

In the Crossfire or the Crosshairs?

Colin H. Kahl

Norms, Civilian Casualties, and
U.S. Conduct in Iraq

In early 2006, *Valley of the Wolves: Iraq*, the most lavish movie production in Turkish history, opened in Istanbul to record crowds. The movie is a standard Hollywood-style action blockbuster, but with a twist: the villains are Americans. The movie depicts the exploits of a Turkish secret agent who seeks revenge against a group of U.S. soldiers for their mistreatment of Turkish special forces operating in northern Iraq. In one scene, U.S. troops crash an Iraqi wedding party and massacre innocent women and children. In another, U.S. forces firebomb a mosque during evening prayer. When asked by a BBC reporter whether the movie was anti-American, one eager patron back to see the movie for a second time said, "That's the reality. Now we can see it on screen."¹

The belief that U.S. forces regularly violate the norm of noncombatant immunity—the notion that civilians should not be targeted or disproportionately harmed during war—has been widely held since the outset of the Iraq conflict. According to a June 2003 Pew Global Attitudes study, for example, more than 90 percent of Jordanian, Moroccan, Palestinian, and Turkish respondents and more than 80 percent of Indonesian and Pakistani respondents felt that the United States "didn't try very hard" to avoid Iraqi civilian casualties. That view was shared outside the Muslim world by more than 70 percent of Brazilians, French, Russians, and South Koreans.²

As conditions in Iraq have moved from bad to worse, the well-documented

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The author would like to thank William Arkin, Stephen Biddle, Michael Desch, Alexander Downes, Charles Dunlap, Raymond Duvall, Kelly Greenhill, Robert Jervis, Helen Kinsella, Ronald Krebs, Richard Lacquement, Jeffrey Lomonaco, John Nagl, William Nash, David Perry, Richard Price, Jack Snyder, Leslie Vinjamuri, Ike Wilson, four anonymous reviewers, and the participants in the Columbia University Conference on the United States and the Laws of War, 2006 Council on Foreign Relations International Affairs Conference, Duke University Casualties and Warfare Conference, Lone Star National Security Forum, Minnesota International Relations Colloquium, Stanford University's Center for International Security and Cooperation seminar series, and the University of Wisconsin's Law, War, and Human Security series for their helpful comments and criticisms. The author would also like to thank the Council on Foreign Relations for facilitating research at the Department of Defense.

1. Quoted in Sarah Rainsford, "Turkish Rush to Embrace Anti-U.S. Film," February 10, 2006, <http://news.bbc.co.uk/2/hi/entertainment/4700154.stm>.

2. Pew Global Attitudes Project, *Views of a Changing World* (Washington, D.C.: Pew Research Center for the People and the Press, June 3, 2003), pp. 24–25.

abuse of Iraqi detainees by U.S. troops at Abu Ghraib and the failure of U.S. authorities to live up to their international legal obligations to provide basic security during the formal occupation period have contributed to the widespread sentiment that the United States has discarded the Geneva Conventions altogether, including their prohibitions against targeting civilians.³ Indeed, a growing chorus of commentators contends that the U.S. military has engaged in systematic civilian victimization in Iraq. According to Neta Crawford, for example, “The United States chose an offensive preventive posture, invaded and occupied Iraq, and began waging a counter-insurgency war when Iraqis continued to resist the U.S. occupation. The type of war the U.S. is fighting and the rules of engagement produce systemic atrocity.”⁴ Similarly, in an October 2006 speech, Seymour Hersh, who came to fame for publicizing the My Lai massacre in Vietnam, declared, “There has never been an [American] army as violent and murderous as our army has been in Iraq.”⁵

Based on field research and an extensive review of primary and secondary materials, I contend that the U.S. military has done a better job of respecting noncombatant immunity in Iraq than is commonly thought. Moreover, compliance has improved over time as the military has adjusted its behavior in response to real and perceived violations of the norm. This behavior is best explained by the internalization of noncombatant immunity within the U.S. military’s organizational culture, especially since the Vietnam War. Contemporary U.S. military culture is characterized by what I call the “annihilation-restraint paradox”: a commitment to the use of overwhelming but lawful force. The restraint portion explains relatively high levels of U.S. compliance with noncombatant immunity in Iraq, while the tension between annihilation and restraint helps account for instances of noncompliance and the overall level of Iraqi civilian casualties resulting from U.S. operations—which, although low by historical standards, have still probably been higher than was militarily necessary, desirable, or inevitable.

3. In a forthcoming work, I argue that the same factors that account for compliance with noncombatant immunity in Iraq explain lower levels of compliance with international legal requirements to treat detainees humanely and meet the obligations of occupying powers.

4. Neta C. Crawford, “Democracy and Norms of War (or, When Soldiers ‘Snap’): Locating Moral Responsibility for Atrocity in Iraq,” paper prepared for the 2006 annual meeting of the American Political Science Association, Philadelphia, Pennsylvania, September 2, 2006, p. 6. See also Neta C. Crawford, “Individual and Collective Moral Responsibility for Systemic Military Atrocity,” *Journal of Political Philosophy* (forthcoming); and Robert Jay Lifton, “Haditha: In an ‘Atrocity-Producing Situation’—Who Is to Blame?” *Editor & Publisher*, June 14, 2006, http://www.editorandpublisher.com/eandp/article_brief/eandp/1/1002612148.

5. Quoted in Martin Lukacs, “There Has Never Been an American Army as Violent and Murderous as the One in Iraq,” *McGill Daily*, October 30, 2006.

The article proceeds in four sections. The first provides a brief description of the norm of noncombatant immunity. The second evaluates the degree of U.S. military compliance with the norm in Iraq during two time periods: the major combat phase (March 19–April 30, 2003) and the stability operations/counterinsurgency (SO/COIN) phase (May 1, 2003–present). The third section argues that organizational culture best explains U.S. military conduct in Iraq, and the conclusion offers several policy recommendations.

The Law of War and the Norm of Noncombatant Immunity

Norms are “collective expectations for the proper behavior of actors with a given identity.”⁶ The norm of noncombatant immunity has its roots in the legal and ethical tradition known as “just war.”⁷ Internationally, the norm has been institutionalized as part of the Law of War, which encompasses all treaties, agreements, and customary law for the conduct of hostilities. During the twentieth century, the Law of War was codified in a series of international agreements and treaties, most notably the Hague Conventions of 1907, the Geneva Conventions of 1949, and the two Additional Protocols to the Geneva Conventions adopted in 1977. These accords are among the most widely ratified international treaties, and the principles embodied in them are generally accepted as obligations that all nations must comply with.⁸ The United States has signed and ratified the Hague and Geneva Conventions; it is a signatory to the Additional Protocols but has not ratified them. Nevertheless, as it relates to the norm of noncombatant immunity, the United States recognizes the vast majority of Additional Protocol I’s relevant articles as customary international law, and Department of Defense (DoD) policy holds that Law of War obligations apply regardless of how a given conflict is characterized.⁹

The Law of War rests on four interrelated principles: military necessity, humanity, distinction, and proportionality. The latter two principles are central to

6. Peter J. Katzenstein, “Introduction: Alternative Perspectives on National Security,” in Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), p. 5.

7. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006).

8. Most relevant are the Fourth Geneva Convention Relative to the Protection of Civilians in Times of War and Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflict. See International Committee of the Red Cross, International Humanitarian Law database, <http://www.icrc.org/ihl>.

9. Keith E. Puls, ed., *Law of War Handbook, 2005* (Charlottesville, Va.: International and Operational Law Department, Judge Advocate General’s Legal Center and School, 2005), pp. 29–30; and U.S. Department of Defense Directive 2311.01E, “DoD Law of War Program,” May 9, 2006.

the norm of noncombatant immunity. The principle of distinction is the obligation for parties to hostilities to always distinguish between lawful military targets (i.e., combatant forces and military objects and objectives) and unlawful noncombatant ones (including the civilian population as such, individuals not taking direct part in hostilities, and civilian objects such as hospitals, schools, places of worship, and important cultural sites). Under no circumstances, including military necessity, is the direct (intentional) application of force against noncombatant targets allowed. Nonuniformed “civilians” may not be targeted unless they directly take part in hostilities, and civilian objects and structures are also off limits unless they are being used for military purposes. The principle of proportionality states that anticipated but unavoidable or otherwise incidental (i.e., “collateral”) damage to noncombatants and civilian objects incurred while attacking a legitimate military objective must not be excessive in relation to the concrete and direct military advantage to be gained. Proportionality is not a wholly separate legal standard, but rather a secondary test that a planned attack must pass after meeting the principle of distinction.¹⁰ If both the distinction and proportionality principles are met, civilian casualties resulting from a strike on a military target, however tragic, are not considered violations of international law.

U.S. Compliance in Iraq

Norm compliance is determined by the extent to which actors recognize normative obligations and attempt to bring behavior into line with these obligations. Evaluating the objective degree of compliance with a given norm is notoriously difficult because what constitutes a “violation” is often open to interpretation; norm compliance does not necessarily imply norm efficacy; and the existence of some violations is not sufficient to demonstrate systematic noncompliance.¹¹ Therefore, three types of measures are used here to assess the degree of U.S. military compliance with the norm of noncombatant immunity in Iraq: (1) levels of civilian casualties (an indirect measure); (2) conduct during military operations; and (3) responses to instances of noncompliance.

10. Additional Protocol I to the Geneva Conventions, articles 51 and 52; and U.S. Department of the Army, *The Law of Land Warfare*, Field Manual 27-10, July 18, 1956, par. 41, change 1.

11. For general discussions of compliance, see Abram Chayes and Antonia Handler Chayes, “On Compliance,” *International Organization*, Vol. 47, No. 2 (Spring 1993), pp. 175–205; and Kal Raustiala and Anne-Marie Slaughter, “International Law, International Relations, and Compliance,” in Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, eds., *Handbook of International Relations* (London: Sage, 2002), pp. 538–558.

CIVILIAN CASUALTIES

Drawing inferences from casualty data is a risky exercise. In wars, especially those involving powerful armed forces and long durations, large numbers of people may be killed or wounded, including civilians. This is why protections for noncombatants were institutionalized within the Law of War in the first place. But the Law of War merely balances military necessity against humanitarian concerns; no one argues that even full compliance with the norm of non-combatant immunity would spare all civilians. Accidents (both human and technological) will happen; civilians will unwittingly get caught in the crossfire; and some collateral damage will be deemed acceptable, at least from a legal point of view. That said, at some point, very low or very high levels of casualties relative to the historical record and the nature of the conflict provide some indirect evidence of compliance or noncompliance.

There are numerous estimates of civilian casualties in Iraq, all of which are problematic. Iraq Body Count (IBC), a nonprofit organization that derives estimates from English-language and translated media sources, suggests that as many as 7,393 civilians may have been killed during major combat. Another estimate by the Project on Defense Alternatives, which corroborated media reports with hospital and burial records and filtered out likely combatant fatalities, suggests that 3,230–4,327 Iraqi civilians were killed.¹² In comparative perspective, it is significant to note that the number of Iraqi civilians killed during the 2003 invasion was similar to that of the 1991 Persian Gulf War, even though the mission objectives in 2003 required coalition forces to operate much more extensively in Iraqi cities, where they confronted both regular Iraqi units and irregular Fedayeen fighters largely indistinguishable from the civilian population.¹³

For the SO/COIN period, the two leading estimates come from IBC and the Brookings Institution. IBC estimates that as many as 54,303 Iraqi civilians were killed from May 1, 2003, through the end of 2006. The maximum number attributed to U.S. forces or crossfire is 4,399. That figure, however, is probably an underestimate because it includes only 87 deaths from U.S. actions at checkpoints and during convoy operations, known as “escalation of force” (EOF) incidents. If estimated EOF fatalities based on U.S. military figures are added to

12. Iraq Body Count, <http://www.iraqbodycount.org>; and Carl Conetta, “The Wages of War: Iraqi Combatant and Noncombatant Fatalities in the 2003 Conflict,” Research Monograph, No. 8 (Cambridge, Mass.: Project on Defense Alternatives, October 20, 2003), <http://www.comw.org/pda/0310rm8.html>.

13. Estimates of direct civilian deaths during the Gulf War range from 3,500 to 15,000. Conetta, “The Wages of War”; and Medact, *Collateral Damage: The Health and Environmental Costs of War on Iraq* (London: Grayston Center, November 2002), p. 2.

the IBC numbers and adjusted for double counting, the modified IBC total is 5,429 deaths attributable to U.S. forces and crossfire from the declared end of major combat through the end of 2006 (representing 10 percent of the total violent deaths).¹⁴ Over the same time period, the Brookings Iraq Index—which supplements IBC data with hospital and morgue records reviewed by the UN Assistance Mission for Iraq (UNAMI), and makes a further upward adjustment to account for likely undercounts from media reporting—estimates that 76,552 Iraqi civilians were killed.¹⁵ The Brookings Iraq Index does not provide a comprehensive estimate of deaths attributable to U.S. forces or crossfire, but assuming the same percentage documented by IBC and adding EOF incidents produces an adjusted Brookings estimate of 8,685 deaths in the SO/COIN period through the end of 2006.

Another well-known study, based on an Iraqi household survey and reported in the British medical journal *The Lancet* in October 2006, estimated 601,000 excess violent deaths since the invasion.¹⁶ Although widely cited as an estimate of civilian deaths, the majority of the 300 postinvasion violent deaths recorded in the sample of 1,849 households were military-aged men (59 percent aged 15–44; 78 percent aged 15–59), and no attempt was made to differentiate between combatants and noncombatants. Moreover, the *Lancet* estimate is so much higher than other available tallies, and its findings suggest so many implausible implications given other available data on the nature of the conflict, that its conclusions seem dubious, perhaps reflecting some significant sampling bias or reporting error.¹⁷ Indeed, a much larger household survey

14. "Murder Is Certain," *Economist*, March 23, 2006; and Josh White, Charles Lane, and Julie Tate, "Homicide Charges Rare in Iraq War," *Washington Post*, August 28, 2006.

15. Michael O'Hanlon and Jason H. Campbell, *Iraq Index* (Washington, D.C.: Brookings, April 26, 2007), p. 15.

16. Gilbert Burnham, Riyadh Lafta, Shannon Doocy, and Les Roberts, "Mortality after the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey," *Lancet*, October 11, 2006, pp. 1–8.

17. Although 92 percent of those asked by the research team provided death certificates, the study's estimate is 12 times higher than those provided by UNAMI and the *Los Angeles Times*, based on a review of death certificates from Iraqi morgues and hospitals for the comparable time period. United Nations Assistance Mission for Iraq, Human Rights Office, "Human Rights Report," May 1–June 30, 2006; and Louise Roug and Doug Smith, "War's Iraqi Death Toll Tops 50,000," *Los Angeles Times*, June 25, 2006. Moreover, the implied number of wounded and car bomb victims, heterogeneous distribution of victims, very high (and historically unusual) ratio of excess violent deaths to nonviolent deaths, mysterious postinvasion drop in child mortality, low estimate of prewar (sanctions era) mortality, and scale and trend in deaths attributed to the coalition all seem highly implausible given everything else that is known about the conflict, suggesting that the *Lancet* estimate is the by-product of some significant sampling bias or other problem with how the survey was conducted. See Beth Osborne Daponte, "The Civilian Death Toll in Iraq War Proves a Nebulous Statistic," *Taipei Times*, January 28, 2007; Hamit Dardagan, John Sloboda, and Josh Dougherty, "Reality Checks: Some Responses to the Latest *Lancet* Estimates," Iraq Body Count, October 16, 2006, <http://iraqbodycount.org/press/pr14.php>; Jim Giles, "Death Toll in Iraq: Survey

funded by the UN Development Programme in 2004 suggests that the IBC and Brookings figures are probably much closer to the actual number of civilian deaths.¹⁸ Jon Pedersen, the research director for the UNDP study, recently stated that he believes the *Lancet* numbers are “high, and probably way too high. I would accept something in the vicinity of 100,000 but 600,000 is too much.”¹⁹ Consequently, the *Lancet* numbers are not used for the analysis here.

Even if, by the end of 2006, the actual number of Iraqi civilian deaths was probably closer to 70,000 than 600,000, no one should trivialize the horrific carnage in Iraq. The overall scale of civilian deaths is an indictment of the U.S. government’s failure to adequately plan for postinvasion contingencies, which allowed chaos to emerge in the wake of regime change. The number of deaths attributed to U.S. forces and crossfire also provides evidence that troops have sometimes engaged in activities that put Iraqi civilians at high risk of death and injury. Yet, as human rights organizations have documented, Iraqi insurgents and militias have engaged in frequent violations of the Law of War, significantly increasing the risk that civilians would be caught in the crossfire; and the vast majority of killings have been at the hands of fellow Iraqis. Sunni insurgents and Shia militias have purposely placed civilians at risk by positioning their forces in mosques and hospitals; using civilian homes as shelter; firing mortars from yards and fields in civilian neighborhoods and near farms;

Team Takes on Its Critics,” *Nature*, March 1, 2007, pp. 6–7; Madelyn Hsiao-Rei Hicks, “Mortality after the 2003 Invasion of Iraq: Were Valid and Ethical Field Methods Used in This Survey?” Households in Conflict Network, Research Design Note, No. 3 (Brighton, U.K.: Institute for Development Studies, University of Sussex, December 2006); Neil F. Johnson, Michael Spagat, Sean Gourley, Jukka-Pekka Onnela, and Gesine Reinert, “Bias in Epidemiological Studies of Conflict Mortality,” Households in Conflict Network, Research Design Note, No. 2 (Brighton, U.K.: Institute for Development Studies, University of Sussex, 2006); Fred Kaplan, “Number Crunching: Taking Another Look at the *Lancet*’s Iraq Study,” *Slate*, October 20, 2006, <http://www.slate.com/id/2151926/>; Jeffrey White and Loring White, “Death in Iraq: A Critical Examination of the *Lancet* Paper,” *PolicyWatch*, No. 1155 (Washington, D.C.: Washington Institute, October 18, 2006), <http://www.washingtoninstitute.org/templateC05.php?CID?2523>; and “Correspondence: Mortality in Iraq,” *Lancet*, January 13, 2007, pp. 101–104.

18. The UNDP-funded study surveyed 21,688 households and estimated that there were 24,000 Iraqi war-related fatalities (both military and civilian) through mid-2004. Central Organization for Statistics and Information and Fafo Institute of Applied International Studies, *Iraq Living Conditions Survey, 2004*, Vol. 2: *Analytical Report* (Baghdad: Ministry of Planning and Development Cooperation, 2005), p. 54. Although the UNDP estimate is 1.6 times higher than the IBC estimate during the comparable time period (see Hami Dardagan, John Sloboda, and Josh Dougherty, “Speculation Is No Substitute: A Defence of Iraq Body Count,” April 2006, http://reports.iraqbodycount.org/d/a_defence_of_ibc.pdf, Table 3), once the estimated 9,200 Iraqi military casualties from the major combat phase identified by the Project on Defense Alternatives are subtracted (Conetta, “The Wages of War”), the difference nearly disappears.

19. Quoted in Jefferson Morley, “Iraq’s Civilian Death Toll ‘Horrible’—Or Worse?” *Washington Post*, World Opinion Roundup, October 19, 2006, http://blog.washingtonpost.com/worldopinionroundup/2006/10/is_iraqs_civilian_death_toll_h.html.

and using ambulances, taxis, and other civilian vehicles to transport fighters and weapons and launch bomb attacks. They have also engaged in frequent indiscriminate attacks, and, as the conflict has evolved, have increasingly targeted civilians directly through devastating bombings and mass executions, triggering the current spiral of sectarian bloodshed.²⁰

The number of documented fatalities attributable to U.S. forces or crossfire in Iraq is much lower than those for many other U.S. military campaigns of the last century where civilians were clearly targeted. During World War II, for example, U.S. and British forces engaged in strategic bombing against German and Japanese cities, killing more than 1 million noncombatants. In a single night of U.S. firebombing over Tokyo in 1945, at least 85,000 people, mostly civilians, were incinerated—nearly 21 times the total number of civilian deaths from U.S. air strikes in Iraq through the end of 2006 (according to IBC data), and 6–10 times the total number of Iraqi civilians killed by all U.S. ground and air forces or crossfire in the first three and one-half years of the war.²¹ Although some might argue that improvements in precision-guided munitions account for the majority of this historical difference, many of the noncombatant fatalities from bombing during World War II were the result of attacks aimed at destroying enemy morale, not incidental by-products of crude targeting and guidance technologies.

Perhaps the most telling comparisons, however, are to the U.S. wars in the Philippines and Vietnam, the two most significant foreign counterinsurgency campaigns in U.S. history. In the Philippines between 1899 and 1902, approximately 16,000 guerrillas were killed and at least 200,000 civilians perished (out of a total population of 7.4 million in 1900). U.S. forces engaged in the widespread destruction of crops, buildings, civilian property, and entire villages as forms of collective punishment against families and communities suspected of supporting insurgents. Hundreds of thousands of Filipino civilians were moved to concentration camps to separate them from guerrillas, and able-bodied men who dared to venture outside of these “protected zones” were assumed to be enemies and could be shot.²²

In Vietnam, the United States also fought in ways that put civilians directly

20. Human Rights Watch, *A Face and a Name: Civilian Victims of Insurgent Groups in Iraq*, Vol. 17, No. 9E (October 2005); and UNAMI, “Human Rights Report,” November 1–December 31, 2006.

21. A.C. Grayling, *Among the Dead Cities: The History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan* (New York: Walker, 2006), p. 77. IBC estimates that 4,081 Iraqi civilians were killed by air strikes through the end of 2006.

22. Michael Clodfelter, *Warfare and Armed Conflicts: A Statistical Reference to Casualty and Other Figures, 1500–2000*, 2d ed. (Jefferson, N.C.: McFarland, 2002), p. 271; and Brian McAllister Linn, *The Philippine War, 1899–1902* (Lawrence: University Press of Kansas, 2000), chap. 9.

in the crosshairs. Almost 750,000 North Vietnamese troops and Vietcong were killed during the war, and a conservative estimate of civilian deaths from violence in South Vietnam places the total at 522,000 (out of a total population of 16 million in 1966). U.S. troops fighting in Vietnam relied on massive firepower directed on occasion at targets in densely populated areas. U.S. forces established “free fire zones” in some areas, allowing anyone not wearing a South Vietnamese military uniform to be shot. The U.S. military used more than 29 times the tonnage of incendiary bombs in Vietnam as it did in World War II, and sprayed toxic defoliants on land in South Vietnam that was home to about 3 percent of the population. U.S. forces were also involved in many cases of outright murder and several incidents of mass killing. In the most notorious case, at My Lai on March 16, 1968, as many as 571 unarmed men, women, and children were massacred by a platoon of U.S. soldiers.²³ Recently declassified records show abuses were documented in every U.S. Army division deployed to Vietnam.²⁴

The contrast between the current Iraq war and previous U.S. counterinsurgency campaigns is striking. Adjusted for population size and duration, civilian deaths in Iraq through the end of 2006 were 11–17 times lower than in the Philippines. Because available data for the Philippines do not separate casualties caused by U.S. forces, this estimate is based on all violent deaths in Iraq. This certainly underestimates the difference between the Philippines and Iraq because, in the former case, anecdotal evidence strongly suggests that U.S. troops were responsible for a much higher percentage of total deaths. In the case of Vietnam, extrapolations from available hospital records suggest that at least 177,480 South Vietnamese civilians were killed by U.S. bombing and shelling.²⁵ Controlling for population and duration, Iraqi civilian fatalities attributable to direct U.S. action and crossfire through the end of 2006 were 17–30 times lower than those from bombing and shelling alone in Vietnam. Without adjusting for population, the average monthly deaths are still 10–16 times lower than in Vietnam.

Outside the U.S. context, contemporary Russian counterinsurgency efforts in Chechnya offer an even starker contrast. In the two Chechen wars (1994–96 and 1999–present), the Russians used an extraordinary amount of indiscrimi-

23. Clodfelter, *Warfare and Armed Conflicts*, pp. 784–785.

24. Nick Turse and Deborah Nelson, “Civilian Killings Went Unpunished,” *Los Angeles Times*, August 6, 2006.

25. This is derived by applying the percentage in Thomas C. Thayer, *War without Fronts: The American Experience in Vietnam* (Boulder, Colo.: Westview, 1985), p. 130, Table 12.3, to the estimate of 522,000 civilian deaths.

nate firepower, including intensive artillery and aerial bombardment in dense urban settings. The lowest estimate of civilian deaths attributable to Russian actions through 2003 is 50,000 out of a total Chechen population of approximately 1 million (other estimates place the death toll for the two wars as high as 250,000).²⁶ Even the most conservative estimate is 100–175 times the U.S.-caused toll in Iraq through 2006 (controlling for duration and population).

Given the nature of the conflict, the number of civilians killed in Iraq, however awful, is not sufficient to suggest systematic U.S. noncompliance with the norm of noncombatant immunity. On the contrary, compared with conflicts where civilians were directly targeted, Iraqi casualty data provide some indirect evidence for U.S. adherence.

MILITARY CONDUCT

An analysis of U.S. military conduct during operations in Iraq also points to relatively high levels of compliance.

“NO-STRIKE” LISTS AND COLLATERAL DAMAGE ESTIMATES. From the outset of the war in Iraq, the U.S. military has put several mechanisms in place to ensure compliance with the principles of distinction and proportionality. During the planning phase, a joint target list was developed containing an inventory of all potential targets that might be hit by coalition forces. Every potential target was vetted by judge advocates for compliance with the Law of War before it got on the list, and then vetted again after the list was complete. Certain operations directed against Saddam Hussein’s regime were deemed off limits if they targeted civilians or risked producing disproportionate damage to civilians and civilian infrastructure. Early in the planning process, the Pentagon drew up “no-strike” lists that included schools, mosques, sensitive cultural sites, hospitals, water treatment facilities, power plants, and other elements of the civilian infrastructure. In late 2002 a phone number and website address were circulated to UN agencies and nongovernmental organizations inviting them to submit nominations for inclusion on no-strike lists. The list grew to include thousands of potential targets as nominations were incorporated.²⁷

26. For a discussion of relevant estimates, see the Human Rights Violations in Chechnya website: <http://hrvc.net/htmls/references.htm>.

27. Lt. Col. Randy Brawley, chief of guidance, apportionment, and targeting at the Central Command Air Forces (CENTAF) Combined Air Operations Center during the air phase of major combat, interview by author, Washington, D.C., July 11, 2006; Col. Amy Bechtold, Joint Task Force–Southwest Asia legal adviser during the major combat phase, interview by author, Washington, D.C., July 31, 2006; Bob Woodward, *Plan of Attack* (New York: Simon and Schuster, 2004), pp. 56–57, 157–159, 205–208, 276–277; and Michael R. Gordon and Gen. Bernard E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* (New York: Pantheon, 2006), pp. 209–210.

No-strike lists placed significant limits on air and ground attacks during major combat. In contrast to the 1991 Gulf War air campaign, for example, the United States largely avoided targeting Iraqi civilian infrastructure in 2003.²⁸ And, on the ground, artillery batteries from the 3rd Infantry Division, the main army land force advancing to Baghdad, were programmed with a no-strike list of 12,700 sites that could not be fired on without a manual override. Ground forces also endeavored to keep strikes 300–500 meters away from civilians and civilian objects; attacks usually required visual confirmation of the target before firing (except in the case of counterbattery fire, where the army sometimes considered radar acquisition to be sufficient); and judge advocates were forward deployed to advise commanders on the legality of ground strikes.²⁹

Throughout the war, the U.S. military's collateral damage estimation methodology (CDEM) has also informed targeting. The CDEM provides a detailed analytical framework that employs a combination of computer software, intelligence, and human vetting (including vetting by judge advocates) to both measure possible civilian casualties and instruct operators in procedures to avoid or mitigate collateral effects. It distills targeting decisions into five sequential questions used by commanders and their legal advisers to determine the legitimacy of a given strike under the Law of War. First, is it possible to positively identify the object or person as a legitimate military target authorized for attack by the current rules of engagement (ROE)? Second, is there a protected facility (i.e., no-strike), civilian object or people, or significant environmental concern within the effects range of the preferred weapons system? Third, is it possible to avoid damage to that concern by attacking the target with a different weapon or with a different method of approach? Fourth, if not, how many people are likely to be injured/killed by the attack? Fifth, is it necessary to call a higher commander for permission to attack this target? The U.S. military has reviewed all preplanned targets throughout the war using this methodology.³⁰ During the air phase of major combat, for example, a collateral damage estimate was done for every target nominated by a component

28. Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War* (New York: Human Rights Watch, 1991); and Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (New York: Human Rights Watch, December 2003), pp. 41–54.

29. Col. Lyle Cayce, staff judge advocate for the 3rd Infantry Division during the major combat phase, interview by author, Fort Benning, Georgia, May 10, 2006; 3rd Infantry Division, Rules of Engagement for the Employment of Indirect Fires; Gordon and Trainor, *Cobra II*, p. 223; and Human Rights Watch, *Off Target*, pp. 92–94.

30. Human Rights Watch, *Off Target*, pp. 18–20; U.S. Army, *Legal Lessons Learned from Afghanistan and Iraq*, Vol. 1: *Major Combat Operations (September 11, 2001–May 1, 2003)* (Charlottesville, Va.: Center for Law and Military Operations, 2004), pp. 85, 103; and Lt. Col. James K. Carberry and M.

to accomplish daily objectives. By the time a target was actually struck, it had been vetted by dedicated intelligence officers and reviewed three or four times by judge advocates for potential Law of War violations. As the officer in charge of compiling the daily taskings for air strikes in the Combined Air Operations Center (CAOC) observed, "You couldn't swing a dead cat in the CAOC without hitting a JAG [judge advocate general]."³¹

The CDEM also triggers certain thresholds for political approval, with targets considered to represent a risk of "high collateral damage" requiring approval by the secretary of defense (and, during the major combat phase, the president). In the lead-up to the war, the CDEM process narrowed 11,000 initial high-collateral damage aim points down to around two dozen, and both Secretary of Defense Donald Rumsfeld and President George W. Bush were briefed on them. According to a senior Central Command (CENTCOM) official, twenty of these potential high-collateral damage targets were hit.³² Because these targets were generally struck at times of day meant to minimize the risks to civilians, however, both a study by Human Rights Watch and a RAND study commissioned by the U.S. Air Force suggest that there were not significant numbers of civilian casualties from preplanned strikes.³³

RULES OF ENGAGEMENT. Of course, there have been numerous situations where U.S. forces have not had sufficient time to conduct thorough collateral damage estimates, especially during the heat of battle when commanders are authorized to approve attacks necessary for self-defense. In this context, rules of engagement explicitly "delineate the circumstances and limitation under which United States forces will initiate and/or continue combat engagement with other forces encountered."³⁴ Unclassified ROE cards and "shoot/don't shoot" scenarios used to train U.S. forces suggest that American ROE attempt to balance the legitimate right that individuals and units have to self-defense with Law of War concerns by providing troops with a clear sense of what constitutes a lawful military target and appropriate response. During major combat, the Combined Forces Land Component Command (CFLCC), the highest operational command element (reporting to CENTCOM) for the war, issued status-based criteria to all U.S. forces. The CFLCC ROE identified Iraqi mili-

Scott Holcomb, "Target Selection at CFLCC: A Lawyer's Perspective," *Field Artillery*, March–June 2004, pp. 41–42.

31. Lt. Col. Randy Brawley, email correspondence with author, July 12, 2006.

32. Human Rights Watch, *Off Target*, pp. 19–20. According to open source material, the threshold for "high collateral damage" during major combat was 30. Gordon and Trainor, *Cobra II*, p. 110.

33. Human Rights Watch, *Off Target*, p. 5; and Brawley, email correspondence with author.

34. Joint Chiefs of Staff, Publication 1-02, *DoD Dictionary of Military and Associated Terms*, as amended through March 22, 2007, <http://www.dtic.mil/doctrine/jel/doddict/>.

tary and paramilitary forces as “declared hostile forces” that could be attacked until such time as they were wounded or surrendered.³⁵

As the major combat phase of the war concluded, the U.S. military began to modify the mission-specific ROE to account for the changing strategic, operational, and tactical landscape. New instructions were issued by Combined Joint Task Force 7 (CJTF-7), the successor organization to CFLCC, and then by Multi-National Corps–Iraq (MNC-I), the operational component of Multi-National Force–Iraq (MNF-I), which eventually replaced CJTF-7. Evolving ROE had to account for the fact that U.S. forces confronted adversaries who were indistinguishable from the civilian population. The criterion for determining a legitimate military target therefore became primarily conduct-based. Current ROE require that U.S. troops secure positive identification of a “hostile act,” such as firing an automatic weapon in the direction of coalition forces, or “hostile intent,” such as brandishing a rocket-propelled grenade or planting an improvised explosive device (IED), before firing their weapons.

U.S. rules of engagement make it clear that troops are authorized to use all necessary force in self-defense. When troops engage legitimate military targets, however, the ROE in use since the end of major combat have also explicitly required troops to respond to hostile act/intent with graduated force. That is, when possible, U.S. troops are supposed to provide warnings and use nonlethal measures such as verbal warnings, flashing lights, hand signals, and a show of force to deter, dissuade, or prevent an incident, then escalate to impeding measures, warning shots, and disabling shots before engaging in deadly violence. Moreover, the criteria for the use of force, even if met, do not require troops to engage. Rather, the ROE bring troops to the point where, based on the context of the situation, deadly force may be used as a last resort. Once a target is engaged, the ROE used throughout the war have further instructed U.S. troops to minimize incidental injury, loss of life, and other collateral damage.³⁶

OBSERVED FIRES. Based on interviews, accounts from embedded correspondents, and troop memoirs, U.S. forces in Iraq seem to have generally followed the ROE requirement to secure positive identification of hostile force/act/

35. CFLCC ROE card (unclassified); and CFLCC ROE Vignettes, February 2003.

36. CJTF-7 ROE card (unclassified); MNC-I ROE card (unclassified); 24th Infantry Division (Mechanized), “Operation Iraqi Freedom: Rules of Engagement Training,” PowerPoint briefing, 2003; 1st Marine Expeditionary Force–Forward (1 MEF-FWD), “LOAC/ROE/EOF Retraining and Your Continuing Moral Obligation,” PowerPoint briefing, June 28, 2006; Center for Army Lessons Learned, *Escalation of Force Handbook*, and Marine Corps Center for Lessons Learned, “Escalation of Force: Lessons, Observations, and Training from Operation Iraqi Freedom 05-07,” April 5, 2007.

intent before attacking.³⁷ The need for positive identification has led commanders to emphasize “observed fires.” Beyond the naked eye, U.S. forces rely on advanced optics attached to their weapons systems to assist in positive identification at long distances, day or night.³⁸ U.S. Air Force, Navy, and Marine fighter aircraft and unmanned aerial vehicles (UAVs) have been equipped with reconnaissance pods, allowing embedded forward air controllers (now called joint terminal attack controllers) to provide real-time overhead surveillance and streaming video to assist ground forces in distinguishing insurgents from civilians during raids and combat missions. Forward observers also visually identify and “paint” targets, or provide 10-digit grid points, for laser- or global positioning system (GPS)–guided bomb attacks.³⁹

Further evidence for the strong preference for observed fires is the reluctance to use artillery for counterbattery fire during the SO/COIN period. Because artillery systems have a large radius of destruction, U.S. forces have generally been hesitant to employ artillery in densely populated areas, even when receiving indirect fire from insurgents. U.S. artillery units are usually able to use a combination of radar, automated indirect fire systems, other sensors, and vector logic to track the point of origin of insurgent mortar and rocket fire. Whether U.S. forces engage in counterbattery fire, however, has been subject to highly restrictive procedures. Operators and their legal advisers have typically used databases of maps and satellite images to conduct quick and informal collateral damage estimates. If the point of origin appears to be in a densely populated area or near a no-strike location, the tendency

37. Lt. Col. Tom Ayres, staff judge advocate for the 82nd Airborne Division during the first year of the war, interview by author, Washington, D.C., December 15, 2005; Col. Peter Mansoor, commander of the 1st Brigade, 1st Armored Division, during the first year of the war, interview by author, New York, New York, March 6, 2006; Col. John Toolan, commander of Marine Corps Regimental Combat Team 1 during the second year of the war, interview by author, Quantico, Virginia, March 13, 2006; Colby Buzzell, *My War: Killing Time in Iraq* (New York: G.P. Putnam’s Sons, 2005), pp. 225–226; Pamela Constable, “Troops Gaining Grip in Sections of Fallujah,” *Washington Post*, April 7, 2004; Pamela Constable, “Expect Snipers on All Minarets”; Patrolling Fallujah by Foot, Marines Who Sought Friendship Now Face Elusive Enemies,” *Washington Post*, April 10, 2004; Richard A. Oppel Jr. and Damien Cave, “U.S. Troops Lock Down Much of East Baghdad,” *New York Times*, February 11, 2007; John Crawford, *The Last True Story I’ll Ever Tell: An Accidental Soldier’s Account of the War in Iraq* (New York: Riverhead, 2005), pp. 117–118; Bing West, *No True Glory: A Frontline Account of the Battle of Fallujah* (New York: Bantam, 2005), p. 209; and Karl Zinsmeister, *Boots on the Ground: A Month with the 82nd Airborne in the Battle for Iraq* (New York: St. Martin’s, 2003), pp. 95–99.

38. For examples, see Tom Vanden Brook, “Drones Reshaping Iraq’s Battlefields,” *USA Today*, July 7, 2006; Zinsmeister, *Boots on the Ground*, pp. 95–96; and West, *No True Glory*, pp. 260–266.

39. Tom Lasseter, “The Task of Fighting Insurgents Carries the Risk of Killing the Innocent,” *Philadelphia Inquirer*, June 7, 2006; and Jefferson D. Reynolds, “Collateral Damage and the 21st-Century Battlefield,” *Air Force Law Review*, Vol. 56 (2005), p. 99.

has been not to return fire with artillery. Instead, close air support or ground forces capable of putting their “eyes on the target” have been used, or U.S. forces have refrained from attacking altogether.⁴⁰

WEAPONEEING AND MITIGATION. Throughout the Iraq War, the U.S. military has used “weaponeering”—the process of selecting the type and quantity of weapon necessary to produce a desired effect—and other mitigation techniques to minimize risks to Iraqi civilians during its operations.⁴¹ In its efforts to comply with the principles of distinction and proportionality, the U.S. military has come to increasingly rely on precision-guided munitions (e.g., laser-, GPS-, and optically guided weapons). In the 1991 Gulf War, for example, only 7–8 percent of munitions were precision-guided, compared with 30 percent in Kosovo, 60 percent in Afghanistan, and 68 percent used during the major combat phase of the current Iraq war.⁴² During the SO/COIN period, moreover, nearly all of the bombs and missiles fired appear to have been precision-guided.⁴³

Other types of weaponeering have also been used. The U.S. military has relied heavily on penetrator munitions and delayed fuses to ensure that most blast and fragmentation damage is kept within the impact area.⁴⁴ Additionally, munitions with smaller payloads have been developed to ensure the minimum necessary force required to destroy a target. Starting with the major combat phase, the U.S. military began to use new 500-pound laser-guided bombs to replace the traditional 1,000-pound and 2,000-pound varieties. It deployed 500-

40. Ayres, interview by author; Col. Mark Martins, staff judge advocate for the 1st Armored Division during the first year of the war, phone interview by author, January 24, 2006; Mansoor, interview by author; Toolan, interview by author; senior MNC-I staff, discussions by author, Baghdad, Iraq, July 23, 2006; Buzzell, *My War*, pp. 118–23; Patricia Slayden Hollis, “Fires and Effects for the 1st Armored Division in Iraq,” *Field Artillery*, January–February 2005, pp. 5–9; West, *No True Glory*, pp. 258, 287; and Rick Jervis, “U.S. Forces Caught in Crossfire on Streets of ‘Capital of Death,’” *USA Today*, October 23, 2006. One major exception to the general pattern of restraint in counterbattery fire during the SO/COIN period was the overly aggressive 4th Infantry Division. Thomas A. Ricks, *Fiasco: The American Military Adventure in Iraq* (New York: Penguin, 2006), pp. 233–234.

41. Joint Chiefs of Staff, *Joint Tactics, Techniques, and Procedures for Intelligence Support to Targeting*, Joint Publication 2-01.1 (Washington, D.C.: Department of Defense, January 9, 2003).

42. John H. Cushman Jr. and Thom Shanker, “A War Like No Other Uses New 21st Century Methods to Disable Enemy Forces,” *New York Times*, April 10, 2003; and Lt. Gen. T. Michael Moseley, *Operation Iraqi Freedom—By the Numbers* (Langley, Va.: U.S. CENTAF-PSAB, Assessment and Analysis Division, April 30, 2003), p. 11.

43. Of the 229 air strikes reported by CENTAF for 2006, for example, all 177 bombs dropped were laser- or satellite-guided, including 162 GBU-12 laser-guided 500-pound bombs, 67 GBU-38 satellite-guided 500-pound bombs, and 15 GBU-31/32 2,000-pound bombs. The remaining strikes involved 52 Hellfire/Maverick missiles. Nick Turse, “Bombs over Baghdad: The Pentagon’s Secret Air War in Iraq,” <http://www.tomdispatch.com/index.mhtml?pid?163152>.

44. Wickman, interview by author; and Human Rights Watch, *Off Target*, p. 17.

pound GPS-guided munitions to Iraq for the first time in September 2004, and 500-pound devices and 100-pound Hellfire missiles have become the norm for air strikes during the SO/COIN period.⁴⁵

Nevertheless, a 500-pound bomb, no matter how precise, is still a large weapon. During the SO/COIN period, therefore, it has been common practice not to rely on aerial bomb and missile attacks in situations where they might produce excessive civilian casualties. The first choice has typically been to use other equally precise but less destructive ground or aerial attacks and call in bomb strikes to hit hardened targets only after other means have failed.⁴⁶ This conclusion is reinforced by available data on ground and air activities. From the end of major combat through 2006, U.S. forces conducted countless targeted raids, patrols, and armed convoys by small units, and more than 200 large-scale "named" operations (e.g., Operation Iron Hammer, Operation Steel Curtain, etc.), many lasting several days and involving company, battalion, brigade, or larger elements in significant ground actions.⁴⁷ Over this period, official figures from Central Command Air Forces (CENTAF) suggest that coalition aircraft flew 14,292 close air support sorties (e.g., infrastructure protection, overwatch of routes and convoys, intelligence, surveillance, and reconnaissance, and air-to-ground attacks) in 2004, 16,924 in 2005, and 15,676 in 2006. Of these sorties, however, only 285 in 2004, 404 in 2005, and 229 in 2006 involved bomb and missile strikes. In contrast, in the first thirty days of the war, CENTAF reported 20,733 air strikes (18,695 of which were from U.S. planes). Thus, on average, there appear to have been fewer bomb and missile strikes per year in 2004–06 than the average number of strikes per day (623) during major combat.⁴⁸

Beyond weaponizing, other "mitigation" techniques have also been used, including adjusting the timing, angle, and azimuth of attack to reduce risks to civilians. During the air campaign in March and April 2003, for example, bombing was conducted at night to avoid concentrations of civilians on the

45. Brawley, interview by author; Moseley, *Operation Iraqi Freedom*, p. 11; and Sarah Baxter and Ali Rafat, "U.S. Forces Step Up Iraqi Airstrikes," *Sunday Times of London*, January 1, 2006.

46. Col. Joe Anderson, commander of the 2nd Brigade, 101st Airborne Division, during the first year of the war, interview by author, Washington, D.C., February 8, 2006; Mansoor, interview by author; and Toolan, interview by author.

47. "Iraq Pacification Operations," *Military*, http://www.globalsecurity.org/military/ops/iraq_ongoing_mil_ops.htm.

48. Unclassified data provided to author by U.S. CENTAF, February 20, 2007; and Robert S. Dudley, "The Gulf War II Air Campaign, By the Numbers," *Air Force Magazine*, July 2003, p. 37. Both sets of CENTAF data exclude attacks by Marine Corps aviation units, although they do include CENTAF assets operating in Marine areas of responsibility. Moreover, CENTAF numbers are only from bomb and missile strikes; they exclude 20- and 30-millimeter cannon and rockets.

streets, and attack angles were selected so as to account for schools, hospitals, and other civilian facilities.⁴⁹

REACTIONS TO INSTANCES OF NONCOMPLIANCE

Despite these steps, U.S. adherence to the norm of noncombatant immunity has been incomplete. The key to measuring compliance in the context of violations is observing the organizational reactions to real (or perceived) breaches of the norm. Does the U.S. military repudiate the norm or limit the scope of its application when violations occur? Or does it reiterate its commitment to the norm and take steps to bring organizational behavior back into compliance? If it is the former, as has often been the case with detainee treatment in the broader “war on terrorism,” the commitment to the norm is weak. If it is the latter, however, commitment to the norm is robust.

TARGETING AND WEAPONS SELECTION. During major combat operations, the U.S. military went to great lengths to craft targeting procedures and choose weapons that reduced risks to Iraqi civilians, but the execution was imperfect. When striking high-value targets under time pressure, U.S. forces acted on intelligence that was insufficient to adequately protect civilians. For example, they relied heavily on intercepts from satellite phones to identify high-value targets of opportunity, according to a Human Rights Watch report, even though the technology used for tracking the coordinates associated with these phones was known to be inaccurate, and they lacked the time and the human intelligence to either corroborate their targets’ positions or estimate the likely collateral damage. In fact, not one of the 50 time-sensitive attacks U.S. forces waged against high-value targets in this time period killed the intended individual; together, however, they did kill and wound scores of Iraqi civilians.⁵⁰

Human Rights Watch also suggests that ground-launched cluster munitions used against Iraqi artillery in residential neighborhoods in Baghdad, Hilla, Najaf, and elsewhere killed or injured hundreds of civilians during the land invasion and that unexploded ordnance (or “duds”) left over from these attacks killed or injured many more in the months following major combat. While the attacks themselves were aimed at legitimate military targets, the nature of the munitions used meant that considerable civilian deaths and injury were to be expected. Whether these collateral effects were disproportional to the military

49. Human Rights Watch, *Off Target*, pp. 16–17. For an excellent recent example, see Barry R. McCaffrey, “After Action Report—Trip [to] Iraq and Kuwait, 9–17 March 2007,” March 26, 2007, p. 6, <http://www.iraqslogger.com/downloads/McCaffreyIraq.pdf>.

50. Human Rights Watch, *Off Target*, pp. 21–41.

necessity of the attacks is open to debate; Human Rights Watch and others believe they were, while the U.S. military asserts they were not.⁵¹

It is not clear what, if any, steps the U.S. military has taken to avoid a repeat of the mistakes related to time-sensitive high-value targeting. Although there do not appear to be documented cases of the military relying on satellite-phone intercepts to launch attacks during the SO/COIN period, it has sometimes launched strikes based on dubious human intelligence, causing more civilian deaths. Correcting this problem requires building more trust among the Iraqi population in order to gather better intelligence and, therefore, relates to the overall conduct of counterinsurgency operations, which I discuss below.

The U.S. military has done a better job of trying to fix the problem of ground-launched cluster munitions. The Defense Department commissioned the Defense Science Board to study the problem of duds, and the resulting report identified a number of measures that could be taken to reduce the threat to civilians and friendly forces. The U.S. Army has introduced new guidance systems to improve the accuracy of ground-launched cluster munitions, is developing self-destruct fuses to lower the dud rate, and has even hinted at the prospect of eliminating these weapons altogether, or, at the very least, sharply curtailing their use in future conflicts.⁵² The U.S. Army has also developed and deployed a new unitary Guided Multiple Launch Rocket System that uses precision GPS-guided artillery that does not rely on dud-producing submunitions.⁵³

POSTINVASION VIOLATIONS. In the aftermath of major combat, some U.S. ground forces have engaged in behavior that violates, or appears to violate, noncombatant immunity. Car bombs and suicide attacks have been among the greatest threats to U.S. forces manning checkpoints or driving along supply routes. In this context, numerous instances of questionable behavior have occurred during EOF incidents when U.S. troops have fired on unarmed individuals or vehicles that have gotten too close to their positions or that engaged in other behavior that troops perceived as threatening.⁵⁴ Early in the SO/COIN

51. *Ibid.*, pp. 80–99; and Cayce, interview by author.

52. Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, *Defense Science Board Task Force on Munitions System Reliability*, September 2005; Paul Wiseman, “Ground Forces Won’t Use Improved Cluster Bombs until at Least 2005,” *USA Today*, December 11, 2003; and Corine Hegland, “The Civilian Death Toll,” *National Journal*, May 29, 2004.

53. Michael J. Carden and Matthew Clifton, “New Precision MLRS Helps in Battle for Tal Afar,” *Army News Service*, September 23, 2005. The army is also developing other forms of precision-guided artillery to minimize risks to civilians. Hollis, “Fires and Effects for the 1st Armored Division in Iraq,” p. 8.

54. Under a Freedom of Information Request, the American Civil Liberties Union recently received a summary of roughly 500 claims filed by families of Afghan and Iraqi civilians killed by

period, U.S. checkpoints and temporary roadblocks were often poorly marked, and, even at well-marked traffic stops, U.S. troops have fired on many confused Iraqi drivers who did not halt in time. Similarly, although U.S. military vehicles typically display signs warning Iraqi drivers to stay back 50–200 meters or risk being fired on, there have been numerous occasions in which unwitting civilian drivers have attempted to pass U.S. convoys or patrols with deadly consequences.⁵⁵

In other instances, U.S. troops appear to have interpreted “hostile act” and “hostile intent” in dubious ways. In a few cases, U.S. forces seem to have overreacted to perceived threats during demonstrations, killing and wounding civilians.⁵⁶ At other times, positive identification of “bad guys” and “terrorists” has been based on nothing more than observations of men engaged in a suspicious activity or gathered in a questionable location. For example, because IEDs are often triggered by mobile phones, U.S. forces have sometimes shot Iraqis seen handling a phone following a bomb blast.⁵⁷ Even when U.S. forces have acted in legitimate self-defense during firefights and insurgent ambushes, they have occasionally responded with disproportionate return fire in the general direction of the attack rather than taking sufficient care to ensure positive identification of targets and minimize civilian casualties.⁵⁸

Other incidents have occurred during U.S. raids and sweeps of Iraqi homes, businesses, and neighborhoods. Too often, raids have been based on dubious intelligence gleaned from informants seeking to settle scores. At times, especially early in the occupation, searches for weapons and insurgents were

U.S. forces, mostly during EOF incidents. American Civil Liberties Union, “Claims Filed under the Foreign Claims Act by Civilians in Afghanistan and Iraq,” April 12, 2007, <http://www.aclu.org/natsec/foia/log.html>. This list represents only a portion of the roughly \$32 million in claims paid by the U.S. military in Afghanistan and Iraq. Paul von Zielbauer, “Civilian Claims on U.S. Suggest Toll of War,” *New York Times*, April 12, 2007.

55. Human Rights Watch, *Hearts and Minds: Postwar Civilian Deaths in Baghdad Caused by U.S. Forces*, Vol. 15, No. 9E (October 2003), pp. 4, 18–22, 34–38; “When Deadly Force Bumps into Hearts and Minds,” *Economist*, January 1, 2005, pp. 30–32; and Carl Conetta, “Vicious Circle: The Dynamics of Occupation and Resistance in Iraq,” Research Monograph, No. 10 (Cambridge, Mass.: Project on Defense Alternatives, May 18, 2005), pp. 9–11, <http://www.comw.org/pda/0505rm10.html>.

56. Patrick Cockburn, “American Soldiers Fire on Political Rally, Killing at Least 10 Civilians,” *Independent* (London), April 16, 2003; and Human Rights Watch, *Violent Reprise: The U.S. Army in Fallujah* (New York: Human Rights Watch, June 2003).

57. “When Deadly Force Bumps into Hearts and Minds”; and David Gritten, “Iraqi Civilian Deaths Shrouded in Secrecy,” *BBC News*, March 22, 2006, http://news.bbc.co.uk/2/hi/middle_east/4830782.stm.

58. See, for example, Human Rights Watch, *Hearts and Minds*, pp. 38–39; Sean Raymont, “U.S. Tactics Condemned by British Officers,” *Sunday Telegraph* (London), April 11, 2004; Patrick Colburn, “Despair in Iraq over the Forgotten Victims of U.S. Invasion,” *Belfast Telegraph*, September 9, 2004; “When Deadly Force Bumps into Hearts and Minds”; Ricks, *Fiasco*, p. 353; and West, *No True Glory*, pp. 57–58, 128, 197.

highly aggressive, property was destroyed, and residents were humiliated. And when troops encountered armed resistance from families seeking to defend their homes against unknown intruders, they have sometimes responded with deadly force, killing family members, neighbors, or passersby.⁵⁹

Many of these real and perceived cases of noncompliance can be at least partly attributed to the incredibly thick “fog of war” that enveloped U.S. forces after the invasion. Even during major combat, most hostile forces confronting soldiers and Marines were irregular Fedayeen fighters, not uniformed Iraqi soldiers.⁶⁰ Given the frequency of attacks on U.S. troops by individuals in civilian garb or vehicles, and the intentional use of noncombatants and civilian objects as shields by insurgents and militias throughout the war, it is not surprising that noncombatants would sometimes be mistakenly targeted.⁶¹ Moreover, like all human beings in war, U.S. forces under attack are vulnerable to confusion, fear, and narrowing of perception, which may account for some cases of indiscriminate or disproportionate return-fire in self-defense situations.⁶²

The failure of the military to adequately plan or train for both the stability operations and the counterinsurgency mission that confronted U.S. forces once Baghdad fell, however, compounded this problem, contributing to many of the most egregious examples of noncompliance during the early occupation period. The failure to prepare for Phase IV—the military term for the postconflict environment—has been widely discussed. Usually this failure is ascribed to the overly optimistic assumptions held by top civilians at the Pentagon and elsewhere in the administration. In fact, blame should be placed at the feet of both the civilian and military leadership.⁶³ Nobody had a plan, and the mili-

59. Human Rights Watch, *Hearts and Minds*, pp. 4, 23–29; Conetta, *Vicious Circle*, pp. 6–9; Ricks, *Fiasco*, pp. 235–238, 275–276; and Nir Rosen, *In the Belly of the Green Bird: The Triumph of the Martyrs in Iraq* (New York: Free Press, 2006), chap. 3.

60. Cayce, interview by author; Gordon and Trainor, *Cobra II*, chaps. 10–21; and Tim Pritchard, *Ambush Alley: The Most Extraordinary Battle of the Iraq War* (New York: Ballantine, 2005).

61. See, for example, Peter Maass, “Good Kills,” *New York Times Magazine*, April 20, 2003; Dan Murphy, “A Speeding Sedan and a Close Call for One Marine Unit,” *Christian Science Monitor*, March 7, 2005; and Sam Dagher, “Baghdad Security Plan Puts U.S. Forces, Civilians Perilously Close,” *Christian Science Monitor*, April 24, 2007.

62. Martins, phone interview by author.

63. 3rd Infantry Division (Mechanized) After Action Report, *Operation Iraqi Freedom*, July 2003, pp. 281, 289–290; Nora Bensahel, “Mission Not Accomplished: What Went Wrong with Iraqi Reconstruction,” *Journal of Strategic Studies*, Vol. 23, No. 3 (June 2006), pp. 453–473; James Fallows, “Blind into Baghdad,” *Atlantic Monthly*, Vol. 293, No. 1 (January/February, 2004), pp. 52–74; Gordon and Trainor, *Cobra II*, chaps. 1–8, 23–24; George Packer, *The Assassin’s Gate: America in Iraq* (New York: Farrar, Straus and Giroux, 2005); and Bob Woodward, *State of Denial: Bush at War, Part III* (New York: Simon and Schuster, 2006).

tary failed to adequately prepare and train U.S. forces for stability and counterinsurgency operations.⁶⁴ In the absence of sufficient preparation, troops fresh from major combat, or trained and equipped for major combat and deployed as the fighting was winding down, had a difficult time transitioning to the types of nonviolent behavior—such as manning checkpoints, policing crowds, and conducting searches—required for the “postwar” environment.⁶⁵

The U.S. military has responded to these instances of real and perceived noncompliance, as well as some of their root causes, in several ways. First, it has altered its tactics, techniques, and procedures (TTPs). For example, in response to a number of incidents at checkpoints in Baghdad involving troops from the 1st Armored Division, one of the units criticized in a Human Rights Watch report on checkpoints, the division rapidly adjusted its TTPs to reduce risks to civilian drivers.⁶⁶ Eventually, many of these changes were adopted by U.S. forces throughout the country, including better lighting, flares, and clearer signs in English and Arabic to provide early warning, as well as concertina wire, spike strips, and physical barriers to force cars to slow down.⁶⁷ These changes at stationary checkpoints, however, appear to have been inconsistently applied at temporary roadblocks.⁶⁸

In late 2005 and early 2006, U.S. commanders began to place renewed emphasis on reducing EOF incidents. Signs at checkpoints and on U.S. vehicles, lights, and portable matériel have since been improved; new “dazzling” laser technologies to warn drivers are being tested (and additional research and development money is being invested into nonfatal ways to halt vehicles); and steps have been taken to raise awareness within the Iraqi population. Training changes have put greater emphasis on EOF practices, and U.S. troops have

64. Kalev Sepp, counterinsurgency adviser to Multi-National Force–Iraq, phone interview by author, May 8, 2006; TM C/3-15 Infantry, Task Force 1-64 Armor, 3ID, “Operation Iraqi Freedom After Action Review Comments,” April 24, 2003, <http://www.strategypage.com/dls/articles/20030912.asp>; Lt. Col. William T. Dolan and Lt. Col. Tobin Green, “Tactical Command and Leadership Issues for OIF,” reproduced and posted on September 16, 2003, <http://andrewolmsted.com/MT/archives/000090.html>; and Lt. Gen. David H. Petraeus, “Learning Counterinsurgency: Observations from Soldiering in Iraq,” *Military Review*, January–February 2006, p. 2.

65. John Sawyers, British special representative for Iraq, “Iraq: What’s Going On,” memorandum, May 11, 2003, reproduced in Gordon and Trainor, *Cobra II*, p. 575; and Human Rights Watch, *Hearts and Minds*, p. 17.

66. Lt. Col. Mark Martins, email correspondence with author, January 24, 2006. The 82nd Airborne Division, another target of Human Rights Watch criticism, made similar adjustments. Ayres, interview by author.

67. Pamela Hess, “U.S. Still Grapples with Traffic Tactics,” United Press International, May 3, 2005.

68. Human Rights Watch, “Iraq: U.S. Checkpoints Continue to Kill,” Human Rights News, May 5, 2005; and Human Rights Watch, “Iraq: Checkpoints Lack Basic Safety Measures,” Human Rights News, June 17, 2005.

been instructed to pay more attention to cues to assist in distinguishing actual threats from ordinary civilians. And, to monitor and enforce these changes, the U.S. military has instituted a policy requiring commanders to report and justify the resort to force up the chain of command every time a weapon is fired at a checkpoint or during a convoy operation. The resulting data are being tracked and used to further adjust TTPs. All told, these measures appear to be having an effect. According to the military's own statistics, the number of Iraqi civilians killed at checkpoints, roadblocks, and alongside convoys had fallen from an average of one per day in 2005 to four per week in January 2006 and one per week by mid-2006.⁶⁹

Second, ROE have become more restrictive over time. In referencing the latitude to draw inferences about hostile intent and employ deadly force, one captain from the 4th Infantry Division told a reporter in February 2006 that "what was allowed during the first tour in Iraq, isn't [any longer]."⁷⁰ This is also clear from recent "shoot/don't shoot" training scenarios, which encourage substantial restraint in the face of potential threats.⁷¹

Third, training and education have been substantially altered to emphasize stability and counterinsurgency operations, and the need to minimize harm to civilians during these operations. This evolution is evident at unit home stations and the three large predeployment centers (the Joint Readiness Training Center, the National Training Center, and the Marine Corps Air Ground Combat Center) that every army and Marine unit stationed in the United States passes through before going to Iraq and Afghanistan. Dozens of mock Iraqi villages have been constructed at these centers and populated with Iraqi-American and other role players simulating civilians on the battlefield. Training still includes force-on-force fighting, but there is considerably more emphasis on cultural awareness, civil affairs, information operations, actionable intelligence, discriminate "cordon and knock" operations, convoy security, EOF procedures, and the training and advising of local security forces. Observer controllers monitoring these exercises, including teams of judge ad-

69. Senior MNC-I staff, discussion by author; Steve Negus, "Americans Takes Steps to Prevent Accidental Shootings," *Financial Times*, April 6, 2006; Thom Shanker, "U.S. Changes Guidelines for Troops to Lessen Everyday Tension with Iraqi Civilians," *New York Times*, May 2, 2006; Will Dunham, "U.S. Troops Use Lasers to Stop Drivers Who Don't," *San Diego Union-Tribune*, May 19, 2006; Greg Jaffe, "U.S. Curbs Iraqi Civilians Deaths in Checkpoint, Convoy Incidents," *Wall Street Journal*, June 6, 2006; White, Lane, and Tate, "Homicide Charges Rare in Iraq War"; and William M. Welch, "Military Tests Non-Fatal Ways to Halt Vehicles," *USA Today*, November 27, 2006.

70. Quoted in Thomas E. Ricks, "Troops Honed in '03 Fighting a Different War in Iraq," *Washington Post*, February 18, 2006.

71. 1 MEF-FWD, "LOAC/ROE/EOF Retraining and Your Continuing Moral Obligation"; and Tony Perry, "Marines Trained to React Quickly—and Ethically," *Los Angeles Times*, July 6, 2006.

vocates, measure both successes and failures, such as situations of indiscriminate fire or excessive collateral damage. The observer controllers then provide after action reports to commanding officers from the brigade level down to the squad level in an attempt to reinforce good behavior and reduce mistakes.⁷²

Together, the evolution in ROE and training appears to have had an effect on the behavior of U.S. forces, lessening the prospects for noncompliance. Reports by embedded correspondents suggest that U.S. troops from late 2005 onward were behaving in a more restrained manner than in previous tours, even in insurgent and militia strongholds in Anbar Province and Baghdad where troops have seen heavy combat.⁷³ As one Marine corporal conducting operations in Ramadi put it, "If you want to kick down doors, going in all hard and treating them like insurgents, that is what you are going to get. . . . I got shot at last night. We couldn't see where it was coming from, so we did not return fire. We can't spray'n'pray."⁷⁴

Finally, steps are under way within the military to institutionalize the lessons learned from Iraq (and Afghanistan) to limit the same mistakes in future contingencies, including the development of a new joint U.S. Army–Marine Corps counterinsurgency doctrine that is more sensitive to Law of War principles. The new field manual de-emphasizes traditional notions of force protection and highlights the need for counterinsurgent forces to use the least amount of force possible to reduce risks to civilians.⁷⁵ During the drafting

72. Observations and briefings during visit by author to the Joint Readiness Training Center (Fort Polk, Louisiana, August 23, 2005), the National Training Center (Fort Irwin, California, April 9–10, 2006), and the Marine Corps Air Ground Combat Center (Twentynine Palms, California, April 27–28, 2006). See also Wells Tower, "Under the God Gun: Battling a Fake Insurgency in the Army's Imitation Iraq," *Harper's*, January 2006, pp. 57–66; Dexter Filkins and John F. Burns, "Deep in a U.S. Desert, Practicing to Face the Iraq Insurgency," *New York Times*, May 1, 2006; and Perry, "Marines Trained to React Quickly—and Ethically."

73. Ricks, *Fiasco*, pp. 414–416; Antonio Castaneda, "In Ramadi, Troops Swap Aggression for Courtesy," *Washington Times*, July 5, 2006; Dexter Filkins, "In Ramadi, Fetid Quarters and Unrelenting Battles," *New York Times*, July 5, 2006; Julian E. Barnes, "A Suspect Iraqi: Do You Fire?" *Los Angeles Times*, August 5, 2006; Larry Kaplow, "U.S. Troops Take Friendlier Approach," *Atlanta Journal-Constitution*, August 27, 2006; C.J. Chivers, "Sniper Attacks Adding to Peril of U.S. Troops," *New York Times*, November 4, 2004; C.J. Chivers, "Perfect Killing Method, but Clear Targets Are Few," *New York Times*, November 22, 2006; Tony Perry, "Marines Battle Their Past in an Iraqi City," *Los Angeles Times*, February 2, 2007; Joshua Partlow, "U.S. Unit Walks 'a Fine Line' in Iraqi Capital," *Washington Post*, February 6, 2007; Oppel and Cave, "U.S. Troops Lock Down Much of East Baghdad"; Richard A. Oppel Jr. and Damien Cave, "Troops Sweep 3 Shiite Areas in Baghdad Push," *New York Times*, February 15, 2007; and Edward Wong, "Iraq Plan's Elusive Target: Fear Itself," *New York Times*, April 8, 2007.

74. Quoted in Julian Barnes, "Marines Try Lighter Touch in Ramadi," *Los Angeles Times*, July 12, 2006.

75. U.S. Department of the Army, *Counterinsurgency*, Field Manual (FM) 3-24/Marine Corps Warfighting Publication (MCWP) 3-33.5 (Washington, D.C.: Department of the Army, December 15, 2006).

phase, the authors solicited input from a wide range of military and nonmilitary experts, including representatives from Harvard University's Carr Center for Human Rights, Human Rights First, Human Rights Watch, and the International Commission of the Red Cross.⁷⁶ Additional courses on counterinsurgency have also been added at the Army War College at Carlisle Barracks, the Command and General Staff College at Fort Leavenworth, and the Marine Corps University Command and Staff College at Quantico.⁷⁷ And, in late 2005 the U.S. military created a new counterinsurgency academy in Taji, Iraq, to more quickly impart lessons learned to arriving unit commanders and their staffs. One of the explicit goals of the academy is to avoid many of the mistakes, including abuses of civilians, that occurred during the early occupation period.⁷⁸

MAJOR URBAN OFFENSIVES. The U.S. military has also been roundly criticized for launching large-scale assaults against insurgents in densely populated urban areas with little regard for the inevitable civilian casualties. Nowhere has this criticism been more acute than in the case of Fallujah. In April 2004, approximately 2,500 Marines assaulted the city in response to the death and mutilation of four U.S. contractors. The Marines engaged in a series of ferocious close-quarters battles with scores of insurgents mixed in with the civilian population. Approximately 150 air strikes were carried out, and 75–100 buildings and two mosque compounds were badly damaged or destroyed.⁷⁹ Although hundreds of civilians may have been caught in the crossfire, reports from embedded news correspondents suggest that the Marines did not intentionally target noncombatants during the offensive.⁸⁰ And in my interviews, Marine commanders who had overseen forces in the city claimed that their troops went to considerable lengths to protect noncombatants. They insisted that U.S. forces did not use artillery in the city, despite reports to the contrary, because

76. Lt. Col. John Nagl, interview by author, Washington, D.C., January 19, 2006; and Conrad Crane, interview by author, Carlisle, Pennsylvania, April 26, 2006. Nagl and Crane were both involved in drafting the document.

77. Thomas E. Ricks, "Lessons Learned in Iraq Show Up in Army Classes," *Washington Post*, January 21, 2006; Thomas P.M. Barnett, "The Monks of War," *Esquire*, March 2006, pp. 218–219, 234–237; and Bryan Bender, "Pentagon Studying Its War Errors," *Boston Globe*, August 16, 2006.

78. Multi-National Force–Iraq, *Counterinsurgency Handbook*, 1st ed. (Camp Taji, Iraq: Counterinsurgency Center for Excellence, May 2006).

79. Frank G. Hoffman, "The U.S. Marine Corps in Review," *U.S. Naval Institute Proceedings*, Vol. 131, No. 5 (May 2005), pp. 90–97; Ricks, *Fiasco*, pp. 330–335, 338–346; and West, *No True Glory*, chaps. 6–7, 11, 14–15, 17–20.

80. Pamela Constable, "Troops Gaining Grip in Sections of Fallujah," *Washington Post*, April 7, 2004; Pamela Constable, "Marines Try to Quell 'a Hotbed of Resistance,'" *Washington Post*, April 9, 2004; Pamela Constable, "'Expect Snipers on All Minarets'"; Robert Kaplan, "Five Days in Fallujah," *Atlantic Monthly*, Vol. 294, No. 1 (July/August 2004), pp. 123–126; and West, *No True Glory*, pp. 91–93.

they deemed its “area effects” to be too imprecise. Instead, the commanders relied on ground forces backed up by more accurate AC-130 gunships and 500-pound laser-guided bombs to strike hardened insurgent locations. And they called in air strikes only after lesser force had been employed without success.⁸¹

Nevertheless, concerns over mounting civilian casualties forced the Marines to withdraw from Fallujah in late April.⁸² Almost immediately, the city became a stronghold of Sunni insurgents, eventually prompting another major U.S. attack. The second offensive, in November 2005, was massive. Between 10,000 and 15,000 troops assaulted the city, damaging or destroying 18,000 of the city’s 39,000 buildings.⁸³ Before attacking, however, Marine and army forces surrounded Fallujah and launched an extensive information campaign urging residents to leave. Estimates suggest that at least 250,000 of Fallujah’s 280,000 inhabitants fled in advance of the onslaught. U.S. forces also collected much more specific intelligence about insurgent locations inside the city, relying extensively on UAVs to identify potential targets. Even with improved intelligence, concern for civilian casualties was so great that senior U.S. commanders approved only a small percentage of the preplanned targets prior to the attack. Additional targets were struck only after positive sightings of insurgent fighters were made.⁸⁴

Despite these steps, more than 1,000 Iraqi civilians may have been killed by U.S. action or crossfire during the two Fallujah offensives (precise figures remain uncertain).⁸⁵ The scale of destruction alone convinced many observers that the attacks were disproportionate, an illegitimate form of collective punishment that violated the norm of noncombatant immunity.⁸⁶

In response to this criticism, U.S. forces have refrained from waging addi-

81. Lt. Gen. James N. Mattis, commander of the 1st Marine Division during the April 2004 offensive, interview by author, Quantico, Virginia, March 13, 2006; and Toolan, interview by author. For corroborating evidence, see Pamela Constable, “Marines, Insurgents Battle for Sunni City,” *Washington Post*, April 8, 2004; Jeffrey Gettleman, “Marines Use Low-Tech Skill to Kill 100 in Urban Battle,” *New York Times*, April 15, 2004; and West, *No True Glory*, pp. 200–201.

82. West, *No True Glory*, pp. 115–116, 119–123, 158–160, 180, 184–185.

83. Hoffman, “The U.S. Marine Corps in Review”; “Operation al-Fajr; Operation Phantom Fury,” *Military*, <http://www.globalsecurity.org/military/ops/oif-phantom-fury-fallujah.htm>; Ricks, *Fiasco*, pp. 398–405; and West, *No True Glory*, pp. 314–315.

84. Toolan, interview by author; Lt. Col. Joseph L’Etoile, operations officer for the 1st Marine Division prior to the assault, interview by author, Twentynine Palms, California, April 28, 2006; Robert F. Worth, “Sides in Falluja Fight for Hearts and Minds,” *New York Times*, November 17, 2004; and West, *No True Glory*, chaps. 24–28.

85. The estimate of more than 1,000 combined deaths comes from the IBC database.

86. Alice Hills, “Fear and Loathing in Falluja,” *Armed Forces & Society*, Vol. 32, No. 4 (2006), pp. 623–639; and John Pilger, “Iraq: The Unthinkable Becomes Normal,” *New Statesmen*, November 15, 2004, pp. 13, 31–34.

tional urban offensives of such magnitude.⁸⁷ The next largest operation, which occurred in September 2005 in Tal Afar (an insurgent safe haven 40 miles from the Syrian border), was planned and executed with extraordinary care to comply with the norm of noncombatant immunity. Prior to the assault, the U.S. military employed radio and television messages, loudspeaker broadcasts, meetings with tribal leaders, posters, handbills, and air-dropped leaflets to encourage residents in the Serai District (where the insurgents were concentrated) to evacuate. Individuals in other parts of the city were directed to remain in their homes to avoid being mistaken for insurgents. Those who left the city were provided prepositioned humanitarian supplies in outlying areas. Before and during the September offensive, U.S. air strikes and artillery struck insurgent safe houses and defensive positions. To minimize risks to noncombatants, only precision-guided munitions were used; attacks were carried out with continual eyes on the target (including the use of UAVs for surveillance); and strikes were timed to minimize the risk to noncombatants. The main thrust of the operation relied on U.S. and Iraqi ground forces, which attacked known insurgent holdouts and conducted house-by-house searches. All told, U.S. and Iraqi forces killed or captured hundreds of insurgents; the U.S. military estimated that three civilians were killed in the crossfire.⁸⁸

In the summer of 2006, approximately 5,500 soldiers and Marines initiated a similar operation to regain control of the insurgent stronghold of Ramadi, the capital of Anbar Province. Although the commander of the 1st Brigade of the 1st Armored Division leading the mission, Col. Sean McFarland, was given wide discretion on how to carry out the mission, he was told to “Fix Ramadi, but don’t destroy it. Don’t do a Fallujah.”⁸⁹

WAR CRIMES. Every war produces significant instances of misconduct, including war crimes. Such violations are especially likely in prolonged counterinsurgency campaigns due to the frustration of fighting an unseen enemy and growing estrangement from the portion of the population perceived to be compliant in insurgent attacks. In the fall of 2006, the U.S. Army Mental Health Advisory Team (MHAT) IV concluded the first survey of its kind to include explicit questions on battlefield ethics. The anonymous survey of 1,320 soldiers

87. Tom Bissell, “Improvised, Explosive, and Divisive: Searching in Vain for a Strategy in Iraq,” *Harper’s*, January 2006, p. 49.

88. Col. H.R. McMaster, commander, 3rd Armored Cavalry Regiment, email correspondence with author, February 1, 2006; Lt. Col. Paul Yingling, effects coordinator, 3rd ACR, email correspondence with author, February 3, 2006; Ann Scott Tysons, “Ten Days in Tall Afar,” *Washington Post*, March 26, 2006; and George Packer, “The Lessons of Tal Afar,” *New Yorker*, April 10, 2006, pp. 48–65.

89. Quoted in Jim Michaels, “Behind Success in Ramadi—an Army Colonel’s Gamble,” *USA Today*, May 1, 2007.

and 447 Marines serving in Iraq did not reveal wonton killing, but 9 percent of soldiers and 12 percent of Marines reported unnecessarily damaging or destroying Iraqi property, 4 percent of soldiers and 7 percent of Marines reported unnecessarily hitting or kicking a noncombatant, and 5 percent of soldiers and 7 percent of Marines reported a willingness to ignore ROE to accomplish a mission. Although a large majority of respondents reported that they received clear training on noncombatant immunity, 29 percent of soldiers and 33 percent of Marines said their unit commanders did not adequately emphasize the need to treat noncombatants with respect. Poor command climate, anger, stress, unit casualties, and the handling of dead bodies or remains were all correlated with increased risk of mistreatment or ROE violations.⁹⁰

In this context, there have been several cases of significant misconduct by individuals and small units. The death of two dozen unarmed Iraqis, including women, children, and elderly, at the hands of Marines in Haditha following a roadside bomb attack on November 19, 2005, stands out as the gravest alleged war crime. The initial Marine account claimed that the civilians died from the bomb blast, but this version of events was called into question by an extensive *Time* magazine investigation published in March 2006. A subsequent military probe concluded that the Iraqi civilians had indeed been killed by Marines and that there was sufficient evidence to proceed with a criminal investigation. A second investigation into command issues concluded that officers ignored clear signs suggesting a massacre and that the command climate of the units involved contributed to the normalization of civilian casualties during combat operations.⁹¹

In the wake of the Haditha incident, there were a number of other smaller-scale incidents that also came to light. In one case, seven Marines and a navy corpsman were charged with dragging an Iraqi man from his home in Hamdaniyah in April 2006, killing him in cold blood, and then attempting to cover up the crime by planting an AK-47 and a shovel next to his body to make it appear as if he was planting an IED (five have thus far pleaded guilty).⁹² Elsewhere, five soldiers stand accused of a premeditated attack in

90. Office of the Surgeon Multinational Force–Iraq and Office of the Surgeon General United States Army Medical Command, *Mental Health Advisory Team (MHAT) IV, Operation Iraqi Freedom 05-07 Final Report*, November 17, 2006, pp. 34–42, <http://i.a.cnn.net/cnn/2007/images/05/04/mhat.iv.report.pdf>.

91. Tim McGirk, "Collateral Damage or Civilian Massacre in Haditha?" *Time*, March 19, 2006, <http://www.time.com/time/world/article/0,8599,1174649,00.html>; Tim McGirk and Aparism Ghosh, "The Ghosts of Haditha," *Time*, June 12, 2006, pp. 26–35; Josh White, "Death in Haditha," *Washington Post*, January 6, 2007; and Josh White, "Report on Haditha Condemns Marines," *Washington Post*, April 21, 2007.

92. Josh White and Sonya Geis, "8 Troops Charged in Death of Iraqi," *Washington Post*, June 22, 2006; and Tony Perry, "Marine Gets 8 Years for Iraqi's Death," *Los Angeles Times*, February 18, 2007.

which an Iraqi girl was raped and killed along with three family members in Mahmudiya in March 2006 (as of this writing, three had pleaded guilty).⁹³ Four other soldiers were convicted of crimes related to the capture, release, and murder of three male detainees during a raid on an island near Samarra in May 2006.⁹⁴ A particularly disturbing aspect of the last episode is the claim by the soldiers involved that their brigade commander issued orders to treat all military-aged men on the island as legitimate targets.⁹⁵

Given the near certainty that some misconduct will occur regardless of steps to avoid it, the key to measuring organizational compliance is to consider the steps taken to minimize the number of these incidents and, when they occur, to investigate them and punish offenders. Thus far, the U.S. military has been better at the former than the latter. The aforementioned changes to training, TTPs, and ROE are meant to reduce the prospects of war crimes happening in the first place. After Haditha, moreover, senior U.S. commanders in Iraq ordered immediate refresher training to reinforce appropriate ROE, "core values," and the importance of complying with the Geneva Conventions.⁹⁶

The military is also obligated to investigate Law of War violations when they occur and punish those who have committed war crimes. Prior to the flurry of cases following the Haditha allegations, the Pentagon claimed to have initiated more than 600 investigations in Iraq and Afghanistan in response to allegations of misconduct. The vast majority of these investigations, however, appear to have focused on alleged abuse of detainees.⁹⁷ According to a comprehensive review of available documents by the *Washington Post*, only 39 service members were formally accused in connection with the deaths of 20 Iraqis from 2003 to early 2006, 26 of whom were initially charged with murder, negligent homicide, or manslaughter. According to military officers, military lawyers, and troops interviewed by the *Post*, this number probably represents a

93. Jonathan Finan and Joshua Partlow, "Four More GIs Charged with Rape, Murder," *Washington Post*, July 10, 2006; and Associated Press, "U.S. Soldier Pleads Guilty in Iraqi Rape, Killings," March 21, 2007, <http://www.cnn.com/id/17727790/>.

94. Brad Knickerbocker, "'Atrocity' Cases Test U.S. Military Justice," *Christian Science Monitor*, December 22, 2006; and "U.S. Soldier Guilty in Iraq Killing," *BBC News*, March 17, 2007, <http://news.bbc.co.uk/2/hi/americas/6461215.stm>.

95. Robert F. Worth, "Lawyers for 4 Accused Soldiers Say They Acted on Orders," *New York Times*, July 23, 2006; Borzou Daragahi and Julian E. Barnes, "Officers Allegedly Pushed 'Kill Counts,'" *Los Angeles Times*, August 3, 2006; and Paul von Zielbauer, "Army Says Improper Orders by Colonel Led to 4 Deaths," *New York Times*, January 21, 2007.

96. Thomas E. Ricks, "Top Marine Visits Iraq as Probe of Deaths Widens," *Washington Post*, May 26, 2006; and Lt. Gen. Peter W. Chiarelli, memorandum on "Core Warrior Values Training," June 1, 2006.

97. Human Rights Watch, *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, Vol. 18, No. 2G (April 2006).

small portion of the incidents in which Iraqi civilians were killed by U.S. troops under questionable circumstances. Moreover, of those charged, only 12 ultimately served prison time for any offense.⁹⁸

In this regard, Haditha may mark a turning point. In December 2006, after a criminal investigation and another inquiry into how commanders responded to the event, four Marines were charged with multiple counts of murder for their involvement in the incident. Moreover, after the Marine Corps concluded that the initial probe into the deaths was highly suspect, the battalion and company commanders responsible for supervising the unit were relieved of duty and later charged, along with two other officers, with crimes related to their failure to report and investigate the slayings.⁹⁹

Nevertheless, it is significant that these steps were initiated only after the U.S. military was informed by *Time* about the results of the magazine's own investigation. The system seemed to work reasonably well once the allegations were brought to light, but it suggests that camaraderie within small units may sometimes short-circuit the revelation of potential violations in the first place. Indeed, the MHAT IV report found that only 55 percent of soldiers and 40 percent of Marines surveyed said they would report a fellow unit member who injured or killed a noncombatant.¹⁰⁰ The military's decentralized justice system—in which the commander of the service member suspected of Law of War violations is responsible for initiating criminal inquiries—may also create disincentives for officers to initiate potentially embarrassing investigations.¹⁰¹ Given these tendencies, the recent spate of allegations and investigations into misconduct, as well as the charging of several officers in the Haditha case, may actually be the visible manifestation of organizational learning and a signal to commanders of the need for greater diligence in investigating potential incidents.¹⁰² Indeed, in April 2006, under direction from Lt. Gen. Peter Chiarelli, the MNC-I commander at the time, commanders across Iraq were ordered to begin investigating all instances that result in the death or serious wounding of an Iraqi civilian, or that cause property damage of \$10,000 or more, regard-

98. White, Lane, and Tate, "Homicide Charges Rare in Iraq War."

99. Tony Perry, "Three Marine Commanders Relieved of Duties," *Los Angeles Times*, April 8, 2006; Eric Schmitt and David S. Cloud, "General Faults Marine Responses to Iraq Killings," *New York Times*, July 8, 2006; and White, "Death in Haditha."

100. Office of the Surgeon Multinational Force-Iraq and Office of the Surgeon General United States Army Medical Command *Mental Health Advisory Team (MHAT) IV*, p. 37.

101. Mark Sappenfield, "Can the Military Effectively Investigate Itself?" *Christian Science Monitor*, June 1, 2006; and White, "Report on Haditha Condemns Marines."

102. From March through August 2006, seventeen U.S. troops were charged with murder, not counting those in the Haditha case. White, Lane, and Tate, "Homicide Charges Rare in Iraq War."

less of an accusation of misconduct.¹⁰³ Since taking over command of all U.S. forces in Iraq in February 2007, Gen. David Petraeus has also emphasized the importance of protecting the civilian population in counterinsurgency operations and has ordered aggressive investigations of alleged wrongdoing.¹⁰⁴

COSTLY COMPLIANCE

The available evidence suggests that U.S. compliance with the norm of non-combatant immunity in Iraq has been relatively high and has increased over time. Quantitative studies find that, historically, the temptation to engage in purposeful civilian victimization increases as the costs of war mount and the prospects for victory decline, especially in counterinsurgency campaigns.¹⁰⁵ Yet despite escalating U.S. military casualties (more than 3,300 dead and 24,000 wounded by May 2007 compared with 149 deaths and 542 injuries during major combat), budgetary costs approaching those of the Vietnam War, a dangerous decline in military readiness, rising domestic political pressure to end the war quickly, and a growing recognition across the political spectrum that the United States is failing to achieve its objectives, the U.S. military has not turned to systematic victimization of Iraqi civilians.¹⁰⁶ On the contrary, U.S. military conduct has become more restrained over time.

U.S. forces have often remained compliant even when doing so has generated direct costs and risks. Concerns for force protection have certainly been responsible for many Iraqi civilian deaths, but the U.S. military has also assumed a fair amount of risk to protect noncombatants, and it has been willing to accept more risk as the war progressed. The ROE requirement for positive identification places U.S. troops in danger by requiring closer proximity to insurgent forces. Helicopter pilots responding to insurgent attacks in Iraqi cities, for example, could conceivably fire missiles from 3 or 4 miles away, but are in-

103. Tony Perry and T. Christian Miller, "Marines Getting a New Message," *Los Angeles Times*, July 9, 2006; and Thom Shanker, "The Struggle for Iraq: Casualties; New Guidelines Are Reducing Iraqi Civilian Deaths, Military Says," *New York Times*, June 22, 2006.

104. White, "Report on Haditha Condemns Marines"; and Gen. David H. Petraeus, "Letter to Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen Serving in Multi-National Force-Iraq," May 10, 2007.

105. Alexander B. Downes, "Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War," *International Security*, Vol. 30, No. 4 (Spring 2006), pp. 152–195; and Benjamin Valentino, Paul Huth, and Dylan Balch-Lindsay, "'Draining the Sea': Mass Killing and Guerrilla Warfare," *International Organization*, Vol. 58, No. 2 (Spring 2004), pp. 375–407.

106. "Iraq Coalition Casualty Count," <http://icasualties.org/oif/>; Joel Havemann, "War Costs Are Hitting Historic Proportions," *Los Angeles Times*, January 14, 2007; and Mark Thompson, "America's Broken-Down Army," *Time*, April 5, 2007, pp. 28–35, <http://www.time.com/time/nation/article/0,8599,1606888,00.html>.

stead required to close within visual range, putting them at considerably greater danger of being shot down.¹⁰⁷ Complying with the proportionality principle by employing dismounted infantry to clear buildings in most cases rather than simply leveling them with artillery or air strikes, as the Russians did in Grozny, also means more troops will be killed or wounded.

The rules also place U.S. forces at a significant tactical disadvantage when insurgents attempt to exploit them by laying down their weapons or using civilians as human shields, which reports and soldier testimonials suggest are regular occurrences.¹⁰⁸ At the operational, and perhaps even strategic, level the U.S. military has also been willing to absorb costs to spare civilians. In Najaf and Fallujah in 2004 and Tal Afar in 2005, for example, U.S. restraint allowed significant numbers of insurgents and militia members to melt back into the general population, surviving to fight another day and continue to destabilize Iraq.¹⁰⁹ Indeed, some hawkish commentators argue that the United States' strategic difficulties in Iraq are largely the by-product of being far too compliant with the norm of noncombatant immunity.¹¹⁰

Organizational Culture and the "American Way of War"

In the face of these real and perceived costs, U.S. compliance with the norm of noncombatant immunity is best explained by the organizational culture of the U.S. military. "Organizational culture" refers to a system of causal beliefs, val-

107. Dexter Filkins, "Civilian Dead, and Bitterness: No Way to Bridge the Rage?" *New York Times*, September 16, 2004.

108. Ryan Lenz, "U.S. Military Training to Adapt to Iraq," *Miami Herald*, June 6, 2006; Chivers, "Sniper Attacks Adding to Peril of U.S. Troops"; and Chivers, "Perfect Killing Method, but Clear Targets Are Few"; Paul Beaver and Peter Beaumont, "'Smart' Rebels Outstrip U.S.," *Observer*, March 11, 2007; Dan Efron and Christian Caryl, "A Centurion's E-mails," *Newsweek*, November 6, 2006, <http://www.msnbc.msn.com/id/15458906/site/newsweek/>; Herschel Smith, "Politically Correct Rules of Engagement Endanger Troops," *Captains Journal*, No. 414, December 6, 2006, <http://www.captainsjournal.com/2006/12/06/politically-correct-rules-of-engagement-endanger-troops>; Blackfive, "ROE—Rules of Engagement," Blackfive Blog, December 11, 2006, http://www.blackfive.net/main/2006/12/roe_rules_of_en.html; and Herschel Smith, "The NCOs Speak on Rules of Engagement," *Captains Journal*, No. 419, December 13, 2006, <http://www.captainsjournal.com/2006/12/13/the-ncos-speak-on-rules-of-engagement/>.

109. Dexter Filkins, "The Riddle of Najaf: Who Won?" *New York Times*, August 29, 2004; Dexter Filkins and James Glanz, "U.S. Begins Main Assault in Falluja, Setting Off Street Fighting," *New York Times*, November 9, 2004; West, *No True Glory*, pp. 234–235; and Jacob Silberberg, "Many Insurgents Escape U.S.-Iraqi Sweep," Associated Press Online, September 11, 2005.

110. See, for example, Victor Davis Hanson, "Almost Everything Today," December 7, 2006, section titled "Mistakes and Then There Were Mistakes," http://victordavishanson.pajamasmedia.com/2006/12/07/almost_everything_today.php; Edward N. Luttwak, "Dead End: Counterinsurgency Warfare as Military Malpractice," *Harper's*, February 2007, pp. 40–42; and Ralph Peters, "The Roots of Today's Wars," *USA Today*, February 28, 2007.

ues, norms, and practices that specify how an organization should adapt to its external environment and manage its internal affairs. Military culture is institutionalized, routinized, and reproduced in several ways, including education and training, career incentives, doctrine and war plans, budgetary priorities, procurement programs, and even force structures. This culture establishes organizational goals, creates a filter through which information is interpreted, shapes shared understandings among military personnel regarding the effectiveness and appropriateness of certain means of war fighting, reinforces behavioral tendencies in accordance with these beliefs, and even creates a bias toward the development of material capabilities to carry them out. As such, a military's organizational culture creates a certain degree of path dependency that shapes and shoves behavior in ways that may diverge from both the functional military requirements suggested by traditional organizational theory and the supposedly "objective" demands placed on the military by the strategic environment.¹¹¹

U.S. compliance with the norm of noncombatant immunity is a result of the integration of the norm into the military's broader organizational culture, including its conceptualizations of core values and interests, as well as its particular understandings of the most effective and efficient means to advance these interests.

THE "ANNIHILATION-RESTRAINT" PARADOX

For much of its history, the U.S. military has embraced a Jominian subculture of annihilation. This tradition holds that the application of direct and overwhelming force to destroy the enemy is necessary to achieve victory. In contrast to the more holistic, strategically, and politically oriented Clausewitzian view, the Jominian orientation implies that war is a series of battles to be won and that politics reasserts itself only after the complete destruction of the adversary on the battlefield. Scholars note that the U.S. military's Jominian subculture embraces an enemy-centered view (as opposed to a population-centered one); a hyperscientific, technology-based, and capital-intensive ap-

111. Elizabeth L. Kier, *Imagining War: French and British Military Doctrine between the Wars* (Princeton, N.J.: Princeton University Press, 1997), chap. 2; and Jeffrey W. Legro, *Cooperation under Fire: Anglo-German Restraint during World War II* (Ithaca, N.Y.: Cornell University Press, 1995), chap. 1. Traditional organizational theory states that militaries attempt to maximize autonomy and resource allocations while minimizing uncertainty, producing a strong bias toward offensive military doctrine, resistance to civilian interference, and a willingness to use any available means to secure victory. See Barry R. Posen, *The Sources of Military Doctrine* (Ithaca, N.Y.: Cornell University Press, 1984), pp. 41–59; and Jack L. Snyder, *The Ideology of the Offensive: Military Decision Making and the Disasters of 1914* (Ithaca, N.Y.: Cornell University Press, 1984), pp. 24–30.

proach to war that relies on the use of overwhelming firepower; a disdain for unconventional (or “irregular”) skills and tactics; a strong belief in U.S. exceptionalism and the moral mission of the U.S. military; profound impatience; and a substantial concern for force protection.¹¹²

The U.S. subculture of annihilation has been widely recognized, but it is not the only relevant tradition. In the late nineteenth century, a second, Lieberian, subculture of restraint emerged. In 1863, in response to horrific violations of customary laws of war during the Civil War, the Union government adopted General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*. The document, written by Dr. Francis Lieber and commonly known as the Lieber Code, was the first comprehensive set of regulations covering the conduct of land warfare. The Lieber Code specifically recognized the importance of distinguishing “unarmed” or “inoffensive” civilians from combatants at all times, as well as the need to spare them from harm, to the extent possible, during military operations.¹¹³ The manual was widely adopted in Europe and helped provide the foundation for the later codification of customary Law of War in the Hague and Geneva Conventions. This tradition thus qualifies the annihilation mind-set by defining the legal and moral constraints regarding the types of targets against which the application of overwhelming force can be lawfully directed.

Together, these two traditions constitute the annihilation-restraint paradox: a culture that embraces the lawful application of direct and overwhelming force to destroy the enemy.

In the century after the publication of the Lieber Code, the balance between annihilation and restraint in U.S. military culture was tilted decisively in favor of the former. While U.S. military documents recognized the basic principles embodied in the Lieber Code and the Hague and Geneva Conventions, the organizational commitment to fully institutionalizing and socializing members of the armed forces to the norm of noncombatant immunity and other Law of War principles was lacking for much of the twentieth century.

In this regard, the U.S. experience in Vietnam had a profound effect on the

112. J. Echevarria II, *Toward an American Way of War* (Carlisle, Pa.: Strategic Studies Institute, U.S. Army War College, 2004); Colin S. Gray, “The American Way of War: Critique and Implications,” in Anthony D. McIvor, ed., *Rethinking the Principles of War* (Annapolis: Naval Institute Press, 2005); John A. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (Chicago: University of Chicago Press, 2005), chap. 3; and Russell F. Weigley, *The American Way of War: A History of United States Military Strategy and Policy* (Bloomington: Indiana University Press, 1973).

113. General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field* (Lieber Code), April 24, 1863, sec. 1, <http://www.yale.edu/lawweb/avalon/lieber.htm>.

relative balance between the two subcultures. On the one hand, the defeat in Vietnam did not lead the military to abandon its conventional annihilation mind-set. In fact, a dominant lesson drawn in U.S. Army circles was that Vietnam was lost because civilian leaders had not allowed the U.S. military to engage in an all-out conventional war against North Vietnam.¹¹⁴

On the other hand, the war in Vietnam did dramatically strengthen the U.S. military's commitment to complying with the Law of War, in general, and the norm of noncombatant immunity, in particular. The 1968 My Lai massacre became symbolic of the failure of the U.S. military to faithfully comply with the norm of noncombatant immunity. The Peers Report, which investigated the underlying causes of My Lai, concluded that systematic failures in training were partly to blame. The direct consequence of the political fallout from My Lai and the conclusions of the Peers Report was an organization-wide commitment by the U.S. military to fully institutionalize compliance.¹¹⁵ The process began in 1974, when the secretary of defense issued Department of Defense Directive 5100.77, the "DoD Law of War Program."¹¹⁶ The directive was followed by a series of specific instructions issued by the DoD, the Joint Chiefs of Staff, and the various services to clarify procedures for meeting the directive's requirements.¹¹⁷

The DoD Law of War Program broadened and deepened the U.S. military's commitment to moral and legal constraints in at least three important ways. First, it radically altered the operational role of judge advocates. Before and during Vietnam, judge advocates primarily provided basic legal services. The DoD Law of War Program recognized that U.S. compliance with Law of War

114. Conrad C. Crane, *Avoiding Vietnam: The U.S. Army's Response to Defeat in Southeast Asia* (Carlisle, Pa: Strategic Studies Institute, U.S. Army War College, 2002).

115. David E. Graham, "My Lai and Beyond: The Evolution of Operational Law," in John Norton Moore and John F. Turner, eds., *The Real Lessons of the Vietnam War: Reflections Twenty-five Years after the Fall of Saigon* (Durham, N.C.: Carolina Academic Press, 2002), pp. 363–379.

116. Department of Defense Directive 5100.77, "DoD Law of War Program," November 5, 1974 (re-issued July 10, 1979, and December 9, 1998, and reissued as DoD Directive 2311.01E on May 9, 2006).

117. See, for example, DoD Instruction 5500.15, "Review of Legality of Weapons under International Law," October 16, 1974; CJCSI 5810.01B, "Implementation of the DoD Law of War Program," March 25, 2002; Air Force Policy Directive 51-4, "Compliance with the Law of Armed Conflict," April 26, 1993; Air Force Instruction 51-402, "Weapons Review," May 13, 1994; Air Force Instruction 51-401, "Training and Reporting to Ensure Compliance with the Law of Armed Conflict," July 19, 1994; Army Regulation 27-53, "Review of Legality of Weapons under International Law," January 1, 1979; Secretary of the Navy Instruction 3300.1A, "Law of Armed Conflict (Law of War) Program to Insure Compliance by the Naval Establishment," May 2, 1980; Secretary of the Navy Instruction 3300.52, "Law of Armed Conflict (Law of War) Program to Insure Compliance by the U.S. Navy and Naval Reserve," March 18, 1983; and Secretary of the Navy Instruction 5711.8A, "Review of Legality of Weapons under International Law," January 29, 1988.

principles, including the norm of noncombatant immunity, required a dedicated cadre of individuals responsible for training and monitoring compliance during military operations, spawning a new branch of legal guidance called Operational Law.¹¹⁸ Consequently, contemporary service and joint doctrine require that legal advisers assist commanders in reviewing operational plans, policies, directives, ROE, and procurements for compliance with the Law of War, and investigate and prosecute potential war crimes.¹¹⁹

Second, under the DoD Law of War Program, training aimed at socializing members of the armed forces to the norm of noncombatant immunity was modified. Contemporary basic training provides rudimentary Law of War instruction, but training becomes more detailed as service members progress, and additional training is given to those who conduct and direct combat operations. The U.S. Navy, for example, requires that commanding officers, aviators, and those connected to target selection and evaluation receive more extensive instruction. Likewise, soldiers and Marines involved in combat specialties receive more detailed Law of War training than those who specialize in logistics, and commanders receive more training than infantrymen. Furthermore, as they move up in rank, enlisted troops and officers receive additional tailored training at their schools in their chain of advancement. The services and global combatant commands also integrate Law of War principles into their regular training exercises at all levels.¹²⁰

Finally, the DoD Law of War Program altered the process of weapons development and procurement. In line with article 36 of Additional Protocol I to the Geneva Conventions, DoD instructions specify that all U.S. weapons, weapons systems, and munitions must be reviewed by the relevant service judge advocate generals for legality under the Law of War. A review is required before the award of an engineering or manufacturing development contract and

118. Graham, "My Lai and Beyond," pp. 365–367; and Rear Adm. Michael F. Lohr and Cmdr. Steve Gallotta, "Legal Support in War: The Role of Military Lawyers," *Chicago Journal of International Law*, Vol. 4, No. 2 (Fall 2003), pp. 469–470.

119. U.S. Department of the Army, *Legal Support to Operations*, Field Manual 27-100, March 1, 2000; Air Force Doctrine Document 2-4.5, *Legal Support*, May 15, 2003; Joint Chiefs of Staff, *Joint Doctrine for Operations*, Joint Publication 3-0, September 10, 2001; and Joint Chiefs of Staff, *Joint Doctrine for Targeting*, Joint Publication 3-6, January 17, 2002.

120. Lt. Col. Ian Corey, Lt. Col. Thomas Wagoner, and Maj. John Rawcliffe, interview by author, Judge Advocate General's Legal Center and School, Charlottesville, Virginia, August, 9 2005; Martins, interview by author; Col. H.R. McMaster, phone interview by author, May 26, 2006; observations by author during visits to the Joint Readiness Training Center, National Training Center, Marine Corps Air Ground Combat Center, and U.S. Army Infantry Center (Fort Benning, Georgia, May 11–12, 2006); and W. Hays Parks, "The United States Military and the Law of War: Inculcating an Ethos," *Social Research*, Vol. 69, No. 4 (Winter 2002), pp. 985–998.

again before the award of the initial production contract.¹²¹ This “bias” in development and procurement helps account for the tendency over time to increasingly rely on expensive weapons systems designed to limit civilian casualties.

EXPLAINING COMPLIANCE

The annihilation-restraint paradox has created a fine line between the military’s mission of destruction and protection in Iraq. For example, in describing what he expected of his company of paratroopers as they prepared to assault the city of Samawah in early April 2003, a captain with the 82nd Airborne declared: “I need guys who can hit targets. I need guys who will do anything to protect their buddies. I need guys who are ready to kill. . . . And I want you to remember something. You are Americans. Americans don’t shoot women and children. They don’t kill soldiers that have surrendered. That’s what the assholes we’re up against do. That’s what we’re fighting. We’re gonna do things differently. But if your life is in danger, you shoot. And you shoot to kill.”¹²² This tension is also captured vividly by a large sign displayed on a wall at the Marine Corps Air Ground Combat Training Center at Twentynine Palms listing “habits of thought.” These include the notion that there is “no better friend, no worse enemy” than a Marine. The sign also reminds Marines that they are obligated to “first, do no harm.” It then warns that “the Iraqi people are not our enemy, but our enemy hides among them,” followed by two corollaries: “Corollary 1: You have to look at these people as if they are trying to kill you, but you can’t treat them that way. Corollary 2: Be polite, be professional, have a plan to kill everyone you meet.” The same sign can be found on the walls of Marine bases in Iraq.¹²³

The organizational culture embodied in the annihilation-restraint paradox explains the degree and trajectory of U.S. military compliance with noncombatant immunity in Iraq. The growing importance of the restraint tradition since Vietnam explains why U.S. compliance in Iraq has been relatively high across the entire period. Although the U.S. military has deployed massive firepower against enemy combatants in Iraq, it has largely refrained from the kind of intentional, systematic civilian victimization common in historical counterinsurgency campaigns, and it has accepted some tactical, operational, and strategic risks to reduce Iraqi civilian casualties.

121. DoD Instruction 5000.2, “Operation of the Defense Acquisition System,” May, 12 2003; Army Regulation 27-53; Air Force Instruction 51-402; and Secretary of the Navy Instruction 5711.8A.

122. Quoted in Zinsmeister, *Boots on the Ground*, p. 126.

123. Observations by author during visit to the Marine Corps Air Ground Combat Center; and Filkins, “In Ramadi, Fetid Quarters and Unrelenting Battles.”

At the same time, the tension apparent in the annihilation-restraint paradox also accounts for many of the instances of questionable behavior by the U.S. military, especially early in the SO/COIN period, as well as the organizational responses to noncompliance over time. First, the conventional, enemy-centered mind-set of the U.S. military explains why troops were initially ill prepared to quickly transition from high-intensity combat to stability and counterinsurgency operations, which, in turn, contributed to numerous mistakes and misconduct that cost many Iraqis their lives.

Second, by emphasizing the enemy as the center of gravity rather than the population, the annihilation tradition contributed to a tendency to err on the side of seeing Iraqis, especially military-aged men, as potential threats rather than an audience to be won over. This lowered the threshold for “hostile intent” needed to justify an escalation of force and, in some instances, may have tipped the balance between force protection and population security in favor of the former. This helps account for questionable behavior during checkpoint, convoy, sweep, and combat operations. And, in a handful of extreme cases, it may have contributed to a command climate that permitted or encouraged atrocities.¹²⁴

Third, the emphasis on the use of overwhelming force against enemy combatants helps explain why the U.S. military has generally been better at complying with the distinction principle than the proportionality principle. As Thomas Ricks, a *Washington Post* reporter who has spent substantial time embedded with U.S. forces throughout the war, observed, “The U.S. military . . . wasn’t indiscriminate in its use of firepower, but it tended to look upon it as a good, especially during the big counteroffensives in the fall of 2003, and again in the battles in Fallujah.”¹²⁵ There is a tension between the notion of restraint as it applies to noncombatants and the annihilation of enemy combatants. In the context of preplanned, deliberate targeting, the U.S. military has put clear mechanisms in place to calculate and minimize unintended or incidental risks to civilians. But, in self-defense situations, there is a cultural inclination to utilize all available means to destroy the enemy that cuts against ROE admonitions to use graduated force and minimize collateral damage.¹²⁶

Fourth, the annihilation-restraint paradox helps explain why the U.S. mili-

124. Lasseter, “The Task of Fighting Insurgents Carries the Risk of Killing the Innocent”; Daragahi and Barnes, “Officers Allegedly Pushed ‘Kill Counts’”; and White, “Report on Haditha Condemns Marines.”

125. Ricks, *Fiasco*, p. 266.

126. See the comments posted by an anonymous Marine judge advocate, “U.S. Military Rules of Engagement and the Iraq War,” *Informed Comment: Thoughts on the Middle East, History, and Religion*, August 10, 2005, <http://www.juancole.com/2005/08/us-military-rules-of-engagement-and.html>.

tary initially adopted an approach to counterinsurgency in Iraq that created certain inevitable risks for Iraqi civilians even assuming high levels of technical compliance. More often than not, U.S. forces approached the initial SO/COIN period with a tendency to apply the same enemy-oriented and firepower-heavy mental models they employed during major combat, resulting in a dysfunctional search-and-destroy approach to counterinsurgency. Although the restraint tradition prevented the military from tipping all the way in the direction of direct, brutal, and indiscriminate violence, the search-and-destroy approach still created more risks to Iraqi civilians than was militarily necessary.¹²⁷ At time t , U.S. forces might clear a portion of an Iraqi town or village; but without a persistent security presence, insurgents would return at time $t+1$, requiring another operation at $t+2$, and so on. In addition, the raids themselves (especially broad sweeps of entire areas) were bound to alienate and sometimes kill innocent Iraqis. In the absence of a permanent presence and sustained reconstruction, this alienation most assuredly increased the number of insurgents.¹²⁸ Thus, early U.S. counterinsurgency efforts contributed to a cycle of violence and the need for repeated military engagements, each producing fresh risks that civilians could be caught in the crossfire despite generally high levels of technical compliance across engagements.

Finally, U.S. military culture provides insight into the nature of organizational learning and the tendency for adherence to the norm of noncombatant immunity to increase over time. History suggests that it would have been tempting for the U.S. military to adopt a more brutal approach as it became clear that the war was going poorly in a desperate bid to shift costs from the military to civilians and use extreme coercion to end the war quickly. Yet adopting such an approach in Iraq would have required abandoning the organizational commitment to restraint. Instead of getting harsher, the military increasingly came to recognize the importance of population security, especially from late 2005 onward.¹²⁹ The turn toward a “softer” approach was certainly

127. Andrew Krepinevich Jr., “How to Win in Iraq,” *Foreign Affairs*, Vol. 84, No. 5 (September/October 2005), pp. 87–104; and Brigadier Nigel Aylwin-Foster, “Changing the Army for Counterinsurgency Operations,” *Military Review*, November–December 2005, pp. 2–15. There was variation across the units deployed in Iraq in this regard. See, for example, Maj. Gen. Peter W. Chiarelli and Maj. Patrick R. Michaelis, “Winning the Peace: The Requirements for Full-Spectrum Operations,” *Military Review*, July–August 2005, pp. 4–17; and Ricks, *Fiasco*, pp. 225–234, 270–290.

128. Conetta, *Vicious Circle*; Ahmed S. Hashim, *Insurgency and Counter-insurgency in Iraq* (Ithaca, N.Y.: Cornell University Press, 2006), pp. 333–340; and Ricks, *Fiasco*, chaps. 11, 12.

129. Sepp, phone interview by author; senior MNC-I staff, discussions with author; Packer, “The Lessons of Tal Afar”; and Ricks, *Fiasco*, chap. 18. Despite some limited efforts to employ this new approach in Tal Afar in 2005, Ramadi in 2006, and elsewhere, insufficient troop levels, the continued concentration of U.S. forces on large bases, and the unreliability of Iraqi security forces to hold

driven in part by the belief among civilian and military leaders that doing so would help win Iraqi "hearts and minds."¹³⁰ But this begs the question of why they would take it for granted that the use of discriminate and proportional force was the only or best approach to counterinsurgency when the U.S. military's own organizational experience in the Philippines, its most successful counterinsurgency campaign, suggested otherwise.¹³¹ Given that other historically viable theories of victory existed, including ones that were incompatible with noncombatant immunity, the turn in a more restrained direction was not the mere by-product of rational adaptation to objective conditions; organizational culture mattered too.

Conclusion

Three conclusions emerge from the evidence and analysis presented here. First, U.S. compliance with the norm of noncombatant immunity in Iraq is higher than critics of the war often assert. Second, despite some remaining problems, compliance has increased over time as the U.S. military has responded to instances of noncompliance by modifying tactics, ROE, training, and even doctrine. Third, the observed level of compliance is best explained by the military's organizational culture.

Before interpreting these findings as a celebration of the "American way of war," however, it is important to remember that the norm of noncombatant immunity is necessary but not sufficient to eliminate civilian suffering during hostilities. Observed through the narrow lens of the Law of War, the U.S. military has gone to commendable lengths to comply with noncombatant immunity in Iraq. But, while these efforts have dramatically reduced the number of civilian casualties relative to what they might otherwise have been in the age of carpet bombing, thousands of Iraqis have still died at the hands of U.S. forces. Both U.S. civilians and senior military commanders failed to prepare

cleared areas prevented successful implementation. The January 2007 presidential announcement of a population-centered Baghdad security plan backed by a substantial "surge" of U.S. forces was meant to address some of these problems. David E. Sanger, Michael R. Gordon, and John F. Burns, "Chaos Overran Iraq Plan in '06, Bush Team Says," *New York Times*, January 2, 2007.

130. This theory of victory is embraced by the National Security Council, *National Strategy for Victory in Iraq* (Washington, D.C: White House, November 2005); and *Counterinsurgency*, FM 3-24/MCWP 3-33.5.

131. As the insurgency in Iraq escalated, the proper lessons to draw from the Philippines case were widely discussed in military circles. See Brian McAllister Linn, "The Philippines: Nationbuilding and Pacification," *Military Review*, March–April 2005, pp. 46–54; and Timothy K. Deady, "Lessons from a Successful Counterinsurgency: The Philippines, 1899–1902," *Parameters*, Vol. 35, No. 1 (Spring 2005), pp. 53–68.

for the mission that emerged the day after Baghdad fell; and, as chaos erupted, U.S. forces adopted an approach that focused on killing and capturing “bad guys” instead of providing genuine security to the Iraqi population. The tension between annihilation and restraint within U.S. military culture ultimately generated more risks for civilians than was militarily necessary or inevitable.

As U.S. operations in Iraq continue, still more should be done to protect Iraqi civilians. The military should continue to conduct anonymous battlefield ethics surveys of troops. Regular mental health questionnaires should be expanded to ascertain how often and why Law of War violations occur, and whether a code of silence, command climate, flaws in the military justice system, or other factors mask them when they do. The military should also establish “civilian casualties response teams,” comprising judge advocates, intelligence officers, medical personnel, forensics and munitions specialists, engineers, and information officers, to study the effects of U.S. military operations on the Iraqi population just as battle damage assessments measure the effects of weapons systems.¹³² The findings should be used to further refine the rules and tactics governing the use of deadly force, inform planning and targeting procedures, and assist in criminal investigations.

More broadly, the U.S. military must finally commit to tracking and transparently reporting all wartime civilian casualties. Recent efforts to keep tabs on EOF incidents are a step in the right direction, but they do not apply to incidents that occur during patrols, raids, and combat. The U.S. military has gone to great lengths to comply with the norm of noncombatant immunity at the front end of operations. Now it needs an organization-wide commitment at the back end to better monitor and enforce adherence to the Law of War.

132. A similar suggestion is made by Reynolds, “Collateral Damage and the 21st-Century Battlefield,” pp. 104–106.