“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 encounter as bloody and pernicious as possible to the first aggressors.”

I. Introduction

A. Humanizing War with Law: Aspiration

Since the dawn of man, war has been justified as an object of divine ordination, the natural state of humanity, and a tool in the progressive betterment of character, culture, and civilization. In this hyper-ideological age tragically symbolized by September 11, 2001, war, to the dismay of those who hoped material transformations might weaken its siren’s call, waxes ever more destructive, driving efforts to abolish force as a moral imperative and, less quixotically, to induce compliance with an accreting body of law.


2 DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPALS OF MORALS 20 (1777).

3 War is as old as humanity. See LAWRENCE H. KEELEY, WAR BEFORE CIVILIZATION (2000) (examining anthropological research tracing war to before the origin of the human species); Edoisiagbon Akhionbare, War and Peace in Contemporary International Relations: An Empirical Study of the Concept of Intermediacy in International Law and Politics 2 (1991) (unpublished Ph.D. dissertation, Texas Tech University) (noting that, in every historical age, war has been admitted among the relations between peoples as a legitimate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).

4 Although the issue of whether an armed conflict is a “war” in the Constitutional sense is relevant under U.S. 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 L. FREEDMAN, ED., WAR 2 (1994) (defining war as a state of law involving a high degree of violence in the relations between organized human groups).

5 See, e.g., ST, AUGUSTINE, CITY OF GOD 392 (G.G. Wash et al, transl. 1958) (contending that, despite its miseries, war is a state of affairs of which God approves) (citing Ecclesiastes 3:8)); ST. THOMAS AQUINAS, SUMMA THEOLOGICA Secunda Secundae, Question 40 (same); HELMUT VON MOLTKE, STRATEGY (positing that war is an integral aspect of the divine ordering of the universe); 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 (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].”)

6 See THOMAS HOBBES, LEVIAETHAN 105 (1660) (describing natural condition of mankind as a state of perpetual war of all against all—“bellum omnium contra omnes”); NICCOLO MACCHIAVELLI, IL PRINCIPE (1515) (W.K. Marriot transl.) (positing war as an evil necessary to the existence of the state); STEVEN PINKER, THE BLANK SLATE 306-10 (suggesting human violence has biological, environmental, and cultural determinants). Liberation theorists suggested war was 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). For communist and fascists, war was creator and purpose of the state. See, e.g., BENITO MUSSOLINI, DIZIONARIO ITALIANO (1932) (“War alone brings up to its highest tension all human energy and puts the stamp of nobility upon the peoples who have courage[,]”)

7 See JOHANN K. BLUNTSCHLI, DES 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”).

8 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”).

9 See DAVID WELLS, THE WAR MYTH 78 (1967) (noting that 19th 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); HERBERT SPENCER, SOCIAL DARWINISM (1857) (describing war as the means through which “the ethical health of nations is maintained”).

10 See KEEGAN, supra note 5, at 58 (examining “(e)expectations that . . . rising living standards, literacy, scientific medicine, the spread of social welfare” would trigger the arrival of effective anti-warmingaking attitudes in the world.”).

11 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).

12 “War abolitionists,” committed to the view that the horrors of war can be mitigated only 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, 1997 ARMY LAW. 4, 13 (1997). The Kellog-Briand Pact is a monument to this creed. See Renunciation of War as an Instrument of National Policy (Kellogg-Briand Peace Pact or Pact of Paris), Aug. 27, 1928, 46 Stat. 2343, 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,
of rules, known as international humanitarian law (“IHL”),3 to “humanize” armed conflict.4 This progressive regulation5 has met nearly universal approbation6: many ethical people, instinctively

GROUNDWORK ON THE METAPHYSIC OF MORAALS 101 (H.J. Paton trans. 1964) (“Always act so as to treat humanity . . . never merely as a means but always as at the same time as an end.”). For a discussion of war abolitionism, see FRANK PRZETACZNIK, THE PHILOSOPHICAL AND LEGAL CONCEPT OF WAR 182 (1994).

3 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 (1979). 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 AIR 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 LAO TZU, TAO TE CHING (citing ancient Chinese doctrine that “he who delights in the slaughter of men cannot have a place in the State.”); HOMER, THE ILIAD (S. Butler transl. 1955) (describing those who unjustly shed blood in warfare to be “unfit to pray to the gods.”); MICHAEL HOWARD, GEORGE J. ANDREOPoulos, & MARK R. SHULMAN, HISTORY, WAR, AND LAW (1994) (describing legal constraints of ancient Greek and Roman warfare); Karima Bennoune, As Salama Alaykum?: Humanitarian Law in Islamic Jurisprudence, 15 MICH. J. INT’L L. 605, 617-27 (identifying Islamic legal proscriptions on methods, sources, and objects of warfare); BUNDEJ FLECK (ed.), THE HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICTS 15 (1999) (indicating that medieval Japanese war was regulated by a quasilegal code known as bushido); THEODOR MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES 7 (1993) (describing regulation of medieval warfare by a set of customs and canon laws known as the jus armorum (code of chivalry)). 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 interpreting theories of natural law, theology, and secular morality. Id. at 211-13. The 19th and 20th 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 noncombatants, and in particular prisoners-of-war, applicable during the U.S. Civil War. See Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863 (“Lieber Code”). The Lieber Code inspired imitations; states borrowed liberally from its provisions in crafting their own military manuals. ASTRID J.M. DELisSEN & GERARD T. TANJA, HUMANITARIAN LAW OF ARMED CONFLICT 15 (describing Lieber Code as the “Adam and Eve of all subsequent law of war manuals”); THOMAS E. HOLLAND, THE LAWS OF WAR ON LAND 73-74 (1907) (listing states adopting military manuals incorporating the Lieber Code, including Britain, France, Spain, Italy, Portugal); WELLS, supra note 8, at 4 (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) (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 resort 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. TRANSNAT’L 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 Baxter, So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs, 23 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) 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 this note, at 61-62. See Bennoune, supra note 13, 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, supra note , 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 to antiquity. See 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”); PICTET, supra note 13, at 6 (contending that “traces of a desire to attenuate the horrors of combat” can be located in earliest mankind); QUINCY WRIGHT, A STUDY OF WAR 160-61 (1965) (correlating “rise of a civilization” with legal regulation of war). 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. Prior to the advent of the modern IHL regime in the 19th century, military strategists and natural law theorists insisted that the “humanization” of war could only obtain 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 13, at para. 2 (1863) (“The more vigorously wars are pursued the better it is for humanity. Sharp wars are brief.”); WALZER, supra note 13 at 47 (citing Prussian...
antipathetic to war, welcome any anodyne, and few proclaim its absolute independence from legal regulation. Indeed, the distinction between “murder” and “war” is now difficult to sustain without reference to positive law, and the term “war crime” has entered the popular lexicon accompanied by images of atrocity that provoke moral outrage. Empirically, states and individuals obey IHL at least some of the time, and the phrase “laws of war” is no longer ipso facto oxymoronic.

B. Frustration: Compliance Deficiencies

However, 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 impose have been transcended its entire developmental history. Prior to

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: CAN AMERICA’S GENDER-NEUTRAL FORCE STILL WIN WARS? 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.”); BOURKE, AN INTIMATE HISTORY OF KILLING 368 (1989) (“What the hell else is war than killing people?”) (quoting Lieutenant William L. Calley, incredulous at his conviction by court-martial in 1969 of the murder of Vietnamese civilians at My Lai). 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). 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 intranspecific combat within groups of our hominid ancestors).

See J. M. SPAIGHT, WAR RIGHTS ON LAND 5 (1911) (observing that, by the turn of the 20th century, “no nation . . . has not rendered homage to the laws of war”); HINGORANI, supra note 15, at 6 (highlighting formal recognition of obligations erga omnes under IHL); WALZER, supra note 13, at 33 (suggesting that recognition of legal responsibility for the conduct of military operations has undergone universalization in the post-U.S. Civil War era). See TAYLOR, supra note 14, 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.”). 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 armed conflict . . . by a perpetrator linked to one side of the conflict.”] Fenrick, supra note 13, 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). See GEOFFREY BEST, WAR AND LAW SINCE 1945 182-84 (1994) (tracing earliest use of “war crimes” to Nuremberg). See Christopher C. Joyner, Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability, 59 L. & CONTEMP. PROB. 153, 153 (1996) (noting that war crimes “sicken the conscience of civilized society” and that “brutal acts of plunder, torture, rape, and murder that [IHL] forbid[s] . . . appall . . . all of humanity.”); JANIL KASTO, JUS COGENS AND HUMANITARIAN LAW 41 (1994) (positing that revulsion to war crimes “unites the human race”). 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 15, at 192-93 (enumerating hypotheses).

24 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 WALZER, supra note 13, 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.”); OSIEL, supra note 15, at 161 (stating that IHL “prohibits [violations] unequivocally, in all circumstances and without exceptions.”); J. PICTET, COMMENTARIES 193 (1965) (suggesting that IHL has evolved to the point that “no possible loophole is left; there can be no excuse, no attenuating circumstances.”). 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. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF ETHICS 63-79 (M. Shef trans., Shatz Stein ed. 1994) (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 13, 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 “[the 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).

See BEST, supra note 20, at 290 (characterizing the observance of IHL as “indifferent and lamentable”); see also MERON, supra note ., at 369 (noting that violations of IHL are “not exceptional”); WALZER, supra note 13, at 232 (indicating that violations of IHL are routinely committed even by “morally serious” soldiers who are capable of differentiating right from
World War II, IHL was enforceable only as far as states possessed the political will to prosecute their own nationals, and suppression of violations was left largely to an informal regime of reprisal. The recent record of compliance is improving yet still sparse. Confronted by realist, just-war, and behavioralist explanations for failures to restrain self-interested soldiers and states in combat, IHL scholars, by the 1980s, were lamenting a regime shrinking to the “vanishing point” of international law.

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26 Violated or ignored. Because to men at war, these rules often don’t seem relevant to the extremity of their situation.
28 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 of August 12, 1949, 6 U.S.T.S. 3317, at Art. 129 (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 15, 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.
29 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 at note 28.
30 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 DELISSEN & TANJA, supra note 13, 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. 19-20, 30, 35, 38-40 (1995).
31 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 Raymond Aron, The Anarchical Order of Power, in CONDITIONS OF WORLD ORDER 25, 25, (Stanley Hoffman ed. 1968) (describing the international system as an “anarchical order of power” where might equates with right and law is irrelevant); HANS J. MORGENTHAU, POLITICS AMONG NATIONS 279-314 (5th ed. 1978) (expressing deep skepticism with regard to the law's capacity to trump power in international relations and in particular to the issue area of armed conflict); 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.”). Some realist commentators contend that IHL itself contributes to the perpetuation of war by making it “more acceptable, more endurable”. See F. 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 de-legalize international conflict to the point 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 it is merely a “device 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).
32 Ayaan Hirsi Ali, supra note 2, at 26. A 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 aggressors. See S. PUFFENDORF, THE LAW OF NATURE AND OF NATIONS 1298 (C. & W. Oldfather trans., 1964) (commenting that reason dictates fewer restrictions on the fighting of a just war and that, since victory admits of no impediment, parties are permitted “to use force to any degree . . . [they] think desirable.”). 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 VITORIA, ON THE LAW OF WAR 180 (suggesting that the highest form of morality when threatened by transcendent evil is not adherence to an artificial program of legal regulation but victory, whatever the cost to the rules). Just war theory is considerably more complex than herein presented. For a detailed discussion of just war theory, see generally WALZER, supra note 13.
33 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 “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.” TAYLOR, supra note 14, at 33; WALZER, supra note 13, 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.”);
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, dedicated to the suppression of war crimes as part of a human rights agenda, 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 tribunal with universal jurisdiction to punish

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FLORY, supra note _, at 9 (warning that “exigencies in battle . . . may be so great as to warrant violation” of IHL by states and individuals pursuing self-preservation). 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 24, at 161 (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 U.S. 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 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, “[w]hen the shooting starts, soldiers follow those principles that . . . have been etched in their minds . . . [that] conform to both 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 VIRGINIA HELD, SIDNEY MORGENBESSER, & THOMAS NAGEL, PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS 60 (1974) (contending that “the distinctions between what is obligatory and what is prohibited appear to rest on no intelligible grounds or persuasive principles.”); WALZER, supra note 13, at 47 (conceding the facial irrationality and “alien”-ness of much of IHL in relation to the experience of soldiers); BEST, supra note _, at 290 (stating that the “whole IHL enterprise is objectively parochial and far-fetched: war on the one hand, human nature on the other.”). In short, for behavioralists, 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.

31 Hersch Lauterpacht, The Problem of the Revision of the Law of War, 29 BRIT. YBK. INT’L L. 360, 382 (1952) (conceding that “if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.”).

32 See Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. 32/ACONF. 183/9, 37 I.L.M. 999 (1998) (“Rome Statute”), at Art. 1 (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.” VON HEBEL ET AL., supra note 31, at 16. 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 UN 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 (Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 27), Allied Control Council Law No. 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 ET AL., supra note 31, at 18-21. 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 UNSC Res. 670 (1990), at para. 13 (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); UNSC Res. 686, 687 (opting to confine criminal responsibility for violations of IHL to states). In 1993 and 1994, the UN 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 (“ICTY”), U.N. S.C. Res. 827 (1993), U.N. Doc. S/25704 of 23 May 1993; Statute of the International Criminal Tribunal for Rwanda (“ICTR”), U.N. Doc. S/RES/955 (1994) (1994). 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.” The Prosecutor
serious violations of IHL by individuals. 34 Despite a contentious drafting process, 35 state after state acceded to the Rome Statute, 36 and the International Criminal Court (“ICC”), hailed as a triumph of international civil society over statist impunity 37 certain to bring the worst violators tobrook, 38 entered into force in July 2002. 39 However, long-standing U.S. rejectionism 40 manifested in heated objections.

v. Dusko Tadic, Case No. IT-94- AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction by the [ICTFY], at 79 (Oct. 2, 1995). The International Law Commission, hoping to capitalize on the momentum, reconvened a Working Group that recommended “that [the UN] convene an international conference . . . to conclude a convention on the establishment of an International Criminal Court.” Report of the International Law Commission on its Forty-Sixth Session, 1994, UN Doc.A/49/10, paras 23 91); see also UNGA Res. 49/53, Dec. 9, 1994 (creating an Ad Hoc Committee on the Establishment of an International Criminal Court). However, although the ad hoc tribunals have achieved some success, they are not permanent tribunals, and lack the efficiency, accrued institutional expertise, and enhanced legitimacy that are often associated with a permanent international criminal court. 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, 65 (1999) (elaborating limitations of ad hoc tribunals).

See Rome Statute, supra note , at 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.

The Rome Conference commenced 15 June 1998, and five weeks of intense negotiations ensued during which a “Like-Minded Group” of over 80 militarily weak states, committed to a powerful state 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 U.S. and other members of the Security Council, concerned about the potential for a court with overbroad jurisdiction. VON HEBEL ET AL., supra note 31, at 2-3. Multiple U.S. jurisdictional amendments that would have limited prospective jurisdiction were defeated. See 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 U.S.-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); VON HEBEL ET AL., supra note 31, at 60 (describing defeat of U.S. jurisdictional amendment requiring consent of state of nationality of accused). Although a Third Group succeeded in amending ICC jurisdiction to permit a 7-year exemption from twar crimes, the tide of U.S. influence was forced back by a consortium of Like-Minded states and NGOs. For a discussion of the travaux préparatoires, see M. CHERIF BASSIOUNI, DOCUMENTS OF THE PREPARATORY COMMITTEE FOR THE ROME CONFERENCE (1999).


The signing of the Rome Statute in July 1998 was heralded as long-awaited milestone in the progressive erosion of the consent-based system of state sovereignty. For its champions, the ICC symbolizes a transition to an ethically-superior order “in which the highest forms of power and legitimacy [are] fushered in international organizations, establishing the constitutional supremacy of international law over all national law[,] and in which . . . states [are] subordinate to that order.” Anderson, supra note , at 84.

In the ICC, proponents see a future wherein states will ensure that violators of IHL are prosecuted or extradited and enforcement of IHL deers be transgressors, leading ultimately to greater peace. VON HEBEL ET AL., supra note 31, at 9.

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, at 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. at Art. 8(2)(d). The Rome Statute thus does not formalize criminal all violations of human rights but rather is addressed exclusively to serious violations of IHL. See Meron, supra note 13, 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, at Arts. 6-8.


During the early 1990s, Congress produced aspirational language supporting an international criminal court. See, e.g., S.R. 103-71 (May 20, 1993) (expressing that the “time is propitious for the [U.S.] to lend its support to . . . an international criminal court”); 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 For. Rel., Federal Document Clearing House, Jul. 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 (R-N.C.), 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 U.S. did not retain the power to veto an indictment. See Helms Declares U.N. Criminal Court “Dead-on Arrival” in Senate Without U.S. Veto, GOV’T PRESS REL. Mar. 26, 1998. Helms further advised that the creation of “any permanent judiciary within the U.N. system would be totally inappropriate, insomuch as . . . it would grant the UN 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,
D. Rejection: The U.S.—So Indispensable Nation—Actively Opposes the ICC

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

U.S. critics prophesied that, rather than administer universal justice, “rogue” prosecutors and state-parties,\(^{41}\) eager to circumscribe U.S. hegemony, would prosecute members of the U.S. Armed Forces\(^{42}\) for acts not widely-recognized as violations of customary IHL,\(^{43}\) especially the blurry, unsedimented

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\(^{43}\) International law consists of treaty-based, as well as customary, sources of law. \textit{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. \textit{North Sea Continental Shelf Cases}, F.R.G. v. Denmark & Netherlands, 1969 I.C.J. 4. State practice, particularly by directly affected states, is the most concrete element. Michael Akenhurst, \textit{Custom As A Source of International Law}, 47 BRIT. Y.B. INT’L L. 18 (1977). To become binding, the practice must be consistent, settled, and uniform. Prosper Weil, \textit{Towards Relative Normativity in International Law}?, 77 AM. J. INT’L L. 413, 433 (1983). The progressive development of ICC has proceeded largely by codification of the customs of soldiers. A.P.V. ROGERS, \textit{LAW ON THE BATTLEFIELD} 2 (1995). 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. Theodor Meron, \textit{Determining Customary International Law Relative to the Conduct of Hostilities in Non-International Armed Conflicts}, 2 AM. U. INT’L L. & POL’Y 471, 491-92 (1987). Although the ICJ has specifically addressed the question of the requisite degree...
principles of necessity, proportionality, and distinction. By unjustifiably increasing the criminal exposure of U.S. forces engaged in thankless peace and humanitarian operations with which the world

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 (Nicaragua v. U.S.), Merits, 1986 I.C.J. 1, para. 186 (“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 Cases, supra note _, 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, supra note _, 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 question as to the applicability of such treaties as between non-parties) Furthermore, even manuals of states legally sophisticated states do not identify provisions of various IHL conventions they believe declaratory of custom. KWAKWA, supra note 3, at 32-24. 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 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 is the subject of a contested process); Du Preez and Another v. Truth and Reconciliation Comm'n 1997 (3), S. AFR. L. REP. 204, 233 (A) (1997). (“Selecting what is and what is not part of custom is . . . fraught with political considerations.”). 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, supra note _, at 247 (suggesting that human rights groups take an “idealistic” position in 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) (stating that the “firm statement by the State of what it considers 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, 1974) (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, at 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.” 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. at Art. 9(1). By arrogating to itself the power to define custom, the ICC may displace state sovereignty. VON HEBEL ET AL., supra note 31, at 43 (stating the Rome Statute “must prevail [in a conflict with domestic law].” Due to this open grant to redefine customary IHL, the U.S. is unwilling to subject its Armed Forces to ICC jurisdiction.

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 Principles 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 United States v. Krupp, 10 WAR CRIMES REP. 138-39 (1949) (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 than to abrogate the laws . . . of war entirely.”); In re von Leeb and Others, 12 WAR CRIMES REP. 1, 93 (1949) (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 usages of civilized nations.”); United States v. List et al., 11 TRIALS WAR CRIM. 1, 1255-5 (1949) (“Military necessity or expediency do not justify a violation of positive rules. [IHL] is prohibitive law.”); LAW OF LAND WARFARE, DEPT’T ARMY F.M. 27-10 (1956) (defining military necessity as “that principle which justifies those measures not forbidden by international law which are necessary for securing the complete submission of the enemy as soon as possible.”) (emphasis added); W.V. O’Brien, The Law of War. Command Responsibility, and Vietnam, 60 GEORGETOWN L. J. 616 (1972) (stating that military necessity “consists in all measures . . . indispensable and proportionate to a legitimate military end, provided 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 J. L. 559, 559 (2002). Many commentators have doubts as to the continued applicability of the principle. See WALZER, supra note _, 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); Francesco Forrest Martin, Using International Human Rights Law for Establishing a Unified Use of Force
bailiff has selflessly saddled itself,47 a politicized ICC with a mandate to remake IHL 48 will induce isolationism.49 U.S. opponents further opined that, despite textual deference to complementarity,50 the

Rule in the Law of Armed Conflict, 64 SASK. L. REV. 347, 394 n.166 (2002) (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, 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. Dunbar, Military Necessity in War Crimes Trials, 29 BRIT. Y.B. INT’L L. 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 PRZETACZNIK, supra note 11, at 36 (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); McCoubrey, International Humanitarian Law 249 (1990) (stating that necessity “recognizes the potential impracticability of full compliance with legal norms in certain circumstances and . . . may mitigate or expunge culpability for prima facie unlawful actions [.]”).

The customary principle of “proportionality” dictates that military force not be employed to cause damage “excessive in relation to the concrete and direct military advantage anticipated.” HENRY SIDGWICK, ELEMENTS OF POLITICS 254 (restating the principle as the prohibition against “any mischief of which the consequences to the end is slight in comparison to the amount of mischief”). J.R. Baxter, Modern Law of War, 73 MIL. L. REV. 165, 178-79 (1980) (deriving proportionality as the requirement that civilian losses be balanced against military advantage). “Proportionality,” however, is just as elusive as necessity, for it is difficult to assess whether the method and means of warfare are in fact “conducive” to the end sought and not excessive in relation to that end. See WALZER, supra note _, 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.”); BARNETT, supra note _, at 73 (inquiring whether one must “necessarily assume . . . casualties in order to comply with the requirements of proportionality?”).

The customary IHL principle of “distinction,” which maintains that the only legitimate object of war is to destroy 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. & COMM. REG. 943, 966 (1987) (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., The Collected Essays, Journalism and Letters of George Orwell, Sonia Orwell and Ian Angus, eds., vol. III, 151-52 (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); PAUL FUSSELL, THANK GOD FOR THE ATOM BOMB AND OTHER ESSAYS 27 (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.’”); MAO TSE-TUNG, ON GUERRILLA WARFARE 73 (Samuel B. Griffith transl. 1961 ed.) (postulating that during an insurgency all adults become combatants). Other commentators insist that distinction rests upon reciprocity. See 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); PAUL RAMSEY, THE JUST WAR 435 - 36 (1968) (contending that low-intensity conflicts by their very nature “enlarge[e] the area of civilian death and damage that is legitimately collateral[.]”). Still others propound a “supreme emergency” exception whereby civilians may be attacked if state survival demands. JOHN RAWLSS, THE LAW OF PEOPLES 98 (1999). In practice arguments about distinction centers 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 Statement of Senator Helms Before the U.N. Security Council (Jan. 20, 2000) (“When the oppressed peoples of the world cry out for help, . . . free peoples . . . have a fundamental right to . . . come to the[r] aid. . . [I]f the [U.S.] is to serve as beneficent world sovereign . . . it must not be made to endure penalties by outsiders who object to the means it chooses.”). Humanitarian intervention is, however, the scenario feared most likely to trigger ICC prosecution of U.S. 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?, CORNELL INT’L J. 1, 4-5(2001/2002). See, e.g., Madeleine Morris, High Crimes and Misconduct: The ICC and Non-Party States, 64 L. & CONTEMP. PROB. 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); FRYE, supra note 35, at 39-40 (opining the ICC will become for declaring “spontaneous customary [IHL]” at variance with traditional understandings).

See William Safire, Enter the Globocourt, N.Y. TIMES, Jun. 20, 2002, at A27 (“[T]he lack of any effective mechanism to prevent politicized prosecutions of [U.S.] service members . . . could create a powerful disincentive for U.S. military engagement in the world.”) (quoting U.S. 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 U.S. 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, 45 (2001) (positing that the prospect of political prosecution of U.S. forces engaged in such operations will depress U.S. participation); Smidt, supra note 40, at 199 (contending that a politicized ICC will “limit severely those . . . controversial . . . interventions that the advocates of human rights . . . so desperately seek from the [U.S.]”); David J. Scheffer, The United States and the International Criminal Court, 93 AM. J. INT’L L. 12 (1999) 12 (judging the possibility for politically-motivated prosecutions as “so high . . . that the [U.S.] forces most likely to . . . prevent . . . humanitarian violations may actually be deterred from responding[.]”), Christopher M. Van de Kieft, Uncertain Risk: The United States Military and the International Criminal Court, 23 CARDOZO L. REV. 2325, 2340 (2002) (suggesting politically-motivated ICTFY war crimes investigation of NATO Kosovo campaign will deter future interventions).
ICC would subvert U.S. jurisdiction, trump U.S. sovereignty, and vitiate the procedural rights of U.S. defendants. Critics railed further at a lack of Security Council oversight they deem essential to ensuring the political accountability and democratic legitimacy of the ICC.  

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50 States are obligated to extradite suspects accused of a crimes giving rise to universal jurisdiction to a requesting state or to try them domestically. 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. VON HEBEL, supra note 31, at p. 4. The Rome Statute incorporates complementarity. Rome Statute, supra note 32, at Art. 17(1)(a)-(b) (determining a case to be inadmissible where it is “being investigated or prosecuted by a State which has jurisdiction, unless the State is unwilling or unable 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.”).

51 The Rome Statute obligates the ICC to defer to a state decision not to prosecute, as well as to a domestic acquittal, provided neither is “for the purpose of shielding the person concerned from criminal responsibility.” Id. at Art. 17(2), 20(3). U.S. 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 45, 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. The domestic critics envisaged an exercise of jurisdiction in a peremptory, rather than complementary, body that sets aside national adjudications with which it disagrees. See VON HEBEL, supra note 31 (intimating the ICC is a “‘super’ international appellate court . . . rather than a court intended to complement States.”)). By this view, the ICC is, at best, redundant. See Department of Defense News Briefing, Read Admiral Craig Quigley, Sept. 14, 2000 (stating that the U.S. has a “stable judicial system . . . fully capable of . . . prosecuting “all allegations of misconduct by U.S. service members.”).

52 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, at Art. 93(4). Under U.S. law, judges are deferential toward assertions of the state secrets privilege. See Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982) (denying motion to compel disclosure of information claimed privileged by CIA Director). Some question whether the ICC will be as deferential. Jacob Katz Cogan, International Criminal Courts and Fair Trials: Difficulties and Prospects, _YALE J. INT’L L. 111, 139-40 (2002).

53 The ICC may exercise jurisdiction over crimes committed by states-parties as well as crimes committed on the territory of a member state. Rome Statute, supra note 32, at 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. at Art. 12(3). Moreover, the Security Council may make a referral 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, at Art. 13(b). Similarly, the ICC Prosecutor may initiate investigation _pro proprio motu_ of all persons alleged to have committed crimes on the territory of member states. Rome Statute, supra note 32, at Arts. 12(3), 13(b), 15. According to critics, the ICC cannot even in concert with the Security Council trump the lack of U.S. consent to jurisdiction over its nationals. Morris, supra note 46, at 64. Still, as written Articles 12-15 would permit, e.g., Iraq to invoke ICC jurisdiction for alleged crimes committed by U.S. troops in Iraq while the ICC would be unable to “prosecute Saddam for massacring his own people.” U.S. Dep’t of State, Press Briefing, Jul. 20, 1998. The U.S., objecting to the jurisdictional breadth of the Rome Statute, proposed unsuccessful 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. NEIER, supra note 3, at 256.

54 International criminal tribunals must provide minimum procedural protections to defendants. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966) at Art. 14(3); Trial of Joseph Alstotter & Ors, L. REP. TRIALS WAR CRIM. 103 (1948). The Rome Statute does incorporates extensive safeguards: defendants may not be charged with ex post facto crimes (Art. 22) or for conduct committed prior to entry into force (Art. 24); may not be placed in double jeopardy (Art. 20); are presumed innocent(Art. 66(1), are entitled to a statement of charges (Art. 61(3)), counsel of choice (Art. 67(1)(b), (d)), speedy and public trials (Art. 67(1)(a), (c)), examine adverse witnesses (Art. 67(1)(e), remain silent “without such silence being a consideration in the determination of guilt,” (Art. 67(1)(g)); may not be tried in absentia (Art. 63); are entitled to the exclusion of illegally obtained evidence (Art. 69(7)), cannot be compelled to self-incriminate (Art. 55(1)(a)), and are entitled to appeal guilty verdicts as well as sentences (Art. 81). However, predecessor tribunals have a mixed record in implementing such rights. See supra note 46, at 256. 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. at Art. 12(3). Moreover, the Security Council may make a referral 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, at Art. 13(b). Similarly, the ICC Prosecutor may initiate investigation _pro proprio motu_ of all persons alleged to have committed crimes on the territory of member states. Rome Statute, supra note 32, at Arts. 12(3), 13(b), 15. According to critics, the ICC cannot even in concert with the Security Council trump the lack of U.S. consent to jurisdiction over its nationals. Morris, supra note 46, at 64. Still, as written Articles 12-15 would permit, e.g., Iraq to invoke ICC jurisdiction for alleged crimes committed by U.S. troops in Iraq while the ICC would be unable to “prosecute Saddam for massacring his own people.” U.S. Dep’t of State, Press Briefing, Jul. 20, 1998. The U.S., objecting to the jurisdictional breadth of the Rome Statute, proposed unsuccessful 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. NEIER, supra note 3, at 256.

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Thus, although the ICC commenced operations in March 2003 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.” The U.S. signed, but did not ratify, the Rome Statute, and subsequently...
withdrew its signature. Moreover, the U.S. has flexed economic muscle, and threatened to withdraw from peacekeeping commitments, to dissuade ratifications and exempt its nationals from ICC jurisdiction. The American Servicemembers’ Protection Act terminates military aid to states-parties, precludes U.S. personel assignments to missions in their territory, and, with the “Hague Invasion Clause,” commands the President to employ “all means necessary,” including military force, to rescue any U.S. national in ICC custody. In short, the U.S. has “washed [its] hands of the [ICC].”

U.S. hostility strikes the devoted transnational cadre supporting the ICC as apostasy given the history of U.S. leadership in the defense and promotion of human rights. In discourses strewn with

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 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 H.R. 1794 (May 10, 2001) (amending, as earlier version of ASPA, the Foreign Relations Authorization Act 2002-03, H.R. 1646 (2001)) (instructing President to use “all means necessary” to effect release any U.S. or allied personnel detained against their will or on behalf of the ICC).


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 . . . 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, HARV. J. L. & PUB. POL’Y
pious nostrums, universalists deride irresponsible attachments to a realist mode of governance—organized upon principles of state power and sovereignty—{}that more idealist theories and multilateral institutions—organized upon general principles of equality and law—are said to have displaced.{} For ICC partisans, not only is the Court institutionally superior to the ancien regime, but the meritless objections actually militate in its favor. If the U.S. fears the prosecution of its soldiers, it need only

591, 594-95 (2002). For this cohort, the international is always superior to the domestic. See Kenneth Anderson, Secular Eschatologies and Class Interests of the Internationalized New Class, in PETER JUVILER & CARRIE GUSTAFSON (eds.), RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS? 91 (1998) (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). Although the U.S. 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 U.S. lawyers, one can argue that the U.S. has led the promotion and protection of human rights since their legal origins. Although this argument is undermined by the pattern of selective U.S. 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.

Realists contend that only those institutions that reflect the interests of their states-parties can hope to be effective in the creation enforcement of law. See VON HEBEL ET AL., supra note 31, 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.” FRYE, supra note 35, at 9. Where states are unwilling to comply with IHL obligations, military force is necessary to ensure obedience, and other states possess such currency in abundance; consequently, it to 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 as 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.

For a discussion of the globalist vision of IHL and the formal institutional enforcement model embodied by the ICC, see generally ANNE-MARIE SLAUGHTER ET AL., TOWARDS AN INTERNATIONAL CRIMINAL COURT (1998). Again, however, note that not all academics are so critical of the U.S. position as are the most dedicated of globalists. See, e.g., Anderson, supra note 63 (arguing that “[t]o frame the issue as one of US unilateralism . . . as against the virtually 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 U.S. 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.

See HELD ET AL., supra note _, 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[,]”)

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 El Zeidy, The Principle of Complementarity: A New Machinery to Implement International Law, 23 MICH. J. INT’L L. 689 (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, as 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. Further, defenders of the ICC point to the recent immunization of UN peacekeepers as a mechanism whereby states disproportionately involved in humanitarian and peacekeeping operations may limit the criminal exposure of their engaged forces. See (note) (asserting that, because Article 8 provides that the only war crimes within ICC jurisdiction are those committed as part of a “plan or policy[,]” peacekeepers, the deployment of whom could not possibly be undertaken as part of a plan or policy to engage in war crimes, would almost certainly never be haled before the ICC for isolated criminal acts). 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 _, at 69 (citing claims that the Rome Statute provides “layers of protection” against undue prosecutions); see also (note) (stating that jury trial is not applicable to trial of U.S. forces overseas because the Bill of Rights have “no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country” (citing Neeley v. Henkel, 180 U.S. 109, 122 (1901)); id. (contending that the “list of the due process rights guaranteed by the Rome Statute is . . . somewhat more detailed and comprehensive than those in the America Bill of Rights. Not better, but more detailed.”); Leila Nadya Sadat & S. Richard Carden, The New International Criminal Court: An Uneasy Revolution, 88 GEORGETOWN L. J. 417 (2000) (suggesting that the safeguards afforded defendants in the ICC are actually “excessive”).
ensure that they do not commit war crimes, or punish them when they do. 70 By its opposition the U.S., according to this globalist philosophy, has stuck itself on the wrong side of history. 71

If the asserted bases accurately portrayed the grounds upon which the U.S. eschews participation, a quick solution could be crafted: 72 the U.S. 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, 73 amend the Statute to enhance individual rights, and elaborate complementarity to support deference to domestic judicial processes. However, the etiology of U.S. disaffection is traceable less through statutory provisions than to a post-September 11th set of understandings concerning the challenge posed by the intersection of international terrorism 74 and weapons of mass destruction [“WMD”], 75 along with the proper role of IHL in the battle against this threat to civilization. 76 Although these criticisms are not meretricious, a “decent Respect to the Opinions of Mankind” 77 urges a declaration of the causes that impelled the U.S. to reject a venture to which many states have committed themselves.

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

70 See FRYE, supra note _, at 27 (contending that the ICC will not substitute its judgment for that of U.S. courts unless the U.S. “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 7 years. See Rome Statute, supra note 32, at Art. 124 (permitting a party to “opt out” of ICC jurisdiction over war crimes for a nonrenewable 7 year period upon accession).
71 Some critics of the U.S. abandonment of the ICC proclaim a devolution “back to the anarchic world of pre-Nuremberg.” King & Theofrostus, supra note 33, at 104-05.
73 See FRYE, supra note 35, at 32 (noting proposals to grant such immunity to U.S. peacekeepers out of recognition of the “special responsibilities” shouldered by the U.S. in the maintenance of international peace).
74 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 http://untreaty.un.org/English/Terrorism.asp (listing 12 conventions and protocols defining terrorism); ROSLYN HIGGINS & MAURICE FLORY, EDS., TERRORISM AND INTERNATIONAL LAW (listing and discussing instruments related to terrorism). U.S. federal law defines terrorism as an activity that “(a) involves a violent act or an act dangerous to human life that is 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) appears 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 assassination or kidnapping.” 18 USC §3077 (2000). 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 163 (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., U.N. Doc. 7 (1992); see also S.C. Res. 1373, UN SCOR, 4385th mtg., U.N. Doc./RES/1373 (Sept. 28, 2001), paras. 1-3, 6 (Sept. 28, 2001) (obligating all member states to deny financing, support, and havens to terrorists and affirming the right of self-defense against “terrorist acts[,]”).
75 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 . . . toxic or poisonous chemicals or their precursors; . . . a disease organism; or . . . radiation or radioactivity.” 50 U.S.C. 2302(1)(2000).
76 Theories abound in answer to the question, “What is the purpose of law?,” with utilitarians, natural legal theorists, materialists, legal positivists, libertarians, socialists, statist, statist, developmentists, critical legal scholars, and others weighing in with arguments. 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 (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, Advisory Opinion, 1996 I.C.J. Rep. 8 (Jul. 1996) (Shahabuddin, J., dissenting) (stating that the purpose of law is not merely to resolve disputes but to protect civilization).
77 See U.S. DECLARATION OF INDEPENDENCE, Jul. 4, 1776, at preambular paragraph (conceding that the international community, of which the U.S. was a constituent “People,” was entitled to a statement of causes for U.S. secession from Britain).
Prior to the attacks of September 11th, 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. The U.S. 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, and the negotiations toward the Rome Statute nearly included terrorism as a crime within ICC jurisdiction, underscoring widespread support for judicial responses to the phenomenon. While eradication of the global scourge of terrorism may benefit from allied judicial efforts, however, the attacks unleashed on the U.S. that infamous morning fundamentally transformed, from the U.S. vantage point, perceptions of the nature and magnitude of the danger and, consequently, the proper instrumentalities to employ and objectives to pursue in response. September 11th—the first day of a new historical era—withered the veil of ignorance, and the U.S. now concedes that, after a decade of denial, it is at war against a menace no

78 See Ronald J. Sievert, War on Terrorism or Global Law Enforcement Operation?, 78 NOTRE DAME L. REV. 307, 313 (2003); see also MICH. J. INT’L L., supra note __ at 754 (contending, prior to September 11th, that terrorism could be reduced or eliminated by states ceding sovereignty to transnational organizations’); Mark A. Drumbi, Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of International Legal Order, 81 N.C. L. REV. 1, 4 (2002) (suggesting international terrorism is amenable to a civilian solution); Emanuel Gross, Trying Terrorists—Justifications for Differing Trial Rules: The Balance Between Security Considerations and Human Rights, 13 IND. INT’L & COMP. L. REV. 1 (2002) (stating that terrorism is “no different than any other criminal offense”); 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 UN was the logical place to which to turn to organize such cooperative efforts. Smidt, supra note __, at 229.

79 On November 4th, 1998, Usama bin Laden and members of the Al Qaeda terrorist organization were indicted in the U.S. District Court for the Southern District of New York for orchestrating acts of terrorism against U.S. nationals, including the bombing of U.S. Embassies in Nairobi, Kenya, and Dar As-Salaam, Tanzania. See Indictment, United States v. Usama bin Laden et al., S(2) 98 Cr. 1023 (LBS) (S.D.N.Y. Nov. 4, 1998) (charging bin Laden and others with conspiracy, bombing U.S. embassies, 224 counts of murder, leadership of a “terrorist group dedicating to opposing non-Islamic governments with force and violence,” seeking to obtain WMD, issuing orders to his followers to attack U.S. forces in all Muslim countries, and ordering followers to commit genocidal war against all U.S. citizens), at http://www.fbi.gov/contact/fo/nyfo/pressrels/1998/11041998.htm. As the capture and trial of these defendants was considered critical to U.S. national security interests, the conviction of several of these defendants in the spring of 2001 was, at the time, considered to be a national security coup. See, e.g., Elizabeth Neuffer, Four Guilt in Embassy Bombings, BOST. GLOBE, May 20, 2001 (reporting the conviction, on 302 counts, of four participants in the destruction of U.S. embassies and the deaths of 224 people, including 12 Americans).


81 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 U.S. against the authors of September 11th. See Declaration of National Emergency, Proclamation 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001) (declaring the U.S. to be in a state of emergency by virtue of the terrorist attacks of September 11, 2001); see also Joint Resolution 23 (JR 23), Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 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 and that future such attacks could only be prevented by re-establishing a credible threat of punishment for would-be attackers and that no institution other than the U.S. military could mount such a threat. Smidt, supra note __, at 157-58; see also Ruth Wedgwood, The Law at War: How Osama Slipped Away, 66 NAT’L INTEREST 69, 71-72 (2002) (deriding as a “very dangerous intellectual failure” the application of criminal law, rather than force, to overcome the scourge of terrorism). Non-U.S. commentators appear not to 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, 140-57, in STRAWSON, ED., Gliding Away, 71-72 (2002) (deriding as a “very dangerous intellectual failure” the application of criminal law, rather than force, to overcome the scourge of terrorism). Non-U.S. commentators appear not to 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, 140-57, in STRAWSON, ED., supra note __, (contending that the terrorists of September 11th are best described by some indeterminate intermediate term between criminals and “agents of war”). Others suggest that the U.S. abandoned the criminal justice model in favor of a military approach during the latter half of the 1990s, well before September 11th. See, e.g., Todd M. Sailer, 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 U.S. to “[s]ee the existing evidence in a new light,” and the restructuring of U.S. foreign policy toward military solutions to the problem of terrorism dates to that infamous day. See ASSOC. PRESS, Ramsfelds Defends War, Jul. 10, 2003.

less threatening to its existence than the Great Wars, hot and cold, of the 20th century. In response, the U.S. has pledged that, while it will mean a long hard struggle to defeat all the individuals, groups, and states involved, victory in the War on Terror is certain.

However, the U.S. faces foes that arm themselves with WMD, present no static targets, abjure legal restraint, and deliberately murder civilians. U.S. armed forces, trained to observe and obey limitations imposed by IHL, are distinctly disadvantaged by a grossly asymmetrical legal framework in


The official U.S. assessment is that the attacks of September 11th effected a general declaration of war, by global terrorist organizations and their state sponsors, against the U.S. See Elaine Sciolino, Long Battle Seen: “We’re at War,” He Says, N.Y. TIMES, Sept. 16, 2001, at A1 (“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). Commentators concur with this assessment, e.g., W. Michael Reisman, Assessing Claims to Revise the Laws of War, 97 AM. J. INT’L L. 81, 88 n.14 (2003) (stating that “[o]nly a most technical and arid legalism could deny [that the U.S. is in a state of war with al Qaeda];”)

Derek Jinks, September 11 and the Laws of War, 28 YALE J. INT’L L. 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 U.S. as a whole, and treated as such by state governments and international organizations, including NATO and the UN). 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 President George W. Bush, Prepared Remarks Declaring End to Major Combat in Iraq, N.Y. TIMES, May 1, 2003 (“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.

Arguments that juridically speaking it is 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, 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 (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: possession of terrorist poses as significant a threat to U.S. vital interests as states and that the judicial response is inadequate to resolve the threat. See Roberto Iraola, Military Tribunals, Terrorists, and the Constitution, 33 NEW MEX. L. REV. 95, 113 (2003) (“It is clear that a state of war exists between the [U.S.] and al Qaeda[,] a terrorist group that “has openly proclaimed war against the [U.S.] and has repeatedly carried out attacks upon us.”).

See Charles Feldman & Stan Wilson, Ex-CIA Director: U.S. Faces “World War IV'” (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 U.S. is at least as extreme as these earlier conflicts); David Rivkin Jr. & Lee A Casey, That’s Why They Call It War, WASH. POST, Mar. 14, 2003, at B4 (describing War on Terror as a “long-term life or death struggle” in which the U.S. has “never been more threatened.”).

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 (January 29, 2002) (labelling Iran, North Korea, and Iraq an “axis of evil” due to sponsorship of terrorist groups and signaling the U.S. would “not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.”).

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 Sept. 20, 2001, in which President Bush stated that the U.S. effort would not stop “until every terrorist of global reach has been found, stopped and defeated.”).

In contrast to states, which present “fixed addresses” against which to direct measures 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, rendering 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 Mark A. Drumbl, Victimhood in Our Neighborhood: Terrorist Crime, Talibani Guilt, and the Asymmetries of International Legal Order, 81 N.C. L. REV. 1, 47-48 (2002) (discussing the legal difficulties in directing proportional and precise military force against non-state actors).

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].” 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, _ TEMPLE 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.

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, N.Y. TIMES, Mar. 29, 2003, at A1 (listing Iraqi violations of IHL, including mistreatment and extrajudicial killing of POW’s, perfidious surrender, fighting in civilian garb, using civilians as human shields, employing hospitals and ambulances to military ends, and placing cash bounties on U.S. pilots).

which morally inferior warriors 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, erodes the U.S. military advantage. The reduction in power differential triggered by this synthesis of WMD and terrorists’ exploitation of legal compliance disparities renders ultimate U.S. victory more costly, in lives and treasure, and more uncertain.

In light of this strategic reconfiguration, the U.S. has, albeit belatedly, enhanced the flexibility of its policy options. The Bush Doctrine proclaims the rights to employ preemptive measures in self-defense, depose regimes harboring terrorists, eliminate terrorist leadership, and bring ever-more sophisticated weaponry to bear upon these adversaries. However, rather than reap gratitude for shoudering a disproportionate burden in the War on Terror, the U.S. has been accused of opprobrious conduct arising from the proactive use of force, the use of certain weapons systems, and collateral destruction arising from the proactive use of force.

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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[,]”).

The U.S. 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 much greater cost. See id. 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 NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 3 (Dec. 2002), at http://www.whitehouse.gov/response/index/html (“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.”); David E. Langer, Bush Renews Pledge to Strike First to Counter Terror Threats, N.Y. TIMES, Jul. 20, 2002, at A3 (reporting message from President Bush to U.S. troops in Afghanistan stating that the U.S. will preemptively strike against states developing WMD and that “America must act against these terrible threats before they’re fully formed[,]”). For an extended discussion of the doctrine of preemptive self-defense at domestic and international law, see infra at note .

See President George W. Bush, Address to a Joint Session of Congress and the American People, Washington, D.C., 20 September 2001, available at www.usembassy.org.uk/bush83.html (“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.”).

Targeted killing of terrorist leaders may preclude subsequent acts of terrorism, produce fewer casualties than other options, inflict greater destruction 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 U.S. has added this policy option to its anti-terrorist arsenal. See John Diamond, Shackles Loosened on U.S. Intelligence, USA TODAY, Jul. 9, 2002, at 8A (reporting that the Bush Administration has authorized executive agencies to overthrow regimes and eliminate foreign leaders); James Rosen & David Johnston, War of Secrets: Not Much Has Changed in a System that Failed, N.Y. TIMES, Sept. 8, 2002, at D1 (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 at note .

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 A1.

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., Regulations Concerning the Laws and Customs of War on Land (annexed to Fourth Hague Convention of 1899, rev’d. 1907), 29 July 1899, at Art. 23(3) (limiting the methods and means of warfare that cause “superfluous injury” or “unnecessary suffering”); 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); Protocol for the Prohibition of the Use in Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 (forbidding use of gas and bacteriological weapons but not outlawing development); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, April 10, 1972, 1015 U.N.T.S. 164 (1972) (“BWC”) (prohibiting the development, stockpiling, and use of biological 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 (“CCW”), 19 I.L.M. 1524 (1981) (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, Stockpiling and Use
damage resulting therefrom.\textsuperscript{79} The injection of the ICC into this equation bodes ill for the eventual defeat of international terrorism. Despite the seemingly self-evident fact that U.S. operations are designed to, and have the effect of, preventing depredations,\textsuperscript{99} 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 it)\textsuperscript{99} and the troops who execute it) and the indemnification of

of Chemical Weapons and on their Destruction, 13 January 1993, 32 I.L.M. 800 (1993) (prohibiting development, production, or use of chemical weapons); 1997 United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (36 I.L.M. 1507) (1997) (banning the use of land mines). 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 Smidt, supra note \textsubscript{79}, at 226 (discussing this development); BARNETT, supra note \textsubscript{48}, at 120 (discussing longstanding efforts to prohibit napalm and fuel-air explosives); Roberts, supra note \textsubscript{79}, at 22-23 (suggesting that cluster bombs, while not illegal per se, may be incompatible with the “fundamental principles” of IHL); Nicholas Wade & Eric Schmitt, U.S. Use of Tear Gas Could Violate Treaty, Critics Say, N.Y. TIMES, Apr. 5, 2003, at (reporting contention that U.S. use of riot control agents would violate the Chemical Weapons Convention); STUART MASLEN, ANTI-PERSONNEL MINES UNDER HUMANITARIAN LAW (2001) (discussing process whereby anti-personnel mines have been proscribed by multilateral treaty and 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., Depleted Uranium: Hague War Crimes Prosecutor Not Ruling NATO Trial Out, LA REPUBLICA, Jan. 14, 2001, at 14 (quoting Chief Prosecutor of the ICTFY 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); Smidt, supra note \textsubscript{79}, at 226 (speculating that lasers and mines will soon be declared violative of customary IHL despite persistent state dissent); IJC Advisory Opinion on Nuclear Weapons, Jul. 8, 1996 (stating, in an advisory opinion, that the use of nuclear weapons, in addition to other environmental-altering weapons, may give rise to a violation of customary IHL). The set of banned weapons recognized by the U.S. 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 \textsubscript{79}, at 732 (discussing controversy in depth).

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 \textsubscript{48}, at 46 (2001) (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 subjection 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 \textsubscript{79}, at 229. The further introduction of a negligence, rather than a specific intent, standard renders this proposal even more objectionable. See Anderson, supra note \textsubscript{63} (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.”).

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, 29\textsuperscript{th} Sess., U.N. Doc. A/RES/3314 (1975), at Annex, Definition of Aggression, art. 3(g); see also 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).

In the view of a number of senior civilian U.S. 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 U.S. in concert with politically motivated prosecutors and judges. See FRYE, supra note \textsubscript{35}, 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, U.S. and otherwise, including the heads-of-state of the U.S. and Israel, in the domestic courts of several states lends credence to this speculation. See, e.g., Green, supra note \textsubscript{79}, at 314 (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, 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 command responsibility for the commission of war crimes by unknown U.S. soldiers, in a Belgian court granted universal jurisdiction under a 1993 Belgian law); note (reporting that Spanish magistrate Baltasar Garzon, purporting to exercise universal jurisdiction, is seeking the extradition of 46 former Argentine military officers accused of having committed human rights abuses during the “Dirty War” from 1973-1983); but see Paul Geitner, “Universal Jurisdiction” is Removed from War Crimes Law, ASSOC. PRESS, Aug. 2, 2003 (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).
terrorism.\textsuperscript{106} 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 defined\textsuperscript{106} could result, particularly if such exercise is at odds with Security Council,\textsuperscript{102} in an attempt to hale U.S. personnel to the Hague to answer charges levied by a state sponsor of terrorism\textsuperscript{103} for operations that result in unintended civilian casualties\textsuperscript{104} or the use of “disproportionate” force against terrorists.\textsuperscript{105} The potential for mischief

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\textsuperscript{100} to require the U.S. 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 Internationally Targeting Terrorists and Aggressor-State Regime Elites, 37 U. RICH. L. REV. 787, 804 (2003).
\textsuperscript{101} A long quasilegislative history precedes attempts to define the crime of “aggression” at international law. See 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); see also Charter of the IMT, supra note \textsuperscript{1}, at 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 law, 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 as including an option that would require as a condition precedent a determination of state responsibility for an unlawful war, 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 7/8 majority, to a definition and to any conditions precedent and in no event will this occur prior to 7 years after the entry into force of the Rome Statute. See Rome Statute, supra note 32, at Art. 5(1)(d) (granting the ICC jurisdiction over the crime of aggression); id. at 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. at Art. 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 \textsuperscript{1}, at 227-28 (commenting that an overbroad definition of aggression “may have the unintended consequences of protecting [terrorists].”).
\textsuperscript{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 UN Charter accords the Security Council the “primary responsibility for the maintenance of international peace and security” (Art. 24(1), see infra at note \textsuperscript{1} and the exclusive competence to “determine the existence of any . . . act of aggression” (Art. 39), under the Rome Statute the ICC Prosecutor is empowered, in theory, to usurp the authority of the UN 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 U.S. See 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); King & Theofrastus, supra note \textsuperscript{1}, at 100 (indicating that for some members of Congress the inclusion of the crime of aggression in the Rome Statute was a “new and capricious attempt” reminiscent of the ICJ judgment against the U.S. for its support of the Contras, to circumscribe the role of the Security Council and “reign in U.S. unilateral actions,” such as Grenada, Nicaragua, Libya, and Panama); see also Hearing on the Creation of an International Court Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Cong. 60 (“I think I can anticipate what will constitute a crime of ‘aggression’ in the eyes of [the ICC]: it will be a crime when the [U.S.] takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations.”). In response to Congressional anxiety over the prospect that the ICC would effectively dilute the U.S. veto of sanctions directed against it by the Security Council, the Congress, in the American Servicemen’s 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 \textsuperscript{1}, at §202 (“Findings”).
\textsuperscript{103} U.S. critics of international institutions rail against the idea that democratic nations are susceptible to legal judgment by dictatorships and rogue states. See Helms, supra note \textsuperscript{1}. 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 Charter of the United Nations, at Art. 2 (enshrining formal legal equality of states). By the same token, the principle does not prevent awarding the chair on the UN Human Rights Committee and the UN Conference on Disarmament to states such as Libya and Husseinist Iraq respectively. See N.Y. TIMES, Jan. 29, 2003, at A1 (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 UN sanctions banning its own possession of various weapons systems).
\textsuperscript{104} The Rome Statute prohibits knowingly attacking a target that “will cause incidental loss of life or injury to civilians.” Rome Statute, supra note \textsuperscript{1}, at Article 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
explains why some brand the ICC a pernicious institution that will grant terrorists moral ablation and invite further evil, and it accounts, in part, for the covert orchestration of much of the War on Terror the better to evade a welter of scrutiny waxing unsympathetic to U.S. purpose.  

104 The U.S. accepts limitations on the use of force, imposed under the customary IHL principle of proportionality, in the conduct of military operations. See U.S. ARMY, THE LAW OF LAND WARFARE, FM 27-10, Department of the Army Field Manual, Washington, D.C., Jul. 1956, rev’d Jul. 15, 1976, at para. 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.”). 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 at note_. 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.” Turner, supra note_, at 800. Others argue that proportionality requires a balancing approach. Still others suggest that in determining the proportionality of attacks against certain infrastructure one must take into account the “indirect and cumulative effects” of the military action, and not merely the direct effects. Shue & Wippman, supra note 43, at 574. 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 (unpublished manuscript on file with author), at 7 (stating that the principle of proportionality is in tension with the U.S. 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 Drumb, supra note_, 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.”).  

105 The U.S. impression of the ICC as antipathetic to U.S. national security and conducive to malefactors is well-summarized as follows: “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_, at 229.  

106 Covert operations, also known as “special activities” or “special operations,” are a “peculiarly American invention” used by every President since the founding of the U.S. Melvin A Goodman, Espionage and Covert Action, in Craig Eisendrath, ed., National Security: U.S. Intelligence After the Cold War (2000); Statement of Mitchell Rogovin, Special Counsel to the Director of Central Intelligence, Hearings Before the House Select Committee on Intelligence, 94th Cong., 1st Sess., Part 5, 1729, 1731-33 (1976) (detailing long usage of covert operations as instrument in U.S. foreign policy). Such operations are defined in U.S. law as “activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the U.S. Government is not apparent or acknowledged publicly.” Executive Order, No. 12,333, at 1.8(3). “Special operations [are] conducted by specially organized, trained, and equipped military and paramilitary forces to achieve military, political, economic, or psychological objectives by unconventional military means in hostile, denied, or politically sensitive areas” and which “require[e] clandestive, covert, or low visibility techniques.” CHAIRMAN OF THE JOINT CHIEFS OF STAFF, Joint Publication 3-05 (Test): Doctrine for Joint Special Operations (1990), at 3-5 (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 Foreign Military Intelligence, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 755, 94th Cong., 2d Sess., Book I, at 490-91 (1976) (citing an early National Security Council document, NSC-4/A (1948); REISMAN & BAKER, supra note 1, at 305 n.30 (stating that although the doctrine of plausible deniability was formally abandoned in 1974 it is operative as a matter of policy). 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 as amended in scattered sections of 10 and 50 U.S.C.), at 50 U.S.C. §403(d)(5) (1994) (authorizing President to direct the CIA “to perform . . . other functions and duties related to intelligence affecting the national security”).

Where the UN authorizes a military operation, the relevant Security Council resolution provides the broad mission, political objective, and legal authority and creates a quasi-compact between the UN 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 pertains. See UN Charter at 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 expediency 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 REISMAN & BAKER, supra note 1, at 75-77, 115 (suggesting that while covert operations conducted in accord with IHL may be “contributive and supplementary to rather than destructive of international law[ and order,]” the inference of unlawfulness does not attach to an unauthorized covert operation any more than it does to an unauthorized overt operation); see also W. Michael Reisman, *International Legal Responses to Terrorism*, 152 MIL. L. REV. 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 3rd parties to more readily ignore the consequences); Jami Melissa Jackson, *The Legality of Assassination of Independent Terrorist Leaders*, 24 N.C.J. INT’L L. & COM. REG. 669, 713 (1999) (identifying increased international legal intolerance of covert operations across state borders).

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); Legal Opinion by Lloyd Cutler, President’s Counsel, on War Powers Consultation Relative to the Iran Rescue Mission (May 9, 1980), reprinted in Subcomm. on Int’l. Security and Scientific Aff. 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 U.S. citizens held hostage where mission success is surprise-dependent) (relying upon *The Hostage Act, Rev. Stat. 2001, 22 U.S.C.§1732) (providing that the “President shall use such means, not amounting to acts of war, as he may think necessary and proper to achieve or effectuate the release [of U.S. citizens held hostage].” Accordingly, to the extent the U.S. 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 U.S. president has the authority, under domestic law, to authorize Executive Branch officials to violate international law. See REISMAN & BAKER, supra note 1, at 68 (I believe in the right of a country, when it believes that its interests are best served, to practice covert activity.”) (quoting President Ronald Reagan); Statement of Assistant Attorney General William P. Barr, Office of Legal Counsel, On the Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities That Depart from International Law, Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, Nov. 8, 1989 (concluding that as a matter of U.S. 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).

The U.S. 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 the employment of U.S. special forces and CIA paramilitary forces to “disrupt and destroy enemy assets” in countries where the U.S. is not at open war and where the local government is not aware of their presence); see also Thom Shanker, *Jump in Elite Forces’ Budget Foreshadowed*, 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 issued a finding that authorized the CIA and Army Special Forces to kill two dozen terrorist leaders—the “worst of the worst”—if capture is “too dangerous or logistically impossible.” See CIA Gets 007 Tag from Bush: License to Kill*, REUTERS., Dec. 16, 2002, at A1 (reporting finding as “broadest discretion ever bestowed on CIA to make use of covert operations.”). While the liberal use of covert measures is likely to continue, the Bush Administration has not avoided all legal criticism. The consequences for the rule of law and for democratic accountability are beyond the context of this Article; for a broader discussion, see Alberto R. Coll, *Unconventional Warfare, Liberal Democracies, and International Order*, in ALBERTO R. COLL, JAMES S. ORD, & STEPHEN A. ROSE, LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT, 67 INT’L L. STUD. 1 (1995).

Very few states have offered more than platitudes in support of the U.S.-led War on Terror, with most either remaining quasineutral and some even adopting an obstructionist approach in the UN Security Council. The reasons for this are beyond the scope of this article. The principle exception has been NATO, which in the immediate aftermath of September 11th invoked the collective defense provisions of the NATO Charter to offer the U.S. military assistance if necessary. See North Atlantic Treaty, Apr. 4, 1949, art. V, 63 Stat. 2241, 2244 (providing that “an armed attack against one or more of [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 V of Nato Charter). Similarly, despite a plethora of proclamations, the UN, has never demonstrated a firm commitment to eradicating terrorism, and group of Afro-Asian states have carved out exceptions to language condemning terrorism on the theory that citizens of certain states, in particular the U.S. 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
The foregoing is not a 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 19 Islamic terrorists who crashed jets laden with civilian passengers into the World Trade Center and the Pentagon may have struck targets physically within the U.S., but in so doing they and their organizational and state supporters declared war upon Western civilization. Quite simply, there are no categories of criminality that can contain such acts, and their authors can only be understood as barbarians. Accordingly, the U.S. has concluded that, after defeating fascism and communism, the free world is once more at war: the Bush Doctrine, disdaining judicial responses for military measures, pronounces clearly that the nexus of Islamic terrorism and WMD must be defeated to “prevent the triumph of an intolerable tyranny.”

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

By reference to a series of events in the film Saving Private Ryan, a fictionalized account of the Allied invasion of Normandy in 1944, and to a hypothetical scenario involving a U.S. 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 obligations and innocent civilian populations should be differentiated from legitimate struggles of peoples under colonial, alien, or foreign domination for self-determination and national liberation.

110 See DANIEL BENJAMIN & STEVEN SIMON, THE AGE OF SACRED TERROR 36 (2002) (stating that the 9/11 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 A1 (“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 disseminate themselves from the category of rights-bearing subjects by their transgressions against the rights of others. See ALEXANDER & RAPOPORT, supra note _, at 294 “the 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 . . . The terrorist cannot legitimately expect respect for his claims from those to whom he makes them, for he is exhausting himself from the rightless status to which he would relegate all others purely on the basis of his self-appointment[.]” 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 Guide206 NEW LEFT REV. 44, 47 -53 (1994). For an operationalization of the term, see infra at Part III.

112 See Gross, supra note _, at 523 (suggesting that Islamic terrorism is an existential threat to the “free world”, defined as the liberal Western democracies); see also ECONOMIST, The Day the World Changed, 15-21 Sept. 2001 (“The terror . . . this week is an assault not just on the [U.S.] but on civilisation itself.”).

113 Although others have applied the term more narrowly, the “Bush Doctrine” encompasses the broader transformation of U.S. policy toward preempting, rather than simply responding to, threats. See David Sanger, Making Case to Hit First, N. Y. TIMES, Sept. 4, 2002, at A1 (labeling as the “Bush Doctrine” the current U.S. 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, 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 (2003) (terming the “Bush Doctrine” the dichotomization of states into supporters of the U.S. 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 _, at 130.

114 The quoted words are drawn from the title of an essay encouraging the U.S. to abandon neutrality and intervene against Nazi Germany on the ground that to refuse would constitute an immoral act. Reinhold Niebuhr, CHRIST. CENT., Dec. 18, 1940.


116 See supra at note _.
institutionalized in the system of courts-martial, and the judicial model embodied in the ICC\textsuperscript{117}—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 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 against 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 reflects\textsuperscript{118}—will be followed by a Conclusion.

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


\textit{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.]”\textsuperscript{119} The medieval code of chivalry, which established a detailed set of rules and principles for the violation of which one’s knighthood could be stripped, further elaborated this “soldier’s code,” also known as the “martial code.”\textsuperscript{120} Knights engaged in a casuistic process of self-reflection and criticism, as well as collective argumentation, over whether particular actions breached this martial code.\textsuperscript{121} By the late Renaissance a set of self-expectations, internalized by a transnational caste of officers as a moral and professional behavioral code requiring, inter alia, the minimization of civilian casualties, consistent with military objectives, as a matter not of law but of honor, had perfused the practice of war.\textsuperscript{122} Further, the martial code, by rejecting the “total, unrecognizable alienness” and inhumanity of the enemy in favor of a conception of the foe as a fellow professional, directed the honorable soldier to refrain from treachery and criminality in combating him.\textsuperscript{123} As the martial code diffused and matured, a body of

\textsuperscript{117} For a contemporary presentation of the considerations involved in electing either a judicial or a military approach to problems in international politics and law, see Ruth Wedgwood, \textit{Responding to Terrorism: The Strikes Against bin Laden}, 24 \textit{YALE J. INT’L L.} 559 (1999) (bifurcating responses to international terrorism into a judicial model, characterized by the use of the tools of the criminal justice system and the 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).

\textsuperscript{118} See OSIEL, \textit{supra note }\textsuperscript{a} at 5 (suggested IHL has reached the stage whereby it is now constitutive of civilization); KASTO, \textit{supra note }\textsuperscript{a} at 12 (arguing that IHL is “connected with the real existence of society”).

\textsuperscript{119} OSIEL, \textit{supra note }\textsuperscript{a} at 207.

\textsuperscript{120} See JOHAN HUIZINGA, HOMO LUDENS 78 (1949) (identifying “compassion, fidelity, and justice” as “essential” to the chivalric code); MAURICE KEEN, NOBLES, KNIGHTS, AND MEN-AT-ARMS 51-59 (describing chivalric virtues as including graciousness to vanquished foes in recognition of shared membership in an international brotherhood-at-arms); MERON, \textit{supra note }\textsuperscript{a} at 209 (noting that breach of the chivalric code associated with dishonor, shame, and ostracism); MICHAEL IGNATIEFF, THE WARRIOR’S HONOR 117 (describing “warrior’s honor” as an ethical system that defines the “moral etiquette by which warriors judged themselves to be worthy of respect[,]”).

\textsuperscript{121} OSIEL, \textit{supra note }\textsuperscript{a} at 17. Medieval Japanese knights called the martial code \textit{bushido}. IGNATIEFF, \textit{supra note }\textsuperscript{a} at 117.

\textsuperscript{122} See OSIEL, \textit{supra note }\textsuperscript{a} 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 yesterday and today?”).

\textsuperscript{123} BEST, \textit{supra note }\textsuperscript{a} at 290.
collective narrative developed to inform and guide soldiers in the discharge of their duties; when in doubt as to their obligations, soldiers conformed their conduct to “stories about the great deeds of honorable soldiers” drawn from the “ongoing collective narrative of [their] corps.”

In other words, as a constituent part of their professional honor, soldiers have long recognized an obligation to accept personal risks, and it is this self-selected and -imposed commitment, undertaken as the price of membership in an epistemic community, to upholding the virtues of a shared profession that continues to inspire adherence to the humanitarian principles underlying the positive legal regime of IHL.

Admittedly, martial honor alone does not suppress all violations. Revenge, fear, and other intractable instincts tapped by the horror of war can be overwhelming, and when their discipline disintegrates and darker angels of their nature overcome them, some soldiers—no less emotional and fallible creatures than their civilian counterparts—do indeed descend into inhumanity. However, their failure to abide by the martial code, which reflects an internal deterrence regime while imposing a more stringent standard of conduct than that demanded by IHL, strips wayward members of something of incalculable value—theyir status, worth, and identity within the martial caste. When the threat of professional banishment fails to enforce compliance with this strict behavioral template, the martial code subjects individual transgressors to courts-martial and the unit(s) responsible to reprisals, each regime brings internal standards of judgment to bear and can impose, where 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.

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 under which violations in question are alleged to have been committed. Whereas many IHL proponents would impose a duty upon soldiers to utterly

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129 See Statement of General Douglas MacArthur in Confirming the Death Dentence Imposed by a United States Military Commission on Japanese General Tomoyuki Yamashita for Command Responsibility in the Murder of U.S. POWs, October 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 for his being. When he violates this sacred trust, he no 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.”

125 See Anderson, Ottawa (contending that the “sense of a shared professionamong men -at-arms” dictates limits of enforceability of IHL); MERON, supra note at 216 (1993) (“Honour and mercy . . . formed potent forces for civilized behaviour in time of war.”); RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR 5 (1983) (suggesting that restraint in combat “d(oes) not stem from conscious articulation of principles of [IHL] so much  as from a soldi er’s honor[. ]); JEFFREY LEGRO, COOPERATION UNDER FIRE (1995) (identifying martial honor as the most important source of control over martial conduct).

128 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 , at 32 (suggesting that while IHL establishes a “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.’”).

127 See infra at pp._ (discussing the U.S. court-martial in depth).
abjure self-preservation in obeisance to absolute legal prohibitions on the killing or destruction of certain classes of persons and things, \textsuperscript{131} courts-martial, a more pragmatic forum, 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. \textsuperscript{132} The decision to inflict reprisal requires the responsible military commander to undertake a similar, if more informal, analysis with respect to the nature of the act and whether it was committed out of a reasonable interpretation of military necessity, any potential claims that the act did not trammel upon martial honor, and 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 recognizing and 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. Nonetheless, few honest observers adjudge martial honor wanting with respect to its capacity to preserve humanity in war while successfully defending civilization.

2. Saving Private Ryan

On the morning of June 6\textsuperscript{th}, 1944, the first of 1 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 U.S. formations spearheading \textbf{OPERATION OVERLORD} against fierce German resistance was the 75\textsuperscript{th} Ranger Regiment.

The film \textit{Saving Private Ryan} opens with C Company of the 2\textsuperscript{nd} Battalion, 75\textsuperscript{th} Ranger Regiment, 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 the majority 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 machinegun 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 redeployes 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 the fortifications atop the bluffs above OMAHA so additional forces can be ushered ashore. Murderous machinegun fire rakes C Company during its struggle up the heights, but as C Company and its sister companies turn the tide the German infantry manning 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

\textsuperscript{131} See WALZER, supra note 12, at 305 (claiming that IHL establishes the absolute rule that “self-preservation . . . is not an excuse for violations of the rules of war”).

\textsuperscript{132} See Telephone Interview with LTC Mark Martens, 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, 36 (“circumstances arise when military necessity, or even something less, causes [the rules] to be disregarded. In
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, 75th Ranger Regiment, his shaking hands betraying unspoken emotions.

Several days later, after he reports to his battalion commander the intelligence gathered from an
engagement between 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. 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 machinegun nest at the base of a destroyed radar
installation that has been hastily emplaced to delay U.S. 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 machinegun if his
men do not, orders a modified frontal assault that results in the second death within his squad. After the
sole surviving machinegunner is captured, Captain Miller permits his troops to beat and otherwise abuse
the terrified, desperate German 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 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 U.S. national anthem the better to prove his love for
the U.S. 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 U.S. forces absorb heavy losses but hold the position until Allied air patrols

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.").

133 Private Fritz Nyland 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
destroy the bridge, the paroled German machinegunner, who has rejoined his SS 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 machinegunner, 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 machinegunner, 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 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 prisoners of war (“POWs”) rendered *hors de combat* was common. The denial of quarter—refusal to grant clemency to combatants no longer capable of offering resistance by virtue of wounds or other disability—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.” For the ancients war was a n intercommunal effort bereft of rules or mercy: victory and defeat were absolutes, and all categories of persons and property were legitimate targets. POWs were killed or enslaved out of enmity, with a
preference for the former, and soldiers who refused to crucify, mutilate, drown, or torture their captives to death could be punished as moral reprobates for having committed, in effect, war crimes. Dead POWs were not necessarily beyond insult: some cultures killed their captives for food. Although a minority view counseled mercy, ancient practice ran strongly 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.

Although the medieval code of chivalry directed knights to extend certain reciprocal rights and privileges in combat, including the right of quarter to surrendering foes upon the payment of ransom, military necessity justified the denial of quarter even to nobility where capitulants might subsequently pose a threat were the tide of battle to turn or where the execution of POWs would demoralize the

139 See 1 Samuel 15:3 (instructing Saul to “go and smite Amalek, and utterly destroy all that they have; do not spare them, but kill both man and woman, infant and suckling, ox and sheep, camel and ass.”); THUCYDIDES, HISTORY OF THE PELOPONNESIAN WARS (REX WARNER transl., 1954), Bk. I, Ch. 50 (“[The Corinthians] sailed in and out of the wreckage, killing rather than taking prisoners.”); PLATO, THE REPUBLIC, Bk. V, §3, The Rules of War, at 205-09 (Desmond Lee transl., 1974) (citing Socrates as stating that “any . . . taken prisoner should be abandoned to his captors to deal with as they wish.”); TACITUS, ANNALS, book II chap. 2 (noting that the Roman general Germanicus urged his legions invading the Rhineland to “Slay on, and slay on, do not take prisoners; we shall only have peace by the complete destruction of the nation.”).

141 FOOKS, supra note_, at 16, 118-19 (listing methods of execution of POWs used by ancient Assyrians, Greeks, and Romans).
142 See FOOKS, supra note_, at 8 (citing the exile of the Syracusean general Hemocrates 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); JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 262 (1974) (indicating that killing prisoners of war was “practically mandatory under contemporary notions of morality” at the time of the Old Testament).
143 FOOKS, supra note_, at 27.
144 See, e.g., SUN Tzu, ON THE ART OF WAR 16 (Lionel Giles transl., 1910) (suggesting that it may be more efficacious to accept surrenderers rather than kill prisoners); FOOKS, supra note_, at 119 (noting that the ancient Greek Xenophon asserted that POWs should 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_, at 176 (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); CICERO, DE OFFICIIIS v. I, at 11: (“The conquered have a right to our respect as well as those who have surrendered themselves.”); BLUNTSCHLI, REVUE DE DROIT INTERNATIONALE PUBLIC 304 (M.C. Lardy transl.) (stating that some Hindu tribes adhered to the code of Manou, which proscribed killing POWs).
145 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:

The Greek commander who, after 3000 Persians had escaped him at Plateia, found 260,000 more who wished to surrender. If he had accepted their surrender, how would he have fed them? . . . This was logistically impossible, apart from the fact that the whole of Greece could scarcely have absorbed such a sudden increase in the slave population, while to have disarmed and released such a horde could have been a recipe for disaster. Slaughter was the chosen solution.
146 “Quarter” refers to the acceptance of the surrender of the defeated foe. See id. at 113 (noting the origin of the term in a 17th-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 1/4 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.
148 See GIOVANNI DA LEGNANO, ch. 30, at 253-54 “[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.”); HONORE’ BOUVET, THE TREE OF BATTLES (G.W. Copeland ed., 1949) (composed c. 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.”); VI FRANCISCUS DE VITORIA, DE INDIS ET DE JURE BELLII RELECTIONES 183 (published posthumously in 1577) (Carnegie edn., trans. John Pawley Bate, ed. Ernest Nys, 1917) (“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 danger is over, [they] are not to be killed.”); PISAN, supra note_, at 222 (stating, in a 1408 compilation of the
enemy and aid in victory. Moreover, common soldiers and civilians were not subjects of the *jus armorum*, and despite the growing influence of the Church most commentators proclaimed support for the general right of a captor to kill all common soldiers, as well as residents of enemy territory who had borne arms or mustered support for the war effort, as enemies of the state. Practice followed this restatement of customary right: throughout the Middle Ages belligerents routinely dispatched POWs, particularly in the context of the “untrammeled savagery” of inter-confessional conflicts, and entire populations of cities were put to the sword in fits of religious cleansing. Conflict beyond Christendom was even more brutal: Islamic practice condoned execution of Christian POWs who refused to convert,
while Christian Crusaders reflexively denied quarter to Muslims\textsuperscript{157} to the approval of leading jurists.\textsuperscript{158} Although merciful captors occasionally granted their captives the status of protected persons,\textsuperscript{159} 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.

\textit{iii. Enlightenment: 1648 A.D.—1800 A.D.}

The humanitarian conception of the soldier rendered \textit{hors de combat} as an unfortunate wretch with a claim to protection against mistreatment,\textsuperscript{160} rather than an enemy of the state deserving of death, acquired some purchase in the 17\textsuperscript{th} century, inspired largely by the writings of Enlightenment scholars who labored for the humanization of war.\textsuperscript{161} The development 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 soldier,\textsuperscript{162} and by the 18\textsuperscript{th} century, although they could be confined and even sold into slavery\textsuperscript{163} to prevent their rejoining the fray,\textsuperscript{164} POWs were no longer reflexively put to death. State practice gradually incorporated principles of restraint codified in domestic military regulations\textsuperscript{165} and bilateral agreements requiring that enemy POWs be granted quarter,\textsuperscript{166} and during the American Revolution, a weak customary regime of exchange permitted parole\textsuperscript{167} of officers upon their promise to refrain from future participation in the conflict, and common soldiers could hope for release without ransom at the termination of hostilities.\textsuperscript{168} However, the

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\textsuperscript{157}HOFF, supra note 4, at 3.
\textsuperscript{158}See, e.g., HOFF, supra note 4, at 5 (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).
\textsuperscript{159}SDACPOW, supra note 4, at 1.
\textsuperscript{160}See IDAHO, supra note 7, at §416 (holding that the refusal to take Muslim prisoners, and the execution of the same, was ipso facto a matter of military necessity).
\textsuperscript{161}See, e.g., GREEN, supra note 7, at 290 (noting that after the Siege of Limoges (1370) the English knights John of Gaunt and the Earl of Cambridge, moved to mercy by the pleas of French captives, countermanded orders denying quarter).
\textsuperscript{162}A.J. BARKER, PRISONERS OF WAR 6 (1975).
\textsuperscript{163}See EMMERICH VATTEL, LE DROIT DU GENS, bk. III, ch. viii, paras. 140-141, 151 (1758 edn., C. Fenwick transl., 1916) (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); MONTESQUIEU, ESPRIT DE LOIS, bk. 15, ch. 11 (stating that soldiers rendered hors de combat were entitled to be spared from further injury); DE MARTENS, PRECIS DU DROIT DES GENS MODERNES DE L’EUROPE bk. VII ch. 4, at 272 (1877) (holding that POWs were entitled to quarter except in reprisal for denial of quarter on their own part); CHRISTIAN WOLF, THE LAW OF NATIONS ch. XVIII, para. 797 (Oxford edn. 1934) (published 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 surrendered unconditionally.”); JOHANN TEXTOR, SYNOPSIS OF THE LAW OF NATIONS ch. XVIII, paras. 17-19 (Carnegie Foundation edn., 1916) (published late 17\textsuperscript{th} century) (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).
\textsuperscript{164}Although merciful captors occasionally granted their captives the status of protected persons,\textsuperscript{159} 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.
\textsuperscript{165}Release non-Muslim POWs provided the parolees had not committed precapture crimes and pledged, upon their release, teach illiterate Muslims to read and write. Bennoune, supra note 4, at 634 (discussing alternate dispositions of non-Muslim POWs).
\textsuperscript{166}FLORY, supra note 4, at 13.
\textsuperscript{167}See, e.g., VICTORIA, supra note 4, 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).
\textsuperscript{168}See, e.g., Green, supra note 4, at 290 (noting that after the Siege of Limoges (1370) the English knights John of Gaunt and the Earl of Cambridge, moved to mercy by the pleas of French captives, countermanded orders denying quarter).
practice of denying quarter out of military necessity continued despite the fitful emergence of a protean custom, 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, 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.

iv. Pre-Modern Era: 1800 A.D.—1914 A.D.

As the 19th century progressed, POWs were increasingly viewed as unfortunates rather than criminals, and in 1863 the Lieber Code 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 quarter or kill captured POWs 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.” 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 . . . where his own salvation makes it impossible to cumber himself with prisoners.” Moreover, the Lieber Code explicitly denied quarter to enemy units “known or discovered to give no quarter[,]” and enemy POWs who fit this description could be executed within three days of capture. 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, thereby further qualifying its scope and applicability. In

See B. TARLETON, A HISTORY OF THE CAMPAIGNS OF 1780 AND 1781 30-32 (1968 ed.) (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. Cool, War Crimes of the American Revolution, 82 MIL. L. REV. 171, 185, 191-92 (discussing the treatment of POWs during the American Revolution).

See, e.g., id. at 168-84 (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 at 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., PUFFENDORF, supra note, at ch. 3; TEXTOR, supra note, at ch. XVIII, paras. 17-19; MONTESQUIEU, bk. XII, chap. 3; PRADIER FODERE, TRAITE DE DIPLOMATIE, bk. VI, chap. IX (holding that unless an enemy provides reasonable assurances that he is helpless, quarter should be denied); J. BLUNTSCHEL, DROIT INTERNATIONALE CODIFIE, art. 580 (providing that one may have legitimate reasons to refuse quarter, such as if enemy resorts to reprisals or it is impossible to take prisoners due to inadequacy of forces).

See CHRISTIAN WOLFF, THE LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD 409-50 (F. Hemelt transl., 1964) (1764) (stating that the “customs of certain nations” gave a “general license” to kill all enemy subjects, including surrendering soldiers); MONTESQUIEU, ESPIRIT DE LOIS, bk. XII, ch. 3 (supporting the argument that extermination of prisoners of war conformed with positive international law); CORNELIUS VAN BYNKERSHOEK, QAESTIONUM JURIS PUBLICI LIBRI DUO 16 (T. Frank transl., 1964) (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.”).

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).

See supra at note, .

See Lieber Code, supra note, at Art. 60 (“It is against the usage of modern war to resolve . . . to give no quarter[,]”).

See id. at 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.”).

Id. at Art. 15.

Id. at Art. 60.

Id. at Art. 62.

Id. at Art. 66.

See U.S. War Dep’t, General Order No. 207 (Jul. 3, 1863).
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 claims of military necessity, as both armies executed POWs out of expediency and in reprisal for violations real and imagined of the customs of war and besieged garrisons were categorically denied quarter after their refusals to surrender.

Still, the Lieber Code exerted a transnational influence upon the codification of a customary preference for granting quarter to defeated enemies that had been “hardening in the heads of decent warriors for several centuries.[182] A series of states published military manuals incorporating much of the Lieber code nearly verbatim,[183] and the Brussels Conference of 1874[184] and the Hague Convention of 1907 codified, as a matter of international law, the custom reflected in the Lieber general prohibitions against the denial of quarter, whether ad hoc or in an advance declaration.[185] Nevertheless, international 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. 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;[187] and during the Russo-Turkish War (1877-78) Turks were denied quarter on the ground that, in the words of the Russian commanding general, “there 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.”[188] Both sides took extreme reprisals against POWs during the

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180 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 (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).

181 See SPAIGHT, supra note , 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).

182 DELISSEN & TANJA, supra note , at 655.

183 See HOLLAND, supra note , at 73-74 (1907) (listing states adopting military manuals incorporating the Lieber Code, including, inter alia, Britain, France, Spain, Italy, Portugal); WELLS, supra note , 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.

184 KRIEGSBRAUCH IM LANDKRIEGE (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).

185 See Hague Convention of 1907, supra note , at Art. 23(c) (prohibiting killing of an enemy hors de combat); id. at 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., KRIEGSBRAUCH, supra note , at (explicitly recognizing that necessity could release troops from a general obligation to grant quarter).


187 FOOKS, supra note , at 116. For much of the conflict, neither Russian nor Japanese forces requested or gave quarter.

188 SPAIGHT, supra note , at 94.

189 Id. at 93 (citing V.L. NEMEROVITCH-DANTCHENKO, PERSONAL REMEMBRANCES OF GENERAL SKOBOLEV 165 (E.A.B. Hodgetts transl. 1884).
Boer War (1899-1900),189 U.S. commanders ordered the slaughter of all males over ten years of age in fighting against Muslim guerrillas in the Philippines (1900-02),190 and in the Russo-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.191

Contemporary commentators, while memorializing a general custom proscribing the denial of quarter, paid heed to state practice in unequivocally recognizing exceptions rooted in military necessity, including in reprisal,192 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,193 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.194 In short, although a custom disfavoring denial of quarter was crystallizing scholars of the era described a stable, consistent practice, grounded in necessity, to deny quarter.

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190 See FRIEDMAN (ed.), THE LAW OF WAR 800 (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 U.S. forces in the Philippines during the period, see PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 51-66 (2001).
191 FOOKS, supra note_, at 120-21.
192 See F. DE MARTENS, PRECIS DU DROIT DES GENS MODERNES DE L’EUROPE bk VII ch. 4 272 (1899) (holding that quarter could be denied in retaliation for denial of quarter by the enemy); FOOKS, supra note_, 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.”).
193 BLUNTSCHLI, supra note_ at 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); PAUL ERNEST PRADIER - FODERE, TRAITE DE DIPLOMATIE (1899), bk. vi, ch. IX (stating that, if reasonable assurances cannot be provided that an enemy is helpless, quarter may be denied out of an interest in self-preservation); THOMAS E. HOLLAND, LAWS AND CUSTOMS OF WAR ON LAND 47, 58 (BRITISH FIELD MANUAL) (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_, 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. SPAIGHT, supra note_, 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 sure to follow.”).
194 Military history is “full of incidents in which a platoon or squad, having taken casualties at the enemy’s hands, finally prevails.” OSIEL, supra note_, at 120. The proposition that soldiers engaged in a life-or-death struggle should be required, immediately upon the indication of their 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 19th and early 20th 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_, at 113.

Similarly,

[It is often impracticable to grant quarter to troops who resist to the last moment. No war right of killing is recognized in such circumstances; it is simply the necessity of war which justifies the refusal of quarter. It must often happen that in the storing of a trench, when men’s blood is aboil and all is turmoil and confusion, many are cut down or bayoneted who wish to surrender.]

SPAIGHT, supra note_, at 91.

In practice, “Too late, chum,” has often been the response received by 11th-hour would-be surrenderees. KEEGAN, supra note_, at 50-51. Psychologists have explained that the frenzy of fear, bloodlust, and primordial passion unshackled by the
During World War I, several belligerents entered into bilateral agreements governing the status of POWs, although few were ratified and most parties, including the U.S., accepted few if any legal obligations. Although some belligerents recognized expanded customary duties, including the general obligation to grant quarter, in either official policy statements or military manuals, most domestic military legal systems retained explicit exceptions allowing the denial of quarter under categories of circumstances, including military necessity and in reprisal, while others expressly ordered their military forces to deny quarter in order to sow terror amongst their enemies. Moreover, as the very concept of surrender remained as shameful to the martial mind as it was to the ancients, it was not difficult 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., DAVID GROSSMAN, ON KILLING 179 (1995); JONATHAN SHAY, ACHILLES IN VIETNAM 77-102 (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 19th century practice on the one hand and a restatement of an emerging custom relative to quarter on the other. See HOLLAND, supra note , 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); CARLOS CALVO (1873) at §2138 (suggesting that a garrison may be massacred for futile resistance); HALL, supra note , at (“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 c. 1820); BEST, supra note , 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 20th century).

196 BARKER, supra note , at 16.
197 See, e.g., FORMAL REPORT OF GENERAL JOHN J. PERSHING 85 (instructing the Provost Marshal General, by order General Pershing, supreme U.S. commander in World War I, “to follow the principles of the Hague and Geneva Conventions in the treatment of prisoners, although these [are] not recognized as binding in the present war.”). Official U.S. military regulations, which superseded while incorporating much of the Lieber Code almost verbatim, denied the force of most, if not all, legal obligations. See U.S. Dep’t of War, Rules of Land Warfare (“Rules of Land Warfare, 1914”), para. 9-34 (War Dep’t Doc. No. 467, Office of the Chief of Staff, Apr. 25, 1914) (recognizing that belligerents were permitted to “apply 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. at paras. 8 & 9.
198 See id. at para. 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 disentitled 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.”).
199 See BARKER, supra note , at 28 (“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.”) (quoting Kaiser Wilhelm, reviewing troops in Bremerhaven in July 1914); see also Theodore S. Woolsey, Retaliation and Punishment, 9 PROC. AM. SOC’Y INT’L L. 62, 63 (1916) (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).
200 See BARKER, supra note , 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 , at 99 (relating the officially-heralded saga of the five-day ordeal of a U.S. battalion commander who, despite being surrounded by a vastly superior German force and without rations or medical supplies for his attritted 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 U.S. military personnel from voluntary surrender and from accepting parole. See U.S. Code of Conduct for Members of the U.S. Armed Forces, E. O. No. 10631, Aug. 17, 1955; CFR 6057.
several belligerents to indoctrinate their armies, even if they did not issue direct orders, to neither grant nor request quarter,201 nor was it unusual that units would make this decision independent of their command structure.202 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 combat,204 out of vengeance,205 and out of alleged necessities, including avoidance of encumbrances.206

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 destruction207 and compromise the mission of the larger force,208 or where the exigencies of combat precluded the immediate extension of protection to all those manifesting an intent to surrender,209 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,\(^{210}\) 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.\(^{211}\)

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 IHL\(^{212}\) and the trajectory of state practice.\(^{213}\) Nonetheless, states continued to veer from the increasingly restrictive positive law crafted by diplomats and glossed by legal scholars and hewed 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,\(^{214}\) and the

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\(^{210}\) See *ALBERIC ROLIN, LE DROIT MODERNE DE LA GUERRE* 287-88 (1920) (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 _, at 474 (limiting the scope of a military necessity exception to the obligation to grant quarter to the vanishing point by holding that “prisoners 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.”).

\(^{211}\) See *Geneva Convention Relative to the Treatment of Prisoners of War, 27 July 1929, at Art. 2 (extending protective rules and principles of Hague Regulations of 1899 and 1907 and establishing comprehensive rules for protecting POWs).*


\(^{213}\) 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 _, at 10 (“The treatment of prisoners is strongly influenced by the relation between international law and necessity[,]”).

\(^{214}\) Neither the 1934 or 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 _, at paras. 3 & 4 (restating as its central principle the defense of the chivalric code with deference to military necessity). As such, although the U.S. did not craft its military manuals in order to grant *carte blanche* to its armed forces, nonetheless U.S. 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. at para. 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), at para 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 _, at para. 33 (restating para. 182 of the Rules of Land Warfare, 1914, to the effect that surrendering enemy personnel are generally entitled to quarter); but see id. at para. 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 _, at para. 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 _, at 203 (suggesting that troops were expected, as a matter of martial honor, to govern themselves in
martial cultures of a number of militaries retained a disdain for the very concept of surrender. Thus, as World War II erupted, the denial of quarter was condoned, whether explicitly or tacitly, by several leading states, resulting in a round-robin of reprisals. 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), a number exceeded by the Red Army after the Nazi defeat at Stalingrad (1943) after which more than 105,000 German POWs were dispatched outright and on the march to gulags. German forces repeatedly denied quarter to Allied troops, most notoriously at Malmedy during the Battle of the Bulge (1944), and Allied soldiers reciprocated against Axis troops, including a mass execution of SS camp guards during the liberation of Dachau (1945).

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.

Since ancient times, 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 at note_. 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 FOOKS, supra note_, at 42-43 (noting that the official Soviet response to a Nazi request for a POW exchange advised that “[t]here are no Russian POWs” as the “Russian soldier fights on till death” and “if he chooses to become a prisoner, he is automatically excluded from the Russian community.”); id. (noting the Japanese attitude toward surrendering forces was one of contempt and that their own forces were absolutely forbidden to surrender); INSTITUTE OF WORLD POLITI, PRISONERS OF WAR 17 (1948) (indicating that neither the Soviet nor Japanese governments recognized any interests with respect to their POWs on the ground that surrender was antithetical to their culture); SDACPOW, supra note_, at 20 (referencing the U.S. Code of Conduct, promulgated in 1953, which codified a set of customary obligations incumbent upon U.S. soldiers, including the following: “Art. II. I will never surrender of my own free will.”).

See, e.g., FUSSELL, supra note_, at 283 (citing BRITISH HANDBOOK OF IRREGULAR WARFARE (1942)) (“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.”).

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 Baba Masao, 11 WAR CRIMES REP'TS 56 (1947) (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 LORD RUSSELL OF LIVERPOOL, THE KNIGHTS OF BUSHIDO (1954); see also James R. Dawes, Language, Violence, and Human Rights Law, 1 YALE J. L. & HUMAN. 215, 234-35 (1999) (detailing Japanese abuses of British POWs in Southeast Asia).

218 BARKER, supra note_, at 35.

219 See The Nuremberg Judgment, Trial of the Major War Criminals Before the International Military Tribunal, Opinion and Judgment, (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); The Dostler Case, U.S. Mil. Comm’n, Rome, Italy, Oct. 12, 1945, at I LAW REP. TRIALS WAR CRIM. 22 (1945) (convicting commander of the German 75th Army Corps, General Anton Dostler, for ordering on 25 March 1944 the summary execution of fifteen uniformed U.S. POWs captured while on a mission to demolish a railway tunnel between La Spezia and Genoa); Abbaye Ardenne Case, 4 WAR CRIMES REP’T S 97 (1945) (condemning the commander of a Nazi SS Regiment for having counseled his men to deny quarter to Allied troops); Trial of Gunther Thiele and Georg Steinert, (United States Mil. Commn., Augsberg, Germany, June 13, 1945), II LAW REP. TRIALS WAR CRIM. 56-57 (1948) (convicting two members of a German unit for the denial of quarter to a wounded U.S. officer); Trial of Kapitanleutnant Heinz Eck and Four Others For The Killing Of Members Of The Crew Of The Greek Steamship Peleus, Sunk On The High Seas (“The Peleus”) (Brit. Mil. Ct., Hamburg, Germany, Oct. 17-20, 1945), I LAW. REP. TRIALS WAR CRIM. 1, 12 (1947) (convicting German submarine commander for machinegunning survivors of a sunken ship); LORD RUSSELL OF LIVERPOOL, THE SCOURGE OF THE SWASTIKA 22-23 (discussing German refusals to grant quarter to, and subsequent executions of captured, British at Dunkirk in 1940); id. at 26-27 (reprinting U.S. reports of a German massacre of captured U.S. soldiers at St Vith during the Battle of the Bulge in 1944); id. at 41 (relating German executions of U.S. airmen captured unharmed but later shot on the false claim that they were “attempting to escape”)


221 See RICHARD FALK, GABRIEL KOLKO, & ROBERT JAY LIFTON, CRIMES OF WAR 224 (1971) (contending that U.S. troops denied quarter to Axis soldiers, albeit with significantly less frequency than their adversaries); see also MAX HASTINGS,
Moreover, the belligerents seized upon the advent of large-scale guerrilla warfare and commando operations 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, for the Nazi general staff, operations against infrastructure were ipso facto illegal methods of warfare, on the asserted grounds that members of units 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. With the infamous Kommando Befehl (Commando Order) in October 1942, Germany ordered its armed forces to deny quarter to all Allied forces on “so-called Commando missions in Europe or Africa[,]” and this instruction remained in effect for the duration of the war. Allied soldiers branded as “commandos” were executed with the official explanation that they were killed “in Kampf oder af der Flucht” (in battle or attempting to escape.”) A similar, but informal, regime governed the conflict in Yugoslavia, where, with few exceptions, no belligerent granted quarter.

The academic literature in the aftermath of World 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, scholars continued to recognize the

OVERLORD, D-DAY AND THE BATTLE FOR NORMANDY 11-12 (1984) (stating that “overall it seems doubtful whether [the denial of quarter] was done on a greater scale by one side or the other.”); AMBROSE, supra note, at 206 (chronicling a reported incident wherein a heavily decorated and widely respected U.S. officer is rumored to have impulsively machinegunned German POWs on a work detail); STEPHEN AMBROSE, CITIZEN SOLDIERS (2001) (reporting that the commander of the 101st Airborne Division, General Maxwell Taylor, ordered his troops to deny quarter to German soldiers during OVERLORD). After World War II, a German newspaper published the names of 369 German soldiers alleged to have been denied quarter by U.S. troops, but a German court, under U.S. military administration, refused to assert jurisdiction. See (http://www.scrapbookpages.com/DachauScrapbook/DachauTrials/MalmedyMassacre03.html).

See Thomas Farragher, Vengeance at Dachau, BOST. GLOBE, Jul. 2, 2001, at A1 (reporting that in U.S. soldiers of the 45th Infantry Division, after liberating Dachau, executed least 17 SS guards at least in part in reprisal for the Malmedy massacre).

“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.

See Baxter, Spies, supra note, at (discussing legal status of commando operations during World War II).

See KALSHOVEN, supra note, 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 were 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 unbecoming the honourable profession of arms” by denying quarter and by the perfidious wearing of German uniforms. BARKER, supra note, at 21. Nonetheless, not all members of the German High Command concurred with this legal judgment: Admiral Canaris believed that the Kommando Befehl 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, at 190-92.


“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.

See 26 I.M.T. Docs. 551-PS.

KALSHOVEN, supra note, at 190.

KEEGAN, supra note, at 54.

See, e.g., 2 H. WHEATON, INTERNATIONAL LAW 179-80 (7th ed., A. Keith, 1944) (stating that by the end of World War II the privilege of quarter was crystallizing into a near-absolute right).
legal legitimacy of exceptions carved out of the general rule in the interest of self-preservation.\textsuperscript{232} In sum, although the customary regime governing warfare had evolved since ancient times to enhance the protections owed to soldiers rendered \textit{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.

\textit{b) Violation of Parole}

Although in ancient times most members of a defeated force could expect a swift death,\textsuperscript{233} POWs were on occasion granted a limited \textit{parole}\textsuperscript{234} and released to permit them to serve as intermediaries in diplomatic negotiations and as couriers of the news of a defeat to a conquered people.\textsuperscript{235} 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.\textsuperscript{236} By the Middle Ages more POWs were released upon their promise to refrain from further acts of belligerency,\textsuperscript{237} and special feudal courts punished breaches of the \textit{jus armorum}, including breaches of parole agreements, committed by dishonorable knights.\textsuperscript{238} During the Enlightenment the concept of the soldier as a servant of his government not responsible for its policies began to take root,\textsuperscript{239} 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.\textsuperscript{240} By the late 17\textsuperscript{th} century parole was no longer accompanied by a financial transaction, and during the

\textsuperscript{232}See FLORY, \textit{supra} note\textsubscript{2}, at 159 (affirming that in “very unusual circumstances” capturing personnel may deny quarter).
\textsuperscript{233}See infra at note\textsubscript{2}.
\textsuperscript{234}“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 rejoicing from the conflict, contributing to the war effort, or, in some cases, leaving a certain geographic area. See Gary D. Brown, \textit{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, DIR. 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, \textit{supra} note\textsubscript{2}, at 146. See Brown, \textit{supra} note\textsubscript{2}, at 202 (noting the Carthaginian practice of granting parole to POWs for these purposes).
\textsuperscript{235}See PIERINO BELLIO, \textit{DE RE MILITARY ET BELLO TRACTUS} (1563), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 126 (J. Scott ed., 1936) (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).
\textsuperscript{236}See SAMUEL PUFENDORF, \textit{DE JURE NATURAL ET GENTIUM LIBRI OCTO} (1688), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 1150 (J. Scott ed., 1936) (asserting that the grant of parole obligated an individual to refrain from belligerancy against the grantee and his sovereign).
\textsuperscript{237}The primary constitutive force behind the medieval regime of parole was the honor of the soldier to whom it was granted. See BALTHAZAR AYALA, \textit{DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARY LIBRI} (1582), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 58 (J. Scott ed., 1912) (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. T. KEEN, \textit{LAWS OF WAR IN THE LATE MIDDLE AGES} 27-34 (1965); see also Green, \textit{supra} note\textsubscript{2}, at 291 (describing conviction of a French knight in chivalric court for violating parole); MERON, \textit{supra} note\textsubscript{2}, at 168 (discussing case of an English knight who escaped his French captors before receiving parole and was ordered back to custody).
\textsuperscript{238}See VATTEL, \textit{LE DROIT DE GENS}, \textit{supra} note\textsubscript{2} (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).
\textsuperscript{239}See KEEGAN, \textit{supra} note\textsubscript{2}, at 321. 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. See GROTIUS, \textit{DE JURE BELLII AC PACIS}, bk. II, ch. 14, §9 (1625) (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).
American Revolution captured officers of both forces were routinely released upon their promises simply to refrain from further belligerency. Although by the late 18th century the violation of parole was no longer universally treated as a capital crime, it remained an ignominious offense.

The Lieber Code described parole as “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” and explicitly prescribed death for violation of the conditions attached to the grant. The solemnity of the 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 officers and to non-combat situations, and it required an exchange of written documents. Moreover, as parole was conditioned upon a promise secured by honor, it could be accepted, but not imposed, under the Lieber Code. Although the parole regime during the U.S. Civil War collapsed under the weight of reciprocal violations, subsequent 19th and early 20th century codifications, domestic as well as international, as well as the jurisprudence of the U.S. Supreme

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241 Parole was not exclusive to officers: enlisted personnel were occasionally granted the option in lieu of confinement. Carnahan, supra note , at 115 (describing parole of enlisted personnel of the Virginia Militia by British General Benedict Arnold).

242 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).

243 The traditional punishment for a parole violator was death, particularly if the violator was subsequently recaptured under arms. FLORY, supra note , at 124; see also SPAIGHT, supra note , at 296-97 (noting the hanging of a U.S. officer, Colonel Hayne, by the British in 1782 for violating parole); id. (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., GENTILL, supra note , at 18. Additionally, belligerents entered into agreements to specify lesser punishments for the offense. See, e.g., Treaty of Amity and Commerce, U.S.-Prussia, 8 Bevans 78, 8 Stat. 162, entered into force Aug. 8, 1786 (providing, inter alia, that violation of parole would result in imprisonment at close confinement rather than death).

244 See SPAIGHT, supra note , at 297 (indicating that a parole violator was “shunned by gentlemen”).

245 See Lieber Code, supra note , at 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. at Art. 130.

246 See id. at Art. 124 (“Breaking the parole is punished with death when the person breaking the parole is captured again.”); id. at Art. 130 (“[C]lases of breaking parole . . . can be visited with the punishment of death.”).

247 See id. at Art. 126 (“Commissioned officers only are allowed to give their parole[,]”); id. at 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.”).

248 See id. at Art. 128 (“No paroling on the battlefield . . . is permitted[,]”). Both the U.S. and the Confederate armies refused to recognize paroles granted on the battlefield on the ground that the duressive environment under which they were granted vitiates any validity they might otherwise have possessed. FLORY, supra note , at 130 (citing U.S. War Dep’t, General Order No. 49 (1863), at art. 1, §7) (“No prisoner of war can be forced by the hostile government to pledge his parole[,]”).

249 See id. at Art. 125 (requiring that names and ranks of paroled soldiers be memorialized and exchanged between governments).

250 Id. at 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.

251 See Brown, supra note , at 205 (attributing the failure of the Civil War parole regime to the return to arms of 37000 Confederate parolees and to the execution of civilians sympathetic to the Confederacy).

252 The military manuals of numerous states conferred jurisdiction upon military courts to try violations of parole and sentence those convicted to death, including France, Germany, Japan, and the U.S. SPAIGHT, supra note , at 297 (citing sources); THE LAWS OF WAR ON LAND, INSTITUTE OF INTERNATIONAL LAW, adopted Sept. 9, 1880 (“OXFORD MANUAL”) at Art. 78 (“A prisoner liberated on parole and recaptured in arms, forfeits his rights as a prisoner of war[,]”); BULLETIN OFFICIEL DE MINISTRE DEL LA GUERRE 229-29 (1893) [France], at Art. 35 (same); RULES OF LAND Warfare 1914, supra note , at Arts. 72-82 (restating Lieber Code with respect to parole).

253 See Brussels Convention of 1874, supra note , at 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 , at 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.”).
Court, 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, some were condemned to death. During World War I, the custom of parole fell into desuetude after serial violations early in the conflict, and the subject was little revisited, apart from in the context of restatements of domestic military manuals, prior to World War II.

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.

c. Reprisal against POWs

Belligerents have threatened and undertaken acts of reprisal to deter and punish violations of the laws and customs of war, including the abuse of POWs, throughout history. Enlightenment commentary expressed approval for the use of reprisals by otherwise law-abiding states as necessary to deter unlawful adversaries, and during the American Revolution, the threat of reprisal was required to induce Britain to terminate its denial of quarter to and maltreatment of U.S. POWs. In the U.S. Civil War the “infliction of retaliatory measures” against enemy POWs was a permissible means to transform the conduct of the enemy. Soldiers committing perfidious surrenders in World War I might expect to be

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254 See U.S. ex rel. Henderson v. Wright, Case No. 17,777, 28 Fed. Cas. 796, 798 (1863) (holding that parole is a “sacred obligation” the violation of which dishonors the national character and damages the “national faith”).
255 See SPAIGHT, supra note _, at 296-97 (suggesting that by the late 19th century opinion was divided as to whether the appropriate punishment for a parole violator was death by hanging or strict confinement at labor).
256 Military courts treated violations of parole as serious offenses: during the Boer War, parole violators were occasionally punished by death. See SPAIGHT, supra note _, 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]”); CODE MILITAIRE, Art. 204, §2 (“Every [POW] who, having broken his parole is recaptured with arms in hand, is punished with death.”) (cited in WELLS, supra note _, at 152).
257 Brown, supra note _, at 208.
258 For example, the revisions to the Rules of Land Warfare, 1914, simply renumbered sections of the U.S. military regulations and added almost nothing of substance. See WELLS, supra note _, at 152 (documenting the near-verbatim recodifications of the 1914 Rules in 1934 and 1940).
259 See HALL, supra note _, at 490 (glossing the question of parole in brief).
260 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. FLORY, supra note _ at 262.
261 “Reprisal” is a legal term describing an act undertaken to induce enemy forces to cease violating the rules and customs of war. See generally FKALSHOVEN, supra note _. 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.
262 BARKER, supra note _, at 196.
263 DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 20 (1777).
264 See Coil, supra note _, at 183-84, 191 92 (noting that threats of reprisals against British POWs were successful in protecting some U.S. POWs against execution); see also WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 15-16 (stating that a “right of retaliation” [i.e., reprisal] existed during the Revolutionary War in cases of the denial of quarter).
265 Lieber Code, supra note _, at Art. 59. Examples of reprisals explicitly permitted include the denial of quarter to troops that offer no quarter. Id. at Art. 62, Art. 66. Such resort was effective: in reprisal for Union executions of Confederate POWs, Confederate Lieutenant Colonel John Singleton Mosby ordered 27 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, Jr., supra note _, at 148-50.
266 See Lieber Code, supra note _, at 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).
employed as human shields or summarily executed, upon their eventual capture, in retaliation,\(^\text{267}\) and reprisals against POWs, to include execution, were employed by the Allies and the Entente\(^\text{268}\) and justified by scholars as necessary deterrent measures.\(^\text{269}\) 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,\(^\text{270}\) 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.\(^\text{271}\) 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,\(^\text{272}\) 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 neither generally disfavored by nor inconsistent with the martial code.\(^\text{273}\)

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 to 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\(^\text{274}\). Nevertheless, to develop the argument that the

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\(^{267}\) See FOOKS, supra note _, at 121 n.2 (stating that, after the author, a British officer, came under fire from German machinegunners who feigned surrender only to inflict heavy casualties before their subsequent capture, the U.S. captors marched the German POWs before their advance to obtain a ceasefire from other German units).

\(^{268}\) PRZETACZNIK, supra note _, at 136.

\(^{269}\) See SPAIGHT, supra note _, at 465 (“The 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 _, 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 Chairman Lord Younger of the International Law Association at the Hague Conference on the Treatment of Prisoners of War, 1921).

\(^{270}\) Domestic military manuals expressly permitted reprisal at the time of World War I. See, e.g., Rules of Land Warfare 1914, supra note _, at para. 383 (“Persons guilty of no offense whatever may be punished as retaliation for the guilty acts of others.”).

\(^{271}\) 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, 188-246, at Art. 13 (“All reprisals, as such, upon 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].”).

\(^{272}\) See Geneva Conventions of 1929, POW Convention, supra note _, at 2 (providing that “[m]easures of reprisal against [POWs] are forbidden.”).

\(^{273}\) See PRZETACZNIK, supra note _, at 137 (noting execution of 80 German POWs by French Partisans in reprisal for execution of 80 Partisans, as well as German execution of 10 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).

\(^{274}\) The Army routinely investigates various civil and criminal matters. See DEP’T ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURES 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. §§801-946 (2003) (UCMJ), at Art. 32 (providing for public adversarial hearing to determine whether charges should be preferred). 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 _, at_. 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, Prosecuting the “Fog of War?” Examining The Legal Implications of an Alleged Massacre of South Korean Civilians by U.S. Forces during 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 to achieve the objects and purposes of IHL without compromising the survivability of soldiers and the civilization they defend, this Article will analyze the likely result of a U.S. Army court-martial 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. However, because the rules of court-martial have evolved

Opening Days of the Korean War in the Village of No Guan Ri, 33 VAND. J. TRANSNAT’L L., 933, 951 (quoting then Secretary of the Army Louis Caldera) (“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, at 286 (noting numerous courts-martial of members of the U.S. 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 U.S. Army Private Clarence Bertucci for the deliberate killing of 8 sleeping German POWs in a detention camp in Utah. However, the decision to convene a court-martial hinges, at least in part, upon political purposes and risks at issue: for example, in the waning days of World War II, U.S. Army troops executed most of the SS 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 BEUCHNER, THE HOUR OF THE AVENGER (reporting that Patton rejected the proposal to court-martial the U.S. 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 U.S. court-martialled him for unlawful reprisal against POWS because “the public mood after a long and bloody war needed a scapegoat.” WELLS, supra note, at 94-95. 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 FM 27-10, Dep’t of the Army (1956), at para. 507(b) locating prosecutorial authority and discretion in the commander); DEP’T ARMY, FUNDAMENTALS OF MILITARY LAW 58 (1980) (describing breadth of discretion of convening authority with respect to trial and sentencing); 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).

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 offense was committed, the nationality of the victims are not generally material.” U.N. War Crimes Commission, Law Reports of Trials of War Criminals x (1949). However, the sources of and authority for the military jurisdiction of the U.S. 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. DEPT OF ARMY, FUNDAMENTALS OF MILITARY LAW 1 (1980). With Article I, §8, cl. 14, the Framers of the U.S. 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., Vth Amend. (excerpting “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 (1969) (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 Uniform Code of Military Justice (“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 UCMJ, supra note, at 286. 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 E.O. 12473, 49 FR 17152, 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 and the U.S. 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. AUSTIN WAKEWAN SCOTT, HANDBOOK OF MILITARY LAW 3 (1918).

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.” FM 27-10, para. 499; see also 11 TRIALS OF WAR CRIMINALS 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 U.S. Constitution makes reference, is part of the law of the U.S. 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 (1900) (establishing that customary international law is part of the law of the U.S. “where there is no treaty and no controlling executive or legislative act or judicial decision[,]”). However, subject
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 et al. will observe the procedures and structure of contemporary court-martial proceedings.277 The

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 U.S. courts, including courts-martial. See U.S. 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 U.S. courts independent of domestic implementing legislation); Foster v. Neilson, 27 U.S. 253 (1829) (incorporating the doctrine of self-execution in U.S. law). 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 UCMJ, supra note, at Art. 18 (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 Ex Parte Quirin, 317 U.S. 1 (1942) (holding that the incorporation of IHL treaties and customary IHL by reference is a permissible exercise of Congressional Article I, §§ 8, cl. 7 authority to “define and punish . . . Offences against the Law of Nations[,]”); In re Yamashita, 327 U.S. 1, 12-13 (1946) (“[Congress] has incorporated by reference . . . all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction.”). Accordingly, U.S. 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 FM 27-10, supra note, at para 507 (“Violations of the law of war committed by persons subject to the law of the [U.S.] 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) (explaining that “ordinarily persons subject to the [UCMJ] should be charged with a specific violation of the [UCMJ] rather than a violation of the law of war.”); Levine, supra note, at 3 n.29 (stating that, strictly speaking, courts-martial apply U.S., 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, Pub. L. No. 104-92, 110- Stat. 2014 (codified at 18 U.S.C. §2441) (1996) (stating that the U.S. 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 U.S. 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 UCMJ. See FM 27-10, ch.8, §1, para. 502 (prohibiting, as grave breaches, the “making use of poisonous or otherwise forbidden arms or ammunition, treacherous request for quarter, maltreatment of dead bodies, firing on localities which are undefended and without military significance, abuse of or firing on the flag of truce, misuse of the Red Cross emblem, use of civilian clothing by troops to conceal their military character before battle, improper use of privileged buildings for military purposes, poisoning of wells or streams, pillaging or purposeless destruction, compelling prisoners of war to perform prohibited labor, killing without trial spies or other persons who have committed hostile acts, compelling civilians to perform prohibited labor, violations of surrender terms.”); see also Robinson O. Everett, Did Military Justice Fail or Prevail? Son Thang: An American War Crime, 96 MICH. L. REV. 1421, 1434 (1998) (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 resort to the UCMJ). The U.S. 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 FM 27-10 (“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 expanded discussion of domestic jurisdiction over alleged violations of IHL, see 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 et al. discharged their legal obligations with respect to the UCMJ and its forebears, the manner in which the regime of courts-martial would address any delicts, and the contemporary compatibility of this regime with the joint defense of law and civilization.

277 Prior to 2000, Private Ryan et al. would have been, by virtue of his discharge from the U.S. Army, immune from court-martial for any transactions occurring in 1944, irrespective of the question of any applicable statutes of limitations, as under existing law only active-duty personnel were subject to court-martial (see infra), 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 Toth v. Quares, 350 U.S. 11, 15 (1955) (holding that Congress lacked the power to subject civilians who had “severed all relationship with the military,” regardless of prior military status or the nature of the crime, to trial by court-martial under existing federal law; Willenbring v. Neurater, 48 M.J. 152 (C.A.A.F. 1998) (upholding Toth); BISHOP, supra note, 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). Moreover, despite a 1968 General Assembly resolution declaring statutes of limitations inapplicable with respect to war crimes, the U.S.:
contraposition of the likely results of a court-martial wherein current substantive laws governing parole and reprisal are applied offers evidence in further support of this claim.

a) U.S. v. Private Ryan et al., July 1944

On July 5th, 1944, following an Article 32 investigation 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 75th Ranger Regiment, Major General Lucian Truscott, reluctantly ordered the courts-martial of Private Ryan, PFC Reiben, and T/5 Upham. T/5 Upham was charged with a violation of Article 118 of the UCMJ, “Murder,” for shooting the German machinegunner whom he had taken prisoner in Ramelle. PFC Reiben was not charged with a violation of Article 118 for denying quarter to surrendering Germans on the bluffs overlooking Omaha Beach as the prosecution determined that there was not sufficient evidence to sustain a conviction; however, Reiben was charged with a violation of

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 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, Nov. 26, 1968, 754 U.N.T.S. 73, U.N. GA Res. 2391 (excluding applicability of any statute of limitations for grave breaches enumerated in the Geneva Conventions of 1949) (signed by only 41 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 L. 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 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 (C. D. 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 waive the constructive statute of limitation imposed by way of the more limited personal jurisdiction predating the Act. See MEJA, P.L. 106-523, 106th Cong., 2d Sess., codified at 18 U.S.C. §3261(a) (creating jurisdiction in Article III courts over civilian personnel alleged to have committed war crimes while accompanying the U.S. Armed Forces overseas); id. at (c) (providing that such jurisdiction is complementary to courts-martial); id. at (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). Although if MEJA were invoked as the basis for jurisdiction Private Ryan et al. 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[,]” neither question need be reached here. See U.S. CONST., Vth Amend. (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., Vth Amend.). 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. H. McCoubrey, The Concept and Treatment of War Crimes, 1 J. ARMED CONFL. L. 121, 133 (1996) (discussing ethical and evidentiary issues associated with long-delayed war crimes prosecutions).

278 See MCM, supra note __, at Rule 405 (governing procedural rules in Article 32 investigations).
279 A general court-martial can be convened only by the President, the secretary of a military service, or a senior commanding officer. UCMJ, supra note __, at Art. 26. To protect the substantive rights of the accused, the convening authority cannot also be the accuser. Id. at Art. 22(b). For this reason, each convening authority is advised by an experienced attorney. Id. at Art. 34.
280 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.” UCMJ, supra note __, at Art. 118. 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.”
281 All of the potential prosecution witness to the events that might have led to an Article 118 prosecution of PFC Reiben—U.S. soldiers who made the Omaha landings and the German soldiers who contested them—were dead as of July 1944. Had there
Article 128, “Assault,” for his physical abuse of the German machinegunner subsequent to capture, and of Article 134, “Misprision of Serious Offense,” for concealing the commission of violations by Private Ryan and T/5 Upham. Private 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, informed of the charges, advised of their rights, and appointed defense counsel. At arraignment the defendants each entered a plea of not guilty. Shortly after the arraignment, Private Ryan refused a grant of immunity to testify against T/5 Upham.

The trial judge denied defendants’ motions to dismiss on the ground that the specifications failed to state offenses, and after other preliminary matters, including the pretrial orientation of the members of the court conducted by General Truscott, the common trial commenced before a panel of five members, two of whom were enlisted soldiers. As all defendants stipulated to the facts as presented in the specification of charges, the prosecution was relieved of the potential embarrassment of having to call as witnesses enemy POWs. However, each defendant offered a series of affirmative defenses to the charges and submitted a witness list that included experts to testify in support of these defenses. All defendants offered the defense of ignorance or mistake of fact as to the criminality of the offenses with been an available eyewitness, the prosecution had been determined to charge PFC Reiben as well with a violation of Article 118, Murder, for denying quarter to the German defenders on OMAHA BEACH.
which they were charged,\footnote{See id. at Rule 703 (governing the employment of expert witnesses).} while T/5 Upham and PFC Reiben offered the defenses of justification, obedience to orders, and lack of mental responsibility. The prosecution, relying on the stipulation of the defendants as to the facts 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),\footnote{See id. at Rule 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.”).} the Geneva Conventions of 1929,\footnote{RULES OF LAND WARFARE 1940, supra note_, at para. 33 (restating para. 182 of the Rules of Land Warfare, 1914, to the effect that surrendering enemy personnel are generally entitled to quarter).} and the Hague Convention of 1907\footnote{See Geneva Conventions of 1929, supra note_, at Art. 2 (stating that POWs “shall at all times be humanely treated and protected, particularly against acts of violence” and “[m]easures of reprisal against them are forbidden.”).} 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.\footnote{See Hague Convention of 1907, supra note_, at Art. 23(c) (“It is especially forbidden . . . (c) to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion[.]”).} Even if, arguendo, military necessity could ever justify the extrajudicial killing of POWs,\footnote{The argument that the denial of quarter and the extrajudicial killing of POWs is absolutely prohibited was made before the International Military Tribunals at Nuremburg and Tokyo and before other U.S. military tribunals and commissions adjudicating the guilt of Nazi and Japanese defendants charged with the denial of quarter and the killing of U.S. POWs in the period from 1944–1981. See, e.g., Nuremburg Judgment, Nazi Conspiracy and Aggression: Opinion and Judgment 57 et seq., I WAR CRIMES REP. (1947) (refusing to consider defenses and sentencing the authors and executors of the Kommand Befehl and the execution of Allied POWs to death); The Jaluit Atoll Case, 1 WAR CRIMES REP. 71 (1945) (sentencing the commander of Japanese naval forces who executed U.S. POWs to death for permitting a crowd to kill 3 British POWs); The Dostler Case, U.S. Mil. Comm’n, Rome, Italy, Oct. 12, 1945, at I LAW REP. TRIALS WAR CRIM. 22 (1945) (convicting commander of the German 75th Army Corps, General Anton Dostler, for ordering summary execution of fifteen uniformed U.S. POWs captured while on a mission to demolish a railway tunnel between La Spezia and Genoa); Abbaye Ardenne Case, 4 WAR CRIMES REP. 97 (1945) (condemning commander of a Nazi SS Regiment for counseling his men to deny quarter to Allied troops); Trial of Gunther Thiele and Georg Steinert, (United States Mil. Comm’n, Augsburg, Germany, June 13, 1945), II LAW REP. TRIALS WAR CRIM. 56-57 (1948) (convicting two members of a German unit for denial of quarter to a wounded U.S. officer); Trial of Amberger, 1 WAR CRIMES REP. 81 (1946) (same); “Trial of Bury and Hafner,” 3 WAR CRIMES REP. 62 (1945); “Trial of Schosser,” 3 WAR CRIMES REP. 65 (1945) (same); “Trial of Tauber,” 4 WAR CRIMES REP. 113 (1946) (same); The Hostage Case, II WAR CRIMES REP. 1230 (1948) (rejecting applicability of defenses and convicting principals and accessories of, inter alia, denial of quarter to Allied POWs).} the prosecution further argued, it was a defense unavailable to Upham, who could have availed himself of

\footnote{See supra note_. at Art. 2 (stating that POWs “shall at all times be humanely treated and protected, particularly against acts of violence” and “[m]easures of reprisal against them are forbidden.”).}
alternative, non-lethal methods of preventing the harms that 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.\textsuperscript{302} 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.\textsuperscript{303} A second prosecution expert—a former British infantry officer now a 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,”\textsuperscript{304} 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 Upham\textsuperscript{305} but that even if such an action could have been reasonably construed otherwise, whether as a reprisal or on other grounds, it was an illegal order\textsuperscript{306} that Upham knew or should have known was illegal\textsuperscript{307} and thus he was duty-bound, as a matter of transnational military custom\textsuperscript{308} as well as U.S. military regulations,\textsuperscript{309} to disobey. To the defense of a lack

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\textsuperscript{302} See OSIEL, supra note\_\_ 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).
\textsuperscript{303} See 2 L. OPPENHEIM, INTERNATIONAL LAW, 183-84 (6\textsuperscript{th} ed. H. Lauterpacht 1943) (categorically rejecting any defenses to the charge of denial of quarter).
\textsuperscript{304} See McCoubrey, supra note\_\_ 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 avow 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”)
\textsuperscript{305} 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.
\textsuperscript{306} The prosecutor read Article 2 of the Geneva Convention of 1929, providing that POWs are “in the power of the hostile Government, but not of the individuals or formation which captured them[,]” and forbidding “[m]easures 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.
\textsuperscript{307} See MCM, supra note\_\_ at Rule 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).
\textsuperscript{308} 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 thus “[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.” Jaluit Atoll Case, supra note\_\_ at 5 (citing U.S. v. Carr, 25 F. Cas. 306, 307-08 (1872)); see also Dostler Case, supra note\_\_ (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); Hostage Case, supra note\_\_, at (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 Supreme Command of the Allied Powers, Rules Promulgated for War Crimes Cases (1945), at 16(f) (“The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment.”). Further, action pursuant to order of the accused’s superior, or of his government, shall not constitute a defence but may be considered in mitigation of punishment[,]” (cited in Albert Lyman, A Reviewer Reviews the Yokohama War Crimes Trials, 17 J. B. ASS’N. N. D. C. 267, 274 (1950)).
\textsuperscript{309} See, e.g., Court-Martial of General Jacob H. Smith, Manila, Philippines, April, 1902, S. Doc. 213, 57\textsuperscript{th} Cong, 2\textsuperscript{nd} Sess., 5-17 (1902) (convicting commander of U.S. 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 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, v. VII 187 (1906) (discussing the Smith court-martial and the issue of unlawful orders). A mere eight months before the courts-martial of Private Ryan et al., the section of the Rules of Land Warfare, 1940, 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. DEP’T OF THE ARMY, RULES OF LAND WARFARE (1944), at para. 345.1, “Liability of Offending Individuals.” (providing that “the fact that [ofences 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
of mental responsibility, the prosecutor 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. Finally, the prosecution attempted to prove that, by virtue of the extensive U.S. 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, attacking 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 POW subsequent to his capture, as there was no imminent threat from other enemy forces and U.S. 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 or otherwise urging 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 that he 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 U.S. military regulations the denial of quarter is a serious offense. The prosecution made effectively an identical case against Private Ryan on the misprision charge and then rested.

Following a brief recess, the defendants’ joint motion for a finding of not guilty was denied, 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

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310 See MCM, supra note _, at Rule 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 . . . acts” by virtue of a “severe mental disease or defect”).
311 See id. at Rule 916(k)(2) (providing that a “mental condition not amounting to a lack of mental responsibility . . . is not a defense[,]”); id. at (3)(A) (providing that an accused is “presumed to have been mentally responsible[,]”).
312 See id. at Art. 128(b)(1) (providing that the elements for assault are the attempt to cause physical harm to another through the use of unlawful force or violence).
313 See supra at note _.
314 See MCM, supra note _, at Rule 913 (governing presentation of the merits).
315 See id. at Rule 917 (governing motions for a finding of not guilty after presentation of the U.S. case-in-chief).
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 captors and defeated a mission assigned strategic significance by the Army Chief of Staff. Upham further testified that in shooting the German POW he had acted consistently with lawful mission and standing orders requiring him to evacuate Private Ryan at all costs in the face of an uncertain enemy threat all along his planned axis of maneuver and that to have accepted the additional encumbrance of POWs and threat this would have entailed would have been in contravention of his orders as he understood them. Further, Upham testified that he lacked mental responsibility for killing the German POW as a consequence of extreme “battle fatigue” coupled with uncontrollable outrage over the death of his commander at the hand of a perfidious parole violator 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 and subjective understandings of the enemy threat and of the importance attached to their mission by the General Staff of the U.S. 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, that he had believed it necessary to use a moderate degree of force to establish physical control over the POW, and that he had 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 that based upon his military training 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

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316 Although the U.S. Theater Provost Marshal was prepared to process, in the first few days after D Day, as many as 50,000 German POWs in accordance, as far as possible, 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 AMRBOSE, supra note 3 at (noting that by 20 June 1944, German POWs outnumbered their captors by a ratio of 150:1).

317 See www.army.benning.mil (Rogers’ Rangers) (listing the standing orders under which U.S. Army Rangers have served for more than two centuries and which supplement their general and mission orders to the present).

318 See OSIHEL, supra note 2 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 U.S. v. Calley, 48 C.M.R. 19 (1968)).

319 “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, trauma. See AM. PSYCH. ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL IV (rev.), at 309.81 (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 an event that involves death, injury, or a threat to the physical integrity of another person). Sustained exposure to combat can induce or exacerbate PTSD and warp the normal moral calculus of soldiers. See 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).

320 See supra at note 2. 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.
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 U.S. Army Judge Advocate General Corps and now law professors, testified that the U.S. Army Rules of Land Warfare expressly sanctioned the denial of quarter under limited circumstances, including self-preservation and the preservation of the military mission. 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 as to do so would necessitate abandoning the mission or disclosing it to the enemy. The third, a former British military lawyer, 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, 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, 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.”

With respect to the defense of superior orders, defense experts testified that, whether deliberately or indeliberately, illegal orders are frequently issued to subordinates who are nevertheless obligated to comply and that U.S. Army regulations, as well as the Charter of the Nuremberg Tribunal, explicitly provided that even if an order to deny quarter would necessarily be illegal, the very existence of that order

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321 See Rules of Land Warfare, 1940, supra note , at para. 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).
322 See WHEATON, supra note , 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 , 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 U.S. 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. BARKER, supra note , at 27-28.
323 See supra at notes . The jurisprudence of the IMT supported the defense expert testimony that the defense of military necessity was to be counted among the survivors, rather than the victims, of World War II. See, e.g., Flick Case, VI TRIALS WAR CRIM. 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”).
324 See Lippman, supra note , at 110.
325 OSIEL, supra note , at 157.
326 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[,]” (cited in 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 (1921).
327 See Rules of Land Warfare 1940, supra note , at paras. 345, 347 (providing that U.S. Army personnel will not be punished for war crimes ordered by their superiors).
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; 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.331 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 to warp normal moral judgments and render the application of formal legal rules by those who to whom such experiences are foreign a “morally questionable exercise.”332 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 magnitude in proportion to the intensity of the combat.333 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.335 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 deprivations against their own units.336

329 See Nuremberg Charter, supra note __, at Art. 8 (“The fact that the defendant acted pursuant to order of his Government or of a superior . . . may be considered in mitigation of punishment[].”).
330 See II OPPENHEIM, supra note __, at 453
331 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 U.S. POWs. See Dostler Case, I TRIALS WAR CRIM., supra note __, at 2. The accused contended that the 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 U.S. POWs a legitimate reprisal. See KALSHOVEN, supra note __, at 192-301 (discussing the intersection of the superior orders defense with reprisals).
333 The destruction that omnipresence of 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[.]
334 See Smidt, supra note __, at 155 (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).
335 See Everett, supra note __, 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).
336 The phenomenon whereby soldiers are unable to restrain themselves from exacting revenge when capturing enemy forces that shortly before were killing 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 Drew L. Kersh, A Symposium on Film and the Law: Breaker Morant, 22 OK. CITY U. L. REV. 107 (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 captured wearing British uniforms who had ambushed and killed the commander of the defendants, 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
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[.]”\textsuperscript{337} 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 Army\textsuperscript{338} as well as the capacity of soldiers to absorb such complex material in the context of other training obligations.\textsuperscript{339} 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.\textsuperscript{340} Finally, the defense introduced as character witnesses\textsuperscript{341} members of the 101st Airborne Division whose lives Private Ryan had saved in combat on the night of June 5th, 1944 resulting in the award of the Silver Star;\textsuperscript{342} the defense also entered into evidence copies of the citations issued to Private Ryan and PFC Reiben upon their respective awards of Bronze Stars\textsuperscript{343} for heroism in combat in Italy in early 1944. After the defense concluded its case-in-chief, the court adjourned.

The next morning the judge, acting \textit{sua sponte}, issued a finding of “not guilty” as to PFC Reiben and Private Ryan\textsuperscript{344} and ordered their release from custody. The prosecution proceeded to its closing argument as to the remaining defendant, T/5 Upham.\textsuperscript{345} The prosecutor described the denial of quarter to

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  \item The Bronze Star is a decoration for military valor awarded for “heroic or meritorious achievement or service . . . while engaged against an enemy of the United States[,]” E.O. No. 9419 (February 4, 1944) (superseded by E.O. No. 11046) (Aug. 24, 1962).
  \item 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[,]”\textsuperscript{337} 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 Army\textsuperscript{338} as well as the capacity of soldiers to absorb such complex material in the context of other training obligations.\textsuperscript{339} 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.\textsuperscript{340} Finally, the defense introduced as character witnesses\textsuperscript{341} members of the 101\textsuperscript{st} Airborne Division whose lives Private Ryan had saved in combat on the night of June 5\textsuperscript{th}, 1944 resulting in the award of the Silver Star;\textsuperscript{342} the defense also entered into evidence copies of the citations issued to Private Ryan and PFC Reiben upon their respective awards of Bronze Stars\textsuperscript{343} for heroism in combat in Italy in early 1944. After the defense concluded its case-in-chief, the court adjourned.

The next morning the judge, acting \textit{sua sponte}, issued a finding of “not guilty” as to PFC Reiben and Private Ryan\textsuperscript{344} and ordered their release from custody. The prosecution proceeded to its closing argument as to the remaining defendant, T/5 Upham.\textsuperscript{345} 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,\textsuperscript{346} by virtue of the despicable status of the victim as a parole violator in the armed forces of a state at war with U.S. 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 chose actions that he knew were illegal. In conclusion the prosecution described Upham as having engaged in an illegal reprisal, dressed up as military necessity\textsuperscript{347} against an enemy soldier, for whom he held personal animus, the effects of which were to bring grievous harm and disrepute upon, as well as compromise the good order and discipline of, the U.S. 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 U.S. Army and 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, and that 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 a 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, and that in any event 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.\textsuperscript{348} Finally, the defense encouraged the panel to

\textsuperscript{346} The prosecutor stated that duties of combatants, whether U.S. 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, \textit{supra} note\textsubscript{1}, at 110.

\textsuperscript{347} BARKER, \textit{supra} note\textsubscript{1}, at 283 (describing thusly the defense of military necessity offered by the Nazi defendants at Nuremburg in response to the charge of war crimes for killing POWs). Although the martial code admits of 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 TALYOR, \textit{supra} note\textsubscript{1}, at 338 (“[I]f military law does no more than track operational considerations jot for jot, mirroring commanders’ calculations of military necessity, it becomes largely superfluous. But if it departs too greatly from these considerations, it quickly comes to be ignored and . . . thereby ceases even to be formally binding.”).

\textsuperscript{348} 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 HELD et al., \textit{supra} note\textsubscript{1}, 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).
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 who are struggling merely 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 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.  

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. Following this the court adjourned.

The following morning, after reviewing proposed jury instructions submitted by the parties, 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 offenses of Article 119, Manslaughter, as and 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 question 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 U.S. law (and if so they were to return a finding of 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

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349 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 U.S. Navy Secretary James Webb castigating the absolutism of NGOs that sought to prosecute U.S. soldiers for alleged violations of IHL during the Korean War. See Kershen, supra note _, 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).

350 See Lippmann, supra note _, at 110 (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).

351 MCM, supra note _, at Rule 920(c).

352 Id. at Rule 920(e).
colonel on the staff of General Eisenhower, initiated deliberations applicable law and as to the actual practice of soldiers in battle, denial of quarter to an enemy POW was unanimously answered Question #1 in the negative, concluding that, on the basis of evidence as to operations as he had witnessed that practice. The judge then instructed the panel to consider the extent to which the defendant departed from the standard practice of the U.S. Army in the European Theater of Operations as he had witnessed that practice. Finally, the judge instructed members of the panel that to reach a finding of guilty a two-thirds majority was required.

The members of the panel retired to deliberate in closed session and the senior member, a colonel on the staff of General Eisenhower, initiated deliberations 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, 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, 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, denial of quarter to an enemy POW was

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354 See UCMJ, Art. 119, “Manslaughter” (criminalizing the unlawful killing of a human being “in the heat of sudden passion caused by adequate provocation” with the intent to kill). Maximum punishment for manslaughter is 15 years confinement, dishonorable discharge, and forfeiture of pay and allowances. Id. at Art. 119(e)(1).

355 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.

356 See UCMJ, Art. 118(b)(1)(c) (requiring, to establish the crime of murder, that the killing be proven “unlawful”).

357 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 _, at 159-60 (describing standard court-martial instructions to the panel on the issue of the lawfulness of orders).

358 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 _, at 55.

359 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 _, at 1426. Moreover, in charging a jury the court frequently provides express instructions to consider “a host of environing circumstances[,]” and to attempt in so doing to assume the perspective of the “ordinary soldier.” OSIEL, supra note _, at 128 (citing U.S. v. Calley, 48 C.M.R. 19 (1969)). 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 _, at 53.

360 The defenses in court-martial are essentially equitable, rather than legal, in nature, and to ensure that a specific act that is not far removed from 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. TAYLOR, supra note _, at 155-56.

361 See UCMJ, supra note _, at Art. 52 (10 U.S.C. §852(a)(2)) (requiring a 2/3 majority for a guilty finding).

362 Rank is immaterial in the deliberations of the court-martial panel. See id. at Rule 921(a).

363 See id. at Article 118(b)(1)(c) (requiring, to establish the crime of murder, that the killing be proven “unlawful”).

364 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. Id. at Rule 921(c).
not categorically illegal. 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 75th Ranger Regiment and were lightly wounded in subsequent combat, insisted that an order from the command apex of the U.S. Army to evacuate a private soldier was so remarkable that ordinary measures of force protection could not apply and the denial of quarter, as well as any other measures necessary to the success of what was presumptively a mission of strategic significance, 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 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—neither granted nor expected quarter. 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 with which it was treated by the two enlisted members as closely intertwined. The two enlisted soldiers reiterated 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 U.S. 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 as yet undecided. With tempers flaring, the sergeant-at-arms excused them for the day.

364 The members of the panel in the case of U.S. v. Private Ryan et al. did not have the benefit of the jurisprudence emanating from the Nuremburg and Tokyo tribunals in reaching their findings. See supra at notes_.

365 See supra at note_ (chronicling such incidents in military history of WWII).
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 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. “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.”

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 extenuating or mitigating circumstances. An enlisted soldier countered with the possibility of considering Article 134, para. 60(c)(3), Assault with Intent to Commit Voluntary Manslaughter, but because this offense had not been specified the judge, responding to a query, 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.

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366 The M1 Garand Rifle was the primary personal weapon carried by U.S. 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. At the court-martial of Lieutenant Morant for denial of quarter to Boer POWs, Morant, asked under what rule of military regulations he had ordered the execution of POWs, replied “We caught them and we shot them under Rule 303,” referring to the caliber, .303, of the British-issued Enfield rifle. Kershen, supra note _, at 111.

367 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 act in the heat of battle, while under threat from their enemies, on their own initiative. See BARKER, supra note _, at 27-28 (stating that it was less difficult at the post-World War tribunals to attribute criminal liability for war crimes to “decisionmakers far from the scene of the action” than to prove the liability of “those who carry out . . . orders[,]”).

368 Article 134 of the UCMJ punishes “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[,]” UCMJ, supra note _, at Art. 134(a). Art. 134(a)(2)(b) specifically provides for punishment for a “[b]reach of custom in the service,” defined as the “long established practices by which common usage have attained the force of law in the military[,]” UCMJ, supra note _, at Art. 134(a)(2)(b).

369 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
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?”

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, although . . .” he said, trailing off into thought.

The colonel then proposed that the panel convict T/5 Upham of Manslaughter but take into consideration extensive factors in mitigation of the sentence, reminding them that they had authority to pronounce any sentence they should choose. The panel deliberated for another three hours and then, late in the afternoon, returned to the courtroom to announce its findings. On the charge of Manslaughter, Article 119, UCMJ, the panel convicted T/5 Upham by a vote of 4-1. 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 factor and that the maximum sentence of fifteen years’ confinement, along with a forfeiture of benefits and a dishonorable discharge, was appropriate. The defense introduced evidence that Upham, only 19 years old, had been an exemplary civilian and soldier who had volunteered at 17 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

accused as well as the integrity of the profession of arms. OSIEL, supra note _, at 285 (describing process whereby military professionals debate and resolve standards of virtue crucial to the functioning of the martial code).

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 _, at 356.

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 even ask this question . . .: ‘What kind of person do I want to be, and what would such a person do?’” Reed Bonadonna, Above and Beyond: Marines and Virtue Ethics, 178, in ROBERT L. TAYLOR & WILLIAM ROSENBACK, EDs., MILITARY LEADERSHIP (1996).

See UCMJ, supra note _, at Art. 52 (providing that the members of a court-martial also determine the sentence and may take into consideration factors in mitigation, aggravation, and extenuation).

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 (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 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 $250.00 per month for six months. U.S. v. Duffy, 47 C.M.R. 658, 1973 WL 14807 (ACMR).

MCM, supra note _, at Rule 922 (proving that findings are announced immediately in the presence of all parties).

See id. at 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).

See MCM, supra note _, at Art. 119(e)(1) (providing for a maximum penalty of 15 years confinement, dishonorable discharge, and forfeiture of pay and benefits upon conviction of manslaughter).
theretofore been largely in support of Army intelligence at brigade echelon) and as 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 U.S. 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 discharge upon conviction of denial of quarter during a
“desperate struggle . . . with a cruel and savage foe” such as those against which the U.S. was now pitted.

Following arguments as to sentencing, the judge instructed the panel that the maximum sentence
for manslaughter was 15 years’ confinement and instructed the members on procedures for voting, 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: one year confinement, forfeiture of six months’
pay, reduction in rank to E-1, and a general discharge, with the one year confinement suspended and
the remainder of the sentence deferred until the end of the war against Germany. A petition for clemency,
signed by four of the five jurors, accompanied the sentence. With that the court-martial adjourned.

The next morning the Staff Judge Advocate[“SJA”] assigned to the 75th Ranger Regiment to assist
Major General Truscott in determining whether and how to exercise his command prerogative reported
his recommendation that the sentence be executed as pronounced. However, rather than do so
General Truscott, who had argued vehemently against the courts-martial of Private Ryan et al. only to be
overruled by General Eisenhower, transmitted the trial record to the Judge Advocate General of the Army
with an expression of his views that “the killing of the German POW without judicial process was a

377 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. at Appendix XII, President’s
Table of Maximum Punishments. 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 UN 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, including the domestic constabulary, despite having committed prosecutable crimes, including genocide, war crimes,
and crimes against humanity, during the civil war. See Gregory L. Naarden, Nonprosecutorial Sanctions for Grave Violations of
the regime of non-penal sanctions administered by the UN in Bosnia).
378 See U.S. v. Private Ryan et al., Defense Motion in Support of Proposed Sentence (citing Court-Martial of General Jacob H.
Smith, Manila, Philippines, April 1902, S. Doc. 213, 57th Cong., 2nd Sess., 5-17, at 17) (sentencing BG Jacob H. Smith to be
“admonished by the reviewing authority” for having issued orders to subordinates directing denial of quarter to enemy guerrillas).
379衔 SHELDON GLUECK, WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT 31-32 (1944).
380 Id. at Rule 1005.
381 Id. at Rule 1007.
382 Id. at Rule 1108.
383 Id. at Rule 1101 (providing for deferment of sentence by the convening authority or officer with jurisdiction).
384 Id. at Rule 1106(d)(3)(B).
385 Id. at Rule 1011.
386 Id. at Rule 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, he 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. DEP’T ARMY, supra note _, at 58.
387 See DEP’T ARMY, supra note _, 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
regrettable, but momentary, lapse in the maintenance of the discipline and honor that distinguish our
Armed Forces from those of our enemies,” that 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 that 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 respect to which the Chief of Staff, writing under separate cover,
concurred, that in light of further review, General Truscott had articulated an adequate basis for
disapproving the sentence of the court-martial\(^{388}\) as well as, in his discretion, ordering a rehearing\(^{389}\) or a
dismissal of the charge.\(^{390}\) With the major offensive against Germany already underway, and with an
immediate rehearing thus impracticable\(^{391}\) if Upham was to be returned to service, General Truscott
elected to dismiss the charge against T/5 Upham and immediately ordered his transfer to the headquarters
of the 3rd Army, soon to be commanded by Lieutenant General George S. Patton.

On December 26\(^{th}\), 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 Allies.

That a court-martial convened to try Private Ryan et al. 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
disentitling a soldier to continued membership in the martial caste is not surprising. 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, were Upham to have
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 could 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

\(^{388}\) See MCM, supra note , at Rule 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[,]”).
\(^{389}\) See id. at Rule 1107(e)(1) (providing for rehearing as to charged offenses or sentence at discretion of the convening authority).
\(^{390}\) See id. at Rule 1107(c )2(A) (allowing convening authority to set aside a guilty finding and dismiss a charge).
\(^{391}\) See id. at Rule 1107(e)(1)(B)(iii) (stating that “[I]f the convening authority finds a rehearing as to any offenses impracticable, the convening authority may dismiss those specifications and, when appropriate, charges.”).
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, of whom the Army still had great need in its titanic struggle against the Axis, 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, rather than penal, sanction.

b) U.S. v. Private Ryan et al., 2003

The drive to humanize war gained impetus from World War II, and the Geneva Conventions of 1949 ("GCs"), consisting of four multilateral treaties, updated and enlarged the IHL regime and imposed upon parties the obligation to pass domestic legislation criminalizing "grave breaches" of their provisions. Denial of quarter and reprisal are specifically and categorically prohibited as grave breaches, the Geneva Conventions, on their face, appear to oblige parties to render inapplicable any

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392 See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ("GCI"); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ("GCII"); Convention Relative to the Treatment of Prisoners of War ("GCIII"); Convention Relative to the Protection of Civilian Persons in Time of War ("GCIV"). Four Geneva Conventions of 12 August 1949, 75 U.N.T.S. (1950) (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 Care known collectively as the "Geneva Conventions."

393 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 (Nicaragua v. U.S.), Merits, Un. 27, 1986, 1986 ICJ Rep. 14, 141 (holding that common Article 1 of the Geneva Conventions is declaratory of customary IHL); Meron, supra note ., 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); ICRC COMMENTARY TO THE GENEVA CONVENTIONS (J. Pictet ed.), at 368 (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). For a minority of commentators, the substantive provisions of the Geneva Conventions have attained the status of customary norms of jus cogens from which no derogation is permitted. See Rumudiger Wolfrum, The Decentralized Prosecution of International Offenses Through National Courts, 24 ISR. Y.B. HUM. RTS. 183, 1888 (1994) (suggesting that the entirety of the Geneva Conventions is directly applicable as customary IHL); Alexide, The Legal Nature of Jus Cogens in Contemporary International Law, 172 RECUEILS DES COURTS 223, 262-63 (1982) (same).

394 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 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces I in the Field of August 12, 1949, 75 UNTS (1950) 85-133, at Art. 49 (creating the duty to suppress and prosecute grave breaches of GCI); Geneva Conventions Relative to the Treatment of Prisoners of War III of August 12, 1949, at Art. 129 (creating same duty under GC III); GC IV, supra note ., at Art. 146 (creating same duty under GC IV). Specific grave breaches include, inter alia, "wilful killing" and "torture or inhuman treatment" (GC I, Art. 50; GC III, Art. 130) and "wilfully causing great suffering or serious injury to body or health . . . or wilfully depriving a prisoner of war of the rights of fair and regular trial[,]" (GC III, Art. 130; GC IV, Art. 147). Not all delicts constitute grave breaches under the Geneva Conventions; only those 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 qualify and thereby impose upon states-parties investigatory and prosecutorial duties, whereas acts better characterized as misdemeanors do not. See ICRC COMMENTARY, GENEVA CONVENTIONS RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 617-20 (J. Pictet, ed.) (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 (1998) (further elaborating this distinction and contrasting state duties with respect to grave breaches and other violations of the Geneva Conventions); KASTO, supra note , at 46-47 (suggesting that grave breaches of the Geneva Conventions have been so classified because they constitute violations of norms of jus cogens, norms which are non-derogable and which are "essential to the protection and coexistence of the peoples and States members of the international community" and which are "derived from the legal conscience of the international community as a whole.").

395 Grave breaches include, inter alia, 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 or the right to a fair trial, taking of hostages, and forcible relocation or deliberate targeting of civilians. See (note).
defenses, such as military necessity or superior orders, to domestic prosecutions of individuals accused of the denial of quarter and of reprisal,\textsuperscript{396} as well as to investigate, prosecute, and punish all violations with “effective penal sanctions.”\textsuperscript{397} Extending individual criminal responsibility for violation of the prohibitive regime of IHL still further, the First Additional Protocol to the Geneva Conventions [“AP I”]\textsuperscript{398} frontally

\textsuperscript{396} See Art. 3(1) (Common) to the Four Geneva Conventions (“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 GC I, supra note\textunderscore _ at Art. 46 (“Reprisals against . . . personnel . . . protected by the Convention are prohibited.”); id. at 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 . . .”); GC III supra note\textunderscore _ at 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 subject to physical mutilation . . . Measures of reprisal against [POWs] are prohibited.”) (emphasis added); id. at 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 . . .”).

\textsuperscript{397} GC III, supra note\textunderscore _ at 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 heretofore were either condoned or excused on grounds such as military necessity. See ICRC, COMMENTARIES ON THE GENEVA CONVENTIONS (note) (stating that with respect to the obligations of parties to prosecute abuses of POWs, including denial of quarter, “[n]o possible loophole is left; there can be no excuse. no attenuating circumstances.”); see also OSIEL, supra note\textunderscore , at 132 (stating that GCIII prohibits killing POWs “even on grounds of self-preservation or because it appears certain they will regain their liberty.”). 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\textunderscore _ at Art. 49(2); GCII, supra note\textunderscore _ at Art. 50(2); GCIII, supra note\textunderscore _ at 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\textunderscore _ at Art.99(1. Whether, by exploiting this indirect enforcement mechanism, states may thereby attenuate their obligations under the Geneva Conventions, is a matter open to debate. See BOTHE, MACALISTER-SMITH, & KURZIDEM (EDS.), NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW (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); Essgion & 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); M. Cherif Bassiouini, 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); 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); ANTONIO CASSESE, ED., THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 212 (1980)(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).

Whether 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 49/50/129/146, to either undertake a good-faith investigation and, where appropriate, to 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 x (1995). The U.S. officially recognizes this obligation as a state-party. See U.S. Department of the Army, Pamphlet 27-1, Treaties Governing Land Warfare (1956), at 183-84 (stating that the duty to investigate and prosecute those who commit grave breaches includes not only enemy war criminals but also U.S. nationals).

\textsuperscript{398} See API, supra note\textunderscore _. 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\textunderscore _ 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\textunderscore _ at Arts. 11(4), 85(3)-(4). In addition, the API obligates states-parties to cooperate with the UN “in situations of serious violations of the [Geneva] Conventions or of [the API],” (Art. 89), as well as with international fact-finding commissions (Art. 90), in the suppression of grave breaches. The API has come under criticism for introducing controversial positions into IHL, including the legitimation of decolonization (Art. 1(4)), the legal protection of terrorists (Art. 44), the withdrawal of the protection of GCIII from mercenaries (Art. 47), the definition of a military objective (Art. 52), and the prohibition of attack upon certain military objectives (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\textunderscore _. 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 CASSESE, supra note\textunderscore _ at 243 (noting that the “Western powers” were “very reluctant” to embrace API without reservations); David Turns,
rejects the military necessity defense and reinforces the absolute, nonderogable obligations to grant quarter and refrain from reprisal incumbent upon parties to AP I and, arguably, as a matter of customary IHL, even in regard to a parole violator captured under arms.

Although national military establishments had labored for much of the 19th and early 20th centuries to defend against encroaching legal absolutism with a pragmatic approach that privileged necessity in its intersection with humanitarianism, in the aftermath of World War II the military manuals of the leading powers began to reflect a generalized strategic withdrawal from this position toward an accommodation, and even to an extent a convergence, with the treaty-based regime codified in the Geneva Conventions. Specifically, in 1956, U.S. Army Field Manual 27-10 [“FM 27-10”], declared denial of quarter and reprisal against POWs to be categorically illegal as a matter of international and domestic law and, save for exceptional circumstances, non-justifiable by military necessity. Moreover, FM 27-10, an

Prosecuting Violations of International Humanitarian Law: The Legal Position of the United Kingdom, 4 J. ARMED CONFL. 1 (1998) (describing the UK position with respect to API and the reservations it has taken to that instrument limiting domestic prosecutions for violations of its provisions). The U.S. 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 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. INT’L L. & POL’Y 419-31 (1987). Nonetheless, the U.S. 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.; no official statement clarifying precisely which provisions, however, has yet to be 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 KALSHOVEN, supra note , at 301; 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 . . . has 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).

See API, supra note , at 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 (“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.”); id. at Art. 40 (prohibiting issuance of an “order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.”); id. at Art. 20 (“Reprisals . . . are prohibited.”). The obligations created by API I with respect to quarter are absolute, even in the case of a greatly outnumbered unit physically unable to take prisoners. Id. at Art. 41 (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.”).

See supra at note .

The Geneva Conventions recognizes that POWs who are paroled “are bound on their personal honour scrupulously to fulfil . . . the engagements of their paroles or promises.” GC III, supra note , at 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 GC III, supra note , at 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.”); PICSTET, supra note , at 181 (stating that the Geneva Conventions afford parole violators the opportunity to defend against charges of breaking parole).

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).


See FM 27-10, supra note , at para. 28. “Refusal of Quarter” (“It is officially forbidden . . . to declare that no quarter will be given.”) (quoting, almost verbatim, Article 23(d), Hague Regulations of 1907, supra note ); id. at para. 29. “Injury Forbidden After Surrender” (“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. (quoting Article 23(c), Hague Regulations of 1907, supra note ).

See id. at para. 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 U.S. forces are permitted) (citing GC III, supra note , at Art. 13).

See id. at Art. 3 (stating that the “[p]rohibitory 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[,]”); see also id. (limiting the definition of military necessity to justify only “those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”). Some scholars argue that FM 27-10 effected the complete rejection by the U.S. Army of the defense of military necessity to allegations of war crimes. See, e.g., WALZER, supra note , at 130-31 (stating that subsequent to 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
affirmation of principles of existing IHL in light of the experience of World War II promulgated “to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare.” 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 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.

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

However, despite their willingness to incur limitations upon their sovereign prerogatives, states, with respect to the denial of quarter has 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, and in the Sinai Campaign (1956) Israeli forces, claiming military necessity, executed scores of Egyptian POWs. During the Vietnam War (1954-1975), political pressure to maximize numbers of enemy dead (known as “body counts”) as tangible evidence of battlefield successes, coupled with the psychological stress of combat, led U.S. forces and
their allies to deny quarter and undertake reprisals, and the summary execution of POWs is a present feature of enduring conflicts wherein military necessity abuts conflicting legal prohibitions.

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 to be disregarded[,]” and “small detachments on special missions” ordered to execute strategic missions deep behind enemy lines are justified by military necessity in denying quarter to enemy forces on the ground that to release prisoners

415 Numerous sources document a widespread practice of denying quarter during the Vietnam War. See, e.g., JOHN DUFFET (ED.), AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 310 (1968) (concluding that as of 1968 “finishing off of the wounded on the battlefield and summary executions are frequent [practices during the Vietnam War]”); ESQUIRE, Aug. 1965, at reporting the execution of enemy wounded by a U.S. Army captain in the Special Forces following an unsuccessful ambush as a relatively commonplace occurrence (cited in FALK ET AL., supra note, at 270-71). 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., FALK ET AL., supra note, at 246-47 (stating that the policy that U.S. 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 with 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.”

Cited in FALK ET AL., supra note, at 248-52.

Combat-invoked emotions such as rage and the desire for revenge contributed to the denial of quarter as well. See id. at 248-52 (“Before these two friends were hit I had sort of a lukewarm feeling against the enemy[,] . . . [b]ut 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.”) (quoting a U.S. Army platoon commander); see also DAVID A. HALBERSTAM, THE MAKING OF A QUAGMIRE (1965) (reporting upon the capture a group of “cocky” Viet Cong who shouted “anti-American slogans and . . . curses” their U.S. Marine captors “simply lined up the seventeen guerrillas and shot them down in cold blood[,]”); Raymond R. Coffey, CHICAGO DAILY NEWS, Nov. 19, 1965: (reporting execution of North Vietnamese wounded following a battle); Kenneth A. Howard, CHICAGO DAILY NEWS, Nov. 19, 1965: (“Before these two friends were hit I had sort of a lukewarm feeling against the enemy[,] . . . [b]ut 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.”) (quoting a U.S. Army platoon commander); see also DAVID A. HALBERSTAM, THE MAKING OF A QUAGMIRE (1965) (reporting upon the capture a group of “cocky” Viet Cong who shouted “anti-American slogans and . . . curses” their U.S. Marine captors “simply lined up the seventeen guerrillas and shot them down in cold blood[,]”); Raymond R. Coffey, CHICAGO DAILY NEWS, Nov. 19, 1965: (reporting execution of North Vietnamese wounded following a battle); 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”) (citing battalion mission orders to company commanders) TAYLOR, supra note, at 36 (noting, during the Vietnam War, that “[t]he 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.”).

416 Some scholars, in supporting a military necessity exception to a general rule prohibiting denial of quarter, restrict the application to circumstances colorable as 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, at 305 (“But if it is only the safety of the unit that is in question . . . the proper appeal would be to self-preservation[.]”); and HELD ET AL., supra note, 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.”).
would “greatly endanger the success of the mission[s] or the safety of the unit[s].”

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.”

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 surrender and to the moral and legal culpability of the soldier(s) offering surrender: parole violators, by virtue of their own misconduct, expose themselves to the penalty of death, even if they remain entitled to due process in a judicial forum, and 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.” According to this position, it is an “obligation of soldiering as an office” to accept the additional risks posed by the release of POWs, and

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418 TAYLOR, supra note, at 36 (stating further that “no military or other court has been called upon, so far as I am aware, to declare such killings a war crime.”). Others, while striving hard to refuse any exceptions to a general prohibition against denial of quarter, admit that “[t]here may be time in war when it is permissible to kill combatants who have laid down their arms and tried to surrender.” HELD ET AL., supra note, at 76; BEST, supra note, at 348-50 (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); PAUL RAMSEY, THE JUST WAR 435-36 (accepting that “in fluid, jungle situations in which the [POW] is liable to return quickly to safety away from the combat zone[,]” denial of quarter is neither unexpected nor unjustifiable on the ground of necessity); OSIEL, supra note, 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, at 250 (“In a supreme emergency, indeed, it may be necessary ‘to hack one’s way through[,]’”).

419 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).

420 See BEST, supra note, 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); MCDONALD & FELICIANO, supra note, at 75-76 (“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.”).

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

422 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 GC III, supra note, at Art. 5 (stating that POWs are entitled to protection from the time of capture until repatriation); id. at 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, at Art. 12 (stating that a parole violator recaptured bearing arms must “be brought before the courts.”).

423 INSTITUTE OF WORLD POLITY, supra note, at xi; see also ROGERS, supra note, 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[,]”); M. 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, Telephone Interview, 2 Oct. 2000 (stating that each member of the U.S. Army recognize 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.”).
the killing of enemy forces that have indicated their intention to surrender is always a war crime immune from excuse or justification. 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. Moreover, reprisal is categorically prohibited. In short, an exegesis of scholarly texts demonstrates little more than 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 et al., the positive rules of IHL and the military regulations governing members of the U.S. Army, have waxed increasingly formal and prohibitive, 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 that they would be prosecuted. Moreover, a number of U.S. Army courts-martial convened over the past several decades have sentenced soldiers to periods of confinement for the crime of murder arising from denials of quarter, 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 2003 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, Upham either knew or

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425 See DEP’T OF ARMY, supra note _, 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.”).
426 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., HELD ET AL., supra note _, 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).
427 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 DEP’T OF ARMY, supra note _, 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).
428 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.”).
429 See supra note _.
430 See, e.g., Ex parte Keenan, 18 U.S.C.M.A. 108 (1969) (holding that there is an absolute duty to disobey an order to deny quarter and sentencing a soldier convicted of denial of quarter to 5 years’ imprisonment) (citing cases). During the Vietnam War, U.S. courts-martial tried over 100, and convicted 60, defendants for the crime of murder. BISHOP, supra note _, at 291. 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 _, at Art. 82. Although the U.S. does not concede any specific legal obligations under the API in the past twenty years U.S. Army JAG lawyers, whose mission is “to support the commander on the battlefield by providing professional legal services as far forward as possible at all echelons of command throughout the operational continuum” 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. DEP’T OF ARMY, FM 27-100, LEGAL OPERATIONS 1 (Sept. 1991). 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 Timothy P. Bulman, A Dangerous Guessing Game
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.32

However, this outcome is as unlikely at present as it would have been in the last year of World War II, even conceding that 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.33 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,43 and, notwithstanding the fact that these sources directly prescribe 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

Disguised as Enlightened Policy: United States Law of War Obligations during Military Operations Other Than War, 150 MIL. L. REV. 152, 173 (1999) (noting that the failure of the U.S. to authoritatively state which provisions of the Geneva Conventions and Additional Protocols are binding frustrates attempts at compliance by combat commanders); Shefi, supra note _, 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, “where time permits, it is now objectively unreasonable for an 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 _, at 345. At the same time, combat commanders and their subordinates, entitled to reasonably rely upon the guidance of legal advisors whose approval of their plans is evidence of the presumed legal propriety of their intended objectives and methods, are partially insulated from the legal consequences of decisions made in reliance upon the judgment of JAG lawyers that upon post hoc review are determined to have been unlawful. See Jonathan Tomes, Indirect Responsibility for War Crimes, MIL. REV. 37, 43 (1986) (“It is difficult to accuse a commander of lack of concern about the law of war if he has a Staff Judge Advocate approval of a plan.”). Modifications to military manuals have augmented the work of JAG lawyers in enhancing “awareness of the objects of use of forces 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, 182-83 (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 U.S. Army military education, see http://www.jagcnet.army.mil/CLAMO.

43 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 _, at A22 (making this argument in regard to criticisms over U.S. hesitancy to investigate allegations of U.S. massacres of civilians in the Korean War). An example in support of this assertion is the March to the Sea by General William T. Sherman in 1864-65 during the U.S. 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).
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.\(^{435}\) Furthermore, the similarity of the threat posed by Islamic terrorists to the Nazi regime might sway members of a jury toward acquittal or toward a sentence that nullifies much of the legal consequences of a guilty verdict, and the jury might well struggle toward a conclusion along the lines of the following: that Upham, despite having committed a technical violation of the laws and customs of war, violated none of the constitutive tenets and precepts of the martial code in taking reprisal against a parole violator and that his conduct, although not to be extolled as the epitome of martial honor, merits mere disciplinary, rather than penal, sanctions, particularly in the context of a global challenge to fundamental national interests such as is posed by the intersection of international terrorism and the proliferation of WMD. On the basis of such a 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 under the system of military justice entails an 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 to claim standing to complain of violations and to police its own ranks—conducted under conditions of relative normative autonomy,\(^ {436} \) 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

\(^{435}\) See supra at note_._

\(^{436}\) IHL may well remain as impenetrable to the average enlisted mind in 2003 as it did in 1944. See DEP’T OF ARMY, PAMPHLET 27-161-2, 2 International Law, at 246 (1962) (conceding that ignorance of IHL may well excuse soldiers from liability for its violation since IHL “does not in some cases possess either the exactitude or degree of publicity which pertains to municipal law.”). Although the U.S. 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 U.S. Armed Forces. See 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, 166-74 (1993) (discussing U.S. failure to specify with precision the obligations it accepts under IHL and suggesting that, until such a specification is forthcoming, the best insight into U.S. policy with respect to the extent of these obligations is an observation of U.S. 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_._ (enumerating various provisions of IHL the violations of which constitute criminal offenses punishable in federal district courts, although not displaceing 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 accordance with the law might find themselves being told simply “Not to worry, the complexities are beyond your ken; just obey the order, unless it calls for atrocities.” OSIEL, supra note_., at 108. Consequently, soldiers in 2003 attempting to meet their legal obligations might be left with little 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 to an alleged violation of IHL is permitted. For an in-depth discussion of the superior orders defense, see infra at note_._

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_., 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.”).
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 more parochial model of justice 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 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. In sum, under 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 professional and ethical judgments of members of the profession of arms. Nevertheless, a court-martial convened in 2003 to evaluate the conduct of Private Ryan et al. 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.

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, deeply skeptical that professional self-regulation is sufficient to suppress violations of IHL by members of the armed forces whose mission, after all, is to win wars rather than to observe law, and unwilling to cede any regulatory terrain, reject martial honor as a thoroughly

437 In other words, as compared to the judicial model the martial code prohibits a greater range of conduct but makes it easier to argue it is excusable to go beyond the bounds in certain circumstances: 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.

Id. at 285.

Put slightly 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.” Kenneth Anderson, TIMES LIT. SUPP., Jul. 31, 1998 (reviewing First in the Field: The Unique Mission and Legitimacy of the Red Cross in a Culture of Legality) (quoting John Keegan).

438 “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.” Id. at 162-63. 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 Miles Kahler, Conclusion: The Causes and Consequences of Legalization, 54 INT’L ORG. 661 (2000).

439 “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, 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 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).

440 See, e.g., WELLS, supra note , at 178 (stating that IHL cannot safely be entrusted to the care of those “who understandably are preoccupied with winning wars and who cannot be expected to [interpret IHL] with a view to humanizing war[,]”); OSIEL, supra note , at (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
inadequate substitute for the judicial model.\footnote{See Joyner, supra note \_ _, at 162 (stating the absolutist credo that “war 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”).} For legal absolutists, a penchant for 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 cosseted behind military culture; 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,\footnote{See King & Theofrastous, supra note \_ _, at 69 (arguing, in reference to My Lai, that the “de minimis punishment” court-martials sometimes impose is proof that courts-martial effectively immunize soldiers from responsibility for war crimes).} claims in defense of acts otherwise classed as violations of IHL, reliant as they are upon 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.\footnote{Failures to suppress violations of IHL are thus manifestations not of the inherent unsuitability of positive law to the practical needs of soldiers in combat but rather of the moral culpability of the perpetrators, and the solution lies in the punishment of the actors, the enhancement of penalties to support the deterrent value of the regime, and the creation of additional rules to strengthen the judicial model.\footnote{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 \_ _, at 39-40 (discussing the legal consequences of the disjunction between civilian society and the military profession within democratic states).} For obdurate absolutists, military justice is a proxy for military impunity,\footnote{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. Id. at 162-63; see also RAMSEY, supra note \_ _, 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 \_ _, at 43-44 (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.} and the system of courts-martial is an obscurant 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 in the context of a U.S. covert operation designed to eliminate WMD in the custody of terrorists, a fictional scenario representative of future conflicts in the Age of Terrorism.446


In 1998 Juma Namangani, age 34, an ethnic Uzbeki447 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 Uzbekistan 448 and a “virtual partner” with Al Qaeda.449 Namangani, a born-again Muslim who traveled to Saudi Arabia in the early 1990s to steep in the Wahhabist sect of Islam,450 declared jihad to remove the secular government of Uzbekistan and establish a pan-Central Asian Islamic republic, and 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 Europe,451 and the trafficking of opium between Afghanistan and Europe.452 was launching increasingly successful attacks against government targets in the Fergana Valley, a region on the frontier near Kyrgyzstan and Tajikistan and the stronghold of indigenous Wahhabism.453 In 2000 President Karimov, a major ally in the U.S. anti-Taliban coalition, requested and received assistance, and U.S. 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 U.S. 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.”454

General Franks proved prescient: when the U.S. campaign against Al Qaeda455 and the Taliban456 regime commenced with heavy bombing of targets in northeastern Afghanistan on October 7th, 2001.

446 See James B. Motley, Coping with the Terrorist Threat: The U.S. Intelligence Dilemma, in STEPHEN J. CIMBALA, ED., INTELLIGENCE AND INTELLIGENCE POLICY IN A DEMOCRATIC SOCIETY 165 (1987) (asserting that terrorism is the “characteristic form of warfare of this age[,]”).
447 The Uzbeki people are a Central Asian nationality that traces their ancestry to Uzbek Khan, grandson of Genghis Khan. AHMED RASHID, JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA 23 (2002).
448 Uzbekistan, with the capital city in Tashkent, is a landlocked, arid, predominantly Muslim nation slightly larger than California which 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. 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_, at 85.
449 Id. at 173.
450 Id. at 136-50.
451 See id. at 8, 137-50 (tracing IMU financing to Saudia and Iranian intelligence agencies and to Islamic charities in the West). IMU, Al-Qaeda, and other allied Islamic terrorist organizations maintain front businesses and solicit donations from Muslim charitable organizations to support their operations. http://www.state.gov/www.state.gov/www/regions/africa/fsbinLadin.html;
452 See RASHID, supra note_, at 137-50 (detailing the sources of IMU finance, including trafficking of heroin and other opium products between Central Asia and Europe).
453 Id. at 4, 85.
454 Id. at 192 (quoting General Tommy Franks, U.S. Army, U.S. Central Command (commanding) (now retired)).
455 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 http://www.fas.org/irp/world/para/ladin. It is commanded by the charismatic Usama bin Laden, the wealthy son of a Saudi businessman, who has ordered all Muslims to kill US 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 11th, 2001 which killed more than 3,000 innocents, mostly civilians. Prior to
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 2003 IMU-Al Qaeda forces had defeated the Uzbeki Army in a series of battles. Success bred converts, and early 2004, IMU forces, bolstered by additional troops drawn from allied Islamic terrorist organizations, captured Tashkent, executed President Karimov, and proclaimed the Islamic Emirate of Uzbekistan. 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), 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.

Worse was to come: in summer 2004, U.S. human intelligence sources reported that an international gathering of terrorists in Tashkent had assembled to plan the “eviction of the U.S. from the Muslim world and the liberation of Jerusalem,” and, on the third anniversary of September 11th, 2001, members of Al Qaeda launched simultaneous attacks upon U.S. and international targets across Central Asia, destroying the U.S. embassies in Tashkent, Astana, Kazakhstan, and Ashgabat, Turkmenistan, the offices of the Amoco Oil Company in Astana and Dushanbe, Tajikistan, the offices of the World Bank and the UN 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 U.S. Central Intelligence Agency and the Federal Bureau of Investigation.

The U.S. immediately declared a national emergency, passed domestic legislation authorizing military action against those responsible, and dispatched investigatory teams to Central Asia. In the 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. CIA World Factbook, supra note __, Afghanistan.

Events presented from July 2003 and forward are fictional.

See Testimony of Ambassador Michael A. Sheehan, Coordinator for Counterterrorism, U.S. Department of State, Hearings Before the Subcomm. on Near E. and S. Asian Affairs of the Senate Foreign Relations Comm., 106th Cong. (Nov. 2, 1999) (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).

See IACOPINO, supra note __, at 27 (noting that the victorious Taliban renamed the country the “Islamic Emirate of Afghanistan”).

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, and President Bush demanded that the Yuldashev regime either extradite a list of suspects, including Usama bin Laden, or else accept responsibility for their actions on the theory of vicarious state responsibility. Yuldashev, disclaiming any criminal association with bin Laden, refused to surrender any Muslim suspects without a determination of their guilt in an Islamic court; 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. Outraged, 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.” Late in 2004, the day after the U.S. announced the major enhancement of the capabilities of its special operations forces, a joint U.S.-Israeli intelligence operation determined that several Iraqi microbiological scientists who had escaped after the fall of the Saddam Hussein regime in April 2003 had surfaced only to recommence their work in Uzbekistan, sparking fears that the Yuldashev regime was

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 twentieth. GEORGE W. BUSH (Patterned after the Declaration of the same title issued on September 14th, 2001 in response to the attacks on September 11th). 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 U.S. 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 (note). The Joint Resolution further authorized the President to “use United States Armed Forces against those responsible for the recent attacks launched against U.S. nationals, property, and interests in Central Asia” and provided that such authorization was consistent with the requirements of the War Powers Resolution. (Note).

The sheltering of members of other tribes is an ancient Central Asian tradition followed by contemporary terrorists of the region that is agnostic as to the moral virtue, or lack thereof, of the guest, 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[,]”). 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 U.S. citizens and interests. See El-Ayyouty, supra note _, at 492 (noting issuance of a fatwa, or religious commandment, by bin Laden in 1996 calling for war of genocide against Americans).

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).

This is the precise position taken by the Taliban regime with respect to bin Laden and other members of Al Qaeda upon the U.S. demand for their extradition to the United States in 1998. See Taliban Willing to Discuss What to Do With Osama bin Laden, AGENCY FRANCE PRESS, Aug. 29, 1998 (reporting an agreement reached with the Taliban to try members of Al Qaeda in an Islamic court provided the U.S. provided credible evidence).

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).


The U.S. Special Operations Command [“SOCOM”], 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 Thom Shanker, Jump in Elite Forces’ Budget Foreseen, N.Y. TIMES, Jan. 8, 2003, at A10.


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 dispered to China, Syria, Iran, and Egypt, ostensibly to resume such work in those states. See Annual Report: Adherence to and Compliance with Arms Control Agreements 9,
developing biological weapons.\textsuperscript{474} The following week the Uzbek government official responsible for weapons programs defected while at a conference in London, corroborating CIA reports and providing additional details, including partial information about Al Qaeda plans to deploy BWs in reservoirs across the U.S.\textsuperscript{475} The Director of Homeland Security,\textsuperscript{476} in consultation with the Defense Threat Reduction Agency,\textsuperscript{477} estimated that Uzbekistan was less than ninety days from testing its arsenal\textsuperscript{478} and ordered his staff to begin planning the declaration of martial law and the commandeering of vaccinations.\textsuperscript{479}

http://www.acda.gov/reports/annual/comp97.htm. 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.\textsuperscript{476} 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 infection by a target population to create an epidemic, which are capable of auto-reproduction), such as anthrax, choler, ebola, plague, and yellow fever; 2) toxics (consisting of harmful substances produced by living organisms but which are not themselves living organisms and are thus incapable of reproduction), such as botulim and staphilococcus; and 3) chemical agents (consisting of inorganic, harmful substances), such as mustard gas and chlorine. See Matthew S. Meselson, \textit{Chemical and Biological Weapons}, \textit{SCIENTIFIC AM.}, May, 1970, at 303 (discussing taxonomy of poisonous weapons); James R. Ferguson, \textit{Biological Weapons and U.S. Law}, 278 J. AM. MED. ASSOC. 357, 359 (1997) (discussing various categories of infectious and toxic agents).


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 can thus be ported and distributed to great operational effective without the use of significant manpower. See Robert P. Kadlec et al., \textit{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 in 1998 WL 14095268 (“Five pounds of anthrax, properly dispersed, would kill over 200,000 in Washington, D.C.”); see also \textit{Vaccine Improves Odds Against Anthrax}, REGULATORY INTELLIGENCE DATABASE, Apr. 6, 1998, available in 1998 WL 194056 (F.D.C.H.) (“When inhaled, an unvaccinated, unprotected person has about a one percent chance of surviving a concentrated anthrax exposure.”) (discussing the chance of survival after inhaling anthrax used as a biological weapon). 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. \textit{Id}. 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, “\textit{Then the Dogs Died}”: \textit{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, \textit{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).

See Burrus M. Carnahan, \textit{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, \textit{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).

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 U.S. from terrorist threats or attacks. See \textit{The White House, the Office of Homeland Security}, at http://www.whitehouse.gov/homeland/

Over the past seven years the U.S. 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 U.S. nuclear weapons was sufficient, the troubling diffusion of BWs has altered U.S. calculations. In 1996, Congress passed legislation in recognition of the fact that the U.S. lacked adequate plans and countermeasures to defeat the threat posed by the possession of BWs by terrorists and rogue states. See \textit{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 \textit{Nunn-Lugar Amendment No. 4349}, S. 1745, 104\textsuperscript{th} Cong. (1996) (noting that no specific response unit existed for emergencies involving chemical or biological weapons). After President Clinton issued Executive Order 12,868
This revelation did not catch the U.S. completely by surprise: although Uzbekistan ratified the Biological Weapons Convention (“BWC”) in 1996, 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, and the notion that a small and impoverished state could inflict massive devastation upon the U.S. had been on the minds of policymakers for over a decade. However, the BWC did not of its own effect constitute prior authorization of the use of military force to ensure compliance, and the 2001 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., 1st Sess. (1997) (finding further, throughout Title II, §207(a), that the “threats posed in chemical and biological weapons to the 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 that “the United States Armed Forces should make countering the use of chemical and biological weapons an organizing principle for U.S. 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 prepare the U.S. for an attack against it using BWs. See U.S. Lags in Biological Warfare Protection Threat Said to Be On the Rise, NEW ORLEANS TIMES-PICAYUNE, 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, the then-secret executive branch conference revealed the magnitude of U.S. 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. Dept’t of Defense, Establishment of the Defense Threat Reduction Agency, Research Intelligence Database, Oct. 1, 1998 (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 DTRA, upon assuming his post, warned that “[t]he deterrent capability of the United States is still very effective against national states . . . [but] . . . it’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 FRANCE PRESSE, Oct. 2, 1998 (cited in Matthew Linke, 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)). Although DTRA has centralized responsibility for enhancing U.S. capacities to respond to and deter BW attacks launched against the U.S., the employment, by terrorist groups, of BWs against the U.S. remains the most immediate and serious threat facing the nation. EISENDRATH, supra note __, at 15.

479 See Michael Lacey, Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction, 10 IND. INT’L & COMP. L. REV. 293, 293 (positing, in a fictional scenario, a U.S. 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).

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

477 See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction, entry into force 1975 (“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 __, at Art. 16. However, current prohibitions and regulations derive from the instruments of IHL governing chemical weapons, which preceded BWs to the arsenals of belligerents. The Hague Convention (IV) of 1907 (supra note __ at 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, 26 U.S.T. 571, T.I.A.S. No. 8061. 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.

476 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).

475 See Michael Mandelbaum, Lessons of the Next Nuclear War, FOR. 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.”).

474 See Fred C. Ikle, The New Germ Warfare Treaty is a Fraud, WALL ST. J., Jul. 27, 2001 (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, Symposium: 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 Linke, supra note __ 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

480 See Scott Silliman, Symposium: 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 Linke, supra note __ 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
collapse of the BWC Protocol, which would have appended enforcement mechanisms to the treaty, left the U.S. in search of multilateral enforcement mechanisms to secure Uzbek compliance with the BWC. Although the U.S. 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 U.S. plans to eradicate Iraqi WMD in the mid-1990s).

Ironically, although the U.S. 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, U.S. Special Negotiator for Chemical and Biological Arms Control Issues, Statement by the United Nations to the Ad Hoc Group of Biological Weapons Convention States Parties, Geneva, Switz. (Jul. 25, 2001), at http://www.state.gov/t/ac/rls/rm/2001/5497.htm (presenting grounds upon with the Bush Administration rejected the proposed BWC Protocol); see also Alexander Higgins, U.S. Rejects Anti-Germ Warfare Accord, ASSOC. PRESS, Jul. 25, 2001 (“In our assessment, the draft protocol would put national security and confidential business information at risk.” (quoting Ambassador Mahley). Although a majority of the 56 states in attendance favored adopting the Protocol, an instrument that represented the fruits of 7 years’ negotiation, following the U.S. withdrawal from the Review Conference talks were suspended. Germ Warfare Talks Suspended: U.S. Pullout Makes Accord Useless, Delegates Say, ASSOC. PRESS, Aug. 4, 2001. Many commentators expressed outrage at the U.S. position; UN Secretary General Kofi Annan stated that the U.S. is “practically standing alone in opposition to agreements that were broadly reached by just about everyone else” and urged the U.S. to “close ranks with the rest of the international community.” Id. To date, talks have not resumed, and the BWC continues to lack any enforcement provisions.

When UNSCOM, the U.S. 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 U.S. 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.

When the UN 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 a series of escalating measures in response, ranging from the creation of an investigative and advisory commission to the imposition of an economic embargo on the offending state and ultimately to the authorization of the use of force against the offender. See Charter of the United Nations, supra note 7, at 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 Wedgewood, 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 are required by UNSCR 687, the Secretary-General of the UN, Kofi Annan, insisted that ‘some sort of consultation with other members’ was required before enforcement action could be undertaken).

The issuance of a UN Security Council resolution under Chapter VII of the UN 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 UNSCR 865, U.N. SCOR, 3280th mtg., U.N. Doc. S/RES/865 (1993) (condemning attacks on UN personnel and “reaffirm[ing] that those who have committed or 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, 112 (2000) (making this assertion).
to spend months making such a demonstration, was hesitant to provide.\footnote{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 UN 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 glacial pace of the UN 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, 85 U.C.L.A. J. INT'L L. & FOR. AFF. 135, 152-53 (2000) (describing determination of material breaches of peace and security as “plodding” and subject to the “whim of whatever 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 (2000); see also Linkie, supra note _, at 573 (explaining that the U.S. 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 U.S. continued to face claims, contrary to the evidence, that the facility was engaged in the benign purpose of producing animal feed and that the U.S. strike was an unlawful reprisal. Linkie, supra note _, at 569. For a discussion of this case, see Pentagon and C.I.A. Defend Sudan Missile Attack, N.Y. TIMES, Sept. 2, 1998, at A5; Serge Schmemann, U.S. Fury on Two Continents, How Can Terror Best Be Combatted, N.Y. TIMES, Aug. 21, 1998, at A11. Russian, Chinese, and French opposition to military action to enforce relevant Security Council Resolutions requiring Iraq to disarm prevented the use of UN collective security, and thus upon the Iraqi suspension of UNSCOM activity in August 1998 the UN, 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 _, at 101 (discussing the failure of collective security and enforcement of Security Council resolutions in the case of Iraq).} A Russian-Chinese-French bloc prevented the issue from coming to a vote,\footnote{Russian, Chinese, and French opposition to military action to enforce relevant Security Council Resolutions requiring Iraq to disarm prevented the use of UN collective security, and thus upon the Iraqi suspension of UNSCOM activity in August 1998 the UN, 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 _, at 101 (discussing the failure of collective security and enforcement of Security Council resolutions in the case of Iraq). and with Iraq and Iran sitting as heads of the UN Disarmament Committee\footnote{See El-Ayouty, supra note _, at 496 (recommending that the U.S. create a pan-Islamic military force to acquire both the military strength, intelligence cooperation, and political legitimacy necessary to defeat Islamic terrorists).} and no further assistance forthcoming in the UN system, the U.S. shifted diplomatic gears and attempted to assemble a “coalition of the willing” to compel Uzbeki compliance, commencing with NATO and U.S.-allied Islamic states.\footnote{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) UN Security Council Resolution 687 of April 3, 1991, which expressly linked the ceasefire ending the First Gulf War with “unconditional . . . acceptance” of the elimination of WMD and verification by UNSCOM (see UNSC Res. 687 (April 3, 1991), 30 ILM 847 (1991)), 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 the peace and security the restoration of which UN members were authorized, by UNSC Res. 687 to effect. See Wedgwood, supra note _, at 724 (1998) (discussing legal justifications for coalition operations against Iraq). In other words, everything hinged upon UNSCR 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 precisely this sort of evidence that, in the scenario in this Article, the U.S. is unwilling to publicly disclose.\footnote{See Frontline: Interviews: William S. Cohen, 3-4 (http://www.pbs.org/wgbh/pages/frontline/shows/plague/interviews/cohen.html) (cited in Keefer, supra note _, at 114) (quoting the former Secretary of Defense with respect to responses to the use of WMD against the U.S.)} and no further assistance forthcoming in the UN system, the U.S. shifted diplomatic gears and attempted to assemble a “coalition of the willing” to compel Uzbeki compliance, commencing with NATO and U.S.-allied Islamic states. However, in the absence of a Security Council resolution authorizing force, only Britain, Australia, Italy, Poland, and Croatia, states with whom the U.S. had shared all or some of its sensitive intelligence, committed to a U.S.-led coalition,\footnote{See Frontline: Interviews: William S. Cohen, 3-4 (http://www.pbs.org/wgbh/pages/frontline/shows/plague/interviews/cohen.html) (cited in Keefer, supra note _, at 114) (quoting the former Secretary of Defense with respect to responses to the use of WMD against the U.S.)} and in a press conference denouncing NATO and Security Council inaction the President of the U.S. 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.”\footnote{See Frontline: Interviews: William S. Cohen, 3-4 (http://www.pbs.org/wgbh/pages/frontline/shows/plague/interviews/cohen.html) (cited in Keefer, supra note _, at 114) (quoting the former Secretary of Defense with respect to responses to the use of WMD against the U.S.).}
On January 3, 2005, electronic intercepts of telephone and radio communications between senior members of Al Qaeda and Uzbeki officials corroborated the reports of U.S. agents within the Uzbeki opposition that the Namangani regime and Al Qaeda were collaborating on the production and planned use of BWs, and the next day a Special National Intelligence Estimate presented by the Director of the Central Intelligence Agency (“DCIA”) to the President concluded that the Government of Uzbekistan, in consortium with Al Qaeda, was producing and stockpiling weapons-grade anthrax and ebola in an ancient mosque in a densely populated urban neighborhood in Namangan (a city of 430,000 in the northern Fergana Valley), that Usama bin Laden had ordered a wave of BW attacks on major U.S. cities to commence with the inauguration of the President on January 20, and that in preparation the stockpiled weapons were to be moved to Al Qaeda cells in the U.S. within 48 hours. 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 options and ordered CJCS to present plans to

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494 The National Security Agency (“NSA”), the federal agency charged with the protection of U.S. government communications and the interception of foreign communications, or SIGINT, intercepted and decoded exchanges between the Qadhaffi regime and the Libyan People’s Bureau in East Berlin, including an order from Libya to carry out a terrorist attack on U.S. 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 http://www.nsa.gov.

495 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.

496 The sitting 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 at note_ (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 at note_.

497 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. Linkie, supra note_, 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 supra at note_.

498 A congressional investigation suggests up to 70,000 members trained by Al Qaeda are in the U.S. prepared to initiate terrorist missions on command. David Pace, Up to 120,000 Were Trained by al-Qaeda, Senator Says, ASSOC. PRESS, Jul. 14, 2003.

499 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 UN Security Council, satisfy the requirements of IHL with respect to the right under jus ad bellum to undertake military action, 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[,]” 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_, at 17-18; see also Johnson, supra note_, at 303-04 (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 UN, 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_, at 567 (stating that the political advantage of submitting military operational plans to multilateral bodies such as the UN for approval is more than outweighed by the compromise of secrecy and that by publicizing operational plans “[a] country may even have to reshape its military operations in order to avoid alerting the enemy[,]”). 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 Loch K. Johnson, On Drawing a Bright Line for Covert Operations, 86 AM. J. INT’L L. 284, 284-85 (1992) (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.” EISENDRATH, ED., supra note_, at 83. Thus, even if overt options might generally more defensible, legally and politically,
conduct a covert operation with the primary mission to protect the destruction of the BWs and the secondary objective to capture or eliminate bin Laden if found at or near the target. The plan provided that neither the participation of U.S. Armed Forces nor responsibility for the results was to be attributed to the U.S. until the President authorized such disclosure. The proposed rules of engagement ("ROEs")

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 note _, at 305.

A "mission" is "the primary task assigned to an individual, unit, or force" and "the elements of who, what, when, where, and the reason therefore," DEP'T ARMY, FM 101-5-1, OPERATIONAL TERMS AND SYMBOLS 1-47 (21 Oct. 1985).

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, 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 Rene Beres, On International Law and Nuclear Terrorism, 24 GA. J. INT'L & COMP. L. 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 [U.S.] shall engage in, or conspire to engage in, assassination." E.O. 12,333, 46 Fed. Reg. 59,941 (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. 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, TEMPLE 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 U.S. has continued post-E0 12,333 to engage in "the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or U.S. 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, 43 MERCER L. REV. 615, 635 (1992) (stating that the definitional ambiguity attached to the term "assassination" allows for a flexible approach that "leaves potential adversaries unsure as to exactly what action the U.S. 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 David E. Sanger, 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); Paul Richter, Clinton Administration Reserves Right to Assassinate Terrorists, MINN. STAR TRIB., Oct. 30, 1998, at A23. Consequently, the U.S. Army maintains that "the 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." Alan Enisman, Ineffectiveness at Its Best: Fighting Terrorism with Economic Sanctions, 9 MINN. J. GLOBAL TRADE 299, 323 (2000) (citing U.S. Army sources).

"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 JOINT CHIEFS OF STAFF PUBLICATION 1-02, DOD Dictionary of Military and Associated Terms 23 (Mar. 23 1994) (defining ROEs as "[d]irectives issued by 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 conduct a covert operation with the primary mission to protect the destruction of the BWs and the secondary objective to capture or eliminate bin Laden if found at or near the target. The plan provided that neither the participation of U.S. Armed Forces nor responsibility for the results was to be attributed to the U.S. until the President authorized such disclosure. The proposed rules of engagement ("ROEs")
drafted by the Office of the Staff Judge Advocate, Task Force Ryan, 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 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, approved a CJCS plan, OPERATION JEREMIAH, 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 18 hours. Although the President instructed his staff to “do what needs to be done and worry about the legal niceties later[,]” the White House Office of Legal Counsel drafted a Memorandum outlining relevant legal authority and a finding in support of the operation:

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

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.” Martins, supra note _, at 5 (citing Graham v. Connor, 490 U.S. 386, 396-97 (1989)).

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 _, at 169.


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.”). See ASSOC. PRESS. Martial Law Possible in Biological Terror Scenario, Aug. 4, 2001 (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.).

For an example of a memorandum of law providing the President with a legal opinion as to the authority of the President to commit U.S. Armed Forces to engage in operations, see Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 13 Op. Off. Legal Counsel 8, Dec. 4, 1992.

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.

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, Aug. 14, 1991, at §503(a) (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 operations, the mere fact of special operations forces participation in a military mission does not convert a traditional military mission into a covert operation, which is legally distinct in that the role of the U.S. is intended 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 (reporting impending amendment of Intelligence Authorization Act of 1991).
The next evening—a moonless night—twenty-four U.S. Army Special Forces soldiers of the 3rd Special Forces Group, headquartered at the JFK Special Warfare Center in Fort Bragg, North Carolina but already prepositioned in Afghanistan and trained for OPERATION JEREMIAH, 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 and 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 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 un molested toward their objective.

A dozen lightly armed sentries in Islamic civilian dress, posted in the porticoes, surrounding gardens, and twin minarets, guarded the compound. Within minutes Alpha One established perimeter security while Alpha Two moved into position, quickly and quietly eliminated the sentries, and accessed

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510 The United States Special Operations Command (“USSOCOM”) was formed on 1 April 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 P.L. 99-661, §1311 (1986) (“Cohen-Nunn Amendment”) (Nov. 14, 1986) (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 (1986), P.L. 99-145, 99 Stat. 760 (29 July 1985) (codified at §1453) (providing that “The special operations forces of the Armed Forces provide the United States with immediate and primary capability to respond to terrorism.”); 10 U.S.C. §167(j) (providing that the statutory missions of special operations forces include “short-duration, small-scale offensive activities such as raids, ambushes, hostage rescues, and ‘surgical’ strikes to neutralize, seize, or destroy critical targets that could include weapons of mass destruction and associated production facilities” and counterterrorism). Special operations forces are “specially trained, equipped, and supported for a specific target whose destruction, elimination, or rescue . . . . is a political . . . imperative.” CHAIRMAN OF THE JOINT CHIEFS OF STAFF, Joint Pub. 3-05 (Test), Doctrine for Joint Special Operations (1990), at E-5. Special operations, governed by political considerations, “requir[e] clandestine, covert, or low-visibility technique[,]” and they differ from conventional operations in the “degree of physical and political risk . . . [and] operational techniques.” Id. 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 _, at 204.

Special forces, drawn from each of the components of the Armed Forces and task 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. U.S. 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 12-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.

511 U.S. Army Special Forces troops have been posted to a number of locations in or near the Middle East and Central Asia following September 11th. 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 SF 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 (reporting increase in U.S. Special Forces presence in Yemen in 2002).

512 U.S. 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 ASSOC. PRESS, Reviewing Ideas for Fighting Terrorists, N.Y. TIMES, Aug. 3, 2002, at A10 (reporting high-level covert operations planning within SOCOM for counterterrorist mission post-September 11th).
the building. While Alpha One maintained security, Alpha Two moved through the assembly, down the ornate corridors, and into the *madrasa*, where, within 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. While Alpha Two collected samples and planted a series of incendiary, chlorine dioxide, and high explosive devices throughout the weapons cache, Alpha One, maintaining security, began to come under 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 U.S. 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 U.S. fire. Despite their best efforts, which included the use of non-lethal weapons such as blinding lasers and riot control agents to disorient and disable attackers, the Alpha teams were unable to prevent civilian casualties as they defended against the Al Qaeda assault, and by the time the MH-60 Black Hawk helicopters began circling overhead, hundreds of bodies littered the streets surrounding the Central Mosque. As several companies of Uzbeki infantry encircled U.S. 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 U.S.S. 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 and the flames jumped to nearby houses, and within a quarter hour a series of explosions tore through the

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514 The destruction of anthrax requires either extremely high temperatures or exposure to potent biocides such as chlorine dioxide. See [http://www.epa.gov/epahome/hi-anthrax.htm#FORRESPONDERS](http://www.epa.gov/epahome/hi-anthrax.htm#FORRESPONDERS). The oxidizing effects of chlorine dioxide are enhanced by high temperatures. See [http://www.inchem.org/documents/icsc/icsc_eics0127.htm](http://www.inchem.org/documents/icsc/icsc_eics0127.htm). Consequently, the choice of a combination of incendiary, biocidal, and explosive devices would likely be used to neutralize a large volume of anthrax.

515 This practice was employed by Somali warlords to some effect against U.S. forces operating to provide humanitarian relief during the civil war in Somalia in 1992-1993. See Lorenz, *supra* note_, at 36 (discussing numerous violations of IHL by Somali warlords during the Somali Civil War).

516 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.”).

517 “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. DEPT ARMY, FIELD MANUAL 19-15, ch.9, Riot Control Agents (25 November 1985).

518 Even where women and children divest themselves of the privileges of noncombatancy by taking up arms, members of the U.S. Armed Forces are very reluctant to fire upon them. See Lorenz, *supra* note_, at 39 (describing emotional difficulties encountered by U.S. 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.*
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 U.S. forces departed Uzbekistan, the UN 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,”519 that there was no distinction between terrorists and those who harbored them, that “in light of the present anarchic and hostile world environment the U.S. must defend itself in every possible way,”520 that “the world had reverted to [a] primitive system,”521 because the Security Council had “repeatedly and materially breached its obligations to the world community” and “damaged its credibility as an enforcer of international law,”522 that the U.S. 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.”523 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 “today we have done what we had to do. If necessary, we shall do it again.”524 The President stated further that the “reckless threats and attacks on Americans” had created an “imminent danger” against which the U.S. was “entitled to take measures necessary to defend our nation and its people.”525 Although the U.S. “regretted the loss of civilian life,”

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 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 UN and NATO to play a serious role in the maintenance of peace left us no choice but to act alone.526

The President stated that although the U.S. 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

519 See Al-Ayouty, supra note __, 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 cooperates internationally with the extradition or the apprehension in prosecution and punishment of all those implicated in th[e] genocidal war against the American people.”).

520 Johnson, supra note __, at 293-94.


522 Lysobey, supra note __, at 103-04.


524 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.


526 This “quote” is very loosely patterned after the statement offered by President William Clinton as justification for U.S. attacks against Al Qaeda in 1998. Statement of President William Jefferson Clinton, Aug. 18, 1998.
Rules,”527 because “the world isn’t Beverly Hills, it’s a bad neighborhood at two o’clock in the morning.528 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 that

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.”529 The “survival of states is not a matter of law,”530 but rather a question of courage. We will 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.”531

The next day, President Yuldashev angrily denounced OPERATION JEREMIAH, which he claimed was responsible for more than 800 civilian casualties,532 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 U.S. action failed in the face of a U.S.-UK veto,533 the UN Secretary-General angrily condemned the operation in an open letter published in the New York Times, the General Assembly passed a resolution in denunciation,534 calling upon the U.S. to “arrest and prosecute those responsible for war crimes and crimes against humanity in accordance with international law,”535 and most of the “street” across the world, viewing pictures of the carnage and the destroyed mosque, was outraged.536 Within forty-eight hours,

527 Johnson, supra note _, at 293-94 (quoting an unidentified former CIA officer).
528 See Johnson, supra note _, at 293-94 (quoting a statement by G. Gordon Liddy, former CIA officer and Watergate conspirator, made on the campus lecture circuit).
529 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), at http://www.whitehouse.gov/news/releases/2002/05/20020523-2.html.
530 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).
531 See Job 21:17, 18.
532 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 30% or more of the “civilian” casualties reported in the U.S. invasion of Panama in 1989 were in fact members of the Noriega-led Panamanian Defense Forces who chose to fight in civilian clothing).
536 Much of public opinion across the globe was intensely critical of the U.S. 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 utilized 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 _, at 17-18.
international anti-U.S. sentiment exploded when CNN began broadcasting reports 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 U.S. offered to airlift antibiotics and experts from the Center for Disease Control, President Yuldashev rejected the U.S. offer, and within five days post-raid more than seventy-five thousand Uzbekis were dead. A joint communiqué promulgated by the League of Arab States and the Organization of the Islamic Conference condemned the “use of biological weapons against Uzbeki civilians” as an “unlawful act of aggression and a crime against humanity,” and the UN Secretary-General met with President Yuldashev in Tashkent and demanded that the U.S. 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 U.S. 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 U.S. action were thus directly attributable to Al Qaeda and to the Uzbeki Government; consequently, the U.S. would not be investigating any parties involved in the operation but would rather 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 90% 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 U.S. attack on the Central Mosque and requesting 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.” Within a week, the Prosecutor concluded on the

537 Journalists evaluating the claims of innocence proffered by rogue regimes and terrorist groups in response to U.S. 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 _, 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).

538 The incubation period for inhaled varies between 1-5 days, but exposure left untreated for the first twenty-four hours is fatal in over 90% of cases. Keefer, supra note _, at 110 n.9.

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

540 Uzbekistan signed the Rome Statute on December 29, 2000, although as of July 2003 has not ratified that instrument. For a list of current parties, see http://untreaty.un.org/ENGLISH/bible/englishintertembible/partI/chapterXVIII/treaty10.asp. Non-party states may accept the jurisdiction of the ICC in a particular case. Rome Statute, supra note _, at 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 7 year period. Rome Statute, supra note 32, at 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 UN 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.

541 Id. at Art. 14(1).
basis of information submitted by Uzbekistan, other UN members, and human rights NGOs that a reasonable basis existed to investigate, and he submitted to the Pre-Trial Chamber a request for authorization. The Pre-Trial Chamber found a “reasonable basis to proceed” and that the case was within ICC jurisdiction and thus authorized the investigation. U.S. efforts to procure a Security Council resolution deferring the investigation for 12 months were trumped by a Sino-Soviet veto.

On March 15, 2005, after a month-long investigation during which an additional 40,000 Uzbek 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 SOCOM, 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. Although the U.S., a non-party to the Rome Statute, brought a jurisdictional challenge, the ICC, self-determining its jurisdiction, held that the case was properly before it and that the U.S. decision not to investigate was made to shield persons from criminal responsibility, rendering it admissible. The indictment charged all defendants with “Crimes Against Humanity” under Article 7(a), (f), and (k) and “War Crimes” under Article 8(2)(a)(i), (ii), (iii), and (iv)

542 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. at Art. 15(2).
543 Id. at Art. 15(3). Under these circumstances—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, 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.
544 Rome Statute, supra note, at Art. 15(4).
545 See id. at Art. 16 (providing that the UN Security Council may adopt a resolution under Chapter VII deferring an investigation or prosecution for a renewable 12-month period); see also Todd M. Sailer, The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Disavowal of U.S. Objections (elaborating the “Singapore Compromise” achieved at the drafting conference which permits deferral of an investigation or prosecution if all 5 permanent members of the Security Council “believe that the ICC would interfere with the Council’s efforts to further international peace and security.”). The power of the UN Security Council to block the exercise of ICC jurisdiction is predicated upon Article 103 of the UN Charter (the international “Supremacy Clause”) which ensures that “In 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.” UN Charter, supra note, at Art. 103. The Security Council has exercised this power previously. See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom and U.S.) (Provisional Measures) (Orders of 14 April 1992), ICI Rep. 1992, at 1 (holding that UN Security Council could, under UNSCR 748 (1992) 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 U.S. 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).
546 The prosecution of senior U.S. 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 FRYE, supra note, at 1 (noting that in 1999 the Russian Foreign Minister denounced the NATO campaign in Kosovo and called for U.S. and NATO commanders to be prosecuted in the ICTFY).
547 See Rome Statute, supra note, at Art. 19 (providing that the ICC “shall satisfy itself that it has jurisdiction[,]”).
548 See id. at 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 considered whether “[t]he 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. HEBEL ET AL., supra note, at 131. Others suggest that “the [ICC] could find the case admissible and exercise its jurisdiction, rather than defer to [U.S.] 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, at 11. Several scholars question further whether a U.S. decision to investigate, followed by a decision not to prosecute, would be shielded by the doctrine of complementarity. See, e.g., David, supra note, at _.
549 “Crime 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, at Art. 7.
and 8(2)(b)(i), (ii) (iii), (iv), (ix), (xiii), (xvii), (xviii), (xx), and charged the President and the Defense Secretary with command responsibility for “Aggression” under Articles 5, 25, 27, and 28.  

550 See id. at 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[,]”); id. at Art. 8(2)(b) (defining as “war crimes” other “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 retaliation 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[,]”).  

551 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 _, at 165, 167. Command responsibility is “the legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of his subordinates,” DEPT OF THE DEP’T OF DEF., FIELD LETTER, 101-5, 1-1 (May 1997). The contemporary formulation provides that criminal 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 ARMS 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, COMMAND AND THE LAWS OF ARMED CONFLICT 35 (1993). 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 for all acts performed by the persons in the execution of such plans.” 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 for all acts performed by the persons in the execution of such plans.” 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 for all acts performed by the persons in the execution of such plans.” 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 for all acts performed by the 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Count One charged all defendants with crimes against humanity 556 for “engaging in a conspiracy to commit, and committing, an armed attack on the Central Mosque in Namangan, Uzbekistan, a civilian house of worship, on or about January 5th and 6th, 2005, 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, 557 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 2444 558 and 3675, 559

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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 _, 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 _, at 141.

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 _ (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 the purpose 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, or 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 the use of any weapons by 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[j].”). OSIEL, supra note _, at 464.

See Rome Statute, supra note _, at 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[,]”).

See id. at 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[,]”).

See id. at Art. 28 (establishing command responsibility liability by providing that a “military commander . . . shall be criminally responsible for crimes . . . committed by forces under his or her effective command and control . . . where [t]he . . . 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 . . . that . . . person failed to take all necessary and reasonable measure within his or her power to prevent or repress their commission or to submit the matter to competent authorities for investigation and prosecution.

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 persecution on political, racial, or religious grounds[.]” Charter of the IMT, supra note _, at 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, Case No. IT 94-1- T, Opinion and Judgement, paras. 639-43, Trial Chamber, ICTFY, May 7, 1997, reprinted in 36 I.L.M. 908, 939-41 (1997) (citing Article 5, ICTFY) (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 . . . a time of armed conflict” under the direction of an official policy. Fenrick, supra note _, 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 _, at 849 (noting that suspects have been charged in predecessor tribunals with war crimes and crimes against humanity for the same acts).

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, Dec. 10, 1984, U.N. GAOR, 39th Sess., Supp. 51, at 197 (defining torture as an intentional act inflicted by or under the responsibility of public officials that causes severe pain).

556 See General Assembly Resolution 3675, Basic Principles for the Protection of Civilian Populations In Armed Conflicts, GA Res. 3675, 25th Sess., Resolutions, (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.”). See 1907 Hague Regulations, supra note _, at Art. 26 (providing that the “commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.”).

557 See GCIV, supra note _, at Art. 3(1)(a) (prohibiting the application of “violence to life nad person, in particular murder of all kinds, mutilation, cruel treatment and torture” to civilians and to combatants rendered hors de combat); id. at 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 punishment, [and] mutilation, “”) at Art. 53 (prohibiting “[a]ny destruction . . . of real or personal property . . . except where such destruction is rendered absolutely necessary by military operations.”).


559 See API, supra note _, at 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.”).

560 See API, supra note _, at Art. 51(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 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.]”

561 See API, supra note _, at Art. 52 (“(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 of 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.”).

562 See API, supra note _, at Art. 53 (“(1) It 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.”).

563 See API, supra note _, at Art. 56 (“(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
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 destruction in a manner calculated 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,"
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 justification or authorization,” employed armed force against the territorial integrity and political independence of Uzbekistan in a manner inconsistent with the Charter of the United Nations, in derogation of the “independence and freedom of the Uzbeki people,” and in contravention of the “clear pronouncement [established at Nuremburg] that aggressive war is a crime.” The indictment stated further that “the U.S. was not the victim of an armed attack and OPERATION JEREMIAH was a prima facie act of aggression.” The Pre-Trial Chamber issued arrest warrants for all defendants, and the Prosecutor forwarded copies to the Secretary of State requesting cooperation in their arrest and surrender in accordance with Articles 87, 89 and 93.

The U.S. Ambassador presented this address the next morning in the UN Security Council.

It is my solemn duty to report that after the U.S. acquired clear and compelling information concerning plans by Al Qaeda, a terrorist organization aided and abetted by the Government of Uzbekistan, to infiltrate the U.S. 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 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 _, at Art. 8(2)(b)(iv).

See Case Concerning the Military and Paramilitary Activities In and Against Nicaragua Nicaragua v. U.S., ICJ 1986 (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 UN Security Council but not an act of anticipatory self-defense).

See David, supra note _, at 403-04 (stating that the risk to the U.S. of being subjected to charges of aggression before the ICC arises “only where the U.S. acts 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 (“FRY”) in 1999 absent UN Security Council authorization, FRY sued NATO members on ten separate counts in the ICJ alleging, inter alia, that the bombing was an illegal act of aggression. See Legality of the Use of Force (Yugoslavia v. United States) (http://www.icj-cij.org/icjwww/idocket/iyuk/iyukframe.htm) (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).

See UN Charter, supra note _, at 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[].”)

Quincy Wright, The Law of the Nuremburg Trial, 41 AM. J. INT’L L. 1, 1 (1947). Although the Nuremburg 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, I 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 the 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 _, at 12.

David, supra note _, at 395 (warning that the ICC may disagree with the U.S. as to the propriety of a particular use of force).

See Rome Statute, supra note 59.

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

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

See id. at 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[].”)

See id. at 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.”).

See id. at 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).


See President Bush, Address to the United Nations Security Council, Oct. 7, 2001 (“If any government sponsors the outlaws and murderers and killers of innocents, they have become outlaws and murderers themselves.”).
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 UN Charter548. States and their

548 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); Caroline Case (note) (permitting self-defense where “the necessity ... is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”). However, the UN 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-defense 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-Defense—Appraising the Impact of the September 11 Attacks on Jus Ad Bellum, 36 INT’L LAWYER 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 __, at 307 (“Without the sine qua non of imminence, [preemptive] self-defense becomes nothing more than the slippery slope of naked aggression.”); IAN BROWNLEE, 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 Oscar Schachter, The Right of States to Use Armed Force, 82 MICH. L. REV. 1620, 1634 (1984); William V. O’Brien, Reprisals, Deterrence and Self Defense in Counterterror Operations, 30 VA. J. INT‟L L. 421, 478 (1990) (supporting right of preemptive self-defense). 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 __, 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 horn in the side of IHL, and the UN, since the 1960s. See U.N. SCOR 188, Apr. 9, 1964 (rejecting Portuguese claim of self-defense in the shelling of Senegal); U.N. SCOR 488, Jun. 19, 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. 6/2, Jan. 14, 1981 (rejecting invocation of Article 51 by Soviet Union as justification for invasion of Afghanistan). Similarly, the I.CJ, 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 Case Concerning Military and Paramilitary Activities, supra note __, at 193-95. State practice is inconclusive: he U.S. 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, ARMY LAW, Dec. 1989, at 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 JHoward as stating that a politician would be “failing the most basic test of office” if he did not order preemptive action); Lacey, supra note __, 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 __, 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:

[Common 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 to self-defense ... [T]his view accords better with State practice and with the realities of recent military conflicts 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-EMPITIVE 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 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 UN 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
citizens possess the inalienable right to life, and to defend life. When a terrorist organization couples hostile intent with the means to execute that intent, neither the U.S. nor any other peaceful state need wait to be devastated before responding. Although the U.S. delayed action for several months to pursue peaceful modalities of resolution in this august body, diplomacy failed. 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 U.S. was morally obligated to employ to protect its people. To brand our response an unlawful act of aggression is an ill-considered measure that simply obliterates the distinction between terrorism and self-defense. Some may question the factual predicate that gave rise to the decision to employ measures of self-defense to 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. In the interim, the ICC ought never to

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 note _, at 1087. However, the law has been slow to respond, and the UN 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 _, 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 U.S. preemptive strike in Afghanistan with Nazi “self-defense” argument and contending that the Bush Doctrine is the primary reason for U.S. opposition to the ICC); Letter Dated 23 September 1999, supra note _, at annex, para. 7 (1999) (condemning U.S. bombing of suspected chemical weapons site in Sudan as an “unlawful act of aggression”). 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 _, at 393.

See Lacey, supra note _, at 294 (arguing that the legal justification for preemptive self-defense should be the argument that states have an inherent juris ad vitam (“right to life”) that “prevents the random annihilation of their populations from WMD in the hands of unstable regimes or the murder of their citizens by rogue terrorist bands.”). As the ICJ, 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 an eradication is, at the very least, a good-faith legal argument. See Legality of the Threat or Use of Nuclear Weapons, ICJ Rep. 66, 80 (1996), 35 ILM 809 (“[T]he court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstances of self-defense, in which the very survival of a state would be at stake.”).

The Department of Defense defines “hostile intent” as “the threat of imminent use of force by a foreign force or terrorist unit . . . against the [U.S.], U.S. forces, . . . U.S. citizens and their property, U.S. commercial assets, or other designated non-U.S. forces, foreign nations and their property.” CICS 3121.01, supra note _.

State of the Union Address (Jan. 28, 2003) 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 words and recriminations would come too late.”). 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., 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); David, supra note _, 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). 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[e] the need for force . . . and . . . eliminate the risk to civilians.” David, supra note _, at 402.

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 _, at 308 (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 _, 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.”).

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). 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 _, at 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. at Arts. 72, 93(4)-(6). States are inclined to be reluctant to comply with requests for assistance with the prosecution of their own nationals,
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 U.S. intelligence operations lead to the development and implementation of military options. 597

Moreover, OPERATION JEREMIAH was planned and conducted with great care to minimize casualties to innocent civilians and civilian property, as are all U.S. military operations. 598 The U.S. 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 Protocols 599 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 target."599 In striking this target, which made direct and significant

particularly if the requested assistance concerns divulging classified military matters or national intelligence product. VON HEBEL ET AL., supra note_, at 119. However, the ICTFY has ruled that state obligations to cooperate with international tribunals are extensive and that “to admit that a State holding [documents concerning military operations] could lead to the stultification of international criminal proceedings[,]” thereby undermining the “very raison d’etre of [international criminal tribunals].”). Prosecutor v. Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No: IT-95-14-AR108, 29 October 1997, para. 65. 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_, at Art. 93(4). In other words, U.S. unwillingness to share sources and methods with the ICC might lead to a Security Council vote on whether the U.S. has a duty to share national security information with potential adversaries.

597 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., FYRE ET AL., supra note_, at 66-68 (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.”).

598 See Marc L. Warren, Operational Law—A Concept Matures, 152 MIL. L. REV. 3362 (1996) (“In combat the goal of the United States forces is always to minimize civilian casualties[,]”); see also UN 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.”).

599 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. Dusan Tadic (Appeals Chamber), ICTFY, IT-94- AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, at para. 117 (“Many provisions [of the Protocols Additional] are now declaratory of existing rules or . . . have crystallized 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_, at_. 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_, 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 U.S. Delegation during the negotiation of API; Letter of Submittal from Secretary of State George P. Schultz, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, S. TREATY DOC. NO. 2, 100° Cong., 11° 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 U.S. 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_, at 168.

600 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.” Phillip S. Mellinger, Winged Defense: Airwar, The Law, and Morality, 20 ARM. FORCES & SOC’Y 103, 111 (1993). 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_, at 89-90
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.\textsuperscript{601} 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

(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\textsubscript{2}, at 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\textsubscript{2}, at 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 U.S. 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\textsubscript{2}, at 150 (warning of “dire consequences” for attackers who refuse to engage such targets). During the negotiation of API, the U.S. Delegation made numerous statements regarding their understandings of the text, including, inter alia, (1) that Article 52 prohibits attacks on 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\textsubscript{2}, at 18.

The U.S. 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, 100\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (1987), at 7. 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\textsubscript{2}, at 112 (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\textsubscript{2}, 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)); United States Department 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). Some, including a number of NGOs, contest the U.S. interpretation, suggesting that certain enumerated categories of facilities can never be divested of their civilian character. See, e.g., 12 HUM. RTS. WATCH, Civilian Deaths in the NATO Air Campaign (2000) (available at http://www.hrw.org/reports/2000/nato/index.htm) (charging NATO targeting of bridges and communications facilities used by Yugoslavia in support of the war effort against NATO as war crimes in violation of the targeting restrictions imposed by Articles 51-58 of API). These redefinitons of legitimate military targets, posited by what one commentator terms an “extreme” and “fringe” group, have begun to influence international legal jurisprudence. See Meyer, supra note\textsubscript{1}, at 164-65. However, if, as the U.S. and a number of other states contend, the Protocols Additional, particularly Articles 51-58, are not yet expressive of customary IHL, the U.S. position is a permissible interpretation of the sole applicable instrument of IHL governing restraints on combat targeting, the Hague Regulations of 1907, which are silent with respect to the targeting of particular categories of facilities. See supra note\textsubscript{2}. 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 U.S. Air Force answers the question in the affirmative. See Jeanne Meyer, Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine, 51 A.F. L. REV. 143 (2001) (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.”). 601 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\textsubscript{2}, at 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\textsubscript{2}, at 62; see also API, supra note\textsubscript{2}, at 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 exposed attacking forces, permits the more surgical application of force and enhances the opportunities to limit collateral damage. See Michele L. Malvesti, Bombing Bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy, 26-SPG Fletcher F. World Aff. 17 (2002); U. MICHIGAN, Post-Cold War, supra note\textsubscript{2}, at 717 (reporting that the Department of Defense estimated during Desert Storm that the destruction of Iraqi biological weapons sites located in urban areas by aerial bombardment, as opposed to ground-based assault, could have the unintended effect of releasing toxic fallout and killing as many as 6 million Iraqi civilians). Thus, the U.S., by employing Special Forces to eliminate the BWs in the Central Mosque, would arguably be judged by an independent reviewer to have taken “all practical precautions” in preventing collateral damage.
have done so.\textsuperscript{602} Unfortunately, because Al Qaida intended to immediately transfer the weapons for use against the United States, it was not. Nonetheless, and consistent with the felony murder doctrine in common-law,\textsuperscript{603} 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.\textsuperscript{606}

Not only does the U.S. lack responsibility for civilian casualties associated with OPERATION JEREMIAH, but the mere fact that a great number of civilians perished during and subsequent to the U.S. military attack does not support the conclusion that the U.S. is responsible for any crimes. Although the U.S. 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,\textsuperscript{605} 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.\textsuperscript{606} 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 killing of civilians,\textsuperscript{607} 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

\textsuperscript{602} 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\textsubscript{6} 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\textsubscript{4}) 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\textsubscript{4} at 420. Similarly, Article 57(2)(c) of API provides that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” (emphasis added). U.S. 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 “where[re] the situation permits[,]” and U.S. 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\textsubscript{4} at 48-50 (discussing legal questions related to warnings to defending forces during OPERATION JUST CAUSE in Panama (1989)).

\textsuperscript{603} 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. IND. CODE §35 - 42 -1-1 (“A person who . . . kills another human being while committing or attempting to commit [a felony] commits murder[,]”).

\textsuperscript{604} API obligates the defending party “to the maximum extent feasible” to remove civilians from the area of military objectives, to locate military objectives away from densely populated areas, and to take other necessary precautions to protect civilians. ARTICLES OF WAR, supra note\textsubscript{4}, at 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. See API, supra note\textsubscript{4} at Art. 51(7); see also GCIII, supra note\textsubscript{4} at Art. 28 (providing that civilians may not be used to render an area immune from attack.). Thus, when defending forces fail to discharge their obligations to remove civilians from the area of military objectives, the resulting civilian casualties are arguably attributable to this breach of the defender.

\textsuperscript{605} 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 made 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\textsubscript{4} 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, Mislabeled 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).


\textsuperscript{607} 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\textsubscript{4}, at Art. 6 (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. at Art. 8 (note); Fenrick, supra note\textsubscript{4}, 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).
gained by a legally permissible attack preceding those casualties, or otherwise great in comparison to resulting military casualties. 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. This is not the first time terrorists have cynically manipulated civilian populations, nor will it be the last. However, to “resort to counting bodies and placing monetary values on destruction and then applying a ‘but for U.S. intervention this would not have occurred’ kind of formula” 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 rat at the notion that terrorists, a group beyond the pale of the law, can don civilian garb and hug the civilian population to make themselves invulnerable, but the Al Qaida terrorists, who know that the U.S. Armed Forces are populated

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**Footnotes**:

608 See Parkerson, supra note _, 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 “methods and means of combat” that had the effect of causing disproportionate civilian casualties. See Roberts, supra note _, at _ (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., 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); Kalshoven, supra note _, at 99 (stating that an attack on a military target satisfies the principle of distinction only if “the attack could be carried out without unduly severe losses among the civilian population.”); Parkerson, supra note _, at 61 (indicating that some adherents to this position consider that the U.S. doctrine of “highly sophisticated weaponry and tactics to present an overwhelming superiority of firepower that would make any resistance unthinkable” unnecessarily causes civilian casualties and therefore ipso facto violates the proportionality principle); Belt, supra note _, at 173 (reporting arguments that the U.S. practice of employing precision-guided munitions (“PGMs”) over the last 10 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.

609 Americas Watch, a human rights NGO, has intimated that it is possible to draw inferences as to U.S. compliance with the principles of distinction and proportionality by comparing the number of civilian dead resulting from a U.S. military operation to the number of casualties suffered by attacking U.S. forces. See Parkerson, supra note _, at 61 n. 155 (decraying 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 U.S. 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 [U.S.] forces, when proceeding to subdue the enemy force, within the framework of the military action of defending against [the enemy,].”). Temple, supra note _, at 237.

610 See Parkerson, supra note _, at 59 (“Prior to attack, the attacking commander knows much less than the defender about the location of civilians[,] . . . [and] therefore 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 . . . encourage[s] 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.”).

611 See O’BRIEN, supra note _, at 123 (stating that U.S. violations of proportionality and distinction in Vietnam was “in substantial measure the result of deliberate Communist policies of using the population as a shield[,] [a]s [o]ften it was impossible to get at the enemy without risking disproportionate and indiscriminate actions.”).

612 Parkerson, supra note _, at 139-40.

613 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.

614 Quoting WALZER, supra note _, at 195. Terrorists are heavily reliant upon secrecy and surprise, and largely immune from considerations of ethics and morality. Baxter, supra note _, 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 _, 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 U.S. does not succumb to the urge to
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.\(^a\) That the ICC Prosecutor should undertake the selective prosecution of U.S.

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\(\text{Footnote}\)

\(^a\) 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\(^a\), at 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\(^a\), at Art._ (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 THE ARMY, DA PAMPHLET NO. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 138 (1979) (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 (e.g., fighting out of uniform). See GCIII, supra note\(^a\), at Art. 4(a)(2) (codifying customary IHL with respect to the elements of conduct required of belligerents to maintain their entitlement to POW status, immune from trial for acts of lawful belligerency, upon capture); GCIII, supra note\(^a\), at 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\(^a\), 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 327 (stating that such unlawful belligerents are “subject to the maximum penalty which the detaining belligerent desires to impose.”); API, supra note\(^a\), at Art. 44 (providing that combatants who do not carry arms openly while preparing for or engaging in hostilities are acting perfidiously and thus disenliten 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\(^a\), at 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. at Art. 5(3) (stripping protections as noncombatants from civilians who take up arms); API, supra note\(^a\), at Art. 51(3) (“Citizens shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”); RAMSEY, supra note\(^a\), at 435-36 (explaining that “‘combatant’ means anyone who is an actual bearer of the force one seeks to repress by resorting to arms.”); DEP’T OF THE ARMY, supra this note, at 138 (“Citizens who take direct part in hostilities are ‘unlawful combatants’” who may be legally targeted . . . and may be tried . . . if captured by the adverse party.”). 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 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, supra note\(^a\), at 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 [GC] . . . . 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\(^a\), at 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 cases 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\(^a\), at 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
personnel, but not the terrorists and their state sponsors, for actions associated with OPERATION JEREMIAH is no more surprising than that U.S. forces, under heavy fire from these craven terrorists, should exercise their inherent right to self-defense. 615 “U.S. forces never have to wait until they take casualties before they do what is needed to defend themselves[...],”616 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 U.S. 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 U.S. forces to minimize civilian casualties while eliminating the illegal biological weapons stored in the Central Mosque. Although the U.S. Government recognizes various restrictions upon its right to employ certain weapons systems under the Conventional Weapons Convention616 and the Chemical Weapons Convention,617 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.618 All instruments of war 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”619 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.620 It is not the amount of destruction

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 Aldrich, supra note _, at 764 (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.”); DEP’T OF ARMY, supra this note, at 138-39 (discussing official U.S. objections to Articles 43-44 of API); KWAKWA, supra note _, 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 nullify 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).

Just as states possess the inherent right to self-defense, individuals possess the right, under IHL, to defend themselves against attack. See XIII L. REP., TRIALS WAR CRIM. 149, 151 (1949) (holding, in acquitting Erich Weiss and Wilhelm Munds, tried on 9-10 November 1945 by U.S. military commission for the alleged unlawful killing of a U.S. 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, VIII TRIALS WAR CRIM. 1081, 1179 (1950) (restricting the defense of self-defense to those instances where actions taken in self-defense are necessary and proportional).


616 Although the U.S. is a party to the Convention on the Chemical Weapons Convention (“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 U.S. 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 2 (quoting W. Hayes Parks, Special Assistant to U.S. 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.

617 Official U.S. policy has long approved the use of riot control agents (“RCAs”) (see supra note _) to aid in the rescue of downed aircrews and the dispersal of civilians being used as human shields. See E.O. 11,850 (3 C.F.R. 980 (1971-1975)), reprinted in FM 27-10, THE LAW OF LAND WARFARE (note); CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3110.07, NUCLEAR, BIOLOGICAL, AND CHEMICAL DEFENSE; RIOT CONTROL AGENTS; AND NON-LETHAL WEAPONS (3 July 1995) (authorizing and instructing U.S. Armed Forces in the use of RCAs). Although neither the Executive Order nor the Instruction have been superseded, the U.S. 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 _, 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.

621 The U.S. 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_; Noone, supra note_ 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_, at 730-31 (summarizing but criticizing position that laser weapons are of no military value and categorically illegal).

618 See Hague Convention of 1907, supra note_ (prohibiting methods and means that create “unnecessary suffering”).

619 See Carnahan, supra note_, at 712 (“[U]nnecessary supplies that there is such a thing as necessary suffering, because the infliction of some suffering and injury [is] an inherent feature of armed conflict.”)
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.\(^{623}\) In the best judgment of U.S. 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 U.S. Armed Forces who executed OPERATION JEREMIAH. Members of the U.S. Armed Forces who receive and follow lawful orders such as these are entitled to rely upon the legal judgments of their military and civilian superiors.\(^{624}\) The soldiers of Task Force Ryan did precisely what they were ordered to do in a professional

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\(^{623}\) 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 _, 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. DAVID HUGHES-MORGAN, LEGAL CRITERIA FOR THE PROHIBITION OR RESTRICTION OF USE OF CATEGORIES OF CONVENTIONAL WEAPONS (1974). Moreover, when alternate weapons are available, too costly, or ineffective, the military and civilian weapons system is entitled to a presumption that it does not cause unnecessary suffering. Carnahan, supra note _, at 713.

\(^{624}\) 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 _, at 137; WELLS, supra note _, at xiv (stating that prior to 1944 U.S. 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 _, at para. 366 (exempting from liability those whose violations of IHL were committed under orders from their “government” or “commanders”); R. v. Smith, 17 SCR 561 (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 _, at 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 _, at para. 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 _, 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.” \(\text{Id. at }5\) (“The law is 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 U.S. 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. LAW OF LAND WARFARE (1976), supra note _, at para. 509 (“(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.”); U.S. v. Calley, 48 C.M.R. 19, 27 (1973-74) (“[T]he 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. Medina, C.M. 427162 (1971) (case not reported) (same); U.S. v. Griffen, 39 CMR 586, 588 (1968) (same); Kenneth A. Howard, Command Responsibility for War Crimes, 21 J. PUB. L. 7, 8-12 (1982) (“It is an affirmative defense that the actor, engaging in conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services that he does not know to be unlawful.”).
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.\footnote{625} Nor can 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.\footnote{626} 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.\footnote{627} Furthermore, the President, as head-of-state, along with the Secretary of Defense and other public officials, are entitled to immunity for their official acts,\footnote{628} and

The legal issue to be determined at a U.S. 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 entire principle of immunity is concerned with manifestly unlawful acts or that the negotiating parties intended to eliminate the defense.\footnote{629} 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 Apraisal 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 U.S. bombing of Hiroshima and Nagasaki violated the principles of proportionality and distinction under IHL).\footnote{627} See supra note_, (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 at note_. However, such an interpretation, even if it were to attain the status of customary IHL, would not be directly enforceable in U.S. courts-martial or in civilian courts of the U.S.. Customary international law is inferior to statutory law and will not be enforced in U.S. 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 U.S. defendants. See MCM, supra note_, at Art. 77. 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.\footnote{630} The argument that the U.S. 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 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. High Command Case, supra note _, at __.

\footnote{630} 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 rests 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. Cherif 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 _, at 2. The jurisprudence of the ICTFY 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. Zeljko Delalic, IT-96-21-T (16 Nov. 1998) (Cedić Case), paras. 356-63, 368-78 (available at http://www.un.org/icty/celicci/trials2/judgment/cetld9811fe.pdf) (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, 49 Sess., 6 May-26 July 1996, GAOR, 51st Sess., Supp. No. 10; UN Doc. A/51/10) (extending doctrine of command responsibility to civilians 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); Prosecutor v. Zlatko Aleksovski, Case No. IT-98-14/1-T, Judgment, para. 75, Trial Chamber, ICTFY (1999) (extending command responsibility over subordinates to civilian leaders who have the “power to sanction” within the military hierarchy). 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. at 38, 40 (J. Murphy,
nothing could be more 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 protection to victims of [armed] conflicts, consistent with legitimate military requirements. According to the Rome Statute, the ICC would have a new and independent mandate, and it will be immune from criminal prosecution for acts committed in the discharge of its functions. The Rome Statute expressly eliminates the immunity of these officials. See Rome Statute, supra note 14, at Art. 25. Whether the ICC will forge a course similar to that of the ICTFY and futher strip immunity from senior 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 decisionmaking, 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 Ghadaffi 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).
elastic concepts stretched by propagandists, to reach lawful acts of self-defense. Even as the U.S. 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. 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 UN 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 U.S. citizens, and the choice of weapons and tactics—made in consultation with legal advisors in reference to applicable law—was calculated to reduce the suffering of the civilian population. None of the U.S. civilian or military personnel that operationalized and executed the lawful orders of the President violated any laws. Once again, although the U.S. regrets civilian casualties subsequent to OPERATION JEREMIAH, given the foregoing the U.S. 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 U.S. citizens, clearly prevented significantly greater number of civilian deaths. In sum, no acts or omissions of any U.S. nationals satisfy any elements of any crime within ICC jurisdiction, and the U.S. will not submit to any tribunal other than the moral judgments of history.

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 U.S., as a non-party to the Rome Statute, had no obligation to cooperate with an institution the “sole purpose of which is to put U.S. citizens and U.S. foreign policy, along with the citizens and policies of our adversaries in the War on Terror, up to the skewed judgment of the world.” The next day the U.S. 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 U.S. non-cooperation to the Security Council and requested assistance. The Security Council voted that afternoon on a Sino-Soviet resolution, defeated by a U.S.-UK veto and a bloc of abstentions, which would have condemned the U.S. and imposed economic sanctions under Chapter VII for its “failure to surrender for trial the defendants

631 See BEST, supra note , 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).
633 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.”).
634 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 U.S. has and would likely continue to reject although the ICTFY has ruled otherwise. See Prosecutor v. Tihomir Blaskic (Judgment on the Request of the Government of Croatia for Review of the Decision of the Trial Chamber of 18 July 1997, IT-98 14 AR 108, 29 October 1997, at para. 26 (holding that cooperation with the ICTFY 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 PACER INT’L L. REV. 103, 117 (1994).
637 See Blaskic, supra note , at para. 33 (“[The ICTFY] 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.
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 U.S. cooperation.638

In light of the failure of the Security Council to compel U.S. cooperation in the case of Prosecutor v. Task Force Ryan., the Prosecutor tried the defendants in absentia.639 After a bench trial lasting one month, all were convicted on all counts of the indictment. In response, the U.S. Congress passed a joint resolution authorizing the President “to use all necessary force to prevent the forcible abduction or rendition of any U.S. national associated with OPERATION JEREMIAH.”640 The legislation also resolved that should any state assist the ICC in its efforts to obtain physical custody over these U.S. 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.” Accordingly, 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.642 Where a modality of adjudication would criminalize acts promotive of the ends law is

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638 See Uniting for Peace Resolution, G.A. Res. 377(A) (June 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 toward making appropriate recommendations to Members for collective measures[,]”) (providing legal justification for collective enforcement measures against North Korea when the Security Council was paralyzed).

639 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 _, at Art._ (prohibiting trial in absentia); but see id. at 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 _, at 196. The ICTFY 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 ICTFY, 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 ICTFY. See U.S. NEWS & WORLD REP., Dec. 25, 1997, at 47 (quoting Richard Goldstone, former Chief Prosecutor of the ICTFY).

640 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. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Attorney General of Israel v. Eichmann, Dist. Ct. Jerusalem (Isr. 1961), 36 INT’L L. REP. 5 (1961). Forcible rendition to hale the offender into the U.S. is permissible as well under U.S. law. See United States v. Alvarez-Machain, 504 U.S. 655 (1992) (applying the Kerr-Frisbie rule to hold that the forcible rendition of a criminal suspect from a state with which the U.S. maintained a treaty of extradition was permissible under U.S. law); United States v. Rezag, 908 F. Supp. 6 (D. D.C. 1995) (same). Moreover, the Rome Statute imposes general and specific obligations upon States Parties to cooperate with the ICC under Articles 86, 87, and 93, and 111, to include in the rendition of persons it has formally accused or convicted of crimes within its jurisdiction. For the U.S. to object to the rendition of U.S. 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.

642 OSIEL, supra note _, at 31-32.

643 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 _, at 460 (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.
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.\textsuperscript{643}

Moreover, the contrast between martial honor and the ICC also demonstrate 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,\textsuperscript{644} and pronouncements upon the legality
of particular weapons systems have similarly inured to the benefit of terrorist groups and rogue states
masquerading as lawful combatants.\textsuperscript{645} Further, the proliferation of dubious declarations as to what
constitutes customary IHL, and perhaps even more importantly, how it is to be interpreted in adjudging
individual criminal responsibility in connection with the use of 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 and fetter the self-defense measures
undertaken by states in response to global terrorism. 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 \textit{jus in bello})\textsuperscript{646} but
agnostic with respect to the justice of the cause on behalf of which combatants take up arms (the \textit{jus ad
bellum}),\textsuperscript{647} privilege terrorists at the expense of their 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. 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 legitimate subject of critical examination.\textsuperscript{648} However, despite incipient awareness that
IHL is waxing perilously anachronistic with respect to the scourge of terrorism,\textsuperscript{649} heretofore there has

\textsuperscript{643} For a discussion of functionalist theory, see infra at note_.
\textsuperscript{644} See Carnahan, supra note_, at 232 (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[,]”).
\textsuperscript{645} See supra at note_.
\textsuperscript{646} See supra note_ (defining \textit{jus in bello}).
\textsuperscript{647} See supra note_ (defining \textit{jus ad bellum}).
\textsuperscript{648} Criticism is a “crucial part of the historical process through which [IHL] is made.” WALZER, supra note_, 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_, at (asserting that only the constant re-examination of IHL can forestall its “complete breakdown[,]”).
\textsuperscript{649} IHL evolved in consideration of traditional force-on force conflicts and has been viewed for more than a decade as unsuitable
for application to conflicts with terrorists and other subnational actors. Personal Conversation with Guy Roberts, May 28, 2003
(stating that the Protocols Additional were drafted in response to the perception that IHL as it existed in the late 1960s was not
designed to govern the sort of Third World conflicts likely to predominate in the future). 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 is calling for the general revisitation of IHL in light of its inutility.
been no proposal for its substantial modification. 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 application 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 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. 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, 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 and upon which law rightly supervened, 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. 655 Whereas civilized people committed themselves to cities, culture, learning, commerce, and diplomacy, barbarians were nomadic groups bereft of letters, culture, and alliances 656 whose sole occupations were destruction, pillage, and war. 657 To keep barbarism at bay, Roman law incorporated stark dichotomies as between barbarians, 658 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 citizenship 659 including the protections of Roman civil law (jus civile), 660 and citizens (cives), who enjoyed full legal personhood under jus civile. 661 In other words, “barbarian” connoted rejection of a civilization constituted around public law and obligations 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, 662 and citizenship, a precious concept, imposed the unremitting 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, 663 as did cives captured in war 664 and others

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655 S.P. Scott, 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 THEODESIAN CODE (C. Pharr transl.) at 3-7; C. Gibbon, Decline and Fall of the Roman Empire (); M.P. Pearson, Beyond the Pale: Barbarian Social Dynamics in Western Europe, 198 226, in J.C. Barrett, A.P. Fitzpatrick, & L. Macinnes, Barbarians and Romans in North-west Europe from the later Republic to Late Antiquity (1989); Peter S. Wells, The Barbarians Speak: How the Conquered Peoples Shaped Roman Europe (2001).

656 See John Stuart Mill, Civilization, in Essays on Politics and Culture (Gertrude Himmelfarb, ed. 1962), at 49 (contending that “none but civilized nations . . . ever . . . form[ed] an alliance.”).

657 According to the ancient Roman historian Herodotus in his Histories, “Barbarians 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[,]” Cited in HERWIG WOLFRAM, THE HISTORY OF THE GOTHS 6-7 (1990). Tacitus’ Germany, 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 transl. 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., HUNTINGTON, supra note _ at 321 (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.

658 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. SCOTT, supra note _. A third class, latini, was added later. Id. Slaves could be made of persons from any of the preceding categories.


660 See id. at 202 (describing barbarians as outlaws subject to jus gentium (law of peoples) and not the more favorable jus civile)

661 Id. at 200 (noting that Roman jurisprudence was exclusively applicable to only those enjoying Roman citizenship, the cives).

662 SCOTT, supra note _, at _

663 Id. at _ (indicating that loss of citizenship imposed a condition akin to outlawry).

664 BURDICK, supra note _, at 204-05.
who suffered impairment of their civic honor. 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 war-making, and Roman military commanders were granted near-unlimited authority to destroy barbarians to whom the Roman laws of war did not reach. When fighting barbarians, the bellum hostile, a regime characterized by restraint, was supplanted by the unlimited bellum romanum. Similarly, the Greeks accepted no restraints in conflicts with barbarians.

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. However, by the second millennium, the diffusion of Roman law 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. 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 summoned or committing particularly egregious felonies were held to be beyond the protection of the law under the doctrine of “outlawry.” Outlaws, as persons with no enforceable legal rights, could be

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665 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).

666 JULIUS CAESAR, GALLIC WARS 5.55 (note).

667 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.”).

668 See HOWARD ET AL., supra note _, 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).

669 See PLATO, MENEXENUS (recommending moderation in relations between Greeks but none in relation to barbarians).

670 Lay, supra note _, at 198.


672 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).

673 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).

674 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).

675 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[.]”).
killed by all upon sight, and their property was forfeit, by operation of law, to the crown.676 Likewise, associates of outlaws were outlawed and subjected to summary punishment, as were the issue of traitors in punishment for treason.677 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.678 With the rise of piracy in the 16th 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 criminals679 were in perpetual war with all mankind680 and thus, as hostis humani generis subject to attack by any and all persons at any time681 without legal niceties, such as a declaration of war682 or the protection of the laws.683 Regardless of nationality, all persons were entitled, under universal jurisdiction684 and principles of natural law harkening to the ancients,685 to capture and summarily kill pirates.686

676 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 civilitur mortuus (“dead citizens”).
677 See 3 HOLDSWORTH, supra note _, 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.
678 See 2 POLLOCK & MAITLAND, supra note _, 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.
679 See GROTIUS, supra note _, at _ (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).
680 See GENTILL, COMMENTARIES ON THE LAW OF WAR (1598) (classifying pirates as outlaws and “common enemies of all mankind”).
681 See RUBIN, supra note _, 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 17th century scholar Leoline Jenkins)
682 PIERINO BELLI, DE RE MILITARY ET BELLO TRACTATUS (1564).
683 See GENTILL, supra note _ (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 violent behavior by a legitimate public sovereign); RUBIN, supra note _ at 70 (stating that pirates, by rendering themselves enemies of all mankind “ha[ve] thereby lost [their] right in the law of nations.”) (quoting 17th century statement of the King’s Advocate of the Admiralty, Dr. William Oldys); 30 Fed. Cas. 1049, No. 18,277 (16 Oct. 1861), at 1049-50 (“[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 _.
684 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 REST. (3°) FOR. REL. L. U.S., §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. For a thorough discussion of universal jurisdiction, see generally Kenneth C. Randall, Universal Jurisdiction under International Law, 66 TEX. L. REV. 785 (1988).
685 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., CHARLES MOLLOY, DE JURE MARITIMO 38 (1677) (stating that “the old natural liberty remains in places where are no judgments” and that instead of resorting to judicial process “Justice may be done upon [pirates] by the Law of Nature[,]”) (RUBIN, supra note _ , at 86.).
686 See id. 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 MOLLOY, supra note _ 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.”).
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.\(^{687}\) In the words of 17\(^{th}\) century scholar Emmerich Vatel, “as 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.”\(^{688}\) 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,\(^{689}\) is at the very least permissive of the declaration of the authors of unlawful private acts of violence hostile to the natural legal order buttressing civilization as barbarians subject to death upon capture.\(^{690}\) The precedents stretch to the Lieber Code:

> Although pirates were afforded due process protections in the 19\(^{th}\) century, states retained legislation permitting their summary trial and execution. *See*, e.g., 30 Fed. Cas. 1049, No. 18,277 (16 Oct. 1861), at 1049-50 (“All 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, U.N. Doc. A/CONF 62/122, 21 I.L.M. 1261 (10 Dec. 1982), at Articles 100-110 (defining piracy as a crime of universal jurisdiction and requiring states to cooperate in its suppression and punishment). *See* Wedgwood, *supra* note _, at 564 (stating that Article I, Section 8 of the U.S. 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 U.S. 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 U.S. Armed Forces for violations of IHL. *See* GCIII, *supra* note _, at Art. 85. However, the U.S. Supreme Court ruled, prior to U.S. 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*, e.g., Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might U.S. Soldiers Have Their Day in the Same Court*, 36 VA. J. INT’L L. 659 (1996).

\(^{687}\) *EMMERICH VATEL*, II THE LAW OF NATIONS, ch. 4, at 132.

\(^{688}\) 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* REST. (THIRD) OF FOR. REL. L. U.S. §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 TREATIES OF INTERNATIONAL CRIMINAL LAW 5, 32-33 (M. Cherif. Bassiouni and 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 _, at 167-68 (arguing that Nuremburg 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.”).

\(^{689}\) Concerted post World War II efforts to immunize the conduct of broad categories of belligerents who do not meet the traditional requirements of combatant (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* at note _. A number of states, and the European Court of Human Rights, have accepted the view that
Men . . . who commit hostilities . . . without being part . . . of the organized army, and without sharing continuously in the war, but who do so with intermittent 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.

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.

Although the Geneva Conventions and Protocols Additional reject the outlawry of and summary reprisal against guerrillas and others who abjure obligations under IHL 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 to which terrorists are judged entitled presumes, contrary to fact, that they are susceptible to deterrence by legal sanctions, or that they have a stake in the

deterrence of their conduct.

The Crime of Unlawful Combatancy

The Crime of Unlawful Combatancy

For a discussion of unlawful combatancy generally and as applied to the War on Terror, see (note).

"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. DELISSEN & TANJA, supra note , at 205. 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 , 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); SLANN & SCHCHIPERMAN, supra note , at 20 (presenting arguments in support of the general irrationality of terrorists);
civilizational order that can be used to impel them to comply with IHL,\(^\text{695}\) rather than a burning desire to destroy civilization and law itself.\(^\text{696}\) Moreover, these instruments, along with the contemporary disfavor into which reprisal has fallen,\(^\text{697}\) 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,\(^\text{698}\) or the principles of contract which postulate parties of equal legal capacity with co-dependent legal obligations\(^\text{699}\) 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 breach\(^\text{700}\) and power is again the sole convertible currency.

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[,]”\(^\text{702}\) and no soldier or state in extremis is ever likely to privilege compliance with IHL over survival.\(^\text{703}\) Nonetheless, the general observance of IHL by honorable soldiers fighting in defense of

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STEPHEN J. CIMBALA, ED., INTELLIGENCE AND INTELLIGENCE POLICY IN A DEMOCRATIC SOCIETY 181 (1987) (suggesting that deterrence based upon apprehension and punishment is inapplicable to self-sacrificial terrorists); von CLAUSEWITZ, ON WAR bk. I, ch. 1, at 2, 3, 75, 76 (Howard and Paret eds. 1976) (contrasting civilization and barbarism and describing the use of force by barbarians as not directed toward a political objective but the “crude expression of instinct.”).

\(^\text{695}\) 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”).

\(^\text{696}\) See Robert McFarlane, Deterring Terrorism, J. DEF. & DPI., June 1985, at 63 (“Terrorism is a revolting . . . form of warfare directed against the very heart of civilization[.]”).

\(^\text{697}\) See supra at notes (discussing reprisal under IHL and evaluating contemporary arguments as to its applicability).


\(^\text{699}\) 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 with 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, 24-41, in John Strawson, ed. (2002).

\(^\text{700}\) 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 OSIIE, supra note _, at 134 (discussing dangerd 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).

\(^\text{701}\) 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).

\(^\text{702}\) BEST, supra note _, at 349-50 (stating a truism that is untenable to the untutored but common sense to veterans).

\(^\text{703}\) 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
civilization is the behavioral variable which most clearly distinguishes civilized peoples from modern-day barbarians, a venal and intractable assemblage *hors de loi* ("outside the law") 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, 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, that the premeditated murder of innocents is ethically and juridically distinct from their unintentional killing, and that rather than promote and defend, and the means to these ends. With the fall of the Berlin Wall, Western liberal scholars reposed much faith in the prospect that a modern and universal civilization, based upon Western norms and values such as liberty, individual

the most unsettling to humanitarians. See TAYLOR, supra note _, 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 at note _(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.

See Gross, supra note _, 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 military 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 DAVID C. RAPOPORT & YONAH ALEXANDER, EDS., THE MORALITY OF TERRORISM: RELIGIOUS AND SECULAR JUSTIFICATIONS 290 (1982) (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.


See Cowles, Universality of Jurisdiction over War Crimes, 33 CAL. L. REV. 181 (1945) (tracing the terrorist genealogy through barbarians to “bandits,” “pirates,” and “guerrillas”).

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. Shibaing, transl. 1994); V. S. SOLOVIEV, POLITICS, LAW AND MORALITY (W. Wozniak ed. 2000). This position is at odds with the practice of contemporary IHL absolutism on a number of counts. See infra at p._

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 [.]

RAPOPORT & ALEXANDER, supra note _, at 292.

“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
rights, free markets, limited government and separation of church and state, and a legal culture built upon the doctrine of the formal equality of all persons, would emerge from decades of bipolar confrontation.

More pessimistic observers, anticipating that the collapse of Communism 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, postulated a “clash of civilizations” in which burgeoning antagonisms, rather than Westernization, would fill the vacuum left by receding East-West tensions.

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. 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, and perpetual conflict with the unbelievers of the *dar-al harb* is therefore divinely ordained. Although it may shock

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See generally LARENCE M. FRIEDMAN ET AL., LEGAL CULTURE AND THE LEGAL PROFESSION (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).

*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”).


*See Ahmad, *supra note* _, at 605 (listing the major civilizations as Western, Islamic, Chinese, Eastern Orthodox, Japanese, Latin American, Hindu, and African).

*See SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 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, 2 vols. (Charles Francis Atkinson trans., Alfred A. Knopf, 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* _, 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.”).

*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* _, 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). SHIREEN T. HUNTER, THE FUTURE OF ISLAM 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 Khan, *supra note* _, at 317 (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); J.I. COFFEY & CHARLES T. MATHEWES, RELIGION, LAW AND THE ROLE OF FORCE 56 (2003) (noting widely-shared Muslim sentiment that international law is incompatible with Islamic law and therefore “alien”).

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 (1981). Faithful Muslims are commanded to take up *jihad* and wage perpetual war with *dar-al-harb* to defend and spread the faith. See ENCYCLOPEDIA ISLAMICUS (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* _, 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 47:1 (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. & POL’Y 201 (2002).
untutored Westerners, the history of Muslim efforts to conquer the “infidel” West, which commenced in 7th century Spain and continued through the medieval crusades to the present, 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.

Still others treat the suggestion that differences between civilizations necessarily translate into violent conflict as a gross oversimplification. They stress that Islam is akin to Judaism and Christianity in ascribing to the divinity all legitimate authority to order the affairs of mankind while utterly proscribing acts of murder; they insist further that the contemporary resurgence of Islam is simply an assertion of religiosity that can be harmonized with, or at least exist in harmless parallel to, Western civilization. Moreover, they clearly distinguish a liberal strain of Islamic thought from the schismatic teachings of an untutored, if charismatic, minority, and reject the idea of a monolithic ummah dedicated

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718 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).
719 HUNTINGTON, supra note __, 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 __, at 95.
720 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 __, 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, Nous Sommes Tous Amerindiens, NEW LEFT REV., Jan./Feb. 2003, at 2 (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”).
722 The most fundamentalist Muslims purport to be the bearers of the absolute revealed truth of the Creator. RAPOPORT & ALEXANDER, EDS., supra note __, at 68. However, in this regard they are no different from the orthodox among their spiritual forebears, Jews and Christians. HUNTER, supra note __, at ix.
723 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.
724 BERNARD LEWIS: CRISIS OF ISLAM 47 (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 that it is these religions, rather than Islam, that embrace terrorism and mass murder. See, e.g., Deuteronomy 7:1-6 “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[,]”. 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.”).
726 Hashmi, supra note __, at 23 (describing attempts of intellectuals to accommodate Islamic ethics with a modern social world).
727 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 __, at 307; see also HUNTER, supra note __, 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 __, 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).
to destroying the West.\textsuperscript{727} Even if Muslim states miraculously unified,\textsuperscript{728} any transhistorical conflict has withered along with the potential for any such coalition to muster sufficient military power to pose a credible threat.\textsuperscript{729} In short, the explanation of Islam as a cultural orientation\textsuperscript{730} maintains that there is simply no Islamic civilizational approach to law or politics and nothing to fear from Islam ascendant, and U.S. Middle Eastern policy is more squarely within the chain of causation of September 11\textsuperscript{th} than the twisted version of the religion professed by those who piloted the final instruments of that tragedy.\textsuperscript{731}

Whether Islam is a call to jihad or merely a call to prayer is an open question.\textsuperscript{732} Islamic terrorism may eventually be revealed as a treatable, although severe, symptom of regional societal dysfunction,\textsuperscript{733} yet it may also be the logical outgrowth of an agenda of conquest laid down by Muhammad in medieval Mecca.\textsuperscript{734} Nevertheless, it is unnecessary to prove the civilizational conflict thesis or probe the motives of

\textsuperscript{727} 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\textsubscript{75}, 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) (dissmissing the hesideness of pan-Islamic sentiment as applied to geopolitics); Fouad Ajami, The Summoning: “But They Said, We Will Not Hearken”, 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,\textsuperscript{729} LEWIS, supra note\textsubscript{72}, at 47; JESSICA STERN, TERROR IN THE NAME OF GOD (2002) (same). Even if Islam imposes a dar-islam\textsubscript{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 (positing the defensive interpretation of jihad).

\textsuperscript{728} 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\textsubscript{72}, at 18 (discussing disunity that characterizes relations within the community of Islamic states since the fall of the Caliphate in the 11th century).

\textsuperscript{729} HALLIDAY, supra note\textsubscript{71}, at 112.

\textsuperscript{730} 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).

\textsuperscript{731} 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 that, because it has supported Israel and allegedly suppressed Arab self-determination, the U.S. is partly responsible for September 11\textsuperscript{th} and other acts of violence against U.S. targets in recent years); see also PAUL BERMAN, TERROR AND LIBERALISM (2002) (presenting and criticizing arguments that U.S. capitalist foreign policy is responsible for creating the hatred that produced September 11\textsuperscript{th}). Critics of the impulse to find the origins of September 11\textsuperscript{th} in the consequences of U.S. 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. ELSHTAIN, supra note\textsubscript{71}, at 3.

\textsuperscript{732} 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 11\textsuperscript{th}, the U.S. 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 Islam. 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, September 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. Yeager, Just War: Reflections on 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, at _ (arguing Islam is fundamentally hostile to secular civilization and that the conflict in which the U.S. is embroiled is “not simply a ‘war against terrorists’ but in fact a ‘much broader’ conflict between modernity and anti-modernity).” See CRAIG HALL, THE WAKE-UP CALL OF TERRORISM, 36 INT’L LAWYER 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).\textsuperscript{734}

\textsuperscript{733} For arguments in support of the latter position, see BENJAMIN NATANYAHU, 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).
individual terrorists to establish that the entire Society of Peoples is under assault by atavistic foes who abjure all political, moral, and legal restraints and brandish a radical religious vision as both weapon and justification for the deliberate mass murder of innocents. 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: that tragic morning during which over 3000 innocent men, women, and children were deliberately immolated by 19 suicidal Islamic terrorists heralded a paradigmatic shift toward an era of asymmetrical warfare in which enemies of the U.S. 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 will. Terrorism and WMD are merely the more obvious and tangible weapons. It is somewhat paradoxical, although consistent with the historical development of 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, and the Western populations they target, for whom law is a central ordering principle—that bristles as the most potent weapon in the

735 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-Muhammad 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 11 further underscores this point. See Usama bin-Laden, Statement of Oct. 7, 2001, AL-JAZEERA (“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.”).

736 See JOHN RAWLTS, THE LAW OF PEOPLE 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).

737 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 civilians of the U.S. and other Western governments. See Al Qaeda Training Manual 8 (available at http://www.usdoj.gov/ag/trainingmanual.htm.) (“The confrontation that Islam calls for with these godless and 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[,]” J.J. COFFEY & CHARLES T. MATHEWES, RELIGION, LAW AND THE ROLE OF FORCE 30 (2003) (discussing 1998 Usama Bin Laden fatwa calling for terrorist acts against U.S. citizens and property).

738 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 power of language.” Charles J. Dunlap, Jr., A Virtuous Warrior in a Savage World, 8 USAFA J. LEG. STUD. 71 (1998). The deliberate targeting of innocent women and children, and the conscription of children as warriors in the cause, are but two of the more heinous means and methods in the arsenal of these unscrupulous terrorists. See Justus Reid Weinder, The Use of Palestinian Children in the Al-Aqsa Intifada: A Legal and Political Analysis, 16 TEMP. INT’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 SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT (1994) (same).

739 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.”).

740 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 UN 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 LAWYER 1081 (2003) (noting that international law has required that aggression stem from a state) (citing G.A. Res. 3314, GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/9619 (1974)).

741 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.

742 See supra note (enumerating recent violations of IHL by irregular unlawful combatants during the Liberation of Iraq); see also Anderson, supra note (listing violations of categorical rules of war committed by terrorists and other unlawful combatants, including systematic rape, use of human shields, and summary execution of POWs).
Islamic terrorist arsenal. Nonetheless, because a concatenation of “reforms” over the last several decades, coupled with the ascendance of IHL absolutism, have delivered IHL into the hands of terrorists who now wield it as a sword against civilization, 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.

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

IHL, just as any other regime of legal regulation, is an ongoing functional response to existing and anticipated factual circumstances that is designed and interpreted in light of the capacities, interests, objectives, and “felt necessities” of politically relevant actors to the benefit of whom it disproportionately redounds. 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 tactics, strategies, and weapons systems. Nevertheless, the process whereby IHL is subject to reconstruction is omnidirectional, and when states,

743 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); see also QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE (1999) (“When a nation state . . . (which adheres to certain rules and will only use limited force to obtain a limited goal), faces off with [terrorist] organizations . . . (which never observe any rules and which are not afraid to fight an unlimited war using unlimited means), it will often prove very difficult for the nation state . . . to gain the upper hand.”). 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); Anderson, supra note, at 3 (stating that IHL has the effect of “rewarding” state sponsors of terrorists who recognize that the commission of war crimes against their own civilians, and the subsequent attribution of those crimes to retaliating states, is a very effective strategy against more powerful foes); Aldrich, supra note, 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).

744 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., MACHIABELLI, supra note, at 99 (“There are two ways of fighting: by law and by force.”).

745 The social theory of functionalism maintains that society is essentially 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 DURKEIM, THE DIVISION OF LABOR IN SOCIETY (1893) (positing a general functionalist theory). Functionalist theory postulates that law is the mechanism that structures expectations and secures compliance with a particular set of socially desirable norms, principles, rules, and procedures at the lowest possible cost, and that the need to resort to coercive enforcement to comply with this set of values marks the weakness, and even failure, of the law. See MICHAEL BAKUN, LAW WITHOUT SANCTIONS 87-88, 157 (1968) (describing law as the authoritative and normative statement of the “paths over which the affairs of [a] community are carried on” and stating that the overriding function of law is “the 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 positive and normative rules, prevented from destroying the objects, norms, and principles constitutive of civilization without rendering that application of force in the defense of civilized values impracticable. See Douglas Cassel, Does International Human Rights Law Make a Difference?, 1 CHL. J. INT’L L. 121, 126-30 (2001) (stating that international law functions to deny moral relativism, establish normative preferences shared by the international community, and defend those 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, THE THEORY OF COMMUNICATIVE ACTION (1984); for a defense of functionalist theory against critics, see MICHAEL FAIA, DYNAMIC FUNCTIONALISM (1986).

746 Reisman, supra note, at 81.

747 Id. (“[E]very legal regime perforce benefits some actors more than others[,]”).
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].”749
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 U.S. has effectively declared in renouncing the ICC, a
compromised and dysfunctional legal regime.750 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 between the danger inherent in the order that the ICC
might well impose and the disorder engineered by terrorists,751 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 a demanding the revision, and even the broader rethinking, of IHL and the institutions
responsible for its enforcement.752 The salvation of Western civilization depends upon victory in the War
on Terror; in turn, this calls into question whether the (primarily U.S.) soldiers defending civilization,
although they must as a moral imperative cleave as closely as practicable to the humanitarian purpose of
the IHL regime,753 may employ allegedly prohibited methods and means or otherwise derogate from a
body of law never tailored for this sort of conflict754 in order to guarantee victory. To be sure: the U.S.
remains unwaveringly committed to the observance of IHL during the conduct of post-September 11th
operations in the asymmetrical War on Terror.755 However, September 11th revealed that the defense of

748 See supra at note_. (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 supra at Part III (same); Reisman,
supra note_. at 81 (describing “tensions between formally prescribed [IHL] from a previous period and contemporary [IHL].”).
749 Reisman, supra note_. at 81.
750 See JOHN STRAWSON, ED., LAW AFTER GROUND ZERO xi (2002) (conceding, from the perspective of an IHL
absolutist, 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).
751 See Paul Valery, French Poet (1871–1945) (“Two dangers constantly threaten the world: order and disorder.”).
752 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 at note_.
753 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_. 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.
754 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
also id. at p. 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 at Part_.
755 See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTRUCTION 5810.01, supra note_. (insisting that the “Armed Forces of the
United States will comply with the law of war during the conduct of all military operations and related activities in armed
conflict, however such conflicts are characterized.”). The U.S. commitment to the observance of IHL, however, does not imply
vital national and civilizational interests are in tension with a cascading series of constraints on U.S. freedom of military action\footnote{756} that, although they spring from noble impulse, have neutralized the comparative military advantage of the U.S. and handicapped its policy options against terrorism beyond the danger point.\footnote{757} At first blush it seems we are enmeshed in a moral dilemma from which escape requires a Hobson’s choice:  \footnote{758} 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 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.\footnote{759} 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 twin moral shoals: rather than deify IHL, as the absolutist framers of the ICC in their subsumption of its authorship from states \footnote{760} would have us do, we

\begin{list}{}{}
\item 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 their “state practice.” It has even shifted away 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.\cite{Anderson, supra note _}
\item \textit{“Ownership” of IHL is indeed crucial. Inarguably, the substantive quality of scholarship in IHL is augmented by knowledge of military history and especially by combat experience; those unenriched by either of these capacities are left subject to criticism particularly where they advocate prescriptions or proscriptions that history and experience have proven untenable in actual combat operations. \cite{Elliot, Howard, Anreopoulos, & Shulman, History, war, and law (1994), 30 Tex. Int'l L. J. 631, 637 (1995) (book review) (“Only when one has a firm foundation in military history can one truly begin to understand the utility and limits of the law of war.”). Many critics of the U.S. position with respect to the ICC are civilians lacking in the experience necessary to an understanding of the stochastic, nonrational processes that govern combat operations and exert pressures upon combatants to derogate from absolutist, positivist legal proscriptions and prescriptions. \cite{Fussett, wartime 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 individual soldiers make decisions, and thus when they recapitulate the events in question to determine what they would do under similar circumstances and to adjudicate the criminal responsibility of individual soldiers,}\end{list}
should accord it our respect and criminalize its violation only to the extent that it comports with the practical necessities of honorable soldiers locked in total war against barbarians who brook no legal restraints whatsoever. In other words, by rationalizing IHL the West can interdict evil and shepherd law, along with the civilization law defends and reflects, through the vale of terrorism. The next section operationalizes this thesis by proposing reinvention of IHL as a regime that genuinely supports the humanization of conflicts between soldiers who observe the martial code while banishing barbarians to a legal wasteland beyond its application.

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 defend civilization and 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 U.S. and allied states are generally entitled in interpreting the boundaries of IHL should be stretched to its zenith, rather than contracted to its nadir. Ultimate victory over terrorism will, on occasion, require the U.S. and other states to undertake missions that will 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 the positive law, are excusable or at least mitigated in their seriousness in light of all the circumstances, 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

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.

761 Although there has not been a formal declaration of war, “only a most technical and arid legalism could deny [that the U.S. is at war with terrorist organizations].” Reisman, supra note_, at 88 n.14.

762 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_, 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_, 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 rules [of IHL] which run counter to its basic principles and interests.”).

763 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.

764 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_, at 726. Ideally, the U.S. 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 U.S. may be forced to take the path to a rationalized IHL alone. See id. (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).
favorable that any rational theory of IHL will ensure that institutions called upon to adjudicate their
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 rejects considerations of
exigency, necessity, and justice from its calculus to pass judgment in regard to alleged violations of IHL
in the War on Terror, U.S. and allied soldiers should be held to the ethical and moral strictures of the
martial code and, where appropriate, prosecuted and punished in courts-martial.

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 the 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 agendas of
Nazism and Islamic terrorism—irrefutably barbaric programs—could ever be perceived as more
deserving 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, rationalization need neither imply nor countenance the general suspension

765 See AIME CESAREA, DISCOURSE ON COLONIALISM (Joan Pinkham transl. 1972) (1955) (offering an early academic
treatment of Nazism as “the crowning barbarism that sums up all the daily barbarians[,]”).
766 Terrorists are the sort of “implacable enemy whose avowed objectives”—the destruction of our way of life—motivate
maximalist responses and the abandonment of “hitherto accepted norms of human conduct” as the price of their defeat.
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 DERSHOWITZ, WHY TERRORISM WORKS:
UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 166-213 (2002). Another scholar suggests that
the U.S. 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
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.
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 U.S., one of the few states that has systematically prosecuted violations of IHL, must continue its official policy of scrupulous 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, 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, 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 variables in ascertaining 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

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767 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 , 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).

768 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 ELLICKSON, ORDER WITHOUT LAW (1991).
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, should exercise its sovereign right to prescribe legislation designating particular states, groups, (including but not limited to those listed as foreign terrorist organizations by the State Department), and individuals, regardless of nationality, as barbarians and declaring them, by virtue of their deliberate predations against civilians, criminals against civilization who disentitle themselves from the panoply of legal rights and privileges under international and domestic law. The Actus Contra Barbarum (“Act Against Barbarians”) (“ACB”) will relegate such actors to an inferior status under IHL—in effectively, it will redefine them as unprivileged, rightless outlaws—as IHL is incorporated in U.S. law. 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 stand as a public proclamation 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 concerning civilians and other noncombatants. Terrorists 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 romanum 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 against whom the full military force of the U.S. would otherwise be immediately employed to desist from terrorism and comply with IHL; failure to do so would result in immediate abandonment of

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76 The protective principle of jurisdiction permits domestic exercise of jurisdiction where an extraterritorial act threatens interests vital to thesecurity, territorial integrity, or political independence of the prosecuting state and allows the state to prosecute foreign nationals. See REST. (3rd) FOR. REL. L. U.S § 6. This jurisdictional basis has been used to prosecute terrorists under U.S. law for conspiracy to engage in attacks that affected or would affect U.S. nationals. See U.S. v. Yousef et al, 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 U.S. nationals were to have been on board, in violation of 18 U.S.C. §32)


78 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 4, at 165 (discussing sources of conflict between domestic and international law with regard to war crimes definitions); see also supra note 3 (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, and 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 own soldiers, of all tactics, weapons, and practices, even those otherwise prohibited by law, against the enemy. The declaration proposed herein would effectively stand as a declaration of war against terrorists that would not only transform legal relations between the U.S. 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 Due Process Clause of the 5th Amendment 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, 453 (1956) (Douglas and Black, dissenting) (“The prohibition of Bills of Attainder place[s] beyond the pale the imposition of infancy or outlawry by either the Executive or the Congress.”).

79 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 U.S. citizenship, have been violated by their continued detention without the benefit of the Geneva Conventions and without trial, as well as to arguments that such practice violates the substantive provisions of the Geneva Conventions and the Protocols Additional. See Padilla ex rel Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003) (challenging detention of U.S. citizen, suspected of membership in the terrorist group Al Qaeda, held by the military on a material witness warrant as an unlawful combatant without access to counsel); see also supra at notes. (discussing the effects of the Protocols Additional on the customary doctrine of unpunished belligerency). Moreover, the proposed declaration encompasses all members of the designated terrorist groups within its ambit even in advance of armed conflict with those groups, rather than applying simply to those members caught while not in compliance with the conditions necessary to establish lawful combatancy. Id. 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 if in contravention of IHL, as between different categories of combatants on the basis of the objectives and methods of their armed operations.

77 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.
The legislation might also incorporate a provision granting affected parties standing to appeal their inclusion on the list of designated terrorist groups, and permitting special appearances, along with safe passage, for this purpose. In the alternative, or in conjunction, the legislation might authorize the President to negotiate bilateral agreements, akin to treaties, 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.

To translate this strategic declaration into rules of decision for courts-martial, Congress could, as provision in ACB, amend the UCMJ to expressly establish the doctrine contra barbarum (“against terrorists”) as an absolute defense that would excuse soldiers accused of committing crimes in violation of the UCMJ of criminal responsibility. 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.

The President 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.

If the ICC amends Article 120, 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 cases of armed conflict with terrorists; (b) a statement to the effect that the U.S. does not recognize any conventional instruments to which it is not a party, or any statements of custom to which it

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774 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 Terry Nardin, ed., The Ethics of War and Peace (1997); 128-45; Ignatieff, supra note _, 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).

775 See FED. R. CIV. P. 12(b)(2).

776 Terrorists might be given temporary status as protected diplomatic persons to enable their safe passage to and from the U.S. to plead their legal cases. See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, at 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.”).

777 The U.S. has a lengthy history of negotiating treaties with states with which it continues thereafter in a state of war, including those that would currently be characterized as “rogue states” and sponsors of terrorism. See, e.g., Treaty of Peace and Amity between the United States and Tripoli, concluded June 4, 1805, Article XVI (cited in MALLOY, TREATIES AND CONVENTIONS ETC. 1776-1909 v. 2) (agreeing on principles restricting conduct of war between U.S. and the Barbary States and providing in particular that POWs would not be enslaved but would be exchanged within 1 year of capture). On April 15, 2003, the U.S. concluded its first ever accord with a terrorist organization, permitting the Mujahideen al Khalq, a 1000 member anti-Iranian group operating out of bases in Iraq that was 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 U.S. military operations in exchange for agreeing not to undertake hostile acts against the U.S. and to provide intelligence on Iran. See Douglas Jehl & Michael R. Gordon, American Forces Reach Cease-Fire with Terror Group, N.Y. TIMES, Apr. 29, 2003, at A1. Whether similar such agreements are possible with organizations such as Al Qaeda is very much in doubt. See Howard Witt, Iranian Group on Terrorist List Has Pull in D.C., CHI. TRIB., Jul 13, 2003, at A4 (suggesting that the agreement with the Mujahideen al Khalq was possible only because Congress considers it a “pro-Western” organization); ELSHTAIN, supra note _, at 154 (valuing a treaty negotiated with a terrorist group as “not . . . worth the paper it was written on.”).

778 See supra at note _ (enumerating applicable defenses in U.S. courts-martial)

779 See supra at note _ (considering mitigating and extenuating circumstances in trial and sentencing in courts-martial).

780 Presently, the ICC does not permit reservations. See Rome Statute, supra note _, at Art. 120 (“No reservations may be made to this Statute.”). Nor may amendments be made prior to 7 years after entry into force of the Rome Statute, and even then a supermajority of 7/8 of States Parties is required. See id. at Art. 121(1) (“After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto.”); id. at Art. 121(4) (requiring a 7/8 supermajority to amend). 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 [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 U.S. upon its accession.
has persistently objected,\textsuperscript{782} as creating any legal obligations; and (c) a statement to the effect that 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.\textsuperscript{783}
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.\textsuperscript{784} The U.S. should withdraw all forces from the territory of states-parties and notify the UN that it
will refuse to provide troops to peacekeeping operations upon their territory. An amendment to ASPA
bolstering the Hague Invasion Clause “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.”\textsuperscript{785}
6. The U.S. should encourage all states to adopt similar classificatory mechanisms reflective of the
civilizedpeoples/barbarian distinction to facilitate a coordinated \textit{bellum romanum} against terror.\textsuperscript{786}

Chart I presents three variant images of the relationship between law and war: the first depicts the
legal absolutist view, in which war wholly subsumed by and regulated by law; the second illustrates the
nihilist or barbarian position, in which law is irrelevant to war; and the third represents a rationalized IHL
in which military 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 \textit{contra barbarum}
where law does not reach war.\textsuperscript{787} In this third image, invocation of ACB directs soldiers to set aside the
martial code and march across the line delineating the zone of intersection from the zone \textit{contra barbarum}
into total war against their barbarian adversaries; by the same token, in the third image the
border is permeable bidirectionally: the barbarians are invited to embrace the martial code, cease
attacking civilians, and engage soldiers in the zone of intersection.

\begin{center}
\textit{ \textcolor{black}{(Insert Chart I about here)}}
\end{center}

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

\textsuperscript{782} The “persistent objector” rule of customary international law provides that a state is not bound by the maturation of a
customary international legal principle if it has consistently indicated its dissent from a practice while the law was “still in a state
of development.” \textit{REST. (3rd), FOR. REL. L. U.S.} §102, commt. d. The U.S. has at the very least an arguable claim that it has
persistently objected to many declarations of customary IHL, although its failure to specify precisely what it does recognize as its
legal obligations, coupled with its adherence to many of the principles contained in the Protocols Additional and other IHL
declarations out of humanitarian concerns if not a sense of \textit{opinio juris}, complicates this claim. \textit{See supra} at notes (noting U.S.
refusal to specify which provisions of the Protocols Additional it recognizes as creating legal obligations and describing U.S.
practice as consistent with the provisions of much of the Protocols Additional). For a discussion of the “persistent dissenter” rule
in customary international law, \textit{see} T. Stein, \textit{The Approach of a Different Drummer: The Principle of the Persistent Objector in

\textsuperscript{783} \textit{See} Jack Goldsmith, \textit{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.).

\textsuperscript{784} \textit{See supra} at note (discussing the recent proliferation of such treaties between the U.S. and over 35 states).

\textsuperscript{785} \textit{See supra} at note (offering proposed language to effect such a declaration of war under these circumstances).

\textsuperscript{786} Currently, there is disagreement within the Western Alliance as to precisely which organizations merit classification as
“terrorists.” See Marc Perleman, EU Won’t Ban Hamas, Jul. 17, 2003, at \url{www.frontpagemag.com} (reporting that the EU
executive organ, the European Commission, despite significant U.S. 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 \textit{bellum romanum} approach proposed. \textit{See} Matthew Chance, CNN, Israel

\textsuperscript{787} 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. \textit{See} Jonathan Zasloff, \textit{Law and the Shaping of
war without neglecting civilizational obligations because it attaches practical legal consequences to the gross moral distinction between honorable soldiers and barbarians.

IV. Conclusions

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, as well as to the general weakening of international law. Some may attack as illiberal, imperialist, Islamophobic, or even racist the argument that only a rationalized IHL that differentiates between combatants based upon the justice of the causes for which they fight and the degree to which they themselves observe IHL can defend human civilization. Others, disinclined to inject moral considerations into law, unwilling to agree upon an epistemology that enables us to discern what is right and what is wrong and uncomfortable with revivification of the language of good and evil, 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

See Adam Roberts, The Laws of War in the War on Terror (unpublished manuscript on file with author, forthcoming in INT’L L. STUD. (2003) (anticipating that suggestions for the modification of IHL will be perceived by legal absolutists to be programs for the destruction of IHL). Some observers, willing to concede in theory 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.” Antonio Cassesse, 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 that the former position is gaining adherents. See Anne-Marie Slaughter, Op-Ed., N.Y. TIMES, (describing U.S. conduct in the War on Terror as “illegal but legitimate” in light of moral considerations (referencing language from the Independent Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned 4 (2000)).

See STRAWSON, supra note _, 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 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-mystic status as a kind of received truth in the minds of state decisionmakers, that it is never acceptable to violate international 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.

See generally ANDREW BACEVICH, AMERICAN EMPIRE (2002) (claiming that the U.S. is becoming an imperial power through the globalizing influence of U.S. law and power and that the sole question is what form the empire will assume). 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 be interested in pursuing a civilization mission rather than the maximization of power, as well as by dependency theorists and critical scholars as part of an imperialist justification for the use of power to dominate “backward peoples” and thereby secure an advantage in global trade. See WILLIAM OLSON & A.J.R. GROOM, INTERNATIONAL RELATIONS THEN AND NOW 146 (1991) For the most plangent critique of the contemporary resurrection of the civilization/barbarian distinction, see SALTER, supra note _ (noting that classifications of peoples as morally, culturally, and racially inferior justified abandonment of legal restraint to aid in their domination and extermination).

Admittedly, 19th and 20th century Western powers have warped the civilization/barbarian distinction to the explanation and justification of racist policies of colonialism and even genocide in the name of “progress.” See, e.g., HEINRICH VON TREITSCHKE, ZEHN JAHRE DEUTSCHE KAMPEF (1896) (justifying extermination of “barbaric” colonial populations on the ground that such peoples were alleged to be biologically inferior); JOHN FISKE, THE BEGINNINGS OF NEW ENGLAND (1889) (justifying slaughter of American Indians on the ground that “civilized peoples” were entitled to use any means and methods to defend their existence against “savages”); HENRY GRAFF, ED., AMERICAN IMPERIALISM 95 (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[,]” (citing 1902 Congressional testimony in response to reported U.S. atrocities committed against Philippino forces). Some contemporary scholars fear that the trope of the terrorist as “frightening, foreign, barbaric beast” is nothing more than a racialized illusion to differentiate between “us” and “them” 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

For some, the use of terms such as “good” and “evil” is not only strategically unwise but also itself an act of immorality. See Gavin McCormack, North Korea in the Vice, 18 NEW LEFT REV. 25 (2002) (describing the reference to an “Axis of Evil” in the 2002 State of the Union Address to describe the linkage between North Korea, Iran, and Iraq as “historically immoral” in its use of this judgmental language); Text of Address by Alexander Solzhenitsyn at Harvard University, Thursday, June 8, 1978 A World Split Apart by Alexander Solzhenitsyn (lamenting a world in which evil ideas and individuals prey upon those who internalize the “humanistic and benevolent concept according to which there is no evil inherent to human nature”).
offend those for whom natural law dictates that all individuals possess, by the fact of their existence, an inviolable body of rights: for these critics, the proposed rationalization may seem a nihilistic Conradian plea to “Exterminate the brutes!” that tramples upon the maxim _ex injuria jus non oritur_ and leaves undesirable normative footprints in the sands of legal and moral history. The proposal may strike others as the emotional sacrifice of law on the altar of expedience and the open-ended bellicization of political life to fill a vacuum left by the end of the Cold War, and thus a capitulation to terrorism. Worst of all, 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.

However, best-laid plans of legal absolutists cannot bring to heel the world’s most execrable and rapacious individuals and groups, although, ironically, it is for them as law breakers, rather than for law followers, that all law is originally conceived. Reclassifying terrorists as barbarians is a pleonasm inasmuch as both terms are descriptive of counter-civilizational entities, but it bears repetition that terrorists are functional equivalents of the 5th-century Vandals who sacked Rome and cast the West into a thousand years of darkness: they will not cease attempting to topple our civilization until they succeed or are destroyed. If terrorists are not objectively evil, nothing and no one can ever be. The law-creating, law-abiding, peoples of the earth—a designation inclusive of the vast majority of Muslims—must

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794 At the conclusion of The Heart of Darkness, the body of Kurz, 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 Kurz had concluded that if savages would not accept the gift of civilization it was necessary to “Exterminate the Brutes!” to preserve the West. See JOSEPH CONRAD, HEART OF DARKNESS (1899).

795 Translated loosely from the Laton, “Right cannot originate from injustice.”

796 See Mofidi & Eckert, _supra_ note_, at 92 (suggesting the U.S. response to September 11th has been the product of “inflamed passions and emotions” rather than a “commitment to the calm and rational, albeit slow, path of law.”).

797 See Yehezkel Dror, _Terrorism as a Challenge to the Democratic Capacity To Govern_, in Terrorism, Legitimacy, and Power 73-74 (Martha Crenshaw ed., 1983) (contending that counterterrorist measures sacrifice law to the defeat of terrorists and threaten to “barbarize” the international system). One commentator, thoroughly wedded to a judicial model that treats terrorism as a crime “no different from any other 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 Emanuel Gross, _supra_ note_, at 2, 95.

798 The assumption that law is created to control, by threat of punishment, the actions of those who would otherwise be tempted to commit the acts made illegal by positive rules, rather than to govern the conduct of those who would already obey the legal sanction even in its absence, is of old vintage. See I Timothy 1:8-14 (“We also know that law is made not for the righteous but for lawbreakers and rebels, the ungodly and sinful, the unholy and irreligious; for those who kill their fathers or mothers, for murderers, for adulterers and perverts, for slave traders and liars and perjurers[,]”); see also THE FEDERALIST No. 51 (“If men were angels, no government would be necessary.”); LOUIS HENKIN, HOW NATIONS BEHAVE (2nd ed. 1979) (“In international society . . . law is not effective against the Hitlers.”).

799 Elshtain urges 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 gleeeful about the lives lost and exult in the terrible devastation to so many families.” ELSHTAIHN, _supra_ note_, 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.

800 Many relativist moral philosophers contest the argument that there are absolute and self-evident moral principles or “verdictive beliefs” that are independent of attitudes and contexts and that some things, persons, and ideas are objectively good, whereas others are objectively evil. See Russ Shafer-Landau, _Knowing Right from Wrong_, 79 ASTRALASIAN J. PHIL. 62 (2002) (examining such arguments and contrasting them with a “moral realist” perspective). Not all persons may agree with the moral realist assertion that terrorists are the exemplars of pure evil. Some may reject the very concept of evil; others may simply be unwilling to definitively state that terrorists are objectively so; still others may consider absolute evil to be the slaughter of dolphins (as opposed to humans), or the eating of meat, or some other avulue-system or practice. We may simply have to agree to disagree.

801 The official U.S. position with regard to the Islamic faith is one of respect and tolerance; it is the terrorists who claim their particular version of the Islamic faith directs them to murder innocent civilians, and not the Islamic faith against whom they blaspheime in claiming the sanction of Islam in these murders, against whom the War on Terror is directed. See George W. Bush, “Islam is Peace,” Says President, Office of the Press Secretary, 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.”).
choose between civilization and barbarism, and the creation and implementation of policy instruments entail decisions that feed into that choice. If regulators simply cobble together additional sources of law and foist them upon soldiers rather than identify and support rules and institutions that promote the primary end law is intended to serve—the creation, sustenance, and manifestations of the values that preserve humanity against chaos—then regulators are handmaidens of evildoers. Combat 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 can legitimately be fit into the 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. Truly 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, but evanescence of considerations of the justice of the cause for which combatants battle has utterly blurred moral distinctions and made possible the legal morass in which the events in the fictional scenario may well transpire. A slavish devotion to positive IHL, to which absolutists would commit us, “would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.” The re-incorporation of traditional principles of martial custom, reconsideration of the justice of the causes for which combatants fight, and re-acquisition of an empathetic understanding of the moral universe in which the subjects of regulation experience the cauldron of 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.

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. 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 U.S. military power, or the threat thereof, it is counterproductive to alienate the U.S. and forfeit its prodigious energies in the humanization of war by clinging to a talismanic insistence upon the ICC. It is further irrational, and even morally irresponsible, to condemn U.S. 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

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802 See BARNETT, supra note _, at 139 (quoting Thomas Jefferson from an 1810 letter to J.B. Colvin).
803 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 _. 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 only the support of a legalistic structure.” 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.
804 See SCHACTER, supra note _, at 5-6 (“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 system [.]”).
805 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 _, at 400 (cautioning against the premature judgment of international criminal tribunals).
806 “Absolute adherence to pacifism makes the pacifist morally responsible for the evils that an intelligent use of force may sometimes prevent.” SIDNEY HOOK, PACIFISM AND POLITICS _ (1947). The same might be said for an absolute
benefits the international community. The proposal to do so here is one the U.S. has rejected largely upon moral considerations that do not register with the cult of legal absolutists peddling the ICC, an institution that threatens to become the next “smelly little orthodoxy contending for our soul.”

It is confounding that a mere two years after September 11, rather than express common resolve, the ardent consortium of activists championing the ICC will not concede that, in the absence of a central executive, U.S. military operations, even where unauthorized by the UN, enhance the security of the entire international community that cultural and historic agnosticism of real-world military operations should temper their absolutism, and that the U.S. deserves a margin of appreciation in its titanic struggle. 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 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, to determine which of the causes for which combatants fight are virtuous and which are vile. We need not become servants to law; rather, law must be made to serve us, and IHL is not, any more than domestic law, a suicide pact. Evaluating the rectitude of the cause for which combatants fight is far more essential to an ethically legitimate theory adherence to the ICC in the face of strong evidence that it 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.

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 U.S. abstention from participation in the ICC).

GEORGE ORWELL, HOMAGE TO CATALONIA, (1938) (referring to socialism and fascism).

See James B. Motley, Coping with the Terrorist Threat: The U.S. Intelligence Dilemma, in STEPHEN J. CIMBALA, ED., INTELLIGENCE AND INTELLIGENCE POLICY IN A DEMOCRATIC SOCIETY 165 (opining that one might expect that “[c]ompassion [would be] stirred when Americans, or citizens of other nations, become hostages to or victims of fanatical terrorists[,]”). At first blush it appears that the attacks of September 11 are being treated by U.S. allies as an attack not so much upon the West as upon the U.S. as the primary power. If true, the admonition that to understand terrorism, and responses thereto, 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 in analyzing the post-September 11 political equation. SLANN & SCHECHTERMAN, supra note, at 3. While collective security has always been bedeviled by the free-rider problem, that the U.S. 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 for the future. See Edward A. Amley, Jr., Peace by Other Means: Using Rewards in UN Efforts to End Conflicts, 26 DENV. J. INT’L L. & POL’Y 235, 242-43 (critiquing the free-rider problem in the UN collective security system).

See infra at note, (identifying and describing this coalition of states, most of which have little military capacity and no responsibility for international peace and security, and activist NGOs). Many of the staunchest supporters of the ICC are members of the European Union, militarily weak states that have “moved beyond power” and adopted a post-realist normative framework for their harmonized foreign policies in which the use of force is inconceivable except where authorized by the UN and conducted multilaterally. See James Dao, Solitaire; One Nation Plays the Great Game Alone, N.Y. TIMES, Jul. 7, 2002, at D1 (illuminating European preference for multilateral institutionalist approaches to security).

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 UN Charter, in which the provision of law prescribing 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 legitimizd notwithstanding the black letter of the law).

See 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.

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).
of IHL than an assessment of the methods and means they employ or a tabulation of the casualties they create. We need not navigate a moral maze or parse legal texts to assert that the cause to which the U.S. and its allies are committed—preserving the last best hope for human freedom and dignity—is infinitely more noble than that of their terrorist foes. 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 would must themselves respect the reciprocal rights of others. Legal absolutism invites catastrophe. A rationalized IHL that unabashedly lets slip the dogs of the bellum romanum is no parochial approach to the “laws of war;” rather, it is an affirmation of a universal vision of law with ubroken ties to moral reason and judgment.

If we screw our civic and moral courage to the sticking point 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. The barbarians are at the gates of civilization, they are evil, and they 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 plain haunted by the drifting ghosts of its humanizing promise.

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815 Terminiello v. City of Chicago, 337 U.S. 1 (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.”).
816 See supra at note (discussing advantages to a multilateral approach to international relations). Ideally, the U.S. 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, NAT’L INTEREST, Winter 2001/02, at 10-12 (advocating U.S. 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 U.S. values).
817 “It is essential to condemn what must be condemned, but swiftly and firmly.” ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH (1960)
818 See WILLIAM SHAKESPEARE, JULIUS CAESAR, Act III, sc. 1 (“Cry havoc and let slip the dogs of war!”).
819 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, YALE L. J. 1011, 1023-24, 1047 (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. 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 1097.
820 See Solzhenitsyn, supra note (“The Western world has lost its civil courage . . . Should one point out that from ancient times decline in courage has been considered the beginning of the end?).
821 “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).