

# Protecting Civilians...or Soldiers? Humanitarian Law and the Economy of Risk in Iraq

THOMAS W. SMITH

*University of South Florida St. Petersburg*

The level of non-combatant casualties in modern Western warfare is determined in large part by the way in which policymakers apportion risk between soldiers and civilians. In the U.S. counterinsurgency in Iraq, a “kinetic” strategy and a muscular doctrine of force protection have lowered the threshold for the use of violence and, in many cases, transferred risk from soldiers to civilians. Particularly in areas deemed hostile, aggressive tactics make up for a shortage of soldiers on the ground and direct violence toward non-combatants. This is not the fog of war: even unintended civilian casualties flow predictably from policy choices. Perceptions of risk increasingly govern U.S. interpretations of its humanitarian obligations under international law, threatening to dilute the doctrine of proportionality and reverse the customary and legal relationship between combatants and non-combatants. Only late in the war has the U.S. administration recalibrated risks and launched a more orthodox counterinsurgency strategy.

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“Even the shadows have shadows,” noted a recent *New York Times* article about the insurgency in Iraq (Filkins 2006). Distinguishing combatants from non-combatants is a daunting task when fighting a war in which civilians and soldiers are intermingled, identities are blurred, and combat is waged in close civilian quarters. Analysts lament that non-combatant casualties are inevitable in such a conflict. When elephants fight, goes the adage, the grass gets trampled. This tragic view of counterinsurgency can, however, obscure other, more systematic, sources of civilian harm. Such has been the case with the war in Iraq. Though framed in terms of “strategy” or “mission accomplishment,” the Coalition’s day-to-day task is to manage risk. As Martin Shaw (2005:98–99) argues, risk has become the “currency of Western warfare.” Strategy and tactics are shaped by the economy of risk, that is, how political risks as well as the “life-risks” of combatants and non-combatants are valued and traded.

In Iraq, this often has meant trading civilian lives for military advantages. For most of the war, Pentagon officials have apportioned risk in hopes of achieving

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war aims while appeasing a skeptical public at home. The practice is most notable in a doctrine of force protection designed to minimize American casualties, but it is a broader pattern than that. A reactive, “kinetic” strategy has lowered the threshold for the use of violence and, in many cases, transferred risk from soldiers to civilians. Particularly in areas designated as hostile, hard-charging house raids, belligerent street patrols, and tense checkpoints make up for a shortage of soldiers on the ground and direct violence away from soldiers and toward civilians. Defying virtually every theory of counterinsurgency, military officials have pursued force protection even at the expense of mission accomplishment. Only in the past year, with the U.S. mid-term elections over and the full implications of failure sinking in, has the Bush administration recalibrated risk, shifting troops off the bases and into neighborhoods in a more orthodox counterinsurgency strategy.

Collateral damage becomes a calculated tragedy. The fog of war can never be dispelled completely, but to a large degree, modern strategists fix the levels of risk that combatants and non-combatants face. Civilian casualties flow from policy preferences in predictable ways. Risk management is not inherently at odds with the law of war. Harm to non-combatants is permissible, if it is the unintended or indirect result of a proportionate attack against a lawful military objective. Risk transfer, however, is indefensible. The lives of combatants may never be set against the lives of non-combatants. Soldiers and civilians are distinct: there is no rate of exchange between them. Not only does risk transfer undermine this basic humanitarian rule, but it also shifts the legal ground on which armed forces claim to operate. The use of lethal force is no longer justified only by hostile acts or hostile intent. The more subjective standard of “perceived threats” is now commonly invoked—even as it endangers civilians and diminishes accountability.

### **Soldiers, Civilians, and the Assumption of Risk**

Proportionality in the conduct of war is meant to guide the selection of targets as well as the means and methods of attack. Belligerents may use only as much force as is necessary to achieve lawful military objectives and as is justified by the military significance of those targets (Coates 1997:209). Proportionality is binding on all armed forces as a matter of customary law as well as black-letter law. The Geneva Conventions consider wartime violence proportionate if the expected military advantage outweighs the expected collateral damage. Article 51(5)(b) of the 1977 Additional Protocol bars 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.” When faced with a choice of means, Article 57(3) mandates that the attacker shall choose the course of action “which may be expected to cause the least danger to civilian lives and to civilian objects.”

Even if the protection of civilians is not absolute, the practice of measuring human losses against military gains is fraught with peril. The bedrock of non-combatant immunity is that civilians may never be treated as means to military ends. Soldiers, conversely, are *exactly* means to an end (McKeogh 2002:167). In war, a soldier’s worth is not as a person but as an instrument of military policy. As an active participant in hostilities and until such time as he or she is wounded, captured, or otherwise out of combat, the soldier’s personhood and attendant rights are suspended, and he or she may be treated instrumentally both by commanders and by the enemy. The soldier forfeits the right to life and becomes a legitimate military target; in exchange, the soldier is granted immunity from blame for the killing he or she commits in war as long as it is discriminate and proportionate (McKeogh 2002:12–13).

In this formulation, non-combatant immunity does not rest on the problematic claim that a civilian's life is worth more than a soldier's life. Nor does it turn on the supposed guilt or innocence of potential targets, a distinction that animates much of just war theory. Using soldiers as means to military ends does not mean using them as cannon fodder, however. Napoleon was wrong when he said, cynically, that "soldiers are made to be killed" (Walzer 1977:136; and see Shaw 2005:133). Modern militaries carry out humanitarian operations and other peaceful functions. But all soldiers understand that certain risks come with the job. The assumption of risk is clearest when one considers the protection of soldiers *relative to* the protection of civilians. As Walzer notes (1977:136), even if we reject the idea that soldiers are made to be killed, we can state with even greater confidence that *no one else* is made to be killed.

Wartime risks are not easily compartmentalized, however. Risk management often pits the safety of soldiers against the safety of civilians. Michael Reisman (1997:381) describes the temptation to "externalize" the human costs of operations by using tactics and technologies that protect one's own personnel from harm but increase the likelihood of collateral damage. "The safety equation is zero-sum," he notes. "The more safety reserved for your forces, the more unintended and, of course, regrettable injury to civilians" (Reisman 1997:397). A simple theoretical model illustrates the trade-off between civilian immunity and force protection (Waxman 2000:34). Rules of engagement designed to protect civilians tend to place soldiers at greater risk; conversely, rules that stress force protection usually come at the expense of civilians. A sliding scale of violence means that there is no natural level of civilian casualties. Nor are particular tactics always necessary or inevitable. The civilian toll varies depending on how risk is allocated and how rules of engagement are defined.

What risks may soldiers legally assume for themselves or impose on civilians? Eyal Benvenisti (2006:93) contends that soldiers have "a duty to reduce harm to enemy civilians that does not entail an obligation to assume personal life-threatening risks." Still, proportionality demands that commanders be willing to accept *some* "same-side" casualties: a zero-casualty policy implies the lopsided use of force (Bring 2002:47–48). That is exactly what happened in the 1998 NATO air war in Yugoslavia. Under rules of engagement derived from a no-body-bag policy, NATO bombers flew at unusually high altitudes to protect pilots and planes from ground fire, even though this made it harder for pilots to identify targets and diminished the accuracy of the bombs dropped (Smith 2002:366). That policy, plus the risk-avoiding decision to wage an air war rather than a ground war in the first place, meant that not a single NATO soldier or airman died in combat. The result was an immaculate war. Had pilots flown at lower levels they would have assumed greater risk, but they probably would have avoided the worst civilian strikes. The policy instead set the lives of NATO soldiers against the lives of Yugoslav civilians (Shaw 2005:135).

But in most cases the calculations are subtler. Military lawyers ask a series of open-ended questions (Fenrick 2001:499). What relative values are to be assigned to mission goals and civilians and civilian objects? What constitutes excessive force? What defines a military advantage? To what extent must a commander expose his charges to danger so as to protect civilians? Is an attack vital to the war effort? How to respond to the positioning of civilian "human shields" in the vicinity of otherwise lawful military targets?

Although the science of risk management is inexact, the law does define excessive force, and Article 52(2) of Protocol I crisply delineates military objectives as those "making an effective contribution to military action." But no "proportionometer" exists with which to gauge whether or not the principle of proportionality has been respected (Holland 2004:48). The ambiguities of the

law probably operate in the interest of the soldier rather than the civilian, especially when belligerents see a mission as imperative or specific tactics as necessary (Gardam 1993:408). Benvenisti (2006:95–96) argues that armies construe their legal obligations narrowly in any case:

Armies interpret the law as granting them wide discretion. They wish to limit the commanders' responsibilities rather than increase protection to civilians. They highlight the obligations imposed on the defending army. In applying the test of proportionality, they stipulate that the means used should be measured against the overall aim of winning the military conflict rather than against the particular aim of winning a specific battle. And this overall aim is defined subjectively.

Whatever ambiguities may exist in the laws of war, risk transfer—that is, the practice of shifting risk from soldiers onto civilians—is beyond the pale. Modern humanitarian law reflects a duty to protect civilians actively, not just to avoid targeting them. Risk-transfer inverts the rights of civilians vis-à-vis the rights of soldiers, and flouts the basic norm that combatants assume greater risk than non-combatants. Military advantage must contribute directly to the defeat of one's adversary. Force protection may not be an end in itself if it means privileging combatants over non-combatants. As Alexandra Boivin (2006:46) notes, “By factoring the preservation of one's own forces into the evaluation of the military advantage anticipated from an attack, an attacking Party justifies a greater likelihood of collateral damage, thereby unfairly skewing the proportionality calculation in favor of military considerations.” Similarly, when rules of engagement are loosened to treat soldiers as ends rather than means, or to appease political, public relations, or other demands removed from the battlefield, they undercut the norms and laws of war.

### America in Iraq

One iteration of proportionality has steadily gained currency among U.S. policymakers and defense officials. This is the view that broad latitude in the use of violence is warranted so as to secure the safety of U.S. troops. Pentagon planners are keenly aware that rising casualties on either side can erode support for a war, though “same-side” casualties seem to count more. This is not to say that officials disregard or devalue civilian lives. The civilian idea is ingrained in modern American military culture (Thomas 2001). But that norm competes with expectations of force protection. Such expectations are highest in “elective” wars, particularly in cases where the public may question the national security interests at stake (Reisman 1997:396).

Crude risk management has always been implicit in the American military tradition. President Truman's decision to drop atomic bombs on Hiroshima and Nagasaki was prompted at least in part by the wish to avoid what were forecast to be huge casualties to the U.S. forces landing on the beachheads of Japan. In Vietnam, massive aerial bombardment and the use of chemical defoliants shifted risk from U.S. soldiers to Vietnamese civilians. But it was the advent of precision weapons that led American strategists to fine-tune risk management. In 1998, Michael Schmitt envisioned what he called “*Bellum Americanum*,” a new style of legalized, risk-averse war that hinged on precision-guided bombs, standardized targeting, and normative levels and types of collateral damage. Leveraging technology, the new war would employ “precision engagement” and “full dimension protection... to enhance the survivability of U.S. forces” (Schmitt 1998:1057). Already, risk is allocated with God-like precision. Using targeting protocols and software refined during the air war in Yugoslavia, Pentagon plan-

ners can predict damage caused by the direct impact of a missile, but also the collateral damage produced by the debris spray from the blast.

The challenge for the U.S. military in Iraq has been to translate risk management from limited air war to large-scale counterinsurgency. The results have been far from immaculate. At the date of this writing nearly 4,000 U.S. troops have died in Iraq, about 3,200 of them killed in action, most as the result of improvised explosive devices (IEDs) or roadside ambushes. At least 50,000 Iraqi civilians have died in the war. The number of those killed as a direct result of Coalition operations—air strikes, stand-off attacks, patrols, house raids, check-point encounters—is frequently pegged at 5,000–10,000. Yet, by investing in force protection and kinetic raids while neglecting civilian security, U.S. strategists are implicated in many more non-combatant deaths than those directly attributable to U.S. soldiers.

There are huge incentives for the Coalition to minimize collateral damage. Not only are civilian casualties grist for the insurgency, but also they offset the Coalition's humanitarian claims about the war. Nonetheless, Coalition forces, especially U.S. forces, have committed widespread civilian violence. Headline allegations of murder, such as those in Haditha, make day-to-day violence seem normal by contrast. But Iraqis bitterly resent routine excesses. Prime Minister Nuri Kamal al-Maliki denounced the abuses as a "daily occurrence" by U.S. troops who "do not respect the Iraqi people." "They crush them with their vehicles and kill them just on suspicion" (Oppel 2006). The Pentagon report prepared by Maj. Gen. Eldon Bargewell in the wake of the Haditha killings found a culture of "inattention and negligence" regarding Iraqi civilians: "All levels of command tended to view civilian casualties, even in significant numbers, as routine and as the natural and intended result of insurgent tactics." "Statements made by the chain of command...taken as a whole, suggest that Iraqi civilian lives are not as important as U.S. lives, their deaths are just the cost of doing business . . ." (von Zielbauer 2007).

### **Rules of Engagement**

Although they are tailored for specific missions, all U.S. rules of engagement (ROE) rest on a platform of principles that seek to balance military demands and collateral damage. The Chairman of the Joint Chiefs of Staff Standing Rules of Engagement (SROE) set a baseline of "implementation guidance" for operational ROE "and the exercise of self-defense." Rules of engagement cover everything from target selection, scale of force, appropriate weapons ("weaponizing"), protection of property, alert conditions, arming orders, positive identification of targets, unobserved or observed ("eyes on target") fire, territorial or geographical constraints, limits on manpower, and restrictions on specific "point targets" (U.S. Army 2000:8-6-8-7). The rules are designed for flexibility. "ROE must evolve with mission requirements and be tailored to mission realities," notes the Army's main legal manual. "ROE should be a flexible instrument designed to best support the mission through various operational phases and should reflect changes in the threat" (U.S. Army 2000:8-3). "Special instructions"; FRAGOS, or fragmentary orders that depart from basic orders; Tactics, Techniques, and Procedures; and other informal directives add flexibility. Unit leaders exercise further discretion in crafting and carrying out ROEs.

As they were in Vietnam, the general rules of engagement in Iraq are widely known. The 2003 Coalition Forces Land Component Command ROE card, which governed most of the invasion and major combat, as well as the 2005 Multi-National Corps-Iraq (MNC-I) ROE card currently in force in day-to-day operations in Iraq were published by the Army's International and Operational Law Department (Rawcliffe and Smith 2006:117-118). Citing operational

security, the Pentagon has not advertently released copies of special instructions and other rules covering specific operations in Iraq, though rules have been described in broad strokes by Pentagon spokesmen and lawyers, and have been reported in some detail by journalists.<sup>1</sup> We have a reasonably good picture of the evolution of checkpoint protocols (see, e.g., Human Rights Watch 2003; Burns 2005; Ciezadlo 2005; Smith and Tyson 2005; and U.S. Department of Defense 2005; Shanker 2006a, 2006b), rules governing stand-off targeting and indirect fire (see, e.g., Cobb, LaCour, and Hight 2005; Hollis 2005; and Kinne, Tanzi, and Yaeger 2006), and urban combat (see, e.g., Gettleman 2004; Broder 2006; White 2006; and Catagnus, Edison, Keeling, and Moon 2005).

Revealing as well are a trove of documents released by the Pentagon and other federal agencies in response to two Freedom of Information Act requests filed by the American Civil Liberties Union and several other organizations seeking materials on the potential mistreatment of Iraqis (hereinafter, “the ACLU documents”).<sup>2</sup> The lightly redacted materials include point of capture reports, ROE interviews, and notes from “sensing sessions”—debriefings in which groups of soldiers were encouraged to speak freely without individual attribution. While the style of these documents is to focus on areas in need of improvement, they detail as systematically as is probably possible in the midst of a sprawling war the familiarity of soldiers with ROE covering combat operations, rules of interaction (ROI) guiding the treatment of detainees, as well as general training in the law of armed conflict.

Pre-deployment training has improved substantially since 2003. Brigadier General Robert W. Cone, who commands the Army’s National Training Center at Fort Irwin, California, says that training has undergone “profound and almost continuous change” since the beginning of 2004, and that the Army continues to identify and train for emerging risks (Cone 2006:70). Mock Iraqi villages have been constructed on the training grounds. Convoy training has been instituted. Cultural training and preparation for intelligence-gathering and non-kinetic operations are standard. Still, the training could stand improvement. A 2005 study by the Center for Law and Military Operations (CLAMO) at the Judge Advocate General’s Legal Center and School found ROE training sometimes wanting, though the use of vignettes was singled out as beneficial: “Soldiers confronted with difficult and realistic ROE scenarios have difficulty applying the appropriate use of force, although they can repeat the rules after the fact” (Center for Law and Military Operations 2005:17). At the time, four of the largest combat training centers, including the National Training Center and the Joint Readiness Training Center at Fort Polk, Louisiana, were served by a total of nine judge advocates to oversee the training of tens of thousands of soldiers. Some stop-gap units have been deployed without the benefit of having attended one of the training centers.

ROE cards have grown more realistic as well. On the front of the 2003 ROE card issued to the 101st Airborne, for example, were phonetic spellings of “Halt! Don’t move! Hands up!” in Farsi, “Urda” (Urdu), and Arabic, though most U.S. troops were unlikely to encounter Farsi or Urdu speakers, or necessarily know if it they did. The accompanying hip-pocket vignettes, meant to illumine the rules through concrete examples, described scenarios with a precision that

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<sup>1</sup>A copy of the 27-page “2005 Rules of engagement for Multi-National Division Baghdad, classified Secret” was recently leaked to the Wikileaks website. The document is available at [http://www.wikileaks.org/wiki/US\\_Rules\\_of\\_Engagement\\_for\\_Iraq](http://www.wikileaks.org/wiki/US_Rules_of_Engagement_for_Iraq). Last retrieved March 4, 2008.

<sup>2</sup>A searchable database and PDF files of the original documents are available at <http://www.aclu.org/torturefoia>. The parenthetical citations below refer to the numbers assigned to the documents by the Pentagon when the materials were produced to the FOIA petitioners.

was elusive on the ground. The 2005 MNC-I card and vignettes currently in force are notable for replacing “status-based” rules that targeted specific groups (uniformed Iraqi military units, Saddam’s *feyadeen*, or other “declared hostile forces”), with “conduct-based” rules that focus on hostile intentions or hostile acts, a shift that occurred 2 years into the war (Kahl 2007:18–19). The 2003 cards declared that “enemy military and paramilitary forces are declared hostile and may be attacked” subject to positive identification, and sparing soldiers *hors de combat*, civilians and civilian objects, civilian populated areas, and infrastructure. The 2005 card states that “you may engage the following individuals based on their conduct: a. Persons who are committing hostile acts against CF [coalition forces]. b. Persons who are exhibiting hostile intent toward CF.” The new card introduced not only measures more fitting for counterinsurgency, but also codified the ambiguities of counterinsurgency. The vignettes probably do a better job of parsing hostile acts, hostile intent, and non-hostile postures. Equally important in the 2005 card is the focus on “graduated measures of force,” a version of the “5 S’s” (see below). The card also includes a general admonition to “minimize incidental injury, loss of life, and collateral damage,” and includes strong language on the duty “to report any suspected violations of the Law of War committed by any U.S., friendly or enemy force.”

The war became a study in mixed signals. According to the ROE card issued in 2003 “positive identification is required prior to engagement” of hostile forces. The Army’s first standing rule of self-defense is to return fire with “aimed” or “observed” fire, in which the soldier can see, or at least pinpoint, the target (U.S. Army 2000:8–15). Pre-deployment training scenarios similarly barred unobserved fires. Once in Iraq, however, soldiers were allowed to employ unobserved fires for the “immediate defense of friendly forces” or if approved by a commander (Center for Law and Military Operations 2004:315), though later iterations of the ROE stressed the use of observed fires (Kahl 2007:19–21). The Army’s 101st Airborne card expressly barred the use of napalm or white phosphorous in “populated areas.” But Marines in Fallujah and other cities were free to use white phosphorous, which produces a searing flame and dense smoke, as a screening agent and as a psychological weapon known popularly as “shake and bake” (Cobb et al. 2005:26).

Even basic rules have fluctuated. In the ACLU documents, many soldiers frequently recite the “5 S’s”—shout, shove, show (weapon), shoot (non-lethal), shoot (lethal)—a graduated response that could apply to detainees as well as unruly civilians. Some ROE cards listed 4 S’s, without a distinction between lethal and non-lethal shooting, for the general treatment of civilians (Center for Law and Military Operations 2004:315). Vignettes issued in 2003 list the “the five S’s” for handling Enemy Prisoners of War, but they are five different S’s—search and seize, silence, segregate, safeguard, speed them to the rear (Center for Law and Military Operations 2004:324). The 2005 MNC-I card lists “block access or detain” in place of “shove.” A 2005 CLAMO report noted that soldiers “often know the 5 S’s, but have not internalized them and therefore fail to apply them in given situations” (Center for Law and Military Operations 2005:17). Although the 5 S’s are the core of the escalation-of-force doctrine, they have limited relevance to urban combat, traffic checkpoints, or even many routine patrols—all of which have more specialized rules of engagement.

In the ACLU documents, a commander’s point of capture interview noted that “ROE training was simple, but it was fuzzy when they first got [here]” “Things turned out a lot different” (U.S. DOD 016084). Soldiers report that they “did not understand ROE” (U.S. DOD 015948-015949), that the “ROE changes over time” (U.S. DOD 015965), and that “the problem with ROE and other training was lack of scenarios to provide some practical teaching for Soldiers—briefings were too dry and vague” (U.S. DOD 015968). A staff judge

advocate described guidance on detention procedures issued “in separate FRA-GO...had to do a lot of digging for guidance” (U.S. DOD 024678). A memorandum prepared for the chief of the inspections division noted that “regular home station training did not correspond to actual operations...training was for open warfare, but Iraq was urban warfare” (U.S. DOD 015975). “The schoolhouse teaches outdated material, based on conventional warfare...with no relevance to terrorism or today’s asymmetric operations” (U.S. DOD 015977). “Battle drills from WWII when all current ops are urban. Too hard to train for real-world—too many variables (no bunkers/trenches to take out). Unconventional enemy/tactics” (DOD 021853).

The human rights abuses at Abu Ghraib and other detention centers are often attributed to the idea that U.S. soldiers were drilled to distinguish between combatants and non-combatants, but were unprepared for the “corrections” work of processing and interrogating detainees. Lack of detention training has been cited in every major investigation of the abuses. The ACLU documents suggest, however, that soldiers may have possessed a clearer understanding of the ROI for handling detainees than they did of the ROE in force during raids and patrols. A few of the soldiers interviewed said that they had had “no training on ROI” or had “set their own ROI” (DOD 024866). But soldiers more often referred to “cultural training” or some iteration of “chain teaching on new policies down to soldiers” (DOD 024750). The most common detailed response to questions about training in the laws of war was to recite some version of the “5 S’s.”

According to the Pentagon investigators, few of the soldiers interviewed recounted in detail broader training in laws of war and rules of engagement. “SOP”—standing operating procedure—was the stock response, referring to the 5 S’s, the ROE card, and/or the orders guiding specific operations. It is important to note that the standardized level of care called for in the unclassified ROE cards may not always be mirrored in the classified rules unit commanders set for specific missions. Some officers have suggested anecdotally that the focus on ROE cards is misplaced given the wide range of mission rules—“useless,” one Marine intelligence officer described the general ROE in relation to mission-specific ROE (Brennan 2007). This is probably too strong. Though, as MNC-I spokesman Maj. Gen. Caldwell noted recently, “ROE remain commanders’—not lawyers’—rules for the use of force.” ROE cards “were never intended to tell service members exactly what to do in a specific situation...instead, they serve as a reminder of general principles of the law of armed conflict” (Caldwell 2007).

### **Risk-Transfer Warfare**

The Pentagon’s emphasis on force protection has been widely discussed. Thomas Ricks (2006:266) observes that “every indication is that the majority of U.S. troops did act well toward Iraqis most of the time.” But, he adds, “the emphasis on the use of force, on powerful retaliation, and on protecting U.S. troops at all costs tended to push them toward harsh treatment . . .” A Council on Foreign Relations report notes that Pentagon planners favored troop protection at the cost of mission accomplishment. “To limit risks, U.S. soldiers isolate themselves on heavily fortified bases, conduct surveillance missions backed by armored vehicles, and rarely come into contact with everyday Iraqis.” Strategic analyst Stephen Biddle noted, “That model provides maximum force protection but it means minimum effectiveness at solving the problem” (Beehner 2006).

The Joint Chiefs’ Standing Rules of Engagement distinguish between individual and unit self-defense, which is non-derogable, and defense of mission, which is of a lesser order. “Authority to use force in mission accomplishment may be



limited in light of political, military, or legal concerns, but such limitations have NO impact on a commander's right and obligation of self defense," notes the 2006 *Operational Law Handbook*. "The SROE do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity" (Rawcliffe and Smith 2006:87). The primacy of force protection was imprinted early on in Iraq. The 2003 ROE card listed protocols covering targeting of combatants and using force against civilians. At the top of the card in bold capital letters: "NOTHING IN THESE RULES PROHIBITS YOU FROM EXERCISING YOUR INHERENT RIGHT TO DEFEND YOURSELF AND OTHER ALLIED FORCES" (Center for Law and Military Operations 2004:315). The self-defense language was placed on the back of some later ROE cards out of concern that soldiers might adopt "a reactive self-defense posture" (Center for Law and Military Operations 2004:94). But force protection language found its way back to the top of the MNC-I card issued in 2005. After an op-ed article in the *Washington Times* charged that the ROE unduly fettered U.S. forces, Maj. Gen. Caldwell reiterated that "nothing in our rules of engagement prevents our troops from using necessary and proportional force to defend themselves" (Caldwell 2007).

If the safety equation is zero-sum, the pursuit of force protection should be expected to lead to higher rates of civilian casualties. In the air war, Coalition planners shifted risk to civilians while trying to mitigate the harm. Before the war, every single target on the Pentagon's Joint Target List was vetted by military lawyers for compliance with the laws of war. Planners developed a "no-strike" list of civilian targets as well as a "restricted strike" list of otherwise civilian infrastructure which supported Saddam and the Baathist leadership. The proportionality of strikes was weighed according to a collateral damage estimate (CDE) matrix which considered the target's military purpose, its protected status, weaponing, and anticipated civilian losses. "High collateral damage" strikes (those expected to result in 30 or more civilian deaths) required approval from the secretary of defense or the president. Several targets were abandoned for humanitarian reasons; in other cases, damage was reduced by the timing of the attacks and the types of weapons used (Kahl 2007:16-18). The CDE matrix showed concern for balancing military and humanitarian goals, though it also showed how deliberate and calculated collateral damage could be: foreseen civilian harm could hardly be attributed to the fog of war. The CDE could also be less regimented than it appeared. The vetting process was condensed to as little as 2 hours (as opposed to 72 hours in Yugoslavia). Most targets were reviewed in advance, though pilots could also bomb "time-sensitive" targets and "targets of opportunity" that had not been reviewed. As one pilot described a strike on a visual target in downtown Baghdad, "No photographs, no grids, everything was ad hoc" (Schmitt 2003).

During major combat, precision weapons struck Iraqi government ministries and military installations with relative ease. But on the ground, area targeting, punishing artillery fire, cluster bombs, and untried and poorly trained ROEs led to the killing of hundreds, perhaps thousands, of civilians. As the war metamorphosed from regime change to counterinsurgency, the Coalition adopted more invasive and punitive measures. During the post-invasion hunt for Baath Party operatives (the "deck of cards"), tactics became more, not less, generalized. People suspected of doing something were rounded up, but so were those suspected of knowing something. The threat extended to Iraqis in general, or "Hajjis," as they are referred to in the day-to-day language of Coalition soldiers. One British officer noted that "the U.S. troops view things in very simplistic terms. It seems hard for them to reconcile subtleties between who supports what and who does not in Iraq. It is easier for their soldiers to group all Iraqis as the

bad guys. As far as they are concerned, Iraq is a bandit country and everybody is out to kill them” (Rayment 2004). At its nadir, the use of razor wire, checkpoints, “neighborhood punishments,” night-time raids, and smashing in doors—plus news that American tacticians had consulted experts in the Israeli Defense Forces—pointed to the “Palestinianization” of Iraq (Filkins 2003).

As the Coalition grasped for a strategy, calculations of risk drove the choice of military rather than police or quasi-police methods. The Green Zone, the heavily fortified sector of Baghdad that housed many of Saddam’s palaces and state ministries, is now the seat of the American embassy and Coalition military leadership. But most U.S. soldiers exist in their own green zones: dozens of heavily protected “forward operating bases,” or FOBs. Walled off from Iraqi society, these “sprawling fortress-cities” are more suited for protecting troops than they are for waging an effective counterinsurgency (Partlow 2007). Long periods sequestered on base are punctuated by rapid raids “outside the wire” into what is sometimes referred to as “Indian territory.” These risk-averse, “kinetic” operations set up an often lethal dynamic between soldiers and civilians. The Department of Defense’s *Quadrennial Defense Review* (2006 draft) cites a DOD analysis of 127 U.S. “pacification operations” in Iraq between May 2003 and May 2005. Almost all were reactive; only 6% were geared toward creating a secure environment for Iraqis. “There was a strong focus on raiding, cordon & search and sweeps ops throughout: the one-day brigade raid is the preferred tactic”; the focus is on “killing insurgents, not protecting the population” (Aylwin-Foster 2005:5).

Throughout the war, harsh measures minimized immediate risks to U.S. troops and helped make up for a shortage of boots on the ground. The April 2004 offensive in Fallujah followed rules of engagement that transformed the city into a virtual free-fire zone (Gettleman 2004). The ROE were loosened further in the November 2004 campaign, when many civilians had fled the city after being forewarned of the impending attacks, an act that saved some civilians from harm but shifted the onus of protection from combatants to non-combatants. A group of Marines write in a “lessons learned” article that “surprise, speed, and maximum violence wins small unit battles” (Catagnus et al. 2005:88–89). Aggressive tactics in civilian quarters will, by design, increase harm to non-combatants. It was standard practice in house-to-house combat to fire “clearing rounds”—spraying gunfire or tossing fragmentation grenades into a room in preparation for entry, a process described as “prepping rooms” (Ricks 2006:403–404; Catagnus et al. 2005:80).

While media reports stress house-to-house combat and tense checkpoints, the most dangerous situations still call for stand-off artillery or air attacks. The assertion that such tactics are “required” or “necessary” is itself bound up in the risk economy. The use of precision weapons can make these strikes more palatable, but hugely destructive means are still used—air strikes, mortars, tank and cannon fire, helicopter gunships, and fixed-wing aircraft. Air power remains critical across Anbar and Diyala provinces, where U.S. soldiers and marines are stretched thin. The Pentagon says that as the value of targets in Anbar rose, so did the number of air attacks, reaching about 150 a month in late 2005 during Operation Steel Curtain. But it is also true that the campaign was carried out using modest troop levels of 2,500 U.S. marines and soldiers and about 1,000 Iraqi soldiers. What the Coalition lacked in ground troops it made up for with air power. Prior to Steel Curtain, air strikes had been concentrated around Fallujah, but in 2006 U.S. warplanes struck at least 18 different cities (Lasseter 2006). Scores, perhaps hundreds, of civilians were killed in Husaybah, Qaim, Ubaydi, and Karabilah. Ten marines died in the campaign (Knickmeyer 2005). In spite of, or perhaps because of, this disparity of risk, the use of airpower has since expanded dramatically. The number of U.S. air attacks in Iraq grew fivefold

from 2006 to 2007 (White 2008). Not surprisingly, as the number of airstrikes increased, so did the number of collateral civilian deaths, from between 544 and 623 in 2006 to between 868 and 1,326 in 2007. Air strikes are now responsible for most of the civilian casualties caused by Coalition forces in Iraq (Iraq Body Count 2008).

### **Escalation of Force Incidents**

Even in relatively controlled environments there have been thousands of “escalation of force” incidents involving American troops and Iraqi civilians. According to a Pentagon official there were 3,000 such incidents in 2005 alone, though not all resulted in civilian casualties (Youssef 2006). In these situations, American ROEs tend to be more permissive than those of Coalition partners (Parker 2006). British troops, for example, have scaled responses up or down according to ongoing risk assessments while U.S. forces have remained on high alert. British ROEs also list specific tactics that are allowed, while the American rules are more abstract and reactive in how they respond to risk (MacAskill 2006).

### *Rules of Engagement at Checkpoints*

In major military operations, Iraqi civilians have some control over the dangers they face: civilians may be encouraged to flee the area in the lead-up to major battles, for example. But it is impossible to evade daily traffic control points, or TCPs, and here the risks are controlled almost entirely by the military. Approaching drivers may not realize the checkpoint lies ahead, or may be unsure of the proper protocol to follow. Soldiers manning the checkpoints make snap judgments about oncoming vehicles knowing that roadblocks are favored targets for terrorist bombers. In hundreds of encounters, force protection has dictated an aggressive, often preemptive, response. A 2003 Human Rights Watch report recounted in heart-rending detail a number of cases of civilians, including entire families, killed at checkpoints. These were “regrettable incidents,” noted Pentagon spokesmen, but nonetheless the soldiers “acted in accordance with the rules of engagement” (Human Rights Watch 2003:23).

After the release of the Human Rights Watch report, the Pentagon set out to mark and light checkpoints more clearly and has continued to improve checkpoint safety. The general rules of engagement follow an escalating protocol: erect road signs, flash lights and lasers, signal with arm and hands, fire warning shots into the air, fire shots into the engine block of the oncoming vehicle, fire into the vehicle itself. Part of the problem in these encounters is “cultural.” Iraqi drivers fear being kidnapped or carjacked, and there is safety in speed. After 35 years of Saddam’s tyranny, motorists also tend to speed up when faced with officialdom: in the old days, idling around government buildings or state officials attracted suspicion (Ciezdlo 2005). Words and gestures are often misunderstood. Machine gunners are instructed to raise a clenched fist, a military signal that means “stay back,” but which is lost on many Iraqis, though gunners may also yell, wave their arms, and throw water bottles before opening fire (Burns 2005).

But risks are also structural. Civilian casualties occur most frequently at new and mobile checkpoints, or “snap TCPs.” Pentagon officials cite the necessity of “hasty” or “flying” checkpoints and roadblocks; this is longstanding policy favored for the tactical advantages it offers over static checkpoints. Ordinary Iraqis, no less than terrorists, may barrel through surprise checkpoints and draw fire. U.S. troops have also employed two-stage checkpoints. The first stage is usually manned by Iraqi soldiers with signs saying in Arabic and English, “Stop or

you will be shot.” Drivers often slow down for the Iraqi contingent, then, thinking they are in the clear, begin to accelerate just as they approach the second stage, where they encounter the American soldiers (Ciezadlo 2005). “Rules of engagement are standing orders,” noted a Pentagon spokesman in March 2005. “Everyone knows what they are...they are automatic.” Still, many Iraqis say they have come under fire with little or no warning (Burns 2005). Even if soldiers fail to follow the rules to a tee, they will likely be held blameless so long as they presumed that the oncoming vehicle posed a risk. This has been the case even when a military unit exhibits a pattern of violence at checkpoints (Smith and Tyson 2005).

Just how automatic the response could be was clear in the killing of Italian security agent Nicola Calipari and the wounding of Italian journalist Giuliana Sgrena on the evening of March 4, 2005, when a gunner from the U.S. Army’s 1-69th Infantry Battalion opened fire on the Italians’ car as it approached a roadblock at an access ramp onto the main highway to Baghdad International Airport. Known as “Route Irish,” the thoroughfare had seen numerous IED and car bomb attacks, and the commander of the unit said that “force protection was paramount in his mind” (U.S. DOD 2005:19). Poor communications and bad weather contributed to the incident. But so did the design of the roadblock and the ROE in force. The 1-69th did not have a written protocol for executing blocking positions as they did for checkpoints, though the unit had practiced roadblocks and had carried out similar missions before. The ROE were a rough translation of the 5 S’s: “Shout, that is, use the spotlight on an approaching vehicle as far in advance of the Alert Line as possible; Show, that is, use the green laser light, aimed at the driver, at the Alert Line; Shove, that is, fire warning shots; and Shoot, that is, disabling shots first, then, if necessary, shoot to kill” (U.S. DOD 2005:20).

An Italian government report on the Calipari killing stressed the inexperience of the U.S. troops at the roadblock and surmised that “some of the soldiers made instinctive and barely controlled reactions” (Arie 2005). But all indications are that the unit used a form of graduated force and that the shooter, Specialist Mario Lozano, a National Guardsman from New York, followed the ROE. Seated in the turret of a humvee with a M240 machine gun, Specialist Lozano was to shine the hand-held spotlight toward the oncoming vehicle and, if necessary, drop the light, lift his weapon, and “engage the threat with well-aimed fire using both hands” (U.S. DOD 2005:18). The necessity of firing went unquestioned. So did the idea of using lethal force at roadblocks in the first place, when physical barriers alone might block the flow of traffic. Specialist Lozano’s judgment call was fairly straightforward. If the vehicle reached the warning line without slowing down, he would open fire and the risks of the encounter would be borne by the inhabitants of the oncoming car. The Calipari case is highly unusual in one respect: an Italian prosecutor charged Lozano with murder (citing lack of jurisdiction, a judge dismissed the charges in October 2007). But the underlying causes of the shootings had less to do with Specialist Lozano than they did with the poor design and inadequate illumination of the blocking point. There were no road signs or lights on the approach. The unit’s warning signs were in storage at the time; the investigator noted that “there is no requirement for signs, only a suggestion” (U.S. DOD 2005:16). The Italian report estimated that 3 seconds elapsed between the warning signals and the time the gunner opened fire. Eleven bullets struck the car, rendering the distinction between disabling shots and lethal shots slim indeed. The Army investigator recommended better tactical training that distinguished between checkpoints and roadblocks, as well as other, non-lethal ways to engage oncoming vehicles, noting that “while effective for accomplishing the mission, the spotlight and laser pointer may not be the best system from a civilian point of view” (U.S. DOD 2005:35).

Pentagon efforts to make checkpoints safer for Iraqis without relinquishing the upper hand militarily have achieved some success. According to DOD data, since the beginning of the occupation, there was on average one civilian killing at a checkpoint each day. The new rules put into place starting in late 2005—including delayed warning shots, expanded use of hand signals, better signage, strobe lights, dazzling lasers, horns, flares, sirens and other “non-kinetic” tools, as well as efforts to educate Iraqi drivers how to behave at the traffic stops—reduced the number of civilian deaths at checkpoints to about one per week during the first 6 months of 2006 (Shanker 2006a, 2006b). Other non-lethal tools, including spike strips, spike blankets, and small “scatterjacks” that pierce the tires of oncoming vehicles, as well as temporary speed bumps, gun-mounted lasers, high-intensity noise guns, and stopping nets have not been widely implemented. Media campaigns designed to instruct Iraqis on how to conduct themselves around convoys and checkpoints have foundered. Unwarranted warning shots are also a continuing problem (Montgomery 2006).

#### *The Killings in Ishaqi*

The attack on an occupied house in the Sunni Triangle town of Ishaqi at 2:30 AM on March 15, 2006, illustrates the escalatory use of violence in which stand-off bombing takes the place of a ground assault because the risk of storming the building is deemed too great for U.S. troops. No combination of tactics and weapons endangers civilians more. In a well-regarded study, Iraq Body Count analyzed the circumstances surrounding 23,000 civilian deaths in Iraq between 2003 and 2005. The analysts found that “stand-off weapons which put a substantial distance between soldiers and their intended targets are the most likely to cause unintended harm to bystanders” (Iraq Body Count 2005:14). U.S. officials stress that the tactic, which marries risk management and advanced technology, employs only as much violence as necessary. Supposedly reserved for high-value targets, it has been used in numerous cases in which U.S. troops have come under attack.

The intended target at Ishaqi was Ahmad Abdallah Muhammad Na'is al-Utaybi, an alleged al-Qaeda cell leader who reportedly was visiting the house. According to U.S. military spokesmen, the marines drew fire as they approached the building. The marines returned fire, but as gunshots from the house persisted, they called in attack helicopters, and, finally, an air strike by an AC-130 gunship equipped with air-to-surface guided missiles. The AC-130, a slow-moving, fixed-wing workhorse of the brand of force protection known as “close air support,” is used almost exclusively in night-time raids lest it be shot down. The blasts demolished the structure. Pentagon officials later identified one insurgent, two women, and a 6-month-old child who were killed in the attacks. The officials said that as many as nine additional civilians were killed in the raid, though mangled bodies and mounds of rubble and debris at the site made an exact count impossible. Al-Utaybi, the al-Qaeda cell leader, fled the building at the beginning of the raid and was apprehended nearby (Brown 2006).

Pentagon officials ordered an investigation after Knight Ridder newspapers published a copy of a police report quoting several witnesses who said that American soldiers entered the house, handcuffed the inhabitants, shot them execution-style, and then ordered the missile strikes so as to destroy evidence of the killings (Schofield 2006). Because there were inconsistencies surrounding the allegations, the Pentagon's inquiry never developed into a formal criminal investigation. In early June, investigators exonerated the American commander in charge of the raid. “All loss of innocent life is tragic and unfortunate, and we regret such occurrences,” noted Coalition spokesman Maj. Gen. William B. Caldwell. “Allegations that the troops executed a family living in this safe house, and

then hid the alleged crimes by directing an air strike, are absolutely false,” stated Caldwell. “The ground force commander appropriately reacted by incrementally escalating the use of force from small arms fire to rotary wing aviation, and then to close air support...until the threat was eliminated” (Multi-National Force-Iraq Combined Press Information Center 2006).

Coming on the heels of revelations about possible atrocities in Haditha, the headline that the Ishaqi deaths had *not* been intentional eclipsed serious discussion about the use of stand-off weapons for purposes of force protection. In fact, the exoneration relied on a certain sophistry. The “necessity” of the air strikes was imbedded in the official inquest, but the line between deliberate and accidental killing was blurred. Intentions notwithstanding, unleashing high-end missiles on an occupied residence in the middle of the night virtually assured that civilians would be killed. Nor was it clear how seriously the commander had contemplated a ground assault on the house (referred to as a “safe house” in Caldwell’s statement) after the U.S. troops came under fire from what was later identified as a lone gunman who remained in the building after the al-Qaeda operative fled. It appears unlikely that the risk to civilians was weighed seriously against the military advantages to be gained by obliterating the house. The lop-sided risks of stand-off tactics are still very much in force in Iraq. An almost identical sequence of events unfolded in a second stand-off incident in Ishaqi on December 8, 2006 (Gamel 2006).

### **Eroding International Humanitarian Law**

The economy of risk increasingly frames how U.S. armed forces interpret the Geneva Conventions. On the question of hostile acts and hostile intent set out in Article 51 of the Additional Protocol, which the U.S. has not ratified but has tended to follow, the Pentagon’s interpretations increasingly are at odds with the International Committee of the Red Cross (ICRC). The ICRC commentary notes that the “immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts.” Hostile acts are defined as those “which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces” (ICRC 1987:Line 1942). Until recently, the U.S. hewed to similar language. The Army, for example, defined a hostile act as “an attack or other use of force.” Hostile intent was defined as “the threat of imminent use of force” (U.S. Army 2000: 8–5). But as the invasion gave way to counterinsurgency in Iraq, the standard for using force softened to take into account “perceived threats,” a more subjective determination which shifted the balance of combatant/non-combatant risk in favor of protecting soldiers (Kerley 2006).

As Benvenisti (2006:96) notes, militaries tend toward a permissive jurisprudence in which force protection is “a relevant and even paramount consideration.” “The army’s position...views the duty to spare enemy civilians as implying a prohibition on ‘willful intent’ to inflict civilian casualties or, at most, as synonymous with ‘wanton disregard for the safety of the civilian population,’ or with ‘recklessness.’ Otherwise, the enemy civilians are exposed to the risk of error.” Emphasis on personal criminal responsibility as evidenced by the soldier’s *mens rea*, or “guilty mind,” limits the assignment of blame. This article has argued that civilian harm often hinges on deliberate government policies adopted with reasonable certainty as to their consequences.<sup>3</sup> In Iraq, this elusive responsibility is compounded by the subjectivity of the perceived-threat standard.

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<sup>3</sup>Neta Crawford has recently described this kind of routinized violence as “systemic military atrocities”—“caused by structural forces, prior policy choices and institutional constraints” (Crawford 2007:189).

As news reports of the Haditha killings emerged, for example, a Marine Corps official predicted that the investigation would boil down to “Did they feel threatened? Did they perceive hostile action?” (White 2006).

Poor intelligence can also stand in as an excuse for violence against civilians. Here, the Geneva Conventions do not deny the fog of war. Instead, the blurring of targets and identities is reason to raise, not lower, the standards of civilian protection. The “Basic Rule” of Protocol I demands that parties to the conflict “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and...direct their operations only against military objectives.” Article 50 adds, “in case of doubt whether a person is a civilian, the person shall be considered to be a civilian”; and that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”

The inability to pinpoint active participants in hostilities can hide behind the idea of the Iraqi insurgency as an amorphous organism. A marine stationed near Haditha noted, “Saying who’s a civilian, or a ‘muj’ [mujahadin] in Iraq, you really can’t. That’s how wishy-washy it was. This town did not want us there at all” (Broder 2006). This logic can elide individual culpability and tempt military commanders to collapse, or at least weaken, the distinction between combatants and non-combatants. Coalition spokesmen regularly suggest that Iraqi civilians bear some responsibility for their plight because they harbor insurgents, withhold information, or fail to embrace the Coalition effort. Even the routine designation of “enemy civilians” erodes the distinction between combatants and non-combatants: it is doubtful that “friendly civilians” would be treated in the same way.

Though spurious in humanitarian law, this degrees-of-innocence idea was routinely used to justify potential and indeterminate targeting. Shifting risk wholesale, hostile areas, not just hostile people, have been targeted. “All-Anbar” rules of engagement, for example, respond to general hostilities in the province, not to discrete threats (White 2006). Village and tribal ties have been treated as proxies for guilt, or at least strong suspicion (Al-Tae and Negus 2005). Declaring zones of operation also shifts the burden of protection from soldiers to civilians. Civilian claims for compensation have been denied by U.S. adjusters on grounds the civilians had heedlessly remained in “military” locations, broadly defined.

Framing risk in this way lends soldiers broad latitude to escalate force. The Pentagon has prosecuted more than 200 detainee abuse cases, but only a handful of combat cases (Worth 2006). Of the civilian deaths that have been investigated, the vast majority were found to have been justified. Prosecutors seem reluctant to second-guess combat soldiers, and courts-martials have been rare even in serious cases. In Fallujah in November 2004, for example, a freelance journalist filmed a Marine corporal shooting an apparently wounded and unarmed Iraqi in a mosque. The film footage was damning, but the corporal was later cleared by a military review panel which found that he had acted within the rules of engagement (Worth 2006). The most infamous case is the alleged killing of 24 Iraqis, most of them unarmed, by members of Staff Sergeant Frank D. Wuterich’s Squad, Kilo Company, 3rd Battalion, 1st Marines, in the city of Haditha on November 19, 2005. Wuterich and several other members of the unit faced charges of unpremeditated murder, negligent homicide, and assault; four officers were charged with dereliction of duty for failing to investigate the incident properly. The killings, thought to be reprisals for the killing of a marine by an IED in the town, came to light after reporters from *Time* magazine pieced together witness accounts of the shootings and presented them to Col. Barry Johnson, chief U.S. military spokesman in Baghdad. At the time of the

raid, commanding officers seem to have accepted the Marine unit's account that the civilians had been victims of an insurgent bomb.

The Kilo Company marines have made the rules and norms of engagement the centerpiece of their defense. Many members of the company were veterans of house-to-house fighting in Fallujah, and the Haditha ROE were only slightly more restrictive than those governing the free-fire zone of Fallujah. Lawyers representing several of the marines say their clients followed the ROE and that it is the commanders who crafted the regulations, not the marines on the ground, who bear any blame. One of Sgt. Wuterich's lawyers said it was standard procedure in the wake of an attack on U.S. troops to use aggressive lethal tactics: "The collateral civilian deaths were absolutely tragic, but occurred as a result of legally justified actions that routinely occur during time of war" (von Zielbauer 2006c). One marine said that "running and gunning" was not unusual; when threatened, soldiers were allowed to spray rooms with gunfire. "It may be a bad tactic, but it works." "It keeps you alive" (White 2006). Another marine explained, "you've got to do whatever it takes to get home. If it takes clearing by fire where there's civilians, that's it" (Broder 2006).

In May 2006, U.S. Representative John P. Murtha, a critic of the war, said that the marines had "killed innocent civilians in cold blood" (Lowe 2006). Sgt. Wuterich, worried that Haditha would become this war's My Lai, and he its Lt. Calley, sued Congressman Murtha for libel, saying that the legislator impugned Kilo Company by personalizing what were essentially military policy decisions. It turns out that none of the Haditha marines will be court-martialed on murder charges. All charges have been dropped against all but two of the marines involved in the killings. Sgt. Wuterich will be court-martialed on charges of aggravated assault, reckless endangerment, dereliction of duty, and obstruction of justice; Lance Cpl. Stephen Tatum will be tried for involuntary manslaughter, reckless endangerment, and aggravated assault. Lieutenant Colonel Paul J. Ware, who conducted the military grand jury investigation in the Wuterich case, found that Wuterich "acted decisively and in accord with how he was trained, not on a specific intent to murder innocent people . . ." (Ware 2007:23). Ware also maintained that individual culpability in the case was diminished by the nature of Kilo Company's training and experience in military operations in urban terrain (MOUT). Regardless of the formal ROE in place at the time, "clearly this unit's training and leadership either received different training, or came up with its own form of MOUT tactics for clearing a house." In other words, the indiscriminate tactics used had become the norm.

A similar defense is being mounted in a case involving Company C, Third Brigade, 187th Infantry of the 101st Airborne Division of the U.S. Army. The Brigade was commanded by Col. Michael Steele, who led the 1993 mission in Somalia memorialized in the book and film *Black Hawk Down* and who is known for promoting aggressive tactics. Military prosecutors have accused the unit's leader and several soldiers of murdering three Iraqis whom the soldiers claimed were attempting to flee after being captured in a raid at Tharthar Lake north of Baghdad in May 2006. The unit maintained a "kill board" that tracked the number of alleged insurgents each soldier had downed. The night before the raid, Col. Steele reportedly instructed the soldiers to "kill them all" or "kill all military-age males"—more shades of Lt. Calley. Several soldiers testified that they had been ordered "to kill all military-age males that were not actively surrendering" (von Zielbauer 2006a, 2006b).

In both cases, the "rules and norms" line of defense may turn out to be a red herring. The Haditha killings may well have been cold-blooded murder, as Rep. Murtha has charged. Or tactics designed for Fallujah were adopted, officially or unofficially, in Haditha. The evidence thus far in the Company C case suggests that several soldiers orchestrated the "escape" of the battlefield prisoners as an



excuse to shoot them. Nonetheless, it is revealing that unleashing a rampage of unobserved gunfire and grenades in civilian quarters, or resorting to virtual free-fire tactics in the midst of non-combatants, could be portrayed as even remotely falling within the rules of engagement.

### **Reconsidering Risk? The “Surge” and Beyond**

If the goal of creating a secure, unified Iraq seems as elusive as ever, Coalition forces have made progress in how they manage risk. Grasping the extent to which violence against civilians has embittered Iraqis and incited the insurgency, commanders increasingly emphasize civilian security and follow a more pragmatic ideology of force protection. As U.S. Army Lt. Gen. Peter Chiarelli, an early advocate for greater restraint, noted, “the insurgency over time has repopulated itself... Every time we [accidentally kill or injure civilians] we’re creating more people that shoot at us, make bombs and plant bombs” (Montgomery 2006). Taking command of day-to-day operations in Iraq in January 2006, Chiarelli tried mightily to lower the level of violence used in encounters with Iraqis. He claimed that the number of times U.S. soldiers fired on “perceived threats” fell by a third in the first 5 months of 2006 (Kerley 2006; MacAskill 2006). The appointment in January 2007 of Lt. Gen. David Petraeus as commander of all U.S. forces in Iraq signaled further pragmatism. Petraeus was one of the prime movers behind the new Counterinsurgency Manual (FM 3-24), which entered into force in December 2006. The manual reads like the anti-Iraq handbook, roundly rejecting risk transfer: “Sometimes, the more you protect your force, the less secure you are”; “the more force is used, the less effective it is”; “some of the best weapons for counterinsurgents do not shoot.” “Ultimate success is COIN [counterinsurgency] is gained by protecting the populace, not the COIN force. If military forces remain in their compounds, they lose touch with the people, appear to be running scared, and cede the initiative to the insurgents...risk [must be] shared with the populace” (1–27).

The reallocation of risk has also been spurred by a deeper sense of what is at stake in Iraq. The grandiose claims the Bush administration made about the American interests in jeopardy were hard to square with the risk-averse way in which much of the war was fought. But growing sectarian strife has cast a pall on the entire region. A turning point was the bombing in February 2006 of the Al-Askari Mosque in Samarra, one of Shi’ite Islam’s holiest shrines. The attack, which reduced the mosque’s gilded dome to rubble, was the first time a major religious symbol had been targeted. Launched in June 2006 to try to tamp down Sunni-Shi’ite violence, Operation Together Forward failed to curb the growing militia movement or to slow the sectarian cleansing of neighborhoods. With the American mid-term elections looming and the administration hoping to avoid a spike in U.S. casualties, Together Forward was waged by Iraqi troops with U.S. forces in a secondary role. The “surge,” or as it is known in the National Security Council’s Iraq Strategy Review of January 2007, the “operational shift” toward “population security,” is an unambiguously American effort, committing as many as 30,000 additional U.S. troops to Iraq (National Security Council 2007). Some 17,000 troops are being dispatched to Baghdad, which, accounting for those in support roles, should put an additional 4,000–5,000 U.S. soldiers on the streets (Kaplan 2007:19). The number of troops deployed may be less important than how they are deployed. The establishment of urban “patrol bases,” first experimented with in the provincial cities of Mosul and Tall Afar, where U.S. commanders were more attuned to local conditions and had greater leeway to improvise, is being replicated in Baghdad. Since February 2007, surge troops have established scores of “joint security stations” and smaller “combat outposts” scattered across the city. Pentagon officials hope that the sustained street

presence of U.S. soldiers will help to develop better intelligence, to improve neighborhood relations, and to capitalize on joint patrols with Iraqi troops. As Gen. Petraeus is fond of saying, “You can’t commute to the fight.”

As the surge has taken hold, the tempo of the counterinsurgency has slowed. The outposts resemble fortified police precinct houses, and in many cases soldiering segues into policing. Rapid raids have been replaced with more measured and methodical tactics. Provocations that 2 years ago would have spurred round-ups of neighborhood men are now handled more deftly. Although it has received less attention, the city of Ramadi has also been stabilized thanks to a network of new police stations and substations secured by Iraqi and U.S. troops. The new approach has undoubtedly compromised force protection. As one staff sergeant put it, “These little combat outposts, they are more exposed: Your routes in here are very limited, and they’re definitely watching us” (Partlow 2007). Exposed as never before, 899 U.S. troops were killed in Iraq in 2007, making it the deadliest year for the U.S. military since the war began 5 years ago. While the surge has earned cautiously optimistic reviews for improving civilian security, the arc of improvement since the Al-Askari bombing has been erratic. Between Fall 2005 and Fall 2006, the number of U.S. patrols actually fell from about 400 a day to about 100 a day, though the U.S. presence in Baghdad increased in late 2006 as violence mounted there (Kamp, O’Hanlon, and Unikewicz 2006). As the surge has gathered steam, the number of sectarian execution-style murders in Baghdad has dropped markedly, though, as military spokesman Maj. Gen. William Caldwell noted in April, 2007, Coalition officials had not seen the “same significant amount of decline in the overall number of casualties” (Rubin and Wong 2007). As noted earlier, the increasing number and lethality of U.S. airstrikes further undermines civilian protections.

The fact that the Coalition is now trying to quell sectarian and militia violence should not detract from the role American policies played in begetting this catastrophe. The U.S. military has begun to dismantle an ideology of force protection that was too muscular by half. It remains to be seen whether the new approach can avert further disaster. Even today, fully half of U.S. troops in Iraq are devoted primarily to force protection (Burns 2007). Outposts remain a novel idea, while the forward operating system seems almost permanent. The American public, too, must be brought along in support of the new strategy. Risk transfer as state practice has surely undermined international humanitarian law. The reckoning in Iraq has disabused policymakers of the illusion that the war could be fought with few same-side casualties, or that the risks involved could be traded away. Even if the U.S. administration has finally grasped that civilian protections are the linchpin of any political or military solution in Iraq, the future still looks grim for most Iraqis. The owl of Minerva flies at dusk: wisdom comes too late.

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