷⁸ Article 57(2)(a)(1) of the Additional Protocol I requires combatants to do “everything feasible” to ensure that targets are military objectives,¹⁷⁹ but there is agitation over how to interpret the legitimacy of targeting protected objects that may indirectly assist an opposing military.¹⁸⁰ More unequivocal restrictions are placed on attacks against civilian items entirely unrelated to an opposing military’s operations.¹⁸¹

177. Geneva Convention IV, *supra* note 96, art. 53 (emphasis added). Similarly, with respect to impositions during occupation, an Occupying Power may “subject the population of the occupied territory to provisions *which are essential* to enable the Occupying Power to fulfill its obligations under the present convention to maintain the orderly government of the territory.” *Id.* at arts. 64, 65 (emphasis added).

178. Additional Protocol, *supra* note 134, art. 52(2) (emphasis added).

179. *Id.* at art. 57(2)(a)(1).

180. U.S. NAVY/MARINE CORPS/COAST GUARD, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 8.2.5, NWP 1-14M (2007), available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_NWP](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_NWP) (affirming that civilian economic infrastructure, such as telecommunications, infrastructure, and power systems can still be attacked because they “indirectly but effectively support and sustain the enemy’s war-fighting capability”); Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 143, 172 (2001) (interpreting *Air Force Basic Doctrine* (1997) under international law as: “Air Force doctrine clearly recognizes and allows for the attainment of advantages beyond simple tactical military advantages on the battlefield. It provides for choosing targets that also affect the enemy’s will and morale, both of their military forces and their civilian population.”) (further noting that the *USAF Intelligence Targeting Guide* specified that non-military targets, as restricted in the Geneva Convention, can be chosen based on “necessity of the target, rather than its military characteristics”). A power plant might be called a strategic military target, and civilian deaths during bombing operations of such targets might be deemed “collateral damage.” IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 161 (Jeremy Brecher, Jill Cutler, Brendan Smith eds., 2005) (internal quotation marks omitted).

181. See, e.g., HENCKAERTS & DOSWALD-BECK, *supra* note 142, at 127 (“Property of great importance to the cultural heritage of every people must not be the object of attack *unless imperatively required* by military necessity.”) (emphasis added). For example, during the 1991 Gulf War, there were allegations that Pentagon officials chose not to bomb an aircraft stationed near a temple at Ur, but archaeologists later found bomb craters. Marion Forsyth, *Casualties of War: The Destruction of Iraq’s Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War*, 14 DEPAUL-LCA J. ART & ENT. L. POL’Y 73, 91 (2004). State Parties should “to the maximum extent feasible . . . remove movable cultural property from the vicinity of military objectives or provide for adequate *in situ* protection” and to “avoid locating military object[s] near cultural

The balance for military necessity, including with consideration of humanitarian cost, must be proportional to the military objective,¹⁸² such that the humanitarian variable limits the permissible use of force in military necessity to a degree that would not exist in the absence of the humanitarian concern.¹⁸³ Civilians can never legally be “the object of attack,”¹⁸⁴ but they may ultimately be killed in some extrapolation of “military necessity” as collateral damage.¹⁸⁵ For example, Articles 18, 33, 53, and 55 of the Fourth Geneva Convention and Article 52 of Protocol I prohibit attacks on civilians and their property and civilian infrastructure,¹⁸⁶ and if a state makes disproportionate and indiscriminate attacks on civilians, a war crime is committed under international law¹⁸⁷

property.”) (emphasis added). Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 8, *opened for signature*, May 17, 1999, 38 I.L.M. 769. It seems odd that an aircraft would be stationed at a location where there were no aircraft services or a runway. Forsyth, *supra*, at 103. A plane on the ground with no means of becoming airborne was assuredly not a threat. U.S. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 615 (1992) (noting that intelligence was sufficiently astute to draw this conclusion).

182. Jones, *supra* note 169, at 275–77; U.S. NAVY/MARINE CORPS/COAST GUARD, *supra* note 180, ¶ 6.2.6.4.2 (affirming that military necessity permits “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources”); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 240 (2000) (“Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage.”).

183. Schmitt, *supra* note 131, at 797, 802; Sitaraman, *supra* note 62, at 1752–53 (calling this linkage between laws of war and humanitarian protection one of the major trajectories from conventional war). *Contra* RICHARD S. HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR 123 (1983) (reporting that Confederate Secretary of War James Seddon contended that the Lieber Code condoned Union actions, and was “a barbarous system of warfare under the pretext of military necessity”).

184. Additional Protocol, *supra* note 134, art. 51(2).

185. O’KEEFE, *supra* note 164, at 190–91 (stating that there are different views on whether military necessity makes civilian deaths legally permissible, including a restrictive view that “outlaws collateral damage even if ‘militarily necessary’ in the traditional sense” and more lenient approaches which assume that military necessity must be combined with assessments of proportionality and unavailability to deem collateral damage illegal); Michael N. Schmitt, *Human Shields in International Law*, 47 COLUM. J. TRANSNAT’L L. 292, 293–95 (2009) (noting that there were allegations that Iraqi fighters were using human shields).

186. Brilmayer & Chepiga, *supra* note 67, at 418 n.20, 422.

187. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. In another high-profile case of humanitarian harm that affirms it is not always easy to find a willing tribunal, the European Court of Human Rights denied jurisdiction to hear a case from victims in the former Yugoslavia during the 1999 bombings, stating that it was outside its competence. Bankovic v.

if perceptions are adequately persuaded.¹⁸⁸ Civilian deaths might be attributable to carelessness, negligence, or callousness, but Princeton Professors Michael Walzer and Avishai Margalit have offered a prudent perspective of due diligence by expressing that before a military exposes civilians to unnecessary risk, it should consider whether it would be acceptable for civilians in its own country to be vulnerable to the same harm.¹⁸⁹

Because the value of military targets to victory might be appraised in conjunction with anticipated humanitarian exposure, the U.S. Secretary of Defense utilized a standard for the Iraq War.¹⁹⁰ Four months after the war began, Lieutenant General T. Michael Moseley mentioned that from the beginning of the war, Secretary of Defense Rumsfeld was required to personally authorize air strikes “thought likely to result in deaths of more than 30 civilians,” and over fifty of these air strikes were proposed, all were approved, and all were carried out.¹⁹¹ While the process of assent may seem conscientious, critics might oppugn that such a standard comports with international rules of warfare that were ratified decades ago.¹⁹² Attacks on military installations are even impermissible if the military objective could have been achieved without the humanitarian harm¹⁹³ and will be indiscriminate if they “may be expected to cause

Belgium, App. No. 52207/99, ¶¶ 36, 75, 84–85, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099#{"itemid":\["001-22099"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099#{).

188. Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT’L REV. RED CROSS 445, 445–46 (2005) (emphasizing that public opinion presumes that attacks are illegal when civilians are killed or injured); Sloane, *supra* note 89, at 55 (noting that if a regime can persuade perceptions that the *casus belli* is legal or legitimate as a military necessity, civilian harm is not apt to rise to the level of actionable violations of international law).

189. Michael Walzer & Avishai Margalit, *Israel: Civilians and Combatants*, N.Y. REV. BOOKS, May 14, 2009, available at <http://www.nybooks.com/articles/archives/2009/may/14/israel-civilians-combatants/>.

190. See *infra* note 191 and accompanying text.

191. JAMES CARROLL, *CRUSADE: CHRONICLES OF AN UNJUST WAR* 214–15 (2004). For example, one might develop a numerical test for military necessity in bombing operations in an area with two hundred possible combatants, with a dozen suspected innocent civilians. The target could be valuable to military victory and it may not be possible to separate the innocent from combatants. Commentators will disagree on where to draw the line between legality and illegality.

192. Saby Ghoshray, *When Does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws Against Contemporary Human Rights Discourse*, 41 CREIGHTON L. REV. 679, 689–90 (2008) (having a high likelihood of civilian casualties may meet the definition of a premeditated war crime).

193. Additional Protocol, *supra* note 134, art. 57(2)(a)(ii) (stating that if the military objective might be achieved without humanitarian loss, combatants must “take all feasible precautions in the choice of means and methods of attack with a view to

incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁹⁴

With these standards in mind, the next section tenders five examples in which authorities may disagree over whether military operations adequately incorporated humanitarian protection into military necessity calculations. The examples also include additional potentially constraining substantive rules, but emphasize that weapon systems with marked destructive power and technological prowess have skirted consummate prohibitions and spawned incertitude on the balance between military necessity and humanitarian protection. If there is controversy over the use of these weapons, and superior decision-makers in the military chain of command choose the suspect weapons and the missions, and there is never any comeuppance, what message does this relay to the ground troops regarding the responsibility for their personal choices and the integrity of the military justice system?

C. Technological Prowess

1. Comparative Military Power

The U.S. and Britain isolated Iraq and arrogated over half of the country's airspace for a decade with no-fly zones that the United Nations never authorized.¹⁹⁵ The U.S., the modern-day military hegemon, with an unparalleled Navy and sophisticated weaponry,¹⁹⁶ possessed the capability of deploying military force to a region across the Atlantic Ocean and initiated bombing operations and armed conflict inside Iraqi territory¹⁹⁷ without the U.S. ever being attacked by Iraq or being

avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”).

194. *Id.* at art. 51(5)(b).

195. S.C. Res. 688, U.N. Doc. S/RES/0688 (Apr. 5, 1991) (the regime that imposed demands on Iraq to respect its civilian population and also “reaffirm[ed] the commitment of all Member States to respect the sovereignty, territorial integrity and political independence of Iraq and of all States in the region,” did not authorize no-fly zones); *No-Fly Zones: The Legal Position*, BBC (Feb. 19, 2001, 19:07 GMT), http://news.bbc.co.uk/2/hi/middle_east/1175950.stm.

196. See Brian Jones, *One Chart Shows the Magnitude of U.S. Naval Dominance*, BUS. INSIDER (Nov. 13, 2013, 5:36 PM), <http://www.businessinsider.com/magnitude-of-us-naval-dominance-2013-11>.

197. Press Release, White House: Office of the Press Secretary, President Bush Addresses the Nation (Mar. 19, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html>.

vulnerable to a realistic threat from Iraq.¹⁹⁸ Yet, the Bush Administration repeatedly and unequivocally guaranteed that there was an exigent need to act preemptively to impede peril to Americans from Iraq's devastating weapons.¹⁹⁹

It became abundantly clear after the war that Iraq did not possess chemical or biological weapons, missiles that exceeded the 120 kilometers range that the United Nations proscribed, or an active nuclear facility, which still would have required up to a decade to develop a nuclear weapon even if such a program had existed.²⁰⁰ If Iraq had possessed such weapons, the Security Council would likely have deemed that the country posed a threat to peace and security to the region, and if it had used such weapons against another country, it would have violated laws of war.²⁰¹ By comparison, the Bush Administration directed the U.S. military to attack Iraq and Pentagon brass chose to use devastating weapons, including cluster bombs, depleted uranium (DU) munitions, napalm firebombs, and projectiles and bombs with massive destructive power, and these weapons can yield comparably lethal force to the weapons that Iraq was banned from possessing.²⁰² Although, accountability is not assessed on the U.S. military superiors for utilizing

198. See *infra* note 200 and accompanying text.

199. Charles Lewis & Mark Reading-Smith, *False Pretenses*, CTR. FOR PUB. INTEGRITY (Jan. 23, 2008, 12:00 AM), <http://www.publicintegrity.org/2008/01/23/5641/false-pretenses> (providing a chronological chart of false statements and noting that "President George W. Bush and seven of his administration's top officials, including Vice President Dick Cheney, National Security Adviser Condoleezza Rice, and Defense Secretary Donald Rumsfeld, made at least 935 false statements in the two years following September 11, 2001 about the national security threat posed by Saddam Hussein's Iraq On at least 532 separate occasions (in speeches, briefings, interviews, testimony, and the like), Bush and these three key officials, along with Secretary of State Colin Powell, Deputy Defense Secretary Paul Wolfowitz, and White House press secretaries Ari Fleischer and Scott McClellan, stated unequivocally that Iraq had weapons of mass destruction (or was trying to produce or obtain them), links to Al Qaeda, or both.").

200. Bejesky, *Intelligence Information*, *supra* note 101, at 875–82.

201. See R. 74 *Chemical Weapons*, in INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2009), available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter24_rule74.

202. IN THE NAME OF DEMOCRACY, *supra* note 180, at 43–45. Neil Mackay, *U.S. Forces' Use of Depleted Uranium Weapons is 'Illegal'*, SUNDAY HERALD, Mar. 30, 2003, available at <http://www.hartford-hwp.com/archives/27c/303.html> ("British and American coalition forces are using depleted uranium (DU) shells in the war against Iraq and deliberately flouting a United Nations resolution which classifies the munitions as illegal weapons of mass destruction."). In the case of the danger of nuclear proliferation, confirmed nuclear powers include the U.S., Britain, France, China, Russia, India, Pakistan, and perhaps Israel, but the U.S. and Britain classified Iraq as a grave threat.

lethiferous power, the foci are on non-combat negligence and ground troop wrongdoing.

The war began on March 19, 2003,²⁰³ which was prior to the expiration of President Bush's ultimatum to fully comply with UN weapons inspections.²⁰⁴ President Bush issued orders to launch dozens of cruise missiles from Navy ships as an initial "decapitat[ion]" strike on Saddam Hussein and his inner circle of officials.²⁰⁵ The next day, missiles were fired, and 4,200 pound "bunker buster" bombs were dropped on Baghdad.²⁰⁶ News agencies provided real-time video images of "Operation Iraqi Freedom" and its "shock and awe" campaign.²⁰⁷ Devastation assailed "Baghdad, sending enormous mushroom clouds of smoke wafting hundreds of feet into the air Giant fires raged fiercely all over the city as wave after wave of missiles slammed into government ministries and military command centers."²⁰⁸

By one estimate, 68% of missiles and bombs fired during the attack were precision-guided weapons,²⁰⁹ perhaps reducing collateral

203. White House, *supra* note 197.

204. *Bush Offers Ultimatum to Saddam in Address to Nation*, FOX NEWS (Mar. 18, 2003), <http://www.foxnews.com/story/2003/03/18/bush-offers-ultimatum-to-saddam-in-address-to-nation/> (stating that Bush gave Hussein and his sons 48 hours to leave Iraq and avoid attack and that Bush remarked that "[t]hese attacks are not inevitable The terrorist threat to America and the world will be diminished the moment that Saddam Hussein is disarmed."). Hussein's regime had been disarmed of prohibited weapons for several years. See Bejesky, *Intelligence Information*, *supra* note 101, at 817-18.

205. David E. Sanger & John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES (Mar. 20, 2003), <http://www.nytimes.com/2003/03/20/world/threats-responses-white-house-bush-orders-start-war-iraq-missiles-apparently.html>; *U.S.: Hundreds of Civilian Deaths in Iraq Were Preventable*, HUMAN RIGHTS WATCH (Dec. 13, 2003), <http://www.hrw.org/news/2003/12/12/us-hundreds-civilian-deaths-iraq-were-preventable> (noting that "[t]he decapitation strategy was an utter failure on military grounds, since it didn't kill a single Iraqi leader in 50 attempts" and that "[r]esidents said there was no evidence that Saddam Hussein or any members of the Iraqi government had been there").

206. Thousands of bombs and missiles were used in the first few days as a prelude to a full-force ground invasion. ANTHONY ARNOVE, *IRAQ: THE LOGIC OF WITHDRAWAL* 13 (2006); IN THE NAME OF DEMOCRACY, *supra* note 180, at 36; DILIP HIRO, *SECRETS AND LIES: OPERATION IRAQI FREEDOM AND AFTER* 450 (2004) (noting that during the first four weeks of the invasion, the Pentagon dropped 28,000 bombs and missiles at a cost of \$45 billion to the American taxpayer); 21 DAYS TO BAGHDAD (National Geographic 2003) (during the first week, the Pentagon fired more than 600 Tomahawk missiles and over 4,300 precision-guided weapons); *Baghdad Wakes Up to Explosions*, FOX NEWS (Mar. 22, 2003), www.foxnews.com/story/2003/03/22/baghdad-wakes-up-to-explosions/.

207. JEFFREY MICHAELS, *THE DISCOURSE TRAP AND THE US MILITARY: FROM THE WAR ON TERROR TO THE SURGE* 81-82 (2013).

208. HIRO, *supra* note 206, at 189.

209. UNITED STATES AIR FORCES CENTRAL COMMAND, ASSESSMENT AND ANALYSIS DIVISION, *OPERATION IRAQI FREEDOM—BY THE NUMBERS* 11 (2003), *available at*:

damage.²¹⁰ Nonetheless, international authorities still criticized the U.S. for slighting the rule of proportionality and for not employing precautionary measures to protect against civilian casualties, particularly when advanced weaponry may reduce the threshold for what constitutes “excessive” collateral damage²¹¹ and a “necessary” and “proportional” attack.²¹² Missile and bomb attacks caused extensive civilian casualties during the first few days of the war.²¹³ During the first six weeks following the invasion, 139 U.S. troops and between 7,600 and 10,800 Iraqis were killed.²¹⁴

If victims of aggression are not obligated to respect laws of war,²¹⁵ and if the Iraq War was not justified under *jus ad bellum*, Iraqis would

http://www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf.

210. Kenneth Anderson, *Who Owns the Rules of War?*, N.Y. TIMES MAG. (Apr. 13, 2003), http://www.pegc.us/archive/Press/NY_Times/nyt_digest_2003.txt (writing that “there is no moral equivalence between stray missiles aimed in good faith, using the best technology available, and deliberate violation of the categorical rules of war, like using human shields, shelling civilians to prevent them from fleeing Basra”).

211. Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L.J. 163, 167, 194 (2011); see also CARROLL, *supra* note 191, at 119 (stating that the Pentagon has taken initiatives that reportedly were designed to protect civilians, but the Bush Administration had a cavalier belligerence toward war and its outcome); George R. Lucas, Jr., “*This is Not Your Father’s War*”—*Confronting the Moral Challenges of “Unconventional” War*, 3 J. NAT’L SECURITY L. & POL’Y 329, 337–38 (2009) (noting that unconventional wars do not require “exotic expensive high-tech weapons,” but “military cultures . . . persistently favor them”).

212. Hague Convention 1907, *supra* note 119, art. 23(g) (emphasizing that there should not be needless destruction or seizure of the enemy’s property “unless such destruction or seizure be imperatively demanded by the necessities of war”); see also Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 391 (1993).

213. Ghoshray, *supra* note 192, at 698; Reynolds, *supra* note 137, at 43–44 (noting that in April 3, 2003, there were 1,252 civilian deaths in Iraq, with 5,103 injured and 3,420 dead in June 2003).

214. See SPENCER C. TUCKER, THE ENCYCLOPEDIA OF MIDDLE EAST WARS: THE UNITED STATES IN THE PERSIAN GULF, AFGHANISTAN, AND IRAQ CONFLICTS 266 (2010) (referencing various credible Iraqi death toll figures for the first phase of operations, which was March 19, 2003 and April 30, 2003); *The Toll of War*, *supra* note 11 (placing U.S. troop fatalities in March 2003 at 65 and in April 2003 at 74). There were also casualties from friendly fire accidents. Paul E. Jeter, *What Do Special Instructions Bring to the Rules of Engagement?*, *Chaos or Clarity*, 55 A.F. L. REV. 377, 378 (2004) (noting several friendly fire accidents in Afghanistan and in Iraq, including U.S. Air Force F-15 fighters shooting down U.S. Army UH-60 Blackhawk helicopters).

215. Marco Sassoli, *Ius ad Bellum and Ius in Bello—The Separation Between the Legality of the Use of Force and Humanitarian Rules To Be Respected in Warfare: Crucial or Outdated?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 247 (Michael Schmitt & Jelena Pejic eds., 2007); J. CARL FICARROTTA, KANTIAN THINKING ABOUT MILITARY ETHICS 74 (2013) (quoting the chief British

have had a right to act in self-defense during these devastating strikes.²¹⁶ However, if the comparative death toll from the first six weeks of war is indicative, which was a death rate that involved somewhere between 55 and 78 times more Iraqis being killed than the invading forces that sought to hinder *Iraq* from being a security threat, perhaps there was only negligible retaliation. In addition to whether the war was legally justified, perhaps fierce bombing and tremendous strikes with advanced weapons at the beginning of the war that Iraqis could not retaliate against,²¹⁷ inadequate protection for civilians, and an unnecessary and disproportionately high casualty rates and level of destruction under *jus in bello*, led to a more vehement insurgency and opposition during the occupation.²¹⁸ This context, which might stir fury and resentment among family and friends of Iraqis killed and maimed, could lamentably place American ground troops in elevated peril due to anteceding decisions of Pentagon superiors.²¹⁹

prosecutor at Nuremburg stating that “where a war is illegal . . . there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber bands”).

216. U.N. Charter, art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”); Additional Protocol, *supra* note 134, at preamble (“[The] Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”); FLETCHER, *supra* note 146, at 58 (affirming the right of a group under attack to act in collective self-defense).

217. MICHAELS, *supra* note 207, at 82–83 (emphasizing that top U.S. military commanders originated the term “shock in awe” in the mid-1990s and quoting the 1996 National Defense University publication which emphasized that the U.S. had achieved such “overwhelming military and technological superiority that the US defense establishment should now organize to strike with enough speed and destructive force to inflict Shock and Awe on its adversaries and thereby gain Rapid Dominance over them”); Gary L. Whitley, *PSYOP Operations in the 21st Century*, in STRATEGIC RESEARCH PROJECT 1 (2000) (quoting Chinese military philosopher Sun Tzu who stated that, “[o]ne need not destroy one’s enemy. One need only destroy his willingness to engage.”).

218. Bejesky, *Politico*, *supra* note 100, at 105 (quoting polls from 2003 to 2009 that found that approximately 70 percent of Iraqis wanted the U.S. to withdraw from Iraq). In drawing a distinction between mistaken targeting with military attacks and mistaken detention of suspected insurgents, the former is more egregious because it can cost innocent lives whereas over-detention has the possibility of holding innocent individuals and militants, but detention still permits an evidentiary review in which innocent people have the opportunity to be released. Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1406–07 (2008). Although, over-detention of innocent people could also cause retaliation.

219. When U.S. troops are not present, a foe’s possible interpretation could be that new bombing and strikes could be unleashed, but when there is a continued presence of

The American media's role during this stage of the war was essential. The media is an institution that can adjust policymaking via democratic feedback, but humanitarian protection was arguably not the media's paramount target. The American media's cynosure was broadcasting images of shock and awe bombing, offering a sense of patriotism and triumph, and imparting that Americans were now safer with preemptive attacks on the regime that the Bush Administration repeatedly maintained posed a security threat.²²⁰ The U.S. media refrained from telecasting images of civilians killed and maimed with shrapnel wounds and missing limbs,²²¹ self-censored humanitarian harm,²²² tallied military casualties without imagery, imparted the impression that Iraqi deaths and injuries were necessary to protect U.S. troops, and asserted that Iraqis were killing each other at levels comparable to pre-invasion levels, which was flagrantly inaccurate. A Johns Hopkins University study found that the "risk of death from violence in the period after the invasion was fifty-eight times higher . . . than in the period before the war."²²³

The media in other Western countries was not as concerned as the U.S. media about censoring evocative images, and this lack of bowdlerization ostensibly made foreign populations more critical of the

U.S. troops on the ground, adversaries could strike back at softer targets, which could mean that earlier superior directives could place U.S. troops at greater risk.

220. JOHN TULLOCH & R. WARWICK BLOOD, *OF WAR AND TERROR: MEDIA IMAGES IN AN AGE OF INTERNATIONAL RISK* 132–34 (2012) (emphasizing the American media system focus on shock and awe bombing, patriotism, and victory); SARAH OATES, *INTRODUCTION TO MEDIA AND POLITICS* 128 (2008) (stating that "the media do not question the rationale for war," "coverage itself relies heavily on nationalistic images," and "[t]here is a strong reliance on information from the military, including video supplied by the military").

221. Jeremy Brecher, Jill Cutler & Brendan Smith, *War Crimes Are High Crimes, in IMPEACH THE PRESIDENT: THE CASE AGAINST BUSH AND CHENEY* 85 (Dennis Loo & Peter Phillips eds., 2006) (stating that following the shock and awe bombing, the "Associated Press deemed its hospital footage of babies cut in half and children with their limbs blown off too upsetting to air on television"). See generally NORMAN SOLOMON, *WAR MADE EASY* (2005) (documenting the chronology of Pentagon and media interaction to market pro-invasion and occupation messages); Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 359–66 (2012) (noting that in comparison to the foreign media, the American media held a pro-war position before the invasion and bias after the invasion).

222. Clay Calvert & Mirelis Torres, *Staring Death in the Face During Times of War: When Ethics, Law, and Self-Censorship in the News Media Hide the Morbidity of Authenticity*, 25 NOTRE DAME J.L. ETHICS & PUB POL'Y 87, 108 (2011) (noting that it seems unlikely that a media organization could incur "legal liability in tort for publishing images of death during war, no matter how gruesome they may be," particularly with a newsworthy accompanying story).

223. ARNOVE, *supra* note 206, at 28.

war.²²⁴ Arab news was even more undaunted and depicted civilian casualties and humanitarian distress,²²⁵ which some American commentators believed was an unfair bias.²²⁶ However, there were

224. Terhi Rantanen, *European News Agencies and Their Sources in the Iraq War Coverage*, in REPORTING WAR: JOURNALISM IN WARTIME 301–02, 308–09 (Stuart Allan & Barbie Zelizer eds., 2004) (stating that European news agencies received accounts from American and Middle Eastern sources that “the biased structure of news machinery inevitably favored the USA and the UK simply by the sheer amount of news coming from their national media,” that the Arab media did not “set[] out to construct the news in a similar way to Western media,” that Al-Jazeera and other Arabic-language stations were significant providers of battlefield news, and that European agencies had to be critical of both extremes in news (i.e., American and Arab)); Ted Rall, *Your Turn: Suffer the Schoolchildren*, COLORADO SPRINGS INDEPENDENT (Jan. 22, 2004), <http://www.csindy.com/coloradosprings/your-turn/Content?oid=1122262> (explaining how societal perceptions can be crafted: “Children get their politics from their parents and teachers, who form their impressions from the media. The European media has covered a different war than the one you’ve seen on CNN and Fox News The bloody corpses of Iraqi civilians are standard TV fare here.”).

225. MARC LYNCH, VOICES OF THE NEW ARAB PUBLIC 194 (2006) (explaining that Al Jazeera’s coverage and debates “were broadcast live and uncensored, offering an unmatched window into Arab public political argumentation”). *Al Jazeera* and a dozen other channels

provided straight news that in many ways gave their viewers a more rounded picture—from the inside—than the Anglo-American networks did. While the Anglo-American networks tended to show Allied medics treating injured Iraqi civilians tenderly while their armed colleagues handed out drinking-water cans to thirsty Iraqi POWs, the Arab media, while airing the briefings and sound bites coming from London, Washington, and Doha . . . also showed the . . . charred Iraqi bodies, . . . grievously wounded civilians, . . . dead Allied troops and injured Iraqi soldiers, [and] hospitals choked with wounded and burnt Iraqis. Away from the battle zone, the Arab networks showed Iraqi suffering, humiliation, and panic—distraught families held up at Anglo-American military checkpoints, hooded Iraqi POWs, thousands fleeing the capital, and civilians, deprived of food and water, driven to begging or looting.

HIRO, *supra* note 206, at 192–94; see also *Iraq and the Media: A Critical Timeline*, FAIRNESS & ACCURACY IN REPORTING (Mar. 19, 2007), <http://fair.org/take-action/media-advisories/iraq-and-the-media/> (observing that on March 22, 2003, *NBC Nightly News* interpreted similar scenarios differently: “For days now with armored tank convoys dominating American TV, both the BBC and the Arab network Al-Jazeera have devoted significant time to what Iraq suggested were innocent victims targeted in the bombings.”).

226. RALPH PETERS, NEW GLORY 49 (2005) (“In the Middle East and elsewhere the media are often no more than propaganda outlets explicitly hostile to the United States, the West, and any attempts to foster democracy or liberty.”); *War Made Easy: How Presidents and Pundits Keep Spinning Us to Death*, DEMOCRACY NOW! (May 29, 2007), http://www.democracynow.org/2007/5/29/war_made_easy_how_presidents_pundits (noting that the position of those supporting the Bush Administration were “[i]f you’re pro-war you’re objective. But if you’re anti-war, you’re biased.”); TAL SAMUEL-AZRAN, AL-JAZEERA AND U.S. WAR COVERAGE 87 (2010) (Pentagon senior spokesman Mark Kimmitt stating: “Change the channel to a legitimate, authoritative, honest news station.

gruesome images that the Pentagon favored releasing.²²⁷ To capture top leaders, the U.S. State Department offered rewards of \$30 million that led to the location of Hussein's two sons and \$25 million that led to the location of Saddam Hussein.²²⁸ The Pentagon released the body-bagged and bloody corpse photographs of Uday and Qusay Hussein, one of whose face was shaven so that they would appear more like live images.²²⁹ Local and occupation authorities were apparently also unsuccessful in or were indifferent to preventing an unknown individual from capturing and publicly releasing the video of Saddam Hussein's hanging body after being found guilty at trial.²³⁰

The American media's content choices during the Iraq War had precedent. The American media emphasized patriotism and the vital American interest in victory during the Vietnam War,²³¹ even though the war was initiated on dubious justifications²³² and occurred on the heels of

The stations that are showing Americans intentionally killing women and children are not legitimate news sources. That is propaganda, and that is lies." Kimmitt is correct; it would be bias to contend that American troops were "intentionally killing women and children," but that is a very high threshold of wrongdoing when the legal standard for ensuring protection of innocent civilians is much lower.

227. HIRO, *supra* note 206, at 335 (The Bush Administration explained that the photos should be released because "Iraqis are frightened of Saddam Hussein and his regime").

228. Rumsfeld: Uday, Qusay Photos Will Be Released, CNN (July 23, 2003, 9:27 PM), <http://www.cnn.com/2003/WORLD/meast/07/23/sprj.irq.sons/>.

229. HIRO, *supra* note 206, at 335–36; Bob Graham, *Was America Right to Release Pictures?*, DAILY MAIL ONLINE, <http://www.dailymail.co.uk/news/article-189933/Was-America-right-release-pictures.html> (last visited Sept. 29, 2014) (noting that the gruesome bodies had been shot 20 times and critics contended that the "U.S. had descended to Saddam Hussein's own level of barbarism").

230. Sam Daghes, *Hussein's Execution Brings Tears, Jubilation and Fear*, CNN (Jan. 1, 2007, 1:15 PM), http://www.cnn.com/2006/WORLD/meast/12/31/iraqi.reaction/index.html?section=cnn_1atest.

231. JOHN R. MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE 1991 GULF WAR*, at xii (1st ed. 1992) (stating that similar to the 1991 and 2003 wars with Iraq—when the Vietnam War began, the media parroted that victory was "vital to American interests, that the enemy was on the verge of collapse, that our strategy and tactics were effective, and that each year would end in victory").

232. The Johnson Administration provided false information to Congress and the American people. JAMES BAMFORD, *BODY OF SECRETS* 299 (2001); PETER IRONS, *WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION* 187 (2005); H.R. MCMASTER, *DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEF OF STAFF, AND THE LIES THAT LED TO VIETNAM* 330, 333–34 (1997); Lori Fisler Damrosch, Comment, *War and Uncertainty*, 114 YALE L.J. 1405, 1409 (2005); Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1210 (2005) (writing that President Johnson pursued his own "self-interest" by promoting a national interest by "deception, misrepresentation, distortion, gross understatements, and outright lies").

Vietnamese desire to end French colonialism.²³³ During the early years of the war, pro-war voices outnumbered antiwar voices nine to one on TV talk shows and documentaries,²³⁴ and the establishment media portrayed protest to the Vietnam War as “communist-inspired,”²³⁵ which was a contention that President Nixon used to justify illegal spying on Americans inside the United States and to chill dissent.²³⁶ The number of war critics on television finally surpassed pro-war voices after 1970,²³⁷ and as this tone of coverage evolved so did the media’s willingness to portray humanitarian destruction.²³⁸ With respect to the basis of the Vietnam War and an alleged attack in the Gulf of Tonkin,²³⁹ Senator Fulbright stated to Congress, “Insofar as the consent of this body is said to derive from the Gulf of Tonkin Resolution, it can only be said that the

233. War expenditures may have been instrumental to President Nixon’s failure to comply with the IMF Gold Standard in 1971. IRONS, *supra* note 232, at 182; Bassiouni, *supra* note 36, at 744; Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT’L L. 91, 153, n.414 (2012) (estimated expenditures for the Vietnam War were \$110–115 billion, but they increased to \$150 billion).

234. MACARTHUR, *supra* note 231, at 134–36 (citing Lawrence W. Lichty’s investigations of media coverage prior to 1966).

235. SHELDON RAMPTON & JOHN STAUBER, *WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH’S WAR ON IRAQ* 182–83 (2003).

236. Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12 CONN. PUB. INT. L.J. 1, 29–30 (2012); Richard Falk, *Responsible Scholarship in “Dark Times,”* 7 UCLA J. ISLAMIC & NEAR E.L. 1, 1–2 (2008) (noting that there was reluctance among academics to openly oppose the Vietnam War even though they did personally oppose it). Hence, even though Red Scare II (McCarthyism) ended, the ideological core of dissent was similar to earlier eras—pro-war and combating anti-communist thought was orthodox, while antiwar or left-wing dissent was targeted, stymied, and even persecuted into the 1970s. See *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 235 (1957); *United States v. Dennis*, 341 U.S. 494 (1951); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

237. MACARTHUR, *supra* note 231, at 136. There was a gradual transition in the news that presented more opposition to the Vietnam War after the 1968 Tet offensive. *Id.* at 134 (noting that Professor Hallin’s studies found that comments by television journalists were four to one in favor of the Administration’s policy); NOAM CHOMSKY, *AMERICAN POWER AND THE NEW MANDARINS* 10 (3d ed. 2002) (“I suppose this is the first time in history that a nation has so openly and publicly exhibited its own war crimes.”).

238. MACARTHUR, *supra* note 231, at 136 (stating that Max Frankel, *New York Times* executive editor explained: “As protest moved from the left groups, the antiwar groups, into the pulpits, into the Senate—with Fulbright, Gruening, and others—as it became majority opinion, it naturally picked up coverage. And then naturally the tone of coverage changed.”); RAMPTON & STAUBER, *supra* note 235, at 182–83 (noting that Vietnam War violence in news reports was normally portrayed as puffs of smoke in the distance against an unseen enemy, but television coverage of the spring offensives in 1972 showed suffering and destruction).

239. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384, 384 (1964).

resolution, like any other contract based on misrepresentation, in my opinion, is null and void.”²⁴⁰ The Gulf of Tonkin Resolution, which was Congress’s authorization for the Vietnam War, was repealed in January 1971,²⁴¹ after nearly seven years of war.

2. Cluster Bombs

The U.S.’s use of cluster bombs in Iraq evoked ire because it has long been known that cluster munitions and similar weapons can inflict humanitarian catastrophe.²⁴² Cluster weapons can be used in rockets, aircraft, and artillery²⁴³ to target military convoys and pierce armed equipment and tanks, but they can also inflict indiscriminate carnage because the weapons are often released or fired as a canister containing over two hundred soda-size bomblets and are capable of defusing over an area the size of several football fields.²⁴⁴ The immense zone of impact expectantly has a high miss rate²⁴⁵ and can kill someone within 150 meters of the explosion.²⁴⁶

240. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 19 (1993); Damrosch, *supra* note 232, at 1409.

241. Special Foreign Assistance Act of 1971, Cooper-Church Amendment, Pub. L. No. 91-652, 84 Stat. 1942, 1943 (1971); Ackerman & Hathaway, *supra* note 109, at 485.

242. See *Special Report: A Close Look at the U.S.-Led Coalition’s Use of Cluster Weapons in Iraq, USA TODAY*, <http://usatoday30.usatoday.com/news/graphics/world/gcluster/flash.htm> (last visited Oct. 20, 2014) (“[C]luster weapons pose a grave threat to civilians. For that reason, military officials say cluster bombs are their weapons of last resort.”).

243. Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT’L L. 85, 89 (2000).

244. IN THE NAME OF DEMOCRACY, *supra* note 180, at 37, 40; HUMAN RIGHTS WATCH, *FATALLY FLAWED: CLUSTER BOMBS AND THEIR USE BY THE UNITED STATES IN AFGHANISTAN* 6–10, 40–41 (2002), available at <http://www.hrw.org/reports/2002/us-afghanistan/Afghan1202.pdf> (discussing the impact radius and potential for indiscriminate harm and that cluster weapons were also used in the 1991 Gulf War and Yugoslavia); see also Virgil Wiebe, *For Whom the Little Bells Toll: Recent Judgments by International Tribunals on the Legality of Cluster Munitions*, 35 PEPP. L. REV. 895, 897 (2008); Symposium, *The International Responses to the Environmental Impacts of War*, 17 GEO. INT’L ENVTL. L. REV. 565, 572 (2005) (stating that cluster bombs are “like mines dropped from the planes . . . [with] unexploded ordnances”).

245. Lesley Wexler, *Limiting the Precautionary Principle: Weapons Regulation in the Face of Scientific Uncertainty*, 39 U.C. DAVIS L. REV. 459, 504 (2006).

246. Wiebe, *supra* note 243, at 89. It is possible for cluster weapons to have a broader impact zone. *Id.* at 93, 110 (stating that when used as a bomb in a B-52 bomber, the munitions can cover 27,500 football fields, and when used in the U.S. Army’s Multiple Launch Rocket System, several rockets can be fired at the same time and the cluster munitions can cover an area the size of sixty football fields).

An additional humanitarian concern is that ten to thirty percent of bomblets may not detonate on impact and could be tantamount to landmines because bomblets have a small size, could go unnoticed on the ground, and can explode later when a passerby touches the canister.²⁴⁷ Professor Virgil Wiebe wrote: "Their unacceptably high failure rates result in thousands if not hundreds of thousands of unexpected bomblets which kill and injure children and adults, deny access to agricultural and grazing land, and prevent rapid post-conflict reconstruction and development."²⁴⁸ One study of the use of cluster munitions across several conflicts found that 75–80% of the casualties were caused by unexploded submunitions,²⁴⁹ furthermore, 98% of deaths caused by cluster munitions were civilians.²⁵⁰ Consequently, the lack of precision²⁵¹ and the menace from unexploded bomblets breed profound concerns under laws of war that require targeting of military objectives and prohibit indiscriminate attacks,²⁵² particularly when cluster munitions have long aroused exasperation.

Early versions of cluster munitions were used during World War II, but the first time the weapon was deployed was during the Vietnam War. U.S. aircraft dropped nearly 800,000 cluster bombs during the Vietnam War,²⁵³ and the attacks sparked outrage and were labeled the "most

247. Bonnie Docherty, *The Time Is Now: A Historical Argument for a Cluster Munitions Convention*, 20 HARV. HUM. RTS. J. 53, 63, 76–77 (2007); Wiebe, *supra* note 243, at 118.

248. Wiebe, *supra* note 243, at 952.

249. Richard Norton-Taylor, *Civilians Main Cluster Bomb Victims*, THE GUARDIAN (Nov. 2, 2006, 7:04 PM), <http://www.guardian.co.uk/world/2006/nov/03/military.armstrade>.

250. Stuart Hughes, *Global Cluster Bomb Ban Comes into Force*, BBC NEWS (Aug. 1, 2010, 12:26 AM), <http://www.bbc.com/news/world-10829976>.

251. Phillip S. Meilinger, *Precision Aerospace Power, Discrimination, and the Future of War*, AEROSPACE POWER J., Fall 2001, available at <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj01/fal01/meilinger.html> (stating that "air warfare over the past decade has significantly humanized war" but that it is not possible to achieve perfect accuracy with bombing and missile strikes because there can still be "failure of the guidance system or aircraft equipment, as well as aircrew error"). However, with cluster bombs, precision may not be possible by the nature of the device.

252. Additional Protocol, *supra* note 134, arts. 5(1), 51(4)(b) (attacks must "employ a method or means of combat which cannot be directed at a specific military objective").

253. *Timeline of Cluster Munitions Use*, HUMAN RIGHTS WATCH (May 2008), http://www.hrw.org/sites/default/files/related_material/Timeline_Cluster_Use_05.08.pdf; Joseph Anzalone, *The Virtue of a Proportional Response: The United States Stance Against the Convention on Cluster Munitions*, 22 PACE INT'L L. REV. 183, 186 (2010) (noting that bombs with 360 million submunitions were dropped during the Vietnam War); Karl C. Ching, *The Use of Cluster Munitions in the War on Terrorism*, 31 SUFFOLK TRANSNAT'L L. REV. 127, 137 (2007) (noting that during the 1960s and 1970s, the U.S.

indiscriminate” weapon used.²⁵⁴ In addition to the use in Southeast Asia during the Vietnam War, the U.S. deployed cluster munitions during the first Gulf War and in Yugoslavia and Afghanistan.²⁵⁵ The Israeli military also fired cluster weapons in Southern Lebanon in 2006²⁵⁶ and unleashed 90% of its cluster bomb attacks in the final seventy-two hours of conflict,²⁵⁷ leaving approximately one million unexploded submunitions in Lebanon and 26% of Lebanon’s cultivatable land contaminated with unexploded submunitions.²⁵⁸ International tribunals recently held officials in Eritrea and Yugoslavia responsible for injuries and deaths from cluster bombs.²⁵⁹

During the first four weeks of the invasion of Iraq, conservative estimates noted that the U.S. military dropped 1,566 cluster bombs, while Human Rights Watch stated that the U.S. and Britain used 13,000 cluster bombs during the first month of the war.²⁶⁰ In an article devoted to supporting efforts to consummate a convention banning cluster bombs, Harvard Law Professor Bonnie Docherty estimated that the U.S. and U.K. dropped at least 12,000 cluster bombs that carried two million submunitions during the Iraq War and highlighted the unacceptable ruination.²⁶¹ After an early series of cluster bomb strikes purportedly designed to “decapitate” the Iraqi leadership, the *Los Angeles Times* surveyed hospitals in Baghdad and found that 1,700 civilians were killed

military dropped between nine and twenty-seven million cluster bomblets that today still continue to injure and kill civilians).

254. Eitan Barak, *None to Be Trusted: Israel’s Use of Cluster Munitions in the Second Lebanon War and the Case for the Convention on Cluster Munitions*, 25 AM. U. INT’L L. REV. 423, 431 (2010); Carmel Capati, *Note: The Tragedy of Cluster Bombs in Laos: An Argument for Inclusion in the Proposed International Ban on Landmines*, 16 WIS. INT’L L.J. 227, 239 (1998) (noting that the U.S. gave \$850,000 in prosthetic limbs to Laotian victims of the Vietnam War).

255. Docherty, *supra* note 247, at 62; Ching, *supra* note 253, at 139–40 (noting that the U.S. military dropped twenty million bomblets during the 1991 Gulf War, 330,000 bomblets in Yugoslavia in 1999, and massive quantities in Afghanistan).

256. Barak, *supra* note 254, at 428–29; Docherty, *supra* note 247, at 62.

257. THOMAS NASH, FORESEEABLE HARM: THE USE AND IMPACT OF CLUSTER MUNITIONS IN LEBANON 3 (2006). Israel claimed the weapons were needed to prevent rocket strikes at Israel, the attacks were proportional, and were fired only at military targets. Barak, *supra* note 254, at 440, 457.

258. Anzalone, *supra* note 253, at 198.

259. Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶¶ 456–72, 480 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2007), www.icty.org/x/cases/martic/tjug/en/070612.pdf; The Federal Democratic Republic of Ethiopia v. The State of Eritrea, Partial Award, Central Front, Ethiopia’s Claim 2, 43 I.L.M. 1275, 1294–96 (Apr. 28, 2004), available at http://www.pca-cpa.org/showpage.asp?pag_id=1151.

260. HIRO, *supra* note 206, at 296; HUMAN RIGHTS WATCH, *supra* note 205.

261. Docherty, *supra* note 247, at 54–55.

and over 8,000 injured in that spate of attacks.²⁶² Reporters discovered hospital patients suffering from shrapnel wounds.²⁶³

Amnesty International called the use of cluster bombs in civilian areas a violation of humanitarian law because the weapons are incapable of distinguishing between combatants and civilians.²⁶⁴ After all, Article 51 of Additional Protocol I of the Geneva Convention prohibits indiscriminate attacks, which are attacks that are “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²⁶⁵ Instead of encouraging an outright ban, the U.S., the U.K., and several other European countries have convened attention on restricting cluster bombs with a high dud rate.²⁶⁶ An alternative position is that emphasizing the failure rate merely deviates from the advocacy of those who maintain the weapons should not be used in the first place,²⁶⁷ places the onus of compliance on countries incapable of producing higher technology weaponry, and attempts to restrict cluster weapons solely for the

262. IN THE NAME OF DEMOCRACY, *supra* note 180, at 36; HUMAN RIGHTS WATCH, *supra* note 205 (asserting that cluster munitions killed or wounded at least 1,000 civilians); Reynolds, *supra* note 137, at 44 (2005) (describing harm from the bombing).

263. IN THE NAME OF DEMOCRACY, *supra* note 180, at 7, 36, 39 (further noting that injured survivors described how bombs “fell like grapes from the sky . . . bounc[ing] through the windows and doors of their homes”).

264. See Amnesty Int’l, *Iraq: Use of Cluster Bombs; Civilians Pay the Price*, AI Index MDE 14/065/2003, Apr. 2, 2003, available at <http://web.archive.org/web/20040313144231/http://web.amnesty.org/library/index/ENG.MDE140652003> (“The use of cluster bombs in an attack on a civilian area of al-Hilla constitutes an indiscriminate attack and a grave violation of international humanitarian law.”); see also Jessica Corsi, Note, *Towards Peace Through Legal Innovation: The Process and the Promise of the 2008 Cluster Munitions Convention*, 22 HARV. HUM. RTS. J. 145, 149 (2009); Docherty, *supra* note 247, at 62 (noting that a 2006 report estimated that 98% of all cluster munitions casualties are civilians); Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 128 (2002) (calling cluster bomb use in civilian populated areas a clear violation of international law); Wiebe, *supra* note 243, at 112.

265. Additional Protocol, *supra* note 134, art. 51(5)(b).

266. Docherty, *supra* note 247, at 65–67; ANDREW FEICKERT & PAUL K. KERRY, CONG. RESEARCH SERV., RS22907, CLUSTER MUNITIONS: BACKGROUND AND ISSUES FOR CONGRESS 5 (2013) (noting that in 2008, Congress forbid allocating funds to procure cluster bombs with a failure rate that exceeds one percent, but “the Pentagon’s new policy is the unwaiverable requirement that cluster munitions used after 2018 must leave less than 1% of unexploded submunitions on the battlefield”).

267. See BRIAN RAPPERT, CONTROLLING THE WEAPONS OF WAR: POLITICS, PERSUASION, AND THE PROHIBITION OF INHUMANITY 145 (2013) (noting advocacy for a complete ban); MINES ACTION CANADA, BANNING CLUSTER MUNITIONS: GOVERNMENT POLICY AND PRACTICE 35–36, 150 (2009), available at http://www.the-monitor.org/cm/2009/banning_cluster_munitions_2009.pdf.

repercussion that makes them akin to landmines. U.S. support has been lacking in the international efforts to ban both landmines and cluster munitions.

Significant advocacy developed nearly two decades ago to rid the world of landmines.²⁶⁸ The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction in 1997 specifically excluded cluster munitions even though there are similarities between cluster munitions and landmines.²⁶⁹ There are 162 state parties,²⁷⁰ but the U.S. never signed the treaty because the Pentagon still supports landmines as a weapon system.²⁷¹ Also, in 2007 nearly seventy countries initiated efforts to ban cluster weapons,²⁷² and in 2010 the Convention on Cluster Munitions became binding to prohibit producing, stockpiling, and using cluster munitions.²⁷³ The Convention has eighty-eight state parties and an additional 27 signatories,²⁷⁴ but the Bush Administration did not participate in the negotiations in Oslo, purportedly because cluster weapons provide a significant military advantage.²⁷⁵ The Pentagon has stockpiled 5.5 million cluster munitions, or 728.5 million submunitions.²⁷⁶

268. JODY WILLIAMS, MY NAME IS JODY WILLIAMS: A VERMONT GIRL'S WINDING PATH TO THE NOBEL PEACE PRIZE xiv (2013).

269. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. 2(1), Sept. 18, 1997, 2056 U.N.T.S. 211.

270. *Id.* at 1–3.

271. Schmitt, *supra* note 131, at 814; Docherty, *supra* note 247, at 59–61.

272. 68 Countries Push for Ban on Cluster Munitions, HUMAN RIGHTS WATCH (May 26, 2007), <http://www.hrw.org/news/2007/05/25/68-countries-push-ban-cluster-munitions>; Anzalone, *supra* note 253, at 200 (noting that the Oslo Conference involved five conferences held over two years).

273. Convention on Cluster Munitions, May 30, 2008, 48 I.L.M. 357; *see also* Convention Text, CONVENTION ON CLUSTER MUNITIONS.ORG, <http://www.clusterconvention.org/the-convention/convention-text/> (last visited Dec. 22, 2014).

274. Convention Status, CONVENTION ON CLUSTER MUNITIONS.ORG, <http://www.clusterconvention.org/the-convention/convention-status/> (last visited Dec. 22, 2014).

275. Anzalone, *supra* note 253, at 184–85; *see* Barak, *supra* note 254, at 436 (noting that thirty-four countries produce over two hundred different types of cluster weapons and over seventy countries have them stockpiled); *see also* Docherty, *supra* note 247, at 63–64, 78.

276. Anzalone, *supra* note 253, at 186.

3. Nuclear Programs and Depleted Uranium

The concern over nuclear proliferation prompted the international community to adopt the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in 1968.²⁷⁷ The NPT established a system for states to consummate bilateral agreements with the International Atomic Energy Commission (IAEC) to authorize the commission to conduct inspections and ensure that signatory states operate and develop nuclear energy facilities transparently.²⁷⁸ The NPT urged countries to refrain from pursuing nuclear weapon programs in exchange for granting signatory states with nuclear power assistance and technology for peaceful purposes.²⁷⁹ Consequently, the system may have prevented countries from adapting enriched uranium into nuclear weapons that could pose a threat to international peace and security. However, an additional boon to states with the scientific technology is that nuclear programs have been utilized to produce depleted uranium (DU), which has proven propitious in non-prohibited weapon systems.²⁸⁰ While the U.S. has never encountered an enemy that has used DU in military armaments or equipment,²⁸¹ the U.S. military acquires ammunition synthesized with DU to augment firing range and explosive power and procures tanks constructed with DU to strengthen armor.²⁸² With respect to utilizing DU to intensify destructive potential, one might query whether the use of DU is merely splitting hairs between legal weapons and condemned nuclear weapons by making nuclear weapons smaller, with a less radioactive

277. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970).

278. See, e.g., Agreement Between Iran and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, arts. 7, 31, 33, May 15, 1974, *reprinted in* INT'L ATOMIC ENERGY AGENCY, THE TEXT OF THE AGREEMENT AND THE AGENCY FOR THE APPLICATION OF SAFEGUARDS IN CONNECTION WITH THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (1974).

279. Andrew Grotto, *Why Do States That Oppose Nuclear Proliferation Resist New Nonproliferation Obligations?: Three Logics of Nonproliferation Decision-Making*, 18 CARDOZO J. INT'L & COMP. L. 1, 5 (2010).

280. See UNITED NATIONS, FINAL REPORT OF THE OFFICE OF THE PROSECUTOR FOR THE INTERNATIONAL CRIMINAL COURT FOR THE FORMER YUGOSLAVIA REGARDING POSSIBLE NATO WAR CRIMES, *reprinted in* AARON SCHWABACH, INTERNATIONAL ENVIRONMENTAL DISPUTES: A REFERENCE HANDBOOK 225 (2006) ("There is no specific treaty ban on the use of DU projectiles.").

281. Matthew L. Wald, *Danger From Depleted Uranium Is Found Low in Pentagon Study*, N.Y. TIMES (Oct. 19, 2004), http://www.nytimes.com/2004/10/19/politics/19uranium.html?_r=0.

282. Wexler, *supra* note 245, at 468.

composition, and with reduced destructive potential. Moreover, there are humanitarian, health, and environmental anxieties.²⁸³

Some experts maintain that when a DU-laced weapon impacts a target, the DU can contaminate the ground and air and infect the food chain.²⁸⁴ Radiation-exposed civilians, and even American soldiers using the weapons, have reportedly experienced ill-health effects, including lung disease, kidney disease, leukemia, lymphoma, bone and breast cancer, and neurological disabilities; some have bore children with birth defects.²⁸⁵ Recent scientific studies blame the Pentagon's use of DU for the steep rise in the cancer rate, birth defects, and severe environmental contamination in war-torn Iraqi cities.²⁸⁶ Some U.S. officials and experts have acknowledged the concerns over the ill-effects of DU,²⁸⁷ but the Pentagon has disagreed with the results of studies on ill-health effects. One U.S. official contended that those who advocate for a ban on DU ammunition are attempting to blunt American military might.²⁸⁸ Perhaps critics also aspire to avert postern cheating on the NPT.

The international community has long recognized that war desecrates the environment²⁸⁹ and that recent wars have possibly damaged

283. See Int'l Comm. of the Red Cross, *Depleted Uranium Munitions*, INT'L REV. RED CROSS, No. 842, June 30, 2001, available at <https://www.icrc.org/eng/resources/documents/misc/57jqxp.htm>.

284. SAMUEL UPTON NEWTON, *NUCLEAR WAR I AND OTHER MAJOR NUCLEAR DISASTERS OF THE 20TH CENTURY* 244 (2007); see also Larry Johnson, *Use of Depleted Uranium Weapons Lingers as Health Concern: War's Unintended Effects*, SEATTLE POST-INTELLIGENCER (August 3, 2003, 10:00 PM), <http://www.seattlepi.com/news/article/Use-of-depleted-uranium-weapons-lingers-as-health-1120909.php>.

285. See IN THE NAME OF DEMOCRACY, *supra* note 180, at 43–45; see also Ghoshray, *supra* note 192, at 701; Ann Hubbard, *A Military-Civilian Coalition for Disability Rights*, 75 MISS. L.J. 975, 1001–03 (2006).

286. *Depleted Uranium Used by U.S. Forces Blamed for Birth Defects and Cancer in Iraq*, RT (July 22, 2013, 1:21 PM), <http://rt.com/news/iraq-depleted-uranium-health-394/>; see Rob Edwards, *Iraq's Depleted Uranium Clean-Up to Cost \$30m as Contamination Spreads*, THE GUARDIAN (Mar. 6, 2013, 6:44 AM), <http://www.theguardian.com/environment/2013/mar/06/iraq-depleted-uranium-clean-up-contamination-spreads>.

287. Ghoshray, *supra* note 192, at 700 (citing a British documentary broadcast on January 3, 1996, and referencing Brent Scowcroft, National Security Advisor under President George H.W. Bush, who explained: "Depleted uranium is more of a problem than we thought when it was developed. But it was developed according to standards and was thought through very carefully. It turned out, perhaps, to be wrong.").

288. *U.S. to Use Depleted Uranium*, BBC NEWS (Mar. 18, 2003, 16:28 GMT), <http://news.bbc.co.uk/2/hi/2860759.stm>.

289. Rymn James Parsons, *The Fight to Save the Planet: U.S. Armed Forces, "Greenkeeping," and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict*, 10 GEO. INT'L ENVTL. L. REV. 441, 441 (1998).

ecosystems.²⁹⁰ Nonetheless, victors have never been punished for environmental crimes²⁹¹ and no country or individual since the Nuremburg Tribunal has been charged with environmental war crimes²⁹² even though wartime environmental destruction is recognized as a crime in several international agreements.²⁹³ In the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (1996), the ICJ held that states must “take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate

290. Tara Weinstein, *Prosecuting Attacks That Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 GEO. INT'L ENVTL. L. REV. 697, 709–10 (2005) (contending that problems should have been recognized from recent experiences in Yugoslavia because NATO bombings attacked chemical facilities and contaminated soil and waterways and used scorched-earth policies that destroyed infrastructure and agriculture). Before the Iraq War, over two hundred lawyers and professors addressed a letter to U.N. Secretary-General Kofi Annan and warned that a war could cause “massive . . . environmental destruction.” *Experts Warn of Environmental Catastrophe and Violations of International Law in Iraq*, AUSTRALIAN NAT'L UNIV. (Mar. 19, 2003), http://oldinfo.anu.edu.au/OVC/Media/Media_Releases/_2003/030319iraqwar.asp.

291. Richard Falk, *The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime*, in THE ENVIRONMENTAL CONSEQUENCES OF WAR 137, 146–47 (Jay E. Austin & Carl E. Bruch eds., 2000) (stating that prosecutions appear as victor's justice to punish the defeated); Symposium, *A Collision of Authority: The U.S. Constitution and Universal Jurisdiction*, 9 RICH. J. GLOBAL L. & BUS. 307, 321, 331–32 (2010) (discussing remarks by Erwin Chemerinsky, giving the Nuremburg Tribunals as an example of exercising universal criminal jurisdiction, and pointing to examples used by Rabkin, such as the U.S. and allies killing 600,000 Germans and dropping atomic bombs on Japanese cities during World War II as examples that were not punished).

292. Weinstein, *supra* note 290, at 698, 704.

293. Rome Statute, *supra* note 187, at art. 8(2)(b)(iv) (criminalizing “widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”); see *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), at Annex I (Aug. 12, 1992) (“Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary The environment and natural resources of people under oppression, domination and occupation shall be protected.”); Additional Protocol, *supra* note 134, at art. 35, para. 3; see also Rule 45. *Causing Serious Damage to the Natural Environment*, INTERNATIONAL COMMITTEE OF THE RED CROSS, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule45 (last visited Oct. 20, 2014). Rule 45 restricts “methods or means of warfare that . . . may be expected . . . to cause widespread, long-term and severe damage to the natural environment.” *Id.* The U.S. is not a party to Protocol I, but 174 countries are members to make Protocol I an additional source to the Geneva Conventions. Additional Protocol, *supra* note 134, at art. 35, para. 3; 1949 Conventions and Additional Protocols, and Their Commentaries, ICRC, <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (last visited Dec. 22, 2014).

military objectives.”²⁹⁴ The U.S. Uniform Code of Military Justice provides for penalties for environmental destruction,²⁹⁵ but it does not appear that the Pentagon has viewed DU pernicious to the environment.

4. Chemical Weapons

The Chemical Weapons Convention (CWC) banned chemical weapons in 1993, became binding in 1997, and presently has 190 parties, including the U.S.²⁹⁶ The CWC prohibits using, preparing, acquiring, possessing, developing, and transferring chemical weapons.²⁹⁷ There were allegations that the U.S. used chemical weapons in Iraq, including napalm-equivalent weapons, white phosphorous,²⁹⁸ and riot control agents.²⁹⁹ The allegation about the use of riot control agents is the least controversial.

After President Bush authorized the use of tear gas—a riot control agent—in Iraq, experts advised that the use of control agents could violate the CWC.³⁰⁰ The U.S. military apparently did not discharge tear

294. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241 (July 8).

295. See generally Eric Talbot Jensen & James J. Teixeira, Jr., *Prosecuting Members of the U.S. Military for Wartime Environmental Crimes*, 17 GEO. INT'L ENVTL. L. REV. 651, 653, 667–70 (2005) (stating that Deputy Staff Judge Advocate Eric Talbot Jensen and Military Justice Division Chief James J. Teixeira maintain “[t]he Uniform Code of Military Justice (UCMJ), which applies to all members of the United States Armed Forces, provides sufficient penalties and other enforcement mechanisms to deter potential environmental law violators, punish convicted criminals, and protect the environment”).

296. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21 [hereinafter Chemical Weapons Convention]; *OPCW Member States*, ORG. FOR THE PROHIBITION OF CHEM. WEAPONS, <http://www.opcw.org/about-opcw/member-states/> (last visited Dec. 22, 2014). A similar sentiment to ban destructive weapons was expressed in the 1972 Biological Weapons Convention, which has 168 States Parties. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163. States Parties to the Biological Weapon Convention are organized by country and signing date. *Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://disarmament.un.org/treaties/t/bwc> (last visited Dec. 22, 2014).

297. Chemical Weapons Convention, *supra* note 296, at arts. I(a)–(c), II(1).

298. See George Monbiot, *The U.S. Used Chemical Weapons in Iraq—and Then Lied About It*, THE GUARDIAN (Nov. 14, 2005, 9:04 PM), <http://www.theguardian.com/politics/2005/nov/15/usa.iraq>.

299. See *infra* note 300 and accompanying text.

300. Nicholas Wade & Eric Schmitt, *A Nation at War: Weapons; U.S. Use of Tear Gas Could Violate Treaty, Critics Say*, N.Y. TIMES (Apr. 5, 2003),

gas,³⁰¹ but after private contractors fired riot control agents during the occupation,³⁰² the U.S. Senate held debates over the illogic of being able to employ lethal force in instances where tear gas would be forbidden.³⁰³ This is a credible but only partially developed proposition. A decapacitating agent, but not lethal force, could be a justifiable means of restraining civilian crowds,³⁰⁴ but the CWC proscribes member states from deploying “riot control agents as a method of warfare.”³⁰⁵ If riot-control decapacitating agents could be used during combat, this could grant an unfair advantage to one side of combatants³⁰⁶ and lead to a slippery slope of competition among combatants to employ agents that will most decapacitate opposing forces while also using deadly force, or permit the development of hybrid chemical compositions that are near-lethal. Ultimately, the use of riot control agents in Iraq was not galling;

<http://www.nytimes.com/2003/04/05/us/a-nation-at-war-weapons-us-use-of-tear-gas-could-violate-treaty-critics-say.html>; Chemical Weapons Convention, *supra* note 296, at art. II(7) (explaining that a riot control agent is “[a]ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure”).

301. DAVID A. KOPLOW, *DEATH BY MODERATION: THE U.S. MILITARY’S QUEST FOR USEABLE WEAPONS* 207–08 n.17 (2010) (stating that while President Bush authorized tear gas for use in the war, there were not authoritative reports of actual use).

302. James Risen, *2005 Use of Gas by Blackwater Leaves Questions*, N.Y. TIMES (Jan. 10, 2008), http://www.nytimes.com/2008/01/10/world/middleeast/10blackwater.html?pagewanted=all&_r=0 (noting that Blackwater, a private contractor, used tear gas, but that military rules mandate that riot control agents can only be used “under the strictest conditions and with the approval of top commanders”).

303. 151 CONG. REC. S25,411 (Nov. 8, 2005) (statement of Sen. Ensign).

304. *U.S. Policy and Practice with Respect to the Use of Riot Control Agents by the U.S. Armed Forces: Hearing Before the S. Subcomm. on Readiness and Mgmt. Support of the Comm. on Armed Servs.*, 109th Cong. (2006) (discussing the history surrounding President Ford’s Executive Order 11850 of April 8, 1975 and noting that riot control agents cannot be used as a method of warfare but that they can be used as a means of nonlethal force); GORDON M. BURCK & CHARLES C. FLOWERREE, *INTERNATIONAL HANDBOOK ON CHEMICAL WEAPONS PROLIFERATION 197–200* (1991) (stating that Israel has used tear gas and angered countries throughout the Middle East); Roman Reyhani, *The Legality of the Use of White Phosphorus by the United States Military During the 2004 Fallujah Assaults*, 10 U. PA. J.L. & SOC. CHANGE 1, 21–23 (2007) (noting the slippery slope argument used by the U.S. that rationalized the use of riot control agents during warfare, how problems emerge when conjoining riot control with lethal force, and the difficulty of fulfilling humanitarian obligations).

305. Chemical Weapons Convention, *supra* note 296, at art. I(5).

306. For example, if a combatant only uses a nonlethal decapacitating agent and the adversary does not have a similar, non-lethal, means of retaliating, adversary-combatants might respond more chaotically and with lethal force, placing the combatant who uses the decapacitating agent at a disadvantage; or the combatant could use decapacitating agents and lethal force together, which places the retaliating party at a disadvantage.

the material anxiety arose over the use of napalm-like incendiary weapons and white phosphorus.³⁰⁷

Napalm is a bomb that detonates into massive fireballs.³⁰⁸ Experts have debated whether napalm should be banned as a chemical weapon,³⁰⁹ because it does have “toxic or asphyxiating effects,” is made with chemical substances,³¹⁰ and produces fumes that can incapacitate, which means that combatants could suffocate or become more distressed over the prospect of burning to death from flames consuming surrounding edifices than with defending themselves.³¹¹ Irrespective of its classification as a chemical weapon, napalm was independently banned by the United Nations as an incendiary weapon in 1980³¹² because of the horrendous terror that napalm wreaked in Vietnam.³¹³

307. Monbiot, *supra* 298.

308. IN THE NAME OF DEMOCRACY, *supra* note 180, at 45.

309. *U.S. Chemical Warfare Policy: Hearing Before the H. Subcomm. on National Security Policy & Scientific Developments of the H. Comm. on Foreign Affairs*, 93d Cong. 136-39 (1974) (debating whether napalm should be defined as a chemical weapon); ALBERT J. MAURONI, *CHEMICAL AND BIOLOGICAL WARFARE: A REFERENCE HANDBOOK* 3 (2d ed. 2007) (noting that some believe “that the use of chemical munitions such as white phosphorous and napalm (or similar fuel-filled weapons) should be considered chemical warfare, because they are chemicals and, if deliberately used against people, seem to fit the definition”).

310. INT’L COMM. OF THE RED CROSS, *WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS* 54-55 (1973), *available at* http://www.loc.gov/r/rfd/Military_Law/pdf/RC-Weapons.pdf (noting that napalm is made with “petroleum hydrocarbon, such as gasoline” and other synthetic ingredients to “enhance its aggressive properties”).

311. DEP’T OF THE ARMY, *PAMPHLET* 385-64, at 29 (2011) (listing napalm as a chemical weapon and stating that “[p]rotection from inhalation of smoke from burning incendiary mixtures is required”); FRITS KALSHOVEN, *REFLECTIONS ON THE LAW OF WAR* 347 (2007) (writing that “napalm can be the payload of incendiary bombs used against industrial or urban areas,” military vehicles, fixed military installations, and fighters who hide in a “dugout or enemy village”).

312. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons art. 1, *opened for signature* Oct. 10, 1980, 1342 U.N.T.S. 171, 19 I.L.M. 1534 (entered into force Dec. 2, 1983) (“[I]ncendiary weapon means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat or a combination thereof, produced by a chemical reaction of a substance delivered on the target.”).

313. HUMAN RIGHTS WATCH & HARVARD LAW SCHOOL INT’L HUMAN RIGHTS CLINIC, *MEMORANDUM TO CCW DELEGATES I* (2010), *available at* <http://hrp.law.harvard.edu/wp-content/uploads/2011/04/protocolmemo.pdf> (stating that the “horrors of napalm and other incendiary weapons impelled the negotiation of the third protocol to the Convention”); James W. Crawley, *Officials Confirm Dropping Firebombs on Iraqi Troops*, SAN DIEGO UNION TRIBUNE (Aug. 5, 2003), http://legacy.utsandiego.com/news/military/20030805-9999_1n5bomb.html (noting overwhelming condemnation when images and video surfaced of U.S. use of napalm in Vietnam and reporting that of the Iraqi soldiers who died from fire bombs in 2003,

There was discord as to whether the U.S. held napalm in its arsenal and whether the military brought it to Iraq.³¹⁴ Two days into the war, embedded reporters from the *Sydney Morning Herald* and CNN traveled with troops and stated that napalm was used in Iraq, but the Pentagon ultimately denied the allegation.³¹⁵ Several months later, U.S. military officials acknowledged the reports³¹⁶ but stated that the weapon was technically not napalm because the weapon discharged was composed of “kerosene” instead of “petrol.”³¹⁷ Over two years after the use, the British government admitted that “American officials lied to British ministers over the use of ‘internationally reviled’ napalm-type firebombs in Iraq.”³¹⁸ Due to the evident loopholes in Protocol III that bans

Colonel James Allen explained: “Unfortunately there were people there because you could see them in the . . . video. They were Iraqi soldiers. It’s no great way to die.”).

314. Crawley, *supra* note 313 (discussing Marine Corps officials admitting that they brought hundreds of “Mark 77” firebombs to Iraq and that the U.S. has never even agreed to ban napalm use against civilian targets); Lindsay Murdoch, *Dead Bodies Are Everywhere*, SYDNEY MORNING HERALD (Mar. 22, 2003), <http://www.smh.com.au/articles/2003/03/21/1047749944836.html> (noting Lieutenant Commander Danny Hernandez stating: “We don’t even have that [napalm] in our arsenal.”).

315. Murdoch, *supra* note 314 (noting that the Pentagon responded to the *Sydney Morning Herald* by stating: “Your story . . . claiming U.S. forces are using napalm in Iraq, is patently false. The U.S. took napalm out of service in the early 1970s.”); ROBERT M. NEER, *NAPALM: AN AMERICAN BIOGRAPHY* 208–09 (2013). *Contra* Andrew Buncombe, *U.S. Admits it Used Napalm Bombs in Iraq*, THE INDEPENDENT (Aug. 10, 2003), <http://www.independent.co.uk/news/world/americas/us-admits-it-used-napalm-bombs-in-iraq-99716.html> (stating that Marine Corps Maj. Gen. Jim Amos “confirmed that napalm was used on several occasions in the war”).

316. Buncombe, *supra* note 315 (quoting Colonel James Allen as saying in reference to a March 21 bombing: “We napalmed both those approaches The generals love napalm. It has a big psychological effect.”); IN THE NAME OF DEMOCRACY, *supra* note 180, at 45; HIRO, *supra* note 206, at 188.

317. NEER, *supra* note 315, at 208–09 (noting that the Pentagon still claimed the report was untrue because they had destroyed “the last batch of napalm on 4 April, 2001”). Pentagon officials instead rationalized that the bombs used in Iraq used “kerosene” instead of “petrol,” which has the identical effect and is equally lethal as the petrol-type bomb used since 1942. IN THE NAME OF DEMOCRACY, *supra* note 180, at 45; *see* HIRO, *supra* note 206, at 187. Robert Musil, executive director of Physicians for Social Responsibility, called the distinction “pretty outrageous” and “clearly Orwellian.” Crawley, *supra* note 313. One newspaper characterized the Pentagon’s denial as a “quibble.” Ben Cubby, *Napalm by Any Other Name: Pentagon Denial Goes Up in Flames*, SYDNEY MORNING HERALD (Aug. 9, 2003), <http://www.smh.com.au/articles/2003/08/08/1060145870882.html>.

318. Colin Brown, *U.S. Lied to Britain over Use of Napalm in Iraq War*, THE INDEPENDENT (June 17, 2005), <http://www.independent.co.uk/news/uk/politics/us-lied-to-britain-over-use-of-napalm-in-iraq-war-226119.html>. British Armed Forces Minister Adam Ingram stated: “The U.S. confirmed to my officials that they had not used MK77s

incendiary weapons and the U.S.'s use of napalm and white phosphorous in Iraq, in November 2010, Human Rights Watch and Harvard Law School International Human Rights Clinic addressed a memorandum to the Convention on Conventional Weapons (CCW) delegates to accentuate the inadequacies of Protocol III.³¹⁹

The events that would eventually erupt into the controversial use of white phosphorus began in Sunni-dominated Fallujah five weeks after the war began when a sizable but reportedly peaceful protest erupted after U.S. troops occupied a local school on April 29, 2003.³²⁰ U.S. military personnel opened fire and killed seventeen and injured over seventy during the protests.³²¹ The Pentagon maintained that the shooting was in self-defense,³²² but Iraqis were outraged,³²³ and animosity in Fallujah remained high.³²⁴

Nearly one year later, on March 31, 2004, four Pentagon-contracted Blackwater security company employees were killed in Fallujah.³²⁵ While the U.S. media had been censoring photos of dead Iraqis and U.S. troops, the media curiously displayed the hanging charred bodies of the four Blackwater security company employees in clear and crisp color, with the BBC video headline accentuating that "[t]here's never been an attack as brutal as this."³²⁶ A U.S. State Department official remarked that "the US government was appalled by the horrific attacks in Fallujah

in Iraq at any time and this was the basis of my response to you . . . I regret to say that I have since discovered that this is not the case and must now correct the position." *Id.*

319. HUMAN RIGHTS WATCH & HARVARD LAW SCHOOL INT'L HUMAN RIGHTS CLINIC, *supra* note 313, at 1–2, 6, 9.

320. ARNOVE, *supra* note 206, at 57.

321. HUMAN RIGHTS WATCH, VIOLENT RESPONSE: THE U.S. ARMY IN AL-FALLUJA 1 (2003), available at <http://www.hrw.org/reports/2003/iraqfalluja/iraqfalluja.pdf>; see also ARNOVE, *supra* note 206, at 56.

322. HUMAN RIGHTS WATCH, *supra* note 244, at 12.

323. Ian Fischer, *U.S. Force Said to Kill 15 Iraqis During an Anti-American Rally*, N.Y. TIMES (Apr. 30, 2003), <http://www.nytimes.com/2003/04/30/international/worldspecial/30IRAQ.html> (noting that Ahmad Hussein, whose son was shot in the stomach by U.S. troops, stated about the U.S. military: "Either they leave Falluja or we will make them leave.").

324. Reyhani, *supra* note 304, at 2 (noting that this Sunni-dominated region was tremendously opposed to the U.S. occupation and was very dangerous for U.S. soldiers through 2003 and 2004).

325. *Bodies Mutilated in Iraq Attack*, BBC NEWS (Mar. 31, 2004, 18:23 GMT), http://news.bbc.co.uk/2/hi/middle_east/3585765.stm (referencing the accompanying video clip); see also Colin Freeman, *Horror at Fallujah/Savage Attack: Bodies Dragged Through Street, Hung from Bridge 4 U.S. Contractors Killed in Ambush Hours After 5 Soldiers Slain in Iraq*, S. F. CHRONICLE (Apr. 1, 2004, 4:00 AM), <http://www.sfgate.com/news/article/Horror-at-Fallujah-SAVAGE-ATTACK-Bodies-2772639.php>.

326. *Bodies Mutilated in Iraq Attack*, *supra* note 325.

and the senseless loss of life.”³²⁷ Hostilities then escalated to a level that should have questioned whether the war had ended.³²⁸

In April 2004, Brigadier General Mark Kimmit, Deputy Director of Operations in Iraq, assured “an overwhelming response” to the deaths and explained that “we will pacify that city.”³²⁹ The U.S. military executed an operation with 25,000 U.S. troops advancing about a quarter of a mile a day into the center of Fallujah, a city of 250,000 residents.³³⁰ With respect to the context of abiding by laws of war, Pentagon leadership made strategic choices in these offensive operations, and U.S. ground troops executed the operations.³³¹ U.S. commanders claimed that they had killed between 1,200 and 1,600 insurgents in Fallujah.³³² By comparison, fifty-one U.S. troops were reportedly killed during the battles.³³³ After a U.S. soldier was charged (and acquitted) of using unlawful force in Fallujah,³³⁴ his defense attorney remarked: “The insurgents didn’t play fair. They didn’t follow the rules . . . They had one idea in mind: to kill as many Marines as possible.”³³⁵

One explanation provided for the high Iraqi death-toll during “Operation Phantom Fury” was that al-Qaeda enemies were hiding among civilians.³³⁶ Yet, when corpses were inspected, weapons were

327. *Id.*

328. Reyhani, *supra* note 304, at 31 (noting that the military operation in Fallujah was “akin to a method of warfare” and at this time there was a UN authorization to enforce order, but no Iraqi government).

329. WALDEN BELLO, *DILEMMAS OF DOMINATION* 56–57 (2005).

330. *The Rape of Falluja: U.S. War Crime*, THE INTERNATIONALIST (Dec. 2004), <http://www.internationalist.org/fallujarape0412.html>; Rory McCarthy, *Uneasy Truce in the City of Ghosts*, THE GUARDIAN (Apr. 24, 2004, 9:36 PM), <http://www.theguardian.com/world/2004/apr/24/iraq.rorymccarthy>.

331. McCarthy, *supra* note 330.

332. Dexter Filkins & James Glanz, *Rebels Routed in Falluja; Fighting Spreads Elsewhere in Iraq*, N.Y. TIMES (Nov. 15, 2004), http://www.nytimes.com/2004/11/15/international/middleeast/15falluja.html?_r=0.

333. *The Rape of Falluja*, *supra* note 330.

334. Catherine Elsworth, *U.S. Marine Acquitted of War Crimes in Ground-Breaking Trial*, TELEGRAPH (Aug. 29, 2008, 12:03 AM), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/2641186/US-marine-acquitted-of-war-crimes-in-ground-breaking-trial.html>.

335. Steve Liewer, *Ex-Marine on Trial in Killings of 4 Captives*, SAN DIEGO UNION-TRIB. (Aug. 22, 2008), http://www.utsandiego.com/uniontrib/20080822/news_1m22trial.html.

336. Ghoshray, *supra* note 192, at 703 (noting that Ralph Peters, a former career military intelligence officer, wrote: “We must not be afraid to make an example of Fallujah. We need to demonstrate that the United States military cannot be deterred or defeated. If that means widespread destruction, we must accept the price . . . even if Fallujah has to go the way of Carthage, reduced to shards, the price will be worth it.”). The Pentagon named its attack on Fallujah “Operation Phantom Fury” and contended the

rarely discovered, and the *New York Times* reported that “[t]he absence of insurgent bodies in Falluja has remained an enduring mystery.”³³⁷ Based on reports contending that as many as 2,000 civilians were killed in Falluja,³³⁸ Professor Roman Reyhani emphasized that while an occupying power can restore order, “the indiscriminate killing of civilians [in Fallujah was] . . . a violation of Articles 27 and 29 of the Fourth Geneva Convention, which require that civilians receive humane treatment and protection from violence.”³³⁹

Perhaps one reason that the U.S. offensive was so successful was due to the use of white phosphorus. Professor Reyhani wrote: “The assaults on Fallujah by the United States military in April and November of 2004 involved the use of white phosphorus. White phosphorus has extremely damaging effects on the health of victims, including severe burns and irritation of the respiratory system.”³⁴⁰ Israel’s Ministry of Health reported that “white phosphorus burns on less than 10 percent of the body can be fatal because of damage to the liver, kidneys and heart.”³⁴¹ On August 11, 2005, Italian television aired a documentary on the use of white phosphorous in Fallujah and remarked that it can have an effect similar to napalm.³⁴² The documentary purportedly depicted corpses in Fallujah with burned and melted skin onto bones,³⁴³ which is characteristic of the expected chemical reaction from the exposure to white phosphorus.³⁴⁴ The effect of white phosphorous, particularly

city was an al-Qaeda stronghold. Barbara Starr, *Fallujah Rebuilds, Adjusts to Peace*, CNN (Feb. 21, 2008, 9:19 AM), <http://www.cnn.com/2008/WORLD/meast/02/21/iraq.falluja/index.html>.

337. Filkins & Glanz, *supra* note 332.

338. Reyhani, *supra* note 304, at 3.

339. *Id.* at 32.

340. *Id.* at 1.

341. HUMAN RIGHTS WATCH, RAIN OF FIRE: ISRAEL’S UNLAWFUL USE OF WHITE PHOSPHOROUS IN GAZA 1, 11 (2009), *available at* <http://www.hrw.org/sites/default/files/reports/iop0309webwcover.pdf>.

342. U.S. Broadcast Exclusive—“*Fallujah: The Hidden Massacre*” on the U.S. Use of Napalm-Like White Phosphorus Bombs, DEMOCRACY NOW! (Nov. 8, 2005), http://www.democracynow.org/2005/11/8/u_s_broadcast_exclusive_fallujah_the [hereinafter U.S. Broadcast Exclusive].

343. *Fallujah: The Hidden Massacre* (Italy RAI State Television Network broadcast Nov. 8, 2005), *available at* <http://topdocumentaryfilms.com/fallujah-the-hidden-massacre/>. See generally Ghoshray, *supra* note 192, at 700; Joseph D. Tessier, *Shake & Bake: Dual-Use Chemicals, Contexts, and the Illegality of American White Phosphorus Attacks in Iraq*, 6 PIERCE L. REV. 323, 353–54 (2007) (discussing BBC reports with similar images).

344. ENVIRONMENTAL AND OCCUPATIONAL MEDICINE 1091 (William N. Rom & Steven B. Markowitz eds., 4th ed. 2007) (“White phosphorous can cause serious burns that can be deep and extremely painful, with vesiculation and necrosis. Upon contact, white phosphorous can continue to burn on the skin in the presence of air until all phosphorous

because of its burning effect and production of toxic fumes,³⁴⁵ may make it a chemical weapon.³⁴⁶

Similar to the denial of the use of napalm, the Pentagon also initially denied using white phosphorous in Fallujah, and then revised its account and avowed that the substance was only fired “very sparingly in Fallujah, for illumination purposes.”³⁴⁷ Emphasizing that it was used against enemy combatants in Fallujah, Col. Barry Venable explained: “White phosphorus is an incendiary weapon, not a chemical weapon The combined effects of the fire and smoke—and in some cases the terror brought by the explosion on the ground—will drive them out of the holes so that you can kill them with high explosives.”³⁴⁸ This process is routinely described by military officials as a “Shake & Bake,”³⁴⁹ but the explanation certainly does not comport with the Bush Administration’s cursory reference to use solely for “illumination purposes.”³⁵⁰ While the military hierarchy approves of these battle tactics, a 2006 Zogby poll revealed that 80% of American service members “oppose the use of such internationally banned weapons as napalm and white phosphorous.”³⁵¹ The Italian documentary cited reporters who claimed that the U.S. military had confiscated video and photographic footage and attempted

is consumed or until there is deprivation of oxygen Damage to the bone may result.”); *U.S. Used White Phosphorus in Iraq*, BBC NEWS (Nov. 16, 2005, 11:25 GMT), <http://news.bbc.co.uk/2/hi/4440664.stm> (“The U.S. had earlier said the substance—which can cause burning of the flesh—had been used only for illumination If the substance hits someone’s body, it will burn until deprived of oxygen.”); see also Tessier, *supra* note 343, at 347; Reyhani, *supra* note 304, at 5–6 (describing media reports of U.S. attacks with a substance that melted their skin and medical examinations of corpses).

345. Tessier, *supra* note 343, at 347; Chris Hedges, *Salvador Charged with Dropping Incendiary Bombs*, CHRISTIAN SCIENCE MONITOR (Apr. 27, 1984), <http://www.csmonitor.com/1984/0427/042725.html> (reporting that Harvard biochemistry professor Dr. Matthew Meselson explained that “when white phosphorus enters the body, it keeps on burning It will burn under water, and actually burn inside the body The white phosphorus will also emit acidic fumes.”).

346. Tessier, *supra* note 343, at 352–53; Reyhani, *supra* note 304, at 14–16, 33–35, 45 (itemizing a convincing analysis and stating that “the use of [white phosphorus] by U.S. forces was a violation of the prohibition against the use of chemical weapons”).

347. Reyhani, *supra* note 304, at 6.

348. *U.S. Used White Phosphorus in Iraq*, *supra* note 344; Tessier, *supra* note 343, at 325–26.

349. See generally Tessier, *supra* note 343 (noting a veteran of the Iraq War using the phrase “Shake & Bake” nineteen times in the article as a way to reference what military officials routinely call the use of white phosphorus); Reyhani, *supra* note 304, at 4–5 (describing the military’s “shake ‘n’ bake” strategy).

350. Reyhani, *supra* note 304, at 6.

351. *U.S. Troops in Iraq: 72% Say End War in 2006*, ZOGBY (Feb. 28, 2006), <http://www.informationclearinghouse.info/article12103.htm>.

to prevent reporters from accessing Fallujah,³⁵² while other news sources and the Pentagon challenged the accuracy of the Italian documentary.³⁵³ It was also reported that the U.S. used white phosphorus in Afghanistan³⁵⁴ and that Israel used it in the Gaza Strip.³⁵⁵

352. *U.S. Broadcast Exclusive*, *supra* note 342.

353. The *New York Times* published pieces that questioned whether evidence was substantiated and whether the weapons were used. See *NY Times Responds Again on Fallujah*, FAIRNESS & ACCURACY IN REPORTING (July 24, 2007), <http://fair.org/take-action/activism-updates/ny-times-responds-again-on-fallujah/>; *N.Y. Times Responds to Fallujah Weapons*, FAIRNESS & ACCURACY IN REPORTING (July 20, 2007), <http://fair.org/take-action/activism-updates/ny-times-responds-on-fallujah-weapons/>. For example, in critiquing the Italian television documentary, the *New York Times* wrote:

The half-hour film was riddled with errors and exaggerations, according to United States officials and independent military experts. But the State Department and Pentagon have so bungled their response—making and then withdrawing incorrect statements about what American troops really did . . . that the charges have produced dozens of stories in the foreign news media and on Web sites suggesting that the Americans used banned weapons and tried to cover it up.

Scott Shane, *U.S. Is Slow to Respond to Phosphorus Charges*, N.Y. TIMES (Nov. 21, 2005),

<http://www.nytimes.com/2005/11/21/international/21phosphorus.html?pagewanted=print>; see also Tessier, *supra* note 343, at 323–26 (discussing the varied Pentagon and State Department responses to the accusations). It would be unlikely that a program sponsored by Italian government television, with footage of melted corpses and survivors testifying to what happened, would be a hoax. The Pentagon response was similar to the way that the British government admitted that the Pentagon lied about the use of napalm. Brown, *supra* note 318. The U.S. media should report objectively and accurately instead of scurrying behind Pentagon officials and scooping up propaganda dropped for reporters.

354. *Afghan Rights Groups Eye Allegations of Phosphorus Use*, USA TODAY (May 11, 2009, 1:21 PM), http://usatoday30.usatoday.com/news/world/2009-05-10-afghanistan-probe_N.htm (reporting that in a battle that killed 125 to 130 civilians in Afghanistan, doctors found fourteen villagers who came forward with “severe burns the doctors [had] never seen before” and that the Pentagon denied responsibility, but left open the possibility that Taliban militants could have used white phosphorus).

355. Israel used white phosphorus in violation of international law during attacks against Palestinians in the Gaza Strip in December 2008 and January 2009. AMNESTY INT’L, ISRAEL/OPT: FUELLING CONFLICT: FOREIGN ARMS SUPPLIES TO ISRAEL/GAZA 17 (2009), *available at* <http://www.amnesty.org/en/library/asset/MDE15/012/2009/en/278d5cfc-0b39-4409-bd68-4c6f44d99a64/mde150122009en.pdf> (stating that Israel’s attacks in the Gaza Strip have been “equipped to a large extent by US-supplied weapons, munitions and military equipment paid for with US taxpayers’ money”); Barak Ravid, *Operation “Cast Lead”: Israeli Air Force Strike Followed Months of Planning*, GLOBAL RES. (Dec. 28, 2008), <http://www.globalresearch.ca/operation-cast-lead-israeli-air-force-strike-followed-months-of-planning/11521> (contending that Western media and governments are complicit with the disinformation and covering up of Israel’s war crimes); Henry Siegman, *Israel’s Lies*, 31 LONDON REV. OF BOOKS, no. 2, 2009, *available at* <http://www.lrb.co.uk/v31/n02/henry-siegman/israels-lies>

Hostilities in Fallujah erupted again in January 2014 when Iraqi police contended that al-Qaeda fighters took over the city³⁵⁶ and persuaded the population to cooperate with the militants because the group supposedly drove through the streets and made an announcement by loudspeaker that they would protect the population against the Iraqi government.³⁵⁷ The allegation that al-Qaeda took over a city of 250,000, as brazenly ersatz as it was, might serve as a cognitive justification for international audiences that a harsh response by the Iraqi government against militants in Fallujah could be required³⁵⁸ or might even be a persuasive mode to attain U.S. assistance.³⁵⁹ A human rights group accused the Iraqi military of firing mortars into civilian areas, and the locals explained that the al-Qaeda allegation was an excuse for Prime Minister Maliki to suppress Sunnis for fighting back against persecution committed by the Shiite-led government and military.³⁶⁰ Perhaps if the

("Western governments and most of the Western media have accepted a number of Israeli claims justifying the military assault on Gaza: that Hamas consistently violated the six-month truce that Israel observed and then refused to extend it; that Israel therefore had no choice but to destroy Hamas's capacity to launch missiles into Israeli towns; that Hamas is a terrorist organization, part of a global jihadi network; and that Israel has acted not only in its own defence but on behalf of an international struggle by Western democracies against this network."). The author points out weaknesses in these justifications.

356. Qassim Abdul-Zahra, *Iraq City Falls Fully in Hands of al-Qaida Group*, MILITARY.COM (Jan. 4, 2014), <http://www.military.com/daily-news/2014/01/05/fallujah-falls-fully-into-hands-of-al-qaida-group.html>.

357. *Al Qaeda Sweep in Iraqi Cities Revives Battleground*, FOX NEWS (Jan. 3, 2014), <http://www.foxnews.com/world/2014/01/03/al-qaeda-sweep-in-iraqi-cities-revives-battleground/>.

358. Khalid Al-Ansary & Dana El Baltaji, *Iraq Forces, Tribes May Soon Start Attack to Recapture Fallujah*, BLOOMBERG NEWS (Jan. 5, 2014), <http://www.businessweek.com/news/2014-01-05/u-dot-s-dot-won-t-send-troops-to-iraq-to-fight-al-qaeda-kerry-says> (discussing that the Iraqi army "will allow residents to flee the city before it starts an attack").

359. Jordan's Crown Prince Hassan bin Talou contended that the United States use of force is still available with military bases in the region, and this would allow ratcheting up the pressure and firing the "occasional cruise missile." *CBS Evening News*, (CBS television broadcast Jan. 9, 2014), available at https://archive.org/details/KPIX_20140110_013000_CBS_Evening_News_With_Scott_Pelley#start/600/end/660; Loveday Morris & Ernesto Londoño, *Iraq's Maliki Says He Has Asked for New Arms from U.S., Will Also Seek Training for Troops*, WASH. POST (Jan. 16, 2014), http://www.washingtonpost.com/world/middle_east/iraqs-maliki-says-he-has-asked-for-weapons-from-us-will-also-see-training-for-troops/2014/01/16/0f369ed6-7ea0-11e3-9556-4a4bf7bcbd84_story.html (noting that Iraqi Prime Minister Nouri al-Maliki "has asked the United States for new arms to beat the dramatic resurgence of al-Qaeda-linked militants" and that he is "satisfied that we will achieve victory against al-Qaeda").

360. *CBS Evening News*, *supra* note 359. Yet, when the original story was released, reports said that "[g]overnment troops, backed by Sunni tribesmen who oppose Al Qaeda,

new Iraqi government learned anything from lavish Pentagon propaganda programs,³⁶¹ it was to defuse criticism by accentuating that the targets of military attack should be lined with al-Qaeda operatives or some mishmash of foes associated with al-Qaeda.³⁶² In June 2014, the

have encircled Fallujah for several days, and have entered parts of the provincial capital Ramadi, also overrun by militants.” FOX NEWS, *supra* note 357.

361. *Ban on Iraq War Propaganda Faces Fight*, WASH. TIMES (June 4, 2008), <http://www.washingtontimes.com/news/2008/jun/04/ban-on-iraq-war-propaganda-faces-fight/?page=all> (noting that “Congressional Democrats want to ban Pentagon propaganda on the Iraq war” and this initiative was even after the House of Representatives passed legislation to restrict the military from production of “any form of communication in support of national objectives designed to influence the opinions, emotions, attitudes or behavior of the people of the United States”); David Barstow, *Behind TV Analysts, Pentagon’s Hidden Hand: Courting Ex-Officers Tied to Military Contractors*, N.Y. TIMES, Apr. 20, 2008, at A1 (reporting on the 8,000 pages of documents the *New York Times* acquired on the Pentagon’s elaborate “independent analyst” program that operated for the first five years of the Iraq War and noting that: “Many Americans, polls showed, were uneasy about invading a country with no clear connection to the Sept. 11 attacks. Pentagon and White House officials believed the military analysts could play a crucial role in helping overcome this resistance.”); Mark Mazzetti, *Pentagon Audit Clears Propaganda Effort*, N.Y. TIMES (Oct. 20, 2006), http://www.nytimes.com/2006/10/20/washington/20lincoln.html?pagewanted=print&_r=2& (noting Pentagon propaganda in Iraqi media outlets).

362. See generally Robert Bejesky, *Cognitive Foreign Policy: Linking Al Qaeda and Iraq*, 56 HOW. L.J. 1 (2012) (noting that the White House invented links between al-Qaeda and Iraq and that investigations proved they were false); James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 335 (2009) (“By the time it became clear [that Iraq] had no weapons of mass destruction, the Bush administration began warning of the risks of losing to terrorists in Iraq”); Robert Burns, *Iraq’s al-Qaeda Affiliate “Devastated,” Says Top U.S. Officer*, DENVER POST (June 7, 2010), http://www.denverpost.com/headlines/ci_15241354 (presuming that al-Qaeda linked groups were abundant in Iraq and noting that “[a] string of setbacks for al-Qaeda’s affiliate in Iraq has left the insurgent group devastated”). At a critical juncture in which Congress sought to remove U.S. troops from Iraq, commentators claimed that Iraq would become a “terrorist Disneyland” if the U.S. were to leave. Mark Trevelyan, *Iraq a “Terrorist Disneyland” if U.S. Goes: Expert*, REUTERS (May 15, 2007, 11:49 AM), <http://www.reuters.com/article/2007/05/15/us-iraq-alqaeda-idUSL1560349920070515>; Mark Tran, *Talabani: Iraq Still Needs Coalition Forces*, THE GUARDIAN (May 11, 2007, 12:32 PM), <http://www.guardian.co.uk/world/2007/may/11/usa.iraq1> (noting that as domestic pressure in the U.S. and U.S. forces in Iraq preferred withdrawal, Iraqi deputy prime minister expressing that U.S. military forces were necessary because “‘Iraq is a central battleground in this historic conflict’ against terrorism”); Thomas E. Ricks, *Military Plays Up Role of Zarqawi*, WASH. POST (Apr. 10, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/09/AR2006040900890.html> (reporting that “[t]he U.S. military is conducting a propaganda campaign to magnify the role of the leader of al-Qaeda in Iraq” and noting that Col. Derek Harvey stated that the intention is to enlarge the Zarqawi “caricature” and make “him more important than he really is” but that the long-term threat is from “these former regime types and their friends”).

Islamic State of Iraq and Syria (ISIS), which began as a faction that battled the Syrian dictatorship for two years, swept through Sunni areas of Iraq without resistance due to the Sunni hostility toward Maliki and his brutal security services.³⁶³

5. Other High-Technology Weapon Systems

There are examples of other advanced weapon systems, such as Unmanned Aerial Vehicles (UAVs), the Massive Ordnance Air Blast Bombs (MOAB), and Electro-Magnetic Pulses (EMP) that might afford distinct advantages in warfare to states with the resources and expertise to invest in procurement for high-technology military equipment.³⁶⁴ In fact, controversy surrounding these weapons parallels the context of the asymmetric bombing and missile attacks—technological ascendancy permits the attacker to unilaterally choose the reasonableness of the level of force.³⁶⁵ State-of-the-art weapon systems may continuously reside

363. Zaid Al-Ali, *How Maliki Ruined Iraq*, FOREIGN POL'Y (June 19, 2014), http://www.foreignpolicy.com/articles/2014/06/19/how_maliki_ruined_iraq_armed_force_s_isis (noting that Maliki has been corrupt, deemed himself the “preeminent military leader,” met peaceful protests with security services, called protestors terrorists, has hired thugs to beat and kill protestors, and arrested and tortured thousands until protests ended; and that “[g]roups of young men were arrested in waves, often in the middle of the night, and would be whisked to secret jails, often never to be seen again”); *Iraq Crisis: John Kerry in Baghdad as Isis Rebels Advance*, BBC NEWS (June 23, 2014, 10:38 AM), <http://www.bbc.com/news/world-middle-east-27970894> (dropping the al-Qaeda terrorism labels and calling them “ISIS rebels,” “rebels,” and “Sunni insurgents”).

364. ROUTLEDGE ENCYCLOPEDIA OF INTERNATIONAL POLITICAL ECONOMY 672 (R.J. BARRY JONES ed., 2001) (emphasizing that “the development of new technologies not only greatly enhanced US military power” and that there was a “resurgence of US hegemony”); RONALD J. GLOSSOP, CONFRONTING WAR: AN EXAMINATION OF HUMANITY’S MOST PRESSING PROBLEM 90 (4th ed. 2001) (“Once a military-industrial complex is created to produce this military superiority, it tends to be self-sustaining and to encourage attitudes and policies which will work to its own advantage.”).

365. “Asymmetric warfare” can be employed in this context, but the term has been used to describe “any number of concepts or ideas” and “lack[s] . . . a definition,” which has led some experts to contend that “the term should be banned from use in military doctrine and discussion.” Jesse G. Chace, *Defining Asymmetric Warfare: A Losing Proposition*, 61 JOINT FORCE QUARTERLY 123, 124 (2011). Nonetheless, a Pentagon office defined “asymmetric warfare” as “[a] war fighting methodology that exploits vulnerabilities of organization, function, culture, technology, behavior, situation, or location by employing innovative tactics and technologies to achieve surprise and neutralize or stymie an opponent’s military capabilities and technical strengths.” *Id.* The definition does refer to technology that can neutralize an opponent’s capabilities or to the level of power inflicted on an adversary, which only leaves open the question of how the court of public opinion perceives the level of humanitarian protection. The discussion is also fixed on insurgents placing the U.S. at a disadvantage under laws of war as a form of asymmetric warfare. See ANDREW POTTER, THE AUTHENTICITY HOAX 249 (2010); Gerry

ahead of the curve of international legality,³⁶⁶ particularly if there is veracity to the contention that dominant states are capable of imposing rules on weaker states.³⁶⁷ As Professor Reisman wrote, with technology, “modes of warfare evolve as each side looks for an edge The enormous American military power translates into what has been aptly called ‘fate control’ but not ‘behavior control.’”³⁶⁸ Reisman further explained: “It is certain that the United States could completely destroy Iraq in a few hours. It is not certain that it could, at a nationally or internationally acceptable price, control Iraq’s behavior.”³⁶⁹ Hence, weaker states may perceive that the optimal defense against later generation weapons is to possess banned weapons that have proven effective or to bombard troops in unexpected and unconventional methods, which may situate subordinate-troops into conditions of heightened insecurity because of preceding decisions made by Pentagon superiors.

For over ten years, Iraq, under Saddam Hussein, was prohibited from attempting to develop Unmanned Aerial Vehicles (UAVs) because of the suspicion that UAVs could deliver biological and chemical weapons.³⁷⁰ Iraq was also independently condemned by the Bush Administration prior to the 2003 invasion for allegedly possessing chemical and biological weapons, meaning that the condemnation for suspicion of maintaining a UAV program was attributable to the anxiety over the potential existence of a particularly sophisticated delivery device for

J. Gilmore, *U.S. Must Win in Iraq, Focus on Asymmetric Threats, Gates Says*, AM. FORCES PRESS SERV. (May 13, 2008), <http://www.defense.gov/news/newsarticle.aspx?id=49854> (noting that Defense Secretary Gates stated that “even nation-states will try to exploit our perceived vulnerabilities in an asymmetric way” and that the U.S. military must balance “irregular and asymmetric threats versus conventional threats”).

366. Including these examples is not intended to intimate that the damage inflicted from technologically superior weapons is *per se* disproportionate to the level of force that is necessary for victory in combat or that sophisticated ordnance foments as much humanitarian or moral consternation as banned chemical, biological, nuclear, and incendiary weapons. The intent is to emphasize that, akin to multifaceted uses for DU, overwhelming advantage should be calculated in formulae of legality under laws of war.

367. Debate stirs over whether international laws sanction a governance authority for powerful states to enforce their will as legitimate, or whether norms and institutions inject greater equality and a voice to masses of weaker countries to counter dominant states. GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 165 (2004); ROUSSEAU, *supra* note 115, at 12 (“Right of conquest has no foundation other than the right of the strongest.”).

368. W. Michael Reisman, *The Manley O. Hudson Lecture: Why Regime Change is (Almost Always) a Bad Idea*, 98 AM. J. INT’L L. 516, 522 (2004).

369. *Id.*

370. S. REP. NO. 108-301, at 221–31 (2004).

prohibited weapons, but the allegation was also untrue.³⁷¹ By comparison, the U.S. has developed unrivaled UAVs. In the case of the Predator drone, equipped with Hellfire missiles, the weapon has been used to target thousands of suspected terrorists and insurgents, and strikes have resulted in civilian deaths.³⁷² Using drones may be inhumane corporal punishment because the target has not been proven guilty of a crime, extraterritorial operations with UAVs may infringe the sovereignty of other countries,³⁷³ and UAVs may subvert the human and political deterrent effect of controversial warfare that might otherwise exist if there was a human presence in a combat zone.³⁷⁴

Threatening to use overwhelming, asymmetric weaponry can violate laws of war.³⁷⁵ Article 2(4) of the United Nations Charter prohibits both the use of force and the threat to use force.³⁷⁶ General Assembly resolutions have reaffirmed that the threat to use force violates international law.³⁷⁷ The ICJ has also held that if a distinct use of force would be unlawful, the threat to use that specific type of force would also be unlawful.³⁷⁸ The ICJ affirmed that a threat to use weapons, including nuclear weapons, would be illegal if the use of that weapon system

371. *Id.*

372. Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SECURITY J. 283, 285–86, 324, 343 (2011) (stating that there are several kill/capture lists for Afghanistan with more than a thousand names on them, that the CIA drone programs killed over 2,000 persons in Pakistan, and that there are serious concerns about civilians being killed).

373. *Id.* at 301–06.

374. P.W. SINGER, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* 395–96 (2009). The use of UAVs may reduce the level of ordinary human responsibility by using a lethal weapon system that permits the CIA or Pentagon operator to sit remotely in front of a computer screen without any personal risk of harm. Perhaps there is also less reluctance to view war powers, democratic public, and international law restraints on deploying unmanned equipment into hostile foreign airspace than there would be with a human pilot. Robert Bejesky, *Precedent Supporting the Constitutionality of Section 5(B) of the War Powers Resolution*, 49 WILLAMETTE L. REV. 1, 1–3, 28–30 (2012).

375. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 239 (July 8) (stating that threatening to use nuclear weapons is not favored under international law).

376. U.N. Charter art. 2, para. 4.

377. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res. 42/22, U.N. Doc. A/RES/42/22 (Nov. 18, 1987); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

378. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 227 (June 27).

would be unlawful and those weapons appeared ready to be used.³⁷⁹ For example, if a state possesses nuclear weapons and threatens to attack with nuclear weapons, an adversary with nuclear weapons could also permissibly threaten to use the same weapon system with similar catastrophic impact. However, it would be toilsome to envision a circumstance where a state with nuclear weapons could confront or threaten a state without nuclear weapons in a method that would be necessary and proportional. Yet, a comparable scenario did unfold prior to the Iraq War.

Just days before the attack on Iraq, the Pentagon released video footage on national television of the Massive Ordnance Air Blast Bomb (MOAB) or “Big Blu,” stated that the weapon would be available in Iraq, and contended that MOAB was a conventional and legal bomb.³⁸⁰ MOAB is a passenger bus-sized bomb that weighs 21,000 pounds, must be dropped from a C-130 cargo plane, and destroys everything within a 600-meter diameter blast-circle.³⁸¹ Based on MOAB’s proclaimed destructive potential, distinctions between a nuclear weapon and the MOAB are merely semantical. When the Pentagon released video images of MOAB’s destructive power, Department of Defense officials admitted that the news release was devised to strike fear, intimidate, and threaten Iraqi troops,³⁸² which is especially abhorrent if Iraqis viewed the video and equated the potential damage from MOAB with the atomic bombs dropped on Japan.

The Pentagon had long been conducting research on various EMP weapons and reportedly procured missiles and bombs to obliterate the electronic communications of a target.³⁸³ While the technology to sear or

379. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

380. Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting*, 40 CAP. U. L. REV. 967, 1035 (2012).

381. *Id.*

382. Barbara Starr, *U.S. Tests Massive Bomb*, CNN (Mar. 11, 2003, 10:33 PM), <http://www.cnn.com/2003/US/03/11/sprj.irq.moab/> (quoting Secretary of Defense Rumsfeld as stating that “[t]he goal is to have the pressure be so great that Saddam Hussein cooperates” and to promote an “enormous disincentive for the Iraqi military to fight against the coalition”); NICHOLAS D. EVANS, *MILITARY GADGETS: HOW ADVANCED TECHNOLOGY IS TRANSFORMING TODAY’S BATTLEFIELD . . . AND TOMORROW’S* 92 (2004) (explaining that MOAB is “thought to be used for psychological effect, due to its extensive mushroom cloud”).

383. JOHN TIFFIN & CHRIS KISSLING, *TRANSPORT COMMUNICATIONS: UNDERSTANDING GLOBAL NETWORKS ENABLING TRANSPORT SERVICES* 180 (2007) (stating that an EMP bomb may not do significant damage to people but the high-altitude explosion can send the EMP “far beyond the location of the explosion,” including knocking out electrical, transport, and communication systems); COLONEL JOHN B. ALEXANDER, *FUTURE WAR: NON-LETHAL WEAPONS IN TWENTY-FIRST-CENTURY WARFARE* 65 (1999) (explaining that

jam electronic circuitry from a distance has apparently been accessible for decades, the Pentagon first used this “e-bomb” (EMP) on March 25, 2003, in Baghdad.³⁸⁴ The EMP weapons were proclaimed to be targeting Iraq TV, but because the explosion converts into a surge of microwave energy, the explosion can annihilate all electronic circuits within an expansive radius.³⁸⁵ When one wonders why Iraqis had been suffering for years from a lack of basic utilities that were worse than before the invasion, including a lack of electricity and clean water,³⁸⁶ one can hope that high-technology weapons were not responsible for humanitarian suffering.

D. Historical Examples

With the U.S. military’s advanced weaponry, there were distinct advantages in Iraq that would generate differing impressions of necessary and proportional combat, or a military necessity under specific factual conditions where humanitarian restrictions apply.³⁸⁷ Nonetheless,

the U.S. military and other countries have been researching EMP weapons for decades and that the U.S. “has poured hundreds of millions of dollars into research and development of pulse-power weapons”).

384. Joel Roberts, *U.S. Drops ‘E-Bomb’ on Iraqi TV*, CBS NEWS (Mar. 25, 2003, 10:41 PM), <http://www.cbsnews.com/news/us-drops-e-bomb-on-iraqi-tv/>; Seth Schiesel, *Taking Aim at an Enemy’s Chips*, N.Y. TIMES (Feb. 20, 2003), <http://www.nytimes.com/2003/02/20/technology/taking-aim-at-an-enemy-s-chips.html> (quoting Naval Postgraduate School Professor John Arquilla stating: “If there is a war in Iraq, there is no question in my mind that we will see the use of both directed-energy and radio-frequency weaponry.”).

385. HIRO, *supra* note 206, at 177 (stating that the Pentagon used “Blackout Bombs,” which showers graphite filaments to short circuit power grids, and this plunged Baghdad’s entire population into darkness); Roberts, *supra* note 384 (noting that the “pulse of microwaves [are] powerful enough to fry computers, blind radar, silence radios, trigger crippling power outages and disable the electronic ignitions in vehicles and aircraft”).

386. INT’L COMM. OF THE RED CROSS, IRAQ: NO LET-UP IN THE HUMANITARIAN CRISIS 3 (2008), available at <https://www.icrc.org/eng/assets/files/other/icrc-iraq-report-0308-eng.pdf>.

387. Markus Wagner, *Autonomy in the Battlespace: Independently Operating Weapon Systems and the Law of Armed Conflict*, in INTERNATIONAL HUMANITARIAN LAW AND THE CHANGING TECHNOLOGY OF WAR 107 (Dan Saxon ed., 2013) (remarking on the “tension between the elements of military necessity and humanity” and stating that there are different views on “the degree extant circumstances such as advances in military technology, [and] the acceptability of civilian casualties in the court of public opinion”); ARMIN KRISHNAN, *KILLER ROBOTS: LEGALITY AND ETHNICITY OF AUTONOMOUS WEAPONS* 91 (2009) (stating that “[t]he principle of military necessity dictates that military forces should only be used against the enemy to the extent as is necessary for winning the war,” affirming that arguments can be made that particular operations “can

these examples were not nearly as lethal as other historical introductions of new weapons into combat. Weapons used during World War II and the Vietnam War drew considerable attention to the issue of grave humanitarian harm, which might even be a reason that stricter interpretations of laws of war are not observed today. The American Military Tribunal following World War II held:

Military necessity permits a belligerent, subject to the Laws of War, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money It permits the destruction of life of armed enemies and other persons whose destruction is incidentally avoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of International Law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.³⁸⁸

During World War II, the Germans and Japanese were convicted in military tribunals for initiating a war of aggression, but by the final operations to end the war, the Allies killed about 600,000 German civilians by bombing German cities.³⁸⁹ On August 6, 1945, the U.S. dropped an atomic bomb on Hiroshima, Japan, which killed between 70,000 and 180,000 civilians, injured even more civilians, and destroyed 62,000 buildings.³⁹⁰ Dropping an atomic bomb on Hiroshima was called “necessary” because the city was a prime source of military supply and shipping.³⁹¹ Three days later, the U.S. military dropped another atomic

be justified by the principle of necessity” irrespective of the moral consequences, and remarking that “[t]echnology can largely affect the calculation of military necessity”).

388. Ghoshray, *supra* note 192, at 691–92.

389. Luke Harding, *Germany’s Forgotten Victims*, THE GUARDIAN (Oct. 22, 2003, 3:03 PM), <http://www.theguardian.com/world/2003/oct/22/worlddispatch.germany>.

390. CHAIRMAN’S OFFICE, U.S. STRATEGIC BOMBING SURVEY: THE EFFECTS OF ATOMIC BOMBING OF HIROSHIMA AND NAGASAKI 13, 19 (1946); CARROLL, *supra* note 191, at 38 (noting that the bomb dropped on Hiroshima killed 100,000 victims and 95 percent were civilians).

391. CHAIRMAN’S OFFICE, *supra* note 390, at 10, 30. *See contra* Falk, *supra* note 236, at 14 (quoting Noam Chomsky as stating that the U.S. was unwilling to accept responsibility for “the vicious terror bombings of civilians . . . [that] reach[ed] their

bomb on Nagasaki and killed 35,000 to 100,000 people and destroyed 52,000 residential units.³⁹² The atomic bombs caused massive humanitarian and environmental destruction,³⁹³ but the reports describing the horrors from Hiroshima and Nagasaki in the days following the bombings were censored by General MacArthur “because he believed they would tarnish the public image of the U.S. victory, and they remained unpublished for sixty years.”³⁹⁴

During the Vietnam War, the American military dropped twenty million gallons of dichlorophenoxyacetic acid (Agent Orange),³⁹⁵ which “destroy[ed] 233,351 acres of food crops in South Vietnam” and desolated 1,522,300 acres of adjacent agricultural land, thereby “deny[ing] food to neutral civilian communities,”³⁹⁶ wiping out farmer’s crops, and leaving people homeless.³⁹⁷ U.S. military commanders did not call Agent Orange a chemical weapon but instead deemed it a “herbicide,”³⁹⁸ that was necessary to devastate crops because Vietcong forces had been taking food from these communities to assist their operations.³⁹⁹

Studies maintained that American troops exposed to Agent Orange developed fibromyalgia; migraines; depression; chronic fatigue syndrome;⁴⁰⁰ permanent nervous system damage; coughing, dizziness, or burning in the chest from inhalation; digestive and neuromuscular system

culmination in Hiroshima and Nagasaki, surely among the most unspeakable crimes in history”).

392. CHAIRMAN’S OFFICE, *supra* note 390, at 8, 16, 19.

393. Hourcle, *supra* note 176, at 653–58.

394. David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 49–50 (2006); see TILLY, *supra* note 73, at 237 (“World War II bombings of Dresden, London, Hiroshima, Nagasaki, all had the tinge of terror[ism].”).

395. SANA LOUE, *FORENSIC EPIDEMIOLOGY: INTEGRATING PUBLIC HEALTH AND LAW ENFORCEMENT* 25 (2010); Mark A. Drumbl, *Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes*, 22 FORDHAM INT’L L.J. 122, 123 (1998); Marc A. Ross, *Environmental Warfare and the Persian Gulf War: Possible Remedies to Combat Intentional Destruction of the Environment*, 10 DICK. J. INT’L L. 515, 515–18 (1992); PHILIP JONES GRIFFITHS, *AGENT ORANGE: COLLATERAL DAMAGE IN VIETNAM* (2003) (stating that the U.S. dropped over “ten million gallons of Agent Orange and other defoliants containing deadly toxins”).

396. Reynolds, *supra* note 137, at 17–18.

397. VIETNAM AND THE AMERICAN POLITICAL TRADITION: THE POLITICS OF DISSENT 107 (Randall B. Woods ed., 2003).

398. COMMITTEE TO REVIEW THE HEALTH EFFECTS IN VIETNAM VETERANS OF EXPOSURE TO HERBICIDES, INST. OF MEDICINE, *VETERANS AND AGENT ORANGE: HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM* (1994).

399. Reynolds, *supra* note 137, at 18.

400. Hubbard, *supra* note 285, at 986.

distress; death from ingestion of large quantities;⁴⁰¹ skin diseases; various cancers; birth defects in offspring; and other diseases.⁴⁰² Given the collateral negative health impact on U.S. troops who were exposed to Agent Orange and the fact that Vietnamese land was the direct target of the pesticides, Vietnamese people may have suffered even more than American troops. In 2005, Vietnamese civilians sued Agent Orange manufacturers in federal court, and the Eastern District of New York held that the government contractor defense was applicable because permitting the plaintiffs' claims would "essentially challenge military judgments made by the president" and "effectively invite all of the United States' past and future enemies to sue a wide variety of military contractors based on such presidential decisions in United States courts."⁴⁰³

Commentators may dispute what would be a valid military necessity in these examples. During World War II, the Allies did not initiate the war, and intense bombing operations were claimed to be necessary to end a war that had already claimed fifty million lives.⁴⁰⁴ In the case of the Vietnam War, which killed as many as four million,⁴⁰⁵ the U.S. initiated the war on specious justifications, and the Gulf of Tonkin Resolution was revoked.⁴⁰⁶ The 2003 Iraq War was also premised on false pretenses.⁴⁰⁷

401. Reynolds, *supra* note 137, at 17 n.86; *Veterans' Diseases Associated with Agent Orange*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/conditions/> (last visited Nov. 28, 2014).

402. Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 BERKELEY J. GENDER L. & JUST. 369, 382 (2005).

403. *In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d 7, 86 (E.D.N.Y. 2005), *disagreed with by* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); Falk, *supra* note 236, at 1–2 (noting the significant reluctance among scholars to protest against the war despite personal beliefs in opposition to the war). The U.S. government reportedly knew more about the human hazards from Agent Orange exposure than the manufacturers of the chemicals. *In re Agent Orange Product Liability Litigation*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982). Likewise, bombing operations were classified. Reynolds, *supra* note 137, at 22. Manufacturers may not have had knowledge of military chain of command directives that deployed their products.

404. DORIS WEATHERFORD, *AMERICAN WOMEN DURING WORLD WAR II: AN ENCYCLOPEDIA* 165 (2010).

405. CHARLES A. CORR & DONNA M. CORR, *DEATH & DYING, LIFE & LIVING* 88 (7th ed. 2013).

406. ELY, *supra* note 240, at 19; Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, § 7, 84 Stat. 1442, 1443 (1971); Damrosch, *supra* note 232, at 1409.

407. *Study: Bush Led U.S. to War on 'False Pretenses'*, NBC NEWS (Jan. 23, 2008, 2:30 AM), http://www.nbcnews.com/id/22794451/ns/world_news-mideast_n_africa/t/study-bush-led-us-war-false-pretenses#.VEhapPnF_wg.

IV. CONCLUSION

This article considered an alternative perspective on the issue of military justice reform. The contention is that without objectively assessing official military acts during warfare to implant objective and reasonable expectations of punishment for wrongdoing, and without the granting of remedial relief to victims as an obligatory legal outcome of transgressions, adjustments to favorably modify the functioning of the justice system may not be availing if the nature of performance of subordinate personnel is inherently conjoined to the demands and culture of the hierarchical command chain. Precedent ostensibly adduces that there is a likelihood American troops could be held responsible for not appropriately executing military orders in war zones, but superiors who issue encompassing and reverberating orders that seem inconsistent with the parameters of the laws of war are less likely to be punished, and the language and functioning of U.S. law do not expressly impute civil liability for unreasonable combat related damage.⁴⁰⁸ If the possibility of punishment or imposition of liability does not deter mal-performance at the higher levels of the military command chain, antecedent decisions by superiors may not only founder in transmitting effectual examples of behavior to subordinates, but could also place troops in more precarious and stressful situations in a hostile zone, thereby making troops more prone to misjudge circumstances with perceived foes.

With respect to adhering to the laws of war, international law mandates that a state's use of armed force be justified, necessary, and proportional; that civilian lives and humanitarian rules be respected; and that collateral damage and humanitarian harm be restricted, unless potential transgressions are absolutely essential to achieving the mission's victory.⁴⁰⁹ In Iraq, military commanders issued directives to execute "shock and awe" missile strikes, approved dozens of bombing operations where it was likely that civilians could be killed, launched imprecise shelling with cluster munitions, fired depleted uranium weapons, which some experts believe inflict horrendous health tolls on exposed humans and the environment and might be equated to miniaturized nuclear weapons, deployed firebombs and white phosphorus, and used other devastating high-technology weapons.⁴¹⁰ During the first six weeks of war operations, approximately fifty to eighty times more Iraqis were killed than U.S. troops, and in the strategic

408. *See supra* Part II.A-B.

409. *See supra* Part III.A-B.

410. *See supra* Part III.C.

offensive operations in Fallujah, there may have been forty times more civilians killed than U.S. troops.⁴¹¹

American troops should be respected and protected, but it is the directives of superiors that are conventionally presumed to be compatible with laws of war, while controversial subordinate acts are more likely to be punished.⁴¹² Ground troops did not issue air strikes on Baghdad or the strategy for offensive operations in Fallujah, and as Dr. Saby Ghoshray wrote: "Has the value of Iraqi human lives been made subordinate to the mandate of war during the shock and awe campaigns in Baghdad? Has the Geneva Convention been made redundant and inapplicable during Operation Phantom Fury in Fallujah?"⁴¹³ Due to superior orders, troops may have been placed in an environment of vulnerability to insurgents who are intent on retaliating against any U.S. agent because of prior asymmetric and calamitous shelling with advanced weaponry that remains ahead of the regulatory curve for legality. Consequently, if troops are hypersensitive to threats and prone to react in manners that they might not have otherwise acted had their environment not been substantially forged by antecedent military strategy, and if superior directives and hierarchical acculturation do influence subordinates and do not impart suitable lessons on the reasonable use of force, perhaps military justice reforms should be foreshadowed by a judicious assessment of whether there are reasonable deterrents within the chain of command to bolster compliance with laws of war across the military apparatus.

411. See *supra* notes 214, 334, 338 and accompanying text.

412. See *supra* Part II.A.

413. Ghoshray, *supra* note 192, at 683, 696–97; *id.* at 695 (citing other examples of what would seem to be callous disregard for human life).