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BARBARIANS AT THE GATES: A POST-SEPTEMBER 11TH PROPOSAL TO RATIONALIZE THE LAWS OF WAR

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“And were a civilized nation engaged with barbarians, who observed no rules of war, the former must also suspend their observance of them, where they no longer serve to any purpose; and must render every action or recounter as bloody and pernicious as possible to the first aggressors.”¹

I. Introduction

A. Humanizing War with Law: Aspiration

Since the dawn of man,² war³ has been justified as an *640 object of divine ordination,⁴ the natural state of humanity⁵ and a tool in the progressive betterment of character,⁶ culture⁷ and civilization.⁸ In this hyper-ideological age tragically *641 symbolized by September 11, 2001, war, to the dismay of those who hoped material transformations might weaken its siren’s call,⁹ waxes ever more destructive,¹⁰ driving efforts to abolish force as a moral imperative¹¹ and, less quixotically, to induce compliance with an accreting body of rules, known as international humanitarian law (IHL),¹² to “humanize” armed conflict. *643 ¹³ This progressive regulation¹⁴ has met nearly universal approbation:¹⁵ many ethical people, instinctively antipathetic *644 to war,¹⁶ welcome any anodyne and few proclaim its absolute independence from legal regulation.¹⁷ Indeed, the distinction between “murder” and “killing in war” is now difficult to sustain without reference to positive law,¹⁸ and the term “war crime”¹⁹ has entered the popular lexicon²⁰ accompanied by images of atrocity that provoke moral outrage.²¹ Empirically, states and individuals obey IHL at least some of the time,²² and the phrase “laws of war” is no longer ipso facto oxymoronic.

*645 B. Frustration: Compliance Deficiencies

Incorporation of humanitarian principles--fundamentally moral conceptions-- into law presents ontological problems, and thus has war proven recalcitrant to legal restraint: the non-derogable limitations IHL purports to impose²³ have been transcended throughout its entire developmental history.²⁴ Prior to World War II, IHL was enforceable only insofar *646 as states possessed the political will to prosecute their own nationals,²⁵ and suppression of violations was left largely to an informal regime of reprisal.²⁶ The recent record of compliance is improving, yet still sparse.²⁷ Confronted by realist, just-war and behaviorist explanations for failures to restrain self-interested soldiers and states in combat,²⁸ IHL scholars, *648 by the 1980s, were lamenting a regime shrinking to the “vanishing point” of international law.²⁹

C. Formalization: The International Criminal Court

Despite its history, IHL has been resurrected by the post-Cold War passion of its proponents. Freed of the restraints of bipolar paralysis,³⁰ dedicated to the suppression of war *649 crimes as part of a human rights agenda³¹ and convinced that the path to this goal ran ineluctably through law, the torrent of globalization was steered toward the establishment of the first permanent tribunal³² with universal jurisdiction to *650 punish serious violations of IHL by individuals.³³ Despite a contentious drafting histoprocess,³⁴ state after state acceded to the Rome Statute,³⁵ and the International Criminal Court *651 (ICC), hailed as a triumph of international civil society over statist impunity³⁶ certain to bring the worst violators to brook,³⁷ entered into force in July 2002.³⁸ However, long-standing United States rejectionism³⁹ manifested in heated objections.

*652 D. Rejection: The United States--Sole Indispensable Nation--Actively Opposes the ICC

1. Arguments for Public Consumption: Sovereignty, Accountability, Legitimacy

United States critics prophesied that, rather than administering universal justice, “rogue” prosecutors and states parties,⁴⁰ eager to circumscribe United States hegemony, would *653 prosecute members of the United States Armed Forces⁴¹ for acts not widely recognized as violations of customary IHL,⁴² *655 especially the blurry, unsedimented principles of necessity,⁴³ *656 proportionality⁴⁴ and distinction.⁴⁵ By unjustifiably increasing *657 the criminal exposure of United States forces engaged in thankless humanitarian operations with which the world bailiff has selflessly saddled itself,⁴⁶ a politicized icc with a *658 mandate to remake IHL⁴⁷ would induce isolationism.⁴⁸ United States opponents further opined that, despite textual deference to complementarity,⁴⁹ the ICC would subvert United *659 States jurisdiction,⁵⁰ trump United States sovereignty⁵¹ and vitiate the procedural rights of United States defendants.⁵² Critics railed further at a lack of U.N. Security Council oversight they deemed essential to ensuring the political accountability and democratic legitimacy of the ICC.⁵³

*662 Thus, although the ICC commenced operations in March 2003⁵⁴ after garnering the support of a majority of states for which it is now the regnant paradigm for enforcing IHL, it lacks the backing of the sole “indispensable nation.”⁵⁵ The United States signed, but did not ratify, the Rome Statute⁵⁶ *663 and subsequently withdrew its signature.⁵⁷ Moreover, the United States has flexed economic muscle and threatened to withdraw from peacekeeping commitments to dissuade ratifications and exempt its nationals from ICC jurisdiction.⁵⁸ *664 The American Servicemembers’ Protection Act⁵⁹ terminates military aid to states parties, precludes United States personnel assignments to missions in their territory and, with the “Hague Invasion Clause,”⁶⁰ commands the President to employ “all means necessary,” including military force, to rescue any United States national in ICC custody.⁶¹ In short, the United States has “washed (its) hands of the (ICC).”⁶²

*665 United States hostility strikes the devoted transnational cadre supporting the ICC⁶³ as apostasy given the history of United States leadership in the defense and promotion of human rights.⁶⁴ In discourses strewn with pious nostrums, universalists deride irresponsible attachments to a realist mode of governance--organized upon principles of state power and sovereignty⁶⁵--that more idealist theories and multilateral *666 institutions--organized upon general principles of equality and law--are said to have displaced.⁶⁶ For ICC partisans, not only is the court institutionally superior to the ancien regime,⁶⁷ but the meritless objections actually militate in its favor.⁶⁸ If the United States fears the prosecution of its soldiers, *667 it need only ensure that they do not commit war crimes, or punish them when they do.⁶⁹ By its opposition the United States, according to this globalist philosophy, has stuck itself on the wrong side of history.⁷⁰

If the asserted bases accurately portrayed the grounds upon which the United States eschews participation, a quick solution could be crafted:⁷¹ the United States might accede to the Rome Statute, join in the (re)definition of crimes within ICC jurisdiction, secure the permanent immunity of peacekeepers operating under Security Council mandate,⁷² amend the Statute to enhance individual rights and elaborate complementarity to support deference to domestic judicial processes. However, the etiology of United States disaffection is traceable less through statutory provisions than through a post-September 11th set of understandings concerning the challenge posed by the intersection of international terrorism *668⁷³ and weapons of mass destruction (WMD),⁷⁴ along with the proper role of IHL in the battle against this threat to civilization.⁷⁵

*669 Although these criticisms are not meretricious, a “decent Respect to the Opinions of Mankind”⁷⁶ urges a declaration of the causes that impelled the United States to reject a venture to which many states have committed themselves.

2. Criminalization of the War on Terror? The Bush Doctrine and the ICC

Prior to the attacks of September 11, 2001, terrorism was widely considered, like narcotrafficking or counterfeiting, a transnational law enforcement problem necessitating institutional cooperation between civilian criminal justice systems of concerned states.⁷⁷ The United States and other states scored several apparently major legal victories against international terrorists in civil courts, an outcome that seemed to support the utility of the transnational judicial response to terrorism,⁷⁸ and the negotiations toward the Rome Statute *670 nearly included terrorism as a crime within ICC jurisdiction, underscoring widespread support for judicial responses to the phenomenon.⁷⁹ However, while eradication of the global scourge of terrorism may benefit from allied judicial efforts, the attacks unleashed on the United States that infamous morning fundamentally transformed, from the United States vantage point, perceptions of the nature and magnitude of the danger and, consequently, the proper instrumentalities to employ and objectives to pursue in response.⁸⁰ September *671 11th--the first day of a new historical era--withdrew the veil of ignorance, and the United States now concedes that, after a decade of denial,⁸¹ it is at war⁸² against a menace no less *672 threatening to its existence than the great wars, hot and cold, of the 20th century.⁸³ In response, the United States has pledged that, while it will mean a long hard struggle to defeat all the individuals, groups and states⁸⁴ involved, victory in *673 the war on terror is certain.⁸⁵

However, the United States faces foes that arm themselves with WMD, present no static targets,⁸⁶ abjure legal restraint⁸⁷ and deliberately murder civilians. United States armed forces, trained to observe and obey limitations imposed by IHL,⁸⁸ are distinctly disadvantaged by a grossly asymmetrical legal framework in which morally inferior warriors⁸⁹ *674 enjoy all its protections but respect none of its obligations. This legal asymmetry, coupled with the destructive capacity of weapons brought rapidly and unexpectedly to bear by enemies against whom deterrence is impossible,⁹⁰ erodes the United States military advantage. The reduction in power differential triggered by this synthesis of WMD and terrorists' exploitation of legal compliance disparities renders ultimate United States victory more costly in lives and treasure, and more uncertain.

In light of this strategic reconfiguration, the United States has, albeit belatedly,⁹¹ enhanced the flexibility of its policy options. The Bush Doctrine proclaims the rights to employ preemptive measures in self-defense,⁹² depose regimes harboring *675 terrorists,⁹³ eliminate terrorist leadership⁹⁴ and bring evermore sophisticated weaponry to bear upon these adversaries.⁹⁵ However, rather than reap gratitude for shouldering a disproportionate burden in the war on terror, the United States has been accused of opprobrious conduct arising from the proactive use of force, the use of certain weapons systems⁹⁶ and collateral damage resulting therefrom.⁹⁷ The injection *677 of the ICC into this equation bodes ill for the eventual defeat of international terrorism. Despite the seemingly self-evident fact that United States operations are designed to, and have the effect of, preventing depredations,⁹⁸ the constellation of actors hostile to the war on terror may well, if permitted, hijack the ICC as an accomplice in the criminalization of the Bush Doctrine (along with the civilians

who crafted it⁹⁹ *678 and the troops who execute it) and the indemnification of terrorism.¹⁰⁰ In light of ongoing contestation over the parameters of IHL, it is not inconceivable that exercise of ICC jurisdiction over the crime of “aggression” (as it comes to be defined¹⁰¹) could result, particularly if such exercise is at odds *679 with Security Council,¹⁰² in an attempt to hale United States personnel to the Hague to answer charges levied by a state sponsor of terrorism¹⁰³ for operations that result in unintended *680 civilian casualties¹⁰⁴ or the use of “disproportionate” *681 force against terrorists.¹⁰⁵ The potential for mischief explains *682 why some brand the ICC a pernicious institution that will grant terrorists moral ablution and invite further evil,¹⁰⁶ and it accounts, in part, for the covert orchestration of much of the war on terror,¹⁰⁷ the better to evade a welter of international *683 scrutiny¹⁰⁸ waxing unsympathetic to United States purpose.¹⁰⁹

*685 The foregoing is no veiled attempt to secret national interests within an international rubric: there is a less parochial foundation upon which to reject the fruits of Rome. With their monstrous acts, the nineteen Islamic terrorists who crashed passenger jets into the World Trade Center and the Pentagon may have struck targets physically within the United States, but in so doing they and their organizational and state supporters declared war upon Western civilization.¹¹⁰ Quite simply, there are no categories of criminality that can contain such acts, and their authors can only be understood as barbarians who have transcended criminality altogether.¹¹¹ Accordingly, *686 the United States concludes that, after defeating fascism and communism, the free world is once more at war:¹¹² the Bush Doctrine,¹¹³ disdaining judicial responses for military *687 measures, pronounces unmistakably the American view that the nexus of Islamic terrorism and WMD--a threat to civilization far greater than anything that has yet presented in the framework of traditional understandings of criminality--must be vanquished to “prevent the triumph of an intolerable tyranny.”¹¹⁴

E. Accommodation: Toward a Rationalized Theory of the Laws of War

By reference to a series of events in the film *Saving Private Ryan*,¹¹⁵ a fictionalized account of the Allied invasion of Normandy in 1944, and to a hypothetical scenario involving a United States covert operation to eliminate WMD in the custody of terrorists, Part II juxtaposes the two contending paradigms--the code of martial honor, a regime of professional self-regulation rooted in non-legal norms and customs and institutionalized in the system of courts-martial, and the judicial model embodied in the ICC¹¹⁶--to illustrate that only the former suppresses violations of IHL while immunizing all but those acts that can be genuinely and universally branded criminal in order to grant soldiers a necessary margin of appreciation in defending against manifestly evil adversaries *688 bent on destroying civilization. Part III will resurrect an ancient taxonomy denoting terrorists as a species of near-rightless outlaws--barbarians--with regard to whom the West may place some aspects of IHL in abeyance and drape its military forces and civilian commanders with broad immunities in operations designed to preempt, defeat and destroy these malefactors. Proposals for measures likely to draw law and justice into a closer relationship by rationalizing IHL in support its teleological mission--the protection of the civilization it defends and reflects¹¹⁷--will be followed by a Conclusion.

II. *Saving Private Ryan* v. *Trying Captain Ryan*: A Functionalist Comparison of the Martial Code and the ICC in the Enforcement of IHL

A. *Saving Private Ryan*: Martial Honor, War Crimes in World War II and the System of Courts-Martial

1. Martial Honor

Since ancient times, certain acts committed during war have been widely known to be “manifestly wrongful, on account of their flagrant inconsistency . . . with (the) professional character as an honorable (soldier.)”¹¹⁸ The medieval code of chivalry, which developed a detailed set of rules and principles for the violation of which

one's knighthood could be stripped, further developed this martial code.¹¹⁹ Knights engaged in a casuistic process of self-reflection and-criticism, as well as collective argumentation, to determine whether particular *689 acts breached this martial code.¹²⁰ By the Renaissance, a set of norms,¹²¹ constructed and internalized by a transnational professional caste as an organizational culture requiring, inter alia, minimization of civilian casualties, consistent with military objectives, as a matter not of law but of honor,¹²² had perfused warfare.¹²³ Further, the martial code, by rejecting the alienness and inhumanity of the enemy in favor of a conception of the foe as a fellow professional, directed the honorable soldier to renounce treachery and criminality in combating him,¹²⁴ even if these tactics could be otherwise construed as rational methods of war.¹²⁵ As the martial code *690 diffused and matured, a collective narrative developed to inform soldiers in the discharge of their duties; when in doubt, soldiers conformed to "stories about the great deeds of honorable soldiers" drawn from the "collective narrative of (their) corps."¹²⁶ In short, as a constituent aspect of their professional honor, soldiers accept risks¹²⁷ and it is this self-constructed and-imposed commitment, undertaken as the price of membership in a global epistemic community,¹²⁸ that upholds shared virtues and a common sociality and inspires adherence to the principles underlying the positive regime of IHL.¹²⁹

*691 Admittedly, revenge, fear and other intractable instincts tapped by the horror of war can be overwhelming. When discipline disintegrates and darker angels of human nature overcome them, some soldiers--no less fallible creatures than their civilian counterparts--do indeed descend into inhumanity. However, their failure to abide by the martial code, which reflects endogenous norms and imposes a more stringent standard of conduct than that demanded by IHL,¹³⁰ strips wayward members of an incalculable value--their **status** and identity within the martial caste.¹³¹ When the threat of professional banishment fails to secure compliance with this strict normocentric behavioral template, the martial code subjects transgressors to courts-martial¹³² and the unit(s) responsible *692 to reprisals;¹³³ each institutionalized regime brings internal standards of judgment to bear and can impose, as appropriate to specific delicts, sanctions as serious as death. The propinquity of an accused to the peers called to judge him is simply not proof against obloquy, castigation and excommunication if he has failed to idealize the martial code.

However, although courts-martial and reprisals inflict harsh punishment upon dishonorable members of the martial caste, at the same time these self-policing regimes are intrinsically disposed to the holistic examination of the wide welter of circumstances that characterize the combat environment. Whereas many IHL proponents would impose a duty upon soldiers to utterly abjure self-preservation in obeisance to absolute legal prohibitions on the killing or destruction of certain classes of persons and things,¹³⁴ courts-martial, more pragmatic forums, reserve judgment to other military personnel who, by virtue of their own experience, are able to discern the extent to which defenses, such as those grounded in military necessity, ought to be considered in immunization against liability or in mitigation or extenuation of guilt.¹³⁵ The decision *693 to inflict reprisal requires the responsible military commander to undertake a similar analysis to determine whether the enemy act could reasonably be justified by military necessity, judge any potential claims that the act did not trammel upon martial honor and evaluate the utility of reciprocal violations in deterring future such enemy acts. In sum, martial honor demands even more of soldiers than laws established by outsiders to regulate them, and a rigid yet informal transnational regime vigorously enforces this code upon the ultimate pains of professional banishment and death. However, in accepting that soldiers have an instinct, a right and a duty to self-preservation that no law can abridge or even regulate in any meaningful way, martial honor deviates from IHL absolutism in a sense so profound it is difficult to overstate.¹³⁶ Still, few honest observers adjudge martial honor wanting with respect to its capacity to preserve humanity in war while successfully defending civilization.

*694 2. Saving Private Ryan

On the morning of June 6, 1944, the first of one million Allied forces under the supreme command of General Dwight Eisenhower invaded Nazi-occupied Europe, with initial landings upon a series of code-named beaches in the Normandy region of France. Among other United States formations spearheading Operation Overlord

against fierce German resistance was the 75th Ranger Regiment.

The film *Saving Private Ryan* opens with C Company of the 2nd Battalion, 116th Infantry Regiment, 29th Infantry Division, already under fire from shore batteries, preparing to disembark from their landing craft and storm Dog Green sector of Omaha Beach. The maelstrom of shot and shell obliterates much of the first wave, including most of C Company, and their commander, Captain John Miller, aware that the success of the invasion hangs in the balance, orders the shocked survivors, pinned by withering machine gun fire and flak behind tank obstacles at water's edge, to advance. Men disintegrate in puffs of warm crimson mist as C Company drags forward and redeploys behind a natural berm strewn with pieces of their buddies. With casualties mounting at an incredible rate, Captain Miller orders his troops to advance through a draw and eliminate fortifications atop the bluffs above Omaha so additional forces can be ushered ashore. Murderous machine gun fire rakes C Company during its struggle up the heights, but as C Company and its sister companies turn the tide, the German infantry in the fortifications atop the bluffs throw down their weapons in surrender. Rather than accept surrenders, however, C Company, its members enraged at the mass slaughter of so many Americans, mows down the lines of now-defenseless Germans as Captain Miller and his first sergeant silently observe. Although the battle yet rages along the invasion beaches, Dog Green is quiet as Captain Miller surveys the beach below, carpeted with the bodies of the 2nd Battalion, his shaking hands betraying unspoken emotions.

Several days later, after he reports to his battalion commander the intelligence gathered from an engagement between *695 the remnants of C Company and an entrenched German flak unit defending the German withdrawal across Normandy, Captain Miller is ordered to select and lead a squad on what is described as a mission of strategic importance, the objective of which is the location and evacuation of Private James S. Ryan. The Chief of Staff of the Army, General George C. Marshall, upon learning of the combat death of Private Ryan's three brothers in other theaters, has determined that the injury to national morale would be too great were Ryan's mother to lose all four sons in battle, and he orders Private Ryan hastened to immediate safety.¹³⁷ Captain Miller selects a squad of seven and sets out for the last known location of Private Ryan, a town deep behind enemy lines.

After a day's march, the squad advances upon a machine gun nest at the base of a destroyed radar installation that has been hastily emplaced to delay United States forces pursuing the German retreat. Against the advice of his men, who counsel the bypass of the position, Captain Miller, reasoning that, despite the importance of his strategic mission, follow-on forces will be forced to eliminate the machine gun nest if his men do not, orders a modified frontal assault that results in the second death within his squad. After the sole surviving machine gunner¹³⁸ is captured, Captain Miller permits his troops to beat and otherwise abuse the terrified, desperate German prisoner of war (POW) for several minutes while he ponders a course of action, his hands once again shaking with the gravity of the situation and the depths of his internal anguish. One member of the squad, Private First Class (PFC) Reiben, argues vehemently that the POW should be executed, insisting that to release him will result in his rejoining his *696 unit and revealing the existence of the mission to the Germans, who will recognize the strategic nature of the mission and initiate a hunt for the squad, whereas to take the POW along will encumber and compromise the success of the mission. Captain Miller finally determines that the POW will be blindfolded and released upon his promise to surrender himself to the first Allied patrol he encounters. The parolee, madly repeating the words to American movies, deriding Hitler, and attempting to sing the United States national anthem the better to prove his love for the United States and his hatred for Nazism, steps briskly into the distance. When PFC Reiben quarrels directly with Captain Miller, Sergeant Horvath takes him to task for his insubordination, and the two nearly come to blows before Captain Miller reorients the unit to the search for Private Ryan.

Private Ryan is located in the village of Ramelle with a subordinate unit of the 101st Airborne Division defending a bridgehead, and, after he refuses to accompany the rescue squad until the German armored counterattack against his position is defeated, the units are integrated in defense. During the pitched battle, in

which United States forces absorb heavy losses but hold the position until Allied air patrols destroy the bridge, the paroled German machine gunner, who has rejoined his $\S\S$ unit, kills a member of the squad in hand-to-hand combat and shoots Captain Miller. Reinforcements arrive on the heels of close air support, and a group of German attackers throw down their weapons and surrender to Technical Sergeant (T/5) Upham, a German linguist and intelligence analyst who has emerged from the building wherein he cowered for much of the battle. Although Upham has leveled his rifle at the Germans, the paroled machine gunner, recognizing Upham for the timid soul he is and hoping to rattle him, calls him by name and derisively informs him in German, loudly so the others can hear, that he is “no soldier.” Upham hesitates only a second before shooting the paroled machine gunner, after which he gruffly tells the other German detainees to “scatter.” They do so, and the sole survivors, PFC Reiben, T/5 Upham and Private Ryan, gather around the dying Captain Miller, whose final words challenge Private Ryan *697 to live his life so as to earn the sacrifices of the men who died so he might live. In the final scene, Private Ryan, now an aging grandfather surrounded by his extended family, pays his respects at the gravesite of Captain Miller in the American Military Cemetery atop the bluffs overlooking Omaha Beach and, as the film concludes, it is clear that Private Ryan has indeed done everything he could to merit the valor of his fallen comrades and that their sacrifice, made to rid the world of the great evil of Nazism, was not in vain.

3. War Crimes in Private Ryan?

a. Denial of Quarter

i. Antiquity

The earliest recorded history of war indicates that the killing of **POWs** rendered hors de combat¹³⁹ was common. The denial of quarter—refusal to grant clemency to combatants no longer capable of offering resistance by virtue of wounds or other disability¹⁴⁰—is one of the most ancient and enduring practices of warfare, conducted by the Greeks, Romans and others for whom “war, naked and unashamed, kn(ew) of no right but the right to kill.”¹⁴¹ For the ancients *698 war was an intercommunal effort bereft of rules or mercy: victory and defeat were absolutes, and all categories of persons and property were legitimate targets.¹⁴² **POWs** were killed or enslaved out of enmity,¹⁴³ with a preference for the former,¹⁴⁴ and soldiers who refused to crucify, mutilate, drown or torture their captives to death¹⁴⁵ could be punished as moral reprobates for having committed, in effect, war crimes.¹⁴⁶ Dead **POWs** were not necessarily beyond insult: some cultures killed their captives for food.¹⁴⁷ Although a minority view counseled mercy,¹⁴⁸ ancient practice ran strongly *699 in favor of a norm in which the lives of **POWs** and civilians were forfeit to the captor and their dispatch was acceptable moral conduct.¹⁴⁹

ii. Middle Ages: 1000 A.D.--1648 A.D.

Although the medieval code of chivalry directed knights to extend certain reciprocal rights and privileges in combat, including the right of quarter¹⁵⁰ to surrendering foes upon the payment of ransom,¹⁵¹ military necessity justified the denial of quarter even to nobility where capitulants might subsequently pose a threat were the tide of battle to turn¹⁵² or *701 where the execution of **POWs** would demoralize the enemy and aid in victory.¹⁵³ Moreover, common soldiers and civilians were not subjects of the jus armorum and, despite the growing influence of the Church,¹⁵⁴ most commentators proclaimed support for the general right of a captor to kill all common soldiers,¹⁵⁵ as well as residents of enemy territory who had borne arms or mustered support for the war effort, as enemies of the state.¹⁵⁶ Practice followed this restatement of customary right: throughout the Middle Ages belligerents routinely dispatched **POWs**,¹⁵⁷ particularly in the context of the “untrammelled savagery”¹⁵⁸ of inter-confessional conflicts, and entire populations of cities were put to the sword in fits of *702 religious cleansing.¹⁵⁹ Conflict beyond Christendom was even more brutal: Islamic practice condoned execution of

Christian **POWs** who refused to convert¹⁶⁰ while Christian crusaders reflexively denied quarter to Muslims,¹⁶¹ to the approval of leading jurists.¹⁶² Although merciful captors occasionally granted their captives the **status** of protected persons,¹⁶³ savagery reigned during the Dark Ages, and it was not until the dawning of the Enlightenment that chivalry began to embrace common soldiers and civilians within its normative and protective fold.

iii. Enlightenment: 1648 A.D.--1800 A.D.

The humanitarian conception of the soldier rendered hors de combat as an unfortunate wretch with a claim to protection against mistreatment,¹⁶⁴ rather than an enemy of the state deserving of death, acquired some purchase in the seventeenth century, inspired largely by the writings of Enlightenment scholars who labored for the humanization of war.¹⁶⁵ The development *703 of secular international law subsequent to the Treaty of Westphalia in 1648 bolstered this development as **POWs** came incrementally to be viewed as wards of the custodial sovereign rather than as the prizes of the capturing soldier¹⁶⁶ and, by the eighteenth century, although they could be confined and even sold into slavery¹⁶⁷ to prevent their rejoining the fray,¹⁶⁸ **POWs** were no longer reflexively put to death. State practice gradually incorporated principles of restraint codified in domestic military regulations¹⁶⁹ and bilateral agreements requiring that enemy **POWs** be granted quarter¹⁷⁰ and, during the American Revolution, a weak customary regime of exchange permitted the parole¹⁷¹ of officers upon their promise to refrain from future participation in the conflict. Common soldiers could hope for release without ransom at the termination of hostilities.¹⁷² However, the practice *704 of denying quarter out of military necessity continued despite the fitful emergence of a protean custom,¹⁷³ and a majority of scholars conceded that, as a matter of law, a surrendering enemy was stripped of all rights, including the right to quarter,¹⁷⁴ and that any formal legal claims to protection at the hands of the enemy were moral, rather than legal. As such, the **POW** could be, and often was, summarily killed.¹⁷⁵

*705 iv. Pre-Modern Era: 1800 A.D.--1914 A.D.

As the nineteenth century progressed, **POWs** were increasingly viewed as unfortunates rather than criminals and, in 1863, the Lieber Code¹⁷⁶ marked the first major codification of a developing custom favoring the qualified right of surrendering soldiers to quarter. The Lieber Code generally prohibited Union troops to deny quarter¹⁷⁷ or kill captured **POWs**¹⁷⁸ on the ground that “(m)en who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.”¹⁷⁹ However, military necessity continued to provide an important exception to the waxing force of custom: a provision recognized that, under circumstances of “great straits,” a commander was permitted “to direct his troops to give no quarter . . . when his own salvation makes it impossible to cumber himself with prisoners.”¹⁸⁰ Moreover, the Lieber Code explicitly denied quarter to enemy units “known or discovered to give no quarter,”¹⁸¹ and enemy **POWs** who fit this description could be executed within three days of capture.¹⁸² Furthermore, the Lieber Code was interpreted in concert with other applicable regulations, one of which ordered Union troops to refuse wholesale surrenders by Confederate troops eager to quit the war,¹⁸³ thereby further qualifying its scope and applicability. In practice, the Lieber Code, although it discouraged denial of quarter upon moral grounds, was of limited value in enforcing the rights of **POWs** against competing *706 claims of military necessity, as both armies executed **POWs** out of expedience and in reprisal for violations real and imagined of the customs of war¹⁸⁴ and besieged garrisons were categorically denied quarter after their refusals to surrender.¹⁸⁵

Still, the Lieber Code exerted a transnational influence upon the codification of a customary preference for granting quarter to defeated enemies that had been crystallizing within the martial case for centuries.¹⁸⁶ A series of states published military manuals incorporating much of the Lieber Code nearly verbatim.¹⁸⁷ The Brussels Conference of 1874¹⁸⁸ and the Hague Convention of 1907 codified, as a matter of international law, the custom reflected in the Lieber Code’s general prohibitions against the denial of quarter, whether ad hoc or in an

advance declaration.¹⁸⁹ Nevertheless, international *707 practice, whether justified by claims of military necessity or simply by the relative weakness of any norm entitling defeated personnel to protection, belied diplomatic pronouncements and overwhelmed the general presumption in favor of quarter for surrendering forces. Examples abound: despite having promised quarter to secure the surrender of the besieged garrison at the Battle of Jaffa (1800), Napoleon, unable to feed his own troops, ordered 4000 Arab captives slain;¹⁹⁰ French forces fleeing their failed invasion of Russia (1812) were denied quarter by Russian cavalry; victorious Mexican forces at the Alamo (1836) refused quarter to permanently preclude seasoned veterans from rejoining the Texan struggle for independence;¹⁹¹ and during the Russo-Turkish War (1877-78) Turks were denied quarter on the ground that, in the words of the Russian commanding general, “(t)here are circumstances under which it is impossible to make prisoners--when your force is small and prisoners might prove dangerous (S)ad necessity force(d) us to shoot them.”¹⁹² Both sides took extreme reprisals against POWs during the Boer War (1899-1900),¹⁹³ United States commanders ordered the slaughter of all males over ten years of age in fighting against Muslim guerrillas in the Philippines (1900-02)¹⁹⁴ and in the Russo- *708 Japanese War (1904-05) Russia ceased granting quarter after receiving reports that wounded Japanese had feigned surrender only to shoot Russian troops, who believed the Japanese hors de combat, bypassing their positions.¹⁹⁵

Contemporary commentators, while memorializing a general custom proscribing the denial of quarter, paid heed to state practice of unequivocally recognizing exceptions rooted in military necessity, including reprisal,¹⁹⁶ in circumstances where capturing forces were numerically inadequate to effectively subdue surrendering forces without unacceptably increasing the jeopardy of attack from other enemy forces not hors de combat,¹⁹⁷ and where a besieged force, obstinately resisting surrender beyond the point it might reasonably expect to prevail, obligated attacking forces to incur needless casualties storming the position.¹⁹⁸ In short, although a custom *709 disfavoring denial of quarter was crystallizing, scholars of *710 the era described a stable, consistent practice grounded in necessity to deny quarter.

v. The Great Wars: 1914 A.D.--1945 A.D.

During World War I, several belligerents entered into bilateral agreements governing the status of POWs, although few were ratified¹⁹⁹ and most parties, including the United States, accepted few if any legal obligations.²⁰⁰ Although some belligerents recognized expanded customary duties, including the general obligation to grant quarter,²⁰¹ in either official policy statements or military manuals,²⁰² most domestic military legal systems retained explicit exceptions allowing the denial of quarter under categories of circumstances, including military necessity and reprisal,²⁰³ while others *711 expressly ordered their military forces to deny quarter in order to sow terror amongst their enemies.²⁰⁴ Moreover, as the very concept of surrender remained as shameful to the martial mind as it was to the ancients,²⁰⁵ it was not difficult for several belligerents to indoctrinate their armies to neither grant nor request quarter, even if they did not issue direct orders,²⁰⁶ nor was it unusual that units would make this decision *712 independent of their command structure.²⁰⁷ Throughout World War I, quarter was systematically denied as a standing tactical procedure, in reprisal for perfidious surrenders and for posing as casualties only to resume combat²⁰⁸ out of vengeance²⁰⁹ and out of alleged necessities, including avoidance of encumbrances.²¹⁰

*713 On balance, the reflections of commentators assessing the lessons of the “Great War” reinforced the conclusion that the fabric of a martial custom favoring the grant of quarter continued to be woven through with exceptions. Where rapidity and secrecy were paramount, such as in the case of a small force occupying a strategic position in advance of a main body for whom disclosure of their purpose or encumbrance by POWs would enhance the likelihood of their own destruction²¹¹ and compromise the mission of the larger force,²¹² or where the exigencies of combat precluded the immediate extension of protection to all those manifesting an intent to surrender,²¹³ jurists conceded the legitimacy of military necessity. Although a minority contended that the grant of quarter to persons rendered hors de combat had reached the status of an absolute obligation from which soldiers were not permitted to derogate, *714 ²¹⁴ most continued to view the grant of quarter through the

prism of state practice, from which it appeared as a custom-based privilege with respect to which the recipient could assert an entitlement only in the absence of any military necessity that would move the grantor to deny it. In the interwar period, humanitarians tried to harden this conditional custom into something more protective of soldiers hors de combat, but the resulting Geneva Conventions of 1929, in some senses simply an expansion upon the membership of their conventional predecessors, added little more than an additional declaration that **POWs** were immune from reprisal and entitled to protection from the moment of capture.²¹⁵

Attempts to stamp a legal imprimatur upon the customary regime governing quarter were not confined to the international arena, as several states made minor modifications to their respective military manuals in recognition of the interplay between developments in IHL²¹⁶ and the trajectory of ***715** state practice.²¹⁷ Nonetheless, states continued to veer from the increasingly restrictive positive law crafted by diplomats and glossed by legal scholars, hewing instead to the restatements of custom proffered by their military establishments: updated military manuals retained the primacy of the actual practice and usage of soldiers atop the hierarchy of sources of obligation incumbent upon their armed forces,²¹⁸ ***716** and the martial cultures of a number of militaries retained a disdain for the very concept of surrender.²¹⁹ Thus, as World War II erupted, the denial of quarter was condoned, whether explicitly or tacitly, by several leading states,²²⁰ resulting in a round-robin of reprisals.²²¹ Following their invasion of the Philippines, Japanese troops drove, at bayonet point, over 40,000 Allied captives to their deaths on the Bataan Death March (1942),²²² a number exceeded by the Red Army after ***717** the Nazi defeat at Stalingrad (1943) after which more than 105,000 German **POWs** were dispatched both outright and on the march to gulags.²²³ German forces repeatedly denied quarter to Allied troops,²²⁴ most notoriously at Malmedy during the Battle of the Bulge (1944),²²⁵ and Allied soldiers reciprocated ***718** against Axis troops,²²⁶ including a mass execution of SS camp guards during the liberation of Dachau (1945)²²⁷ and the ruthless extermination of Japanese troops in the Pacific Theater by United States Marines in 1944-45.²²⁸

Moreover, the belligerents seized upon the advent of large-scale guerrilla warfare and commando operations²²⁹ to further clarify, and even codify, the preexisting martial custom conferring upon military authorities wide latitude to self-define and apply exceptions to the general entitlement to quarter. Although the legal **status** of missions undertaken to disable or destroy industrial and other strategic installations beyond the traditional theater of operations was the subject of dispute during World War II,²³⁰ for the Nazi general staff, operations against infrastructure were ipso facto illegal methods of warfare on the asserted grounds that members of units ***719** engaged in such missions did not themselves grant quarter or otherwise comply with IHL, and thus warranted reprisal in the form of the eradication of all members of the enemy units concerned.²³¹ With the infamous Kommando Befehl (Commando Order) in October 1942,²³² Germany ordered its armed forces to deny quarter to all Allied forces on “so-called Commando missions in Europe or Africa,”²³³ and this instruction remained in effect for the duration of the war.²³⁴ Allied soldiers branded as “commandos” were executed with the official explanation that they were killed “in Kampf oder auf der Flucht” (in battle or attempting to escape).²³⁵ A similar but informal regime governed the conflict in Yugoslavia where, with few exceptions, no belligerent granted quarter.²³⁶

The academic literature written in the aftermath of World ***720** War II reveals that, despite the progressive development of IHL and its normative influence upon eminent international lawyers, the martial code had yet to be displaced as the lodestar guiding state practice. Although statements of absolutism with respect to the quarter were working their way into some commentaries,²³⁷ scholars continued to recognize the legal legitimacy of exceptions carved out of the general rule in the interest of self-preservation.²³⁸ In sum, although the customary regime governing warfare had evolved since ancient times to enhance the protections owed to soldiers rendered hors de combat, state practice butted up against this evolving regime and, at the time of the Normandy invasion in June 1944, martial honor, reflected in the contents of military manuals and above all in the intersubjective understandings and practice of the professional soldierly caste, did not categorically proscribe denial of quarter to enemy soldiers offering their surrenders, nor did it absolutely preclude execution of **POWs** under circumstances of military necessity.

b. Violation of Parole

Although in ancient times most members of a defeated force could expect a swift death,²³⁹ POWs were on occasion granted a limited parole²⁴⁰ and released, permitting them to serve as intermediaries in diplomatic negotiations and as *721 couriers of the news of a defeat to a conquered people.²⁴¹ Honor was enough to ensure the effectiveness of the grant of parole: anecdotal evidence indicates that POWs granted their release returned after their service as emissaries, even armed with the knowledge that return meant sure death.²⁴² By the Middle Ages, more POWs were released upon their promise to refrain from further acts of belligerency²⁴³ and special feudal courts punished breaches of the *jus armorum*, including breaches of parole agreements, committed by dishonorable knights.²⁴⁴ During the Enlightenment, the concept of the soldier as a servant of his government not responsible for its policies began to take root²⁴⁵ and as it did, the system of parole was augmented by a regime whereby, although poor prisoners could often expect the sword, wealthy captives could hope to secure parole upon the payment of a ransom.²⁴⁶ By *722 the late seventeenth century, parole was no longer accompanied by a financial transaction and, during the American Revolution, captured officers of both forces²⁴⁷ were routinely released upon their promises simply to refrain from further belligerency.²⁴⁸ Although by the late eighteenth century the violation of parole was no longer universally treated as a capital crime,²⁴⁹ it remained an ignominious offense.²⁵⁰

The Lieber Code described parole as a “pledge of individual good faith and honor to do, or to omit doing, certain acts after he . . . shall have been dismissed . . . from the power of the captor”²⁵¹ and explicitly prescribed death for violation of the conditions attached to the grant.²⁵² The solemnity of the *723 grant dictated that it be offered only where the honorableness of the grantee could be accurately determined and where the agreement could be recorded. Consequently, the Lieber Code restricted the grant of parole to officers²⁵³ in non-combat situations,²⁵⁴ and it required an exchange of written documents.²⁵⁵ Moreover, as parole was conditioned upon a promise secured by honor, it could be accepted but not imposed under the Lieber Code.²⁵⁶ Although the parole regime during the United States Civil War collapsed under the weight of reciprocal violations,²⁵⁷ subsequent nineteenth and early twentieth century codifications, domestic²⁵⁸ and international,²⁵⁹ as well as the jurisprudence of the United States Supreme *724 Court,²⁶⁰ supported the moral basis for parole as well as the right of states to harshly punish violators. Violations of parole continued to excite moral outrage and, although most were punished with imprisonment at hard labor,²⁶¹ some were condemned to death.²⁶² During World War I, the custom of parole fell into desuetude after serial violations early in the conflict²⁶³ and the subject was little revisited, apart from the context of restatements of domestic military manuals,²⁶⁴ prior to World War II.²⁶⁵

Thus, as of June 1944, POWs who accepted release upon the promise to refrain from further belligerency were expected to abide by their agreements; those who did not could expect death upon recapture.²⁶⁶

*725 c. Reprisal Against POWs

Belligerents have threatened and undertaken acts of reprisal²⁶⁷ to deter and punish violations of the laws and customs of war, including the abuse of POWs,²⁶⁸ throughout history. Enlightenment commentary expressed approval for the use of reprisals by otherwise law-abiding states as necessary to deter unlawful adversaries²⁶⁹ and, during the American Revolution, the threat of reprisal was required to induce Britain to terminate its denial of quarter to and maltreatment of United States POWs.²⁷⁰ In the United States Civil War the “infliction of retaliatory measures” against enemy POWs²⁷¹ was a permissible means to transform the conduct of the enemy.²⁷² Soldiers committing perfidious surrenders in World *726 War I might expect to be either employed as human shields or summarily executed in retaliation upon their eventual capture,²⁷³ and reprisals against POWs, including execution, were employed by the Allies and the Entente²⁷⁴ and justified by scholars as necessary deterrent measures.²⁷⁵ In the immediate aftermath of World War I, international efforts to limit reprisals against POWs failed to dislodge the settled practice of states in responding to and deterring injuries to their armed forces,²⁷⁶ and diplomats settled for the requirement that reprisals against POWs be limited to where

the act was justified as having been undertaken to protect **POWs** of the capturing state.²⁷⁷ Thus, although the Geneva Conventions of 1929 purported to subvert the custom-based regime of reprisal and institute an absolute prohibition on reprisals against **POWs**,²⁷⁸ this declaration made few inroads into the mass of state interests in deterring mistreatment of their own soldiers and, for the duration of World War II, reprisals remained relatively commonplace and practical measures were neither generally disfavored by nor inconsistent with the martial code.²⁷⁹

4. The Court-Martial of Private Ryan

No disciplinary or judicial measures were taken against any of the characters in Saving Private Ryan. The most brutal eleven months of the war lay ahead and Allied efforts were tightly focused upon defeating the Nazi war machine. To have exposed soldiers to the threat of punishment in cases where allegations of misconduct would have been considered of questionable merit would have chilled the aggressiveness necessary for survival in combat and dulled the very instrument essential to victory. Even more importantly, by the standards of the martial code in June 1944, none of the acts or omissions were clearly colorable as prosecutable war crimes, and it is almost inconceivable that any commander would have investigated, let alone charged, any defendants.²⁸⁰ Nevertheless, to ***728** develop the argument that the martial code is superior to international adjudication as arbiter of the moral and legal legitimacy of the conduct of soldiers in war as well as the sole mechanism of social control whereby the objects and purposes of IHL may be achieved without compromising the survivability of soldiers and the civilization they defend, this Article will analyze the likely result of a United States Army court-martial ***729**²⁸¹ of Private Ryan and other members of the rescue squad on charges of denial of quarter and reprisal against the German **POW** for violation of parole. The substantive elements of the crimes with which defendants might have been charged will be those as they existed in 1944.²⁸² However, ***732** because the rules of court-martial have evolved in the intervening years, and as this analysis is undertaken in support of the claim that the contemporary system of courts-martial, as the institutionalization of the martial code, is more suitable to the defense of law and civilization in the ongoing war on terror than is the ICC, the court-martial of Private Ryan will observe the procedures and structure of contemporary court-martial, proceedings.²⁸³ The contraposition of the likely results ***733** of a court-martial, wherein current substantive laws governing parole and reprisal are applied, offers evidence in further support of this claim.

a) United States v. Private Ryan, July 1944

On July 5, 1944, following an Article 32 investigation²⁸⁴ sparked by a New York Times article under the byline of a reporter who had accompanied the 101st Airborne Division into Normandy and described in detail the Battle of Ramelle, including the shooting of the German **POW** “in cold blood,” the commanding general of the 29th Infantry Division, Major ***734** General Charles Gerhardt, reluctantly ordered the courts-martial of Private Ryan, PFC Reiben and T/5 Upham.²⁸⁵ T/5 Upham was charged with a violation of [Article 118 of the UCMJ](#), “Murder,” for shooting the German machinegunner he had taken prisoner in Ramelle.²⁸⁶ PFC Reiben was not charged with a violation of [Article 118](#) for denying quarter to surrendering Germans on the bluffs overlooking Omaha Beach because the prosecution determined that there was not sufficient evidence to sustain a conviction;²⁸⁷ however, Reiben was charged with a violation of Article 128, “Assault,” for his physical abuse of the German machinegunner subsequent to capture and of Article 134, “Misprision of Serious Offense,” for concealing violations by Private Ryan and T/5 Upham.²⁸⁸ Private ***735** Ryan was charged with a violation of Article 134 for concealing the commission of violations by T/5 Upham. The defendants were arrested and confined in late June 1944,²⁸⁹ informed of the charges,²⁹⁰ advised of their rights and appointed defense counsel.²⁹¹ At arraignment,²⁹² the defendants each entered a plea of not guilty.²⁹³ Shortly after the arraignment, Private Ryan refused a grant of immunity to testify against T/5 Upham.²⁹⁴

The trial judge denied defendants’ motions to dismiss on the ground that the specifications failed to state

offenses,²⁹⁵ *736 and after other preliminary matters, including the pretrial orientation of the members of the court conducted by General Truscott,²⁹⁶ the common trial commenced²⁹⁷ before a panel of five members, two of whom were enlisted soldiers.²⁹⁸ As all defendants stipulated to the facts as presented in the specification of charges,²⁹⁹ the prosecution was relieved of the potential embarrassment of having to call as witnesses enemy POWs. However, each defendant offered a series of affirmative defenses³⁰⁰ to the charges and submitted a witness list that included experts to testify in support of these defenses.³⁰¹ All defendants offered the defense of ignorance or mistake of fact as to the criminality of the offenses with which they were charged,³⁰² while T/5 Upham and PFC Reiben offered the defenses of justification, obedience to orders and lack of mental *737 responsibility. The prosecution, relying on the stipulation of the defendants that Upham had killed the German POW, in the presence of the other two defendants, that PFC Reiben had physically abused the German POW and that neither PFC Reiben nor Private Ryan had reported the events leading to the charges against other defendants that they had witnessed, presented a brief and direct case-in-chief to prove the unlawfulness of defendants' actions.

With respect to T/5 Upham, the prosecution introduced into evidence relevant provisions of the Rules of Land Warfare (1940),³⁰³ the Geneva Conventions of 1929³⁰⁴ and the Hague Convention of 1907³⁰⁵ to establish that the denial of quarter and the execution of POWs were categorical violations of IHL as it existed at the time of the alleged offenses for which defenses were unavailable as a matter of law.³⁰⁶ Even *738 military necessity could ever justify the extrajudicial killing of POWs,³⁰⁷ the prosecution further argued, it was a defense unavailable to Upham, who could have availed himself of alternative, non-lethal methods of preventing the harms that *739 Upham asserted the execution of the POW had been undertaken to prevent. Specifically, Upham might have bound or otherwise secured the POW, disabled him in some fashion or simply released all the POWs unharmed.³⁰⁸ The prosecution called the eminent scholar Hersch Lauterpacht, who testified that under IHL as it existed at the time of the alleged offense, defenses to the denial of quarter were categorically unavailable.³⁰⁹ A second prosecution expert--a former British infantry officer and law professor at Oxford--testified that the defense of military necessity was applicable only to acts undertaken under circumstances where compliance with the law was a "genuine material impossibility,"³¹⁰ and that Upham either could have complied with the obligation to grant quarter or else was obligated to release surrendering German troops on parole.

In regard to the proffered defense of superior orders, the prosecutor argued against its applicability with respect to war crimes and contended that, even if it applied, not only was the killing of enemy POWs not within the scope of the orders given to Upham³¹¹ but even if such an action could have been reasonably construed otherwise, whether as a reprisal or on other grounds, it was an illegal order³¹² that Upham knew or *740 should have known was illegal³¹³ and thus he was duty-bound, as a matter of transnational military custom³¹⁴ as well as United States military regulations,³¹⁵ to disobey. To the defense of a lack of mental responsibility,³¹⁶ the prosecutor *741 argued that, even conceding that he was profoundly enraged by the perfidy of the German POW and the death of Captain Miller, T/5 Upham retained sufficient mental responsibility that, in conjunction with the presumption of mental responsibility that attaches to every soldier, he was disqualified from offering this defense.³¹⁷ Finally, the prosecution attempted to prove that, by virtue of the extensive United States Army regulations governing the laws of land warfare and the manifest illegality of his actions, T/5 Upham either knew or should have known that killing an enemy POW rendered hors de combat was categorically illegal. Experts--military psychiatrists and professors of military law--testified for the prosecution with respect to all aforementioned defenses.

In the case against PFC Reiben, charged with assault in violation of Article 128 and misprision of a serious offense in violation of Article 134 for concealing the commission of violations of the UCMJ by Private Ryan and T/5 Upham, the prosecution presented its case first as to the assault charge. The prosecution attacked the defenses of justification based on military necessity, obedience to orders and lack of mental responsibility on grounds virtually identical to those in the case against Upham. The prosecution contended that no exigent circumstances required PFC Reiben to cause bodily harm to the German POW³¹⁸ subsequent to his capture

because there was no imminent threat from other enemy forces, and United States troops outnumbered the sole surviving German, who offered no physical resistance. The prosecution further argued that neither PFC Reiben nor any other member of the rescue squad had received orders instructing them to mistreat enemy POWs, and that notwithstanding the influence of the emotions associated with the death of T/5 Wade, PFC Reiben presumptively retained sufficient responsibility for his actions *742 and could not assert the defense of lack of mental responsibility as a matter of law. With respect to the misprision charge, the prosecutor supplemented the stipulation, in which PFC Reiben stated that he had observed T/5 Upham shoot the German POW but had not subsequently reported the shooting, with evidence that PFC Reiben either knew or should have known that Upham's actions were criminal, that PFC Reiben had the opportunity but did not elect to report and that under United States military regulations the denial of quarter is a serious offense.³¹⁹ The prosecution effectively made an identical case against Private Ryan on the misprision charge and then rested.³²⁰

Following a brief recess, the defendants' joint motion for a finding of not guilty was denied,³²¹ and the defendants presented their case. T/5 Upham testified that he was justified in shooting the German POW on the ground of military necessity. According to Upham, his squad had been virtually eliminated by enemy action, and with only three remaining soldiers it was impossible to accept the surrender of all six German POWs without compromising his mission: the safe evacuation of Private Ryan from the theater of operations. Had he granted quarter, the three survivors would have at the very least been greatly encumbered in their movements; at worst, the six enemy POWs, along with other German forces known to be concentrated along the planned avenue of evacuation and preparing for counterattack against the Normandy beachhead, might well have overwhelmed their captors³²² and defeated a mission assigned strategic significance by the Army Chief of *743 Staff. Upham further testified that in shooting the German POW he had acted consistently with his lawful mission and with standing orders requiring him to evacuate Private Ryan at all costs in the face of an uncertain enemy threat along his planned axis of maneuver. To have accepted the additional encumbrance of POWs and the threat this would have entailed would have been in contravention of his orders as he understood them.³²³ Further, Upham testified that he lacked mental responsibility for killing the German POW as a consequence of extreme "battle fatigue"³²⁴ coupled with uncontrollable outrage over the death of his commander at the hand of a perfidious parole violator³²⁵ on whose behalf he had, days earlier, urged his unwilling comrades to grant parole. Finally, Upham testified that he believed it was legally permissible to shoot an enemy POW for parole violation without resort to judicial process, particularly under the circumstances outlined in his earlier testimony.

Following the testimony of T/5 Upham, PFC Reiben and Private Ryan corroborated prior testimony as to their objective *744 and subjective understandings of the enemy threat and of the importance attached to their mission by the General Staff of the United States Army. PFC Reiben testified further that he had not believed it possible to accept the surrender of the German POW due to concerns over the likelihood of imminent contact with a numerically superior enemy force, and that he had believed it necessary to use a moderate degree of force to establish physical control over the POW. He also believed, insofar as he knew and understood applicable law, that Upham had been justified, by necessity and by reference to squad orders, in killing the POW, and he did not believe that he, Upham or Private Ryan had violated any laws in failing to report the circumstances of the death of the POW through the chain of command. Private Ryan reiterated the testimony of PFC Reiben, denying that in the course of his military training he had ever been instructed that failure to report an offense was a violation of Army regulations.

After a recess, a series of expert witnesses testified for the defense, beginning with the defense of military necessity. The first two, retired former colonels in the United States Army Judge Advocate General Corps and now law professors, testified that the United States Army Rules of Land Warfare expressly sanctioned the denial of quarter under limited circumstances, including self-preservation and the preservation of the military mission.³²⁶ These experts further testified that, although the denial of quarter was normally a manifestly illegal act not justifiable by military necessity or superior orders, it could, under certain circumstances, be excused where a small unit operating behind enemy lines in a high-threat environment, could not accept prisoners

because to do so would necessitate abandoning the mission or disclosing it to the enemy.³²⁷ The third, a former British military lawyer, *745 did not share the opinion that the refusal to grant quarter could be justified; however, he stated that in circumstances such as those faced by the defendants, the denial of quarter was “understandable” and excusable. Although all three experts conceded on cross-examination that an order to withhold from enemy POWs the legal protections afforded by relevant IHL treaties would be an illegal order not entitled to obedience, and that obedience would support the charge of murder,³²⁸ each expert insisted that military necessity had always been available, and continued to be available, as a defense to a charge of murder arising from the denial of quarter in exceptional circumstances,³²⁹ and that to refuse to permit “individuals confronting calamities” to act in the interest of self-preservation would “only succeed in bringing the law (of war) into disrepute.”³³⁰

With respect to the defense of superior orders, defense experts testified that, whether deliberately or indeliberately, illegal orders are frequently issued³³¹ to subordinates who are nevertheless obligated to comply.³³² They also testified *746 that the United States Army regulations,³³³ as well as the Charter of the Nuremberg Tribunal,³³⁴ explicitly provided that even if an order to deny quarter would necessarily be illegal, the very existence of that order was, depending upon the factual circumstances, either a defense or a mitigating factor. These witnesses further testified that soldiers could be lawfully ordered to undertake acts that would otherwise amount to war crimes but for the fact that the purpose of the ordered acts was in reprisal for prior violation(s) of the laws and customs of war by the enemy,³³⁵ that soldiers were duty-bound to execute these orders; and that reprisal against a parole violator could reasonably and in good faith have been considered to be within the scope of the orders issued to the rescue squad to which Upham had been assigned.³³⁶ On the question of the lack of mental responsibility, a psychiatrist testified that combat soldiers are exposed to sleep deprivation, poor nutrition and emotional and physical trauma that conspire *747 to warp normal moral judgments and render the application of formal legal rules by those to whom such experiences are a foreign “morally questionable exercise.”³³⁷ According to this witness, where battlefield failure, and even personal destruction, are introduced into this decisional climate, the likelihood that soldiers’ conduct will depart from the positive law increases by orders of magnitude³³⁸ in proportion to the intensity of the combat.³³⁹ In his opinion, considering that the defendant had, immediately prior to his execution of the parole violator, witnessed the latter kill his commander, T/5 Upham was suffering from an extreme case of battle fatigue that had destroyed his capacity to judge the moral and legal consequences of his acts.³⁴⁰ A military historian testified further to the effect that the defense of lack of mental capacity, predicated upon battle fatigue, had long been available to soldiers accused of exacting revenge upon enemy soldiers and units for depredations against their own units.³⁴¹

*748 Defense counsel then introduced several Army publications in support of the defense of ignorance, claiming that, although ignorance of the law does not justify its violation as a general rule, the government recognized as a matter of official policy that IHL “does not in some cases possess either the exactness or the degree of publicity which pertains to municipal law,”³⁴² thereby affording the ignorant violator a defense. A series of retired members of the Judge Advocate General corps and professors of military law testified that knowledge of IHL, an increasingly complex regime, could not be presupposed even in officers, let alone enlisted soldiers, by virtue of the uneven and incomplete distribution of such knowledge in the training provided by the Army³⁴³ as well as the capacity *749 of soldiers to absorb such complex material in the context of other training obligations.³⁴⁴ These experts concluded that it was reasonable for Upham to have relied on his superiors and to have believed that such orders were legal even if he had been mistaken.³⁴⁵ Finally, the defense introduced as character witnesses³⁴⁶ members of the 101st Airborne Division whose lives Private Ryan had saved in combat on the night of June 5, 1944 resulting in his award of the Silver Star;³⁴⁷ the defense also entered into evidence copies of the citations issued to Private Ryan and PFC Reiben upon their respective awards of Bronze Stars³⁴⁸ for heroism in combat in Italy in early 1944. After the defense concluded its case-in-chief, the *750 court adjourned.

The next morning the judge, acting sua sponte, issued a finding of “not guilty” as to PFC Reiben and Private Ryan³⁴⁹ and ordered their release from custody. The prosecution proceeded to its closing argument as to the

remaining defendant, T/5 Upham.³⁵⁰ The prosecutor described the denial of quarter to the German **POW** as an act of premeditated murder that was no less criminal, under domestic and international law,³⁵¹ by virtue of the despicable **status** of the victim as a parole violator in the armed forces of a state at war with the United States. The prosecutor then recapitulated the arguments that none of the defenses were applicable, either as a matter of law or in the factual circumstances presented, on the grounds that Upham knew that the denial of quarter was categorically illegal or at least illegal in circumstances wherein he had the option to use nonlethal means to reduce the threat to the squad and the mission, and that notwithstanding the stressors of combat Upham possessed the requisite mental capacity to freely choose actions that he knew were illegal. In conclusion the prosecution described Upham as having engaged in an illegal reprisal “dressed up as military necessity”³⁵² against an enemy soldier, for whom he held personal *751 animus, the effects of which were to bring grievous harm and disrepute upon, as well as compromise the good order and discipline of the United States Army. The prosecution thus requested that the panel find Upham guilty of murder in violation of [Article 118 of the UCMJ](#).

The defense then began its closing argument by restating that T/5 Upham acted pursuant to lawful orders issued by the Chief of Staff of the United States Army transmitted to him through his commanding officer, Captain Miller, requiring him to safely evacuate Private Ryan from a position deep behind enemy lines during the height of a German counterattack. In this threat posture, obedience to these orders, particularly after the Battle of Ramelle further attrited the rescue squad, required him, as senior enlisted soldier in command, to deny quarter to an enemy soldier who had previously demonstrated his perfidy by violating his parole. The defense insisted that the laws and customs of war permitted an exception to the general presumption in favor of quarter in circumstances where an understrength unit was physically unable to take prisoners and the would-be prisoner in question--a parole violator--was the permissible object of reprisal. In any event, the defense also insisted that Upham was so overcome by the stressors of combat that even had he been instructed in the course of his military training that his spontaneous decision to kill the German **POW** was legally impermissible, which he had not, he would have been unable, as a result of a lack of mental capacity, to refrain from so doing. In effect, the defense propounded a standard for the panel in determining the guilt of the defendant which would require the panel to enter a finding of not guilty unless the panel could clearly conclude that the defendant knew his actions to be illegal and intended to violate a legal obligation.³⁵³ Finally, the defense encouraged *752 the panel to

look past the dusty books written by old lawyers who never smelled a whiff of cordite, never seen gouts of blood gushing from the shattered hulk of a buddy, never had to decide whether to protect their buddies and lose their innocence or keep their innocence and lose their buddies. Look past murky rules that make sense only from the safety and comfort of Washington and seem as bizarre moralistic posturings to the brave but terrified American boys locked in an existential struggle against an evil regime that every day violates more rules of war than the eminent experts testifying before this court could ever hope to identify and record and catalogue. This is a normal man under abnormal circumstances made all the more aberrant by the perfidy and treachery of the deceased, a willing and eager exponent of a criminal government, and he did nothing more than protect himself and accomplish his mission as ordered by the Chief of Staff of this United States Army. There is a ocean of difference between peace and war, between those who went to war and those who have stayed behind, between the murderous criminals who run the government that declared war upon our nation and this bewildered young man sitting before you. Does deliberately killing an enemy soldier who has proven his untrustworthiness constitute a war crime? If it is, then how do you justify the carpet-bombing of Hamburg and Tokyo and the deliberate roasting to death of women and children in the name of breaking the enemy's will to fight? One of the greatest ironies of human history is the fact that if you kill one hundred thousand civilians with bombs dropped from an airplane you're a hero, whereas if you shoot one enemy soldier for perfidy you get a seat in the docket at court-martial with a firing squad looming in the wings. Do not erect an insurmountable double-standard for those struggling to survive in a world gone mad. Do not profane the very ideals and principles you exalt by punishing this man unless you yourselves would wish to bear the burdens of your own judgment and unless you can proclaim precisely how, during that frightful fortnight, you would have managed to retain your life and your sanity while faithfully discharging your duty would it have been you, rather than he, who your government tapped to hold that no-man's land between the civilization the so-called laws and customs of war

have been instituted to defend *753 and the relentless advance of modern-day barbarians for whom any imperative, save for the urge to conquest, death, and destruction, is but a nuisance to be circumvented by deception and force.³⁵⁴

With this, the defense rested, and on rebuttal the prosecutor urged the panel not to permit a “code of complicity between brothers-in-arms” or the “natural sympathies for those fighting in a noble cause” to prevent the administration of justice in accordance with law.³⁵⁵ Following this the court adjourned.

The following morning, after reviewing proposed jury instructions submitted by the parties,³⁵⁶ the judge provided the members of the panel with a detailed statement of the law with respect to the elements that constituted the charge of “Murder,” [Article 118 of the UCMJ](#), along with the lesser-included offenses³⁵⁷ of Article 119, Manslaughter.³⁵⁸ The instructions also contained a description of proffered defenses, as well as a detailed statement of the law with respect to military necessity, the extent of any duty to obey illegal orders, the effect of mental capacity on legal responsibility for one’s actions and the effect of ignorance of the law. The judge then charged them with answering a series of questions to ascertain the guilt or innocence of the accused, including (1) whether the denial of quarter to an enemy **POW** was categorically illegal as a matter of United States law (if so, they were to return a finding of *754 guilty); (2) whether the defendant’s orders expressly ordered the denial of quarter or could reasonably have been construed to authorize denial of quarter; (3) if the answer to (1) was negative, whether under the circumstances of the case the defendant had any available defenses to the charge of murder; and (4) if the answer to (3) was affirmative, whether one or more of these defenses constituted a complete or partial defense or a factor in mitigation. The judge then expressly advised the members of the panel that, if they reached Question (4), they were permitted to consider any environing circumstances supported by the evidence³⁵⁹ in determining whether an ordinary soldier in the position of the defendant could have (a) reasonably mistaken the circumstances under which he shot the German **POW** to be such that it was militarily necessary to deny quarter to preserve his own life, the lives of his fellow soldiers or the success of the mission; (b) reasonably understood himself to be acting pursuant to a reasonable interpretation of superior orders³⁶⁰ that were not manifestly illegal,³⁶¹ (C) reasonably been unaware that his actions were illegal; or (d) been unable to understand the illegality of his actions due to a lack of mental responsibility.³⁶² The judge then instructed the panel to *755 consider the extent to which the defendant departed from the standard practice of the United States Army in the European Theater of Operations as he had witnessed that practice.³⁶³ Finally, the judge instructed members of the panel that a two-thirds majority was required to reach a finding of guilty.³⁶⁴

The members of the panel retired to deliberate in closed session,³⁶⁵ and the senior member, a colonel under General Eisenhower, initiated deliberations³⁶⁶ by suggesting that the duty of the panel was solely to determine whether the government had established that the killing of the German **POW** was unlawful,³⁶⁷ as the question of whether the defendant had committed the act had already been definitively resolved by stipulation. Without dissent, the panel, by informal voice vote,³⁶⁸ swiftly and unanimously answered Question (1) in the negative, concluding that, on the basis of evidence as to applicable law and as to the actual practice of soldiers in battle, *756 denial of quarter to an enemy **POW** was not categorically illegal.³⁶⁹ On Question (2), the members unanimously concluded that the orders issued by the Chief of Staff and transmitted down the chain of command did not expressly obligate Upham to deny quarter. However, although the three officers, only one of whom had experienced combat, disdainfully rejected the defense argument that the orders in question were susceptible of an interpretation authorizing the killing of Germans attempting surrender, the two enlisted members, both of whom came ashore on Omaha Beach with the 1st Battalion of the 116th Infantry Regiment and were lightly wounded in subsequent combat, insisted that an order from the command apex of the United States Army to evacuate a private soldier was so remarkable that ordinary measures of force protection could not apply and the denial of quarter could have been constructively authorized. Moreover, the enlisted members pronounced that they themselves might have interpreted the orders in this fashion and, to the consternation of two of the officers, offered anecdotal evidence from their combat experience that enlisted soldiers neither granted nor expected

quarter in circumstances such as those faced by T/5 Upham-- executing orders to complete a mission of national importance with severely attritted forces in a fluid threat environment characterized by overwhelming enemy strength and enemy perfidy along the planned axis of maneuver.³⁷⁰ Although the enlisted members did not sway the officers, only three of the five members found against the defense on the question of whether an interpretation of the defendant's orders to authorize denial of quarter was reasonable under the circumstances.

In regard to Question (3), the panel began with the defense of military necessity, which fared the same as the defense of superior orders and was treated by the two enlisted members as closely intertwined. The two enlisted soldiers reiterated *757 their argument that even if the post hoc review of others might reach a different conclusion, military necessity might have justified the killing of the German POW from the perspective of the defendant, who could not have been certain, given the heavy attrition his squad had suffered and the concentration of enemy forces preparing to counterattack against the Allied salient, that he could successfully evacuate Private Ryan encumbered by an enemy POW whose perfidy had already been established by the violation of his parole and the bearing of arms against his former captors. Although heated criticism of this argument, centered upon the contention that the defendant could have simply released the German POW without appreciably increasing the threat profile or further compromising the mission and without committing a putative violation of law, failed to budge the agitated junior members of the panel, to whom this argument was the "the sort of wishful armchair officer's thinking that winds up getting men killed"; it had the reverse effect with respect to a lieutenant whose injuries sustained during training in England in early 1944 had resulted in his reassignment from the 82nd Airborne Division to a pending assignment as an airborne instructor in the United States. By the end of a lengthy debate over the precise meaning of military necessity, the enlisted members of the panel were prepared to accept the defense of necessity and move directly to acquit the defendant, while the lieutenant was undecided. With tempers flaring, the sergeant-at-arms excused them for the day.

In the calmer atmosphere of the next morning, the panel pressed on to the consideration of the remaining defenses. All members immediately rejected the defense of a lack of mental responsibility, with the enlisted soldiers expressing particular indignation that the defendant would have permitted his counsel to employ the argument that he had not been in possession of his faculties. "First he says he knew what he was doing and why, that he had to complete the mission, and now he says he was out of his mind over his captain," fumed one of the enlisted soldiers. "Don't blame him, it's the lawyer," the other reminded him. On the defense of ignorance, all but one of the panel concluded that the defendant had not known that the denial of *758 quarter was arguably an illegal act and that the military training he received had not instructed him otherwise. "Might be a good idea to add another week to basic training," opined the lieutenant, to shrugs from the others. The sole member who rejected the ignorance defense, a major of infantry and a veteran of the World War I Battles of St. Mihiel and Cantigny, did so on the ground that he believed that the defendant had in fact known the status of the law, including, in his estimation, the fact that the law permitted reprisals in the field against a parole violator. "When you catch one in arms after he granted his parole, you shoot him. That's something every soldier knows. Last time I checked it's the first rule in the law book, Rule M1," the major said, to grim smiles from the enlisted soldiers.³⁷¹ "It ain't like the Nazis," one of the enlisted soldiers added. "He didn't kill him in cold blood. He gave a war criminal what he had coming. Any of us would've done the same thing. That's war."³⁷² In other words, T/5 Upham had acted lawfully, and now three members were prepared to acquit the defendant of murder.

In recognition of the vector along which deliberations were traveling, the colonel suggested that a finding of guilty on the specification of Murder was impossible and that, because none of the defenses proffered had been ruled complete defenses, the panel should consider the lesser-included offense of Manslaughter as well as the cumulative effect of various defenses and any *759 extenuating or mitigating circumstances. An enlisted soldier countered with the possibility of considering Assault with Intent to Commit Voluntary Manslaughter,³⁷³ but because this offense had not been specified, the judge instructed that this was not within their jurisdiction. The panel deliberated for hours without progress; the enlisted soldiers and the lieutenant were committed to the defense of necessity, the colonel strongly favored conviction and the major was inscrutable.³⁷⁴

Late that afternoon, the panel voted by show of hands as to the guilt or innocence of T/5 Upham. Only one--the colonel--voted to convict on the charge of Manslaughter, and following the vote, the colonel posed this question to the other members: "Do we really want the defendant to walk away from this with nothing? Can we really say that Upham was not morally culpable at all? Even though that Nazi was a dishonorable son-of-a-bitch, is what Upham did the way we as soldiers are supposed to behave?"³⁷⁵ The four other members of the panel pondered for a long moment, and one-by-one shook their heads save for one of the enlisted men. "I reckon not," the other enlisted soldier said. "If he had really wanted to he could have had one of the other **POWs** tie that German up, or better yet had them all tie each other up. But he had a score to settle. Not too sure I blame him, though . . ." he said, trailing off into thought.³⁷⁶

***760** The colonel then proposed that the panel convict T/5 Upham of Manslaughter but take into consideration extensive factors in mitigation of the sentence,³⁷⁷ reminding them that they had authority to pronounce any sentence they should choose.³⁷⁸ The panel deliberated for another three hours and then, late in the afternoon, returned to the courtroom to announce its findings.³⁷⁹ On the charge of Manslaughter, [Article 119 of the UCMJ](#), the panel convicted T/5 Upham by a vote of four-to-one. In the sentencing hearing, which followed immediately, the prosecution admitted that T/5 Upham had no prior convictions and that there was significant rehabilitative potential but argued that the deliberate nature of the offense should be considered as an aggravating factor³⁸⁰ and that the maximum sentence of fifteen years' confinement, along with a forfeiture of benefits and a dishonorable discharge, was appropriate. ***761** ³⁸¹ The defense introduced evidence that Upham, only nineteen years old, had been an exemplary civilian and soldier who had volunteered at age seventeen rather than wait to be drafted, and whose services, including his native fluency in German and French, were very much in need. The defense contended that the likelihood of a repetition of the offense was minimal as Upham would not likely be assigned again to a combat unit (his duties had theretofore been largely in support of Army intelligence at brigade echelon), and he now knew that execution of a parole violator was contrary to law. The defense argued further that Upham could best be rehabilitated, and the interest of the United States would best be served, were he to remain subject to Army jurisdiction. The defense proposed, in lieu of confinement, a sentence of forfeiture of pay and benefits, reduction in rank to E-1 and a bad conduct discharge³⁸² subsequent to the termination of the war against Germany. This proposal was supported with precedential evidence suggesting that, in addition to their already broad equitable powers, courts-martial have great discretion to pronounce lenient sentences, such as admonishment³⁸³ and other disciplinary punishments,³⁸⁴ upon a conviction of denial of quarter during a ***762** struggle with a savage foe.

Following arguments as to sentencing, the judge instructed the panel that the maximum sentence for manslaughter was fifteen years confinement and instructed the members on procedures for voting,³⁸⁵ at which time the panel retired to deliberate. Three hours later the panel returned and the colonel, as president of the court-martial, pronounced the sentence:³⁸⁶ one year confinement, forfeiture of six months' pay, reduction in rank to E-1 and a general discharge with the one year confinement suspended³⁸⁷ and the remainder of the sentence deferred until the end of the war against Germany.³⁸⁸ A petition for clemency signed by four of the five jurors accompanied the sentence,³⁸⁹ and the court-martial adjourned.³⁹⁰

The next morning the Staff Judge Advocate (SJA) assigned to the 75th Ranger Regiment to assist Major General Gerhardt in determining whether and how to exercise his command prerogative,³⁹¹ reported his recommendation that the sentence be executed as pronounced. However, rather than do so, General Gerhardt, who had argued vehemently against the courts-martial of Private Ryan and others only to be overruled by General Eisenhower, transmitted the trial record to the Judge Advocate General of the Army with an expression of his views³⁹² that ***763** "the killing of the German **POW** without judicial process was a regrettable, but momentary, lapse in the maintenance of the discipline and honor that distinguish our Armed Forces from those of our enemies," and after further reflection he "could not clearly conclude that T/5 Upham had committed any offense under the military regulations as they are commonly understood by the enlisted soldier," and the execution of the sentence "would not serve the interests of justice but would rather, if widely publicized, be

detrimental to the morale and fighting spirit of the troops under my command who are even now preparing for an invasion of Germany that will require the maximum devotion from every available soldier if victory is to be ours.” In short order, the Judge Advocate General of the Army relayed his opinion in which the Chief of Staff writing under separate cover concurred, that in light of further review, General Gerhardt had articulated an adequate basis for disapproving the sentence of the court-martial³⁹³ as well as ordering a rehearing³⁹⁴ or a dismissal of the charge.³⁹⁵ With the major offensive against Germany already underway, and with an immediate rehearing thus impracticable³⁹⁶ if Upham was to be returned to service, General Gerhardt elected to dismiss the charge against T/5 Upham and immediately ordered his transfer to the headquarters of the 3d Army, soon to be commanded by Lieutenant General George S. Patton.

On December 26th, during the Battle of the Bulge, T/5 Upham was killed in combat in the town of Bastogne, Belgium. Six months later Germany surrendered unconditionally to the *764 Allies.

It is not surprising that a court-martial convened to try Private Ryan and others in 1944 could not adjudge the killing of a parole violator to disencumber a unit engaged in a mission of strategic importance during a counterattack by a numerically superior foe to be the sort of dishonorable and egregious violation of the martial code disintitling a soldier to continued membership in the martial caste. The putative victim had not conducted himself as a honorable soldier and thus could not claim all the privileges and immunities attendant to that **status**, and the treatment meted out by T/5 Upham was precisely that which the martial code would have prescribed, albeit after judicial determination of guilt, had Upham accepted his surrender. Moreover, the claims of military necessity and ignorance of the law struck a chord with those members of the jury to whom, as enlisted infantry soldiers, the vicissitudes of combat and the extraordinary requirements of survival in battle were not alien but for whom scienter of the “black letter” of IHL--a body of regulations so uncertain that even experts disagree as to its precise commandments--was, through no omission or fault of their own, glaringly absent. While Upham might not have exhibited that degree of professionalism, temperance and martial virtue demanded by his peers, neither did he entirely excommunicate himself from their fellowship by executing a dishonorable member of the armed forces of an atavistic regime dedicated to the destruction of the civilization the defense of which, on the afternoon in question, was his duty. In short, the jury, in consideration of all the circumstances, including conflicting expert statements as to the rules of IHL, issued a judgment that reproached and disciplined Upham for his true crime--falling short of a professional ideal that demands of soldiers that they accept significant additional personal risks before they deny quarter to even the most reprehensible **POWs**--without inflicting inordinate punishment disproportionate to the offense, without conceding any absolute obligation to grant quarter and without branding Upham as beyond the pale of the martial code and thus unfit for duty. With the spectre of Nazism looming large as a backdrop, the seriousness of the delict in question assumed its proper proportion, meriting disciplinary *765 rather than penal sanction.

b) United States v. Private Ryan, 2003

The drive to humanize war gained impetus from World War II and the Geneva Conventions of 1949 (GCs),³⁹⁷ which consisted of four multilateral treaties that updated and enlarged the IHL regime and imposed upon parties³⁹⁸ the obligation to pass domestic legislation criminalizing “grave breaches”³⁹⁹ of their provisions. Denial of quarter and reprisal *766 are specifically and categorically prohibited as grave breaches;⁴⁰⁰ the Geneva Conventions, on their face, appear to obligate parties to render inapplicable any defenses, such as military necessity or superior orders, to domestic prosecutions of individuals accused of the denial of quarter and of reprisal⁴⁰¹ as well as to investigate, prosecute and punish all violations *767 with “effective penal sanctions.”⁴⁰² Extending individual criminal responsibility for violation of the prohibitive regime of IHL still further, the First Additional Protocol to the Geneva Conventions (AP I)⁴⁰³ frontally rejects the military necessity *769 defense and reinforces the absolute, nonderogable obligations to grant quarter and refrain from reprisal⁴⁰⁴ incumbent upon parties to AP I and, arguably, as a matter of customary IHL,⁴⁰⁵ even in regard to a parole violator captured under arms.⁴⁰⁶

Although national military establishments had labored for much of the nineteenth and early twentieth centuries to defend against encroaching legal absolutism with a pragmatic approach that privileged necessity in its intersection with humanitarianism, the military manuals of the leading powers in the aftermath of World War II began to reflect a generalized strategic withdrawal from this position toward an accommodation, and even a convergence, with the treaty-based regime codified in the Geneva Conventions.⁴⁰⁷ Specifically, in 1956, United States Army, Rules of Land Warfare, Field Manual 27-10 (FM 27-10),⁴⁰⁸ declared denial of quarter⁴⁰⁹ and reprisal against POWs⁴¹⁰ to be categorically illegal as a matter of international and domestic law and, save for exceptional circumstances, non-justifiable by military necessity.⁴¹¹ Moreover, FM 27-10, an affirmation of principles of existing IHL in light of the experience of World War II⁴¹² that were promulgated “to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare,”⁴¹³ directly addresses the question of whether military necessity can ever justify denial of quarter in the negative:

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that *771 they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war.⁴¹⁴

Finally, FM 27-10 identifies the grave breaches of the Geneva Conventions to include denial of quarter and reprisal as punishable war crimes⁴¹⁵ under the UCMJ⁴¹⁶ and imposes upon those under UCMJ jurisdiction the duty to refuse to obey illegal orders and to report violations of FM 27-10 and the UCMJ.⁴¹⁷

However, despite their willingness to incur limitations upon their sovereign prerogatives, states, with respect to the denial of quarter, have cleaved far more closely to their historical pattern than to the modern prohibitory regime. During the Korean War (1950-1953), North Korean forces, unwilling to spare food for POWs, frequently shot them instead,⁴¹⁸ and in the Sinai Campaign (1956), Israeli forces claiming military necessity, executed scores of Egyptian POWs.⁴¹⁹ In 1962, Egyptian *772 forces intervening in Yemen routinely executed POWs as a matter of official policy.⁴²⁰ During the Vietnam War (1954-1975), political pressure to maximize the number of enemy dead (known as “body counts”) as tangible evidence of battlefield successes, coupled with the psychological stress of combat, led United States forces and their allies to deny quarter and undertake reprisals.⁴²¹ The summary execution of POWs is *773 thus a present feature of enduring conflicts wherein military necessity abuts conflicting legal prohibitions.⁴²²

The schizophrenic quality of state conduct, revealed in the disjunction between concrete expressions of commitment to evolving IHL and serial violations of that very regime, has not escaped the notice of contemporary commentators who themselves are divided on the question of quarter. For one group “circumstances arise when military necessity . . . causes (rules) *774 to be disregarded,” and “(s)mall detachments on special missions” ordered to execute strategic missions deep behind enemy lines are justified by military necessity⁴²³ in denying quarter to enemy forces on the ground that to release prisoners would “greatly endanger the success of the mission(s) or the safety of the unit(s).”⁴²⁴ To permit enemy forces the freedom to jeopardize the mission or the survival of one’s own forces would, for this scholarly camp, constitute an exercise of “asinine ethics.”⁴²⁵ Furthermore, this non-absolutist camp accepts that denial of quarter may be excusable, or at the very least not the cause for severe legal remonstrations, by reference to the psychological dimensions of the circumstances giving rise to the decision to refuse surrender⁴²⁶ and to the moral and legal culpability *775 of the soldier(s) offering surrender. Parole violators, by virtue of their own misconduct, expose themselves to the penalty of death,⁴²⁷ even if they remain entitled to due process in a judicial forum.⁴²⁸ Expressions of outrage at their perfidy that take the form of summary execution are understandable, if not permissible, under positive law.

Other scholars argue that the legal prohibition against denial of quarter is absolute and that even in the unusual circumstance where the grant of quarter would threaten the mission or the lives of the forces to whom an offer of surrender is made, there can be no exception in extremis: "The law is quite clear . . . Quarter may not be denied nor may prisoners be executed because they are burdensome."⁴²⁹ Viewed through this optic, it is an "obligation of soldiering *776 as an office" to accept the additional risks posed by the release of POWs,⁴³⁰ and the killing of enemy forces that have indicated their intention to surrender is always a war crime⁴³¹ immune from excuse or justification.⁴³² Enemy soldiers over whom military personnel are unable to exercise custody without compromising their own safety or the success of their mission simply cannot be dispatched, although they may be otherwise rendered incapable of inflicting injury.⁴³³ Moreover, reprisal is categorically prohibited.⁴³⁴ In short, an exegesis of scholarly texts demonstrates little more than that the academic community is a house divided on the question of the legality of the acts and omissions at issue.

In the sixty years since the court-martial of Private Ryan, the positive rules of IHL and the military regulations governing members of the Army have waxed increasingly formal and prohibitive,⁴³⁵ drawing the legal issues of the conduct at issue into sharper focus and thereby increasing the likelihood that the defendants' conduct would be discerned as illegal and be *777 prosecuted. Moreover, a number of Army courts-martial over the past several decades have sentenced soldiers to periods of confinement for the crime of murder arising from denials of quarter,⁴³⁶ providing important precedent as to applicable law as well as guidance to a jury in determining whether and how far the conduct of the defendants departed from that expected of honorable members of the martial profession. Thus, it is not inconceivable that a court-martial convened in 2004 might accept the absolutist pronouncements of the drafters of the various IHL instruments, which brook no claims that military necessity or lack of knowledge about the boundaries of the permissible in combat can ever absolve an accused of even partial legal responsibility for violations, and thus conclude, upon the same evidence available to the court-martial of 1944, that military necessity as it has been shaped by the evolution of positive law and practice can no longer be invoked to justify the denial of quarter and that, given the much broader dissemination of knowledge about and training in IHL to which Upham had been exposed, in the form of FM 27-10 and a much more intensive military education,⁴³⁷ Upham either knew or *778 should have known that the killing of a POW was manifestly unlawful. A present-day court-martial might therefore conclude that denial of quarter was categorically illegal under the UCMJ and that the defenses accepted in partial mitigation of sentence--necessity and ignorance-- are unavailable to T/5 Upham, whose deeds dragged his brothers-in-arms into disrepute and who thus deserved public disassociation from the corps of honorable soldiers. By this analysis, Upham would be convicted of murder or manslaughter and serve a lengthy prison sentence.⁴³⁸

However, this outcome is as unlikely at present as it would have been in the last year of World War II, even conceding that *779 IHL is in a constant state of development and that acts which would have been permissible at one point in time have been proscribed with the progression of that regime.⁴³⁹ Although the post-World War II revision of military regulations in reflection of the increasing absolutism in the IHL regime may overcome any hesitancy to investigate and charge the defendants, the ultimate determination of their guilt or innocence remains the responsibility of their peers, for whom, despite the codification of a prohibitory legal regime, the defenses accepted in partial mitigation by the 1944 court might be at least as persuasive. Moreover, neither the regime of IHL nor FM 27-10 are directly incorporated in the UCMJ,⁴⁴⁰ and, notwithstanding the fact that these sources directly proscribe the conduct in question, the jury, in evaluating the defendants' conduct, would likely be instructed, consistent with the rights that defendants are guaranteed under the system of courts-martial, to consider whether a defense such as military necessity, under the specific circumstances, could justify killing an enemy parole violator who posed a potential threat to their physical safety and the success of their mission. By the same token, the 2003 jury would be instructed to determine the extent to which ignorance of IHL, a body of regulation no less difficult for the enlisted soldier to fathom than that which existed in 1944, should be considered in defense or in mitigation of the charge of murder, as well as the extent to which state practice in regard to denial of quarter should be considered in determining whether Upham comported himself in the manner expected of soldiers.⁴⁴¹ Furthermore, *780 the similarity of the threat posed by Islamic terrorists to the Nazi regime might sway jury members toward acquittal or toward a sentence that nullifies the legal

consequences of a guilty verdict, and the jury might well struggle toward the conclusion that Upham, despite having committed a technical violation of the laws of war, violated none of the constitutive tenets and precepts of the martial code in taking reprisal against a parole violator and that, although he ought not be extolled as the epitome of martial honor, Upham merits mere disciplinary, rather than penal, sanctions, particularly in the context of a threat to fundamental interests such as is posed by the intersection of international terrorism and the proliferation of WMD. On the basis of this finding, the jury might well impose lenient sanctions similar to those pronounced by the 1944 court-martial.

In summary, the essential point is that a determination of the legal responsibility of a soldier accused of a violation of IHL *781 under the system of military justice entails a searching inquiry by fellow members of the military community--the group most directly injured in reputation as well as life and limb by violations of the martial code and thus the party with the greatest incentive standing to complain of violations and to police its own ranks--conducted under conditions of relative normative autonomy.⁴⁴² The purpose is to ascertain not whether the accused ran afoul of a provision of positive law drafted by outsiders without obligations to the martial caste, but whether, in consideration of all the surrounding circumstances, the accused can fairly be said to have failed in his duty to his brothers-in-arms by engaging in unchivalrous or otherwise reprehensible acts that shock the martial conscience and would, if unpunished, shame and dishonor the martial profession. Although the normative universe in which this admittedly more parochial compliance mechanism⁴⁴³ operates refuses to accept the subordination of its internal values to external review or to impose punishment for acts undertaken in self-defense or in furtherance of the military mission, it is ultimately conducive to a more holistic and stricter standard of judgment, for despite the *782 absence of any provision of IHL proscribing a particular act, a court-martial might well adjudge the author to have transgressed against his obligation under the martial code.⁴⁴⁴ In sum, within the decisional culture of the martial code, positive law is significantly less dispositive of the boundaries of permissible conduct and of the consequences for overstepping these boundaries than the ethical judgments of members of the profession of arms.⁴⁴⁵ Nevertheless, a court-martial convened today to evaluate the conduct of Private Ryan is likely to accept that T/5 Upham, while not wholly blameless, has neither committed an act worthy of professional banishment nor demonstrated himself beyond moral redemption, and the punishment levied under the martial code is likely to foster his rehabilitation and continued service to the military mission: now, as then, the defense of civilization.

***783 B. Trying Captain Ryan: International Legal Absolutism, Allegations of Crimes in the War on Terror and the International Criminal Court**

1. International Legal Absolutism: The Judicial Model

Legal absolutists,⁴⁴⁶ deeply skeptical that professional self-regulation can suppress violations of IHL by members of the armed forces whose mission, after all, is to win wars rather than to observe law,⁴⁴⁷ and unwilling to cede any regulatory terrain, reject martial honor as a thoroughly inadequate substitute for the judicial model.⁴⁴⁸ For legal absolutists, the norms *784 to which individual soldiers must adhere are not fixed by professional practice and internal socialization but are exogenously determined and imposed by state acquiescence to external regulations codified in IHL treaties.⁴⁴⁹ A penchant for management by law overrides considerations of non-legal solutions to practical problems, and the threat of harsh punishment, rather than the compliance pull exerted by an internal code of conduct, is necessary to condition and influence the battlefield behavior of soldiers cossetted behind military culture. This is exactly an argument countering the empirical desert; thus, only a powerful ICC, freed from the influence of self-interested states and their military establishments and superior in the hierarchy of sources of rules and regulations, can promote respect for and observance of IHL. Furthermore, for legal absolutists, ignorant of the moral universe of soldiers and distrustful of military self-judgment,⁴⁵⁰ claims in defense of acts otherwise classed as violations of IHL, reliant as they are upon *785 subjective interpretations of variables the measurement of which is beyond the experiential realm of

all but combat soldiers, are wholly incompatible with exceptions to the universal, positive commands constituting the IHL regime.⁴⁵¹ Failures to suppress violations are thus manifestations not of the inherent unsuitability of positive IHL to the practical needs of soldiers in combat but rather of the moral culpability of the perpetrators, and the solution lies in punishing the actors, enhancing penalties to support the deterrent value of the regime, and creating additional rules to strengthen the judicial model.⁴⁵² For obdurate absolutists, military justice is a proxy for military impunity,⁴⁵³ and the system of courts-martial is an obscurant and idiosyncratic institution comprised of tendentious assemblages of cronies convened to afford legal shelter to guilty soldiers that will hold stubborn sway until swept aside by law. The next section illustrates how legal absolutism, expressed through the ICC, might adjudicate alleged violations of IHL arising from a United States covert operation designed to eliminate WMD in the custody of terrorists--a fictional scenario representative of future conflicts in the Age of Terrorism.⁴⁵⁴

***786 2. Prosecutor v. Task Force Ryan**

In 1998 Juma Namangani, age 34, an ethnic Uzbeki⁴⁵⁵ and a former Red Army paratrooper and veteran of the Soviet War in Afghanistan, formed the Islamic Movement of Uzbekistan (IMU), an Islamic terrorist organization committed to the establishment of Islamic republic in Uzbekistan⁴⁵⁶ and a "virtual partner" with al Qaeda.⁴⁵⁷ Namangani, a born-again Muslim who traveled to Saudi Arabia in the early 1990s to steep in the Wahhabist sect of Islam,⁴⁵⁸ declared jihad to remove the secular government of Uzbekistan and establish a pan-Central Asian Islamic republic. By 1999, IMU, its forces gathered in bases in Afghanistan and Tajikistan and its coffers bursting with funds from the intelligence agencies of Saudi Arabia and Iran, Islamic charities in Europe⁴⁵⁹ and the trafficking of opium between Afghanistan and Europe,⁴⁶⁰ was launching increasingly successful attacks against government targets in the Fergana Valley, a region on the frontier near *787 Kyrgyzstan and Tajikistan and the stronghold of indigenous Wahhabism.⁴⁶¹ In 2000, President Karimov, a major ally in the United States anti-Taliban coalition, requested and received assistance, and United States Special Forces based in Tashkent began to train the Uzbeki Army in counterterrorism. However, the power of the IMU increased apace, and by spring 2001, General Tommy Franks, head of the United States Central Command, commented on a visit that he "believe(d) it (wa)s possible for very small numbers of committed terrorists to bring great instability . . . to the people in the region."⁴⁶²

General Franks proved prescient when the United States campaign against al Qaeda⁴⁶³ and the Taliban⁴⁶⁴ regime commenced with heavy bombing of targets in northeastern Afghanistan on October 7, 2002. After Namangani, the commander of joint IMU-Taliban operations in that sector, was killed in battle his second in command, Tahir Yuldashev, withdrew IMU and al Qaeda forces in strength, slipped through the noose and crossed the border into the Fergana Valley, and, by late 2004, IMU-al Qaeda forces had defeated the Uzbeki Army in a series *788 of battles.⁴⁶⁵ Success bred converts, and in early 2005 IMU forces, bolstered by additional troops drawn from allied Islamic terrorist organizations,⁴⁶⁶ captured Tashkent, executed President Karimov and proclaimed the Islamic Emirate of Uzbekistan.⁴⁶⁷ Yuldashev, the Emir of Uzbekistan, moving swiftly to create a Wahabbist state, declared Uzbekistan bound by no legal obligations save those imposed by Shari'ah (Islamic law),⁴⁶⁸ and soon the teaching of foreign languages, the failure of men to wear beards and the provision of co-educational academic and medical services became punishable by stoning and amputation.⁴⁶⁹ Worse was to come when in summer 2005 United States human intelligence sources reported that an international gathering of terrorists in Tashkent had assembled to plan the "eviction of the United States from the Muslim world and the liberation of Jerusalem,"⁴⁷⁰ and, on the fourth anniversary of September 11, 2001, members of al Qaeda *789 launched simultaneous attacks upon U.S. and international targets across Central Asia, destroying the United States embassies in Tashkent, Astana, Kazakhstan and Turkmenistan as well as the offices of the Amoco Oil Company in Astana and Dushanbe, Tajikistan, the offices of the World Bank and the U.N. Development Program in Fergana City and the headquarters of the 10th Mountain Division at its base in Khanabad, Afghanistan. Among the more than 5000 people killed were the directors of the United States Central Intelligence Agency and the Federal Bureau of Investigation.

The United States immediately declared a national emergency,⁴⁷¹ passed domestic legislation authorizing military action against those responsible⁴⁷² and dispatched investigatory *790 teams to Central Asia. In the aftermath of what came to be known as “9/11 2” the CIA belatedly discovered that Usama bin Laden and al Qaeda had taken shelter in Uzbekistan,⁴⁷³ and President Bush demanded that the Yuldashev regime either extradite a list of suspects, including Usama bin Laden,⁴⁷⁴ or else accept responsibility for their actions on the theory of vicarious state responsibility.⁴⁷⁵ Yuldashev, disclaiming any criminal association with bin Laden, refused to surrender any Muslim suspects without a determination of their guilt in an Islamic court.⁴⁷⁶ Within a week, the Supreme Islamic Court of the Emirate of Uzbekistan “exonerated” bin Laden and other senior leaders of al Qaeda of all charges of terrorism.⁴⁷⁷ Outraged, *791 the President dispatched several carrier battle groups to the Mediterranean and, at a White House news conference, declared that “countries like Uzbekistan must know that if they harbor terrorists they cannot complain if we bomb.”⁴⁷⁸ Late in 2005, the day after the United States announced the major enhancement of the capabilities of its special operations forces,⁴⁷⁹ a joint United States-Israeli intelligence operation⁴⁸⁰ determined that several Iraqi microbiological scientists who had escaped after the fall of the Saddam Hussein regime in April 2004 had surfaced only to recommence their work in Uzbekistan,⁴⁸¹ sparking fears that the Yuldashev regime was developing biological weapons.⁴⁸² The following week the *793 Uzbeki government official responsible for weapons programs defected while at a conference in London, corroborating CIA reports and providing details, including partial information about al Qaeda plans to deploy biological weapons (BW) in reservoirs across the United States.⁴⁸³ The Director of Homeland Security,⁴⁸⁴ in consultation with the Defense Threat Reduction Agency,⁴⁸⁵ estimated that Uzbekistan was less than *794 ninety days from testing its arsenal⁴⁸⁶ and ordered his staff to begin planning the declaration of martial law and the commandeering of vaccinations.⁴⁸⁷

This revelation did not catch the United States completely *795 by surprise because although Uzbekistan ratified the Biological Weapons Convention (BWC) in 1996,⁴⁸⁸ this was not the first time an avowed member of a non-proliferation treaty had violated the terms of its membership by producing the prohibited weapons in question,⁴⁸⁹ and the notion that a small and impoverished state could inflict massive devastation upon the United States had been on the minds of policymakers for over a decade.⁴⁹⁰ However, the BWC did not of its own effect constitute prior authorization of the use of military force to ensure compliance,⁴⁹¹ and the 2001 collapse of the BWC Protocol,⁴⁹² *796 which would have appended enforcement mechanisms to the treaty, left the United States in search of multilateral enforcement mechanisms to secure Uzbeki compliance with the BWC. Uzbekistan categorically denied possession of WMD, and United States pressure to permit inspection and verification led the *797 U.N. Secretary General to dispatch a delegation at the invitation of Uzbekistan. However, Yuldashev ejected the U.N. weapons inspectors after three days, declaring that they were in fact United States intelligence officers,⁴⁹³ and further requests to inspect were met with demands for financial assistance as a precondition. When the United States and Britain sought to have the problem defined in the Security Council as a threat to international peace and security⁴⁹⁴ and to have Yuldashev declared criminally responsible for his breach of the BWC,⁴⁹⁵ *798 critics of the United States, domestic as well as foreign, demanded proof which the United States, unwilling to jeopardize the sources and methods whereby it had developed its information and unwilling to spend months making such a demonstration, was hesitant to provide.⁴⁹⁶ A Russian-Chinese-French *799 bloc prevented the issue from coming to a vote,⁴⁹⁷ and with Iraq and Iran sitting as heads of the U.N. Disarmament Committee⁴⁹⁸ and no further assistance forthcoming in the U.N. system, the United States shifted diplomatic gears and attempted to assemble a “coalition of the willing” to compel Uzbeki compliance, commencing with NATO and United States-allied Islamic states.⁴⁹⁹ However, in the absence of a Security Council resolution authorizing force, only Britain, Australia, Italy, Poland and Croatia, states with whom the United States had shared all or some of its sensitive intelligence, committed to a U.S.-led coalition.⁵⁰⁰ In a press conference *800 denouncing NATO and Security Council inaction, the President of the United States warned that “any country who would threaten . . . our people with . . . biological weapons . . . (will) be met with a devastating response that would be quite swift and overwhelming.”⁵⁰¹

On January 3, 2006, electronic intercepts of telephone and radio communications between senior members of al

Qaeda and Uzbeki officials corroborated the reports of United States agents within the Uzbeki opposition that the Namangani regime and al Qaeda were collaborating on the production and planned use of BWs,⁵⁰² and the next day a Special National Intelligence Estimate⁵⁰³ presented by the Director of the Central Intelligence Agency (DCIA) to the President concluded that the Government of Uzbekistan, in consortium with al Qaeda, *801 was producing and stockpiling weapons-grade anthrax and ebola in an ancient mosque in a densely populated urban neighborhood⁵⁰⁴ in Namangan (a city of 430,000 in the northern Fergana Valley).⁵⁰⁵ Also, Usama bin Laden had ordered a wave of BW attacks on major United States cities, and stockpiled weapons were to be moved to al Qaeda cells in the United States within forty-eight hours.⁵⁰⁶ After a brief discussion with the Chairman of the Joint Chiefs of Staff (CJCS) and the National Security Adviser, the President, concerned about the repercussions of failure and the possibility that members of Congress might delay and even refuse his proposals, rejected overt military options⁵⁰⁷ and ordered CJCS to present plans *802 to conduct a covert operation with the primary mission⁵⁰⁸ the destruction of the BWs and the secondary objective the capture or elimination of bin Laden if found at or near the target.⁵⁰⁹ *803 The plan provided that the neither the participation of United States Armed Forces nor responsibility for the results was to be attributed to the United States until the President authorized such disclosure. The proposed rules of engagement (ROEs)⁵¹⁰ *804 drafted by the Office of the Staff Judge Advocate, Task Force Ryan,⁵¹¹ provided that (1) temporary detention of noncombatants was authorized for security reasons or in self-defense, but personnel were advised that enemy combatants were unlikely to be uniformed or to grant quarter; (2) known or suspected terrorists were to be eliminated if capture was not feasible as inadequate lift capacity was available to evacuate significant numbers of enemy **POWs** and the successful completion of the mission precluded diversion of resources; and (3) best efforts *805 were to be used to prevent civilian casualties and destruction of civilian property without compromising the requirements of force protection.

Within hours, the President, in an operations order limiting civilian access to the National Security Adviser and DCIA,⁵¹² approved a CJCS plan, Operation Jeremiah,⁵¹³ calling for a Special Forces assault force to infiltrate Uzbekistan, proceed to and seize the mosque and destroy the weapons with execution to commence within eighteen hours. Although the President instructed his staff to “do what needs to be done and worry about the legal niceties later,”⁵¹⁴ the White House Office of Legal Counsel drafted a Memorandum⁵¹⁵ outlining relevant legal authority⁵¹⁶ and a finding in support of the operation: *806⁵¹⁷

I, President George W. Bush, President of the United States of America, find that the grave acts of violence committed by foreign terrorists against United States nationals and interests, coupled with the possession of weapons of mass destruction and the intent to use these weapons against the United States, constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and I hereby authorize covert action by the Armed Forces of the United States to eliminate this threat.

The next evening--a moonless night--twenty-four United States Army Special Forces⁵¹⁸ soldiers of the 3rd Special Forces *807 Group, headquartered at the JFK Special Warfare Center in Fort Bragg, North Carolina, but already prepositioned in Afghanistan⁵¹⁹ and trained for Operation Jeremiah,⁵²⁰ crossed the border and parachuted into the arid Alay Mountains in Uzbekistan from MH-53J Pave Low helicopters flown by the 160th Special Operations Aviation Regiment. Upon landing, the two Alpha teams accessed prepositioned gear and weapons, mounted camouflaged dune buggies and sped north down the mountains and through the Fergana Valley, bypassing areas of human settlement toward Namangan. The heavily-laden teams disembarked on the city outskirts, buried unneeded equipment in a cultivated field, established communications, received confirmation of their mission and proceeded on foot the final several kilometers toward the Central Mosque. As the teams maneuvered through the twisted streets, several unarmed men *808 in civilian clothing rounded a corner, reacted in surprise and began running in the opposite direction shouting warnings in Uzbeki. After brief hesitation, the commander of the mission and of Alpha One, Captain James F. Ryan, grandson of Private Ryan, ordered a team member to kill the would-be messengers. This done, the teams proceeded otherwise unmolested toward their objective.

A dozen lightly armed sentries in Islamic civilian dress were posted in the porticoes surrounding the gardens and twin minarets while guarding the compound. Within minutes Alpha One established perimeter security while Alpha Two moved into position, quickly and quietly eliminated the sentries and accessed the building. While Alpha One maintained security, Alpha Two moved through the assembly area and down the ornate corridors and into the madrasa, the living quarters for the religious teachers and students. There, stored in sealed crates readied for shipment and stamped with markings indicating their contents to be religious literature, were what Alpha Two estimated, and subsequent scientific testing established, to be more than two tons of weapons-grade anthrax genetically modified to be extremely antibiotics-resistant and readily dispersible by inhalation.⁵²¹ While Alpha Two collected samples and planted a series of incendiaries, chlorine dioxide and high explosive devices throughout the weapons cache,⁵²² Alpha One, maintaining security, began to come under *809 fire from a rapidly gathering number of armed men dressed in civilian clothing but suspected to be al Qaeda terrorists. Alpha Two emerged from the mosque, requested evacuation and joined Alpha One in suppressing opposition as the force of the battle mounted. Although the United States force had begun to absorb casualties, none were serious, and the coordinated and accurate fire from the Alpha teams inflicted far more devastating consequences upon the enemy, a number of whom burst into houses and dragged unarmed civilians, including women and children, into the streets as human shields against United States fire.⁵²³ Despite their best efforts, which included the use of non-lethal weapons such as blinding lasers⁵²⁴ and riot control agents⁵²⁵ to disorient and disable attackers, the Alpha teams were unable to prevent civilian casualties as they defended against the al Qaeda assault. By the time the MH-60 Black Hawk helicopters began circling overhead, hundreds of bodies littered the streets surrounding the Central Mosque.⁵²⁶ As several companies of Uzbeki infantry encircled *810 United States forces, the Black Hawks dropped ropes, lifted the Alpha teams to safety and brought suppressive fire to bear before speeding southward through the airspace of Uzbekistan, Afghanistan and Pakistan to the United States. Carl Vinson waiting on station in the Arabian Sea.

Minutes later, as the recorded voice of the muezzin began calling the faithful to prayers from loudspeakers atop the Central Mosque, chlorine dioxide gas began seeping into the surrounding neighborhood, and thousands of civilians rising from their beds were afflicted with hacking coughs, headaches, and shortness of breath. Panicked soldiers and civilians fled as the mosque began to burn. As the flames jumped to nearby houses, a series of explosions tore through the stricken mosque. Thick clouds of smoke drifted on a gentle breeze blowing from the east, smudging the rising sun from view. The Central Mosque burned to rubble over the course of the day.

One hour after United States forces departed Uzbekistan, the U.N. Secretary-General received a personal letter from the President which noted that Uzbekistan was a "Barbary State upon which the civilized world had no choice but to impose law and order,"⁵²⁷ that there was no distinction between terrorists and those who harbored them, that "(i)n light of the present anarchic and hostile world environment, (the U.S.) must defend itself in every possible way,"⁵²⁸ that "the world had reverted to (a) primitive system"⁵²⁹ because the Security Council had "repeatedly *811 (and) materially breached its obligations to the world community" and "damaged its own credibility as an enforcer of international law,"⁵³⁰ that the United States had "acted pursuant to the right of self-defense confirmed by Article 51 of the Charter of the United Nations," and that the "target struck, and the time and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality."⁵³¹ At H-Hour Plus Three, 8:00 P.M. Eastern Time, the President of the United States addressed the nation in a live broadcast carried by national networks around the globe. In his hour-long address, the President stated that "(t)oday, we have done what we had to do. If necessary, we shall do it again."⁵³² The President stated further that the "reckless threats and attacks on Americans" had created an "imminent danger" against which the United States was "entitled to take measures necessary to defend our nation and its people."⁵³³ Although the United States "regretted the loss of civilian life," the President stated,

I was forced to order this action, as an obligation of the office with which the American people have entrusted me, for five reasons: First, because we have convincing evidence that al Qaeda, supported and sheltered by the Yuldashev regime, are the authors of the recent attacks on American citizens and property in Central Asia;

second, because al Qaeda had executed murderous terrorist attacks on the United States in the *812 past, most notoriously on September 11th, 2001; third, because we have compelling information that Uzbekistan and al Qaeda were planning additional terrorist attacks against our citizens and those of other countries; fourth, because these terrorists and their state sponsors had acquired biological weapons and other weapons of mass destruction which they had stored in a place of worship and which they intended to use in a genocidal war against this great nation; and fifth, because the failure of the U.N. and NATO to play a serious role in the maintenance of peace left us no choice but to act alone.⁵³⁴

The President stated that although the United States would continue to observe international law it would not “respond like a man in a barroom brawl who will fight only according to Marquis of Queensbury rules”⁵³⁵ because “(t)he world isn’t Beverly Hills, it’s a bad neighborhood at (two) o’clock in the morning.”⁵³⁶ Law will not be perverted by evildoers into an instrument to be used to restrain and threaten people who desire to live in peace and justice. We will defend ourselves against enemies who store weapons of mass destruction in houses of worship and who hide behind their own women and children when called to task.” He concluded by promising,

The United States “will not stand by as peril draws closer and closer . . . If we wait for threats to fully materialize, we will have waited too long.”⁵³⁷ The “survival of states is not a matter of law”⁵³⁸ but rather a question of courage. We will *813 remain vigilant in the defense of civilization against barbarism, and those who by their actions declare themselves beyond the pale of human civilization shall be treated accordingly by a nation aroused as never before in its history. They shall reap that which they sow. As the Book of Job teaches us, we shall “put out the lamps of the wicked, . . . and they shall be like straw before the wind, and chaff that the storm carries away.”⁵³⁹

The next day, President Yuldashev angrily denounced Operation Jeremiah, which he claimed was responsible for more than 800 civilian casualties,⁵⁴⁰ reiterated his claim that Uzbekistan possessed no prohibited weapons and demanded that the Security Council meet in emergency session to impose sanctions. Although a Sino-Soviet effort to pass a resolution in the Security Council condemning the United States action failed in the face of a U.S.-U.K. veto,⁵⁴¹ the U.N. Secretary-General angrily condemned the operation in an open letter published in the New York Times. Additionally, the General Assembly passed a resolution in denunciation⁵⁴² calling upon the United States to “arrest and prosecute those responsible for war crimes and crimes against humanity in accordance with international law.”⁵⁴³ Most of the world, after viewing pictures *814 of the carnage and the destroyed mosque, was outraged.⁵⁴⁴ Within forty-eight hours, international anti-United States sentiment exploded when CNN began broadcasting reports⁵⁴⁵ that several thousand Uzbeki civilians had been hospitalized with symptomatology including fever, malaise and respiratory distress, and preliminary toxicological reports provided by the Uzbeki national medical service and the World Health Organization (WHO) indicated exposure to chlorine dioxide and anthrax. Within the next two days, fifty thousand Uzbekis were hospitalized and the WHO reported ten thousand Uzbeki fatalities. Although the United States offered to airlift antibiotics and experts from the Center for Disease Control, President Yuldashev rejected the United States offer, and within five days after the raid more than seventy-five thousand Uzbekis were dead.⁵⁴⁶ A joint communiqué promulgated by the League of Arab States and the Organization of the Islamic *815 Conference condemned the “use of biological weapons against Uzbeki civilians” as an “unlawful act of aggression and a crime against humanity,”⁵⁴⁷ and the U.N. Secretary-General met with President Yuldashev in Tashkent and demanded that the United States launch an investigation “to determine the criminal responsibility of those involved in the attack on the house of worship.”

In his second national address, the President of the United States stated that the outbreak of anthrax in Uzbekistan, while unfortunate, had resulted from the partially successful attempt to eliminate BWs that the Yuldashev regime had permitted al Qaeda to stockpile and that any civilian casualties resulting from the United States action were directly attributable to al Qaeda and to the Uzbeki Government; consequently, the United

States would not be investigating any parties involved in the operation but would be decorating them, where appropriate, for heroism. Congress passed a joint resolution commending the President and the members of the Armed Forces that conducted Operation Jeremiah, and polling indicated over ninety percent domestic approval. Two weeks after the strike, President Yuldashev personally lodged a declaration with the ICC Registrar accepting, on behalf of Uzbekistan, as the territorial state, the exercise of ICC jurisdiction with respect to the United States attack on the Central Mosque⁵⁴⁸ and requesting ***816** that the ICC Prosecutor “investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of . . . crimes.”⁵⁴⁹ Within a week, the Prosecutor concluded on the basis of information submitted by Uzbekistan, other U.N. members and human rights NGOs⁵⁵⁰ that a reasonable basis existed to investigate, and he submitted to the Pre-Trial Chamber a request for authorization.⁵⁵¹ The Pre-Trial Chamber found there was a “reasonable basis to proceed” and that the case was within ICC jurisdiction, and he thus authorized the investigation.⁵⁵² The United States’ efforts to procure a Security Council resolution deferring the investigation for twelve months were trumped by a Sino-Soviet veto.⁵⁵³

***817** On March 15, 2006, after a month-long investigation during which an additional forty-thousand Uzbeki civilians died from anthrax inhalation, the Prosecutor sparked a firestorm with his announcement of the indictments of each member of the Alpha Teams, the commander of USSOCOM, the CJCS, the Secretary of Defense and the President on multiple counts of aggression, war crimes, and crimes against humanity in the context of Operation Jeremiah.⁵⁵⁴ Although the United States, a non-party to the Rome Statute, brought a jurisdictional challenge, the ICC, self-determining its jurisdiction,⁵⁵⁵ held that the case was properly before it. Moreover, the ICC held that the United States decision not to investigate was made to shield persons from criminal responsibility and rendered it admissible as a result.⁵⁵⁶ The indictment charged all defendants ***818** with “Crimes Against Humanity” under Article 7(a), (f) and (k)⁵⁵⁷ and “War Crimes” under Article 8(2)(a)(i), (ii), (iii) and (iv) as well as 8(2)(b)(i), (ii) (iii), (iv), (ix), (xiii), (xvii), (xviii), (xx)⁵⁵⁸ and charged the President and the Defense Secretary with command responsibility⁵⁵⁹ for “Aggression”⁵⁶⁰ ***821** under Articles 5, 25,⁵⁶¹ 27,⁵⁶² and 28.⁵⁶³

Count One charged all defendants with crimes against humanity⁵⁶⁴ for “engaging in a conspiracy to commit, and ***822** committing, an armed attack on the Central Mosque in Namangan, Uzbekistan, a civilian house of worship, on or about January 5th and 6th, 2006, in a manner and by means, including chemical weapons and blinding lasers, intentionally calculated to systematically and directly expose civilians to great mental and physical suffering amounting to torture,⁵⁶⁵ serious injury, and death and which did in fact cause torture, injury, and death.” Count Two charged all defendants with war crimes for “unenumerated violations of the laws or customs of war, as recognized by Articles of the Statute of the ICC and sources of conventional and customary law, including but not limited to UNGA Resolution 2444⁵⁶⁶ and 3675,⁵⁶⁷ Article 26 ***823** of the Hague Convention of 1907,⁵⁶⁸ Articles 3, 32, and 53 of the Fourth Geneva Convention of 1949,⁵⁶⁹ Article 4(4) of the Hague Convention on Cultural Property,⁵⁷⁰ Articles 35(2),⁵⁷¹ 51,⁵⁷² 52,⁵⁷³ 53,⁵⁷⁴ 56,⁵⁷⁵ and 57⁵⁷⁶ of the First Protocol ***826** Additional, and Articles 4(2),⁵⁷⁷ 13,⁵⁷⁸ 15,⁵⁷⁹ 16,⁵⁸⁰ of the Second Protocol Additional, occasioned by the unlawful, wanton, and indiscriminate armed attack, not justified by necessity and out of proportion to any legitimate military purpose and without warning to civilian inhabitants, upon the Central Mosque, a historic facility dedicated to a religious purpose and known by defendants to be so, with lasers, asphyxiating gases, and other weapons of mass destruction⁵⁸¹ in a manner calculated ***827** to cause widespread death, inhuman treatment, and unnecessary suffering to civilians, as well as the unnecessary and willful destruction of civilian property, and which did in fact cause such death and unnecessary suffering to many thousands of civilians and the extensive destruction of civilian property.”⁵⁸² Count Three charged the SOCOM CinC, CJCS, the Secretary of Defense, and the President with aggression, alleging that by “dispatching members of the Armed Forces of the United States to invade the sovereign state of Uzbekistan, occupy Uzbeki territory, and attack the Central Mosque with conventional weapons and weapons of mass destruction,” the defendants had, “without justification⁵⁸³ or authorization,⁵⁸⁴ employed ***828** armed force against the territorial integrity and political independence of Uzbekistan in a manner inconsistent with the Charter of the United Nations,”⁵⁸⁵ in derogation of the “independence and freedom of the Uzbeki people,” and in contravention of the “clear pronouncement

(established at Nuremberg) that aggressive war is a crime.”⁵⁸⁶ The indictment stated further that “the United States was not the victim of an armed attack and Operation Jeremiah was a prima facie act of aggression.”⁵⁸⁷ The Pre-Trial Chamber issued arrest warrants for all defendants,⁵⁸⁸ and the Prosecutor forwarded copies to the Secretary of State⁵⁸⁹ requesting cooperation in their arrest and *829 surrender⁵⁹⁰ “in accordance with Articles 87,⁵⁹¹ 89⁵⁹² and 93.”⁵⁹³

The United States Ambassador presented this address the next morning in the U.N. Security Council.⁵⁹⁴ It is my solemn duty to report that after the United States acquired clear and compelling information concerning plans by Al Qaeda, a terrorist organization aided and abetted by the Government of Uzbekistan,⁵⁹⁵ to infiltrate the United States and attack our citizens with biological weapons, the President ordered United States Armed Forces to take preemptive measures to eliminate these weapons, which were stored in the Central Mosque. This defensive action, undertaken to prevent the deaths of millions of Americans, was clearly permissible under customary international law, as well as under the U.N. Charter⁵⁹⁶ States and their citizens *832 possess the inalienable right to life,⁵⁹⁷ and to defend life.⁵⁹⁸ When a terrorist organization couples hostile intent⁵⁹⁹ with the means to execute that intent, neither the United States nor any other peaceful state need wait to be devastated before responding.⁶⁰⁰ Although the United States delayed action for *833 several months to pursue peaceful modalities of resolution in this august body, diplomacy failed.⁶⁰¹ While the risk in waiting was patently obvious, wait we did, until terrorist attack was imminent and the slightest further delay would have jeopardized the lives of millions of innocent men, women and children. The last resort is always the stark reality of armed force, which the United States was morally obligated to employ to protect its people.⁶⁰² To brand our response an unlawful act of aggression is an ill-considered measure that simply obliterates the distinction between terrorism and self-defense.⁶⁰³ Some may question the factual predicate that gave rise to the decision to employ measures of self-defense to *834 preempt the terrorist threat. When the United States determines it is possible to share some or all of the sensitive intelligence that prompted the military response without compromising its national security, it will do so.⁶⁰⁴ In the interim, the ICC ought never to permit military operations conducted in good-faith to be the germ of criminal prosecutions which would disclose to our enemies the process whereby sensitive sources and methods of United States intelligence operations lead to the development and implementation of military options.⁶⁰⁵

Moreover, Operation Jeremiah was planned and conducted with great care to minimize casualties to innocent civilians and civilian property, as are all United States military operations. *835 ⁶⁰⁶ The United States deeply regrets the loss of innocent civilian lives, as well as the destruction of the Central Mosque. It is unnecessary to reenter the divisive debate over the legal force or the wisdom of the Additional Protocols⁶⁰⁷ *836 to conclude that in choosing a perfidious and dishonorable strategy, the terrorists and their state sponsors, and not the United States, made of the Central Mosque, a cultural treasure otherwise entitled to the broadest degree of immunity, a legitimate military target⁶⁰⁸ In striking this target, which *838 made direct and significant contribution to the military operations of al Qaida and Uzbekistan, it appears that some of the biological weapons stored within leaked from that site, causing civilian injury and death, despite the fact that the United States took great precautions, including the use of a ground-based assault rather than aerial bombardment, to avoid this.⁶⁰⁹ Some, including the ICC Prosecutor, intimate that the failure to warn the Government of Uzbekistan of our impending military action prevented the evacuation of civilians and thus constitutes a crime. Had it been possible to provide warning without jeopardizing the mission, we would have done so.⁶¹⁰ Unfortunately, because al Qaida intended to *839 immediately transfer the weapons for use against the United States, it was not. Nonetheless, and consistent with the felony murder doctrine in common-law,⁶¹¹ the ultimate authors of death and destruction associated with Operation Jeremiah are al Qaida and Uzbekistan, who chose to deliberately site prohibited weapons of mass destruction in a crowded urban area in a cowardly attempt to shield themselves and their weapons from attack.⁶¹²

Not only does the United States lack responsibility for civilian casualties associated with Operation Jeremiah, but the mere fact that a great number of civilians perished during *840 and subsequent to the United States

military attack does not support the conclusion that the United States is responsible for any crimes. Although the United States accepts a customary obligation to adhere to the doctrines of proportionality and distinction in the conduct of its military operations and to use its best efforts to limit and prevent civilian casualties,⁶¹³ it is or should be patently obvious that the United States neither targeted civilians nor intended that civilians become casualties of Operation Jeremiah, which was directed solely against the weapons of mass destruction in the hands of terrorists and their rogue state sponsor. Civilian casualties are, tragically, an inevitable concomitant of armed conflicts conducted in urban areas.⁶¹⁴ For this reason, proportionality is not an element in the charge of a crime against humanity, which imputes the intentional targeting and not the inadvertent *841 killing of civilians,⁶¹⁵ nor is there a magic formula that can be fairly applied post-hoc to answer the subjective question of whether civilian casualties are disproportionate to the military advantage gained by a legally permissible attack preceding those casualties,⁶¹⁶ or otherwise great in comparison *842 to resulting military casualties.⁶¹⁷ To the extent that any parties were in a privileged position to prevent civilian casualties, that distinction is reserved to al Qaida and Uzbekistan, which, rather than exploit ambiguities in the laws of war to support their propagandistic claims that the United States has engaged in an indiscriminate attack, might have evacuated their prohibited weapons and relocated innocent civilians but chose, for political purposes, another course of conduct.⁶¹⁸ This is not the first time terrorists have cynically manipulated civilian populations, nor will it be the last.⁶¹⁹ However, to “resort to counting bodies and placing *843 monetary values on destruction and then applying a ‘but for United States intervention this would not have occurred’ kind of formula”⁶²⁰ to find a violation of the laws of war is as much a perversion of the law as it is of the facts and of the requirements of justice, and is beneath the dignity of this institution.

Furthermore, the most basic conceptions of morality and law rail at the notion that terrorists, a group beyond the pale of the law,⁶²¹ can don civilian garb and hug the civilian population to make themselves invulnerable,⁶²² but the al Qaida terrorists, who know that the United States Armed Forces are populated with decent individuals who recoil at the thought of pressing an attack likely to result in civilian casualties, capitalized upon the moral and ethical distinction between themselves and our soldiers by electing the criminal strategy of fighting in civilian clothing and taking women and children hostage in direct violation of the international law.⁶²³ That *846 the ICC Prosecutor should undertake the selective prosecution of United States personnel, but not the terrorists and their state sponsors, for actions associated with Operation Jeremiah is no more surprising than that United States forces, under heavy fire from these craven terrorists, should exercise their inherent right to self-defense.⁶²⁴ “United States forces never have to wait until they take casualties before they do what is needed to defend themselves,”⁶²⁵ and although our soldiers, forced to make split-second decisions, did everything possible to prevent civilian casualties, some hostages were killed as a result of gunfire. While the United States regrets their deaths, again, responsibility for this tragedy lies heavy upon al Qaida and the Government of Uzbekistan.

Moreover, the United States elected to employ various non-lethal weapons systems, including lasers and riot control agents, solely to enable United States forces to minimize *847 civilian casualties while eliminating the illegal biological weapons stored in the Central Mosque. Although the United States Government recognizes various restrictions upon its right to employ certain weapons systems under the Conventional Weapons Convention⁶²⁶ and the Chemical Weapons Convention,⁶²⁷ the United States has never accepted restrictions upon its sovereign right to employ those means of war best calculated to strike a balance between military necessity and humanitarian considerations.⁶²⁸ All instruments of war *848 are cruel and inhuman in the sense that they cause destruction and suffering, but to brand the use of lasers and riot control agents--systems designed and employed to temporarily incapacitate, rather than to kill--as inflicting “unnecessary suffering”⁶²⁹ suggests, contrary to fact, that there is such a thing as necessary suffering, or that it would be preferable to kill by gunfire rather than to incapacitate by other means.⁶³⁰ It is not the amount of destruction or suffering that is relevant in appraising the lawfulness of a particular weapon but rather the superfluity of harm involved in accomplishing a legitimate military objective with that weapon.⁶³¹ In the best judgment of United States military commanders, based upon the tactical considerations and available intelligence, use of lasers and riot control agents constituted the most practical, and the most humane, means to afford our forces the security necessary to destroy the weapons of mass destruction.

Finally, the President, acting in his official capacity as Commander-in-Chief in defense of the United States, issued lawful orders through the lawful chain of command to members of the United States Armed Forces who executed Operation Jeremiah. Members of the United States Armed Forces who receive and follow lawful orders such as these are entitled *849 to rely upon the legal judgments of their military and civilian superiors.⁶³² The soldiers of Task Force Ryan did *850 precisely what they were ordered to do in a professional manner, and each and every one of their acts and omissions were both permissible under the laws of war and well within the scope of their lawful orders. As such they bear no legal responsibility whatsoever for Operation Jeremiah.⁶³³ Nor can *851 any legal liability be imputed, even under the most expansive interpretation of the command responsibility doctrine, to any senior military or civilian officials, whose lawful orders to subordinates were executed faithfully, professionally, and with all due attention to humanitarian considerations.⁶³⁴ There can be no question of superior negligence where each and every act and omission of subordinates is both lawful and in compliance with orders, and where, as here, the orders themselves are lawful, the issue never arises.⁶³⁵ Furthermore, *852 the President, as head-of-state, along with the Secretary of Defense and other public officials, are entitled to immunity for their official acts,⁶³⁶ and nothing could be more *853 within the scope of official acts of state than a dispatch of national armed forces to do battle in self-defense.

The United States has traditionally been in the forefront of efforts to codify and improve (IHL) with the objective of giving the greatest possible protection to victims of (armed) conflicts, consistent with legitimate military requirements.⁶³⁷ Accordingly, the United States recognized and scrupulously upheld the laws of war during Operation Jeremiah.⁶³⁸ However, war crimes and crimes against humanity *854 have become elastic concepts stretched by propagandists⁶³⁹ *855 to reach lawful acts of self-defense. Even as the United States sets the standard for other nations to follow in their observance of humanitarian principles, we must not, and need not, give . . . protection to terrorist groups as a price for progress in humanitarian law.⁶⁴⁰

To reiterate, Operation Jeremiah was a proportionate, discriminate response ordered by the President of the United States consistent with the inherent right of self-defense recognized in the U.N. Charter. That it resulted in civilian casualties is regrettable, but the responsibility for the destruction of civilian lives and property is the sole responsibility of the terrorist group al Qaida and the Uzbeki sponsors, whose decision to site weapons of mass destruction in a house of worship needlessly imperiled the civilian population in serial violation of applicable humanitarian law. The object was limited to the destruction of those weapons, which the terrorists intended to use against United States citizens, and the choice of weapons and tactics--made in consultation with legal advisors in reference to applicable law⁶⁴¹--was calculated to reduce the suffering of the civilian population. None of the United States civilian or military personnel that operationalized and executed the lawful orders of the President violated any laws. Once again, although the United States regrets civilian casualties subsequent to Operation Jeremiah, given the foregoing the United States had no legal obligation to investigate or prosecute any of its nationals for their acts or omissions in furtherance of this mission, which, by eliminating weapons of mass destruction the terrorists had imminent plans to use against United States citizens, clearly prevented significantly greater number of civilian deaths. In sum, no acts or omissions of any United States nationals satisfy any elements of any crime within ICC jurisdiction, and the United States will not submit to any tribunal other than the moral judgments of history.⁶⁴²

*856 The Ambassador submitted a draft resolution calling upon the Security Council to delay prosecution for one year as provided in Article 16 of the Rome Statute, but it was immediately voted down by China, Russia, France, Syria, Iran, Netherlands and Iraq. In response, he declared that the United States, as a non-party to the Rome Statute, had no obligation to cooperate⁶⁴³ with an institution the "sole purpose of which is to put United States citizens and United States foreign policy, along with the citizens and policies of our adversaries in the war on terror, up to the skewed judgment of the world."⁶⁴⁴ The next day the United States President issued a terse letter to the ICC President refusing cooperation in the arrest and extradition of the named defendants, and in turn the ICC President reported United States non-cooperation to the Security Council⁶⁴⁵ and requested assistance.⁶⁴⁶ The Security Council voted that afternoon *857 on a Sino-Soviet resolution, defeated by a United

States-UK veto and a bloc of abstentions, which would have condemned the United States and imposed economic sanctions under Chapter VII for its “failure to surrender for trial the defendants associated with Operation Jeremiah, an act of state terrorism,” although the General Assembly called upon member states to contribute forces to enforce the ICC request for United States cooperation.⁶⁴⁷

In light of the failure of the Security Council to compel United States cooperation in the case of Prosecutor v. Task Force Ryan., the Prosecutor tried the defendants in absentia.⁶⁴⁸ After a bench trial lasting one month, all were convicted on all counts of the indictment. In response, the United States Congress passed a joint resolution authorizing the President “to use all necessary force to prevent the forcible abduction or rendition of any United States national associated with Operation Jeremiah.”⁶⁴⁹ The legislation also resolved that *858 should any state assist the ICC in its efforts to obtain physical custody over these United States nationals, “a state of war will exist between the United States and that nation.”

C. Lessons

The preceding analysis suggests that the substantive content of IHL secures compliance to the extent that it does so not because the rules and regulations are constitutive of a positive legal canon, but because those aspects of the canon that soldiers obey are already internal to the martial profession in the form of the martial code. The juxtaposition of the two paradigms suggests further that “to be broadly acceptable in practice, rules (of IHL) must respect the reasonable requirements of the armed forces for the efficient conduct of hostilities and minimization of their casualties, while equally being consistent with generally accepted humanitarian principles.”⁶⁵⁰ Accordingly, *859 institutions called to adjudicate alleged violations of IHL ought to immunize, rather than criminalize, good-faith measures undertaken to defend law and civilization, even if and where such measures depart from the formal, positive legal prescriptions and proscriptions of IHL, particularly as that canon comes to be interpreted by outsiders to the martial profession.⁶⁵¹ Where a modality of adjudication would criminalize acts promotive of the ends law is tasked to serve, that modality is objectively dysfunctional. Martial honor, reliant upon a regime of self-regulation that secures compliance with a rigorous code of conduct upon pain of disgrace and death while nonetheless recognizing exigencies unique to the experience of the combat soldier and immunizing all but those acts that genuinely and universally smack of barbarism, is not only conducive to a more holistic and stricter standard of judgment of the martial caste but better suited than the ICC to accomplishing the critical functional task of suppressing inhumanity in war without disabling the defense against existential threats posed by manifestly evil adversaries dedicated to the destruction of civilization.⁶⁵²

Moreover, the contrast between martial honor and the ICC *860 also demonstrates that the stakes associated with the choice of paradigms have been raised by the drift of the IHL canon over the past quarter-century. The provisions of the Protocols Additional purporting to redefine proportionality and distinction drain the principle of necessity of nearly all meaning,⁶⁵³ and pronouncements upon the legality of particular weapons systems inure to the benefit of terrorist groups and rogue states masquerading as lawful combatants.⁶⁵⁴ Further, the proliferation of dubious declarations as to what constitutes customary IHL, and even more importantly, how it is to be interpreted in adjudging individual criminal responsibility in connection with certain methods and means of war, along with intemperate claims that preemption is synonymous with aggression, threaten to disrupt what remains of the equilibrium between operational necessities and IHL. In short, contemporary IHL absolutists, by eliding distinctions between lawful and unlawful combatants and adopting an interpretive approach absolute with respect to observance of self-declared rules concerning methods and means of war (the *jus in bello*)⁶⁵⁵ but agnostic with respect to the justice of the cause on behalf of which combatants take up arms (the *jus ad bellum*),⁶⁵⁶ privilege terrorists at the expense of their fettered targets.

In other words, the credibility of IHL, cut adrift to terrorists’ advantage, is at a nadir at an extraordinarily unpropitious moment in world history to bull forward with an ill-conceived, absolutist catechism.⁶⁵⁷ The contemporary push to simultaneously formalize and internationalize adjudication of (alleged) violations

committed under such exigent circumstances, a misguided crusade that offers succor to terrorists, is the *861 legitimate subject of critical examination.⁶⁵⁸ However, despite incipient awareness that IHL is waxing perilously anachronistic with respect to the scourge of terrorism,⁶⁵⁹ heretofore there has been no proposal for its substantial modification.⁶⁶⁰ In part this is attributable to the magnitude of the venture. The defense by rationalization of IHL necessitates more than the modification of tactics; it requires re-examination, and perhaps re-imagination, of the IHL canon, as well as the reclamation of responsibility for its creation and application⁶⁶¹ by the predominant actor (the U.S.) that has consistently been able and willing to defend it, and the civilization from whence it sprung, against barbarism. In some measure it *862 is due to a lack of scholarly temerity: the very act of challenging the adequacy of IHL, save by advocating greater restrictions upon state military forces, is considered by many within the academy to be impolitic, if not heretical, and repudiating the prevailing claims of moral equivalence between democratic states and their terrorist enemies and suggesting a wide margin of appreciation for the former, may be grounds for excommunication.⁶⁶² Nonetheless, because the defeat of terrorism is prefigured by the development of not merely an effective military strategy but also a common legal strategy with which those arrayed against terror can reverse the base exploitation of IHL that occupies so central a position in the terrorist campaign,⁶⁶³ the next Part reintroduces the concept of “barbarians” as the framework around which to craft a legal strategy intended to internalize the costs of terrorists’ violations of IHL while empowering, rather than hobbling, the robust application of military force to the defense of global order.

III. Contra Barbarum: A Proposal for a Rationalized Theory of the Laws of War

A. Barbarians: A Conceptual Definition

The ancient Greeks and Romans, who believed in a natural moral order inherent in the universe which bound all peoples *863 and upon which law rightly supervened,⁶⁶⁴ divided the world into two spheres, with the first inhabited by “civilized” peoples whose affairs were governed by public laws and ethical principles derived from this order and the second the domain of savage, hedonistic, immoral “barbarians” who rejected public legal authority and invested political power in a head-man in whom they tolerated corrupt authoritarianism.⁶⁶⁵ Whereas civilized people committed themselves to cities, culture, learning, commerce, and diplomacy, barbarians were nomadic groups bereft of letters, culture, and alliances⁶⁶⁶ whose sole *864 occupations were destruction, pillage, and war.⁶⁶⁷ To keep barbarism at bay, Roman law incorporated stark dichotomies as between barbarians,⁶⁶⁸ near-rightless persons who by virtue of their existence beyond the pale of law-governed civilization were not entitled to the sacred privileges of Roman citizenship⁶⁶⁹ including the protections of Roman civil law (jus civile),⁶⁷⁰ and citizens (cives), who enjoyed full legal personhood under jus civile.⁶⁷¹ In other words, “barbarian” connoted rejection of a civilization constituted around public law and obligations *865 descending therefrom in favor of parochial customs and rules and private sources of authority. In contrast, a “citizen” was a member of civilization who accepted the rule of public law and attendant obligations, including taxation and military service,⁶⁷² and citizenship, a precious concept, imposed the unrelenting obligation to behave in keeping with duties to the natural legal order upon which civilization rested: a citizen convicted of a serious crime forfeited his citizenship and assumed the status of a de facto barbarian,⁶⁷³ as did cives captured in war⁶⁷⁴ and others who suffered impairment of their civic honor.⁶⁷⁵ The distinction was crucial: armed operations against barbarians could be initiated without invoking the blessings and protection of the Roman gods that preceded wars against non-barbarians because the former did not possess the legal personality necessary to be legitimate subjects of warmaking,⁶⁷⁶ and Roman military commanders were granted near-unlimited authority to destroy barbarians to whom the Roman laws of war did not reach.⁶⁷⁷ When fighting barbarians, the bellum hostile, a regime characterized by restraint, was supplanted by the unlimited bellum romanum.⁶⁷⁸ Similarly, the Greeks accepted no restraints in inevitable conflicts *866 with barbarians.⁶⁷⁹

The citizen-barbarian distinction, drawn to sharply limn the separation between societies organized around public law on the one hand and the rule of man on the other, coupled with the application of different sets of

rules and norms to govern armed conflicts against citizen as distinct from barbarian enemies, survived the fall of Rome, and from 400-900 A.D. much of Europe evolved pluralistic legal systems that applied one law, the *lex romanum*, to Romans and another, known as the *lex barbarorum*, to tribes and political communities beyond the reach of the Roman legal order.⁶⁸⁰ However, by the second millennium, the diffusion of Roman law⁶⁸¹ and the rise of strong nation-states with institutions of organized coercion effective in securing compliance with codified systems of public law drew vast areas outside the former boundaries of Roman rule within the realm of civilization, a process that largely subsumed the *lex barbarorum*.⁶⁸² Nonetheless, certain individuals and groups continued to resist the tide of history and remain outside the reach of public laws and institutions, and the citizen-barbarian distinction thus became important less to specifying imperial boundaries than to the development of new legal regimes to counter the emerging phenomenon of transnational criminality.

In medieval England, those who defied legal obligations by refusing to appear in court when summoned⁶⁸³ or committing *867 particularly egregious felonies were held to be beyond the protection of the law under the doctrine of "outlawry."⁶⁸⁴ Outlaws, as persons with no enforceable legal rights,⁶⁸⁵ could be killed by all upon sight, and their property was forfeit, by operation of law, to the crown.⁶⁸⁶ Likewise, associates of outlaws were outlawed and subjected to summary punishment, as were the issue of traitors in punishment for treason.⁶⁸⁷ A decree of outlawry could not be evaded by flight: comity provided that those outlawed by one court were accorded the same **status** in other jurisdictions.⁶⁸⁸ With the rise of piracy in the sixteenth century, international law drew from the ancient barbarian distinction, along with the doctrine of outlawry, to provide that pirates and other private bands of organized criminals⁶⁸⁹ were in perpetual war with all mankind⁶⁹⁰ and thus, as *hostis humani generis*⁶⁹¹ subject to attack by any and all persons at *868 any time⁶⁹² without legal niceties, such as a declaration of war⁶⁹³ or the protection of the laws.⁶⁹⁴ Regardless of nationality, all persons were entitled, under universal jurisdiction⁶⁹⁵ *869 and principles of natural law harkening to the ancients,⁶⁹⁶ to capture and summarily kill pirates.⁶⁹⁷

Historically, barbarians disentitled themselves from the protections of the *jus in bello*, a body of regulation contracted as between legitimate public sovereigns, and in contemplation of the threat posed by the predations of pirates and others of their ilk, states claimed the sovereign prerogative to modify the scope of application of IHL to better enable the punishment of offenses against the "law of nations" and the defense of civilization against such attacks.⁶⁹⁸ In the words of seventeenth century *870 scholar Emmerich Vattel, "(a)s for those monsters who . . . act as a scourge and plague of the human race, they are nothing more than wild beasts, of whom every man of courage may justly purge the earth."⁶⁹⁹ Modern IHL, erected in service to the moral conviction that the most egregious war criminals are violators of norms of *jus cogens* and deserving of the most serious legal sanction available,⁷⁰⁰ is at the very least permissive *871 of the declaration of the authors of unlawful private acts of violence hostile to the natural legal order buttressing civilization--i.e., terrorists--as barbarians subject to death upon capture.⁷⁰¹ The precedents stretch to the Lieber Code:

*872 Men . . . who commit hostilities . . . without being part . . . of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting return to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers . . . are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.⁷⁰²

Furthermore, the historical practice of states with regard to reprisals against and trials of war criminals evinces that violations committed by soldiers in battle have long been considered serious assaults upon the integrity of the system of public law that justify death as the only condign punishment.⁷⁰³ Although the Geneva Conventions and Protocols Additional reject the outlawry of and summary reprisal against guerrillas and others who abjure obligations under IHL⁷⁰⁴ as archaisms in favor of an approach originating in the broadly protective law of human rights, terrorism calls into question whether recent expansions of the panoply of rights and privileges *873 to which terrorists are judged entitled presumes, contrary to fact, that they are susceptible to

deterrence by legal sanctions,⁷⁰⁵ or that they have a stake in the civilizational order that can be used to impel them to comply with IHL,⁷⁰⁶ rather than a burning desire to destroy civilization and law itself.⁷⁰⁷ Moreover, these instruments, along with the contemporary disfavor into which reprisal has fallen,⁷⁰⁸ call into question whether the general legal principle of reciprocity, which maintains that to be a subject of law entitled to its privileges and protection one must in turn respect the legal privileges and rights of others,⁷⁰⁹ or the principles of contract which postulate *874 parties of equal legal capacity with co-dependent legal obligations⁷¹⁰ are any longer to be elemental to the theory underpinning IHL. If IHL is to be created and interpreted through an institutional framework so as to provide one set of rules, less restrictive and more protective of terrorists, and another, more restrictive of and more likely to impose criminal liability upon soldiers, IHL, and international law more generally, cannot inhabit an anarchic world where law is respected only in the breach⁷¹¹ and power is again the sole convertible currency.⁷¹²

*875 No military force will ever conduct its operations in perfect concord with IHL--quite simply, there are "limits to the amount of humanitarian observance that desperately fighting flesh and blood can stand,"⁷¹³ and no soldier or state in extremis is ever likely to privilege compliance with IHL over survival.⁷¹⁴ (Which is not true to martial honor though) Nonetheless, the general observance of IHL by honorable soldiers fighting in defense of civilization is the behavioral variable which most clearly distinguishes civilized peoples from modern-day barbarians,⁷¹⁵ a venal and intractable assemblage *876 hors de loi ("outside the law")⁷¹⁶ that inhabits an utterly incompatible moral universe and that, by deliberately targeting innocent civilians permanently dislocates itself, along with its barbarian, piratical, and outlawed progenitors,⁷¹⁷ from the ranks of the civilized. One need not embrace the ancient ordination of territory into civilized and barbarian spheres to defend the assertions that morality, even during war, should march in step with law,⁷¹⁸ that the premeditated murder of innocents is ethically and juridically distinct from their unintentional killing, and that rather than accord terrorists enhanced status under the law defenders of civilization should withdraw the protections of the law they shun.⁷¹⁹ Nor need *877 one lump all enemies together under the barbarian rubric: simply stated, barbarians are those who deliberately attack civilians to advance the destruction of a civilization based upon liberty, law, and respect for individual human rights and dignity.

B. Islamic Terrorists and Rogue-State Sponsors: Latter-Day Barbarians

With the fall of the Berlin Wall, Western liberal scholars reposed much faith in the prospect that a modern and universal civilization,⁷²⁰ based upon Western norms and values such as liberty, individual rights, free markets, limited government and separation of church and state, and a legal culture⁷²¹ built upon the doctrine of the formal equality of all persons,⁷²² would emerge from decades of bipolar confrontation.⁷²³ More pessimistic observers, anticipating that the collapse of Communism *878 would yield a global order in which religion would become the primary constituent of civilizational identity and increased contacts would heighten tensions between largely incommensurable civilizations,⁷²⁴ postulated a "clash of civilizations" in which burgeoning antagonisms, rather than Westernization, would fill the vacuum left by receding East-West tensions.⁷²⁵ According to this civilizational conflict thesis, the principal fault line along which systemic upheaval can be expected lies between the West and Islam by virtue of stark dissimilarities between belief systems and legal cultures.⁷²⁶ For Muslims, law is of divine origin and therefore incompatible with and supreme compared to a Western legal order that recognizes human reason and the will of the majority as sources of legitimate rule-making authority,⁷²⁷ and perpetual conflict with the *879 unbelievers of the dar-al harb is therefore divinely ordained.⁷²⁸ Although it may shock untutored Westerners,⁷²⁹ the history of Muslim efforts to conquer the "infidel" West, which commenced in seventh century Spain and continued through the medieval crusades to the present,⁷³⁰ is very much with us, and, if the West is to survive, the civilizational conflict thesis holds that Westerners are duty-bound to awaken to the defense of their civilization against the growing Islamic military challenge.⁷³¹

*880 Still others treat the suggestion that differences between civilizations necessarily translate into violent

conflict as a gross oversimplification.⁷³² They stress that Islam is akin to Judaism and Christianity in ascribing to the divinity all legitimate authority to order the affairs of mankind⁷³³ while utterly proscribing acts of murder;⁷³⁴ they insist further that the contemporary *881 resurgence of Islam is simply an assertion of religiosity that can be harmonized with, or at least exist in harmless parallel to, Western civilization,⁷³⁵ and that, far from hinder the development of democracy, fidelity to Islamic teachings will, more than any other social practice or institutional commitment, catalyze the liberal democratization of the Middle East.⁷³⁶ Moreover, they clearly distinguish a liberal strain of Islamic thought⁷³⁷ from the schismatic teachings of an untutored, if charismatic, minority,⁷³⁸ and reject the idea of a monolithic ummah dedicated to destroying the West.⁷³⁹ Even *882 if Muslim states miraculously unified,⁷⁴⁰ any transhistorical conflict has withered along with the potential for any such coalition to muster sufficient military power to pose a credible threat.⁷⁴¹ In short, the explanation of Islam as a cultural orientation⁷⁴² maintains that there is simply no Islamic civilizational approach to law or politics and nothing to fear from Islam ascendant, and United States Middle Eastern policy is more squarely within the chain of causation of September 11th than the twisted version of the religion professed by those who piloted the final instruments of that tragedy.⁷⁴³

*883 Whether Islam is a call to jihad or merely a call to prayer is an open question.⁷⁴⁴ Islamic terrorism may eventually be revealed as a treatable, although severe, symptom of regional societal dysfunction,⁷⁴⁵ yet it may also be the logical outgrowth of an agenda of conquest laid down by Muhammad in medieval Mecca.⁷⁴⁶ Nevertheless, it is unnecessary to prove *884 the civilizational conflict thesis or probe the motives of individual terrorists⁷⁴⁷ to establish that the entire Society of Peoples⁷⁴⁸ is under assault by the recrudescence of atavistic foes who abjure all restraint and brandish a radical religious vision as both weapon and justification for the deliberate mass murder of innocents.⁷⁴⁹ September 11th demonstrated something far more profound than the futility of employing laws to deter wicked miscreants who value their own lives no more than those of their hapless victims and for whom no depredation is beyond contemplation:⁷⁵⁰ that tragic morning during which *885 over 3000 innocent men, women, and children were deliberately immolated by 19 suicidal Islamic terrorists heralded a paradigmatic shift toward an era of asymmetrical warfare⁷⁵¹ in which enemies of the United States and its allies, absolutely incapable of gathering armed forces to meet and defeat regular armies on the field of battle, will instead employ unconventional methods in an attempt to overcome their political will⁷⁵² and undermine the further transmission of the liberal Western mode of governance.⁷⁵³ Terrorism and WMD are merely the more obvious and tangible weapons. It is somewhat paradoxical,⁷⁵⁴ although consistent with the historical development of *886 the analytical concept of “barbarians” as those beyond the shadow of law, that it should be IHL itself--or, more properly, the asymmetry in compliance as between the terrorists, who proclaim their divorce from any legal obligations and flout the rules of IHL to their advantage,⁷⁵⁵ and the Western populations they target, for whom law is a central ordering principle--that bristles as the most potent weapon in the Islamic terrorist arsenal.⁷⁵⁶ Nonetheless, because a concatenation of “reforms” over the last several decades, coupled with the ascendancy of IHL absolutism, have delivered IHL into the hands of terrorists who now wield it as a sword against civilization,⁷⁵⁷ the moral essence of the law must be reclaimed and decocted from accumulated ideological accretions if it is to once again shield civilization against barbarism. Accordingly, the next section crafts a legal strategy to empower the robust application of military force in defense of global order and liberty.

***887 C. Reforming IHL to Meet the Barbarian Threat: A Functionalist Argument**

IHL, just as any other regime of legal regulation, is an ongoing functional response⁷⁵⁸ to existing and anticipated factual circumstances. It is designed and interpreted in light of the capacities, interests, objectives, and “felt necessities” of politically relevant actors⁷⁵⁹ to the benefit of whom it disproportionately redounds.⁷⁶⁰ However, the matrix of costs and benefits under all legal regimes tend to be kinetic, rather than static: under the metamorphic pressures exerted by human rights NGOs and other absolutists over the last generation it is not surprising that IHL has been warped in ways that have redistributed the costs and benefits attendant to particular *888 tactics, strategies, and weapons systems.⁷⁶¹ Nevertheless, the process whereby IHL is subject to

reconstruction is omnidirectional, and when states, the principal authors of international law for centuries, can “no longer assure their defense within the ambit of inherited law, those charged with national defense (will) inevitably demand changes in (IHL).”⁷⁶² Thus, if even the remotest possibility exists that IHL, unwisely reformed to suit the felt needs of the human rights community and subject to interpretation and application in the hostile politico-legal milieu of the ICC, could be slaved to the sheltering of terrorists and rogue-states bent on the annihilation of millions of innocents and the criminalization of the reasonable acts of honorable soldiers protecting civilization itself against holocaust, IHL is, as the United States has effectively declared in renouncing the ICC, a compromised and dysfunctional legal regime.⁷⁶³ That IHL should ever be marshaled to gainsay the assertion that the Private Ryans and Captain Ryans of the world are at critical moments the sole bulwark standing between civilization and unremitting evil, and that law should ever be permitted to punish virtuous soldiers who brave danger in a long twilight struggle against terrorist adversaries who flout the law as but a bothersome trapping of the civilization they aim to eradicate would be farcical if it were not so disconcerting. In short, civilization is bracketed *889 between the danger inherent in the order that the ICC might well impose and the disorder engineered by terrorists,⁷⁶⁴ for whom IHL is but the substrate for evil.

It is thus logical that those states predominantly responsible for civilizational defense would assume the van in demanding the revision, and even the broader rethinking, of IHL and the institutions responsible for its enforcement.⁷⁶⁵ The salvation of Western civilization depends upon victory in the war on terror; in turn, this calls into question whether the (primarily United States) soldiers defending civilization, although they must as a moral imperative cleave as closely as practicable to the humanitarian purpose of the IHL regime,⁷⁶⁶ may employ allegedly prohibited methods and means or otherwise derogate from a body of law never tailored for this sort of conflict⁷⁶⁷ in order to guarantee victory. To be sure: the *890 United States remains unwaveringly committed to the observance of IHL during the conduct of post-September 11th operations in the asymmetrical war on terror.⁷⁶⁸ However, September 11th revealed that the defense of vital national and civilizational interests are in tension with a cascading series of constraints on United States freedom of military action⁷⁶⁹ that, although they spring from noble impulse, have neutralized the comparative military advantage of the United States and handicapped its policy options against terrorism beyond the danger point.⁷⁷⁰ At first blush it seems we are enmeshed in a moral dilemma from which escape requires a Hobson’s choice:⁷⁷¹ either jettison IHL, suspend all normative restraint, and sacrifice the higher moral terrain to a counter-jihad against terrorism, or scrupulously observe a regime whose demise will be but a mere incident to the ritual suicide of the civilization from whence it emerged. The first choice conflates the distinction between combatants, debases the civilization for which the war is fought, and confers a victory upon the terrorists, whose re-creation of us in their own image would assuage *891 their defeat on the battlefield. The second abdicates moral responsibility to the abjectly immoral and orders the sworn defenders of civilization to orchestrate its passage into the gloom of a darker and more fearful age.

In short, a fissure has expanded into a chasm dividing what is generally deemed lawful under IHL from what might be charged as unlawful, although it can legitimately be described as the morally just conduct of soldiers.⁷⁷² This disjunct threatens, in synergy with the ICC, to swallow up respect for, and observance of, law more generally. However, although this is unquestionably a moment of fragility and perhaps even decision for international order, there is a narrow course that will maximize national and global welfare that can be navigated between these moral shoals: rather than deify IHL, as the absolutist framers of the ICC in their subsumption of its authorship from state⁷⁷³ would have us do, we should accord it our *892 respect and criminalize its violation only to the extent that it comports with the practical necessities of honorable soldiers locked in total war⁷⁷⁴ against barbarians who brook no legal restraints whatsoever. In other words, by rationalizing IHL⁷⁷⁵ the West can interdict evil and shepherd law, along with the civilization law defends and reflects, through the vale of terrorism.⁷⁷⁶ The next section operationalizes this thesis by reinventing IHL as a regime that humanizes conflicts between soldiers who observe the martial code yet banishes barbarians to a legal wasteland beyond its application.⁷⁷⁷

*893 D. Operationalizing the Barbarian Distinction

States, as well as individuals, have the moral and legal right, independent of any institutional arrangements, conventional understandings, or subjective beliefs, to defend themselves against terrorism. Principles of fundamental fairness and justice militate in favor not only of restoring the pre-1977 legal consequences of terrorists' unlawful combatancy but of internalizing, rather than transferring to their opponents, the legal consequences of their depredations against civilized peoples. If IHL is to continue to merit compliance by state-defenders of the international community, then, in the existential battle against terrorists who declare civilization itself as the stakes for which the war is to be contested, the margin of appreciation to which the United States and allied states⁷⁷⁸ are generally entitled in interpreting the boundaries of IHL should be stretched to its zenith, not contracted to its nadir. Ultimate victory over terrorism will, on occasion, require states to undertake missions that give rise to claims that members of their armed forces have violated provisions of IHL that do not universally meet the definition of binding law; in other cases, otherwise valorous warriors pressed to their physical and emotional limits may deny quarter or inflict reprisals that, while inarguably violative of positive law, are excusable or at least mitigated in their seriousness in light of all the circumstances, *894 especially the fact that it is terrorists who are the "victims." The ratio of the evil that soldiers may occasion in the defeat of terrorism to the evil that they avert by hastening its demise is sufficiently favorable that any rational theory of IHL will ensure that institutions called upon to adjudicate criminal responsibility consider the net benefit with which their labors have endowed mankind in balancing the scales of justice. In short, the transposition of IHL in light of the contemporary threat directly implicates the ideological interests and perspectives of the actors and institutions that interpret and adjudicate the conduct of soldiers, and rather than permit the ICC, a politicized body disinterested in the moral universe of soldiers and committed to an absolutist philosophy that excludes exigency, necessity, and justice from its calculus, to pass judgment in regard to alleged violations of IHL in the war on terror, United States and allied soldiers should be held to the ethical and moral strictures of the martial code.

However, courts-martial will justifiably rely upon the judgment and experience of members of the martial profession in applying nonlegal norms, interpreting ROEs, and ultimately determining whether the conduct of an accused can fairly be said to have been contrary to that expected of the honorable soldier, a standard radically different from legal absolutism. A rationalized approach to IHL takes a much more conscientious approach to upholding civilizational obligations and demands that parallel institutions respect the determinations of courts-martial. Certainly, not all transgressions across the burgeoning boundaries of what the human rights NGOs championing the ICC declare to be IHL can legitimately be characterized as war crimes or crimes against humanity. Viewed through the analytical prism of a rationalized IHL, as courts-martial have been wont to do across their developmental history, it is impossible to describe the acts of Private Ryan et al. or the personnel associated with Task Force Ryan as barbaric, and it is utterly beyond comprehension that the conduct of those prosecuting the agenda of Nazism and Islamic terrorism--irrefutably barbaric programs⁷⁷⁹--could ever be perceived as more deserving *895 of legal shelter than the soldiers who interpose between them and civilization. It is worse than foolish to pretend that the militaries of Western democracies defending against Nazism and Islamic terrorism spawn war criminals at the rate or on the order of their wicked foes. To forfeit moral judgment guts IHL of its normative component and mocks justice.

This is not to suggest that courts-martial need validate the greatest fears of legal absolutists, who distrust the professional self-regulation of the armed forces and envision courts-martial as a forum suited principally to whitewashing military misdeeds. Although the temptation to abandon all normative and legal restraint may be great,⁷⁸⁰ rationalization need neither imply nor countenance the general suspension of IHL in the fight contra barbarum. Even while engaged in this just cause, moral and legal responsibility attach to all individuals--civilian or military--charged with the prosecution of the war on terror. In armed conflicts, however characterized, the United States, one of the few states that has systematically prosecuted violations of IHL, must continue its official policy of scrupulous *896 adherence to those aspects of the IHL canon that can be harmonized with the ethos and principles of the martial code and the practical necessities of the war on terror,

and it should strive always to conduct its operations so as to afford the greatest humanitarian protections to all privileged persons. Moreover, the martial code does not necessarily disfavor the grant of humanitarian treatment, where feasible, to terrorists,⁷⁸¹ in part because law is so deeply impressed into the fabric of our civilization that it is difficult to forswear it even in response to terrorism,⁷⁸² and in part out of homage to chivalric ideals.

Nonetheless, a rationalized IHL is inimical to the absolutist argument that the legal standard to which soldiers combating barbarism should be held is exempt from recalibration to reflect the nature of, and threat posed, by these anti-civilizational adversaries. It is worse than foolish to pretend that the militaries of Western states defending against Nazism and Islamic terrorism spawn war criminals or criminals against humanity at the rate of their foes; rather, it is a dangerous, often politically-motivated position which finds expression in the exposition of legal absolutist arguments that, actualized through the jurisprudence of the ICC, may threaten the edifice of law and the civilization which depends upon it. In stark contrast, the martial code, with its broad consideration of not merely legal but also non-legal variables⁷⁸³ in ascertaining *897 whether an accused has abided by the precepts that direct the conduct of honorable member of the military profession, embraces the positions that legal and moral obligations under IHL are, to some extent, conditional, and that the degree to which an enemy force observes IHL, the means and methods employed by an enemy, and the justice of the cause for which an enemy fights are relevant variables in the decisional matrix employed by those called upon to judge martial conduct. In other words, a sliding legal-moral scale is at work within the legal machinery of a rationalized IHL regime that weighs the experience of the combat soldier and the moral virtues and vices of combatants without abandoning its humanizing mission. This scale would permit a far more nuanced and holistic examination of alleged violations of IHL. Although it would unhesitatingly adjudge the deliberate murder of an innocent civilian or otherwise blameless **POW** serving an enemy force that accords treatment consistent with the martial code to be ipso facto an act of barbarism, it would declare reprisal against a parole violator or terrorist as either a justifiable offense or a much less serious crime punishable with disciplinary sanctions, and not simply declare the act a war crime justifying imprisonment. Moreover, it would reflexively reject any assertion of criminality with respect to the unintentional killing of civilians located near terrorist targets. In effect, a rationalized IHL is an admixture of *jus in bello* and *jus ad bellum* that treats not merely the conduct of soldiers but also the cause for which they fight as practically significant in establishing differential legal standards, canons of interpretation and guidelines for adjudication. Thus, the following measures are proposed to effect the formal operationalization of the civilized peoples/barbarians distinction in a rationalized IHL regime:

1. The U.S., acting under the protective principle of jurisdiction,⁷⁸⁴ should exercise its sovereign right to prescribe legislation *898 designating particular states, groups (including but not limited to those listed as foreign terrorist organizations by the State Department)⁷⁸⁵ and individuals,⁷⁸⁶ regardless of nationality, as barbarians and declaring them, by virtue of their predations against civilians, “criminals against civilization” who disentitle themselves from the panoply of legal rights and privileges under international and domestic law.⁷⁸⁷ The *899 *Actus Contra Barbarum* (Act Against Barbarians) (hereinafter ACB) will relegate such actors to an inferior **status** under IHL-- in effect, it will redefine them as unprivileged, rightless outlaws--as IHL is incorporated in U.S. law.⁷⁸⁸ This declaration need not be interpreted as a denunciation of the general applicability of IHL provisions with which the U.S. disagrees; rather, it would publicly proclaim that the U.S. will withhold the protections of IHL from rogue states and terrorists and exercise restraint in its operations against them only indirectly through observation of humanitarian obligations safeguarding civilians and other noncombatants.⁷⁸⁹ Terrorists *900 and rogue states would then be subject to attack by all means and methods at all places and times, denied quarter, and subjected to summary execution. In short, ACB would declare *bellum americanum*⁷⁹⁰ against terrorists. To secure domestic political support, and in light of strategic considerations, the ACB might contain a provision suspending its legal effect for a period of months to induce affected states and groups to desist from terrorism and comply with IHL; failure to do so would result in immediate abandonment of all restraint.⁷⁹¹ The legislation might incorporate a provision granting affected parties standing to appeal inclusion on the list and permitting special appearances,⁷⁹² along with safe passage,⁷⁹³ for this purpose.⁷⁹⁴ In the alternative, or in conjunction, *901 the legislation might authorize the President to negotiate

bilateral agreements, akin to treaties,⁷⁹⁵ with states and terrorist groups in which the U.S. would pledge to refrain from implementing ACB in respect to those actors that pledge to follow IHL, refrain from military operations against the U.S. and its nationals and divest themselves of all but those weapons systems required for self-defense.⁷⁹⁶

***902** 2. To translate this strategic declaration into rules of decision for courts-martial, Congress could, as a provision in ACB, amend the UCMJ to expressly establish the doctrine *contra barbarum* ("against terrorists") as an absolute defense that absolves soldiers of responsibility who are accused of UCMJ violations while combating terrorism.⁷⁹⁷ Alternatively, the Manual for Courts-Martial could be amended to provide that the fact that a soldier is alleged to have committed the specified crime in question *contra barbarum* is a factor in mitigation of the severity of the offense as well as of applicable sanctions upon conviction.⁷⁹⁸

3. The President should not submit future IHL treaties for ratification without first negotiating a *contra barbarum* clause waiving the legal effect of these instruments with respect to terrorists. The Senate might append an understanding or declaration to such texts indicating that the U.S. position is that terrorists are not within the protections afforded by such treaties.

4. If the ICC amends Article 120,⁷⁹⁹ the President might revisit the question of accession to the Rome Statute. Conditions precedent should, however, at a minimum include the following: (a) a *contra barbarum* clause in the instrument of ratification reflecting the understanding of the Senate that the Rome Statute is inapplicable in armed conflict with terrorists;⁸⁰⁰ (b) a statement to the effect that the U.S. does not ***903** recognize any conventional instruments to which it is not a party, or any statements of custom to which it has persistently objected,⁸⁰¹ as creating any legal obligations; and (c) a statement to the effect that the U.S. understands that the ICC Prosecutor will in, all cases, recognize that a U.S. decision not to investigate or prosecute a U.S. national, or to sentence a U.S. national upon conviction at court-martial to a particular penalty, will have been made in good-faith and consistent with the interests of justice and that the Prosecutor, in deference to complementarity, will not invoke ICC jurisdiction. The U.S. might pursue the conclusion of a treaty to this effect, thereby securing a grant of functional immunity.⁸⁰²

5. If the ICC will not amend Article 120, the U.S. should suspend all financial aid to and terminate trade relationships with states that refuse to sign bilateral treaties pledging not to extradite U.S. nationals to the ICC.⁸⁰³ The U.S. should withdraw all forces from the territory of states-parties and notify the U.N. that it will refuse to provide troops to peacekeeping operations upon their territory. An amendment to ***904** ASPA bolstering the Hague Invasion Clause⁸⁰⁴ might grant explicit notice that the transfer of a U.S. national to the ICC would create a state of war between the transferring state and the U.S.⁸⁰⁵

6. The U.S. should encourage all states to adopt similar classificatory mechanisms reflective of the civilized peoples/barbarian distinction to facilitate a coordinated *bellum americanum* against terror.⁸⁰⁶

Chart I presents three variant images of the relationship between law and war: the first depicts the legal absolutist view, in which war is wholly subsumed by and regulated by law; the second illustrates the nihilist position, in which law is irrelevant to war; and the third represents a rationalized IHL in which operations against honorable foes occur in the zone of intersection and are governed by the martial code, but operations against terrorists are conducted in the peripheral space *contra barbarum* where law does not reach war.⁸⁰⁷ In this third image, invocation of ACB directs soldiers to march across the line delineating the zone of intersection from the zone *contra barbarum* into total war against barbarians; by the same ***905** token, in the third image the border is permeable bidirectionally. Barbarians are invited to embrace the martial code, cease attacking civilians and engage soldiers in the zone of intersection.

***906 CHART 1: THREE IMAGES OF THE RELATIONSHIP BETWEEN LAW AND WAR**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
 TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
 TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*907 In sum, a rationalized IHL, given effect through the system of courts-martial but with the door open to parallel association with a reformed and delimited ICC, is the image best suited to humanizing war without neglecting civilizational obligations because it attaches practical legal consequences to the gross moral distinction between honorable soldiers and barbarians.

IV. Conclusions

The proposal for a rationalized IHL is the first major theoretical revision of the laws of war in decades, perhaps even a half-century,⁸⁰⁸ and change is invariably received by some as threatening. Legal absolutists, in their cupidity for a law-ruled world, may read into the call for a rationalized IHL an entreaty to the destruction of their avatar,⁸⁰⁹ as well as to the general *908 weakening of international law.⁸¹⁰ Some may attack as illiberal, imperialist,⁸¹¹ Islamophobic or even racist⁸¹² the argument that only the process of differentiation between combatants based upon the justice of the causes for which they fight *909 and the degree to which they observe IHL can defend civilization.⁸¹³ Others, disinclined to inject moral considerations into law, unwilling to agree upon an epistemology that enables us to discern what is right and wrong⁸¹⁴ and uncomfortable with revivification of the language of good and evil,⁸¹⁵ or unalterably distrustful of the moral fibre of soldiers, may cavil at the re-introduction of jus ad bellum considerations, particularly if members of the martial profession sit in judgment not only of their peers but of the causes for which their enemies take up arms. Further, the argument that any class of persons, no matter how reprehensible, can ever be stricken from the set of rights-bearing entities may offend those for whom natural law dictates that all individuals possess, by the bare fact of their *910 existence, an inviolable body of rights: for these critics, the proposed rationalization may seem a nihilistic Conradian plea to "Exterminate all the brutes!"⁸¹⁶ that tramples the maxim ex injuria jus non oritur⁸¹⁷ and leaves undesirable normative footprints in the sands of legal and moral history.⁸¹⁸ The proposal may strike others as the emotional sacrifice of law on the altar of expedience⁸¹⁹ and the open-ended bellicization of political life to fill a vacuum left by the demise of the Cold War,⁸²⁰ and thus a capitulation to terrorism.⁸²¹ Worst of all, *911 some may fear that the rationalization of IHL by Western democracies, particularly if promiscuously applied to regimes not objectively barbarous, will be prologue to a vicious spiral of subsequent, and genuinely barbaric, counter-"rationalizations" by rogue-states and terrorists.⁸²²

However, the best-laid plans of legal absolutists cannot bring to heel the world's most execrable, rapacious individuals, although, ironically, it is for them as law breakers, rather than for law followers, that all law is originally conceived.⁸²³ Reclassifying terrorists as barbarians is a pleonasm inasmuch as both terms describe counter-civilizational entities, but it bears repetition that terrorists are functional equivalents of the fifth century Vandals who sacked Rome and cast the West into 1000-years of darkness; they will not cease attempting to topple our civilization until they succeed or are destroyed.⁸²⁴ If terrorists *912 are not objectively evil, nothing and no one can ever be.⁸²⁵ The law-creating, law-abiding, peoples of the earth--a *913 designation inclusive of the vast majority of Muslims⁸²⁶--must choose between civilization and barbarism, and creation and implementation of policy instruments entail decisions that feed into that choice. If regulators simply cobble together more sources of law and foist them upon soldiers rather than identify and support rules and institutions that promote the primary ends law is intended to serve--the creation, sustenance, and manifestations of the values that preserve humanity against chaos--regulators become handmaidens of evildoers. Soldiers fighting a desperate struggle on behalf of a civilization yet to fully awaken to the magnitude of the threat deserve no less than that their acts and omissions, unless they legitimately fit into categories of war crimes or crimes against

humanity, be immunized by the official machinery of politics and law. The Private Ryans and Captain Ryans of this world are simply not enemies of all mankind; the Usama bin Ladens and their minions are this and more. Anti-civilizational criminals--those who deliberately set out to kill innocents en masse--do not deserve the entitlements of the laws they seek to ravage, yet evanescence of considerations of the justice of the cause for which combatants battle has utterly blurred moral distinctions and made possible the legal morass from which the events in the fictional scenario may well emerge. A slavish devotion to positive IHL, to which absolutists would commit us, would diminish respect for IHL⁸²⁷ and even threaten "to lose the law itself, *914 with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."⁸²⁸ The re-incorporation of traditional norms of martial custom, re-consideration of the justice of the causes for which combatants fight and re-acquisition of an empathetic understanding of the moral cauldron in which the subjects of regulation experience combat, are intended not to banish law from war but to rescue IHL before it withers into an elegy for the civilization it owed a duty *inter vivos*.⁸²⁹

Law cannot cure every ill by the mere fact of its existence. Ultimately, all legal regimes are aspirational in that they are enforceable only if there is power and will behind them. Moreover, the formal legal equality of states does not translate into support for international order.⁸³⁰ The empire of law requires an imperial power, and until it is disproven that the sole source of support for the enforcement of IHL is United States military power or the threat thereof,⁸³¹ it is counterproductive to alienate *915 the United States and forfeit its prodigious energies in the humanization of war by clinging to a talismanic insistence upon the ICC.⁸³² It is further irrational, and even morally irresponsible,⁸³³ to condemn United States opposition to the ICC as sovereigntist arrogance rather than hail a principled stand against the existential threat posed by Islamic terrorism armed with WMD. Simply put, leadership is essential, and not every pooling of sovereignty benefits the international community.⁸³⁴ The proposal to do so here is one the United States has rejected largely upon moral considerations that do not register with the cult of legal absolutists peddling the ICC, an institution threatening to become the next "smelly little orthodoxies . . . contending for our souls."⁸³⁵

It is confounding that a mere two years after September 11th, rather than express common resolve,⁸³⁶ the ardent consortium *916 championing the ICC⁸³⁷ will not concede that, absent a central executive, United States military operations (even if unauthorized by the UN) enhance the security of the entire international community,⁸³⁸ that agnosticism of real-world military operations should temper their absolutism and that the United States deserves a margin of appreciation in its titanic struggle.⁸³⁹ However, our civilization is in the crucible, and we must soberly face the fact that we no longer have the post-modernist luxury of pretending that morality (or normativity) and law are estranged cousins, or that all wars are equally unjust, or that it is beyond our ken to sift through the moral confusion engendered by sophists and autists who have enshrined their professed ignorance about the ultimate metaphysical foundations of justice in the provisions of modern IHL,⁸⁴⁰ to determine which of the causes for which combatants *917 fight are virtuous and which are vile. We need not become servants to law; rather, law must be made to serve us,⁸⁴¹ and IHL is not, any more than domestic law, a suicide pact.⁸⁴² Evaluating the rectitude of the cause for which combatants fight is far more essential to an ethically legitimate theory of IHL than an assessment of the methods and means they employ or a tabulation of the casualties that result. We need not navigate a moral maze or parse legal texts to assert that the cause to which the United States and its allies⁸⁴³ are committed--preserving the last best hope for human freedom and dignity--is infinitely more noble than that of the terrorists.⁸⁴⁴ Application of a differential legal standard in the war on terror is an act of moral indignation in the face of a great evil threatening all with a stake in humanity. All may seek and enjoy the protection of the laws, but those who do must themselves respect *918 the reciprocal rights of others. Legal absolutism invites catastrophe. The paradigmatic transformation toward a rationalized IHL that unabashedly lets slip the dogs of the *bellum americanum*⁸⁴⁵ is no parochial approach to the "laws of war;" rather, it is an affirmation of a universal vision of law with unbroken ties to moral reason and judgment.⁸⁴⁶

If we screw our civic and moral courage to the sticking point⁸⁴⁷ and rise to the "new height of vision" to which we were summoned, presciently, by the Russian Nobel laureate Alexander Solzhenitsyn a quarter-century ago,

will we see the world not merely as we would wish it to be but as it is?⁸⁴⁸ The barbarians are at the gates of civilization;⁸⁴⁹ they are evil and *919 mean us grievous harm. It falls to us to decide whether IHL is to be crafted into the battering ram that forces a breach or the sword that sweeps away the hordes, and whether the inheritance of future generations is to be a civilization wisely governed by law or a darkling plain⁸⁵⁰ haunted by the drifting ghosts of its humanizing promise.

Footnotes

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¹ David Hume, *An Enquiry Concerning the Principles of Morals* 20 (Open Court Publ'g Co. 1930) (1777).

² War is as old as humanity. See Lawrence H. Keeley, *War Before Civilization* 3-5 (1996) (examining anthropological research tracing war to before the origin of the human species); Claudio Cioffi-Revilla, *Ancient Warfare: Origins and Systems*, in 2 *Handbook of War Studies* 59 (Manus I. Midlarsky ed., 2000) (noting that, in every historical age, war has been admitted among the relations between peoples as a legitimate means of protecting rights and settling disputes).

³ Although the issue of whether an armed conflict is a "war" in the constitutional sense is relevant under United States law, the terms "war" and "armed conflict" have become essentially synonymous in international law. Edward K. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* 1 (1992). Both are employed in reference to the phenomenon of organized violence between contending political communities, whether such violence is directed across or within state borders. See Lawrence Freedman, *Introduction to War* 3 (Lawrence Freedman ed., 1994) (defining war as a state of law involving a high degree of violence in the relations between organized human groups).

⁴ See, e.g., St. Augustine, *City of God* 392 (Gerald G. Walsh et al. trans., Vernon J. Bourke ed., Image Books 1958) (1467) (contending that, despite its miseries, war is a state of affairs of which God approves); St. Thomas Aquinas, *Summa Theologica* 152-62 (Fathers of the English Dominion Province trans., Burns Oates & Washbourne Ltd. 1912) (same); Darrell Cole, [Death Before Dishonor or Dishonor Before Death? Christian Just War, Terrorism, and Supreme Emergency](#), 16 *Notre Dame J.L. Ethics & Pub. Pol'y* 81, 98-99 (2002) (contending that "we fail to be all that we are intended by God to be . . . when we refuse to fight just wars" and "soldiers are elevated by God through (war)").

⁵ See Thomas Hobbes, *Leviathan* 86-87 (Nelle Fuller ed., Encyclopedia Britannica, Inc. 1952) (1651) (describing natural condition of mankind as a state of perpetual war of all against all--"bellum omnium contra omnes"); Konrad Lorenz, *On Aggression* 271-72 (Marjorie Kerr Wilson trans., Harcourt, Brace & World, Inc. 1966) (1963) (suggesting a primitive force in man impels him to war); Niccolo Machiavelli, *The Prince* 21 (W.K. Marriott trans., Encyclopedia Britannica, Inc. 1952) (1513) (positing war as an evil necessary to the existence of the state); Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* 306-10 (2002) (suggesting human violence has

biological and cultural determinants). Liberation theorists, developing a parallel body of thought, suggest war is the vehicle through which “the embittered, the dispossessed, the naked of the earth, the hungry masses yearning to breathe free, express their anger, jealousies and pent-up urge to violence.” John Keegan, *History of Warfare* 56 (1994).

⁶ See generally Johann Caspar Bluntschli, *Das Moderne Kriegsrecht* (1866) (stating that war is an element of the world order established by God which fosters the noble virtues of man—courage, self-sacrifice, obedience); Keith L. Nelson & Spencer C. Olin, *Why War?* (1979) (“(War) fosters the noblest virtues of man, courage, self-denial, obedience to duty, and the spirit of sacrifice; the soldier gives his life. Without war the world would stagnate and sink into materialism.” (quoting letter from Helmuth von Moltke to J.K. Bluntschli (Dec. 11, 1880), in *Letters on War and Neutrality* 25 (Thomas H. Holland ed., 1909))).

⁷ See Keegan, *supra* note 5, at 46 (positing that war may be the product of the forceful perpetuation, against resistance, of culture, defined as “that great cargo of shared beliefs, values, associations, myths, taboos, imperatives, customs, traditions, manners and ways of thought, speech and artistic expression which ballast every society”).

⁸ See 1 Herbert Spencer, *Principles of Sociology* 490-91 (1882) (describing war as means for maintaining ethical health of nations and progressive evolution of species); Donald A. Wells, *The War Myth* 78 (1967) (noting that nineteenth century continentals analogized war to the process of national or cultural selection whereby the most fit civilization(s) would survive a contest with lesser civilizations and that this relentless war of extermination was essential to human progress).

⁹ See Keegan, *supra* note 5, at 58 (examining “(e)xpectations that . . . rising living standards, literacy, scientific medicine, the spread of social welfare” would trigger “the arrival of effective anti-warmaking attitudes in the world”).

¹⁰ See R.J. Rummel, *Death by Government* 13 (1994) (noting that in the last century alone, wars have claimed the lives of 203 million combatants and civilians and squandered vast fortunes).

¹¹ “War abolitionists,” committed to the view that the horrors of war can be mitigated only by its elimination, cling to the hope that “at some future point reason will prevail and all international disputes will be resolved by nonviolent means.” Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, *Army Law.*, Dec. 1997, at 4, 13. The Kellog-Briand Pact is a monument to this creed. See General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57 (renouncing recourse to war for the solution of international disputes). For many, the abolition of war is a Kantian imperative, outlawing the use of force against human beings. See Immanuel Kant, *Groundwork of the Metaphysic of Morals* 101 (H.J. Paton trans., 1964) (1785) (stating that one should always act so as to treat humanity “never merely as a means, but always at the same time as an end”). For a discussion of war abolitionism, see Frank Przetacznik, *The Philosophical and Legal Concept of War* 250 (1993).

¹² IHL, also known as the “laws of war,” is a set of “articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements” that serves as the normative and positive structure of legal relations during armed conflict. Michael Walzer, *Just and Unjust Wars* 44 (1977). IHL is thus related to, although distinct from, “military law,” defined as the “domestic, foreign, and international law associated with the planning and execution of military operations.” Robert L. Bridge, [Operations Law: An Overview](#), 37 *A.F.L. Rev.* 1, 3 (1994). Many ancient cultures, religions and belief systems developed rules distinguishing between combatants and noncombatants and limiting methods and means of warfare and, as such, the roots of IHL are “as old as war itself, and war is as old as life on earth.” Jean Pictet, *Development and Principles of International Humanitarian Law* 6-7 (1985); see also Theodor Meron, *Henry’s Wars and Shakespeare’s Laws: Perspectives on the Law of War in the Later Middle Ages* 7 (1993) (hereinafter Meron, *Henry’s Wars*) (describing regulation of

medieval warfare by a set of customs and canon laws known as the *jus armorum* (code of chivalry)); Lao Tzu, Tao Te Ching 34 (David Hinton trans., Counterpoint 2000) (citing ancient Chinese doctrine that he who delights in the slaughter of men cannot have a place in the State); Josiah Ober, Classical Greek Times, in *The Laws of War* 12 (Michael Howard et al. eds., 1994) (describing legal constraints of ancient Greek warfare); Karima Bennoune, Note, [As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence](#), 15 *Mich. J. Int'l L.* 605, 617-27 (identifying Islamic legal proscriptions on methods, means and objects of warfare). Still, limits on warfare remained largely customary as late as the Middle Ages, and the evolution of a positive regime of IHL traces to the late Renaissance scholars Grotius, Vattel and Bynkershoek, who carried forward medieval chivalric codes while interweaving theories of natural law, theology and secular morality. *Id.* at 211-13. The nineteenth and twentieth centuries witnessed the systematic codification of customary principles of IHL beginning with the Lieber Code, drafted by Francis Lieber, a law professor at Columbia University with sons in both the Confederate and Union armies, at the behest of President Lincoln. Kenneth J. Keith, [Rights and Responsibilities: Protecting the Victims of Armed Conflict](#), 48 *Duke L.J.* 1081, 1090 (1999). The Lieber Code established explicit rules regarding rights and duties of combatants and non-combatants, and in particular prisoners of war, applicable during the United States Civil War. See Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863) (hereinafter Lieber Code). The Lieber Code inspired imitations; states borrowed liberally from its provisions in crafting their own military manuals. Geoffrey Best, *The Restraint of War in Historical and Philosophical Perspective*, in *Humanitarian Law of Armed Conflict* 15 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (describing Lieber Code as the “Adam and Eve of all subsequent law of war manuals”); see Thomas Erskine Holland, *The Laws of War on Land* app. 1, at 72-73 (Scientia Verlag Aalen 1977) (1908) (listing states adopting military manuals incorporating the Lieber Code, including Britain, France, Spain, Italy and Portugal); Donald A. Wells, *The Laws of Land Warfare* 4 (1992) (noting near-direct translation of Lieber Code in military manuals of Germany, France and Russia). Over the next nine decades, IHL was progressively codified in treaties, now numbering in the dozens, the object and purpose of which has been to provide a conventional framework for the customary rules and principles evolving in the direction of greater protections for individuals. IHL is thus both the point of origin as well as the very core of human rights law. Theodor Meron, [The Humanization of Humanitarian Law](#), 94 *Am. J. Int'l L.* 239, 244 (2000) (hereinafter Meron, *Humanization*) (tracing complementary development of IHL and human rights law). The strand of IHL known as “*jus ad bellum*” or “Hague law” answers questions such as when resorting to warfare is permissible and what means and methods may be employed therein, whereas “*jus in bello*” or “Geneva law” specifies who and what are legitimate subjects of war. See William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*, 37 *Colum. J. Transatl. L.* 767, 770 (1999) (distinguishing between principle components of IHL). By strictly limiting, rather than expressly authorizing, certain forms of conduct in war, IHL is a “prohibitive” legal regime. Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerillas, and Saboteurs*, 28 *Brit. Y.B. Int'l L.* 323, 324 (1951). Several fundamental IHL principles have been distilled: 1) non-combatants are immune and entitled to active protection by belligerents; 2) a combatant rendered hors de combat by virtue of wounds or surrender may not be attacked; 3) the wounded and sick are the responsibility of the party in whose power they are located; 4) prisoners of war are entitled to basic rights and privileges, including immunity from reprisal; 5) all persons are entitled to be protected against torture and denial of judicial guarantees; 6) methods of warfare are limited and means which cause unnecessary suffering are prohibited and 7) distinctions must be drawn between civilian and military targets, with only the latter subject to attack. Pictet, *supra*, at 61-72.

¹³ See Bennoune, *supra* note 12, at 608 (noting that the essential goal of IHL is to place “humane restrictions” on war). Not all admit this possibility; for many, humanization of war requires its abolition. Meron, *Humanization*, *supra* note 12, at 240. However, the notion that wars can and should be limited by sacrificing some aspects of military expediency to the alleviation of suffering dates back to antiquity. See Pictet, *supra* note 12, at 6 (contending that “traces of a desire to attenuate the horrors of combat” can be located in earliest mankind); Telford Taylor, *Nuremberg and Vietnam* 20 (1970) (stating that “the concept that the ravages of war should be mitigated . . . by prohibiting needless cruelties” is an “instinct almost as old as human society”); Quincy Wright, *A Study of War* 160-61 (2d ed. 1965) (correlating “rise of a civilization” with legal regulation of war).

¹⁴ IHL is an ongoing and intensive process of international deliberation and negotiation oriented toward the development and codification of formal rules restricting the methods and means of war and protecting certain persons and things from attack. R.C. Hingorani, *Prisoners of War* 195 (1982). Evidence is discernible in the development of international instruments, the jurisprudence of international and domestic tribunals, state practice

and statements by government representatives.

¹⁵ Prior to the advent of the modern IHL regime in the nineteenth century, military strategists and natural law theorists insisted that the “humanization” of war could only be obtained in the absence of legal regulations on the ground that mitigating the intensity of war would enhance its social acceptability and thereby prolong it. See, e.g., Lieber Code, *supra* note 12, sec. II, para. 29 (“The more vigorously wars are pursued the better it is for humanity. Sharp wars are brief.”); Walzer, *supra* note 12, at 47 (citing Prussian General von Moltke for the proposition that the “greatest kindness in war” is not the mitigation of combat but the swift defeat of an enemy). Natural law critics of the legalization of war also base their arguments on efficiency considerations, maintaining that the odds of success in war are inversely proportional to the degree of adherence to legal restraints on the conduct of military operations, as well as the absolute right to engage the enemy in any manner with any means. *Id.*; see also Stephanie Gutman, *The Kinder, Gentler Military* 275 (1999) (arguing that in combat the “fiercer, angrier, most-blood-lusting force will win” and that armies must be guided not by law but rather “driven by . . . a killer instinct”). A shrinking number of commentators still rejects much of the IHL canon as an infeasible, if philosophically attractive, attempt to “shift the balance established between military necessity and humanitarian principles in such a way as to hamper the ability of states to use military force.” Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 Va. J. Int’l L. 108, 146 (1985).

¹⁶ See Robert L. O’Connell, *Of Arms and Men* 24 (1998) (noting anthropological research suggesting an inclination to “fight by the rules” and limit war is an emotional vestige of intraspecific combat within groups of our hominid ancestors).

¹⁷ See Hingorani, *supra* note 14, at 6 (highlighting formal recognition of obligations *erga omnes* under IHL); J.M. Spaight, *War Rights on Land* 4 (1911) (observing that, by the turn of the twentieth century, “no nation . . . has not rendered homage to the laws of war”); Walzer, *supra* note 12, at 33 (suggesting that recognition of legal responsibility for the conduct of military operations has undergone universalization in the post-United States Civil War era)

¹⁸ See Taylor, *supra* note 13, at 19 (“War consists largely of acts that would be criminal if performed in time of peace . . . (but are) not . . . because the state of war lays a blanket of immunity over the warriors.”). For discussion of the distinction between murder and the taking of life in war, see Jeffrey F. Addicott, [Proposal for a New Executive Order on Assassination](#), 37 U. Rich. L. Rev. 751, 761-62 (2003).

¹⁹ The term “war crime” refers generally to “one of a list of acts generally prohibited by treaty but occasionally prohibited by customary law, and . . . committed during an armed conflict . . . by a perpetrator linked to one side of the conflict.” Fenrick, *supra* note 12, at 771. War crimes are understood to be that limited category of acts committed during armed conflict that are prohibited without reference to the **status** of a belligerent. See Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 Case W. Res. J. Int’l L. 205, 214 (1977).

²⁰ See Geoffrey Best, *War and Law Since 1945*, at 182-84 (1994) (tracing earliest use of “war crimes” to Nuremberg).

²¹ See Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 Law & Contemp. Probs., Autumn 1996, at 153 (noting that war crimes are “repulsive, heinous acts” and that “brutal acts of plunder, torture, rape, and murder that (IHL) forbid(s) . . . appall and offend all of humanity.”).

²² Explanatory theories posit that states comply with IHL in order to preserve their reputations, increase the potential for reciprocity, avoid reprisals and serve the interests of justice. Hingorani, *supra* note 14, at 192-93 (enumerating

hypotheses).

²³ Much of IHL has been constructed as absolute, unqualified prohibitions on conduct in war that do not permit derogation even in extremis and do not take into consideration the relative justice of the cause. See Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War* 161 (1999) (stating that IHL “prohibit(s) (violations) unequivocally, in all circumstances and without exceptions”). The notion that the substantive content of IHL is the product of a universal consensus--the “general consent of mankind”--supplies the categorical imperative for such absolutism; Walzer, *supra* note 12, at 230 (noting that “the rules of war are a series of categorical and unqualified prohibitions . . . that . . . can never rightly be violated even in order to defeat aggression”). See generally Immanuel Kant, *Fundamental Principles of the Metaphysic of Ethics* (Thomas Kingsmill Abbott trans., Longmans, Green & Co. 1955) (1873) (elaborating the absolute proscription of killing human beings in all circumstances). While the absolutist school has much to argue in its favor--namely clarity, consistency and the perception of moral superiority in the sense that the amelioration of the rigors of war may best be achieved by refusal to permit any derogations whatsoever lest loopholes become escape hatches for crafty but malevolent actors--some commentators suggest that the practical exigencies of actual military operations are such that absolutism may be ill-suited even to absolutist purposes. See, e.g., Walzer, *supra* note 12, at 231 (suggesting an alternative, utilitarian doctrine “that stops just short of absolutism” and “might be summed up in the maxim: do justice unless the heavens are (really) about to fall”). Others simply reject the notion that IHL is akin to other species of law, contending instead that “(t)he law of war is different (from labor or environmental law) in that there are more gray areas than black and white.” William Hays Parks, *The Law of War Adviser*, 18 *Mil L. & L. War Rev.* 357, 385 (1979).

²⁴ See Best, *supra* note 20, at 290-91 (characterizing the observance of IHL as “indifferent and lamentable”); see also Osiel, *supra* note 23, at 162 (stating that “atrocious misconduct has been, if not a virtual constant, then at least persistent and perennial”); Walzer, *supra* note 12, at 232 (indicating that violations of IHL are routinely committed even by “morally serious” soldiers who are capable of differentiating right from wrong). As empirical evidence of the frequent violation of IHL, note the creation of judicial fora for the specific purpose, inter alia, of prosecuting violations of IHL that occurred in the former Yugoslavia and Rwanda in the 1990s. See Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mfg., U.N. Doc. S/RES/827 (1993).

²⁵ Obligations under IHL traditionally extended only so far as to the passage of domestic legislation and the domestic investigation and prosecution of offenses. See, e.g., [Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3317](#) (limiting international legal obligation of parties to the passage of the necessary domestic legislation to provide for effective punishment of offenders). Enforcement of IHL was left subject to affected states that, in many instances, ordered or tolerated systemic violations of IHL. Hingorani, *supra* note 14, at 197. States loathe on political grounds to sanction their military personnel for executing state policies have been even less amenable to exposing themselves to embarrassment resulting from the extradition of individuals accused of violating IHL. Best, *supra* note 20, at 396.

²⁶ See Solf & Cummings, *supra* note 19, at 205 (surveying modalities employed in the suppression of war crimes). For a definition and discussion of “reprisal,” see *infra* note 134.

²⁷ Prior to the establishment of international criminal tribunals in the 1990s, the number of prosecutions of war criminals could be counted on the fingers of one’s hands. See Christine van den Wyngaert, *The Suppression of War Crimes Under Additional Protocol I*, in *Humanitarian Law of Armed Conflict*, *supra* note 12, at 201 n.18 (reporting the paucity of prosecutions enforcing IHL between 1945 and 1988). In all likelihood, the majority of war crimes go unreported. See Best, *supra* note 20, at 397 (opining that most war crimes go unnoticed, and “what they amount to as a proportion of those (that are reported) . . . defies calculation”). For a survey of various mechanisms employed or proposed to enhance enforcement of IHL, see Jamie Mayerfeld, *Who Shall be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, 25 *Hum. Rts. Q.* 93 (2003); see also

Adam Roberts, [The Laws of War: Problems of Implementation in Contemporary Conflicts](#), 6 Duke J. Comp. & Int'l L. 11, 19-20, 30, 35, 38-40 (1995).

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Explanations for compliance deficiencies cluster in several camps. Legal realists contend that existing enforcement mechanisms offer inadequate support for IHL because international law generally, and IHL specifically, is structurally indisposed to the governance of state behavior in an anarchical system wherein power remains the primary currency and decisions with respect to the conduct of war are rendered with a view toward power maximization rather than adherence to law; where violation of IHL would maximize power, it is therefore optimal to do so and IHL is thus little more than the codification of abstract aspirations certain to be disappointed in practice. See Keegan, *supra* note 5, at 63 (summarizing realist pessimism regarding the malleability of the nature of the international system by noting that “(t)he most important limitations on warmaking . . . have always lain beyond the will or power of man to command”); Hans J. Morgenthau, *Politics Among Nations* 279-314 (Hans J. Morgenthau & Kenneth W. Thompson eds., 5th ed. 1973) (expressing deep skepticism with regard to the capacity for law to trump power in international relations, in particular in the issue area of armed conflict); Raymond Aron, *The Anarchical Order of Power*, in *Conditions of World Order* 25 (Stanley Hoffman ed., 1968) (describing the international system as an “anarchical order of power” where might equates with right and law is irrelevant). Some realist commentators contend that IHL itself contributes to the perpetuation of war by making it “more acceptable, more endurable.” See Frits Kalshoven, *Belligerent Reprisal* (1991) (suggesting that rather than limit the methods and means of war, those who would make the phenomenon more rare ought to delegatize international conflict to the point that they become “unbearable beyond endurance” and therefore less rational as a policy instrument). Law and economics realists reject the assumption that IHL is governed by a desire to humanize war and suggest to the contrary that laws of war are merely “devices for limiting the efficiency of military technology” and thereby equalizing power disparities between the powerful and the weak; as such, it is not in the interest for the powerful to consent to or comply with it. Eric Posner, [A Theory of the Laws of War](#), 70 U. Chi. L. Rev. 297 (2003).

Another school of IHL skeptics, just war theorists, argue that states fighting in a just cause, defined generally as a war initiated by legitimate authority for the sole purpose of checking unjust aggression, are obligated to derogate from the positive laws of war to the extent necessary to triumph over unjust adversaries. See Aron, [supra](#), at 27-52. In effect, the justice of the cause sanctions and even necessitates violations of IHL, and moderation in the struggle against terrorists and rogue states is therefore vice rather than virtue. See Francisco de Vitoria, *On the Law of War*, in *Political Writings* 295-305 (Anthony Pagden & Jeremy Lawrence eds., 1991) (suggesting that the highest form of morality when threatened by transcendent evil is not adherence to legal regulation, but victory). Just war theory is considerably more complex than herein presented. For a detailed discussion, see generally Walzer, *supra* note 12.

In turn, behavioral theorists fix upon the tension between the rational self-interest of combatants and the self-abnegation demanded of them by an oft-irrational and incoherent legal regime promulgated without reference to any broad theory of human behavior in combat. For behavioralists, it is axiomatic that when confronted by a choice between self-preservation and violation of IHL, many “(o)therwise law-abiding individuals will commit crimes in order to save their own lives; national governments will likewise break treaties and international rules, if necessary, for their own preservation.” Taylor, *supra* note 13, at 33; Walzer, *supra* note 12, at 14-15 (“The moral theorist . . . must come to grips with the fact that his rules are often violated or ignored . . . (because) to men at war, (these) rules often don’t seem relevant to the extremity of their situation.”). Behavioralists also seize upon the propensity for soldiers to exhibit irrational responses to the stressors of combat and, in so doing, to transcend the rules of IHL. Osiel, *supra* note 23, at 162 (suggesting that the “frenzy of combat elicits primordial passions that are nearly impossible to restrain,” such as a “soldier’s sudden impulse to avenge a close comrade who was killed, perhaps through an enemy’s act of deception”). Empirical data supports the premise that compliance with IHL is a function of its conformity to the normative conventions and practical necessities of soldiers. *Id.* at 31-32 (identifying “widespread disregard” for restrictive rules of engagement that enhanced the threat to United States ground forces during the Vietnam War as foundation for the assertion that “(i)t has since become an article of faith among U.S. officers that these rules placed American forces in undue danger and were therefore tactically imprudent (and morally indefensible)”); Mark S. Martins, [Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering](#), 143 Mil. L. Rev. 3, 5 (1994) (asserting that, rather than cleave closely to external legal constraints, “when the shooting starts, soldiers follow those principles that . . . potent experiences have etched into their minds . . . (and that) conform both to tactical wisdom and to relevant legal constraints on the use of force” (emphasis added)). By failing to incorporate exceptions for soldiers’ instincts and passions, the absolutist regime of IHL has charted an irrational course toward the rocky shoals of human nature. See Best, *supra* note 20, at 291 (stating that the “whole IHL enterprise is objectively paradoxical and . . . far-fetched: war on the one hand, human nature on the other”);

Walzer, *supra* note 12, at 47 (conceding the facial irrationality and “alien”-ness of much of IHL in relation to the experience of soldiers); Richard Wasserstrom, *The Responsibility of the Individual for War Crimes*, in *Philosophy, Morality, and International Affairs* 47, 60 (Virginia Held et al. eds., 1974) (contending that “the laws of war are not a rational, coherent scheme of rules and principles. Were there an intelligible rationale to the laws of war, . . . the soldier (could) attempt to determine which of his actions were war crimes and which were not.”). In short, for behaviorists, an absolute obligation to self-sacrifice is at odds with the instinct to self-preservation, and IHL is “a bunch of rules made up by lawyers who sit behind a desk, rather than by real soldiers who have felt the sting of battle.” Morris, *supra* note 11, at 4.

²⁹ H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 *Brit Y.B. Int’l L.* 360, 382 (1952) (“(I)f international law is, in some ways, at the vanishing point of law, the law of war is . . . at the vanishing point of international law.”). In 1986 the International Conference of the Red Cross (ICRC) lamented the “disturbing decline in respect for (IHL).” *Respect for International Humanitarian Law in Armed Conflicts and Action by the ICRC for Persons Protected by the Geneva Conventions*, ICRC Res. 1 (1986).

³⁰ See Eric L. Chase, *Fifty Years After Nuremberg: The United States Must Take the Lead in Reviving and Fulfilling the Promise*, 6 *USAF J. Leg. Stud.* 177, 182 (1995-96) (attributing ineffective enforcement of IHL post World War II--a “betrayal” and an assault on the Nuremberg process--in large measure to Soviet machinations in the U.N. Security Council that privileged political objectives at the expense of justice).

³¹ Advocates of IHL concentrate their labors on ensuring that states investigate and prosecute, or extradite, their own nationals for violations of IHL. Philippe Kirsch, *Introduction to Reflections on the International Criminal Court* 9 (Herman A.M. von Hebel et al. eds., 1999) (hereinafter *Reflections*). Enhancing universal respect for, and compliance with, human rights law as a regime independent from political considerations is the ultimate objective. Best, *supra* note 20, at 399-400 (stating that a fundamental objective of IHL advocacy is the creation of supranational institutions with the “authority and power so universally effective and irresistible that no national or regional interest will be able to thwart . . . the principles of the law”).

³² See [Rome Statute of the International Criminal Court, July 17, 1998, art. 1, U.N. Doc. A/CONF.183/9 \(1998\)](#), 37 [I.L.M. 999 \(hereinafter Rome Statute\)](#) (establishing the ICC as a “permanent institution”). The subject of a permanent international criminal court was first visited in the aftermath of World War I when, in 1920, the League of Nations appointed an Advisory Committee of Jurists to examine a High Court of International Justice with jurisdiction “to try crimes against international public order and the universal law of nations.” Herman von Hebel, *An International Criminal Court--A Historical Perspective*, in *Reflections*, *supra* note 31, at 16-17. Although a commission was appointed by the Allies to prepare the prosecution of Kaiser Wilhelm II and other German defendants for war crimes related to the invasion of neutral Belgium, unrestricted submarine warfare and extrajudicial killing of POWs, the proposed High Court did not come to pass. *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 *Am. J. Int’l L.* 95, 117 (1920). In 1943 the U.N. War Crimes Commission was established to prepare the trial of Axis war criminals and, on August 8, 1945, the Allies created the Charter of the International Military Tribunal. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal*, Aug. 8, 1945, 59 *Stat.* 1544, [82 U.N.T.S. 27](#) (hereinafter *Charter of the IMT*). Allied Control Council Law Number 10 of December 20, 1945, granted jurisdiction to the IMT to try Nazi defendants charged with crimes against peace, war crimes and crimes against humanity, and the first judgment was rendered in October 1946. von Hebel, *supra* note 32, at 19-21. However, the IMT mandate was terminated after the Nuremberg trials and, although in 1981 the United Nations General Assembly authorized the International Law Commission to codify international crimes as a precursor to a permanent international criminal court, the subject, as a practical matter, lay dormant for decades. *Id.* at 24-25; see also S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg., ¶ 13, U.N. Doc. S/RES/670 (1990) (suggesting that criminal liability for violations of IHL with respect to the Iraqi invasion of Kuwait would attach to individuals but demanding no specific enforcement); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991); S.C. Res. 686, U.N. SCOR, 46th Sess., 2978th mtg., U.N. Doc. S/RES/686 (1991) (opting to confine criminal responsibility for violations of IHL to states).

In 1993 and 1994, the U.N. Security Council, acting under Chapter VII of the Charter to Restore International Peace and Security, created ad hoc tribunals with jurisdiction to punish individuals for violations of IHL occurring in the territory of the former Yugoslavia and Rwanda. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/25704 (1993) (hereinafter ICTY); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) (hereinafter ICTR). Champions of international criminal tribunals “rejoice(d) that (for the first time) . . . a person suspected of (violations of IHL) may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming . . . from all continents of the world.” *Prosecutor v. Tadic*, 1995 I.C.T.Y. IT-94-1-AR72, ¶ 62 (Oct. 2) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

³³ See Rome Statute, *supra* note 32, art. 25 (providing for criminal responsibility for commission of crimes within ICC jurisdiction whether committed “as an individual, jointly with another or through another person”). Although individual criminal responsibility for violations of IHL was arguably a principle of customary international law prior to World War II, the ICC is the first permanent international tribunal with a statutory basis for jurisdiction over individual criminal defendants.

³⁴ The Rome Conference commenced on June 15, 1998, and five weeks of intense negotiations ensued during which a “Like-Minded Group” of over eighty militarily weak states, committed to a powerful court and supported by an array of NGOs such as Human Rights Watch and the ICRC, emerged in opposition to a “Third Group of States,” led by the United States and other members of the Security Council who were concerned about the potential for a court with overbroad jurisdiction. Kirsch, *supra* note 31, at 2-3. Multiple United States jurisdictional amendments that would have limited prospective jurisdiction were defeated. See Mahnouch H. Arsanjani, *Reflections on the Jurisdiction and Trigger-Mechanism of the International Criminal Court*, in *Reflections*, *supra* note 31, at 60 (describing defeat of United States jurisdictional amendment requiring consent of state of nationality of accused); Melissa K. Marler, [The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute](#), 49 *Duke L.J.* 825, 832 (1999) (describing overwhelming defeat of joint United States-Indian jurisdictional amendment that would have permitted the state of nationality to declare that its accused national committed the crime in pursuit of official duties and thereby prevented the ICC from exercising jurisdiction in the absence of a Security Council referral). Although a Third Group succeeded in amending ICC jurisdiction to permit a seven-year exemption from war crimes, the tide of United States influence was forced back by a consortium of Like-Minded states and NGOs.

³⁵ The Rome Statute was adopted by a non-recorded vote of 120 in favor, seven against, and four abstentions on July 17, 1998. See Press Release, United Nations, *Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court* (July 17, 1998), at <http://www.un.org/icc/pressrel/rom22.htm>. The United States, Iraq, Libya, Sudan, Yemen, China and Israel voted against. Anne-Marie Slaughter, *Memorandum to the President, in Toward an International Criminal Court?* 7 (Alton Frye ed., 1999).

³⁶ The signing of the Rome Statute in July 1998 was heralded as a long-awaited milestone in the progressive erosion of the consent-based system of state sovereignty. In the ICC, proponents see a future wherein states will ensure that violators of IHL are prosecuted or extradited and the enforcement of IHL will deter would-be transgressors, leading ultimately to greater peace. Kirsch, *supra* note 31, at 9.

³⁷ Article 5 of the Rome Statute provides that the ICC has jurisdiction only over “the most serious crimes of concern to the international community as a whole.” See Rome Statute, *supra* note 32, art. 5. Moreover, ICC jurisdiction is limited to cases arising out of armed conflict and does not reach acts committed during “isolated and sporadic acts of violence.” *Id.* art. 8(2)(d). The Rome Statute thus does not formally criminalize all violations of human rights but rather is addressed exclusively to serious violations of IHL. See Meron, *Humanization*, *supra* note 12, at 265. Accordingly, Articles 6-8 create jurisdiction solely over genocide and specifically enumerated lists of crimes against humanity and serious war crimes. Rome Statute, *supra* note 32, arts. 6-8.

³⁸ Article 126 provides that the ICC would come into existence sixty days after the sixtieth ratification and thus the statute entered into force on July 1, 2002. See United Nations Treaty Collection, Rome Statute of the International Court, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (listing ratifications). For a discussion of the structure of the ICC, see generally Robert Cryer, Commentary on the Rome Statute for an International Criminal Court: A Cadenza for the Song of Those Who Died in Vain?, 3 J. Armed Conflict L. 271 (1998).

³⁹ During the early 1990s, Congress produced aspirational language supporting an international criminal court. See, e.g., 103 H.R.J. Res. 89, 105th Cong. (1997) (calling on the President to “continue to support and fully participate in negotiations . . . to . . . establish an international criminal court”). The Ambassador-at-Large for War Crimes Issues, David Scheffer, indicated a firm executive commitment to implementing this “sense of Congress.” Foreign Relations Nominations: Congressional Testimony Before the U.S. Senate Comm. on Foreign Relations, Federal Document Clearing House, July 15, 1997. However, determined legislative hostility to the ICC had manifested as early as 1994. See 140 Cong. Rec. S96, 100 (daily ed. Jan. 26, 1994) (offering Amendment No. 1254, proposed by Senator Jesse Helms, to the Department of State Authorization Act of 1994 which, although tabled, stated as its purpose “to strike all language . . . relating to support for an international criminal court”). As international momentum in support of the ICC developed in 1998, Senator Helms pronounced the ICC Treaty “dead on arrival” at the Senate Foreign Relations Committee if the United States did not retain the power to veto an indictment. See Cong. Press Release, Helms Declares U.N. Criminal Court “Dead-on-Arrival” in Senate Without U.S. Veto (Mar. 26, 1998). Helms further advised that the creation of “any permanent judiciary within the U.N. system would be totally inappropriate, inasmuch as . . . it would grant the U.N. a principal trapping of sovereignty.” *Id.* Many legislators joined in the characterization of the ICC as a “monster that must be slain.” See Jesse Helms, Personal View: Slay This Monster, *Fin. Times*, July 30, 1998, at 12. Subsequent to promulgation of the Rome Statute, congressional Republicans developed a four-point action plan: 1) withdrawal of United States troops from any state ratifying the ICC, 2) veto any [Security Council referral to the ICC](#), 3) [withholding of funds to the ICC](#) and 4) [revision of Status of Forces Agreements to preclude extradition of United States military personnel to the ICC](#). Symposium, [Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime](#), 21 *Mich. J. Int’l L.* 655, 754 (2000) (hereinafter Symposium). Congressional Democrats have introduced legislation supporting the ICC, but none of their proposals have enjoyed significant support. See American Citizen’s Protection and War Criminal Prosecution Act of 2001, S. 1296, 107th Cong. (2001) (introduced by Sen. Christopher Dodd, a Democrat from Connecticut, on August 1, 2001); H.R. 2699, 107th Cong. (2001) (introduced by Rep. William Delahunt, a Democrat from Massachusetts, on August 2, 2001). Executive opposition has found expression in statements from senior Department of Defense officials who, in measured fashion, have sought to limit the criminal exposure of United States military personnel. See Department of Defense News Briefing, American Forces Press Service, Remarks at NATO Headquarters, Brussels, Belgium (June 11, 1998) (expressing, in a statement by Defense Secretary William Cohen, concerns that the ICC would compromise United States interests in providing “one hundred percent protection” to its forces serving overseas); see also Department of Defense News Briefing (Sept. 14, 2000) (hereinafter DOD Briefing) (“We still don’t think that the ICC in its current configuration is the right thing for the United States to sign on to.”).

⁴⁰ See Marcella David, [Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law](#), 20 *Mich. J. Int’l L.* 337, 357 (1999) (conceding possibilities for politicization of ICC by a “rogue prosecutor(”)”); [Michael L. Smidt, The International Criminal Court: An Effective Means of Deterrence?](#), 167 *Mil. L. Rev.* 156, 200 (2001) (stating that a “politicized ICC . . . could become a sort of human rights advocate, responsive to any and all complaints regardless of the source or seriousness of the allegations”). The election of Luis Moreno Ocampo, prosecutor of Latin American military personnel in highly politicized contexts, as first Chief Prosecutor, is unlikely to allay such concerns. Moreno Ocampo Named ICC Chief Prosecutor, *Harvard University Gazette*, Apr. 24, 2003, at 8.

⁴¹ Concerns abound that the ICC might be pressed into service to check United States influence through the malicious prosecutions of United States military personnel by states parties jealous of United States wealth and power. See, e.g., Robert Kagan, *Europeans Courting International Disaster*, *Wash. Post*, June 30, 2002, at B7 (suggesting that, as

the “dominant economic . . . and military force,” the United States is particularly vulnerable to the machinations of weaker states that would manipulate the ICC to bring unfounded criminal charges against United States military forces to neutralize United States power); Marler, *supra* note 34, at 833 (noting United States and French concerns about potential for politically-motivated prosecutions); Madeleine Morris, [Universal Jurisdiction in a Divided World](#), 35 *New Eng. L. Rev.* 337, 338 (2001) (describing politically motivated prosecution as a weapon in waging interstate quarrels); Bill Newill, Legal Scholars Issue Principles on War Crimes, Record (Bergen County, N.J.), July 23, 2001, at A3 (quoting Cherif Bassiouni, principal drafter of Rome Statute, as conceding the “very real possibility” of political ICC prosecutions). Experience raises the question of whether adjudication of violations of IHL is invariably a political exercise. Wells, *supra* note 12, at 119 (noting that many legal scholars believe World War II tribunals lacked any basis in IHL because no precedent existed declaring conspiracy to wage aggressive war a crime, “following orders” was a permissible defense and law was applied *ex post facto*); The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley & the Centre for Human Rights, University of Sarajevo, [Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors](#), 18 *Berkeley J. Int’l L.* 102, 107 (2000) (hereinafter Human Rights Center & Centre for Human Rights) (claiming ICTY is “plagued by a crisis of legitimacy”). See generally Anthony Sammons, [The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts](#), 21 *Berkeley J. Int’l L.* 111 (2003) (warning against dangers of overreach of domestic courts applying universal jurisdiction to reach extraterritorial violations of IHL). Moreover, concerns about politicization extend to the judges. Darin R. Bartram & David B. Rivkin, Jr., The ICC’s First False Step, *Wall St. J.*, Feb. 17, 2003, at 18. The eighteen ICC judges enjoy broad powers but are without general guidance on the legal principles that will inform their decisions and are not directly accountable to states. Colin Warbrick, *International Criminal Courts and Fair Trial*, 3 *J. Armed Conflict L.* 45, 45 (1998). But cf. Ruth Mackenzie & Philippe Sands, [International Courts and Tribunals and the Independence of the International Judge](#), 44 *Harv. Int’l L.J.* 271, 284 (2003) (suggesting states exercise significant control over international judicial bodies).

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International law consists of treaty-based as well as customary sources of law. See Statute of the International Court of Justice, art. 38, 59 Stat. 1055 (1945) (enumerating sources of international law as treaties, custom, general principles and the opinions of expert commentators). Customary international law (CIL) evolves from the practice of states consistent with the subjective understanding that such practice is legally obligatory. [North Sea Continental Shelf \(F.R.G. v. Den.; F.R.G. v. Neth.\)](#), 1969 *I.C.J.* 3, 4 (Feb. 20). State practice, particularly by directly affected states, is the most concrete element. Michael Akenhurst, Custom as a Source of International Law, 47 *Brit. Y.B. Int’l L.* 18, 18 (1977). To become binding, the practice must be consistent, settled and uniform. Prosper Weil, [Towards Relative Normativity in International Law?](#), 77 *Am. J. Int’l L.* 413, 433 (1983). The progressive development of IHL has proceeded largely by codification of the customs of soldiers. A.P.V. Rogers, *Law on the Battlefield 2* (1996). It is universally accepted that the foundational principles of IHL are necessity, proportionality and distinction. Still, it is arguable that much of the substantive content of the more hortatory declarations and conventions has not yet passed into the corpus of customary IHL. The substantive provisions of military manuals vary widely from one state to another, suggesting the absence of a body of custom widely accepted by states. Although the ICJ has specifically addressed the question of the requisite degree of consistent practice necessary to constitute custom, determining that it need not be universal, no authoritative judicial pronouncement exists to delineate the precise boundaries of customary IHL. See [Military and Paramilitary Activities in and Against Nicaragua \(Nic. v. U.S.\)](#), 1986 *I.C.J.* 14, 98 (June 27) (“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.”). Moreover, nearly all states are members of IHL treaties; there are no non-parties to whom one can refer to determine whether customary IHL obligations are operative. See [North Sea Continental Shelf](#), 1969 *I.C.J.* at 5 (stating that, although little support for the customary legal basis of a norm may be found in the conduct of state parties where state parties follow a practice solely in accord with treaty obligations, if non-parties are doing so it is likely the result of a customary obligation); Meron, *Humanization*, *supra* note 12, at 247 (noting that, although the legal obligations of IHL treaties were once limited to parties, the crystallization of the substance of those treaties as customary IHL, and the accession of almost all states to those treaties has rendered moot questions as to the applicability of such treaties as between non-parties). Furthermore, even manuals of legally sophisticated states do not identify provisions of various IHL conventions they believe declaratory of custom. Kwakwa, *supra* note 3, at 24-32. Worse, few studies pointedly address the formation of customary IHL, nor do various international judicial decisions discuss the process by which conventional norms are transformed into CIL. As a result, the substantive boundaries of customary IHL are subject to constant contestation. See *Du Preez v. Truth and Reconciliation Comm’n*, 1997 (3) SALR 204, 233 (A) (“Selecting what is and what is not

part of custom is . . . fraught with political considerations.”); Stuart Walters Belt, [Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas](#), 47 Naval L. Rev. 115, 148 (2000) (indicating that the determination and application of customary norms of IHL is a contested process). Human rights advocates insist that the expanding body of norms and principles articulated since the late 1970s constitutes a body of CIL directly applicable to the battlefield. Most states, however, have elected to incorporate, in criminal codes and military manuals, only those rules and principles for which there is evidence of widespread state practice. Meron, *Humanization*, supra note 12, at 247 (suggesting that human rights groups take an “idealistic” position with regard to customary IHL that even otherwise sympathetic experts find “problematic”). Some commentators restrict customary IHL further, stating that it is official statements that delineate the scope and force of legal obligation. R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 Brit Y.B. Int’l L. 275, 300 (1965-66) (stating that the “firm statement by the State of what it considers to be the rule (of customary IHL) is far better evidence of its position than what can be pieced together from (its) actions . . . in a variety of contexts”); cf. [Nuclear Tests \(N.Z. v. Fr.\)](#), 1974 I.C.J. 457, 472 (Dec. 20) (holding that official declarations of CIL can legally obligate a state). In short, the content of customary IHL is nebulous and insufficiently articulated so as to give notice. See Paul Christopher, *The Ethics of War and Peace* 167 (1994) (noting that the lack of clarity as to the content of customary IHL makes it “virtually impossible . . . for soldiers to know with any surety whether certain orders they might receive are lawful or not”). The Rome Statute restates rules and principles of IHL as sources of law. See Rome Statute, supra note 32, art. 21(1) (providing that primary sources of applicable law are the “Elements of Crimes and its Rules of Procedure and Evidence” and “applicable treaties and the principles . . . of the international law of armed conflict”). Despite the amorphousness of custom-based IHL, Article 21 endows the ICC with competence to pronounce the “principles of the international law of armed conflict.” Id. Moreover, although Article 9 purports to establish a textual basis for specific elements, amendment of the Statute could enable a two-thirds majority of states parties to define new crimes without reference to practice, and further provides that enumerated elements are not dispositive but merely intended to “assist” the ICC in its “interpretation” of Articles 6-8. Id. art. 9(1). By arrogating to itself the power to define custom, the ICC may displace state sovereignty. Adriaan Bos, *The International Criminal Court: Recent Developments*, in *Reflections*, supra note 31, at 43 (stating that the Rome Statute “must prevail (in a conflict with domestic law)”). Due to this open grant to redefine customary IHL, the United States is unwilling to subject its armed forces to ICC jurisdiction.

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The overwhelming bulk of death and destruction incident to war is governed not by positive IHL but rather by “military necessity,” the slipperiest, most elastic concept in the IHL canon. Burrus M. Carnahan, [Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity](#), 92 Am. J. Int’l L. 213, 219 (1998). Traditionally, the customary IHL principle of necessity implicitly authorized all operations undertaken in the immediate interest of self-preservation, provided a minimal threshold requirement--that they be intended and tended directly toward the military defeat of the enemy--was satisfied. Rogers, supra note 42, at 5 (defining military necessity as “the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for . . . the complete submission of the enemy”). However, by World War II the range of actions considered permissible by necessity had narrowed. See *The Krupp Trial*, in 10 UN War Crimes Comm’n, *Law Reports of Trials of War Criminals* 138-39 (William S. Hein & Co. 1997) (1948) (retreating from the general authorization of military operations by reference to military necessity in holding that “(t)o claim that (IHL) can be wantonly--and at the sole discretion of any one belligerent--disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws . . . of war entirely”); see also U.S. Dep’t of Army, *Field Manual 27-10, The Law of Land Warfare* (1956) (hereinafter *The Law of Land Warfare* (1956)) (defining military necessity as “that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible” (emphasis added)); *The German High Command Trial*, in 12 UN War Crimes Comm’n, supra, at 93 (holding that if necessity constituted general authorization for all belligerent acts it “would eliminate all humanity and decency and all law from the conduct of war and it is a contention which (the) Tribunal repudiates as contrary to the accepted usage of civilized nations”); *The Hostage Case*, in 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1255-56 (1950) (hereinafter *The Hostage Case*) (“Military necessity or expediency do not justify a violation of positive rules. (IHL) is prohibitive law.”); William V. O’Brien, *The Law of War, Command Responsibility and Vietnam*, 60 Geo. L.J. 605, 616 (1972) (stating that military necessity “consists in all measures . . . indispensable and proportionate to a legitimate military end, provided that they are not prohibited by the laws of war or the natural law” (emphasis added)). An uneasy compromise exists between the prohibitionism of IHL regulators and the pragmatism of soldiers. Henry Shue & David Wippman, *Limiting Attacks on Dual-Use Facilities*

[Performing Indispensable Civilian Functions](#), 35 Cornell Int'l L.J. 559, 559 (2002). Many commentators have doubts as to the continued applicability of the principle. See Walzer, *supra* note 12, at 5-8 (criticizing Athenian justification for killing the entire male population of Melos during Peloponnesian Wars on ground that to fail to do so would have inspired resistance elsewhere); Francisco Forrest Martin, [Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict](#), 64 Sask. L. Rev. 347, 395 n.166 (2001) (rejecting necessity as justification for Allied bombing of Dresden). For others, the proscription of so much conduct heretofore permissible has drained necessity of operational significance. Rogers, *supra* note 42, at 3. To still others, determination of necessity is a balancing test that weighs the value of the legitimate objective against the suffering caused in its attainment; it is essentially a proxy for proportionality. J. Nicholas Kendall, [Israeli Counter-Terrorism: "Targeted Killings" Under International Law](#), 80 N.C. L. Rev. 1069, 1070 (2002). Despite theoretical disagreements, necessity, though it does not have a general suspensory effect on IHL, may yet be invoked in "exceptional circumstances . . . in regard to acts otherwise prohibited." N.C.H. Dunbar, *Military Necessity in War Crimes Trials*, 29 Brit. Y.B. Int'l L. 442, 442 (1952). The validity of a defense is fact-intensive and tribunals called to render judgments accord a margin of appreciation to soldiers in recognition of imperfect knowledge of the facts of the battlefields. See Hilaire McCoubrey, *International Humanitarian Law* 147-50 (1990); Przetacznik, *supra* note 11, at 289-306 (stating that, although many battlefield actions are "presumptively illegal," the sole circumstance under which necessity is inapplicable as a defense is where the method employed was illegal per se).

⁴⁴ The customary principle of "proportionality," which derives from the Mosaic Lex Talionis, prescribing that an injury should be requited reciprocally but not with greater injury, dictates that military force not be employed to cause damage "excessive in relation to the concrete and direct military advantage anticipated." Henry Sidgwick, *The Elements of Politics* 254 (1919); R.R. Baxter, [Modernizing the Law of War](#), 78 Mil. L. Rev. 165, 178-79 (1978) (defining proportionality as the requirement that civilian losses be balanced against military advantage); Exodus 21:23-25 (stating "(an) eye for (an) eye, (a) tooth for (a) tooth"). "Proportionality," however, is as elusive as necessity: it is difficult to assess whether the method and means are in fact "conducive" to the end sought and not excessive in relation to that end. See Walzer, *supra* note 12, at 129 ("(T)here is no ready way to establish an independent or stable view of the values against which the destruction . . . is to be measured.").

⁴⁵ The customary IHL principle of "distinction," which maintains that the only legitimate object of war is to destroy enemy armed forces, imposes a strict prohibition against the deliberate targeting of noncombatant personnel and civilian targets. See Christopher C. Burris, [Re-Examining the Prisoner of War Status of PLO Fedayeen](#), 22 N.C. J. Int'l L. & Com. Reg. 943, 966 (1997) (discussing origins and application of principle of distinction). Not all scholars concur with the assumption that noncombatants bear no responsibility for war and as a consequence should be spared its direct effects. See, e.g., Paul Fussell, *Thank God for the Atom Bomb*, in *Thank God for the Atom Bomb and Other Essays* 13 (1988) ("The intelligence officer of the U.S. Fifth Air Force declared on July 21, 1945, that 'the entire population of Japan is a proper military target,' and he added emphatically, 'There are no civilians in Japan.'"); George Orwell, *As I Please*, in 3 *Collected Essays, Journalism and Letters of George Orwell*, 150, 151-52 (Sonia Orwell & Ian Angus eds., 1968) (suggesting that the bombing of civilian targets in World War II "shattered the immunity of civilians, one of the things that have made war possible," and in so doing reduced the likelihood of future war); Mao Tse-Tung, *On Guerrilla Warfare* 73 (Samuel B. Griffith trans., 1961) (postulating that during an insurgency all adults become combatants). Other commentators insist that distinction rests upon reciprocity. See Paul Ramsey, *The Just War* 435-36 (1983) (contending that low-intensity conflicts by their very nature "enlarg(e) the area of civilian death and damage that is legitimately collateral"); Emanuel Gross, [Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?](#), 16 Emory Int'l L. Rev. 445, 464 (2002) (examining argument that deviation of one party from the duty to distinguish combatants from noncombatants releases the other). Still others propound a "supreme emergency" exception whereby civilians may be attacked if state survival demands it. John Rawls, *The Law of Peoples* 98 (1999). In practice, arguments about distinction center not upon whether civilians may be deliberately targeted, but rather whether targeting decisions that cause unintended civilian casualties are illegal.

⁴⁶ That the only state routinely willing and able to liberate the oppressed peoples of the world should endure criminal exposure when so doing is offensive to ICC critics. See Senator Helms Before the U.N. Security Council (Jan. 19, 2000) ("(W)hen the oppressed peoples of the world cry out for help, the free peoples . . . have a fundamental right to

respond.”). Humanitarian intervention is, however, the scenario feared most likely to trigger ICC prosecution of United States nationals. Jimmy Gurule, [United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?](#), 35 Cornell Int’l L.J. 1, 4-5 (2002).

⁴⁷ See, e.g., John Bolton, Speech Two: Reject and Oppose the International Criminal Court, in *Toward An International Criminal Court?*, supra note 35, at 39-40 (opining that the ICC will become a forum for declaring “spontaneous customary (IHL)” at variance with traditional understandings); Madeline Morris, [High Crimes and Misconceptions: The ICC and Non-Party States](#), 64 Law & Contemp. Probs. 13, 34 (2001) (expressing belief that the relative paucity of precedent for judicial enforcement of IHL will permit the ICC to exploit definitional uncertainties and reach interpretations that criminalize erstwhile legitimate conduct).

⁴⁸ See William Safire, Enter the Globocourt, N.Y. Times, June 20, 2002, at A25 (“(T)he lack of any effective mechanism to prevent politicized prosecutions of United States service members . . . could create a powerful disincentive for U.S. military engagement in the world.” (quoting United States Secretary of Defense Donald Rumsfeld)). Critics of the ICC, which is silent as to the legality of humanitarian intervention, suggest that the effects will be most pronounced in the area of “optional” military engagements in which the United States is more invested than any other state. See Guy Roberts, Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court, 17 Am. U. Int’l L. Rev. 35, 44-45 (2001) (positing that the prospect of political prosecution of United States forces engaged in such operations will depress United States participation); David J. Scheffer, [The United States and the International Criminal Court](#), 93 Am. J. Int’l L. 12, 19 (1999) (contending that a politicized ICC will “limit severely those . . . controversial . . . interventions that the advocates of human rights . . . so desperately seek from the United States”); Smidt, supra note 40, at 197 (judging the possibility for politically motivated prosecutions as “so high . . . that the United States forces most likely to . . . prevent . . . humanitarian violations may actually be deterred from responding”); Christopher M. Van de Kieft, Note, [Uncertain Risk: The United States Military and the International Criminal Court](#), 23 Cardozo L. Rev. 2325, 2340 (2002) (suggesting politically motivated ICTY war crimes investigation of NATO Kosovo campaign will deter future interventions).

⁴⁹ States are obligated to either extradite suspects accused of crimes giving rise to universal jurisdiction to a requesting state or to try them domestically. M Cherif Bassiouni & Edward M. Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law 3 (1995). The principle of “complementarity” transposes this principle and provides that an international tribunal may exercise jurisdiction only where the state that would normally do so on a territorial, nationality or other basis is unwilling or unable. Kirsch, supra note 31, at 4-5. The Rome Statute incorporates complementarity. Rome Statute, supra note 32, art. 17(1)(a)-(b) (determining a case to be inadmissible where it is “being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution,” or where the case “has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute . . . unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”).

⁵⁰ The Rome Statute obligates the ICC to defer to a state decision not to prosecute, as well as to a domestic acquittal, provided that neither is “for the purpose of shielding the person concerned from criminal responsibility.” Id. arts. 17(2), 20(3). United States concerns center upon whether the ICC would defer to a decision, based on factual sufficiency, prudential considerations or other good faith grounds, not to prosecute. See Gurule, supra note 46, at 8-9 (noting debate over whether ICC should intervene only when state proceedings were a “sham . . . intended to shield the perpetrator” or more generally to “correct a perceived miscarriage of justice”). Domestic critics envisage an activist ICC arrogating jurisdiction to create a peremptory, rather than complementary, body that sets aside national adjudications with which it disagrees. By this view, the ICC is, at best, redundant. See Department of Defense News Briefing (Sept. 14, 2000) (stating that the United States has a “stable judicial system . . . fully capable of” prosecuting “all allegations of misconduct by U.S. service members”). Exacerbating these concerns is uncertainty as to whether the ICC will permit a state to refuse “disclosure of evidence which relates to its national security.” Rome Statute, supra note 32, art. 93(4). Under United States law, judges are deferential toward assertions of the state secrets privilege. See [Halkin v. Helms](#), 690 F.2d 977, 985 (D.C. Cir. 1982) (denying motion to compel disclosure of

information claimed privileged by CIA Director). Some people question whether the ICC will be as deferential. Jacob Katz Cogan, [International Criminal Courts and Fair Trials: Difficulties and Prospects](#), 27 *Yale J. Int'l L.* 111, 139-40 (2002).

⁵¹ The ICC may exercise jurisdiction over crimes committed by nationals of states parties as well as crimes committed on the territory of a member state. Rome Statute, *supra* note 32, art. 12(2). Further, exercise of territorial jurisdiction, permits the ICC to prosecute nationals of states that have not consented to its jurisdiction, provided the territorial state accepts ad hoc jurisdiction in the case in question. *Id.* art. 12(3). Moreover, the Security Council may make a referral as to whether or not the state of nationality or territory is a party, thereby creating jurisdiction over the nationals of every state. Rome Statute, *supra* note 32, art. 13(b). Similarly, the ICC prosecutor may initiate investigation proprio motu of all persons alleged to have committed crimes on the territory of member states. Rome Statute, *supra* note 32, arts. 12(3), 13(b), 15. According to critics, the ICC, even in concert with the Security Council, cannot trump the lack of United States consent to jurisdiction over its nationals. Morris, *supra* note 47, at 64. Still, as written, Articles 12-15 would permit, for example, Iraq to invoke ICC jurisdiction for alleged crimes committed by United States troops in Iraq while the ICC would be unable to "prosecute Saddam for massacring his own people." U.S. Dep't of State, Daily Press Briefing (July 20, 1998). The United States, objecting to the jurisdictional breadth of the Rome Statute, unsuccessfully proposed amendments that would have required the state of nationality of the accused to consent to jurisdiction or, in the alternative, barred the ICC from asserting jurisdiction over crimes in any conflict of which the Security Council was seized. Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* 256 (1998).

⁵² International criminal tribunals must provide minimum procedural protections to defendants. International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, art. 14(3), S. Exec. Doc. E, 95-2, at 26 (1978), 999 U.N.T.S. 171, 177; The Justice Trial, in 6 UN War Crimes Comm'n, *supra* note 43, at 103. The Rome Statute incorporates extensive safeguards: defendants may not be charged with ex post facto crimes (Article 22) or for conduct committed prior to entry into force (Article 24); may not be placed in double jeopardy (Article 20); are presumed innocent (Article 66(1)); are entitled to a statement of charges (Article 61(3)), counsel of choice (Article 67(1)(b), (d)), speedy and public trials (Article 67(1)(a), (c)), examine adverse witnesses (Article 67(1)(e), remain silent "without such silence being a consideration in the determination of guilt" (Article 67(1)(g); may not be tried in absentia (Article 63); are entitled to the exclusion of illegally obtained evidence (Article 69(7)); cannot be compelled to self-incriminate (Article 55(1)(a)) and are entitled to appeal guilty verdicts as well as sentences (Article 81). However, predecessor tribunals have a mixed record in implementing such rights. See Human Rights Center & Centre for Human Rights, *supra* note 41, at 103-04 (criticizing ICTY for murky procedural and evidentiary rulings, politicized case selection and lengthy detentions and trials). International trial judges have assumed wide latitude in drafting and amending rules of procedure and evidence, in effect claiming a legislative role. See *Prosecutor v. Blaskic*, 1998 I.C.T.Y. IT-95-14-AR-108 (Jan. 21) (Appeal of Judgment) (stating "it is the judge who finally takes a decision on the weight to ascribe to (evidence). The (ICTY) is . . . a sui generis institution with its own rules of procedure . . ."). The interpretation of evidentiary and procedural rules by predecessor tribunals has resulted in decisions, inconsistent with United States conceptions, to admit hearsay. *Id.* para. 7, 16, 17 (rejecting "blanket prohibition" on hearsay). That the broad interpretive powers available to the ICC might be exercised to deprive defendants of protections inherent in the United States legal system is of concern. Robert Christensen, [Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court](#), 6 *UCLA J. Int'l L. & Foreign Aff.* 391, 409-10 (2001-02). ICC defenders insist that international criminal proceedings are autonomous from domestic process. Henry T. King & Theodore C. Theofrastous, [From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy](#), 31 *Case W. Res. J. Int'l L.* 47, 91 (1999) (querying "whether . . . U.S. constitutional standards must be adopted by the rest of the world, or whether generally accepted principles of just treatment will not . . . promote a greater respect for (IHL)"). Nonetheless, as a matter of domestic law, United States citizens are entitled to the full protections of the Constitution, including the right to trial by jury, even when tried outside the United States. See [Reid v. Covert](#), 354 U.S. 1, 6 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide . . . should not be stripped away . . ."). Domestic critics claim that Article III, Section 2 of the United States Constitution grants sole authority to try United States citizens to United States courts, but safeguards enshrined in the Bill of Rights, including rights to a speedy jury trial, to confront witnesses and to protection against hearsay, are glaringly absent. David M. Baronoff, [Unbalance of Powers: The](#)

[International Criminal Court's Potential to Upset the Founders' Checks and Balances](#), 4 U. Pa. J. Const. L. 800, 804 (2002) (identifying numerous ICC failures to provide safeguards guaranteed by United States Constitution); Smidt, *supra* note 40, at 219. Moreover, international tribunals do not explicitly accord defendants the wide range of defenses available at common law; Smidt, *supra* note 40, at 219. See Cryer, *supra* note 38, at 277 (noting that the Rome Statute categorically rejects superior orders defense); Matthew Lippman, [Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War](#), 15 Dick. J. Int'l L. 1, 109 (1996) (defining purpose of international criminal tribunals to be "confining conflict" and stating that "(d)eveloping doctrinal defenses . . . is of secondary significance"). Accordingly, Congress, in a precursor to ASPA, found ICC protection of individual rights inadequate under United States law. Protection of United States Troops from Foreign Prosecution Act of 1999, H.R. 2381, 106th Cong. § 2(5) (1999).

⁵³ United States critics question whether the Security Council will retain primary responsibility for maintaining international peace and security as well as the determination of threats to and breaches thereof. See U.N. Charter art. 24 (providing that the Security Council has "primary responsibility" for maintaining international "peace and security"); *id.* art. 39 (according to the Security Council, it has sole authority to make a determination of aggression or a threat to or breach of international peace and security). The relationship of the ICC to the U.N. remains uncertain and nothing in the Rome Statute, which provides merely that the ICC will be "brought into relationship with the (UN) through an agreement to be approved by the Assembly of States Parties," implies any role for the ICC in the maintenance of international peace and security. Rome Statute, *supra* note 32, art. 2. However, predecessor tribunals, even where established as subsidiary organs of the UN, have been determined to be operationally independent. *Prosecutor v. Tadic*, 1995 I.C.T.Y. IT-94-1-AR-72, ¶¶ 37-38 (Oct. 2) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction). Moreover, crimes within ICC jurisdiction--aggression, genocide, war crimes and crimes against humanity--are those most likely to constitute threats to international peace and security and are thus within the primary responsibility of the Security Council. Commentators suggest that by exercising jurisdiction over defendants in particular cases where the Security Council has not made a finding of aggression or a threat to or breach of the peace, the ICC Prosecutor may presuppose state responsibility for the crimes of which the individual is accused and in so doing usurp the exclusive competence of the Security Council. See Vera Gowlland-Debbas, *The Relationship Between the Security Council and the Projected International Criminal Court*, 3 J. Armed Conflict L. 97, 103 (1998) (indicating widespread dissatisfaction with potential conflict between the Security Council and the ICC over definition and prosecution of aggression). While some suggest that in practice the two institutions will reach an accommodation whereby the Security Council will act as a "filter mechanism" through the judicious exercise of discretion, others envision structural conflict due to overlap of the material fields of operation. See *id.* at 111-13. This structural conflict thesis is supported by Article 16 which, rather than commit the ICC to deferring to the veto of a prosecution by a permanent member of the Security Council, requires an affirmative vote of the entire Council in a resolution under Chapter VII to oblige the ICC prosecutor to defer prosecution. Because the United States can, in theory, exercise its Security Council veto power over ICC actions, the United States wants to preserve U.N. primacy. United States officials staunchly opposed the ICC because it will likely undermine that primacy. Hearing on the United Nations International Criminal Court Before the Subcomm. on Int'l Operations of the Senate Comm. on Foreign Relations, 105th Cong. 1, 6 (1998). Failure to preserve Security Council primacy threatened to decouple the influence of the United States polity, exercised through elected and appointed officials, over the ICC. Because the determination of what justice is and how it is to be administered is a fundamental concomitant of self-government, domestic adversaries assail the ICC as an illegitimate attack on democracy. See Bolton, *supra* note 47, at 41 (stating that administration of justice is legitimate "to the extent that it rests on popular sovereignty" and that the ICC, beyond the control of the United States electorate, is therefore democratically illegitimate).

⁵⁴ See Julia Preston, *U.S. Rift with Allies on World Court Widens*, N.Y. Times, Sept. 10, 2002, at A6 (noting approval of \$40 million budget for 2003 and adoption of rules for electing judges and a prosecutor).

⁵⁵ See Samuel P. Huntington, *The Lonely Superpower*, Foreign Aff., Mar.-Apr. 1999, at 35, 37 (referring to United States as the "indispensable nation" to global order). After the Gulf Wars, even the staunchest opponents of United States hegemony would likely concede that the United States has a vital leadership role in maintaining international security and that United States participation is a necessary, if not necessarily sufficient, condition for success. On at

least this ground, the United States is indeed the sole indispensable nation. See Ambassador David J. Scheffer, Address Before the Carter Center (Nov. 13, 1997), at http://www.amicc.org/docs/Scheffer11_13_97.pdf (articulating United States indispensability thesis by noting United States participation in peacekeeping, enforcement of U.N. mandates, and humanitarian intervention and stating that “(n)o other government shoulders the burden of international security”).

⁵⁶ President Clinton signed the Rome Statute on the last possible date--December 31, 2000. Elizabeth A. Neuffer, U.S. to Back Out of World Court Plan Envoy: Bush Team May “Unsign” Treaty, *Boston Globe*, Mar. 29, 2002, at A22. Presidents Clinton and Bush refused to submit the treaty to the Senate for its advice and consent as is required for a treaty to have effect as domestic law. See U.S. Const. art. II, § 2 (providing that a treaty becomes law only upon a favorable vote of two-thirds of the Senate).

⁵⁷ In May 2002, President Bush informed the U.N. that the United States was no longer a signatory to the Rome Statute. *Safire*, supra note 48. Whether the President has the authority, as a matter of domestic and international law, to “unsign” a treaty is a subject addressed in recent scholarship. See, e.g., David C. Scott, [Presidential Power to “Unsign” Treaties](#), 69 U. Chi. L. Rev. 1447, 1460 (2002) (arguing that the President has unilateral authority to withdraw a signed treaty from the Senate to negate the domestic and international legal consequences of a signature); John Setear, [An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law](#), 37 *Harv. Int’l L.J.* 139, 202 (1996) (allowing that limited normative grounds exist permitting termination of treaties). Nonetheless, by withdrawing its signature, the United States is not a participant in the Preparatory Commission, the body which may draft procedural and evidentiary rules, nor can it vote on the selection of judges or the prosecutor.

⁵⁸ In 1998 the Senate Foreign Relations Committee, under Chairman Jesse Helms, began to insert the following boilerplate language expressing opposition to the ICC and warning other states of the consequences of supporting the ICC in the ratification of instruments providing for “mutual legal assistance in criminal matters”:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.--The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

See 144 Cong. Rec. S12,985-01 (daily ed. Nov. 12, 1998). Senator Helms accompanied such provisions with warnings of “grave consequences for our bilateral relations with every nation that signs (the Rome Statute).” James Podgers, War Crimes Court Under Fire, *ABA J.*, Sept. 1998, at 66. Clarifying Helms’s warning, Defense Secretary William Cohen advised European allies that their support for the ICC would lead to a “re-thinking” of United States overseas troop commitments and the United States role in NATO. Alessandra Stanley, U.S. Presses Case Against War Court: Two-Thirds of World Opposes Current Plan, U.N. Conference is Told, *Int’l Herald Trib.*, July 16, 1998, at 5. At the same time, the Clinton Administration, concerned with the ramifications of the ICC with respect to the liability of its forces, began to review **Status** of Forces Agreements with states in which United States military personnel are deployed in order to encourage corrective actions regarding this treaty. *Id.*; see also William J. Clinton, Statement on the Rome Treaty on the International Criminal Court, 37 *Weekly Compilation of Presidential Documents* 4 (Dec. 31, 2000) (expressing concerns about politically motivated prosecutions of United States forces). Congress responded with legislation prohibiting the United States from providing military assistance to a non-NATO state party to the ICC unless that state provided treaty assurances that it would not extradite United States military personnel to the ICC. American Servicemembers’ Protection Act of 2002, [Pub. L. No. 107-206, 116 Stat. 899 \(2003\)](#) (hereinafter ASPA). By conditioning United States financial and military aid upon cooperation with its agenda, the United States has secured agreements that obligate states to refuse requests to extradite United States military, and in some cases civilian, personnel to the ICC. See [Sean D. Murphy, Contemporary Practice of the United States Relating to International Law](#), 97 *Am. J. Int’l L.* 681, 711 (2003) (reporting that as of June 2003, thirty-eight states had concluded bilateral treaties exempting United States personnel from ICC jurisdiction under Article 98(2) of the Rome Statute). Similar pressure has resulted in exemptions from the EU and the UN. See S.C. Res. 1487, U.N. SCOR, 58th Sess., 4772d mtg., U.N. Doc. S/RES/1487 (2003) (exempting all U.N. peacekeepers from ICC jurisdiction for one year on renewable basis); Paul Meller, Europeans to Exempt U.S. from War Court, *N.Y. Times*,

Oct. 1, 2002, at A6 (reporting decision by European Union to refuse ICC requests for extradition of United States military and diplomatic, but not civilian, personnel charged with war crimes). On July 1, 2003 the United States suspended military assistance to thirty-five states that refused to grant immunity to United States citizens. Murphy, *supra*, at 711.

⁵⁹ [Pub. L. No. 107-206, 116 Stat. 899 \(2002\)](#), ASPA, designed to “protect United States military personnel and other elected and appointed officials of the United States . . . against criminal prosecution by (the ICC),” prohibits all agencies and entities of the United States, or of any state or local government, from cooperating with the ICC. Id. § 2006.

⁶⁰ See Richard J. Goldstone & Janine Simpson, [Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism](#), 16 *Harv. Hum Rts. J.* 13, 25 (2003) (coining the phrase).

⁶¹ See American Servicemembers’ Protection Act of 2001, H.R. 1794, 107th Cong. (2001) (amending, as earlier version of ASPA, the Foreign Relations Authorization Act, H.R. 1646, 107th Cong. (2001) (instructing President to use “all means necessary” to effect release on any United States or allied personnel detained against his or her will or on behalf of the ICC)).

⁶² Peter Slevin, U.S. Renounces Its Support of New Tribunal for War Crimes, *Wash. Post*, May 7, 2002, at A1.

⁶³ For the most strident proponents of the ICC, the internationalization of judicial tribunals with competence to adjudicate violations of IHL is “not a policy choice, but rather a cultural preference, more akin to a . . . religious choice than an argument deduced from empirical reason.” Kenneth Anderson, [What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base](#), 25 *Harv. J.L. & Pub. Pol’y* 591, 594-95 (2002). For this cohort, the international is always superior to the domestic. See Kenneth Anderson, Reply: Secular Eschatologies and Class Interests of the Internationalized New Class, in *Religion and Human Rights: Competing Claims?* 112-15 (Carrie Gustafson & Peter Juviler eds., 1999) (claiming that an “International New Class,” with claims to special legitimacy by virtue of their “planetary pretension,” is the engine behind a legal globalization agenda that prioritizes enforcement of IHL through the ICC and privileges international institutions over local governance).

⁶⁴ The United States has signed few and ratified fewer of the instruments elaborating “human rights” to the extent that the impetus for the development of international human rights law was born of the Allied defeat of Nazi Germany and the development and application of legal standards to punish systematic violations of those standards by United States lawyers. However, one can argue that the United States has led the promotion and protection of human rights since their legal origins. Although this argument is undermined by the pattern of selective United States engagement in the defense of human rights (i.e., in Bosnia, but not in Rwanda; in Kosovo, but not in Chechnya or Tibet), this position is buttressed by the fact that few other nations place their troops and their treasure at risk in defense of the principles they proclaim.

⁶⁵ Realists contend that only those institutions that reflect the interests of their states parties can hope to be effective in the creation of the enforcement of law. See Bos, *supra* note 42, at 40. International criminal tribunals depend for their success upon the degree to which states are willing to sacrifice their sovereignty to aid in the “fortification of the global rule of law.” Slaughter, *supra* note 35, at 9. Where states are unwilling to comply with IHL obligations, military force is necessary to ensure obedience and only other states possess such currency in abundance; consequently, it is to those states that institutions must turn if IHL is to be enforced and states will only do so to the degree they perceive inherent advantage. Moreover, the most powerful states will remain beyond the reach of IHL because no other state or states will have the power to enforce violations committed by the most powerful states. The assumption that a stable IHL regime must reflect the practical interests and capabilities of powerful states, rather than

the moral aspirations of non-state actors or weak states, is central to realist IHL scholarship.

⁶⁶ For a discussion of the globalist vision of IHL and the formal institutional enforcement model embodied by the ICC, see generally *Toward an International Criminal Court?*, supra note 35. Again, however, note that not all academics are so critical of the United States position as are the most dedicated of globalists. See, e.g., Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of Civil Society*, 11 Eur. J. Int'l L. 91 (2000) (arguing that "(t)o frame the issue as one of US unilateralism . . . as against the virtuously internationalist world gets it wrong" as "some unilateral US actions tend in the direction of US imperialism as an alternative to what I have called 'international legal imperialism,' the nascent imperialism, the willingness to impose supranational rule, that is the consequence of assertions of the sovereignty of supranational institutions"). In essence, the conflict between proponents and opponents of the ICC may well be the spawn of an existential conflict between European elites who govern international NGOs who have seized upon the ICC as a "means to resist, at least at the rhetorical level, American imperialism," and United States democrats whose transcendent moral and political principle--consent of the governed--does not permit joining in a "mystical" venture toward an international civil society governed by decree from afar. Id. at 102-10. Anderson suggests that the scholarly and activist community advancing the cause of the ICC has organized theoretical and practical energies around an internationalist, legal imperialist agenda of the NGOs and their European elites. Id.

⁶⁷ See Marshall Cohen, *Morality and the Laws of War*, in *Philosophy, Morality, and International Affairs*, supra note 28, at 86-87 (contending that the ICC is the "best available way to mitigate the corrosive effects of mortal combat . . . (g)iven the current realities of international politics").

⁶⁸ ICC advocates counter each asserted basis of opposition. To claims that the ICC Prosecutor will selectively prosecute, they stress that the Rome Statute, under Article 20(3)(b), coupled with complementarity, eliminates the opportunity for politicization of justice by placing the burden of proof upon the prosecutor to demonstrate, prior to initiating a prosecution and to the satisfaction of two of the three judges in the Pretrial Chamber, that the state of nationality of the accused affirmatively failed to independently and impartially administer justice. See Mohamed M. El Zeidy, [The Principle of Complementarity: A New Machinery to Implement International Criminal Law](#), 23 Mich. J. Int'l L. 869, 906-07 (2002). With respect to the definition of crimes within ICC jurisdiction, proponents of the Rome Statute contend that, although the definitions remain fuzzy, the sole method of remedying these definitional shortcomings is accession to membership because only members may participate in the work of the Preparatory Committees charged with more precise articulation of the definitions of crimes. See David, supra note 40, at 404-05. Insofar as the rights of the accused are concerned, supporters of the ICC extol the abundance of provisions in the Rome Statute that ensure protection of criminal defendants while suggesting that these provisions provide greater protection than is constitutionally necessary or functionally prudent. See Podgers, supra note 58, at 69 (citing claims that the Rome Statute provides "layers of protection" against undue prosecutions). But see Leila Nadya Sadat & S. Richard Carden, [The New International Criminal Court: An Uneasy Revolution](#), 88 Geo. L.J. 381, 417 (2000) (suggesting that the safeguards afforded defendants in the ICC are actually "excessive").

⁶⁹ See Kenneth Roth, *Speech One: Endorse the International Criminal Court*, in *Toward an International Criminal Court?*, supra note 35, at 27 (contending that the ICC will not substitute its judgment for that of United States courts unless the United States "insist(s) on shielding criminal suspects from legitimate investigation and prosecution," which is highly unlikely because "it is firm American policy to prosecute any rogue soldier who might commit a war crime"). An additional option is to accede to the Rome Statute while suspending acceptance of ICC jurisdiction over war crimes for seven years. See Rome Statute, supra note 32, art. 124 (permitting a party to "opt out" of ICC jurisdiction over war crimes for a nonrenewable seven year period upon accession).

⁷⁰ Some critics of the United States abandonment of the ICC proclaim a devolution "backward to the anarchic world of pre-Nuremberg." King & Theofrostus, supra note 52, at 104-05.

- ⁷¹ See, e.g., Andrew Moravcsik, [Conservative Idealism and International Institutions](#), 1 Chi. J. Int'l L. 291, 297 (2000) (arguing for qualified United States participation in the ICC under certain stated conditions).
- ⁷² See Roth, *supra* note 69, at 32 (noting proposals to grant such immunity to United States peacekeepers out of recognition of the "special responsibilities" shouldered by the United States in the maintenance of international peace).
- ⁷³ Although the very definition of "terrorism" is to some extent a political exercise, the proliferating definitional offerings coalesce around the notion that "terrorism" is the threat or use of violence with the intent to cause fear in a target group in order to accomplish political objectives. See generally United Nations Treaty, Conventions on Terrorism, at <http://untreaty.un.org/English/Terrorism.asp> (listing twelve conventions and protocols defining terrorism); Terrorism and International Law 27 (Roslyn Higgins & Maurice Flory eds., 1997) (listing and discussing instruments related to terrorism). United States federal law defines terrorism as activities that (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State (and) (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping. [18 U.S.C. § 2331 \(2000 & Supp. 2001\)](#). A leading academic definition considers terrorism to be "the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet political (or quasi-political) objectives of the perpetrators." Oscar Schacter, *International Law in Theory and Practice* 162-63 (1991). Although no single definition is universally accepted, the elements of civilian targets, violence and political extortion are found in almost every working definition and the United Nations has imposed a duty upon every state "to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force." S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992); see also S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. ¶¶ 1-3, U.N. Doc. S/RES/1373 (2001) (obligating all member states to deny financing, support, and havens to terrorists and affirming the right of self-defense against "terrorist acts").
- ⁷⁴ A "weapon of mass destruction" is defined as "any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of (A) toxic or poisonous chemicals or their precursors; (B) a disease organism; or (C) radiation or radioactivity." [50 U.S.C. § 2302\(1\) \(2000\)](#).
- ⁷⁵ Theories abound in answer to the question, "What is the purpose of law?," with utilitarians, natural legal theorists, materialists, legal positivists, libertarians, socialists, statisticians, developmentalists, critical legal scholars and others weighing in with arguments. See generally Richard A. Posner, *The Problematics of Moral and Legal Theory* (1999). Many of the extant theories of law converge around the hypothesis that the purpose of law is to direct and limit government in the collective organization of the defense of life, liberty and property, and to preserve civilization against threats to these core values, a hypothesis central to the current work. See Frederic Bastiat, *The Law* 6-7 (Dean Russell trans., Foundation for Economic Education, Inc. 1950) (1850) (synthesizing several strands of legal theory to postulate the purpose of law). The notion that law serves as firebreak against threats to civilization has acquired purchase in international jurisprudence and illuminates the thesis that the nexus of terrorism and weapons of mass destruction is a threat to which law is obliged to respond. See [Legality of the Threat or Use of Nuclear Weapons \(United Nations\)](#), 1996 I.C.J. 226, 375 (July 8) (Shahabuddeen, J., dissenting) (stating that the purpose of law is not merely to resolve disputes but to protect civilization).
- ⁷⁶ See The Declaration of Independence pmbl. (U.S. 1776) (conceding that the international community, of which the United States was a constituent "People," was entitled to a statement of causes for United States secession from Britain).

⁷⁷ See Ronald J. Sievert, [War on Terrorism or Global Law Enforcement Operation?](#), 78 Notre Dame L. Rev. 307, 313 (2003); see also Mark A. Drumbl, [Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of International Legal Order](#), 81 N.C. L. Rev. 1, 4-5 (2002) (suggesting international terrorism is amenable to a civilian solution); Emanuel Gross, [Trying Terrorists--Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights](#), 13 Ind. Int'l & Comp. L. Rev. 1, 31 (2002) (stating that terrorism is "no different than any other criminal offense"); Symposium, *supra* note 39, at 750-53 (contending, prior to September 11th, that terrorism could be reduced or eliminated by states ceding sovereignty to transnational organizations); Robinson O. Everett, *The Law of War: Military Tribunals and the War on Terrorism*, Fed. Lawyer, Nov./ Dec. 2001, at 20 (arguing that terrorism violates the laws of nations but not IHL). Although it offered no assistance in enforcing its pronouncements condemning terrorism, for adherents to the criminal justice paradigm the U.N. was the logical place to turn to organize such cooperative efforts. Smidt, *supra* note 40, at 232-33.

⁷⁸ On November 4, 1998, Usama bin Laden and members of the al Qaeda terrorist organization were indicted in United States District Court for the Southern District of New York for orchestrating acts of terrorism against United States nationals, including bombing United States Embassies in Nairobi, Kenya, and Dar As-Salaam, Tanzania. See Indictment, *United States v. bin Laden*, S(10) 98 Cr. 1023 (LBS) (S.D.N.Y. Nov. 4, 1998) (charging Usama bin Laden and others with conspiracy, bombing United States embassies, 224 counts of murder, leadership of a "terrorist group dedicated to opposing non-Islamic governments with force and violence," seeking to obtain WMD and ordering followers to attack United States forces in Muslim countries and commit genocidal war against United States citizens), available at <http://news.findlaw.com/hdocs/docs/binladen/usbinladen-1a.pdf>. Because the capture and trial of these defendants was considered critical to United States national security, the conviction of several in spring 2001 was, at the time, considered to be a national security coup. See, e.g., Elizabeth Neuffer, *Four Guilty in Embassy Bombings*, Boston Globe, May 20, 2001, at A1 (reporting conviction of four participants on 302 counts in destruction of United States embassies and deaths of 224 people, including twelve Americans).

⁷⁹ See Lucy Martinez, [Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems](#), 34 Rutgers L.J. 1, 13-62 (2002) (discussing history of negotiations and prospects for future inclusion of terrorism within Rome Statute).

⁸⁰ Immediately following the attacks, President George W. Bush declared a national emergency and Congress delegated him extensive authority to, *inter alia*, "use all necessary and appropriate force" in defense of the United States against the authors of September 11th. See Declaration of National Emergency, Proclamation 147,463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (declaring the United States to be in a state of emergency by virtue of the terrorist attacks of September 11, 2001); see also Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (enacted Sept. 18, 2001) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"). In jettisoning the judicial approach, the Bush Administration determined that the deterrence failures that led to September 11th were attributable to the inadequacy of the judicial approach, that future such attacks could only be prevented by reestablishing a credible threat of punishment for would-be attackers and that no institution other than the United States military could mount such a threat. Smidt, *supra* note 40, at 157-58; see also Ruth Wedgwood, *The Law at War: How Osama Slipped Away*, Nat'l Interest, Winter 2001-02, at 69, 71-72 (deriding as a "very dangerous intellectual failure" the application of criminal law, rather than force, to overcome the scourge of terrorism). Not all commentators have been so easily swayed from the criminal justice model. See, e.g., Keith Hayward & Wayne Morrison, *Locating "Ground Zero": Caught Between the Narratives of Crime and War*, in *Law After Ground Zero* 140-57 (John Strawson ed., 2002) (contending that the terrorists of September 11th are best described by some indeterminate term between criminals and "agents of war"); Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 Yale U. Int'l L. 325, 326 (2003) (undertaking a strict positivist interpretation of IHL texts to reject any basis for classifying the belligerency with al Qaeda as "war" and insisting on retention of criminal designation). Others suggest that the United States abandoned the criminal justice model for a military approach during the latter half of the 1990s, well before September 11th. See, e.g., Todd M. Sailer, Comment, [The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections](#), 13 Temp. Int'l & Comp. L.J. 311, 311 (1999). However, September 11th caused the United States to "s(ee) the existing evidence in a new light,"

and the restructuring of United States foreign policy toward military solutions to the problem of terrorism dates to that infamous day. See Powell Defends War Amid Doubts, CBSNews.com (July 10, 2003), at <http://www.cnnnews.com/stories/2003/07/10/iraq/main562701.shtml>.

⁸¹ Every year the President must submit a report to Congress on the national security strategy of the United States See Goldwater-Nichols Department of Defense Reorganization Act of 1986, [Pub. L. No. 99-433, § 603, 100 Stat. 992 \(1986\)](#) (imposing this obligation). The United States National Security Strategy, issued in September 2002, rejects the judicial approach to combating terrorism and confesses that “(i)t has taken almost a decade for us to comprehend the true nature of th(e) new threat” and react accordingly. See National Security Strategy of the United States of America (September 2002), at 15, available at www.whitehouse.gov/nsc/nss.pdf (hereinafter NSSUSA).

⁸² The official United States assessment is that the attacks of September 11th effected a general declaration of war by global terrorist organizations and their state sponsors against the United States See Elaine Sciolino, Long Battle Seen, N.Y. Times, Sept. 16, 2001, § 1, at 1 (“We’re at war. There’s been an act of war declared upon America by terrorists, and we will respond accordingly.” (quoting address by President Bush to the National Security Council)); Statement of Secretary of Defense Donald H. Rumsfeld Before the Senate Armed Services Committee (Dec. 12, 2001), available at http://www.senate.gov/~armed_services/statemnt/2001/011212wolf&rums.pdf (“The September 11th attacks were acts of war. The people who planned and carried out these attacks are not common criminals—they are foreign aggressors . . .”). Commentators concurred with this official assessment. See, e.g., Derek Jinks, [September 11 and the Laws of War, 28 Yale J. Int’l L. 1, 1-9 \(2003\)](#) (concluding that the September 11th attacks resembled acts of war within the meaning of IHL in that they were extraordinarily severe, orchestrated from abroad by an organized enemy, directed against the United States as a whole and treated as such by state governments and international organizations, including NATO and the UN); W. Michael Reisman, Comment, [Assessing Claims to Revise the Laws of War, 97 Am. J. Int’l L. 82, 88 n.14 \(2003\)](#) (stating that “(o)only a most technical and arid legalism could deny (that the United States is in a state of war with al Qaeda)”). The war on terror has not been concluded with the defeat of the Taliban or the Hussein regime in Iraq; rather, it has just begun. See Transcript of President Bush’s Remarks on the End of Major Combat in Iraq, N.Y. Times, May 2, 2003, at A16.

“The battle of Iraq is one victory in a war on terror that began on September 11th, 2001, and still goes on. . . . Any person, organization or government that supports, protects, or harbors terrorists is complicit in the murder of the innocent, and equally guilty of terrorist crimes. Any outlaw regime that has ties to terrorist groups, and seeks or possesses weapons of mass destruction, is a grave danger to the civilized world, and will be confronted.

Id. Arguments that it is juridically impossible to be at war with non-state actors may well be sound in terms of their fidelity to legal technicalities. See, e.g., Stacie D. Gorman, Comment, [In the Wake of Tragedy: The Citizens Cry Out for War, but Can the United States Legally Declare War on Terrorism?, 21 Penn St. Int’l L. Rev. 669, 685-88 \(2003\)](#) (concluding that, under domestic and international law, only sovereign entities—i.e., states—possess the legal personality necessary to be the objects of a declaration of war). However, they miss the point that terrorism poses as significant a threat to United States vital interests as do states and that the judicial response is inadequate to resolve the threat. See Roberto Iraola, [Military Tribunals, Terrorists, and the Constitution, 33 N.M. L. Rev. 95, 114 \(2003\)](#) (“(A) state of war exists between the United States and al Qaeda, (a terrorist group that) has openly proclaimed war against the United States and has repeatedly carried out attacks against us.”). But see Mark Osler, [Capone and bin Laden: The Failure of Government at the Cusp of War and Crime, 55 Baylor L. Rev. 603, 611 \(2003\)](#) (rejecting characterization of the war on terror as “war”).

⁸³ See Charles Feldman & Stan Wilson, Ex-CIA Director: U.S. Faces “World War IV” (Apr. 3, 2003), at <http://www.cnn.com/2003/US/04/03/sprj.irq.woolsey.world.war/> (quoting former CIA Director James Woolsey as describing war on terror as a “fourth world war,” following World Wars I & II and the Cold War, in which the threat to the United States is at least as extreme as these earlier conflicts); David B. Rivkin Jr. & Lee A Casey, That’s Why They Call It War, Wash. Post, Mar. 16, 2003, at B4 (describing war on terror as a “long-term life or death struggle” in which the United States has “never been more threatened”).

- ⁸⁴ State terrorism and sponsorship of terrorist groups is of special concern because states have the resources to project and sustain violence on a systematic, global basis. See President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (labelling Iran, North Korea and Iraq an “axis of evil” due to sponsorship of terrorist groups and signaling that the United States would “not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons”).
- ⁸⁵ See R.W. Apple, A Clear Message: “I Will Not Relent,” N.Y. Times, Sept. 21, 2001, at A1 (reporting a presidential address to a joint session of Congress on September 20, 2001, in which President Bush stated that the United States effort would not stop “until every terrorist group of global reach has been found, stopped and defeated”).
- ⁸⁶ In contrast to states, which present “fixed addresses” against which measures may be directed in reprisal for their initial use of force, terrorist organizations are an inchoate conglomeration of entities that operate as part of “shadowy” networks, independent in some instances of the control or direction of the states in which they are physically located. This renders it very difficult to employ anti-terrorist countermeasures that do not simultaneously inflict harm upon these non-culpable states, many of which are as distressed about the presence of terrorists in their midst as are the victims of their terrorism. See Drumbl, *supra* note 77, at 47-48 (discussing the legal difficulties in directing proportional and precise military force against non-state actors).
- ⁸⁷ Terrorism, the “totalitarian form of war and politics,” rejects any obligation to adhere to the dictates of law or morality and in so doing “shatters (IHL).” Emanuel Gross, [Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State’s Duty to Protect Its Citizens](#), 15 *Temp. Int’l & Comp. L.J.* 195, 233 (2001). Among the more reprehensible tactics they employ is sheltering their number in areas populated by civilians in order to “exploit the rules of the game . . . , which categorically state that the civilian population must not be involved in the armed conflict.” *Id.* at 234. This and other violations of IHL were committed by forces fighting for the Saddam Hussein regime in Iraq. See Neil A. Lewis, U.S. Is Preparing to Try Iraqis for Crimes Against Humanity and Mistreating Prisoners, N.Y. Times, Mar. 29, 2003, at B14 (listing Iraqi violations of IHL, including mistreatment and extrajudicial killing of **POWs**, perfidious surrender, fighting in civilian garb, using civilians as human shields, employing hospitals and ambulances to military ends and placing cash bounties on United States pilots).
- ⁸⁸ See Int’l & Operational Law Dep’t, The Judge Advocate Gen.’s Sch., U.S. Army, JA 422, Operational Law Handbook 5-2 (2000) (stating the policy of the United States to comply with IHL under all circumstances to the extent practicable and feasible).
- ⁸⁹ See Michael F. Noone, Jr., [Applying Just War Jus in Bello Doctrine to Reprisals: An Afghan Hypothetical](#), 51 *Cath. U. L. Rev.* 27, 27-32 (2001) (applying pejorative label “warriors” to individuals who war in the absence of legal restraint and “soldiers” to those who accept legal limitations on the available methods and means); see also Alberto R. Coll, The Legal and Moral Adequacy of Military Responses to Terrorism, 81 *Am. Soc’y Int’l L. Proc.* 297, 297-98 (1987) (relegating terrorists from the category of lawful combatants to the pariah category of “unlawful belligerents”).
- ⁹⁰ NSSUSA, *supra* note 81, at 15 (contending that deterrence is ineffective against the deadly threat of Islamic terrorists whose “avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death”).
Interesting point – the comparison between deterrence (and its inefficiency in criminal law) and its inefficiency in int’l law – as a point for using desert (and empirical desert) in the int’l arena. Same argument can be used for the fact that the reprisals reciprocity might be ineffective.
- ⁹¹ Two decades ago it was apparent to prescient commentators that the United States would one day face a war against terrorists with Western civilization as the stakes. See, e.g., Jeanne J. Kirkpatrick, Speech at the Jonathan Institute’s

Conference on International Terrorism (June 25, 1984) ("There is a coming terrorist war (against the United States), (that) is part of a total war which sees the whole society as an enemy, and all members of a society as appropriate objects for violent actions.").

⁹² The United States now embraces preemptive self-defense, a doctrine that claims the right of a state to use unilateral force even in the absence of legal authorization from the UN, to eliminate an incipient threat that is not yet operational but which, if permitted to mature, could be reduced only at a much greater cost. See NSSUSA, *supra* note 81, at 15 (stating that the "immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit . . . let(ting) our enemies strike first"); see also David E. Sanger, *Bush Renews Pledge to Strike First to Counter Terror Threats*, N.Y. Times, July 20, 2002, at A3 (reporting message from President Bush to United States troops in Afghanistan stating that the United States will preemptively strike against states developing WMD and that "America must act against these terrible threats before they're fully formed"); President George W. Bush, *National Strategy to Combat Weapons of Mass Destruction 3* (Dec. 2002), available at <http://www.state.gov/documents/organization/16092.pdf> ("Because deterrence may not succeed, and because of the potentially devastating consequences of WMD use against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through preemptive measures."). For an extended discussion of the doctrine of preemptive self-defense at domestic and international law, see *infra* note 597.

⁹³ See President George W. Bush, *Address to a Joint Session of Congress and the American People* (Sept. 20, 2001), available at <http://www.house.gov/hayworth/jdcontent/news/120701.shtml> ("Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.").

⁹⁴ Targeted killing of terrorist leaders may preclude subsequent acts of terrorism, produce fewer casualties than other options, inflict greater disruption on terrorist groups and leave no prisoners to become causes for future terrorist attacks. Daniel B. Pickard, *Legalizing Assassination? Terrorism, The Central Intelligence Agency, and International Law*, 30 *Ga. J. Int'l & Comp. L.* 1, 31-32 (2001). On this basis, the United States has added this policy option to its anti-terrorist arsenal. See John Diamond, *Shackles Loosened on U.S. Intelligence*, USA Today, July 9, 2002, at 8A (reporting that the Bush Administration has authorized executive agencies to overthrow regimes and eliminate foreign leaders); James Risen & David Johnston, *War of Secrets: Not Much Has Changed in a System that Failed*, N.Y. Times, Sept. 8, 2002, § 4, at 1 (reporting that CIA Special Activities Division has been activated for covert operations and authorized to use deadly force against terrorists). For a discussion of the domestic and international legal regimes governing assassination, see *infra* note 510.

⁹⁵ Examples of sophisticated weapons systems either in development, making their debut or being used widely in the war on terror include precision-guided munitions (PGMs), lasers, depleted uranium munitions, carbon fiber bombs and unmanned aerial vehicles. See Richard Whitby, *High-Tech Hardware in War on Terror*, N.Y. Daily News, Sept. 8, 2002, at 24.

⁹⁶ Certain means of war, such as various types of ammunition that cause unnecessary suffering and biological weapons, have long been proscribed by treaties. See, e.g., Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, Sept. 18, 1997, [36 I.L.M. 1507](#) (banning the use of land mines); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, [32 I.L.M. 800](#) (prohibiting development, production or use of chemical weapons); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, [19 I.L.M. 1523 \(hereinafter CCW\)](#) (prohibiting weapons that use fragments not detectable by X-ray, regulating mines and booby traps and regulating incendiary weapons); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, [Apr. 10, 1972, 26 U.S.T. 583](#), 1015 U.N.T.S. 164 (hereinafter BWC) (prohibiting the development, stockpiling, and use of biological

weapons); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, [June 17, 1925, 26 U.S.T. 571](#), 94 L.N.T.S. 65 (forbidding use of gas and bacteriological weapons but not outlawing development); Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (hereinafter Hague Convention of 1907) (committing parties to pass domestic military regulations incorporating the protections of **POWs** provided for therein, precluding the use of many weapons systems and providing protection for religious and cultural institutions); Convention with Respect to the Laws and Customs of War on Land (Hague II), July 29, 1899, art. 23, 32 Stat. 1803, 1817, 1 Bevans 247 (limiting the methods and means of warfare that cause “superfluous injury” or unnecessary suffering). In recent years a movement, the purpose of which is to deny technologically sophisticated states the legal capacity to employ advanced weapons systems, has gained momentum. See Roger W. Barnett, *Asymmetrical Warfare* 120 (2003) (discussing longstanding efforts to prohibit napalm and fuel-air explosives); Smidt, *supra* note 40, at 226 (discussing this development); Nicholas Wade & Eric Schmitt, *U.S. Use of Tear Gas Could Violate Treaty, Critics Say*, N.Y. Times, Apr. 5, 2003, at B13 (reporting contention that United States use of riot control agents would violate the Chemical Weapons Convention). See generally Stuart Maslen, *Anti-Personnel Mines Under Humanitarian Law* (2001) (discussing process whereby anti-personnel mines have been proscribed by multilateral treaty and noting efforts to extend the application of the treaty to non-ratifying states). This effort rests largely upon declarations, unsupported by state practice, that the weapons system in question is violative of customary IHL principles. See, e.g., [The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241 \(July 8\)](#) (stating, in an advisory opinion, that the use of nuclear weapons, in addition to other environment-altering weapons, may give rise to a violation of customary IHL); Smidt, *supra* note 40, at 226 (speculating that lasers and mines will soon be declared violative of customary IHL despite persistent state dissent); War Crimes Tribunal May Probe DU, BBC News (Jan. 14, 2001), at <http://news.bloc.co.uk/2/hi/europe/1117554.stm> (quoting chief prosecutor of the ICTY as stating that the use of depleted uranium (DU) munitions by NATO may constitute a war crime on the sole ground that DU munitions violate customary IHL). The set of banned weapons recognized by the United States is considerably narrower than the set claimed by NGOs whose aggressive moves to declare such systems prohibited augur ill for technologically sophisticated states engaged in conflicts, such as anti-terrorist operations, where such systems have significant utility. See Carnahan, *supra* note 43, at 732 (discussing controversy in depth).

⁹⁷ Whereas the customary IHL principle of distinction has traditionally imposed a strict prohibition against the deliberate targeting of noncombatant personnel and civilian targets, thereby implying that specific intent to target noncombatants or civilians is required to prove criminal liability, IHL activists, contending that advances in military technology have facilitated much greater precision, now argue that the standard for criminal liability when an attacker misses a military target and causes collateral damage should be mere negligence. See Roberts, *supra* note 48, at 46 (stating that the reduction in the burden of proof in a case alleging a violation of the principle of distinction will leave combatants and civilian decisionmakers constantly subjected to second-guessing over weapon and target selection and liable to prosecution for misjudgments made even in conditions of great uncertainty). The subject of targeting decisions, whether *ex ante* or *ex post*, to the review of a judicial body such as the ICC is, for many commentators, not a serious option. Smidt, *supra* note 40, at 229. The further introduction of a negligence, rather than a specific intent, standard renders this proposal even more objectionable. See Kenneth Anderson, *Who Owns the Rules of War*, N.Y. Times, Apr. 13, 2003, § 6 (Magazine), at 38 (arguing that even employing this reduced standard, negligence “has to consist of more than a lot of collateral damage, including gruesome civilian death and injury, that might be the result simply of a cruise missile aimed in good faith but gone astray”).

⁹⁸ It seems inarguable that operations in suppression of terrorism can reasonably be thought to fit within this category; the General Assembly has approved this thesis in declaring support of terrorists as “acts of aggression” constitutive of an “armed attack” against which the right to self-defense appertains. G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex art. 3(g), U.N. Doc. A/RES/3314 (1975). See generally Constantine Antonopoulos, *The Unilateral Use of Force by States After the End of the Cold War*, 4 J. Armed Conflict L. 117 (1999) (arguing that UNSCRs 1368 and 1373, which recognize the “inherent” right of self-defense against terrorism, implicitly authorize the exercise of such a right).

⁹⁹ In the view of a number of senior civilian United States decisionmakers, they themselves, and not the troops they dispatch to do battle in the war on terror, are the most valuable prize to be claimed through the manipulation of the

ICC agenda by the enemies of the United States in concert with politically motivated prosecutors and judges. See Bolton, *supra* note 47, at 43 (suggesting that the “top civilian and military leaders, those responsible for our defense and foreign policy are the real potential targets of the ICC’s politically unaccountable prosecutor”). Recent indictments lodged against senior civilian and military decisionmakers, United States and otherwise, including the heads of state of the United States and Israel, in the domestic courts of several states lend credence to this speculation. See, e.g., L.C. Green, [Enforcement of the Law in International and Non-International Conflicts--The Way Ahead](#), 24 *Denv. J. Int’l L. & Pol’y* 285, 314 (1996) (discussing phenomenon whereby a number of states, including the UK, Canada, Australia and Belgium, have amended their criminal codes to permit the exercise of universal jurisdiction in order to indict senior military and civilian officials of other states for war crimes and crimes against humanity); Jeffrey T. Kuhner, *Iraqis Target Gen. Franks for War Crimes Trial in Belgium*, Wash. Times, Apr. 28, 2003, at A1 (reporting the filing of a criminal complaint against General Tommy Franks, commander of the liberation of Iraq, alleging in a Belgian court that was granted universal jurisdiction under a 1993 Belgian law, command responsibility for the commission of war crimes by unknown United States soldiers. But see Paul Geitner, “Universal Jurisdiction” is Removed from War Crimes Law, Miami Herald, Aug. 2, 2003, available at <http://www.miami.com/mld/miamiherald> (reporting the amendment of the Belgian law after its “abuse and manipulation for political ends” and damage to relations with states with which Belgium had had “excellent rapport” (quoting Belgian Foreign Minister Louis Michel)).

¹⁰⁰ To require the United States to first absorb a terrorist attack prior to undertaking self-defense measures would be to “giv(e) the bad guys a ‘free kick’ at the start of the conflict.” Robert F. Turner, [It’s Not Really “Assassination”: Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites](#), 37 *U. Rich. L. Rev.* 787, 804 (2003).

¹⁰¹ A long quasilegislative history precedes attempts to define the crime of “aggression” at international law. See generally Jonathan A. Bush, [“The Supreme . . . Crime” and its Origins: The Lost Legislative History of the Crime of Aggressive War](#), 102 *Colum. L. Rev.* 2324 (2002) (chronicling this history); Charter of the IMT, *supra* note 32, art. 6 (defining “crimes against peace” as including “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances”). Although the crime of aggression was included within ICC jurisdiction, the negotiating parties could not agree upon a definition. See Van de Kieft, *supra* note 48, at 2359-63 (describing various proposed definitions of aggression giving rise to individual criminal liability, including an option that would require a determination of state responsibility for an unlawful war as a condition precedent, a second option limiting individual liability to those ordering the aggressive acts and a third identical to the first with the exception that peacekeeping operations were exempted). As a result, the ICC will not exercise jurisdiction over aggression until the states parties agree, by a seven-eighths majority, to a definition and to any conditions precedent. In no event will this occur prior to seven years after the entry into force of the Rome Statute. See Rome Statute, *supra* note 32, art. 5(1)(d) (granting the ICC jurisdiction over the crime of aggression); *id.* art. 5(2) (providing that the ICC “shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the (ICC) shall exercise jurisdiction”); *id.* arts. 121, 123 (providing rules and procedures for voting amendments to the ICC). Were the ICC to define aggressuib to rule that a necessary and proportional response to a terrorist attack is not a measure in self-defense, such a definitional approach would incriminate states operating in self-defense and simultaneously insulate terrorists, along with the states harboring them, from responsibility for their actions if states that would otherwise employ force in response to terrorist attacks were dissuaded from doing so out of concern that their actions would give rise to legal liability. See Smidt, *supra* note 40, at 206 (commenting that an overbroad definition of aggression “may have the unintended consequences of protecting (terrorists)”).

¹⁰² Although Article 5(2) of the Rome Statute provides that the exercise of ICC jurisdiction over the crime of aggression “shall be consistent with the relevant provisions of the Charter of the United Nations,” and although the U.N. Charter accords the Security Council the “primary responsibility for the maintenance of international peace and security,” U.N. Charter art. 24(1), and the exclusive competence to “determine the existence of any . . . act of aggression,” U.N. Charter art. 39, under the Rome Statute the ICC prosecutor is empowered, in theory, to usurp the authority of the U.N. Security Council by indicting an individual for the crime of aggression without an Article 39 finding by the Security Council that the state of nationality of the individual committed an act of aggression, an eventuality

anathema to the United States. See Hearing on the Creation of an International Court Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Cong. 60 (1997) (statement of Sen. Helms) (hereinafter Hearing) (“I think I can anticipate what will constitute a crime of ‘aggression’ in the eyes of (the ICC): it will be a crime of aggression when the United States takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations.”); King & Theofrastous, *supra* note 52, at 100 & n.213 (indicating that for some members of Congress inclusion of aggression in the Rome Statute was a “new and capricious attempt,” reminiscent of the ICJ judgment against the United States for its support of the Contras, to circumscribe the Security Council and “reign in U.S. unilateral actions,” such as Grenada, Nicaragua, Libya and Panama); Jennifer Trahan, [Defining “Aggression”: Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum](#), 24 *Loy. L.A. Int’l & Comp. L. Rev.* 439, 440 (2002) (concluding that the ICC Prosecutor is not restricted by operation of the Rome Statute from making a determination of the existence of an act of aggression independent of a contrary Security Council determination). In response to congressional anxiety over the prospect that the ICC would effectively dilute the United States veto of sanctions directed against it by the Security Council, Congress, in the American Servicemembers’ Protection Act, stated emphatically that “(a)ny agreement within the Preparatory Commission that . . . usurps the prerogative of the United Nations Security Council under Article 39 of the charter of the United Nations to ‘determine the existence of any . . . act of aggression’ would contravene the charter of the United Nations.” ASPA, *supra* note 58, at § 2002 (Findings).

¹⁰³ United States critics of international institutions rail against the idea that democratic nations are susceptible to legal judgment by dictatorships and rogue states. See Hearing, *supra* note 102. However, the international legal principle of the formal equality of states does not permit a distinction to be drawn between democratic states and dictatorships with respect to the question of standing to bring a complaint in the ICC. See U.N. Charter art. 2 (enshrining formal legal equality of states). By the same token, the principle does not prevent awarding the chair on the U.N. Human Rights Committee and the U.N. Conference on Disarmament to states such as Libya and Husseinist Iraq respectively. See Showdown: Iraq (CNN television broadcast, Feb. 8, 2003) (reporting naming of Iraq as co-chair of the Conference with responsibilities for monitoring compliance with numerous weapons control treaties despite its failure to comply with U.N. sanctions banning its own possession of various weapons systems).

¹⁰⁴ The Rome Statute prohibits knowingly attacking a target that “will cause incidental loss of life or injury to civilians.” Rome Statute, *supra* note 32, art. 8(2)(b)(iv). To take advantage of the reticence of military planners to run afoul of this legal proscription and of the media attention to the casualties that unintentionally result from counterterrorist operations, terrorists often cite military targets in civilian neighborhoods. Mark Lloyd, *Special Forces: The Changing Face of Warfare* 230 (1995). A government suspected of supporting terrorism has only to produce evidence of heavy civilian casualties sustained during a retaliatory raid to divert attention from the initial purpose of that raid (because) . . . such evidence is often enough to convince a shocked and militarily unsophisticated media that . . . the attack was little more than an outrageous atrocity. *Id.*; Interview by Cokie Roberts, ABC TV, with Donald Rumsfeld, Secretary of Defense, at ABC Studio (Oct. 28, 2001), available at http://www.defenselink.mil/news/Oct2001/t10282001_t1028sd.html (“(Al Qaeda terrorists are) using mosques . . . for command and control, for ammunition storage . . .”). The possibility--perhaps even the probability--exists that when the United States targets terrorists hiding in the midst of civilian populations, United States ordnance “may kill (innocent civilians) per accidens, as an unintentional byproduct of killing the enemy.” Cole, *supra* note 4, at 97; see also Steven Erlanger, *NATO Powers Accused of War Crimes; Rights Group Says Civilians Targeted in Yugoslavia*, Plain Dealer, June 8, 2000, at 5A (reporting description by Ambassador Scheffer of hypothetical scenario wherein a state party to the Rome Statute seeks to indict United States nations when United States bombs accidentally destroy civilian targets and human shields behind whom terrorist are hiding). Indeed, United States operations during Operation Enduring Freedom in Afghanistan have resulted in the deaths of hundreds of civilians. Dexter Filkins, *Flaws in U.S. Air War Left Hundreds of Civilians Dead*, N.Y. Times, July 21, 2002, § 1, at 1 (reporting deaths of hundreds of civilians in Oruzgan Province). However, as a matter of policy, the United States makes good-faith efforts beyond those of any other state to avoid civilian casualties in its targeting decisions and it employs significant technological and personal resources to advance the principle of distinction as far as possible. See, e.g., U.S. General Accounting Office, *Operation Desert Storm: Evaluation of the Air Campaign*, GAO/NSIAD-97-134, at 5.2.2 (1997) (requiring pilots to place ordinance in a “particular corner, a vent, or a door” to count as a hit rather than a miss and thus to protect civilian life and property); Emily Eakin, *Ethical War? Do the*

Good Guys Finish First?, N.Y. Times, Mar. 8, 2003, at B9 (reporting that the great lengths to which the United States Central Command went to avoid accidental collateral damage to civilians actually compromised apprehension of members of al Qaeda); Adam Roberts, Counter-terrorism, Armed Force and the Laws of War, 44 Survival 7, 7-32 (Spring 2002), available at <http://www.ssrc.org/sept11/essays/roberts.htm> (“(T)here are strong reasons to believe US statements that civilian deaths in (Afghanistan due to the United States bombing) were unintended.”). Consequently, United States planners as well as many neutral commentators “blame (terrorists) for the deaths of innocent people they hide among.” Cole, *supra* note 4, at 97-98 (elaborating the principle of distinction as understood within the Christian just war theory); see also Ken Anderson et al., A Public Call for International Attention to Legal Obligations of Defending Forces as Well as Attacking Forces to Protect Civilians in Armed Conflict, Crimes of War Project, Mar. 19, 2003, at <http://www.criomesofwar.org/special/Iraq/news-iraq3.html> (attributing to defendants rather than attackers the obligation to exclude civilians from military targets and the responsibility for resulting casualties where civilians are not excluded).

¹⁰⁵ The United States accepts limitations on the use of force, imposed under the customary IHL principle of proportionality, in the conduct of military operations. See *The Law of Land Warfare* (1956), *supra* note 43, ¶ 41 (“(T)he loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.” (citing revision of 1976)). However, just as the precise meaning of the principle of distinction is contested legal terrain, the definition of proportionality, and the application of the principle to military operations, is the subject of dispute. See *supra* note 44. The injunction not to employ force so as to cause damage “excessive in relation to the concrete and direct military advantage anticipated” suggests to one commentator that the principle of proportionality “favors the option of intentionally killing the head tyrant as a means of ending aggression, rather than sending our young men and women onto the battlefield to slaughter--and be slaughtered by--the tyrant’s young men and women.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, [1125 U.N.T.S. 3 \(hereinafter API\)](#); Turner, *supra* note 100, at 800. Others argue that proportionality requires a balancing approach. Shue & Wippman, *supra* note 43, at 574. Still others suggest that in determining the proportionality of attacks against certain infrastructures, one must take into account the “indirect and cumulative effects” of the military action and not merely the direct effects. *Id.* Although the Bush Administration interpreted proportionality to require that strikes against the Taliban military structures and al Qaeda terrorist camps be carefully calibrated, in practice it is impossible to adhere to universally accepted standards of proportionality when employing such devastating weapons systems as cruise missiles, heavy bombers and cluster munitions. See Adam Roberts, *The Laws of War in the War on Terror* 7 (unpublished manuscript, on file with author) (stating that the principle of proportionality is in tension with the United States doctrine favoring application of overwhelming force in order to achieve decisive victory quickly and with a minimum of casualties). Consequently, there is space to determine a breach of a legal obligation under almost any circumstances. See Drumbl, *supra* note 77, at 48 (stating that malleability of the principle of proportionality is “reason() to be concerned over the . . . incipient legalization of the use of . . . force in response to (terrorist) attacks”).

¹⁰⁶ The United States impression of the ICC as antipathetic to United States national security and conducive to malefactors has been well summarized:
However well-intentioned advocates for the (ICC) may be, the (ICC) represents a significant threat to the national security of the United States and its allies. . . . Since the forces of evil will recognize the deterrent influence of such politically based prosecutions on potential responders, the leaders of these regimes may make entirely rational decisions to commit acts of aggression, knowing they can act without fear of military intervention from foreign forces.
Smidt, *supra* note 40, at 157-58.

¹⁰⁷ Covert operations, also known as “special activities” or “special operations,” are a “peculiarly American invention” used by every President since the founding of the United States. See generally Melvin A. Goodman, *Espionage and Covert Action*, in *National Insecurity: U.S. Intelligence After the Cold War* 23-42 (Craig Eisendrath ed., 2000); Statement of Mitchell Rogovin, Special Counsel to the Director of Central Intelligence: Hearings Before the House Select Committee on Intelligence, 94th Cong., 1729, 1731-33 (1976) (detailing long usage of covert operations as United States foreign policy instrument). Such operations are defined in United States law as “activities conducted in

support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly.” [Exec. Order No. 12,333](#); [46 Fed. Reg. 59, 941, 59,953 \(Dec. 4, 1981\)](#). Covert operations may lawfully be conducted only by the Central Intelligence Agency or by United States Armed Forces unless the President makes a finding that another agency “is more likely to achieve a particular objective.” *Id.* at 49,946. “(Special operations are) conducted by specially organized, trained, and equipped military and paramilitary forces to achieve military, political, economic, or informational objectives by unconventional military means in hostile, denied, or politically sensitive areas” and which “requir(e) clandestive, covert, or low visibility techniques” Joint Chiefs of Staff, *Doctrine for Joint Special Chairman I-1* (1998) (emphasis added). The principal distinguishing feature of covert operations is that, unlike overt applications of force, they are intended to remain secret from the public in order to permit government officials to plausibly deny responsibility for their effects. See Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, [S. Rep. No. 94-755, at 490-91](#), 94th Cong., 2d Sess., Book I (1976) (citing an early National Security Council document, NSC-4/A (1948)). While the domestic legal regime governing covert operations is beyond the scope of this Article, the President has authority, acting through the National Security Council, to direct the Central Intelligence Agency or the Defense Department to engage in covert operations. See National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified in part at [50 U.S.C. § 403\(d\)\(5\) \(2000\)](#)) (authorizing the President to direct the CIA to “perform . . . other functions and duties related to intelligence affecting the national security”).

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Where the U.N. authorizes a military operation, the relevant Security Council resolution provides the broad mission, political objective and legal authority and creates a quasi-contract between the U.N. and states contributing forces. Marc L. Warren, [Operational Law--A Concept Matures](#), 152 *Mil. L. Rev.* 33, 48 (1996). Although under international law there is no explicit prohibition against covert operations and even if covert operations often result in greatly minimized use of force as compared to overt military interventions, a general presumption against the legality of the use of force exists. See U.N. Charter art. 2(4) (“All members shall refrain in their international relations from the threat of or use of force”). While tactical considerations of secrecy and expedience may suggest that a covert operation is more likely to achieve an outcome otherwise achievable by overt force, absent prior authorization by the Security Council, the political costs and the risk of legal exposure attendant to a covert operation increase geometrically. See W. Michael Reisman & James E. Baker, *Regulating Covert Action* 305 n.30 (1992). (suggesting that while covert operations conducted in accordance with IHL may be contributive and supplementary to rather than destructive of international law and order, the inference of lawfulness does not attach to an unauthorized covert operation any more than it does to an unauthorized overt operation); see also Jami Melissa Jackson, [The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications](#), 24 *N.C. J. Int’l L. & Com. Reg.* 669, 713 (1999) (identifying increased international legal intolerance of covert operations across state borders); W. Michael Reisman, [International Legal Responses to Terrorism](#), 22 *Hous. J. Int’l L.* 3, 19 (1999) (arguing that neutralization of terrorist targets by covert means does not excite as much condemnation as does an overt military operation due to the opportunity for the plausible deniability by the attacking state and for third parties to more readily ignore the consequences). However, American presidents have jealously defended their rights and claimed duties to employ covert operations when overt military force would carry political and legal risks. See Marcus Eyth, [The CIA and Covert Operations: To Disclose or Not to Disclose--That is the Question](#), 17 *BYU J. Pub. L.* 45, 68 (2002); Lloyd Cutler, Counsel to President Carter, Legal Opinion on War Powers Consultation Relative to the Iran Rescue Mission (May 9, 1980), reprinted in Subcomm. on Int’l Security and Scientific Affairs of the House Comm. on Foreign Aff., *War Powers Resolution: Relevant Documents, Correspondence, Reports*, 98th Cong., 1st Sess. 50 (1983) (claiming inherent presidential powers to employ covert operations to rescue United States citizens held hostage where mission success is surprise-dependent (relying upon The Hostage Act, [22 U.S.C. § 1732 \(2000\)](#) (providing that the “President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release (of United States citizens held hostage”))). Accordingly, to the extent that the United States Executive Branch has been interested in the legality of covert operations, attention has been focused upon the domestic, rather than the international, legal issues. Inasmuch as international law is considered in the covert operations context, presidents and commentators have opined that the United States president has the authority, under domestic law, to authorize executive branch officials to violate international law. See *The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International Law: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 3 (1989) (concluding that as a matter of United States law the president can authorize executive officials to conduct covert operations that violate the territorial sovereignty of

other states in contravention of customary international law); Reisman & Baker, *supra* note 107, at 68 (quoting President Ronald Reagan as saying, "I do believe in the right of a country, when it believes that its interests are best served, to practice covert activity.").

The United States has met significant political and legal resistance in response to the war on terror. In response it has shielded much of its battle plan from public review (and legal attack) and turned to covert operations as its principle weapon. See Thom Shanker & James Risen, *Rumsfeld Weighs New Covert Acts by Military Units*, N.Y. Times, Aug. 12, 2002, at A1 (reporting that the Department of Defense has issued a classified directive ordering a focus upon employment of United States special forces and CIA paramilitary forces to "disrupt and destroy enemy assets" in states where the local government is unaware of their presence); Thom Shanker, *Jump in Elite Forces' Budget Foreseen*, N.Y. Times, Jan. 8, 2003, at A10 (reporting expansion of Special Operations Command and authorization to independently plan and execute counterterrorist operations). Shortly after September 11th, President Bush authorized CIA and Army Special Forces to kill two dozen terrorist leaders-- the "worst of the worst"--if capture is "too dangerous or logistically impossible." CIA Has License to Kill Enemies, Reuters (Queensland), Dec. 16, 2002, at A1 (reporting finding as the broadest discretion ever bestowed on CIA to make use of covert operations). While liberal use of covert measures is likely to continue, the Bush Administration has not avoided all legal criticism. For a broader discussion of the consequences of the use of covert operations for the rule of law and political accountability, see Alberto R. Coll, *Unconventional Warfare, Liberal Democracies, and International Order*, in *Legal and Moral Constraints on Low-Intensity Conflict* 67 (Alberto R. Coll et al. eds., 1995).

¹⁰⁹ Very few states have offered more than platitudes in support of the United States-led war on terror, with most either remaining quasi-neutral and some even adopting an obstructionist approach in the U.N. Security Council. One commentator suggests that, for a plethora of reasons beyond the scope of this Article, a fundamental rift has opened between the United States and its Western allies over the principles and canons of interpretation that are to guide the application of law to armed conflict in the new millennium. David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, Nat'l Int., Fall 2003, at 57 (stating that with respect to IHL the United States and Europe effectively "can be said to operate under different legal codes"). Although in the immediate aftermath of September 11th NATO invoked the collective defense provisions of the NATO Charter to offer the United States military assistance if necessary, the Alliance has offered little military support to the war on terror. See North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (providing that "an armed attack against one or more (NATO members) . . . shall be considered an attack against them all"); Press Release, NATO Reaffirms Treaty Commitments in Dealing with Terrorist Attacks Against the U.S. (Sept. 12, 2001) (reaffirming commitment to mutual defense under Article 5 of NATO Charter). Similarly, despite a series of proclamations, the U.N. has never demonstrated a firm commitment to eradicating terrorism, and a group of Afro-Asian states have carved out exceptions to language condemning terrorism on the theory that citizens of certain states, in particular the United States and Israel, do not serve immunity on account of the "racist" or "colonial" policies of their governments. See U.N. GAOR, 56th Sess., 14th plen mtg., U.N. Doc. GA/9922 (2001) (stating that "(a)cts of pure terrorism, involving attacks against innocent civilian populations should be differentiated from legitimate struggles of peoples under colonial, alien or foreign domination for self-determination and national liberation"). For its part, the Islamic Conference has proposed exempting terrorist acts "related to an armed conflict" from treaties condemning terrorism. Malvina Halberstam, [The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed](#), 41 Colum. J. Transnat'l L. 573, 581-82 (2003) (referencing legislative history of Draft Comprehensive Convention on Terrorism drafted by ad hoc committee of UNGA). That the United States should be chary of submitting to the legal judgment of states that propagate the canard that "one man's freedom fighter is another man's terrorist" should not be surprising.

¹¹⁰ See Daniel Benjamin & Steven Simon, *The Age of Sacred Terror* 36 (2002) (stating that the September 11th attacks were specifically directed, religiously motivated blows against icons of the West).

¹¹¹ On September 15th, President George W. Bush made a colloquial reference to the terrorists of September 11th as "barbarians" in public comments urging Americans to return to their normal lives as much as possible but to anticipate possible future attacks. See Bob Kemper & Tim Jones, *Bush Warns of Long Fight Ahead*, Chi. Trib., Sept. 16, 2001, at 1 ("The American people need to go about their business on Monday, but with a heightened sense of awareness that a group of barbarians have declared war on the American people."). This nomenclature has not yet

found a formal place in law. However, the equation of terrorists with barbarians is suitable inasmuch as both are counter-civilizational and both disentitle themselves from the category of rights-bearing subjects by their transgressions against the rights of others. See Robert S. Gerstein, *Do Terrorists Have Rights?*, in *The Morality of Terrorism* 294 (David C. Rapoport & Yonah Alexander eds., 1982).

(T)he terrorist . . . not only violates particular rights, he also rejects the principles on which rights rest, and aims at destroying the capacity of the government to protect them. . . . (T)he terrorist is . . . an enemy of rights in general (T)he terrorist still cannot legitimately expect respect for his claims from those to whom he makes them, for he is exempting himself from the rightless **status** to which he would relegate all others purely on the basis of his self-appointment

Id. The reconceptualization of terrorists as modern-day barbarians is indebted to the work of Eric Hobsbawm who, in an influential 1994 essay, opined that an ongoing process marked by “the disruption and breakdown of the systems of rules and moral behaviour by which all societies regulate . . . relations” and the erosion of the “universal system of . . . rules and standards of moral behaviour, embodied in the institutions of states dedicated to the rational progress of humanity: to Life, Liberty and the Pursuit of Happiness, to Equality, Liberty and Fraternity or whatever,” was dragging civilization into an abyss wherein a “dangerous classes” of predators “for whom no accepted or effective rules and limits of behaviour exist any longer: not even the accepted rules of violence in a traditional society of macho fighters,” would transcend all boundaries of morality in their attacks. See Eric Hobsbawm, *Barbarism: A User’s Guide*, 206 *New Left Rev.* 44, 45-53 (1994). Other scholars concur that a new and unlimited species of terrorist, committed not to the traditional goals of revolution or national liberation but to the destruction of civilization, has emerged in the vacuum left by the collapse of bipolarity. See generally Martha Crenshaw, *The Psychology of Terrorism: An Agenda for the 21st Century*, 21 *Pol. Psychol.* 405 (2000) (contrasting “old” terrorism with this deadlier “new” terrorism). For an operationalization of the term “barbarians” as employed in reference to these new terrorists in this Article, see *infra* Part III.

¹¹² See Gross, *supra* note 45, at 523 (suggesting that Islamic terrorism is an existential threat to the “free world”, defined as the liberal Western democracies); see also *The Day the World Changed*, *Economist*, Sept. 15, 2001, at 13 (“The appalling atrocities of September 11th (are) acts that must be seen as a declaration of war not just on America but on all civilised (sic) people . . .”).

¹¹³ Although others have applied the term more narrowly, the “Bush Doctrine” encompasses the broader transformation of United States policy toward preempting, rather than simply responding to, threats. See David E. Sanger, Note, *Bid to Justify a First Strike*, *N.Y. Times*, Sept. 5, 2002, at A1 (labeling as the “Bush Doctrine” the current United States strategy that asserts the right to launch pre-emptive strikes against any state that could put WMD in the hands of terrorists). Compare Benjamin Langille, Note, *It’s “Instant Custom”: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 *B.C. Int’l & Comp. L. Rev.* 145, 145-46 (2003) (terming the “Bush Doctrine” the dichotomization of states into supporters of the United States and supporters of terrorism). The Bush Doctrine is thus a major foreign policy redirection from the Clinton Doctrine, which was characterized by the display (as opposed to the use) of military power, casualty avoidance, absolute minimization of collateral damage and “unseemly haste to declare even the most modest use (or threat) of force a roaring success.” Barnett, *supra* note 96, at 130.

¹¹⁴ The quoted words are drawn from the title of an essay encouraging the United States to abandon neutrality and intervene against Nazi Germany on the ground that to refuse would constitute an immoral act. Reinhold Niebuhr, *If America Is Drawn into the War, Can You, as a Christian, Participate in It or Support It?*, *Christian Century*, Dec. 18, 1940, at 1578.

¹¹⁵ DreamWorks Studios, 1998.

¹¹⁶ See generally Ruth Wedgwood, [Responding to Terrorism: The Strikes Against bin Laden](#), 24 *Yale J. Int’l L.* 559 (1999) (bifurcating responses to international terrorism into a judicial model, characterized by use of the tools of the criminal justice system and creation of norms to support transnational administration of justice through treaties, and a

military model, characterized by the use of force to disable and disrupt terrorists from carrying out their missions).

¹¹⁷ See Osiel, *supra* note 23, at 5 (suggesting IHL has reached the stage whereby it is now constitutive of civilization).

¹¹⁸ *Id.* at 207.

¹¹⁹ See Johan Huizinga, *Homo Ludens* 179-80 (Beacon Press 1950) (1944) (identifying compassion, fidelity and justice as essential to the chivalric code); Maurice Hugh Keen, *Nobles, Knights, and Men-At-Arms in the Middle Ages* 51-59 (1996) (describing chivalric virtue as graciousness to vanquished foes in recognition of shared membership in an international brotherhood-at-arms); Michael Ignatieff, *The Warrior's Honor* 117 (1997) (describing "moral etiquette by which warriors judged themselves . . . worthy of respect"); Meron, *Henry's Wars*, *supra* note 12, at 209 (noting that breach of the chivalric code associated with dishonor, shame and ostracism).

¹²⁰ Osiel, *supra* note 23, at 17. Medieval Japanese knights called the martial code Bushido. Ignatieff, *supra* note 119, at 117.

¹²¹ Norms can be defined as "a set of intersubjective understandings readily apparent to actors that make behavioral claims on those actors." Martha Finnemore, *National Interests in International Society* 2 n.2 (1996) (explaining that distinct social groups develop, apply and evaluate compliance with parochial normative structures); John M. Levine & Richard L. Moreland, *Progress in Small Group Research*, 41 *Ann. Rev. Psychol.* 585, 585 (1990) (defining norms as "shared expectations about how group members are to behave," the most central of which develop through common group experience over time). For a constructivist account of the evolutionary process of norm generation in social relations, see Ann Florini, *The Evolution of International Norms*, 40 *Int'l Stud. Q.* 363, 363-89 (1996).

¹²² The concept of "honor" is now considered largely an anachronism in civil society but was once a "central construct in . . . socio-political thought and a commonplace in works of law and political philosophy." Allen Z. Hertz, [Honour's Role in the International States' System](#), 31 *Den. J. Int'l L. & Pol'y* 113, 116 (2002). Although the term is applied in many contexts, most definitions converge around the idea that honor signifies the "esteem, glory, or reverence that a man receives from his fellow men." 2 Alexis de Tocqueville, *Democracy in America* 230 n.1 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1840).

¹²³ See Osiel, *supra* note 23, at 31-32 ("(Soldiers) ask themselves: 'What is required of honorable soldiers, here and now?' rather than 'What does international law require?' . . . Martial honor 'means doing nothing to tarnish that proud heritage' of one's unit, regiment, or branch of service . . ."). Under the martial code, a soldier gauges his conduct by asking not whether it was legal but rather "(w)ould (my) actions pass muster if . . . evaluated by responsible, respectable soldiers of yesteryear and today?"). James H. Toner, *Teaching Military Ethics*, *Military Rev.* 33, 37 (1993).
Excellent – this is exactly the force of desert – first order considerations that look inside the person- not thinking about the law. Useful for this is the comparison in Robinsin's article re legitimacy – second order vs desert – first order

¹²⁴ Best, *supra* note 20, at 290. In essence, the martial code fosters empathy for fellow martial professionals. Diane Guillemette, *Legal Advisers in Armed Forces*, in *Implementation of International Humanitarian Law* 133, 144 (Fritskalshoven & Yves Sandoz eds., 1989).

¹²⁵ See generally Friedrich Kratochwil, *Rules, Norms, and Decisions* (1989) (describing process whereby regimes, a designation inclusive of martial honor, deploy normative constraints to fortify socially optimal solutions against the temptation of an individual to make rational decisions); J.G. March, *Decision Regimes* ix (1994) (describing process

whereby the normative force of institutional customs and traditions socializes and determines individual preferences and directs members not explainable by reference to their rational self-interest defined in terms of wealth or even physical security).

¹²⁶ March, *supra* note 125, at 21. This narrative identity is conferred largely by anecdotal reference to an accreting stock of stories that detail how heroic soldiers behaved in combat, particularly with regard to the avoidance of the infliction of unnecessary suffering. *Id.*

¹²⁷ See Order of General Douglas MacArthur Confirming the Death Sentence of General Tomayuki Yamashita (Feb. 16, 1946) ("The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits--sacrifice."); see also Roger Fisher, *Improving Compliance with International Law* 92 (1981) ("(S)oldiers are brought up to risk almost certain death rather than fail in their duty . . . even though there is no compensating chance of personal gain.").

¹²⁸ See Ryan Goodman & Derek Jinks, [Toward an Institutional Theory of Sovereignty](#), 55 *Stan. L. Rev.* 1749, 1783 (2003) (describing national military establishments as global epistemic community that adheres to prescriptive norms of conduct); Peter Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 *Int'l Org.* 1, 3 (1992) (defining "epistemic community" as a "network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain" as well as to a set of shared norms and practices to guide self-regulation).

¹²⁹ Richard Shelly Hartigan, *Lieber's Code and the Law of War* 5 (1983) (suggesting restraint in combat "d(oes) not stem from a conscious articulation of principles of (IHL) so much as from a kind of soldier's honor"); Jeffrey Legro, *Cooperation Under Fire: Anglo-German Restraint During World War II* 2 (1995) (developing "organizational-cultural" theory of transnational cooperation and identifying the collective understanding of "how soldiers thought about themselves, perceived the world, formulated plans, advised leaders, and went into action"--in other words, the martial code--as the explanation for adherence to behavioral norms); Meron, *Henry's Wars*, *supra* note 12, at 216 ("Honour and mercy . . . formed potent forces for civilized behaviour in time of war.").

¹³⁰ Much of the language codified as IHL represents the lowest common denominator of what states parties were willing to accept, and thus the prohibitive regime is less stringent than the martial code. See Osiel, *supra* note 23, at 32 (suggesting that while IHL establishes "a 'floor' beneath which no soldier may descend," the "most effective soldiering, the sort that wins medals (and battles) is . . . 'supererogatory,' requiring the acceptance of risk . . . 'beyond the call of duty'").

¹³¹ Social control theorists note that private groups exert far more control over members' behavior, through internal enculturation, than externally imposed rules. Jon Elster, *The Cement of Society* 15 (1989) (demonstrating importance of endogenous nonlegal normative systems in regulating social organizations); Tom R. Tyler, *Why People Obey the Law* 22-23 (1990) (discussing related theories); Yaacov Y.I. Vertzberger, *The World in Their Minds* 195-96 (1990) (describing process whereby group membership creates a "cognitive mediation role" by providing members a normative "benchmark and a sense of (normative) direction for coping with . . . their complex environment"); Oran R. Young, *Compliance and Public Authority* 22 (1979) (identifying internal social pressures operant within social groups as powerful source of inducement toward compliance with norms); Alexander Wendt, *Collective Identity Formation and the International State*, 88 *Am. Pol. Sci. Rev.* 384, 384-85 (1994) (positing corporate structures organized around internal normative systems as crucial to construction and regulation of international relations). See generally [Harold G. Grasmick & Robert J. Bursik, Jr., Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model](#), 24 *L. & Soc'y Rev.* 837 (1990) (examining role of social groups in creating legal norms and mobilizing the desire for peer respect and affiliation as security against violation

of those rules of member conduct). See generally Haas, *supra* note 128 (describing compliance pull generated by the inculcation of group norms within transnational professional networks).

Awesome! Uses social science on a related to empirical desert conceptualization. To check if the empirical desert literature is relying on the same theories. To note - it even uses Tyler.

¹³² The “court-martial” is a domestic military court with jurisdiction to try offenses against military order and discipline as well as against the laws and customs of war. See *infra* note 283 (discussing United States court-martial in depth).

¹³³ “Reprisal” is an act of retaliation undertaken to induce enemy forces to cease violating IHL. See generally Kalshoven, *supra* note 28. When undertaken absent a prior enemy violation, reprisal would violate IHL, but when undertaken to force an adversary to cease violating IHL it becomes legal provided it is proportional, temporary and preceded by notice. *Id.* Reprisals, or the threat thereof, alter the decision matrix of soldiers. The resort, or threatened resort, to mechanisms built upon the principle reciprocity to prevent defections from behavioral norms is common practice within social groups constructed on the basis of kinship, religion and professional **status**. See, e.g., George Dalton, Traditional Production in Primitive African Economies, in *Tribal and Peasant Economies* 61-80 (George Dalton ed., 1967).

¹³⁴ See Walzer, *supra* note 12, at 305 (claiming IHL establishes an absolute rule that “self-preservation . . . is not an excuse for violations of the rules of war”).

¹³⁵ See Telephone Interview with LTC Mark Martins, Deputy SJA, XVIIIth Airborne Corps (Oct. 2, 2000) (noting that at a court-martial proceeding an accused is permitted trial before a jury of military peers who are charged with determining whether extenuating or mitigating circumstances such as “heat of passion, lack of sleep or food, (or) extremity of the circumstances” should be permitted as partial or complete defenses or factors to be considered in reduction of sentencing); see also Taylor, *supra* note 13, at 36.
(C)ircumstances arise where military necessity, or even something less, causes (the rules) to be disregarded. In the heat of combat, soldiers who are frightened, angered, shocked at the death of comrades, and fearful of treacherous attacks by enemies feigning death or surrender, are often prone to kill rather than capture.
Id.

¹³⁶ According to Professor Fisher,
Basic perceptions of the world, of what is right and wrong, of what is desirable and of what is undesirable, are shaped primarily for any given (institution) by considerations other than the law. Family, schools, cultural attitudes, and the implicit assumptions of any society are subject to change, but not primarily through legal tinkering.
Fisher, *supra* note 127, at 143.
As this Article will demonstrate, the martial code, built upon a set of non-legal normative understandings and values, is at its core a non-legal regime not generally tractable by traditional legal pressures, particularly when exerted by outsiders who do not share the normative commitments that animate the regime of military self-regulation. For an argument that non-legal sources of normative prescription regarding “what is right and good for human life” that precede attempts at positive legal regulation are more effective, at least in international relations, in securing compliance with behavioral objectives, see generally Martti Koskeniemi, [The Pull of the Mainstream](#), 88 *Mich. L. Rev.* 1946 (1990).

¹³⁷ Private Fritz Niland of the 101st Airborne Division was removed from the European Theater of Operations by order of the War Department in June 1944 after it was discovered that all three of his brothers were killed in action in a single week. See Stephen E. Ambrose, *Band of Brothers* 103 (1992).

¹³⁸ In the film, the character is referred to simply as “Steamboat Willie,” so named for his desperate recitation of all the sound bites from American culture that he can recall, one of which is the Disney cartoon by that title. *Saving Private*

Ryan (Paramount Pictures 1998).

¹³⁹ Hors de combat is a legal term of art drawn from the French and signifying that an individual has been rendered “out of combat” and thus is no longer a combatant. See API, *supra* note 105, art. 40 (defining hors de combat as including those “in the power of an adverse party”; those who clearly express “an intention to surrender”; and those who have been “rendered unconscious or otherwise incapacitated by wounds or sickness” and are therefore incapable of defending themselves).

¹⁴⁰ To conserve space, the analysis of denial of quarter does not distinguish between the refusal to accept surrender and the slaughter of **POWs** whose surrender has already been accepted, although this distinction is relevant to the evaluation of the conduct of Captain Miller’s troops on the bluffs above Omaha Beach. See Myres S. McDougal & Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* 575-76 (1994) (“(I)n case of close and sustained combat in land war, where the signal of surrender is postponed and resistance continued to the very last moment, quarter may in practice be difficult to grant Determination of the particular time when further violence becomes nonpermissible is thus a matter of rough practical judgment.”).

¹⁴¹ Spaight, *supra* note 17, at 3.

¹⁴² See 2 Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* 234-38 (1911) (stating that in ancient times extermination, sacrifice of prisoners to the gods, slavery, mutilation of corpses and refusal of mercy to the old and sickly were usual practices); Howard S. Levie, *Humanitarian Law and the Law of War on Land*, in *International Humanitarian Law: Origins* 181 (John Carey et al. eds., 2003) (“From the caveman to Biblical times, and for centuries thereafter, the winner in battle took from the loser not only his life, but also all of his available belongings, including women, children, domestic animals, and personal property.” (citing Numbers 31:7-11)).

¹⁴³ See I Samuel 15:3 (instructing Saul to “go and smite Am’a-lek, and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass”); Herbert C. Fooks, *Prisoners of War* 8 (1924) (noting that the Roman general Germanicus urged his legions invading the Rhineland to “(s)lay, and slay on, do not take prisoners; we shall only have peace by the complete destruction of the nation” (citing Tacitus, *Annals* bk II, ch. 21)); Plato, *The Rules of War*, in *The Republic* bk V, § 3, at 226 (H.D.P. Lee trans., 1955) (citing Socrates as stating that “any . . . taken prisoner should be abandoned to his captors to deal with as they wish”); Thucydides, *The History of the Peloponnesian War* bk. I, ch. 50 (Rex Warner trans., 1954) (“(The Corinthians) sailed in and out of the wreckage, killing rather than taking prisoners.”).

¹⁴⁴ Secretary of Defense Advisory Committee on Prisoners of War, **POW**: *The Fight Continues After the Battle* 3 (1955) (hereinafter SDACPOW).

¹⁴⁵ Fooks, *supra* note 143, at 16, 118-19 (listing methods of execution of **POWs** used by ancient Assyrians, Greeks and Romans).

¹⁴⁶ See Joseph W. Bishop, Jr., *Justice Under Fire: A Study of Military Law* 263 (1974) (indicating that killing prisoners of war was “practically mandatory under contemporary notions of morality” at the time of the Old Testament); Fooks, *supra* note 143, at 7-8 (citing the exile of the Syracusan general Hemocratus for the crime of ordering his troops to treat Athenian prisoners with moderation rather than death); *id.* at 7 (stating that many ancient nations regarded moderation in the treatment of prisoners of war as a religious offense).

¹⁴⁷ Fooks, *supra* note 143, at 8.

¹⁴⁸ See, e.g., 1 Cicero, *De Officiis* 11 (1814) (“The conquered have a right to our respect as well as those who have surrendered themselves.”); Fooks, *supra* note 143, at 119 (noting that the ancient Greek Xenophon asserted that **POWs** should be treated humanely, and that the Roman Sallust declared that the laws of war would not permit the killing of Numidian prisoners taken during the Punic Wars); Osiel, *supra* note 23, at 176-77 (indicating that, following the surrender of the Spanish city of Locha in 203 B.C., the Roman commander Scipio Aemilianus punished his troops who had refused to give quarter and publicly apologized for their conduct); Sun Tzu, *On the Art of War* 16 (Lionel Giles trans., 1910) (suggesting that it may be more efficacious to accept surrenders rather than kill prisoners). See generally Bluntschli, *supra* note 6 (stating that some Hindu tribes adhered to the code of Manu, which proscribed killing **POWs**).

¹⁴⁹ Although considerations of military necessity per se did not directly enter into the moral calculus of the ancients with respect to any duties owed **POWs**, the logistical requirements of maintaining them did in fact militate in favor of their swift dispatch. See generally E. Bodian, *From Plataea to Potidaea: Studies in the History and Historiography of the Pentecontaetia* (1993).

¹⁵⁰ “Quarter” refers to the acceptance of the surrender of the defeated foe. See *id.* at 113 (noting the origin of the term in a seventeenth century war between Spain and the Netherlands in which the parties made a regulation that they would spare the lives of **POWs** upon payment of a ransom equal to one-fourth of their annual salaries and that captives for whom no such payment was made would be killed). To make the declaration of no quarter was to inform an enemy that surrender would be neither requested nor granted and that combat would continue until the death of the last enemy soldier or until the attacker decided to cease operations.

¹⁵¹ See Christine de Pisan, *The Book of Fayttes of Armes and of Chyvalrye* 184 (A.T.P. Byles ed., William Caxton trans., 1932) (1489) (noting that the medieval laws of war and customs of chivalry suggested that prisoners of war ought to be spared in exchange for ransom).

¹⁵² See Honore’ Bonet, *The Tree of Battles* (G.W. Coopland trans., Harvard University 1949) (1387) (“He who in battle has captured his enemy, especially if it be the duke or marshal of the battle . . . should have mercy on him, unless by his deliverance there is danger of having greater wars . . .”); Maurice Keen, *Chivalry* 276 & n.7 (1984) (noting that during medieval combat, killing **POWs** in emergencies was permitted and quarter was not invariably given); Giovanni da Legnano *De Bello, De Represaliis et De Duello* ch. 30, at 253-54 (Thomas Erskine Holland ed., J.L. Brierly trans., Oceana Publications 1964) (1383)) (“(Q)uarter should be granted to one who humbles himself and does not try to resist, unless the grant of quarter gives reason for fearing a disturbance of the peace, in which case he must suffer (Q)uarter is to be granted only when disturbance of the peace is not feared, and otherwise not.”); Pisan, *supra* note 151, at 222 (stating, in a 1408 compilation of the medieval customs of war that, although it is expected that Christian soldiers will extend to each other the grant of quarter as a principle of their humanity, prisoners who would otherwise endanger their captor may be killed); 6 Franciscus de Victoria, *De Indis et De Ivre Belli Reflections* 183 (Ernest Nys ed., John Pawley Bate trans., Carnegie 1917) (1577) (“Speaking absolutely, there is (no law) to prevent the killing of those who have surrendered or been captured in a just war so long as abstract equity is observed, (although) after victory has been won . . . and all danger is over, (they) are not to be killed.”). The most discussed denial of quarter necessity occurred in 1415 when troops under the command of the English King Henry V, invading France at the beginning of the Hundred Years’ War, killed French prisoners during the Battle of Agincourt. Although a majority supports the argument that military necessity was a complete justification for the denial of quarter, commentators are divided as to whether Henry, his forces outnumbered and convinced that French cavalry reserves were about to be committed to battle, had a legitimate claim of military necessity in ordering the execution of enemy prisoners to prevent their liberation and resumption of combat operations against the English. See Richard Crompton, *The Mansion of Magnamitie* ch. 6 (Theatrum orbis Terrarum, Ltd. 1975) (1399).
(U)ppon such necessary occasion, to kill them was a thing by all reason allowed, for otherwise the king having lost diverse valiant Captaines and souldiers in this battell, and being also but a small number in comparison of the French kings army & in a strang cuntry, where he could not supply his neede upon the sudden, it might have bene much daungerous to have againe joyned with the enemy, and kept his prisoners alive, as in our Chronicles largely appeareth.

Id. (cited in Meron, *Henry's Wars*, supra note 12, at 166-67); see also 1 Winston S. Churchill, *A History of the English-Speaking Peoples* 401-08 (1956) (justifying Henry's order to kill **POWs** on ground of necessity); Raphael Holinshed, *Henry V*, in *Holinshed's Chronicles* 38 (R.S. Wallace & Alma Hansen eds., 1923) (1587) (holding that although the killings were undertaken "contrarie to his accustomed gentleness" and "incontinentlie" they were permissible under custom); Harold F. Hutchison, *King Henry V* 124 (1967) (stating that "(b)y medieval standards Henry was obeying his soldier creed--military necessity justified any butchery"); Harris Nicolas, *A History of the Battle of Agincourt* 124 (2d ed. 1832) (arguing that "imperative necessity" justified the order); William Shakespeare, *Henry V* act IV, sc. vi (suggesting that he did). But see 2 Pierino Belli, *De Re Militari et Bello Tractatus* 40-41 (James Brown Scott ed., Herbert C. Nutting trans., Carnegie 1936) (1563) (condemning killing of **POWs** as a "practice most abominable"); 2 Alberico Gentili, *De Jure Belli Libri Tres* 211-12 (James Brown Scott ed., John C. Rolfe trans., Carnegie 1933) (1598) (describing denial of quarter to soldiers who "threw down their arms on the ground . . . (as a grave) crime" and rejecting justification by necessity); Desmond Seward, *Henry V* 81 (1987) ("(B)y fifteenth-century standards, to massacre captive, unarmed noblemen who, according to the universally recognized international laws of chivalry, had every reason to expect to be ransomed if they surrendered . . . was a peculiarly nasty crime . . .").

¹⁵³ See Francisco Suarez, *Disputation XIII: On Charity*, in 2 *Selections From Three Works* 841 (Jams Brown Scott ed., Gwladys L. Williams et al. trans., Oceana 1944) (1621) (stating that slaughter of **POWs** may be necessary to terrify the adversary).

¹⁵⁴ See William E.S. Flory, *Prisoners of War* 13 (1942) (discussing early efforts by the Christian Church to improve the treatment of prisoners of war by appeals to the "equality and brotherhood" of man); Fooks, supra note 143, at 10 (describing influence of Christianity in promoting a custom to allow prisoners to pay a ransom in exchange for their liberation).

¹⁵⁵ See 3 Hugo Grotius, *Le Droit de la Guerre et de la Paix* ch. 5 (Universite de Caen 1957) (1645) (hereinafter Grotius, *La Paix*) (stating that enemies captured in war, as well as their descendants in perpetuity, are the property of the captor to dispose of as he should so choose); see also 3 Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* ch 4, § 10 (James Brown Scott ed., Francis W. Kelsey trans., Carnegie 1964) (1625) (hereinafter Grotius, *Libri Tres*) ("So far as the law of nations is concerned, the right of killing . . . captives taken in war, is not precluded at any time . . .").

¹⁵⁶ See 3 Grotius, *La Paix*, supra note 155, ch. 5 (approving the killing of every inhabitant of a town that refused the request to surrender); William Edward Hall, *A Treatise on International Law* 474 n.2 (8th ed. 1924) ("Quarter was not given to the garrison of a place which resisted an attack from an overwhelming force, which held out against artillery in absence of sufficient fortifications, or which compelled the besiegers to deliver an assault.").

¹⁵⁷ See, e.g., Meron, *Henry's Wars*, supra note 12, at 109 (reporting that, prior to the English denial of quarter at the Battle of Agincourt, the French leaked their intention to grant quarter only to English nobles and to amputate the right hand of every English archer).

¹⁵⁸ SDACPOW, supra note 144, at 3-4.

¹⁵⁹ See generally William P. Guthrie, *The Later Thirty Years War: From the Battle of Wittstock to the Treaty of Westphalia* (2003) (describing the common practice during European religious wars of killing all residents of captured cities, such as Heidelberg, Magdeburg and Kempten).

¹⁶⁰ See Green, supra note 99, at 289 (citing ninth century Islamic code distinguishing Muslim from non-Muslim **POWs** and permitting killing of latter provided the offer of conversion was rejected). Some scholars indicate that in practice Muslim captors would release non-Muslim **POWs** provided the parolees had not committed precapture crimes and

pledged, upon their release, to teach illiterate Muslims to read and write. Bennoune, *supra* note 12, at 634 (discussing alternate dispositions of non-Muslim **POWs**).

¹⁶¹ Flory, *supra* note 154, at 13.

¹⁶² See, e.g., Victoria, *supra* note 152, at §§ 44-48 (holding that the refusal to take Muslim prisoners, and the execution of the same, was *ipso facto* a matter of military necessity).

¹⁶³ See, e.g., Green, *supra* note 99, at 290 (noting that after the Siege of Limoges (1370) the English knights John of Gaunt and the Earle of Cambridge, moved to mercy by the pleas of French captives, countermanded orders denying quarter).

¹⁶⁴ A.J. Barker, *Prisoners of War* 6 (1975).

¹⁶⁵ See G.F. de Martens, *Precis Du Droit Des Gens Moderne De L'Europe* bk. VII, ch. 4, at 272 (1858) (holding that **POWs** were entitled to quarter except in reprisal for denial of quarter on their own part); Montesquieu, *De L'esprit Des Lois* bk. 15, ch. 11, at 242 (Thomas Nugent trans., 1900) (1748) (stating that soldiers rendered hors de combat were entitled to be spared from further injury); 2 Johann Wolfgang Textor, *Synopsis of the Law of Nations* ch. XVIII, paras. 17-19 (Ludwig von Bar ed., John Pawley Bate trans., Carnegie 1916) (denying the right of a captor to kill a **POW** rendered harmless and distinguishing between categories of former enemies who had promoted the war and willingly taken up arms from those who were forcibly conscripted); Emmerich Vattel, *Le Droit Des Gens ou Principes de la Loi Naturelle* bk. III, ch. VIII, paras. 140-141, 151 (James Brown Scott ed., George D. Gregory trans., Carnegie 1902) (1758) (commenting that the moment a soldier surrendered, he was under the protection of his captor and could not be killed unless he had committed a pre-capture crime justifying reprisal and death); Christian Wolff, *The Law of Nations* ch. XVIII, § 797, at 412 (Joseph H. Deake trans., Oxford 1934) (1734) ("Since once ceases to be an enemy as soon as he is in my power, . . . it is not allowable to kill those who have been surrendered unconditionally.").

¹⁶⁶ SDACPOW, *supra* note 144, at 4.

¹⁶⁷ See 3 Grotius, *Libri Tres*, *supra* note 156, ch. 14, § 9; Armand du Payrat, *Le Prisonnier de Guerre Dans La Guerre Continentale* 15 (1910) (declaring that a conqueror might spare the life of a prisoner upon his promise to accept enslavement (citing Puffendorf, *Le Droit de la Nature et des Gens* bk. VI, ch. 3, bk. VIII, ch. 6)).

¹⁶⁸ Howard S. Levie, *Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War*, 7 *USAFA J. Legal Stud.* 37, 37 (1996-97).

¹⁶⁹ See *Laws and Ordinances of Warre, Established for the better Conduct of the Army* (1643) ("None shall kill an enemy who yeelds, and throws down his Arms . . . upon pain of death.").

¹⁷⁰ See, e.g., *Treaty of Amity and Commerce*, Sept. 10, 1785, U.S.-Prussia, 8 Stat. 84 (obligating parties to provide reciprocal humane treatment, including quarter, to prisoners of war).

¹⁷¹ See *infra* note 240 and accompanying text (discussing the concept of "parole").

¹⁷² Although this customary regime did ameliorate the treatment of some captured personnel and the parole of a great many officers, the exceptions nearly swallowed the rule, and the British in particular committed major violations of the tacit agreement to treat POWs with humanity. See B. Tarleton, *A History of the Campaigns of 1780 and 1781 in the Southern Provinces of North America* 30-32 (1968) (chronicling British violations of the emerging custom that required humane treatment of POWs, such as the confinement of Ethan Allen in irons on a prison ship and the refusal to grant quarter at the Battles of Waxhaws and Fort Griswold). Compliance with what remained of the regime was secured not through any sense of legal or professional obligation but largely through threat of reprisal, as commanders whose captured troops were threatened with execution resorted to reciprocal threats against enemy prisoners of war in their own custody to protect their own personnel. See George L. Coil, *War Crimes of the American Revolution*, 82 Mil. L. Rev. 171, 185, 191-92 (1978) (discussing the treatment of POWs during the American Revolution).

¹⁷³ See, e.g., Coil, *supra* note 172, at 182-84 (noting that British commanders during the Revolution justified the denial of quarter to American troops on the grounds that Americans had made perfidious surrender, see *infra* note 208 discussing perfidy, that British troops were so enraged that they could not be expected to have restrained themselves sufficiently to accept prisoners, that ongoing resistance on other parts of the battlefield made it impossible to safely accept prisoners and that the British officer corps had been so decimated that there was no functioning chain of command capable of issuing orders to restrain British enlisted soldiers from dispatching American prisoners). Almost without exception, international law scholars expressly approved of a military necessity exception to an emerging custom entitling surrendering soldiers to quarter. See, e.g., Montesquieu, *supra* note 165, bk. 12, chap. 3; Textor, *supra* note 165, ch. XVIII, paras. 17-19.

¹⁷⁴ See Montesquieu, *supra* note 165, bk. 12, ch. 3 (supporting the argument that extermination of prisoners of war conformed with positive international law); Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo* 16 (James Brown Scott ed., Tenney Frank trans., Carnegie 1930) (1737) (“(E)very force is lawful in war. So true is this that we may destroy an enemy though he be unarmed. . . . (I)n short everything is legitimate against an enemy.”); Christian Wolff, *Jus Gentium Methodo Scientifica Pertraetatum* 409-50 (James Brown Scott ed., Joseph H. Drake trans., Carnegie 1964) (1764) (stating that the “customs of certain nations” gave a “general license” to kill all enemy subjects, including surrendering soldiers).

¹⁷⁵ See Burrus M. Carnahan, [Reason, Retaliation, and Rhetoric: Jefferson and the Quest for Humanity in War](#), 139 *Mil. L. Rev.* 83, 85 (1993) (indicating that summary execution of POWs was declining in frequency but common during the Enlightenment).

¹⁷⁶ See *supra* note 12.

¹⁷⁷ See Lieber Code, *supra* note 12, art. 60 (“It is against the usage of modern war to resolve . . . to give no quarter.”).

¹⁷⁸ See *id.* art. 56 (“A (POW) is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.”).

¹⁷⁹ *Id.* art. 15.

¹⁸⁰ *Id.* art. 60.

¹⁸¹ *Id.* art. 62.

¹⁸² Id. art. 66.

¹⁸³ See U.S. War Dep't, General Order No. 207 (July 3, 1863).

¹⁸⁴ See William E. Boyle, Jr., [Under the Black Flag: Execution and Retaliation in Mosby's Confederacy](#), 144 *Mil. L. Rev.* 148, 148-50, 154-55 (1994) (reporting a spiral of reprisals and counterreprisals taken against POWs during fighting between Confederate forces under the command of Lieutenant Colonel Mosby and Union forces under the command of Generals Sheridan, Custer, and Grant). For a comprehensive study and analysis of acts of reprisal against POWs of both armies during the Civil War, including execution of POWs, denials of quarter and maltreatment, see Lonnie R. Speer, *War of Vengeance* (2002).

¹⁸⁵ See Spaight, *supra* note 17, at 99 (citing correspondence between garrison commanders and the commanders of besieging forces offering the besieged the privilege of parole upon an unconditional surrender while threatening to deny quarter in the event further military measures were necessary to overcome the fortifications).

¹⁸⁶ See generally Humanitarian Law of Armed Conflict, *supra* note 12.

¹⁸⁷ See Holland, *supra* note 12, at 73-74 (listing states adopting military manuals incorporating the Lieber Code, including, inter alia, Britain, France, Spain, Italy, Portugal); Wells, *supra* note 12, at 4 (noting near-direct translation of Lieber Code in military manuals of Germany, France and Russia published between 1880 and 1912). Commitments to these codifications in an era of suspicion and nationalist resentments remained suspect, however, and the traditional position--that the "humanitarianism as conceived by many modern civilized nations is a weakness rather than a virtue" and that the enemy could be more easily cowed by terror than by kindness--remained dominant. See, e.g., German General Staff, *Kriegsbrauch Im Landkriege* ch. 1 (1902) (stating that adherence to customs protective of enemy POWs was incompatible with German "frightfulness," a concept whereby enemies experiencing German ferocity and mercilessness would be all the more likely to refuse to give battle in the future).

¹⁸⁸ See Congress of Brussels (1874) (providing, in 146 articles, for the humane treatment of POWs).

¹⁸⁹ See Hague Convention of 1907, *supra* note 96, art. 23(c) (prohibiting killing of an enemy hors de combat); id. art. 23(d) (prohibiting declaration that no quarter will be given). However, military necessity carved out exceptions from these codes of military regulations. See, e.g., German Gen. Staff, *supra* note 187, ch. 1 (explicitly recognizing that necessity could release troops from a general obligation to grant quarter).

¹⁹⁰ Pictet, *supra* note 12, at 24.

¹⁹¹ Fooks, *supra* note 143, at 113-22. For much of the conflict, neither Russian nor Japanese forces requested or gave quarter. Spaight, *supra* note 17, at 94.

¹⁹² Spaight, *supra* note 17, at 93 (citing V.L. Nemirovitch-Dantchenko, *Personal Reminiscences of General Skobolev* 165 (E.A.B. Hodgetts trans., 1884)).

¹⁹³ See 2 Ellery C. Stowell & Henry F. Munro, *International Cases* 205 (1916) (reporting 1899 massacre of Boer prisoners at Elandsplaagte and reprisal against British prisoners at Ladysmith during the Boer War in South Africa). For a general discussion of war crimes committed during the Boer War, see generally Drew L. Kershen, [Breaker Morant](#), 22 *Okla. City U. L. Rev.* 107 (1997).

¹⁹⁴ See Court-Martial of General Jacob H. Smith 1902, in 1 *The Law of War* 799, 800-01 (Leon Friedman ed., 1972) (discussing the order from Brigadier General Jacob H. Smith to Major L.W.T. Waller instructing his Marines to take no prisoners and that "(t)he more you kill and burn, the better you will please me"). For a discussion of the general suspension of IHL by United States forces in the Philippines during the period, see Peter Maguire, *Law and War: An American Story* 51-66 (2001).

¹⁹⁵ Fooks, *supra* note 143, at 120-21.

¹⁹⁶ See De Martens, *supra* note 165, bk. VII, ch. 4, at 272 (holding that quarter could be denied in retaliation for denial of quarter by the enemy); Fooks, *supra* note 143, at 120-21 ("To make quarter (with respect to) the persons who have abused the confidence of the victor and shoot him in the back after being treated kindly, will compromise the success of the battle and perhaps, frustrate the plans of the entire campaign."); *id.* ("The commander must remember that the blood of one of his own men taken by . . . treachery should be more precious to his eyes than that of thousands of such villains committing acts against the laws of war.").

¹⁹⁷ Bluntschli, *supra* note 6, art. 580 (condoning the denial of quarter when capturing forces are too few to adequately secure surrendering soldiers without compromising either their mission or their safety); Thomas Erskine Holland, *Laws and Customs of War on Land* 47, 58 (1904) (stating that "(a) white flag (indicating a desire to surrender) can protect only the force by which it is hoisted," and then only if every individual member of that force, as well as of other enemy forces that might still pose a danger, ceases to resist); Spaight, *supra* note 17, at 266 (sanctioning the execution of prisoners who attempt to aid, by whatever means, their "uncaptured comrades" and thus endanger their captors). However, at least one commentator suggested that for capturing forces to execute POWs solely because they would otherwise hamper movement was an "inhumane" policy sure to provoke reprisal, even if it could be justified as militarily necessary. *Id.* at 266 (describing the execution of Peruvian POWs by Chilean captors desirous of moving without encumbrance in 1882 as a "wanton act" from which "bloody reprisals are bound to follow").

¹⁹⁸ Military history is "full of incidents in which a platoon or squad, having taken heavy casualties at the enemy's hands, finally prevails." Osiel, *supra* note 23, at 120. The proposition that soldiers engaged in a life-or-death struggle should be required, immediately upon the indication of a desire to surrender on the part of their mortal enemies, to denature the emotions of rage and fear that impel them forward and to stifle any thoughts of reprisal and revenge for the deaths of their comrades struck nineteenth and early twentieth century commentators, many of whom were acquainted with combat, as incompatible with reality:

During the heat of battle there is not much opportunity for . . . pity The soldier's training does not make him a machine to such extent that he is a passive weapon. The noise of battle, the sight of the dead and dying, the feeling of weariness after long hardships, may weaken his sense of fairness, and cause him to refuse to give quarter, and force his adversary to drink from the bitter cup of Death, even after he has asked for mercy by surrendering.

Fooks, *supra* note 143, at 113-14. Similarly,

(I)t is often impracticable to grant quarter to troops who resist to the last moment. No war right of killing is recognised (sic) in such circumstances; it is simply the necessity of war which justifies the refusal of quarter. It must often happen that in the storming of a trench, when men's blood is a-boil and all is turmoil and confusion, many are cut down or bayoneted who wish to surrender

Spaight, *supra* note 17, at 91.

In practice, "Too late, chum," has often been the response received by eleventh-hour would-be surrenderees. Keegan, *supra* note 5, at 50-51. Psychologists have explained that the frenzy of fear, bloodlust and primordial passion unshackled by the horrors of combat accounts for the denial of quarter and other abuses of POWs in such circumstances and that the grim practice of soldiers is or should be excusable under the defense of temporary insanity. See, e.g., Dave Grossman, *On Killing* 179 (1995); Jonathan Shay, *Achilles in Vietnam* 77-102 (1994) (explaining the extreme reactions of soldiers to the experience of combat). While not technically an exception based on military necessity, the denial of quarter predicated upon the human emotions that render the actual grant improbable is essential to an explanation for the variation between nineteenth century practice on the one hand and a

restatement of an emerging custom relative to quarter on the other. See Best, *supra* note 20, at 349 n.109 (restating general consensus of commentators that the exception to the right to quarter in the case of “a fortress refusing surrender even when its walls had been breached, so that the besiegers had to go through the often hideous business of an assault,” survived well into the twentieth century); Carlos Calvo, *Le Droit International Theorique et Pratique* § 2138 (A. Rousseau trans., 1st ed. 1873) (suggesting that a garrison may be massacred for futile resistance); Hall, *supra* note 156, at 474 (“I believe it has always been understood that the defenders of a fortress stormed have no right to quarter.” (citing the Duke of Wellington in correspondence, circa 1820)); Holland, *supra* note 197, at 58 (noting that, although the precise definitions are left to practice, after a “stubborn and prolonged siege” an attacking force is relieved of a customary obligation to grant quarter and that one who would demand quarter must not delay his surrender until the very last possible moment lest he disentitle himself).

¹⁹⁹ Barker, *supra* note 164, at 16.

²⁰⁰ See Telegram from Lansing to Stovall, American Minister to Switzerland, U.S. State Department, Foreign Relations, supp. 2 (1918) (stating that the United States “does not consider (the) Geneva Convention (of 1906) binding in (the) present war . . . because all belligerents (are) not signatory to (the) convention. Similar interpretation has been consistently given to (the) Hague convention.”).

²⁰¹ See U.S. War Dep’t, Field Manual 27-10, Rules of Land Warfare ¶ 182 (1914) (hereinafter Rules of Land Warfare (1914)) (stating that “(i)t is especially forbidden . . . to declare that no quarter will be given”); *id.* ¶ 183. It is no longer contemplated that quarter will be refused to the garrison of a fortress carried by assault, to the defenders of an undefended place who did not surrender when threatened with bombardment, or to a weak garrison which obstinately and uselessly persevered in defending a fortified place against overwhelming odds. *Id.*

²⁰² See, e.g., John J. Pershing, Final Report of General John J. Pershing 85 (1919) (instructing the Provost Marshal General, by order of General Pershing, supreme United States commander in World War I, “to follow the principles of the Hague and Geneva Conventions in the treatment of prisoners, although these (a)re not recognized as binding in the present war”). Official United States military regulations, which superseded while incorporating much of the Lieber Code almost verbatim, denied the force of most, if not all, legal obligations. See Rules of Land Warfare (1914), *supra* note 201, ¶¶ 9, 34 (recognizing that belligerents were permitted to “appl(y) any amount and any kind of force which is necessary for the purpose of the war” while imposing only the very minimal obligation that soldiers refrain from “all such kinds and degrees of violence as are not necessary”). However, the Rules of Land Warfare (1914) did impose duties and grant privileges arising from customary principles of necessity, humanity and chivalry. See *id.* ¶ 7¶ 8, 9.

²⁰³ See Rules of Land Warfare (1914), *supra* note 201, ¶ 368 (stating that failure to make a clear and good faith intent to surrender by either the hoisting of a white flag or the disposal of weapons and the clear showing of hands disintitled the enemy to quarter); see also *id.* (“All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.”).

²⁰⁴ See Barker, *supra* note 164, at 28 n.*.
As soon as you come to blows with the enemy he will be beaten. No mercy will be shown! No prisoners will be taken! As the Huns under King Attila made a name for themselves, which is still mighty in traditions and legends today, may the name of Germans be so fixed in China by your deeds that no Chinese should ever again dare to look at a German askance . . . open the way for Kultur once and for all.
Id. (quoting Kaiser Wilhelm, reviewing troops in Bremerhaven in July 1914); see also Theodore S. Woolsey, Retaliation and Punishment, 1915 Am. Soc’y Int’l L. Proc. 62, 63 (stating that the German General Staff considered IHL superseded by military necessity and that the exercise of humanitarianism with respect to enemy POWs was a lapse “into sentimentality and flabby emotion” to be avoided).

²⁰⁵ See Barker, *supra* note 164, at 29 (describing the aversion to surrender felt by honorable soldiers as the “age-old idea that it is better to die fighting than to be captured”). So deeply inculcated was this imperative of martial culture that soldiers would fight to the death against vastly superior forces to avoid the moral stigma of capture. See Fooks, *supra* note 143, at 99 (relating the officially-heralded saga of the five-day ordeal of a United States battalion commander who, despite being surrounded by a vastly superior German force and without rations or medical supplies for his attrited force, refused to surrender). Moreover, so powerful was the obligation to demonstrate bravery in the face of the enemy that soldiers who merely retreated under overwhelming fire knew and accepted that they could be executed. See *id.* at 102-04 (noting that a French lieutenant, executed for withdrawing his company rather than permit it to be overrun by the Germans, conceded that he had been wrong). The soldierly aversion to surrender continues to the present day and is reflected in regulations enjoining United States military personnel from voluntary surrender and from accepting parole. See [Exec. Order No. 10,631, 20 Fed. Reg. 6057 \(Aug. 17, 1955\)](#), amended by [Exec. Order No. 12,633, 53 Fed. Reg. 10,355 \(Mar. 28, 1988\)](#) (prohibiting military personnel from voluntary surrender, accepting parole and other acts of disloyalty). For a discussion of the Code of Conduct and of the shame that continues to attach to the act of surrender, see David H. Hackworth, *Neglect of Code Insults Real Heroes*, *Sun-Sentinel* (Fort Lauderdale, Fla.), Jan. 19, 1995, at A23.

Important point to note when I speak about the concept of martial honour. It’s impact on the soldier might be even stronger than the normal “moral credibility of the system” impact on the individual – in that that the martial honour can actually supersede the self preservation instinct. This is definitely a too strong of a force to disregard.

²⁰⁶ The United States issued orders to troops in forward areas to “hold their positions at any cost,” instructions that implied that they were to succeed or die in the attempt, rather than offer surrender if they failed. Fooks, *supra* note 143, at 96. The French high command reinforced these orders, instructing United States forces joining the battle in 1917 that as they could anticipate German perfidious surrenders they should themselves neither grant nor request quarter. *Id.*

²⁰⁷ See Barker, *supra* note 164, at 117 (reporting that United States units, including the enlisted personnel of the 28th Infantry Division, signed pledges not to grant or accept quarter). The reasons are not difficult to fathom: during World War I, many soldiers, as have soldiers since antiquity, considered the act of surrender to be inherently dishonorable. Flory, *supra* note 154, at 67.

²⁰⁸ Perfidious surrenders, whereby soldiers feign submission to delude and lure the enemy into close proximity only to reclaim their weapons and resume fighting at great advantage over adversaries who have relaxed their guard, was a common practice during World War I. See Barker, *supra* note 164, at 35 (citing widespread German use of perfidious surrender during the Battle of the Somme (1916)); Fooks, *supra* note 143, at 121 (“The practice (of perfidious surrender) was repeated many times during the World War, and especially in the Battle of the Somme,” to great effect). In response, defrauded adversaries would execute **POWs** taken subsequently, including those who had committed perfidy as well as others whose only offense was to have been members of the same army. See Barker, *supra* note 164, at 35 (stating that, subsequent to German perfidious surrender at the Somme, “(n)o prisoners were taken that day, and it was a long time before German cries of ‘Kamerad’ were accepted with any confidence by the British troops involved in the action”); Fooks, *supra* note 143, at 117 (relating the explanation offered by the commander of the United States 28th Infantry Division for the relatively small number of German **POWs** captured by his troops at the Battle of Cantigny (1918): when a German officer had held up his hands to surrender, another German shot an American officer, and “(a)fter this the captors saw ‘red’ and killed about 380 of the German captives”). To the present, soldiers express outrage at the perfidious killing of their comrades, and perfidy remains perhaps the most egregious breach of the martial code. See Best, *supra* note 20, at 292 (describing perfidy as “to borrow a valuable Christian idea, IHL’s ‘sin against the Holy Spirit’”).

²⁰⁹ See Guy Chapman, *A Passionate Prodigality* 99-100 (1933) (recounting an oft-repeated incident wherein, after a prolonged and bloody advance across a series of trenches, a vengeful British sergeant “half mad with excitement”

took the fieldglasses from a surrendering German officer only to “tuc(k) the butt of his rifle under his arm and sho(o)t the officer straight through the head”).

²¹⁰ Toward the end of World War I the great mass of surrendering Germans so overwhelmed the capacity of United States troops to secure and provide for them that decisions were made to kill all German forces either by refusing quarter or subsequent to capture. See Fooks, *supra* note 143, at 120 (reporting communication received from the commanding colonel to the effect that “(i)n the advance upon Sedan, just prior to the armistice, November 11, 1918, the 16th United States Infantry found it difficult to take all prisoners of war who ordinarily are entitled to such treatment because of the great mass of the enemy encountered and overcome”).

²¹¹ See Hall, *supra* note 156, at 474 (allowing that, although the presumption runs strongly in favor of quarter, an exception may be made when “it is impossible for a force to be encumbered with prisoners without danger to itself” from other enemy forces, such as where “small bodies of troops remain () for a long time isolated in the midst of enemies”).

²¹² See Fooks, *supra* note 143, at 121-22.
Troops sent on reconnoitering duties far in advance of the remainder of their forces, or who occupy an important strategic point, a bridge, exploration of a forest, ravine, or a fortification which is the key to a position for the purposes of holding until the main body of their forces arrive, must not be too considerate for any small group of the enemy which frustrates such mission.
Id.

²¹³ Writing in response to his own experiences during World War II, Fussell expresses the intellectual and moral disruption occasioned by the stochastic combat environment by noting that the “relative few who actually fought know that the war was not a matter of rational calculation. They know madness when they see it. Paul Fussell, *Wartime* 283 (1989). Under such conditions, the exercise of dispassionate ethical and moral judgment and unfaltering compliance with formal legal rules expected by lawyers and others ignorant of the combat environment is more than perhaps ought to be expected.

²¹⁴ See 3 Alberic Rolin, *Le Droit Moderne de la Guerre* 287-88 (1921) (holding that neither supreme necessity and imminent danger permit denial of quarter or the killing of POWs subsequent to capture, as the obligation to accept surrender and treat POWs with humanity is absolute); cf. Hall, *supra* note 156, at 474 (limiting the scope of a military necessity exception to the obligation to grant quarter to the vanishing point by holding that “(p)risoners who cannot safely be kept can be liberated, and the evil of increasing the strength of the enemy is less than that of violating the dictates of humanity, unless there is reason to expect that the prisoners if liberated, or a force successfully attempting rescue, would massacre or ill-treat the captors”).

²¹⁵ See [Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 2, 47 U.S.T. 2021](#) (hereinafter *Geneva Convention of July 27, 1929*) (extending protective rules and principles of Hague Regulations of 1899 and 1907 and establishing comprehensive rules for protecting POWs).

²¹⁶ See U.S. War Dep’t, *Field Manual 27-10, Rules of Land Warfare* ¶ 2 (1934) (hereinafter *Rules of Land Warfare* (1934)), reissued in substantially identical form as U.S. War Dep’t, *Field Manual 27-10, Rules of Land Warfare* (1940) (hereinafter *Rules of Land Warfare* (1940)) (updating the *Rules of Land Warfare* (1914), and making explicit reference to parts of the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1929 as having legal effect as between parties under the rubric of the “written rules or laws of war”); see also U.S. War Dep’t, *Cases on Military Government* (1943) (supplementing the *Rules of Land Warfare* (1940), and elaborating cases concerning the rules of armed conflict that created legal obligations for the United States and members of its armed forces); U.S. War Dep’t, *Treaties Governing Land Warfare* (1944) (explaining the legal significance of obligations undertaken by

the United States between 1929 and 1937 under treaties interpreting the Hague and Geneva Conventions of 1907 and 1929 respectively). For a discussion of the specifics of these instruments and manuals, see generally Wells, *supra* note 12.

²¹⁷ Law reflects and shapes practice, just as practice reflects and shapes law, and the disposition of **POWs** during war is determined by the complex relationship between positive law, custom, and the practical exigencies of combat. See Flory, *supra* note 154, at 10 (“The treatment of prisoners is strongly influenced by the relation between international law and necessity . . .”).

²¹⁸ Neither the 1934 nor the 1940 revisions to the Rules of Land Warfare withdrew support for the foundational basis of the martial code, namely the promotion of chivalric virtue to the extent possible in light of the practical reality of military necessity. See Rules of Land Warfare (1934), *supra* note 216, ¶¶ 3, 4 (restating as its central principle the defense of the chivalric code with deference to military necessity). As such, although the United States did not craft its military manuals in order to grant *carte blanche* to its armed forces, nonetheless United States military regulations did not incorporate obligations to **POWs** derived from IHL treaties in a manner inconsistent with the promotion of chivalry or the military mission of its armed forces. See *id.* ¶ 22 (stating that “(t)he object of war is to bring about the complete submission of the enemy as soon as possible by means of regulated violence”); Rules of Land Warfare (1940), *supra* note 216, ¶ 22 (same). Specifically, although both the 1934 and 1940 revisions drew upon language in the 1914 Rules of Land Warfare, recognizing that surrendering enemies are generally entitled to quarter, neither revision repealed the explicit exception which provided that under certain circumstances military necessity might permit the denial of quarter to surrendering enemies. See Rules of Land Warfare (1934), *supra* note 216, ¶ 33 (restating paragraph 182 of the Rules of Land Warfare (1914), to the effect that surrendering enemy personnel are generally entitled to quarter). But see *id.* ¶ 85 (providing that a commander could deny quarter on the grounds that it was necessary to do so in the interest of self-preservation or that caring for enemy **POWs** interfered with his mission); Rules of Land Warfare (1914), *supra* note 201, ¶ 368 (detailing exceptions to the general entitlement to quarter). To an important extent, the retention of exceptions based on necessity to the general obligation to grant quarter comports with the internal value system of soldiers of the era for whom, as in earlier periods, the concept of surrender was suspect on its face as an ostensibly dishonorable act that would disentitle the soldier offering his surrender to honorable treatment, whether from his own comrades or from the enemy. See Barker, *supra* note 164, at 202-03 (suggesting that troops were expected, as a matter of martial honor, to govern themselves in accord with obligations to refuse surrender, parole, voluntary disclosure of information to the enemy and inducements to disloyalty). In short, the absence of an absolute prohibition against denial of quarter in military manuals may reflect this unfavorable assessment of the honor and entitlements of a surrendering soldier.

²¹⁹ Since antiquity, soldiers have been inculcated in a martial culture that ascribes dishonor to the act of surrender and insists that good warriors simply do not permit themselves to be taken prisoner. See *supra* note 205. Although by the outbreak of World War II civilian diplomats and lawmakers had drawn this martial value into some discord with their humanitarian objectives, surrender remained anathema to the martial mind as well to the cultural imperatives of several of the belligerent parties, which adjudged the surrendering soldier to be traitorous. See Ernst H. Feilchenfeld, Institute of World Polity, Prisoners of War 17 (1948) (indicating neither the Soviet nor Japanese governments recognized any interests with respect to their **POWs** on the ground that surrender was antithetical to their culture); Gerald F. Linderman, *The World Within War* 50-51 (1997) (reporting that Japanese soldiers who surrendered were officially written out of the history of Japan); Richard J. Overy, *Russia's War* 107 (1997) (noting that Stalin issued Order 270 in August 1941, declaring that Soviet soldiers who surrendered were “traitors” subject to death upon repatriation and that the wives of Soviet **POWs** would be imprisoned); SDACPOW, *supra* note 144, at 20 (referencing the U.S. Code of Conduct, promulgated in 1953, which codified a set of customary obligations incumbent upon United States soldiers, including the following: “Article II. I will never surrender of my own free will.”).

²²⁰ See, e.g., Fussell, *supra* note 213, at 284 (“Never give the enemy a chance; the days when we could practice the rules of sportsmanship are over. . . . Every soldier must be a potential gangster. . . . Remember you are out to kill.” (citing British Handbook of Irregular Warfare (1942))).

²²¹ See Omar Bartov, *The Eastern Front 1941-1945: German Troops and the Barbarisation of Warfare* 118 (2d ed. 1985) (describing cycle of reprisals and counter-reprisals triggered by German denials of quarter to Soviet POWs); Richard Holmes, *Acts of War* 381-83 (1985) (recounting similar cycles of reprisal on the Western Front).

²²² Although Japanese forces did not summarily execute all their POWs, the standing Japanese practice was to forcibly march them to death and to shoot or bayonet stragglers; the practical result was identical to the summary refusal to grant quarter. See, e.g., Trial of Lieutenant-General Baba Masao, 11 UN War Crimes Comm'n, supra note 43, at 56 (chronicling forcible evacuation of Allied POWs in Borneo that resulted in the death, by exhaustion and shooting, of nearly all the captives). For a detailed discussion of Japanese transgressions against law and/or martial custom during World War II, including the denial of quarter, see generally Lord Russell of Liverpool, *The Knights of Bushido* (1958). See also James R. Dawes, *Language, Violence, and Human Rights Law*, 11 *Yale J.L. & Human.* 215, 234-35 (1999) (detailing Japanese abuses of British POWs in Southeast Asia).

²²³ Barker, supra note 164, at 35 & n.*.

²²⁴ See *The Nuremberg Trial*, 6 F.R.D. 69 (1946) (citing regulation issued by the German High Command to members of the German Armed Forces calling for "ruthless and energetic action . . . by force of arms (bayonets, butts and firearms)" against Soviet POWs and threatening any German soldier "who does not use his weapons, or does so with insufficient energy" against Soviet POWs with punishment); Ambrose, supra note 137, at 112 (noting that German troops cut the throats of paratroopers caught suspended from their harnesses, and thus effectively hors de combat, during the Normandy invasion); Barker, supra note 164, at 57 (discussing denials of quarter between British and German troops in North Africa in 1942-43); Linderman, supra note 219, at 107-14 (noting that German soldiers would frequently kill United States POWs captured in possession of German material on the presumption that the United States POW had taken the items from a German soldier he had himself killed); Lord Russell of Liverpool, *The Scourge of the Swastika* 23-24 (1954) (discussing German refusals to grant quarter to, and subsequent executions of, captured British at Dunkirk in 1940); id. at 26-27 (reprinting United States reports of a German massacre of captured United States troops at St. Vith during the Battle of the Bulge in 1944); id. at 41 (relating German executions of United States airmen captured unharmed but later shot on the false claim that they were "attempting to escape"); *The Abbaye Ardenne Case*, in 4 UN War Crimes Comm'n, supra note 43, at 97 (condemning the commander of a Nazi SS Regiment for having counseled his men to deny quarter to Allied troops); *The Dostler Case*, in UN War Crimes Comm'n, supra note 43, at 22 (convicting commander of the German 75th Army Corps, General Anton Dostler, for ordering, on March 25, 1944, the summary execution of fifteen uniformed United States POWs captured while on a mission to demolish a railway tunnel between La Spezia and Genoa); *The Peleus Trial*, in 1 UN War Crimes Comm'n, supra note 43, at 1, 12 (convicting German submarine commander for machine gunning survivors of a sunken ship); Trial of Gunther Thiele and Georg Steinert, in 3 UN War Crimes Comm'n, supra note 43, at 56-57 (convicting two members of a German unit for the denial of quarter to a wounded United States officer).

²²⁵ See generally James J. Weingartner, *Crossroads of Death: The Story of the Malmedy Massacre and Trial* (1979) (discussing the trial in Dachau, Germany, May 12-July 16, 1946, where seventy-two soldiers of I Panzer Corps were convicted for denying quarter to U.S. troops surrendering during the Battle of the Bulge in Malmedy, Belgium in December, 1944).

²²⁶ See Richard A. Falk, *The Circle of Responsibility*, in *Crimes of War* 224 (Richard A. Falk et al. eds., 1971) (contending that United States troops denied quarter to Axis soldiers, albeit with significantly less frequency than their adversaries); see also Ambrose, supra note 137, at 206 (chronicling a reported incident wherein a heavily decorated and widely respected United States officer is rumored to have impulsively machinegunned German POWs on a work detail); Stephen E. Ambrose, *Citizen Soldiers* 43-44 (1997) (reporting that the commander of the 101st Airborne Division, General Maxwell Taylor, ordered his troops to deny quarter to German soldiers during Operation

Overlord). After World War II, a German newspaper published the names of 369 German soldiers alleged to have been denied quarter by United States troops, but a German court, under United States military administration, refused to assert jurisdiction. See Malmedy Massacre Trial, at <http://www.scrapbookpages.com/DachauScrapbook/DachauTrials/MalmedyMassacre03.html>.

²²⁷ See Thomas Farragher, Vengeance at Dachau in Dark Footnote to Death Camp's Liberation, *Boston Globe*, July 2, 2001, at A1 (reporting that in United States soldiers of the 45th Infantry Division, after liberating Dachau, executed least seventeen §§ guards at least in part in reprisal for the Malmedy massacre).

²²⁸ See John W. Dower, *War Without Mercy* 52-53, 61-71 (1986) (reporting general denial of quarter to Japanese forces by United States Marines motivated by vengeance for Pearl Harbor and Bataan Death March); Lindermann, *supra* note 219, at 143-84 (chronicling the Pacific War).

²²⁹ "Commando operations" is a broad term that includes missions undertaken outside the actual theater of war to demolish military installations, sabotage industrial plants, sink warships in harbor, provide intelligence to partisan groups, rescue prisoners and otherwise disrupt and damage enemy capacity to conduct traditional military operations.

²³⁰ See generally Baxter, *supra* note 12 (discussing legal **status** of commando operations during World War II).

²³¹ See Kalshoven, *supra* note 28, at 190-92 (summarizing the argument offered by the Legal Department of Oberkommando der Wehrmacht that commandos were not entitled to the protections of the customs of war as 1) they did not themselves grant quarter to civilians or soldiers, 2) they wore German uniforms when engaging German forces and 3) even when they did wear proper uniforms and observe the laws and customs of war they were not honorable soldiers inasmuch as honorable soldiers did battle against other soldiers and did not join "terror and sabotage groups"). In fact, many of those recruited to these extremely dangerous units had indeed been drawn from the ranks of convicted military personnel, who presumably had less to lose than other soldiers, and some "generally behaved in a perfidious manner totally unbefitting the honourable profession of arms" by denying quarter and by the perfidious wearing of German uniforms. Barker, *supra* note 164, at 22. Nonetheless, not all members of the German High Command concurred with this legal judgment: Admiral Canaris believed that the Kommando Befehlung was applicable only to commandos captured in civilian clothing or German uniforms and not to properly uniformed soldiers, regardless of their missions. Kalshoven, *supra* note 28, at 190-92.

²³² Fuehrer Order Concerning Handling of Commandos, 18 October 1942, International Military Tribunal Document 498-PS, reprinted in 3 U.S. G.P.O., *Nazi Conspiracy and Aggression* 416-17 (1946)

²³³ "From now on all enemies on so-called Commando missions in Europe or Africa challenged by German troops, even if they are to all appearances soldiers in uniform or demolition troops, whether armed or unarmed, in battle or in flight, are to be slaughtered to the last man." *Id.*

²³⁴ See Treatment of Commando Participants, 25 June 1944, International Military Tribunal Document 551-PS, reprinted in 3 U.S. G.P.O., *supra* note 232, at 316-400.

²³⁵ Kalshoven, *supra* note 28, at 190.

²³⁶ Keegan, *supra* note 5, at 54.

- ²³⁷ See, e.g., 2 Henry Wheaton, *International Law* 179-80 (Arthur Berriedale Keith ed., 7th ed. 1944) (stating that by the end of World War II the privilege of quarter was crystallizing into a near-absolute right).
- ²³⁸ See Flory, *supra* note 154, at 159-60 (affirming that in “very unusual circumstances” capturing personnel may deny quarter).
- ²³⁹ See *supra* note 143.
- ²⁴⁰ “Parole” is a legal term used with respect to **POWs** to refer to an agreement between the surrendering soldier and his captors (or, in the modern era, with the detaining state) whereby the captors release the prisoner in consideration for his promise to refrain from rejoining the conflict, contributing to the war effort or, in some cases, leaving a certain geographic area. See Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 *Mil. L. Rev.* 200, 200 (1998) (defining parole under international law (citing U.S. Dep’t of Defense, Directive 1300.7, Training and Education Measures Necessary to Support the Code of Conduct encl. 2, para. B(3)(a)(5) (Dec. 23, 1988))). Although parole is granted and accepted under great duress, it is an agreement with moral, and legal, consequences. Walzer, *supra* note 12, at 47.
- ²⁴¹ See Brown, *supra* note 240, at 202 (noting the Carthaginian practice of granting parole to **POWs** for these purposes).
- ²⁴² See 2 Pierino Belli, *De Re Militari et Bello Tractus* 126 (James Brown Scott ed., Herbert C. Nutting trans., Clarendon Press 1936) (1563) (chronicling the return of Regulus to Carthage after his parole to Rome where he urged the Senate to abandon Roman **POWs** (including himself), to death).
- ²⁴³ See 2 Samuel Pufendorf, *De Jure Naturae Et Gentium Libri Octo* 1150 (James Brown Scott ed., C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688) (asserting that the grant of parole obligated an individual to refrain from belligerency against the grantee and his sovereign).
- ²⁴⁴ The primary constitutive force behind the medieval regime of parole was the honor of the soldier to whom it was granted. See Balthazar Ayala, *De Jure Et Officiis Bellicis et Disciplina Military Libri* 58 (John Westlake ed., John Pawley Bate trans., Carnegie 1912) (1582) (describing violation of parole as a breach of a sacred trust). Strong though it was, honor was not always adequate to bind knights to their promises; death or other punishment was visited upon the parole violator. M.H. Keen, *The Laws of War in the Late Middle Ages* 27-34 (1965); see also Meron, *Henry’s Wars*, *supra* note 12, at 168 (discussing case of an English knight who escaped his French captors before receiving parole and was ordered back to custody); Green, *supra* note 99, at 291 (describing conviction of a French knight in chivalric court for violating parole).
- ²⁴⁵ See generally Vattel, *supra* note 165 (asserting that because quarrels were between states and not men, individual soldiers were entitled to their release under the natural law principle of respect for human dignity).
- ²⁴⁶ See Sean McGlynn, *The Myths of Medieval Warfare*, *Hist. Today*, Jan. 1994, at 28. The payment of ransom to further secure the promise of the parolee largely ceased with the Treaty of Westphalia in 1648, and ransom was replaced by reciprocity: each contesting government had interests in the return of its prisoners, and the release of **POWs** came to be governed on this basis. *Id.*; see also 3 Grotius, *Libri Tres*, *supra* note 155, ch. 14, § 9 (describing reciprocal paroles of **POWs** as advantageous, or at least not disadvantageous, to both sovereigns on the ground that prisoners, while in the custody of the detaining power, were as if already dead to the cause of their governments).
- ²⁴⁷ Parole was not exclusive to officers: enlisted personnel were occasionally granted the option in lieu of confinement.

Carnahan, *supra* note 175, at 115 (describing parole of enlisted personnel of the Virginia Militia by British General Benedict Arnold).

²⁴⁸ Although the promise to abstain from further acts against the enemy was standard consideration for a grant of parole, during the American Revolution, capturing forces imposed additional conditions, including obligations to refrain from criticism of the opposing side and to respond to a summons if requested. See Charles H. Metzger, *The Prisoner in the American Revolution* 193 (1971).

²⁴⁹ The traditional punishment for a parole violator was death, particularly if the violator was subsequently recaptured under arms. Flory, *supra* note 154, at 124; see also Spaight, *supra* note 17, at 296-97 (noting the hanging of a United States officer, Colonel Hayne, by the British in 1782 for violating parole); *id.* at 298 (indicating that aggravating circumstances justifying death include being in possession of arms and attempted assassination). However, some commentators restricted the ultimate sanction to mercenaries. See, e.g., Gentili, *supra* note 152, at 18. Additionally, belligerents entered into agreements to specify lesser punishments for the offense. See, e.g., Treaty of Amity and Commerce, *supra* note 170 (providing, *inter alia*, that violation of parole would result in imprisonment at close confinement rather than death).

²⁵⁰ See Spaight, *supra* note 17, at 297 (indicating that a parole violator was “shunned by gentlemen”).

²⁵¹ See Lieber Code, *supra* note 12, art. 123. The standard promise given in exchange for parole was to not conduct belligerent acts during the present conflict unless exchanged for a **POW** of the other belligerent. *Id.* art. 130.

²⁵² See *id.* art. 124 (“Breaking the parole is punished with death when the person breaking the parole is captured again.”); *id.* art. 130 (“(C)ases of breaking parole . . . can be visited with the punishment of death . . .”).

²⁵³ See *id.* art. 126 (“Commissioned officers only are allowed to give their parole”); *id.* art. 127 (“No (enlisted soldier) can give his parole except through an officer. . . . The only . . . exception is where individuals, properly separated from their commands, (are) without the possibility of being paroled through an officer.”).

²⁵⁴ See *id.* art. 128 (“No paroling on the battle-field . . . is permitted”). Both the United States and the Confederate armies refused to recognize paroles granted on the battlefield on the ground that the duressive environment under which they were granted vitiated any validity they might otherwise have possessed. Flory, *supra* note 154, at 130; see also U.S. War Dep’t, General Order No. 100, § 7, art. 133 (1863) (“No prisoner of war can be forced by the hostile government to parole himself . . .”).

²⁵⁵ See Lieber Code, *supra* note 12, art. 125 (requiring that names and ranks of paroled soldiers be memorialized and exchanged between governments).

²⁵⁶ *Id.* art. 133. Because acceptance of the grant of parole was voluntary, the parolee continued to be obligated, upon his honor, to abide by the terms of his parole. See Hall, *A Treatise on International Law* 425 (4th ed. 1895) (discussing legal obligations under parole). Paroles secured under the use of or threat of force were of no legal significance. *Id.*

²⁵⁷ See Brown, *supra* note 240, at 205 (attributing the failure of the Civil War parole regime to the return to arms of 37,000 Confederate parolees and the execution of civilians sympathetic to the Confederacy).

²⁵⁸ The military manuals of numerous states, including France, Germany, Japan and the United States, conferred

jurisdiction upon military courts to try violations of parole and sentence those convicted to death. Spaight, *supra* note 17, at 297 (citing sources) Rules of Land Warfare (1914), *supra* note 201, arts. 72-82 (restating Lieber Code with respect to parole).

²⁵⁹ See Project of an International Declaration Concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, art. 33 (“Any prisoner of war liberated on parole and recaptured bearing arms against the Government to which he had pledged his honour may be deprived of the rights accorded to prisoners of war and brought before the courts.”); Hague Convention of 1907, *supra* note 96, art. 12 (“Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour . . . forfeit their right to be treated as prisoners of war, and can be brought before the courts.”).

²⁶⁰ See *United States ex rel. Henderson v. Wright*, 28 F. Cas. 796, 798 (W.D. Pa. 1863) (No. 16,777) (holding that parole is a “sacred obligation” the violation of which dishonors the national character and damages the “national faith”).

²⁶¹ See Spaight, *supra* note 17, at 296-97 (suggesting that by the late nineteenth century opinion was divided as to whether the appropriate punishment for a parole violator was death by hanging or strict confinement at labor).

²⁶² Military courts treated violations of parole as serious offenses: during the Boer War, parole violators were occasionally punished by death. See Spaight, *supra* note 17, at 88 (discussing parole violations during the Boer War and noting the execution of a paroled Boer officer recaptured under arms in a British uniform). British Manual of Military Law 298 (1884) (providing for death for violations of parole in “aggravating case(s)”; Wells, *supra* note 12, at 152 (“Every (POW) who, having broken his parole, is recaptured with arms in hand, is punished with death.” (citing the French Military Code art. 204, sec. 2)).

²⁶³ Brown, *supra* note 240, at 208.

²⁶⁴ For example, the revisions to the Rules of Land Warfare (1914) simply renumbered sections of the United States military regulations and added almost nothing of substance. See Wells, *supra* note 12, at 152-53 (documenting the near-verbatim recodifications of the 1914 Rules in 1934 and 1940).

²⁶⁵ See Hall, *supra* note 156, at 490 (glossing the question of parole in brief).

²⁶⁶ Within the Martial Code as of 1944, the punishment for dishonor was commensurate with the crime, and for those who purported to resume the **status** of combatants after promising to surrender that **status** in exchange for their release, death was an appropriate sanction. Kalshoven, *supra* note 28, at 260-61.

²⁶⁷ “Reprisal” is a legal term describing an act undertaken to induce enemy forces to cease violating the rules and customs of war. See generally Kalshoven, *supra* note 28. A reprisal, if undertaken prior to an enemy violation, would constitute a violation of the laws and customs of war, whereas when done solely for the purpose of forcing an adversary to discontinue its prior violation, it may be adjudged legal or, at the very least, permissible. *Id.* Reprisals may consist of acts that mirror those of the adversary (“in kind”) or other acts (“not in kind”), but resort to reprisal has been considered to require the failure of other means, formal notice to the adversary and limitation of otherwise illegal acts consistent with the requirements of proportionality.

²⁶⁸ Barker, *supra* note 164, at 196.

²⁶⁹ Hume, *supra* note 1, at 20.

²⁷⁰ See Coil, *supra* note 172, at 185-86, 191-92 (noting that threats of reprisals against British **POWs** were successful in protecting some United States **POWs** against execution); see also William Winthrop, *Military Law and Precedents* 796-97 (2d ed. 1920) (stating that a “right of retaliation” (i.e., reprisal) existed during the Revolutionary War in cases of the denial of quarter).

²⁷¹ Lieber Code, *supra* note 12, art. 59. Examples of reprisals explicitly permitted include the denial of quarter to troops that offer no quarter. *Id.* arts. 62, 66. Such resort was effective: in reprisal for Union executions of Confederate **POWs**, Confederate Lieutenant Colonel John Singleton Mosby ordered twenty-seven Union **POWs** to draw lots to determine which seven would be hanged in reprisal. To the corpses notes were pinned with the following text: “These men have been hung in retaliation for an equal number of Colonel Mosby’s men, hung by order of General Custer at Front Royal. Measure for measure.” Cited in Boyle, *supra* note 184, at 148-50.

²⁷² See Lieber Code, *supra* note 12, art. 27 (stating that “(a) reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage” than reprisal).

²⁷³ See Fooks, *supra* note 143, at 121 n.2 (stating that, after the author, a British officer, came under fire from German machine gunners who feigned surrender only to inflict heavy casualties before their subsequent capture, the United States captors marched the German **POWs** before their advance to obtain a ceasefire from other German units).

²⁷⁴ Kalshoven, *supra* note 28, at 136.

²⁷⁵ See Spaight, *supra* note 17, at 465 (“(T)he right to inflict reprisals--to retaliate--must entail the right to execute in very extreme cases. Otherwise there would be no effective means of checking the enemy’s very worst excesses.”); see also Kalshoven, *supra* note 28, at 74 (“(N)o army could reasonably be expected to renounce in war so effective and powerful a weapon for the redress or cessation of supposed intolerable wrong upon its own nationals at the hand of the enemy as immediate or threatened reprisal on enemy units within its own hands.”) (quoting Chariman Lord Younger of the International Law Association at the Hague Conference on the Treatment of Prisoners of War, 1921).

²⁷⁶ Domestic military manuals expressly permitted reprisal at the time of World War I. See, e.g., *Rules of Land Warfare* (1914), *supra* note 201, ¶ 383 (“Persons guilty of no offense whatever may be punished as retaliation for the guilty acts of others.”).

²⁷⁷ See International Law Association, 30th Conference, The Hague, 30 August-3 September 1921, *Proceedings Concerning the POW Code: Report of the Conference by the Treatment of Prisoners of War Committee*, Vol. I, art. 13, at 188-246 (“All reprisals, as such, on prisoners of war are deprecated . . . (**POWs**) shall in no case be subjected to reprisals except in retaliation for acts committed or sanctioned by their own Governments in connection with the treatment of (**POWs**).”).

²⁷⁸ See Geneva Convention of July 27, 1929, *supra* note 215, art. 2 (providing that “(m)asures of reprisal against (**POWs**) are forbidden”).

²⁷⁹ See generally Robert Katz, *The Battle of Rome: The Germans, the Allies, the Partisans, and the Pope*, September 1943-June 1944 (2003) (noting execution of eighty German **POWs** by French Partisans in reprisal for execution of eighty Partisans, as well as German execution of ten Italian **POWs** for every German soldier killed in the Battle of Rome in March 1944); Matthew Lippman, [Conundrums of Armed Conflict: Criminal Defenses to Violations of the](#)

[Humanitarian Law of War, 15 Dick. J. Int'l L. 1, 60-68 \(1996\)](#) (noting pattern of reprisals against **POWs** during World War II).

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The Army routinely investigates various civil and criminal matters. See U.S. Dep't of Army, Reg. 15-6, Boards, Commissions, and Committees: Procedure for Investigating Officers and Boards of Officers (Aug. 24, 1977). If no formal accusation is made, the issue may be disposed of by this informal investigative procedure. However, when a soldier is formally accused of a crime, the Uniform Code of Military Justice (UCMJ) requires a pretrial investigation unless it is waived by the accused. See [10 U.S.C. § 832 \(2003\)](#) (providing for public adversarial hearing to determine whether charges should be proffered). Under the UCMJ, the convening authority has the ultimate discretion to determine whether to charge an accused subsequent to an Article 32 investigation, as the report of that investigation is merely advisory. See Everett, *supra* note 77, at 20. Moreover, the decision to launch an investigation, whether informal or formal, is a discretionary act driven not solely by legal considerations. See Christopher D. Booth, Note, [Prosecuting the "Fog of War?" Examining the Legal Implications of an Alleged Massacre of South Korean Civilians by U.S. Forces During the Opening Days of the Korean War in the Village of No Gun Ri, 33 Vand. J. Transnat'l L. 933, 951 \(2000\)](#) (quoting then Secretary of the Army Louis Caldera as stating that "(the Army) will not investigate every firefight, every battle" in which its soldiers might be alleged to have committed crimes). Commanders have indeed convened courts-martial to try members of their commands for serious violations of IHL, even during total wars such as World War II. See, e.g., Bishop, *supra* note 146, at 286 (noting numerous courts-martial records of members of the United States Armed Forces under the UCMJ for the deliberate killing of **POWs**); Richard Whittingham, *Martial Justice: The Last Mass Execution in the United States* 259 (1971) (referencing the court-martial of United States Army Private Clarence Bertucci for the deliberate killing of eight sleeping German **POWs** in a detention camp in Utah). However, the decision to convene a court-martial hinges, at least in part, upon the political purposes and risks at issue. For example, in the waning days of World War II, United States Army troops executed most of the §§ guards at the Dachau extermination camp, yet, upon learning of the massacre, their commanding general, General George S. Patton, made the prudential decision not to investigate the matter lest it cause embarrassment to the Allies and blur the moral distinction between the forces of liberation and those of subjugation. See Howard A. Buechner, *Dachau: The Hour of the Avenger* (1994) (reporting that Patton rejected the proposal to court-martial the United States soldiers with the following words: "Public outrage would certainly have opposed the prosecution of American heroes for eliminating a group of sadists who so richly deserved to die."). In contrast, although the Confederate commandant of the Andersonville **POW** camp, Captain Henry Wirtz, did his best to improve the miserable prison conditions he inherited from his predecessor, the United States court-martialled him for unlawful reprisal against **POWs** because the public mood after a long and bloody war needed a scapegoat. Wells, *supra* note 12, at 3-4. Commanders are understandably loathe to trigger judicial proceedings, the politico-military ramifications of which are unpleasant, for courts-martial serve purposes in addition to the administration of criminal justice, and thus it is solely within the discretion of the commander to determine whether a soldier will be investigated, as well as whether he will be tried and, if convicted, punished. See Robert Sherrill, *Military Justice is to Justice as Military Music is to Music* 73 (1969) (explaining that a court-martial is a not a judicial forum but an "instrumentality of the executive power of the President for the enforcement of discipline in the armed forces" that permits broad exercise of discretion); *The Law of Land Warfare* (1956), *supra* note 43, ¶ 507(b) (locating prosecutorial authority and discretion in the commander); U.S. Dep't of Army, *Fundamentals of Military Law* 58 (1980) (describing breadth of discretion of convening authority with respect to trial and sentencing).

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States derive their ultimate military jurisdiction "from the bare fact that the person charged is within the custody of the Court; his nationality, the place where the offence was committed, the nationality of the victims are not generally material." 15 UN War Crimes Comm'n, *supra* note 43, at x. However, the sources of and authority for the military jurisdiction of the United States are augmented by custom stretching back to Rome, by the Constitution and by positive legislation. English courts-martial borrowed liberally from Roman law, and in turn the Continental Congress, during and subsequent to the American Revolution, adopted much of the English system to regulate the relationship between members of the Armed Forces and the U.S. Dep't of Army, *Fundamentals of Military Law*, *supra*, at 1. With Article I, Section 8, Clause 14, the Framers of the United States Constitution conferred upon Congress the power to "make Rules for the Government and Regulation of the land and naval Forces," and recognized that the exigencies of military discipline would require a special system of military courts distinct from Article III courts. See [U.S. Const. amend. V](#) (exempting "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and,

inferentially, from the right to trial by jury); see also [O'Callahan v. Parker](#), 395 U.S. 258, 261-62 (1969), overruled on separate grounds by [Solorio v. United States](#), 483 U.S. 435 (1987) (recognizing the constitutional bases for congressional authority to create a system of military justice distinct from civil justice (citing [Ex parte Quirin](#), 317 U.S. 1, 40 (1942))). In 1951, Congress exercised this constitutional grant and enacted the UCMJ to regulate the conduct of all Armed Forces personnel and to define and provide for the punishment of crimes which, but for the military status of the accused, would be tried and punished under applicable federal or state law. See 10 U.S.C. §§ 801-946. By executive order in 1984, the Manual for Courts-Martial was created to aid in the application and interpretation of the UCMJ and to provide rules of evidence and procedure. See [Exec. Order No. 12,473](#), 49 Fed. Reg. 17,152 (Apr. 13, 1984) (amended most recently Apr. 11, 2002). In addition, the respective service secretaries of the military components promulgate regulations governing the administration of military justice to which personnel are subject in accordance with 10 U.S.C. § 3012, and the decisions of Courts of Military Review, the United States Court of Military Appeals (the "Supreme Court of the Military"), general and special orders of the Department of Defense and of post and combat commanders and military customs complement and conclude the sources of law applicable to courts-martial. 3 Austin Wakeman Scott, Handbook of Military Law (1918).

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The term "war crime" is a legal term-of-art for a "violation of (IHL) by any person . . . , military or civilian(, and) (e)very violation of (IHL) is a war crime." The Law of Land Warfare (1956), supra note 43, ¶ 499; see also 11 UN War Crimes Comm'n'l, supra note 43, at 1241 (identifying "war crimes" as a species of "international crime," defined as act "universally recognized as criminal, which (are) considered . . . grave matter(s) of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state"). IHL, as part of the "law of nations" to which Article I, Section 8 of the United States Constitution makes reference, is part of the law of the United States even in the absence of specific incorporation, provided it is not in conflict with a treaty or statute or a previous executive or judicial determination. See [The Paquete Habana](#), 175 U.S. 677, 700 (1900) (establishing that customary international law is part of the law of the United States "where there is no treaty and no controlling executive or legislative act or judicial decision"). However, subject matter jurisdiction over allegations of violations of IHL by members of the Armed Forces, otherwise known as "war crimes jurisdiction," is slightly more complex. Although the doctrine of self-execution of treaties is beyond the scope of this Article, it suffices to note that IHL instruments have been interpreted as non-self-executing agreements that require specific domestic implementing legislation incorporating their provisions in domestic law as a further condition in order to create obligations binding in United States courts, including courts-martial. See [Foster v. Neilson](#), 27 U.S. (2 Pet.) 253, 314 (1829), overruled in part on other grounds, [United States v. Percheman](#), 32 U.S. (7 Pet.) 51 (1833) (incorporating the doctrine of self-execution in U.S. law); [United States v. Noriega](#), 808 F. Supp. 791, 797 (S.D. Fla. 1992) (holding the Geneva Conventions and other IHL instruments to be non-self-executing agreements that did not create a cause of action in United States courts independent of domestic implementing legislation). Moreover, rather than attempt the complex task of codification and specific incorporation of IHL, Congress has chosen to incorporate by reference in the UCMJ and, consequently, an analysis of evolving external sources is required to determine jurisdiction over offenses and persons in a particular case. See 10 U.S.C. § 818 (providing that "courts-martial (shall) . . . have jurisdiction to try any person who by the law of war is subject to (the UCMJ) and may adjudge any punishment permitted by the law of war"); see also [In re Yamashita](#), 327 U.S. 1, 7-8 (1946) ("(Congress) had incorporated, by reference, . . . all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction."); [Ex Parte Quirin](#), 317 U.S. 1, 26 (1942) (holding that the incorporation of IHL treaties and customary IHL by reference is a permissible exercise of Congressional [Article I, Section 8, Clause 7](#) authority to "define and punish . . . Offenses against the Law of Nations"). Accordingly, United States policy is to charge soldiers with violations of the UCMJ, rather than with violations of IHL and, as such, the court-martial proceeding is an adjudication under domestic, rather than international, law. See The Law of Land Warfare (1956), supra note 43, ¶ 507(b) ("Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the (UCMJ) and, if so, will be prosecuted (within the United States) under that Code."); Manual for Courts-Martial, United States, [R.C.M. 307\(c\)\(2\)](#) (2000) (explaining that "(o)rdinarily persons subject to the (UCMJ) should be charged with a specific violation of the (UCMJ) rather than a violation of the law of war"); Levie, supra note 142, at 3 n.29 (stating that, strictly speaking, courts-martial apply to United States, and not international, law). The War Crimes Act of 1996, which provides that "grave breaches" of the Geneva Conventions of 1949 are punishable under federal law, theoretically creates independent war crimes jurisdiction in Article III courts, and it provides that grave breaches of any of the Conventions are punishable by jail or death. See War Crimes Act of 1996, [18 U.S.C. § 2441](#) (2003) (stating that the United States incorporates into domestic law the "grave breaches" provisions of the Geneva Conventions as prescribing punishable war crimes); see also William Jefferson Clinton,

Statement on Signing the War Crimes Act of 1996, 2 Pub. Papers 1323 (Aug. 21, 1996) (stating that the War Crimes Act “provides the United States with clearer authority to prosecute violations of the laws of war”). However, in practice, any alleged acts or omissions that would constitute grave breaches of the Geneva and Hague Conventions are expressly outlawed only in the United States military manual and are charged and prosecuted under relevant provisions of the UCMJ. See *The Law of Land Warfare* (1956), *supra* note 43, ¶ 504. Prohibited, as additional violations of the law of war, include:

- a. Making use of poisoned or otherwise forbidden arms or ammunition.
- b. Treacherous request for quarter.
- c. Maltreatment of dead bodies.
- d. Firing on localities which are undefended and without military significance.
- e. Abuse of or firing on the flag of truce.
- f. Misuse of the Red Cross emblem.
- g. Use of civilian clothing by troops to conceal their military character during battle.
- h. Improper use of privileged buildings for military purpose.
- i. Poisoning of wells or streams.
- j. Pillage or purposeless destruction.
- k. Compelling prisoners of war to perform prohibited labor.
- l. Killing without trial spies or other persons who have committed hostile acts.
- m. Compelling civilians to perform prohibited labor.
- n. Violations of surrender terms. *Id.*; see also Robinson O. Everett, [Did Military Justice Fail or Prevail?](#), 96 *Mich. L. Rev.* 1421, 1434 (1998) (reviewing Gary D. Sows, *Son Thang: An American War Crime* (1997) (stating that, in practice, the UCMJ is the only viable procedure whereby to prosecute an accused service member and that to proceed under the War Crimes Act would still necessitate resorting to the UCMJ). The United States does take an expansive view of its treaty-based obligations with respect to prosecuting violations of treaty-based IHL, despite its disfavor for direct incorporation and its preference for implementing legislation. See *The Law of Land Warfare* (1956), *supra* note 43, ¶¶ 498-511 (stating that it is the intent of the United States to follow the Geneva Conventions of 1949 regardless of whether or not the treaty is legally binding upon or followed by the enemy nation). Nonetheless, breaches of customary IHL are not specifically addressed in any positive source of military law, although Congress retains the authority to prescribe with respect to “offenses against the Law of Nations,” and arguably has an international legal obligation to do so, although the manner in which it chooses to incorporate customary IHL remains its prerogative. For an extended discussion of domestic jurisdiction over alleged violations of IHL, see generally Michael L. Smidt, [Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations](#), 164 *Mil. L. Rev.* 155 (2000). Because the corpus of IHL is in a constant state of flux, it is essential to distinguish the body of law applicable in 1944 from that applicable in 2003 to evaluate the extent to which Private Ryan and others discharged their legal obligations with respect to the UCMJ and its forebears, the manner in which the regime of courts-martial would address any delict and the contemporary compatibility of this regime with the joint defense of law and civilization.

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Prior to 2000, Private Ryan would have been, by virtue of his discharge from the United States Army, immune from court-martial for any transactions occurring in 1944, irrespective of the question of any applicable statutes of limitations because as under existing law only active-duty personnel were subject to court-martial, and discharged members of the Armed Forces could not be recalled involuntarily to active duty unless they were entitled to receive retired pay, which is generally paid only to those who have served more than twenty years on active duty. See [United States ex rel. Toth v. Quarles](#), 350 U.S. 11, 14 (1955) (holding that Congress lacked the power to subject civilians to trial by court-martial who had “severed all relationship with the military,” regardless of prior military status or the nature of the crime); [Willenbring v. Neurater](#), 48 M.J. 152, 158 (C.A.A.F. 1998) (upholding Toth); Bishop, *supra* note 146, at 63, 292 (discussing long-standing opposition with the Department of the Army to proposed amendments to this jurisdictional gap to permit court-martial of honorably discharged service personnel). Despite a 1968 General Assembly resolution declaring statutes of limitations inapplicable with respect to war crimes, the U.S., while it has expressed support for expansive jurisdiction over war crimes in theory, has never recognized any obligations under international law with respect to the waiver of otherwise applicable statutes of limitations or other impediments to jurisdiction in cases such as that of Private Ryan et al., nor are commentators inclined to suggest that such non-applicability has ripened into customary international law. See generally Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 U.N. GAOR, 23d Sess., 1727th Mtg., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968) (prohibiting applicability of any statute of limitations for grave

breaches enumerated in the Geneva Conventions of 1949) (signed by only forty-one states but not by the U.S.); see also Scott R. Morris, Killing Egyptian Prisoners of War: Does the Phrase 'Lest We Forget' Apply to Israeli War Criminals?, 29 Vand J. Transnat'l J. 903, 910-20 (1996) (disputing claims that the non-applicability of statutes of limitations for war crimes or crimes against humanity is part of CIL). For a thorough discussion, see generally Robert H. Miller, The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 65 Am. J. Int'l L. 476 (1971).

However, a transnational trend in favor of waiving statutes of limitations with respect to war crimes garnered judicial and Congressional notice. See, e.g., [Handel v. Artukovic](#), 601 F. Supp. 1421, 1430 (D. C. Cal. 1985) (noting that the U.S. officially favored the Non-Applicability Convention even if it had not signed the instrument). Over Army objections, with the Military Extraterritorial Jurisdiction Act (MEJA) Congress expanded the scope of federal criminal jurisdiction over war crimes to include civilian personnel as well as discharged former military personnel, although the latter category of defendants is still entitled to court-martial as opposed to an Article III court, and waived the constructive statute of limitation imposed by way of the more limited personal jurisdiction predating the Act. See Military Extraterritorial Jurisdiction Act of 2000, [18 U.S.C. § 3261\(a\) \(2000\)](#) (creating jurisdiction in Article III courts over civilian personnel alleged to have committed war crimes while accompanying the United States Armed Forces overseas); [id. § 3261\(c\)](#) (providing that such jurisdiction is complementary to courts-martial); [id. § 3261\(d\)](#) (expanding personal jurisdiction of courts-martial to include discharged military personnel accused of having committed prosecutable offenses while members of the Armed Forces but not previously tried by court-martial or by a foreign government). If the MEJA were invoked as the basis for jurisdiction, Private Ryan and others might have defenses on constitutional as well as common law grounds were they to assert that they are not members of the "land or naval forces, or in the Militia." See [U.S. Const., amend. V](#) (providing that "(n)o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."); see also [U.S. v. McDonagh](#), 14 M.J. 415, 419 (C.M.A. 1983) (holding that retroactive application of a criminal statute by courts-martial violates the Ex Post Facto Clause, as does retroactive application of a judicial construction of a statute) (citing [U.S. Const., amend. V](#)). Similarly, any evidentiary or ethical problems triggered by the trial of "'old men' for crimes committed (sixty years) ago" is beyond the scope of this Article. Hilaire McCoubrey, The Concept and Treatment of War Crimes, 1 J. Armed Conflict L. 121, 133 (1996) (discussing ethical and evidentiary issues associated with long-delayed war crimes prosecutions).

²⁸⁴ See [R.C.M. 405](#) (governing procedural rules in Article 32 investigations).

²⁸⁵ A general court-martial can be convened only by the President, the secretary of a military service or a senior commanding officer. [10 U.S.C. §§ 822 \(2000\)](#). To protect the substantive rights of the accused, the convening authority cannot also be the accuser. [Id. § 822\(b\)](#). For this reason, each convening authority is advised by an experienced attorney. [Id. § 834](#).

²⁸⁶ [Article 118 of the UCMJ](#) provides in pertinent part that Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he . . . has a premeditated design to kill; . . . intends to kill or inflict great bodily harm; . . . (or) is engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life . . . shall suffer death or imprisonment for life as a court-martial may direct. [10 U.S.C. § 918 \(2000\)](#). Lesser included offenses under [Article 118](#) include (in)voluntary manslaughter, negligent homicide, and assault with intent to commit murder or manslaughter. [Id. Article 119 of the UCMJ](#), "Manslaughter," provides that conviction can occur where (b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being--(1) by culpable negligence; or (2) while perpetrating or attempting to perpetrate an offense, other than those . . . in ([Article 118](#)), directly affecting the person; is guilty of involuntary manslaughter and shall be punished as a court-martial shall direct. [10 U.S.C. § 919 \(2000\)](#).

²⁸⁷ All of the potential prosecution witnesses to the events that might have led to an [Article 118](#) prosecution of PFC

Reiben-United States soldiers who made the Omaha landings and the German soldiers who contested them--were dead as of July 1944. Had there been an available eyewitness, the prosecution may have charged PFC Reiben as well with a violation of [Article 118](#), "Murder," for denying quarter to the German defenders on Omaha Beach.

²⁸⁸ See [10 U.S.C. § 934 \(2000\)](#) (providing for punishment at discretion of a court-martial for wrongful concealment of the commission of a serious offense by another that is prejudicial to the good order and discipline of the Armed Forces). Failure to report the commission of a violation of the "law of war" is a violation of Department of the Army regulations. See U.S. Dep't of Army, Reg. 350-4, Training in Units, ch. 14 (Mar. 19, 1933) (requiring, inter alia, that "(s)oldiers report all violations of the law of war to their superiors.").

²⁸⁹ See [R.C.M. 305](#) (providing for pretrial confinement of the accused).

²⁹⁰ See [R.C.M. 308, 602](#) (providing for notification to the accused of charges against him).

²⁹¹ See generally United States Law and the Armed Forces: Cases and Materials on Constitutional Law, Courts-Martial, and the Rights of Servicemen (Willis E. Schug ed., 1972) (detailing the extensive procedural protections of the accused in court-martial proceedings); see also [United States v. Tempia, 37 C.M.R. 249, 253 \(C.M.A. 1967\)](#) (stating in dictum that much of the Bill of Rights is applicable to defendants in courts-martial proceedings). Among other aspects of the due process accorded the accused in a court-martial is the entitlement to civilian counsel. See [R.C.M. 506](#). United States courts-martial provide more extensive safeguards to defendants than the civil legal systems of the vast majority of states and greater protections than those afforded at international tribunals. See Mark S. Martins, Comment, [National Forums for Publishing Offenses Against Informational Law: Might U.S. Soldier Have Their Day in Court?](#), 36 Va. J. Int'l L. 659, 673-74 (1996) (discussing safeguards afforded defendants in courts-martial and comparing these with other fora).

²⁹² See [R.C.M. 904](#) (governing arraignment).

²⁹³ See [R.C.M. 910](#) (listing possible pleas and providing for procedural safeguards).

²⁹⁴ See *id.* at Rule 704 (governing grants of immunity). Where the ability of the United States to obtain a conviction is uncertain, it is not uncommon for the government to offer a grant of immunity in exchange for testimony, although the perception this permits wrongdoing to go unpunished is particularly acute in cases of war crimes. For a recent discussion of the political and legal issues attendant to the question of a grant of immunity in courts-martial adjudicating allegations of war crimes, see Booth, *supra* note 280, at 952.

²⁹⁵ See [R.C.M. 907](#) (providing procedures for a motion to dismiss on grounds of a lack of jurisdiction over the person or the offense or that the specification does not state an offense).

²⁹⁶ The Manual for Courts-Martial was amended in 1969 to reduce the influence of the convening authority upon the court and enhance the perceptions of its impartiality, although some suggest that the practice of pretrial orientation of the court for the purpose of influencing its decisionmaking continues. See Sherrill, *supra* note 280, at 77.

²⁹⁷ See [R.C.M. 812](#) (providing for joint and common trials of defendants and stating that "each accused shall be accorded the rights and privileges as if tried separately.").

²⁹⁸ The Sixth Amendment right to trial by a jury of peers is inapplicable to courts-martial. [Ex Parte Quirin, 317 U.S. 1,](#)

39-45 (1942); see also [United States v. Loving](#), 41 M.J. 213, 285, 287 (C.A.A.F. 1994), aff'd on other grounds, 517 U.S. 748 (1996); [United States v. Curtis](#), 32 M.J. 252, 267 (C.M.A. 1991), cert. denied, 502 U.S. 952 (1991). Accused servicemembers are instead tried at general court-martial by a panel of at least five service members who are chosen by the commander who convenes the court-martial on a "best qualified" basis. See 10 U.S.C. § 825(d)(2) (2000); [United States v. Tulloch](#), 47 M.J. 283, 285 (C.A.A.F. 1987). In the event an enlisted soldier so elects, a minimum of one-third of the jury must be enlisted personnel. [R.C.M. 805](#).

²⁹⁹ [R.C.M. 811](#) (providing that parties may stipulate to any fact, written statement or testimony of a witness).

³⁰⁰ See [R.C.M. 916](#) (describing a defense as an admission of the commission of the objective acts constituting the offense charged but denying criminal responsibility); id. (listing available affirmative defenses, including justification, obedience to orders, self-defense, accident, entrapment, coercion, inability, ignorance and lack of mental responsibility).

³⁰¹ See [R.C.M. 703](#) (governing the employment of expert witnesses).

³⁰² See id. [R.C.M. 916\(j\)](#) (providing that "it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense.").

³⁰³ Rules of Land Warfare (1940), supra note 216, ¶ 33 (surrendering enemy personnel are generally entitled to quarter).

³⁰⁴ See Geneva Convention of July 27, 1929, supra note 215, art. 2 (stating that **POWs** "shall at all times be humanely treated and protected, particularly against acts of violence" and "(m)asures of reprisal against them are forbidden.").

³⁰⁵ See Hague IV, supra note 96, art. 23(c) ("It is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.").

³⁰⁶ The argument that the denial of quarter and the extrajudicial killing of **POWs** is absolutely prohibited was made before the International Military Tribunals at Nuremberg and Tokyo and before other United States military tribunals and commissions adjudicating the guilt of Nazi and Japanese defendants charged with the denial of quarter and the killing of United States **POWs** in the period from 1944-1951. See, e.g., *Nazi Conspiracy and Aggression: Opinion and Judgment* 57 (1947) (refusing to consider defenses and sentencing the authors and executors of the Kommand Befehl and the execution of Allied **POWs** to death); *The Jalvit Atoll Case*, in 1 U.N. War Crimes Comm'n, supra note 43, at 71 (sentencing the commander of Japanese naval forces who executed United States **POWs** to death for violation of Article 23(c) of Hague IV and Article 2 of the Geneva Convention of June 27, 1929); *The Essen Lynching Case*, in 1 U.N. War Crimes Comm'n, supra note 43, at 88 (sentencing German officer to death for permitting a crowd to kill 3 British **POWs**); *The Dostler Trial*, in 1 U.N. War Crimes Comm'n, supra note 224, at 22 (convicting commander of the German 75th Army Corps, General Anton Dostler, for ordering summary execution of fifteen uniformed United States **POWs** captured while on a mission to demolish a railway tunnel between La Spezia and Genoa); *Abbaye Ardenne Case*, in 4 U.N. War Crimes Comm'n, supra note 224, at 97 (condemning commander of a Nazi SS Regiment for counseling his men to deny quarter to Allied troops); *Trial of Gunther Thiele and Georg Steinert*, in 3 U.N. War Crimes Comm'n, supra note 43, at 56-57 (convicting two members of a German unit for denial of quarter to a wounded United States officer); *The Dreierwalde Case*, in 1 U.N. War Crimes Comm'n, supra note 224, at 81 (same); *Trial of Albert Bury and Wilhelm Hafner*, in 3 U.N. War Crimes Comm'n, supra note 43, at 62; *Trial of Anton Schosser*, in 3 U.N. War Crimes Comm'n, supra note 43, at 65 (same); *Trial of Major Karl Rauer*, in 4 U.N. War Crimes Comm'n, supra note 43, at 113 (same); *The Hostage Case*, 11 Trials of War Criminals, supra note 43, at 1230 (rejecting applicability of defenses and convicting principals and accessories of, inter alia, denial of quarter to Allied **POWs**).

³⁰⁷ To permit necessity to trump the “accepted usages of civilized nations” would, in the words of the IMT, “eliminate all humanity and decency . . . the conduct of war.” The High Command Case, in 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, supra note 43, at 462, 492 (hereinafter The High Command Case); see also The Einsatzgruppen Case, in 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, supra note 43, at 1317 (holding that recognition of an expansive view of military necessity urged by the defense would cause “the rules of war . . . (to) quickly disappear.”). Unless incorporated into the positive law, the defense of military necessity to a violation of the customs of war was, according to the United States at the time of the post-World War II war crimes trials, absolutely unavailable. See The Justice Case, in 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, supra note 43, at 954, 1127 (holding that military necessity may serve as a defense only where expressly incorporated into specific provisions of IHL). The very specific question of whether military necessity could every justify derogation from the martial code, to include proscription against the denial of quarter or execution of **POWs**, was reached by United States and international military tribunals in several post-World War II trials and answered invariably in the negative. See, e.g., Trial of Lieutenant-General Baba Masao, in 11 U.N. War Crimes Comm’n, supra note 222, at 56 (rejecting defense of military necessity to the charge of denial of quarter despite evidence that an Allied landing was anticipated, and did in fact occur, in the area of operations from whence United States **POWs** were forcibly removed and killed); The Peleus Trial, in 1 U.N. War Crimes Comm’n, supra note 224 (convicting a German submarine commander of denial of quarter to the survivors of a sunken ship despite evidence that Allied air surveillance might otherwise have spotted the survivors and led to the detection and destruction of his submarine). The case of Thiele and Steinert is even more squarely on point with respect to the position of the prosecutor in U.S. v. Ryan et al.: members of a small German unit surrounded by numerically superior United States troops who killed a United States **POW** to avoid detection and probable death were convicted of denial of quarter under the Hague and Geneva Conventions by a court-martial that rejected military necessity as absolutely unavailable. Trial of Gunther Thiele and Georg Steinert, in 3 U.N. War Crimes Comm’n, supra note 224, at 56.

³⁰⁸ See Osiel, supra note 23, at 132-33 (suggesting that the question of liability for denial of quarter turns on whether non-lethal alternatives, such as the disabling of the **POWs** by bindings, were reasonably available).

³⁰⁹ See 2 Oppenheim’s International Law 183-84 (H. Lauterpecht ed., 6th ed. 1943) (categorically rejecting any defenses to the charge of denial of quarter).

³¹⁰ See McCoubrey, supra note 283, at 135 (suggesting that in the situation where a submarine commander is unable to carry out search-and-rescue operations on behalf of the survivors of a torpedoed vessel due to his vulnerability to detection while on the surface, he may avail himself of the defense of military necessity to the charge of denial of quarter as compliance with the obligation to rescue would constitute a “genuine material impossibility”).

³¹¹ Captain Miller issued verbal, and not written, orders to the rescue squad, and the defense stipulated to the fact that the orders did not specifically authorize the killing of enemy **POWs** or any derogations from the laws of war.

³¹² The prosecutor read Article 2 of the Geneva Convention of July 27, 1929, supra note 215, providing that **POWs** are “in the power of the hostile Government, but not of the individuals or formation which captured them,” and forbidding “(m)asures of reprisal against them” into the record to establish the categorical illegality of reprisals under IHL and that Upham could not characterize his actions to have been a legal reprisal against the German **POW**.

³¹³ See R.C.M. 916(d) (providing that if a defendant knows an order to be illegal or a “person of ordinary sense and understanding would have known the orders to be unlawful,” he is obligated to disobey).

³¹⁴ The post-World War II jurisprudence of the Nuremberg and Tokyo tribunals authoritatively established the position of the Allies that, notwithstanding any contrary domestic practice, a “(s)oldier is bound to obey only the lawful orders of his superiors,” and “(i)f he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it.” The Jaluit Atoll Case, in 1 U.N. War Crimes Comm’n, supra note 306, at 5 (citing [United States v. Carr](#), 25 F. Cas. 306, 307-08 (1872)); see also The Dostler Case, in 1 U.N. War Crimes Comm’n, supra note 224 (rejecting a superior orders defense to the charge of denial of quarter on the ground that such a defense was unavailable under IHL and that the accused had a duty to disobey the unlawful order); The Hostage Case, supra note 43 (rejecting the availability of a superior orders defense as the “rule that a superior order is not a defense to a criminal act is a rule of fundamental justice that has been adopted by civilized nations extensively” and only lawful orders are entitled to obedience). Moreover, the formal rules of procedure and evidence promulgated by the Allies to govern prosecution of German and Japanese war crimes cases utterly proscribed application of the superior orders defense. See generally Albert Lyman, A Reviewer Reviews the Yokohama War Crimes Trials, 17 J. D.C. B. Ass’n 267-280 (1950).

³¹⁵ See, e.g., Court-Martial of General Jacob H. Smith, Manila, Philippines, April, 1902, S. Doc. 213, 57th Cong, 2nd Sess., 5-17 (1902) (convicting commander of United States expeditionary force in the Philippines, Brigadier General Smith, of a violation of good conduct and discipline for issuing orders in violation of Article 60 of the Lieber Code that suggested it would be permissible to deny quarter); see also 7 John Bassett Moore, A Digest of International Law 187 (1906) (discussing the Smith court-martial and the issue of unlawful orders). A mere eight months before the courts-martial of Private Ryan the section of the 1940 Rules of Land Warfare concerning the defense of superior orders was rewritten to relegate it from the **status** of a complete defense to a qualified defense inapplicable to the denial of quarter. U.S. Dep’t of Army, Field Manual 27-10, Rules of Land Warfare ¶ 345.1 (1944) (hereinafter Rules of Land Warfare (1944)) (providing that “the fact that (offenses against the “laws and customs of war”) were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment.”). The purpose of the 1944 revision, made at the order of General George C. Marshall--the source of the orders to rescue Private Ryan--was to harmonize regulations governing the conduct of United States Armed Forces with those the Allies had proposed would govern the prosecution of German and Japanese soldiers who, it was anticipated, would claim to have been following superior orders. Wells, supra note 12, at 10.

³¹⁶ See [R.C.M. 916\(k\)](#) (providing that it is an affirmative defense if at the time of an offense an accused was “unable to appreciate the nature and quality or the wrongfulness of his other acts” by virtue of a “severe mental disease or defect”).

³¹⁷ See [R.C.M. 916\(k\)\(2\)](#) (providing that “(a) mental condition not amounting to a lack of mental responsibility . . . is not a defense”); [R.C.M. 916\(3\)\(A\)](#) (providing that an accused is “presumed to have been mentally responsible.”).

³¹⁸ See [10 U.S.C. § 928\(a\) \(2000\)](#) (providing that the elements for assault are the attempt to cause physical harm to another through the use of unlawful force or violence).

³¹⁹ See supra note 201 and accompanying text.

³²⁰ See [R.C.M. 913](#) (governing presentation of the merits).

³²¹ See [R.C.M. 917](#) (governing motions for a finding of not guilty after presentation of the United States case-in-chief).

³²² Although the United States Theater Provost Marshal was prepared to process, in the first few days after D-Day, as many as 50,000 German **POWs** in accordance with the requirements of the Geneva Conventions of 1929, Allied military planners were very concerned that once Allied forces extended the beachhead inland the ratio of enemy

POWs to capturing Allied troops would threaten not only their capacity to comply with legal obligations but also their physical security. See generally Ambrose, *supra* note 226, at 27-55 (noting that by June 20, 1944, German **POWs** outnumbered their captors by a ratio of 150:1).

³²³ See Osiel, *supra* note 23, at 128 (stating that fact finders in courts-martial have traditionally undertaken an analysis of defendants' understandings of the lawfulness of their orders and whether such understandings were reasonable under the particular circumstances of each case). Courts-martial have traditionally been instructed to consider whether an accused might reasonably have mistaken his conduct as lawful on the ground that he reasonably believed that he was acting pursuant to the orders of his superior. *Id.* (citing [United States v. Calley, 48 C.M.R. 19 \(C.M.A. 1973\)](#)).

³²⁴ "Battle fatigue" is a historically-dated term for what is now described as post-traumatic stress disorder (PTSD), a mental condition characterized by and caused by shock and trauma. See Am. Psych. Ass'n, Diagnostic and Statistical Manual 309.81 (4th ed. 1994) (describing PTSD as the development of characteristic symptoms of fear, helplessness, persistent re-experiencing of the event, numbing of general responsiveness and increased arousal "following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing (such) an event). Sustained exposure to combat can induce or exacerbate PTSD and warp the normal moral calculus of soldiers. See generally Eric T. Dean, Jr., *Shook Over Hell: Post-Traumatic Stress, Vietnam, and the Civil War* (1997); Dennis Grant, *Psychological Damage of Combat*, 148 Am. J. Psych. 271 (1991).

³²⁵ The defense argued in effect that the violation of parole on the part of the deceased German **POW** was the proximate cause not only of the death of Captain Miller but of the reaction of T/5 Upham.

³²⁶ See Rules of Land Warfare (1940), *supra* note 216, ¶ 85 (providing that a commander may deny quarter on the ground it is necessary in the interest of self-preservation or that caring for enemy **POWs** interferes with his mission).

³²⁷ See 2 Wheaton, *supra* note 237, at 210-11 (stating that military necessity, though often a "fictitious and ubiquitous" claim, excuses the denial of quarter when the likelihood of victory or the rapidity or secrecy of movement would be greatly compromised otherwise); see also Spaight, *supra* note 17, at 91 (stating that quarter may be denied where the numerical strength of the prospective **POWs** exceeds the strength of the prospective captors and thus would threaten their safety). Neither of these authors served in the United States Army JAG Corps; however, the substance of their publications is substantially the same as the testimony which experts with practical and academic backgrounds in operational law--the sort of witnesses the defense would call--would have been likely to offer, and thus it is presented as if it were offered by former JAG officers now in legal academia.

³²⁸ Barker, *supra* note 164, at 27-28.

³²⁹ The jurisprudence of the IMT supported the defense expert testimony that the defense of military necessity was to be counted as among the survivors, rather than the victims, of World War II. See, e.g., *The Flick Case*, in 6 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, *supra* note 43, at 1187, 1192, 1201, 1206 (1952) (stating that it might be "reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity," a principle with "wide acceptance in American and English courts and . . . recognized elsewhere").

³³⁰ See Lippman, *supra* note 52, at 110.

³³¹ Osiel, *supra* note 23, at 157.

- ³³² A defense expert cited the case of General Karl Stenger, a German commander charged with issuing orders directing subordinates to deny quarter and to kill all **POWs** in their custody but acquitted, despite substantial inculpatory evidence, on the supposition that “no Prussian general officer would have issued such an order.” Claude Mullins, *The Leipzig Trials* 151 (1921). Although his subordinates were nevertheless convicted of having denied quarter (ostensibly on their own initiative), the charge and the penalties were mitigated by virtue of the suspicion they had been ordered to deny quarter. George G. Battle, *The Trials Before the Leipsic Supreme Court of Germans Accused of War Crimes*, 8 Va. L. Rev. 1, 11-14 (1921).
- ³³³ See Rules of Land Warfare (1940), *supra* note 216, ¶¶ 345, 347 (providing that United States Army personnel will not be punished for war crimes ordered by their superiors).
- ³³⁴ See Charter of the International Military Tribunal, Aug. 8, 1945, art. 8, 59 Stat. 1548, 82 U.N.T.S. 279 (hereinafter *Nuremberg Charter*) (“The fact that the Defendant acted pursuant to order of his Government or of a superior . . . may be considered in mitigation of punishment.”).
- ³³⁵ See 2 Oppenheim, *supra* note 309, at 453.
- ³³⁶ This precise question was presented in the Dostler Case, during which General Dostler offered the defense of superior orders to the charge of denial of quarter to United States **POWs**. See *The Dostler Case*, in 1 UN. War Crimes Comm’n, *supra* note 224, at 2. The accused contended that Hitler’s Kommando-Befehl, ordering the denial of quarter to Allied commandos, was legal inasmuch as it was undertaken in reprisal for Allied denials of quarter and as such left no alternative but to obey. *Id.* at 28. However, the military commission hearing the case convicted the defendant without providing any legal reasoning to support its rejection of the superior orders defense or the argument that the Kommando-Befehl rendered the shooting of the United States **POWs** a legitimate reprisal. See generally Kalshoven, *supra* note 28, at 192-301 (discussing the intersection of the superior orders defense with reprisals).
- ³³⁷ Interview with Lieutenant Colonel Mark S. Martins, Deputy Staff Judge Advocate, XVIIIth Corps (Airborne) (Oct. 2, 2000).
- ³³⁸ The destruction that omnipresent threats to physical survival can wreak upon the moral frame of reference through which soldiers view the world is almost beyond the capacity of those who have not experienced combat to comprehend:
For the common soldier, at least, war has the feel--the spiritual texture--of a great ghostly fog, thick and permanent. There is no clarity. Everything swirls. The old rules are no longer binding, the old truths no longer true. Right spills over into wrong. Order blends into chaos, love into hate, ugliness into beauty, law into anarchy, civility into savagery. The vapor sucks you in. You can’t tell where you are, or why you’re there, and the only certainty is overwhelming ambiguity.
Tim O’Brien, *The Things they Carried* 88 (1990).
- ³³⁹ See Smidt, *supra* note 40, at 155-59 (correlating the displacement of the moral compass of soldiers off its normal bearing with the increase in combat intensity and associated spike in destruction and death).
- ³⁴⁰ See Everett, *supra* note 283, at 1429 (outlining, from the point of view of a JAG lawyer and a military judge, the standard arguments in support of a defense of lack of mental capacity to a charge of a war crime).

³⁴¹ The phenomenon whereby soldiers are unable to restrain themselves from exacting revenge after capturing enemy forces have killed their comrades is well-documented, and although the defense of lack of mental responsibility resulting from the emotional trauma of such circumstances has not uniformly led to the acquittal of soldiers charged with denial of quarter, it has been treated by courts-martial as an admissible defense and as an extenuating and mitigating factor. See generally Kershen, *supra* note 193 (discussing the admission and adjudication of the defense of a lack of mental responsibility in the 1900 court-martial of British soldiers for denial of quarter to Boer POWs and suggesting that the pre-capture conduct of POWs would normally have been considered as extenuating and mitigating circumstances). Even more frequently, under such circumstances the denial of quarter to enemy POWs has been treated as a forgivable, and even understandable, reaction to extreme provocation not subject to referral to the military criminal justice system. The following exchange, conducted between a senior noncommissioned officer and the author, an officer in the British Army, following the execution of German POWs by British soldier, "S--", subsequent to the storming of a German trench in World War I, is representative of this oft-repeated practice:

‘What the hell ought I to do?’

...

‘I don’t see that you can do anything,’ I answered slowly. ‘What can you do? Besides I don’t see that S--’s really to blame. He must have been half mad with excitement by the time he got into that trench. I don’t suppose he ever thought what he was doing. If you start a man killing, you can’t turn him off like an engine. After all, he is a good man. He was probably half off his head.’

‘It wasn’t only him. Another did exactly the same thing.’

‘Anyhow, it’s too late to do anything now. I suppose you ought to have shot both on the spot. The best thing now is to forget it.’”

Guy Chapman, *A Passionate Prodigality: Fragments of Autobiography* 115-16 (1933).

³⁴² U.S. Dep’t of Army, II International Law, DAP 27-161-2, at 246 (1962) (hereinafter DAP 27-161-2).

³⁴³ See Wells, *supra* note 12, at 120-21; Osiel, *supra* note 23, at 126 (noting that in the court-martial of Lieutenant Calley for the unlawful killing of noncombatants in My Lai during the Vietnam War, the defense of “following superior orders unreasonably believed to be lawful” was reinforced by evidence that Calley had been inadequately trained in IHL, leading to a reduction in the charges against him) (referring to [United States v. Calley](#), 46 C.M.R. 1131 (A.C.M.R. 1973), *aff’d*, 22 C.M.A. 534, 48 C.M.R. 19 (C.M.A. 1973), petition for writ of habeas corpus granted sub nom. [Calley v. Callaway](#), 382 F. Supp. 650 (M.D. Ga. 1974), *rev’d*, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976); Christine Van Den Wyngaert, *The Suppression of War Crimes Under Additional Protocol I*, in *Humanitarian Law of Armed Conflict*, *supra* note 12, at 200-01 (indicating that confusion and ignorance with respect to IHL remained endemic within the armed forces of many states as late as the 1990s due to inadequate military education programs).

³⁴⁴ See Dov Shefi, *The Status of the Legal Adviser to the Armed Forces: His Functions and Powers*, 100 Mil. L. Rev. 119, 119-20 (1983) (stating that the “prolific development” and “great complexity” of IHL requires significant study, guidance and expertise in the translation to the battlefield where faculties are dedicated to the defeat of the enemy, leaving little additional capacity to parse the meaning of the commandments of an unclear legal regime).

³⁴⁵ See Osiel, *supra* note 23, at 356 (elaborating the “reasonable error” approach to the defense of superior orders where the analysis centers upon whether a defendant’s mistaken belief in the legality of his orders was reasonable under the circumstances).

³⁴⁶ At courts-martial, evidence supporting the inference of the good character of the accused consists primarily of citations for heroism in combat as well as the testimony of witnesses whose lives the accused has saved. Everett, *supra* note 282, at 1432-33.

³⁴⁷ The Silver Star--the third-highest decoration for military valor awarded by the United States--is awarded to a person "who . . . is cited for gallantry in action . . . while engaged in an action against an enemy of the United States" but where the circumstances do not justify the award of the Distinguished Service Cross. [32 C.F.R. § 578.7 \(2000\)](#).

³⁴⁸ The Bronze Star is a decoration for military valor awarded for "heroic or meritorious achievement or service . . . while engaged in an action against an enemy of the United States." [Exec. Order No. 11046, 32 C.F.R. § 578.11 \(2000\)](#).

³⁴⁹ [R.C.M. 917](#) provides that the court, acting sua sponte, "shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected.").

³⁵⁰ [R.C.M. 919](#) (providing procedures for closing arguments and rebuttal by the government).

³⁵¹ The prosecutor stated that duties of combatants, whether United States or foreign, included those obligations imposed by applicable treaties limiting conduct in war, and that, because Congress had ratified such treaties and consented to their incorporation in domestic law, to the extent domestic and international law were in disharmony (which disharmony the prosecutor did not recognize in the instant case), the international obligations governed. For arguments that IHL is a peremptory regime that trumps inconsistent domestic law, see Lippmann, *supra* note 52, at 110.

³⁵² Although the martial code admits and concedes terrain to military necessity, it does not categorically justify all acts, including manifestly unlawful acts alleged to have been undertaken in light of necessity; rather, the martial code immunizes legitimate acts essential to self-preservation and to the accomplishment of a mission but rejects the necessity defense in cases where other options were available and would have been chosen by honorable soldiers. See Taylor, *supra* note 13, at 34-36.

³⁵³ Some commentators suggest that legal culpability in courts-martial should be restricted to those circumstances where an accused knew his actions to be illegal. See Wasserstrom, *supra* note 28, at 66 (noting advocacy in favor of this more stringent standard of proof based upon actual knowledge of illegality and intent to commit an illegal act).

³⁵⁴ The defense summation is loosely patterned after that offered by Major J.F. Thomas, counsel for Lieutenant "Breaker" Morant, at his court-martial before a British panel in 1900, as well as an editorial from former United States Navy Secretary James Webb castigating the absolutism of NGOs that sought to prosecute United States soldiers for alleged violations of IHL during the Korean War. See Kershen, *supra* note 193, at 115 (discussing the Morant court-martial); James Webb, *The Bridge at No Gun Ri*, Wall St.J., Oct. 6, 1999, at A22 (arguing against absolutism and in favor of the martial code in the post hoc review of the legitimacy of actions undertaken by soldiers in combat).

³⁵⁵ See Lippmann, *supra* note 52, at 111 (stating that a "code of complicity among armed comrades complicate(s) the reconstruction of events and the apprehension and prosecution of offenders" at courts-martial).

³⁵⁶ [R.C.M. 920\(c\)](#).

³⁵⁷ [R.C.M. 920\(e\)](#).

- ³⁵⁸ See [10 U.S.C. § 919 \(1998\)](#) (criminalizing the unlawful killing of a human being “in the heat of sudden passion caused by adequate provocation” with the intent to kill).
- ³⁵⁹ The “infinitely varied circumstances and conditions of combat never produce exactly the same situation twice,” and as “terrain, weather, dispositions, armament, morale, supply, and comparative strength are variables whose mutations always combine to form new patterns of physical encounter.” Richard D. Hooker, Jr., *The Mythology Surrounding Maneuver Warfare*, 23 *Parameters* 27, 30 (1993). Consequently, the judge at court-martial instructs the panel to treat each case arising out of a hostile engagement as an event *sui generis* whose facts are to be ascertained, assessed and adjudicated not by reference to some artificial template but on its own merits.
- ³⁶⁰ In connection with the determination of the defendant’s interpretation of his orders, the judge instructed the panel to determine what standard of lawfulness the defendant had been trained to apply in the course of his military education. See Taylor, *supra* note 13, at 159-60 (describing standard court-martial instructions to the panel on the issue of the lawfulness of orders).
- ³⁶¹ The “manifest illegality” standard creates an irrebuttable presumption that a defendant executing a manifestly illegal order possesses the requisite knowledge of the criminal character of the order and, as such, is guilty of the underlying act as a matter of law. Lippmann, *supra* note 52, at 55.
- ³⁶² Following the conclusion of the evidence, the judge gives the panel detailed jury instructions as to the elements of the crime(s) specified and other matters of law, including the elements of and availability of affirmative defenses and the presumption of innocence. Everett, *supra* note 282, at 1426. Moreover, in charging a jury, the court frequently provides express instructions to consider “a host of environing circumstances,” and, in so doing, to attempt to assume the perspective of the “ordinary soldier.” Osiel, *supra* note 23, at 128. Although the “ordinary soldier” standard would appear to be an objective measure, in practice it is “calibrated to the defendant’s background, rank and circumstance, thus taking into account the typical conscript’s level of understanding and the conflicting pressures placed upon him,” and far more is demanded of an officer than of an enlisted soldier in assessing the reasonableness of a defendant’s subjective interpretations of the law relevant to the acts and omissions giving rise to the charge(s) against him. Lippmann, *supra* note 52, at 54.
- ³⁶³ The defenses in court-martial are essentially equitable rather than legal in nature, and to ensure that a specific act that is conduct either authorized or encouraged by higher elements in the chain of command is not treated as a criminal act it is necessary, in the interests of justice, to view that act against the backdrop of the prevailing practices of the Army. See Taylor, *supra* note 13, at 155-56.
- ³⁶⁴ See [10 U.S.C. § 852\(a\)\(2\)](#) (requiring a two-thirds majority for a guilty finding).
- ³⁶⁵ See [R.C.M. 921](#) (providing for secret deliberation on findings).
- ³⁶⁶ Rank is immaterial in the deliberations of the court-martial panel. See [R.C.M. 921\(a\)](#).
- ³⁶⁷ [10 U.S.C. § 918](#) (requiring, to establish the crime of murder, that the killing be proven “unlawful”).
- ³⁶⁸ Voting as to innocence or guilt is conducted by secret written ballot, although votes on other questions may be held by whatever means the members elect. See [R.C.M. 921\(c\)](#).

³⁶⁹ The members of the panel in the case of *United States v. Private Ryan* did not have the benefit of the jurisprudence emanating from the Nuremberg and Tokyo tribunals in reaching their findings. See *supra* notes 360, 363 and accompanying text.

³⁷⁰ See *supra* notes 140, 222, 225-29, 232 and accompanying text (chronicling such incidents in military history of World War II).

³⁷¹ The M1 Garand Rifle was the primary personal weapon carried by United States soldiers in the European Theater of Operations in 1944. Reference to "Rule M1" is a sardonic acknowledgement that the most important principles and customs governing war are those that are practiced on the battlefield, that soldiers are expected to kill enemy soldiers with their M1 rifles, and that no positive legal regime can regulate soldiers' conduct unless it is compatible with the custom of reprisal, which continues to hold a most prominent place in the martial code.

³⁷² Adjudication of individual criminal responsibility on the part of commanders who issue orders to others to commit war crimes, or on the part of those who commit such crimes after a long opportunity for repose, is arguably a less morally and legally complicated exercise than is the determination of the liability of those who, on their own initiative, act in the heat of battle while under threat from their enemies. See Barker, *supra* note 164, at 27-28 (stating that it was less difficult at the post-World War tribunals to attribute criminal liability for war crimes to "decision-makers far from the scene of the action" than to prove the liability of "those who carry out the orders").

³⁷³ See [10 U.S.C. § 934](#) (punishing "all disorders and neglects to the prejudice of good order and discipline in the armed forces, (and) all conduct of a nature to bring discredit upon the armed forces").

³⁷⁴ This intense internal debate, rather than frustrate administration of military justice, is essential to the determination of the requirements of martial honor as applied to the specific case before a jury of military peers and is protective of the rights of the accused as well as the integrity of the profession of arms. Osiel, *supra* note 23, at 285 (describing process whereby military professionals debate and resolve standards of virtue crucial to the functioning of the martial code).

³⁷⁵ The fundamental question of liability in courts-martial can only be resolved by a determination of whether the accused was morally culpable, within the framework of reference of honorable soldiers, of any wrongdoing; the "arcane and logically irresolvable "questions" of whether particular descriptions of the accused's conduct violated various textual and customary prescriptions and proscriptions, though of great interest to IHL lawyers, are far less relevant. Osiel, *supra* note 23, at 356.

³⁷⁶ As one military scholar notes, even the most honorable soldiers may find that, subject to the stress and exigencies of combat, there is simply no time to ask, 'What kind of person do I want to be, and what would such a person do?'" Reed R. Bonadonna, *Above and Beyond: Marines and Virtue Ethics*, in *Military Leadership* (Robert L. Taylor & William E. Rosenbach eds., 1996).

³⁷⁷ See [10 U.S.C. § 852](#) (providing that the members of a court-martial also determine the sentence and may take into consideration factors in mitigation, aggravation and extenuation).

³⁷⁸ In some senses, the power of the jury in courts-martial to pronounce a very lenient sentence amounts to a form of quasi-nullification in cases where equity demands its application. Perhaps the most (in)famous example occurred during World War II, when a black Army officer, charged with physical violence for allegedly pushing an officer attempting to prevent him from entering an officer's club designated for whites only, was, although convicted of the charge, sentenced by a court-martial jury to pay a \$150 fine despite being eligible for the death penalty. See James

Allison, Mutiny at Freeman Field: The Life and the Art of James Gould Cozzens, 92 Black Hist. News & Notes (May 2003) (discussing jury nullification in the court-martial of 2LT Roger C. Terry in 1945). Jury nullification occurs with respect to even the most serious of crimes. In the court-martial of Lieutenant Duffy for ordering the murder of an unarmed Vietnamese POW in 1969, the jury, after hearing testimony that other officers had been given orders to deny quarter but nonetheless convicting Duffy of murder, amended the first two findings to find Duffy guilty of conspiring to commit involuntary manslaughter and sentenced him to confinement for six months and forfeiture of \$250 per month for six months. [United States v. Duffy, 47 C.M.R. 658, 660-62.](#)

³⁷⁹ See [R.C.M. 922](#) (proving that findings are announced promptly in the presence of all parties).

³⁸⁰ See [R.C.M. Rule 1001](#) (providing procedures for adversarial hearing on sentencing and the introduction of evidence as to general character, rehabilitative potential and evidence in aggravation as well as mitigation and extenuation).

³⁸¹ See [Manual for Courts-Martial, United States, ¶ 44.e.\(1\)](#) (2000 ed.) (providing for a maximum penalty of fifteen years confinement, dishonorable discharge, and forfeiture of pay and benefits upon conviction of manslaughter).

³⁸² Punitive discharge, forfeiture of pay and benefits, reduction in rank and formal admonishment are distinctively non-penal military punishments for which the Manual for Courts-Martial makes specific provision. See *id.*, app. 12. The use of non-penal sanctions, even with respect to the punishment of serious crimes, is not unique to domestic law or to the system of courts-martial. In post-civil war Bosnia, where domestic prosecutions are difficult to conduct due to evidentiary, political, logistical and financial difficulties, the U.N. mission has recently begun, with some success, to introduce non-penal sanctions to reach the conduct of thousands of culpable individuals who remain in official positions in public life despite having committed prosecutable crimes, including genocide, war crimes and crimes against humanity. See Gregory L. Naarden, [Nonprosecutorial Sanctions for Grave Violations of International Humanitarian Law: Wartime Conduct of Bosnian Police Officials](#), 97 *Am. J. Int'l L.* 342-52 (2003) (discussing the regime of non-penal sanctions administered by the U.N. in Bosnia).

³⁸³ See, e.g., Court-Martial of General Jacob H. Smith, *supra* note 315, at 17 (sentencing Smith to be “admonished by the reviewing authority” for having issued orders to subordinates directing denial of quarter to enemy guerrillas).

³⁸⁴ Sheldon Glueck, *War Criminals: Their Prosecution and Punishment* 31-32 (1944).

³⁸⁵ See [R.C.M. 1005](#).

³⁸⁶ See [R.C.M. 1007](#).

³⁸⁷ See [R.C.M. 1108](#).

³⁸⁸ See [R.C.M. 1101](#) (providing for deferment of sentence by the convening authority or officer with jurisdiction).

³⁸⁹ See [R.C.M. 1106\(d\)\(3\)\(B\)](#).

³⁹⁰ See [R.C.M. 1011](#).

- ³⁹¹ See [R.C.M. 1106](#) (providing for assistance of legal counsel to convening authority in determining a course of action with respect to the sentence of court-martial). The role of the SJA is to evaluate the sufficiency of the evidence and make recommendations for action in light of the service record of the accused and other relevant considerations. *Id.* Although the convening authority normally accepts the SJA recommendation, it has “absolute power to disapprove the findings and sentence, or any part thereof, for any reason or no reason,” and thus the SJA role is simply advisory. See U.S. Dep’t of Army, *supra* note 288, at 58.
- ³⁹² See U.S. Dep’t of Army, *supra* note 288, at 58 (“In those unusual cases in which a convening authority is in disagreement with his (SJA) or legal officer as to the effect of any error or irregularity respecting the proceedings, as to the adequacy of the evidence, or as to what sentence can legally be approved, the convening authority may transmit the record of trial, with an expression of his own views and the opinion of his . . . legal officer, to the Judge Advocate General of the armed force concerned for advice.”).
- ³⁹³ See [R.C.M. 1107\(d\)\(1\)](#) (“The convening authority may for any or no reason disapprove a legal sentence . . . , and change a punishment . . . as long as the severity of the punishment is not increased.”).
- ³⁹⁴ See [R.C.M. 1107\(e\)\(1\)](#) (providing for rehearing as to charged offenses or sentence at discretion of the convening authority).
- ³⁹⁵ See [R.C.M. 1107\(c\)\(2\)\(A\)](#) (allowing convening authority to set aside a guilty finding and dismiss a charge).
- ³⁹⁶ See [R.C.M. 1107\(e\)\(1\)\(B\)\(iii\)](#) (stating that “If the convening authority finds a rehearing as to any offenses impracticable, the convening authority may dismiss those specifications and, when appropriate, charges.”).
- ³⁹⁷ See 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 (hereinafter GCI); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, [6 U.S.T. 3217](#), 75 U.N.T.S. 85 (hereinafter GCII); Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter GCIII); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [6 U.S.T. 3516](#), 75 U.N.T.S. 287 (hereinafter GCIV) (increasing categories of persons entitled to **POW status**, improving treatment of **POWs**, improving post-conflict repatriation procedures, and codifying a specific set of war crimes, known as “grave breaches”). These Conventions are known collectively as the “Geneva Conventions.”
- ³⁹⁸ The Geneva Conventions have been ratified by almost all States and can thus be considered binding not only upon parties but upon non-parties as customary IHL. See [Military and Paramilitary Activities in and Against Nicaragua \(Nic. v. U.S.\), 1986 I.C.J. 14, 114 \(June 27\)](#) (holding that common Article 1 of the Geneva Conventions is declaratory of customary IHL); Meron, *Humanization*, *supra* note 12, at 252 (stating that Common Article 6/6/6/7 of the Geneva Conventions, providing that parties may conclude bilateral agreements conferring protection upon individuals greater than that afforded in the Geneva Conventions, has attained the **status** of a quasi-norm of jus cogens and is evidence of customary IHL); Int’l Comm. of the Red Cross, *Commentary on the Geneva Conventions* Aug. 12, 1949, at 368 (Jean S. Pictet ed., 1952) (hereinafter ICRC Commentary) (suggesting that Common Article 3 is declaratory of a customary international obligation to suppress all breaches of the Geneva Conventions); Howard S. Levie, *Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War*, 7 U.S.A.F.A. J. Leg. Stud. 37, 38 (1996-1997) (arguing more broadly that the substantive provisions of the Geneva Conventions are enforceable against non-parties as customary IHL).
- ³⁹⁹ Although any violation of the Geneva Conventions might theoretically be categorized or described as a “war crime,” the Conventions provide that only certain acts constitute such exceptionally opprobrious violations of IHL, known as “grave breaches,” that parties are obligated to take measures to actively suppress them, largely by implementing

domestic legislation criminalizing these acts and prosecuting those who commit them. See GCI, supra note 397, art. 49 (creating the duty to suppress and prosecute grave breaches of GCI); GCIII, supra note 397, art. 129 (creating same duty under GCIII); GCIV, supra note 397, art. 146 (creating same duty under GCIV). Specific grave breaches include, inter alia, “willful killing” and “torture or inhuman treatment; GCI, supra note 397, art. 50; GCIII, supra note 397, art. 130, and “wilfully causing great suffering or serious injury to body or health . . . or wilfully depriving a prisoner of war of the right of fair and regular trial,” GCIII, supra note 397, art. 130; see also GCIV, art. 147. Only those delicts analogous to felonies under domestic law or violations of norms of jus cogens under customary international law, committed by members of the military forces of parties to the conflict constitute grave breaches and thereby impose upon states-parties investigatory and prosecutorial duties, but acts better characterized as misdemeanors do not. See ICRC Commentary, supra note 398, at 617-20 (elaborating distinctions between grave breaches and other violations of the Geneva Conventions); see also M. Cherif Bassiouni, [The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities](#), 8 Transnat’l L. & Contemp. Probs. 199-236 (1998) (further elaborating this distinction and contrasting state duties with respect to grave breaches and other violations of the Geneva Conventions).

⁴⁰⁰ Grave breaches include willful killing or inhuman treatment of protected persons, willfully causing unnecessary suffering, extensive destruction or appropriation of property not justified by military necessity, willfully depriving a **POW** of the right to a fair trial, taking of hostages, and forcible relocation or deliberate targeting of civilians. See supra note 399 and accompanying text.

⁴⁰¹ See GCI, GCII, GCIII, GCIV, supra note 397, art. 3(1) (“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds” (emphasis added)); see also GCI, supra note 397, art. 46 (“Reprisals against . . . personnel . . . protected by the Convention are prohibited.”); id. art. 50 (“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons . . . protected by the Convention: wilful killing”); GCIII, supra note 397, art. 13 (“**(POWs)** must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a **(POW)** in its custody, is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no **(POW)** may be subjected to physical mutilation . . . Measures of reprisal against **(POWs)** are prohibited.” (emphasis added)); id. art. 130 (“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons . . . protected by the Convention: wilful killing”).

⁴⁰² GCIII, supra note 397, art. 129. The legal effect of the Geneva Conventions, in the estimation of the ICRC and other NGOs, has been to further extend that prohibitive regime of IHL to encompass within the field of individual criminal responsibility actions that theretofore were either condoned or excused on grounds such as military necessity. See ICRC Commentary, supra note 398; see also Osiel, supra note 23, at 132 n.17 (stating that GCIII prohibits killing **POWs** “even ‘on grounds of self-preservation’ or because ‘it appears certain that they will regain their liberty’” (quoting GCIII, supra note 397, art. 85)). However, the Geneva Conventions are imprecise as to what constitutes “effective penal sanctions,” and states-parties may discharge their obligations by prosecuting those whom an investigation indicates may have committed grave breaches. See GCI, supra note 397, art. 49(2); GCII, supra note 397, art. 50(2); GCIII, supra note 397, art. 129(2). Moreover, the Geneva Conventions, contemplating a regime of complementary jurisdiction, accord states-parties the latitude to investigate and prosecute under their own domestic laws without obligating them to submit to international supervision. GCIII, supra note 397, art. 99(1). Whether states may thereby attenuate their obligations under the Geneva Conventions, by exploiting this indirect enforcement mechanism, is a matter open to debate. See generally National Implementation of International Humanitarian Law (Michael Bothe et al. eds., 1990) (indicating that the extent to which states-parties to the Geneva Conventions discharge their duties under those instruments varies considerably in substance and procedure); The New Humanitarian Law of Armed Conflict 212 (Antonio Cassese ed., 1980) (hereinafter New Humanitarian Law) (noting that some hold that the duty to prosecute grave breaches under the Geneva Conventions is incumbent only upon belligerents while others maintain that universal jurisdiction obligates all states to prosecute grave breaches); M.

Cherif Bassiouni, *Repression of Breaches of the Geneva Conventions Under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, 8 Rutgers-Camden L. Rev. 185, 196 (1977) (suggesting that complementary jurisdiction in an international tribunal is contemplated by the Geneva Conventions where domestic prosecution is inadequate or ineffective); Esgain & Solf, *The 1949 Geneva Conventions Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, 4 N.C. L. Rev. 537, 580-81 (1963) (discussing variations in imposition of effective penal sanctions for violations of the Geneva Conventions across the range of states-parties); Oren Gross, [The Grave Breaches System and the Armed Conflict in the Former Yugoslavia](#), 16 Mich. J. Int'l L. 783, 792 (1995) (suggesting that the principle of universality of jurisdiction permits states other than the state of nationality of the accused to assert jurisdiction in the event that state does not undertake good-faith investigation and prosecution).

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Whether or not states-parties elect themselves to investigate and prosecute allegations of grave breaches of the Geneva Conventions, they remain obligated under the customary international legal principle *aut dedere aut judicare* ("extradite or prosecute"), to which the Geneva Conventions make explicit reference at Articles 49, 50, 129 and 146 to either undertake a good-faith investigation and initiate prosecution or, in the alternative, to extradite to a state-party that will do so. M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* 4-5 (1995). The United States officially recognizes this obligation as a state-party. See U.S. Dep't of Army, *Treaties Governing Land Warfare*, DAP 27-1, at 183-84 (1956) (stating that the duty to investigate and prosecute those who commit grave breaches includes not only enemy war criminals but also United States nationals).

See API, *supra* note 105. The API, an instrument largely the work of the ICRC, updates the Geneva Conventions in light of an additional three decades of state practice. See Solf & Cummings, *supra* note 19, at 219 (tracing the role of the ICRC in the development of the API). The principle supplementation of the API concerns the addition of grave breaches, including making civilians, public works and installations, the ICRC emblem and cultural or religious objects the object of attack and unjustifiably delaying the repatriation of POWs. See API, *supra* note 105, arts. 11(4), 85(3)-(4). In addition, the API obligates states-parties to cooperate with the U.N. "in situations of serious violations of the (Geneva) Conventions or of (the API)," *id.* art. 89, as well as with international fact-finding commissions, *id.* art. 90, in the suppression of grave breaches. The API has come under criticism for introducing controversial positions into IHL, including the legitimization of decolonization, *id.* art. 1(4), the legal protection of terrorists, *id.* art. 44, the withdrawal of the protection of GCIII from mercenaries, *id.* art. 47, the definition of a military objective, *id.* art. 52, and the prohibition of attack upon certain military objectives, *id.* art. 56, and the question of whether these or other provisions of API are binding upon non-parties as customary IHL or as norms of *jus cogens* is open to considerable debate and will be discussed *infra* at note 437. Although most states have ratified the API, a number of states have either declined ratification or attached a series of reservations purporting to limit legal obligations under that instrument despite ratification. See New Humanitarian Law, *supra* note 402, at 243 (noting that the "Western powers" were "very reluctant" to embrace API without reservations); David Turns, *Prosecuting Violations of International Humanitarian Law: The Legal Position of the United Kingdom*, 4 J. Armed Confl. 1 (1998) (describing the U.K. position with respect to API and the reservations it has taken to that instrument limiting domestic prosecutions for violations of its provisions). The United States has signed the API but since taken the position that it is a "fundamentally flawed" instrument that would "politicize (IHL) and efface the distinction between terrorists and lawful combatants, and accordingly has not ratified that instrument. See Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U.J. Int'l L. & Pol'y 419, 431 (1987). Nonetheless, the United States has publicly accepted that some of the provisions of the API are declaratory of customary IHL and are thus binding in courts of the U.S., but no official statement clarifying precisely which provisions has been offered. For an argument that API is neither customary IHL nor expressive of norms of *jus cogens* and, therefore, not binding upon non-parties, see Suzanne M. Bernard, [An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners](#), 25 Rutgers L.J. 759, 766 (1994) ("It is generally accepted that the Geneva Conventions have achieved the status of customary international law even if Protocol I . . . ha(s) not."). For a contrary argument, see Kenneth J. Keith, [Rights and Responsibilities: Protecting the Victims of Armed Conflict](#), 48 Duke L.J. 1081, 1095 (stating that although some commentators consider the API to be an instance of "la trahison des clercs" (treachery of the intellectuals), the fact that more than 150 states have ratified suggests that it has become declaratory of customary IHL).

⁴⁰⁴ See API, supra note 105, art. 40 (“It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”); see also id. art. 41(1) (“A person who is recognized or who, in the circumstances, should be recognized to be hors de combat, shall not be made the object of attack.”). The obligations created by API with respect to quarter are absolute, even in the case of a greatly outnumbered unit physically unable to take prisoners. Id. art. 41(3) (requiring that even “under unusual conditions of combat which prevent . . . evacuation (of enemy **POWs**) . . . they shall be released and all feasible precautions shall be taken to ensure their safety.”).

⁴⁰⁵ See supra note 403 and accompanying text.

⁴⁰⁶ The Geneva Conventions recognize that **POWs** who are paroled “are bound on their personal honour scrupulously to fulfil . . . the engagements of their paroles or promises.” GCIII, supra note 397, art. 21. However, under Article 20, reprisals are expressly prohibited against parole violators who are entitled to judicial process and to the protected **status** of **POW** in the interim. See GCIII, supra note 397, art. 85 (stating that **POWs** “prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention”); Pictet, supra note 12, at 181 (stating that the Geneva Conventions afford parole violators the opportunity to defend against charges of breaking parole).

⁴⁰⁷ See W. Michael Reisman & William K. Lietzau, Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict, in 64 United States Naval War College International Law Studies, the Law of Naval Operations 1 (Horance B. Robertson, Jr. ed., 1991) (discussing this trend).

⁴⁰⁸ See Rules of Land Warfare (1956), supra note 43. FM 27-10 was updated without significant changes in 1976.

⁴⁰⁹ See id. ¶ 28 (“It is especially forbidden . . . to declare that no quarter will be given.” (citation omitted)); id. ¶ 29 (“It is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion. (citation omitted)).

⁴¹⁰ See id. ¶ 497(c) (stating that reprisals “against the persons or property of (**POWs**) . . . are forbidden,” although reprisals against enemy forces not yet in the control of the United States forces are permitted (citing GCIII, supra note 397, art. 13)).

⁴¹¹ See id. art. 3 (stating that the “prohibitory effect of the law of war is not minimized by ‘military necessity’ which has . . . been generally rejected as a defense for acts forbidden by the customary and conventional laws of war.”). Some scholars argue that FM 27-10 effected the complete rejection by the United States Army of the defense of military necessity to allegations of war crimes. See, e.g., Walzer, supra note 12, at 130-31 (stating that since FM 27-10 an accused soldier can no longer “justify his violation of the rules by referring to the necessities of his combat situation or by arguing that nothing else but what he did would have contributed significantly to victory”). However, the use of the language “generally rejected” seems to suggest that some vestige of a military necessity defense might yet remain available to a defendant charged with violation of the provisions of the UCMJ.

⁴¹² See Wells, supra note 12, at 11 (discussing the drafting of FM 27-10, written primarily by Prof. Richard Baxter of Harvard Law School and an officer in the United States Army JAG Corps). FM 27-10 has been as influential in the transformation of the military regulations of other states as was the Lieber Code in the nineteenth and early twentieth centuries.

⁴¹³ Rules of Land Warfare (1956), supra note 43, ¶ 1.

- ⁴¹⁴ Id. ¶ 85. FM-27-10 states further that military necessity is “generally rejected as a defense for acts forbidden by the . . . laws of war.” Id. ¶ 3.
- ⁴¹⁵ See id. ¶ 502 (listing, inter alia, “wilful killing” of **POWs** as violations of the Geneva Conventions); id. ¶ 504 (listing, inter alia, “(k)illing without trial spies or other persons who have committed hostile acts” as a punishable war crime).
- ⁴¹⁶ See id. ¶ 506(c) (stating that grave breaches of the Geneva Conventions and other war crimes “committed by persons subject to United States military law . . . constitute acts punishable under the (UCMJ).”).
- ⁴¹⁷ U.S. Dep’t of Army, *supra* note 288, at 101.
- ⁴¹⁸ See Eugene Kincaid, *Why They Collaborated* 43 (1953) (“In the first five months of the (Korean) war, North Korean . . . often shot soldiers they could have taken prisoner . . . simply because they did not want to bother with them; . . . (t)hey had little food . . . and they had no place to put them.”).
- ⁴¹⁹ In October 1956, an Israeli parachute infantry company inserted 100 miles behind enemy lines near the Mitla Pass in Sinai captured a platoon of Egyptian troops. However, Egyptian forces in the vicinity, which already greatly outnumbered the Israelis, were increasing, and the Egyptian Air Force enjoyed operational superiority. Ordered to redeploy elsewhere to prepare for another parachute insertion, and without adequate numbers to guard or relocate the **POWs**, several of whom were taunting forces with the threat that “the Egyptian Army will slaughter you!,” the Israeli commander positioned the **POWs** face-down in the sand and directed their execution, claiming years later that military necessity justified his actions. See Morris, *supra* note 283, at 905-08 (“(I) didn’t give an explicit instruction, and I didn’t ask for one. Only a fool can ask his commander for permission to do what he has to do.”) (quoting General Arye Biro of the Israeli Defense Forces (Ret.), then-commander of the company in question). Similar allegations of Israeli treatment of Egyptian **POWs** are leveled in a recent work. See., e.g., James Bamford, *Body of Secrets* 201-02 (2001) (claiming the IDF, without supplies and unable to safely detain prisoners, killed as many as 1000 Egyptians near the coastal town of El Arish on June 8, 1967).
- ⁴²⁰ Michael B. Oren, *Six Days of War* 15 (2002).
- ⁴²¹ Numerous sources document a widespread practice of denying quarter during the Vietnam War. See, e.g., *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (John Duffet ed., 1968). Much of the responsibility for this practice is attributed to the pressure to produce body counts to satisfy domestic critics of the war as well as public opinion that American military operations were succeeding. See, e.g., *The Interrogation of Captain Howard Turner at the Trial of Lieutenant James Duffy 1970*, in *Crimes of War*, *supra* note 276, at 246-47 (stating that the policy that United States forces would deny quarter was not instituted by formal order but rather emerged from pressure to produce “body counts” emanating from the highest echelons). In the absence of orders to the contrary, the pressure to increase enemy dead was translated at the company and platoon level and tacitly authorized by higher echelons as an order to deny quarter, as the following statement by an infantry platoon commander in 1969 illustrates:
- I decided I was not going to take any more prisoners. If at all possible I was not going to let the situation arise where a prisoner might be taken. . . . I told all my men that if they were going to engage someone, not to stop shooting until everyone was dead. . . . Nobody ever said anything against this policy and I think most of the men agreed to it. My company commander felt the same way I did about it.
- ...
- I know in my case, platoon leaders never got any guidance on treatment of prisoners. Battalion HQS never said anything about them. There was no SOP, there was never a request that we take any prisoners. The only thing we ever heard was to get more body count, kill more VC! We heard that all the time; it was really stressed. . . . The only

way anybody judged a unit's effectiveness was by the number of body counts they had.

...

That is really the only mission we have in the field, to kill the enemy."

Lieutenant Duffy's Statement, in *Crimes of War*, supra note 276, at 250-51, 253.

Combat-invoked emotions such as rage and the desire for revenge contributed to the denial of quarter as well. See *id.* at 248 ("Before these two friends were hit I had sort of a lukewarm feeling against the enemy. But after seeing them hurt so bad I had a true hatred for all VC and from then on I wanted to kill as many of them as I could."); Taylor, supra note 13, at 36 (noting during the Vietnam War that "(i)n the heat of combat, soldiers who are frightened, angered, shocked at the death of comrades, and fearful of treacherous attacks by enemies feigning death or surrender, are often prone to kill rather than capture."); Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. Pub. L. 7, 12 (1972) (noting that orders given to company commanders before the battle of My Lai to effectively deny quarter were issued in part as a matter of revenge against a "hidden enemy that have been clobbering us" and from whom it was now possible to "get our pound of flesh").

⁴²² See Walzer, supra note 12, at 308 (indicating that, although denial of quarter is becoming rare, the practice continues); Wasserstrom, supra note 28, at 50 (stating that denial of quarter remains common practice). During the Gulf War in 1991 the U.S.S. Nicholas fired upon Iraqi oil platforms, in the process killing Iraqi troops attempting to surrender, because the platforms housed intelligence equipment that placed the Nicholas in jeopardy. Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 *Naval L. Rev.* 217, 227 (1998) (indicating United States personnel were exonerated of wrongdoing by a review board). In 1993, an Israeli special forces unit, Shayetet 13, was conducting anti-terrorist operations near a terrorist camp in Lebanon when it was discovered by a group of terrorists. Shayetet 13 killed one terrorist and captured a second but a third escaped. The captured terrorist attempted to escape despite having been bound with rope, and after the commander was refused permission to evacuate the terrorist with his unit, he elected to disable him by shooting his legs. Despite his wounds, the terrorist was able to escape into nearby brush, and the commander, concerned that permitting escape would endanger his force, ordered one of his soldiers to execute the terrorist. Upon formal investigation, the Israeli JAG determined that the commander had acted out of military necessity in preserving his men and his mission and that no charges should be specified against any persons. See Bagaz 2888/99 Advocate Holander v. Hayoaz Hamishpati Lamemshala (Isr. 1997).

⁴²³ Taylor, supra note 13, at 36. Some scholars, in supporting a military necessity exception to a general rule prohibiting denial of quarter, restrict the application to colorable circumstances requiring the execution of **POWs** in the interest of self-preservation, thereby disallowing justifications predicated primarily upon concerns that their release might compromise missions. See Walzer, supra note 12, at 305 n.* ("But if it is only the safety of the unit that is in question . . . the proper appeal would be to self-preservation, (as) (t)he argument from necessity has not . . . been accepted by legal writers, (while) the argument from self-preservation has won greater support."); Cohen, supra note 67, at 78 ("(E)ven those who say that the prisoners may be killed are not necessarily relying on the principle of military necessity--a much narrower principle of (state) self-preservation will suffice.").

⁴²⁴ Taylor, supra note 13, at 36 (stating further that "no military or other court has been called upon, so far as I am aware, to declare such killing a war crime."); see also Best, supra note 20, at 349 (recognizing that when "hard-pressed troops in continuing action find themselves with prisoners on their hands whom they have no means to conduct under guard to safety away from the combat zone," denial of quarter is neither unexpected nor unjustifiable on the ground of necessity); Osiel, supra note 23, at 355-56 (allowing that despite the absolutist language of sources of conventional IHL, the general practice of states reveals that military necessity can still be invoked in justification of the denial of quarter under circumstances where to grant quarter would compromise the outcome of a mission); Walzer, supra note 12, at 250 ("In a supreme emergency, indeed, it may be necessary 'to hack one's way through . . .'").

⁴²⁵ Mao Tse Tung, *Basic Tactics* 98 (1966) (stating in explanation that in the case described by other authors it is impossible to take prisoners and that if it is not feasible to disarm and disperse enemy forces it is obligatory to execute them).

⁴²⁶ See Best, *supra* note 20, at 348-49 (stating that “(t)here are limits to the amount of humanitarian observance that desperately fighting flesh and blood can actually stand” and that “when a well-protected machine-gunner, defending his safely-retreating compatriots, succeeds in killing a great many of his attackers before at the last moment emerging (if he is very unwise, with a confident smile) to surrender to their surviving mates,” that grief-stricken and enraged soldiers should deny quarter to the would-be **POW** should not come as a surprise); McDougal & Feliciano, *supra* note 140, at 575-76 (“It may be observed that in case of close and sustained combat in land war, where the signal of surrender is postponed and resistance continued to the very last moment, quarter may in practice be difficult (due to the emotional state of the attackers) to grant.”).

⁴²⁷ See Brown, *supra* note 240, at 212 (noting that the death penalty remains among the sanctions currently available to punish parole violators); Hingorani, *supra* note 14, at 65 (noting that surrendering soldiers who have committed war crimes pre-capture are occasionally denied quarter on this ground).

⁴²⁸ **POWs** who violate parole are disentitled to **POW status** but may not be subjected to summary execution and are entitled to defend themselves against the charge of breach of parole. See GCIII, *supra* note 347, art. 5 (stating that **POWs** are entitled to protection from the time of capture until repatriation); *id.* art. 85 (stating that **POWs** may be prosecuted under the laws of the detaining power for acts committed pre-capture); Hague Convention of 1907, *supra* note 96, art. 12 (stating that a parole violator recaptured bearing arms must “be brought before the courts.”).

⁴²⁹ Feilchenfeld, *supra* note 219, at xi; see also Rogers, *supra* note 42, at 147 (“A long-range patrol ambushes a group of enemy soldiers and in the exchange of fire kills all its members except one who is wounded. A soldier is ordered to kill the wounded man because the patrol cannot take him with them and if he is left behind he may endanger the patrol by reporting its existence. The order is illegal, so the soldier carrying it out would be liable to prosecution.”); Morris Greenspan, *The Modern Law of Land Warfare* 103 (1959) (“A commander is not entitled to kill his prisoners to preserve his own forces, even in cases of extreme necessity. . . . (whether) because they slow up his movements, weaken his fighting force because they require a guard, consume supplies, or appear certain to be set free by their own forces.”); Mark S. Martins, LTC, Deputy Staff Judge Advocate, XVIIIth Airborne Corps (Oct. 2, 2000) (stating that each member of the United States Army recognizes that “you may find yourself behind enemy lines, and in order not to be a war criminal you may have to expose your mission. You accept this as the quiet professional you are.”).

⁴³⁰ Walzer, *supra* note 12, at 305.

⁴³¹ See U.S. Dep’t of Army, *supra* note 288, at 100 (stating that even under extreme circumstances “(t)he decision to execute (murder) the prisoner . . . is . . . a war crime . . . , and . . . the one doing this can be tried and executed.”).

⁴³² Some members of the absolutist school of thought accept the argument that a superior orders defense might serve as a partial excuse where the accused lacked any possible moral choice other than to deny quarter. See, e.g., Wasserstrom, *supra* note 28, at 58 (stating that a superior orders defense to a charge of denial of quarter is available only to those accused who were subject to execution as the “announced, probable, and understood penalty for disobedience” and as a result lacked true moral choice in determining whether to follow the order).

⁴³³ Capturing forces may take actions to reduce the threat posed by the release of enemy **POWs** provided such measures are “legal, humane, and . . . fit the military situation.” See U.S. Dep’t of Army, *supra* note 288, at 100 (stating that such options include the detachment of several soldiers to evacuate the **POW**, the binding and gagging of the **POW** for forced march in accompaniment of the detaining forces and the secreting of the **POW** in a hidden location for subsequent evacuation).

⁴³⁴ Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 Am. J. Int'l L. 1, 3 (1972) (“(C)oming after the event and when the harm has already been inflicted, reprisals cannot be characterized as a means of protection.”).

⁴³⁵ See *supra* note 281 and accompanying text.

⁴³⁶ See, e.g., *United States v. Keenan*, 18 C.M.A. 108 (1969) (holding that there is an absolute duty to disobey an order to deny quarter and sentenced a soldier convicted of denial of quarter to five years imprisonment). During the Vietnam War, U.S. courts-martial tried over 100, and convicted sixty, defendants for the crime of murder. See Bishop, *supra* note 146, at 291.

⁴³⁷ The API imposed upon parties the duty to ensure that “legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.” API, *supra* note 105, art. 82. Although the United States does not concede any specific legal obligations under the API, in the past twenty years United States Army JAG lawyers, whose mission is “to provide professional legal services at all echelons of command throughout the range of military operations” and to provide authoritative guidance to soldiers of all ranks in the lawful discharge of their duties, have accomplished the purpose of article 82, transforming the defense of ignorance to simultaneously render it less frequently available but, where available, more likely to succeed. U.S. Dep’t of Army, *Field Manual 27-100, Legal Support to Operations* (2000) (hereinafter FM 27-100). Determining the extent of law applicable to combat has become an increasingly complex endeavor in a modern era in which non-state actors and other nontraditional combatants have proliferated, technologies have become more potent and more precise, and instruments purporting to declare IHL have continued to accrete. See generally Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other than War*, 150 Mil. L. Rev. 152 (1999) (noting that the failure of the United States to authoritatively state which provisions of the Geneva Conventions and Additional Protocols are binding frustrates attempts at compliance by combat commanders); Shefi, *supra* note 344, at 119-20 (stating that translating the “prolific development” in IHL, much of it unclear, into something of use to soldiers who are “usually more preoccupied in fulfilling the task of insuring military success than in carrying out the law” requires significant study, guidance and expertise typically to be found only in JAG lawyers). Despite the trends in law, technology and strategy, the expert legal guidance provided by JAG lawyers at all phases of the planning and execution of military operations denies the combat commander the opportunity to claim a lack of knowledge that his actions are legally impermissible, on the contemporary battlefield, “(w)here time permits, it is now objectively unreasonable for a (sic) American commander to refrain from consulting such a legal advisor whenever there is any ground for doubting the legality of a contemplated use of force.” Osiel, *supra* note 23, at 345. Modifications to military manuals have augmented the work of JAG lawyers in enhancing “awareness of the objects of the use of force and sensitivity to ethical, moral, and legal considerations in the conduct of warfare.” R.R. Baxter, *Modernizing the Law of War*, 78 Mil. L. Rev. 165, 183 (1978). The supporting system of military education further inculcates soldiers in their legal obligations during wartime through courses in IHL conducted in basic and advanced individual training, as well as at the Army JAG School. For a complete listing of all such courses in the system of United States Army military education, see The Center for Law & Military Operations at <http://www.jagcnet.army.mil/CLAMO>.

⁴³⁸ Although not without a legal foundation, such a punishment would run the risk of criticism as a “revisionist moral judgment half a century after the fact” that elides the question of fundamental fairness to a defendant whose conduct, by the standards of his era, was neither manifestly unlawful nor wholly at odds with the martial code. Webb, *supra* note 354, at A22 (making this argument in regard to criticisms over United States hesitancy to investigate allegations of United States massacres of civilians in the Korean War).

⁴³⁹ An example in support of this assertion is the “March to the Sea” by General William T. Sherman in 1864-65 during the United States Civil War, during which Union forces committed acts legal at that time that would today constitute grave breaches of IHL, including denial of quarter and deliberate destruction of civilian property. See generally Thomas G. Robisch, *General William T. Sherman: Would the Georgia Campaigns of the First Commander of the*

[Modern Era Comply with the Current Law of War Standards?, 9 Emory Int'l L. Rev. 459 \(1995\).](#)

⁴⁴⁰ See [10 U.S.C. § 832 \(2003\)](#).

⁴⁴¹ IHL may well remain as impenetrable to the average enlisted mind today as it did in 1944. See U.S. Dep't of Army, DAP 27-161-2, II International Law, 246 (1962) (conceding that ignorance of IHL may well excuse soldiers from liability for its violation). Although the United States has mandated adherence to IHL at all times in every military operation as official policy, it has made little if any effort to authoritatively determine which of the various sources of conventional and customary IHL creates legal obligations that bind the United States Armed Forces. See Bulman, *supra* note 437, at 166-74 (discussing United States failure to specify with precision the obligations it accepts under IHL and suggesting that, until such a specification is forthcoming, the best insight into United States policy with respect to the extent of these obligations is an observation of United States practice). Although federal legislation enacted in 1996 indicates that the grave breaches provisions of the Geneva Conventions, various articles of the Hague Conventions of 1907 and the texts and protocols of "such convention(s) to which the United States is a party" are applicable sources of law in the domestic prosecution of "war crimes" in federal district courts, as of 2003 IHL remains such a muddled and conditional body of regulation that, with the exception of manifestly unlawful acts, it is virtually impossible for soldiers to know with certainty what is prohibited in war. See War Crimes Act of 1996, *supra* note 282 (enumerating various provisions of IHL, the violations of which constitute criminal offenses punishable in federal district courts, although not displacing courts-martial jurisdiction in the case of military personnel). Moreover, enlisted soldiers inquiring of their superiors as to whether their orders are lawful in a desire to tailor their conduct in accord with the law might find themselves simply told "Not to worry, the complexities are beyond your ken; just obey the order, unless it calls for atrocities." Osiel, *supra* note 23, at 108. Consequently, soldiers today attempting to meet their legal obligations might be left with no more guidance than their peers of 1944, and the absence of support at higher levels in the chain of command might well be dispositive of whether a superior orders defense is permitted. See *infra* note 314 and accompanying text (discussing the superior orders defense).

The complexity of modern LOAC, is an additional reason to tailor it on the simple predicates of military honour.

⁴⁴² Proponents of the martial code rest their faith on two principle assumptions. The first is that "actions performed by professionals in professional roles can be evaluated only with respect to criteria internal to the professional practice." See Arthur Applbaum, *Are Lawyers Liars?*, 4 Leg. Theory 62, 73 (1988). The second is that "(a)n approach to professional ethics that casts itself as an interpretation of (the) ordinary moral experience (of soldiers) . . . would do well to stay close to the terms of soldiers' self-understanding." Osiel, *supra* note 23, at 18. To falsify the first assumption it would be necessary to demonstrate that professionals are less well-suited to self-regulation than outsiders; to attack the second it would be necessary to show that soldiers' understandings of the requirements of their profession and the moral experiences associated with soldiering can be readily moulded by external, particularly legal, regulations that are contrary to those understandings and experiences. For reasons discussed *supra*, attempts to falsify either assumption and impose legal modification inconsistent with the values that are internal to the military caste are unlikely to prevail. *Id.* at 164-65 (stressing that the only legal regulations likely to transform the behavior of soldiers are those which build upon "existing commitments and self-understandings.").

⁴⁴³ See Oran R. Young, *Compliance and Public Authority* 5 (1979) (labeling as "compliance mechanisms" the informal institutions that structure the incentives to obedience of subgroups through "efforts to mold the underlying criteria of evaluation that actors use in their decision making").

⁴⁴⁴ In other words, as compared to the judicial model, the martial code:
While . . . strict on the rules themselves, it is relatively more lenient in allowing exceptions to them . . . (It) allows a small area at either extremity, that which is absolutely permissible and that which is absolutely impermissible, but concentrates its energies upon the middle ground where the debate takes place. Transgressing the boundaries becomes something which requires justification . . . In addition to the realms of (clear) permission and prohibition is the area of debate where what is normally prohibited can be argued for if the circumstances are sufficiently compelling.

Osiel, *supra* note 23, at 286 (quoting Ian Clark, *Waging War* 75 (1988)). Put differently, humanization of war is the product of overweening notions of custom, honor and professionalism, and “there is no substitute for honour as a medium for enforcing decency on the battlefield, never has been, and never will be.” John Keegan, *If You Won’t, We Won’t: Honour and the Decencies of Battle*, *Times Literary Supp.* (London), Nov. 24, 1995, at 11.

⁴⁴⁵ “Law is only one among several kinds of norms that govern (martial) life. In striving to influence a given societal sphere, law ignores these other norms, assuming its supremacy over them, at its peril. . . . Law’s efforts to avoid atrocity inevitably intersect with and rely upon the continuing efficacy of these other norms and mechanisms, which have historically played a much greater role toward this end.” Osiel, *supra* note 23, at 163. More general research suggests that formal legalization, while it may advance the interests of “compliance communities”—particularly lawyers whose influence and financial interests are served thereby—does not enhance compliance in every context and is not necessarily preferable to regulation by other means, including professional self-regulation. See generally Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 *Int’l Org.* 661 (2000).

⁴⁴⁶ “Legal absolutism” is the school of thought that posits that it is never justifiable to violate positive law in the pursuit of moral values as law, and that the universal distillation of natural legal principles and moral virtue, is the highest value human beings can serve; in contrast, legal relativism holds that where a positive law is intolerably incompatible with the requirements of justice, the provision of positive law must be disregarded. See generally Gustav Radbruch, *Philosophy of Law* (1932) (elaborating theory of legal relativism). For a thorough discussion of legal absolutism and legal relativism, see generally Kenneth Cauthen, *Natural Law and Moral Relativism* (1998).

⁴⁴⁷ See generally, Osiel, *supra* note 23 (explaining that even many of those who cannot be classified as legal absolutists are suspicious of military self-regulation). When challenged, legal absolutists point to the failure of the successively revised editions of the military manuals of leading states to directly incorporate the proliferating series of declarations of new sources of customary IHL as evidence that the military profession is insufficiently committed to the principles underlying IHL. Wells, *supra* note 12, at 17. Although courts-martial are sometimes accused by civilian critics of offering defendants inadequate procedural protections against the influence of commanders bent on securing their convictions, some legal absolutists further fault courts-martial as an overly lenient institution that abuses the privilege of self-regulation to insulate its members from deserved punishment. See Bishop, *supra* note 146, at 22 (condemning military justice as a regime that “knows what it wants and it systematically goes in and gets it.”). Legal absolutists making the latter of these criticisms ignore evidence controverting the notion that courts-martial are a rubber-stamp for commanders. See David A. Schleuter, [Military Justice for the 1990s—A Legal System Looking for Respect](#), 133 *Mil. L. Rev.* 1, 1-29 (1991) (discussing decades of revisions to system of courts-martial that have enhanced fairness to parties and the integrity of proceedings).

⁴⁴⁸ By and large, the civilian polities of democratic states, who for reasons beyond this work, disparage the concept of martial honor and despise the martial caste, are quite willing to impose dangerous legal constraints and uninformed retrospective moral judgments upon their armed forces, and they are unwilling and in many cases unable to critically evaluate the argument that military honor is superior to other institutions in suppressing violations of IHL. Osiel, *supra* note 23, at 39-40 (discussing the legal consequences of the disjunction between civilian society and the military profession within democratic states).

⁴⁴⁹ See James D. Morrow, *The Institutional Features of the Prisoner of War Treaties*, 55 *Int’l Org.* 971, 973, 990-91 (2001) (reinforcing legal absolutist assumption that IHL treaties are the source, not the reflection, of the norms and decisions that govern war, and that states pattern their conduct and “shape their treatment” of protected persons after “understandings” created by treaties rather than mould and interpret treaties to reflect conduct considered legitimate by their military establishments).
Interesting

⁴⁵⁰ Legal absolutists tend to hail from the ranks of those with no military experience and even less interest in acquiring insight into the moral universe of soldiers than their fellow civilians, and, as such, they tend to be much more critical

of soldiers' conduct than do those whose greater understandings temper any impulses to condemn. Osiel, *supra* note 23, at 162-63; see also Ramsey, *supra* note 45, at 503 (describing legal absolutists as very often "intellectuals and churchmen who have forgotten if they ever knew the meaning of a legitimate military target . . . (and) simply do not know the qualitative difference between 'murder' and 'killing in war.'"). Distrust of and disdain for soldiers' moral competence to self-regulate is so great that for legal absolutists, soldiers are bound by their externally-imposed legal formulations even where such formulations are incomplete, incoherent and even contrary to soldiers' self-understandings. Walzer, *supra* note 12, at 15 (stating that the "moral reality of war is not fixed by actual activities of soldiers but by the opinions of mankind" and in particular the "activity of philosophers, lawyers, (and) publicists."). Whereas for proponents of the martial code an understanding of and appreciation for the experience of the combat soldier is essential to understanding the utility and limits of IHL, for legal absolutists such knowledge is, at best, superfluous.

⁴⁵¹ See Osiel, *supra* note 23, at 285 (stating that, in direct contrast to the martial code, which permits exceptions to its code of conduct yet imposes a much broader set of regulations consistent with its more holistic regulatory purpose, the approach to the prevention of violations of IHL advanced by legal absolutists is more "lenient in terms of the content of the rules themselves but strict in terms of its demand for their observance" and insists that acts that are prohibited are absolutely prohibited and may not be excused by claims such as necessity, ignorance or other defenses available under the system of courts-martial (quoting Ian Clark, *Waging War* 75 (1988)).

⁴⁵² The position that IHL compliance deficiencies are the result not of substantive inadequacy of the law itself but of deficiencies in enforcement that in turn are rooted in the lack of effective criminal sanctions is central to IHL legal absolutism. See Joyner, *supra* note 21, at 162 (stating the absolutist credo that "(w)ar crimes flourish in direct proportion to the . . . deficiency of law enforcement."); see also Tom R. Tyler, *Why People Obey the Law* 3 (1990) (referring to the model of human behavior that links legal compliance to the effectiveness of penalties as "instrumentalist").

⁴⁵³ See King & Theofrastous, *supra* note 52, at 69 (arguing, in reference to My Lai, that the "de minimis punishment" courts-martial sometimes impose prove that courts-martial effectively immunize soldiers from responsibility for war crimes).

⁴⁵⁴ See James B. Motley, *Coping with the Terrorist Threat: The U.S. Intelligence Dilemma*, in *Intelligence and Intelligence Policy in a Democratic Society* 165 (Stephen J. Cimbala ed., 1987) (asserting that terrorism is the "characteristic form of warfare of this age").

⁴⁵⁵ The Uzbeki people are a Central Asian nationality that traces their ancestry to Uzbek Khan, a grandson of Genghis Khan. Ahmed Rashid, *Jihad: The Rise of Militant Islam in Central Asia* 23 (2002).

⁴⁵⁶ Uzbekistan, with the capital city in Tashkent, is a landlocked, arid, predominantly-Muslim nation slightly larger than California that is bordered by Afghanistan, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan. Prior to 1991, it was a constituent republic of the Soviet Union. Despite extensive natural gas and petroleum reserves and a high literacy rate, it is a very poor nation with a per capita GDP of only \$2500, and, in addition to its natural resources, opium production is a major industry. Uzbekistan, with an overwhelmingly homogenous population of 25 million largely of Uzbeki ethnicity, is governed by an authoritarian, corrupt regime led by President Islam Karimov which has a poor record on human rights and democratization issues. See Central Intelligence Agency, *The World Factbook* 2002, Uzbekistan, available at <http://www.cia.gov/cia/publications/factbook/geos/uz.html> (hereinafter *World Fact Book*). The secular Karimov regime has been repressive on religious issues, preventing the Muslim majority from engaging in the free expression of their faith. Rashid, *supra* note 455, at 85.

⁴⁵⁷ Rashid, *supra* note 455, at 173.

⁴⁵⁸ Id. at 136-50.

⁴⁵⁹ See id. at 8, 137-50 (tracing IMU financing to Saudi and Iranian intelligence agencies and to Islamic charities in the West).

⁴⁶⁰ See id. at 137-50 (detailing the sources of IMU finance, including trafficking of heroin and other opium products between Central Asia and Europe).

⁴⁶¹ Id. at 8, 45.

⁴⁶² Id. at 192 (quoting Retired General Tommy Franks, United States Army, United States Central Command).

⁴⁶³ Al Qaeda is a multi-national organization of several thousand armed terrorists established in the late 1980s to “unite all Muslims and to establish a government which follows the rule of the Caliphs” by overthrowing non-Islamic governments and expelling Westerners and non-Muslims from Islamic states. See Federation of American Scientists Intelligence Resource Program, at [http:// www.fas.org/irp/world/para/ladin](http://www.fas.org/irp/world/para/ladin) (last visited June 6, 2004). It is commanded by the charismatic Usama bin Laden, the wealthy son of a Saudi businessman, who has ordered all Muslims to kill U.S. citizens--civilian or military--and their allies everywhere. Yassin El-Ayouty, [International Terrorism Under the Law](#), 5 ILSA J. Int’l & Comp. L. 485, 487 (1999). Al Qaeda is responsible for a host of acts of international terrorism, most notoriously the attacks on the World Trade Center and the Pentagon on September 11, 2001, which killed more than 3000 innocents, mostly civilians. Prior to coalition attacks in October 2001, al Qaeda was based in Afghanistan, but it has now dispersed in small groups across Asia and the Middle East. See World Factbook, *supra* note 456, Afghanistan.

⁴⁶⁴ The United States initially supported the Taliban to promote security for pipeline projects and end the drug trade but cut support in response to serial violations of the human rights of women and children in 1997. Vincent Iacopino, *The Taliban’s War on Women* 35 (1998).

⁴⁶⁵ Events presented from July 2003 and forward are fictional.

⁴⁶⁶ See *Terrorism in the Middle East and South Asia: Hearing Before the Senate Subcomm. on Near E. and S. Asian Affairs*, 106th Cong. (1999) (testimony of Ambassador Michael A. Sheehan, Coordinator of Counterterrorism, U.S. Dep’t of State, available at [http://www.fas.org/inp/Congress/1999_hr/99/02_sheehan_ terrorism.htm](http://www.fas.org/inp/Congress/1999_hr/99/02_sheehan_terrorism.htm). (testifying that by the late 1990s Uzbekistan had become a safe haven and a recruiting base for the Egyptian Islamic Jihad, Algerian Armed Islamic Front, Kashmiri separatists and other terrorist groups).

⁴⁶⁷ See Iacopino, *supra* note 464, at 27 (noting that the victorious Taliban renamed the country the “Islamic Emirate of Afghanistan”).

⁴⁶⁸ See U.S. Dep’t of State, *Afghanistan Report on Human Rights Practices for 1996* (Jan. 30, 1997), available at http://www.state.gov/www/global/human_rights/1996_hrp_report/afghanis.html (cited in Marjon E. Ghasemi, [International Human Rights and Women’s Equality: Afghan Women Under Taliban Rule](#), 8 S. Cal. Rev. L. & Women’s Stud. 445, 445 (1999)) (describing the same process instituted by the Taliban immediately subsequent to their seizure of power in Afghanistan in 1996).

⁴⁶⁹ See Iacopino, *supra* note 464, at 3 (describing the arbitrary detention, torture, disappearance and cruel punishment of thousands of Afghans under the Taliban).

⁴⁷⁰ In the summer of 2003, al Qaeda claimed to have completely reorganized following the devastating United States attacks on its bases in Afghanistan, and spokesman Thabet bin Qais is reported to have stated that al Qaeda is “way ahead of the Americans and its allies in the intelligence war,” that American security agencies still are ignorant of the changes the leadership has made, and that an attack the size of the Sept. 11 attacks is being devised against the U.S. See Dana Priest & Dan Eggen, U.S. Expects More Strikes by Al Qaeda, *Wash. Post*, May 16, 2003, at A01.

⁴⁷¹ The text of the declaration is as follows:
 Declaration of National Emergency by Reason of Certain Terrorist Attacks by the President of the United States of America, A Proclamation: A national emergency exists by reason of the terrorist attacks in Central Asia and the continuing and immediate threat of further attacks on the United States. NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, hereby declare that the national emergency has existed since September 11, 2004, and, pursuant to the National Emergencies Act ([50 U.S.C. 1601 et seq.](#)), I intend to utilize the following statutes: [sections 123, 123a, 527, 2201\(c\), 12006, and 12302 of Title 10, United States Code](#), and [sections 331, 359 and 367 of Title 14, United States Code](#). This proclamation immediately shall be published in the Federal Register or disseminated through the Emergency Federal Register and transmitted to the Congress. This proclamation is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of September, in the year of our Lord two thousand four, and of the Independence of the United States of America the two hundred and twenty-ninth. GEORGE W. BUSH
 (Patterned after the Declaration of the same title issued on September 14th, 2001 in response to the attacks on September 11th).

⁴⁷² In a Joint Resolution dated September 12, 2004, Congress, recognizing in a series of “whereas” clauses the right to self-defense, the threat posed by terrorist attacks to the “national security” of the U.S. and the “inherent powers of the President to take action to deter and prevent acts of international terrorism” against United States interests, passed legislation authorizing “the use of all necessary and appropriate force against those nations, organizations, or persons (the President) determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2004, in order to prevent any future acts of terrorism against the United States.” See *supra* note 80 and accompanying text. The Joint Resolution further authorized the President to “use United States Armed Forces against those responsible for the recent attacks launched against United States nationals, property, and interests in Central Asia” and provided that such authorization was consistent with the requirements of the War Powers Resolution. *Id.*

⁴⁷³ The sheltering of members of other tribes is an ancient Central Asian tradition followed by contemporary terrorists of the region, and it was this tradition which in part provided the basis for the Taliban to provide sanctuary to Usama bin Laden. See Tim McGirk, Pakistan Seizes a Suspect in the U.S. Embassy Bombings, *Time*, Aug. 31, 1998, at 34 (reporting that the Taliban reluctance to release bin Laden stemmed from a Central Asian tradition so absolutist that it mandates sheltering from their pursuers, “even your own worst enemy or a murderer.”).

⁴⁷⁴ Usama bin Laden, the mastermind, financier and spiritual leader of al Qaeda, has been in hiding for over a decade and has declared a jihad against all United States citizens and interests. See El-Ayouty, *supra* note 463, at 492 (noting issuance of a fatwa, or religious commandment, by bin Laden in 1996 calling for war of genocide against Americans).

⁴⁷⁵ See Michael Lacey, [Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction](#), 10 *Ind. Int’l & Comp. L. Rev.* 293, 305 (presenting the argument that states are responsible for the actions of terrorist groups they permit to operate within their borders on a theory of vicarious state responsibility).

⁴⁷⁶ This is the precise position taken by the Taliban regime with respect to bin Laden and other members of al Qaeda upon the United States demand for their extradition to the United States in 1998. See Taliban Willing to Discuss what to Do with Osama bin Laden, *Agence Fr.-Presse*, Aug. 29, 1998 (reporting an agreement reached with the Taliban to try members of al Qaeda in an Islamic court provided the United States provided credible evidence).

⁴⁷⁷ See *Afghans Silence but Won't Expel bin Laden*, *Sun Sentinel* (Ft. Lauderdale), Feb. 13, 1999, at 32A (reporting the acquittal of bin Laden in a Taliban court).

⁴⁷⁸ See Hearings of the Senate Foreign Relations Subcommittee on Near Eastern and South Asian Affairs, *Fed. News Service*, Oct. 8, 1998, at 1 (testimony of [United States Ambassador to Afghanistan](#)) (cited in [Stephanie R. Nicolas, Negotiating in the Shadow of Outlaws](#), 9 *J. Transnat'l L. & Pol'y* 385, 392 n.45 (2000)).

⁴⁷⁹ The United States Special Operations Command (USSOCOM), headquartered at MacDill Air Force Base in Tampa, Florida, has been the recipient of greatly increased budgets since 2000, with much of the resources dedicated to procurement of troops and weapons systems for the War on Terror. See Shanker, *supra* note 108, at A10.

⁴⁸⁰ Israeli collaboration with United States intelligence operations in Iraq was critical in unmasking Iraqi concealment of its WMD programs in the late 1990s. See Allison Van Lear, [Loud Talk About a Quiet Issue: The International Atomic Energy Agency's Struggle to Maintain the Confidentiality of Information Gained in Nuclear Facility Inspections](#), 28 *Ga. J. Int'l & Comp. L.* 349, 355-56 (2000) (detailing extensive U.S.-Israeli intelligence coordination in the context of the United Nations Special Commission (UNSCOM) inspections in Iraq).

⁴⁸¹ Despite coalition efforts to ascertain the whereabouts of and debrief Iraqi weapons scientists, many of the senior Iraqi weapons scientists are as yet unaccounted for. Upon the collapse of the Soviet Union, many Russian scientists who had been detailed to biological weapons programs dispersed to China, Syria, Iran and Egypt, ostensibly to resume such work in those states. See Adherence to and Compliance with Army Control Agreements, U.S. Dep't of State, 1997 Report, available at <http://www.state.gov/www/global/arms/reports/annual/comp97.html>. It is not inconceivable that Iraqi weapons scientists might seek other employment opportunities in their field in states able and willing to pay for their services and shelter them from apprehension.

⁴⁸² Poisonous weapons, a subset of WMD, are organized into three categories: (1) biological weapons (BW) (consisting of living organisms, whether bacteria or viruses, disseminated for ingestion by a target population to create an epidemic, which are capable of auto-reproduction), such as anthrax, cholera, ebola, plague and yellow fever; (2) toxins (consisting of harmful substances produced by living organisms but which are not themselves living organisms and are thus incapable of reproduction), such as botulin and staphylococcus; and (3) chemical agents (consisting of inorganic, harmful substances), such as mustard gas and chlorine. See James R. Ferguson, *Biological Weapons and U.S. Law*, 278 *J. Am. Med. Assoc.* 357, 359 (1997) (discussing various categories of infectious and toxic agents); Matthew S. Meselson, *Chemical and Biological Weapons*, *Sci. Am.*, May 1970, at 303 (discussing taxonomy of poisonous weapons).

BWs, the first category of poisonous weapons, vary in lethality, incubation period and their capacity for diffusion. David R. Franz, *Clinical Recognition and Management of Patients Exposed to Biological Warfare Agents*, 278 *J. Am. Med. Assoc.* 399 (1997). They are typically delivered by bombs and other systems that cause the lethal organisms to disperse as aerosolized particles, although they can also be delivered by terrorists using less sophisticated means, including the use of crop-dusting aircraft, in the air circulation systems of large buildings, in food and water supplies and by mail. Jeffrey D. Simon, *Biological Terrorism: Preparing to Meet the Threat*, *J. Am. Med. Assoc.* 428, 429 (1997) (discussing methods of dissemination of BW by terrorists); Raymond A. Zilinskas, *Iraq's Biological Weapons: The Past as Future*, 278 *J. Am. Med. Assoc.* 418, 420 (1997) (listing traditional methods of delivery of BW). Even the most lethal agents are difficult to control due to the complexities in managing their

wind dispersal patterns. John D. Steinbruner, Biological Weapons: A Plague Upon All Houses, 109 Foreign Pol'y 85, 87-88 (1997-98). As a consequence, many states have foresworn BWs and destroyed existing stockpiles and turned to other weapons systems for strategic defense. See Scott Keefer, [International Control of Biological Weapons](#), 6 ILSA J. Int'l Comp. L. 107, 108-09 (1999) (discussing trend towards demilitarization in field of BWs since late 1960s).

However, despite their inherent unpredictability, BWs are potentially very effective weapons to terrorist organizations. BWs, the "poor man's atomic bomb," are tremendously lethal in small quantities and thus can be transported and distributed effectively without the use of significant manpower. See Robert P. Kadlec et al., Biological Weapons Control: Prospects and Implications for the Future, 278 J. Am. Med. Assoc. 351, 351 (1997) (discussing the aspects of BWs that render them especially suited to use by terrorists, including lethality and portability); DOD News Briefing, M2 Presswire, July 9, 1998, available at [1998 WL 14095268](#) ("Five pounds of anthrax, properly dispersed, would kill over 200,000 in Washington, D.C."); see also [Vaccine Improves Odds Against Anthrax](#), Regulatory Intelligence Database, Apr. 6, 1998, available at [1998 WL 194056](#) ("When inhaled, an unvaccinated, unprotected person has about a one percent chance of surviving a concentrated anthrax exposure."). Moreover, as their effects are often not observed for days, the radius of lethality can expand to cover a wide target population as victims, unaware of their condition, move about, continuously infecting others. [1998 WL 194056](#). Further, BWs are relatively simple and cost-effective to produce, and they can be manufactured in otherwise innocuous-seeming facilities such as pharmaceutical laboratories, light industrial facilities and even in civilian residential infrastructure. See David G. Gray, ["Then the Dogs Died": The Fourth Amendment and Verification of the Chemical Weapons Convention](#), 94 Colum. L. Rev. 567, 574 (1994) (discussing the relative ease of producing chemical weapons and BWs). Because BWs can be readily produced in these "dual-use" facilities (facilities that have a second or "dual" purpose other than their military character), it is difficult to detect their manufacture and easy to deny the same. See Ruth Wedgwood, [Responding to Terrorism: The Strikes Against bin Laden](#), 24 Yale J. Int'l L. 559, 559-60 (1999) (discussing the ease with which any dual-purpose production facility can be readily converted from the manufacture of chemical weapons or BWs to the production of pharmaceutical drugs).

⁴⁸³ See Burrus M. Carnahan, [Protecting Nuclear Facilities from Military Attack: Prospects After the Gulf War](#), 86 Am. J. Int'l L. 524, 524 (1992) (indicating that a primary method of verification of human intelligence reports with regard to the existence of clandestine WMD programs has been defector reports); see also Vernon Loeb, Iraqi Defector Says Saddam Was Near to Building A-Bomb, Wash. Post, Nov. 5, 2000, at A2 (reporting that reports of the chief Iraqi nuclear scientist, Khidir Hamza, who defected to the U.S., were instrumental in establishing proof of the **status** of Iraqi efforts to obtain nuclear weapons).

⁴⁸⁴ The Department of Homeland Security (DHS) was created on Oct. 8, 2001, to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. See The White House, the Office of Homeland Security, at [http:// www.whitehouse.gov/homeland/](http://www.whitehouse.gov/homeland/) (last visited Feb. 6, 2004).

⁴⁸⁵ Over the past seven years, the United States perception of the threat posed by BWs has transformed dramatically. Whereas BWs were once conceived of as a weapon unlikely ever to be used by virtue of their possession solely by the Soviet Union and perhaps a handful of other states against which the deterrent threat posed by United States nuclear weapons was sufficient, the troubling diffusion of BWs has altered United States calculations. In 1996, Congress passed legislation in recognition of the fact that the United States lacked adequate plans and countermeasures to defeat the threat posed by the possession of BWs by terrorists and rogue states. See Defense Against Weapons of Mass Destruction Act of 1996, [50 U.S.C. §§ 2301-66 \(1996\)](#) (DAWMDA). The Nunn-Lugar Amendment to DAWMDA included significant Congressional findings that supported establishment of a specialized agency tasked to meet this threat. See Nunn-Lugar Amendment 4349, S. 1745, 104th Cong., 2d Sess., 142 Cong. Rec. 57041 (June 26, 1996) (noting that no specific response unit existed for emergencies involving chemical or biological weapons). After President Clinton issued [Executive Order 12,868](#) declaring a national emergency in response to the "unusual and extraordinary threat to the national security, foreign policy, and economy of the United States" posed by the proliferation of WMD, Congress expressed the sense that the use of WMD was an "abhorrent" act in contravention of international law that "should trigger immediate and effective sanctions." See Chemical and Biological Weapons Threat Reduction Act of 1997, S. 495, 105th Cong. (1997) (finding further, throughout Title II,

§ 207(a), that the “threats posed by chemical and biological weapons to United States Armed Forces . . . deployed in regions of concern will continue to grow . . .,” that “the use of chemical and biological weapons will be a likely condition of future conflicts in regions of concern” and “the United States Armed Forces should make countering the use of chemical and biological weapons an organizing principle for United States defense strategy and for the development of force structure, doctrine, planning, training, and exercising policies of the United States Armed Forces.”). Despite these legislative and executive statements of policy, by 1998 little concrete progress had been made to enhance preparedness against an attack against the United States using BWs. See Paul Richter, U.S. Lags in Biological Warfare Protection Threat Said to Be on the Rise, *Times-Picayune* (New Orleans), Dec. 27, 1997, at A6 (stating that “the United States is poorly prepared to defend its armed forces from the rising threat of germ warfare attack and lags even more in protecting Americans at home.”).

In March 1998, however, a then-secret executive branch conference revealed the magnitude of United States unpreparedness, and, in October 1998, the Department of Defense merged several agencies to create the Defense Threat Reduction Agency with the mission to address the problem of growing weapons proliferation and the threat from WMD in the possession of terrorist groups and rogue nations. Dep’t of Defense, Establishment of the Defense Threat Reduction Agency, Research Intelligence Database, Oct. 1, 1998, available at http://www.defenselink.mil/news/oct1998/b10011998_bt508-98.htm (last updated Jan. 14, 2003) (transcript of the Department of Defense announcement on the establishment of the Defense Threat Reduction Agency). According to then-Secretary of Defense William Cohen, “Today’s harsh reality is too powerful to ignore: at least 25 countries have, or are in the process of developing, nuclear, biological or chemical weapons and the means to deliver them . . . We must confront these threats in places like Baghdad before they come to our shores.” *Id.* The Director of DRTA, upon assuming his post, warned that “(t)he deterrent capability of the United States is still very effective against national states. (But) (i)t’s not so clear that it has the same effect on transnational organizations.” New U.S. Agency to Deal with Weapons of Mass Destruction Threat, *Agence Fr.-Presse*, Oct. 2, 1998, available at [1998 WL 16611007](#) (cited in Matthew Linkie, The Defense Threat Reduction Agency: A Note on the United States’ Approach to the Threat of Chemical and Biological Warfare, 16 *J. Contemp. H.L. & Pol’y* 531, 532 n.8 (2000)).

⁴⁸⁶ See Lacey, *supra* note 475, at 293 (positing, in a fictional scenario, a United States strike to eliminate the weapons program of a terrorist group on the ground that the terrorist group was only three months removed from developing operational nuclear weapons).

⁴⁸⁷ In the event of a terrorist attack with BWs upon the U.S., the probable response of the United States government would include the declaration of martial law, the closure of federal and State borders and the commandeering of vaccines. *Martial Law Possible in Biological Terror Scenario*, Associated Press, Aug. 4, 2001; see also Telephone Interview with Cliff Ong, State of Indiana Director of Counterterrorism and Homeland Security (August 16, 2003).

⁴⁸⁸ See Convention on the Prohibition of Bacteriological (Biological) and Toxin Weapons, [Apr. 10, 1972, 26 U.S.T. 583](#), 1015 U.N.T.S. 163 (hereinafter BWC) (prohibiting the production and stockpiling of BWs). The earliest positive legal prohibition on BWs was found in the Lieber Code, which prohibited the use of poisonous weapons. See Lieber Code, *supra* note 12, art. 16. However, current prohibitions and regulations derive from the instruments of IHL governing chemical weapons, which preceded BWs to the arsenals of belligerents. Hague IV, *supra* note 96, art. 23(a), specifically forbade the employment of poisoned weapons by parties to that convention, and the use of “bacteriological methods of warfare” (although not the development of BWs) was prohibited after WWI. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, [June 17, 1925, U.S.-Fr., 26 U.S.T. 571](#). The BWC, which entered into force in 1972, is currently the primary legal instrument governing BWs. It prohibits the development, stockpiling and use of biological weapons, and it has been ratified by almost 150 states. For a list of parties to the BWC, see <http://disarmament.un.org/TreatyStatus.nsf> (last visited Feb. 19, 2004).

⁴⁸⁹ See David Sloss, [It’s Not Broken, So Don’t Fix It: The International Atomic Energy Safeguards System and the Nuclear Nonproliferation Treaty](#), 35 *Va. J. Int’l L.* 841, 842 (noting that Iraq during the 1970s and 1980s was able to conduct a clandestine nuclear weapons program even while a non-nuclear weapon state-member of the Nuclear Nonproliferation Treaty).

⁴⁹⁰ See Michael Mandelbaum, *Lessons of the Next Nuclear War*, *Foreign Aff.* 22 (Mar.-Apr. 1995) ("It doesn't take a superpower to pose a nuclear threat. A small, poor country with a few (WMD) and the means to deliver them could wreak terrible damage on the United States.").

⁴⁹¹ See Fred C. Ikle, *The New Germ Warfare Treaty is a Fraud*, *Wall St. J.*, July 27, 2001 at A8 (reporting the frustration of the Bush Administration with the lack of provisions to enforce the BWC). The lack of enforcement provisions is characteristic of conventions designed to prevent the proliferation and use of WMD. See [Scott Silliman, Foreword: Contemporary Issues in Controlling Weapons of Mass Destruction](#), 8 *Duke J. Comp. & Int'l L.* 1, 2 (1997) (noting that IHL instruments regulating WMD, including the BWC, lack enforcement mechanisms); see also Linkie, *supra* note 485, at 553-54 (describing more generally the shortcomings of international law in guiding states seeking to control the threat of WMD due to a lack of explicit enforcement provisions in relevant conventions and the legal and political difficulties in drafting and applying military sanctions to violators). Although the United States contemplated invading Iraq in 1997 to eliminate WMD in possession of the Hussein government and did in fact do so in 2003, the legal authority upon which it relied was not any enforcement provision of any IHL instrument but rather relevant Security Council resolutions. See Thomas C. Wingfield, [The Chemical Weapons Convention and the Military Commander: Protecting Very Large Secrets in a Transparent Era](#), 162 *Mil. L. Rev.* 180, 180 (1999) (discussing legal sources of justification for United States plans to eradicate Iraqi WMD in the mid-1990s).

⁴⁹² Ironically, although the United States was at the forefront of efforts to create a Protocol that would create mechanisms to monitor and enforce state compliance with the BWC, it was American objections to verification and enforcement mechanisms proposed at the Fourth Review Conference of the BWC that doomed the long-anticipated Protocol. For the U.S., a proposal that would have obligated states-parties to declare whether they possessed BW defense programs and, if so, to submit to random site visits that would include not only defense installations but such potentially dual-use facilities as pharmaceutical plants and medical research facilities was "incurably flawed" on the grounds that, *inter alia*, it would threaten national security and reveal pharmaceutical industrial secrets without contributing to the enforcement of the BWC. See Ambassador Donald Mahley, United States Special Negotiator for Chemical and Biological Arms Control Issues, Statement by the United States to the Ad Hoc Group of Biological Weapons Convention States Parties, Geneva, Switz. (July 25, 2001), available at <http://www.state.gov/t/ac/rls/rm/2001/5497.htm> (last visited Feb. 19, 2004) (presenting grounds upon which the Bush Administration rejected the proposed BWC Protocol); see also Alexander Higgins, *U.S. Rejects Anti-Germ Warfare Accord*, *Desert News* (Salt Lake City), July 25, 2001, at A04 ("In our assessment, the draft protocol would put national security and confidential business information at risk" (quoting Ambassador Mahley)). Although a majority of the fifty-six states in attendance favored adopting the Protocol, an instrument that represented the fruits of seven years' negotiation, talks were suspended following the United States withdrawal from the Review Conference. *Germ Warfare Talks Suspended; Democrats Attack Bush's Foreign Policy*, *Herald Tribune*, Aug. 4, 2001. Many commentators expressed outrage at the United States position; U.N. Secretary General Kofi Annan stated that the United States is "practically standing alone in opposition to agreements that were broadly reached by just about everyone else" and urged the United States to "close ranks with the rest of the international community." Steven Thomma & Warren P. Strobel, *Bush's Unilateral Germ-Warfare Policy Gets Mixed Results*, *Knight Ridder/Tribune News Service*, July 26, 2001. To date, talks have not resumed, and the BWC continues to lack any enforcement provisions.

⁴⁹³ When UNSCOM, the U.N. team of weapons inspectors dispatched by the Secretary-General to locate Iraqi WMD, began to make progress in late 1998, Iraq responded by ejecting UNSCOM and declaring that some of its members were espionage agents of the United States Allison Van Lear, [Loud Talk About a Quiet Issue: The International Atomic Energy Agency's Struggle to Maintain the Confidentiality of Information Gained in Nuclear Facility Inspections](#), 28 *Ga. J. Int'l & Comp. L.* 349, 354-55 (2000). Although it is unclear whether there was any substance to the allegation, it provided justification and political cover for an action that might well have otherwise precipitated a swift, decisive military response to force Iraq to submit to inspection. *Id.* at 356-59.

⁴⁹⁴ When the U.N. Security Council makes the finding that a situation constitutes a “threat to international peace and security” under the Charter of the United Nations, the Security Council is empowered to take any of the following escalating measures in response: create an investigative and advisory commission, impose an economic embargo on the offending state or ultimately authorize the use of force against the offender. See U.N. Charter arts. 36-43. However, even where a threat to international peace and security is apparent, a Security Council response depends upon the political will of its members and cannot be presumed. See Ruth Wedgwood, [The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq’s Weapons of Mass Destruction](#), 92 *Am. J. Int’l L.* 724, 728 (noting that despite the ongoing threat to peace and security posed by Iraqi refusal to permit weapons inspections as required by UNSCR 687, the Secretary-General of the U.N., Kofi Annan, insisted that “some sort of consultations with other members” were required before enforcement action could be undertaken).

⁴⁹⁵ The issuance of a U.N. Security Council resolution under Chapter VII of the U.N. Charter, indicating international condemnation of a particular individual and expressing the intent to hold him criminally responsible for his actions, is effectively an international “arrest warrant,” and one such warrant was the catalyst for the U.S.-led mission to capture Mohammed Farah Aideed, the warlord responsible for the conflict in Somalia in October 1993. See S.C. Res. 865, U.N. SCOR, 3280th Mtg., U.N. Doc. S/RES/865 (1993) (condemning attacks on U.N. personnel and “reaffirm(ing) that those who have committed or have ordered the commission of such criminal acts will be held individually responsible for them”). Although refusal to permit international inspections is not in and of itself a criminal act under IHL, it can be considered evidence of potential violations of legal obligations. See Robert A. Bailey, [Why Do States Violate the Law of War?: A Comparison of Iraqi Violations in Two Gulf Wars](#), 27 *Syracuse J. Int’l L. & Com.* 103, 122 (2000) (making this assertion).

⁴⁹⁶ Some commentators insist that states seeking waiver of the Charter-based general prohibition of the use of force must submit to an international “jurying” process whereby the evidence adduced by the state seeking a variance is “tried” with the onus on the requesting state to prove its purity of motives, the proportionality of the proposed use of force and the severity of the threat. See Thomas M. Franck, [The Use of Force in International Law](#), 11 *Tul. J. Int’l & Comp. L.* 7, 15-17 (2003). However, considerations of bureaucratic inefficiency, opposing political interests, and the absence of effective transnational procedures for protecting shared intelligence sources and methods militate against submission to an international jury. To wit, the production of proof that a state is in possession of prohibited weapons is a time-consuming process made all the more so by the machinery of the U.N. system. See Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium, *Mich. J. Int’l L.* 655, 716 (discussing bureaucratic inefficiencies and the glacial pace of the U.N. system); Michael A. Lysobey, *How Iraq Maintained its Weapons of Mass Destruction Programs: An Analysis of the Disarmament of Iraq and the Legal Enforcement Options of the United Nations Security Council in 1997-1998*, 5 *UCLA Int’l L. & Foreign Aff.* 135, 152-53 (2000) (describing determination of material breaches of peace and security as “plodding” and subject to the “whim of whatever immediate political and economic factors are motivating the Council”). Moreover, proof requires the sharing of intelligence, something states are loathe to do with all but their closest allies for fear that revelation of the evidence will permit deductions as to how the evidence was acquired (methods) and by whom (sources) as well as the possibility that reviewers sympathetic to the target might share the intelligence with the target. Sara N. Scheideman, [Standards of Proof in Forcible Responses to Terrorism](#), 50 *Syracuse L. Rev.* 249, 260-61 (2000); see also Thomas Graham, [National Self-Defense, International Law, and Weapons of Mass Destruction](#), 4 *Chi. J. Int’l L.* 1, 8 (2003) (conceding that it is very unrealistic to suggest that states be forced to disgorge the intelligence upon which they rely in taking measures to preempt attack); Linkie, *supra* note 485, at 573 (explaining that the United States cannot reveal all its evidence without compromising the human intelligence sources, who may be placed within terrorist organizations or supply networks, or disclosing its methods of interception and decryption of enemy communications); Ruth Wedgwood, [Responding to Terrorism: The Strikes Against bin Laden](#), 24 *Yale J. Int’l L.* 559, 567 (1999) (“In the midst of a . . . war, a country defending its territory and its nationals will rarely be able to disclose intelligence sources in a public forum.”). Moreover, even after reviewing the evidence, states unwilling on other grounds to approve a proposed military operation to sanction the state in violation are far less likely to concede that the proffered evidence is probative of the existence of the weapons in possession of the accused state. *Id.* Despite its post-hoc production of physical evidence that the Sudanese Al Shifa facility it destroyed had been producing chemical precursors for VX nerve gas, the United States continued to face claims, contrary to the evidence, that the facility was engaged in the benign purpose of producing animal feed and that the United States strike was an unlawful reprisal. Linkie, *supra* note 485, at 569. For a discussion of this case, see Tim Weiner,

Pentagon and C.I.A. Defend Sudan Missile Attack, N.Y. Times, Sept. 2, 1998, at A5; Serge Schmemmann, U.S. Fury on Two Continents: Pros and Cons; How Can Terror Best Be Combated, N.Y. Times, Aug. 21, 1998, at A11.

⁴⁹⁷ Russian, Chinese and French opposition to military action to enforce relevant Security Council Resolutions requiring Iraq to disarm prevented the use of U.N. collective security; thus, upon the Iraqi suspension of UNSCOM activity in August 1998, the U.N., rather than impose the “unavoidable and explicit” military consequences promised, was left in the position of offering Iraq financial inducements to comply. See generally Lysobey, *supra* note 496, at 103 (discussing the failure of collective security and enforcement of Security Council resolutions in the case of Iraq).

⁴⁹⁸ Ironically, Iraq and Iran--states which have been sanctioned for the use and possession of WMD and which are both suspected of currently possessing WMD--were co-chairs of the U.N. Conference on Disarmament, a U.N. agency responsible for monitoring compliance with nonproliferation treaties from January through June 2003, during which time Iraq was in material breach of numerous U.N. Security Council resolutions requiring its disarmament.

⁴⁹⁹ See El-Ayouty, *supra* note 463, at 496-97 (recommending that the United States create a pan-Islamic military force to acquire both the military strength, intelligence cooperation and political legitimacy necessary to defeat Islamic terrorists).

⁵⁰⁰ The legal justifications for the use of force against Iraq in the period between the ceasefire in March 1991 and the overthrow of the Hussein regime in April 2003 (Second Gulf War) were twofold: (1) U.N. Security Council Resolution 687 of April 3, 1991, S.C. Res. 687, U.N. Doc. S/R65/687 (1991), expressly linked the ceasefire ending the First Gulf War with “unconditional . . . acceptance” of the elimination of WMD and verification by UNSCOM, and (2) the continued Iraqi violation of the terms of the ceasefire by virtue of the continued possession of WMD, which violation constitutes an ongoing threat to peace and security, the restoration of which U.N. members were authorized to effect. See Wedgwood, *supra* note 494, at 724 (1998) (discussing legal justifications for coalition operations against Iraq). In other words, everything hinged upon S.C. Res. 687. In the absence of Security Council authorization, military operations against Iraq could have been justified under the Charter framework only by a claim of self-defense, which would be more difficult to support on the ground that the evidence necessary would have been proof of the existence of Iraqi WMD coupled with an Iraqi intent to use those weapons. It is precisely this evidence that has yet to surface even after several months occupation of Iraq, and it is precisely this sort of evidence that, in the scenario in this Article, the United States is unwilling to publicly disclose.

⁵⁰¹ See Frontline: Plague War (interview with William S. Cohen, U.S. Sec’y of Def.) (Pub. Broad. Serv., Oct. 1998), available at <http://www.pbs.org/wgbh/pages/frontline/shows/plague/interviews/Cohen/html> (hereinafter Frontline) (quoting the former Secretary of Defense with respect to responses to the use of WMD against the U.S.).

⁵⁰² The National Security Agency (NSA), the federal agency charged with the protection of United States government communications and the interception of foreign communications, or SIGINT, intercepted and decoded exchanges between the Qadhafi regime and the Libyan People’s Bureau in East Berlin, including an order from Libya to carry out a terrorist attack on United States military personnel, a response that the attack would occur the next day, a confirmation of the attack and assurance that the attack was untraceable. See Bob Woodward & Patrick E. Tyler, *Libyan Cables Intercepted and Decoded*, Wash. Post, Apr. 15, 1986, at A1. NSA monitors the communications of enemy states and terrorist organizations for the purpose of countering hostile intentions and acts. See generally <http://www.nsa.gov> (last visited Feb. 19, 2004).

⁵⁰³ A Special National Intelligence Estimate (SNIE) is a judgmental assessment based on a consensus of the intelligence community as to a time urgent and specific problem that presents a grave threat to national security.

⁵⁰⁴ The siting of military facilities within civilian areas makes it inordinately difficult for attacking forces to preserve the principle of distinction and separate civilians from military objectives. See *supra* note 45 and accompanying text (discussing principle of distinction). The objective of actors who situate such facilities is to effectively remove legitimate military objectives from the list of those targets an adversary committed to preservation of innocent life will choose to attack. For a discussion of this strategy, see *infra* notes 572-74.

⁵⁰⁵ Electronic interception of communications between officials at the Al Shifa factory and Iraqi weapons scientists corroborated the role of Al Shifa in the production and transshipment of chemical weapons, and similar intercepts revealed the possibility that a facility in a populated suburb of Khartoum, Sudan, was being established as a production center for WMD; President Clinton later ordered the destruction of both facilities. Linkie, *supra* note 485, at 571. On the strength of this intelligence, President Clinton ordered the destruction of both facilities. See President William Jefferson Clinton, Remarks on Departure for Washington, D.C., from Martha's Vineyard, Massachusetts, 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 20, 1998). The production and storage of WMD in densely populated civilian centers, a strategy designed to safeguard prohibited weapons from preemptive attack, is of particular concern in IHL. See *infra* note 622.

⁵⁰⁶ A congressional investigation suggests up to 70,000 members trained by al Qaeda are in the United States prepared to initiate terrorist missions on command. David Pace, *Al Qaida Trained 120,000 Terrorists*, Associated Press, July 14, 2003.

⁵⁰⁷ While an overt military strike against a "rogue state . . . producing biological weapons at a clandestine factory which are to be used in a terrorist action against the United States" would, particularly if approved by the U.N. Security Council, satisfy the requirements of IHL with respect to the right under *jus ad bellum* to undertake military action and to conduct operations openly, particularly if preceded by "elaborate discussions in the Security Council with a view to agreeing on some coordinated response or authorization for a unilateral action . . . (and) would alert the rogue state, allowing it the time to take evasive action and increasing the likelihood and extent of casualties which would be suffered by the state contemplating the preemptive action." Reisman, *supra* note 108, at 17; see also Loch K. Johnson, [On Drawing a Bright Line for Covert Operations](#), 86 *Am. J. Int'l L.* 284, 303-04 (1992) (stating that in the case of potential attack by WMD, the need to act with alacrity and the languid pace of diplomatic negotiations may dictate that covert operations, even where unauthorized by the U.N., are preferable to all other policy options, especially large-scale overt operations that increase the likelihood of civilian casualties). To maintain the secrecy essential to limiting casualties and to mission success, covert operations are preferred in such circumstances. See Wedgwood, *supra* note 496, at 567 (stating that the political advantage of submitting military operational plans to multilateral bodies such as the U.N. for approval is more than outweighed by the compromise of secrecy). Moreover, covert operations are perhaps less likely to be perceived by other states, if their existence ever becomes publicly known and acknowledged, as the sort of serious "assaults on the international order" that unauthorized overt military interventions, which tend to be undertaken on a far broader scale and for a much more extended duration and with far greater effects, are often claimed to constitute. See Johnson, [supra](#), at 284-85 (explaining that covert operations tend to be of more limited scope, intensity, duration and discoverability than overt operations and are consequently less likely to arouse hostile scrutiny). Covert operations can also confer domestic political benefits: they need reduce risks, minimize losses in lives and treasure and are less likely to be revealed in the event of their failure, thus creating less domestic political liability than overt military operations, and they "give Presidents (who need not report them to Congress until after the fact) freedom from . . . difficult and annoying democratic constraints." Goodman, *supra* note 107, at 83. Thus, even if overt options might generally be more defensible, legally and politically, than covert operations, and even as a "more honorable option," there are circumstances where covert operations are preferred as policy options and legal and political arguments in support of the choice to operate covertly. Johnson, [supra](#), at 305.

⁵⁰⁸ A "mission" is "a duty assigned to an individual or unit" and "(t)he who, what, when, where and why that must be accomplished." U.S. Dep't of Army, Field Manual 101-5-1, Operational Terms and Graphics 1-201-203 (Sept. 30, 1997) (hereinafter FM 101-5-1).

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As a matter of international law, most commentators conclude that the policy of killing terrorist leaders, whether labeled assassination or simply an act of anticipatory self-defense, does not contravene convention or custom. See J. Nicholas Kendall, [Israeli Counter-Terrorism: "Targeted Killings" Under International Law](#), 80 N.C.L. Rev. 1069, 1070 (2002) (arguing that although customary IHL prohibits assassination of the civilian political leadership of states, it does not prohibit the killing of terrorists in self-defense under the doctrine of anticipatory self-defense); Louis R. Beres, [On International Law and Nuclear Terrorism](#), 24 Ga. J. Int'l & Comp. L. 1, 29-33 (1994) (same). Domestic law is somewhat more restrictive: [Executive Order No. 12,333](#), promulgated by President Ronald Reagan, provides that "(n)o person employed by or acting on behalf of the (United States) shall engage in, or conspire to engage in, assassination." [Exec. Order No. 12,333](#), 46 Fed. Reg. 59,941 (Dec. 4, 1981). However, assassination may well "offer the best available remedy" in combating terrorism. Louis R. Beres, [The Permissibility of State-Sponsored Assassination During Peace and War](#), 5 Temp. Int'l & Comp. L.J. 231, 249 (1991); see also [Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens](#), 15 Temp. Int'l & Comp. L.J. 195, 229 (discussing utility of a policy of assassination of terrorists). Moreover, precisely what is meant by "assassination" is unclear, as [EO 12,333](#) does not provide any insight into the meaning of, or the limitations on, assassination. W. Hays Parks, Memorandum of Law: [Executive Order 12,333](#) and Assassination, Army Law, Dec. 1999, at 4, 4, 7 (contending that the fact that the [United States has continued post-EO 12,333](#) to engage in "the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to United States citizens or United States national security" suggests that the order is meant to have limited applicability); [Abraham D. Sofaer, Terrorism, the Law, and the National Defense](#), 126 Mil. L. Rev. 89, 119 (1989) (arguing that the killing of terrorists are lawful acts undertaken in self defense and not assassinations, which term implies killing civilian political leaders for political rather than military purposes); Patricia Zengel, [Assassination and the Law of Armed Conflict](#), 134 Mil. L. Rev. 123, 145 (1991) 615, 635 (1992) (stating that the definitional ambiguity attached to the term "assassination" allows for a flexible approach that "leav(es) potential adversaries unsure as to exactly what action the United States might be prepared to take if sufficiently provoked"). Accordingly, several presidents have claimed the right to assassinate leaders and members of terrorist organizations and have issued policy guidance to the Department of Defense to this effect. See Alan Einisman, [Ineffectiveness at Its Best: Fighting Terrorism with Economic Sanctions](#), 9 Minn. J. Global Trade 299, 323 (2000) (alteration in original) (citing United States Army sources); Paul Richter, Clinton Administration Reserves Right to Assassinate Terrorists, Minn. Star Trib., Oct. 30, 1998, at A23. Consequently, the United States Army maintains that "(t)he clandestine, low visibility, or overt use of force against legitimate targets in time of war, or against similar targets in time of peace, where such individuals or groups pose an immediate threat . . . does not constitute assassination."; David E. Sanger, A Nation Challenged: The President; Bin Laden is Wanted in Attacks, "Dead or Alive," President Says, N.Y. Times, Sept. 18, 2001, at A1 (quoting President Bush in speech to Department of Defense officials on Sept. 17, 2001 as granting authority to the Armed Forces to kill, rather than capture, bin Laden).

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"Rules of engagement," or "ROEs," are statements of the means and methods by which the military chain of command authorizes subordinates to employ military force against specific targets and limits the degree of permissible force. F.M. Lorenz, Law and Anarchy in Somalia, 23 Parameters 27, 29 (1993-94); see also Dep't of Defense, Dictionary of Military and Associated Terms, Joint Publication 1-02 (Apr. 12, 2001), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf (hereinafter DOD Dictionary) (defining ROEs as "(d)irectives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."). ROEs are drafted, disseminated and interpreted by JAG officers in collaboration with combat commanders and their staffs. Standard ROEs, which conventional soldiers carry into battle on printed cards, direct soldiers to engage armed civilians only in self-defense, to arrange the evacuation of civilians prior to attack where possible, to obtain approval from proper command authority prior to the use of certain weapons systems and to use only that degree of force necessary and proportional to the threat. John Embry Parkerson, Jr., [United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause](#), 133 Mil. L. Rev. 31, 53-54 (1991); see also Mark S. Martins, Deadly Force is Authorized but also Trained, Army Law., Sept.-Oct. 2001, 1, 6 (explaining that ROEs, regardless of their specific provisions, are interpreted to permit soldiers to use the degree of force "which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property."). ROEs do not preclude the use of force in self-defense; on the contrary, standing ROEs require members of the Armed Forces to use whatever force is necessary to accomplish what is known as "force protection". See DOD Dictionary, *supra* (requiring members of the Armed Forces to participate in force protection,

defined as “(a)ctions taken to prevent or mitigate hostile actions against Department of Defense personnel (to include family members), resources, facilities, and critical information”). Moreover, soldiers are required to remain alert and responsive to changes in their mission and threat dictated by events, and ROEs are to be interpreted in light of these variables. Martins, *supra* note 28, at 5. Overly restrictive ROEs can “handicap and endanger United States forces, especially ground troops.” Martins, *supra*, at 1. Thus, although ROEs are by nature restrictive regulations that limit the legal use of force as a matter of domestic law, ROEs are guidelines, rather than categorical prohibitions, and the interpretation of decisions soldiers make while operating under the restraint of ROEs are “viewed from the perspective of the man on the scene--who may often be forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving--and without the advantage of 20/20 hindsight.” *Id.* at 5 (citing *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

⁵¹¹ A JAG officer is assigned to draft a classified Legal Annex to each military operation clarifying relevant IHL issues and providing instruction as to compliance. Bulman, *supra* note 437, at 165.

⁵¹² The decision to restrict access to aspects of a military operational plan is consistent with applicable federal law and is necessary in order to preserve operational security. See Goldwater-Nichols Department of Defense Reorganization Act of 1986, *Pub. L. No. 99-433, 100 Stat. 992 (1986)* (codified as amended in scattered sections of *Title 10* authorizing classification of operational plans and restricting access of cabinet officials).

⁵¹³ See Jeremiah 21:4-6 (“Thus saith the LORD God of Israel; behold, I will turn back the weapons of war that are in your hands, wherewith ye fight against the king of Babylon, and against the Chaldeans, which besiege you without the walls, and I will assemble them into the midst of this city. And I myself will fight against you with an outstretched hand and with a strong arm, even in anger, and in fury, and in great wrath. And I will smite the inhabitants of this city, both man and beast: they shall die of a great pestilence.”).

⁵¹⁴ ABA Panel: Bioterrorism Attack Would Squash Personal Freedoms; ‘What Needs to be Done’: Border Closures and Mass Quarantines Would Be Likely Responses, *Telegraph Herald* (Dubuque, Iowa), Aug. 5, 2001, at A4 (quoting Suzanne Spaulding, former attorney with the Central Intelligence Agency, on the legal protocol that would in reality be pursued by executive branch officials responding to a terrorist attack with BWs against the U.S.).

⁵¹⁵ For an example of a memorandum of law providing the President with a legal opinion as to the authority of the President to commit United States Armed Forces to engage in operations, see Memorandum Opinion by the Attorney General of the Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 13 Op. O.L.C. 8 (1992).

⁵¹⁶ Among the sources of legal authority cited by the White House Counsel in support of the covert action against Uzbekistan was a 1996 statute in which Congress found that “the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens.” Antiterrorism and Effective Death Penalty Act of 1996, *Pub. L. No. 104-132, § 324(4)*, 110 Stat. 1255 (codified at *22 U.S.C.A. § 2377*).

⁵¹⁷ Under federal law, the President may not authorize covert operations unless he determines that “such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security” Intelligence Authorization Act, *Pub. L. No. 102-88, 105 Stat. 441*, at § 503(a) (1991) (requiring that such a finding be in writing unless time does not permit). However, although special operations forces are frequently used in execution of covert operation; this rests on a legal distinction that the role of the United States in covert operations is to remain unacknowledged. Nonetheless, because a proposed amendment to the Intelligence Authorization Act of 1991, known as the “Cambone Understanding” after the sponsor, would redefine all special operations missions as covert operations requiring a Presidential finding as a condition precedent to their

deployment, this scenario incorporates such a finding. Bill Gertz, Congress to Restrict Use of Special Ops, Wash. Times, Aug. 12, 2003, at A01 (reporting impending amendment of Intelligence Authorization Act of 1991).

⁵¹⁸ The United States Special Operations Command (USSOCOM) was formed on April 1, 1987 and tasked to train and equip special operations forces as the branch of the Armed Forces with primary responsibility for a variety of rapid-reaction, critical missions of strategic importance, including, inter alia, counterterrorism. See Department of Defense Authorization Act of 1987, [P.L. 99-661, § 1311, 100 Stat. 3983-86](#) (1986) (hereinafter Cohen-Nunn Amendment) (mandating creation of USSOCOM, a Board for Low-Intensity Conflict within the National Security Council, and the position of Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict); Department of Defense Authorization Act of 1986, [P.L. 99-145, § 1453\(a\)\(3\)](#), 99 Stat. 760 (1985) (“The special operations forces of the Armed Forces provide the United States with immediate and primary capability to respond to terrorism.”). By capitalizing upon “speed, surprise, audacity, and deception” they “accomplish missions in ways that minimize risks of escalation and maximize returns compared with orthodox applications of military power,” rendering special operations forces particularly suited to covert counterterrorism missions. John M. Collins, *Special Operations Forces: An Assessment* 6 (1994). As such, in practice special operations forces play an inordinate role in the “protect(ion) (of) their parent society against disorder, intimidation, and terrorism.” Lloyd, *supra* note 104, at 204. Special Forces, drawn from each of the components of the Armed Forces and organized into Special Operations Groups, are one of the components of the broader community of special operations forces, which include psychological operations, civil affairs forces, Rangers, Marines and aviators. United States Army Special Forces, known colloquially as “Green Berets,” are the most elite soldiers in the Army, selected on the basis of general proficiency, maturity, intelligence, imagination, cognitive flexibility, determination and experience as well as familiarity with local cultures, languages and the politico-economic climates in the geographic regions in which they are operational. Carl W. Stiner, *U.S. Special Operations Forces: A Strategic Perspective*, 22 *Parameters* 4, 6, 9 (1992). When deployed, Special Forces soldiers operate in twelve-man “Alpha” teams, each of which is a self-contained unit, and employ streamlined communications links, technical and tactical proficiency and an understanding of the incident environment to preserve secrecy and accomplish their missions.

⁵¹⁹ United States Army Special Forces troops have been posted to a number of locations in or near the Middle East and Central Asia following September 11, 2001. See, e.g., Thom Shanker & Eric Schmitt, *U.S. Moves Commandos to Base in East Africa*, N.Y. Times, Sept. 18, 2002, at A20 (reporting stationing of hundreds of Special Forces soldiers in East Africa for missions against al Qaeda); Patrick E. Tyler, *Yemen, an Uneasy Ally, Proves Adept at Playing Off Old Rivals*, N.Y. Times, Dec. 19, 2002, at A1 (reporting increase in United States Special Forces presence in Yemen in 2002).

⁵²⁰ United States Army Special Forces soldiers have been training for covert counterterrorist operations at a high operational tempo following September 11th, and have developed a number of missions for rapid execution on short notice. See *Reviewing Ideas for Fighting Terrorists*, N.Y. Times, Aug. 3, 2002, at A10 (reporting high-level covert operations planning within USSOCOM for counterterrorist mission post-September 11th).

⁵²¹ See *Anthrax Highlights*, at [http:// www.mercola.com/2001/oct/10/anthrax_highlights.htm](http://www.mercola.com/2001/oct/10/anthrax_highlights.htm) (last visited June 6, 2004) (discussing properties of anthrax)

⁵²² The destruction of anthrax requires either extremely high temperatures or exposure to potent biocides such as chlorine dioxide. See U.S. Environmental Protection Agency, *Anthrax*, at [http:// www.epa.gov/epahome/hi-anthrax.htm#FORRESPONDERS](http://www.epa.gov/epahome/hi-anthrax.htm#FORRESPONDERS) (last updated June 8, 2004); see also Center for Disease Control, Division of Bacterial and Mycotic Diseases, *Disease Information: Anthrax*, at [http:// www.cdc.gov/ncidod/dbmd/diseaseinfo/anthrax_g.htm#Whatisanthrax](http://www.cdc.gov/ncidod/dbmd/diseaseinfo/anthrax_g.htm#Whatisanthrax) (last updated May 2, 2003) (discussing lethality and methods of destroying anthrax). The oxidizing effects of chlorine dioxide are enhanced by high temperatures. See IPCS INCHEM, *Chlorine Dioxide*, at [http:// www.inchem.org/documents/icsc/icsc/eics0127.htm](http://www.inchem.org/documents/icsc/icsc/eics0127.htm) (last visited June 6, 2004). Consequently, the choice of a combination of incendiary, biocidal and explosive devices would likely be used to neutralize a large volume of anthrax. See, e.g., Michael W. Lewis, [The Law of Aerial](#)

[Bombardment in the 1991 Gulf War, 97 Am. J. Int'l L. 481, 489 \(2003\)](#) (recounting decision of General Colin Powell and Secretary of Defense Richard Cheney to target Iraqi biological weapons during the 1991 Gulf War with incendiary and biocidal measures).

⁵²³ This practice was employed by Somali warlords against United States forces operating to provide humanitarian relief during the civil war in Somalia in 1992-1993. See Lorenz, *supra* note 510, at 36 (discussing numerous violations of IHL by Somali warlords during the Somali Civil War). Iraqi troops very effectively used civilians to shield themselves against United States operations in March 2003. See Dexter Filkins, *Either Take a Shot or Take a Chance*, N.Y. Times, Mar. 28, 2003, at A2 (reporting United States troops declined repeatedly to engage Iraqi soldiers employing women and children as human shields but that some such civilian hostages were killed as a result of United States fire directed at Iraqi military targets).

⁵²⁴ Tactical blinding lasers are specially designed to temporarily blind enemy forces in order to provide force protection without causing unnecessary casualties, and special operations missions and hostage rescue situations are particularly suitable uses. See Burrus M. Carnahan, [Unnecessary Suffering, The Red Cross and Tactical Laser Weapons, 18 Loy. L.A. Int'l & Comp. L.J. 705, 729 \(1996\)](#) ("A blinding laser rifle may be useful from a humanitarian standpoint in dealing with hostage situations, where enemy forces are using civilians as a shield. Blinding some or all of the enemy forces may . . . permit the hostages to escape.").

⁵²⁵ "Riot control agents" are chemical irritating substances such as CS gas and pepper spray used to temporarily "distract, deter, or disable disorderly people" without permanent injury to permit friendly forces to operate unimpeded. U.S. Dep't of Army, Field Manual 19-15, ch. 9, Riot Control Agents (Nov. 25, 1998).

⁵²⁶ Even where women and children divest themselves of the privileges of noncombatancy by taking up arms, members of the United States Armed Forces are very reluctant to fire upon them. See Lorenz, *supra* note 510, at 39 (describing emotional difficulties encountered by United States forces in Somalia engaged by armed women and children). Where women and children are employed against their will as human shields, the reluctance expands to include the reluctance to bring fire down upon their captors lest innocents become inadvertent and unintended casualties. *Id.*

⁵²⁷ See El-Ayouty, *supra* note 463, at 492 (arguing in 1999 that Afghanistan, under the Taliban, had abdicated state responsibility to suppress terrorism and "should be treated as a Barbary State" upon which "law and order should be imposed . . . from the outside until it co-operates internationally (with) the extradition or the apprehension in prosecution and punishment of all those implicated in th(e) genocidal war against the American people.").

⁵²⁸ Johnson, *supra* note 507, at 293-94.

⁵²⁹ Myres McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 Am. J. Int'l L. 507, 597-98 (1963).

⁵³⁰ Lysobey, *supra* note 496, at 103-04.

⁵³¹ This language is drawn from correspondence delivered by the United States Ambassador to the United Nations to the U.N. Secretary-General formally notifying the U.N. of the United States attack on terrorist targets in Sudan and Afghanistan in 1998. See Letter from Bill Richardson, Permanent Representative of the United States to the United Nations, to the President of the U.N. Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998), available at <http://www.undp.prg.missions/usa/s1998780.pdf>.

⁵³² These precise words were uttered by President Ronald Reagan in announcing the bombing of Libya in reprisal for

the attack on a West Berlin disco in 1986. President Ronald Reagan, Address (Apr. 14, 1986), in Wash. Post, Apr. 15, 1986, at A23.

⁵³³ See President George Bush, Statement (Dec. 20, 1989) (transcript on file at the George Bush Presidential Library in College Station, Texas) (announcing the United States intervention in Panama).

⁵³⁴ This “quote” is very loosely patterned after the statement offered by President William Clinton as justification for United States attacks against al Qaeda in 1998. See President William Jefferson Clinton, Address at the White House (Aug. 18, 1998), at [http:// www.time.com/time/daily/special/asbombing/clintonwash.html](http://www.time.com/time/daily/special/asbombing/clintonwash.html) (last visited June 10, 2004).

⁵³⁵ Johnson, *supra* note 507, at 294 (quoting an unidentified former CIA officer).

⁵³⁶ Id. (quoting a statement by G. Gordon Liddy, former CIA officer and Watergate conspirator, made on the campus lecture circuit).

⁵³⁷ President George W. Bush, Remarks by the President at the 2002 Graduation Exercise of the United States Military Academy at West Point (June 1, 2002), available at [http:// www.whitehouse.gov/news/releases/2002/05/20020523-2.html](http://www.whitehouse.gov/news/releases/2002/05/20020523-2.html).

⁵³⁸ Dean Acheson, Remarks by the Honorable Dean Acheson, 1963 Proc. Am. Soc’y Int’l L. 13, 14 (remarks made in context of the Cuban Missile Crisis).

⁵³⁹ See Job 21:17-18.

⁵⁴⁰ Many of the claimed civilian casualties that resulted from the firefight with the Alpha Teams were terrorists who had entered into battle in civilian clothing. The separation of legitimate civilian casualties from terrorists or irregular forces is often not attempted by the regimes that support terrorism or by the NGOs who lend credence to their claims. See Wash. Post, Jan. 7, 1990, at A22 (reporting that as many as thirty percent or more of the “civilian” casualties reported in the United States invasion of Panama in 1989 were in fact members of the Noriega-led Panamanian Defense Forces who chose to fight in civilian clothing).

⁵⁴¹ The Soviet Union and China attempted and failed, due to a U.S.-U.K.-French veto, to issue a resolution condemning the United States attack on Libya in 1986 and rejecting the Article 51 justification offered by the United States. See Ivan Zverina, U.S., Britain, France Veto U.N. Condemnation of Raid on Libya, United Press Int’l, Apr. 21, 1986.

⁵⁴² In response to the United States attacks on terrorist facilities in Libya in 1986, the General Assembly passed a resolution condemning the military action. See G.A. Res. 41/38, U.N. GAOR, 41st Sess., 78th mtg., 1986 U.N.Y.B. 257.

⁵⁴³ The General Assembly resolution cited a 1973 resolution calling for every state to cooperate in the arrest and prosecution of persons suspected of committing war crimes and crimes against humanity. See Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity G.A. Res. 3074, U.N. GAOR 3d Comm., 28th Sess., 2187th plen. mtg., Supp. No. 30, at 78, U.N. Docs A/9326 and A/9030 (1973).

⁵⁴⁴ Much of public opinion across the globe was intensely critical of the United States decision to attack terrorist facilities in Sudan and Afghanistan in 1998, an operation undertaken for the same purposes, against the same sort of threat, and in the same circumstances of a lack of multilateral political support in the United Nations. See Bashir Maa, *Missiles Will Only Make Matters Worse*, *Herald* (Glasgow), Aug. 24, 1998, at 13. To some extent, the expression of short-term outrage for the attack upon the targeted state is the product of informational asymmetry remediable only by the risky dissemination of the information motivating the targeting decision; where a state undertakes a preemptive strike under circumstances such as those presented herein, “the targeted state is often able to command instant sympathy, while the preemptive attacker may require more time to publicize its intelligence information and elaborate its justifications, both of which may ultimately prove to be more persuasive to the international decision process.” Reisman, *supra* note 108, at 17-18.

⁵⁴⁵ Journalists evaluating the claims of innocence proffered by rogue regimes and terrorist groups in response to United States military operations undertaken to destroy WMD in the past have not generally been critical of such claims and have instead given them credibility in their coverage. See David, *supra* note 40, at 376 (noting that journalists reported rather uncritically the Iraqi claims that a military command-and-control facility located in a civilian area in Baghdad was in fact a bomb shelter protecting civilians).

⁵⁴⁶ The incubation period varies between one-to-five days, but exposure left untreated for the first twenty-four hours is fatal in over ninety percent of cases. Keefer, *supra* note 482, at 110 n.9.

⁵⁴⁷ This language is drawn from a similar communique issued after the United States attack on terrorist targets in Sudan and Afghanistan in 1998. See Letter from the Permanent Observer of the League of Arab States to the President of the Security Council, U.N. Doc. S/1999/997, Annex, para. 7 (Sept. 23, 1999).

⁵⁴⁸ Uzbekistan signed the Rome Statute on December 29, 2000, though it has not ratified that instrument as of September 2003. For a list of current parties, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>. Non-party states may accept the jurisdiction of the ICC in a particular case. Rome Statute, *supra* note 32, art. 12(3). The “opt-out” provision permits states, upon acceding to membership, to accept ICC jurisdiction generally while declining with respect to war crimes for a seven year period. Rome Statute, *supra* note 32, art. 124 (“(A) State, on becoming a party . . . , may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 (war crimes) when a crime is alleged to have been committed by its nationals or on its territory.”). Critics of the ICC interpret the opt-out provision as allowing a state willing to commit war crimes to accede to the Statute only to opt out of war crimes jurisdiction, thus insulating its personnel from ICC prosecution for war crimes while a nonparty dispatching peacekeeping forces to that state would find them immediately subject to ICC war crimes prosecutions. See [Transcript of Statement by Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court Before the Senate Foreign Relations Committee, Washington, D.C., U.S. Dep’t of State Dispatch, Aug. 1, 1998, available in 1998 WL 12885550](#).

⁵⁴⁹ Rome Statute, *supra* note 32, art. 14(1).

⁵⁵⁰ The Prosecutor has discretion to seek information from any “reliable sources that he or she deems appropriate” in determining whether to bring an indictment, including “non-governmental organisations.” *Id.* art. 15(2).

⁵⁵¹ *Id.* art. 15(3). Under these circumstances where the evidence relied upon to launch a military operation is wholly within the control of the attacking state, the defending state denies the existence of WMD and the attacking state refuses to conduct a domestic investigation, it might well be “difficult to see how (the Prosecutor) would be able to conclude . . . that no crime within the Court’s jurisdiction has been committed.” David, *supra* note 40, at 398-99.

Moreover, even if the attacking state agreed to share its intelligence and conduct a domestic investigation, the ICC might elect to conduct its own investigation to independently corroborate or refute the evidence proffered by the attacking state and to establish its independence. *Id.*

⁵⁵² Rome Statute, *supra* note 32, art. 15(4).

⁵⁵³ See *id.* art. 16 (providing that the U.N. Security Council may adopt a resolution under Chapter VII deferring an investigation or prosecution for a renewable twelve-month period); see also Todd M. Sailer, Comment, [The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections](#), 13 *Temp. Int'l & Comp. L.J.* 311, 342 (1999) (elaborating the "Singapore Compromise" achieved at the drafting conference which permits deferral of an investigation or prosecution if all five permanent members of the Security Council "believe() that the ICC would interfere with the Council's efforts to further international peace and security." (citation omitted)). The power of the U.N. Security Council to block the exercise of ICC jurisdiction is predicated upon Article 103 of the U.N. Charter (the international "Supremacy Clause"), which ensures that "(i)n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any international agreement, their obligations under the present Charter shall prevail." U.N. Charter, art. 103. The Security Council has previously exercised this power. See *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K. and U.S. 1992 1 C.J. 1 (Apr. 14))* (holding that U.N. Security Council could, under UNSCR 748 (1992) b, bypass an existing treaty mechanism for the prosecution of individuals in order to determine, a priori, the question of state responsibility for the crimes in question). Whether it will do so in a given case is a political question. A United States proposal that would have automatically stayed ICC actions in any matter of which the Security Council was seized under Chapter VII was defeated. Jelena Pejic, [Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness](#), 29 *Colum. Hum. Rts. L. Rev.* 291, 321-22 (1998).

⁵⁵⁴ The prosecution of senior United States military commanders and civilian government officials in an international tribunal for their actions in ordering and planning military operations has been attempted previously, albeit unsuccessfully. See *Slaughter*, *supra* note 35, at 1 (noting that in 1999 the Russian Foreign Minister denounced the NATO campaign in Kosovo and called for United States and NATO commanders to be prosecuted in the ICTFY).

⁵⁵⁵ See Rome Statute, *supra* note 32, art. 19 (providing that the ICC "shall satisfy itself that it has jurisdiction.").

⁵⁵⁶ See *id.* art. 17 (providing that a case is within ICC jurisdiction if a decision not to investigate or prosecute "resulted from the unwillingness or inability of the State genuinely to prosecute," and that unwillingness is to be determined by considering whether "the national decision was made for the purpose of shielding the person concerned from criminal responsibility."). Some scholars interpret "unwillingness" to require the Prosecutor to show "devious intent" on the part of a state. Louise Arbour & Mark Bogsmo, *Conspicuous Abuse of Jurisdictional Overreach*, in *Reflections*, *supra* note 31, at 131. Others suggest that "the (ICC) could find the case admissible and exercise its jurisdiction, rather than defer to (United States) proceedings conducted in good faith," on the ground that the Rome Statute creates the presumption that a decision not to investigate or prosecute is ipso facto a manifestation of "devious intent." Gurule, *supra* note 46, at 27.

⁵⁵⁷ "'(C)rime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; . . . (f) Torture; . . . (h) Persecution against any identifiable group . . . ; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Rome Statute, *supra* note 32, art. 7.

⁵⁵⁸ See *id.* art. 8(2)(a) (defining "war crimes" as, in addition to grave breaches of the Geneva Conventions, "(i) Wilful

killing; (ii) Torture or inhuman treatment; (iii) Wilfully causing great suffering, or serious injury to body or health; (and) (iv) Extensive destruction and appropriation of property, not justified by military necessity.”). Article 8(2)(b) defines “war crimes” as

serious violations of the laws and customs applicable in international armed conflict, . . . namely . . . (i) intentionally directing attacks against the civilian population as such . . . ; (ii) Intentionally directing attacks against civilian objects . . . ; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . clearly excessive in relation to the concrete and direct overall military advantage anticipated; . . . (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, (and) hospitals . . . provided they are not military objectives; . . . (xvii) Employing poison or poisoned weapons; (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; . . . (and) (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of (IHL), provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute.

Id. art. 8(2)(b).

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By virtue of their unique responsibility commanders are obligated, as “‘society’s last line of defense’ against war crimes,” to “control . . . a military force’s organic capacity for destruction and the conduct of their subordinates.” Smidt, *supra* note 282, at 166-67. Command responsibility is “the legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of a unit.” Dep’t of the Army, Field Manual 101-5,1-1 (1997). Theoretically, command responsibility extends up the chain of military and civilian command to the highest reaches of power, although in practice it is largely immediate military commanders who are under a duty to ensure that their subordinates observe IHL. C.J. Greenwood, *Command and the Laws of Armed Conflict* 35 (1993). Prior to World War II, the limits of commanders’ responsibility extended only so far as to preclude issuance of unlawful orders. Rogers, *supra* note 42, at 130 (stating that criminal liability for acts of subordinates that do not flow from superiors orders is a “comparatively recent development”); U.S. War Dep’t, Rules of Land Warfare ¶ 366 (1917) (hereinafter Rules of Land Warfare (1917)) (stating that although commanders who issued illegal orders could be held criminally liable, mere toleration of unlawful conduct was insufficient). Neither the Nuremberg nor the Tokyo Tribunal directly criminalized failure to prevent atrocities. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1547 (1945) (“Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by the persons in execution of such plan.”). Still, the enduring legacy of prosecutions of Axis war criminals, and one of the grounds opponents seized upon to brand these proceedings “victor’s justice,” is the extension of liability on a negligence theory. See Trial of General Tomoyuki Yamashita, 4 U.N. War Crimes Comm’n, Law Reports of Trials of War Criminals 35 (William S. Hein Co. 1997) (1945) (convicting commander of Japanese Army, Philippines, for murder of United States POWs despite no charge or evidence that he knew or approved, on the inference that given their scale he must have known they were occurring); U.S. v. Soemu Toyoda (Official Transcript) (convicting Commander in Chief of Japanese Fleet of command responsibility for failure to learn of violations committed by his troops); High Command Case, *supra* note 307, at 543-44 (convicting commanders where a “personal dereliction . . . amounting to a wanton, immoral disregard of the (unlawful) action of (their) subordinates,” including execution of United States POWs, constituted “criminal negligence”). Still, the World War II prosecutions did not create an absolute liability standard for commanders, who “cannot keep completely informed of the details of military operations of subordinates,” nor did they equate mere knowledge of violations with criminal liability. The Dostler Case, 1 U.N. War Crimes Comm’n, Law Reports of Trials of War Criminals 22 (William S. Hein Co. 1997) (1948) (holding that “mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law” and that a commander could be held liable only where he “orders, abets, or takes a consenting part in the crime.”); The Trial of General Tomoyuki Yamashita, *supra*, at 35 (“It is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape.”). The contemporary formulation provides that criminal responsibility can be imputed to the commander, even if he did not issue orders requiring violations of IHL, only if he had effective control over forces under his command (the “structural element”) and either knew or should have known that his subordinates would commit the violations (the “mental element”) and failed to take reasonable measures to prevent and/or punish their commission (the “physical element”). See API, *supra* note 105, art. 87 (“(A)ny commander who is aware that subordinates or other persons under his control are going to commit, or have committed a breach of the conventions or of this Protocol, (is obliged) to initiate such steps as are necessary to prevent violations of the conventions or this Protocol. . . .”). This

restrictive contemporary standard is adopted in the Rome Statute, art. 28 and in United States military regulations, which require that the prosecutor prove either that the commander issued a direct order requiring a subordinate to execute a manifestly unlawful act or that the commander is grossly negligent in supervising subordinates. See FM 27-10, *supra* note 43, ¶ 501 (providing that “commanders may be responsible for war crimes committed by subordinate(s) . . . when the acts in question have been committed in pursuance of an order . . . (or) if (the commander) has actual knowledge, or should have knowledge, through reports received by him . . . that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”); UCMJ, [10 U.S.C. § 877 \(2000\)](#) (providing that command responsibility requires proof a commander intended to and did in fact encourage subordinates to commit the unlawful act). Although in practice courts-martial, on the rare occasions they adjudicate an allegation of command responsibility, are prone to apply an even more restrictive standard that permits liability only where a commander is alleged to have issued an unlawful order, the *de jure* standard is identical to that at IHL—either a direct order, or gross and wanton negligence, is required to sustain a charge, and evidence necessary to prove such negligence is limited, essentially, to the failures to train troops in advance and investigate after the fact. See Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. Pub. L. 7, 21 (1972) (stating that no principle of United States military law requires a commander to restrain acts of subordinates he has not ordered); Smidt, *supra* note 282, at 193 (concluding that in practice courts-martial employ the very restrictive standard requiring proof of a direct order or post hoc failure to investigate to sustain a charge). Still, the precise standard the ICC will employ to determine whether to impute knowledge of violations of IHL to a commander—whether actual or constructive knowledge, or mere negligence—is unclear. Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. Int’l L. & Pol. 792, 852 (2002). Similarly, where a commander is alleged responsible on a negligence theory, liability ultimately requires an determination of whether the act was so manifestly unlawful that a reasonably diligent commander would have learned of and prevented it or, at the very least, investigated and prosecuted its author; the discovery that subordinates committed acts not manifestly unlawful would not necessarily obligate investigation or punishment. Osiel, *supra* note 23, at 161. Because the Rome Statute does not specify which acts are manifestly unlawful, the precise boundaries of a commander’s legal responsibility remain unclear. Finally, the Rome Statute is silent on whether a commander can discharge supervisory responsibilities, and thus offer an absolute defense, by proving his subordinates were trained in IHL and provided access to legal officers. Rogers, *supra* note 42, at 141.

⁵⁶⁰ The scenario presumes, contrary to facts, that 7/8 of the Assembly of States Parties agreed to a definition of “aggression,” that the preclusion on prosecution of the crime of aggression for 7 years after entry into force of the Rome Statute is inoperative, and that prosecution of an individual for the crime of aggression does not require a prior determination of the Security Council that his state of nationality, on behalf of which he is alleged to have undertaken acts constituting the elements of the crime, has engaged in aggression. See *supra* note 101 (discussing legal issues concerning the definition of and preconditions to the prosecution of the crime of aggression). The following definition is employed for purposes of this scenario:

1. For purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing . . . political actions in his State, against another State, in contravention of the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State. 2. Acts constituting aggression include the following: (a) the invasion or attack by the armed forces of a State of the territory of another State, any military occupation, however temporary, resulting from such invasion or attack . . . (b) bombardment by the armed forces of a State against the territory of another State; (or) . . . (g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State . . .

David, *supra* note 40, at 389-90, 411 (offering prospective definition of aggression).

⁵⁶¹ See Rome Statute, *supra* note 32, art. 25(3)(b) (providing that a person shall be criminally responsible if he “(o)rders, solicits or induces the commission of . . . a crime which in fact occurs”).

⁵⁶² See *id.* art. 27(1) (providing for the applicability of the Rome Statute “without any distinction based on official capacity . . . as a Head of State or Government, a member of Government . . . or a government official”).

⁵⁶³ See *id.* art. 28. Article 28 establishes command responsibility liability by providing: military commander . . . shall be criminally responsible for crimes . . . committed by forces under his or her effective command and control . . . where: (a) (t)hat . . . person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and . . . (b) that . . . person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to competent authorities for investigation and prosecution.
Id.

⁵⁶⁴ The concept of a “crime against humanity” entered into existence not by way of a multilateral treaty or by the ripening of custom into law but rather with Article 6(c) of the Charter of the IMT, which defined it as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial, or religious grounds . . .” Charter of the IMT, *supra* note 32, art. 6. Under customary IHL as it has developed, a crime against humanity is one of a list of prohibited acts committed as part of a widespread or systematic attack pursuant to or in furtherance of a state or organizational policy directed against any civilian population with knowledge of the attack. *Prosecutor v. Tadic*, 1997 I.C.T.Y. IT-94-1-T, ¶¶ 624-26 (May 7) (Opinion and Judgment) (citing Article 5, ICTY) (creating jurisdiction over crimes against humanity). The existence of an armed conflict is not required as an element of a crime against humanity, but acts prohibited as crimes against humanity typically “involve, or at least occur in the context of, massive killings or mistreatment of civilians in . . . time of armed conflict” under the direction of an official policy. Fenrick, *supra* note 12, at 779 (emphasis added). Because crimes against humanity are most often committed during armed conflict by soldiers as agents of their governments, and because the applicability of IHL has been extended through the Geneva Conventions to apply to most internal armed conflicts, there is thus some overlap between war crimes (when civilians are the victims) and crimes against humanity, and several commentator has called for the elimination of distinctions between the two categories of crimes and for their merger into a single analytical concept. See L.C. Green, “Grave Breaches” or Crimes Against Humanity?, 8 U.S.A.F. Acad. J. Leg. Stud. 29 (1997-98) (making this argument); Marler, *supra* note 34, at 849 (noting that suspects have been charged in predecessor tribunals with war crimes and crimes against humanity for the same acts).

⁵⁶⁵ The Torture Convention, cited by the Prosecution in the Indictment, supplied a definition of torture. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/46 (1984) (defining torture as an intentional act inflicted by or under the responsibility of public officials that causes severe pain).

⁵⁶⁶ See Respect for Human Rights in Armed Conflicts, G.A. Res. 2444, 23 U.N. GAOR, 23d Sess., Supp. No. 18, at 50, U.N. Doc. A/7433 (1968) (declaring customary IHL principle of civilian immunity and complementary principle requiring belligerents to distinguish civilians from combatants at all times).

⁵⁶⁷ See Basic Principles for the Protection of Civilian Populations in Armed Conflicts, G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc A/8028 (1971) (specifying that “every effort should be made to spare civilian populations from the ravages of war”).

⁵⁶⁸ See 1907 Hague Regulations, *supra* note 411, art. 26 (providing that the “officer in command of an attacking force, before commencing a bombardment, except in the case of an assault, do all in his power to warn the authorities”).

⁵⁶⁹ See GCIV, *supra* note 398, art. 3(1)(a) (prohibiting the application of “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” to civilians and to combatants rendered hors de combat); *id.* art. 32 (prohibiting the taking of any measures “of such a character as to cause the physical suffering or extermination of protected persons,” including “murder, torture, corporal punishments, (and) mutilation”); *id.* art. 53 (prohibiting “(a)ny destruction . . . of real or personal property . . . except where such destruction is rendered absolutely necessary by military operations”).

⁵⁷⁰ See [Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240](#), art. 4(4) (obligating states-parties to “refrain from any act directed by way of reprisals against cultural property”).

⁵⁷¹ See API, *supra* note 105, art. 35(2) (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”).

⁵⁷² API, *supra* note 105, art. 51, stating:
 (1) The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations . . . (2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. (3) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities. (4) Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. (5) Among others, the following types of attacks are to be considered as indiscriminate: (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be 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. (6) Attacks against the civilian population or civilians by way of reprisals are prohibited. (7) The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population . . . in order to attempt to shield military objectives from attacks or to shield military operations. (8) Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians . . .
 .
 Id.

⁵⁷³ API, *supra* note 105, art. 52, stating:
 (1) Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2. (2) Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to 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. (3) In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.
 Id.

⁵⁷⁴ See API, *supra* note 105, art. 53 (“(I)t is prohibited: (a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) To use such objects in support of the military effort; (c) To make such objects the object of reprisals.”).

⁵⁷⁵ API, *supra* note 105, art. 56, stating:
 1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives

located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population. 2. The special protection against attack provided by paragraph 1 shall cease: (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support; (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support; (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support. 3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces. 4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals. 5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations. 6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces. 7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

Id.

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API, *supra* note 105, art. 57, stating:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. (2) With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be 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; (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be 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; (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit. (3) When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. 4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects. 5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Id.

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See Protocol II Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(2)(a) (hereinafter APII) (providing that noncombatants and civilians are to be protected against, *inter alia*, “violence to the life, health and physical or mental well-being”).

⁵⁷⁸ See *id.* art. 13 (“The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations . . . (and) shall not be the object of attack . . .”).

⁵⁷⁹ See *id.* art. 15 (providing unqualified immunity for specified civilian facilities).

⁵⁸⁰ See *id.* art. 16 (providing for the protection of cultural objects and houses of worship without waiver in cases of necessity).

⁵⁸¹ Due to unresolved disputes over the inclusion of the use of nuclear weapons as a war crime, as of 2003 the Rome Statute does not expressly prohibit the use of WMD or other weapons systems, requiring that “weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of (IHL)” must be “the subject of a comprehensive prohibition” and be “included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.” Rome Statute, *supra* note 32, art. 8(2)(b)(xx). However, the Prosecutor might be able charge the use of riot control agents and chlorine dioxide gas by the United States as illegal methods of war, and thus war crimes, through Article 8(2)(b)(xvii) and/or (xviii), which prohibit the employment of poison and poisoned weapons as well as asphyxiating and poisonous gases. Rome Statute, *supra* note 32, art. 8(2)(b)(xvii), (xviii); see also Bailey, *supra* note 496, at 110 (arguing on behalf of this interpretation). With respect to blinding lasers, potential criminal liability under Article 8, if not Article 7, is much less clear. The ICRC has denounced blinding lasers as a cause of unnecessary suffering prohibited under existing IHL and advanced the adoption of a protocol to the CCW prohibiting the employment of “laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.” Additional Protocol to the Convention on the Prohibition or Restriction on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Protocol on Blinding Laser Weapons (Protocol IV), CCW/CONF.1/7 (Oct. 12, 1995), arts. 1, 2. Moreover, the ICRC has rejected claims that blinding lasers can inflict merely temporary blindness, that the suffering such weapons inflict are justified by the military advantage gained through their use, and that blinding lasers, as nonlethal weapons, necessarily inflict less suffering than weapons that induce fatalities. See Int’l Commn. of the Red Cross, *Blinding Weapons*, 3, 4, 7 (Louise Doswald-Beck ed., 1993) (stating that “anyone whose eyes are hit by the (laser) beam would be blinded, in most cases permanently and that “it is impossible to develop a laser which can only flash blind”). Nonetheless, the Rome Statute has not been amended to include an annex prohibiting blinding lasers, and even if this weapons system were to be characterized as prohibited by customary IHL its use is not explicitly criminalized by the Rome Statute.

⁵⁸² With respect to war crimes alleging a violation of proportionality and distinction, it is unclear whether the Rome Statute requires the Prosecutor to prove actual knowledge or practical certainty that a military operation would cause loss of life or injury to civilians or damage to civilian property clearly excessive in relation to the military advantage gained or whether a negligence standard will suffice. The actual or subjective knowledge standard imposes a heavier burden of proof than an objective, negligence-based standard which imposes liability if commanders or soldiers were unaware of a substantial risk of harm but should have known that the attack would cause collateral loss of civilian life and damage to civilian property “clearly excessive in relation to the concrete and direct overall military advantage anticipated.” Rome Statute, *supra* note 32, art. 8(2)(b)(iv).

⁵⁸³ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (holding that no customary IHL rule permits a state to self-defend absent an armed attack and that alarming military preparations undertaken by a second state justifies a report to the U.N. Security Council but not an act of anticipatory self-defense).

⁵⁸⁴ See David, *supra* note 40, at 403-04 (stating that the risk to the United States of being subjected to charges of aggression before the ICC arises only “where the United States is acting unilaterally, eschewing resort to the mechanisms of the United Nations for reasons of expediency, or fear of insufficient international support”).

Precedent bears out this assertion: when NATO employed force against the Federal Republic of Yugoslavia (hereinafter FRY) in 1999 absent U.N. Security Council authorization, FRY sued NATO members on ten separate counts in the I.C.J. alleging, inter alia, that the bombing was an illegal act of aggression. See *Legality of the Use of Force (Yugo. v. U.S.)*, 1999 (June 2), at <http://www.icj-cij.org> (dismissing case for lack of jurisdiction). For a discussion of the cases, see Gerry Simpson, *The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power*, 11 *Eur. J. Int'l L.* 439 (2000).

⁵⁸⁵ See UN Charter, *supra* note 53, art. 2(4) (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .”).

⁵⁸⁶ Quincy Wright, *The Law of the Nuremberg Trial*, 41 *Am. J. Int'l L.* 1, 1 (1947). Although the Nuremberg defendants contended that positive IHL did not prohibit aggressive war and that the principle *nulla poena sin lege* (“no punishment without law”) precluded trial on that charge, the IMT ruled against them. See *International Military Tribunal, Motion Adopted by All Defense Counsel*, Nov. 19, 1945, 1 *Trials of the Major War Criminals before the International Military Tribunal 168-70* (1945). Moreover, the chief prosecutor, Justice Robert Jackson, maintained that “(w)hile this law is first applied against German aggressors, . . . if it is to serve any useful purpose it must condemn aggression by any other nations . . .” Taylor, *supra* note 13, at 11-12.

⁵⁸⁷ David, *supra* note 40, at 395 (warning that the ICC may disagree with the United States as to the propriety of a particular use of force).

⁵⁸⁸ See Rome Statute, *supra* note 32.

⁵⁸⁹ *Id.* art. 58(1) (providing for issuance of arrest warrants by Pre-Trial Chamber upon application of Prosecutor).

⁵⁹⁰ See *id.* art. 91(1) (“A request for arrest and surrender shall be made in writing.”).

⁵⁹¹ See *id.* art. 87(5) (“The Court may invite any State not party to this Statute to provide assistance . . . on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.”).

⁵⁹² See *id.* art. 89(1) (“The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request . . . to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”).

⁵⁹³ See *id.* art. 93 (creating obligations to assist the ICC in its investigation and prosecution, including with respect to production of persons and documents and access to victims and witnesses).

⁵⁹⁴ No provision of the Rome Statute enables a requested State to set aside a request for the arrest and surrender of persons present within its jurisdiction, although Article 87(5) of the Report of the Preparatory Committee contained a provision to that effect. See [Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.83/2/Add.1](#), at 135 (1998).

⁵⁹⁵ See President George W. Bush, Address to the United Nations Security Council (Oct. 7, 2001) (“If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers themselves.”).

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International law has long justified preemptive measures in defense of life and property. See, e.g., Hugo Grotius, *De Jure Bellum Ad Pactum* 32, 75 (A.C. Campbell trans., 1901). However, the U.N. Charter narrowed the category of permissible acts of self-defense to those undertaken in response to an “armed attack” and excludes, or at least abridges, the natural right of self-defense subsequent to the moment the Security Council becomes seized of the matter. See UN 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, until the Security Council has taken measures necessary to maintain international peace and security.”) (emphasis added); Yutaka Arai-Takahashi, [Shifting Boundaries of the Right to Self-Defence--Appraising the Impact of the September 11 Attacks on Jus Ad Bellum](#), 36 *Int'l Law.* 1081, 1809 (2003) (contending that once the Security Council assumes “primary responsibility” for the restoration of international peace and security, the right to self-defense under Article 51 lapses and the threatened state must subordinate its response to this mechanism, regardless of its efficacy). Some thus contend that preemptive measures are categorically prohibited and that a state must wait to be attacked prior to defending itself. See, e.g., Bert V.A. Roling, *The Current Legal Regulation on the Use of Force* 5 (1986) (positing the restrictive theory of self-defense); Lacey, *supra* note 476, at 308 (“Without the sine qua non of imminence, (preemptive) . . . self-defense becomes nothing more than the slippery slope of naked aggression.”); Ian Brownlie, *International Law and the Use of Force By States* 112 (1963) (advocating a restrictive interpretation of Article 51). Others argue that a state need not wait for its attacker to strike first but may, consistent with Article 51, preempt such an attack, on the ground that states possess the natural legal right to take necessary and proportional measures in self-defense. See William V. O'Brien, [Reprisals, Deterrence and Self Defense in Counterterrorism Operations](#), 30 *Va. J. Int'l L.* 421, 478 (1990) (supporting right of preemptive self-defense); Oscar Schacter, [The Right of States to Use Armed Force](#), 82 *Mich. L. Rev.* 1620, 1634 (1984). Moreover, as this permissive school asserts, the natural right to self-defend can be easily harmonized with the provisions of positive law by recognizing that, where the Security Council is unable or unwilling to take measures to that end, states are freed to pursue their own salvation. Lysobey, *supra* note 497, at 127. Because “analysis of the legitimacy of an act of preemption requires replacing the objectively verifiable prerequisite of an ‘armed attack’ with the subjective perception of a ‘threat’ of such an attack in the sole judgment of the state believing itself about to be a target,” preemptive self-defense has been a thorn in the side of IHL, and the UN, since the 1960s. See S.C. Res. 178, U.N. SCOR, 18th Sess., 1033d mtg. at 1, U.N. Doc. S/RES/178 (1963) (rejecting Portuguese claim of self-defense in the shelling of Senegal); S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg. at 10, U.N. Doc. S/RES/487 (1981) (rejecting Israeli invocation of Article 51 as basis for destruction of Iraqi nuclear weapons facility at Tamuz despite Israeli evidence that the reactor was to be used to make bombs to target Israel); G.A. Res. ES-6/2, U.N. GAOR, 6th Emer. Spec. Sess., Supp. No. 1, at 2, U.N. Doc A/ES-6/7 (1980) (rejecting invocation of Article 51 by Soviet Union as justification for invasion of Afghanistan). Similarly, the ICJ, in a much-criticized and cited opinion, has held that the legitimacy of a claim to self-defense rests upon and is “subject to the State concerned having been the victim of armed attack,” thus seeming to rule out preemptive measures entirely. See [Military and Paramilitary Activities \(Nicar. v. U.S.\)](#), 1986 I.C.J. 14, at 193-95 (June 27). State practice is inconclusive: the United States is one of the few states that openly embraces the right to preemptive self-defense. W. Hays Parks, [Memorandum of Law: Executive Order 12,333 and Assassination](#), 1989 *Army Law.* 4, 7. However, international terrorism, along with the proliferation of advanced and lethal weapons systems, has invigorated the debate. Because the threat posed by the use of WMD against civilian population centers is many orders of magnitude greater than the threat of conventional weapons used against military targets, and because terrorist attacks can materialize almost without warning whereas traditional military operations are transparent to a much greater degree, several scholars consider that impending terrorist WMD attacks can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded. See Guy B. Roberts, [The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm in Prohibiting the Proliferation of Weapons of Mass Destruction](#), 27 *Denv. J. Int'l L. & Pol'y* 483, 485 (1999) (arguing that when rogue states or terrorist groups possessed of WMD directly threaten the survival of another state, the threatened state has the right to engage in “preemptive use of force to either deter acquisition plans, eliminate acquisition programs or destroy illicit WMD sites”); John Shaw, *Startling His Neighbors*, *Australian Leader Favors First Strikes*, *N.Y. Times*, Dec. 2, 2002, at A11 (quoting Australian Prime Minister Howard as stating that a politician would be “failing the most basic test of office” if he did not order preemptive action); Lacey, *supra* note 476, at 293-94 (arguing that “the threat (posed by terrorists with WMD) is simply too great for states not to act”); El-Ayouty, *supra* note 464, at 492 (stating that “in the case of universal and catastrophic terrorism . . . striking at the terrorists does not wait until a definite nexus is established between the terrorists and their actions.”). Perhaps the most compelling version of this permissive interpretation of Article 51 is as follows:

(C)ommon sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state

passively to accept its fate before it can defend itself. And, even in the face of conventional warfare, this would also seem the only realistic interpretation of the contemporary right of self-defence (sic) . . . (T)his view accords better with State practice and with the realities of modern military conditions than with the more restrictive interpretation of Article 51

Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 242 (1994), cited in Christopher Greenwood, [International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq](#), 4 *San Diego Int'l L.J.* 7, 15 (2003). In sum, the permissive interpretation would permit a state to resort to preemptive self-defense provided it has:

(1) reasonably determined that (WMD) . . . are to be used as an aggressive force against it; (2) affirmatively pursued alternative modalities of resolution and remained engaged in the diplomatic process until the ultimate moment of action; (3) acted only after the aggressor's conduct has coalesced into a coherent . . . threat; and (4) achieved minimal destruction, using only as much force as necessary to effectively eliminate the threat.

Mark E. Newcomb, [Non-Proliferation, Self-Defense, and the Korean Crisis](#), 27 *Vand. J. Transnat'l L.* 603 621 (1994) (building upon an earlier formulation in Yoram Dinstein, *Aggression and Self-Defense* 165-90 (1988)). Arguably, where the U.N. takes no action in response to a request from a threatened state, or moves too slowly to neutralize the threat, the threatened state has the natural right, as well as a right under Article 51, to take military action unilaterally or in concert with others. Moreover, with respect to terrorists in possession of WMD, it is arguable that the Security Council, with Resolutions 1368 and 1373 recognizing the inherent right of self-defense and authorizing the exercise of this right against terrorists on the territory of states unable to prevent terrorist attacks, has accepted the permissive interpretation and pre-authorized preemption. Arai-Takahashi, *supra*, at 1087. However, the law has been slow to respond, and the U.N. Charter, because of its susceptibility to interpretation as a categorical prohibition on self-defense except in the aftermath of an armed attack, presents a formidable legal obstacle to the application of customary doctrine. Moreover, the lawfulness of specific acts of preemptive self-defense often does not become apparent until long after the fact when information, tightly held by states, surfaces. See Reisman, *supra* note 108, at 17-18 (stating that, whereas most scholars condemned the 1981 Israeli attack on the Iraqi reactor, in light of the discovery that Iraq had an advanced WMD program in 1991, "now the general consensus is that it was a lawful and justified resort to unilateral, preemptive action"). Thus, in conjunction with the precedent of Nuremberg and the expansive powers of the ICC to define aggression, individuals who order or participate in preemptive self-defense in the War on Terror may incur criminal liability. See, e.g., Francis A. Boyle, *The Criminality of Nuclear Deterrence* (2002) (equating United States preemptive strike in Afghanistan with Nazi "self-defense" argument and contending that the Bush Doctrine is the primary reason for United States opposition to the ICC). In sum, the legitimacy of preemption remains an open, political, question, and the prospect that an ICC Prosecutor might deem a particular exercise of preemption a crime within ICC jurisdiction is a real possibility. David, *supra* note 40, at 393.

⁵⁹⁷ See Lacey, *supra* note 476, at 294 (arguing that the legal justification for preemptive self-defense should be the argument that states have an inherent *ius ad vitae* ("right to life") that "prevents the random annihilation of their populations from weapons of mass destruction in the hands of unstable regimes or the murder of their citizens by rogue terrorist bands").

⁵⁹⁸ As the I.C.J., presented with the question whether a threatened state could lawfully use nuclear weapons where its survival was at issue, could not reach a definitive conclusion, the position that a state may use less destructive means to protect against its eradication is, at the very least, a good-faith legal argument. See [Legality of the Threat or Use of Nuclear Weapons](#), 1996 I.C.J. 226, 266 (July 8) ("(T)he court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence (sic), in which the very survival of a State would be at stake.").

⁵⁹⁹ The Department of Defense defines "hostile intent" as "(t)he threat of imminent use of force against the (U.S.), U.S. forces, . . . U.S. nationals and their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property." CJCSI 3121.01A, *supra* note 511, at A-5.

⁶⁰⁰ President George W. Bush, *State of the Union Address* (Jan. 28, 2003), at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> ("Since when have terrorists . . . announced

their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and recriminations would come too late.”).

⁶⁰¹ A number of scholars center their post-hoc analysis of the legitimacy of preemptive self-defense on the question of whether the threatened state sought the assistance of the Security Council. For this bloc, where a state seeks such assistance but is offered none, whether through the political paralysis of that body or some other unjustifiable delay, the threatened state is tacitly granted authorization to act unilaterally and preemptively. See, e.g., David, *supra* note 40, at 402 (suggesting that failure to resort to the Security Council for assistance in reducing a threat attenuates the strength of a subsequent claim of legal legitimacy for an act of preemptive self-defense); W. Thomas & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense*, 75 *Vand. J. Transnat'l L.* 417, 427-28 (1982) (stating that legitimate claims to preemptive self-defense require as conditions precedent the unsuccessful referral of the matter to the Security Council and pursuit of “peaceful modalities of resolution,” including mediation and diplomacy). However, not all commentators that support the right of states to undertake self-help following failed resort to the Security Council concur that such resort will “obviate the need for force . . . and . . . eliminate the risk to civilians.” David, *supra* note 40, at 402.

⁶⁰² Liberal democratic social theory holds that the most important function of government is ensuring the physical safety of the governed, and international law will be interpreted by democratic governments to support this mission. See Lacey, *supra* note 476, at 313 (contending that states, as a creation of social contract, are obligated to protect their citizens from harm emanating from outside their boundaries and that “regardless of how international law describes the use of force against a . . . target, . . . (the) state will continue to fulfill its duties to its citizens”); Reisman, *supra* note 82, at 89 (“(A) government in a functioning democracy whose population faces such violence will not last long if . . . it tells its electorate that international law prevents it from taking . . . preemptive action.”).

⁶⁰³ See John Quigley, [Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters](#), 17 *Hastings Int'l & Comp. L. Rev.* 241, 241 (1994) (suggesting that the distinction between self-defense and reprisal is disappearing under a scholarly assault upon the principle of anticipatory self-defense).

⁶⁰⁴ A state may refuse to cooperate with an order or measure of the ICC on the basis of “an existing fundamental legal principle of general application.” Rome Statute, *supra* note 32, art. 93(3). Articles 72 and 93(4)-(6) permit a state to refuse assistance if the request concerns the production of any document or disclosure of evidence that relates to its national security. *Id.* arts. 72, 93(4)-(6). States are inclined to be reluctant to comply with requests for assistance with the prosecution of their own nationals, particularly if the requested assistance concerns divulging classified military matters or national intelligence product. Bert Swart & Garan Sluiter, *The International Criminal Court and International Criminal Co-operation*, in *Reflections*, *supra* note 32, at 119. However, the ICTY has ruled that state obligations to cooperate with international tribunals are extensive and that “(t)o admit that a State holding (documents concerning military operations) could lead to the stultification of international criminal proceedings,” thereby undermining the “very *raison d'être* of (international criminal tribunals).” *Prosecutor v. Blaskic*, 1997 I.C.T.Y. IT-95-14-AR-108, ¶ 65 (Oct. 29) (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997). Whether the ICC would follow this precedent is uncertain; however, if it concludes that an invocation of Article 93(4) as grounds to refuse a request is not in accordance with obligations under the Rome Statute, the ICC may refer the alleged breach to either the Assembly of States Parties or, in the case of non-parties, the Security Council. Rome Statute, *supra* note 32, art. 93(4). In other words, United States unwillingness to share sources and methods with the ICC might lead to a Security Council vote on whether the United States has a duty to share national security information with potential adversaries.

⁶⁰⁵ Some commentators suggest that the U.S., as a precondition to ICC membership, seek and receive the assurance that military operations based upon sensitive intelligence sources and methods are not criminalized in exchange for a solemn representation that its military operations will be predicated upon a good-faith belief in the legitimacy of the same. See, e.g., Ruth Wedgwood, *Speech Three: Improve the International Criminal Court*, in *Toward an International Criminal Court?*, *supra* note 35, at 67-68 (arguing further that “(g)ood faith differences in military

doctrine should be argued in military journals and the public press, not in a criminal courtroom”).

⁶⁰⁶ See Marc L. Warren, [Operational Law--A Concept Matures](#), 152 Mil. L. Rev. 33, 62 (1996) (“In combat the goal of the United States forces is always to minimize civilian casualties. . . .”); see also U.N. Security Council, Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001) (“In carrying out these (military) actions (against the Taliban regime and al Qaida), the United States is committed to minimizing civilian casualties and damage to civilian property.”).

⁶⁰⁷ Although a number of militarily significant states have not ratified either of the Protocols Additional, several scholars, as well as many human rights NGOs and at least one international tribunal, contend that API and APII in their totality have reached the **status** of customary IHL and are thus binding even upon non-parties. See, e.g., Frits Kalshoven, *Prohibitions or Restrictions on the Use of Methods and Means of Warfare*, in *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective* 97, 99 (Ige K. Dekker & Harry H.G. Post eds., 1992); Stefan Oerter, *Methods and Means of Combat*, in *The Handbook of Humanitarian Law in Armed Conflicts* 111-13 (Dieter Fleck ed., 1995); *Prosecutor v. Tadic*, 1995 I.C.T.Y. IT-94-1-AR-72, ¶ 117 (Oct. 2) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (“Many provisions of (the Protocols Additional are now) declaratory of existing rules or . . . (have) crystallised (sic) emerging rules of customary law or else . . . (have) been strongly instrumental in their evolution as general principles.”). However, the drafters of the Rome Statute could not reach an agreement as to whether some or all of contents of the Protocols Additional have risen to level of CIL. Bassiouni, *supra* note 34. Several major military powers, including the U.S., have either refused to ratify the Protocols Additional or have entered extensive reservations, contradicting the claim to **status** as customary IHL. Parkerson, *supra* note 511, at 51. The official position of the U.S., which has signed but not ratified either instrument, maintains that, while various provisions of the Protocols Additional, such as the principle of distinction in targeting set forth in Articles 48 and 49 of API as well as the principle of proportionality codified at Article 57 of API, are expressive of customary IHL, many others are not, including, inter alia, restrictions in Article 56, API, and Article 16, APII, on attacks against civilian facilities converted to military use, the blurring of the distinction between combatants and noncombatants, the presumption of the civilian character of facilities, the abdication of the responsibility for protecting civilians on the part of defending forces, and the relaxing of other obligations. See George H. Aldrich, [Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions](#), 85 Am. J. Int’l L. 1, 12 (1991) (noting statements of understanding offered by the United States Delegation during the negotiation of API); Letter of Submittal from Secretary of State George P. Shultz, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of victims of Noninternational Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 11th Sess., at VII, IX (1987) (enumerating Department of Defense objections, including that the Protocols “grant() guerrillas a legal **status** that often is superior to that accorded to regular forces, . . . unreasonably restrict() attacks against . . . legitimate military targets, . . . (and are) too ambiguous and complicated to use as a practical guide for military operations”). Moreover, for the United States and several other advanced military powers, the Protocols Additional are less a serious attempt to regulate armed conflict than an incorporation of the “political and propagandistic goals of certain delegations, and a number of the Protocol’s provisions simply cannot be reconciled with the basic realities of military strategy and tactics.” Roberts, *supra* note 15, at 168.

⁶⁰⁸ Terrorists, along with rogue states, have made a practice of siting weapons and forces in and in close proximity to sites legally protected under IHL, including hospitals, religious buildings, and archaeological sites, “precisely to make public charges of indiscriminate use of force and of war crimes to the international community through the mass media.” Mark J. Osiel, [Obeying Orders: Atrocity, Military Discipline and the Law of War](#), 86 Cal. L. Rev. 939, 988 (1998). This strategy is intended to confer a degree of immunity upon defenders, for some attackers are loathe to attack churches, medical institutions, and cultural monuments, while some commentators dispute the notion that such facilities can ever be construed to make an “effective contribution to military action” despite their investiture with troops or war materiel. See Kalshoven, *supra* note 28, at 89-90 (positing a broad view of the protections due to categories of facilities). However, defenders who elect this strategy present attackers with factual circumstances that support the legal argument that sites invested with military significance are thereby divested of their immunities as civilian facilities. See API, *supra* note 105, art. 52(2), (3) (limiting attacks to “military objectives,” defined as

"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, . . . offers a definite military of advantage" and providing that doubts as to whether an object is a military objective are to be resolved in favor of a determination of civilian status); Hague Convention of 1907, *supra* note 96, art. 27 (permitting attacks against civilian facilities stripped of civilian character by virtue of their use by the enemy in support of the military effort).

From the United States perspective the question of whether a facility is a legitimate military objective is ultimately a fact-intensive inquiry, and where attackers discover that an otherwise-immunized facility has been converted by defenders to the "efficient conduct of hostilities and minimization of their casualties," attackers are not likely to presume the contrary to their peril. Roberts, *supra* note 15, at 150 (warning of "dire consequences" for attackers who refuse to engage such targets). During the negotiation of API, the United States Delegation made numerous statements regarding their understandings of the text, including, *inter alia*, 1) that Article 52 prohibits only those attacks directed against nonmilitary objectives and does not prohibit incidental collateral damage resulting from attacks on military objectives; (2) that if cultural objects and places of worship protected by Article 53 are used in support of the military effort they lose the special protection of that article; (3) that in relation to Articles 51-58, commanders and others responsible for planning, ordering, or executing attacks necessarily must reach decisions on the basis of information available to them at the relevant moment of decision, rather than in hindsight. Aldrich, *supra* note 608, at 18. The United States made similar expressions of understanding with respect to APII that indicated that "(t)he United States understands that Article 16 (of APII) establishes a special protection for a limited class of objects that, because of their recognized importance, constitute a part of the cultural and spiritual heritage of people, and that such objects will lose their protection if they are used in support of the military effort." State Department Report Submitted to President Reagan, S. Treaty Doc. No. 2, at 7 (1987). Thus, according to the U.S., where defenders, who share with attackers responsibility for reducing the risks faced by civilians, unilaterally strip otherwise protected sites of their immunity, these sites, whether they be schools, nuclear plants, hospitals, or mosques, are by their actions converted into legitimate military targets. See Aldrich, *supra* note 608, at 12 (stating that attacks against otherwise protected nuclear generating stations are permitted as militarily necessary where such stations are furnishing power to military facilities or used for weapons research or stockpiling); Meron, *supra* note 12, at 277 (contending that targets with a generally civilian character may be lawfully attacked if they meet the definition of military objective under API, art. 52(2)); [U.S. Dep't of Defense, Report To Congress On The Conduct Of The Persian Gulf War--Appendix on the Role of the Law of War, 31 I.L.M. 612, 627 \(1992\)](#) (stating unequivocally that, when civilian structures are invested with weapons or defending troops, these structures become legitimate military targets under the rule of military necessity); U.S. Dep't of Air Force, *International Law--The Conduct of Armed Conflict and Air Operations*, AFP 110-31, at 5-11 (1976) (hereinafter AFP 110-31) (same). Some, including a number of NGOs, contest the United States interpretation, suggesting that enumerated categories of facilities can never be divested of civilian character. See, e.g., *Civilian Deaths in the NATO Air Campaign* 12 Human Rts. Watch (2000), at [http:// www.hrw.org/reports/2000/nato/index.htm](http://www.hrw.org/reports/2000/nato/index.htm) (charging NATO targeting of bridges and communications used by Yugoslavia in support of war effort against NATO as war crimes in violation of targeting restrictions imposed by Articles 51-58, API). These redefinitions of legitimate military targets, posited by what one commentator terms an "extreme" and "fringe" group, are influencing international jurisprudence. Jeanne Meyer, [Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine](#), 51 A.F. L. Rev. 143, 164-65 (2001). However, if, as the United States and other states contend, the Protocols Additional, particularly Articles 51-58, are not yet expressive of customary IHL, the United States position is a permissible interpretation of the sole applicable IHL instrument governing restraints on targeting, the Hague Regulations of 1907, which are silent with respect to the targeting of particular categories of facilities. Whether the deliberate targeting of civilians to shatter enemy morale is permissible under the Hague Regulations is beyond the scope and purpose of this Article; it suffices to note in passing that the United States Air Force answers the question in the affirmative. See Meyer, [supra](#), at 172 (stating that current Air Force doctrine "clearly recognizes and allows for . . . choosing targets that also affect the enemy's will and morale, both of their military forces and their civilian population").

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Although the API proscribes attacks against targets likely to release "dangerous forces" for the sole purpose of killing civilians via such release and requires attacking parties to take "all practical precautions" to avoid the escape of "dangerous forces" from targets likely to release such forces, it does not categorically proscribe attacks on such targets, nor does it define what sort of measures are within the bounds of the practical. API, *supra* note 105, art. 56. By selecting those tactics and weapons most likely to minimize the release of dangerous forces and providing warning where possible, attacking forces are most likely to substantiate the claim that they have taken "all practical

precautions.” Parkerson, *supra* note 511, at 62; see also API, *supra* note 105, art. 51(4)(c) (proscribing methods and means of attack that cannot be controlled sufficiently to protect civilians from injury). In comparison to aerial bombardment, which requires significantly more ordnance and increases the potential for errant targeting and collateral damage, a ground assault, while more dangerous to attacking forces, permits the surgical application of force and enhances opportunities to limit collateral damage. See Lewis, *supra* note 523, at 489 (noting that only when the the Secretary of Defense and the Chairman of the Joint Chiefs of Staff were assured that Iraqi BWs could be targeted by air without significant civilian casualties was the order given to do so with incendiary weapons); Michele L. Malvesti, [Bombing Bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy](#), 26 Fletcher F. World Aff. 17 (2002). Thus, the U.S., by employing SF to eliminate BWs in the Central Mosque, would arguably be judged by an independent reviewer to have taken “all practical precautions” in preventing collateral damage. See Michael Ignatieff, *Virtual War: Kosovo and Beyond* 214-15 (2000) (arguing that use of ground forces to eliminate a target, rather than standoff weapons, is far more likely to guard against the “moral danger” of avoiding risk to one’s own forces while enhancing risks to noncombatants).

⁶¹⁰ Assault confers upon attacking forces the tactical advantage of surprise, which is lost when a defender gains prior warning and is able to prepare defenses, and, in relevant circumstances, even relocate WMD. Parkerson, *supra* note 511, at 49. IHL concedes that military necessity may require attacking forces to attack without warning. Article 26 of the Hague Regulations of 1907, *supra* note 410, obligates attacking forces, where circumstances permit, to grant advance warning of an intended assault in order to permit the evacuation of civilians from the target area; the development of state practice since 1907 indicates that derogation is permitted where “circumstances do not permit advanced warning.” Oppenheim, *supra* note 309, at 420. Similarly, Article 57(2)(c) of API provides that “(e)ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” (emphasis added). United States practice reinforces the conclusion that the obligation to grant warning is limited: paragraph 43(c) of FM 27-10 limits circumstances in which a warning is required to those “whe(re) the situation permits,” and United States forces have withheld warnings in recent operations on the ground that to have issued warnings would have increased casualties to attacking and defending forces as well as to civilians. See Parkerson, *supra* note 511, at 48-50 (discussing legal questions related to warnings to defending forces during Operation Just Cause in Panama (1989)).

⁶¹¹ The felony murder doctrine, developed at common-law and codified in several States, provides that any death which occurs during the commission of a felony is first degree murder, and all participants in that felony or attempted felony can be charged with and found guilty of murder. See [Ind. Code § 35-42-1-1](#) (Supp. 2002) (“A person who . . . kills another human being while committing or attempting to commit (a felony) commits murder . . .”).

⁶¹² API obligates the defending party “to the maximum extent feasible” to remove civilians from the area of military objectives, to locate such objectives away from densely populated areas, and to take other precautions to protect civilians. API, *supra* note 105, art. 58(a). Even more pointedly, Article 51(7), along with Article 28 of GCIII, imposes a duty upon the defender to avoid using civilians to shield military objectives. API, *supra* note 105, art. 51(7); see also GCIII, *supra* note 398, art. 28 (providing that civilians may not be used to render an area immune). Thus, when defending forces fail to remove civilians from the area of military objectives, resulting civilian casualties are arguably attributable to this breach of the defender. See AFP 110-31, *supra* note 609, at 5-13 (“A party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise lawful attacks upon valid military objectives in their territory.”).

⁶¹³ In upholding obligations under proportionality and distinction to minimize incidental loss of civilian life, military planners consider a wide range of factors, including 1) the military importance of the target or objective, 2) the density of the civilian population in the target area, 3) the likely incidental effects of the attack, including the possible release of hazardous substances, 4) the types of weapons available and their accuracy, 5) whether the defenders are deliberately exposing civilians or civilian objects to risk, and 6) the mode and the timing of the attack. However, in so doing, military planners are hampered by imperfect information, the fog of war, the imperative of military necessity, and the need to make rapid decisions. Commentators attempting to establish the legal standard

under which to impose liability upon belligerents for violations of IHL committed in the process of target selection and mission tailoring offer what is essentially a gross negligence, rather than an absolute liability, standard, suggesting that the relevant question to be asked and answered after the fact is whether a “normally alert attacker who is reasonably well informed and who ma(de) reasonable use of the available information could have expected the excessive damage among the civilian population” in prosecuting an attack against a given target with the means and methods selected. Kalshoven, *supra* note 28, at 99-100. Determination of liability under a negligence standard thus is a factual question which rests upon an assessment of the information actually or reasonably available to the attacker at the time the decision was made to target a given site with particular means and methods. See David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense and State Responsibility*, 16 *Yale J. Int'l L.* 245, 366-74 (1992) (discussing application of negligence standard to assess liability for deaths of civilians resulting from the mistaken targeting of a civilian airliner believed to be a military aircraft).

⁶¹⁴ See [Dep't of Defense, Report To Congress On The Conduct Of The Persian Gulf War--Appendix on the Role of the Law of War](#), 31 *I.L.M.* 612, 624 (1992) (concluding that civilian casualties are inevitable in modern military operations); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offence*, 7 *Duke J. Comp. & Int'l L.* 539 (1997) (same).

⁶¹⁵ Whereas crimes against humanity implies intentional targeting of civilians, the war crime of committing an unlawful attack envisages circumstances where unintended civilian deaths or injuries result in the course of an attack against a legitimate target. See Rome Statute, *supra* note 32, art. 8 (creating liability solely for the intentional commission of enumerated crimes against civilian victims in violation of the principle of distinction but maintaining silence with respect to the principle of proportionality); cf. *id.* art. 8 (note); Fenrick, *supra* note 12, at 783 (arguing against expansion of conceptual definition of crimes against humanity to incorporate the crime of creating disproportionate civilian casualties during an attack on the ground that to do so could theoretically criminalize the conduct of all soldiers, depending upon how proportionality is determined, and thereby remove legal incentives for moderation during armed conflicts).

⁶¹⁶ See Parkerson, *supra* note 511, at 59 (noting that although the general principles of distinction and proportionality elaborated in API are “unobjectionable as customary (IHL) . . . (a)ssessing what is the ‘concrete and direct military advantage anticipated,’ the ‘incidental loss of civilian life, injury to civilians or damage to civilian objects’ that may be expected, or the ratio between the two prior to attack is an extremely difficult, if not impossible, task to perform with any degree of certainty”). Several states and commentators challenge Article 51(4)(c) of API as constituting a “radical revision of the inherited principle of distinction” in that it would not permit the continued immunization of attacks not intentionally directed against civilian targets where such attacks employed “method(s) and means of combat” that had the effect of causing disproportionate civilian casualties. See Dawes, *supra* note 222, at 242-43 (rejecting the substitution of a proportionality determination, assessed by an evaluation of the method and weapons employed in an attack, for the intent of the combatant as the relevant evidence in determining compliance with the principle of distinction). Other commentators, favoring the modifications of API, have operationalized legal obligations under the principles of proportionality and distinction by suggesting that the two are so interrelated that, although adherence to the principle of distinction does not require that an attack produce no civilian casualties, an attacker must simply strike a balance between the value of the military advantage gained and the collateral damage produced--in other words, distinction drops away (save for those cases involving the intentional targeting of civilians) and what is left is simply that the attacker not violate the principle of proportionality by using excessive force or by using particular weapons systems where less lethal alternatives are available. See, e.g., Belt, *supra* note 42, at 148; Parkerson, *supra* note 511, at 62 (indicating that some adherents to this position consider that the United States doctrine of “‘highly sophisticated weaponry and tactics to present an overwhelming superiority of firepower that would make any resistance unthinkable,’ unnecessarily cause(s) civilian casualties and therefore (ipso facto) violate(s) the proportionality principle); Belt, *supra* note 42, at 173 (reporting arguments that the United States practice of employing precision-guided munitions (hereinafter PGMs) over the last ten years has modified the meaning of proportionality to require the use of PGMs in urban areas). In sum, determination of proportionality is an inherently political exercise, since the value of a military objective, as well as how many civilian casualties are necessary to constitute “unduly severe losses,” is a function of interests rather than law.

⁶¹⁷ Americas Watch, a human rights NGO, has intimated that it is possible to draw inferences as to United States compliance with the principles of distinction and proportionality by comparing the number of civilian dead resulting from a United States military operation to the number of casualties suffered by attacking United States forces. See Parkerson, *supra* note 511, at 61 n.155 (decrying the use of this compliance determination protocol by Americas Watch as a “macabre and distorted method of viewing proportionality”). The unstated assumption is that some proper proportion of military casualties to civilian casualties exists against which United States operations can be assessed for compliance with IHL and that insufficient military casualties permit the inference that an operation was not sufficiently protective of civilians. *Id.* Unsurprisingly, this view is diametrically opposed by the view that in evaluating compliance with the principle of proportionality by assessing whether the degree of force used was necessary to accomplish a legitimate military objective, “we are entitled to take into account not only the force needed to subdue the military force of the enemy, but also the danger posed to our (U.S.) forces, when proceeding to subdue the enemy force, within the framework of the military action of defending against (the enemy.)”. Gross, *supra* note 87, at 237.

⁶¹⁸ See Parkerson, *supra* note 511, at 59 (“(P)rior to attack, the attacking commander knows much less than the defender about the location of civilians(.) . . . (and) (t)herefore the emphasis in Protocol I on placing the primary responsibility for minimization of incidental civilian casualties upon the attacker, rather than upon the more informed defender . . . encourag(es) defenders to charge ‘indiscriminate attack’ and to call for analysis of attack results without consideration of the cause of those casualties, thereby exploiting civilians for tactical and propaganda purposes.”).

⁶¹⁹ See O’Brien, *supra* note 339, at 123 (stating that United States violations of proportionality and distinction in Vietnam was “in substantial measure the result of deliberate Communist policies of using the population as a shield(.) (as) (o)ften it was impossible to get at the enemy without risking disproportionate and indiscriminate actions.”).

⁶²⁰ Parkerson, *supra* note 511, at 139-40.

⁶²¹ Traditionally, terrorist groups did not come within the application of IHL, a regime framed in contemplation of wars between regular military forces; terrorists were classed as common criminals. See generally Kwakwa, *supra* note 3.

⁶²² Quoting Walzer, *supra* note 12, at 195. Terrorists are heavily reliant upon secrecy and surprise, and largely immune from considerations of ethics and morality. Baxter, *supra* note 12, at 328. To maximize secrecy and minimize the risk of drawing hostile fire, terrorists often site their operations within densely populated civilian centers in the expectation that their adversaries will be loathe to attack them for fear of creating incidental civilian casualties and arousing condemnation. See Walzer, *supra* note 12, at 180 (“If you want to fight against us, the (terrorists) say, you are going to have to fight civilians . . . Therefore, you should not fight at all, and if you do, you are the barbarians, killing women and children.”). Although the practice is contrary to law and hostile to the civilian populations wherein they take refuge, and although the United States does not succumb to the urge to violate distinction in order to counter the strategy, terrorists’ refusal to distinguish themselves from civilian populations “invites enemies to attack civilians because the civilians might be (terrorists) in disguise.” Laura Lopez, [Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts](#), 69 N.Y.U. L. Rev. 916, 929 (1994).

⁶²³ The taking of civilian hostages as human shields to protect against enemy fire is categorically prohibited by GCIV as a grave breach. See GCIV, *supra* note 398, art. 34. A determination of the legal ramifications of the wearing of civilian clothing into battle requires deeper analysis, although the Geneva Conventions do not treat the wearing of civilian clothing into combat as a grave breach. See GCIII, *supra* note 398, art. 130 (enumerating grave breaches and providing that the perfidious wearing of enemy uniforms, but not the wearing of civilian clothing per se, constitutes a grave breach). Still, to preserve the capacity for belligerent forces to distinguish between combatants and noncombatants and thereby uphold obligations under the principle of distinction, IHL has long required combatants, as a matter of custom, to dress so as to distinguish themselves from the civilian population and permit enemy forces

to clearly identify permissible, and impermissible, targets. See U.S. Dep't of Army, Protocols to the Geneva Conventions of 12 August 1949, DAP 27-1-1, at 138 (1979) (hereinafter DAP 27-1-1) (noting that customary IHL requires those claiming entitlement to belligerent **status** upon capture to be under the command of a responsible commander, to wear a fixed, distinctive sign recognizable at a distance, to carry arms openly, and to conduct operations in accordance with IHL). The positive rules of IHL reinforce this custom by stripping the benefits to which **POWs** are entitled upon capture from belligerents who do not conform to these requirements by, e.g., fighting out of uniform. See GCIII, *supra* note 398, art. 4(a)(2) (codifying customary IHL with respect to the elements of conduct required of belligerents to maintain their entitlement to **status** as **POWs**, immune from trial for acts of lawful belligerency, upon capture); GCIII, *supra* note 398, art. 85 (entitling **POWs** to protections of the GCs even if prosecuted for pre-capture offenses). Under the Geneva Conventions, even as modified by the Protocols Additional, terrorists, who adhere to none of these obligations, are thus common criminals not entitled to **POW status** upon capture and may, in contrast to **POWs**, be tried as unlawful combatants under the domestic law of the detaining state. Baxter, *supra* note 12, at 338 (explaining that this legal **status** extends to spies, saboteurs, guerrillas and all others who fail to meet the conditions established under international law for favored treatment upon capture by "engag(ing) in hostile conduct without meeting the qualifications established by Article 4 of the (GCs)"); see also *id.* at 328 (stating that such unlawful belligerents are "subject to the maximum penalty which the detaining belligerent desires to impose"); API, *supra* note 105, art. 44 (providing that combatants who do not carry arms openly while preparing for or engaging in hostilities are acting perfidiously and thus disentitle themselves to **POW status** upon capture and may be tried under the domestic law of the capturing state). The same is true of civilians who take up arms without donning a uniform: they lose their protected **status** under IHL and become combatants, albeit unlawfully, and thus legitimate targets as well as the legitimate subjects of post-capture judicial proceedings. See GCIV, *supra* note 398, art. 4(a)(2) (defining noncombatancy and enumerating categories of noncombatants, including civilians, soldiers rendered hors de combat by wounds or capture, and medical personnel); *id.* art. 5(3) (stripping protections as noncombatants from civilians who take up arms); API, *supra* note 105, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."); Ramsey, *supra* note 45, at 435-36 (explaining that "'combatant' means anyone who is an actual bearer of the force one seeks to repress by resorting to arms"). This is true without regard to the age or sex of the civilian who becomes an unlawful combatant. Ilene Cohn & Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict* 148 (1994) (noting that even women and children lose their protected **status** under IHL when they render military assistance to a belligerent). The question of whether providing material support to a belligerent without actually taking up arms, whether by destroying enemy property, providing intelligence support, or in some other fashion, converts a civilian out of uniform into an unlawful combatant is a relevant issue beyond the scope of this Article. See Lisa L. Turner & Lynn G. Norton, 51 A.F. L. Rev. 1, 26-28 (2001) (arguing that the answer must be judged on a "case-by-case basis"); Faculty, The Judge Advocate General's School, [United Nations Convention on the Safety of United Nations \(UN\) and Associated Personnel Enters into Force, 1999 Army Law 21, 27](#) (arguing that civilians forfeit immunity from attack "whenever they take any action intended to cause actual harm to the personnel and equipment of an armed force."); but see ICRC, Commentary on the Geneva Convention (IV) 51 (Jean S. Pictet ed., 1952) ("Every person in enemy hands must have some **status** under international law: he is either a prisoner of war and, as such, covered by (GCIII), a civilian covered by (GCIV), or again, a member of the medical personnel of the armed forces who is covered by (GCI) . . . Nobody in enemy hands can be outside the law."). Similarly, disagreements over the provisions of API which create a presumption of civilian **status** is beyond the current scope, as is the current controversy over whether the designation by the Bush Administration of individual belligerents captured in the War on Terror as "unlawful combatants" creates a separate juridical **status** of persons not privileged either as civilians or as lawful belligerents to whom the protections of the GCs are not available. See API, *supra* note 105, art. 50 (defining as a civilian a person who "does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of (GCIII) and in Article 43 of this Protocol" and providing that "(i)n case of doubt . . . that person shall be considered a civilian").

Although the requirements that must be met to entitle an individual to treatment as a lawful belligerent upon capture were fairly well-settled under the Geneva Convention, API unsettled this body of law, and the requirements that would-be lawful combatants must uphold during a "military deployment preceding the launching of an attack" are now the subject of heated contestation. Article 44 of API provides that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack," but Article 43 eliminates part of the juridical distinction between soldiers and civilians by deleting the requirement that irregular forces wear a distinctive symbol and providing that irregular forces are lawful combatants if they meet the lesser obligations of organization under a responsible commander, adherence to IHL, and a

relationship to “a Party to the conflict.” API, *supra* note 105, art. 43. These two articles have been roundly condemned for blurring the principle of distinction between combatants and noncombatants and permitting interpretations of its text that would unilaterally allow “guerrillas” to disguise themselves as civilians, hide amongst civilian populations until just before the moment of an attack, produce insignia and weapons at the very moment of an assault launched from within the cover of the civilian population, draw fire from enemy forces that will have great difficulty discerning combatants from civilians (many of whom will be unintentionally killed as a result), and evade criminal liability for these actions, viewed widely as unlawful combatancy, upon capture. See George H. Aldrich, [Civilian Immunity and the Principle of Distinction: Guerilla Combatants and Prisoner of War Status](#), 31 *Am. U. L. Rev.* 871, 873 (1982) (stating that the modifications to the Geneva Conventions proposed by API “virtually assure() that guerrillas . . . will disguise themselves as civilians and that the civilian population will suffer as a result”); DAP 27-1-1, *supra* note 50, at 138-39 (discussing official United States objections to Articles 43-44 of API); Kwakwa, *supra* note 4, at 90 (parsing Article 43 of API and identifying erosion of obligations incumbent upon irregular forces; L. Green, *The New Law of Armed Conflict*, 15 *Can. Y.B. Int’l L.* 3, 14 (1977) (suggesting that if Article 44 is read to permit irregular forces to disguise their status for almost the entirety of their operations it will sully the principle of distinction and leave exposed the civilians it is designed to protect). In light of the foregoing, the answer to the question of whether members of al Qaida could be considered unlawful combatants during their counterattack on the Alpha teams during Operation Jeremiah is a function of applicable law, which remains unsettled, contested, and ultimately a political issue. Clearly, however, the taking of civilian hostages constitutes a grave breach of the GCIV, and thus a prosecutable war crime. For a thorough discussion of the concept of unlawful combatancy, see Manooher Mofidi & Amy E. Eckert, [“Unlawful Combatants” or “Prisoners of War”: The Law and Politics of Labels](#), 36 *Cornell Int’l L.J.* 59 (2003).

⁶²⁴ Just as states possess the inherent right to self-defense, individuals possess the right, under IHL, to defend themselves against attack. See *Trial of Eric Weiss and Wilhelm Mundo*, 13 U.N. War Crimes Comm’n, Law Reports of Trials of War Criminals 149-51 (William S. Hein Co. 1997) (1949) (holding, in acquitting Erich Weiss and Wilhelm Mundo, tried on 9-10 November 1945 by United States military commission for the alleged unlawful killing of a United States POW, that “self-defense which, according to principles of penal law is an exonerating circumstances in the field of common penal law offenses when properly established, is also relevant, on similar grounds, in the sphere of war crimes”). Actions taken in self-defense must be necessary and proportional to the threat. See *United States v. Carl Krauch*, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1081, 1179 (1952) (restricting the defense of self-defense to those instances where actions taken in self-defense are necessary and proportional).

⁶²⁵ Faculty, *supra* note 624, at 30.

⁶²⁶ Although the United States is a party to the Conventional Weapons Convention (hereinafter CWC) it has entered extensive reservations and accepted only parts of that instrument as binding, including Protocol I (prohibiting use of weapons that create fragments not detectable by x-ray) and Protocol II (concerning use of mines and booby traps); it has not accepted Protocols III (banning incendiary weapons) or Protocol IV (prohibiting blinding weapons). Commentators suggest that although the United States does not recognize Protocol IV it is adhering to it. See David Atkinson, *New Weapons Technologies Offer Complex Issues for Review*, *Def. Daily*, Sept. 1, 1999, at 1 (quoting W. Hayes Parks, Special Assistant to United States Army Judge Advocate General) (“We are not parties to (Protocol IV) but we are abiding by it.”). For a list of CWC parties, see <http://www.icrc.org/ihl.nsf>.

⁶²⁷ Official United States policy has long approved the use of riot control agents (hereinafter RCAs), *supra* note 526, to aid in the rescue of downed aircrews and the dispersal of civilians being used as human shields. See [Exec. Order No. 11,850](#), 40 *Fed. Reg.* 16,187 (Apr. 8, 1975); Chairman of the Joint Chiefs of Staff Instruction 3110.07, Nuclear, Biological, and Chemical Defense; Riot Control Agents; and Non-Lethal Weapons (July 3, 1995) (authorizing and instructing United States Armed Forces in the use of RCAs). Although neither the Executive Order nor the Instruction have been superseded, the United States Senate ratified the Chemical Weapons Convention in 1997, and President Clinton took the position that the CWC prohibits RCAs as analogous to prohibited chemical weapons. Warren, *supra* note 108, at 55 n.91. The interpretation of the Clinton Administration is not binding upon successor

administrations, which in future conflicts might well order the use of RCAs on the ground that such weapons are non-lethal alternatives effective in particular tactical situations and do so consistent with their belief that RCAs are not prohibited under existing IHL.

⁶²⁸ The United States has developed and deployed portable ground-based low-energy lasers for target-marking and range-finding but has not officially sanctioned their use, although at least one commentator suggests that their use in force protection and reprisal is consistent with IHL. See, e.g., Carnahan, *supra* note 525; Noone, *supra* note 89 at 27-35. Other commentators maintain that blinding lasers are necessarily prohibited means of warfare in that they unavoidably cause unnecessary suffering. See Carnahan, *supra* note 525, at 730-31 (summarizing but criticizing position that laser weapons are of no military value and categorically illegal).

⁶²⁹ See Hague Convention of 1907, *supra* note 96 (prohibiting methods and means that create “unnecessary suffering”).

⁶³⁰ See Carnahan, *supra* note 525, at 712 (“‘(U)nnecessary suffering’ implies that there is such a thing as ‘necessary suffering,’ because ‘the infliction of some suffering and injury (is) an inherent feature of armed conflict.’”)

⁶³¹ In determining whether a given weapon inflicts unnecessary suffering it is necessary to consider not merely the extent of that suffering but to balance it with the effectiveness of that weapon, and military effectiveness is calculated by measuring the success in destroying or neutralizing military material, in restricting the movement of enemy forces, in interdicting enemy lines of communication and command, in depressing enemy morale and elevating friendly morale, in eroding the stamina and cohesion of enemy forces, and in enhancing the security of friendly forces. Carnahan, *supra* note 525, at 713. Soldiers can only carry so much equipment on any given mission and are never able to access the entire range of weapons in their national arsenals, and commanders must make decisions, based on information available, in equipping their forces. North Atlantic Treaty Organization, *Non-Lethal Weapons*, Lord Lyell (United Kingdom) General Rapporteur 1, STC (97)8 (Sept. 1, 1997). Moreover, where alternate weapons are unavailable, too costly, or ineffective, the use of the chosen weapons system is entitled to a presumption that it does not cause unnecessary suffering. Carnahan, *supra* note 525, at 713.

⁶³² Prior to the 1920s, unquestioning obedience was demanded of soldiers, and soldiers who followed superior orders enjoyed absolute immunity for violations of IHL, as did the high government officials who issued such orders. Rogers, *supra* note 42, at 137; Wells, *supra* note 216, at xiv (stating that prior to 1944 United States soldiers were expected to obey orders without questioning their legal legitimacy). The domestic military regulations of leading states explicitly exempted soldiers acting on superior orders from criminal liability. See, e.g., *Rules of Land Warfare* (1917), *supra* note 561, at ¶ 366 (exempting from liability those whose violations of IHL were committed under orders from their “government” or “commanders”); *R. v. Smith*, 17 S.C. 561 (Cape of Good Hope 1900) (acquitting a British soldier who obeyed an order to shoot a civilian who refused to assist the British military effort on the ground that the 1899 Manual of Military Law provided that obedience to superior orders was an absolute defense and soldiers were entitled to rely upon the lawfulness of the orders issuing from their superiors). The Nuremberg Tribunals began to erode superior orders as a defense, confining it to mitigation of punishment and refusing to permit its applicability as a defense. See *Charter of the IMT*, *supra* note 33, art. 8. Anticipating this transformation, as well as the impending prosecution of Axis defendants, the U.S., under the direction of Army Chief of Staff General George C. Marshall, modified its *Rules of Land Warfare* in November 1944 to provide that superior orders did not automatically immunize the commission of manifestly unlawful acts. See *Rules of Land Warfare* (1944), *supra* note 315, at ¶ 345.1 (amending previous version of superior orders defense to permit prosecution of individuals for manifestly unlawful acts). Although manifestly unlawful acts are generally described as those horrific and ghastly deeds which are objectively and gravely morally wrong and positively and clearly prohibited by law, specification of the exact set of such acts is difficult, as the law changes over time, and many of the acts soldiers can be lawfully ordered to undertake--namely, the deliberate killing of strangers--evoke the sentiments of intense revulsion, remorse, disgust, and horror that follow directly upon the heels of the commission of a manifestly unlawful act, such as the deliberate killing of POWs, the execution of schoolchildren, and rape. See Osiel, *supra* note 23, at 113-14 (discussing manifest illegality in depth). The grave breaches provisions supply a ready enumeration of manifestly

illegal acts, and most national codes of military regulation accept that a soldier may presume the lawfulness of superior orders and be excused from punishment for executing those orders if they prove unlawful provided the acts required of him by those orders neither run afoul of the grave breaches provisions nor “involve acts so transparently wicked as to foreclose any reasonable mistake concerning their legality.” *Id.* at 5 (“The law is now generally understood to require that soldiers resolve all doubts about the legality of a superior’s orders in favor of obedience. It therefore excuses compliance with an illegal order unless (the order is manifestly unlawful)”). The corollary to this compromise is that a soldier who commits acts of manifest illegality may not defend himself by asserting reliance upon superior orders.

Contemporary United States military regulations track this formulation closely, providing that courts-martial are prohibited from issuing jury instructions as to the superior orders defense in cases alleging the commission of manifestly illegal acts but free to do so in cases where a defendant reasonably did not know that the act giving rise to the allegation of a war crime was unlawful. *The Law of Land Warfare* (1956), *supra* note 43, ¶ 509. Paragraph 509 states the following:

(a) The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

(b) In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.

Id.; [U.S. v. Calley, 48 C.M.R. 19, 27 \(1973-74\)](#) (“The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior’s order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.”); [U.S. v. Griffen, 39 C.M.R. 586, 588 \(1968\)](#) (same).

The legal issue to be determined at a United States court-martial is thus whether the act giving rise to the specification with which the defendant was charged constitutes a manifestly illegal act for which the superior orders defense is unavailable. The Rome Statute, however, is silent as to the availability of a superior orders defense, suggesting either that the entirety of its jurisdiction is concerned with manifestly unlawful acts or that the negotiating parties intended to eliminate the defense.

⁶³³ For arguments supporting and criticizing the proposition that military personnel who follow orders resulting in extensive civilian deaths and destruction can be held criminally responsible on the theory that reasonable military personnel would have recognized that the orders required the commission of manifestly unlawful acts, a position essentially identical to that staked out by the ICC Prosecutor in this fictional scenario see Richard Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 *Am. J. Int’l L.* 759 (1965) (discussing the conclusion by a Tokyo District Court that the United States bombing of Hiroshima and Nagasaki violated the principles of proportionality and distinction under IHL).

⁶³⁴ See *supra* note 560 (discussing the absolute liability standard of command responsibility proposed by several scholars). The ICC might in theory interpret Article 28 of the Rome Statute to create *de facto* absolute liability of commanders for the acts of their subordinates by dispensing with the element that a commander either order an unlawful act or demonstrate gross and wanton negligence by failing to train and supervise his troops and failing to investigate and/or prosecute wrongdoing. See *infra* note 637. However, such an interpretation, even if it were to attain the **status** of customary IHL, would not be directly enforceable in United States courts-martial or in civilian courts of the U.S. . Customary international law is inferior to statutory law and will not be enforced in United States courts where there is a statute contrary to the international rule. [United States v. Yunis, 924 F.2d 1086, 1091 \(D.C. Cir. 1991\)](#); [Committee of Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 \(D.C. Cir. 1988\)](#). The statute on point, Article 77 of the Manual for Courts-Martial providing the standard of command responsibility to be applied in a court-martial thus will trump the emerging customary IHL standard the ICC would seek to apply against United

States defendants. See [10 U.S.C. § 877 \(2000\)](#). Whether the ICC, after adopting the absolute liability standard, would concede, under the principle of complementarity, that the U.S., in applying the restrictive standard of liability resulting in the acquittal at court-martial of a defendant accused of command responsibility, had discharged its obligations in good-faith is a question without an answer.

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The argument that the United States President and other senior civilian decisionmakers are immune from criminal liability for the acts of subordinates in the absence of proof of a direct order requiring performance of unlawful acts or of criminal negligence is squarely within the contemporary jurisprudence of command responsibility:

The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

The High Command Case, *supra* note 43, at 543-44.

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Since the inception of the state-centric international political and legal order with the Treaty of Westphalia in 1648, heads-of-state, along with other very senior civilian officials, enjoyed absolute immunity for their official acts. See Gilbert Sison, Recent Development, [A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity](#), 78 *Wash. U. L.Q.* 1583 (2000). Although ultimate responsibility for the composition, missions, and rules of engagement of a military force rest with the highest civilian decisionmakers, and although it is these senior political leaders who, by authorizing or tolerating violations of IHL, bear ultimate responsibility for the crimes of their subordinates, international law, for most of the past four centuries, shielded persons in the highest echelons of state power from individual criminal responsibility for violations of IHL. M. Cheriff Bassiouni, [The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities](#), 8 *Transnat'l L. & Contemp. Probs.* 199, 202 n.13 (1998). However, the historical trend since 1945 has been to hold individual government officials, including heads-of-state, accountable for their official actions on the ground that the most heinous criminality is ultimately the work of these senior decisionmakers and that to continue to shield their conduct would effectively foreclose the imposition of criminal responsibility altogether or, alternatively, hold low-ranking personnel responsible for the orders of their superiors. Frye, *supra* note 35, at 2. The jurisprudence of the ICTY suggests that under limited circumstances senior civilian and military leaders may be held criminally liable for the acts of subordinates. See, e.g., *Prosecutor v. Zejnil Delali*, 1998 I.C.T.Y. IT-96-21-T, ¶¶ 356-63, 368-78 (Nov. 16) (Celebici Case) (Trial Chamber II Judgment) (citing ILC Draft Code: Report of the International Law Commission on the work of its Draft Code of Crimes against the Peace and Security of Mankind, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996)) (extending doctrine of command responsibility to civilian superiors to the extent that they exercise a degree of control over their subordinates similar to that of military commanders and thus are de facto part of the chain of command). Some commentators warn that the erosion of immunity for the official acts of senior civilian and military officials may encourage a "victorious nation (to) convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review. [In re Yamashita](#), 327 U.S. 1, at 38, 40 (1946) (Murphy, J., dissenting) (suggesting further that, by virtue of the majority opinion upholding the conviction of a senior military commander for the unlawful actions of subordinates, all executive officials, including the President of the United States, were now potentially liable for the unlawful actions of the armed forces). Critics of the detention of former Chilean head-of-state General August Pinochet on a warrant issued by a Spanish magistrate alleging responsibility in the disappearance of the nationals of several states during a 1973 coup reiterated the argument offered by Justice Murphy and claimed that the rejection by a British court of the defense of head-of-state immunity, a decision contrary to customary international law, threatened to unsettle a domestic compromise reached in Chile and create a political dispute between Chile and the United Kingdom that could threaten international peace and security. See *The Queen v. Bow Street Metro, Stipendiary Magistrate ex parte Pinochet Ugarte* (1998), 3 W.L.R. 1456 (H.L.) (citing Article 27, Rome Statute, which states that heads of state are not exempt from criminal prosecution, as the basis for rejecting the proffered defense of head of state immunity); Lippman, *supra* note 42, at 58 (warning that extension of criminal liability to the policy level is "politically precarious" and potentially destabilizing). Whether customary IHL still makes room for the immunity of heads-of-state and the most senior civilian and military decisionmakers is unclear. The ICJ ruled that an incumbent

Minister of Foreign Affairs enjoys immunity from criminal prosecutions conducted in foreign domestic courts during the pendency of his service in office. See Arrest Warrant of 11 April (Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), reprinted in 41 I.L.M. 536 (2002). However, the Rome Statute expressly eliminates the immunity of these officials. See Rome Statute, *supra* note 32, art. 25. Whether the ICC would forge a course similar to that of the ICTY and further strip immunity from senior civilian and military decisionmakers, or else cotton to the opinion of the ICJ and protect that immunity, is uncertain. For a discussion of the trends in the doctrine of the immunity of heads of state and senior civilian decisionmakers, see Hazel Fox, The Resolution of the Institute of International Law on the Immunities of Heads of State and Government, 51 Int'l & Comp. L.Q. 119 (2002); Salvatore Zappala, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation, 12 Eur. J. Int'l L. 595 (2001); Andrea Bianchi, Immunity Versus Human Rights: The Pinochet Case, 10 Eur. J. Int'l L. 237 (1999).

⁶³⁷ Message from the President of the United States to the Senate Transmitting the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Concluded at Geneva on June 10, 1987, S. Treaty Doc. No. 2 (1987).

⁶³⁸ Prior to World War II states, protective of their sovereignty, did not accept the notion that IHL applied to armed conflicts not constituting "wars" in the international legal sense of the term--conflicts between sovereign states. David Turns, Prosecuting Violations of International Humanitarian Law: The Legal Position of the United Kingdom, 4 J. Armed Confl. 1, 24 (1998). State sovereignty continues to play a role in determining the applicability of IHL: at present, IHL is applicable in its entirety only to international armed conflicts of significant intensity or where war has been declared: noninternational armed conflicts, and interstate conflicts of limited dimensions, give rise to a more limited set of obligations incumbent upon states and members of their armed forces. Geoffrey S. Corn & Michael L. Smidt, "To Be or Not to Be, That is the Question": Contemporary Military Operations and the Status of Captured Personnel: DAP 27-50-319, 1999 Army Law. 1; see also CJCSI 3121.01A, *supra* note 511 (stating that only international armed conflicts trigger all the obligations under IHL, and "not all situations involving the use of force are armed conflicts under international law."); Kwakwa, *supra* note 3, at 47 (noting that although the Geneva Conventions, widely considered to be the primary source of conventional regulation under IHL, are applicable to interstate conflicts, a significant level of intensity is required before an internal armed conflict comes within the limited coverage of Common Article 3 of those instruments, and states contest even the applicability of this lesser standard of protection); UNESCO, International Dimensions of Humanitarian Law 96-97 (conceding that it is "unclear whether the application of (IHL) . . . is called for under conditions of small-scale or low level violence between the armed forces of two or more states" unless war has been declared, in which case its applicability is *ipso jure* and without question); *id.* at 222 (indicating that the question of whether IHL applies to low-intensity conflicts and covert operations is susceptible of multiple pronouncements). Nonetheless, the Department of Defense has adopted the official policy that all members of every service component are obligated to "comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations(.)" effectively vitiating the significance of the nature of the particular conflict at issue in terms of determining applicable sources of IHL. Dep't of Defense Dir. 5100.77, DOD Law of War Program ¶ 5.3 (Dec. 9, 1998). The Chairman of the Joint Chiefs of Staff has ordered that "(t)he Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the U.S. Armed Forces will comply with the principles and spirit of the law of war during all other operations." Chairman of the Joint Chiefs of Staff Instruction 5810.01B, Implementation of the DOD Law of War Program (Mar. 25, 2002) (hereinafter CJCSI 5810.01B). The official United States position, one adopted by many states, comports with the recommendations of various NGOs and other organizations which suggest that IHL be actively merged with human rights laws and principles the better to protect the participants and victims of armed conflicts. See, e.g., Feilchenfeld, *supra* note 219, at xiii (advocating the "(e)xtension to all persons actually participating in armed hostilities amounting to 'war' of all the rights and duties under the law of war that may be reasonably demanded, regardless of formal recognition of their legal status or their conformity to all of the 'conditions' traditionally required for belligerent status."); Oscar M. Uhler et al., Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 36 (1958) (arguing for liberal extension of protections of Common Article 3 during internal armed conflicts); Parkerson, *supra* note 511, at 44 (stating that an examination of state practice reveals that the Geneva Conventions in their entirety are applied to every armed conflict between states).

⁶³⁹ See Best, *supra* note 20, at 350 (stating that the treatment of **POWs**, as well as the prosecution of soldiers who mistreat **POWs**, is part of the propaganda campaign at the heart of every modern conflict).

⁶⁴⁰ Message, *supra* note 638, at 7, reprinted in [81 Am. J. Int'l L. 910 \(1987\)](#).

⁶⁴¹ The role of the JAG Corps in providing legal advice as to the conduct of war consistent with IHL is not limited to approving targets or developing ROEs; on the contrary, it is constantly expanding and reaching further into policy analysis in recognition of the effects that compliance decisions have upon political relationships. See Lewis, *supra* note 523, at 486-87, 508 (stating that the JAG officer's role as legal advisers is "not strictly limited to giving 'legal' advice based upon the laws of war Inasmuch as political considerations also impose restrictions on the use of force, the JAG serves as a political adviser as well.").

⁶⁴² See [Korematsu v. United States, 323 U.S. 214, 248](#) (Jackson, J., dissenting) ("The chief restraint upon those who command the physical forces of the country . . . must be their responsibility . . . to the moral judgments of history.").

⁶⁴³ Article 87(5) permits the ICC to "invite" states that are not parties to cooperate in its investigation and prosecution of their nationals but does not of its own legal force compel them to do so, and Article 89(1) simply provides that the ICC can "request" of non-parties the arrest and surrender of their nationals and that only "States Parties" are obligated to comply. As such, non-party states cannot be said to have legal duties to cooperate with the ICC unless such duties arise under customary international law, which position the United States has and would likely continue to reject although the ICTY has ruled otherwise. See *Prosecutor v. Tihomir Blaskic*, 1997 I.C.T.Y. IT-95-14-AR-108, ¶ 26 (Oct. 29) (Judgment on the Request of the Government of Croatia for Review of the Decision of the Trial Chamber of July 18, 1997) (holding that cooperation with the ICTY was an obligation "erga omnes."). However, some of the most outspoken advocates of the ICC concede that it "makes little sense for State parties that have not accepted the jurisdiction of the (ICC) with respect to the particular crime under investigation or prosecution to be under any legal obligation to cooperate with the (ICC)." Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 Pace Int'n L. Rev. 103, 117 (1994).

⁶⁴⁴ Mark Matthews, *Court Has to Get by Without U.S.; Tribunal: Denied the Right to Exempt its Nationals from the Jurisdiction of the Planned International Criminal Court, America Opts Out of the Treaty*, Balt. Sun, July 22, 1998, at A2 (quoting spokesman for Sen. Jesse Helms).

⁶⁴⁵ See *Blaskic*, 1997 I.C.T.Y. IT-95-14-AR-108, ¶ 33 ("(The ICTY) is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules. It has also the power to report this judicial finding to the Security Council."). Similar power might be conferred upon the ICC.

⁶⁴⁶ See *id.* ¶¶ 25-37 (holding that the president of an international criminal tribunal may request that the Security Council force compliance with arrest warrants).

⁶⁴⁷ See *Uniting for Peace*, G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/RES/377(V) (1950) ("Resolv(ing) that if the Security Council . . . fails to exercise its primary responsibility for the maintenance of international peace and security . . . the General Assembly shall consider the matter immediately with a view making appropriate recommendations to Members for collective measures . . .") (providing legal justification for collective enforcement measures against North Korea when the Security Council was paralyzed).

⁶⁴⁸ Although the Rome Statute as codified prohibits trial in absentia, the Statute can be amended to provide for *de novo*

trial of a defendant upon his capture and rendition to the custody of the ICC even if he has been previously tried and convicted before the ICC. See Rome Statute, *supra* note 32, art. 62 (prohibiting trial in absentia); but see *id.* art. 121 (permitting amendment of the Rome Statute). Some scholars urge the amendment of the Rome Statute to permit trial in absentia in order to enable the preservation of witness testimony and documentary evidence as well as to diminish the incentive for states to resist cooperation with the ICC. See, e.g., Chase, *supra* note 30, at 196. The ICTY has considered, but not attempted, the trial in absentia of defendants not in the custody of the tribunal, a proceeding permissible under Rule 61 of the Statute of the ICTY, on the ground that to fail to do so would likely have the effect of permanently precluding the adjudication of their guilt or innocence and as such would frustrate the interests of justice and the purpose of the ICTY. See U.S. News & World Rep., Dec. 25, 1997, at 47 (quoting Richard Goldstone, former Chief Prosecutor of the ICTY).

⁶⁴⁹ Under customary international law, the forcible rendition of a criminal suspect or convict in connection with a crime committed outside the territorial jurisdiction of the rendering state is permissible under the principle of universal jurisdiction in regard to crimes including, *inter alia*, war crimes and crimes against humanity. See [United States v. Best](#), 304 F.3d 308, 316 (3d Cir. 2002) (holding that forcible abduction of an alien, even if arguendo in violation of applicable international legal principles, is no defense to jurisdiction); [United States v. Yunis](#), 924 F.2d 1086, 1091 (D.C. Cir. 1991) (same); Attorney General of Israel v. Eichmann, Dist. Ct. Jerusalem (Isr. 1961), 36 Int'l L. Rep. 5 (1961) (same). Forcible rendition to hale the offender into the United States is permissible as well under United States law. See [United States v. Alvarez-Machain](#), 504 U.S. 655, 663-70 (1992) (applying the Kerr-Frisbie rule to hold that the forcible rendition of a criminal suspect from a state with which the United States maintained a treaty of extradition was permissible under United States law); [United States v. Rezaq](#), 908 F. Supp. 6, 7-8 (D. D.C. 1995) (same). Moreover, the Rome Statute imposes general and specific obligations upon Parties to cooperate with the ICC under Articles 86, 87, 93, and 111, to include rendering persons it has formally accused or convicted of crimes. For the United States to object to the rendition of United States nationals, forcible or otherwise, by State Parties to the ICC, it would appear obligated to do so upon non-legal grounds, and to seek non-legal remedies in the event of such rendition. For a discussion of forcible abduction to secure jurisdiction under domestic as well as international law, see generally Aaron Schwabach & S.A. Patchett, [Doctrine or Dictum: The Ker-Frisbie Doctrine and Official Abductions Which Breach International Law](#), 25 U. Miami Inter-Am. L. Rev. 19 (1993).

⁶⁵⁰ Osiel, *supra* note 23, at 31-32. In all regulatory regimes, compliance is a function of the degree to which the rules promote the ends, and any given rule draws strength in proportion to the extent to which it makes sense to whom it applies. Fisher, *supra* note 127, at 101. Where rules frustrate the labors of those laboring to attain the ends of a legal regime, compliance diminishes. *Id.*

⁶⁵¹ The duty to defend Western civilization--the highest good imaginable--implies the duty to craft and wield those weapons that enable this defense. See Gross, *supra* note 45, at 460-61 (charging the West with this duty). Thus, the duty of the Western democratic state, engaged in a war against Islamic terror, to its own citizens may mitigate or even obviate any correlative duty to non-citizens to strictly observe of all the politically malleable principles of IHL.

⁶⁵² For a discussion of functionalist theory, see *infra* note 705. Studies of compliance with domestic criminal law suggest that appeal to professional, social, and above all moral claims as to what is right and what is wrong are significantly more likely to prompt behavior consistent with legal rules than is the threat of punishment. See, e.g., Tom. R. Tyler, [Compliance with Intellectual Property Laws: A Psychological Perspective](#), 29 N.Y.U. J. Int'l L. & Pol. 219 (1997); Grasmick & Bursik, *supra* note 131. If achieving isomorphism between the moral content of law and the moral values of the regulated is the royal road to legal compliance, then an IHL canon whose prescriptions and proscriptions reflect (and to some extent condition) the moral sentiments of soldiers and maps closely with their endogenously-determined moral commitments is best likely to secure compliance and contribute simultaneously to the humanization of war and the defense of civilization.

Of notice - this is my argument in a nutshell, however here it probably relies on "legitimacy" framework (not sure - to check). [downloaded the article - it cites in an irrelevant sense the "Utility of desert" article, and builds upon legitimacy and morality. - To peruse the article.

⁶⁵³ See Carnahan, *supra* note 43, at 23 (describing the principle of military necessity from the perspective of IHL absolutists as “something that must be overcome or ignored if (IHL) is to develop”).

⁶⁵⁴ See *supra* notes 95-97 and accompanying text.

⁶⁵⁵ See *supra* note 12 (defining *jus in bello*).

⁶⁵⁶ See *supra* note 12 (defining *jus ad bellum*).

⁶⁵⁷ A pair of international scholars have defined the current juncture in international relations where old rules seem inadequate to the times and much rethinking of positive and normative foundations is necessary as an “international constitutional moment.” Anne-Marie Slaughter & William Burk-White, *An International Constitutional Moment*, 43 *Harv. J. Int’l L.* 1 (2002).

⁶⁵⁸ Criticism is a “crucial part of the historical process through which (IHL) is made.” Walzer, *supra* note 12, at 43-44. Just as its historical evolution toward greater protections was induced by post hoc casuistry and subjected to philosophical criticism, its venture into a new era of asymmetrical warfare ought to be accompanied at every step by the requisite degree of criticism necessary to ensure its continued functionality lest IHL become an unrealistic regime inapplicable to modern combat. See Flory, *supra* note 154, at 9 (asserting that only the constant re-examination of IHL can forestall its “complete breakdown”).

⁶⁵⁹ IHL evolved in consideration of traditional force-on-force conflicts and has been viewed for a decade as unsuitable to conflicts with terrorists and other subnational actors. Interview with Colonel Guy Roberts, U.S. Marine Corps (May 28, 2003) (stating that Protocols Additional were drafted in late 1960s in response to a perception that IHL was ill-suited to the Third World conflicts likely to predominate). However, few commentators, until recently, have brought this point to the fore. In a development perhaps unimaginable only several years ago, a growing, yet still quiescent, chorus consisting not solely of American voices calls for the general revisitation of IHL in light of its inutility with respect to the War on Terror. See, e.g., U.S. Ambassador for War Crimes Issues Pierre-Richard Prosper, Address at the Royal Institute of International Affairs, London (Feb. 20, 2002) (“The war on terror is a new type of war not envisioned when the Geneva Conventions were negotiated and signed We should look at all international documents to see whether they are compatible with this moment in history.”); Communication from the Embassy of Switzerland in Washington, D.C., to the U.S. Dep’t of State (Sept. 13, 2002) (stating that the Swiss Foreign Ministry “wishes to . . . provide a space for debate on the reaffirmation and development of (IHL) in light of the new and evolving realities of contemporary conflict situations.”).

⁶⁶⁰ The ICC framers contemplated the eventual addition of terrorism to ICC jurisdiction. See [Rome Statute, Annex I, Res. E, U.N. Doc. A/CONF.183/10 \(1998\)](#). However, neither the Rome Statute nor any other instrument has propounded the sort of major revision several commentators suggest is essential to the defeat of terrorism. See *infra* note 809 and accompanying text.

⁶⁶¹ See *infra* note 774 and accompanying text (discussing detrimental shift in “ownership” over IHL).

⁶⁶² So powerful is its compliance pull that even United States policymakers shy from acknowledging its shortcomings. Jean B. Elshtain, *Just War Against Terror* 71 (2003) (“Somewhere along the line, the idea took hold that, to be an intellectual, you have to be against it, whatever it is. The intellectual is a negator.”). A few brave voices can yet be heard. See, e.g., George Wright, [Combating Civilian Casualties: Rules and Balancing in the Developing Law of War](#),

[38 Wake Forest L. Rev. 129 \(2003\)](#) (suggesting IHL is “due for reassessment”); J. Bryan Hehir, Just War Theory in a Post-Cold War World, 20 J. Religious Ethics 237, 238 (1992) (discussing danger in “understating how completely we need to rethink (IHL)”).

⁶⁶³ To suggest the centrality of a legal strategy to the defeat of terrorism is not to deny the importance of other policy instruments, such as diplomacy and the dissemination of democratic principles, to the long-term objective of civilizational coexistence with Islam. See generally Jeffrey F. Addicott, *Winning the War on Terror* (2003) (arguing that the War on Terror requires a short-term military solution and a long-term political solution achievable through promotion of democracy and human rights).

⁶⁶⁴ See Woodrow W. Borah, *Justice by Insurance* 6 (1983) (discussing Greco-Roman concept of divine ordination of universal moral-legal order). Ancient Confucian societies shared the Greco-Roman concept of a natural universal order to which barbarians did not conform.

The barbarians are covetous for gain--human-faced but animal-hearted . . . As for clothing, food and language, the barbarians are entirely different from the people of the Middle Kingdom Therefore, the sage rulers . . . neither established contact with them nor subjugated them (T)hey are always to be considered as outsiders, never as citizens. Our administration and teachings have never reached their people Punish them when they come in and guard against them when they retreat Restrain them continually

Alice Erh-Soon Tay, *Legal Culture and Legal Pluralism in Common Law, Customary Law, and Chinese Law*, 26 Hong Kong L.J. 194, 205 (1996) (quoting official Han Dynasty history). However, Confucian societies closed themselves off from barbarians not because barbarians abjured responsibilities under public law in favor of private authority but because barbarians, unlike Confucians, required extensive regulation. See Xin Ren, *Tradition of the Law and Law of the Tradition* 20-21 (1997) (restating position that “law was for barbarians, not for Confucians, because an ideal society did not require extensive legislation . . . and law was an instrument of last resort”). The Confucian position--that the need for, rather than the source of, regulation is determinative of barbarian **status**--is at variance with the Greco-Roman position. For purposes of parsimony, the latter position serves as the historical foundation for the conceptual definition of barbarians in this Article.

⁶⁶⁵ The Civil Law (S.P. Scott ed. & trans., Lawbook Exchange 2001) (1932) (hereinafter *The Civil Law*). For a thorough discussion of the moral, cultural, and philosophical grounds upon which the ancients distinguished between civilized peoples and barbarians, see *The Theodosian Code and Novels, and the Sirmondian Constitutions* 3-7 (Clyde Pharr trans., 1952); M.P. Pearson, *Beyond the Pale: Barbarian Social Dynamics in Western Europe*, in J.C. Barrett et al., *Barbarians and Romans in North-west Europe from the later Republic to Late Antiquity* 198-226 (1989); Peter S. Wells, *The Barbarians Speak: How The Conquered Peoples Shaped Roman Europe* (2001).

⁶⁶⁶ See John Stuart Mill, *Civilization*, in *Essays on Politics and Culture* 49 (Gertrude Himmelfarb ed., 1962) (contending that “none but civilized nations . . . ever . . . form(ed) an alliance”).

⁶⁶⁷ According to the ancient Roman historian Herodotus in his *Histories*, “(B)arbarians can neither think nor act rationally (and) . . . are driven by evil spirits . . . who force them to commit the most terrible acts (They are) incapable of living according to written laws and only reluctantly tolerating kings Barbarians are without restraint” Herwig Wolfram, *The History of the Goths* 6 (1990). Tacitus’ *Germania*, written in the first century A.D., elaborates a similar disgust with barbarian venality in contrast with Roman virtue. See Cornelius Tacitus, *Germania* 6-10 (J.B. Rives trans., 1999) (describing barbarians as a violent, slothful, hedonistic people largely without laws). Contemporary accounts of the disparities between ancient barbarians and civilized contemporaries track closely with this formulation. See, e.g., Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* 321 (1996) (contrasting the “rich accomplishments in religion, art, literature, philosophy, science, morality, and compassion” of the “world’s great civilizations” with their absence in barbarian “cultures”). Some scholars contest the Greco-Roman view of barbarians as destructive, warmongering philistines bereft of morals and ethics and insist that barbarians possessed rich cultures and effective, if private, legal systems that strove to uphold certain virtues. See generally Marc Salter, *Barbarians in International Relations* (2002). However, it is not necessary

to prove or disprove either thesis to borrow the concept of a distinction between civilization and barbarism and transfer that concept to analysis of the role of law in the conflict between a Western civilization committed to law, order, and a set of ethical principles that categorically proscribe terrorism on the one hand and a group of anti-civilizational terrorists committed to destruction of these values and principles on the other.

⁶⁶⁸ Roman *jus civile* originally divided free peoples into two classes-- *cives* (citizens) and *peregrini*, a category that included aliens, barbarians, and others who could claim no rights either private or public. The Civil Law, *supra* note 666. A third class, *latini*, was added later. *Id.* Slaves could be made of persons from any of the preceding categories.

⁶⁶⁹ William L. Burdick, *The Principles of Roman Law* 201 (1989).

⁶⁷⁰ See *id.* at 202 (describing barbarians as outlaws subject to *jus gentium* (law of peoples) and not the more favorable *jus civile*)

⁶⁷¹ *Id.* at 200 (noting that Roman jurisprudence was exclusively applicable to only those enjoying Roman citizenship, the *cives*).

⁶⁷² The Civil Law, *supra* note 666.

⁶⁷³ *Id.* (indicating that loss of citizenship imposed a condition akin to outlawry).

⁶⁷⁴ Burdick, *supra* note 670, at 204-05.

⁶⁷⁵ Civic honor, an essential element of Roman citizenship, obligated *cives* to conduct themselves so as not to bring disgrace upon Rome and so as to remain fit to render service to civilization. *Id.* at 208. *Cives* who failed in this duty suffered immediate impairment of civic honor and were stripped of citizenship. *Id.* at 209 (explaining Roman doctrine of *infamia immediata*).

⁶⁷⁶ Julius Caesar, *The Gallic Wars* 5.55 (H.J. Edwards trans., 1970).

⁶⁷⁷ Alfred P. Rubin, *The Law of Piracy* 6-7, 9 (1988) (noting that whereas non-barbarian enemies might be taken prisoner or otherwise granted the benefit of the protections of Roman laws of war, barbarians were generally denied quarter unless they agreed to accept the laws and political authority of Rome). Against barbarians, in the words of the Roman Senator and jurist Marcus Tullius Cicero uttered in 50 B.C., *silent leges inter arma* ("In time of war the law is silent.").

⁶⁷⁸ See Howard, et al., *supra* note 12, at 34 (elaborating distinctions between *bellum hostile*, a war between civilized peoples in which nascent restraints of the era were operative, and *bellum romanum*, a "war of fire and sword" without any legal restraints whatsoever which could be fought only against barbarians).

⁶⁷⁹ See Plato, *Menexenus* (Benjamin Jowett trans., 1990s) (recommending moderation in relations between Greeks but none in relation to barbarians); see also Ronald B. Levinson, *In Defense of Plato* 223 (1953) (illuminating Platonic arguments as to the inevitability and savagery of conflicts with barbarians).

- ⁶⁸⁰ Tay, *supra* note 665, at 198.
- ⁶⁸¹ See Peter Stein, *Roman Law in European History* (1999) (discussing diffusion of Roman law).
- ⁶⁸² Not all the known world became “civilized,” and medieval Christians were encouraged by secular and clerical elites to take up arms against the barbarian Muslims. See August C. Krey, *The First Crusade: The Accounts of Eyewitnesses and Participants* (1921) (describing exhortatio ad bellum contra barbaros--the call to Christian Crusaders to take up arms against the barbarians holding Jerusalem).
- ⁶⁸³ See 3 William S. Holdsworth, *A History of English Law 604-07* (5th ed. 1942) (stating that failure to answer a minor charge when summoned to court resulted in forfeiture of property and chattels, whereas failure to answer a felony charge, particularly of treason, was considered a tacit admission of the charge that resulted in conviction of the offense and outlawry).
- ⁶⁸⁴ See 2 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 449 (2d ed. 1899) (describing “outlawry” as the condition of being an object, rather than a subject, of law, and of being beyond the protection of the civilized legal order).
- ⁶⁸⁵ See 4 William Blackstone, *Commentaries* 319 (describing legal status of outlaw as “put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect”).
- ⁶⁸⁶ See *id.* (noting that an outlaw under early English law was described as caput lupinum (“having a wolf’s head”), by virtue of the fact that he might be “knocked on the head like a wolf by anyone that should meet him”). Outlaws were effectively dead to the law, or civiliter mortuus (“dead citizens”). *Id.*
- ⁶⁸⁷ See 3 Holdsworth, *supra* note 684, at 69 (reporting that in a defendant who suffered a “judgment of outlawry upon an indictment for felony” or who was convicted of a felony was subjected to “corruption of blood” whereby he lost his ability to own, inherit, or devise property.)
- ⁶⁸⁸ See 2 Pollock & Maitland, *supra* note 685, at 584 (stating that the legal effect of outlawry extended across jurisdictions by the principle of comity and that a “man outlawed in one shire was outlaw everywhere.”). The adoption of extradition treaties has rendered outlawry all but obsolete.
- ⁶⁸⁹ See 3 Grotius, *Libri Tres*, *supra* note 155, ch. 3 (defining as international outlaws all those banded together for criminal wrongdoing, including pirates, but excluding states that engaged in illegal acts on the ground that their wrongdoing was nevertheless authorized by legitimate public authority and thus not anti-civilizational).
- ⁶⁹⁰ See 1 Gentili, *Commentaries on the Law of War* ch. 4 (1598) (classifying pirates as outlaws and “common enemies of all mankind”).
- ⁶⁹¹ See 4 William Blackstone, *Of Public Wrongs* 66, 72 (R. Kerr ed., 1962) (1803) (“The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, hostis humani generis.”) (quoting Coke, C.J., in *King v. Marsh*, 3 Bulstr. 27, 81 E.R. 23 (1615)).
- ⁶⁹² See Rubin, *supra* note 678, at 87 (“(A)ll Pirates and Sea-rovers, . . . are in the Eye of the Law Hostes humani generis,

Enemies not of one Nation . . . only, but of all Mankind. They are outlawed . . . by the Laws of all Nations; that is, out of the Protection of all Princes and of all Laws whatsoever. Every Body is commissioned, and is to be armed against them . . . to subdue and to root them out.”) (citing seventeenth century scholar Leoline Jenkins).

⁶⁹³ Pierino Belli, *De Re Military et Bello Tractatus* ch. 11 (1564).

⁶⁹⁴ See Gentili, *supra* note 691 (stating that the laws of war are not applicable to pirates on the ground that the protections of international law are applicable only to those acting under the command of a legitimate sovereign and that pirates are merely private miscreants unauthorized to engage in violence by a legitimate public sovereign); Rubin, *supra* note 678, at 70 (stating that pirates, by rendering themselves enemies of all mankind “ha(ve) thereby lost (their) right in the law of nations”) (quoting seventeenth century statement of the King’s Advocate of the Admiralty, Dr. William Oldys); [In re Charge to Grand Jury-Treason, 30 F. Cas. 1049, 1049-50 \(C.C. Mass. 1861\)](#) (No. 18,277) (“Pirates) carry on war, but it is not natural war; and they are not entitled to the benefit of the usages of modern civilized international war. There being no government with which a treaty can be made, or which can be recognized as responsible for the acts of individuals, the individuals themselves are (liable to punishment).”). The treatment of pirates as outlaws by virtue of their lack of connection to any legitimate public authority is consistent with the contemporary development of the category of unlawful combatants by the Bush Administration. See *supra* at note 624.

⁶⁹⁵ The modern principle of universal jurisdiction under international law holds that some crimes are so universally abhorrent that their perpetrators are *hostis humani generis*--enemies of all mankind--and that jurisdiction may be based solely on obtaining physical custody over the perpetrators. See [Restatement \(Third\) of Foreign Relations Law of the United States § 494](#) (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even when none of the bases of jurisdiction indicated in § 402 (such as territoriality or nationality of the accused or victim) are present.”). A state exercising universal jurisdiction prosecutes a criminal under its own law, rather than that of the state where the crime was committed, or under international law on the theory that the prosecuting state is acting on behalf of all mankind. The earliest origins of universal jurisdiction trace to the struggle against piracy. See 2 Grotius, *Libri Tres*, *supra* note 155, ch. 20; 1 E. Vattel, *Le Droit de Gens* ch. 19 (1758). The principle of universal jurisdiction enjoys prominent place in many IHL treaties, including the Geneva Conventions. See GCI, *supra* note 398, art. 49; GCIII, *supra* note 398, at art. 146. For a thorough discussion of universal jurisdiction, see generally Kenneth C. Randall, [Universal Jurisdiction Under International Law](#), 66 *Tex L. Rev.* 785 (1988).

⁶⁹⁶ Renaissance commentators indicated that the basis for the assertion of universal jurisdiction over piracy had roots in the theory that pirates were morally akin to barbarians in that by existing beyond the scope of public law they committed the unpardonable sin of threatening the natural legal order constituting and defending civilization. See, e.g., Rubin, *supra* note 678, at 86.

⁶⁹⁷ See Charles Molloy, *De Jure Maritimo* 40 (1677) at 40 (citing Royal Proclamation declaring “all pyrates and rovers” to be “out of (royal) protection, and lawfully to be by any person taken, punished, and suppressed with extremity”). Prior to the 19th century, pirates were typically condemned after a brief hearing and executed. See *id.* at 38 (“If Pirats . . . happen to be overcome, the Captors are not obliged to bring them to any Port, but may expose them immediately to punishment by hanging them up at the main Yard end before a departure . . . So likewise, if the Captors bring (the pirates) to the next Power, and the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loss, . . . the (pirates) may be there executed by the Captors.”). Although pirates were afforded due process protections in the 19th century, states retained legislation permitting their summary trial and execution. See, e.g., [In re Charge to Grand Jury-Treason, 30 F. Cas. at 1049](#) (“(A)ll civilized nations . . . are under a moral obligation, to . . . suppress (pirates), . . . (who are) liable to be put to death for the suppression of their hostilities.”). A series of treaties commit states to the suppression and punishment of piracy, and the pirate continues to be “treated as an outlaw . . . whom any nation may in the interest of all capture and punish.” *The Lotus Case*, 1927

P.C.I.J. Series A., No. 10, at 70 (dissent); see also [Convention on the Law of the Sea, Dec. 10, 1982, art. 100-10, U.N. Doc. A/CONF 62/122](#), reprinted in [21 I.L.M. 1261, 1288-89 \(1982\)](#) (defining piracy as a crime of universal jurisdiction and requiring states to cooperate in its suppression and punishment).

⁶⁹⁸

See Wedgwood, *supra* note 80, at 564 (stating that Article I, Section 8 of the United States Constitution granting power to Congress to define and punish piracy as well as offenses against the “law of nations” was framed to permit derogation from IHL in the case of pirates, a category of unlawful belligerents to whom the Framers did not intend to extend the protections of IHL). The extension of Congressional jurisdiction to punish violations of the “law of nations” extends to the punishment of war criminals and provides the basis for the assertion of jurisdiction over enemies accused of pre-capture crimes. See [U.S. Const., art. I, § 8, cl. 10](#) (providing Congress with broad authority for trial of those who commit criminal offenses “against the Law of Nations” and thus creating the constitutional basis for creating tribunals to try enemy belligerents). With the Geneva Conventions of 1949 the United States accepted the obligation to extend to enemy belligerents charged with pre-capture offenses, regardless of their legal status, the benefits of the identical courts and procedures applicable to the prosecution of members of the United States Armed Forces for violations of IHL. See GCIII, *supra* note 398, art. 85. However, the United States Supreme Court ruled, prior to United States ratification of the Geneva Conventions, that an enemy belligerent is not entitled to this benefit for violations committed pre-capture, and has not revisited the question since 1945. See [In re Yamashita, 327 U.S. at 22](#) (denying habeas corpus relief to enemy POW convicted by a military commission on ground that the “same courts-same procedures” rule from the Geneva Convention of 1929 did not apply to pre-capture offenses). Whether an unlawful combatant accused of pre-capture violations of the “law of nations,” specifically violations of IHL, is entitled to the benefits of court-martial, as opposed to military tribunal, is hotly debated. For a critical discussion of the scope and source of legislative and executive powers to create tribunals to prosecute violations of the “law of nations,” a contentious topic beyond the scope of this Article, see, for example, Martins, *supra* note 291.

⁶⁹⁹

Emmerich de Vattel, *The Law of Nations* 132 (C.G. Fenwick trans., 1916). Terrorists are clearly the modern incarnation of pirates and outlaws and are on this basis subject to the same universal regime of punishment by any who apprehend them. See *id.* at 93 (“Men who by profession are poisoners, assassins or incendiaries may be exterminated wherever they are caught; for they direct their disastrous attacks against all Nations . . .”).

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A norm of *jus cogens*, or a peremptory norm, is recognized by the entire international community as one from which no derogation is permitted and which cannot be modified save by a subsequent norm of general character. Norms of *jus cogens* limit state sovereignty and immunity in that the general will of the international community takes precedence over the individual will of states to order their international relations. See [Vienna Convention on the Law of Treaties, May 23, 1969, S. Treaty Doc. No. 92-1, 1155 U.N.T.S. 331 \(entry into force Jan. 27, 1990\)](#) (defining norms of *jus cogens*); see also [Restatement \(Third\) of Foreign Relations Law of the United States § 102](#), cmt. k, reporter’s note 6 (1987) (defining *jus cogens* as a narrow subset of customary international law norms, including prohibitions against genocide, slavery, torture and terrorism, that sit atop the international legal hierarchy and preempt conflicting treaties and norms). Many commentators insist that prohibitions against war crimes and crimes against humanity, acts which threaten to “subvert the very foundations of the enlightened international community as a whole,” have ascended to the apex of the normative pyramid of international law, and that “those who commit war crimes are the contemporary *hostis humani generis*. S.Z. Peller, *Jurisdiction over Offenses with a Foreign Element*, in 2 *A Treatise of International Criminal Law* 5, 32-33 (M. Cherif. Bassiouni & Ved Nanda eds., 1973). The work of the post-World War II tribunals in identifying, prosecuting, and disposing of the principle architects of aggression, genocide, and war crimes consistent with the joint legal-moral theory that these acts constituted crimes against the entire international community supports the argument that war criminals are an anti-civilizational force. See Joyner, *supra* note 21, at 167-68 (arguing that Nuremberg and subsequent jurisprudence reinforces the claim that war crimes “violent and predatory actions that descend to the level of gross bestiality, . . . offend the law of civilized states and have therefore been declared crimes against universal law.”).

⁷⁰¹

Concerted post World War II efforts to immunize the conduct of broad categories of belligerents who do not meet the traditional requirements of combatancy (including open carry of arms, acceptance of obligations under IHL, responsible command structure, and a fixed insignia visible at a distance), including spies, saboteurs, and guerrillas,

led, in part, to the development of the provisions in the Geneva Conventions and the Protocols Additional that confer additional protections upon these actors. See *supra* notes 215, 398-418 and accompanying text. A number of states, and the European Court of Human Rights, have accepted the view that these instruments preclude the trial of otherwise unprivileged belligerents for unlawful combatancy in domestic military courts. See David B. Rivkin & Lee Casey, *The Crime of Unlawful Combatancy*, *Jerusalem Post*, Aug. 7, 2003, at 9 (reporting the British belief that the European Convention on Human Rights, to which Britain is a party, prohibits the use of military commissions to try “unprivileged” or “unlawful” combatants). Not all states, however, accept that these instruments have modified the international common law of war. See *supra* note 608 (discussing United States objections to various provisions of the Protocols Additional purporting to alter the law of unprivileged belligerency). Many states and commentators consider unlawful belligerents disentitled to treatment as **POWs**, and liable to prosecution, and execution, upon capture. See Nurick and Barrett, *Legality of Guerrilla Forces under the Laws of War*, 40 *Am. J. Int’l L.* 563 (1946) (restating traditional position with respect to unprivileged belligerents); L. Oppenheim, *International Law: A Treatise* 312 (2d ed. 1912) (“Since international law is a law between States only and exclusively, no rules of International Law can exist which prohibit private individuals from taking up arms and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileges of members of the armed forces, and the enemy has according to a customary rule of International Law the right to consider and punish such individuals as war criminals.”); *The Hostages Trial: Trial of Wilhelm List and Others*, VIII U.N. War Crimes Comm’n, *Law Reports of Trials of War Criminals* 64-65 (William S. Hein Co. 1997) (1949) (holding that enemy combatants who fail to meet qualifications for privileged **status** may be prosecuted by their captors). The doctrine, as well as the legal consequences, of unlawful combatancy remain firmly ensconced in the domestic law of leading military powers, and “(b)y universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants.” *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) (holding, in denying writs of habeas corpus, sabotage activities carried out by non-uniformed enemy personnel to be unlawful combatancy, that unlawful combatancy was violative of IHL and a war crime, and that unlawful combatants are “subject to trial and punishment by military tribunals”). To the category of unlawful combatants whom an armed force may prosecute and punish for hostile acts against can be added terrorists, who meet none of the criteria for lawful belligerency; this is the position taken by the Bush Administration in its classification of al Qaida terrorists captured in the War on Terror as “unlawful combatants.” For a discussion of unlawful combatancy generally and as applied to the War on Terror, see *supra* note 624.

⁷⁰² See Lieber Code, *supra* note 12, art. 82.

⁷⁰³ See *supra* notes 132-35 and accompanying text.

⁷⁰⁴ See *supra* notes 402-03 and accompanying text.

⁷⁰⁵ The notion that criminals are amenable to deterrence by the prospect of punishment for their illegal acts is an argument hotly debated in domestic criminal law scholarship, and although some commentators suggest that “ordinary” would-be war criminals, as generally “‘respectable’ persons . . . highly esteemed by their superiors” and “not social outcasts or marginal people,” can be deterred by legal sanctions, the extension of this hypothesis to terrorists—persons who “unlike ordinary criminals . . . belong to the category persons in need of being (sic) ‘resocialized’” can be similarly deterred—has little support. van den Wyngaert, *supra* note 26, at 205-06. Successful deterrence requires rational actors to reject those choices that will result in costs that exceed benefits and to elect those choices that produce benefits in excess of costs, and nonrational actors are exceedingly difficult to deter from criminality. See generally Steven Messner & Richard Rosenfeld, *Crime and the American Dream* (1994); Chase, *supra* note 30, at 191 (maintaining that only rational actors can be deterred through the imposition of costs associated with the enforcement of law). Some, and perhaps most, terrorists, for whom the act of terrorism is itself an “ultimate satisfaction” and not always a rationally-determined means to a clearly-defined and reachable goal but instead the cause of their own destruction, are classically irrational. Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 *Mich. J. Int’l L.* 513, 518 (2003) (contrasting terrorists, “whose avowed tactics are wanton destruction and the targeting of innocents” and who actively seek martyrdom, with previous adversaries of the West, who were “**status** quo” and “risk-averse” in comparison); Louis Rene Beres, *Confronting Nuclear Terrorism*, in *Intelligence*

and Intelligence Policy in a Democratic Society 181 (Stephen J. Cimbala ed., 1987) (suggesting that deterrence based upon the threat of apprehension and punishment is inapplicable to self-sacrificial terrorists).

⁷⁰⁶ See Ralph Peters, *The New Warrior Class*, 24 *Parameters* 16, 16 (1994) (analogizing terrorists to “erratic primitives of shifting allegiance, habituated to violence, with no stake in civil order”).

⁷⁰⁷ See Robert McFarlane, *Deterring Terrorism*, *J. Def. & Dipl.*, June 1985, at 63 (“Terrorism is a revolting . . . form of warfare directed against the very heart of civilization.”).

⁷⁰⁸ See *supra* notes 12, 133 and accompanying text (discussing reprisal under IHL and evaluating contemporary arguments as to its applicability).

⁷⁰⁹ For a discussion of the general legal principle of reciprocity, see Lon Fuller, *The Morality of Law* 19-27 (1969). For a discussion of reciprocity in the structure and process of international law and international relations, see Robert O. Keohane, *Reciprocity in International Relations*, in Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory* 132-57 (1989).

⁷¹⁰ The conception of IHL as a contract between warring parties carries with it the obligation to honor the contract and implies that failure of either party to do so constitutes a breach which entitles the other to declare the contract to no longer be in force. See Costas Douzinas, *Postmodern Just Wars: Kosovo, Afghanistan and the New World Order*, in *Law After Ground Zero*, *supra* note 81, at 25-31.

⁷¹¹ The endemic shortcoming of international law is that in its positive rules and regulations it is too frequently divorced from the practical necessities and moral requirements of the actors that are the subjects of its concern, resulting in ineffectual law and a weakening of the principles and norms that underlie the rules and regulations it declares. For a discussion of this phenomenon, see generally Dinah Shelton, *Commitment and Compliance* (1995). To the extent that the IHL has been unjustly bifurcated into distinct spheres of regulation, with one functionally supportive of terrorists and the other punitive with respect to the armed forces of states, it is not difficult to imagine that members of the latter group might come to view IHL as something artificial to be manipulated, or worse, ignored. See David Chandler, *From Kosovo to Kabul* 158 (2002) (“The gap between ‘justice’ and what is ‘legal’ has led to the degradation of international law rather than to its development.”). If law depends for its respect and observance upon the general perception that it is rational, functional, and just, IHL may be endangered. See Osiel, *supra* note 23, at 134 (discussing danger posed to IHL by its inconsistency with the practical realities of modern warfare and by perceptions that it has departed from a position of fundamental fairness).

⁷¹² The quest to transform international relations from a power-governed to a law-governed system is age-old and has contributed to the development of international legal institutions and conventions, including the Charter of the United Nations, the International Court of Justice, and the proposed ICC. See Anne-Marie Slaughter, *Legalization and World Politics* (2003). However, although all forms of law rely upon at least some measure of voluntary compliance to lower the costs of policing the regime, international law, which cannot turn to a sovereign for enforcement, is, even more than domestic sources of law, a conciliatory law reliant upon voluntarism. For a general discussion of compliance, see Edith Brown Weiss, *Engaging Countries: Strengthening compliance with International Law* (1998); Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 *Yale L.J.* 2632 (1997); Abram Chayes & Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); Hazel Fox, *Effecting Compliance* (1993).

⁷¹³ Best, *supra* note 20, at 349-50 (stating a truism that is untenable to the untutored but common sense to veterans).

⁷¹⁴ The “practical necessities, irrationalities, and uncertainties” of combat invariably impel some soldiers to elect self-preservation over compliance with IHL. Of the many horrors of war the frequency with which soldiers, who by all accounts are otherwise morally upstanding citizens, may be forced to contemplate and commit violations of IHL in combat in order to survive, is among the most unsettling to humanitarians. See Taylor, *supra* note 13, at 33 (“Otherwise law-abiding individuals will commit crimes in order to save their own lives; national governments will likewise break treaties and international rules, if necessary, for their own preservation. Intrinsically a desperate and violent business, war is not readily limitable in terms of the means to be used in its prosecution.”). As unpleasant as this may seem to the uninitiated drafters of conventions and declarations, this has always been, and will always be, the practice of soldiers, and while it may not comport with the expectations of civilians it is entirely consistent with, and remediable to the extent remediation is necessary by, the martial code. See *supra* notes 118-36 and accompanying text (presenting principles upon which the martial code operates). Nonetheless, the phenomenon whereby soldiers engaged in combat with other soldiers occasionally transgress against a formal legal regime to which they generally adhere ought not be accorded the same degree of moral reprobation as the actions of terrorists, who deliberately target civilians and categorically reject IHL obligations.

⁷¹⁵ See Gross, *supra* note 45, at 446 (identifying respect for law as the cardinal distinguishing feature between Western democratic states and “terrorists who trample the law in their fight”). Although soldiers of Western democracies do not hold IHL sacrosanct, their violations of IHL are nonetheless exceptional, and their adherence the norm. The converse is true for terrorists, whose premeditated legal transgressions are standard operating procedure and whose end—the deliberate destruction of civilians and the legal regimes instituted to protect their rights—can never justify reciprocal derogation from obligations under IHL. See Gerstein, *supra* note 111, at 290 (contrasting soldiers, whose violations of IHL are incidental to their mission, with the terrorist, who “not only violates the rights of others by violence, but . . . does so with the purpose of making everyone’s rights insecure . . . and destroy(ing) the community of understanding and mutual self-restraint upon which the existence of rights depends”). In short, the difference between soldiers and terrorists rests ultimately upon the morality of both means and ends.

⁷¹⁶ See George Aldrich, The Hague Peace Conference: [The Laws of War on Land](#), 94 *Am. J. Int’l L.* 42, 47 (2000) (stressing the absolute irrelevance of law to the terrorists’ ends and means); see also Baxter, *supra* note 12, at 333-34.

⁷¹⁷ See Willard B. Cowles, Universality of Jurisdiction Over War Crimes, 33 *Cal. L. Rev.* 181 (1945) (tracing the terrorist genealogy through barbarians to “bandits,” “pirates,” and “guerrillas”).

⁷¹⁸ The philosophical position that, although the worlds of morality and law are perhaps impossible to conflate, particularly in war, the two, which reinforce each other and are essential to the preservation of civilization, should map together as closely as possible even in battle, dates to antiquity. See, e.g., Sun Tzu, *Art of War* (Y. Shihing trans., 1994); V.S. Soloviev, *Politics, Law and Morality* (W. Wozniuk ed., 2000). This position is at odds with the practice of contemporary IHL absolutism on a number of counts. See *infra* notes 758, 810 and accompanying text.

⁷¹⁹ Perhaps the most compelling argument for the divestiture or limitation of legal rights from terrorists rests upon the moral sense that to accord terrorists rights superior to those of their victims is fundamentally unjust: The terrorist makes himself vulnerable . . . in that he loses the moral title to complain of . . . (mal)treatment. Having a right consists precisely in having the title to command respect for our demands that others act or refrain from acting in particular ways towards us, and for our complaints when they fail to do so. The assertion of this title is inconsistent with the position into which the terrorist has put himself to the extent of his wrong-doing. For him to claim that his rights remain intact in spite of the harm he has done to others is for him to claim that he deserves to be left in a better position than his victims, and the unfairness of such a claim seems clear. Gerstein, *supra* note 111, at 292.

⁷²⁰ “Civilization” refers to a human community that, although it may consist of a multiplicity of ethnicities, languages, and states, is united by common historical experiences, traditions, values, and beliefs that influence and determine a

shared normative vision of domestic and international order, the goals that the community should collectively pursue, the values and objectives to be promoted and defended, and the means to these ends. See Jacinta O'Hagan, [Conflict, Convergence or Co-Existence? The Relevance of Culture in Reframing World Order](#), 9 *Transnat'l L. & Contemp Probs.* 537, 539 (1999); see also Ali Ahmad, [The Myth of the "Islamic Threat to the West": Religion and Politics in the Middle East](#), 15 *J.L. & Rel.* 605, 605 (2000-2001) (defining "civilizational identity" as the "highest cultural grouping of people and the broadest level of cultural identity").

⁷²¹ See generally Lawrence M. Friedman et al., *Legal Culture and the Legal Profession* 1 (1996) (defining "legal culture" as the prevailing "legal consciousness--attitudes, values, beliefs, and expectations about the law and the legal system" within a political community).

⁷²² See id. at 197-98 (championing Western universalist approach to post-Cold War global order as morally superior to non-universalist conceptions, insisting upon the necessity for moral judgment, and rejecting "cultural relativism").

⁷²³ See Francis Fukuyama, *The End of History and the Last Man* (1992) (elaborating thesis that the end of the Cold War and the introduction of the integrative forces of globalization heralded the dawn of a universal civilization); Sohail H. Hashmi, [International Society and Its Islamic Malcontents](#), 20 *Fletcher F. World AFF.* 13, 13-14 (1996) (describing diffusion of norms, values, and principles of Western liberalism as necessary to the replacement of international anarchy with an "international society"); O'Hagan, *supra* note 721, at 540 (tracing Western universalism to 19th century evolutionary theories).

⁷²⁴ See Ahmad, *supra* note 721, at 605 (listing the major civilizations as Western, Islamic, Chinese, Eastern Orthodox, Japanese, Latin American, Hindu, and African).

⁷²⁵ See Huntington, *supra* note 668, at 67-68 (elaborating his "clash of civilizations" thesis). This "clash of civilizations" thesis builds upon a skein of long-standing auto-critiques of Western universalism. See Oswald Spengler, *The Decline of the West's Perspectives of World History* (Charles Francis Atkinson trans., 1928) (1922) (suggesting that the world consists of separate and self-contained civilizations pursuing independent histories rather than a universal history); see also Tay, *supra* note 665, at 195 (suggesting that the "multiculturalist" rejection of Western universalism is rooted in the "mystical belief . . . that every people has a specific and special 'genius' and way of life and that all . . . foreign legal influence is a violation of its soul.").

⁷²⁶ Whereas Western legal systems aspire to the incorporation of universal and rational principles, Islamic law is a "**status** group law" that rejects reason in favor of faith and universalism in favor of limitation to a community of believers. Max Weber, *Law and Economy in Society* 241-43 (1954). Although the civilizational conflict thesis concedes ground to universalism by declaring that the central distinction to be drawn is between the West as the dominant civilization and the "non-Western many," it nevertheless maintains that the primary zone of conflict lies at the conjunction of Western and Islamic civilizations. See Huntington, *supra* note 668, at 36, 40-41 (describing Islamic and Western legal cultures as "particularly at odds" due to marked conflicts over the relative importance of individual rights and the relationship between church and state).

⁷²⁷ Shireen T. Hunter, *The Future of Isla and the West: Clash of Civilizations or Peaceful Coexistence?* ix (1998) (identifying source of irreconcilable conflicts between the Muslim and Western theories of political and legal legitimacy); see also Hamid M. Khan, Note, [Nothing is Written: Fundamentalism, Revivalism, Reformism, and the Fate of Islamic Law](#), 24 *Mich. J. Int'l L.* 273, 317-29 (2002) (describing incompatibilities between the Islamic conception of law as divinely-ordained and public international law-- essentially a Western creation--as fashioned by treaties, customs, and the teachings of jurists); Joseph I. Coffey & Charles T. Mathewes, *Religion, Law, and the Role of Force* 56 (2002) (noting widely-shared Muslim sentiment that international law is incompatible with Islamic law and therefore "alien").

⁷²⁸ Islam conceives of the world as divided into two spheres: the dar al-islam (abode of peace), in which dwell the Muslims, and the dar al-harb (abode of war), the realm of the unbelievers. Farooq Hassan, *The Concept of State and Law in Islam* 206 (1981). Faithful Muslims are commanded to take up jihad and wage perpetual war with dar al-harb to defend and spread the faith. See Index Islamicus, at <http://www.libnet.ac.ilb/~libnet/IndexIslamicus.htm> (last updated June 8, 2003) (elaborating the dar al-islam/dar al-harb distinction); id. at (defining “jihad” as the duty of a Muslim to struggle in defense of the faith); Khan, *supra* note 728, at 308 (explaining that Islam justifies war against the dar al-harb because non-Muslim societies establish men and laws, rather than God, as sovereign). The Qur’an clearly delineates one set of duties owed to fellow Muslims and another to unbelievers. See, e.g., Surah 8:57 (commanding Muslims to discriminate between fellow Muslims and non-Muslims with respect to the taking of prisoners); Surah 47:4 (requiring Muslims to kill non-Muslim combatants as punishment for infidelity to God). For an extensive discussion of the militance inherent in Islam, as well as of the call to jihad that animates Islamic terrorism against Western civilization, see Barry Feinstein, *Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation*, 11 J. Transnat’l L. & Policy. 201 (2002).

⁷²⁹ See Daniel Benjamin & Steven Simon, *The Age of Sacred Terror* 384 (explaining that, after a long respite from religious warfare, the conception of religion as a violent variable in world history has become alien to the Western mind).

⁷³⁰ Huntington, *supra* note 668, at 256. The historical and cultural context is important: modern Islamic terrorists do indeed view themselves as heirs to the legacy of the Muslims who defeated medieval Christian crusaders. Cole, *supra* note 4, at 95.

⁷³¹ The social contract theory of the creation of Western liberal democracies posits that states are instituted primarily to protect the lives and property of their citizens. See John Locke, *Two Treatises of Government* (1689). A logical corollary of the duty of the state to protect its citizens is the duty of the state to work in concert with other liberal democracies in their collective defense, and it is this duty to which scholars refer in challenging the West to unify against the Islamic civilizational threat. See Huntington, *supra* note 668, at 311 (charging Westerners with the “duty” to achieve greater political, economic, and military integration the better to restrain the development of Islamic military power); see also Regis Debray, *Letter from America*, 19 New Left Rev. 29, 31-32 (2003) (suggesting that Western civilization must draw closer to defend against an assault by the combined forces of Islamic as well as Sinic civilizations--“Confucius plus Allah”).

⁷³² See, e.g., Jacinta O’Hagan, *Civilisational Conflict? Looking for a Cultural Enemies*, 16 Third World Q. 19, 19 (1995) (criticizing inevitable intercivilizational conflict thesis as a simplistic reduction of the complexity of international relations and an attempt to “look for enemies”).

⁷³³ The most fundamentalist Muslims purport to be the bearers of the absolute revealed truth of the Creator. Gerstein, *supra* note 111, at 68. However, in this regard they are no different from the orthodox among their spiritual forebears, Jews and Christians. Hunter, *supra* note 728, at ix.

⁷³⁴ According to perhaps the foremost Western expert on Islamic law and history:
 At no point do the basic texts of Islam enjoin terrorism and murder. At no point . . . do they even consider the random slaughter of uninvolved bystanders . . . (The 9/11 terrorism) has no justification in Islamic doctrine or law and no precedent in Islamic history . . . These are not just crimes against humanity and against civilization; they are also acts--from a Muslim point of view--of blasphemy, when those who perpetrate such crimes claim to be doing so in the name of God
 Bernard Lewis: *Crisis of Islam* 154 (2003).
 Furthermore, although Christianity, with its just-war doctrine, is more closely associated with the development of

IHL than is Islam, defenders of the latter can point to the sacred text of Judaism and Christianity to argue it is these religions, not Islam, that embrace terrorism and mass murder. See, e.g., Deuteronomy 7:1-5:

When the Lord your God brings you into the land which you are entering to take possession of it, and clears away many nations before you . . . and when the Lord your God gives them over to you, and you defeat them; then you must utterly destroy them; you shall make no covenant with them, and show no mercy to them . . . (Y)ou shall break down their altars, and dash in pieces of their pillars, and . . . burn their graven images with fire.

Deuteronomy 7:1-5; see also M. Juergensmayer, *Terror in the Mind of God: The Global Rise of Religious Violence* (2000) (identifying religiously-inspired terrorist movements emanating from within the Christian, Muslim, Sikh, and Buddhist faiths). But compare Exodus 12:48-49 ("And when a stranger shall sojourn with you and would keep the passover to the Lord, . . . he shall be as a native of the land . . . There shall be one law for the native and for the stranger who sojourns among you.").

⁷³⁵ See Khan, *supra* note 728, at 299, 307 (describing modern Islamic revivalism as a benign cultural awakening); Robert D. Kaplan, *The Ends of the Earth: From Togo to Turkmenistan, From Iran to Cambodia--A Journey to the Frontiers of Anarchy* 107 (1996) (presenting Islam as a compassionate source of social cohesion and moral instruction).

⁷³⁶ For a refutation of the view that Islam is anathema to civilizational coexistence with the West, as well as an extended presentation of Islam as consistent with and key to democracy, see Noah Feldman, *After Jihad: America and the Struggle for Islamic Democracy* (2003).

⁷³⁷ Hashmi, *supra* note 724, at 23 (describing attempts of intellectuals to accommodate Islamic ethics with a modern social world).

⁷³⁸ Most religious "scholars" who condone terrorism--a small minority within the Islamic faith--are adherents to Wahhabism, a "narrow, intolerant, rigid, literalistic, and puritanical" sect of Islam that is extremely hostile to intellectualism, modernity and above all Western culture, which they blame for the numerous difficulties that plague Islamic societies. Khan, *supra* note 728, at 307; see also Hunter, *supra* note 728, at viii (lamenting terrorism as one of the "tragic uses to which Islam has been put" to foster intercivilizational enmity). These new Islamic fundamentalists, a group that includes Usama bin Laden of al Qaeda and Mullah Muhammad Omar of the Taliban, are concerned less with the well-being of their societies than with their cults of personality. Rashid, *supra* note 456, at 3. Courageous mainstream clergy, adamant that Islam is a religion of social justice categorically opposed to terrorism, charge this radical sect with rejecting Islamic tradition, custom and the Qur'an itself in propounding apostasy. See *id.* (differentiating political terrorism of radical Islamists from the religious piety of traditional Islamic scholars); Hugo Young, *It May Not Be PC to Say*, *Guardian*, Oct. 9, 2001, at 24 ("Islam has been hijacked by a discourse of anger and a rhetoric of rage.") (quoting Islamic scholar Iman Hamza).

⁷³⁹ Scholars of Islam stress that the ummah--the billion members of the world Islamic community--is no more unified than are the adherents of any other religion. See Hunter, *supra* note 728, at 7-8, 14-18 (rejecting the notion that the ummah acts as a single political bloc); Kishore Mahbubani, *The Dangers of Decadence*, 72 *FOR. AFF.* 12, 12-14 (1993) (dismissing the adhesiveness of pan-Islamic sentiment as applied to geopolitics); Fouad Ajami, *The Summoning: "But They Said, We Will Not Harken,"* 72 *For. Aff.* 1, 8-9 (1993) (explaining that "the world of Islam divides and subdivides"). Moreover, "there are growing numbers of Muslims . . . who desire nothing better than a closer more friendly relationship with the West." Lewis, *supra* note 735, at 47; Jessica Stern, *Terror in the Name of God* (2003) (same). Even if Islam imposes a dar al-islam/dar al-harb distinction, the Qur'an explicitly establishes that the duty of jihad is purely defensive; aggression is categorically proscribed. See Abulaziz A. Sachedina, *From Defensive to Offensive Warfare: The Use and Abuse of Jihad in the Muslim World* (forthcoming) (positing the defensive interpretation of jihad).

⁷⁴⁰ Although the Organization of the Islamic Conference was formed in 1969 to further cooperation between Islamic

states, no unified program has yet been crafted or proposed by that or any other entity. See Hashmi, *supra* note 724, at 18 (discussing disunity that characterizes relations within the community of Islamic states since the fall of the Caliphate in the 11th century).

⁷⁴¹ See generally Fred Halliday, *Islam and the Myth of Confrontation* (1996).

⁷⁴² The image of Islam as a military program calling for the defense of Islamic civilization by subjugation of non-Muslims is starkly contrasted with that of Islam as a set of customs and values around which to order a just society, and the vast majority of Muslims express their faith in the latter tradition. See John Clark Mead, *The New World War 47-95* (2002) (elaborating distinctions between majoritarian “cultural Islam” and the “militant Islam” of a small minority).

⁷⁴³ See John Quigley, [International Law Violations by the United States in the Middle East as a Factor Behind Anti-American Thought](#), 63 U. Pitt. L. Rev. 815 (2002) (arguing because the U.S. has supported Israel and allegedly suppressed Arab self-determination, it is partly responsible for September 11th and other acts of violence against United States targets in recent years); see also Paul Berman, *Terror and Liberalism* (2002) (presenting and criticizing arguments that United States capitalist foreign policy is responsible for creating the hatred that produced September 11th). Critics of the impulse to find the origins of September 11th in the consequences of United States foreign policy counter with the contention that the perpetrators of the unspeakable horrors of that day simply “loathe (the West) because of who we are and what our society represents,” namely respect for individual liberties, religious tolerance, and a political system governed by secular law. Elshaint, *supra* note 663, at 3.

⁷⁴⁴ A clear distinction can be drawn, and is so drawn, for purposes of this Article between Muslims and terrorists. In the immediate aftermath of September 11th, the United States took the official position that it is terrorists who profess to be Muslims, and not the Islamic faithful, who threaten not only the West but the Muslim faith itself: We respect your faith. It’s practiced freely by millions of Americans, and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Allah. The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself. President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001). This view is shared by religious scholars as well: To suppose that the Islamic faith . . . somehow lead(s) men . . . to be capable of flying an airliner full of passengers into a building crowded with unsuspecting civilians, is deeply denigrating to Muslims It requires us to suppose that Muslims . . . lie almost beyond the borders of a shared humanity . . . simply because they are Muslims David S. Yeago, *Just War: Reflections from the Lutheran Tradition in a Time of Crisis*, 10 Pro Ecclesia 401 (2001). Still, not all scholars believe the War on Terror can be neatly cabined to shield the broader Islamic civilization from violent clash with the West. See, e.g., Francis Fukuyama, *Their Target: The Modern World*, Newsweek, Dec. 17, 2001 (arguing Islam is fundamentally hostile to secular civilization and that the conflict in which the United States is embroiled is “not simply a ‘war’ against terrorists” but is in fact a “much broader” conflict between modernity and anti-modernity).

⁷⁴⁵ See Craig Hall, [The Wake-Up Call of Terrorism](#), 36 Int’l Law. 125 (2002) (suggesting that non-religious factors such as economic deprivation and a lack of education are the root causes of terrorism and must be resolved to prevent future attacks).

⁷⁴⁶ For arguments elaborating the latter position, see Benjamin Netanyahu, *How the West Can Win* 8-9 (1986) (asserting a causative relationship between “Islamic radicalism” and much of the terrorism of the 20th century); Laurie Goodstein, *Seeing Islam as “Evil” Faith, Evangelicals Seek Converts*, N.Y. Times, May 27, 2003, at A1 (reporting the popularization of the impression of Islam as a “very evil and wicked religion” and a global threat based upon its textual support for terrorism); Daniel M. Filler, [Terrorism, Panic, and Pedophilia](#), 10 Va. J. Soc. Pol’y & L. 345, 348-49 (2003) (highlighting and condemning as an act of “moral panic” the rhetoric by Christian groups demonizing

Muslims as predatory pedophiles, based on a questionable interpretation of the life and teachings of Prophet Muhammad, offered in justification of registration of Muslims as a precursor to their future internment in response to anticipated acts of domestic terrorism by Muslim Americans) (citing numerous sources).

⁷⁴⁷ Still, a fatwa (religious command) issued by Usama bin Laden and leaders of other Islamic terrorist groups declaring that to “kill the Americans and their allies--civilians and military--is an individual duty for any Muslim who can do it in any country in which it is possible to do it” supports the thesis that these terrorist groups, at the very least, are in civilizational conflict with the West. Usama bin-Laden et al., Text of Fatwah Urging Jihad Against Americans, *Al-Quds Al-Arabi*, Feb. 23, 1998. The reaction of bin-Laden to the events of September 11th further underscores this point. See Statement from Usama bin-Laden, to Al-Jazeera Television (Oct. 7, 2001), available at http://www.pbs.org/newshour/terrorism/international/binladen_10-7.html (“Here is America struck by God Almighty . . . (T)hanks be to God God has blessed a group of vanguard Muslims, the forefront of Islam, to destroy America.”). Moreover, a recent study consisting of interviews of Islamic terrorists suggests that the destruction of the West and the “recover(y) of (a) lost civilization, to recover the golden age of Islam,” is their overarching mission. Stern, *supra* note 740, at 136.

⁷⁴⁸ See John Rawls, *The Law of Peoples* 3-37 (1999) (defining the “Society of Peoples” as those states that observe treaties, observe the duty of nonintervention, refrain from war except in self-defense, honor human rights, and assist others).

⁷⁴⁹ The terrorist group al Qaeda, relying on its interpretation of Islamic law, explicitly rejects political solutions to disputes with the West and advocates unrestricted murder of citizens of the United States and other Western governments. See Al Qaeda Training Manual 4, available at <http://www.usdoj.gov/ag/trainingmanual.htm> (“The confrontation that we are calling for with the apostate regimes does not know Socratic debates, Platonic ideals nor Aristotelian diplomacy. But it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun.”). For such organizations, Islam offers “carte blanche justification for going to war . . . without concern for limitations upon its means,” and terrorism is “divinely sanctioned.” Coffey & Mathewes, *supra* note 728, at 30 (discussing 1998 Usama Bin Laden fatwah calling for terrorist acts against United States citizens and property).

⁷⁵⁰ The architects of September 11th and their ideological progeny are vicious murderers who “have acquired a taste for killing, . . . (and) are capable of atrocities that challenge the descriptive powers of language.” Peters, *supra* note 707, at 24. They are irrevocably bent on “destroy(ing) an impure world and bring(ing) about the apocalypse,” and no means are beyond limits. Crenshaw, *supra* note 111, at 411. The deliberate targeting of innocent women and children, and the conscription of children as warriors in the cause, are but two of their more heinous means and methods for destroying the West. See Justus Reid Weinder, *The Use of Palestinian Children in the Al-Aqsa Intifada: A Legal and Political Analysis*, 16 Temp. Int’l L. & Comp. L.J. 43 (2002) (describing employment of propaganda and educational incitement to induce Palestinian children to engage in acts of terrorism, including suicide bombing of civilian targets); see also Ilene Cohn & Guy S. Goodwin-Gill, *Child Stories: The Role of Children in Armed Conflict* (1994) (same); Cal Thomas, *America is in Denial about the Mandate to Destroy Us*, *Indianapolis Star*, Oct. 23, 2003, at A13 (surveying recent calls from Islamic clerics and leaders to destroy the West for its alleged infidelity to the true faith).

⁷⁵¹ See Chairman of the Joint Chiefs of Staff, *Joint Vision 2010* (1996) (defining asymmetrical warfare as attempts to circumvent or undermine an opponent’s strength while exploiting his weaknesses using methods that differ significantly from the opponent’s usual mode of operations.).

⁷⁵² The notion that non-state actors might possess the capacity to initiate an armed attack against a state of sufficient magnitude as to vest themselves with a form of international legal personality under IHL and the U.N. Charter had been discussed very little prior to September 11th. See Yutaka Arai Takahashi, [Shifting Boundaries of the Right of](#)

[Self-Defense--Appraising the Impact of the September 11 Attacks on the Jus Ad Bellum, 36 Int'l Law. 1081 \(2003\)](#) (noting that international law has required that aggression stem from a state) (citing G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 19, at 142-43, U.N. Doc. A/9619 (1974)).

⁷⁵³ See William H. Taft, [The Law of Armed Conflict After 9/11: Some Salient Features, 28 Yale J. Int'l L. 319, 319 \(2003\)](#) (identifying intent of 9/11 terrorists as "to undermine civilized society's way of seeing the world and attempting to govern it.").

⁷⁵⁴ That IHL should be perverted from humanizing regime to weapon of war by terrorists is perhaps not so much paradoxical as ironic if one considers that agreements as to limitations on warfare presume shared interests and the capacity to reach rational understandings with enemies who, if such shared interests and understandings were possible, would not likely be enemies.

⁷⁵⁵ See Lewis, *supra* note 88 (enumerating recent violations of IHL by irregular unlawful combatants during the Liberation of Iraq).

⁷⁵⁶ Observance of IHL would deny terrorists the very methods and means of war essential to engaging their enemies on something approximating an equal plane, and consequently they reject its application. See W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 Am. J. Int'l L. 81, 86 (2003) (contrasting practical disparity between the legal restraints occasioned by IHL upon territorial states, who are subject to the "dynamic of reciprocity and retaliation" that underlies international relations and who publicly accept legal limitations upon their capacity to respond to terrorist depredations, with terrorist groups and other nonstate actors who are difficult for states to locate and target in retaliation and who deny any legal restraints upon their actions). By selectively violating and then exploiting lacunae and ambiguity in IHL to their military and especially political advantage, terrorists convert IHL from a shield to a sword. See Abraham D. Sofaer, [The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense, 126 Mil. L. Rev. 89, 89-90 \(1989\)](#) (arguing that IHL ultimately serves terrorists' interests); Aldrich, *supra* note 608, at 3 (expressing qualified support for the argument that, in light of the Additional Protocol I, the West is prejudiced not merely by disparities in compliance as between terrorists and liberal democracies but by the structural and normative foundations of IHL which are evolving in favor of the protection of terrorists).

⁷⁵⁷ The contention that law is an instrument of coercion just as much as is military force dates at least to the Renaissance. See, e.g., Machiavelli, *supra* note 5, at 99 ("There are two ways of fighting: by law and by force.").

⁷⁵⁸ The social theory of functionalism maintains that society is a set of interrelated institutions and norms each of which has a particular essential purpose to the existence and operation of the social whole; society is analogous to a living organism. See Emile Durkheim, *The Division of Labor in Society* (1893) (positing a general functionalist theory); Richard Merton, *Manifest and Latent Functions* (1957) (elaborating modern theory of functionalism). Functionalism postulates that law is the mechanism that structures expectations and secures compliance with a set of socially desirable norms, principles, rules and procedures at the lowest possible cost, and that the need to resort to coercive enforcement to secure compliance with this set of norms marks the weakness, and even failure, of the law. See Michael Barkun, *Law Without Sanctions* 87-88, 157 (1968) (describing law as authoritative and normative statement of "paths over which the affairs of (a) community are carried on" and stating that the overriding function of law is "preservation of order" and the "ordering (of) social relationships"). IHL functions as the mechanism whereby application of force to the resolution of otherwise intractable disputes is, via a set of rules, prevented from destroying the objects, norms, and principles constitutive of civilization without rendering that application of force in the defense of civilizational values impracticable. See Douglas Cassel, *Does International Human Rights Law Make a Difference?*, 1 Chi. J. Int'l L. 121, 126-30 (2001) (stating that international law functions to deny moral relativism and to establish and defend normative transnational preferences against violators). IHL thus simultaneously enables, yet limits, the destruction attendant to war the better to secure civilizational security. For a thorough discussion of

(neo)functionalist theory, see Jurgen Habermas, *Theory of Communication Action* (1984). For a defense of functionalist theory against critics, see Michael Faia, *Dynamic Functionalism* (1986).

⁷⁵⁹ Reisman, *supra* note 82, at 81.

⁷⁶⁰ *Id.* (“(E)very legal regime perforce benefits some actors more than others. . .”).

⁷⁶¹ See *supra* notes 404-07 and accompanying text (discussing effects of purported post-1977 modifications to conventional and customary sources of IHL and the legal debates as to whether such modifications create enforceable obligations); see also discussion *infra* Part III.D (same); Reisman, *supra* note 82, at 81 (describing “tensions between formally prescribed (IHL) from a previous period and contemporary (IHL)”).

⁷⁶² Reisman, *supra* note 82, at 81.

⁷⁶³ See John Strawson, *Introduction in the Name of the Law*, in *Law After Ground Zero*, *supra* note 80, at xi (conceding that IHL has been revealed post-September 11th as “feeble” and “fragile as our world order”); *id.* (describing the Bush Administration view as the position that “we (are) at a now foundational moment at which existing legal norms and institutions are either irrelevant or questionable” and that IHL is dysfunctional or even harmful to the task of defeating terrorism). The argument that IHL may “actually worsen the problems (it was) crafted to redress,” although it is a “radical critique of international law,” deserves empirical evaluation. Ryan Goodman & Derek Jinks, [Measuring the Effects of Human Rights Treaties](#), 14 *Eur. J. Int’l L.* 171, 171 (2003).

⁷⁶⁴ See *The Collected Works of Paul Valery* (Jackson Mathews ed., 1975) (“Two dangers constantly threaten the world: order and disorder.”).

⁷⁶⁵ See Rudolf Dolzer, [Clouds on the Horizon of Humanitarian Law?](#), 28 *Yale J. Int’l L.* 337, 338 (2003) (“(I)t is unrealistic to expect that states, targeted by radical fundamentalists, will draw the lines in their defensive actions, and their strategies in general, precisely in accordance with the humanitarian values which have informed (IHL).”). Moreover, not all states have an equal stake in this reformulation of law, and responsibilities do not rest equally upon them: although states enjoy formal equality under international law, the notion that declarations of custom offered by states that do not engage in armed conflict and have no direct responsibility for the defense of civilization is inconsistent with the practical reality of the context presented by the War on Terror. See *supra* note 96 and accompanying text. It falls to those states primarily able and willing to take the lead in reformulating IHL to meet the functional demands of the War on Terror.

⁷⁶⁶ Deontological scholars, even if they accept the assumption that the defeat of terrorism is an end very much preferable to the alternative, challenge this utilitarian assertion that it is possible to derogate from the IHL regime where absolutely necessary in order to prevail without abdicating the moral high ground and denaturing the moral force of the rule of law. See Gross, *supra* note 45, at 465 (contrasting the deontological and utilitarian perspectives on IHL). However, although it is preferable that the defeat of terrorism complement, rather than erode, IHL, if ultimate victory requires derogation under limited and precisely defined circumstances, it would seem a small price to pay.

⁷⁶⁷ See *id.* at 469 (arguing that because IHL was never designed to apply against terrorists, one must look outside IHL to determine whether a state can ever incur a moral duty to overlook IHL in order to protect its own citizens against terrorists); see *id.* at 484-85 (answering in the affirmative by stating that “(t)errorism . . . thereby forces upon us a ‘regime of necessity’ whereby we are compelled to put aside guiding moral principles in favor of a moral duty to protect the lives of the citizens of the free world.”). For examples of the unsuitability of IHL in its current incarnation

to the War on Terrorism, see *infra* Part III.D.

⁷⁶⁸ See CJCSI 5810.01B, *supra* note 639 (insisting that the “Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized”). The United States commitment to the observance of IHL, however, does not imply United States recognition of the full panoply of legal obligations, particularly of the customary variety, that IHL absolutists would impose through the operation of the ICC. See *supra* note 624 (discussing disagreements over the parameters of IHL).

⁷⁶⁹ See Adda B. Bozeman, U.S. Conceptions of Democracy and Security in a World Environment of Culturally Alien Political Thought: Linkages and Contradictions, in U.S. Domestic and National Security Agendas into the Twenty-First Century 55 (Sam C. Sarkesian & John Mead Flanagan eds., 1994) (tracing progressive United States auto-imposition of constraints on the use of force as evidenced by treaties, practice, and the declarations of public officials).

⁷⁷⁰ See Barnett, *supra* note 96, at 80 (contending that United States membership in IHL conventions has the “effect of removing options from the board” and offering potential adversaries who do not adhere to these conventions opportunities to their asymmetrical advantage); see also Bozeman, *supra* note 770, at 55 (warning that the Western understanding of IHL is dangerously “out of date”).

⁷⁷¹ A Hobson’s choice is the obligation to choose in a situation in which there is no available choice that is free of attendant guilt and responsibility for resultant evils. See Thomas Nagel, 1 *Phil. & Pub. Aff.* 123, 143 (1972).

⁷⁷² That objectively just conduct could ever be characterized as unlawful is an indictment either of the moral character of the community that created the law or of the institutions wherein the conduct adjudged unlawful. For a discussion of evil legal systems, see generally Ronald Dworkin, *Judicial Obligation and the Rule of Law* (1976).

⁷⁷³ NGOs and activists at the helm of this venture have capitalized upon the diminished role of the state in the post-Cold War era and seized control over the prescription and enforcement of IHL from states--the entities that actually engage in armed conflict. In so doing, they have extended it beyond its functional and democratic limitations: For the past 20 years, the center of gravity in establishing, interpreting and shaping the law of war has gradually shifted away from the military establishments of leading states . . . and from the International Red Cross . . . and toward more activist and publicly aggressive N.G.O.’s . . . (T)he pendulum shift toward them has gone further than is useful, and the ownership of the laws of war needs to give much greater weight to state practices of leading countries.
Kenneth Anderson, Who Owns the Rules of War?, Crimes of War Project, available at http://www.crimesofwar.org/special/Iraq/news_imag6.html (last visited June 8, 2004).
“Ownership” of IHL is crucial. Inarguably, substantive IHL scholarship is augmented by knowledge of military history and combat experience: those unenriched by either are subject to criticism particularly where they advocate prescriptions that history and experience have proven untenable in actual combat. See H. Wayne Elliot, *History, War, and Law* (1994), 30 *Tex. Int’l L.J.* 631, 637 (1995) (reviewing *The Laws of War* (Michael Howard et al. eds., 1994)) (“Only when one has a firm foundation in military history can one truly begin to understand the utility and limits of (IHL).”). Many critics of the United States position on the ICC are civilians lacking an understanding of the stochastic, nonrational processes that govern combat and exert pressures to derogate from absolutist, positivist legal proscriptions and prescriptions. See Fussell, *supra* note 213, at 283 (“The relative few who actually fought know that the war was not a matter of rational calculation. They know madness when they see it.”) As a consequence, these critics are unable to appreciate the environment in which soldiers make decisions, and thus when they recapitulate the events in question to determine what they would do under similar circumstances and to adjudicate individual criminal responsibility, they are bereft of the most essential information. IHL conceived in ignorance thus carries within it the seeds of its own compliance failures and ultimately its unenforceability.

⁷⁷⁴ Although there has not been a formal declaration of war, “only a most technical and arid legalism could deny that (the United States is at war with terrorist organizations).” Reisman, *supra* note 82, at 88 n.14.

⁷⁷⁵ See *The Basis of Obligation in International Law* 30 (Hersch Lauterpacht, ed., 1959) (“(W)henever men become sufficiently dissatisfied with the existing regime of positive law and custom, they will be found reaching out beyond it for the rational basis of what they conceive (it) ought to be.”).

⁷⁷⁶ The term “rationalize” has traditionally been employed with respect to the scholarly review of IHL for the purpose of suggesting those modifications that harmonize the “rules on the books” with the prescriptions and proscriptions likely to be observed by soldiers in practice. See, e.g., Fooks, *supra* note 143, at 3 (calling for the modification of IHL such that “the rights of belligerents (are) secured by such agreements as are likely to be followed in time of war”); Hingorani, *supra* note 14, at 194-95 (concurring with the argument that the acceptance and observance of IHL depends upon its compatibility with the realities of warfare and stating that “(n)o belligerent will accept the rules of (IHL) which run counter to its basic principles and interests”).

⁷⁷⁷ Although this distinction intersects at the level of theory with the lawful-unlawful combatants distinction by asserting that the allocation of legal rights should reflect the degree to which belligerents assent to and comport themselves in accordance with the rule of law, the two are of different provenance, and the former is intended as a guide less in regard to the resolution of legal issues surrounding detention and prosecution of enemy belligerents for pre-capture crimes than to the choice of legal standards and institutions connected with the adjudication of alleged violations of IHL by soldiers.

⁷⁷⁸ Unilateralism, generally a more politically costly approach to international relations than a more multilateral foreign policy, “sits uncomfortably” with those who fear that a single “state has taken on the role of judge, jury and policeman.” Wedgwood, *supra* note 495, at 726. Ideally, the United States will gain the support of a coalition of like-minded states who together will demand and obtain a wider margin of legal tolerance for their concerted actions in response to terrorism. However, if a multilateral approach fails, or if multilateral policy agreement does not translate into assistance in military operations or in providing legal support to U.S.-led operations, the United States may be forced to take the path to a rationalized IHL alone. See *id.* at 727 (conceding that the “availability of unilateral action may be essential to forging a result that strengthens security”). For a discussion of the difficulty in securing and maintaining alliances in international relations, see generally James A. Caporaso, *International Relations Theory and Multilateralism: The Search for Foundations*, 46 *Int’l Org.* 599 (1992).

⁷⁷⁹ See Aime Cesaire, *Discourse on Colonialism* 36 (Joan Pinkham trans., 1972) (1955) (offering an early academic treatment of Nazism as “the crowning barbarism that sums up all the daily barbarisms).

⁷⁸⁰ Terrorists are the sort of “implacable enemy whose avowed objectives”--the destruction of our way of life--motivate maximalist responses and the abandonment of “(h)itherto acceptable norms of human conduct” as the price of their defeat. Doolittle Committee, *Report on the Covert Activities of the Central Intelligence Agency* (Sept. 30, 1954). A renowned United States constitutional scholar has advocated the judicially-sanctioned torture of terrorists to force the disclosure of information that would prevent an imminent and massive terrorist attack. See Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 166-213 (2002). Another scholar suggests that the United States go so far as to consider the destruction of Islamic holy sites in order to simultaneously constitute the conditions for future deterrence and to disprove the mistaken notion held by some terrorists that Western decadence renders Western restraint inevitable. See Daniel Pipes, *Discarding War’s Rules*, N.Y. Post (Online Edition), July 22, 2003, available at <http://www.nypost.com/postopinion/opedcolumnists/1200.htm> (previewing a forthcoming work by Lee Harris that claims it is Western restraint, the product of an “arch-civilization,” that has “insulated its enemies from the deserved consequences of their actions.”). Although the present argument is in some senses a call for a break with past restraints, it does not accept that the intentional targeting of civilian structures is permissible within the ethical boundaries established by the martial code.

⁷⁸¹ Terrorists might be offered, as an act of grace rather than legal obligation, the protections of IHL, and the privileges inherent in the judicial model. See [10 U.S.C. § 818 \(1998\)](#) (permitting courts-martial jurisdiction to try “any person who by the law of war is subject to trial by a military tribunal.”); [18 U.S.C. § 3231 \(2000\)](#) (granting jurisdiction to federal district courts to try all offenses against the laws of the United States).

⁷⁸² This is not to suggest that soldiers in circumstances such as those faced by T/5 Upham will never undertake reprisals in response to terrorists’ violations of IHL. However, for soldiers in the armed forces of the West, impressed as they are at all turns with the requirements of the martial code as well as with the obligations, as members of a civilization governed and symbolized by the rule of law, there are significant professional and cultural restraints upon the abandonment of rule-governed behavior. See Barnett, *supra* note 96, at 16 (examining cultural differences with regard to willingness to violate law in pursuit of personal and social objectives and to undertake reprisals for others’ violations of the law).

⁷⁸³ The application of non-legal norms to the humanization of war fits into a generalized discussion of the salience of non-legal norms in regulating the conduct of epistemic communities. See Robert C. Ellickson, *Order Without Law* (1991).

⁷⁸⁴ The protective principle of jurisdiction permits domestic exercise of jurisdiction where an extraterritorial act threatens interests vital to the security, territorial integrity or political independence of the prosecuting state and allows the state to prosecute foreign nationals. See [Restatement \(Third\) of the Foreign Relations of the United States § 402](#) cmt. f (1987). This jurisdictional basis has been used to prosecute terrorists under United States law for conspiracy to engage in attacks that affected or would affect United States nationals. See [United States v. Yousef, 327 F.3d 56, 108-11 \(2d Cir. 2003\)](#) (affirming application of CIL principle of protective jurisdiction to uphold convictions of terrorist defendants for conspiring outside the U.S. to destroy civilian airliners upon which United States nationals were to have been on board, in violation of [18 U.S.C. § 32](#)).

⁷⁸⁵ See U.S. Dep’t of State, Office of the Coordinator on Counterterrorism, Appendix B: Background Information on Foreign Terrorist Groups, at I (Apr. 30, 2001) (listing twenty-eight officially designated foreign terrorist organizations), available at <http://www.state.gov/s/ct/rls/pgtrpt/2000/2450.htm> (authorized by Antiterrorism and Effective Death Penalty Act of 1996).

⁷⁸⁶ See Eric Lichtblau, *Wanted: A Short List of 100,000 Terrorists*, N.Y. Times, Sept. 21, 2003, § 4, at 5 (reporting that the United States is compiling a “master list” of over 100,000 known and suspected terrorists for use in law enforcement and military defense).

⁷⁸⁷ The designation of a “crime against civilization” could be envisaged as a meta-war crime or as a distinct category of criminality. Although domestic definitions of war crimes generally overlap with the definitions established under IHL, the principle of sovereignty permits states to adopt their own domestic standards provided the resulting legislation does not run counter to norms of *jus cogens*. See Joyner, *supra* note 21, at 165 (discussing sources of conflict between domestic and international law with regard to war crimes definitions); see also *supra* note 701 (discussing norms of *jus cogens*). In an attempt to restore a measure of symmetry to the battlefield, states might elect to redefine war crimes to prohibit the tactics, weapons or other practices of their adversaries as well as to threaten enemy combatants with punishment for the employment of these tactics, weapons or practices upon capture. Taken to further extreme, a state might elect to immunize the use, by its soldiers, of all tactics, weapons, and practices, even those otherwise prohibited by law. The declaration proposed herein would effectively stand as a declaration of war against terrorists that would not only transform legal relations between the United States and terrorist groups but would open up, for use against identified terrorists, a set of military options, tactics, and weapons otherwise prohibited by domestic and international law. Constitutional amendment may be necessary to pass such legislation,

as the doctrine of outlawry has long lapsed into obsolescence under the domestic law of States and was never available at federal law, and the 5th Amendment Due Process Clause has been interpreted in dissent by the Supreme Court as an impediment to the resurrection of outlawry. See [Ullmann v. United States, 350 U.S. 422, 452 n.5 \(1956\)](#) (Douglas & Black, J.J. dissenting) (“(T)he prohibition of Bills of Attainder place(s) beyond the pale the imposition of . . . outlawry by either the Executive or the Congress.”).

⁷⁸⁸ Although the unlawful combatant distinction effectively imposes this legal **status** by executive order upon terrorists captured in battle, congressional silence leaves the door open to arguments that the civil rights of unlawful combatant detainees, particularly those who possess United States citizenship, have been violated by their detention without the procedural and substantive benefits of the Geneva Conventions. See [Padilla ex rel Newman v. Rumsfeld, 243 F. Supp. 2d 42 \(S.D.N.Y. 2003\)](#) (challenging detention of United States citizen, suspected of membership in al Qaeda, held by military on a material witness warrant as an unlawful combatant without access to counsel); see also *supra* notes 624-702 (discussing the effects of the Protocols Additional on the customary doctrine of unprivileged belligerency). Moreover, the proposed declaration encompasses all members of designated terrorist groups within its ambit even in advance of armed conflict with those groups rather than applying simply to those members caught not in compliance with the conditions necessary to establish lawful combatancy. [Padilla ex rel Newman, 243 F. Supp. 2d at 43](#). As such, ACB is an act of legal preemption designed to affirmatively resolve not only the constitutional authority to detain unlawful combatants indefinitely but to discriminate, even in contravention of IHL, as between different categories of combatants on the basis of the objectives and methods of their armed operations. In conjunction with existing legislation permitting divestiture of nationality from United States citizens, ACB should meet no constitutional impediments to its application against terrorists of any nationality. See [8 U.S.C. § 1481 \(2003\)](#) (providing for loss of citizenship by United States national who (1) makes formal declaration of allegiance to or serves in armed forces or government of a foreign power, (2) commits treason or (3) attempts the violent overthrow of the U.S.).

⁷⁸⁹ One commentator proposes the far narrower solution of eliminating the principle of proportionality with respect to anti-terrorist operations. See Michael C. Bonafede, Note, [Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11th Attacks](#), 88 [Cornell L. Rev.](#) 155, 189-97 (2002). This Article proposes a much broader suspension of IHL in regard to the War on Terror that is indebted to the ancient Romans, who incorporated contingency clauses in statutes to provide that positive law could not abrogate what was considered sacrosanct or naturally just. See A.P. d’Entreves, *Natural Law: An Introduction to Legal Philosophy* 29-31 (1951) (discussing procedure whereby Roman *lex scripta* could be negated by reference to principles of natural law). Effectively, the *Actus Contra Barbarum* is an assertion that natural legal principles, grounded in a universal understanding that terrorists are enemies of all mankind and beyond the reach of law, permit and even necessitate the bifurcation of IHL the better to defend law and civilization.

⁷⁹⁰ See Hurst Hannum, [Bellum Americanum](#), 27 [Fletcher F. World Aff.](#) 29, 29 (2003) (describing War on Terror avowedly designed to “accomplish ‘good’ through war” as “*bellum americanum*”). *Bellum americanum* is thus *bellum romanum* adapted to current usage. See *supra* note 679 (describing *bellum romanum* as unrestrained war against barbarians).

⁷⁹¹ Social science research suggests that the most efficient strategy for inducing cooperation is one that initiates relations on a cooperative basis but immediately retaliates in response to “defections” with punitive actions. See Robert Axelrod, *The Evolution of Cooperation* 174-76 (1984) (describing “TIT FOR TAT” as the most effective strategy in securing cooperation, suppressing defection and teaching opponents to understand that noncooperation is unprofitable). The proposed strategy, however, requires that subjects make rational calculations, an assumption potentially false in the case of terrorists. [Id.](#) at 174. Moreover, observation of the martial code and terrorism are, logically speaking, mutually exclusive; honorable soldiers simply do not target civilians, and jihadis are programmed to the destruction, not accommodation, of unbelievers. For arguments that Islamic warriors are incapable of assimilating the martial code, see Bassam Tibi, *War and Peace in Islam*, in *The Ethics of War and Peace* 128, 128-45 (Terry Nardin ed., 1996); Ignatieff, *supra* note 119, at 147. For an argument that the regime elites that sponsor terror, as well as leaders of terrorists groups, can be deterred, see Robert F. Turner, [State Responsibility and the War on](#)

[Terror: The Legacy of Thomas Jefferson and the Barbary Pirates, 4 Chi. J. Int'l L. 121, 139-40 \(2003\).](#)

⁷⁹² See [Fed. R. Civ. P. 12\(b\)\(2\)](#).

⁷⁹³ Terrorists might be given temporary **status** as protected diplomatic persons to enable their safe passage to and from the United States to plead their legal cases. See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, art. 29 (providing that the "person of a diplomatic agent shall be inviolable," that he shall be immune "any form of arrest or detention," and that the "receiving State shall . . . take all appropriate steps to prevent any attack on his person, freedom or dignity.").

⁷⁹⁴ This provision would explicitly overrule caselaw. See, e.g., [People's Mojahedin Organization of Iran v. Albright, 182 F.3d 17 \(D.C. Cir. 1999\)](#) (dismissing as nonjusticiable political question a suit by members of foreign organizations appealing their designation as terrorist groups by the Secretary of State).

⁷⁹⁵ Technically, compacts between state and non-state actors are not considered "treaties" under international law. See [Vienna Convention on the Law of Treaties, May 23, 1969, art. 2\(a\), 1155 U.N.T.S. 331, 333](#) (stating that a treaty is always an international agreement "concluded between States."); [Restatement \(Third\) of the Foreign Relations Law of the United States § 311 \(1987\)](#) (restricting treaty membership to states). Nevertheless, under international law terrorist organizations are not per se ineligible from entering into agreements, as distinct from treaties, with states. See 2 L. Oppenheim, *International Law: A Treatise* 494-95 (H. Lauterpacht ed., 6th ed. 1947) (supporting treaty-based agreements between states and insurgent organizations); Brownlie, *supra* note 597, at 65-66 (same).

⁷⁹⁶ The United States has negotiated treaties with states with which it continues thereafter in a state of war, including some that would currently be characterized as rogue states. See, e.g., Treaty of Peace and Amity between the United States and Tripoli, concluded June 4, 1805, article XVI cited in 2 William M. Malloy, *Treaties and Conventions, International Acts, Protols and Agreements Between the United States of America and Other Powers, 1776-1909* (1910) (agreeing on principles restricting conduct of war between United States and Barbary States and providing that **POWs** would not be enslaved but rather exchanged within 1 year). On April 15, 2003, the United States concluded its first ever accord with a terrorist organization, permitting the Mujahedeen al Khalq, a 10,000 member anti-Iranian group placed on the State Department list of terrorist organizations in 1997 for attacks against Iranian government targets, to keep most of its weaponry and to be immune from United States military operations in exchange for agreeing not to undertake hostile acts against the United States and to provide intelligence on Iran. Douglas Jehl & Michael R. Gordon, *American Forces and Terror Group Reach Cease-Fire*, N.Y. Times, Apr. 29, 2003, at A1. Israel reached a similar agreement with Hizballah in 1996 that enjoyed some success. See Adir Waldman, [Clashing Behavior, Converging Interests: A Legal Convention Regulating a Military Conflict, 27 Yale J. Int'l L. 249, 250 \(2002\)](#) (describing IDF-Hesbollah "April Agreement" governing combat in South Lebanon and committing parties to limitations on methods and means and to protection of noncombatants). Whether similar such agreements can be crafted to bind organizations such as al Qaeda is uncertain. See Howard Witt, *Iranian Group on Terrorist List Has Pull in D.C.*, Chi. Trib., Jul 13, 2003, at A4 (suggesting that agreement with the Mujahedeen Khalq was possible only because Congress considers it a "pro-Western" organization); Elstain, *supra* note 663, at 154 (valuing a treaty negotiated with a terrorist group as "not . . . worth the paper it was written on.").

⁷⁹⁷ See *supra* notes 135, 342, 452 (enumerating applicable defenses in United States courts-martial)

⁷⁹⁸ See *supra* notes 135, 342 (considering mitigating and extenuating circumstances in trial and sentencing in courts-martial).

⁷⁹⁹ Presently, the ICC does not permit reservations. Rome Statute, *supra* note 32, art. 120. Nor may amendments be made prior to 2009, and even then a supermajority of 7/8 of States Parties will be required. *Id.* art. 121(1), (4).

⁸⁰⁰ This precondition would possibly require amendment to the Rome Statute, which, under Article 21, rejects “application and interpretation of law . . . with() . . . adverse distinction founded on grounds such as (inter alia) religion or belief, (or) political or other opinion.” Because the doctrine of *contra barbarum* would alter the interpretation or application of law with respect to terrorist on account of the acts they undertake in furtherance of their religiously-motivated political program, the Rome Statute would, as currently conceived, be perceived as a bar to such a reservation or understanding offered by the United States upon its accession.

⁸⁰¹ The “persistent objector” rule of CIL provides that a state is not bound by the maturation of a CIL principle if it has consistently indicated its dissent from a practice while the law was “still in the process of development.” [Restatement \(Third\) of the Foreign Relations Law of the United States § 102](#), cmt. d (1987). The United States has at very least an arguable claim that it has persistently objected to many declarations of customary IHL, although its failure to specify precisely what obligations it does recognize, coupled with its adherence to many principles in the Protocols Additional and other IHL declarations out of humanitarian concerns if not a sense of *opinio juris*, complicates this claim. See *supra* notes 404, 608, 609 (noting United States refusal to specify which provisions of IHL it recognizes as legally obligatory and describing United States practice as consistent with much of Protocols Additional). For a discussion of the “persistent dissenter” rule of CIL, see Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harv. Int’l L.J. 457, 459-60 (1985).

⁸⁰² See Jack Goldsmith, [The Self-Defeating International Criminal Court](#), 70 U. Chi. L. Rev. 89, 103 (2003) (arguing that the price of enforcement of ICC decisions should be the grant of “functional immunity” to the U.S.).

⁸⁰³ See *supra* note 58 (discussing recent proliferation of such treaties between the United States and over 35 states).

⁸⁰⁴ See *supra* note 62 and accompanying text.

⁸⁰⁵ See *supra* note 788 (offering proposed language to effect such a declaration of war under these circumstances).

⁸⁰⁶ Currently, there is disagreement within the Western Alliance as to precisely which organizations merit classification as “terrorists.” See Marc Perelman, *EU Won’t Ban Hamas* (July 16, 2003), available at <http://www.frontpagemag.com/articles/ReadArticle.asp?ID=8937> (reporting that the EU executive organ, the European Commission, despite significant United States pressure, has declined to classify the “political wing” of Hamas a Middle East terrorist organization, although the EU considers its “military wing” to be so). Disagreements over precisely “who is a terrorist?” threaten to impede collective action in the War on Terror. However, Israel, by declaring “all-out war” against Hamas, appears to have adopted the very *bellum romanum* approach proposed. See Matthew Chance, *Israel Vows “All-Out War” on Hamas* (CNN television broadcast, Sept. 2, 2003) at <http://www.cnn.com/2003/WORLD/meast/09/01/mideast/index.html>.

⁸⁰⁷ The depiction of these images builds upon a recent critical analysis of the theories of legal absolutism, also known as classic legalism, and legal peripheralism, a perspective into which a rationalized IHL fits neatly, in which non-legal norms and rules are often more important in the regulation of human behavior than is positive law. See Jonathan Zasloff, [Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era](#), 78 N.Y.U. L. Rev. 239, 254-59 (2003).

⁸⁰⁸ Although Anne-Marie Slaughter has proposed that Article 2(4) of the U.N. Charter be amended to dispense with a primary pillar of the *jus ad bellum*—the principle of the inapplicability of the use of force against the territorial integrity or political independence of states—and strengthen the *jus in bello* principle of civilian inviolability, she offers no concrete proposals to achieve this end, nor does she attempt any fundamental reorganization of the field.

See Anne-Marie Slaughter & William Burke-White, [An International Constitutional Moment](#), 43 Harv. Int'l L.J. 1, 2 (2002) (proposing only that Article 2(4) of the U.N. Charter be amended to read as follows: "All states and individuals shall refrain from the deliberate targeting or killing of civilians in armed conflict of any kind, for any purpose."); See Mary Ellen O'Connell, [Re-Leashing the Dogs of War](#), 97 Am. J. Int'l L. 446, 446 (2003) (reviewing Christine Gray, *International Law and the Use of Force* (2000)) (stating that the extant IHL regime has been essentially unmodified for nearly six decades by a majority of states that continue to insist on strict adherence to its rules).

⁸⁰⁹ See Adam Roberts, *The Laws of War in the War on Terror*, Int'l L. Stud. (forthcoming 2003) (manuscript on file with author) (anticipating suggestions for the modification of IHL will be perceived by absolutists as programs for the destruction of IHL). Some observers, willing to concede the propriety of modification to IHL, nonetheless insist that any modifications be "reasonable," "taken as much as possible on a collective basis," and consistent with the "generally accepted principles in (the) international community." See Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 Eur. J. Int'l L. 993, 1001 (2001). Whether this is a genuine call for a multilateral approach to transforming IHL or merely a sophisticated restatement of IHL absolutism remains to be determined. Other scholars suggest the former position is gaining adherents. See Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. Times, Mar. 18, 2003, at A33 (describing the United States War on Terror as "illegal but legitimate" in light of moral considerations (referencing Independent Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 4 (2000))). Yet others remain staunchly opposed to transforming IHL and maintain that departure from the judicial model in the War on Terror, even more than terrorism itself, represents the "major threat to the future of the international system." Heinz Klug, [The Rule of Law, War, or Terror](#), 2003 Wis. L. Rev. 365, 384.

⁸¹⁰ See Strawson, *supra* note 764, at xix (stating as of 2002 that "(i)n challenging so much in the international legal order (to conduct the War on Terror), President Bush may inadvertently have broken the spell of modern law" inasmuch as "(w)hat had appeared so fixed has now been consciously transformed into a contested arena"). The claim that international law is a fragile body of regulation that relies heavily for its existence upon its near-mythic status as a kind of received truth in the minds of state decisionmakers, that it is never acceptable to violate law even in defense of a moral imperative, and that the fate of international law generally hinges on the preservation and expansion of IHL are central features of legal absolutist dogma.

⁸¹¹ See Andrew J. Bacevich, *American Empire* (2002) (claiming that the United States is becoming an imperial power through the globalizing influence of United States law and power). The civilization/barbarian distinction, once a predominant organizing principle in fin de siecle international relations theory, has been challenged by realists displeased that Western states should pursue a civilizing mission rather than the maximization of power, as well as by dependency and critical scholars who critique an imperialist justification for domination of "backward peoples" to secure an advantage in global trade. See William C. Olson & A.J.R. Groom, *International Relations Then and Now* 146 (1991). For the most plangent critique of the resurrection of the civilization/barbarian distinction, see Salter, *supra* note 668 (noting that classifications of peoples as morally culturally and racially inferior justified abandonment of legal restraint to aid their domination and extermination).

⁸¹² Admittedly, 19th and 20th century Western powers warped the civilization-barbarian distinction to justify colonialist and genocidal policies. See Heinrich von Treitschke, *Zehn Jahre Deutscher Kampfe* (Berlin, George Reimer 1897) (justifying extermination of "barbaric" colonial populations on the ground that such peoples were deemed biologically inferior); John Fiske, *The Beginnings of New England* (New York, Houghton, Mifflin & Co. 1889) (justifying slaughter of American Indians on the ground that "civilized peoples" were entitled to use any means and methods to defend against "savages"); American Imperialism 95 (Henry Graff ed., 1996) ("When a war is conducted by a superior race against those whom they consider inferior . . . the superior race will almost involuntarily practice inhuman conduct."). Some contemporary scholars fear that the trope of the terrorist as "frightening, foreign, barbaric beast" is a racialized illusion to support the claim that "ordinary law is . . . deficient or insufficient to deal with them" and "extra-ordinary law," which will remain on the books long after the threat has passed, is required. Ileana M. Porras, [On Terrorism: Reflections on Violence and the Outlaw](#), 1994 Utah L. Rev. 119, 121-22.

⁸¹³ Some post-structuralists have gone so far as to assert that the very use of the term “terrorism” is a Western ploy to assert the supremacy of the West while denying the worth of “competing perspectives” and stifling necessary debate--domestic and international--over the reality of disorder in the international system. See, e.g., Adrian Guelke, *The Age of Terrorism and the International Political System* (1995); James Der Derian, *Antidiplomacy: Spies, Terror, Speed, and War* (1992). For such critics, terrorism is an anti-imperialist reaction formation, and to the extent that claims to the moral high ground can reasonably be made they belong to the “terrorists.” Guelke, *supra*. Clearly, such ears are deaf to the arguments made in this Article.

⁸¹⁴ See Shannon E. French, *Murderers, Not Warriors: The Moral Distinction Between Terrorists and Legitimate Fighters in Asymmetric Conflicts*, in *Terrorism and International Justice* 31, 33-42 (James P. Sterba ed., 2003) (calling for jus ad bellum considerations to be set aside on the ground that “determination of just cause is often far from obvious” as evidence by the fact that “(p)hilosophers, statespersons, political scientists, lawyers, and theologians worldwide hotly debate . . . just war theory”).

⁸¹⁵ For some, use of terms such as “good” and “evil” is not only strategically unwise but also an act of immorality. See Gavin McCormack, *North Korea in the Vice*, 18 *New Left Rev.* 5, 25 (2002) (describing reference to “Axis of Evil” in 2002 State of the Union Address to describe linkage between N. Korea, Iran and Iraq as “historically immoral” for its use of judgmental language); Alexander Solzhenitsyn, *A World Split Apart*, Commencement Address at Harvard University (June 8, 1978), at [http:// www.forerunner.com/forerunner/X0113_Solzhenisyns_Harvar.html](http://www.forerunner.com/forerunner/X0113_Solzhenisyns_Harvar.html) (lamenting a world in which evil ideas and individuals prey upon those who internalize the “benevolent concept according to which” there is no evil inherent to human nature). Others accept the existence of good and evil but reject the image of the United States as the “‘new Rome,’ the giant colossus striding the world and claiming to speak on behalf of good and evil.” Sanford Levinson, “[Precommitment](#)” and “[Postcommitment](#)”: [The Ban on Torture in the Wake of September 11th](#), 81 *Tex. L. Rev.* 2013, 2053 (2003).

⁸¹⁶ At the conclusion of *The Heart of Darkness*, the body of Kurtz, who failed to civilize the “savages” in the quest to extract ivory from the jungle, is discovered along with a report, written to advise the “International Society for the Suppression of Savage Customs,” on the last page of which Kurtz had concluded that if savages would not accept the gift of civilization it was necessary to “Exterminate all the Brutes!” to preserve the West. See Joseph Conrad & D.C.R.A. Goonetilleke, *Heart of Darkness* 33 (1999).

⁸¹⁷ Translated loosely from the Latin, “Right cannot originate from injustice.”

⁸¹⁸ Psychologists and psychiatrists note a strong cognitive tendency to stereotype out-group adversaries as “barbarians”--emotional representatives of a monolithic, irrational evil that enjoys destruction and cannot be deterred-- in order to rationalize foreign policies directed against the out-group and to protect the in-group’s self-image from moral qualms about the effects upon innocent members of the out-group of in-group policies justified by this distorting image of the enemy. See Michele G. Alexander, Marilyn B. Brewer, & Richard K. Hermann, *Images and Affect: A Functional Analysis of Out-Group Stereotypes*, 77 *J. Pers. Soc. Psych.* 78, 79-81 (1999) (warning against this tendency); Vamik D. Volkan, M.D., *The Need to have Enemies and Allies* 131 (1988) (same). United States decisionmakers must take care that the description of terrorists as “barbarians” is conceptually limited so as not to envelop innocent members of societies from whence terrorists emerge.

⁸¹⁹ See Mofidi & Eckert, *supra* note 624, at 92 (suggesting the United States response to September 11th is the product of “inflamed passions and emotions” rather than a “commitment to the calm and rational, albeit slow, path of law.”); James A.R. Nafziger, *The Grave New World of Terrorism: A Lawyer’s View*, 31 *Denv. J. Int’l & Pol’y* 1, 6-7 (2002) (suggesting the military approach to terrorism is an irrational overreaction).

⁸²⁰ The “ethos of conflict” thesis which postulates that a group, in a perilous conflict with an out-group, writes and follows a collective narrative that describes the in-group as virtuous and moral, the out-group, as evil and the sacrifice of the individual objectives of in-group members for the benefit of the in-group as the only path to peace, security and justice. This thesis has been applied to the United States after September 11th to suggest that the response to the War on Terror is a non-rational approach to the phenomenon of international terrorism that may actually fuel global conflict. See Daniel Bar-Tal, *Shared Beliefs in a Society* (2000) (elaborating the “ethos of conflict” thesis); see also Ervin Staub & Daniel Bar-Tal, *Genocide, Mass Killing, and Intractable Conflict*, in *Oxford Handbook of Political Psychology* 710, 727 (David O. Sears et al. eds., 2003).

⁸²¹ See [Yehezkel Dror, *Terrorism as a Challenge to the Democratic Capacity To Govern*, in *Terrorism, Legitimacy, and Power* 65, 73-74 \(Martha Crenshaw ed., 1983\)](#) (contending that counterterrorist measures threaten to “barbarize” the international system); John T. Parry, [What is Torture, Are We Doing It, and What if We Are?](#), 64 *U. Pitt. L. Rev.* 237, 262 (2003) (arguing the War on Terror threatens “harm to our concepts of rights”). One commentator, wedded to a judicial model that treats terrorism as a crime “no different than any other criminal offense,” likens the “(differentiation) between classes of offenders” as the broadcast of the “moral weakness” of the society that distinguishes terrorists from other malefactors. See Gross, *supra* note 77, at 2, 95.

⁸²² See Axelrod, *supra* note 792, at 244-45 (conceding that a TIT-FOR-TAT strategy can more deeply entrench feuds between opponents); Levinson, *supra* note 816, at 2052 (warning, with particular reference to torture, against the “contagion effect” whereby the first violation of a taboo denatures the prohibition against the act and leads to a proliferation of an erstwhile taboo practice).

⁸²³ The assumption that law is created to control, by threat of punishment, those who would otherwise be tempted to commit acts made illegal by positive rules, rather than to govern those who would already obey the legal sanction even in its absence, is of old vintage. See I Timothy 1:9-10 (“(L)aw is not made for a righteous man, but for the lawless and disobedient, for the ungodly and for sinners, for unholy and profane, for murderers of fathers and . . . mothers, for manslayers, (f)or whoremongers, for them that defile themselves with mankind, for menstealers, for liars, (and) for perjured persons”); see also *The Federalist* No. 51 (James Madison) (“If men were angels, no government would be necessary.”); Louis Henkin, *How Nations Behave: Law and Foreign Policy* 90 (1968) (“In international society . . . law is not effective against the Hitlers.”).

⁸²⁴ Some psychopathic individuals may simply be innately driven to destroy themselves and as much of the civilized world as they can. See generally Sigmund Freud, *Civilization and its Discontents* (James Strachey trans., 1961) (elaborating the psychoanalytic concept “death drive”). The Islamic terrorist organization Hamas fits this bill, proudly proclaiming that “death for the sake of Allah is its loftiest wish.” *Covenant of the Islamic Resistance Movement*, Aug. 18, 1988, art. 8, available at [http:// www.mideastweb.org/hamas.htm](http://www.mideastweb.org/hamas.htm). Recent Islamic terrorist attacks--suicide bombings of hotels and buses, sniper attacks against infants--reinforce this proclivity. See Louis Beres, *Palestinian Terrorism Now Takes Barbarism to New Lows*, *Jerusalem Post*, Oct. 5, 2003 (chronicling the past several years of Islamic terrorism against Israelis). For many Islamic terrorists, their faith calls them “to invade and be killed for the sake of Allah, then invade and be killed, and then invade again and be killed.” *Covenant of the Islamic Resistance Movement*, *supra*, at art. 15. In light of determination of psychopaths to wage war against our civilization and its innocents until victory or death, Elshstain implores us to recall the “‘brutal indiscriminate slaughter of thousands of people in an instant, along with the sight of bodies dropping like debris from dizzying heights’” and warns that it is “important to take the measure of people who not only are capable of planning and executing (September 11th) but are gleeful about the lives lost” Elshstain, *supra* note 663, at 153. It is well that we heed her lest we suffer the “corrosive effects of misdescription” and fail to treat terrorists for who and what they are. *Id.* at 12. This is no idle warning; the weaker side has not always lost an asymmetric conflict, and victory over terrorism is not a foregone conclusion. See French, *supra* note 815, at 33 (recalling the barbarian defeat of Rome in 453 A.D., the United States defeat of Great Britain in 1781, the Communist victory in Vietnam in 1975, and the Soviet defeat in Afghanistan in 1989). Either terrorism or civilization must yield to the other.

⁸²⁵ Many relativist philosophers contest the argument that absolute, self-evident moral principles or “verdictive beliefs” exist independently of attitudes and contexts and that some things, persons, and ideas are objectively good while others are objectively evil. See Claudia Card, *Making War on Terrorism in Response to 9/11*, in *Terrorism and International Justice*, supra note 815, at 171 (insisting that although “evil” is a “heavy, emotively laden term,” the “concepts of evil and terrorism (are) philosophically too important to cede that vocabulary to political manipulators” and that, quite simply, “mass killing of unarmed civilians targeted as such . . . is evil”); Louis Rene Beres, [Straightening the Timber: Toward a New Paradigm of International Law](#), 27 *Vand. J. Transnat’l L.* 161, 167 (1994) (insisting, with reference to Adolf Hitler and Saddam Hussein, that evil exists in international relations, that it cannot be relieved via “structural reconfigurations” of legal institutions and that it must be confronted directly). Not all agree with the moral realist assertion that terrorists are exemplars of pure evil. Some reject the concept of evil; others are unwilling to define terrorists as evil; still others define evil as the slaughter of dolphins, the eating of meat, or some other value-system or practice. We may simply have to agree to disagree. Nevertheless, the public position taken by the Dalai Lama, a longstanding proponent of nonviolent methods of dispute resolution, in support of the use of military force against terrorism suggests that moral relativism on the question of whether terrorists are evil is a minority view. See Laurie Goodstein, *Dalai Lama Says Terror May Need a Violent Reply*, N.Y. Times, Sept. 18, 2003, at A18.

⁸²⁶ The official United States position is tolerant respect for Islam; it is the terrorists who claim a particular version of Islam directing them to murder innocent civilians and not the religion against which they blaspheme in claiming its sanction against whom the War on Terror is directed. See George W. Bush, “Islam is Peace,” Says President, Off. Press Sec., Sept. 17, 2001 (“These acts of violence against innocents violate the fundamental tenets of the Islamic faith That’s not what Islam is () about. Islam is peace.”). In curious contrast, some of the most vociferous European detractors of the Bush Doctrine and the War on Terror engage in domestic political practices suggestive of antipathy, if not outright intolerance, of their Muslim citizens. See, e.g., Elaine Sciolino, *French Minister Threatens to Expel Extremist Muslims*, N.Y. Times, Sept. 20, 2003, at A4 (reporting plans by the French Minister of the Interior to close “extremist” mosques and become “very firm against (French Muslims),” to include expelling “radicals”).

⁸²⁷ See Henry M. Hart, Jr. *The Aims of Criminal Law*, 23 *Law & Contemp. Probs.* 401, 421 (1958) (warning that indiscriminate use of positive law, where non-legal standards are a better lodestar for human conduct, “dilutes the force of . . . community condemnation as a means of influencing conduct”).

⁸²⁸ See Joel R. Paul, [The Geopolitical Constitution: Executive Expediency and Executive Agreements](#), 86 *Cal. L. Rev.* 671, 685 n.59 (1998) (quoting Letter from Thomas Jefferson to John B. Colvin (Sept. 10, 1810)).

⁸²⁹ Very simply, the “letter of the law is too cold and formal to have a beneficial influence on society,” and the failure to take seriously non-legal sources of norms by which we might govern our social life constitutes acceptance of “(moral) mediocrity” and the “paraly(sis) of man’s noblest impulses.” Solzhenitsyn, supra note 816. Moreover, in moments of great crisis, civilization has the greatest need of the support of non-legal sources of norms: “(I)t will be simply impossible to stand through the trials of this threatening century with nothing but the support of a legalistic structure.” Id. It is thus of no small moral concern that IHL should eschew the martial code and its stock of non-legal norms, which in practice exert a tremendous compliance pull, in the War on Terror. The re-emphasis on moral and other non-legal normative considerations thus supports compliance with IHL as well as the attainment of its humanitarian and pro-civilizational objectives. See Fisher, supra note 127, at 111 (“Other things being equal, the more elemental the rules are, the more inherent moral content there is and hence more . . . compliance . . . can be expected.”).

⁸³⁰ See Schachter, supra note 73, at 6 (“Since we cannot deny the crucial role of power in the relations of States, we should seek to understand its specific impact on the international legal system.”).

⁸³¹ It is difficult to seriously dispute that as of 2004 the United States is the global military hegemon and that in most instances where problems involving the maintenance of international peace and security and the defense of IHL arise “if the United States is not the solution, there is no solution.” Harold Hongju Koh, [The Law Under Stress After September 11](#), 31 *Int’l J. Legal Info.* 317 (2003).

⁸³² The ultimate answer to the question of whether the ICC is merely a flawed but improvable institution or is in fact, as this Article asserts, an inescapably dangerous tool ripe for exploitation by terrorists and their state-sponsors, remains to be determined by future events. See Best, *supra* note 20, at 400 (cautioning against the premature judgment of international criminal tribunals).

⁸³³ Absolute adherence to the ICC is prone to unleashing greater evils than would be suppressed by the application of instruments of policy and law to the defeat of terrorism which the ICC would be likely to criminalize.

⁸³⁴ See Andrew Moravcsik, [Conservative Idealism and International Institutions](#), 1 *Chi. J. Int’l L.* 291, 297 (recognizing that on narrow grounds of interests, “a plausible case can certainly be made” for United States abstention from participation in the ICC).

⁸³⁵ IV George Orwell, *The Collected Essays, Journalism and Letters of George Orwell* 460 (Sonia Orwell & Ian Angus eds., 1968) (referring to socialism and fascism).

⁸³⁶ See James B. Motley, *Coping with the Terrorist Threat: The U.S. Intelligence Dilemma*, in *Intelligence and Intelligence Policy in a Democratic Society*, *supra* note 706, at 165 (opining that one might expect that “(c)ompassion (would be) stirred when . . . (people) become . . . victims of fanatical terrorists”). At first blush it appears September 11th is being treated by United States allies as an attack not so much upon the West as upon the United States as the primary power. If true, the admonition that to understand terrorism it is first necessary to understand “what is happening to whom, where, when, how, why and with what outcomes and effects,” takes on additional significance. Martin Slann & Bernard Schechterman, *Multidimensional Terrorism* 3 (1997) While collective security has always been bedeviled by the free-rider problem, that the United States should be forced to go it alone at a time when the necessity of collective action ought arguably to be more apparent than at any time since World War II does not augur well. See Edward A. Amley, Jr., [Peace by Other Means: Using Rewards in U.N. Efforts to End Conflicts](#), 26 *Denv. J. Int’l L. & Pol’y* 235, 242-43 (critiquing free-rider problem in U.N. collective security system).

⁸³⁷ See *supra* note 96 and accompanying text (describing coalition of states and NGOs which possess little or no military capacity and no responsibility for international peace and security). Many of the staunchest supporters of the ICC are weak states that have “moved beyond power” into a post-realist normative framework for their harmonized foreign policies in which the use of force is inconceivable except where authorized by the U.N. and conducted multilaterally. See James Dao, *Ideas & Trends: Solitaire; One Nation Plays the Great Game Alone*, *N.Y. Times*, July 7, 2002, at D1 (illuminating European preference for multilateral institutionalist approaches to security).

⁸³⁸ See Reisman & Baker, *supra* note 108, at 39-40 (stating that international law is merely a form of “authorized coercion” that requires, in the absence of central authority with a monopoly over the use of force, individual states to enforce it).

⁸³⁹ The term “margin of appreciation” refers to the observation that there is a legal disjunction between the “black letter of the (UN) Charter and the bloody reality of world politics” and that states, particularly those responsible for the maintenance of systemic order, are to be granted some latitude to self-interpret their obligations under IHL in the discharge of their duties, particularly with regard to the use of force. *Id.* at 38 (distinguishing between “text myth system” of the U.N. Charter, in which the provision of law proscribing unauthorized use of force is reflexively

applied, and the “operational code” system, in which uses of military force in certain contingencies, such as collective defense, are legitimized notwithstanding the black letter of the law).

⁸⁴⁰ See Notebook, New Republic, Nov. 5, 2001, at 12 (denying that there is any nonarbitrary method of differentiating between descriptions of what is just or good) (citing interview with Stanley Fish); but see Stephen L. Carter, Confessions of an Affirmative Action Baby 145 (1991) (stating that to excuse acts of evil and immorality along the lines of the argument that “Hitler wasn’t evil, just insane” is a “pile of garbage”). To escape the slough of relativist despond, one must “never lose the capacity . . . to judge ourselves and other people.” *Id.* at 144.

⁸⁴¹ “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since.” Oliver Wendell Holmes, [The Path of the Law](#), 10 *Harv. L. Rev.* 457, 469 (1897).

⁸⁴² See [Terminiello v. City of Chicago](#), 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

⁸⁴³ See *supra* notes 508, 779, 838 (discussing advantages to a multilateral approach to international relations). Ideally, the United States will secure the assistance of other states in implementing a rationalized IHL, but the defense of civilization is such a vital imperative that it must be prepared to proceed unilaterally. See Joseph S. Nye, Seven Tests Between Concert and Unilateralism, 66 *Nat’l Interest* 5, 10-12 (2002) (advocating United States unilateral action where vital survival interests are at stake, where it helps advance multilateral interests, and where multilateralism would be “recipes for inaction” or contrary to United States values).

⁸⁴⁴ “It is essential to condemn what must be condemned, but swiftly and firmly.” Albert Camus, *Resistance, Rebellion, and Death* (Justice O’Brien trans., 1960). Levinson urges us to be sure that Western democracies are “better than their enemies.” Levinson, *supra* note 816, at 2052. We can be safely sure that we are.

⁸⁴⁵ See William Shakespeare, *Julius Caesar*, act 3, sc. 1 (“Cry havoc and let slip the dogs of war!”).

⁸⁴⁶ In arguing that the War on Terror may require an “Extra-Legal Measures” model of constitutional law which permits decisionmakers to transcend the established domestic legal order to “protect () the nation . . . and the public in the face of calamity,” Gross contends that it is possible to simultaneously defeat terrorism while “preserv(ing) the long-term relevance of, and obedience to, legal principles, rules, and norms.” Oren Gross, [Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional](#), 112 *Yale L.J.* 1011, 1023-24 (2003). “While going outside the legal order may be a ‘little wrong,’ it . . . facilitate(s) the attainment of a ‘great right,’ namely the preservation not only of the constitutional order, but also of its most fundamental principles and tenets.” *Id.* at 1024. The argument that preservation of domestic law may require violating it in extreme circumstances fits neatly into international context, for “(w)hen government acts in a certain way that is deemed necessary to . . . safeguard the nation, . . . its actions are imbued with affirmative moral value, i.e., they are morally legitimate. If acting extralegally is the right thing to do (pragmatically), . . . it is the right thing to do whichever way you look at it.” *Id.* at 1100.

⁸⁴⁷ See Solzhenitsyn, *supra* note 816 (“The Western world has lost its civic courage . . . (F)rom ancient times a decline in courage has been considered the beginning of the end. . .”).

⁸⁴⁸ I do not suggest that we should abandon long-standing hopes for the perfectibility of man, the evolution of morality to a loftier plane or general adherence to a global ethos of peace and cooperation. I only contend that it is perilous to pretend that in a world of metastatic terrorism we have reached this destination. There may never be peace in our

time; rather than a perpetual peace, we may be consigned by fate to perpetual war. See Ralph Peters, Constant Conflict, 27 Parameters 4, 4 (1997) (warning that “(w)e have entered an age of constant conflict” marked by civilizational conflict and that “(a)t any given moment for the rest of our lifetimes, there will be multiple conflicts in mutating forms around the globe”).

[849](#) The reference is to Edward Gibbon, The History of the Decline and Fall of the Roman Empire ch. XXXI, § 1 (describing march to the gates of Rome by barbarians bent on sacking Roman civilization in 453 A.D.)

[850](#) “And we are here as on a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night.” Matthew Arnold, “Dover Beach” (1867).

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