

# WHEN DOES COLLATERAL DAMAGE RISE TO THE LEVEL OF A WAR CRIME?: EXPANDING THE ADEQUACY OF LAWS OF WAR AGAINST CONTEMPORARY HUMAN RIGHTS DISCOURSE

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First they went into my Father's room, where he was reading the Koran . . . we heard shots. I couldn't see their faces very well—only their guns sticking into the doorway. I watched them shoot my grandfather, first in the chest and then in the head. Then they killed my granny.

Iraqi orphan<sup>1</sup>

These deeds are the overshadowing historical facts by which generations to come will remember this decade. If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this twentieth century may yet succeed in bringing the doom of civilization.

Justice Robert H. Jackson<sup>2</sup>

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1. See Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha?*, *TIME*, Mar. 19, 2006, available at <http://www.time.com/time/world/printout/0,8816,1174649,00.html>. Also, consider this is a statement given by a 9-year old girl describing how U.S. Marines from Kilo Company 3rd Battalion annihilated a family in cold-blood to avenge the death of one of their comrades killed earlier in a roadside bomb. See *id.* The incident was narrated to the *Time* correspondent Aparisim Ghosh in Baghdad, independently corroborated by the Hammurabi Human Rights Watch, which also possesses videotape confirming the incident. See *id.*

2. Robert H. Jackson, *The Nürnberg Case 120* (Alfred A. Knopf, ed., Cooper Square 1971) (1947), available at <http://www.roberthjackson.org/Man/theman2-7-8-2>.

## I. INTRODUCTION

A group of Marines headed toward the house. Eman says she “heard a lot of shooting, so none of us went outside. Besides, it was very early, and we were all wearing our nightclothes.” When the Marines entered the house, they were shouting in English. “First, they went into my father’s room, where he was reading the Koran,” she claims, “and we heard shots.” According to Eman, the Marines then entered the living room. “I couldn’t see their faces very well—only their guns sticking into the doorway. I watched them shoot my grandfather, first in the chest and then in the head. Then they killed my granny.” She claims the troops started firing toward the corner of the room where she and her younger brother Abdul Rahman, 8, were hiding; the other adults shielded the children from the bullets but died in the process. Eman says her leg was hit by a piece of metal and Abdul Rahman was shot near his shoulder. “We were lying there, bleeding, and it hurt so much. Afterward, some Iraqi soldiers came. They carried us in their arms.”<sup>3</sup>

These are not isolated instances of grotesque inhumanities, but familiar stories of civilian sufferings from Baghdad, Fallujah, Latifya, Balad, Ramadi, Samarra and many more.<sup>4</sup> These children, like ragdolls lay in hospitals, mangled and betrayed by the hubris of the western civilization drumbeat of war.<sup>5</sup> Lifeless bodies of their friends, families, and neighbors form a morbid tapestry of destruction and death across occupied Iraq.<sup>6</sup> This was a hidden and quite often dismissed dimension of the War in Iraq that encompassed dead bodies of innocent civilians strewn all over the landscape, perverted by illegal occupation,<sup>7</sup> ravaged for hegemonic

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3. McGirk, *supra* note 1.

4. Dahr Jamail’s MidEast Dispatches, <http://dahrjamailliraq.com> (last visited Apr. 6, 2008) [hereinafter Jamail] (recounting experiences from visiting cities in Iraq).

5. *Id.* (providing a vivid imagery of the war’s most hapless, innocent little victims).

6. *See id.* (recounting civilian calamities borne out by war).

7. The United States and British troops invaded Iraq under the preventative war paradigm, but the invading armies did not have a specific and relevant United Nations mandate, nor did they have any international authorization. *See* U.S. Department of State, U.N. Security Council Resolution 1441, *available at* <http://www.state.gov/p/ios/rls/fs/2003/17926.htm> (noting that the U.N. did not authorize the invasion). Based on data available, it is clear that there existed no immediate threat to either the United States or the world as of March 20, 2003. *See* Julian Borger, White House Lied About Saddam Threat, *GUARDIAN*, July 10, 2003, *available at* <http://www.guardian.co.uk/world/2003/jul/10/iraq.julianborger1> (emphasizing that Iraq posed no imminent threat to either its neighbors or to the United States).

Article 51 of the United Nations Charter states:

Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to

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maintain international peace and security. Measures taken by Members in the exercise of this right. . . shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council. . .

U.N. Charter art. 51, *available at* <http://www.un.org/aboutun/charter/>. This Charter explains the circumstances under which another country is permitted to invade based on self-defense or actual or imminent threat. Similarly, Article 42 authorizes use of force in order to maintain or resolve international peace and security, thereby establishing lack of support for the invasion under the United Nations framework. U.N. Charter art. 42, *available at* <http://www.un.org/aboutun/charter/>. Plenty of evidence has come forward that indicates that the war was sold to both the public and the media under faulty intelligence. *See* Memorandum from C. Greenwood to the U.K. Parliament's House of Common's Select Comm. On Foreign Affairs (Oct. 24, 2002), *available at* [www.publications.parliament.uk/pa/cm200203/cmselect/cmfa/196/2102406.htm](http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfa/196/2102406.htm) (noting that without explicit U.N. authorization, the decision to invade Iraq has questionable legality under International Law); *see also* Written Statement, Lord Goldsmith, Attorney Gen. of the U.K., Legal Basis for use of Force against Iraq (Mar. 17, 2003), *available at* <http://www.number-10.gov.uk/output/Page3287.asp> (establishing the limits of Security Council Resolution 1441, foreclosing the authority to invade Iraq). In the Fund for Independence in Journalism study, a joint Center for Public Integrity analyzed the statements made by Bush administration officials in their attempt to sell the Iraq War. According to a study by two nonprofit journalism organizations, President Bush and top administration officials issued hundreds of false statements about the national security threat from Iraq in the two years following the 2001 terrorist attacks. *U.S. Wiretapping Controversy* (CNN television broadcast Dec. 23, 2005), *available at* [http://transcripts.cnn.com/TRANSCRIPTS/051223/i\\_ins.02.htm](http://transcripts.cnn.com/TRANSCRIPTS/051223/i_ins.02.htm). "Former CIA director Stansfield Turner accused the Bush administration Tuesday of 'overstretching the facts' about Iraqi weapons of mass destruction in making its case for invading that country." *See* John Diamond, *Ex-CIA Director says Administration Stretched Facts on Iraq*, USA TODAY, June 17, 2003, *available at* [http://www.usatoday.com/news/washington/2003-06-17-turner-usat\\_x.htm](http://www.usatoday.com/news/washington/2003-06-17-turner-usat_x.htm). "A forged document was used to support claims by George Bush, John Howard and Tony Blair about Iraq's nuclear weapons program- even though the CIA and the State Department in the United States had dismissed it months earlier as 'garbage', as one analyst said." *See* Marian Wilkinson, *The Garbage Intelligence that helped to Unleash a War*, SYDNEY MORNING HERALD, June 21, 2003, News and Features at 1. The following conclusion was made regarding the statements, that they "were part of an orchestrated campaign that effectively galvanized public opinion and, in the process, led the nation to war under decidedly false pretenses." The Study provided:

The study counted 935 false statements in the two-year period. It found that in speeches, briefings, interviews and other venues, Bush and administration officials stated unequivocally on at least 532 occasions that Iraq had weapons of mass destruction or was trying to produce or obtain them or had links to al-Qaida or both.

James Joyner, *Bush's Iraq War Lies were Untrue*, OUTSIDE THE BELTWAY, Jan. 23, 2008, *available at* [http://www.outsidethebeltway.com/archives/2008/01/bushs\\_iraq\\_war\\_lies\\_were\\_untrue/](http://www.outsidethebeltway.com/archives/2008/01/bushs_iraq_war_lies_were_untrue/). The study further notes that "It is now beyond dispute that Iraq did not possess any weapons of mass destruction or have meaningful ties to al-Qaida," according to Charles Lewis and Mark Reading-Smith of the Fund for Independence in Journalism staff members, writing an overview of the study. "In short, the Bush administration led the nation to war on the basis of erroneous information that it methodically propagated and that culminated in military action against Iraq on March 19, 2003." *Id.* Iraq did not possess weapons of mass destruction (WMD). *See* BRITISH FOREIGN AND COMMONWEALTH OFFICE, IRAQ'S WEAPON OF MASS DESTRUCTION: THE ASSESSMENT OF THE BRITISH GOV'T (2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB80/wmd11.pdf> (explaining the threat of Iraq possessing WMD as a possibility without identifying evidence of actual possession of WMD).

reasons,<sup>8</sup> murdered by liberation,<sup>9</sup> and brutally raped of life for the farcical march to democracy.<sup>10</sup>

The scenario of overcrowded hospitals with injured children provides in this context only a snapshot of the widespread destruction, which includes extensive civilian casualties from cluster bombs, deformed babies because of exposure to U.S. depleted uranium, and bustling markets leveled by high-altitude bombings. As the evidence of this brutal dimension of occupation percolates through the shield of embedded journalism,<sup>11</sup> we are awakened by the stark reality of present day Iraq. How long can we continue to ignore mounting evidence of betrayal? A betrayal of the very cornerstone of equality and justice envisioned in the Nuremberg Principles,<sup>12</sup> and that Justice Robert H. Jackson trumpeted in our civilizations' commitment towards developing a robust form of International Law. Not just robust, but an International Law that can bring justice to the "usual suspects"<sup>13</sup> and stand up to the violators of the Laws of War.<sup>14</sup> As we mark the recent

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8. I have discussed this elsewhere in my work, where I have shown that this hegemonic agenda is part and parcel of a broader political agenda, driven by five primary factors. These factors are as follows: (1) American agenda of perpetuating an undefined yet expanding concept of evil, (2) perpetual quest for invulnerability, (3) isolationism and faulty multi-culturalism post 9/11, (4) policy of exaggeration, and (5) dehumanization of the enemy. These factors, coupled with the asymmetric alignment of power in today's world, and lack of political ethics in American foreign policy can very well explain the genesis of Guantánamo Bay and Abu Ghraib. See Dr. Saby Ghoshray, *Understanding Guantanamo and Abu Ghraib: Looking Through the Prism of American Political Agenda Abroad, The Arrogance of Power: Being American after 9/11*, Address at the University of Mary Washington (April 1-3, 2005), available at [http://www.umw.edu/universityrelations/news/archives/conference\\_on\\_being\\_america.php](http://www.umw.edu/universityrelations/news/archives/conference_on_being_america.php) (noting that hegemonic policy driven agenda can distort citizen's view to perceive unsubstantiated fear).

9. Here I refer to the false premise of invading Iraq for the purpose of liberating the citizens from tyrannical rule of Saddam Hussein, a premise that has been proven to be false by the unfolding of events since March 2003. As has been detailed throughout this article, significant loss of civilian lives resulted from this botched invasion.

10. Because externally imposed Western democracy must develop organically from within it has very little chance of success in Iraq as has clearly been evident in Afghanistan.

11. Here I refer in general to the overall lack of independent, objective news coverage that marked the initial phases of the Iraq War, in which "embedded journalism" was the prevailing order in the journalistic community. This has somewhat changed, as we are seeking more and more reports verifying civilian abuses, civilian infrastructure destruction, and the innocent killing of civilians by the occupying forces.

12. See generally Nuremberg Rules, in *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, 82 U.N.T.S. 279, available at <http://www1.umn.edu/humanrts/instrree/imt1945.htm> (noting that the behavior of occupation forces in Iraq may in fact constitute War Crimes or Crimes against peace, under the various tenets of the Nuremberg Principle).

13. By this phrase, I mean the countries that have historically been brought to the jurisdiction of International Tribunals, or been accused of perpetrating terrorism.

14. By Laws of War, I generally refer to the rich corpus of codified International customs of warfare that have evolved through the centuries, and have been modified by

sixty-year anniversary of the Nuremberg Trials in 1946, history recounts the enduring wisdom of Judge John Parker:<sup>15</sup>

The evidence relating to the war crimes has been overwhelming, in its volume and its detail . . . . The truth remains that war crimes were committed on a vast scale, never before seen in the history of war . . . . There can be no doubt that the majority of them arose from the Nazi conception of "total war," [sic] with which the aggressive wars were waged. For in this conception of "total war," [sic] the moral ideas underlying the conventions, which seek to make war more humane, are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances and treaties all alike are of no moment, and so, freed from the restraining influence of International Law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, war crimes were committed when and wherever the Fuehrer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.<sup>16</sup>

History, however, has come back to haunt us, as Judge Parker's words reverberate from the minarets of Ramadi to the ruins of Babylon. Poignant questions come before us. Has the value of Iraqi human lives been made subordinate to the mandate of war during the shock and awe<sup>17</sup> campaigns in Baghdad? Has the Geneva Convention been made redundant and inapplicable during Operation Phantom Fury in Fallujah?

The answer to all of these questions must be a resounding "yes." If not, we are forced to embrace one of two scenarios. In the first, we must deny that aggressive war was conducted at all, and succumb to

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various wars in modern times. This phrase is used as a reference to the body of laws governing the conduct of hostilities, such as The Hague and the Geneva stream of laws. For information on the Laws of War see MICHAEL E. HOWARD, GEORGE J. ANDREOPOULOS & MARK R. SHULMAN, *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (1994).

15. Judge John Parker was an alternate Judge from North Carolina, who took part in the main trial at Nuremberg. See The Avalon Project at Yale Law School, Judgment: War Crimes and Crimes against Humanity, <http://www.yale.edu/lawweb/avalon/imt/proc/judwarcr.htm> (last visited Apr. 6, 2008) [hereinafter Avalon Project] (noting similarity between Judge Parker's observation of total war with the aggressive war conducted by U.S. forces in Fallujah).

16. See *id.* (observing an uncanny similarity between American forces' conduct of total war with Judge Parker's observation of Nazi war conduct).

17. By shock and awe, I refer to the general ambience of apathy that prevailed during the initial bombing campaigns in Iraq during which an enormous amount of firebombs were dropped on civilian infrastructures and military formations. During this time, the media focused more on the video-game-like graphic images, removing the human element completely.

the brash emergence of embedded journalism. If we make that denial, however, we succumb to a confusing conundrum, as a series of questions remain unanswered. Can an embedded journalist that rides shotgun in the Bradley Fighting vehicle<sup>18</sup> report war crimes committed by the very soldiers upon whom he or she is relying on for personal protection? Can we be proper witnesses to history, while simultaneously being mugged by it? The second scenario would be to take cover under the expanded abstraction of doctrinal difficulties in applying the concept of collateral damage<sup>19</sup> against the backdrop of aggressive war conducted by the coalition forces in Iraq. The term collateral damage was originally employed in an effort to gain immunity from civilian casualties under the pretext of military necessity.<sup>20</sup> However, the term collateral damage has become a modern day euphemism for mass murder.<sup>21</sup> I, therefore, pose the pertinent question: When does collateral damage become a violation of the Laws of War? Accordingly, I will begin with a discussion of collateral damage and articulate its framework of applications within the current confines of

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18. A Bradley Fighting Vehicle is among the machinery used by soldiers fighting in the Iraq War. See generally CNN, War in Iraq, Forces: Weapons, <http://www.cnn.com/SPECIALS/2003/iraq/forces/weapons/index.html> (last visited Apr. 6, 2008) (listing some of the weapons, machinery, and personnel used in the Iraq War).

19. The United States Department of Defense (DOD) defines collateral damage as, "unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time. Such damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack." U.S. DEP'T OF DEF. DICTIONARY OF MILITARY TERMS 93 (2001), available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf). In this context, the dictionary meaning of "collateral" is "running side by side," parallel, accompanying or "serving to support or corroborate." Similarly, "damage" signals impairment of the usefulness or value of person or property. My Article discusses this literal explication of collateral damage and how it is the genesis of the value proposition within the proportionality principle.

20. The principle of military necessity indicates that there must be some military advantage that can be gained from the attack. The Nuremberg Tribunal defines "military necessity" such that:

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

Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. Rev 1, 15 (2005), available at [http://findarticles.com/p/articles/mi\\_m6007/is\\_56/ai\\_n14700122](http://findarticles.com/p/articles/mi_m6007/is_56/ai_n14700122).

21. Clear and convincing evidence exists indicating that on a number of occasions unarmed civilians were unlawfully killed in Iraq. See *infra* Parts III, IV.

modern warfare.<sup>22</sup> Further, I will examine the specific elements of the Laws of War that provide immunity from war crimes during modern conflicts.<sup>23</sup> Next, I will analyze the application of those elements during the recent United States military exercise in Iraq.<sup>24</sup> Third, I will explore whether the existing Laws of War are adequate to address the evolving ground realities in today's battlefields. Then I will conclude with a discussion of whether it is necessary to expand the customary Laws of War against established principles of Human Rights doctrine.<sup>25</sup>

## II. COLLATERAL DAMAGE WITHIN THE FRAMEWORK OF THE LAWS OF WAR

It was an outrage, an obscenity. The severed hand on the metal door, the swamp of blood and mud across the road, the human brains inside a garage, the incinerated, skeletal remains of an Iraqi mother and her three children in their still-smoldering car. Two missiles from an American jet killed them all—by my estimate, more than 20 Iraqi civilians, torn to pieces before they could be 'liberated' by the nation destroyed their lives. Who dares, I ask myself, to call this 'collateral damage?'<sup>26</sup>

The question raised here by the independent, non-embedded reporter, Robert Fisk, goes to the very core of the established military framework in occupied Iraq. Perhaps the most significant of all casualties in Iraq was that of the concepts and definitions of *accidental killing*, *legitimate target*, and *war crime*, all of which have been

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22. See *infra* note 23 and accompanying text.

23. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol 1]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Part IV, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. The United States has not ratified these Protocols, however, the Protocols are recognized by many foreign countries as customary International Law. See Michael J. Matheson, *The United States' Position on the Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, U.J. Int'L L. & POL'Y 419, 420 (1987) (identifying specific military conducts in the war zone that insulate a military personnel from being charged with a war crime); see also the Int'l Comm. of the Red Cross [ICRC], *Protection of Civilian Population Against the Dangers of Indiscriminate Warfare*, ICRC Res. XXVIII (1965) (on file with author) (unsuccessfully attempted to prohibit use of high altitude bombing on the account of excessive collateral damage).

24. See *supra* note 7 and accompanying text.

25. See *supra* notes 14, 23 and accompanying text.

26. Robert Fisk, *It was an Outrage, an Obscenity*, Mar. 27, 2003, <http://www.robert-fisk.com/articles196.htm>.

manipulated under the umbrella of collateral damage.<sup>27</sup> Because accidental killings of civilians do not become war crimes, media campaigns could be manipulated to make the incident appear as though the intended attack was against a legitimate target.<sup>28</sup> The killing then becomes collateral damage, an act that has the protection of immunity under both the Laws of Armed Conflict (“LOAC”) or Laws of War,<sup>29</sup> and the Uniform Code of Military Justice (“UCMJ”).<sup>30</sup>

These terms, incorporated into the jargon of military discourse long before the current hostilities,<sup>31</sup> have now become common in household conversation. In 1999, an American pilot dropped bombs on a passenger train crossing a bridge in the Balkans, killing innocent civilians.<sup>32</sup> The Supreme NATO Commander General Wesley Clark lamented, “[i]t is one of those regrettable things that happen in a campaign like this and we are all very sorry for it, but we are doing the absolute best we can do to avoid collateral damage, I can assure you of that.”<sup>33</sup> Since then, collateral damage has become a clever weapon of mass deception in shaping public opinion in responding to the mass killings of civilians.<sup>34</sup> The deception deepens in the folksy mantra of Donald Rumsfeld’s War on Terror:<sup>35</sup>

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27. A term or concept that has been somewhat buried in the obscurity of military jargon, but has been brought to the limelight, not because of its intended meaning, but rather by precisely what the meaning of the term is not.

28. See *supra* notes 4, 19, 20 and accompanying text.

29. See *supra* note 14 (defining LOAC).

30. See Uniform Code of Military Justice, 10 U.S.C. §§ 801-06 (2000), available at <http://www.au.af.mil/au/awc/awcgate/ucmj.htm> (identifying specific military conduct that immunizes military personnel from being charged with a war crime).

31. In this Article, I restrict the scope to the Iraqi invasion of March 2003 and the current occupation. Even though, the kernel of the argument applies to the Iraq War of 1991 and the Afghanistan War. Nonetheless, I refrain from bringing examples from those conflicts to this Article, except for such cases where a continuous and consistent trend must be examined, such as the use of depleted uranium. See *infra* notes 85, 86 and accompanying text.

32. James Bovard, *Kosovo Déjà Vu*, FREEDOM DAILY, July 2003, <http://www.fff.org/freedom/fd0307d.asp>. An American pilot bombed a passenger train on a railway bridge on April 12, 1999, killing fourteen people. *Id.* NATO’s supreme commander, General Wesley Clark said:

[W]hen all of the sudden, at the very last instant, with less than a second to go, he caught a flash of movement that came into a screen and it was the train coming in. Unfortunately, he couldn’t dump the bomb at that point. It was locked, it was going into the target and it was an unfortunate incident which he and the crew and all of us very much regret.

*Id.* However, the public later learned from the Frankfurter *Rundschau* in 2000, that the video of the passenger train bombing was played on television at triple the speed of the real time video, making the bombing of the train appear more “inevitable” than it truly was. *Id.*

33. *Id.*

34. See *supra* notes 26, 27.

35. War on Terror is a nebulous concept, a carefully orchestrated hegemonic campaign by the Bush Administration to refute and ignore all norms of International Law. I have previously analyzed the legal ramifications and international fallouts from this

Any time that the Department of Defense is engaged from the air or on the ground, we have to know that there are going to be people hurt. Overwhelmingly, they will be people who we intend to hurt. On occasion, there will be people hurt that one wished had not been. I don't think there is any way in the world to avoid that and defend the United States from the kinds of terrorist attacks which we've experienced.<sup>36</sup>

The deception is further cemented in Professor Kenneth Anderson's argument noting that:

[t]here is no moral equivalence between stray missiles aimed in good faith, using the best technology available, and deliberate violation of the categorical rules of war, like using human shields, shelling civilians to prevent them from fleeing Basra and rape or summary execution of prisoners.<sup>37</sup>

I will discard the Rumsfeldian diatribe on two counts. First, he is obligated to follow the lead of the Administration that chose this war-path. Second, throughout his tenure Secretary Rumsfeld has shown scant regard for established rules of the Laws of War. After all, he is the same individual who shook hands with Saddam Hussein during the period of arming Iraq to be the bulwark against Islamic fanaticism of Iran.<sup>38</sup> However, acquiescing to Professor Anderson's argument will indicate that we are indeed witnessing a crisis in International Law, as the degradation of *jus in bello* gives way to *inter arma enim silent leges*.<sup>39</sup>

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War on Terror. See Dr. Saby Ghoshray, Understanding Guantanamo and Abu Ghraib: Looking Through the Prism of American Political Agenda Abroad, The Arrogance of Power: Being American after 9/11, Address at the University of Mary Washington (Apr. 1-3, 2005), available at [http://www.umw.edu/universityrelations/news/archives/conference\\_on\\_being\\_american.php](http://www.umw.edu/universityrelations/news/archives/conference_on_being_american.php) (referring to the semantics and jugglery with words to confuse common people and diverting their attention from the real tangible damage caused by the war).

36. *Pentagon Skeptical of Civilian Deaths*, REFUGEES INT'L, Oct. 15, 2001, <http://refugeesinternational.org/content/article/detail/1046/> (quoting Defense Secretary Donald Rumsfeld).

37. Kenneth Anderson, *Who Owns the Rules of War?*, CRIMES OF WAR PROJECT, Apr. 24, 2003, <http://www.crimesofwar.org/special/Iraq/news-iraq6.html>.

38. The famous handshake between Donald Rumsfeld and Saddam Hussein that occurred on December 20, 1983 has been seared in the memory of the public. A simple search of Google images will produce multiple angles of this photo. Google, <http://images.google.com/images?sourceid=navclient&ie=UTF-8&rls=RNWE,RNWE:2004-,RNWE:en&q=handshake+of+donald+rumsfeld+and+saddam+husein+photo> (last visited Apr. 13, 2008).

39. The Latin phrase *Inter arma enim silent leges* literally means "For among [times of] arms, the laws fall mute," which has become synonymous with the more popular saying, "In times of war, the law falls silent." See Wikiquote, Latin Proverbs, [http://en.wikiquote.org/wiki/Latin\\_proverbs](http://en.wikiquote.org/wiki/Latin_proverbs) (last visited at Apr. 29, 2008). Originally written by Cicero in his published work *Pro Milone* with the wording, "Silent enim leges inter arma," the maxim eventually gained popularity in its current form and has found increasing usage in some of the more recent writings post 9-11, while depicting a gradual erosion of civil liberties. See Cicero, Latin Library, M. Tvlli Ciceronis Pro T. Annio Mi-

Due to its perverted and asymmetric usage in current conflict situations, the term collateral damage has become extremely contentious in current conflicts. Michael Mandel describes collateral damage as a very special kind of “accidental,” “unintentional” or “unpremeditated” killing.<sup>40</sup> The difficulty lies in developing a proper framework to define these important elements of “accidental,” “unintentional” or “unpremeditated” killings within the context of *jus in bello*. This difficulty becomes further compounded for the rules of engagement in the event of asymmetric warfare when one side is extremely over-matched with respect to the other. This has been echoed by Professor Anderson, as he noted, “there is profound disagreement over who has authority to declare, interpret and enforce those rules . . . .”<sup>41</sup> If, however, one incorporates the full interpretation of the terms accidental, unintentional and unpremeditated into the International Law framework of civilian protection, one may begin to see some robust interpretations of collateral damage.

Under the LOAC, two types of attacks against civilians are prohibited, (i) direct and deliberate attacks and (ii) indiscriminate attacks. However, plenty of evidence surfaced in the occupied Iraq, which details how the occupation forces have unleashed unprovoked military might against civilians,<sup>42</sup> an act of military aggression that is inconsistent with the guiding principles of the Laws of War.

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lone Oratio (106-43 B.C.), available at <http://www.thelatinlibrary.com/cicero/milo.shtml>. Some of the more notable usages of the term have been found in a few Supreme Court decisions. For example, in 1866, the Court invoked the phrase while observing in *Ex Parte Milligan*, “these [amendments of the Bill of Rights], in truth, are all peace provisions of the Constitution and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law.” *Ex Parte Milligan*, 71 U.S. 2, 32 (1866). More recently in 2004, Justice Scalia lambasted the plurality decision in *Hamdi v. Rumsfeld* while inserting the phrase in his remarks

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis that, at the extremes of military exigency, inter arma silent leges. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.

*Id.* at 569.

40. MICHAEL MANDEL, HOW AMERICA GETS AWAY WITH MURDER: ILLEGAL WARS, COLLATERAL DAMAGE AND CRIME AGAINST HUMANITY 50 (2004).

41. Anderson, *supra* note 37.

42. Here I refer to the independent media reports that indicate a consistent pattern of unleashing unprovoked military aggression against the civilians, as has been shown throughout this article, especially in areas where the U.S. military personnel have been subjected to casualties, either from roadside bombs, or sudden ambushes. For example, soldiers with the U.S. Army’s 3rd Infantry Division killed seven woman and children when they opened fire on an unidentified four-wheel drive vehicle as it approached a U.S. checkpoint near al-Najaf. See William Branigin, *A Gruesome Scene on Highway 9: Ten Dead after Vehicle Shelled at Checkpoint*, WASH. POST, Apr. 1, 2003.

According to the Protocol I in Article 51(2) of the Geneva Conventions, “[t]he civilian population as such, as well as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread the terror among the civilian population are prohibited.”<sup>43</sup> Additionally, Article 52(I) further stipulates that, “[c]ivilian objects shall not be the objects of attack.”<sup>44</sup> Similarly, the 1998 Rome Statute of the International Criminal Court (“ICC”), under its Article 8(2)(b)(i)-(ii) makes categorical provisions against, “intentional direct attack against civilian population as such, individual civilians or civilian objects.” By the language “civilian population as such,” the statute makes careful distinction between damage caused by direct intentional attack or civilians where no military installation is either present, or no military advantage is to be gained from the attack in which, civilian casualties take place by being in the vicinity of the military installation or being in the path of military objective.

Here, the established Laws of War against direct and deliberate attack against civilians are in conformity with the definitional flavor of collateral damage’s elements of non-intention, non-premeditation and accidental nature. Therefore, civilian casualties as a result of weapon malfunction fall under the immunity paradigm enshrined within the trilogy above, and hence will not incur accountability. On the other hand, indiscriminate attacks on civilians may be unintentional or accidental, those attacks nonetheless require premeditation. Accordingly, soldiers should not be immune from liability for their premeditated acts under collateral damage. Such indiscriminate attacks are laden with wanton disregard for civilian lives and, accordingly, should be interpreted as premeditated acts under Protocol I, and are defined as:

- (a) Those that are not directed at a specific military objective.
- (b) Those that employ a method or means of combat which cannot be directed at a specific military objective.
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilians objects without distinction.<sup>45</sup>

These guiding principles of the Laws of War provide some clear restrictions or prohibitive benchmarks against indiscriminate attacks upon civilian populations. Under this prohibitive framework, the following acts will very definitively against the Laws of War:

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43. Protocol I, *supra* note 23, at art. 51(2).

44. *Id.* at art. 52(1).

45. *Id.* at art. 51(2).

- (i) To open fire blindly into objects, such as, moving vehicles or resident dwellings within the enemy territory, without knowing the identity of the occupants inside, especially when the indiscriminate attack is perpetrated without any warning shot, or without any attempt to extract the identity of the occupants.<sup>46</sup>
- (ii) To release random bombs from aircraft over enemy territory, without any specific knowledge of any military target, or without attempting to identify civilian locations.<sup>47</sup>
- (iii) To conduct bombing raids under the following circumstances, such as,
  - (a) At night without proper target identification.
  - (b) From extremely high altitudes without the ability to identify and acquire potential military objectives.
  - (c) In any and all circumstances where visibility is impaired or target cannot be adequately identified or no discernible military objective is achieved.<sup>48</sup>

If the above acts are against the Laws of War, under what military doctrine could they be remotely permissible? In my view, the recent Iraq war and the behavior of the occupation forces have brought forth the issue of inadequacy in the identification of military objectives, which implores us to an examination of the doctrine of military necessity within the framework of the Laws of War.

### III. PRINCIPLES OF DISTINCTION, NECESSITY, AND PROPORTIONALITY WITHIN THE CONTEXT OF THE LAWS OF WAR

Providing civilian protection and ensuring fulfillment of military objectives during armed conflict forms the backbone of the customary Laws of War. Typically, the fulfillment of military objectives is predicated on achieving some military advantage, which more often than not includes the destruction of a target.<sup>49</sup> The development of the recent and relevant rules for military targeting allows us to codify the laws of engagement within three distinct principles: *distinction*, *necessity*, and *proportionality*. Therefore, an examination of these three principles within the context of current hostilities will allow for a better appreciation of the enduring principles of International Law in its current form.

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46. The established rules of engagement prohibit isolated acts of violence. *Id.*

47. See *infra* note 75 and accompanying text (following the same line of reasoning).

48. *Id.*

49. See *supra* note 44.

#### A. PRINCIPLE OF DISTINCTION

Under the principle of distinction, an attacking party must distinguish between military targets and civilian objects before the attack begins.<sup>50</sup> Protocol I's prohibition of indiscriminate attack can be attributed to the codification of the distinction principle,<sup>51</sup> which in my view can be seen as the fundamental building block of civilian protection during armed conflict. The more fundamental nature of the principle of distinction can be seen from the observation that, among the three military doctrines of distinction, necessity and proportionality, the doctrine of distinction has the ability to make the most profound difference between life and death. For example, regardless of interpretation related to proportionality and necessity, correct interpretation of distinction allows for a particular target to be confronted with deadly force. The principle of distinction, therefore, makes it illegal to open fire on moving cars without properly determining the identity and objective of the occupants. Similarly, acts of firing indiscriminately at civilian houses or bombing civilian infrastructures without properly establishing an enemy presence should be considered violations of the LOAC under the principle of distinction.

#### B. PRINCIPLE OF NECESSITY

In the storied history of the modern Laws of War, perhaps no other movement can better capture the humanitarian dimension of the Nuremberg Trials than the formalized incorporation of the principle of necessity.<sup>52</sup> The framework provides the following:

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

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50. Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148-49 (1999).

51. *Id.*

52. See *supra* note 20 and accompanying text (describing the principle of necessity).

struction of property and the overcoming of the enemy forces.<sup>53</sup>

Military operations during times of armed conflict have undergone substantial changes over the last sixty years, which have resulted in confusion regarding the proper definition and application of military concepts, such as the concept of military necessity. For example, military planners and human rights organizations disagree about both the fundamentals and the interpretation of military necessity and, consequently, have presented inconsistent understandings of those concepts. As a result, it has become extremely problematic to apply the principle of necessity in the assessment of collateral damage and the determination of culpability of crime.

### C. PRINCIPLE OF PROPORTIONALITY

In light of the structural inadequacies of the principle of necessity and emerging fuzzification<sup>54</sup> of the principle of distinction, I draw attention to the principle of proportionality, which provides the strongest civilian protection available in customary International Law.<sup>55</sup> This is evidenced by Article 51(5)(b) of Protocol I which enumerates the following restrictions on military objective which, “[m]ay be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>56</sup> Further, Article 50(3) restricts targeting in categorical provisions when, “[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”<sup>57</sup>

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53. See *supra* note 20.

54. Many of the current hostilities that involve international actors take place in an asymmetric paradigm, in which one entity enjoys significant military advantages with training and overall capabilities. Among these hostilities are invasions on sovereign Nations. These two factors together increase the likelihood that belligerent entities and civilian resources will commingle. As a result, civilian populations in combat zones may become more sympathetic towards the more lightly armed and, in turn, commingle resources with belligerent entities. As a result of commingling, identification of legitimate military targets becomes difficult.

55. In defining “civilian” and “civilian populations” Protocol I states, “The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.” Protocol I, *supra* note 23, at art. 50(3). Protocol I further states that civilian populations are protected from indiscriminate attacks, including attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” *Id.* at art. 51(5)(b).

56. *Id.* at art. 651.

57. *Id.* at art. 50(3).

The principle of proportionality makes it mandatory for the military planners, under Article 57(2)(a)(ii) of Protocol I, “[t]o take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>58</sup> The humanitarian spirit of LOAC makes it incumbent for a military planner to engage in a two step process before targeting a particular object. This includes, (i) ensuring the aggressive maneuver is a viable military objective, and then (ii) determining with reasonable accuracy whether the resulting collateral damage is proportional to the intended military objective. The principle of proportionality does not invalidate a military objective but it provides some restrictive covenants surrounding military objectives to reduce civilian casualties in military operations. This restrictive framework of proportionality has come under attack from the military establishments, especially those who are engaging in aggressive military exercises predominantly on civilians.<sup>59</sup> The focal point of contention is the definitional confusion surrounding the concept of “military objective,” because, unless the military community is able to agree on what a military objective is, the military cannot agree on proportionality.<sup>60</sup> This has been adequately addressed by Judge Higgins in her dissent to the Nuclear Weapons Advisory opinion. Judge Higgins contended that:

The principle of proportionality, even if finding no specific mention, is reflected in many provisions of the Additional Protocol I to the Geneva Conventions of 1949. Thus, even a

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58. *Id.* at art. 57(2)(a)(ii).

59. Donald Rumsfeld's feelings on International Law are well documented. As noted by Michael Byers:

Donald Rumsfeld's own disdain for international humanitarian law was apparent in January 2002, when suspected Taliban and al-Qaida members were transported to the US naval base in Guantanamo Bay. Ignoring criticism from a number of European leaders, the UN High Commissioner for Human Rights and even the normally neutral Red Cross, Rumsfeld insisted the detainees were not prisoners of war and refused to convene the tribunals required under the Geneva Conventions to determine their status. He also ignored advice from the Pentagon's judge advocate generals, and based his decision instead on an analysis provided by White House counsel Alberto Gonzales, a former corporate lawyer from Texas.

Michael Byers, *The Law of War, US-Style*, LONDON REV. OF BOOKS, Feb. 20, 2003, [http://www.lrb.co.uk/v25/n04/byer01\\_.html](http://www.lrb.co.uk/v25/n04/byer01_.html). Additionally, in 2001 Secretary Rumsfeld referenced United States bombs hitting a civilian warehouse in Afghanistan in 2001, stating, “We're not running out of targets, Afghanistan is.” Ben Kiernan, “*Collateral Damage Means Real People*,” BANGKOK POST, Oct. 20, 2002, available at [http://www.yale.edu/gsp/publications/collateral\\_damage.html](http://www.yale.edu/gsp/publications/collateral_damage.html).

60. See Carr Center for Hum. Rights Pol'y, John F. Kennedy Sch. Of Gov't, Harv. U., Understanding Collateral Damage Workshop, Project on the Means of Intervention (2002), <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/WebJuneReport.pdf> (noting proportionality and objectivity may have some mutual exclusivity, from a military perspective, making the implementation rather difficult).

legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.<sup>61</sup>

Therefore, if an attack on a legitimate target becomes synonymous with the concept of military objective, no definitional confusion or applicative quandary arises. Thus, rejecting the interpretation of proportionality on the basis of giving primacy to the concept of military objective simply may not yield a workable solution. This is further corroborated in Article 51(5)(b) of Protocol I, which by incorporating the term "excessive" mandates protection of the civilian population by providing a discernible metric for disproportionately in relation to the fully explicated military objective.<sup>62</sup> In other words, a clearly identifiable threshold of military attack must follow a clear trajectory of "concrete and direct" anticipatory "military advantage."<sup>63</sup>

Per the guidelines in Article 8(2)(b)(iv) of the Rome Statute of the ICC, the issue of proportionality goes to the very core of evaluating the extent of collateral damage.<sup>64</sup> Therefore, it is necessary to evaluate the factual situations and circumstances of the military exercise to determine "excessive" civilian casualties against the anticipated military advantage. The legality of the attack is not to be evaluated by the number of actual losses but by employing a balancing test, weighing the anticipated military advantage against expected civilian casualties. In my view, the principle of proportionality is not an exact science. There is no available metric to determine violations based on proportionality. This subjective evaluation test suffers from a serious drawback in the modern theaters of asymmetric warfare,<sup>65</sup> as the subjectivity depends on individual human characteristics. During times of war these human characteristics become severely infected with prejudice, irrationality, hatred and barbarism. Therefore, within the framework of the current Laws of War, it is simply not possible to develop a proportionality paradigm, which will ensure maximum civilian protection.

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61. International Court of Justice, Dissenting Opinion of Judge Higgins, [http://www.fas.org/nuke/control/icj/text/iunan\\_ijudgment\\_19960708\\_Dissenting\\_Higgins.htm](http://www.fas.org/nuke/control/icj/text/iunan_ijudgment_19960708_Dissenting_Higgins.htm) (last visited Apr. 21, 2008).

62. Protocol I, *supra* note 23, at art. 51(5)(b). Article 51(5)(b), which addresses which type of attacks should be considered "indiscriminant" states: "[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.*

63. Protocol I, *supra* note 23.

64. Rome Statute of the International Criminal Court art. 8(2)(b)(iv) (2002).

65. See *supra* note 54 (discussing the genesis of asymmetric warfare in modern hostilities).

#### IV. TESTING THE LIMITS OF INTERNATIONAL LAW IN OCCUPIED IRAQ

Consider two examples of the mindsets of two U.S. military personnel. First, the cockpit dialogue of a military flight crew and the air controllers. At first glance, it appears to be the excited communication of some youthful video game-players, but, it is quite the contrary. It is the actual dialogue of U.S. military personnel discussing “taking out numerous individuals” they see on the road.<sup>66</sup>

**00:14 F-16:** *“I got numerous individuals on the road. Do you want me to take those out?”*

**Forward Air Control:** *“Take ‘em out!”*

**00:33 F-16:** *“Ten seconds”*

**FAC:** *“Roger”*

**Munitions Detonate in Crowd.**

**00:45 F-16:** *“Impact”*

**00:48 F-16:** *“Aw Dude”*

Likewise, consider this second example, in which a twenty year old military soldier stated, “I want, to go and kill people, so we can go home. Kill them and go home, that’s all we can do now.”<sup>67</sup>

The homicidal psychology reflected in the above two isolated snapshots may not represent the full spectrum of inhumanities unfolding in Iraq, but they open our eyes to the effect of disproportionate force. As international dispatches leak from the Iraqi battlefields, the admonitions of the Nuremberg Conventions must penetrate the warped battlefield drumbeat: “The crimes hereinafter set out are punishable as crimes under; international law: . . . wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.”<sup>68</sup> Thus, the Laws of War make it abundantly clear that military necessity cannot be the final arbiter of civilian rights.

Evidence has been mounting that America’s War in Iraq has killed thousands of Iraqi civilians. Civilian deaths well over 30,000 have been suggested by organizations keeping track of the increasing toll, including The IraqBodyCount.org, The Christian Science Moni-

66. Alex Thomson, *U.S. Military Responds to Fallujah Video* (Channel 4 television broadcast Oct. 7, 2004), available at [http://www.channel4.com/news/2004/10/week\\_2/07\\_iraq.html](http://www.channel4.com/news/2004/10/week_2/07_iraq.html).

67. James Cogan, *U.S. Troops begin Slaughter in Fallujah*, WORLD SOCIALIST WEB SITE, Nov. 9, 2004, <http://www.wsws.org/articles/2004/nov2004/iraq-n09.shtml> (quoting a twenty-year old marine reflecting on the way in which the war had impacted him).

68. Nuremberg Principle no. 82(VI)(b), available at <http://deoxy.org/wc/wc-nurem.htm>.

tor, and CNN.com.<sup>69</sup> But, for the most part, the corporate media is ignoring this carnage,<sup>70</sup> or creating a smokescreen of disinformation blitz.<sup>71</sup>

As I sift through numerous eyewitness accounts of wanton destruction of towns,<sup>72</sup> indiscriminate firing on fleeing cars,<sup>73</sup> and

69. Iraq Body Count, <http://www.iraqbodycount.org> (last visited Apr. 29, 2008); CNN, U.S. and Coalition Casualties, <http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties/index.html> (last visited Apr. 29, 2008); Christian Science Monitor, Surveys Pointing to High Civilian Death Toll in Iraq, <http://www.csmonitor.com/2003/0522/p01s02-woiq.html> (last visited Apr. 29, 2008).

70. War makers can continue to embark on spreading misinformation by making sure the public does not become privy to the full impact of this scorched earth policy of total war. This is accomplished by the corporatization of the media, which occurs when the dissemination by the media is done as part of corporate principles founded on generating revenue. As a result of the corporatization of the media, truth becomes the first casualty, as the media wafts away from independence and neutrality, and instead spreads only information that the general public is likely to consume the most. This is evident in the comments of Rupert Murdoch, owner of the FOX News channel a huge media conglomerate, "There is going to be collateral damage. And if you really want to be brutal about it, better we get it done now than spread it over months." David Kirkpatrick, *Mr. Murdoch's War*, N.Y. TIMES, Apr. 7, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9B0CE4D81238F934A35757C0A9659C8B63>.

71. See *id.* (observing the corporate dimension of the war coverage, in which objective media reporting may have been sacrificed at the alter of corporate profit).

72. Here I refer to the aggressive war conducted for the capture of Fallujah. According to Francis A. Boyle, a professor of international law at the University of Illinois, "The obliteration of Fallujah continues apace. Article 6(b) of the 1945 Nuremberg Charter defines a Nuremberg War Crime in relevant part as the 'wanton destruction of cities, towns or villages.'" Francis A. Boyle, *A War Crime in Real Time: Obliterating Fallujah*, COUNTERPUNCH, Nov. 15, 2004, available at <http://www.counterpunch.org/boyle11152004.html>.

73. Following are the excerpts from a war correspondent describing isolated incidents of indiscriminate firing at fleeing cars:

MARCH 30: Mark Franchetti, a journalist for The Times, reported about the recent battles for the bridges around Nasiriya. He witnessed that the American marines were given orders 'to shoot at any vehicle that drove towards American positions.' Franchetti described how during the night 'we listened a dozen times as the machine guns opened fire, cutting through cars and trucks like paper.' The following day he found the wreckage of some 15 vehicles and counted 12 dead civilians who had been trying to leave Nasiriya overnight.

Information Clearing House, U.S. Charged with War Crimes, The Evidence File, <http://www.informationclearinghouse.info/article3466.htm> (last visited Apr. 28, 2008) (citing Mark Franchetti, *US Marines turn Fire on Civilians at the Bridge of Death*, TIMES, Mar. 30, 2003). The Information Clearing House further provided:

31 March : A US Apache helicopter reportedly fired on and destroyed a pickup truck in the region of al-Haidariya near al-Hilla. The sole survivor, Razeq al-Kadhem al-Khafaji, told an AFP journalist how 15 members of his family were killed in the attack. He said the family was fleeing fierce fighting in al-Nasiriya, further south, when their truck was blown up. Sitting among the 15 coffins at the local hospital, he said he had lost his wife, six children, his father, his mother, his three brothers and their wives. The circumstances of the attack have not been clarified to AI's knowledge.

31 March : Soldiers with the US Army's 3rd Infantry Division killed seven women and children when they opened fire on an unidentified four-wheel drive vehicle as it approached a US checkpoint near al-Najaf. According to a Penta-

photos depicting ravaged lives due to depleted uranium exposure, I am perplexed at the triumphal savagery of the best-trained force on earth. The destruction of civilian infrastructure and the laissez-faire apathy towards human suffering is not the manifestation of incidental transgressions of the Laws of War, rather it signals a deeply rooted homicidal psychology. These are crimes of calculation. These are crimes consonant with the *prima facie* evidence of war crimes, which we must analyze here.

#### A. HIGH ALTITUDE BOMBING

More than four hundred civilians were killed on February 13, 1991, when two U.S F-117 Stealth Bombers dropped two large bombs on the al-Amariyah shelter in Baghdad.<sup>74</sup> The story of al-Amariyah spread like wildfire throughout Iraq. The video feeds of the charred and twisted bodies of women and children stunned the Western world. Pentagon officials denied knowledge of civilian presence and claimed to have intelligence indicating the shelter was used for Command and Control operations.

Let us not dissect the legality of this act, instead, let us focus on the complexity of how the three principles of distinction, necessity, and proportionality are subsuming each other while we face the stark realities of violations of the Laws of War. If it was known that only civilians were present, then the principles of distinction make it imperative on the bombers not to target the bunker. On the other hand, if it were known to contain military command and control, any advance knowledge of large numbers of civilians taking shelter would make it mandatory for the command and control to evaluate the proportionality of military advantage over the anticipated civilian sufferings. It is within this legal framework that the bombing campaigns of the Iraq War must be analyzed. Below is a set of well-documented situations to examine.

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gon spokesman, initial reports indicated that "the soldiers responded in accordance with the rules of engagement to protect themselves." However, this does not appear to be consistent with the version reported in the Washington Post, which indicated that the officer in command at the scene believed at the time that no warning shots were fired. It asserts that the officer roared at the platoon leader, "You just [expletive] killed a family because you didn't fire a warning shot soon enough!"

This version belies the official explanation that the soldiers acted in accordance with the rules of engagement as apparently no warning shots were fired.

*Id.* (citing William Branigin, *A Gruesome Scene on Highway 9: 10 Dead after Vehicle Shelled at Checkpoint*, WASH. POST, Apr. 1, 2003).

74. See Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War, 1991*, <http://www.hrw.org/reports/1991/gulfwar/INTRO.htm> (recounting massive civilian deaths on account of bombing a civilian shelter).

- (i) March 28, 2003. At least fifty-five civilians died when a market in the Shula district of Baghdad was hit. It is known that the market was located in one of the poorest neighborhoods of Baghdad and that there were no military targets within several kilometers.<sup>75</sup>
- (ii) April 1, 2003. Some twenty to twenty-five bombs were dropped on poor residential neighborhoods in Hilla, a small town south of Baghdad. The media confirmed at least seventy-three civilian deaths over several days.<sup>76</sup>
- (iii) April 6, 2003. Ali Ismael Abbas, a twelve year old boy, was the victim of a nighttime missile raid on his house in Diala Bridge, in the district east of Baghdad. During the raid, a missile destroyed his home, killed most of his family, and badly burned him in his sleep. Ali's father, pregnant mother, brother, aunt, three cousins, and three other relatives were all killed while being liberated from the tyrannical regime of Saddam Hussein.<sup>77</sup>
- (iv) April 8, 2003. Some fourteen civilians were killed in the al-Mansur neighborhood of Baghdad when four 2000-pound bombs were dropped on an area packed with pedestrians and motorists. At least fifteen cars burst into flames, burning many of their occupants to death.<sup>78</sup>

Examples of such destruction are in abundance. However, the explanations are hard to come by and occluded in the smokescreens of misinformation and untruths.<sup>79</sup> These examples question whether the obligations of the principles of proportionality, necessity and distinction are being honored. The circumstances and impact felt from

75. See Hassan Hafidh, *Angers as at Least 55 Killed in Baghdad Market*, REUTERS, Mar. 28, 2003, available at <http://www.commondreams.org/headlines03/0328-11.htm> (revisiting indiscriminate attack by U.S. forces on civilian infrastructure).

76. See Simon Helweg-Larsen, *Irregular Weapons used against Iraq*, DISSIDENT VOICE, Apr. 8, 2003, available at [http://www.dissidentvoice.org/Articles3/Helweg-Larsen\\_Iraq.htm](http://www.dissidentvoice.org/Articles3/Helweg-Larsen_Iraq.htm) (recounting indiscriminate bombing of non-military targets causing massive civilian deaths).

77. See Information Clearing House, *supra* note 73 (narrating in specific details to illustrate the magnitude of civilian casualties in Iraq).

78. See Gar Smith, *Bombs Awry! The Imprecision of Precision-Bombing*, July 18, 2003, <http://earthisland.org/project/newsPage2.cfm?newsID=427&pageID=177&subSiteID=44> (recounting the death and destruction caused by errant bombing by U.S. forces). The above example also corroborates my assertion related to the principle of distinction in Part III.A.

79. The nature of the misinformation blitz is evident when considering some of the comments made via the mainstream figures.

War makers. . . policies. . . bring their media cheerleaders into conflict with their self-described task as reporters of news. . . As one of [Murdoch's] FOX pundits, Michael Barone, stated, 'Civilian casualties are not news. The fact is that they accompany wars.'

Gay Alcorn, *Civilian Deaths no cause for Concern*, SYDNEY MORNING HERALD, Jan. 12, 2002, available at <http://newsfrombabylon.com/story/2002/civilian-deaths-no-cause-for-concern> (pointing out the abject apathy toward loss of lives shown by some journalists).

the above bombing incidents raise concerns over the erosion of the customary Laws of War on today's battlefields.

First, the improved air defense systems along with return enemy fire on the ground have made low altitude bombing almost a relic of the past.<sup>80</sup> In trying to carry out bombing raids beyond the reach of enemy air defense, the pilots are sometimes unable to distinguish between military and civilian targets. In a world with an asymmetric super power balance, where *just ad bellum* is gradually relegating *jus in bello* into virtual oblivion, how can we reconcile the balance between military necessity and humanitarian concern?

Secondly, the Laws of War mandate that the attacker use weapons that can distinguish between the enemy and civilians. Adherence to this principle of distinction becomes easier in this age of precision-guided ammunitions; especially because of their enhanced identifying capabilities consequently minimize civilian casualties. Difficulty, however, arises when protracted war puts a drain on cost, and military powers resort to traditional arsenals.

The above cases from actual battlefields bring us face-to-face with the realities of war. Are the casualties described above collateral damage? Were they unpremeditated, unintentional and accidental? Did the attackers fully oblige with the three principles of distinction, necessity and proportionality? Close examination might point to a rather consistent and systemic pattern of violations in the narrated cases. Otherwise, given the technologically superior tracking and surveillance capabilities of the U.S. military, how could they continue to not distinguish civilians and their residential infrastructure from legitimate military targets?

The issue then shifts to the question of military necessity. Again, dropping bombs on civilian neighborhoods and firing missiles on civilian houses cannot be justified by military necessity unless overwhelming evidence suggests that civilian infrastructure concealed legitimate military targets. If we, for argument's sake, concede that civilian infrastructure indeed contained military targets, are we then compelled to engage in a proportionality analysis?<sup>81</sup>

The proportionality principle would dictate that military command and control fully evaluate the intended military advantage that could be gained from aggressive bombing raids and balance that information against the anticipated excessive civilian casualties. The pro-

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80. In his article, "The Laws of War, US-Style," Michael Byers explained that "In 1991, a number of coalition planes (RAF Tornados especially) were lost to Iraqi anti-aircraft fire because they were bombing from low altitudes in order to reduce civilian casualties. Less accurate high-altitude strikes by B-52s were restricted to targets well clear of civilian areas." Byers, *supra* note 59.

81. See *supra* Part IV.A.

portionality principle also indicates that the invading bombers anticipate the panoply of extensive human sufferings. Sufferings such as, “. . . human brains inside a garage, the incinerated, skeletal remains of an Iraqi mother with her three children in their still-smoldering car,”<sup>82</sup> must be weighed against the possibility of a military advantage, like that of an Iraqi War Commander being killed or captured. Accordingly, whenever there is a military scenario with asymmetric capabilities, the principle of necessity should become subordinate to the principle of proportionality. The quantum of necessity required to capture or kill a single Iraqi War Commander or to neutralize a small band of insurgents should be weighed against the possibility of extensive civilian damage. The humanitarian interest of saving civilian lives and properties therefore, requires the belligerent with significantly advantageous military power to forgo the residual or incremental military necessity, unless of course, the military necessity is motivated in part by the homicidal mindset discussed earlier.

B. DOES THE USE OF DEPLETED URANIUM BY THE UNITED STATES AND BRITISH MILITARY CONSTITUTE A WAR CRIME?

‘They used these weird bombs that put up smoke like a mushroom cloud. Then small pieces fall from the air with long tails of smoke behind them.’ . . . [P]ieces of these bombs exploded into large fires that burnt [*sic*] the skin even when water was thrown on the burns.

Abu Sabah, Fallujah refugee<sup>83</sup>

Depleted uranium<sup>84</sup> is more of a problem than we thought when it was developed. But it was developed according to standards and was thought through very carefully. It turned out, perhaps, to be wrong.

Brent Scowcroft, former National Security Advisor under President George H.W. Bush<sup>85</sup>

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82. Robert Fisk, *It Was an Outrage, an Obscenity*, Mar. 27, 2003, <http://www.robert-fisk.com/articles196.htm>.

83. Dahr Jamail, “Unusual” Weapons used in Fallujah, *DISSIDENT VOICE*, Nov. 29, 2004, <http://www.dissidentvoice.org/Nov2004/Jamail1129.htm>.

84. Discussing the nature and effects of Depleted Uranium (DU) Professor Siegwart-Horst Günther of Yellow Cross International, stated the following:

[U]ranium tipped projectiles have a very high penetrating power. DU is best suited for the production of ammunition to break through steel armours. Moreover[,] it is naturally pyphoric material. After penetration, so much heat develops at the exit point, that DU particles catch fire. A hit tank, for instance, explodes releasing highly toxic and radioactive products.

Siegwart-Horst Günther, *Depleted Uranium: Dead Children, Sick Soldiers*, STOP UNITED STATES OF AGGRESSION, Jan. 1, 1996, <http://www.stopusa.be/scripts/texte.php?section=bd&langue=3&id=8224>.

85. John M. LaForge, Damacio A. Lopez & Albrecht Schott, *A Treatise on Military Weapons Containing the Radioactive Material: Depleted Uranium*, PEOPLE FOR PEACE,

Carefully hidden from the prying eyes of global media during the 1991 Iraq conflict,<sup>86</sup> one of the most hideous military exercises of modern warfare was the use of depleted uranium. The use of depleted uranium reared its ugly head again during the 2003 Iraq War.<sup>87</sup> British and U.S. coalition forces used depleted uranium ("DU") shells in the Iraq war,<sup>88</sup> deliberately flouting the U.N. resolution that classified these munitions as illegal weapons.<sup>89</sup> Depleted uranium was blamed for some of the effects of Gulf War Syndrome.<sup>90</sup> DU also contaminates land, causes ill health among the soldiers using the weapons, as well as the enemies' soldiers and civilians. DU is known to cause birth defects in children.<sup>91</sup>

American officials may have been aware of the health hazards of using DU in the munitions even before it became public that the U.S. forces unloaded 350 tons of DU in 1991,<sup>92</sup> mostly along the eleven miles north of the Kuwaiti border on the "Highway of Death."<sup>93</sup> It has been extensively documented that the radiation DU produced is a poison of carcinogenic material that causes birth defects, lung disease, kidney disease, leukemia, breast cancer, lymphoma, bone cancer and neurological disabilities.<sup>94</sup> This therefore, makes the use of DU a war crime according to Article 23 of the Geneva Convention IV. Article 23 states, "[i]t is especially forbidden to employ poison or poisoned weap-

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JUSTICE, AND HEALING, Jan. 2003, <http://www.tacomapjh.org/du2.htm> (quoting Brent Scowcroft, former National Security Advisor under President Bush. See *Riding the Storm* (Channel 4 television broadcast Jan. 3, 1996) (British documentary)).

86. See generally Depleted UF6 Website, Frequently Asked Questions, <http://web.ead.anl.gov/uranium/faq/index.cfm> (last visited Apr. 28, 2008) [hereinafter Depleted Uranium] (noting the hidden agenda shown by the administration in keeping the danger of depleted uranium a secret from the public).

87. See James Howenstine, Depleted Uranium, Anthrax Vaccine and the Gulf War Syndrome, Aug. 14, 2005, <http://www.newswithviews.com/Howenstine/james29.htm> (observing the silence in the media about the adverse impact of depleted uranium).

88. See *U.S. to Use Depleted Uranium*, BBC News, Mar. 18, 2003, available at [http://news.bbc.co.uk/2/hi/in\\_depth/2860759.stm](http://news.bbc.co.uk/2/hi/in_depth/2860759.stm).

89. Article 23 of the Hague Convention IV states that: "It is especially forbidden to employ poison or poisoned weapons; to kill or wound treacherously individuals belonging to the hostile nation or army; . . . to employ arms, projectiles or material calculated to cause unnecessary suffering. . ." Hague Convention IV Respecting the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2227, 1 Bevans 631.

90. See *supra* note 85.

91. Neil Mackay, *U.S. Forces' use of Depleted Uranium Weapons is "Illegal,"* SUN-DAY HERALD, Mar. 30, 2003, available at [http://findarticles.com/p/articles/mi\\_qn4156/is\\_20030330/ai\\_n12581763](http://findarticles.com/p/articles/mi_qn4156/is_20030330/ai_n12581763).

92. Paul Rockwell, *U.S. War Crimes in Iraq: A Prima Facie Case*, IN MOTION MAGAZINE, Jan. 31, 2004, available at [http://www.inmotionmagazine.com/opin/pr\\_uswc.html](http://www.inmotionmagazine.com/opin/pr_uswc.html).

93. *Id.* For a discussion on the 'Highway of Death', see George A. Lopez, *Not so Clean: The U.S. Strategy of Air: Land Battle Closely Resembles 'Total War,'* 47 BULL. OF THE ATOMIC SCIENTISTS 30-35 (1991) (noting how the military conduct of U.S. forces during the First Gulf War may have violated the International Laws of War).

94. See *supra* note 85.

ons to kill treacherously individuals belonging to the hostile nation, or army to employ arms, projectiles or materials calculated to cause unnecessary suffering."<sup>95</sup> A similar framework is laid down in the Geneva Protocol of 1925 which explicitly prohibits the usage of "asphyxiating poisonous or other gases, and all analogous liquids, materials or devices."<sup>96</sup> Again this clearly establishes the prohibitive restraining of using weapons causing radiation against unprotected civilians. How can a civilized nation be permitted to use weapons of such destructive power in a war? This becomes further perplexing when considering that this war began with the intent to find dangerous weapons of mass destruction. Because the U.S. and British forces' use of DU has been established beyond a doubt, are they therefore culpable of war crimes?<sup>97</sup> Depleted uranium is a very attractive weapon. It is much denser than lead, thereby enabling weapons to penetrate steel. A U.S. Commander captured this great advantage of modern war succinctly:

In the last war, Iraqi tanks at fairly close ranges, not nose to nose, fired at our tanks and the shot bounced off the heavy armor, and our shot did not bounce off their armor, so the result was Iraqi tanks destroyed, U.S. tanks with scrape marks. There's no doubt that DU gave us a huge advantage over their tanks.<sup>98</sup>

As the hospitals in Iraq tried to deal with increased cases of cancer,<sup>99</sup> and the 1991 Gulf War Veterans grapple with their sufferings from being exposed to DU,<sup>100</sup> the principle of proportionality again begs us to reckon with the military advantages vis-à-vis disproportionate civilian and military sufferings. I argue that the military necessity of inflicting comparatively greater structural damage to enemy tanks or buildings could never outweigh the everlasting agony unleashed on civilians. Further compounding this horror is the fact that the radiation from DU can last for more than two billion years, a very long time for both affected individual and the environment to suffer the consequences.

Let us consider the ground realities of the comparative advantages at play in Iraq. The U.S. military personnel are required to wear masks and protective gear upon unloading DU laced ammunition. Even with these requirements, U.S. soldiers still have lacked

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95. Hague Convention IV Respecting the Laws and Customs of War on Land, *supra* note 89, 36 Stat. 2227, 1 Bevans 631.

96. Geneva Protocol of 1925, June 17, 1925.

97. *See* Depleted Uranium, *supra* note 86.

98. *U.S. to Use Depleted Uranium*, *supra* note 88.

99. *See supra* note 85.

100. *Id.*

proper protective gear. Thus, it is reasonable to surmise that Iraqi soldiers and civilians as well, have none of the required protective gear. Thus, the usage of DU in a contemporary battlefield must be considered a definite violation of the Laws of War. The hellish aspect of DU is best summed up in the words of Dr. Doug Rokke, a U.S. Army Health Physicist who supervised the first clean-up of DU unloaded in 1991. "Depleted uranium is a crime against God and humanity."<sup>101</sup>

### C. WAR OF CONCEALMENT VERSUS TOTAL WAR

In its very conception, the onslaught on Fallujah was a calculated and illegal mass reprisal against the city and its inhabitants . . . . It was conducted in flagrant and contemptuous violation of all the Geneva Conventions on the laws of war.

Journalist Richard Hoffman, reflecting on Fallujah  
November 24, 2004<sup>102</sup>

Every modern war, however, fortunate its outcome for us, has changed the world by subtracting from its abidingly. Every modern war has had to represent, in order to be won, a temporary abdication of ethical and human standards. Every modern war has, in other words, demanded a certain retreat even of its victors and meant that they have lost in the very process of winning.

John Mason Brown, 1950<sup>103</sup>

We must not be afraid to make an example of Fallujah. We need to demonstrate that the United States military cannot be deterred or defeated. If that means widespread destruction, we must accept the price . . . [e]ven if Fallujah has to go the way of Carthage, reduced to shards, the price will be worth it.

Ralph Peters, New York Post Columnist  
and former military officer, (reflecting  
on the mentality guiding the Pentagon  
and the White House)<sup>104</sup>

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101. Rockwell, *supra* note 92.

102. Richard Hoffman, *Fallujah and the Laws of War*, WORLD SOCIALIST WEB SITE.ORG, Nov. 24, 2004, <http://www.wsws.org/articles/2004/nov2004/fall-n24.shtml>. This is further evidence of the Bush Administration's cavalier approach towards the Geneva Conventions. In 2002, White House Counsel Alberto Gonzales effectively advised the President to rescind the Geneva Conventions, because Mr. Gonzales found the Conventions to be archaic. See generally NOAM CHOMSKY, *FAILED STATES: THE ABUSE OF POWER AND THE ASSAULT ON DEMOCRACY* (2006) (observing that United States onslaught of Fallujah could be considered an egregious violation of all established norms of International Laws of War).

103. JOHN MASON BROWN, *SEEING THINGS* (Greenwood Press 1971) (1946).

104. Hoffman, *supra* note 102.

Amidst the drumbeat of war rhetoric, and the cacophony of war crimes,<sup>105</sup> the abdication of humanitarian principles and ethical dimension of Fallujah's assault has to be reckoned with the military necessities of a war of concealment.<sup>106</sup> Followed by a period of sustained instability,<sup>107</sup> during which more than three hundred American military personnel lost their lives,<sup>108</sup> total war was unleashed upon the city of Fallujah on November 8, 2004.<sup>109</sup> Video footage showed a defenseless Iraqi prisoner being slayed by U.S. military troops.<sup>110</sup> The many embedded journalists missed the ground realities because of their limited exposure to the war.<sup>111</sup> Missed by the embedded journalist, but reported by the independent journalist, were the rampant allegations of deliberate targeting of civilians,<sup>112</sup> the lack of humanitarian and medical aid,<sup>113</sup> indiscriminate bombarding of civilian houses,<sup>114</sup> and the use of internationally banned chemical weap-

105. *See generally id.* (providing a report on possible war crimes).

106. For a discussion on the origin of the concealment of warfare see THOMAS C. THAYER, *WAR WITHOUT FRONTS: THE AMERICAN EXPERIENCE IN VIETNAM* 82 (1985).

107. *See generally Fallujah: City with History of Rebellion*, BBC NEWS, Dec. 23, 2004, available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/3235213.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3235213.stm) (noting the apparent calm that prevailed prior to unleashing the military storm upon the inhabitants of Fallujah); *see also* Editorial, *Zarqawi's City of Death*, WASH. TIMES, Nov. 29, 2004, available at <http://washingtontimes.com/op-ed/20041128-111715-5760r.htm> (recounting how a city of Mosque has been metamorphosized into a city littered with dead civilians); Jonathan Steele & Dahr Jamail, *This is Our Guernica: Ruined, Cordoned Fallujah is Emerging as the Decade's Monument to Brutality*, GUARDIAN, Apr. 27, 2005, <http://www.guardian.co.uk/world/2005/apr/27/iraq.iraq5> (contrasting the multitude of monuments that existed prior to U.S. military assault on Fallujah with the litany of ruins and death that came upon the city, thus bringing out the symbolism of brutality of monumental proportion).

108. *See Hoffman, supra* note 102 (noting perhaps a plausible motive behind the violent attack on Fallujah).

109. *See id.* (emphasizing the comprehensive nature of the attack).

110. *Id. See also Fallujah Report: Telling the Fallujah Story to the World (Third Cut)*, MILITARY.COM, Nov. 20, 2004, [http://www.military.com/NewContent/0,13190,GH\\_Fallujah\\_112004-P1,00.html](http://www.military.com/NewContent/0,13190,GH_Fallujah_112004-P1,00.html) (describing various attacks on Fallujah, the targets, and the subsequent injuries).

111. Severe censorship was imposed on journalists during the assault on Fallujah; embedded reporters were allowed only a few weeks later. CHOMSKY, *supra* note 102.

112. *See supra* note 73.

113. *See* Michael R. Gordon, *In Sadr City, Basic Services are Faltering*, N.Y. TIMES, Apr. 22, 2008; available at <http://www.globalpolicy.org/security/issues/iraq/attack/consequences/2008/0422sadrservices.htm> (recounting how the comprehensiveness of military attack left civilians with no recourse to basic humanitarian aid).

114. The following excerpts describe through isolated accounts the reality of indiscriminate bombing of civilian dwellings during the Iraqi occupation:

March 23, 2003

Nasiriyah, bombing: "On the sun-baked sand of one of the world's largest cemeteries, Ali Kadhim Subhi walked Friday along a row of 10 coffins allocated to the corpses who were once his family. . . . In a U.S. bombing March 23 that left the wreckage of his home smoldering for six days, Subhi was the only one of 26 in his family in the southern city of Nasiriyah to escape death or injury."

ons.<sup>115</sup> These reports were doubted by many,<sup>116</sup> but ultimately were corroborated by the military personnel and administration officials.<sup>117</sup> Although disturbing, the graphic depiction of human atrocities should be seen through the prism of military necessities. While it is difficult to divorce emotion from the imagery of the City of Mosques<sup>118</sup> being

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Melissa Murphy & Carl Conetta, *Civilian Casualties in the 2003 Iraq War: A Compendium of Accounts and Reports*, Project on Defense Alternatives, May 21, 2003, available at <http://www.comw.org/pda/0305iraqcasualtydata.html> (quoting Anthony Shadid, *A Pilgrimage of Sorrow by Shiite Faithful; Bodies of Iraqis Killed during War are Brought to Sacred City to be Buried*, WASH. POST, April 20, 2003). Further:

March 24, 2003

Nasiriyah, bombing: "Nawaf and other residents said in interviews that American bombs, dropped on the city Monday morning, killed 10 Iraqi civilians and wounded as many as 200."

*Id.* (quoting Dexter Filkins & Michael Wilson, *Battle for a City Turns into a Brutal Street Fight*, N.Y. TIMES, Mar. 25, 2003). Additionally:

Al-Azamiyah neighborhood, Baghdad: "Saman Atef was finishing a late breakfast Monday when he heard a long, whining whoosh. Before he had time to ponder the noise, three of his neighbors' houses exploded in a rain of bricks, glass and dust. In the instant the bomb or missile hit, four people were killed and 23 were injured, Atef said, and the people of his working-class neighborhood of northern Baghdad counted one more reason to feel angry with the United States."

*Id.* (quoting John Daniszewski & Geoffrey Mohan, *Allies Pound Iraqi Guard near Capital*, L.A. TIMES, March 25, 2003).

115. Peter Popham, *US Forces "Used Chemical Weapons" during Assault on City of Fallujah*, THE INDEPENDENT, Nov. 8, 2005, <http://www.independent.co.uk/news/world/middle-east/us-forces-used-chemical-weapons-during-assault-on-city-of-fallujah-514433.html>. RAI News 24 reported further developments that:

An investigation by RAI News 24, the all-news Italian satellite television channel, has pulled the veil from one of the most carefully concealed mysteries from the front in the entire [United States] military campaign in Iraq. A [United States] veteran of the Iraq war told RAI [News] correspondent Sigfrido Ranucci this: I received the order use caution because we had used white phosphorus on Fallujah. In military slang it is called 'Willy Pete'. Phosphorus burns the human body on contact-it even melts it right down to the bone. RAI News 24's investigative story, *Fallujah, The Concealed Massacre*, will be broadcast. . . on RAI-3 and will contain not only eye-witness accounts by United military personnel but those from Fallujah residents. A rain of fire descended on the city. People who were exposed to those multicolored substance began to burn. . . relates Mohamad Tareq al-Deraji, a biologist and Fallujah resident.

RAI News 24, *U.S. used Chemic Weapons in Iraq— Veteran admits: Bodies Melted away before us*, INFORMATION CLEARING HOUSE, Nov. 7, 2005, <http://www.informationclearinghouse.info/article10901.htm>. See also *Fallujah: The Hidden Massacre on the U.S. use of Napalm-Like White Phosphorous Bombs* (Democracy Now television broadcast Nov. 8, 2005), available at <http://www.democracynow.org/article.pl?sid=05/11/08/1516227> (bringing out the possibility that, banned substances may have been used by U.S. forces).

116. See RAI News 24, *supra* note 115 (noting the contentious nature of the assertion that may have been disputed in some circles, but eventually corroborated by tangible evidence).

117. Democracy Now, *supra* note 115.

118. Fallujah is known as the "City of Mosques" for its more than 200 mosques. See Harvey Thompson, *Fallujah 'City of Mosques' Now 'City Of Rubble'*, WSWWS.org, 1-21-5, <http://www.rense.com/general62/rubb.htm> (last visited Apr. 29, 2008).

obliterated to smithereens, the allegation of war crimes must be carefully weighed against the realities of urban warfare of concealment.

## V. RECALIBRATING LAWS OF WAR AGAINST HUMAN RIGHTS PRINCIPLES

Was Operation Phantom Fury merely a malevolent vengeance emanating from a tiring force?<sup>119</sup> Or was Operation Phantom Fury a legitimate military necessity to punctuate the simmering, protracting and rapidly escalating insurgency? Are the atrocities attributed to the U.S. military offensive simply collateral damage within the customary Laws of War? The answer requires first to calibrate a framework to ascertain whether the traditional definition of collateral damage is adequate enough to encapsulate the human cost of today's asymmetric warfare. Second, we must determine the boundaries of military necessity within the contradictions of military strategy and morality based humanitarian principles.

In any war it is very natural for the military strategy to significantly influence the military necessity, which in turn dictates the framework for target selection. The traditional Laws of War, however, do not support a target selection methodology borne explicitly out of military strategy and opportunity,<sup>120</sup> even though they have become the operating norm for today's warfare involving emerging targets,<sup>121</sup> and concealment combat.<sup>122</sup> Further compounding the well-organized strategy by adversaries is the humanitarian exploitation of exposing the enemy to excessive collateral damage.<sup>123</sup> A close analysis of the unfolding events in Iraq, invites us to comment on the element of "excessive" within the intersection of distinction, necessity and proportionality principles. In essence, it is a value proposition, which is bound to be subjective. Nonetheless, we must strive to retain the legal threads of objectivity.

Under the current framework of the LOAC, the identification of collateral damage requires a value judgment on the part of the perpetrator according to the Rome Statute's definition on Article 8, paragraph 2(b)(iv).<sup>124</sup> A reading of the prerequisites for a war crime

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119. See Babak Dehghanpisheh, "This Ain't Over Yet" Operation Phantom Fury Lived up to its Name as American Soldiers Stormed Fallujah. On the Ground With the Marines, NEWSWEEK, Nov. 22, 2004, available at <http://www.newsweek.com/id/55767> (discussing the circumstances and military attacks during Operation Phantom Fury).

120. See *supra* note 49 and accompanying text.

121. See *supra* note 54 and accompanying text.

122. *Id.*

123. See *infra* note 125 and accompanying text.

124. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT art. 8(2)(b)(iv).

requires us to identify four separate elements, all of which must be satisfied, before finding guilt. These elements are as follows:

- (i) The belligerent force launched an attack, such that,
- (ii) the attack would cause incidental deaths or injury to civilians, damage civilian objects or cause widespread long-term and severe damage to the natural environment, while,
- (iii) the attacker knew the attack would result in excessive collateral damage, such that,
- (iv) the extent of collateral damage would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>125</sup>

For the sake of clarity I shall not belabor the first two elements. Additionally, allow me to relax the principle of distinction on account of being extremely untenable in the current war scenarios. However, the third and fourth elements require me to define proportionality and also evaluate proportionality for criminality in the context of military necessity. As I embark on a value determination of the civilian casualties in Fallujah, I must also measure this on the basis of defense technologies available and the circumstances present.<sup>126</sup>

The determination of criminality then becomes problematic under several considerations. First, the technological capabilities of fire-power make it abundantly clear that unleashing such weapons would become deadly.<sup>127</sup> Second, the available circumstances make it difficult to identify combatants or insurgents amongst the civilians.<sup>128</sup> This confusing quandary perhaps can be untangled, if the following relevant examples are considered:

- (i) If a woman wears provocative clothing, can the perpetrator of sexual assault then get immunity from prosecution under complementary culpability?
- (ii) If we chose to live near a pedophile, could we relax the quantum of culpability on the part of the perpetrator when a child is violated?

The quandary posed by the above observations and the preceding discussions lead me to conclude that the evolving nature of modern

125. See Jefferson D. Reynolds, *Collateral Damage On The 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. Rev. 1, 15 (2005), available at [http://findarticles.com/p/articles/mi\\_m6007/is\\_56/ai\\_n14700122](http://findarticles.com/p/articles/mi_m6007/is_56/ai_n14700122) (observing instances where the proportionality between military advantage and the intensity of attack may determine whether collateral damage can immunize military personnel).

126. See *supra* notes 73-77 and accompanying text (noting excessive damage caused by superior military weapons); see also *supra* note 49 and accompanying text (discussing the war of concealment).

127. *Id.*

128. See *supra* note 49 and accompanying text.

warfare requires that the targeting military should be a determinable factor for measuring proportionality prior to any attack, which becomes difficult due to obvious linkage between military strategy and developing opportunity.

Therefore, I shall argue that military strategy and opportunity must be de-linked from the paradigm of military necessity if we want to stay within the current framework of balancing proportionality with necessity. Such determination calls for careful analysis of an emerging target or determination of military necessity during a war of concealment. Once we stop incorporating the advantage and opportunity elements from the broader framework of necessity, we will begin to see significant retrenchment in the unleashing of aggressive firepower, with a concomitant reduction in collateral damage. Judging against this backdrop, makes it incumbent upon us to take a serious look at allegations of war crimes against U.S. forces, especially when incidents involve destruction of civilian hospitals,<sup>129</sup> indiscriminate bombardment of city blocks,<sup>130</sup> machine-gun fire at individual gunman,<sup>131</sup> or opening fire at families fleeing in cars.<sup>132</sup> This is important because an objective analysis will allow for bringing in an interpretative gloss of human rights principles within our current discourse of establishing bounds for the Laws of War.

One of the fundamental problems of examining the validity of existing Laws of War is the decoupling that exists between the technical elements of the Laws of War and the basic principles of human rights. In this context, I draw attention to the basic right of an individual human, which is based on the individual's inalienable right to exist in this world, free of coercion, bondage, and suppression. This right can never be compromised under the asymmetric political aspirations of majority or occupying power. When an individual's fundamental right is brought to the forefront, it becomes abundantly clear that any confusion regarding the applicability of technical aspects of the Laws of

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129. See, e.g., Hoffman, *supra* note 102 (recounting military attacks on civilian infrastructure).

130. See *supra* note 107 (recounting indiscriminate attacks without specified military targets).

131. An article from the British paper, the *Daily Telegraph*, sheds much more light on these rules of engagement, as explained to troops:

Lt-Col Pete Newell told Task Force 2-2's 500 soldiers at a dusty staging post in the main base outside Fallujah that sparing as much of the city as possible was second only to that of preserving the lives of their comrades and the 40,000 or so civilians still left. 'We don't want to rubble the city. Somebody has got to come in after us. We want Fallujah to understand what democracy's all about.

Toby Harnden, *Cash On The Spot- If they Tell us where the Weapons are*, TELEGRAPH.CO.UK, Aug. 11, 2004, <http://www.telegraph.co.uk/news/main.jhtml?xml=/News/2004/11/08/wirq208.xml&sSheet=/News/2004/11/08/ixnewst08.html>.

132. *Id.*

War can be easily addressed by carefully calibrating that specific element against the more fundamental driving force of individual human rights, an area I have explored in expansive details under various applications elsewhere.<sup>133</sup>

Finally, I contend that, an expanded meaning of collateral damage flows from the meaning of human rights, which makes the application of collateral damage more restrictive than currently being applied. By continuing to resort to an older definition of collateral damage, existing military powers are creating havoc upon humanity, a trend that must stop at no cost. Unless primacy is given to human rights doctrine in contemporary military discourse, decapitation of human lives, severe abrogation of individual fundamental rights, and more importantly destruction of civilizations will continue unabated

## VI. CONCLUSION

While the bloodstained waters of the Euphrates continue to overflow with the dead bodies of civilians, the cradle of civilization is waking to a new realization. A realization that includes forced injection of Western Democracy,<sup>134</sup> systematic obliteration of indigenous culture,<sup>135</sup> among others, all of which are rewriting the history books in Iraq. I have presented here an orgy of aggressions, flagrant violations of inherent human dignity, and painted a picture of civilian annihilation. In light of this evidence, the viability of international jurisprudence of the Laws of War is faced with serious challenges in Iraq. But we must analyze this evidence with neutral detachment and intellec-

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133. See *Searching for Human Rights to Water Amidst Corporate Privatization in India: Coca-Cola Pvt. Ltd. v. Perumatty Grama Panchayat*, 19 GEO. INT'L ENVTL. L. REV. (2007) (discussing various applications of human rights); *Is There a Human Rights Dimension to Immigration? Seeking Clarity through the Prism of Morality and Human Survival*, 84 DENV. U. L. REV. 1151 (2007) (discussing various applications of human rights); *Race, Symmetry and False Consciousness: Piercing the Veil of America's Anti-Immigration Policy*, 15 TEMP. POL. & CIV. RTS. L. REV. (2007) (discussing various applications of human rights); *Lockdown America: Melding Collateral Consequences of Incarceration within A Humanistic Jurisprudence Vis-à-vis A Value-Centric Incarceration Model*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT (2007) (discussing various applications of human rights).

134. See *supra* note 7.

135. In understanding the rich history of Iraq and the difficulty of foreign occupancy, Zoltan Grossman notes:

They will resent interference by foreign 'administrators' who know little or nothing about Iraq's rich history and cultures. If it is difficult to imagine Texans and Virginians in charge of ancient Mesopotamian cities, try to imagine an administrator from Baghdad or Mosul running an American city as complex as New York or even Milwaukee.

Zoltan Grossman, *The Perils of Occupation: The Easier the Victory, the Harder the Peace*, COUNTERPUNCH, Apr. 10, 2003, <http://www.counterpunch.org/grossman04102003.html>.

tual integrity, to ensure posterity and fulfilling civilizations' aspirations to do justice.

If we deny the culpability of occupation forces on serious charges of war crimes, then the existing framework of collateral damage suffers from inadequacy. On the other hand, if we believe in prima facie evidence of war crimes, then how do we deal with these crimes? Either way, International Law faces serious challenges. As we confront the civilian inhabitants still buried in the rubble among the ruins of ancient cities,<sup>136</sup> arguing for the legality of war becomes a foregone conclusion. It is the solemn responsibility of International Law to ensure that, under no circumstances a military requirement could be created such that a warring nation becomes endowed with a *carte blanche* excuse to unleash limitless military arsenal to engage in wanton destruction of cities and civilian infrastructures like that encountered in Iraq. Allowing such atrocities to go unpunished will not only provide refuge to the perpetrators as their only hope that, "International Law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law."<sup>137</sup>

Finally, in this current Article I identified and provided a framework for a new kind of war—a war that is difficult to define within the existing operative norms. Buried within this smokescreen of definitional complexities and the misinformation blitz of the occupying regime is the urgent cry of help for humanity. As technological advancements, information corporatization,<sup>138</sup> and bounded rationality<sup>139</sup> remove the fundamental element of humanity in the codification process of the Laws of War, the reliance on International Law is becoming the vanishing point of global jurisprudence.<sup>140</sup> This Article proposes an expansion of the International Laws of Armed Conflict that fully incorporates the stark realities of asymmetric warfare of the twenty-first century—a task we cannot ignore. In the guiding wisdom of Justice Robert H. Jackson, "[our] juridical action will put the forces of international law, its precepts, its prohibitions and, most of all, its

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136. See *supra* note 109.

137. Robert H. Jackson, *The Nürnberg Case* 120 (Alfred A. Knopf, ed., Cooper Square 1971) (1947), available at <http://www.roberthjackson.org/Man/theman2-7-8-2>.

138. See *supra* note 71.

139. See Saby Ghoshray, *Symmetry, Rationality and Consciousness: Revisiting Marcusean Repression in America's War on Terror*, in *EROS AND LIBERATION: HERBERT MARCUSE'S VISION FOR A NEW ERA* (forthcoming 2009).

140. Martti Koskenniemi, *Keynote Address at the Harvard Law School Symposium: Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought*, Harvard Law School (Mar. 5, 2005), available at [http://www.law.harvard.edu/news/2005/03/04\\_international.php](http://www.law.harvard.edu/news/2005/03/04_international.php).

sanctions, on the side of peace, so that men and women of good will, in all countries, may have leave to live by no man's leave, underneath the law."<sup>141</sup>

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141. Jackson, *supra* note 137.

