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LOYOLA UNIVERSITY CHICAGO

THE CIVILIAN AND THE WAR ON TERROR:
DO NORMS SHAPE STRATEGY?

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE GRADUATE SCHOOL
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

PROGRAM IN POLITICAL SCIENCE

BY

SHERRI STONE REPLOGLE

CHICAGO, IL

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Even a purely moral act that has no hope of any immediate and visible political effect can gradually and indirectly, over time, gain in political significance.

— Václav Havel

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ABSTRACT

The sentiment that civilians should be protected in war is reflected in the set of legal, moral, and political strictures known as the civilian immunity norm (CIN). This norm is paradoxical in the sense that although it is widely considered settled, meaning it generates a strong consensus in the international community among states and even among publics, it is also quite fragile in actual battlefield conditions, when the protection of civilians often gives way to military necessity. The norm came under considerable stress during the height of the Global War on Terror, when many argued that the norm must be relaxed in order to effectively fight non-state actors. Viewed through this lens, a rather remarkable development occurred in the U.S. military under the War on Terror, when, faced with strategic failure in Afghanistan and Iraq, rather than escalate force against civilians for the sake of “winning,” the military changed its definition of “military necessity” to more closely reflect the constraining normative environment. Despite a growing research agenda centered on issues of civilian immunity, it remains unclear what effect the CIN has, if any, on such developments. *When does the CIN matter? More specifically, when does it alter short term strategic choices and even long term doctrines?*

This study employs a constructivist approach, arguing that democracies will choose strategic outcomes that strengthen compliance with the CIN when they see the constraining normative environment as a key part of the strategic environment.

Legitimacy is argued to be the causal mechanism driving interests and identities to align

more closely with the human rights-based aspects of the international order. My argument, based on a social conception of power, hinges on the observation that state interests change over time and that this is evident as sovereignty-based attitudes toward civilian casualties move toward a more constraining, human rights-based outlook. I identify three conditions under which this occurs: when the normative/discursive framework of protecting civilians is seen as essential to delegitimizing the enemy; when the legitimacy of the initial invasion is in question, and civilian casualties are seen as damaging to the international image by increasing that gap; finally, when regaining a monopoly on force is seen as impossible to achieve through material force alone because civilian casualties increase support for the insurgency. Together, these provide the conditions under which aligning with human rights-centered norms eventually come to be seen as the only viable strategy in fighting insurgencies.

CHAPTER ONE

INTRODUCTION

The civilian immunity norm (CIN) is the formal term assigned to the set of legal, moral, and political strictures meant to regulate state behavior toward civilians in war.¹ As with all international norms, the CIN represents “collective expectations for the proper behavior of actors with a given identity.”² In an increasingly constraining normative environment wherein publics at all levels (domestic, regional, even global) expect moral behavior in war, many believe that it is no longer possible for democracies to inflict large-scale damage on civilians.³ This is often attributed to material factors such as developments in precision weaponry and global communications; however, such observations assume rather than demonstrate that technology alone can account for the causal power of social pressure. Despite a growing literature on state behavior toward civilians, little attention has been paid to the effects of the CIN itself on military strategy,

¹ By formal, I refer to its legal form as codified in the Laws of War (also known as the Laws of Armed Conflict, and more recently as the body of International Humanitarian Law or IHL). The norm is comprised of four principles with corresponding rules and expectations for behavior: distinction, proportionality, precaution, and military necessity. It is also referred to as the non-combatant immunity norm, though non-combatant has a more technical meaning that includes those soldiers not participating in combat. I use the term “civilian immunity norm” since I am less concerned with the legal technicalities than I am with the commonsense, generalized expectations of various international publics.

² Peter J. Katzenstein, ed. *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), 5.

³ See Judith Gail Gardam, *Necessity, Proportionality, and the Use of Force by States* (Cambridge: Cambridge University Press, 2004), 137; Richard D. Rosen, “Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity,” *Vanderbilt Journal of Transnational Law* 42, no. 3 (2009): 730. Rosen argues that even the appearance of civilian casualties can undermine support for military operations.

the aspect of state behavior most directly responsible for the treatment of civilians on the battlefield.

Though it is sometimes assumed that democracies treat civilians better because of pressure issuing from their own domestic publics, the historical record is mixed on both state behavior and public expectations. Democratic publics are often divided when it comes to civilian casualties of foreigners, and democracies sometimes, with or without the support of their publics, escalate force against civilians, especially when faced with strategic failure.⁴ This occurred on a large scale in World War Two and to a lesser degree in Vietnam. Since Vietnam, however, the norm has made significant legal progress,⁵ and we have seen at least two conflicts—Iraq and Afghanistan—in which democracies, when faced with strategic failure, have strengthened efforts to comply with the CIN instead of overriding it. Moreover, in these cases, decision-makers transformed military doctrine to reflect a broader institutional commitment to civilian immunity. *When does the CIN*

⁴ See Alexander B. Downes, "Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War," *International Security* 30, no. 5 (2006). Democratic publics have been shown to support such actions against foreign civilians in exchange for security, while at the same time maintaining a belief in their nation's humane identity. This has been the case in the twentieth century in the United States. See for example, Sahr Conway-Lanz, *Collateral Damage: Americans, Noncombatant Immunity, and Atrocity After World War II* (New York: Routledge, 2006). Michael Walzer supports this tendency in normative theory for exceptional cases only, for what he terms "supreme emergencies," in *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (New York: Basic Books, 1977).

⁵ This refers to the Additional Protocols of 1977, wherein the rules and principles protecting civilians that existed within the just war tradition were spelled out in great detail in international law, for the first time ever. See, for example, Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague; Boston: Martinus Nijhoff Publishers, 1982); Claude Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva; Norwell, MA, USA: International Committee of the Red Cross: Martinus Nijhoff Publishers, 1987).

matter? More specifically, when does it alter short-term strategic choices and even long term doctrine?

The debate about civilian immunity matters in practice for obvious moral reasons—the suffering of innocent human beings in war is a perennial humanitarian concern. The issue of how norms matter also reflects the broader theoretical debate about the extent to which power-seeking states can act morally in the international arena. Few issues capture the tension between principle and power better than how states engaged in war respond to moral pressure by multiple publics—not just domestic publics. On the one hand, constructivists and liberals claim the CIN as one of the strongest, most settled, of all international norms and see it as a great achievement of international law.⁶ On the other hand, realists and sometimes rationalists emphasize war as the closest approximation of an anarchical environment whereby states can be expected to disregard norms in the pursuit of power. Most agree that the international commitment to protecting civilians is constantly endangered by a lack of compliance on the battlefield, when civilians are particularly vulnerable to the exigencies of states’ (and increasingly non-state actors’) strategic calculations.⁷ Even when states do comply with the laws meant to protect civilians, the legal limits of the CIN allows for significant unintentional but

⁶ See Helen Kinsella, *The Image Before the Weapon: A History of the Distinction between Combatant and Civilian* (Cornell University Press, 2011), 3.

⁷ This is true with other norms as well, particularly with more foundational norms such as sovereignty and human rights. I will argue in this chapter that what makes this norm unique is that it is suspended between these foundational norms and as such provides a lens through which to examine the relationship between morality and power. For an explanation of the commitment versus compliance problem more generally, see Thomas Risse-Kappen, Steve C. Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (New York: Cambridge University Press, 1999).

foreseeable harm.⁸ This particular norm thus occupies the extremes of the morality versus power debate, in practice as well as in theory.

This study employs a constructivist approach, arguing that democracies will choose strategic outcomes that strengthen compliance with the CIN when they see the constraining normative environment as a key part of the strategic environment. Legitimacy is argued to be the causal mechanism driving interests and identities to align more closely with the human rights-based aspects of the international order. My argument, based on a social conception of power, hinges on the observation that state interests change over time and that this is evident as sovereignty-based attitudes toward civilian casualties move toward a more constraining, human rights-based outlook. I identify three conditions under which this occurs: when the normative/discursive framework of protecting civilians is seen as essential to delegitimizing the opponent; when the legitimacy of the initial invasion is in question, and civilian casualties risk damaging the state's international image by increasing that gap; finally, when regaining a monopoly on force is seen as impossible to achieve through material force alone because civilian casualties increase support for the opponent. Together, these provide the conditions under which aligning with human rights-centered norms eventually come to be seen as the only viable strategy for democracies fighting insurgencies.

⁸ This refers to the doctrine of double-effect, commonly known as collateral damage. See M. A. Michael Carlino, "The Moral Limits of Strategic Attack," *Parameters* 32, no. 1 (2002); T. A. Cavanaugh, *Double-Effect Reasoning: Doing Good and Avoiding Evil* (Oxford: Oxford University Press, 2006); Colm McKeogh, "Civilian Immunity in War: From Augustine to Vattel," in *Civilian Immunity in War*, ed. Igor Primoratz (Oxford: Oxford University Press, 2007).

The Puzzle: Morality in War

Political realism is aware of the moral significance of political action. It is also aware of the ineluctable tension between the moral command and the requirements of successful political action.⁹

Few political acts carry greater moral significance than killing civilians in war.

To kill innocents in the pursuit of state interests violates the essence of respect for humanity, a key value in the international normative order.¹⁰ Yet international society also recognizes the sovereign state as a war-making body and aims to limit—but not outright prohibit—the killing of civilians. Reflecting the tensions within the international order between sovereignty and human rights, the CIN is suspended in the ambiguous space between military necessity and respect for humanity. Even a cursory glance at history reveals, however, that civilians tend to lose when moral principle confronts military strategy.¹¹ The popular view that holds it is no longer possible for democracies to inflict large-scale damage on civilians¹² runs counter to most theories of realism, the

⁹ Hans J. Morgenthau and Kenneth W. Thompson, *Politics Among Nations: The Struggle for Power and Peace*, brief ed. (New York: McGraw-Hill, 1993). “Six Principles” excerpt available online, accessed February 14, 2013, <https://www.mtholyoke.edu/acad/intrel/morg6.htm>.

¹⁰ Respect for humanity refers to the moral imperative that human beings ought not be treated as a mere means to an end. This foundational limiting principle is best known as Kant’s “Formula of Humanity”: “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means,” in “Groundwork of the Metaphysics of Morals,” in *Immanuel Kant: Practical Philosophy*, ed. and trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 429.

¹¹ Downes, “Desperate Times, Desperate Measures”; Benjamin Valentino, Paul Huth, and Dylan Balch-Lindsay, “Draining the Sea: Mass Killing and Guerrilla Warfare,” *International Organization* 58, no. 2 (2004).

¹² See Gardam, *Necessity and Proportionality*, 137; Rosen, “Preserving Civilian Immunity,” 730. Rosen argues that even the appearance of civilian casualties can undermine support for military operations.

paradigm most closely associated with military affairs. This is because war is the realm of force, in which the possibilities for moral action are thought to be severely diminished.¹³ Proscriptions against killing civilians are therefore often assumed to run against the logic of force; that is, international norms appear as external, even artificial constraints on pure strategic action.¹⁴ My argument is that this understanding derives from a conventional reading of realism that places morality in opposition to power, with the result that too little attention is paid to the possibility that successful political action sometimes requires moral constraint.¹⁵

Amoral versus Ethical Realism

Conventional interpretations of realist IR draw on broader disciplinary assumptions about the state's relationship to violence. The very definition of the state used in political science is drawn from Max Weber, who describes the state as that body which maintains a "monopoly on the legitimate use of violence."¹⁶ Realist IR expands this focus on violence to define the dynamic between states. Classical political thinkers such as Thucydides, Machiavelli, and Hobbes have been interpreted as sharing an ontological perspective centered on the idea of an amoral realm of international politics,

¹³ See Carl von Clausewitz, Michael Howard, and Peter Paret, *On War* (Princeton, N.J.: Princeton University Press, 1984).

¹⁴ For a realist position on norms, see John J. Mearsheimer, "The False Promise of International Institutions," *International Security* 19, no. 3 (1994).

¹⁵ An international norm is commonly defined as the "collective expectations for the proper behavior of actors with a given identity," Katzenstein, *Culture of National Security*, 5.

¹⁶ Max Weber, *Politics as a Vocation* (Fortress Press, 1965).

whereby force or the threat of force is the defining characteristic of relations between states.¹⁷ Machiavelli is often credited with ushering in the rational utility of violence approach, which elevates the national interest and frees violent political action from the strictures of conventional ideas of morality. The insights of Hobbes have also informed realist IR in that while the state's use of force settles questions of ultimate authority and provides internal stability and security for the population, no such possibility exists for relations between states. Neoclassical realists such as Morgenthau emphasize that the state's use of force is directly related to its security obligations toward its own population as well as the survival needs of the state itself:

the individual may say for himself: 'Fiat justitia, pereat mundus (Let justice be done, even if the world perish),' but the state has no right to say so in the name of those who are in its care ... Realism, then, considers prudence-the weighing of the consequences of alternative political actions-to be the supreme virtue in politics. Ethics in the abstract judges action by its conformity with the moral law; political ethics judges action by its political consequences.¹⁸

This assumption of amorality is even more striking in neorealist, or structural realism,¹⁹ since classical and even neoclassical thinkers at least thought it necessary to discuss the relationship between morality and power. The tide may be turning, however, and the idea that morality is a problematic but enduring dimension of international

¹⁷ For a discussion on amoral versus ethical realism, see Jack Donnelly, "The Ethics of Realism," in *The Oxford Handbook Of International Relations*, ed. Christian Reus-Smit and Duncan Snidal (Oxford; New York: Oxford University Press, 2008).

¹⁸ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, Fifth Edition, Revised, (New York: Alfred A. Knopf, 1978), 4-15, accessed February 2, 2011, <https://www.mtholyoke.edu/acad/intrel/morg6.htm>.

¹⁹ Typified by Kenneth Waltz, *Theory of International Politics* (New York: McGraw Hill, 1979).

politics is once again gaining a foothold in the international relations literature, especially in the English School and in some forms of constructivism.²⁰ Contra Kenneth Waltz' assertion that only material capabilities produce change in structure,²¹ an increasingly sophisticated literature is beginning to treat ethics not as an artificial, external intervention into the logic of power politics but rather as part and parcel of the structure of the international political order itself.²² As Hall attests, the conceptual line between power and morality is hard to sustain when one moves from abstract theory to history, since we know, for example, that "moral authority was employed as a power resource to construct and define the rules of a hieratic, feudal-theocratic social order."²³ Moreover, recent works of political theory on classical realist thinkers like Thucydides, Machiavelli, and Hobbes have emphasized the profound moral concerns that animated their work, which becomes evident once their writings are adequately historicized. About Hobbes, for example, Marius Hentea detects that "the need for a clear standard, which has the power of a genuine morality, is what Hobbes wants." He adds that "it is the demands of

²⁰ This is less true in some other post-positivist approaches such as critical theory, feminist IR, and post-structuralism (post-modernism). All of these approaches tend to distrust claims about morality in IR, viewing such claims as indistinguishable from the exercise of power. My approach and assumptions are closer to both constructivism and the English School in that I believe that the employment of ethics both constrains and enables power, but that ethics entails foundations separate from and thus distinguishable from power.

²¹ Waltz, *Theory of International Politics*.

²² For an explanation of the constitutive function of ethics, see especially Mervyn Frost, *Global Ethics: Anarchy, Freedom and International Relations* (Milton Park, Abingdon, Oxon; New York: Routledge, 2008).

²³ Rodney Bruce Hall, "Moral Authority as a Power Resource," *International Organization* 51, no. 4 (1997): 592.

self-preservation in the state of nature and the desire for religious salvation [that] lead[s] men to behavior that is at war with those ends—it is the moral need for peace which informs Hobbes' discussion."²⁴ Hentea's study throws into question the use of these early thinkers to support later IR theories that assume a binary opposition between power and morality (and as a result the irrelevance of morality to power politics).²⁵

While conventional interpretations of realism as "amoral" render moral norms invisible, ethical readings of realism offer a useful starting point for investigating the effects of moral norms. Hans Morgenthau, though distrustful of moralistic foreign policy to the extent that he actively sought to disentangle considerations of morality from political interests, nevertheless conceded that morality functions to set the outer limits of what is politically possible.²⁶ From this conception of power—as social as well as material—it becomes possible to think of these ethical boundaries as internal to the relations between states to the extent that they are embodied in international norms.

²⁴ Marius Mihai Hentea, "Realism's Classical Tradition: Thucydides, Machiavelli, and Hobbes" (Harvard University, 2007), 260.

²⁵ Jack Donnelly also persuasively argues that realism entails its own ethics: "A defensible realist ethic is perhaps best seen as a warning against the inappropriate application of moral standards to international political action," in Donnelly, "The Ethics of Realism," 157.

²⁶ The actual quote is "moral rules do not permit certain policies to be considered at all from the point of view of expediency," Morgenthau and Thompson, *Politics Among Nations*, 225. Examples of this revisionist interpretation of Morgenthau includes A.J.H. Murray's observation that "Morgenthau adopts an Augustinian, rather than Hobbesian-Machiavellian, moral framework," in "The Moral Politics of Hans Morgenthau," *The Review of Politics* 58, no. 1 (1996): 81; also "Morgenthau's realism attempts to recognize the centrality of power in politics without reducing politics to violence," on Michael C. Williams, "Why Ideas Matter in International Relations: Hans Morgenthau, Classical Realism, and the Moral Construction of Power Politics," *International Organization* 58, no. 4 (2004): 633.

Norms: Commitment Versus Compliance

Norms, provide some degree of stability in the international order by creating predictability, even in times of war. Like any social resource, however, they can also be used for change and are subject to change themselves.²⁷ As will be shown in chapter two, the CIN has a long history and is closely tied to the foundational international norms of both sovereignty and human rights. Like both of those norms, it is somewhat paradoxical in the sense that it enjoys a wide consensus on moral, political, and legal grounds, yet this alone does not predict compliance in particular cases. That is, though the CIN is entrenched in the international normative order, both in international law and in global public sentiment,²⁸ it remains contingent and fragile in that it is often violated by states and non-state actors alike.²⁹ Indiscriminate targeting and other forms of civilian victimization still occur, especially in cases of ethnic and intrastate warfare, and as will be shown later, this has been the case in both Afghanistan and Iraq.³⁰ The International Committee for the Red Cross, the organization charged with providing humanitarian

²⁷ See Wayne Sandholtz and Kendall W. Stiles, *International Norms and Cycles of Change* (Oxford; New York: Oxford University Press, 2009).

²⁸ The legal norm was strengthened through the 1977 Additional Protocols to the Geneva Conventions, whereby civilian protections were specified and codified for the first time. See Judith Gail Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (Dordrecht; Boston; Norwell, MA: M. Nijhoff Publishers, 1993).

²⁹ See Alex J. Bellamy, "Massacres and Morality: Mass Killing in an Age of Civilian Immunity," *Human Rights Quarterly* 34, no. 4 (2012): 2.

³⁰ Downes, "Desperate Times, Desperate Measures"; Valentino, "Draining the Sea."

assistance and promoting the laws that protect victims of war, states that “in contemporary armed conflicts, the challenge of upholding humanitarian values is not the result of a lack of rules but a lack of respect for them.”³¹

Significance of CIN in GWOT

This commitment versus compliance paradox became especially salient during the Global War on Terror (GWOT), a far-reaching military response to what was seen by some as an act of war waged against the international order itself. While many understood the far-reaching response of the GWOT as a threat to the longstanding anti-torture norm, it was also a precarious time for the CIN. The post 9/11 years produced much public debate about the changing nature of war and whether current norms regulating when and how force is used would give way to the new security environment that seemed to make it impossible to maintain a distinction between civilian and combatant.³² This anxiety becomes clearer when we consider that there are a variety of strategic outcomes that affect civilians in war.

Counterinsurgency and Civilians

Civilians have been largely absent from the study of strategy, with two notable exceptions: the total war era of World War Two when the strategic bombing of civilians was rationalized as necessary to break the morale of the enemy, and more recently, in counterinsurgency. Counterinsurgency refers to the range of strategies states employ

³¹ ICRC Webpage, accessed October 30, 2012, <http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/index.jsp>.

³² On the debate, see Rosen, "Preserving Civilian Immunity."

when fighting non-state actors who reject the authority of the ruling regime and seek to take over the reins of government. The population figures into counterinsurgency since, as Mao famously pointed out, it is the sea in which the insurgents swim.³³ Separating insurgents from the population is key because the people are potential supporters, providing cover, sustenance, and recruits. However, the mere presence of an insurgency does not determine a specific strategic response. Despite the recent conflation of counterinsurgency with population protection, state behavior toward civilians in counterinsurgency has varied dramatically; population protection is only one of a variety of choices states use to defeat insurgencies. Counterinsurgency strategies can use more or less force, and civilians can be seen as objects to be coerced and manipulated,³⁴ or they can be seen as actors, even as the center of gravity. The French in Algeria, for example, employed multiple strategies, from punishing civilians to protecting them.³⁵ While strategic failure often precedes any wartime innovation,³⁶ including counterinsurgency, whether or not change occurs and what form it takes is not determined by the mere

³³ John Mackinlay, *The Insurgent Archipelago: From Mao to Bin Laden* (New York: Columbia University Press, 2009); Sam C. Sarkesian, *Revolutionary Guerrilla Warfare: Theories, Doctrines, and Contexts* (New Brunswick, N.J.: Transaction Publishers, 2010).

³⁴ Daniel Rothbart and K. V. Korostelina, *Why They Die: Civilian Devastation in Violent Conflict* (Ann Arbor: University of Michigan Press, 2011); Daniel Rothbart, K. V. Korostelina, and Mohammed D. Cherkaoui, *Civilians and Modern War: Armed Conflict and the Ideology of Violence* (New York: Routledge, 2012).

³⁵ For the logic of this type of counterinsurgency in the case of Algeria, see David Galula, *Counterinsurgency Warfare: Theory and Practice* (New York: Praeger, 1964); David Galula, *Pacification in Algeria, 1956-1958* (Santa Monica, CA: RAND Corporation, 2006).

³⁶ Stephen Peter Rosen, *Winning the Next War: Innovation and the Modern Military* (Ithaca: Cornell University Press, 1991).

recognition of an insurgency nor of battlefield conditions alone. The example of the U.S. military's failed attempt to shift its doctrine to a more systematic strategy of civilian protection in Vietnam is one such example.³⁷

Variance: Strategic Interaction Matters

The variance described above allows for the identification of conditions under which compliance with civilian-centered norms comes to be seen as strategically important. Since in most forms of contemporary warfare the fight takes place “among the people,”³⁸ civilians ever present; to what extent each side considers civilian casualties as permissible is a key strategic consideration. This is especially true in insurgencies involving guerrilla warfare wherein a weak party is pitted against one or more strong parties. As Arreguin-Toft wrote in 2001, multiple strategies are possible when engaging in asymmetric warfare. How force is used is key, but only in relation to the strategy of the opposition. He states, for example, that “barbarism,” or violating established norms against killing civilians, is a strategic choice that can win or lose a war. The French in Algeria, for example, suffered reputational damage even after defeating the insurgency.³⁹ Martin Van Creveld, Israeli military historian, suggests this stark choice as well when he presents two methods of counterinsurgency that allow for strong actors to prevail: the

³⁷ Joseph Roger Clark, "Innovation Under Fire: Politics, Learning, and US Army Doctrine" (The George Washington University, 2011).

³⁸ Rupert Smith, *The Utility of Force: the Art of War in the Modern World* (New York: Knopf, 2007).

³⁹ The film, *Battle of Algiers*, depicts this lesson, and is often shown in military classrooms; Galula, *Counterinsurgency Warfare*; Galula, *Pacification in Algeria*.

strong party must either be prepared to use indiscriminate force wholeheartedly and unapologetically, as did Hafez al Assad in Syria, or it must show great restraint, even at the expense of significant casualties, as did Great Britain when dealing with Northern Ireland. Van Creveld points out that most counterinsurgencies that have failed have employed a middle-ground approach.⁴⁰

That strategic or even doctrinal change could follow a variety of paths is confirmed by historical patterns of war more generally. With increasing interest in state behavior toward civilians in war, a body of knowledge is beginning to accrue about how states behave toward civilians in war. Despite claims of democratic peace, the first major quantitative studies on state behavior toward civilians in war have offered little support for a consistent pattern of moral conduct by democracies in war. History shows that democracies will victimize civilians when leaders believe it brings them strategic advantage, and this is especially the case when the other side breaks the rules.⁴¹ Placed into historical context, then, it is quite remarkable that, when faced with a foe in Iraq who refused to be bound by the laws of war, “the US military shifted from a strategy that was accepting of even large numbers of civilian casualties to, as Ricks put it, ‘a strategy

⁴⁰ Martin Van Creveld, *The Changing Face of War: Lessons of Combat, from the Marne to Iraq* (New York: Presidio Press, 2006).

⁴¹ Downes, "Desperate Times, Desperate Measures." The term civilian victimization is defined by Downes as either the direct or indirect policies that inflict suffering on civilians in war for war aims.

founded in the concept that the civilian population isn't the playing field but rather the prize, to be protected at almost all costs."⁴²

C.O.I.N.: A Radical Departure

The strategic change adopted by the U.S. military is embedded in a broader doctrinal shift known as C.O.I.N. (counterinsurgency), which first arose in response to developments in Iraq and was later adapted, albeit to a lesser extent, to the conflict in Afghanistan. Doctrine differs from strategy in that, while strategy shifts with conditions, doctrine is meant to establish a more stable, permanent orientation toward fighting wars. This doctrinal shift is fairly remarkable because, as military scholars have explained, C.O.I.N. marks a radical break with the past Weinberger-Powell doctrine of overwhelming, decisive force.⁴³ Whereas the Weinberger-Powell doctrine held that long, open-ended commitments were to be avoided,⁴⁴ it also reflected confidence in the idea that more force, albeit in the beginning, was key to winning in a combat situation: "if our vital interests are involved, we are prepared to fight. And we are resolved that if we must

⁴² James H. Lebovic, *The Limits of U.S. Military Capability: Lessons from Vietnam and Iraq* (Baltimore, MD: Johns Hopkins University Press, 2010), 76; Thomas E. Ricks, *The Gamble: General David Petraeus and the American Military Adventure in Iraq, 2006-2008* (New York: Penguin Press, 2009), 7.

⁴³ Sarah Sewall, "Introduction to the University of Chicago Press Edition," in *The U.S. Army/Marine Corps Counterinsurgency Field Manual* (University of Chicago Press, 2007).

⁴⁴ This is ironic since Powell was responsible for selling the Iraq invasion to the international community at the United Nations. The transcript is available online, accessed September, 9, 2010, <http://www.cnn.com/2003/US/02/05/sprj.irq.powell.transcript/>.

fight, we must win.”⁴⁵ Viewing the failure in Vietnam as partially a result of not using enough force in the beginning to produce a decisive outcome, Weinberger aimed to “avoid the danger of this gradualist incremental approach which almost always means the use of insufficient force.”⁴⁶ The Powell Doctrine affirmed the previous doctrine and added that the U.S. should “use overwhelming force in order to achieve a decisive outcome, always have an exit strategy, and emphasize low casualties.”⁴⁷

C.O.I.N., on the other hand, emphasizes the “paradoxes” of counterinsurgency: “Sometimes, the more force used, the less effective it is,” and “sometimes, the more you protect your force, the less secure you may be.”⁴⁸ The adoption of this approach is the result of a process of institutional learning about the relationship of force to political goals in a changing strategic environment.⁴⁹ C.O.I.N. clearly emphasizes the strategic preference for population protection over killing the enemy; in this sense civilians become the new “center of gravity,” and killing them comes to be seen as a strategic

⁴⁵ Caspar W. Weinberger, “The Uses of Military Power,” remarks prepared for delivery to the National Press Club, Washington D.C., November 28, 1984, accessed March 23, 2013, <http://www.pbs.org/wgbh/pages/frontline/shows/military/force/weinberger.html>.

⁴⁶ Ibid.

⁴⁷ These are the words of Bernard Trainor, at “Colin Powell as JCS Chairman: A Panel Discussion on American Civil-Military Relations”, John M Olin Institute for Strategic Studies, Harvard University (Washington, DC October 23, 1995), accessed March 29, 2013, 2013, http://www.wcfia.harvard.edu/olin/publications/workingpapers/civil_military/no1.html. Interestingly, the Powell doctrine is a term coined by others, and Powell’s own written remarks do not include the term “overwhelming force,” except to warn that not all campaigns shall require overwhelming force to win. Nevertheless, it is the common usage of the term..

⁴⁸ “Paradoxes of Counterinsurgency: from the U.S. Army Corps Counterinsurgency Field Manual,” accessed March 24, 2013, 47-51, <http://www.press.uchicago.edu/Misc/Chicago/841519.html>.

⁴⁹ Sewall, “Introduction to the University of Chicago Press Edition.”

deficit.⁵⁰ While this process of transformation within the military has been well documented through the lenses of personalities, leadership, and bureaucratic politics, no studies thus far have explicitly linked the impact of civilian-centered ethical norms to the civilian-centered doctrinal outcome. What is specifically lacking is an explanation of whether and how the civilian immunity norm has shaped the perceptions of interests and identities.

Effects of Norms: Identity and Interests Matter

That norms matter in international politics broadly has been established since the mid 1990s; how they emerge, spread, and gain acceptance has been well documented.⁵¹ Though norms are often treated as dependent variables or outcomes, they have been shown to causally matter in at least three ways: they serve as evaluative points of reference; they exert regulative effects on behavior; and they exert constitutive effects on identity and interests. Whether and how norms matter in the relationship between morality and power in the realm of force is unsettled. Military strategy, in particular, has been assumed to most closely approximate pure strategic interaction in the service of pre-given state interests, in the sense that the logic of force serves its own end of “victory.” Winning is defined in coercive terms as when one group overcomes the ability of another to resist its will. If even military strategy, under certain conditions, can be explained as

⁵⁰ Department of the Army, "FM 3-24 Counterinsurgency," ed. U.S. Army (Washington, D.C., 2006).

⁵¹ Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998); Risse-Kappen, Ropp, and Sikkink, "Power of Human Rights"; Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998).

international norms-driven social action, the assumption of amorality in anarchy becomes more difficult to sustain. And understanding what those conditions are has foreign policy relevance that transcends military strategy.

Norms: Constraining and Enabling Effects

Much of the literature on the civilian immunity norm since the war on terror began has been evaluative and legal, asking whether the content of the norm sufficiently protects civilians, whether it is attuned to the changing realities of war, or whether the norm can be expected to survive intact if it disadvantages states to the benefit of non-state actors (insurgents, guerrillas, or terrorists).⁵² In the course of this growing interest in the norm, a just-war revival has resulted in a fresh look at the normative assumptions, moral reasoning, and political context that grounds the civilian immunity norm. While my focus is neither evaluative nor legal, normative political theory in this area, though distinctly ethical in its approach, nonetheless informs my study since I am interested in the empirical effects of moral or ethical norms. Just war theorists assume a connection between theory and political practice; they critique the civilian immunity norm as containing tensions between military necessity, an enabling principle, and proportionality and discrimination, its two constraining principles.⁵³

⁵² See Aaron Xavier Fellmeth, "Questioning Civilian Immunity," *Texas International Law Journal* 43, no. 3 (2008).

⁵³ Alex J. Bellamy, *Security and the War on Terror* (New York: Routledge, 2007); Alex J. Bellamy, *Just Wars: from Cicero to Iraq* (Cambridge, UK; Malden, MA: Polity Press, 2006); Carlino, "The Moral Limits of Strategic Attack"; Richard Shelly Hartigan, *The Forgotten Victim: a History of the Civilian* (Chicago, IL.: Precedent Pub., 1982); Michael Ignatieff, "The Lesser Evil: Political Ethics in an Age of Terror," *The Gifford Lectures* (Princeton: Princeton University Press, 2004); Troy Jollimore, "Terrorism, War, and The

Understanding this sheds light on how states might maneuver within the norm—by using its concepts to both enable and constrain the killing of civilians. Proportionality, for example, is based on double-effect reasoning, which limits the unintentional but foreseeable harm done to civilians to that which provides military advantage. The concept of military necessity might then lend itself to rhetorical expansion in order to accommodate more casualties.

Regulative Effects of CIN: Internalization and Institutionalization

Norms are most often thought to exert regulative effects on behavior. These effects, as applied to the CIN and the Laws of War in general, are more associated with the stability of the social order than with change. Norms are thought to function endogenously through a logic of appropriateness (what is the “right thing to do” in this case); or in cases of norm compliance problems, a logic of consequences is applied, usually involving exogenous factors. Both of these explanations have been employed to explain the civilian immunity norm. Ward Thomas demonstrates that through the gradual internalization of the civilian immunity norm inside the military, along with its institutionalization at the international level, the US was able to make considerable progress toward norm compliance in the area of strategic bombing. According to this study, the mindset and the lack of reciprocity that allowed for the atrocities of World War

Killing of the Innocent," *Ethical Theory & Moral Practice* 10, no. 4 (2007); Larry May, *War Crimes and Just War* (Cambridge; New York: Cambridge University Press, 2007); Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); Brian Orend, *Michael Walzer on War and Justice* (Montreal; Ithaca, NY: McGill-Queen's University Press, 2000); Walzer, *Just and Unjust Wars*.

2, such as the firebombing and atomic bombing of Japan, would be much less likely to occur today.⁵⁴

The cases of Iraq and Afghanistan throw this into question, however, since both conflicts demonstrate variance in behavior toward civilians, indicating independence from a generalized internalization of the norm. However, regulative effects would be expected to constrain the range of strategic choices to exclude especially punitive strategies that would escalate force against civilians in order to defeat the insurgencies.

When Norms Break Down: Lack of Reciprocity

Other cross-national studies that take into consideration strategic interaction have shown that CIN compliance is more problematic, however, and that behavior toward civilians hinges on reciprocity now just as it did in World War 2, in the absence of strong norms.⁵⁵ Reciprocity remains fragile between states, and a particular state's behavior toward civilians in war is not necessarily contingent on whether it was a signatory to the Geneva Conventions.⁵⁶ These studies, focusing on states, obviously do not apply in the same way, if at all, to case involving non-state actors. Downes, however, includes non-state parties to the conflict and argues that whether or not norms break down is contingent on how desperate the state is to win, reduce its costs, and whether or not the

⁵⁴ Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations* (Ithaca: Cornell University Press, 2001).

⁵⁵ Sean Watts, "Reciprocity and the Law of War," *Harvard International Law Journal*, 50, no 2, Summer 2009.

⁵⁶ Benjamin A. Valentino and Paul K. Huth and Sarah Croco, "Covenants without the Sword: International Law and the Protection of Civilians in Times of War," *World Politics* 58, no. 3 (2006).

war is a war of attrition (which includes guerrilla wars).⁵⁷ This partially answers my question, but it looks only at intentional civilian targeting as an *effect* of strategy (such as in wars of attrition that eventually target civilians). My question is concerned both with constraints on strategic choice and with explaining why *even unintentional* civilian casualties are being avoided. That is, the CIN in my case is being tested as an input or independent variable shaping the decision to adopt a strategy and doctrinal outlook. Downes' use of strategy as an input is thus not well suited to my question because it does not explain how certain strategies are chosen over others when more than one choice exists.⁵⁸

Compliance Through Reputation

Finally, the compliance literature also employs the concept of reputation.

Reputation is a broad concept in IR and is generally used in the state-centric, mostly rationalist sense of signaling strength or resolve to other state actors in conflict

⁵⁷ Downes, "Desperate Times, Desperate Measures"; Alexander B. Downes, "Introduction: Modern Insurgency and Counterinsurgency in Comparative Perspective," *Civil Wars* 9, no. 4 (2007); Alexander B. Downes, "Draining the Sea by Filling the Graves: Investigating the Effectiveness of Indiscriminate Violence as a Counterinsurgency Strategy," *Civil Wars* 9, no. 4 (2007); Alexander B. Downes, "Restraint or Propellant? Democracy and Civilian Fatalities in Interstate Wars," *Journal of Conflict Resolution* 51, no. 6 (2007). Alexander B. Downes, *Targeting Civilians in War* (Ithaca: Cornell University Press, 2008).

⁵⁸ The efficacy of killing civilians is a contested matter and is the subject of recent scholarship: Carlino, "The moral limits of strategic attack"; Caleb Carr, *The Lessons of Terror: a History of Warfare Against Civilians*, (New York: Random House, 2003); Conrad C. Crane, *Bombs, Cities, and Civilians: American Airpower Strategy in World War II* (Lawrence, KS: University Press of Kansas, 1993); Downes, "Draining the Sea," Emma Gilligan, *Terror in Chechnya: Russia and the Tragedy of Civilians in War* (Princeton: Princeton University Press); Mark Grimsley and Clifford J. Rogers, *Civilians in the Path of War* (Lincoln: University of Nebraska Press, 2002); M. L. Gross, "Asymmetric War, Symmetrical Intentions: Killing Civilians in Modern Armed Conflict," *Global Crime* 10, no. 4 (2009); Human Rights Watch, *Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War*, A Middle East Watch report (New York: Human Rights Watch, 1991); P. Johnston, "The Treatment of Civilians in Effective Counterinsurgency Operations" (Northwestern, 2009).

situations.⁵⁹ As applied to international law, it is considered one of the strongest explanations of both compliance with and violation of legal norms,⁶⁰ but it has been found to be a relatively weak indicator of compliance with the laws of war.⁶¹ Studies that examine how violations of the civilian immunity norm impact reputation are lacking, despite a growing sense that the US reputation suffers when it is thought to kill too many civilians. This is perhaps, as Sharman suggests, because social costs do not enter into consideration due to the prevailing rationalist definitions of reputation that dominate this literature. Furthermore, this concept of reputation is inherently state-centric because it assumes only states or domestic publics can impose costs on other states. Reputation on this account is a property concept⁶² based on a “collection of individual beliefs” about the “degree to which an actor reliably upholds its commitments, based on a record of past behaviour.”⁶³

⁵⁹ See Paul K. Huth, “Deterrence and International Conflict: Empirical Findings and Theoretical Debates,” *Annual Review of Political Science* 2, (June 1999): 25-48; Jonathan Mercer, *Reputation and International Politics*, (Ithaca, NY: Cornell University Press, 1996).

⁶⁰ Andrew T. Guzman argues “the implication is that many of the topics that receive the most attention in international law--the laws of war, territorial limits, arms agreements, and so on--are unlikely to be affected by international law,” in “How International Law Works: A Rational Choice Theory,” accessed February 25, 2013, http://works.bepress.com/andrew_guzman/8

⁶¹ Andrew T. Guzman. “A Compliance-Based Theory of International Law,” *California Law Review* 90 (2002): 1826-1887.

⁶² See J. C. Sharman, “Rationalist and Constructivist Perspectives on Reputation,” *Political Studies* 55, no. 1 (2007). for this overall critique; See Kreps 1990 on the property concept, “Corporate Culture and Economy Theory,” in J. Alt and K. Shepsle, eds., *Perspectives on Positive Political Economy* (Cambridge: Cambridge University Press, 90–143).

⁶³ *Ibid.*, 20.

This concept has been used in the conflict versus cooperation debate to explain why a state goes to war (when its reputation as a superpower is threatened, for example)⁶⁴ and why it upholds international agreements.⁶⁵ Its focus on state-to-state relations offers little in the way of understanding how a state fights wars against non-state actors and what connection such struggles may have to its changing perceptions of its own interests. Rachel Brewster, in responding to the idea that American reputation suffered when George Bush was suspected of breaking the laws of war regarding torture, considers this and rejects it, suggesting that image is not the same as reputation: “For better or worse, bad actions that are not predictive of future behavior, because the regime has changed or because the strategic situation is different, do not lead to reputational costs.”⁶⁶

Image: A Social Definition of Reputation

A constructivist understanding of reputation, on the other hand, is defined by general beliefs about the “referent’s character or nature, based on a range of information, associations and social cues.” This understanding, suggested by Sharman, is the one I adopt because it is more appropriate to my question.⁶⁷ The social conception of reputation

⁶⁴ This is largely a realist, cold war idea—that the U.S. must fight smaller wars now to avoid war later, that is to safeguard its reputation. See Mercer, *Reputation and International Politics*. See also D. Press, “The Credibility of Power: Assessing Threats during the ‘Appeasement’ Crisis of the 1930s,” *International Security* 29, no 3 (2004/05): 136–69.

⁶⁵ See Robert Axelrod, *Evolution of Co-operation* (New York: Basic Books, 1984); G. Downs and M. Jones, “Reputation, Compliance and International Law,” *Journal of Legal Studies* 31, no. 1 (2002): 95–114.

⁶⁶ “Unpacking the State’s Reputation,” *Harvard International Law Journal* 50, no. 2 (Summer 2009): 233.

⁶⁷ Sharman, “Rationalist and Constructivist Perspectives.”

is inherently relational and thus lends itself to strategic interaction of a social nature. As in all social situations, reputations are subject not just to ownership (wherein good behavior piles up like a bank account) but to strategic management.⁶⁸

Constitutive Effects of Norms

The notion of image or social reputation fits well with what are known as constitutive effects of norms. This effect is least likely to be tested, or even understood as relevant, by those studying the strategic importance of civilians in war.⁶⁹ Constitutive effects are marked by the interdependence or even co-determination of identity and interests. This notion has been applied to security most famously in Katzenstein's 1996 edited volume on the social constructedness of national security interests: "Identity is a short-hand label for varying constructions of nation and statehood" and "culture is a label that connotes collective models of nation state authority or authority carried by convention or law."⁷⁰ Security interests, on this account, must be understood in terms of norms as well as material factors because norms are embedded in culture and provide collective expectations. This concept is familiar when it is applied to the role of military organizational culture in shaping policy, to strategic culture more generally, to the construction of new norms such as intervention, and to the formation of international

⁶⁸ On this idea of strategic management, see , J. F. Mahon and B. M . Mitnick, "Reputation Shifting," *Journal of Public Affairs*, 10, no. 11 (2010): 280–299.

⁶⁹ For an overview of the debate about how causation should be understood in international relations, see Milja Kurki, *Causation in International Relations: Reclaiming Causal Analysis* (Cambridge; New York: Cambridge University Press, 2008).

⁷⁰ Katzenstein, *Culture of National Security*, 5-6.

organizations such as NATO.⁷¹ That the CIN exerts constitutive effects is central to my argument since identifying with “protecting civilians” is often central to the legitimacy claim employed for the use of force in the first place. The language of CIN is constitutive in that it provides the social power to shape perceptions of identity and interests.

Alexander Wendt provides an explanation of how identities and interests are shaped through social interactions. To think of political interactions as social means that identities and interests are co-constituted within a particular social order. The social dimension of power is inherently communicative in that it allows an actor to control interactions by defining the terms within which those interactions occur. One aspect of this is role-taking, which “involves choosing from among the available representations of the Self who one will be, and thus what interests one intends to pursue.”⁷² Another is altercasting, “a technique of interactor control in which ego uses tactics of self-presentation and stage management in an attempt to frame alter’s definition of the situation in ways that create the role which ego desires alter to play.”⁷³ Social power is indicated by the successful achievement of defining the identity of the self and of the other’s identity as well. According to Wendt, “ego tries to induce alter to take on a new

⁷¹ These are typical of the cases in the Katzenstein volume.

⁷² Alexander Wendt, *Social Theory of International Politics* (Cambridge, UK; New York: Cambridge University Press, 1999), 329.

⁷³ Ibid.

identity (and thereby enlist alter in ego's effort to change itself by treating alter as if it already had that identity."⁷⁴

Since the goal is to delegitimize the non-state actor altogether, the aim in this case is not so much to get the actor to accept the identity preferred by the ego but rather to push the alter off the stage altogether. However, engaging in war against said actor (through the GWOT) has already elevated the status of the actor to that of a serious challenger. This forces the identity of the ego toward that of defender, particularly if the power interests of the ego push against the limits of the prevailing normative order. Constitutive effects are present when ego (or alter for that matter) behaves a certain way because its identity must fall in line with its interests. If behavior does not match the preferred identity, either the identity must change, the interests must change, or the relationship between the two must be rearticulated to allow for the contradiction. Furthermore, that there is a "stage" implies the presence of an audience. Who the important audience is thought to be at any given moment provides cues to which norms are persuasive in achieving the desired identity and interests.

The Strategic Importance of Ethics in the War of Ideas

If we think of ethics as always present though not determinative, anarchy begins to approximate a more "realistic" social setting. Jack Donnelly describes this as the view that many people actually hold about IR, which is the recognition that "statesmen are

⁷⁴ Alexander Wendt, "Anarchy is what States Make of it: The Social Construction of Power Politics," *International Organization* 46, no. 2 (1992): 421.

subject to demands of competing systems of values.”⁷⁵ As with any group-based social setting, the primary tension is always marked by the tension between particularist versus universal values. If a state at war most often follows a particularist value system, indicating a primary ethical obligation to its own group, then shifting toward a more universal ethical system indicates that it has come to recognize the social value of demonstrating a commitment to ethical treatment of the members of other groups. Translated to war, this means that the state as social actor is attempting to communicate to an audience its moral identity. Granted, its wish to communicate the vital interests of the war effort to its own domestic public is a constant. This public is generally understood as the most important public since it must support the war effort, and in a democratic society, it also holds the power of electoral punishment as well.⁷⁶ In the case of counterinsurgency, a state may wish to signal resolve and strength to its allies and to its enemies, or in an attempt to intimidate the local population. The lesser understood choice has to do with why ethics would enter into a state’s relationship to occupied publics and the international or global publics that identify with that population. This is explained through the “War of Ideas.”

⁷⁵ Donnelly, "The Ethics of Realism," 158.

⁷⁶ Downes recognizes this public as the primary focus of democratic states since they alone are able to impose costs on the ruling regime. In Downes, "Restraint or Propellant? Democracy and Civilian Fatalities in Interstate Wars."

The Global “War of Ideas”

One of the key observations sparking this study is that the military literature began to express a concern for communicating a more ethical U.S. image to potentially hostile publics around the same time as the strategy in Iraq changed. That the U.S. began to emphasize the importance of winning its global “war of ideas” against al Qaeda and extremist Jihadism as a matter of *security* in the war on terror suggests that ideational factors play a likely role in the overall strategy change. Military scholar Echevarria explains that

Officials and analysts alike continue to underscore the importance of the “war of ideas” as an integral part of the larger war on terror. The *U.S. National Security Strategy* (March 2006) declares that “From the beginning,” the war on terror “has been both a battle of arms and a battle of ideas—a fight against the terrorists and their murderous ideology.” Likewise, the *U.S. National Strategy for Combating Terrorism* (September 2006) states that “In the long run, winning the War on Terror means winning the battle of ideas.” Similarly, the ... *U.S. National Strategy for Homeland Security* (October 2007) affirms that “the War on Terror is a different kind of war—not only a battle of arms but also a battle of ideas.”⁷⁷

The War of Ideas is the ideological aspect of the war on terror, as Echevarria states above. It is essentially a public relations war meant to counter the global Jihadist ideology competing with the U.S. global ideological vision.⁷⁸ Battling anti-Americanism post 9/11 was the vague goal of the War of ideas, but the shift in focus from a war of ideas as a civilian matter, that is as a public diplomacy matter, to a military “war of

⁷⁷ Antulio Joseph Echevarria, “Wars of Ideas and the War of Ideas,” (2008), accessed March 20, 2012, www.StrategicStudiesInstitute.army.mil.

⁷⁸ Manfred B. Steger, *The Rise of the Global Imaginary* (Oxford: Oxford University Press, 2008).

ideas” suggests that decision-makers began to see the ground wars as directly connected to the larger ideological war. The link between the two is the desire to control the perceptions of the audiences each side was trying to affect, mostly the Muslim and Arab communities within a larger, diffuse global public. Writing about the ability of Jihadists to master strategic communications and win the support of Arab/Muslim audiences, Bockstette writes that

their communication goals are aimed at legitimizing, propagating and intimidating. They craft their strategies based on careful audience analysis and adapt their messages and delivery methods accordingly, adhering to the fundamental rules underlying any communication or public relations campaign. Their skillful use of the mass media and the Internet to compensate for asymmetrical disadvantages has enabled them to keep generating new generations of jihadist terrorists. This information asymmetry must be undermined in order to counter the threat of a growing radicalization of the Muslim community. Ensuring one’s own credibility while undermining the jihadists’ credibility is one of the key elements to winning this battle.⁷⁹

One of the key ways Jihadist use strategic communication is for the “legitimization of their movement and the coercion and intimidation of their enemies.”⁸⁰ Therefore, the war of ideas is about countering the ability of the opposition to control the strategic narrative. This is reminiscent of the Cold War public diplomacy project and thus may not seem new or relevant, but its focus on gaining the support of foreign publics for a global war on terror is peculiar to the times. It has not been made theoretically evident

⁷⁹ Carson Bockstette, “Jihadist Terrorist Use of Strategic Communications Management Techniques,” George C. Marshall European Center for Security Studies 20, (2008): 5, accessed March 3, 2013, http://www.marshallcenter.org/mcpublicweb/MCDocs/files/College/F_Publications/occPapers/occ-paper_20-en.pdf.

⁸⁰ Ibid., 9.

why the US requires the support of foreign publics for its military actions, and how support for US military operations is connected to winning the wars in Iraq and Afghanistan. My argument is fairly intuitive but overlooked—that a key strategic communication resource is the appeal of the CIN and its association with the U.S. identity and ideology. Embracing and co-opting the strong global sentiment in favor of protecting civilians from harm in war is the key idea linking the strategy in both the operational and the ideational wars. Whereas Jihadists have a cultural “in” to targeted audiences through the discourse of Islam, the U.S., in order to compete, must appeal to its universal, human rights-based values and language in a way that has global appeal. The civilian is one of the few universal concepts that can bridge competing cultural and religious systems. Put simply, the U.S. later had to put its money where its mouth is by attempting to live up to its professed values.

Interestingly, this link has not yet been made explicit, let alone theoretically explained, by anyone to date. Nowhere in the above article does the word “civilian” appear as part of the war of ideas, though Echevarria does cite world public opinion polls that measure changes in Muslim and Arab public attitudes toward the U.S. in terms of how “threatening” they view it. It requires only a short jump in logic to realize that publics are comprised of civilians; they are the biggest part of *civil* society and thus are likely to perceive the projection of U.S. power as threatening to themselves in terms of threats toward civilians more generally. This is less the case for domestic audiences, but truer for the publics of U.S. allies, and perhaps greatest for Arab and Muslim publics.

Perhaps more importantly, the fact that the two sides of the global war on terror--the material and the ideational side--come to be seen *over time* as strategically intertwined suggests the possibility that the civilian immunity norm may form an assumed but important part of the normative backdrop for both forms of the war and thus may inform actual military strategy in ways not made explicit in a way intelligible to the study of international relations.⁸¹

A more explicit concern for how foreign publics view civilian casualties is evident in the type of research feeding into the military. For example, RAND Corporation, whose research serves the policy needs of the U.S. Department of Defense, completed an in-depth empirical analysis of public and press reactions to civilian casualties in multiple conflicts involving the US.⁸² This concern for civilian casualties has been linked more explicitly to strategy in recent times, but it was present to a degree in the early years of the war on terror. The observations of military analyst Marcus Corbin, of the Center for Defense Information in Washington, predate the RAND study by three years: "Nowadays civilian casualties, and even specific incidents, can have a

⁸¹ A short explanation of the assumptions to which I refer: realist theories have been accused of smuggling in assumptions that are not supported by the theories themselves. An example of this occurred recently when John Mearsheimer, prominent realist, was delivering a public lecture on Israel. To paraphrase, he argued that Israel risked becoming an Apartheid state. The resulting victimization of Palestinians would result in Israel's losing the "war of ideas" whereby it is associated with Western, democratic values. In such a case, the U.S. would no likely be able to defend Israel, he argued, and the state would risk losing its Jewish identity. This may be an accurate assessment, but it is striking coming from a realist since the materialist ontology of realism does not allow for the central importance of ideational factors in driving state behavior, nor for identity to constitute a state interest.

⁸² Eric V. Larson et al., *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime* (Santa Monica, CA: RAND Project Air Force, 2007).

strategic effect on a conflict out of all proportion to their size, especially in an age of instant video transmission around the world.”⁸³ Retired Air Force Col. Sam Gardiner explains, "In our war games, the bad guys gave up fighting us directlyThey moved into cities. They attacked our supply lines with explosives. They wore civilian clothes. They took hostages. They responded to our new weapons by forcing on us the dilemma of killing civilians and of their killing of civilians.”⁸⁴ Rosen, a professor of international law and a colonel in the military, argues that this is a distinct disadvantage for Western states, especially since the “international community, including the media, focuses inordinately on the perceived missteps of Western states as opposed to their adversaries’ violations of the law of war.”⁸⁵

Reconciling the War on the Ground with the War of Ideas

The idea that *democratic* states must exhibit restraint assumes that civilian casualties entail political costs for them because they are “particularly sensitive to popular opinion” and stand to lose both domestic and international support for military operations.⁸⁶ This suggests that states face a trade-off in interests between winning in war through the superior application of force and winning in the court of public opinion, both at home and abroad. While states have many resources to counter domestic public

⁸³ Quoted in *The Christian Science Monitor*, March 31, 2004, accessed February 24, 2011, available online, [http://www.csmonitor.com/2004/0331/p15s01-wogi.html/\(page\)/2](http://www.csmonitor.com/2004/0331/p15s01-wogi.html/(page)/2).

⁸⁴ Ibid.

⁸⁵ Rosen, "Preserving Civilian Immunity," 730.

⁸⁶ Ibid.

opinion (mainly nationalistic sentiment), this is not the case for foreign publics, neither for occupied populations, nor for sympathetic regional or international publics. However, if states see their best option as *reconciling* the two definitions of winning into a consistent goal based on strategic constraint, then it can be argued that morality has a social dimension that at times provides strategic advantage. My argument is that this is exactly what occurred, and that the CIN is a social resource that bridges the two goals in order to gain support of the local public as well as international publics that are sympathetic to the local population.

Therefore, despite the conviction that exercising constraint in asymmetric warfare presents powerful states with a disadvantage, states, when faced with strategic failure, sometimes choose this path. While one is hard-pressed to make the argument that states might knowingly act in ways inconsistent with their strategic advantage, if we assume a rational actor, then it appears that what is normatively good has to some extent come to coincide in such cases with what is strategically advantageous. Therefore, it is difficult and possibly even counterproductive to insist on disentangling the “rational” and normative” casual logics driving the move toward a more ethical strategy and doctrine. This study aims to contribute to the small but growing body of scholarship that seeks to understand how the two come together. Constructivism is particularly useful for this purpose because it allows for the fact that states sometimes change their behavior because their perceptions of their interests change. I argue that this is precisely the case, and that the impact of the civilian immunity norm on state behavior and interests accounts for this

shift. Since the mere presence of the norm is not determinative, the key task is showing how this occurs and also identifying the conditions under which this norm matters, that is, when the normative environment is seen as a key part of the strategic environment.

In the next section, I will explain how attempting to study the strategic aspects of the normative environment bucks up against a larger theoretical debate in IR known as the constructivist/rationalist divide. Arguing that this divide is counterproductive to the topic under examination, I will then explain my adaptation of a model that includes legitimacy as the concept that links norms with state behavior.⁸⁷

Constructivism versus Rationalism Debate

The introduction of constructivism has divided international relations theory into roughly two camps: Checkel states that “rationalists emphasize coercion, cost/benefit calculations, and material incentives, whereas constructivists emphasize social learning, socialization, and social norms.”⁸⁸ March and Olsen provide a framework that captures the basic distinction between the approaches and divides the behavioral domain by assigning different logics to different modes of political action. These are known as the logic of appropriateness versus the logic of consequences.⁸⁹ While this opposition is theoretically neater than an either/or proposition, it is also increasingly seen as

⁸⁷ This is based on Ian Hurd’s work on the instrumental use of norms. See Ian Hurd, “Legitimacy and Strategic Behavior: The Instrumental Use of Norms in World Politics,” Paper Presented at the 48th Annual Convention of the International Studies Association (Chicago, IL, 2007).

⁸⁸ Jeffrey T. Checkel, “Why Comply? Social Learning and European Identity Change,” *International Organization* 55, no. 3 (2001): 553.

⁸⁹ James G. March and Johan P. Olsen, “The Institutional Dynamics of International Political Orders,” *International Organization* 52, no. 04 (1998).

counterproductive for the simple reason that states do not necessarily behave in an either/or fashion. The military literature cited previously about the war of ideas and the war on the ground provide evidence that the military, as the representative of state interests in war, take for granted that conflict involves a struggle over perceptions as well as physical force.

In explaining behavior, from a material rationalist perspective—realism being the most prominent in security studies—the U.S. is least susceptible to pressure from the international community because of its dominant power position, and thus need only respond to its pre-given material interests. When power interests change, cooperation with institutions change, thus rendering institutions epiphenomenal.⁹⁰ From this perspective, power considerations alone will account for the shift in strategy. Compliance literature contains a set of explanations that are rational but liberal in focusing on costs and benefits associated with opportunities to cooperate/transact with other states. This will be discussed in more detail below, but this perspective offers little to account for non-material costs which would help to explain the shift in strategy, or importantly, in the relationship between the ideational and material aspects of war.

Constructivism butts up against some of the assumptions often taken for granted in matters of war, which is the primacy of material factors. Rationalist explanations, while important, are often inadequate to answering the question that interests me, which is ultimately whether and how a more constraining normative context figures into

⁹⁰ See, for example, Mearsheimer, "The False Promise of International Institutions."

strategy. From a constructivist perspective, the puzzle is inherently a social one that may reach beyond behavior to an explanation of how identity and interests are shaped by changing expectations (and how policy thus results in its particular form). Constructivist theory varies in its emphasis on identity,⁹¹ speech acts,⁹² or rules,⁹³ but regardless of its deep theoretical underpinnings, it is closely associated with norms because, on a scale from anarchy to community, it tends toward community, viewing international politics as taking place in a social setting.⁹⁴ While power and material incentives are present for constructivists, this approach allows that “moral” considerations like humanitarianism are as much a part of the social and political game as are the more tangibles.⁹⁵ For domestic audiences and allied publics, reflecting a “humanitarian” or moral identity works to maintain support for the war effort. This is also true for persuading fence-sitting publics, especially those seen as potential supporters of the opposition (whether local or

⁹¹ Wendt, *Social Theory of International Politics*; Alexander G. Wendt, "Collective Identity Formation and the International State," *American Political Science Review* 88, no. 2 (1994).

⁹² Nicholas Greenwood Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia, S.C.: University of South Carolina Press, 1989).

⁹³ Friedrich V. Kratochwil, *Rules, Norms, and Decisions: on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge; New York: Cambridge University Press, 1989).

⁹⁴ Emanuel Adler and Michael N. Barnett, *Security Communities* (Cambridge, UK; New York: Cambridge University Press, 1998). The relevant actors in this social setting depend on context. Part of the contribution of this study is to show how the effort to exclude violent non-state actors also has the effect of bringing civilians into focus as actors rather than simply as objects of war.

⁹⁵ Michael Barnett, "Evolution Without Progress? Humanitarianism in a World of Hurt," *International Organization* 63, no. 04 (2009); Michael N. Barnett, *The International Humanitarian Order* (London; New York: Routledge, 2010); Michael N. Barnett, *The Empire of Humanity: A History of Humanitarianism* (Ithaca: Cornell University Press, 2011).

transnational). Hardened or “irreconcilable” publics would be less persuadable and therefore may not figure into the social game as crucial variables.

Constructivism, in attempting to explain social action as being based on shared intersubjectivity, too often falls back on the assumption that the causal power of norms is to be found internally, and as Hurd notes, “the internalization approach requires a strict separation between strategic behavior and legitimacy which is not only empirically unsustainable but also produces an unproductive ‘either/or’ framing of the relationship between constructivism and rationalism.”⁹⁶ According to Hurd,

the assumption of internalization is counterproductive in IR research for three reasons: it predicts perfect compliance with norms, eliminates strategic thinking by states, and erases any behavioral difference between constructivism and rationalism. These problems attend both rationalism and constructivism as the two have come to agree on a common division of labor between explaining the making of interests and explaining strategic action.⁹⁷

The attempt to find commonalities between normative behavior and strategic behavior is a slowly growing trend because, while the two approaches differ in their ontological assumptions, they are not mutually exclusive.⁹⁸ This occurs not only to constructivists, who bear the onus as the newcomer, but also to rationalists who attempt to make sense of the encroachment of constructivism on the discipline. Such engagements have produced alternative analyses of the relationship between norms and

⁹⁶ Hurd, “Legitimacy and Strategic Behavior: The Instrumental Use of Norms in World Politics.”

⁹⁷ Ibid., 4.

⁹⁸ Jeffrey T. Checkel, “Bridging the Rational-Choice / Constructivist Gap? Theorizing Social Interaction in European Institutions,” in *Institutionalism and the European Union* (Oslo: ARENA, 2000).

strategic action, such as that articulated by Robert Keohane. Keohane, who identifies himself as a rationalist, argues that while norms have both regulative and constitutive effects, constitutive effects have little bearing on behavior:

Katzenstein, Krasner and I have argued that even for rationalist neoutilitarian research programs, constitutive norms can be seen as important – not because they generate a coherent world culture but because they create common knowledge, which is essential for coordination (Katzenstein et al. 1998: 682). Even if strong international and transnational constitutive norms are lacking, knowledge of the norms that various agents and groups hold is important in affecting the strategies that players employ. According to a rationalist neoutilitarian perspective such as my own, however, constitutive norms serve essentially as a source of background knowledge, significant for strategy but not determinative of actions by state or non-state actors.⁹⁹

In the debate about strategic action versus normative behavior, Keohane's position supports the former. The real question is not whether strategy or norms prevails, however, but whether norms have an effect not reducible to that which can be explained by rational choice, strategic or not.

Legitimacy and Norms

As Ian Hurd usefully argues, states sometimes use norms instrumentally, and in doing so, “straddle the academic divide between the [two] logics.” The reason for this centers on legitimacy—invoking norms to justify one's behavior is strategic action for the sake of locating the self within a particular normative order.¹⁰⁰ According to Clark,

⁹⁹ Robert O. Keohane, “Social Norms and Agency in World Politics,” paper prepared for public lecture at the University of California at Los Angeles, October 11, 2009, accessed November 11, 2011, available online: <http://www.international.ucla.edu/media/files/SocialNorms1.0.pdf>.

¹⁰⁰ Hurd, “Legitimacy and Strategic Behavior: The Instrumental Use of Norms in World Politics,” 1.

“legitimacy makes any kind of sense only within a social context.”¹⁰¹ He adds that “socially, legitimacy functions to prescribe recognition of the relevant actors, and also to prescribe appropriate forms of conduct.”¹⁰² Clarke adds that “at the point where legitimacy and legitimation overlap is a political terrain—the meeting ground of norms...[and] distributions of power. Legitimacy entails not just standards but practices in the form of “actors’ strategies of legitimation.”¹⁰³ An act of legitimation is both social and strategic since it upholds the norm of seeking approval even as the actor seeks to manipulate perceptions and even distort the agreed upon meanings of the norm.¹⁰⁴ Hurd gives the example of non-aggression by states: “so prevalent is the reflex to justify war as defensive or as invited that it is difficult to find a case of admitted aggression in the post-1945 world.”¹⁰⁵ Legitimacy is the key concept linking states and norms since it accounts for the social context in which states seek power and cooperation,¹⁰⁶ even as I argue, in war.

Legitimacy is thus the goal of a process rather than a norm in its own right.

Norms are used to achieve legitimacy. Further, in a globalizing world, legitimacy is

¹⁰¹ Ian Clark, *International Legitimacy and World Society* (Oxford ; New York: Oxford University Press, 2007), 18.

¹⁰² Ibid.

¹⁰³ Ian Clark, *Legitimacy in International Society* (Oxford; New York: Oxford University Press, 2005), 3.

¹⁰⁴ Hurd, "Legitimacy and Strategic Behavior," 17-20.

¹⁰⁵ Ibid. 21.

¹⁰⁶ Ian Hurd, “Breaking and Making Norms: American Revisionism and Crises of Legitimacy,” *International Politics* 44 (2007) : 194–213.

located in the intersection between international society and what Clark calls the “world society,” characterized by shifting social bases and multiple audiences. On this account, human rights is a “world society claim” by which “state actors were able to pursue their interests via human rights, only because there was a world society constituency extending beyond international society and to which appeal could be made.”¹⁰⁷ To the extent that the legitimacy of human rights is weighted against sovereignty in the international order, we would expect to see the human rights interpretation of the CIN carry greater strategic appeal.

Thus, contra Keohane, who sees strategically motivated action as negating the explanatory power of norms, I employ a social notion of legitimacy that derives from the observation that social life is inherently strategic in the sense that it entails communicating, arguing about moral claims, and justifying one’s identity and actions to one’s community, even a global civil society. A legitimacy gap on this account would then be indicated by an inability to project identity or image as consistent with one’s position vis a vis the prevailing normative order. Ultimately this means that the actor’s strategies of legitimation have failed. Further, it indicates that reputation or image is being controlled according to alter’s definition instead of ego’s. The causal mechanism for changed behavior lies in the legitimacy gap—the failure to achieve identity on one’s own terms. This means that when an actor is unable to control that image through words,

¹⁰⁷ Clark, *International Legitimacy and World Society*, 147.

it must close the legitimacy gap through deeds, which necessarily entails a redefinition of interests—in this case, what it means to “win” a war.

The recognition that norms matter in ways not amenable to the rationalist-constructivist divide is important to my efforts to carve out a space in the growing body of literature on state behavior toward civilians in war. It explains why what is in reality a fairly straightforward question has not been posed to this point. I believe this is because the literature on civilians in war is divided between branches of rationalism and constructivism, with the security studies literature emphasizing the strategic dimensions of civilians in war on the one hand and a norms-based approach emphasizing culture and identity on the other. These alternative explanations for state behavior toward civilians will be reviewed in chapter three.

First, chapter two of this study will undertake an in-depth historical overview of the civilian immunity norm to show the specific constitutive effects that issue from this norm, specifically how the nexus of law, morality, and power have coalesced around and even within the norm for centuries. This chapter will highlight recent literature discussing the constitutive effects of the norm on the international order itself, specifically in terms of its embodiment of the tension between sovereignty and human rights. This concept of international order draws on Reus-Smit’s notion of the “moral purpose of the state,” meaning that every international order has a purposive function defined by the moral

reason for being of the state.¹⁰⁸ This concept serves to link the GWOT to moral norms by way of communicating a moral purpose in the GWOT conceived as a defense of the international order. This will lay the groundwork for interpreting the instrumental use of the norm both in terms of making sovereign power claims about military necessity and in terms of making identity claims by aligning with the human rights aspects of the norm. The attitudes of states toward civilian casualties say a great deal about the extent to which they perceive a legitimacy gap caused by civilian mistreatment. Likewise, the degree to which states attempt to justify more expansive definitions of military necessity points to the diminished strategic importance of the civilian immunity norm. This chapter will also provide the background to understand the historical centrality the civilian immunity norm to Western military culture.

In Chapter 3, I will narrow the literature to two strands that compete more directly with my own hypothesis: First, I will review the literature on doctrinal innovation in the military, primarily because this is the strand of literature that seeks to explain the change in strategy in social scientific terms. Reviewing this theoretical literature will demonstrate that a gap exists in the explanations for why it is that the innovation was successful; and I will suggest that a norms explanation helps to fill that gap. Second, I will review the literature that specifically seeks to show why and under what conditions states do or do not victimize civilians. This will again demonstrate that the rationalist/constructivist

¹⁰⁸ Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton, NJ: Princeton University Press, 1999).

divide is apparent in the explanatory categories (rationalist/strategic; regime type; identity; and military culture) and that each, taken alone, does not adequately allow me to pursue that account of norms that interests me. My own model hits on but transforms the meanings and relationships between the concepts above; that is, I treat them not as independent factors but rather integral dimensions of the same phenomenon: democratic states strategically alter military culture to render their actions more consistent with the identity claims of the state when they believe a legitimacy gap hinders their ability to act effectively. The strategic use of the civilian immunity norm fills the legitimacy gap by rendering consistent the message between the war of ideas and the war on the ground. The extent to which there is variance between the cases is examined as a function of the legitimacy gap, which I do in chapters 4 and 5.

The Material as Background

In order to test for the effects of the civilian immunity norm, the normative environment or what some consider the normative “background” of C.O.I.N. must be brought to the foreground. This means that the material will not be absent but will rather be shifted to the background. One of the primary missing links within the norms literature as applied to the civilian immunity norm is how international norms are intertwined with material factors. No studies thus far have linked changing perceptions of interests of the U.S. as being tied to its identity, or concerns about “who we are” as a nation, yet the “war of ideas” suggests that winning the *physical war* is being increasingly tied to positive assessments of U.S. identity. A constructivist understanding of reputation recognizes the

socially negotiated nature of identity—that a state can assert its identity endlessly but that unless it is recognized as what it claims to be, it has strategically failed at controlling perceptions. Legitimacy is the central concept that ties together reputation costs with norm compliance because the civilian immunity norm is essential to the reputation of the U.S. in the eyes of foreign publics—they identify more closely with civilians than they do states.

The central material factor at work in my model is derived directly from the military literature: the strategic necessity to deprive insurgents, terrorists, and guerrillas of ideological and material support, especially in terms of increased recruitment of insurgents.¹⁰⁹ This is key because this loss of a monopoly on violence within the international realm leads strategic decision-makers to see the changing nature of warfare as a global insurgency rather than a localized one. This understanding led to an effort to shift from a “case-by-case” strategy to a broad doctrine. Whereas localized insurgencies have always relied on delegitimizing the incumbent government, David Kilcullen, one of the architects of the counterinsurgency strategy, points out that the transnational character of contemporary insurgency is such that several battles are being fought simultaneously (global terrorists, local, and regional battles are all taking place at once, all with different goals) and that multiple audiences, some far away from the battlefield, provide support. Indonesia, for example, was known to have been the source of many foreign fighters at

¹⁰⁹ Echevarria, “Wars of Ideas and the War of Ideas.”

one point in Iraq.¹¹⁰ Multiple populations thus characterize and vastly complicate the global insurgency, or what has also recently been termed the post-Maoist “insurgency archipelago.”¹¹¹ The implications are that while the local population directly experiences the effects of the struggle for legitimacy between insurgents and the host nation, which may include civilian casualties as well as ideological, security, and economic developments, extended audiences will most likely judge the insurgents or terrorists versus the government on their treatment of civilians.

The changing nature of war is a highly contested topic,¹¹² the full examination of which falls outside the scope of this study. My point is rather that if leaders perceive it as such, it helps to explain a shift in interests, even a revised idea of what it means to “win” a war. While it is true that guerrilla warfare is nothing new and neither is counterinsurgency, the political and informational context changes,¹¹³ as do what are considered effective and “appropriate” strategies regarding civilians. Mary Kaldor points out that the emerging global civil society that makes possible the participation of progressive actors such as human rights-oriented NGOs and advocacy groups also makes

¹¹⁰ David Kilcullen, *Counterinsurgency* (Oxford; New York: Oxford University Press, 2010).

¹¹¹ Mackinlay, *The Insurgent Archipelago*, 195.

¹¹² Mary Kaldor, *New and Old Wars*, 2nd ed. (Cambridge, UK; Malden, MA: Polity Press, 2006); Smith, *The Utility of Force*; Van Creveld, *The Changing Face of War*.

¹¹³ This point is increasingly being re-examined within the military and should be taken seriously by IR theory as well. For example, Colin Gray, British military historian and strategist argues that while the nature of war remains the same, the character of war changes according to context, which includes socio-political factors as well as geo-political factors. In Colin S. Gray, "War--Continuity in Change, and Change in Continuity," *Parameters* 40 (2010).

possible the rise of violent actors who wish to challenge humanitarian, liberal norms.¹¹⁴

Although states sometimes press against such norms when it constrains what they see as their sovereign prerogatives, the fact that the liberal human rights regime helps to delegitimize violent non-state actors means that democratic states, at the least, have an abiding rational interest in maintaining the primacy of their own position as guarantors within such an order.

Summary of the Argument

This study employs a constructivist approach, arguing that states will choose to strengthen compliance with the CIN when they see the constraining normative environment as a key part of the strategic environment. Legitimacy is argued to be the causal mechanism driving interests and identities to align more closely with the human rights-based aspects of the international order. My argument, based on a social conception of power, hinges on the observation that state interests change over time and that this is evident as sovereignty-based attitudes toward civilian casualties move toward a more constraining, human rights-based outlook. I identify three conditions under which this occurs: when the normative/discursive framework of protecting civilians is seen as essential to delegitimizing the enemy; when the legitimacy of the initial invasion is in question, and civilian casualties are seen as damaging to the international image by increasing that gap; and when regaining a monopoly on force is seen as impossible to

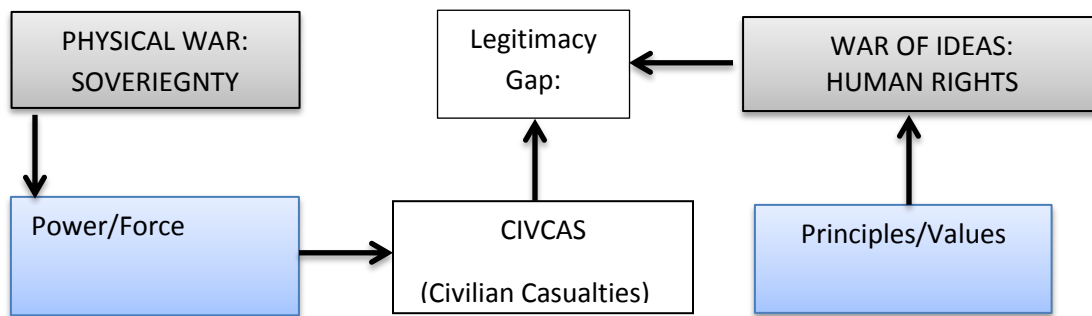
¹¹⁴ Mary Kaldor, *Global Civil Society: An Answer to War* (Cambridge, UK: Polity Press; Distributed in the USA by Blackwell Pub., 2003).

achieve through material force alone because civilian casualties increase support for the insurgency. Together, these provide the conditions under which aligning with human rights-centered norms eventually come to be seen as the only viable strategy in fighting insurgencies.

Overall, this study adds to the literature on the strategic importance of civilians in conflict by testing for the influence of norms in shaping strategy. This particular norm has not yet been considered as a possible cause of strategic change. In this sense, I aim to further the ideational turn in security by showing that norms can be used instrumentally even within war without being reduced to “cheap talk.” I also aim to contribute to the ongoing attempt to bridge constructivism with rationalism through employing a logic that makes use of both approaches.

The schematic below visually demonstrates the causal logic of the model, which is that the war of ideas appeals to human rights-associated principles and values while the physical war appeals to sovereignty-based values. Civilian Casualties (CIVCAS) creates a legitimacy crisis due to the inability to prevail in a way that reconciles the desired identity (defender) with the desired interests (conventional winning through superior force). Civilian protection is a strategy of legitimation that renders words and deeds consistent, and in the process necessitates redefining interests as “winning” by delegitimizing the enemy.

Figure 1. Physical War Versus the War of Ideas



Research Design

Case Selection

George and Bennett suggest that one can reasonably select a single case for in-depth study when it is a deviant, least likely, most likely, or crucial case.¹¹⁵ Afghanistan and Iraq in some ways straddle the line between two cases and a single case, but I will treat them as two cases. Even when treated as two cases, each conflict is still a crucial case because it involves the most powerful state in the system. The two cases are two separate conflicts that overlap in terms of the organization, state, time frames, and personnel involved. Further, the C.O.I.N. doctrine that represents change within the military is the outcome under study in the Iraq war, but it is applied later and to a lesser extent in the Afghanistan war. C.O.I.N. claims to be conceived as a guide for both conflicts, but in reality, it was not adopted in Afghanistan during the same process. As two cases, they also demonstrate variance in terms of the perceived legitimacy of the

¹¹⁵ Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, Mass.: MIT Press, 2005).

invasion of each, and Afghanistan is a joint effort between the U.S. and the international community. This allows me to compare the relative urgency with which civilian casualties were treated, and in addition, material differences between the two conflicts become evident.

Both theaters were considered at the time to be two fronts in the larger war on terror. In this sense, both cases involving the U.S. are both least likely and crucial.¹¹⁶ They are the least likely or hard cases because, from a rationalist perspective, the power position of the US makes it least likely to be punished for norms violations by international institutions such as the International Criminal Court. It is least likely to suffer intervention by other states, or economic or other sanctions from the international community for killing civilians, and its domestic support for war is not historically dependent on civilian casualties, but rather is more sensitive to troop casualties.¹¹⁷ Thus by choosing a constraining strategy it is behaving in ways not expected from a purely rationalist perspective.

From a constructivist perspective, they are crucial cases because the United States has the soft power to set cultural norms, including international norms. Thus, what the U.S. interprets in terms of norms has effects for the entire normative international context. Early debates about the civilian immunity norm suggested that it could be weakened by seeming U.S. indifference to civilian casualties. Moreover, given the

¹¹⁶ George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 80-81.

¹¹⁷ Christopher F. Gelpi, Peter Feaver, and Jason Riefler, *Paying the Human Costs of War: American Public Opinion and Casualties in Military Conflicts* (Princeton, NJ: Princeton University Press, 2009).

immense resources devoted to the war on terror, the U.S. sees the ability to establish the terms of the post 9-11 international order as in its own interests. Constructing the normative environment so as to delegitimize terrorism and the use of violence by non-state actors through strengthening the norm in the public discourse is consistent with its demonstrated interests. No other case has the ability to impact the normative environment in this way.

Data

This study employs multiple data sources. I began with interviews, asking broad exploratory questions about C.O.I.N. and the U.S. shift in strategy, as well as about U.S. attitudes toward civilian casualties. I conducted approximately twenty-two interviews with active and retired military members, some enlisted who served in either or both conflicts, some junior officers, and some high level officers, as well as other civilians with an informed analytical perspective and professional insight. Because of the extremely sensitive nature of the information shared with me, it was mutually agreed that all identifying information would be excluded, with only general rank (lower level, junior officers, et cetera) to be used when necessary to clarify differences in perspective among groups of interviewees. For example, lower level enlisted personnel have a different vantage point on war than those involved in the making of doctrine. This is noted when applicable, though ranks of individuals are not.

Other military perspectives were gleaned from the voluminous literature, which is both secondary and primary. I searched out and viewed or read articles, interviews,

lectures, memoirs, and transcripts of congressional testimony, as well as leaked memos authored by key decision-makers. In order to triangulate the data, I examined and interpreted official security documents of the U.S. Government, speeches, and secondary analytical and historical sources. Wiki-leaks provided access and cues to leaked classified intelligence reports that helped to directly gauge U.S. concerns about civilian casualties during key battles such as Fallujah in Iraq. Another important data source were the primary conference reports detailing a series of meetings held with military officials from 2000 until after the adoption of C.O.I.N. in 2008. These reports demonstrate the change in attitudes that took place among high level military officials over time and included military and human rights academics who would eventually partake in the writing of the actual doctrine. The increased role of these human rights workers in the process of C.O.I.N. revision over time is taken as evidence of the diffusion of civilian-centered human rights norms into the military throughout the innovation process.

Finally, I examined the debate internal to the military during the year preceding the writing of the new doctrine, as well as the field manual itself and the early version of the field manual that was later discarded. A structured comparison allows me to demonstrate variance in how civilians were viewed strategically in older models of counterinsurgency versus the innovated model. I specifically looked for indicators as to whether civilians were seen as objects or as subjects in the war. For example, were they grouped linguistically with material objects such as property, or were they seen as participants in the social/political order? Was moral identity deemed important for

military actors? Were civilian casualties mentioned, and if so, how consistent was the treatment of civilians in the old versus new models? Reading historical and journalistic accounts of both wars allows me to place the developments in C.O.I.N. into context, particularly when it comes to events that garnered bad press for the U.S., such as atrocities and controversies about torture, detainment, and civilian casualties.

Method

The method used is process tracing and historical explanation. The process tracing method is suitable for constructivism since, as Wendt suggests, “the core of descriptions of causal mechanisms is “process-tracing, which in social science ultimately requires case studies and historical scholarship.”¹¹⁸ The aim is to “identify the intervening causal process—the causal chain and causal mechanism—between an independent variable (or variables) and the outcome of the dependent variable.”¹¹⁹ Lupovici agrees that constructivist research designs should use process tracing in order to show a relationship between variables. Because constructivism is also concerned with how the normative context matters, constructivists “need to study both the behavioural and the discursive dimensions.” “Crucial junctures” must be identified “in order to ‘tell the two stories’, and

¹¹⁸ Alexander Wendt quoted in George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 206.

¹¹⁹ Ibid.

to actually establish the regulative as well as the constitutive effects norms have on behaviour.”¹²⁰

As recommended by George and Bennett, this study will employ a structured, focused comparison, which means that both cases are narrowed to the same questions in order to guide and standardize the data. The aim of each case study is to tell the story of civilian casualties, whether and how such casualties came to be seen as problematic, and whether and how this problem contributed to the civilian-centered institutional outcome. The questions used to structure each case were as follows:

1. What was the baseline legitimacy level of each invasion based on international sentiment?
2. Did the attitudes toward civilian casualties change over time? At what point did civilian casualties come to be seen as problematic and why?
3. What were the crucial junctures in each conflict that led to the development of new approaches, whether strategic or doctrinal? Were civilian casualties seen as driving these changes? To what extent and how?
4. What kind of contact did military insiders have with the human rights community? Did attitudes toward the human rights community change over time? How is this expressed in the institutional outcome? (i.e. changes to minimize civilian casualties?)

¹²⁰ Amir Lupovici, "Constructivist Methods: A Plea and Manifesto for Pluralism," *Review of International Studies* 35, no. 01 (2009): 201.

5. What explains the variance in the two cases in terms of when each adopted a new approach and to what extent? For example, why was Iraq the first to inspire new doctrinal thinking and why was population protection in Afghanistan only considered later?
6. What institutional changes brought about as a result of civilian casualties cut across both conflicts?

Because the institution (U.S. military) and the umbrella conflict (GWOT) are the same for both wars, I divided the time periods for each conflict in such a way that overlap was minimal. This allowed me to speak about human rights development from 2001-2012s within the military as a single continuous phenomenon. The Iraq chapter will include the early years and Afghanistan the later years. Human rights is primarily examined through the military's interactions with a particular human rights group at Harvard university, which is spread across the two cases. Moreover, the sequential steps of human rights adoption structures the time periods, with Iraq containing the first three phases: instrumental use, argumentation, and persuasion, and Afghanistan containing the last two phases of habitualization and institutionalization.¹²¹

Since the CIN is not a visible variable, it must be proxied by attitudes toward civilian casualties throughout the phases noted above. As Lupovici explains, "another method for the study of norms is based on examining the actors' arguments about

¹²¹ These are the phases of human rights adoption noted in Risse-Kappen, Ropp, and Sikkink, *The Power of Human Rights*. This framework does not fit perfectly since it is designed for the impact of international norms on domestic regimes, but it does allow for tracking some movement toward a stronger human rights orientation.

normative behavior.”¹²² Modified behavior is indicated by the efforts to change doctrine (actual doctrinal changes do not always coincide with more visible troop buildups, such as the surge in Iraq). The crucial juncture in each conflict is identified as the time when the military saw civilian casualties as driving a legitimacy crisis. Coverage of each conflict ends upon doctrinal change toward civilian-protection; however, Afghanistan continues beyond doctrinal change so that more permanent institutional changes can be noted. The expected sequence of events is increased attention to civilian casualties, perceptions of a legitimacy crisis, and then attempts to innovate doctrine to remedy the situation.

Because mutual constitution of identity and interests are the primary focus, Lupovic argues that discourse analysis is needed to show constitutive effects. Discourse analysis may entail varied approaches, but this study employs critical discourse analysis, an interpretive approach that aims at analyzing the construction of meaning through language. It is critical insofar as it aims to explicate relationships of power. Since my own argument draws on the discourse analysis of others, especially (as will be explained in chapter two) on Kinsella's theory that the “civilian” is produced by locating subjects within discourses of barbarism, I will apply Kinsella's ideas to the case under study. Doing so allows me to demonstrate the war on terror rhetoric as a norms-driven discourse meant to produce identities in relation to international law and morality. Contextualizing the discourse of terrorism as a continuation of the “barbarism versus civilization”

¹²² Lupovici, "Constructivist Methods," 35.

discourse indicates the perceived need to delegitimize the enemy by invoking aspects of the CIN that resonate with the international community.

Moreover, in this approach, identity becomes a relational concept inseparable from power interests, making it compatible with a constructivist lens. This particular notion of discourse is thus Foucaultian in that it sees language as the focal point of power and discourse.¹²³ This interpretive approach examines the language employed to legitimize political action, as well as attempts to construct a preferred identity to legitimize interests. What I will look for in terms of discourse is if and how the historical language of the CIN is invoked instrumentally, as part of the GWOT, to what extent the same language claims are used to delegitimize the enemy, and then to what extent the same language claims are later seen as having created a rhetorical trap.

The intervening process will comprise the bulk of my analysis, and evidence of the presence of the civilian immunity norm will not thus be taken as evidence of the influence of the civilian immunity norm, but rather concerns about how image is connected to legitimacy in relation to the norm serves as the key indicator that the norm is important causally. Legitimacy in this case is not derived from an objective measurement imposed externally but rather a subjective concern for how civilian casualties are being interpreted by multiple audiences at the same time, with an emphasis

¹²³ Michel Foucault, *Discipline and Punish: the Birth of the Prison*, 1st American ed. (New York: Pantheon Books, 1977).

on the Arab/Muslim communities within the warzone and outside as well.¹²⁴ How this is communicated within the military as a concern is indicated by literal mentions of legitimacy as well as expressions that suggest a concern for how behavior reflects on the national and institutional image.

Furthermore, in order to show the movement from sovereignty interpretations of CIN to human rights interpretations, I will look for the language of sovereignty in the beginning, especially during the invasion and shortly thereafter. Table 1 shows that sovereignty indicators of CIN are measured by an emphasis on the military necessity principle as an enabling factor in killing civilians. Treating civilian deaths as the cost of doing business, or as the inevitable outcome of military operations, or as the fault of the enemy, is an indicator of a sovereignty orientation. Table 1 also shows that movement toward a human rights interpretation is indicated by humanity principles (distinction, precaution). Proportionality lies somewhere in between and can be used for either enabling or constraining. Treating civilian casualties as “allowable” collateral damage indicates a tendency to privilege the proportionality principle of the CIN. The key here would be the extent to which the military thought it necessary to emphasize their constraint.

¹²⁴ This concern for multiple audiences was explained earlier as a key concern within the defense community due to the “global” context of modern insurgency. The aim is not to separate out the actual effects on different audiences but only to explain how the perception of having to communicate with multiple audiences helps to explain the instrumental reliance on an international norm that generates consensus across these differences.

The increasing human rights orientation will also be measured by the extent to which the military as an organization follows the predictable steps toward norm diffusion mentioned above. The expected relationship over time is that the proper lens for viewing civilians moves away from sovereignty and toward human rights, which is indicated by the constituent concepts within the norm.

Table 1. Civilian Immunity Norm: Principles and Underlying Meta-Norms

More Sovereignty	Less Sovereignty	Less Human Rights	More Human Rights
Military Necessity	Proportionality	Precaution	Distinction

Expected Findings Combining Process Tracing and Discourse Analysis

Early Invasion

Each case study will begin by placing the conflict into context within the larger global war on terror and determining a baseline level of legitimacy. This will be based on broad sentiments of the international community regarding the legitimacy of the invasion, the degree of international support and involvement in the conflict, and where available, attitudes of relevant audiences, especially those of Arab and Muslim audiences. When perceptions of legitimacy are high, I expect to find a lower concern for civilian casualties in terms of damage to social reputation, values, or “who we are,” in connection with the treatment of civilians (while at the same time a high level of claiming an identity based on human rights, democratic values, and a high regard for innocent life in comparison to terrorists). In the face of criticism about casualties, however, I would expect to find

attitudes of sovereign power expressed in terms of “military necessity” and legalistic referents to the norm in connection with casualties; denial, displacement of blame, and other dismissive statements rather than attempts to create identity alliances with human rights in the face of criticism. Regarding the war of ideas, I would expect to find little recognition that the war of ideas is contingent on actions in the physical war.

Rising Insurgency

The causal steps should reflect an early recognition of an insurgency and the need to re-establish the monopoly of force. The level of concern for reputation costs incurred by civilian casualties would remain low in the beginning and would grow after force is escalated and the need for a clear choice about strategy begins to become apparent. Sensitivity to the strategic of killing civilians will become more common, and arguments will begin to surface about reducing casualties as a matter of winning both the war of ideas and the war on the ground. This will be intensified at key points of global criticism of the U.S. reputation as being tarnished and will take on urgency as the connection between strategic failure and identity becomes evident to key innovators in the military. As an indicator of a crucial juncture, I would expect to find an increasingly explicit articulation of the need for legitimacy in counterinsurgency, and it would be increasingly connected to the idea that killing civilians produces recruits for the enemy.

Adoption of C.O.I.N.

Upon adoption, I would expect to see a concern for operationalizing the ethical standards involved in population protection. Appeals to the ethical warrior culture will be

apparent—words like virtue, honor, ethical, moral high ground will become more common in communications both to the public and to the soldiers. Institutionalization of ethical treatment of civilians will be a goal, and the military will continue to seek out help from human rights workers in order to figure out the details of what is required to maintain a policy of civilian protection. I would also expect to find more coherent and explicit articulations of why this ethical turn is the only possible one for the U.S. to adopt. Connections will be made explicit between the war of ideas and the war on the ground. A newfound appreciation for strategic communication and controlling the narrative will emerge in the military, and a policy of accountability will emerge in military culture.

Falsification

Lupovici explains that

the mere fact that there are actors who violate the norm does not necessarily indicate that the norm does not exist....This is exactly why Kratochwil and Ruggie argue that norms cannot be falsified and hence cannot be regarded as ‘variables.’¹²⁵

My hypothesis will be considered falsified in the absence of supporting evidence as documented above. Counter-evidence would not include material incentives since that is a background to the norm. However, material factors that overrule or crowd out legitimacy concerns would be taken as counter to my hypothesis. Statements that disregard the sequential order of events centered on legitimacy concerns would weaken the hypothesis; for example, patterns of statements that suggest that population protection

¹²⁵ Lupovici, "Constructivist Methods," 33-34.

was preferred from the beginning but was only hampered by operational problems would imply a high level of norm internalization that alone explained the shift in doctrine.

Statements that the U.S. reserves the right to revert to all necessary means would counter the theory of the legitimacy gap. Statements that indicate that it mattered little, if at all, how the U.S. was perceived by foreign audiences in terms of civilian casualties. If coercive strategies were seriously considered but not chosen for purely instrumental reasons, without regard for social damage to the U.S. reputation, this would be considered evidence of a pure logic of consequences, or rationalism with no need for the addition of norms.

The next chapter provides an historical account that demonstrates both the long history of the norm as a social concern as well as the centrality of the CIN to the evolving moral purpose of the state order.

CHAPTER TWO

HISTORY OF THE CIVILIAN IMMUNITY NORM

History provides the strongest proof of the importance of moral factors and their often incredible effect: this is the noblest and most solid nourishment that the mind of a general may draw from a study of the past.

--Carl Von Clausewitz

To introduce into the philosophy of war itself a principle of moderation would be an absurdity.

--Carl Von Clausewitz

As discussed in the previous chapter, the concepts of war and morality seem, on the face of things, oxymoronic: war unleashes political power in its rawest form, which is the use of force to coerce, subjugate, or even to destroy an opposing group; morality on the other hand implies limits based on the recognition of some sort of duties or obligations. The logic of force is potentially limitless, as famously stated by Clausewitz in the above quote;¹ yet as this chapter will demonstrate, Western ways of war have long been embedded in a tradition of moral contemplation and rule-making.² A short history of those rules as they apply to the protection of civilians fulfills three purposes: first, to provide a deeper understanding of the historical context of the CIN; second, to highlight the constitutive role of the norm in the international order; finally, to demonstrate from

¹ Carl von Clausewitz, Michael Howard, and Peter Paret, *On War* (Princeton, N.J.: Princeton University Press, 1976), 190, 184.

² Historians of the just war tradition disagree on its precise origins, but some have surmised that conversations about the relationship between war and morality may be as old as war itself. See Brian Orend, *The Morality of War* (Ontario: Broadview Press, 2006), 11.

the constitutive role of the norm in the international order; finally, to demonstrate from where my qualitative measures derive by showing the norm's development as the reason for its embodiment of the tension between sovereignty and human rights. Let me begin with a brief explication of why an historical overview matters in this case.

Since war, as the realm of politics most resembling anarchy, has been considered the province of realism, the significance of morality (or ideational factors *writ large*) in the face of material interests has been largely dismissed. This view of morality is itself historical; that is, how morality has been understood to matter (or not) changes over time. This fact disappears in structural realism, which takes an ahistorical view reflective of its basic assumptions about states and the state system. This sort of structural explanation presents insurmountable problems for discerning the effects of moral norms, yet its emphasis on power is indispensable for explaining the use of force. Given the ideational turn in the past couple of decades, which has inspired reinterpretations of the realist canon, it has become increasingly evident that the *idea* that war occupies a realm separate from the rest of the moral and political world is itself an historical development. Even Clausewitz, the most influential military strategist and philosopher of war of the 19th century believed that morality matters, though to be sure morality for him mattered in a way that would hardly resonate with contemporary readers—as morale of the soldiers. In that vein, the purpose of this chapter is to provide a history of the moral limits that came to be known as the civilian immunity norm, as well as its contextual significance in shaping the broader normative order.

Derived from just war principles, informed by state practice and military tradition, and ensconced in international treaties and customary law, the civilian immunity norm is

often heralded as the oldest, most entrenched of all international norms, preceding even modern sovereignty and the Westphalian state system. The aim of the civilian immunity norm is simple in that it attempts to limit the permissible harm done to groups of people now known as civilians or noncombatants. It is considered the core moral norm of International Humanitarian Law (IHL), also known as the Laws of Armed Combat (LOAC).³ Simple on the face of things, the norm presents an enigma in that while it generates a high level of consensus (which is at least partially implied in its definition), it has also proven fragile, contingent, and in near constant danger of collapse in the face of a changing international context.⁴ Terrorism, the strategy of warfare whereby non-state actors hide among and purposefully target civilians, is only the latest in a long series of challenges to the norm.

The paradoxical character of the civilian immunity norm means that narratives of *either* progress *or* decline (or even of irrelevance) fail to capture its significance,⁵ not only to the practice of war but to international law and international relations more generally. As Helen Kinsella writes, “the laws of war,” and struggles to define the principle of distinction between combatant and civilian, “offer substantial insight into the conceptualization and institutionalization of relations among states over time.”⁶ These

³ David Kretzmer, “Civilian Immunity in War: Legal Aspects,” in *Civilian Immunity in War*, ed. Igor Primoratz (Oxford: Oxford University Press, 2007), 87.

⁴ For a recent explication of this view as it relates to the Baltic Wars of the 1990s, see Kaldor, *New and Old Wars*.

⁵ Another common view is that the norm made progress until the twentieth century when it was nearly obliterated by World War 2. From that point on, some see progress—see Thomas, *Ethics of Destruction*. Others see a steady decline—see Igor Primoratz, *Civilian Immunity in War*, 21-22. For a more nuanced view, see Kaldor, *Global Civil Society*; Kaldor, *New and Old Wars*.

⁶ Kinsella, “Genealogy of the ‘Civilian,’” 15.

laws have been “both reflective of and constitutive of” particular sociopolitical orders.⁷

As such, many of the key tensions that characterize the contemporary international context, such as the competing dictates of state sovereignty versus human rights, are embodied in the norms protecting civilians.⁸ Moral strictures have thus functioned to *both* enable and limit war’s violent potential, suggesting a more problematic relationship between morality and power than is commonly acknowledged by conventional realism.⁹ By highlighting the norm’s growing importance in relation to identity and interests in the international order, and its enabling and constraining elements, this chapter will also support my central premise that doctrinal innovation centered on minimizing civilian casualties presents a puzzle. In addition to setting the historical stage for the cases under study, the chapter will provide a concrete frame of reference for the ensuing theoretical discussion of norms, how they function, and the methodological challenges that issue from attempting to bridge empirical analysis with an expressly normative subject matter.

The sections that follow will be organized into three parts. First, to demonstrate a pattern of increasing consensus about the importance of civilians in ethical theory, this chapter will discuss the development of the idea of civilian immunity as an important

⁷ Ibid., 22-23.

⁸ Ibid., 9-20. Kinsella specifically discusses the role of civilian immunity in producing the particular meanings of sovereignty. The tensions between human rights and sovereignty is a broader observation addressed most explicitly within the English School, whose core theoretical perspectives are articulated in Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977); Martin Wight, *Systems of States* (Leicester: Leicester University Press, 1977). Linklater and Sugunami (2006) “argue that Bull’s classic text explicitly asks the question whether rules and institutions are a ‘necessary and sufficient’ condition for international order to exist. The problem for Bull is that the answer cannot be clear-cut, as the dependent variable (order) is implicated in the independent variables (institutions). The same rules and institutions that “cause” international order also form part of the shared knowledge that animates social action and makes it intelligible,” as quoted by Dunne in Donnelly, “The Ethics of Realism,” 280-81.

⁹ Conway-Lanz, *Collateral Damage*.

component of the ethical concerns of just war doctrine. Second, it will address some of the seeming contradictions within the norm itself. Third, it will provide an overview of the development of the legal norm of noncombatant immunity, as codified through treaties and conventions, which will link the strengthened consensus to increasing levels of specificity and precision in legal terms, with special attention paid to major developments in international politics that shaped the outcome of the conventions. In doing so, this work will highlight key problematic aspects of the norm that prevent or limit consensus and thus potentially weaken its practice.

Theoretical Origins and Development in Just War Theory

As mentioned above, the roots of the civilian immunity norm are located primarily in just war theory, the systematic and influential body of thought concerned with the justice of war, both in terms of when war may be waged (*jus ad bellum*) and how it is fought (*jus in bello*). While Saint Augustine is typically credited with the birth of just war doctrine, Brian Orend argues that its earliest contributions can be traced to Greco-Roman origins.¹⁰ Aristotle and Plato were both concerned with the just cause of war and what could be rightly done with conquered populations. While the distinction between combatant and civilian was both a theoretical and legal achievement of the enlightenment, attempts to specify when and why soldiers should be subject to harm provide the ethical foundation and impetus for eventually considering the additional category of those who should be protected from harm altogether. Richard Shelly Hartigan explains that the earliest precursors to the concept of the civilian were born of both moral

¹⁰ Orend, *Morality of War*, 12.

imagination and practical necessities of life in the ancient Greek *polis*. The city-state allowed the *civis*, or citizen, the stability and leisure necessary for intellectual reflection but this arrangement also created a practical distinction:

The city, urban living, with shelter secure from the elements and food supplies assured, meant civilization. It was the *sine qua non* of civilization. However, ancient man was forced to pay a price for the luxury of that reflection afforded him by urban living. He had to organize and institutionalize a portion of the city's population for its defense. Thus was born the soldier, and his alter ego, the civilian.¹¹

To be sure, the emerging moral concept of the civilian had little effect on widespread practices of slaughter and enslavement in Ancient Greece. Greek society was extremely parochial, entailing little if any sense of shared humanity with enemy populations, particularly with non-Greeks or Barbarians. It would not be until the city-state began to decline and the Roman Empire began to rise that Stoicism in the pre-Christian era would produce the seeds of a “feeling” that “some members of an enemy population ought to be spared.”¹² Other early Roman contributions to the *jus in bello* (justice in war) include among others, Cicero, a proponent of moderation who asserted that surrendering soldiers ought not be slaughtered, and Ambrose, mentor to Augustine, who called for virtuous fighting.¹³

Out of this context arrives Saint Augustine of Hippo, a towering figure in just war theory. Augustine is notable for framing the Greco-Roman ethical concerns within a

¹¹ Hartigan, *Forgotten Victim*, 19-20.

¹² *Ibid.*, 21.

¹³ Orend, *Morality of War*, 11.

Christian context, and here we can see that the use of force had to be justified against a set of moral imperatives grounded in identity: how could Christians follow the pacifistic teachings of Christ and at the same time wage war on behalf of their communities?

Augustine was much more concerned with the question of *jus ad bellum*, or when is a war just and permissible. His answer was “to repulse an invading enemy, avenge a wrong, and punish those guilty of breaching the peace.”¹⁴ His contribution to *jus in bello* is less recognized, for while he advocates limitations on even just violence, this was mere repetition of the type already commonly made for practical purposes—sparing women and children in the hope that the other side might reciprocate in the future, or for even more banal economic reasons: to preserve them for slavery.¹⁵ What Augustine did contribute to *jus in bello* is that a Christian must have right intention, both in waging war and in fighting it. In order to protect the city from encroaching barbarians, employing force must be motivated by “the right intention [which is] love for, and desire to protect, the endangered innocents,” and it must be carried out in somber, dispassionate fighting.¹⁶ So while moral condemnation against unnecessary slaughter was already in place, Augustine added, “no slaughter at all with desire for glory or revenge.”¹⁷

Augustine’s theoretical contributions did not directly impact the precarious position of what we now think of as civilians, mostly because his formulation of “just cause” overrode any latent concern for innocents of the enemy population. On

¹⁴ Hartigan, *Forgotten Victim*, 38.

¹⁵ Ibid. 36

¹⁶ Orend, *Morality of War*, 12.

¹⁷ Hartigan, *Forgotten Victim*, 36.

Augustine's account, unjust societies were more than likely to be populated by unjust souls. His model of war is therefore distinctively punitive not only toward rulers, but toward the population. Though Augustine admitted the possibility that some innocents may be killed, his practical inclination suggested that in any case, innocence is an interior condition that cannot be readily identified by soldiers. Moreover, death and unjust punishment in war were for him not the worst evils, because "in eternity they quite escape punishment."¹⁸ Regardless, as Hartigan points out, Augustine's contribution to *jus in bello* is "a groping and hesitant articulation of a guilt-innocence opposition" that leads eventually to the familiar "innocent civilian" which would shape the norm for centuries, and which is still used in popular political discourse today.

Though the following centuries of the Dark Ages were not known for great intellectual achievement, they "did manage big progress on the *jus in bello* front."¹⁹ Christian charity and mercy mixed with aristocratic chivalric codes of honor and fair play provided the normative bases for many of these conventions.²⁰ Through consultation with Augustine's writings and the Bible, the church further specified moral obligations toward civilians. Influenced by battlefield practices, changing weaponry, and even violent sporting practices of the times, such as jousting, papal edicts in the tenth century set forth a fairly concrete set of rules which were later developed and consulted by many different sources. The "Peace of God" and the "Truce of God"—as well as the 1139 Second Lateran Council and Gratian's 1148 *Decretum* resulted in, for the first time, women and

¹⁸ Quoted in Ibid., .33.

¹⁹ Orend, *Morality of War*, 14.

²⁰ Kinsella, *History of the Distinction*.

children being singled out for immunity from attack based loosely on their noncombatant status. Other types of harmful methods of fighting were prohibited as well, including the destruction of food sources, using crossbows, and employing weapons dipped in poison.²¹

As Kinsella points out, the emphasis on military honor, chivalry and fair play, and Christian values are important aspects of the Just War tradition since they will be central to the development of the idea of “civilization” as a qualifier consulted to determine who was deserving of protection and who was not.²² In terms of norm development, which is generally indicated by increasing specificity, the events of this era indicate increasingly specific behavioral obligations toward the protection of certain persons, and they build on previous doctrine, indicating a strengthening normative consensus about the protection of certain persons over many hundreds of years. On the other hand, many persons were either excluded (particularly Non-Christians) or considered “unfortunate, unintended victims.”²³

Another important benchmark for the civilian immunity norm occurs in the thirteenth century when St. Thomas Aquinas contributes the principle of proportionality, which limits the force that can be morally justified to that which is proportionate to the military advantage gained. He also provides the earliest articulation of the doctrine of double-effect, which states that the good done by unintentionally killing civilians should outweigh the harm, indicating a sense of precaution that must be taken to limit even

²¹ Orend, *Morality of War*, 14.

²² Kinsella, *History of the Distinction*.

²³ Hartigan, *The Forgotten Victim*, 76.

“necessary” violence.²⁴ At this point, two of the three limiting principles that make up the civilian immunity norm have been conceptualized, even if primitively: distinction and proportionality—with the third being precaution. Distinction carries the heaviest normative weight in that is logically and morally prior to the other two limiting principles.

It is noteworthy that insofar as the earliest preoccupations with the moral limits of war focused on when war *could* be waged and by whom, the frame of reference was nearly a complete reversal of what is today. That is, rather than assume the inevitability and almost naturalization of war in anarchy, the pacifist position of the early Christian church required answers to the question of why *it was permissible* to kill at all, and only then who could *justly* be harmed. It was this line of thinking that eventually led to a corollary logic: if some may be harmed without assigning moral culpability to their killers, then it follows that others should be protected.

As mentioned above, as just war doctrine developed, it became the foundation for the earliest forms of international law, and its concepts and categories eventually fueled aspirations of an international society of states. The roots of society (based on social interactions, in contrast to the realist idea of a “system”), were anchored in its attempts to limit war, even as the Peace of Westphalia approached, and war became increasingly recognized as a tool of statecraft. Paradoxically, the emphasis on state sovereignty was accompanied by an increased emphasis on the individual and the role of reason. The autonomous rational man in natural law accompanied the sovereign nation-state, which

²⁴ Orend, *Morality of War*, 15.

led to the next crucial turn in the development of the civilian immunity norm. This dual autonomy of individual and state would eventually come to be seen as an opposition and would be expressed in the development of international “humanity’s law.” Humanity’s law is a term coined by Teitel, who observes the increasing emphasis in international law on the interests of human beings as separate from or even in opposition to the interests of states.²⁵

The Transition from Just War to International Law

As the ecclesiastical tradition gave way to the Peace of Westphalia and the rise of the nation-state, Just War concepts became secularized and increasingly universalized by way of natural law. Three men who figured prominently in this historical transition were Francisco de Vitoria, an important Catholic theologian and political theorist of the sixteenth century, Hugo Grotius, the seventeenth century “grandfather of international law,” and Emmerich de Vattel, a Swiss jurist who lived more than a century later.²⁶ It was Vitoria who first invoked natural law and claimed that the “deliberate slaughter of the innocent is never lawful in itself.”²⁷ This distinction was for him based on the guilt of the combatants who bore arms and the presumed innocence of those who did not, unless proven otherwise. Categories of protected classes included “women, children, clerics, religious, foreign travelers, guests of the country, ‘harmless agricultural folk, and also ...

²⁵ Ruti G. Teitel, *Humanity's Law* (Oxford; New York: Oxford University Press, 2011).

²⁶ This section is based largely on the arguments of McKeogh, “Civilian Immunity.”

²⁷ Vitoria, “De Jure Bello,” 35, in *Principles*, 88, as quoted in Ibid. 72.

the rest of the peaceable civilian population.’’²⁸ Colm McKeogh argues that the practical effects for civilians were progressive in a general sense, but that the argument was incoherent because Vitoria attempted to fit natural law claims into an Augustinian punitive war framework. Recall that Augustine assumed that the responsibility for the wickedness perpetrated by the ruler was the basis for *jus ad bellum* and that the entire population shared in this guilt. The problem for Vitoria is that it cannot be said that soldiers of both sides are guilty if only one side has just cause, since guilt is what entitles one side to punish the other.

McKeogh argues that the civilian immunity norm as we currently understand it was only made possible because Grotius, in employing natural law, challenged the millennium old model of punitive wars that was justified within the Augustinian tradition as punishment for sin. Grotius paves the way for a state’s moral obligation toward the enemy population by insisting on universalizable *principles*, not just categories, as the basis for judgment. *Jus ad bellum*, or the cause for war, was universalized first, in the sense that self- preservation, rather than the guilt or innocence of the collective enemy, became the justification for fighting. This was necessary in part because the rise of the nation-state meant that standing armies and frequent warfare stretched Augustine’s punitive justification for war incredibly thin, and yet the requirements of sovereignty—as an agreement rather than its later realist meaning as an eternal material fact—necessitated the reconciliation of war with the moral framework meant to regulate state relations.

²⁸ Vitoria, “De Jure Belli,” quoted in James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740* (Princeton, N.J.: Princeton University Press, 1975), 36.

The effect on *jus in bello* was that the actions of the person under consideration must be invoked as reasons justifying his death.²⁹ In shifting the moral locus of concern away from the soldier's internal state, Grotius far surpasses Augustine's prohibition on passionate or vengeful killing. According to Grotius, "the law of nature does not allow inflicting reprisals, except on the actual person who committed the offense. Nor is it enough that by a kind of fiction the enemy may be regarded as forming a single body."³⁰ Emmerich de Vattel adds to Grotius' basic imperative nearly a century later: "The sovereign is the real author of war, which is made in his name and at his command. The troops, both officers and soldiers, and in general all the persons by whom the sovereign carries on war, are only instruments in his hands. They execute his will and not their own."³¹ While instruments who fight may be killed without attributing guilt, civilians, who retain personhood and cannot be considered instruments, may therefore not be subject to harm: "as they do not resist the enemy by force or violence, they give the enemy no right to use it towards them."³² Consideration of just cause was, importantly, effectively separated from justice in fighting, at least on theoretical grounds. The later legal norm based on this distinction is considered by most analysts to be crucial to protecting civilians since the state is seen as possessing its own will, superceding that of combatants but separate from that of civilians. Overall, the Enlightenment revision of just

²⁹ McKeogh, "Civilian Immunity," 73.

³⁰ The importance of the distinction between the collective and the individual cannot be over-emphasized, since the blurring of these lines continues to undermine compliance with the norm today. See Hugo Slim, *Killing Civilians: Method, Madness, and Morality in War* (New York: Columbia University Press, 2008).

³¹ McKeogh, "Civilian Immunity," 75.

³² *Ibid.*, 77.

war doctrine produced a version of civilian immunity that served to square the normative and material conditions of the time, and as Kinsella points out, to invoke natural law as a transition to the emerging Law of Nations.³³

Theorizing about the justness of the causes of war ended for the most part with Vattel, precisely because of the conditions of modern sovereignty:

But how shall this law be made to prevail in the quarrel of Nations and sovereigns who live together in a state of nature? They recognize no superior who shall decide between them and define the rights and obligation of each.³⁴

As Just War Theory declined, the secular turn produced the voluntary Law of Nations and the “science” of international law wherein the justness of war was not at issue so much as the conduct of war. This period of “law” was social rather than positivist, that is, based on custom, which included practice as well as conventional concepts and ways of reasoning. This period is hailed by some as the height of the civilian immunity norm, wherein agreements between sovereign states were based on a shared consensus and reciprocity. These customary understandings would greatly inform the later codification of international law. The result was that the positive laws of war, in assuming the inevitability of war between sovereigns, were more concerned with what *is* than what *should* be. The positivist bent produced problems for grounding the norm, however, in that natural law theorists attempted to shift its foundations from a moral imperative to a material fact. As McKeogh points out, Vitoria and his successor Suarez attempted to link the “powerful moral concepts of guilt and innocence to the material

³³ Kinsella, “History of the Distinction,” p.?

³⁴ Vattel, “Droits des Gens,” as quoted in Gardam, *Non-combatant Immunity*, 11.

facts of combatancy and non-combatancy...yet they can link them only by presumption.”³⁵ The difficulties of establishing a solid grounding for distinguishing between civilians and combatants, combined with many other customary ways of rationalizing who can be harmed and who cannot, leads to a permissiveness that has undermined the imperative to protect.

While the principles of the norm seem straightforward at first glance, the history thus far shows that the norm, even as it gained coherence and a level of consensus among nation-states, has historically allowed for the killing of large numbers of civilians. This is not simply because states have failed to realize the norm’s ideals but also because the norm itself is constituted by tensions between its enabling and constraining elements. These tensions are an inherited feature of the norm that help to account for its continued enigmatic character today.

The basic tension derives from just war theory itself. As a compromise between realism and pacifism, the just war tradition tries to find a middle way between acceptance of war and limiting its devastating effects. The constituent concepts of the civilian immunity norm (distinction, proportionality, precaution, and military necessity) reflect the interplay of power and morality, with the result that military necessity (as interpreted in state practice) has historically limited attempts to increase the norm’s precision and specificity. This becomes evident in the codification process, and provides insight into why large number of civilians can be killed without necessarily violating the norm.

³⁵ Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (New York: Palgrave, 2002), 94.

One of the tensions that accounts for this weakness in the norm is found in double-effect reasoning, the proportionality principle applied to *jus in bello* that was first articulated in medieval times by Aquinas. This compromise between morality and what is deemed “military necessity” reflects the tension between sovereignty based on state rights and natural law rights (eventually known as human rights) based on universal notions of humanity. While developments in the civilian immunity norm depended on the extension of rights to individual human beings to counter notions of collective guilt and punishment, the reality of war is that it kills civilians. Since Just War, and then international law based on its principles, seeks a middle way between realism’s acceptance of war and pacifism’s rejection of violence, double-effect is the compromise that makes war possible. In other words, were the pacifist stance—the total moral prohibition on killing—followed, even if it were modified to allow for the killing of soldiers but not for civilians, it is generally assumed that war would be impossible. Double-effect is a moral loophole, so to speak, whereby foreseen but unintentional deaths of civilians are permissible so long as they are “not productive of the military goal and proportionate to the good sought.”³⁶

Criticism abounds on this point. Just as Augustine saw innocence as an interior state that would not be visible to soldiers, political theorists have raised the problematic of attributing intention or its absence to states since the will of states is abstract, and can often only be judged by acts or by agents.³⁷ Moreover, the line between what is

³⁶ McKeogh, “Civilian Immunity,” 80. See also Hull, Lichtenberg, and Bica cited in nn38.

³⁷ Cavanaugh, *Double-Effect Reasoning*, 123.

intentional versus what is unintentional but foreseen is unclear and often shifts at the tactical and operational levels of military action. In a related vein, military necessity is also a potentially limitless concept. Moreover, critics such as McKeogh charge that the premises of double-effect violate the very basis for civilian immunity: the separation of *ad bellum* and *in bello* on the one hand, and the distinction between instrument and personhood on the other:

Civilians ought not be killed as a side effect of an action to save one's own combatants, for combatants may be treated as instruments, but civilians remain persons; it is not the case that two combatant lives saved outweigh one civilian life lost. Rather, the attack on the military target is only an intermediate step, a means to the end of victory in the war. Its worth cannot be assessed without reference to the *ad bellum* end for which the war is waged by that party to the conflict.³⁸

Furthermore, because the assessment of proportionality takes place event by event, the "cumulative loss of civilian life can become disproportionate to the strategic end of the war."³⁹ Regardless of its moral and theoretical limitations, double-effect and proportionality remain crucial concepts in international law, both enabling the killing of some civilians for the purposes of state, while limiting that killing, at least in theory. This remains one of the most controversial, but arguably practically essential, elements of the civilian immunity norm. Moreover, this moral tension represents well how power and morality interact to both enable and constrain the killing of civilians in war. It also suggests that empirical research focused on the norm's regulative effects would benefit from breaking the norm down into its constituent parts: does military necessity expand to

³⁸ McKeogh, "Civilian Immunity," 80-81.

³⁹ Ibid. 82.

become more permissive of killing civilians, for example? Do the parties to the conflict emphasize the sovereign rights of states over the human rights of civilians, or vice versa?

Another explanation offered for the inherent fragility of the norm is the indeterminacy of the principle of distinction itself. In her groundbreaking and highly regarded work, Helen Kinsella argues that despite the accomplishments of Just War theory, identifying who exactly counts as a civilian—and thus who should be subject to harm and who should not—has shifted considerably throughout history. Rather than taking this as evidence of the norm’s irrelevance, however, she insists that the effects of the norm cannot be understood by measuring compliance alone, but also by its constitutive effects. Tracing the codification process through the major preparatory conferences, debates, and drafts of diplomatic treaties that mark the norm’s milestones, Kinsella finds that the transition of the norm from a social to a legal (positivist) status can only be properly understood in light of the social identities, historical discourses, and power relations that shaped it.

By comparing conflicts that occurred directly before or after major milestones in the norm’s development, Kinsella was able to explain variance in the norm’s effects that could not be measured by numbers alone. She hypothesizes, and convincingly demonstrates, that because the distinction between civilian and combatant was an historical process, specifying who is a civilian relies on shifting, often inconsistent criteria based on gender, civilization, and innocence.⁴⁰ Gender, for example, is often used in a way considered to be synonymous with “civilian” (women and children being the

⁴⁰ Kinsella, *History of the Distinction*.

most common definition). Differences in the definition of “innocence,” however, can support or negate the use of gender and even age as a marker of “civilian.” For example, innocence has been applied according to a continuum of loyalty during the U.S. Civil War, and women who were considered disloyal were killed alongside men and even children. The concept was applied differently in the same time frame, involving some of the same military personnel, in the case of the Indian Sand Massacre. Here, innocence, as applied to Indians, was defined as ignorance or harmlessness, but innocence was overridden by distinctions of “civilization.” Who counted as a civilian deserving of protection was much narrower, and the killing more permissive, because the war was seen as being waged “on behalf of civilization.”

It may be tempting to view the weakness in the civilian immunity norm as an unacknowledged byproduct of the age of colonization but irrelevant to the development of the norm per se. Kinsella pushes beyond the mere fact of shifting standards, however, and ties the development of the principle of distinction to the interests and identities of the emerging European empires and the European order of states. On her account, “civilization” was the identity attribute understood to be shared by European states. Earlier notions of chivalric codes of military honor loosely structured the (voluntary) Laws of Nations between these states, but such laws were not seen as applicable to the wars of colonization. For Kinsella, the importance of the transition from an ecclesiastical to a secular order is that “Vitoria substituted the right of conquest held by Christian states for that held by civilized states.”⁴¹ Civilization takes its meaning from its binary

⁴¹ Ibid., 66.

opposition—barbarism, and wars of colonization were seen as being launched on behalf of civilization. However, barbarism has also historically been constructed as a descriptor of wars that do not honor the civilian/soldier distinction—that is, they are “barbarous” wars.⁴²

Although the barbarian is presumed to demarcate a clear *opposite* or absolute *limit* of civilization, the barbarian is, in fact, immanent to civilization. The barbarian is said to wage war unconstrained and undisciplined, this is among the characteristics of barbarism. And yet, against the barbarian, civilized entities may wage a war unconstrained and undisciplined. Consider the effects of this upon the entire distinction of barbarian and civilized believed to arise from the putative self-discipline, restraint, and moderation of civilized entities. Does this distinction disappear? Or, was it simply never there? Answers to either underscore that the barbarian remains the constitutive outside, presupposed and prefigured by civilization.⁴³

The concept of civilization served not only to allow for what most would now consider violations of the civilian immunity norm, but “the shaping of the laws themselves” were a means by which “civilized nations and civilized men defined and defended their interests and identities.”⁴⁴ Consider how Grotius links the civilized identity of the emerging society of European states to their conduct in war:

There is a common law among nations, which is valid alike for war and in war Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of: I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for

⁴² This construction continues today, although it is not as readily assumed that barbarism is an identity. See for example the basic distinction in strategy between barbarism and limited war drawn by Ivan Arreguín-Toft, *How the weak win wars : a theory of asymmetric conflict*, Cambridge studies in international relations (New York: Cambridge University Press, 2005).

⁴³ Kinsella, “Genealogy of the ‘Civilian’.”

⁴⁴ Kinsella, *History of the Distinction*, 106.

law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crime.⁴⁵

In other words, the construction of the laws of war were an important site of the construction of the international order built on the recognition of sovereignty between states on the one hand and the hierarchy between states and their empires on the other:

The tensions and ambiguities of discourses of civilization both set the limits of law (civilization vs. barbarism) and occasion the exercise of the law (from barbarism to civilization). Only individuals and nations that are defined as civilized are invested with the power to distinguish between combatants and civilians....Barbarians, by definition, lack the capacity to discriminate or to judge and, therefore, are unable to exercise this sovereign power. Consequently, as the Marten's clause illustrates so well, the empire constructs the laws of war, especially the principle of distinction, and the barbarians are held to be (always already) in violation, regardless of actual practice.⁴⁶

This points to the constitutive effects of norms: norms are essential touchpoints in the building of social identities and interests and as such form the basis for a particular order. Thus norms serve as both cause and effect at various times. This is what constructivists term "mutual constitution," which is better imagined as a process than as a linear occurrence. A non-linear causality need not be considered post-positivist, however. As Kendall Stiles and Wayne Sandholtz write, international norms change, and that change is characterized by broad cyclical patterns, meaning a norm serves as both cause and effect at different points in its development. Such shifting is attributable to political

⁴⁵ Hugo Grotius, *Concerning the Law of War and Peace in Three Books* (trans. Francis W. Kelsey), sec. 28, 30, quoted in Hartigan, *Forgotten Victim*, 99.

⁴⁶ Kinsella, *History of the Distinction*, 107.

and legal disputes that mediate between the tensions inherent in normative theory, international law, and political practice.⁴⁷

What becomes evident through the codification phase of the civilian immunity norm is that as the international order transforms to incorporate formerly colonized peoples, the debate about the norm also becomes a site for the struggle of interests and identities. In this section, I will sketch out the major legal milestones for the norm, beginning with the U.S. Civil War and ending with the 1977 Additional Protocols.

Legal Codification of the Norm

General Orders 100 (The Lieber Code)

The parallel discourses of natural law and civilization permeated the European and then the American political landscape and were intimately tied to the colonial project. John Locke's *Second Treatise*, to offer one important example, rationalized the dispossession of the Indians from their land based on such reasoning.⁴⁸ The effect of such reasoning on the civilian immunity norm was that even as the legal code attempted to specify material facts upon which to identify protected civilians, tensions and contradictions created double standards and gray areas that fell back on military honor and chivalry to discern. This is evident in General Orders 100, written by Francis Lieber and issued by the American government in 1863.

⁴⁷ Sandholtz and Stiles, *International Norms*.

⁴⁸ Indeed, some argue that his justification for private property and the rights of revolution are deeply entangled in the premise of Indians as savage. See James Tully, "Rediscovering America: The Two Treatises and Aboriginal Rights," in *An Approach to Political Philosophy: Locke in Contexts* (Cambridge, England: Cambridge University Press, 1993). See also Ronald T. Takaki, *A Different Mirror: A History of Multicultural America* (New York: Back Bay Books/Little, Brown, and Co., 2008). Takaki also argues that the project of British colonization of Ireland is also linked to the civilization versus savagery discourse.

Meant to address the escalating violence of the Civil War, General Orders 100 (Lieber Code) marked the transition from war being seen as “between professionals without a great deal of involvement of the civilian population” to increasingly affecting civilians.⁴⁹ The document was the first comprehensive attempt at codifying previous customary laws of war and was implemented as U.S. domestic law for the last two years of the Civil War. This development serves as a test case for Kinsella’s hypothesis. In comparing two wars conducted at the same time by many of the same military personnel, guided by the same legal codes, Kinsella shows that the treatment of civilians in Sherman’s March was much more discriminate than the treatment of Indians in the Sand Creek Massacre.”⁵⁰ While the Civil War was brutal against some civilians, it was not indiscriminate. Mark Grimsley argues that distinctions were made according to socioeconomic status, with the logic being that elites were targeted because they would likely support the opposition and resist the Union.⁵¹ Thus, “innocence” was based on degrees of loyalty toward the Union. Indians, on the other hand, were deemed uncivilized in a way that suspended them somewhere between the category of children and savage, fueling a tension between policies of “assimilation and extermination,” which resulted in every man being named a potential target. Gender norms—the protection of women--were applied more equally across the two conflicts.⁵²

⁴⁹ Gardam, *Non-Combatant Immunity*, 12.

⁵⁰ Quoted in Alexis Dudden, *Japan's Colonization of Korea: Discourse and Power* (Honolulu: University of Hawai'i Press, 2005), 70. See also Gerrit W. Gong, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984), 62, in Kinsella, *History of the Distinction*, 106-107.

⁵¹ Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians, 1861-1865* (Cambridge; New York: Cambridge University Press, 1995); Grimsley and Rogers, *Civilians in the Path* .

⁵² Kinsella, *History of the Distinction*, 83-84.

The Lieber Code demonstrates the extreme confusion in specifying who counts as a civilian because although it attempted to institute a definition of civilian according to material criteria: those not in uniform that had little to do with that distinction. As Kinsella argues, the visual marker of combatant does not neatly correspond to realities on the ground, especially in a civil conflict, and so the “indeterminacy of the principle of distinction affects compliance with the principle.”⁵³ The Lieber Code’s importance for the codification of the norm is its systematic reflection on the principle of distinction, and its reliance on custom as a source of criteria.⁵⁴

After the Lieber Code, the civilian immunity norm continued to rely on agreements between “civilized” states. This meant in practice that the legal aspects of the norm remained vague and that its practical implementation relied on the expectation that the moral honor of military personnel would dictate distinctions about civilians. The nascent legal norm, however, while even at low levels of specificity and precision, began to take on increasing importance as a part of the normative political order between states. The rise of a legal class meant that it also served as a test of transformational progress for nations seeking recognition as sovereign states—Japan at the turn of the century, for example, was watched by legal scholars to determine whether its conduct in war qualified it for “passage...from the oriental to the European class,” and marked those who were capable of self-rule and recognition of sovereignty.⁵⁵

⁵³ Kinsella, “Genealogy of the ‘Civilian’,” 41.

⁵⁴ Kinsella, *History of the Distinction*, 89.

⁵⁵ *Ibid.*, 109.

The Hague Conventions and the Fourth Geneva Convention

The Lieber Code, though vague and ideological, attempted to “strike a balance between the demands of military necessity and the principles of humanity.” The document survived and formed the “undisputed basis for the so-called Law of the Hague,” the first formal international treaty on the laws of war.⁵⁶ The legal sources of the civilian immunity norm are thus traceable to a long series of conventions, customs, and supporting agreements. The earliest meetings leading up to the First Hague Peace Conference reflected concerns about increasingly lethal weaponry and its effects on the means and methods of warfare. The Brussels Declaration of 1874 was one of the results of such concerns, and it mostly served to protect members of the military from “an unlimited power as to the choice of injuring an enemy,” but this was directed primarily at protecting members of the military.⁵⁷ There are a few exceptions: its concern with artillery bombardment of undefended places refers indirectly to protection of noncombatants.⁵⁸ The Hague Conventions of 1899 and 1907 revised the unratified rules of the Brussels Declaration, but still mostly took for granted that limiting the means and methods of warfare would indirectly limit civilian deaths. It was soon after, in World War I and the Spanish Civil War that the development and implementation of aerial bombardment would exploit the gaps in international law. It was not expressly forbidden to indiscriminately attack a defended area, for example.⁵⁹

⁵⁶ Ibid., 84.

⁵⁷ Gardam, *Non-combatant Immunity*, 18.

⁵⁸ Ibid., 19.

⁵⁹ Ibid., 21.

The next Hague convention produced the Hague Rules of Air Warfare in 1923, though it was never ratified. This marks the recognition of the new vulnerability of noncombatants to developing weapons technology, and it also exposed the limited compatibility of noncombatant immunity with military necessity. Were noncombatant immunity observed, aerial warfare would not at this point be permitted and would render the technology ineffective. The Rules of Air Warfare shifted the debate to proportionality and the identification of proper military objectives and targeting. The purpose of such bombardment was taken into consideration, and intention, first introduced by Augustine, became a litmus test for the norm: the Rules specified that aerial bombardment not be undertaken for the “purpose of terrorizing the civilian population or damaging private property not of a military character, or of injuring noncombatants.”⁶⁰

This did not hold, however, as World War II is almost universally recognized as the lowest point in the lifespan of the civilian immunity norm. Some believed that the distinction between combatant and noncombatant had been forever destroyed, as technology made distinguishing between targeting objectives more difficult, and intentional target area bombing and saturation bombing became more frequent and widespread. Finally, the first use of the atomic bomb, a weapon designed to be indiscriminate, appeared to mark the end of the principle of distinction. During World War 2, military necessity followed the ideology of total war in which the entire nation is mobilized for the war effort. The population was thus seen as a more efficient target for reducing the military capability of the enemy. As Ward Thomas notes, the problem was

⁶⁰ Ibid., 22.

not that the norm did not exist; rather it was that the early days of international law had produced a “multiplicity of laws” that had “a relatively modest impact on expectations, preparations, and decisions in war.”⁶¹

The enormous gaps between the Laws of the Hague and current state practice cast into doubt the ability of international law to uphold the very principle of distinction, let alone the regulations needed to sustain it. This is why the Fourth Geneva Convention (formally entitled Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War of 1949) was *in name* the first attempt to specifically codify the treatment of civilians, but in reality its scope was limited to the protection of civilians in the custody of a foreign military. As Gardam explains, “any provision in the draft of the convention designed to protect the civilian population from the dangers of military operations was carefully removed.”⁶² This was done out of fear that the conventions, in reaching far beyond state practice to limit conduct during hostilities, would not be ratified. Kinsella adds that sovereignty was the overriding concern between states, and that “delegates to 1949 preparatory conferences deemed the sovereignty of states, which is inextricably bound to the emergence and the codification of the laws of war, too sacred to be subjected to international regulation.”⁶³ Instead, the general statement of principle

⁶¹ Jeffrey Legro, *Cooperation Under Fire: Anglo-German Restraint During World War II* (Ithaca: Cornell University Press, 1995), 99, as quoted in Thomas, *Ethics of Destruction*, 123.

⁶² Jean Pictet and International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949*, 4 vols. (Geneva: International Committee of the Red Cross, 1952), as cited in Gardam, *Non-Combatant Immunity*, 10.

⁶³ Kinsella, "Genealogy of the 'Civilian'," 182.

found in the Martens Clause, formulated in the Hague Conference of 1899, provided the guidelines for the legal norm until the Additional Protocols. It states that

Until a more complete code of the laws of war is issued, the high contracting parties think it right to declare that in cases not included in Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience.⁶⁴

Interestingly, however, while the Geneva Conventions were hesitant to restrict state behavior toward civilians, it did for the first time introduce the protection of noncombatants in non-international armed conflict, providing the seeds for the later Additional Protocols.⁶⁵ The Additional Protocols to the Geneva Conventions of 1977 attempted to remedy the timidity of the Geneva Conventions of 1949 by codifying the main precepts of just war principles and secular customs into actual battlefield rules.⁶⁶ This development was profoundly shaped by post World War 2 challenges to the colonial world order, when colonized peoples became represented in the forum of the newly formed United Nations. The U.N., formed in response to the atrocities and enormous scale of destruction wrought by the World Wars, quickly became the forum for the former third world to push a human rights agenda, particularly the right to self-determination.⁶⁷ It was not until the preparation for the 1977 Additional Protocols that the

⁶⁴ Preamble to the 1899 *Hague Convention II*.

⁶⁵ *Ibid.*, Article 3.

⁶⁶ Kretzmer, "Civilian Immunity," 85.

⁶⁷ Human Rights Law also developed after WW2 to address the rights of persons vis a vis their own states, reflecting to some extent the realist view that domestic and international politics are different spheres and should have different jurisdictions. As Kretzmer points out, however, this partition between the two bodies of international law quickly became permeable, and recently, "the International Court of Justice (ICJ) opined that the norms of HRL apply at all times and places, although in a situation of armed conflict IHL

movements arising in the former third world insisted that they be recognized as equal belligerents. As Kinsella points out, for the first time the “‘barbarians’ dictated the laws of war.”⁶⁸

The 1977 Additional Protocols

Gardam concurs that the overarching political context for the 1977 Additional Protocols was the ongoing liberation movements (and the resistance to that struggle by incumbents). Even as the U.N. effectively outlawed war, “for some of these States an integral component of their political agenda was the right of such peoples to use force to achieve their goal of self-determination [which] caused considerable disquiet in the international community.”⁶⁹ Some of these movements revived the medieval Just War paradigm that claimed that a just cause superceded limits on the means and methods of warfare. Gardam and others at the time saw this as a threat to civilian immunity not because of the potential for equal belligerent status of internal war combatants but because the guerrilla warfare strategies used in such wars threatened to undermine the very distinction between *jus ad bellum* and *jus in bello* that made compliance possible. That is, it threatened to support the claims to killing of civilians in the pursuit of a just cause.⁷⁰

constitutes *lex specialis*, which may be relevant in interpreting and applying the human rights norms.” Ibid. 87.

⁶⁸ Kinsella, *History of the Distinction*.

⁶⁹ Gardam, *Non-Combatant Immunity*, 43.

⁷⁰ Ibid.

Other developments in international politics at the time reflect this same basic struggle. After the 1972 Munich attack on Israeli civilians, international terrorism became almost synonymous with attacking civilians. Drawing on the ongoing debates about the Additional Protocols, terrorism became not only a descriptor of a strategy or tactic, nor even an evaluative judgment, but it became an identity for an entire liberation movement (most notably at this time, the Palestine Liberation Movement). Moreover, as state terrorism was employed against various resistance movements in Latin America, the near conflation of terror with killing civilians became politically charged and complicated the codification of the Additional Protocols. The emergence of the anti-terrorism norm became closely related to the civilian immunity norm. Parhad explains

The relatively powerful states, including most of the Western states, saw the creation of a strong anti-terrorism norm as an opportunity to reinforce some level of order in the anarchical society of international politics, by de-legitimizing a certain category of violence that was most often a “weapon of the weak.” Meanwhile, many of the weaker states saw norm-building efforts as an opportunity to bring attention to more insidious and pervasive forms of violence and oppression in the international system.⁷¹

The right to self-determination movement challenged the very notion of who properly represented civilization. The rebels in the French Algerian War, for example, challenged the Western identification with civilization by debating and interpreting the laws of war.⁷² Western states such as the United States who self-identified as a civilized state were faced with a difficult choice. On the one hand, leaders resisted legitimizing guerrillas as belligerents with rights in international wars because to do so would

⁷¹ Rita Parhad, *Illegitimate Violence: The Creation and Development of the International Norm Against Terrorism* (University of California, Berkeley, 2006), 2.

⁷² Kinsella, "Genealogy of the 'Civilian'," 232.

challenge the exclusive claims to sovereignty and the monopoly on legitimate force that sovereignty entails. Furthermore, those states who anticipated involvement in struggles against Guerrillas objected to the military constraints of the additional Protocols, including states who found themselves the site of secessionist struggles.⁷³ On the other, they wanted to delegitimize the methods used by guerrillas and terrorists by ratifying the legal norm.

The result is that the United States rejected Protocol I which mentions guerrilla fighters as combatants in international wars and accepted Protocol 2, which addresses internal wars. Reagan's 1987 remarks to the Senate make clear his objections:

‘It is unfortunate that Protocol 1 must be rejected,’ the President wrote. But, he added, ‘we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.’⁷⁴

Reagan goes on to say that the United States will continue to abide by the principles of noncombatant immunity independently of the dictates of international law. As of the current writing, Protocol I has not been ratified by United States, Israel, Iran, Pakistan, and Turkey. Most of the contributions of Protocol I have been considered customary law since then, however, and the general tenets regarding civilians are widely accepted. The contributions of the Additional Protocols are many and include most importantly the definition of civilian. Article 48 of Additional Protocol I defines the principle of distinction:

⁷³ Gardam, *Non-Combatant Immunity*, 159.

⁷⁴ Quoted in *New York Times*, February 16, 1987, accessed April 10, 2011, online: <http://www.nytimes.com/1987/02/16/world/reagan-shelving-treaty-to-revise-law-on-captives.html?pagewanted=all&src=pm>.

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁷⁵

The three principles of protection (distinction, precaution, and proportionality) became enshrined in the Additional Protocols, with distinction given the most weight (article 48 of API). Furthermore, it states in article 51:

1. The civilian population and individual civilians shall enjoy general protection against danger from military operations. To give effect this protection the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁷⁶

The challenge of international law has been to maintain the determinacy of distinction based on a person's noncombatant status. Kinsella rightly points out that basing civilian status on the direct participation in hostilities does not solve the issue of determining who is and who is not a combatant. Since non-international warfare has become the norm since World War 2, the reality that guerrilla fighters do not distinguish themselves by openly carrying arms still holds. This makes the burden of distinction more difficult in practice, but also more conceptually difficult to maintain since guerillas and insurgent rely on the cover and support provided by civilians in order to be effective. In terms of military strategy in coping with insurgency, the reality is that counterinsurgency has tended to be far less discriminate than in recent interstate wars.

⁷⁵ Kretzmer, "Civilian Immunity," 88.

⁷⁶ Ibid.

To sum, despite the long history and high level of acceptance of the norm at the abstract level, attempts to codify and apply the norm have always been contentious, contingent, and utterly political insofar as the norm shapes and is shaped in turn by the prevailing political order. As such, the norm has been central to the Western war-making tradition, but the U.S. experience with counterinsurgency, its importance to U.S. identity and interests has not always translated into compliance, particularly in these types of wars. Thus, this historical overview supports my basic premise that at a crucial juncture, the doctrinal shift invoked by the U.S. military need not have been in the direction of constraining violence toward civilians in Iraq and Afghanistan. When faced with a failure in strategy, the new strategy chosen by the U.S. could have theoretically enabled or constrained the scope of violence employed in fighting the wars in Iraq and Afghanistan.

Furthermore, this chapter provides the basis for identifying constitutive effects in the conflicts in Iraq and Afghanistan through the employment of a long history of CIN language and legitimating discourses, in particular its reliance on the discourses of “civilization versus barbarism” as well as the “innocence” of civilians. Read in this light, it makes sense that the legitimacy struggle present between the U.S. and non-state actors would lean so heavily on the language of the CIN.

CHAPTER THREE

DOCTRINAL INNOVATION AND CIVILIANS

I argued in the first chapter of this study that the doctrinal shift toward CIN compliance that occurred in Iraq and later in Afghanistan is remarkable because no clear historical pattern suggests a shift toward compliance in the face of strategic failure. The *content* of the new doctrine marks a radical break with previous doctrine in that it forged a new consensus about not only how to fight a war but about what the appropriate goal of war should be— the protection of the population rather than the destruction of enemy forces,¹ the latter of which has been a core assumption in U.S. military doctrine since at least 1944.² This chapter will examine alternative (though not necessarily opposing) explanations. Since my question is embedded within the larger concern of how change in doctrine occurs, in the pages that follow, I will first briefly review how previous literature has explained doctrinal innovation more generally. Then, since not only the mechanisms of change but the particular choice of civilian protection is under examination, I will continue with a discussion of the recent theories of state behavior toward civilian in war, regardless of war type. I finish with locating the norms-based approach articulated in chapter one within the existing literature on civilians in war.

¹ Army, "FM 3-24 Counterinsurgency."

² Clark, "Innovation Under Fire," 6.

Summary of Argument

To this point, I have argued that a constructivist approach is useful in explaining how what is right comes to be seen as what is useful. In the language of norms, the strength of the civilian immunity norm is both a negative and positive resource: it shapes doctrine through regulative effects by constraining the range of strategic choices seen as appropriate and actionable; at a more fundamental level, it shapes doctrine through its constitutive role in producing an ethical, rules-based international order, providing a source of legitimacy to define “who we are” in relation to the enemy in the “war on terror,” as well as in the insurgencies on the ground in Iraq and Afghanistan.³ In the second chapter, I provided an historical overview to show gradual development of the civilian/combatant distinction and its constitutive role in the normative international political order.⁴ This argument has been specified already, so it will only briefly be supplemented with a further explanation of human rights diffusion theory.⁵

Military Doctrine

Military doctrine is the link between grand strategy and the use of force to meet political goals. Military doctrine provides a formal and “explicit articulation of the means

³ The logic of appropriateness versus consequences was conceptualized by March and Olsen, “Institutional Dynamics.” For a critique of the limits on this binary, and an argument that states straddle these two logics in practice, particularly when it comes to the use of force, see Hurd, “Legitimacy and Strategic Behavior.”

⁴ Moral outrage about killing civilians in war has been a constant, but the norm was legally imprecise until it was codified in the Additional Protocols of 1977. For an explanation of why this is the case, see Pilloud et al., *Commentary on the Additional Protocols*. Moreover, “terrorism” was neither an identity nor was it linked solely to the killing of innocent civilians until after the Munich attacks on Israeli Olympians in the early 1970s. See Parhad, “Illegitimate Violence.” On the evolution of terrorism as a tactic see Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 2006).

⁵ See especially Thomas Risse-Kappen and Kathryn Sikkink, “Introduction,” in *Power of Human Rights*.

by which armed forces are to secure national security objectives.”⁶ Effective military doctrine achieves what Posen terms “political-military integration” or the fittedness of military means to political ends. When “political objectives and military doctrine are poorly reconciled,” states incur costs, lose wars, and at the extreme end, “jeopardize their survival.”⁷ Doctrine thus reflects the organization’s attempts to accurately grasp and convey the current state of warfare.⁸ In doing so, doctrine provides militaries with “goals, tasks, cognitive tools and guidance to prepare for and execute military operations suitable to the environment in which it operates.”⁹ In other words, doctrine lays out a broad vision of the best available strategies for succeeding within that context.¹⁰

Clark argues that since doctrinal change must make it through a political and bureaucratic process, when innovation does succeed, it expresses a change in the prevailing consensus within the organization and in the civilian leadership as to how the security environment has changed and how wars are best fought in light of that change. My study contributes to this literature by explaining how the normative environment contributes to changing perceptions of the security environment that resulted in new doctrine in the two conflicts under study.

⁶ Quoted in Clark, “Innovation under Fire,” 3. See also Barry Posen, *The Sources of Military Doctrine: France, Britain, and Germany Between the World Wars* (Ithaca: Cornell University Press, 1984); Rosen, *Winning the Next War*; US Army Field Manual 3-0 200 as cited in Clark, “Innovation under Fire,” 3.

⁷ Posen, *Sources of Military Doctrine*, 25.

⁸ Archie Galloway, “FM 100-5: Who Influenced Whom?” *Military Review* 71, no. 03 (1986), cited in Clark, “Innovation under Fire.”

⁹ Theo Farrell, “Making Sense of Doctrine,” in *Doctrine and Military Effectiveness*, eds. T. F. Michael Duffy and Geoffrey Sloan (Exeter, England: The Strategic Policy Studies Group, 1997), cited in *ibid.*

¹⁰ Robert Endicott Osgood, *Limited War: The Challenge to American Strategy* (Chicago: University of Chicago Press, 1957); Shelford Bidwell and Dominick Graham, *Fire-power: British Weapons and Theories of War, 1904-1945* (New York: Routledge, 1982), cited in *ibid.*

Existing debates about military doctrinal innovation follow the two major schools of thought represented by Posen and Rosen and have centered on whether internal (organizational) or external factors (civilian intervention) are responsible for its occurrence. Posen emphasizes the role of decision-makers inside the military who assess the changing security environment, while Rosen believes that if innovation is to occur, it must be imposed by the civilian administration as it responds to a shifting balance of power.¹¹ Recent scholarship has attempted to bridge the two schools by theorizing that bureaucratic politics is responsible for the success of military innovation.¹²

Interestingly, however, all agree that while the need for change is urgent in the face of strategic failure, it nevertheless rarely succeeds. Battlefield conditions alone do not determine wide reaching change or innovation in doctrine. Instead, battlefield information must be interpreted and doctrine must then be ushered through a process of change. The U.S. in Vietnam, for example, never fully embraced counterinsurgency, despite the presence of the insurgency in South Vietnam and despite the efforts of General Creighton Abrams to push for the change.¹³ Even when doctrinal change succeeds, the logic of the strategic response is not predetermined but may follow any of a number of paths. The U.S. counterinsurgency in the Philippines, for example, mixed civil reforms with civilian victimization.¹⁴

¹¹ Posen, *Sources of Military Doctrine*; Rosen, *Winning the Next War*.

¹² This characterization draws heavily on the work of Clark, "Innovation under Fire."

¹³ John A. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (Chicago: University of Chicago Press, 2005); Clark, "Innovation under Fire."

¹⁴ "The U.S. Army's ...efforts to implement civil government and social reforms, and its ability to coerce Filipinos through property destruction, imprisonment, and in several instances, physical abuse proved stronger than revolutionary ideology or intimidation," in Brian McAllister Linn, *The U.S. Army and*

Since 1944, doctrine has been periodically changed, but the constant assumption has been that the way to win wars and achieve security is “through the destruction of enemy forces.” This core assumption allowed new strategies to develop but prevented others. For example, the Active Defense doctrine, which held that the first battle was the most important determinant of strategic success,¹⁵ was adopted in the early 1970s even as Creighton Abrams’ attempts to innovate doctrine in Vietnam were not.¹⁶

According to Clark, the primary obstacle to doctrinal innovation is the difficulty of achieving double-loop learning within the bureaucracy of the military. Double-loop learning is a term coined by Argyris and Schein to refer to organizational learning that questions the deep assumptions and goals of the organization in order to solve problems.¹⁷ This is difficult to achieve and rare because members of organizations tend to have vested interests in maintaining current assumptions, and members (and perhaps human beings broadly) tend to engage in “defensive reasoning” when assumptions are questioned. This is in contradistinction to single loop learning which tries to solve

counterinsurgency in the Philippine war, 1899-1902 (Chapel Hill: University of North Carolina Press, 1989), 167. See also Downes, “Draining the Sea,” Kathryn McNabb Cochran and Alexander B. Downes, “It’s a Crime, but Is It a Blunder? The Efficacy of Targeting Civilians in War,” APSA 2010 Annual Meeting, 2010.

¹⁵ Clark, “Innovation under Fire,” 6. See also 100-5 Operations 1976; FM 100-5 Operations 1982; Austin Long, “Doctrine of Eternal Recurrence,” in *RAND Counterinsurgency Study* (Santa Monica, CA: RAND, 2008); Benjamin King, *Victory Starts Here: A 35-year History of the US Army Training and Doctrine Command* (Fort Leavenworth, KS: Combat Studies Institute Press, US Army Combined Arms Center, 2008), as cited in Clark, “Innovation under Fire,” 6.

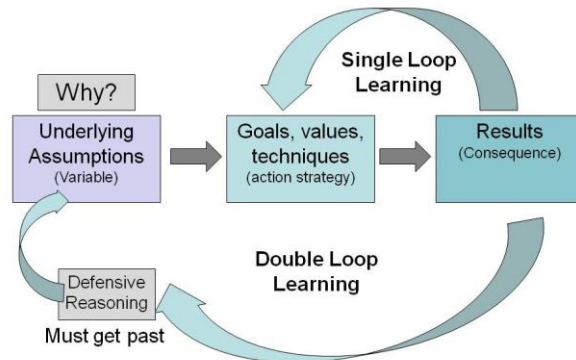
¹⁶ Rothbart argues that throughout much of the 20th century, technocratic military perspectives encouraged civilians to be seen as objects or obstacles on the battlefield rather than as human subjects, in Rothbart and Korostelina, *Why they Die*.

¹⁷ Chris Argyris and Donald A. Schön, *Organizational Learning: A Theory of Action Perspective* (Reading, Mass.: Addison-Wesley Pub. Co, 1978).

problems with different means but without ever questioning the appropriateness of the goals. Double-loop learning is pictured below:

Figure 2. Double Loop Learning¹⁸

Double Loop Learning: Argyris & Schön



A doctrinal entrepreneur must have the authority, access, and autonomy within the organization to set into motion the double loop learning process, creating a community of like-minded innovators who “update conceptual understandings regarding what, how, or where military force is to be applied.”¹⁹ This process entails identifying the problems with previous doctrine, especially its faulty assumptions, and developing solutions based on new assumptions better oriented to the current security environment. Success requires overcoming resisters who are attached to or who have a vested bureaucratic interest in maintaining the old doctrine, gaining the support of the civilian administration and then using that strengthened position to implement the new doctrine within the organization, thus achieving the double loop learning process.

¹⁸ Schematic sourced from Donald Clark, "Double Loop Learning Schematic: Argyris and Schon," accessed October 12, 2012, http://www.nwlink.com/~donclark/leadership/ooda_orientation%20.html.

¹⁹ Quoted in Clark, "Innovation under Fire," 24. See also Posen, *Sources of Military Doctrine*, 13; Clausewitz, *On War*, 595-596, as cited in Clark, "Innovation under Fire," 24.

According to Clark, who compares General Abrams' failed attempt to innovate doctrine toward counterinsurgency in Vietnam with General Petraeus' successful attempt in Iraq, outcomes are a function of the attributes of the bureaucratic position of each entrepreneur at each phase of the innovation process:

In the face of strategic defeat, the attempt to innovate begins with members of an armed service. Within the organization, these individuals must convince their colleagues to revisit long held assumptions. They must then 'exit' the organization and present the need for doctrinal change to civilian authorities and convince them to intervene in support of their proposed innovations. With civilian intervention, innovators 're-enter' the organization with the additional resources and authority necessary to attempt a change in operational behavior.²⁰

While Clark's study shows strong support for the argument that authority, autonomy, and access are required in order to usher innovation through the bureaucracy, he concludes that this was not the case for the idea that back-channel access to the presidential administration *determines* support: both Abrams and Petraeus enjoyed access, but only Petraeus succeeded. As the above schematic demonstrates, overcoming defensive reasoning is the main obstacle to overturning assumptions and beginning to see goals as inappropriate. A bureaucratic position that allows access to key decision-makers is necessary but not sufficient to overcoming defensive reasoning. I suggest that the international normative environment, while not the only difference accountable for the two outcomes, is nevertheless an important one since it was in response to Vietnam that

²⁰ Ibid., 2-3.

the CIN was strengthened. While the experience of counterinsurgency in Vietnam did not translate into doctrinal innovation, the vulnerabilities of civilians caught in the cross-fire in Vietnam had a lasting effect on international norms. The images of civilian suffering broadcast by journalists stood in stark relief to the hearts and minds rhetoric.²¹

International reaction to the large scale suffering of Vietnamese civilians during the conflict²² helped legal aspects of the civilian immunity norm gain significant traction in the 1970s, and Michael Walzer's book, *Just and Unjust Wars*, sparked a renewed interest within both the international academy and among the American public about moral behavior in war.²³ This means doctrinal entrepreneurs in Vietnam, as compared to entrepreneurs in the Global War on Terror, were lacking a key resource in selling the idea of population protection as a security issue.

Theories of State Behavior Toward Civilians

In order to lay the groundwork for arguing why a norms-based approach is necessary if we are to understand how the constraining normative environment shapes doctrine, it is necessary to first address the recent but quickly growing literature seeking to explain both when and why states do and do not target civilians in war. The theories

²¹ One such response was Peter Davis, "Hearts and Minds," (United States Rialto Pictures, 1974). This documentary is representative of the type of critique that sought to expose the gap between the rhetoric and the reality of state behavior toward civilians.

²² And in response to the spread of guerilla-based independence conflicts.

²³ Walzer, *Just and Unjust Wars*.

are grouped according to approach and include regime type, identity, military culture, and strategic-rational theories.²⁴

Regime Type: Democracy as Determinant

Probably the most intuitive and popularly accepted argument about state behavior toward civilians is that democracies are more restrained in their treatment of civilians than are authoritarian regimes. Regime type arguments encompass two contradictory theses about how the attributes of a state affect its treatment of foreign civilians in war. The two relevant characteristics of democracies include the values of the populace and the institutional mechanisms of accountability that pressure state leaders.

The theory that democracies are less likely to victimize civilians is an outgrowth of democratic peace theory.²⁵ Because democracies are rooted in the liberal philosophical concepts of human dignity and individual freedom, their political cultures and institutional arrangements are based on the rule of law. The logic holds that domestic respect for the law would extend to international law and would thus counter the temptation to invoke the idea of collective guilt, that is conflating combatants, who pose a threat and can be legally killed, with civilians, who do not. The assumption is that these Kantian ideals and moral absolutes are reflected in the values of the democratic

²⁴ This characterization of the approaches to explaining state behavior toward civilians is borrowed from Andrew M. Bell, "The Role of Military Culture in Civilian Victimization During Counterinsurgency: Examining the Ugandan Civil Wars," APSA Annual Meeting, New Orleans, LA, 2012.

²⁵ See Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy and Public Affairs* 12, no. 3 (1983); Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs, Part 2," *Philosophy and Public Affairs* 12, no. 4 (1983).

populace,²⁶ and that public opinion would electorally punish leaders who violate international norms so close in spirit to domestic norms. Such constraints, it is theorized, would not inhere in autocratic regimes.

Some support for this thesis has been found in public opinion polls, for example when Mueller found that democratic public opinion generally does not support the direct victimizing of civilians.²⁷ Engelhardt's 1992 study also finds that "nondemocratic regimes are able to rely on brutalization tactics more readily than democracies."²⁸ Davenport and Armstrong link the level of democracy to the level of repression in internal wars and find that strong democracies (but not weak) do not repress in internal wars.²⁹ This holds with mass killings in guerrilla wars also: Valentino, Huth, and Balch-Lindsay find that highly democratic states are 27% less likely than highly authoritarian states to engage in intentional killings of this type. This relationship is stronger when the regime's existence is threatened by the insurgency, and when the insurgency enjoys a high level of support among the population.³⁰ Watts adds that even in conventional warfare, "in cases short of total war, democracies have emphasized greater restraint than non-democracies in the use of air warfare in order to limit the killing of noncombatants,

²⁶ R. J. Rummel, "Democracy, Power, Genocide, and Mass Murder," *Journal of Conflict Resolution* 39, no. 1 (1995).

²⁷ John Mueller, "American Foreign Policy and Public Opinion in a New Era: Eleven Propositions," in *Understanding Public Opinion*, ed. Barbara Norrander and Clyde Wilcox (Washington, D.C.: CQ Press, 2002).

²⁸ Michael J. Engelhardt, "Democracies, Dictatorships, and Counterinsurgency: Does Regime Type Really Matter?," *Conflict Quarterly* 12, no. 3 (1992), as cited in Bell, "Role of Military Culture," 5.

²⁹ Christian Davenport and David A. Armstrong, "Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996," *American Journal of Political Science* 48, no. 3 (2004).

³⁰ Valentino, Huth, and Balch-Lindsay, "Draining the Sea."

even when doing so is perceived as a costly limitation.” Watts attributes this to domestic norms expressed in domestic politics, which is driven by public opinion.³¹

The democratic public opinion thesis does not necessarily hold in cases of indirect strategies of civilian victimization. Mueller, in measuring public opinion about U.S. behavior toward civilian victimization after the Gulf War, remarks that “the public's remarkable indifference to the massive death toll essentially caused by its government's sanctions policy in the decade since the war suggests that any avowed concern for the lives of foreign civilians is at best an expression of unreflective smugness and at worst one of arrant hypocrisy.”³² Moreover, Valentino et al's findings about democratic behavior regarding mass killings in a guerrilla war leaves open the possibility that highly democratic regimes are less likely to generate their own guerrilla resistance movements strong enough to threaten the regime, nor are such movements likely to enjoy a high level of popular support. Models based on the relationship between democracies and insurgencies does not fit well with the object of this study because a highly democratic *intervening force* may respond to different incentives than the domestic regime fighting for its life; the effects of the domestic political culture may not be as relevant in such cases.

Some go further and insist that the logic of democratic institutions works against expected democratic values in the sense that politicians who are dependent on elections

³¹ Stephen Watts, “Air War and Restraint: The Role of Public Opinion and Democracy,” in *Democracy and Security: Preferences, Norms, and Policy-making*, eds. Matthew Evangelist, Harald Mueller, and Niklas Schoernig (New York: Routledge, 2008), 54.

³² John Mueller, “Public Opinion as a Constraint on U.S. Foreign Policy: Assessing the Perceived Value of American and Foreign Lives,” in International Studies Association (Los Angeles, California 2000), 1.

to keep their positions feel more pressure to win wars. Reiter and Stam find that “when the people willingly offer consent for war, even wars of empire or genocide, then democratic governments have obliged.”³³ Moreover, as Watts notes, democracies, more than autocracies, are averse to the casualties of its own soldiers and are thus likely to choose methods that shift the risk toward civilian populations, such as air power.³⁴ Further, some argue that democratic leaders are more likely to do “whatever it takes” to win so that they do not risk the next election for losing the war.³⁵ In interstate warfare, Downes finds that, statistically, democracies are more likely to engage in mass killings, particularly in wars of attrition that they are desperate to win.³⁶ Contra Valentino’s findings, the survival factor is not necessary to reach a threshold of desperation, however. For Downes, the fact that democratic leaders feel pressure to reduce costs and save the lives of their own soldiers is enough to spark mass killing. Interestingly, Downes includes guerrilla warfare as a subtype of attrition in interstate war, which may account for the differences between his and Valentino’s findings.

Given that regime theory produces inconclusive results and relies on contradictory assumptions, it is not clear that regime type determines state behavior toward civilians.

³³ Dan Reiter and Allan C. Stam, *Democracies at War* (Princeton, N.J.: Princeton University Press, 2002), 163.

³⁴ Watts, “Air War and Restraint.”

³⁵ Ibid., 54. See also Sebastian Rosato, “The Flawed Logic of Democratic Peace Theory,” *American Political Science Review* 97, no. 04 (2003): 593-94; Kenneth A. Schultz, *Democracy and Coercive Diplomacy* (Cambridge: Cambridge University Press, 2001), 15-16, cited in Bell, “Role of Military Culture.”

³⁶ Downes, *Targeting Civilians in War*; Downes, “Desperate Times, Desperate Measures;” Downes, “Restraint or Propellant?;” Cochran McNabb and Downes, “It’s a Crime;” Kathryn McNabb Cochran and Alexander B. Downes, “Targeting Civilians to Win? Assessing the Military Effectiveness of Civilian Victimization in Interstate War,” in *Rethinking Violence: States and Non-State Actors in Conflict*, ed. Erica Chenoweth and Adria Lawrence (Cambridge: MIT Press, 2010).

As Bell points out, history demonstrates a mixed record of using civilian victimization strategies, and democratic publics are a fickle bunch, sometimes demonstrating a “rally round the flag effect,” and at other times showing a willingness to trade the lives of others when they perceive their own security to be at stake.³⁷ However, there is clearly a strong identification of democracies with values that support civilian immunity. I will argue that this identification can be better understood from a norms perspective rather than as a too-broad “regime type” variable.

Identity-Based Approaches to State Behavior toward Civilians

Identity theories of civilian victimization are based on the observation that civilians are more likely to be targeted—or if the logic is extended, more civilian casualties are likely to be tolerated—when the population is viewed as “barbaric” or different in a way that inspires hostility or animosity. The relevant categories of difference are generally cultural, ethnic, racial, and religious and are taken as the key predictors for rationalizing exceptions to moral codes prohibiting the targeting of innocents. John Dower, for example, explains the atrocities of World War 2 involving Japan as the result of racist demonization of the enemy’s collective identity.³⁸ As we have seen in the previous chapter, the identity categories of “civilization versus barbarism” have been central to the development of the civilian immunity norm itself,

³⁷ See Matthew A Baum, “The Constituent Foundations of the Rally-Round-the-Flag Phenomenon,” *International Studies Quarterly* 46, no. 02 (2002); Norrin M. Ripsman, *Peacemaking by Democracies: The Effect of State Autonomy on the Post-World War Settlements* (University Park, PA: Pennsylvania State University Press, 2004), as cited in Bell, “Role of Military Culture,” 6. On the security issue, see Conway-Lanz, *Collateral Damage*.

³⁸ John W. Dower, *War without Mercy: Race and Power in the Pacific War* (New York: Pantheon Books, 1986).

often mediating the fuzzy and problematic category of who counts and is thus deserving of protection as an “innocent civilian.” As Kinsella and others have asserted, the idea that only the “civilized” are entitled to civilian immunity runs deep in the history of the norm, with the result that identities outside of the European cultural tradition were more likely to be dehumanized and denied protection, particularly in colonial conflicts.³⁹

The identity thesis is even more strongly associated with the surge in ethnic and intrastate conflict in new, weak, or failing states after the Cold War.⁴⁰ Kaufmann argues, for example, that cultural difference is associated with particularly intense violence against civilians in civil wars.⁴¹ While dehumanizing the enemy in order to rationalize

³⁹ Kinsella, *History of the Distinction*. See also Ronald T. Takaki, *A Different Mirror: A History of Multicultural America* (Boston: Little, Brown & Co., 1993). Takaki conducts a similar analysis on the history of the “civilization versus savagery” discourse and finds that though history supports the idea that violence toward colonized peoples was particularly brutal and that it was rationalized by assigning the label of savage or uncivilized, it was primarily driven by economic factors—the appropriation of land and resources, including the exploitation of the labor (the productive energy of the actual bodies) of the colonized populations. Identity and race in these cases are understood by Takaki as a strategy to maintain economic and political dominance rather than as a cause of brutality toward civilians.

⁴⁰ This is particularly associated with the “age-old animosities” thesis attributed to the Bosnian conflict. See remarks by President George H.W. Bush, quoted in Andrew Rosenthal, “Bush Urges U.N. to Back Force to Get Aid to Bosnia,” *New York Times*, August 7, 1992; see also Conor Cruise O’Brien, “Wrath of Ages: Nationalism’s Primordial Roots,” *Foreign Affairs* 72, no. 5 (1993). For an overview of the 1990s debate between instrumentalist and primordial explanations for the increase in identity conflict, see Ted Robert Gurr, “Peoples against States: Ethnopolitical Conflict and the Changing World System,” *International Studies Quarterly* 38, no. 3 (1994).

⁴¹ Chaim Kaufmann, “Possible and Impossible Solutions to Ethnic Civil Wars,” *International Security* 20, no. 4 (1996). Kaufmann also argues that only separating ethnicities will prevent future violence due to a “security dilemma” brought on by hardened identities and threat escalation between groups as the war progresses. This view overstates the permanence of a feeling that may exist during war and does not take into account counter-examples such as the European Jews and Germans for whom inter-ethnic hostilities lessened after the holocaust. Moreover, state behavior is not always the primary focus of ethnic conflict because it occurs when states are weak and so incites groups to struggle for control. At times the violence toward civilians is more heavily associated with rebel groups or sometimes civilian-on-civilian attacks. See *Human Rights Watch Reports* on the Darfur conflict, for example, accessed June 15, 2012 online: <http://www.hrw.org/en/reports/2009/06/21/no-one-intervene-0>. The state, rather than a direct party to civilian victimization, was charged with failing to provide security by protecting groups from each other: “Lou Nuer leaders publicly threatened they would attack if the authorities did not disarm the Murle, whom they described as “the primary cause of insecurity in Jonglei state.” Lou Community Peace Council press

violence is common, as Downes points out, dehumanizing or “demonizing” the enemy occurs with much greater frequency than does civilian victimization.⁴² Moreover, asserting the presence of significant cultural difference, as an objective causal phenomenon, becomes difficult to sustain in civil conflict as well because cultural distance is not as great when people have lived together for long periods of time. In both Rwanda and Bosnia, for example, before the outbreak of conflict and mass killings, some groups had intermarried, worked and lived together, and mixed freely for long periods. Even in cases where difference is more pronounced, Bell rightly points out that identity-based theory is “both over-predictive and under-predictive, since conflicts between different identity groups sometimes fail to employ civilian victimization, whereas similar identity groups sometimes turn to civilian victimization.”⁴³ Downes and others concur that the mere fact of difference in identity does not predict state behavior toward civilians, since victimizing civilians occurs both when difference is present and when it is absent.⁴⁴

Because of its basis in affective motivations, theories of identity based on difference predict increasingly brutal treatment of civilians as a conflict progresses.⁴⁵ This logic does not hold when held up to the latest quantitative studies; rather, civilian victimization is more likely to be a means of last resort in international conflicts, and the

release, February 1, 2009, quoted in *Human Rights Watch Report*, <http://www.hrw.org/node/83964/section/6>.

⁴² Downes, *Targeting Civilians in War*.

⁴³ Bell, “Role of Military Culture.”

⁴⁴ Downes, *Targeting Civilians in War*. See also Valentino, Huth, and Balch Lindsey, “Draining the Sea.”

⁴⁵ Gurr, “Peoples against States,” 348.

first resort in cases where the one belligerent aims to annex the land, either to expand their territory or to eliminate a potential fifth column.⁴⁶ Downes finds that the “barbarism” explanation is more likely an intervening variable—that is, when the intent to victimize civilians is present, invoking barbarism is likely as a means of rationalizing or legitimizing the treatment. Moreover, he adds that feelings of animosity toward a population is something more likely to be experienced by “soldiers on the battlefield more than those responsible for the strategic direction of the war and is this probably a better explanation for the battlefield atrocities than for policies of civilian victimization.”⁴⁷

Finally, identity theories based on either interstate or intrastate conflict tend to assume dyads such as state versus state or incumbent versus insurgent—both distinct, opposing (enemy) relationships between groups fighting for control of the battlefield. Like the regime model, this model does not fit well with the spectrum of transnational or internationalized conflicts comprised of internal foes as well as external intervening forces. This is important not because these wars are necessarily “new,” but because our old categories and ways of understanding them do not adequately account for the complex political nature of the interactions among actors with different goals—some of whom may have only an indirect stake in governance but who may have other goals.⁴⁸

⁴⁶ Downes, “Desperate Times, Desperate Measures.”

⁴⁷ Downes, *Targeting Civilians in War*, 26. One exception to this is argued by Valentino, who allows that the ethnic hatreds of leaders may result in mass killing. This is secondary, however, and perhaps instrumental to their primary power-seeking motivation, in *Final Solutions: Mass killing and Genocide in the Twentieth Century* (Ithaca, N.Y.: Cornell University Press, 2004).

⁴⁸ The term “new war” is coined by Kaldor, *New and Old Wars*. Kaldor uses Bosnia as a prime example of new wars, which are characterized by their refusal to abide by the internal/external,

A more fundamental critique of the concept of “identity as difference” suggests that identity is often wrongly understood as the objective presence or absence of difference,⁴⁹ as civilizational,⁵⁰ or even as the affective collective consciousness of groups with long-standing traditions.⁵¹ While the effects of identity and culture are that they appear natural and objective among groups and between groups, identities are relational and fluid—the significance changes according to political and social context.⁵² Fluidity is not a critique in itself, only an indicator that identity is social and part of the political struggle (reference Wendt’s theory of ego and alter in chapter one). A norms approach complements an identity approach by seeking to make that context more prominent. While identity has multiple dimensions, identity as a politicized concept only makes sense in the context of how identity is being interpreted and what is perceived to

combatant/noncombatant dichotomies commonly assumed by international relations and comparative politics scholars. Kaldor also subscribes to the instrumentalist view of ethnicity as a strategy of powerful leaders seeking to galvanize support. Earlier scholars, such as Gurr, “Peoples against States,” believe that leaders use ethnic claims for their own purposes, but that “the test of their authenticity—claims and leaders who make them—is whether or not they attract widespread and sustained mobilization among group identifiers,” 352.

⁴⁹ For a contrary view see Stuart J. Kaufman, who argues that “a Milosevic is possible only because it was uncomfortable for the Serbs in Kosovo to live as a minority among the culturally different Albanians,” in *Modern Hatreds: The Symbolic Politics of Ethnic War*, (New York: Cornell University Press, 2001), 7.

⁵⁰ Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996).

⁵¹ Stuart J. Kaufman, “Narratives and Symbols in Violent Mobilization: The Palestinian-Israeli Case,” *Security Studies* 18, no. 3 (2009); Kaufmann, “Possible and Impossible Solutions.”

⁵² This is one of the primary insights of conflict and resolution studies. Identity can be politicized and defined in ways that are seen as obstacles or as assets to peace-building. See, for example, Gerard Hagg and Peter Kagwanja, “Identity and Peace: Reconfiguring Conflict Resolution in Africa,” *African Journal on Conflict Resolution, Special Issue on Identity and Cultural Diversity in Conflict Resolution in Africa* 7, no. 2 (2007).

be at stake.⁵³ Lifting identity out of its social function and political context strips it of meaning; examining identity thus demands an approach suited to social and political analysis, which includes an accounting of strategy which affects and is affected by culture. First, a discussion of how military culture has been treated as an independent variable to explain civilian victimization follows.

Military Culture as an Explanation for State Behavior toward Civilians

Military culture theory centers on the “organizational constraints that influence when militaries do—and do not—victimize civilians in civil war.”⁵⁴ Proponents argue that “the organizational culture of states’ militaries explains the propensity of states to escalate the use of force against civilians in wartime.”⁵⁵ On this account, decisions about how to treat civilians are not completely separable from the “attitudes and behaviors of actors [who] are heavily conditioned by the norms, interests and culture of the

⁵³ Politicized collective identity is defined as the struggle between groups for power within a larger societal context, in Bernd Simon and Bert Klandermans, “Politicized collective identity: A Social Psychological Analysis,” *American Psychologist* 56, no. 4 (2001).

⁵⁴ Bell, “Role of Military Culture,” 2. I adopt Bell’s general framework for military culture wherein “culture is defined as outlining collective models of authority or identity carried by custom,” see Copeland 2000; Katzenstein 1996, quoted in Bell, “Role of Military Culture,” 5-6. Katzenstein’s work on security and culture, while not specific to the study of civilians in war, provides most of the definitions used in this approach and cited in earlier sections of this study as well: norms are “the collective expectations for proper behavior of actors with a given identity,” and identity is defined as “representing differing constructions of nation- and statehood.” Military culture does not substitute for national or state identity, but in times of war, especially, the function of the military is to act as the agent of the state and thus informs not only “who we are” as soldiers but represents “who we are” as a nation.

⁵⁵ Quoted in Alexander B. Downes, “Military Culture and Civilian Victimization: The Allied Strategic Bombing of Germany in World War II,” in *Civilians and Modern War: Armed Conflict and the Ideology of Violence*, eds. Daniel Rothbart, Karina V. Korostelina, and Mohammed Cherkaoui (New York: Routledge, 2012), 72-73. See also Legro 1994, 1995, 1997; Hull 2003, 2005; Kahl 200 as cited in Bell 2012.

organization that acts on behalf of the state.”⁵⁶ Observing the military is useful to explain state behavior toward civilians in war because, as Bell argues, the military is the agent most directly responsible for the treatment of civilians in war.⁵⁷ Further, as Downes points out, the military is “in the business of using force to defeat the nation’s enemies, [and] organizational culture prescribes how and with what means the service should fight in wartime.”⁵⁸

Military culture is closely related to military doctrine in that “the organizational norms, beliefs and customs underlying military behavior—forms the foundation of strategies militaries employ to achieve their ends.” However, from this angle doctrine is not conceptually distinct from culture but is rather taken as an expression of culture. The military culture perspective takes the view that how civilians fit into strategy is a product of culture since organizational culture shapes the goals of the military by “shaping [its] members’ understandings and expectations about the world”⁵⁹ (Bell 10). What follows is an explanation of the theoretical underpinnings of military culture and then a review of how previous literature has used military culture as an explanation for state behavior toward civilians.

⁵⁶ Colin H. Kahl, “In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq,” *International Security* 31, no. 1 (2007): 37 quoted in Bell, “Role of Military Culture,” 9.

⁵⁷ Bell, “Role of Military Culture.”

⁵⁸ Downes, “Military Culture,” takes the opposite position, 73.

⁵⁹ Bell, “Role of Military Culture,” 10.

Organizational Culture

Theories of military culture draw heavily on organizational culture theory, which overlaps to some extent with constructivist theories. Organizational culture can be thought of as an offshoot of broader organizational theory, which stresses both structural and cultural factors in explaining organizational behavior.⁶⁰ Organizations, as purpose-driven, decision-making hierarchies, are “influenced by both formal governance structures and informal norms of behavior—*culture*—that help determine the social orientation of the actors within them”⁶¹ Organizational culture encompasses both “a set of evaluative standards (such as norms or values) and a set of cognitive standards (such as rules and models) that define what social actors exist in a system, how they operate, and how they relate to one other.”⁶²

The concept of “culture” draws on broader sociological theories of culture, particularly social constructivism, the core insight of which is that social interaction

⁶⁰ Organizational culture, as a branch of organizational theory, emphasizes culture over material structure. Conventional IR organizational theory is grounded in rationalism in that it emphasizes the sameness of organizations in their pre-existing, bureaucratic “parochial interests,” namely “maximizing budgetary allotments, decreasing civilian authority and supervision, and minimizing uncertainty,” Bell, “Role of Military Culture,” nn9. According to Jeffrey W. Legro, traditional organization theory “emphasizes the importance of formal structure in causing uniform military behavior, [while] a cultural approach contends that differences in belief can lead to dissimilar actions, in “Military Culture and Inadvertent Escalation in World War II,” *International Security* 18, no. 4 (1994): 110. Other aspects of organization theories will be discussed in the section explaining military doctrine.

⁶¹ Bell, “Roll of Military Culture,” 9. See also March and Simon 1958; March 1988; Scott and Meyer 1994; Williamson 1996; North 2000. See Rubin (2005) for an overview of other ways of defining organizations—as contractual entities (Alchian and Demsetz 1972; Jensen and Meckling 1976); as reflections of institutional and other societal force (P. DiMaggio and Powell 1991; Romanelli, Powell, and P. J. DiMaggio 1992); or as systems with varying inputs from the external environment (Kuhn 1974; Parsons 1991).

⁶² Katzenstein 1996, 6, as quoted in Bell 9.

produces baseline agreement on how to interpret relevant aspects of reality.⁶³ This social context forms the basis for the social identity of the group, constituted and expressed through the internal “taken-for-granted values, underlying assumptions, expectations, collective memories, and definitions” of the organization.⁶⁴ Shared culture allows the organization to “respond to the [external] environment and [to] organize internally to accomplish its goals).”⁶⁵ Culture underlies decision-making by managing the scope of possible alternatives and stabilizing organizational preferences through the process of member socialization, guiding them in “the correct way to perceive, think, and feel” about challenges and problems.⁶⁶

Military culture, commonly understood as “the military’s personality, way of thinking, or values” is the specific application of the concept of organizational culture to

⁶³Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.Y.: Doubleday, 1966). By baseline agreement I mean to indicate that complete agreement is not necessary to indicate culture but that culture provides the frames of reference for negotiating and handling disagreement. This approach differs from both rationalist and post-positivist accounts in that it makes no claims as to the existence or non-existence of objective truth. Rather, social constructivism is sociological in that is concerned with the intersubjectivity of actors, which creates a “social” or cultural context. Rationalism, on the other hand, takes social context as background and generally looks to some materially based incentive structure in order to derive explanatory variables. Post-positivist approaches generally critique the objectivity claims of rationalist, positivist accounts by demonstrating their reliance on unacknowledged but power-infused cultural assumptions (including the rise of a particular brand of social science that denies the legitimacy of all other forms of knowledge). This approach should not be confused with constructivist IR since it also points out the theoretical inconsistencies between claiming the social construction of reality and assuming the pre-existing unified state. See, for example, Maja Zehfuss, *Constructivism in International Relations: The Politics of Reality* (Cambridge, UK ; New York: Cambridge University Press, 2002).

⁶⁴ Kim S. Cameron and Robert E. Quinn, *Diagnosing and Changing Organizational Culture* (Reading: Addison-Wesley, 1999), 14.

⁶⁵ Stephen J. Gerras, Leonard Wong, and Charles D. Allen, “Organizational Culture: Applying A Hybrid Model to the U.S. Army,” (Carlisle Barracks, PA: Army War College, 2008), 1.

⁶⁶ Ibid.

the military.⁶⁷ These ways of thinking take the form of deep assumptions that inform norms and are directly observable in artifacts.⁶⁸ This is possible because cultural attributes of the military become “institutionalized within the bureaucracy through a number of ways, including education and training, career promotion, doctrine and war plans, budgetary priorities, procurement programs, and force structures.”⁶⁹

Review: How Military Culture Impacts Civilian Victimization

The impact of military culture on civilian victimization is a fairly recent and limited area of inquiry, and the scholarship tends to examine the organizational culture of military services to determine the extent to which that culture prescribes strategy that either calls for, allows, or is averse to either putting civilians in the cross-hairs, or even tolerating large numbers of foreseen but unintentional civilian casualties. Such strategies include those that are “punitive, indiscriminate, or focused on breaking civilian morale” even in the face of prohibitive norms.⁷⁰

Jeffrey Legro’s work in the mid 1990s is an influential example of such work. In comparing the cultures of the German and British military services during World War II, Legro shows that pre-existing organizational culture was decisive in setting preferences for the use of “unthinkable” means of warfare and also for the timing and variance of employing prohibited methods of fighting. The prohibited strategies of escalation that

⁶⁷ Ibid.

⁶⁸ Edgar H. Schein, *The Corporate Culture Survival Guide* (San Francisco: Jossey Bass, 1999).

⁶⁹ Kahl 2007, 38, in Bell, “Role of Military Culture,” 9. For organization theory strategies on instituting culture, see Druckman, Singer, and Cott (1997, 90); Schein (1990), 2; Widen (1997, 20) as cited in Bell 9.

⁷⁰ Downes, *Targeting Civilians in War*.

Legro examined include the use of submarines to bomb civilian ships, the strategic bombardment of civilian targets, and the use of chemical weapons.⁷¹ Legro acknowledges that international norms matter insofar as certain forms of warfare are considered “illegitimate,” but on his account the internal attributes of military culture are decisive as to whether or not such means will be employed. Legro’s study contributes to broader IR debates by concluding that, contrary to what either balance of power theories or international norms would predict, the organizational culture of the military was responsible for shaping the preferences of both the state and the military when it came to strategy.⁷² This is because

Informal beliefs interact with formal bureaucratic structure to shape the identity and cognition of groups [which matters because] the various military services favored some modes of warfare over others, valued the strategic environment and enemy activity, and developed plans and capabilities to meet anticipated threats according to their various cultural predispositions.⁷³

According to Legro, the norms of military cultures may either support or compete with international humanitarian norms, and their willingness to violate international norms (or their propensity to comply with such norms) is dependent on internal ways of thinking rather than external (or international) norms. However, this view does not account for the fact that international norms against killing civilians were at their weakest

⁷¹ Legro, *Cooperation under Fire*; Thomas, *Ethics of Destruction*.

⁷² Jeffrey W. Legro, “Military Culture and Inadvertent Escalation in World War II,” *International Security* 18, no. 4 (1994); Jeffrey W. Legro, “Culture and Preferences in the International Cooperation Two-Step,” *American Political Science Review* 90, no. 1 (1996). This is supported by the fact that the U.S. state narrative justifying the attacks on civilians in Hiroshima and Nagasaki was formed after the attacks (see Conway-Lanz, *Collateral Damage*). The logic was drawn from mindsets already prevalent inside the military; the idea that strategic bombing would lessen the overall suffering of war was a common theme supporting the development of air power in the wake of the trench warfare of World War I.

⁷³ Legro, *Cooperation under Fire*, x.

point in World War 2, and it is unclear whether this is an effect of military culture, a cause, or completely unrelated. Some attribute the willingness to victimize civilians during that time to cross-cultural ideas about “total war,” wherein civilians were seen as indistinguishable from the “nation.”⁷⁴ Others attribute civilian victimization to the crudeness of targeting technology, though this is a backward looking narrative that ignores the purposeful targeting of civilians. Ward Thomas examines the U.S. military’s willingness to employ strategic bombardment during World War 2, but he compares this strategy to conflicts occurring later in the century, and finds that militaries gradually internalized post WW2 international ethics against such means and methods of warfare.⁷⁵ This study highlights the fact that culture changes as a complex result of political, technological, and normative changes, so that while militaries may exhibit organizational cultures set apart from the larger societies in which they operate, military culture does not exist in a vacuum.

As Clausewitzian wisdom reminds us, the function of the military is as a tool of policy and not for the use of force as an end in itself. And in a constitutionally limited state, it is also constrained by the broader external environment, both internationally, to some extent, and domestically to a greater degree. Kier shows, for example, that military organizational culture and domestic political constraints shape military doctrine, which determines the tactics militaries use to fight during war.⁷⁶ Similarly, Ward Thomas’ study

⁷⁴ John Baylis, *Strategy in the Contemporary World*, 4th ed. (New York, NY: Oxford University Press, 2012), 55.

⁷⁵ Thomas, *Ethics of Destruction*.

⁷⁶ Elizabeth Kier, *Imagining War: French and British Military Doctrine Between the Wars* (Princeton, N.J.: Princeton University Press, 1997).

concludes that the strength and stability of international norms impacts the preferences and attitudes of the military. A more recent study by Colin Kahl argues that the U.S. military culture has changed a great deal in its attitudes toward civilian victimization since Vietnam,⁷⁷ when it came under heavy criticism for its hearts and minds slogans juxtaposed to the media images of screaming, napalmed women and children.

What sets Kahl's cultural argument apart, however, is that he measures culture through the institutionalization of processes meant to uphold international norms by holding individual members of the military accountable through punishment mechanisms. Kahl notes that military judge advocates (JAGs) became increasingly important in upholding cultural respect for the Laws of War in the Iraq War, in addition to the "expansion of the law of war training program, and the integration of judge advocates into weapons procurement."⁷⁸ Dickenson also documents the presence of "judge advocate corps as 'compliance agents' within the military under the DoD Law of War program [which] led to greater U.S. military law of war compliance during the Iraq War."⁷⁹ Bell adds that such cultural changes can occur even in the absence of a highly professionalized military: "a military culture of civilian respect (MCCR) can explain state military behavior toward civilians better than competing theories of civilian victimization," made

⁷⁷ Kahl, "Crossfire or Crosshairs?"

⁷⁸ Ibid. 40 as quoted in Bell, "Role of Military Culture."

⁷⁹ Laura A. Dickenson, "Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance," *American Journal of International Law* 104, no. 1 (2010), cited by Bell, *Role of Military Culture*, 16.

possible by “high-level military leadership interest, pervasive norm training programs, and norm enforcement structures.”⁸⁰

Both Kahl and Dickensen document changes in Iraq, but it is not clear from their studies if crucial junctures within the conflict contributed to change. Kahl, for example, explains that it is the unwillingness of the U.S. to any longer employ strategies that target civilian morale that account for the precautions increasingly put into place. My study can add nuance to this by showing a more direct relationship between the civilian casualties that did occur, the attitudes about them within the military, and how the social context is read as a strategic matter. Changes to military culture can be treated as an outcome, in other words.

Downes critiques the military culture approach for different reasons: because it fails to take into account the inherently strategic nature of military actors and the external pressures they face when fighting wars. Downes points out that if external factors, such as desperation to win on the battlefield, explain *noncompliance* with civilian immunity norms, then norms internal to military culture will give way under the right conditions. To demonstrate this, Downes examines the same case studies as Legro from World War 2 but finds that military culture is indecisive in the face of objective strategic pressures. Thus, he cautions against assuming that the “norm of noncombatant immunity has become an integral part of the culture of the contemporary American military, implying

⁸⁰ Bell, “Role of Military Culture,” 2. Bell examines the NRA in Uganda, a group who, upon taking control of the state apparatus, demonstrated a high level of commitment to respecting civilian human rights, despite the predictions of competing rationalist resource endowment theory of rebel behavior. As one of the first to link state behavior directly to compliance with civilian-centered humanitarian norms, this section is heavily informed by Bell’s basic framework for competing theories of state behavior toward civilians.

that in future wars the United States will refrain from intentional killing of noncombatants, and will work hard to minimize inadvertent civilian damage as well.”⁸¹

So while the military culture approach emphasizes unique identities and preferences that in turn independently shape the organization’s behavior, apart from and often against the influence of the external environment, Downes provides an important corrective to an overly cultural approach, which is that the most salient external environment for the military is the strategic environment.⁸² This approach is representative of a new strand in civilian studies and brings to the fore that the strategic environment does not operate in a parallel realm, separate from civilians, but rather civilians are often included in the strategic calculus.

Strategic-Rationalist Theories: Why Civilians Are Sometimes Targeted

The past decade has produced intense interest in the strategic aspects of civilians in war, particularly about the strategic value of civilians as military targets. This stream of scholarship is termed “strategic rationalist” theory by Bell (2012) because it “emphasize[s] the strategic incentives of targeting civilians. According to this school, actors target civilians because of the calculation that targeting civilians produces benefits and inflicts harm upon the enemy to allow them to achieve their goals.”⁸³ Strategic

⁸¹ Downes, “Military Culture.”

⁸² According to Gerras, “in the case of the Army, the organization’s external environment is now typically referred to as the Joint Operating Environment (JOE).” This is elaborated in the United States Joint Force Command, Joint Operating Environment, December 2007, 8.

⁸³ Bell, “Role of Military Culture,” 6. See also Stathis N. Kalyvas, “Wanton and Senseless?: The Logic of Massacres in Algeria,” *Rationality and Society* 11, no. 3 (1999); Stathis N. Kalyvas, “The Paradox of Terrorism in Civil War,” *The Journal of Ethics* 8, no. 1 (2004); Stathis N. Kalyvas, *The Logic of Violence in Civil War* (Cambridge; New York: Cambridge University Press, 2006).

rationalist theories share a deep affinity with realism in the assumption that state decision-making takes place in an amoral context. On this account, the utility of force is assumed, and victory is defined in a purely traditional military sense—by defeating opposing forces. The role of the civilian in both interstate and intrastate conflicts is found in their support of the enemy forces, which is why the “innocence” of civilians is a fragile concept.

In interstate conflict, states have been shown to intentionally victimize civilians when they are “desperate to win,” which is generally associated with fighting wars of attrition, guerrilla wars, and also when they desire to annex territory and wish to clear out the population.⁸⁴ When applied to counterinsurgency, two logics prevail in this scholarship: one borrows from the Maoist handbook of Guerrilla warfare which imagines insurgents as fish swimming in a sea of civilian support, both ideological and material.⁸⁵ States will seek to counter insurgent strategies by “draining the sea,” or killing, forcibly removing, or otherwise victimizing civilians so as to deprive insurgents of cover and support.⁸⁶ Another strand sees civilian support as an object, since civilians are conduits of valuable intelligence as well as potential supporters of the insurgency. This theory predicts that incumbents will employ calculated, measured violence against certain civilians, especially fence-sitters, in order to “deter defection.” As Bell points out, “actors

⁸⁴ Downes, *Targeting Civilians in War*; Downes, “Desperate Times, Desperate Measures.”

⁸⁵ Mao Tse-tung, *On Guerrilla Warfare*, trans. Samuel B. Griffith, 2nd ed. (Urbana, IL: University of Illinois Press, 2000).

⁸⁶ Cochran McNabb and Downes, “It’s a Crime”; Cochran McNabb and Downes, “Targeting Civilians to Win?”; Downes, “Introduction: Modern Insurgency and Counterinsurgency in Comparative Perspective;” Downes, “Draining the Sea;” Valentino, “Draining the Sea;” Valentino, *Final Solutions*; Valentino, Huth, and Croco, “Covenants without the Sword.”

in civil conflict employ violence as a factor of the level of civilian control and the amount of information that is able to be gained from civilians through that control.”⁸⁷ Strategic rationalist theories do not predict that states always target civilians, but that they employ a cost-benefit calculus and seek to lower the costs of war when they are desperate to win,⁸⁸ or when civilian support to an insurgency significantly increases the threat level (to an incumbent).⁸⁹

The strategic-rationalist approach highlights an enigma, which is that 1.) anti-civilian strategies continue to be used despite the fact that the civilian immunity norm is one of the strongest of all international norms, enjoying support from nearly all states and most civilian populations, and 2.) anti-civilian strategies continue to be used in counterinsurgency strategies despite the fact that the strategy can backfire by “stiffening the resolve” in the population.⁹⁰ Bell argues that this latest scholarship, while increasing our understanding about the utility of force against civilians at the macro-level, suffers from two weaknesses when applied to individual cases in which civilian victimization *does not* occur: “not all political actors respond to strategic contexts in the same manner, and strategic-rationalist theories ignore the internal characteristics of the entity that actually conducts and executes the violence: the state military itself.”⁹¹ Furthermore, in

⁸⁷ Bell 6, citing Kalyvas, “Wanton and Senseless?”; Kalyvas, “The Paradox of Terrorism,” Kalyvas, *Logic of Violence*.

⁸⁸ Downes, *Targeting Civilians in War*; Downes, “Desperate Times, Desperate Measures.”

⁸⁹ Valentino, “Draining the Sea.”

⁹⁰ Bell, “Role of Military Culture,” 8. See also Robert A. Pape on the ineffectiveness of civilian victimization in interstate wars, in *Bombing to Win: Air Power and Coercion in War* (Ithaca, N.Y.: Cornell University Press, 1996).

⁹¹ Bell, “Role of Military Culture,” 7.

this line of inquiry, the absence of civilian victimization is seen as simply the absence of a strategic or at least rational incentive to victimize. By prior assumption, this approach excludes the possibility of strategic incentives associated with constraint and instead simply assumes the irrelevance of constraining norms, even *when choices are possible and strategy could go either way*.

Moreover, while both interstate war and civil war have garnered much attention, little attention has been paid to the dynamics of civilian victimization in transnational conflicts that contain elements of both intrastate and international conflict and include a variety of non-state actors, including both foreign and domestic insurgents. This is particularly the case when one important actor is an intervening force and another a transnational terrorist. In such cases, the relational dynamics multiply well beyond the familiar dyads of incumbent and insurgent (intrastate) or belligerent and noncombatant (interstate) to include remote and local audiences. The closest examples would include past conflicts in which population protection strategies were employed, such as Britain in the Malaya conflict or France in Algiers. Notably, both of the intervening forces in these conflicts were former colonizers and had to grapple with complex issues of legitimacy in the eyes of both the domestic populations and the international community.

Given the partial but important perspectives of the identity, regime, culture, and strategic theories of conflict, this study suggests that including a constructivist, norms-based approach would further our attempts to understand the changes in orientation toward civilian victimization, particularly in cases where states are faced with a strategic choice and choose to comply rather than to violate civilian immunity. Theories of civilian victimization are incomplete without analyzing the role that the normative

environment plays in influencing how states, especially intervening powers, come to see the protection of civilians as a strategic goal rather than as a strategic obstacle to be overcome.

Norms-Based Constructivism: An Alternative Framework

The review of the literature has produced two gaps in knowledge, first about how doctrinal entrepreneurs are able to overcome defensive reasoning in the innovation process such that assumptions about the effective use of force can be effectively challenged and then overturned. Second, it is unclear why the content of counterinsurgency doctrine would emphasize high degrees of population protection, when prior experience evidences a predilection toward coercive methods. My argument is that the constraining normative environment supplies the missing link through the strengthened civilian immunity norm. Moral norms matter—in this case the norm limiting the use of force against noncombatants—because they are a resource in the struggle for power. I begin by explaining how the constructivist approach is appropriate to explaining how and why this is so.

Constructivism and the Power of Norms

I have argued in the first chapter that mainstream constructivist IR, which is the type I invoke in this study, emphasizes that the identities and interests of actors are mutually constituted through the rules and norms that comprise the social and political context. Norms affect behavior; that is, they exhibit regulative effects, but they also exhibit constitutive effects as was shown in chapter two. This means that the interests of actors are closely tied to their identity within the international order, of which norms are a part. Norms that are important, especially those of with a moral dimension, exhibit

constitutive effects on identity and interests. Identity in this sense is not an objective set of characteristics derived from domestic culture, but is rather the outcome of a process of negotiation that occurs as actors define themselves in relation to other actors, and in relation to the social order itself. Since identity itself is closely tied to interests, norms have strategic value. This means states have an interest in defining norms to suit their power goals, but they also have an interest in aligning their identities with existing, powerful norms. Take, for example, how aspiring states made use of the norm of self-determination of peoples, which creates political claims to legitimate self-rule based on an “imagined community” called a “people.”⁹²

This perspective differs from structural realists like Mearsheimer, who sees ⁹³ strategic behavior almost exclusively in material terms. On his account, norms have no independent effect since, as he puts it, the powerful make rules such that the international order of rules and norms merely “reflects the distribution of power in the world.”⁹⁴ Constructivism does not deny the importance of material factors, but it differs in the extent to which it accepts the assumption that actors are driven almost exclusively by material incentives, particularly in some mythical anarchical state of nature in which rules do not exist. While the early realist position against constructivism was based on what Donnelly calls a “philosophical rejection” rather than an empirical case against it, rationalist critiques since then have become more thoughtful and nuanced. Keohane, for

⁹² Benedict R. O'G Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London; New York: Verso, 2006).

⁹³ Mearsheimer as quoted in Jack Donnelly, “Realism and International Relations,” *Themes in International Relations* (Cambridge, England; New York: Cambridge University Press, 2000), 148.

⁹⁴ Mearsheimer as quoted in *ibid.*

example, considers that norms exist, but sees their causal value as limited, especially for constitutive norms, which form the background for strategic action. In order for norms to be effective, he explains, they require an agent, a norm entrepreneur, who engages in strategic action, employing the norm for some political purpose.⁹⁵ Constructivists agree, but they do not see strategic and normative behavior as necessarily opposed; power and norms are not mutually exclusive. Constructivists, historians, political sociologists, and English School adherents all agree that norms both constrain and enable behavior.⁹⁶ Donnelly, a preeminent human rights scholar, argues that “rules and norms are important precisely because they allow states to achieve effects that they otherwise would not be able to.”⁹⁷

“War is a norms oriented activity,” according to Martha Finnemore, and norms can be permissive or not, weak or strong, but even so, and as even Morgenthau admits, moral norms set the outer limits of what it possible to imagine as behavioral alternatives. As the history of the civilian immunity norm has shown, the content of the norm is a product of inheritance but also fo the discourse and politics of the times. All of this is not to say that the presence of a law, for example, determines state compliance. Indeed, this is why norms change, according to Sandholz and Stiles. Norms are cyclical, and “norm change frequently occurs when (1) when norms are in tension with one another and (2)

⁹⁵ Robert O. Keohane, "Social Norms and Agency in World Politics," unpublished paper prepare for lecture available online, accessed November 2011, <http://www.international.ucla.edu/burkle/calendar/showevent.asp?eventid=7530>.

⁹⁶ Constructivism is not moralist in the sense that it insists on altruistic intentions rather than self-interest.

⁹⁷ Donnelly, “Realism and international Relations,” 148.

when the “fit” between norms and concrete experience is disputed.⁹⁸ The norm’s saliency increases when disagreements ensue, positions are put forth, arguments are made, and new understandings are reached. Rulings may issue forth in formalized systems, which increases the strength and specificity of -the norm, or behavioral expectations may become customary; either way prior expectations alter and give way to new expectations.⁹⁹

The model of Sandholz and Stiles also identifies metanorms, the two major constitutive norms of international society that inform more specific norms: these are sovereignty and liberal norms, namely human rights.¹⁰⁰ According to Sandholz and Stiles, international order overall is moving more in the direction of liberal, human rights-based norms and away from sovereignty based norms.¹⁰¹ I concur, though as the previous chapter shows, the civilian immunity norm embodies the tension between sovereignty and humanity, which later became “human rights.” International law demonstrates this shifting metanorm as well, since the civilian immunity norm, which falls under IHL rather than IHRL, is increasingly interpreted from a human rights perspective. In popular terms as well, the invocation to protect civilians has become

⁹⁸ Titus Chih-Chieh Chen, "Extraterritoriality: Expanding Exclusive Internal Jurisdiction " in *International Norms and Cycles of Change*, eds. Wayne Sandholtz and Kendall W. Stiles (New York: Oxford University Press, 2009), 142.

⁹⁹ Sandholtz and Stiles, *International Norms*.

¹⁰⁰ Ibid., 17-23. The “sovereignty versus human rights” tension is a part of broader English school approach as well. See Bull, *The Anarchical Society*; Wight, *Systems of States*.

¹⁰¹ Sandholtz and Stiles, *International Norms*, 24.

almost indistinguishable from the idea of human rights.¹⁰² Thus the popular moral force of the norm has become more restrictive than the law requires, while at the same time, the meaning of “civilian” has extended to include repression within domestic societies in news accounts and in reporting by transnational advocacy networks such as HRW. The significance is that state obligations to uphold human rights are criticized on the same grounds whether or not they have a governing relationship with the population or not. The “Responsibility to Protect” norm, though legally distinct and meant to compel humanitarian intervention, has come to occupy the same linguistic and moral space as civilian immunity.

“The Civilian” has thus largely become a symbol for the human rights of all people to be immune from the harm that flows from states and non-state groups who use force. Killing civilians or otherwise violating their rights is now a major criterion for a lack of legitimacy for states and in some ways the popular litmus test for the legitimate use of force: it is the ticket to membership in the international order, at least for weaker states--the rule of both Saddam Hussein and Momar Qaddafi were delegitimized on just this basis. Insurgent groups in the Congo are now targeted by peacekeeping forces based on whether or not they kill civilians. And terrorist groups are identified as completely illegitimate precisely because they kill civilians, rather than because states reserve a

¹⁰² See the difference in the way the bodies of law are treated over time: as separate in Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (New York: Oxford University Press, 1989); and as closely related in Orna Ben Naftali, *International Humanitarian Law and International Human Rights Law: Pas de Deux*, (Oxford England; New York: Oxford University Press, 2011).

monopoly on violence for themselves.¹⁰³ Thus the power of the civilian immunity norm lies in its close identification with human rights. And like any source of power, the norm serves as a resource in the political struggle between groups through its ability to legitimize (or not) the political goals of the group. This study hypothesizes that the CIN matters when states see it as a resource by which to delegitimize its “terrorist” enemies.

The Power of Human Rights to Change State Behavior

Some of the most important early work on the power of human rights and how states relate to the norm is found in the volume edited by Risse, Ropp, and Sikkink in 1999.¹⁰⁴ Though this volume is meant to explain the impact of human rights norms on domestic regimes, it reveals much about the influence of human rights to even large powerful states who already identify with human rights but whose sovereignty-leaning, even hegemonic foreign policies may be in tension, and even if they are out of reach of prosecution.¹⁰⁵ This occurs through similar pressures that domestic regimes experience when violating human rights, which is attributable to “the diffusion of international norms in the human rights area.” (5). Though while Risse and Sikkink, writing in 1999, attribute the diffusion of human rights norms directly to transnational networks and their effects on public opinion, I begin with the assumption that those norms associated with human rights enjoy strong support. This is especially the case with the civilian immunity

¹⁰³ This observation runs somewhat counter to Stiles’ characterization of the anti-terrorism norm as mostly a matter of state monopoly on force in that I emphasize that states invoke the illegitimacy of killing civilians with the intention of preserving their own monopoly on force.

¹⁰⁴ Risse-Kappen, Ropp, and Sikkink, “Power of Human Rights.”

¹⁰⁵ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, 1st ed. (New York: W. W. Norton & Co., 2011).

norm, since nearly all states claim to support it and public opinion favors it across the globe. In an era of globalized communications and media, it is fair to assume that violence against civilians produces significant criticism.

My argument is not that the criticism itself resulted in a doctrinal shift toward civilian immunity in Iraq and then in Afghanistan, but rather that states like the U.S. can be expected to use strong human rights norms as part of their legitimizing strategic narrative when employing force, and that the result is increased pressure to comply. Though the model does not exactly fit with my subject area (a state at war), Risse and Sikkink explain that “the process of human rights change always begins with some instrumentally or strategically motivated adaptation by national governments to growing domestic and transnational pressure.”¹⁰⁶ This would be similar for states employing force in the name of human rights, particularly states who intervene using such justifications. When norms are strong, I would expect to see an identification with human rights since “human rights norms have a special status because they both prescribe rules for appropriate behavior, and help define identities of liberal states.”¹⁰⁷ The invocation of human rights norms as a matter of identity would be likely in the preconflict and war rhetoric of the civilian administration, which is easily identifiable in national security statements and public statements and speeches. Conversely, when a norm is not strong, one would expect to see other justifications for force, particularly those that emphasize sovereignty (such as I would expect to be the case in Vietnam, before human rights was

¹⁰⁶ Risse-Kappen, Ropp, and Sikkink, *The Power of Human Rights*, 10.

¹⁰⁷ Ibid., 8.

as strong and before the civilian immunity norm was codified). Once that narrative is employed, however, it invites scrutiny, which transnational groups and, increasingly, ordinary people with internet access and cellphones are able to participate in. The invocation of a norm already professed creates a situation in which a choice must be made as to how to respond. Any narrative of moral identification might provoke one of the three logics as states react to pressures from norm violations: 1. Adaptation and strategic bargaining; 2. moral consciousness-raising, argumentation, and persuasion; 3. Processes of institutionalization and habitualization.¹⁰⁸ With states who are already liberal and strongly identify with human rights, I would expect to see a recognition of the pressure, but that the pressure military will react in ways that emphasize sovereignty until strategic failure forces a choice.

My central theoretical argument is thus based on human rights diffusion theory—when states invoke human rights norms for instrumental purposes (to uphold the anti-terror norm), pressure to comply is increased, not for fear of punishment in this case but for purposes of legitimacy and standing in the international community¹⁰⁹ However, in keeping with doctrinal innovation theory, my argument is that the community of doctrinal entrepreneurs within the military began to see the increasing civilian casualties as a growing political problem, but that it was not until faced with strategic failure and a choice about using more force or less that strengthening the civilian immunity norm became seen as a strategic resource rather than as a constraint on strategy. My hypothesis

¹⁰⁸ Risse-Kappen, Ropp, and Sikkink, *Power of Human Rights*, 11.

¹⁰⁹ See especially Risse and Sikkink, "Introduction."

holds that the CIN becomes a more important resource when regaining a monopoly on force through force is not seen as an option.

The norm becomes a strategic resource in three ways: first, the norm, as an important pre-existing part of the military's culture, is used as a resource to socialize its members and to overcome resistance and attachments to attitudes about the use of force and troop protection over civilian protection. Second, the norm's consistency with prior ideas about counterinsurgency provided a strong resource for attaining the support of the civilian administration, who had already made identity claims about the legitimacy of the use of force based on human rights norms. Further, the regulative effects of the strong civilian immunity norm made increased use of force against civilians untenable. Third, the civilian immunity norm bridges the state's identity claims with its use of force and thus serves a source of legitimation. This is true for the local population,¹¹⁰ but it also addresses the standing of the U.S. in the international community, broadly defined as its moral standing and reliability in upholding norms constraining the use of force. As Reus-Smit writes in 2004, at precisely a moment when the U.S. had gained social capital from the 9/11 attacks, Bush's foreign policy became "muscular," sparking "unease" and "widespread resentment," and he has "crudely chipped away at America's liberal identity

¹¹⁰ The local population's acceptance of the legitimacy of the host nation is the usual way in which "legitimacy" is referenced in counterinsurgency. See, Thomas B. Nachbar, who writes, "Counterinsurgency, as a contest between opposing groups to be recognized by a particular population as their legitimate government, places the host nation government's legitimacy at the center of the conflict. Establishing the rule of law, then, is important to counterinsurgents because of its contribution to a government's legitimacy," in "Counterinsurgency, Legitimacy, and the Rule of Law," *Parameters* (Spring 2012): 27, accessed March 1, 2013, online: <http://www.carlisle.army.mil/usawc/parameters/Articles/2012spring/Nachbar.pdf>.

in international relations.¹¹¹ My hypothesis is that the legitimacy of the initial invasion in each case helps to account for variance in the concern for reputational damage due to civilian casualties and thus the uneven doctrinal response.

My overarching theory is that the military, as an agent of the state, engaged in a redefinition of interests in a manner consistent with constructivist logic: through a mutual constitution of identities and interests such that protecting civilians comes to be seen *less as a constraint on strategy and more as a central tenet of strategy*. By embracing a widely accepted norm that is associated with the broader human rights agenda, the U.S. (re)aligns its identity with the values of the international community while at the same time delegitimizing the identities of those who seek power through the targeting of civilians.¹¹² In doing so, it reinforces the anti-terror norm and denies the legitimate use of force to the “other.” Thus this particular norm matters because of its role in structuring the normative environment that regulates membership in the international community,¹¹³ which is *strategically* important in furthering the foreign policy goals of a “war of ideas” that legitimizes and guides the desired political outcome of the wars on the ground. Seen in this light, the civilian immunity norm highlights the growing strategic importance of moral norms—as a factor in the security environment rather than as an artificially imposed moral constraint on strategic behavior.

¹¹¹ Christian Reus-Smit, *American Power and World Order* (Malden, MA: Polity Press, 2004), ix.

¹¹² See the extended argument in Chapter 2.

¹¹³ See the extended argument in Chapter 2, which draws heavily on the analysis of Kinsella, *History of the Distinction*.

In the language of norms, the strength of the civilian immunity norm acts as both a negative and positive resource: it shapes doctrine through its regulative effects by constraining the range of strategic choices seen as appropriate and actionable; and at a more fundamental level, it shapes doctrine through the consequences of its constitutive role in producing an ethical, rules-based international order, providing a source of legitimacy to define “who we are” in relation to the enemy in the war on terror, as well as in the wars on the ground in Iraq and Afghanistan. In doing so, it helps doctrine to link the use of the military with national security and foreign policy objectives. In the simplest terms, the military doctrinal shift drew on strength of the morally constraining environment by appealing to it instead of fighting against it.

CHAPTER FOUR

IRAQ

In this case study, consistent with my causal model, I will demonstrate how the instrumental use of civilian-centered human rights norms shapes the civilian-centered counterinsurgency doctrine. The chapter begins with a discussion of baseline attitudes about civilian and immunity in the year 2001, as interactions between the military and human rights groups began in earnest. The relationship is traced out through the steps normally seen in human rights diffusion: instrumental use, argumentation, and persuasion. The next section demonstrates how Bush employs the language of just war and human rights instrumentally while at the same time planning a War of Ideas meant to support the War in Iraq. Next, I will show how civilian casualties early in the Iraq War led to a crucial juncture whereby civilians were seen as strategic rather than as simply collateral objects. I go on to show how even the perception of violating civilian immunity became seen as a strategic liability when the U.S. experienced a crisis of legitimacy through the degradation of the American image. This narrowed the scope of alternatives, which eventually led to redefining the “problem” in the war in Iraq, including the acceptance of a loss of the monopoly on force. Once this occurs, the influence of the norm can be seen in the efforts to reshape and clarify counterinsurgency doctrine more in keeping with civilian immunity.

2001: Baseline Attitudes about Civilian Immunity

This story begins in the period leading up to the war in Iraq, when the Global War on Terror (GWOT) had just begun, but before the military's views on civilian casualties had been impacted to a great extent by either the Iraq or the Afghanistan experience. As argued in a previous chapter, civilian immunity has been an increasingly salient aspect of the normative international political order, and some members of the military had already started to recognize that civilian casualties were a political liability (though not yet a military one). In response to U.S. involvement in conflicts in Bosnia, Kosovo, and then Afghanistan and Iraq, the military and a group of human rights scholars from Harvard began building professional relationships in 2000 with a series of conferences and workshops entitled, the Project on the Means of Intervention. The program was organized by the Carr Center for Human Rights Policy, under the auspices of the Human Rights and National Security program. The goal of the early conferences was to encourage dialogue among academics, human rights experts, NGOs, members of the media, and high level military personnel.¹

The 2001 workshop provides a good baseline snapshot of the attitudes of U.S. military personnel about issues pertaining to civilian casualties, media, and military practices. In order to begin to find "common ground," panels were held, conference

¹ Jennifer Hazen, Rapporteur, "Conference Report," in Humanitarian Challenges in Military Intervention Workshop, ed. Sarah Sewall, Project on the Means of Intervention (Washington, DC: Carr Center for Human Rights Policy, 2001), accessed January 6 2012, <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/WebNovConf.report.pdf>.

papers presented, and keynote speakers of the highest level were brought in—in this instance General Wesley Clark, commander of the mission in Kosovo. The director of the Carr Center at that time was Sarah Sewall, who would emerge as one of the key human rights experts to contribute to the revision process of the C.O.I.N. manual in 2006. Sewall was present throughout this process and forged professional ties with Conrad Crane, one of the primary authors of C.O.I.N., who would also participate, as did, eventually, David Petraeus, John Nagl, and others who comprised much of the inner circle of what would become known as the counterinsurgency “community of innovators.”

The attitudes expressed in this early conference roughly approximate what I described in chapter two as the two major tendencies within the civilian immunity norm: sovereignty and human rights, itself a reflection of the two competing currents in the international order. Sovereignty in this sense refers to the interpretation of civilian immunity as a negative constraint on the sovereign war-making function of the state, and the human rights interpretation emphasizes the positive, rights-protecting responsibility of the liberal state toward civilians.² The problem that necessitated the creation of dialogue between the human rights community and the military was the difference in perceptions, expectations, and assessments about civilian casualties among the different parties. Military personnel expressed some frustration with negative press coverage, and emphasized the previous decade’s impressive achievements in minimizing civilian casualties. They presented concern for civilian casualties as an historical, evolutionary

² See Sandholtz and Stiles, *International Norms*.

process far removed from the enormous casualties of World War 2. In contrast, non-military participants expressed continuing criticism about the way force was used; human rights workers were concerned about the “risk aversion” of U.S. personnel, pointing out that both Serbian and Kosovar civilians suffered a great deal as a result of the strategic choice of relentless air strikes, for example.

The conference began with an exploration of the most basic questions, including what the relationship was between international humanitarian law and war. The answer given by one military official provides a good summary of prevailing attitudes of the time, which saw military effectiveness and civilian casualties in direct opposition. As the quote below also shows, the priority of *force protection* was, at this point, assumed by those speaking from a military perspective, confirming a deeply ingrained, organizational cultural perspective about risk aversion:

As a starting point, it is fundamentally correct to say military operations and humanitarian concerns are at odds. Military operations are about destruction, and are often chaotic and confused. Humanitarian concerns are about minimizing this destruction. But this doesn't tell us much. The real question is to what extent can military operations be carried out with minimum casualties without damaging effectiveness and accepting significantly higher casualties of friendly forces.³

The starting assumptions about the role of ethics in the two communities were fairly far apart. Military participants' thinking about civilian immunity at this time reflected a primarily technical outlook, and the scope of discussion was largely limited to choice of weaponry, targeting practices, and collateral damage modeling. Human rights

³ Hazen, "Conference Report," 2. To get a relative sense of what “significantly higher” meant, U.S. casualties were practically zero during the Kosovo operations.

experts, however, saw humanitarian norms endangered by the reluctance to commit ground troops, which sparked a debate as to whether the trend in increased reliance on air power was good or bad for civilians.

They also worriedly pointed out the expansive potential of “military necessity,” the civilian immunity norm’s ambiguous limiting principle. One such example brought up in discussions was the bombing of the television station in Belgrade, which human rights experts saw as illegal since it aimed to sever the link between the people and the government. Consistent with the Weinberger-Powell doctrine of the time, however, some participants held more expansive, sovereignty-oriented views of military necessity, arguing that “media outlets provide effective mobilizing tools for the perpetration of violence and thus are legitimate targets.”⁴ Similar debates occurred about the bombing of electrical grids, which produce great civilian suffering but which was defended by some military participants as necessary to “provide military advantage by injecting friction into the system and temporarily disabling the enemy.”⁵ This difference in perspective also manifested in discussions about whether the concept of military necessity can be coherently applied to coercive strategies.⁶

Overall, many were conflicted about the role of international humanitarian law against a legitimizing backdrop of humanitarian intervention. (It should be noted that

⁴ Ibid., 7.

⁵ Ibid.

⁶ Ibid.

though the GWOT had just begun, counterinsurgency in these discussions was not yet on the radar. The public discourse about civilian casualties, the use of force, and civilian immunity had not yet extended its reach to include issues of ground wars.) Still others brought up the difference between legal and moral standards for military behavior and suggested that “while international humanitarian law certainly places constraints upon the use of force, many thought that popular conceptions of “morality” had a far more powerful impact.”⁷ The report shows evidence of a nascent debate about whether more restrictive moral expectations put the U.S. at a disadvantage. (This debate would arise in relation to Iraq only later). One comment suggested a quite suspicious view of the norm of civilian immunity as a possible a weapon to constrain U.S. power: “New international humanitarian law is emerging, and if allowed to progress, law will become the most potent weapon deployed against the United States.” Some noted the seeming irrelevance of the norm in practice since “the distinction between civilian and non-civilian has become blurred due to the nature of modern warfare and the environments in which modern wars are fought,” especially urban environments.⁸

Some military participants countered that a slew of lawyers were already involved in targeting decisions and that consideration for IHL (or LOAC, the preferred military usage) had become internalized into military decision-making.⁹ The debate was widened

⁷ Ibid., 12.

⁸ Ibid.

⁹ Ibid.

when one participant remarked that “it is a mistake for military planners to view humanitarian concerns as impediments to success in war. Wars are fought for political reasons, and ignoring humanitarian concerns runs the risk of winning the battle and losing the war.” The beginnings of the recognition of the need for legitimacy in humanitarian intervention surfaced because “the domestic public and international community, justifiably or not, holds Western militaries to a higher standard when they intervene for ostensibly humanitarian reasons.” Some acknowledged the more cautious targeting practices that might require, but “it was suggested that the U.S. could “afford” such caution only in limited circumstances. Still another “queried whether it would be either militarily prudent or politically necessary to apply these constraints to the war on terrorism.”¹⁰ Common ground was found, however, as military officials and human rights experts agreed that the U.S. public needed to be encouraged to have more realistic expectations about the humanitarian implications for the use of force.

To sum, analysis of the earliest conference report available (held in November 2001) shows the beginnings of a debate informed by concerns about legitimacy, especially the link between the reasons for using force to the moral issues about how force is applied. Some “asserted that many participants sought to distinguish between morally acceptable and legally justifiable actions, suggesting that there are tensions between them.” This conference also shows a baseline understanding of an oppositional relationship between humanitarian concerns about civilian casualties and military

¹⁰ Ibid., 5, 7.

effectiveness. The comments and concerns of military personnel demonstrate a certain level of internalization of the civilian immunity norm, though this attitude is inconsistent across participants and narrow in scope in the sense that it applies mostly to airpower. Interestingly, we see the first hints that some would assume a lesser degree of political pressure to incur risk to protect civilians in the GWOT than humanitarian intervention required. Both groups wanted to better manage public expectations about the humanitarian consequences of employing force, however, though none at this point saw foreign publics as a concern; rather, the American public was the audience to which they were referring. Finally, military personnel and human rights experts both expressed an interest in “the NGO world saying ‘this is what we’d like to see,’ and the military saying ‘this is the best we can do,’ and trying to narrow this gap.”¹¹ These initial interactions mark a period of “strategic bargaining” in the sense that it is seen as necessary to talk to the human rights community, but for many the attitude appears skeptical, mostly to defend the military’s actions.

Origins of the Legitimacy Gap: the Instrumental Use of Civilian-Centered Norms

*If war is forced upon us, we will fight in a just cause and by just means — sparing, in every way we can, the innocent. And if war is forced upon us, we will fight with the full force and might of the United States military — and we will prevail.*¹²

¹¹ Ibid., 11.

¹² George W. Bush, "Text of President Bush's 2003 State of the Union Address," *The Washington Post* 2003.

While those participating in the human rights policy conferences recognized the competition between the two very different goals of human rights and military action, the tensions between “just means” and “full force” was apparently lost on the George W. Bush administration. From the beginning of the GWOT, President George W. Bush engaged in a strategy of legitimation for his war policies by invoking moral concepts deriving from Just War. His rhetoric invokes the *jus ad bellum* to justify the use of force in Iraq, and he employs the language of just means (*jus in bello*) in order to legitimize the U.S. identity as one that can be trusted to act ethically with that power, which works simultaneously to deny legitimacy to its enemies, both state and non-state.

The War of Ideas and its Reliance on Just War Concepts

The War of Ideas is a real component in the GWOT broadly and in the Wars in Iraq and Afghanistan more narrowly, yet because words are used to sell action, this is often overlooked as mere rhetoric. The point of the War of Ideas is to deny support for extremist ideological movements hostile to the United States. In the *National Security Strategy of 2002* (NSS 2002),¹³ Bush spells out the War of Ideas for the first time, and he explicitly states that the *legitimacy* factor is a central concern:

We will also wage a war of ideas to win the battle against international terrorism. This includes using the full influence of the United States, and working closely with allies and friends, to make clear that all acts of terrorism are illegitimate so that terrorism will be viewed in the same light as slavery, piracy, or genocide.¹⁴

¹³ National Security Council, "National Security Strategy of the United States," (Washington, D.C.: The White House, 2002).

¹⁴ Ibid. 6

Besides starving terrorism of legitimacy, the War of Ideas would also include the following three goals:

- Denying “fertile ground” for extremist Islamist ideology by promoting Muslim moderates.
- Addressing “underlying conditions” with the help of the international community
- Use public diplomacy to counter extremist rule and to promote identification with American ideological concepts such as freedom.¹⁵

The efforts to delegitimize terrorism were, of course, well under way by the time this document was published. Bush employed a familiar tool which is itself the supporting language of civilian immunity and just war, but which has also historically been used to violate the spirit of distinction between combatant and noncombatant: civilization versus barbarism/savagery: “this is civilization’s fight;” “the civilized world is with us;” and “we wage a war to save civilization itself.”¹⁶

That terrorism poses a universal threat to “civilization” was not terribly controversial in the U.S. or elsewhere in the wake of 9/11. As Mendelsohn argues, “Al Qaeda poses a challenge to the sovereignty of specific states but it also challenges the international society as a whole. This way, the challenge that Al Qaeda represents is

¹⁵ Council, “National Security Strategy,” 6.

¹⁶ CNN, “Bush: ‘We wage a war to save civilization itself,’” November 9, 2001, accessed November 1, 2012, available online: <http://edition.cnn.com/2001/US/11/08/rec.bush.speech/index.html>. For a full analysis of Bush’s use of the Geneva Conventions as a legitimizing tool, see Kinsella, “Discourses of Difference.”

putting the survival of the system under risk.”¹⁷ Kinsella adds that “what marks President Bush and his administration as the right defenders of ‘civilization is their claims to protect ‘civilians.’”¹⁸ Most agree that to kill civilians for political purposes is wrong and should be condemned. Naming terrorists as the “enemy of civilization” labels them not as emergent actors who threaten the state monopoly of violence but as illegitimate in their very identity. While their actions necessitate war, “who they are” precludes conferring any legitimacy on their political claims or grievances precisely because “targeting innocent civilians for murder is always and everywhere wrong,”¹⁹ To be a “terrorist” means to be defined by the use of unjust means (killing civilians), which renders impossible just cause and puts terrorists beyond the pale as actors—irreconcilable with, and so incapable of inclusion within, any moral international order.

The analysis above is supported by the congressional testimony of Douglas Feith,²⁰ Under Secretary of Defense for Policy at the time, who was also in charge of the initial civilian reconstruction effort during the Iraq War. Feith helped to shape the Bush stance toward the Geneva Conventions, and he explains that Donald Rumsfeld summoned him and the Chairman of the Joint Chiefs of Staff, General Richard Myers to

¹⁷ Barak Mendelsohn, "Sovereignty under attack: the international society meets the Al Qaeda network," *Review of International Studies* 31, no. 01 (2005): 45.

¹⁸ Kinsella, "Discourses of Difference," 163.

¹⁹ George W Bush, *Remarks by the President at 2002 Graduation Exercise of the United States Military Academy West Point, New York* [Speech] (The White House, June 1, 2002), accessed March 2, 2012, available online: <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>, p. 2.

²⁰ "Statement by Douglas J. Feith before the Constitution, Civil Rights, and Civil Liberties Subcommittee of the House Committee on the Judiciary," (July 15, 2008).

provide a memo about the Geneva Conventions with “talking points” for a National Security Council meeting in February 2002, during the period the Bush Doctrine was still being formulated. Though the issue was at this time centered on torture and POW status, Feith explains that the “memo represented the thinking of the top civilian and military leadership of the Defense Department,”²¹ whose stance was that the U.S. “had a compelling interest in showing respect for Geneva.” It was considered important because “Geneva is crucial for our own armed forces” in order to be treated as the law prescribes in case of capture, and it was “an essential component of military culture.” Moreover, Feith adds, it is “‘morally important, crucial to US morale’ and it is also ‘practically important, for it makes US forces the gold standard in the world, facilitating our winning cooperation from other countries.’”²² Finally, Feith adds, the Geneva Conventions—and here he specifically refers to the core content of the civilian immunity norm—are crucial in the war on terror:

[our] position is dictated by the logic of our stand against terrorism. I argued:

- The essence of the Convention is the distinction between soldiers and civilians (i.e., between combatants and non-combatants).
- Terrorists are reprehensible precisely because they negate that distinction by purposefully targeting civilians.²³

The war on terror became controversial as the universalism of the “human rights interests” of civilization morphed into the sovereignty-based power interests of the

²¹ Ibid., 4.

²² Ibid., 3.

²³ Ibid., 4.

United States, despite the belief that values and interests had fused. This was evident when Bush employed the language of just war and terrorism for the purposes of legitimizing the use of force against other states: in this case, Iraq. As part of his broader foreign policy program known as the Bush Doctrine, the rhetoric Bush crafted at this early point was directed toward mobilizing the domestic audience by “branding” the war in Iraq as a secondary but crucial front in the GWOT. As others have pointed out, however, the nature of global media today makes it nearly impossible to target only one audience since “the media invites domestic and international responses, publicizing the debate.”²⁴

The *NSS 2002* aims to ensure an order whereby all nations would “protect basic human rights”²⁵ by furthering the sovereign power interests of the U.S.: “The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests.”²⁶ This document, while building on the brief surplus of legitimacy afforded the U.S. in fighting Al Qaeda, made instrumental use of Just War concepts (civilian immunity, human rights, and democracy more broadly) to legitimate the expansion of its own power across the globe. Most

²⁴ S.P. Marks, “Branding the War on Terrorism: Is There A New Paradigm of International Law,” *Michigan State Journal of International Law* 14 (2006); Major Sherry K. Oehler, “The Unintended Consequences of Killing Civilians: A Monograph” (United States Army Command and General Staff College, 2012), 1. Reus-Smit, *American Power*.

²⁵ Council, *National Security Strategy of the United States*.

²⁶ *Ibid.* 1.

famously, Bush turned the Just War concept of preemption into prevention,²⁷ a move which served to undermine the stability of the international normative order and reaffirm European publics' initial assessment of Bush as "mak[ing] decisions based entirely on U.S. interests."²⁸ As Hurd argues, his instrumental use and distortion of this norm was damaging on many fronts:

The American challenge to the customary law on preemption threatens *to delegitimize both the existing norms and the social basis of US power*, while also attempting to legitimize American interests and new understandings of the norms. It therefore shows the productive and destructive aspects of the power of legitimation in world politics. Legitimation is the link between states and the normative structures of international society.²⁹

Defining rogue states as illegitimate based on their anti-human rights, "terrorist" ideology, they too are denied any just cause because their identity precludes the possibility: "we make no distinction between terrorists and those who knowingly harbor or provide aid to them."³⁰ In attempting to blur the line between the identities of state and non-state actor by conflating illegitimate violence against foreign civilians (terrorism) with illegitimate violence within a state (human rights violations), Bush serves to

²⁷ "by identifying and destroying the threat before it reaches our borders... we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country" in *ibid.* 6

²⁸ See Pew Results of a Multinational Poll in France, Germany, Great Britain and Italy, "Bush Unpopular in Europe, Seen As Unilateralist." "More than seven-in-ten of those in each country say Bush makes decisions based entirely on U.S. interests." August 15, 2001, accessed March 1 2013, <http://www.pewglobal.org/2001/08/15/bush-unpopular-in-europe-seen-as-unilateralist>.

²⁹ Hurd, "Breaking and Making Norms," 194 [my emphasis].

³⁰ Council, *National Security Strategy*, 5

strengthen the normative power of both human rights and civilian immunity, and more specifically, *reinforces a civilian-centered human rights ethic*.

By employing international society's morally constraining norms in an identity contest with both terrorists and rogue states, however, Bush reinforces expectations that the United States be held to a higher standard in war, undermining the legitimacy of the traditional bias states have maintained toward an expansive, sovereignty-based definition of military necessity. Couching the build-up to the Iraq War in the rhetoric of Just War and undermining its long historical struggle to separate *jus ad bellum* from *jus in bello* (as explained in chapter 2) by fusing unjust cause with unjust means, Bush's garbled communication strategies enact three unintended consequences: 1.) he creates moral confusion about who the enemy is and what type of treatment they are entitled to. This is true of the U.S. public and many of the soldiers at the lower levels, as confirmed by my interviews.³¹ 2.) he invites judgment of his own war according to those same criteria, and 3.) he undermines both the physical wars and the wars of ideas by placing them at odds.

By instrumentally using norms meant to *limit* war-making power for the purposes of *expansion* of power, Bush drew unprecedented attention to the *contradictions* between the American values of rule of law, democracy, and the protection of human rights and American aspirations for global hegemony. As Ikenberry explains, people feared that Bush had abandoned the post WW2 social compact that allowed U.S. power to exist

³¹ As will be shown in the next section, many at the lower levels expressed that many soldiers had the attitude that they were avenging 9/11 in the early years of the Iraq War.

relatively unchallenged by the rest of the world because it rested on how actual, ordinary people, that is, *civilians*, experienced American power.³² The precarious balance previously employed by the U.S. through strategic restraint had rested on the “institutionalization of hegemonic strategy, [which] serves the interest of the United States by making its power more legitimate, expansive, and durable. The price is that some restraints are indeed placed on the exercise of power.”³³ As Ikenberry suggests, in rejecting the restraints on its own power, the U.S. emphasized its “imperial face” over its “liberal face,” which intensified insecurity and inflamed public opinion in many states across the world.³⁴ Anti-Americanism, which the War of Ideas was meant to remedy, instead was fanned in the build-up to the invasion of Iraq.

This worsened as two of the three legs of the stool constructed by the administration to justify its invasion disintegrated (Saddam Hussein’s alleged cooperation with terrorists and his program of WMDs). This left only one leg, humanitarian intervention, which meant that the legitimacy of U.S. military action in Iraq rested precariously on the promise that the good of removing the previous regime would outweigh the violation of Iraq’s state sovereignty, not to mention the destruction and misery wreaked on its people. As damage to the U.S. reputation began to accrue in the

³² G. John Ikenberry, "Institutions, Strategic restraint, and the Persistence of American Postwar Order," in *Primacy and its Discontents: American Power and International Stability*, ed. Michael E. Brown (Cambridge, Mass.: MIT Press, 2008).

³³ G. John Ikenberry, "Strategic Reactions to American Preeminence: Great Power Politics in the Age of Unipolarity," in NIC 2020 project (2003), 12.

³⁴ *Ibid.*

larger international community,³⁵ a legitimacy gap began to expand between the values and identity promoted in the War of Ideas and the material reality of the physical wars. With a unilaterally conceived and implemented foreign policy goal lacking international support, particularly amongst foreign publics,³⁶ the stated goal in Iraq became the creation of a stable, democratic state that respects human rights and that would become an ally in the war on terror.³⁷ Harkening back to the previous social compact of strategic restraint, the material goals of the war were now firmly embedded within normative claims about making life better for ordinary people through freedom, prosperity, and human dignity.

The criteria by which to judge U.S. power and thus U.S. identity was promoted by the U.S. itself through its attempt to establish its place within international society as a global hegemon that was fierce to its enemies but protective of its friends. In using the rhetoric of restraint and principle but appealing to the desire for destruction and revenge, Bush set an emotionally powerful tone for the nation, including some in the military. As my interviews with military personnel have revealed, Iraqi civilians came to be seen as

³⁵ See Pew Report on the image of the U.S. one year into the Iraq War, accessed 3-1-2013, available online: <http://www.pewglobal.org/2004/03/16/a-year-after-iraq-war/>.

³⁶ Pew Global Research Center traces the public opinion of foreign publics and demonstrates the damage to U.S. image due to its foreign policy. See for example, "Global Public Opinion in the Bush Years, 2001-2008, accessed 3-1-2013, .<http://www.pewglobal.org/2008/12/18/global-public-opinion-in-the-bush-years-2001-2008/>.

³⁷ Cited on Common Dreams website, accessed March 1, 2013, online: <http://www.commondreams.org/headlines04/0929-23.htm>.

the enemy by many in the early days of the war. As a result, the latent tensions regarding the moral dimensions of the civilian immunity norm that existed pre-Iraq, between the humanitarian justification for force versus the suffering it causes for innocent civilians, would be amplified ten-fold.

What the U.S. civilian leadership did not yet understand, but what some in the U.S. military would learn fairly quickly, is that the narrative (the actual story that interprets and guides the ideas and perceptions of people about events) and the legitimacy it confers or destroys, was not an ancillary rhetorical issue; rather, the War of Ideas impacted directly on the material success or failure of a war waged on behalf of democratic values and human rights, by a powerful Western democracy, against non-state actors in a state it was responsible for “breaking.”³⁸ What was just as important was that, as in any war, the enemy was watching, listening, and behaving in a strategic manner as well. Moreover, the enemies were multiple, and Al Qaeda, who had been working out its own narrative of morality and legality about killing civilians, provided an alternative narrative about the justness of killing civilians, aiming at the Achilles heel of American legitimacy: its limited ability to see the gap between its own words and its deeds. At the same time Bush was formulating his use of norms, al Qaeda’s official spokesman, Suleiman Abu Ghaith, posted the following on al Qaeda’s web site in June

³⁸ This term refers to Colin Powell’s oft-quoted admonition to President Bush that in Iraq, “you break it, you own it.” Explained in David Samuels, “A conversation with Colin Powell,” *The Atlantic*, March 2011 2007.

2002. Using the same language of WMDs that Bush was using, he wrote a justification for killing Americans based on American behavior toward Muslim civilians:

Due to the American bombings and siege of Iraq, more than 1,200,000 Muslims were killed in the past decade...The Americans have still not tasted from our hands what we have tasted from theirs. The [number of] killed in the World Trade Center and the Pentagon are but a tiny part of the exchange for those killed in Palestine, Somalia, Sudan, the Philippines, Bosnia, Kashmir, Chechnya, and Afghanistan. We have not reached parity with them. We have the right to kill four million Americans – two million of them children – and to exile twice as many and wound and cripple hundreds of thousands. Furthermore, it is our right to fight them with chemical and biological weapons, so as to afflict them with the fatal maladies that have afflicted the Muslims because of [Americans'] chemical and biological weapons. America knows only the language of force. America is kept at bay by blood alone.³⁹

Iraq: Post Invasion 2003-4

The U.S. enjoyed its brief, shining moment in Iraq in the immediate aftermath of the invasion, which was militarily successful by most accounts in the sense that it achieved its goal of defeating and removing the previous regime. Cheers for the liberators soon gave way to chaos, however, as it became apparent that there was a lack of any real post-invasion plan or even capability for state-building. Thomas Ricks documents the “fiasco” of those years when many ordinary Iraqis turned from optimism to suspicion: a failure to police the unruly mobs who destroyed Iraqi cultural heritage; a lack of civilian capacity to assist the military in building infrastructure and institutions; de-Baathification and the dissolution of the Iraqi military by L. Paul Bremer produced

³⁹ Quoted in Carl J. Ciovacco, "The Erosion of Noncombatant Immunity within Al Qaeda," *Small Wars Journal* (2008, June 11), accessed February 25, 2013, online: <http://smallwarsjournal.com/jrnl/art/the-erosion-of-noncombatant-immunity-within-al-qaeda>.

angry, unemployed, and well -armed Sunnis who began resisting what they correctly predicted would be a Shia-majority dominated government.⁴⁰

What is less acknowledged by most accounts of the invasion and early post-invasion period is that the lack of planning included an absence of clear, unified expectations and training on how to treat civilians. While the air strikes in the “shock and awe” campaign employed precise weaponry and careful collateral damage planning, they also used cluster munitions in residential areas.⁴¹ Civilian immunity considerations were institutionalized in air strike targeting procedures, but how ground troops behaved toward civilians fell to the ethical leadership exhibited (or not) by individual leaders. Though some units were expected to (and did) exercise ethical judgment in distinguishing between combatant and civilian, others describe a free-for- all environment in which, as one soldier put it, the rules of engagement were to “kill anything that moves.”⁴² Others described the mood as vengeful and dark after 9/11, and all agreed that force protection was an absolute, unquestioned priority: “better to send a bullet than a soldier” was mentioned as a common slogan of the time.

Despite the words of President Bush, who characterized the invasion as "one of the swiftest and most humane military campaigns in history,"⁴³ the reality of the war on

⁴⁰ Thomas E. Ricks, *Fiasco: the American Military Adventure in Iraq* (New York: Penguin Press, 2006).

⁴¹ Human Rights Watch, "Off Target: The Conduct of the War and Civilian Casualties in Iraq," (New York, December 2003).

⁴² Personal interview.

⁴³ George W. Bush, "Address of the President to the Nation," (The White House, September 7, 2003), cited in Human Rights Watch, "Off Target."

the ground was experienced differently by many of those in uniform and the civilians with whom they interacted. Bush, in an address to the nation (which was of course transmitted throughout the world by global media), said “the people you liberate will witness the honorable and decent spirit of the American military. In this conflict, America faces an enemy who has no regard for conventions of war or rules of morality.” After condemning Saddam Hussein on the grounds of his violations of human rights, Bush adds, “I want Americans and all the world to know that coalition forces will make every effort to spare innocent civilians from harm.”⁴⁴ In the meantime, the military was not, as General Tommy Franks put it, “in the business of doing body counts,”⁴⁵ but an initial damage assessment by Human Rights Watch estimated that the invasion killed thousands.⁴⁶

In the face of the grave material disaster forming on the ground, the lack of basic needs being met and the massive disruption to an already severely damaged society and economy, the War of Ideas faded into the background. Neither the State Department nor the DoD thought much about what would be required to implement it or even how it would relate to the war on the ground. While the military had always engaged in psychological operations, the goal of manipulating perceptions was negative: to support the use of destructive force and defeating the enemy. The last U.S. experience with a war

⁴⁴ George W. Bush, "President Bush Addresses the Nation," The White House, accessed March 1, 2013, online: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html>.

⁴⁵ Quoted in Harold Pinter, "Nobel lecture 7: Art, Truth and Politics," (2005).

⁴⁶ Human Rights Watch, "Off Target."

of ideas meant to promote positive U.S. values, identity, and power occurred during the Cold War, when the state department ran a fairly vibrant public diplomacy effort. As was the case with many of the other traditionally civilian responsibilities, this capability did not exist early in the war. Perhaps more importantly, it was only gradually becoming apparent that what happened on the battlefields and in the neighborhoods of Iraq had any bearing on the larger ideological war of perceptions relating to the GWOT. As President Bush had explained, the War of ideas was meant to address and remedy the fertile ground for terrorism and anti-American feeling, yet those very enabling conditions were taking root in Iraq.

In the meantime, the Project for the Means of Intervention continued to hold conferences and meetings continued between a core of approximately 60 “veteran participants” along with a diverse crowd described as consisting of “intergenerational, international, senior to junior; analytic and operational, [and] “unusual” suspects.” Some could be considered “norms entrepreneurs,” and others were not. As events in Iraq heated up, the meetings became “informal, off-the-record, and intensive.” The causes of civilian suffering and how to reduce it was the main topic of discussion, and assumptions and perspectives of human rights experts and the military were far off. Issues were raised about the utility and difficulty of keeping track of civilian casualties, along with discussions about what was and was not within the control of the U.S. government. It was noted that while the location, capabilities, and intentions of the adversary were not in control of the U.S., the “rules of engagement (ROE), quality of intelligence, and strategy”

were. No consensus, or even emphasis at this time suggested that both sides had decided that civilian suffering was itself a strategic consideration, though it was assumed that the issue was a matter that impacted the “Western ‘center of gravity’ in the sense of affecting “local political and military allies, coalition partners, domestic political support, and international legitimacy.”⁴⁷

By 2003, the outcomes of the conferences showed an acknowledgement of the salience of civilian casualties, and despite the tensions between a military that tended toward the presumption that progress toward civilian suffering was already as good as it gets, the results of the conference highlighted the need to

- ‘increase communication among military, political leadership, human rights groups, and broader public’ about CD issues
- Develop greater understanding of how conduct of U.S. military operations and other factors affect civilians during war
- Help make U.S. use of force as consistent as possible with humanitarian principles
- Make U.S. use of force more effective⁴⁸

Back inside the military, it became clear to many that an insurgency was brewing from the beginning, but that fact did not compel a *unified* doctrinal response.⁴⁹ Rather, in the absence of a clear doctrine to address such a contingency, early attempts at building

⁴⁷ Sarah Sewall, "Final Report: Project on the Means of Intervention 2001-2003," (Carr Center for Human Rights Policy: John F. Kennedy School of Government, 2003), 2.

⁴⁸ *Ibid.*, 18.

⁴⁹ Ricks puts the first insurgent attack at day one of the Iraq War, with the first suicide bombing to come only days later, *Fiasco*, 118.

infrastructure, providing basic services, and working to restore order and stability took place within the context of a disintegrating relationship between soldiers and civilians. Anti-occupation sentiment grew in key areas, and as soldiers experienced the terror tactic of road-side IEDs, suspicion and tension built between the populace and the military. Checkpoint incidences of killing civilians increased, and soldiers kept their physical distance from the people, which exacerbated an already shaky foundation undermined by poor communication, cultural distance, and the sense of soldiers as outsiders. The initial euphoria about U.S. liberation that was touted (and by most accounts generally believed) by the administration, was soon clearly being experienced as occupation by many Iraqis.⁵⁰ Promises of prosperity and freedom instead gave way to destitution, insecurity, and growing chaos.

U.S. forces were trained for conventional war, in which destroying the enemy is the goal, and civilians in many cases became indistinguishable from insurgents, both in their physical appearance, but also, some interviewees suggest, in the minds of some of the soldiers. One remarked: “we began to look at them as the enemy.” Lacking in training and preparation for such a development, many confirmed a widespread mood of avenging 9/11. Other interviewees suggested that most events involving civilian casualties and abuse were never brought to light by the media: “there are lots of things you’ve never heard about on the news.” This is likely due to the practice of controlling the media by

⁵⁰ Recognition of a “cultural” problem was confirmed in interviews, though some suggested it was not seen as a problem until later. This is also well documented in the military debates published throughout 2005 in the internal military journal, *Military Review*, which will be analyzed later.

embedding reporters; one interviewee mentioned a specific incident in which a soldier went on a rampage against civilians in the Iraqi town of Hit after losing several of his buddies to an IED attack. According to this account, the soldier was prosecuted, but this was not a big media hit, at least in the U.S. Two events that did attract global media attention, however, were seen by most of the interviewees as tarnishing the reputation of the military in a significant way,⁵¹ contributing to the spread of an already growing insurgency, and represented a tipping point in the early stages of the war. These two events both centered on perceptions of the unethical treatment of Iraqi civilians by American soldiers: the scandal at Abu Ghraib and the first battle of Fallujah in April of 2004.

The scandal at Abu Ghraib resulted from the brutal, degrading, sometimes deadly treatment of detainees that was captured in film clips, photographs, journals, stories, and official reports by the ICRC and Human Rights Watch.⁵² The investigation began within the military, but traditional media brought it to life—a special on *60 Minutes* and then an article by the famed journalist Seymour Hersh of the *New Yorker*.⁵³ Photographs were leaked and disseminated across the globe via the internet, and the world was shocked by

⁵¹ (and this was reflected in the military journals)

⁵² International Committee of the Red Cross, "Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons in Iraq during Arrest, Internment, and Interrogation," (2004, February); Human Rights Watch, "The Road to Abu Ghraib," (2004).

⁵³ Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10 2004.

the depraved, sadistic images of torture and sexual degradation against the prisoners.⁵⁴

Further, it was mentioned that the released photos were relatively tame compared to the still unreleased photos of rape, torture, beatings, intimidation, and death. Hersh notes that military officials described American soldiers ‘severely beating an Iraqi prisoner nearly to death, having sex with a female Iraqi prisoner, and ‘acting inappropriately with a dead body.’ The officials said there also was a videotape, apparently shot by U.S. personnel, showing Iraqi guards raping young boys.’⁵⁵

Military officers describe this exposure as devastating to the war cause, but interestingly, several sources note that the Iraqi reaction was not the main concern, since this was not surprising to many of them—this was a surprise to those outside of Iraq. Despite the public stance of the civilian administration that this was the result of a few bad apples, one interviewee said that the abusive attitudes in Abu Ghraib reflected a wider attitude toward civilians. He described his own reaction to the outing of Abu Ghraib as consistent with the general reaction of those around him: “Well, we’d been caught is what I thought when I first heard” he said. When asked if it was the global public or the Iraqi public he was concerned about, he indicated it was the perceptions of

⁵⁴ Abu Ghraib proved to be a salient news item even in 2006, when Pew reports that “reports about U.S. prison abuses at Abu Ghraib and Guantanamo have attracted broad attention in Western Europe and Japan – more attention, in fact, than in the United States. Roughly three-quarters of Americans (76%) say they have heard of the prison abuses, compared with about 90% or more in the four Western European countries and Japan. Accessed January 10, 2012, online: <http://www.pewglobal.org/2006/06/13/americas-image-slips-but-allies-share-us-concerns-over-iran-hamas/>.

⁵⁵ Seymour Hersh, "Chain of Command," *The New Yorker*, May 17 2004.

the American audience they most feared: “we were afraid they’d find out we were acting like animals.”⁵⁶

The response of public officials at the time indicated grave concern that the damage to the U.S. image undermines the war in a way that transcends domestic support.

TIME magazine published the following:

Senator Joe Biden, ranking Democrat on the Foreign Relations Committee and a supporter of the decision to invade Iraq, characterized the revelations of abuse as the single most significant blow to U.S. prestige in the Arab world over the past decade. Anthony Cordesman, the widely respected defense analyst at the Center for Strategic and International Studies was equally forthright: “Those Americans who mistreated the prisoners may not have realized it, but they acted in the direct interests of al-Qaeda, the insurgents, and the enemies of the U.S.,” he said. The reason is that they came at a point when U.S. standing in the Arab world was already at an all-time low. Says Cordesman, “These negative images validate all other negative images and interact with them.” In other words, they function as a multiplier by providing photographic “proof” of the demonic picture of the U.S. painted by anti-American propagandists.⁵⁷

As if Abu Ghraib were not bad enough, in the same month the U.S. became embroiled in the single most damaging battle of the war thus far: Fallujah. Fallujah is a city in Iraq that was initially friendly to U.S. forces. It eventually became a hotbed of insurgency, however, fueled by anti-occupation resentment. An overwhelmingly Sunni city, its residents suffered high unemployment from the de-Baathification policies undertaken by the Coalition Provision Authority (CPA).⁵⁸

⁵⁶ Personal interview.

⁵⁷ Tony Karon, “How the Prison Scandal Sabotages the U.S. in Iraq,” *TIME*, May 4, 2004, accessed July 18, 2009, online: <http://www.time.com/time/world/article/0,8599,632967,00.html#ixzz2EO0lvPPP>.

⁵⁸ Mark Manning, “The Road to Fallujah,” (Conception Media, 2009).

A series of incidents occurred that sparked mistrust and anger between the soldiers and citizens. First, only a month into the invasion, 700 troops entered the city and took over a local school as part of their base. Residents resented the closure of the school, and within five days, protests around the school grew more ominous, with evidence of rock-throwing by citizens, some children, and claims by soldiers that they were taking fire. While other reports confirm sporadic violence against soldiers over time, Human Rights Watch did not find credible evidence to support that soldiers were under fire on the day in question. The event culminated with soldiers climbing to the roof and opening fire on the crowds, resulting in about seventeen civilian deaths.⁵⁹

As unrest and resistance grew over the next year, troops pulled out of the city, and, in keeping with Bush's policy goal to hand over control to local forces, Iraqi security forces attempted to keep control. The situation grew more volatile as insurgents massacred police, and as they gained mass support of the city's residents. Moreover, the lack of control in the city allowed it to become inundated with foreign fighters, most notably Al Qaeda in Iraq (AQI).⁶⁰ The event that sparked major combat operations was when four American Blackwater contractors accidentally took a wrong turn into the city and were killed by insurgents. Images of a cheering crowd who then mutilated the corpses and hung them from a bridge enraged Americans, including President Bush and

⁵⁹ For a more military-centric view, see Ricks, *Fiasco*, 330-35.

⁶⁰ James Conachy, "Attack on Fallujah Police Highlights Lack of US Control in Iraq," no. 7-30 (2004), accessed July 9 2013, online: <http://www.wsws.org/articles/2004/feb2004/fall-f23.shtml>.

CPA head, L. Paul Bremer.⁶¹ Troops were hurriedly called in, before there was really time to “shape” the terrain or empty the city of civilians, and the goal of searching out and killing insurgents resulted in an estimated 700-2000 Iraqi deaths (some claim 700 civilians), and from 38-100 U.S. soldiers. The city was destroyed, and many of the people displaced. Several of my interviewees confirmed a “shoot anything that moves” mentality and noted that Fallujah is known for what was a common practice in the early days of Iraq, which was to count all males of a certain age as insurgents. None of the soldiers I spoke with were in the battle and instead relied on the internal accounts and stories spread amongst soldiers. Such a characterization has become almost conventional within the military because even some of the newer soldiers have been taught that Fallujah was the antithesis of what good counterinsurgency should be. It is also known at this time that white phosphorous was used to drive insurgents from houses, and an amateur American filmmaker who entered Fallujah right after the battle interviewed residents, (and later soldiers), who showed him hateful graffiti left by soldiers on the furniture of a resident: “I hate Iraq and all Iraqis.”⁶²

What is remarkable about the preceding events is not necessarily the brutality of war, but the spirit of openness and self-reflection about such incidents that is increasingly evident in the military today. The military literature is filled with monographs seeking to make sense of such events in the interest of organizational learning. Major Sherry Oehler,

⁶¹ Manning, "Road to Fallujah."

⁶² Ibid.

for example, who writes on the unintended consequences of killing civilians, confirms my own assertion that the instrumental use of international norms matters for what happens on the ground: she notes that “the Bush administration’s policy on denying “unlawful combatants” privileges as prisoners of war under the Geneva Conventions enabled troops freedom of maneuver to accomplish these missions, however, the policy contributed to the ambiguity on the ground with regard to the treatment of civilians.”⁶³ Bush at the time of Fallujah demonstrated little recognition of this, as evidenced by the fact that his public comments leading up to Fallujah continued to justify force by instrumentally employing the norms-language of democracy, civilian immunity, and human rights: “they want to kill innocent life to try to get us to quit,” he said. Bush promised that “U.S. troops will use whatever force is needed to quell uprisings in Fallujah...and “we will deal with those who want to stop the march to freedom.”⁶⁴

Bush’s determination to make an example of Fallujah for killing American “civilians” and his stated willingness to use all available means suggest that he was no longer concerned with the image of the U.S. military or state as being in line with civilian immunity. His attempts to signal resolve are indicative of a sovereignty-oriented reading of the CIN wherein military necessity enables more civilian casualties. I suggest that this is a tipping point in the war whereby it became very clear that killing civilians entailed damage to the U.S. social reputation, and that the importance of the War of Ideas was

⁶³ Oehler, "Unintended Consequences," 12.

⁶⁴ "Bush Vows to Win in Fallujah," *Washington Times*, April 2004.

first connected to success in the physical war. This is so because, despite the tough talk about force, the political pressure created by the carnage was immense, and it was decisive in stopping the battle despite material definitions of “winning.”⁶⁵

Some of the interviewees present in Iraq during the Fallujah period named Fallujah as a tipping point: “We looked around, and we’d killed all these people, but now what? What were we doing?” This was not lost on many Iraqis. One Iraqi man spoke to the American press weeks after Fallujah, and

he recalls that his growing uneasiness with the US occupation turned into something steelier a few weeks ago, when he saw the first images of civilian casualties carried from Fallujah on the Arab satellite channels Al Jazeera and Al Arabiya. ‘They showed us what they really are.’⁶⁶

The military denied that there were many casualties or that ROE were broken, but according to an intelligence report leaked to Wikileaks, it was immediately recognized that the perception of civilian casualties had damaged the legitimacy of the American mission by creating “political pressure” and building on anger already present from Abu Ghraib.⁶⁷

A very influential series of articles published in *Military Review*, the Army’s internal journal, in 2005 demonstrate that the thinking of the leadership was in keeping with both the general sentiment expressed by my interviewees and that of the intelligence report. Metz writes

⁶⁵ Edwards Sean A., “Complex Environments: Battle of Fallujah I, April 2004,” (Wikileaks: <http://wlstorage.net/file/fallujah.pdf3-6-2006>).

⁶⁶ Dan Murphy, “Siege of Fallujah Polarizing Iraqis,” *The Christian Science Monitor*, April 15, 2004.

⁶⁷ Edwards, “Complex Environments.”

U. S. forces unilaterally halted combat operations after a few days due to a lack of support from the interim Iraqi Government and international pressures amid unsubstantiated enemy reports of collateral damage and excessive force. Marines won virtually every combat engagement throughout the battle and did so within the established rules of engagement. The missing element was an overall integrated information component to gain widespread support of significant influencers and to prepare key populations for the realities of the battle plan. Without such advance support, the finest combat plan executed by competent and brave Soldiers and Marines proved limited in effectiveness. The insurgent forces established links with regional and global media outlets that had agendas of their own. The failure to mass effects in the global information sphere proved decisive on the battleground in Fallujah.⁶⁸

Metz, who works in information operations, highlights that perceptions are directly relevant to the larger war on terror, which now had direct links to the battlefields of Iraq. He cites Ayman al-Zawahiri, who was writing to al- Zarqawi about the War of Ideas from the perspective of Al Qaeda and now AQI as well, and that this was based on civilian casualties: “. . . I say to you: that we are in a battle, and that more than half of this battle is taking place in the battlefield of the media. And that we are in a media battle in a race for the hearts and minds of our Umma.”⁶⁹ Metz adds that it is specifically the perception “that combat operations are indiscriminate, disproportionate, and in violation of the rules of war” that caused the failure of the April 2004 incursion into Fallujah.⁷⁰ It became quite clear after Fallujah that communication was seen as not simply words but

⁶⁸ Thomas F. Metz et al, "Massing Effects in the Information Domain," *Military Review*, (May-June 2006), <http://usacac.army.mil/cac2/CALL/docs/09-11/ch-4.asp>.

⁶⁹ Ayman al-Zawahiri, "Intercepted Letter to Abu Musab al-Zarqawi," (9 July 2005), as quoted in Metz et al, "Massing Effects."

⁷⁰ Ibid.

as strategic interaction, and that winning the War of Ideas was now seen as directly connected to winning the ground war.

Furthermore, the military began to realize what Bush did not: that the U.S. was light years behind the enemy in acknowledging this basic fact: “[Our] units are facing an adaptive, relentless, and technologically savvy foe who recognizes that the global information network is his most effective tool for attacking what he perceives to be the center of gravity- public opinion, both domestic and international.”⁷¹ By early 2006, Bush’s own former Deputy Assistant Secretary of Defense for Stability Operations, Joseph Collins, published an open letter in the *Armed Forces Journal* warning Bush that ‘[i]f our strategic communications on Iraq don’t improve, the strategy for victory will fail and disastrous consequences will follow.’”⁷²

Transitioning Counterinsurgency: Ideas within the Military

By 2004, post Fallujah, the insurgency was spreading, and now the multi-faceted character of it was becoming clear. The Shiite cleric Muqtada al-Sadr’s faction had also revolted after L. Paul Bremer shut down his region’s television station and arrested one of his men.⁷³ The battle was not nearly as damaging as Fallujah because the civilians separated themselves from the fighter and literally stood aside. As David Kilcullen explains in the *Small War Journal Blog*, however, refraining from killing civilians while going after the enemy is not the end of the road because they still have to choose sides: “in that instance [in Sadr City], and a couple of others, the local Shia population actually stood to one side and

⁷¹ Metz et al, "Massing Effects"

⁷² Quoted in *ibid*.

⁷³ Ricks, *Fiasco*.

waited for us to secure them, but once they saw we weren't planning to stay permanently they were too exposed to support us.”⁷⁴

According to a Shiite cleric at the time, Fallujah had for a brief time united Iraq—against the United States. “What happened in Fallujah made every Iraqi think it could happen in their own town, and that united us.”⁷⁵ The battle in Fallujah however, in destroying much of the city, had displaced both insurgents and civilians, which destabilized other areas in the North and contributed to later sectarian tensions.⁷⁶

With Iraq further destabilizing and beginning to fragment, it became clear to many in the military that the character of the conflict required a change in approach. While information operations were about controlling the narrative and thus perceptions, John Nagl, co-author of the final C.O.I.N. manual (FM3-24) attributes the need for a change to the Information revolution’s effects not only on the image of the U.S., but on the “nature of warfare, especially insurgency.”⁷⁷ The debate within the military about counterinsurgency began to view the actual place of the civilian and ethical treatment toward them as a strategic matter. Despite popular conceptions, the foundations for the C.O.I.N. manual were being laid months before General Petraeus took over the Combined Arms Center and began the famous re-writing of the field manual.

⁷⁴ David Kilcullen to Small Wars Journal Blog Post, January 19, 2007.

⁷⁵ Imam Jawad al-Kalasi, quoted in “Siege of Fallujah Polarizing Iraqis.”

⁷⁶ Linda Robinson, *Tell me how this Ends: General David Petraeus and the Search for a Way out of Iraq* (New York, NY: PublicAffairs, 2008). 72; Manning, “The Road to Fallujah.”

⁷⁷ Booktv, “Interview with John Nagl.”

As I continue with my case, a caveat is in order: at the highest levels of the military, I have not heard my thesis confirmed in public speech, though most lower and mid-level military participants in my study⁷⁸ confirmed the idea that civilian casualties early in the Iraq conflict were a significant reason for the later change in doctrine toward population protection, and many elaborated that the doctrine was needed to get soldiers to “change their attitudes toward the Iraqi people and quit seeing them as the enemy.” “We had to learn that they’re not all terrorists, that they have a culture of their own, and that hurting them hurt the mission.” Nagl’s characterization draws a direct line between civilian casualties and material effects on the battlefield, however, when he wrote in the *Small Wars Journal Blog* that

the key to success in a counterinsurgency environment is not to create more insurgents than you capture or kill. A stray tank round that kills a family could create dozens of insurgents for a generation. Thus, it is essential to use force as carefully and with as much discrimination as is possible.⁷⁹

Nagl also described the need for a change in doctrine as arising because counterinsurgency was previously a special forces task. They needed to “reenergize the force” as a whole. The “big army, conventional war-fighting army needed to be reminded that fighting counterinsurgency” was their job, and the temporary manual that had been

⁷⁸ Interviewees totaled twenty two and consisted of ordinary enlistees who had served in one or both conflicts at various times, mid-level officers, and high level officers. Moreover, military academics and human rights practitioners also provided information and insight. By mutual agreement, no identifying information is being used in this study other than broad groupings (lower level, et cetera).

⁷⁹ John Nagl, to *Small Wars Journal Blog* January 26, 2007, <http://smallwarsjournal.com/blog/spilling-soup-on-myself-in-al-anbar>. This “lesson learned” is now ubiquitous and part of the conventional wisdom of COIN, though my aim is to make apparent that this was not always the case.

hastily put together in October 2004 was about to expire.⁸⁰ What has been left unsaid by military leadership is that the history of special forces and CIA running counterinsurgency operations (in Latin America for example) were secretive and far removed from both the spirit and letter of LOAC. The CIA “murder manual,” for example, was described as a training manual for the Nicaraguan guerrillas in “how to kidnap, assassinate, blackmail, and dupe civilians.”⁸¹

Counterinsurgency Debate: More Carrots, Less Sticks

The doctrinal change that eventually occurred addresses the deficit in military culture toward civilians, and the debate leading up to the new manual in 2005 seemed to recognize this deficit. What the debate in 2005 achieved was to help clarify the logic of counterinsurgency in accordance with the changing political/strategic environment. Ironically, while the public and legal discourse in the U.S. had exploded with questions as to whether or not the civilian immunity norm was obsolete or should be discarded in the face of irregular warfare, military insiders were carefully interrogating assumptions about the use of force, exploring and explicating new goals, and starting to identify what needed to change in order to reach those goals. The community of innovators that shaped the debate engaged in a redefinition of some of the key counterinsurgency concepts in a way that took into account the need to remedy the existing legitimacy gap with the moral content of civilian immunity and by doing so, attempt to bridge the war of ideas with the

⁸⁰ Ibid.

⁸¹ "The CIA's Murder Manual," *The Washington Post* October 21, 1984.

war on the ground. The body of published works taken as a whole attempted to change ideas about how to fight by matching them with revised interests and American identity, creating a conceptual link between the ethical treatment of civilians and national security imperatives and foreign policy goals.

In response to perceptions of failure associated with failing to live up to civilian-centered human rights norms, the debate found in the 2005 (post-Fallujah but pre-Petraeus period) issues of *Military Review*⁸² are indications that human rights demands are having an effect: adaptation, moral consciousness-raising, argumentation, and persuasion are all present. Processes of institutionalization and habitualization would not be expected to come until later, after the adoption of C.O.I.N., which this chapter will not cover.⁸³

The first counterinsurgency manual put out in October, 2004 was a hurried attempt to draw lessons learned from past counterinsurgencies.⁸⁴ The manual shows that prior ideas about how to manage insurgencies emphasize the tactical and operational levels, but not the strategic level, which is the vital difference between it and the later FM3-24. Meant for “division-level leaders and below,” it was not meant to challenge the prevailing assumptions in the military about the utility of force and the way it should be

⁸² This record of the internal transformation of the military’s views on counterinsurgency was recommended to me by one of the higher level interviewees.

⁸³ Risse-Kappen, Ropp, and Sikkink, *Power of Human Rights*, 11.

⁸⁴ This manual was titled, FMI 3-07.22 Counterinsurgency Operations. See Crane 2010, 59, cited in “Clark Innovation under Fire,” 111.

employed. Furthermore, it reflected Rumsfeld's priority that responsibility for the aftermath of the Iraq War was to be shifted onto Iraq,⁸⁵ the host nation (HN): "a basic premise of counterinsurgency is that the ultimate responsibility rests with the HN." And, "one of the key recurring lessons is that the United States cannot win other countries' wars for them, but can certainly help legitimate foreign governments overcome attempts to overthrow them." Lessons from past counterinsurgency experience were thus interpreted in a manner meant to uphold current strategic assumptions, and despite the change in circumstances, the manual reflected an understanding of the U.S. as having a supporting role in the counterinsurgency (as it did in Latin America) rather than as a primary actor: "the use of combat forces is a presidential decision and serves only as a temporary or provisional solution until HN forces are able to stabilize the situation and provide security for the populace."⁸⁶ However, since the war was one of choice by the U.S., and ostensibly for the purposes of humanitarian intervention, the situation in Iraq hardly matched the traditional model of insurgency as resulting from the internal organic uprising of elites with grievances. Instead, it was the result of an invasion and post-invasion policies, including the dismantling of its prior institutions.

⁸⁵ Bob Woodward, *The War Within: A Secret White House History, 2006-2008* (New York: Simon & Schuster Paperbacks, 2009).

⁸⁶ "Field Manual—Interim No. 3-07.22 Counterinsurgency Operations," ed. Department of Army (Washington, D.C.2004), vii, vi, vii.

Though the first manual contained the basic elements of C.O.I.N. in terms of population protection as a goal,⁸⁷ and it emphasized that officers should “prevent indiscriminate use of force,” this is overshadowed by force protection. The manual notes that human rights are a likely grievances and something to be taken into consideration, but it sees them as competing with the use of force and kinetic operations: “Counterinsurgency operations must balance elimination of grievances (that is, reform to include elimination of human rights abuses) and security force action that eliminates the insurgents.”⁸⁸ The manual also emphasizes the media effects of collateral damage and the psychological effects on the populace as damaging to the mission: “Do not hurt the people, but kill the insurgents. Where US forces violate this dictum, US policies may fail.”⁸⁹ However, consistent with remarks by one of my interviewees that “civilians were treated as objects, not human beings,” civilians are mentioned in the same subheading as “Resource Control.” “Combat operations are developed to neutralize the insurgent and, together with *population and resources control measures*, establish an environment within which political, social, and economic progress is possible.”⁹⁰ An entire section discussed coercive practices toward civilians, which included the extreme measure of forceable relocation of populations if deemed necessary.⁹¹

⁸⁷ Ibid., viii

⁸⁸ Ibid., section 1-38.

⁸⁹ Ibid., section c-2:

⁹⁰ Ibid., viii, my emphasis.

⁹¹ Ibid., section 3-4.

In contrast to the inconsistent focus of the prior counterinsurgency manual, which emphasizes that combat operations are in tension with population protection, the series of articles published in *Military Review* during 2005⁹² emphasize the importance of limiting force and protecting the civilian, both for ethical and strategic reasons. In doing so, it lays the intellectual groundwork for shifting the “center of gravity” from the insurgent to the civilian.

The articles in the year preceding C.O.I.N. emphasize the synthesis of moral identity, moral behavior, and strategic goals in the war in Iraq. There is an emphasis on developing Information Operations capabilities, but also on how information operations require challenging the assumption that force produces victory: “U.S. forces find, engage, capture, and kill terrorists, but this traditional approach to counterinsurgency does not adequately counter the insurgents’ information environment strategy.”⁹³ There was a growing recognition that all negative experiences and images of the U.S. hurt the mission, but that changes are not simply about controlling the story through counter-stories, but about changing the hearts and minds of soldiers as well. In acknowledging the damage done by Abu Ghraib, the author emphasizes the changes that must occur as a result: “The stark images from Abu Ghraib prison fade from the news only until the next

⁹² *Military Review* is used to disseminate military scholarship. It is a part of the institutional curriculum. Petraeus gained control of it at the end of 2005 and used it to publish key articles supporting the new doctrine (some authors were invited to write about C.O.I.N. after writing for *Military Review*).

⁹³ U.S. Army Major Norman Emery, U.S. Air Force Major Jason Werchan, and Jr. Major Donald G. Mowles, U.S. Air Force, “Fighting Terrorism and Insurgency: Shaping the Information Environment,” *Military Review* LXXXV no. 1 (January/February 2005), 32.

U.S. soldier must answer formal charges for what happened there. The Army is ensuring what happened will not happen again.”⁹⁴

Competing perspectives appear on occasion, for example, one that argues for the primacy of force protection. The author defends force protection as a strategic necessity because of the casualty sensitivity of the American public: “the enemy also learned that America’s vulnerable center of gravity is dead American soldiers.”⁹⁵ The overwhelming tenor of the publication at this time though is of change, not one of maintaining the status quo. Part of this change is a concerted effort to explain the importance of ideas and the physical war as being connected and of drawing distinctions between terrorists and insurgents versus the U.S. military through their actions: “The United States must also understand that when its forces react negatively and kick down doors in night raids, they are helping the enemy improve his own information environment. Their actions will annoy and alienate citizens who might no longer cooperate or who might begin actively supporting the insurgents.”⁹⁶

Others seek to bring the context of the current war back into its original humanitarian framework: “If the military is to conduct the Global War on Terrorism in an

⁹⁴ U.S. Army Major James F. Gebhardt, Retired, “The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience,” *Military Review* LXXXV no. 1 (January-February, 2005), 44.

⁹⁵ U.S. Army Major General Robert H. Scales, Retired, “Urban Warfare: A Soldier’s View,” (January-February 2005): 9.

⁹⁶ U.S. Maj. Norman Emery, U.S. Army; Maj. Jason Werchan, U.S. Air Force; and Maj. Donald G. Mowles Jr., U.S. Air Force, “Fighting Terrorism and Insurgency: Shaping the Information Environment,” *Military Review* (January-February 2005), 55, Accessed March 1, 2013, online: http://www.army.mil/professionalWriting/volumes/volume3/may_2005/5_05_3.html.

effects-based campaign, then all military operations must become part of that plan. Consider, for instance, the secondary effects of a humanitarian relief operation. As part of the Global War on Terrorism, such an operation well executed serves the campaign plan.”⁹⁷ Even suicide attacks are explained, not as Arab or Muslim cultural defects—which was common in the U.S. at the time, but as strategic aims of insurgencies, including al Qaeda, which increased with anti-occupation resentments. The author argues that closer engagement with the people could defuse the underlying conditions that give rise to such strategies.⁹⁸

A British officer, in a frank and rather controversial article, observed the effects of U.S. military culture and made an explicit criticism: “It was apparent that many considered that the only effective, and morally acceptable, C.O.I.N. strategy was to kill or capture all terrorists and insurgents; they saw military destruction of the enemy as a strategic goal in its own right.”⁹⁹ Others attempted to show what went wrong in past operations to demonstrate the strategic utility of ethical behavior and to counter the tendency to rely on excessive force and permissive ROE. Brian Mcallister Linn drew lessons from the Philippines counterinsurgency about the “necessity of having officers of

⁹⁷ U.S. Army Brigadier General Mick Bednarek, U.S. Army Lieutenant Colonel Thomas P. Odom, Retired, and Stephen Florich, "Expanding Jointness at the Joint Readiness Training Center," *Military Review* LXXXV, no. 1 (2005), 55.

⁹⁸ Robert J. Bunker and John P. Sullivan, "Suicide Bombings in Operation Iraqi Freedom," *Military Review* LXXXV, no. 1 (2005): 79.

⁹⁹ Brigadier Nigel Aylwin-Foster, and British Army, "Counterinsurgency Operations," *Military Review*, no. 2 (2005): 5.

character, initiative, and humanity in counterinsurgency operations.”¹⁰⁰ Another author discussed how important maintaining or repairing perceptions of moral character were in British counterinsurgencies and yet another in the French Algerian War. Montgomery McFate, an anthropologist working for the DoD, argued that as soon as coalition forces toppled Saddam Hussein, they became de facto players in the Iraqi social system.”¹⁰¹ She encouraged cultural knowledge, both in terms of understanding Arab culture and on reflecting on the military’s own strategic character and how that affects outcomes: “the American solution to the conflict [in Vietnam] was the use of overwhelming force in the form of strategic bombing and the Accelerated Pacification Campaign, neither of which resulted in victory.”¹⁰²

C.O.I.N. Revision

By the time David Petraeus was installed as the head of the Combined Arms Center in November 2005, the raw mass of intellectual ideas that formed the foundation of C.O.I.N. had been circulating throughout the organization. Petraeus almost immediately announced that there would be a revision, and the process sped forward, making extensive use of some of the articles already published in *Military Review*. He

¹⁰⁰ Brian McAllister Linn, "The Philippines: Nationbuilding and Pacification," *Military Review* 85(2005): 46.

¹⁰¹ Montgomery McFate, "Anthropology and Counterinsurgency: The Strange Story of their Curious Relationship," *Military Review* (March-April 2005): 24.

¹⁰² Ibid., 31, 34.

employed John Nagl as editor and Conrad Crane, the military historian, as primary author.

The Human Rights Conferences at the Carr Center had, in the meantime, been ongoing, and the mood had shifted within the meetings as well. The November 2005 meeting was attended by Petraeus, Crane, Susan Rice, and about 85 others. Participants looked back at historical counterinsurgencies, seeking to learn lessons, and most agreed that giving up on the idea of force used in a conventional way was a necessity. When discussing how some states employed brutal methods against populations even within counterinsurgencies, most agreed that this was no longer possible for “Western nations prosecuting counterinsurgency campaigns as they would be viewed as collective punishments that deny fundamental human rights to innocent populations.”¹⁰³ Indeed, “conference participants were generally critical of what they called ‘terrorism to fight terrorism’ employed by the French in Algeria.”¹⁰⁴ Not only were they critical in ethical terms, but they spoke of past brutality as counterproductive: “in Vietnam, too, indiscriminate force was counterproductive and undermined overall political objectives.”¹⁰⁵

The general feeling at this time was that political considerations required an ethical stance and that this had to trump military considerations, and not vice versa.

¹⁰³ Sarah Sewall, “Counterinsurgency in Iraq: Implications of Irregular Warfare for the U.S. Government,” (John F. Kennedy School of Government: Harvard University, 2005), 3.

¹⁰⁴ Ibid., 4.

¹⁰⁵ Ibid.

While some questioned the possibility that an insurgency could be eliminated without dirty tactics, another claimed that such assertions being “floated around: were “garbage.”¹⁰⁶ As a consensus emerged about the limited utility of force in such situations, the discussion turned to more technical aspects of putting counterinsurgency into practice: how institutions were to be built, what was needed from the U.S. government, and what difficulties lay ahead.

The relationships built between the human rights community and the military was consummated with the C.O.I.N. revision conference in February 2006, when Crane and Petraeus included the Human Rights Policy group as part of the 150 total academics, journalists, CIA and State Department members that were invited to provide criticism and feedback. Tyler Mozelle, of the Carr Center, says in an interview, “this work was a major milestone in American history and throughout the world of military policy because we were able to broaden the aperture of thinking about US national security to include a more humane approach to thinking about war, civilian casualties, and the ethical dimensions of US foreign policy.”¹⁰⁷

The C.O.I.N. manual (FM3-24) was published a year later in December 2006, and it was downloaded more than a million times. Sarah Sewall, of the Carr Center, wrote the introduction for the University of Chicago Press version published shortly thereafter, and she calls it “radical” in the way it challenges the “American way of war.” Sewall notes

¹⁰⁶ Ibid., 12.

¹⁰⁷ Rahim Kanani, “Human Rights at Harvard: An Interview with Tyler Moselle,” *Forbes*, July 26, 2011.

that the manual's purpose transcends the immediate need to find a workable strategy and claims that its direction "raises some fundamental questions about the legitimacy, purposes, and limits of U.S. power."¹⁰⁸

The manual is directed toward practitioners, but its engagement in a redefinition of interests and identity is clear: protecting the population is the new center of gravity, and given the strength of the moral, human rights dimensions of civilian immunity, and their instrumental connection to the justification of the war, this was the only possible choice that allowed the U.S. to salvage its identity, other than walking away from the fight. The War of Ideas and the war on the ground needed to be consistent; indeed, Petraeus describes the shift in Iraq as a "surge of ideas."¹⁰⁹ Concerned about whether the soldiers would embrace the ethical stance deemed necessary, he urged them to accept one of the key tenets of the manual, which is to "live our values."¹¹⁰ He states:

Realize that we are in a struggle for legitimacy that will be won or lost in the perception of the Iraqi people. Every action taken by the enemy and our forces has implications in the public arena. Develop and sustain a narrative that works, and continually drive the themes home through all forms of media....Live our values. Do not hesitate to kill or capture the enemy, but stay true to the values we hold dear. Living our values distinguishes us from our enemies.¹¹¹

¹⁰⁸ Sewall, "Introduction to the University of Chicago Press Edition."

¹⁰⁹ David H. Petraeus, "Speech at AEI: The Surge of Ideas," (2010).

¹¹⁰ See interview on Guantanamo closure and torture: "Fox News: Interview with David Petraeus," (May 29, 2009).

¹¹¹ David H. Petraeus, "Multi-national force-Iraq commander's counterinsurgency guidance," *Military Review* (September-October 2008): 4.

In sum, I find strong support for my central hypothesis that civilian-centered norms helped to shape the civilian-centric population protection doctrine known as C.O.I.N.. Attitudes toward civilian casualties show movement ranging from early sovereignty-based attitudes about military necessity and proportionality (collateral damage as inevitable), even overtly abusive attitudes, toward an increasing emphasis on distinction over time; this movement is relative to the political pressure resulting from the civilian casualties that drew press attention. The result was a period of self-reflection in which the U.S. foreign policy goal of instituting a democratic state friendly to the U.S. and unfriendly to terrorist ideology was seen to be endangered. As it became clear that a new doctrine was needed, members of the military and human rights experts, in interaction, decided that this doctrinal change needed to be based on the moral or at least ethical actions of the U.S. military regarding the treatment of civilians. My interviews confirm this, with one recently trained cadet stating that they are now taught to be extremely careful of civilian casualties because “we are the human instrument of U.S. foreign policy, and everything we do reflects on the whole nation.” Compare this to some of the stories told to me by enlistees—that he was never told what the Geneva Conventions were, or that civilians were looked at as enemies. Emma Sky, adviser to Petraeus and Odierno in Iraq, remarked that “the biggest mindset change was for the U.S. to look at Iraqis as not the enemy, but to look at the Iraqis as people who needed protecting.”¹¹²

¹¹² Quoted in Peter Bergen, “How Petraeus Changed the U.S. Military,” CNN.com, (November 11, 2012).

Further, it was recognition of the strength and salience of the norms protecting civilians that drove concern for the presence of media rather than the other way around; this is clear from the lack of concern about abuses before they hit the media. Media is an empty vessel, but the strategic narrative that is woven from available norms can either legitimize or delegitimize the actions of actors. Since the legitimacy gap was eventually seen to fuel the insurgency, both global and local, the legitimacy gap created a crucial juncture which required at some point either changing the U.S.'s purported values—in this case abandoning or at least downplaying identification with human rights and civilian immunity, or changing behavior and thus the definition of what it means to “win.” My argument is that the military took on the political burden handed it by Bush, and attempted to change its behavior.

Furthermore, documenting the increasing interaction between human rights organizations and the U.S. military reveals the diffusion of human rights norms, beginning with the instrumental use of the CIN, to argumentation about civilian casualties, to efforts to persuade members of the strategic value of abiding by a more human rights-orientation toward civilians. Finally, I find support for the three conditions under which this transformation in strategy occurs: the questionable legitimacy of the initial invasion, the need to delegitimize terror, and the recognition of a loss of a monopoly of force.

2001: Baseline Attitudes about Civilian Immunity

This story begins in the period leading up to the war in Iraq, when the Global War on Terror (GWOT) had just begun, but before the military's views on civilian casualties had been impacted to a great extent by either the Iraq or the Afghanistan experience. As argued in a previous chapter, civilian immunity has been an increasingly salient aspect of the normative international political order, and some members of the military had already started to recognize that civilian casualties were a political liability (though not yet a military one). In response to U.S. involvement in conflicts in Bosnia, Kosovo, and then Afghanistan and Iraq, the military and a group of human rights scholars from Harvard began building professional relationships in 2000 with a series of conferences and workshops entitled, the Project on the Means of Intervention. The program was organized by the Carr Center for Human Rights Policy, under the auspices of the Human Rights and National Security program. The goal of the early conferences was to encourage dialogue among academics, human rights experts, NGOs, members of the media, and high level military personnel.¹

The 2001 workshop provides a good baseline snapshot of the attitudes of U.S. military personnel about issues pertaining to civilian casualties, media, and military practices. In order to begin to find “common ground,” panels were held, conference

¹ Jennifer Hazen, Rapporteur, "Conference Report," in Humanitarian Challenges in Military Intervention Workshop, ed. Sarah Sewall, Project on the Means of Intervention (Washington, DC: Carr Center for Human Rights Policy, 2001), accessed January 6 2012, <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/WebNovConf.report.pdf>.

papers presented, and keynote speakers of the highest level were brought in—in this instance General Wesley Clark, commander of the mission in Kosovo. The director of the Carr Center at that time was Sarah Sewall, who would emerge as one of the key human rights experts to contribute to the revision process of the C.O.I.N. manual in 2006. Sewall was present throughout this process and forged professional ties with Conrad Crane, one of the primary authors of C.O.I.N., who would also participate, as did, eventually, David Petraeus, John Nagl, and others who comprised much of the inner circle of what would become known as the counterinsurgency “community of innovators.”

The attitudes expressed in this early conference roughly approximate what I described in chapter two as the two major tendencies within the civilian immunity norm: sovereignty and human rights, itself a reflection of the two competing currents in the international order. Sovereignty in this sense refers to the interpretation of civilian immunity as a negative constraint on the sovereign war-making function of the state, and the human rights interpretation emphasizes the positive, rights-protecting responsibility of the liberal state toward civilians.² The problem that necessitated the creation of dialogue between the human rights community and the military was the difference in perceptions, expectations, and assessments about civilian casualties among the different parties. Military personnel expressed some frustration with negative press coverage, and emphasized the previous decade’s impressive achievements in minimizing civilian casualties. They presented concern for civilian casualties as an historical, evolutionary

² See Sandholtz and Stiles, *International Norms*.

process far removed from the enormous casualties of World War 2. In contrast, non-military participants expressed continuing criticism about the way force was used; human rights workers were concerned about the “risk aversion” of U.S. personnel, pointing out that both Serbian and Kosovar civilians suffered a great deal as a result of the strategic choice of relentless air strikes, for example.

The conference began with an exploration of the most basic questions, including what the relationship was between international humanitarian law and war. The answer given by one military official provides a good summary of prevailing attitudes of the time, which saw military effectiveness and civilian casualties in direct opposition. As the quote below also shows, the priority of *force protection* was, at this point, assumed by those speaking from a military perspective, confirming a deeply ingrained, organizational cultural perspective about risk aversion:

As a starting point, it is fundamentally correct to say military operations and humanitarian concerns are at odds. Military operations are about destruction, and are often chaotic and confused. Humanitarian concerns are about minimizing this destruction. But this doesn't tell us much. The real question is to what extent can military operations be carried out with minimum casualties without damaging effectiveness and accepting significantly higher casualties of friendly forces.³

The starting assumptions about the role of ethics in the two communities were fairly far apart. Military participants' thinking about civilian immunity at this time reflected a primarily technical outlook, and the scope of discussion was largely limited to choice of weaponry, targeting practices, and collateral damage modeling. Human rights

³ Hazen, "Conference Report," 2. To get a relative sense of what “significantly higher” meant, U.S. casualties were practically zero during the Kosovo operations.

experts, however, saw humanitarian norms endangered by the reluctance to commit ground troops, which sparked a debate as to whether the trend in increased reliance on air power was good or bad for civilians.

They also worriedly pointed out the expansive potential of “military necessity,” the civilian immunity norm’s ambiguous limiting principle. One such example brought up in discussions was the bombing of the television station in Belgrade, which human rights experts saw as illegal since it aimed to sever the link between the people and the government. Consistent with the Weinberger-Powell doctrine of the time, however, some participants held more expansive, sovereignty-oriented views of military necessity, arguing that “media outlets provide effective mobilizing tools for the perpetration of violence and thus are legitimate targets.”⁴ Similar debates occurred about the bombing of electrical grids, which produce great civilian suffering but which was defended by some military participants as necessary to “provide military advantage by injecting friction into the system and temporarily disabling the enemy.”⁵ This difference in perspective also manifested in discussions about whether the concept of military necessity can be coherently applied to coercive strategies.⁶

Overall, many were conflicted about the role of international humanitarian law against a legitimizing backdrop of humanitarian intervention. (It should be noted that

⁴ Ibid., 7.

⁵ Ibid.

⁶ Ibid.

though the GWOT had just begun, counterinsurgency in these discussions was not yet on the radar. The public discourse about civilian casualties, the use of force, and civilian immunity had not yet extended its reach to include issues of ground wars.) Still others brought up the difference between legal and moral standards for military behavior and suggested that “while international humanitarian law certainly places constraints upon the use of force, many thought that popular conceptions of “morality” had a far more powerful impact.”⁷ The report shows evidence of a nascent debate about whether more restrictive moral expectations put the U.S. at a disadvantage. (This debate would arise in relation to Iraq only later). One comment suggested a quite suspicious view of the norm of civilian immunity as a possible a weapon to constrain U.S. power: “New international humanitarian law is emerging, and if allowed to progress, law will become the most potent weapon deployed against the United States.” Some noted the seeming irrelevance of the norm in practice since “the distinction between civilian and non-civilian has become blurred due to the nature of modern warfare and the environments in which modern wars are fought,” especially urban environments.⁸

Some military participants countered that a slew of lawyers were already involved in targeting decisions and that consideration for IHL (or LOAC, the preferred military usage) had become internalized into military decision-making.⁹ The debate was widened

⁷ Ibid., 12.

⁸ Ibid.

⁹ Ibid.

when one participant remarked that “it is a mistake for military planners to view humanitarian concerns as impediments to success in war. Wars are fought for political reasons, and ignoring humanitarian concerns runs the risk of winning the battle and losing the war.” The beginnings of the recognition of the need for legitimacy in humanitarian intervention surfaced because “the domestic public and international community, justifiably or not, holds Western militaries to a higher standard when they intervene for ostensibly humanitarian reasons.” Some acknowledged the more cautious targeting practices that might require, but “it was suggested that the U.S. could “afford” such caution only in limited circumstances. Still another “queried whether it would be either militarily prudent or politically necessary to apply these constraints to the war on terrorism.”¹⁰ Common ground was found, however, as military officials and human rights experts agreed that the U.S. public needed to be encouraged to have more realistic expectations about the humanitarian implications for the use of force.

To sum, analysis of the earliest conference report available (held in November 2001) shows the beginnings of a debate informed by concerns about legitimacy, especially the link between the reasons for using force to the moral issues about how force is applied. Some “asserted that many participants sought to distinguish between morally acceptable and legally justifiable actions, suggesting that there are tensions between them.” This conference also shows a baseline understanding of an oppositional relationship between humanitarian concerns about civilian casualties and military

¹⁰ Ibid., 5, 7.

effectiveness. The comments and concerns of military personnel demonstrate a certain level of internalization of the civilian immunity norm, though this attitude is inconsistent across participants and narrow in scope in the sense that it applies mostly to airpower. Interestingly, we see the first hints that some would assume a lesser degree of political pressure to incur risk to protect civilians in the GWOT than humanitarian intervention required. Both groups wanted to better manage public expectations about the humanitarian consequences of employing force, however, though none at this point saw foreign publics as a concern; rather, the American public was the audience to which they were referring. Finally, military personnel and human rights experts both expressed an interest in “the NGO world saying ‘this is what we’d like to see,’ and the military saying ‘this is the best we can do,’ and trying to narrow this gap.”¹¹ These initial interactions mark a period of “strategic bargaining” in the sense that it is seen as necessary to talk to the human rights community, but for many the attitude appears skeptical, mostly to defend the military’s actions.

Origins of the Legitimacy Gap: the Instrumental Use of Civilian-Centered Norms

*If war is forced upon us, we will fight in a just cause and by just means — sparing, in every way we can, the innocent. And if war is forced upon us, we will fight with the full force and might of the United States military — and we will prevail.*¹²

¹¹ Ibid., 11.

¹² George W. Bush, "Text of President Bush's 2003 State of the Union Address," *The Washington Post* 2003.

While those participating in the human rights policy conferences recognized the competition between the two very different goals of human rights and military action, the tensions between “just means” and “full force” was apparently lost on the George W. Bush administration. From the beginning of the GWOT, President George W. Bush engaged in a strategy of legitimation for his war policies by invoking moral concepts deriving from Just War. His rhetoric invokes the *jus ad bellum* to justify the use of force in Iraq, and he employs the language of just means (*jus in bello*) in order to legitimize the U.S. identity as one that can be trusted to act ethically with that power, which works simultaneously to deny legitimacy to its enemies, both state and non-state.

The War of Ideas and its Reliance on Just War Concepts

The War of Ideas is a real component in the GWOT broadly and in the Wars in Iraq and Afghanistan more narrowly, yet because words are used to sell action, this is often overlooked as mere rhetoric. The point of the War of Ideas is to deny support for extremist ideological movements hostile to the United States. In the *National Security Strategy of 2002* (NSS 2002),¹³ Bush spells out the War of Ideas for the first time, and he explicitly states that the *legitimacy* factor is a central concern:

We will also wage a war of ideas to win the battle against international terrorism. This includes using the full influence of the United States, and working closely with allies and friends, to make clear that all acts of terrorism are illegitimate so that terrorism will be viewed in the same light as slavery, piracy, or genocide.¹⁴

¹³ National Security Council, "National Security Strategy of the United States," (Washington, D.C.: The White House, 2002).

¹⁴ Ibid. 6

Besides starving terrorism of legitimacy, the War of Ideas would also include the following three goals:

- Denying “fertile ground” for extremist Islamist ideology by promoting Muslim moderates.
- Addressing “underlying conditions” with the help of the international community
- Use public diplomacy to counter extremist rule and to promote identification with American ideological concepts such as freedom.¹⁵

The efforts to delegitimize terrorism were, of course, well under way by the time this document was published. Bush employed a familiar tool which is itself the supporting language of civilian immunity and just war, but which has also historically been used to violate the spirit of distinction between combatant and noncombatant: civilization versus barbarism/savagery: “this is civilization’s fight;” “the civilized world is with us;” and “we wage a war to save civilization itself.”¹⁶

That terrorism poses a universal threat to “civilization” was not terribly controversial in the U.S. or elsewhere in the wake of 9/11. As Mendelsohn argues, “Al Qaeda poses a challenge to the sovereignty of specific states but it also challenges the international society as a whole. This way, the challenge that Al Qaeda represents is

¹⁵ Council, “National Security Strategy,” 6.

¹⁶ CNN, “Bush: ‘We wage a war to save civilization itself,’” November 9, 2001, accessed November 1, 2012, available online: <http://edition.cnn.com/2001/US/11/08/rec.bush.speech/index.html>. For a full analysis of Bush’s use of the Geneva Conventions as a legitimizing tool, see Kinsella, “Discourses of Difference.”

putting the survival of the system under risk.”¹⁷ Kinsella adds that “what marks President Bush and his administration as the right defenders of ‘civilization is their claims to protect ‘civilians.’”¹⁸ Most agree that to kill civilians for political purposes is wrong and should be condemned. Naming terrorists as the “enemy of civilization” labels them not as emergent actors who threaten the state monopoly of violence but as illegitimate in their very identity. While their actions necessitate war, “who they are” precludes conferring any legitimacy on their political claims or grievances precisely because “targeting innocent civilians for murder is always and everywhere wrong,”¹⁹ To be a “terrorist” means to be defined by the use of unjust means (killing civilians), which renders impossible just cause and puts terrorists beyond the pale as actors—irreconcilable with, and so incapable of inclusion within, any moral international order.

The analysis above is supported by the congressional testimony of Douglas Feith,²⁰ Under Secretary of Defense for Policy at the time, who was also in charge of the initial civilian reconstruction effort during the Iraq War. Feith helped to shape the Bush stance toward the Geneva Conventions, and he explains that Donald Rumsfeld summoned him and the Chairman of the Joint Chiefs of Staff, General Richard Myers to

¹⁷ Barak Mendelsohn, "Sovereignty under attack: the international society meets the Al Qaeda network," *Review of International Studies* 31, no. 01 (2005): 45.

¹⁸ Kinsella, "Discourses of Difference," 163.

¹⁹ George W Bush, *Remarks by the President at 2002 Graduation Exercise of the United States Military Academy West Point, New York* [Speech] (The White House, June 1, 2002), accessed March 2, 2012, available online: <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>, p. 2.

²⁰ "Statement by Douglas J. Feith before the Constitution, Civil Rights, and Civil Liberties Subcommittee of the House Committee on the Judiciary," (July 15, 2008).

provide a memo about the Geneva Conventions with “talking points” for a National Security Council meeting in February 2002, during the period the Bush Doctrine was still being formulated. Though the issue was at this time centered on torture and POW status, Feith explains that the “memo represented the thinking of the top civilian and military leadership of the Defense Department,”²¹ whose stance was that the U.S. “had a compelling interest in showing respect for Geneva.” It was considered important because “Geneva is crucial for our own armed forces” in order to be treated as the law prescribes in case of capture, and it was “an essential component of military culture.” Moreover, Feith adds, it is “‘morally important, crucial to US morale’ and it is also ‘practically important, for it makes US forces the gold standard in the world, facilitating our winning cooperation from other countries.’”²² Finally, Feith adds, the Geneva Conventions—and here he specifically refers to the core content of the civilian immunity norm—are crucial in the war on terror:

[our] position is dictated by the logic of our stand against terrorism. I argued:

- The essence of the Convention is the distinction between soldiers and civilians (i.e., between combatants and non-combatants).
- Terrorists are reprehensible precisely because they negate that distinction by purposefully targeting civilians.²³

The war on terror became controversial as the universalism of the “human rights interests” of civilization morphed into the sovereignty-based power interests of the

²¹ Ibid., 4.

²² Ibid., 3.

²³ Ibid., 4.

United States, despite the belief that values and interests had fused. This was evident when Bush employed the language of just war and terrorism for the purposes of legitimizing the use of force against other states: in this case, Iraq. As part of his broader foreign policy program known as the Bush Doctrine, the rhetoric Bush crafted at this early point was directed toward mobilizing the domestic audience by “branding” the war in Iraq as a secondary but crucial front in the GWOT. As others have pointed out, however, the nature of global media today makes it nearly impossible to target only one audience since “the media invites domestic and international responses, publicizing the debate.”²⁴

The *NSS 2002* aims to ensure an order whereby all nations would “protect basic human rights”²⁵ by furthering the sovereign power interests of the U.S.: “The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests.”²⁶ This document, while building on the brief surplus of legitimacy afforded the U.S. in fighting Al Qaeda, made instrumental use of Just War concepts (civilian immunity, human rights, and democracy more broadly) to legitimate the expansion of its own power across the globe. Most

²⁴ S.P. Marks, “Branding the War on Terrorism: Is There A New Paradigm of International Law,” *Michigan State Journal of International Law* 14 (2006); Major Sherry K. Oehler, “The Unintended Consequences of Killing Civilians: A Monograph” (United States Army Command and General Staff College, 2012), 1. Reus-Smit, *American Power*.

²⁵ Council, *National Security Strategy of the United States*.

²⁶ *Ibid.* 1.

famously, Bush turned the Just War concept of preemption into prevention,²⁷ a move which served to undermine the stability of the international normative order and reaffirm European publics' initial assessment of Bush as "mak[ing] decisions based entirely on U.S. interests."²⁸ As Hurd argues, his instrumental use and distortion of this norm was damaging on many fronts:

The American challenge to the customary law on preemption threatens *to delegitimize both the existing norms and the social basis of US power*, while also attempting to legitimize American interests and new understandings of the norms. It therefore shows the productive and destructive aspects of the power of legitimation in world politics. Legitimation is the link between states and the normative structures of international society.²⁹

Defining rogue states as illegitimate based on their anti-human rights, "terrorist" ideology, they too are denied any just cause because their identity precludes the possibility: "we make no distinction between terrorists and those who knowingly harbor or provide aid to them."³⁰ In attempting to blur the line between the identities of state and non-state actor by conflating illegitimate violence against foreign civilians (terrorism) with illegitimate violence within a state (human rights violations), Bush serves to

²⁷ "by identifying and destroying the threat before it reaches our borders... we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country" in *ibid.* 6

²⁸ See Pew Results of a Multinational Poll in France, Germany, Great Britain and Italy, "Bush Unpopular in Europe, Seen As Unilateralist." "More than seven-in-ten of those in each country say Bush makes decisions based entirely on U.S. interests." August 15, 2001, accessed March 1 2013, <http://www.pewglobal.org/2001/08/15/bush-unpopular-in-europe-seen-as-unilateralist>.

²⁹ Hurd, "Breaking and Making Norms," 194 [my emphasis].

³⁰ Council, *National Security Strategy*, 5

strengthen the normative power of both human rights and civilian immunity, and more specifically, *reinforces a civilian-centered human rights ethic*.

By employing international society's morally constraining norms in an identity contest with both terrorists and rogue states, however, Bush reinforces expectations that the United States be held to a higher standard in war, undermining the legitimacy of the traditional bias states have maintained toward an expansive, sovereignty-based definition of military necessity. Couching the build-up to the Iraq War in the rhetoric of Just War and undermining its long historical struggle to separate *jus ad bellum* from *jus in bello* (as explained in chapter 2) by fusing unjust cause with unjust means, Bush's garbled communication strategies enact three unintended consequences: 1.) he creates moral confusion about who the enemy is and what type of treatment they are entitled to. This is true of the U.S. public and many of the soldiers at the lower levels, as confirmed by my interviews.³¹ 2.) he invites judgment of his own war according to those same criteria, and 3.) he undermines both the physical wars and the wars of ideas by placing them at odds.

By instrumentally using norms meant to *limit* war-making power for the purposes of *expansion* of power, Bush drew unprecedented attention to the *contradictions* between the American values of rule of law, democracy, and the protection of human rights and American aspirations for global hegemony. As Ikenberry explains, people feared that Bush had abandoned the post WW2 social compact that allowed U.S. power to exist

³¹ As will be shown in the next section, many at the lower levels expressed that many soldiers had the attitude that they were avenging 9/11 in the early years of the Iraq War.

relatively unchallenged by the rest of the world because it rested on how actual, ordinary people, that is, *civilians*, experienced American power.³² The precarious balance previously employed by the U.S. through strategic restraint had rested on the “institutionalization of hegemonic strategy, [which] serves the interest of the United States by making its power more legitimate, expansive, and durable. The price is that some restraints are indeed placed on the exercise of power.”³³ As Ikenberry suggests, in rejecting the restraints on its own power, the U.S. emphasized its “imperial face” over its “liberal face,” which intensified insecurity and inflamed public opinion in many states across the world.³⁴ Anti-Americanism, which the War of Ideas was meant to remedy, instead was fanned in the build-up to the invasion of Iraq.

This worsened as two of the three legs of the stool constructed by the administration to justify its invasion disintegrated (Saddam Hussein’s alleged cooperation with terrorists and his program of WMDs). This left only one leg, humanitarian intervention, which meant that the legitimacy of U.S. military action in Iraq rested precariously on the promise that the good of removing the previous regime would outweigh the violation of Iraq’s state sovereignty, not to mention the destruction and misery wreaked on its people. As damage to the U.S. reputation began to accrue in the

³² G. John Ikenberry, "Institutions, Strategic restraint, and the Persistence of American Postwar Order," in *Primacy and its Discontents: American Power and International Stability*, ed. Michael E. Brown (Cambridge, Mass.: MIT Press, 2008).

³³ G. John Ikenberry, "Strategic Reactions to American Preeminence: Great Power Politics in the Age of Unipolarity," in NIC 2020 project (2003), 12.

³⁴ *Ibid.*

larger international community,³⁵ a legitimacy gap began to expand between the values and identity promoted in the War of Ideas and the material reality of the physical wars. With a unilaterally conceived and implemented foreign policy goal lacking international support, particularly amongst foreign publics,³⁶ the stated goal in Iraq became the creation of a stable, democratic state that respects human rights and that would become an ally in the war on terror.³⁷ Harkening back to the previous social compact of strategic restraint, the material goals of the war were now firmly embedded within normative claims about making life better for ordinary people through freedom, prosperity, and human dignity.

The criteria by which to judge U.S. power and thus U.S. identity was promoted by the U.S. itself through its attempt to establish its place within international society as a global hegemon that was fierce to its enemies but protective of its friends. In using the rhetoric of restraint and principle but appealing to the desire for destruction and revenge, Bush set an emotionally powerful tone for the nation, including some in the military. As my interviews with military personnel have revealed, Iraqi civilians came to be seen as

³⁵ See Pew Report on the image of the U.S. one year into the Iraq War, accessed 3-1-2013, available online: <http://www.pewglobal.org/2004/03/16/a-year-after-iraq-war/>.

³⁶ Pew Global Research Center traces the public opinion of foreign publics and demonstrates the damage to U.S. image due to its foreign policy. See for example, "Global Public Opinion in the Bush Years, 2001-2008, accessed 3-1-2013, .<http://www.pewglobal.org/2008/12/18/global-public-opinion-in-the-bush-years-2001-2008/>.

³⁷ Cited on Common Dreams website, accessed March 1, 2013, online: <http://www.commondreams.org/headlines04/0929-23.htm>.

the enemy by many in the early days of the war. As a result, the latent tensions regarding the moral dimensions of the civilian immunity norm that existed pre-Iraq, between the humanitarian justification for force versus the suffering it causes for innocent civilians, would be amplified ten-fold.

What the U.S. civilian leadership did not yet understand, but what some in the U.S. military would learn fairly quickly, is that the narrative (the actual story that interprets and guides the ideas and perceptions of people about events) and the legitimacy it confers or destroys, was not an ancillary rhetorical issue; rather, the War of Ideas impacted directly on the material success or failure of a war waged on behalf of democratic values and human rights, by a powerful Western democracy, against non-state actors in a state it was responsible for “breaking.”³⁸ What was just as important was that, as in any war, the enemy was watching, listening, and behaving in a strategic manner as well. Moreover, the enemies were multiple, and Al Qaeda, who had been working out its own narrative of morality and legality about killing civilians, provided an alternative narrative about the justness of killing civilians, aiming at the Achilles heel of American legitimacy: its limited ability to see the gap between its own words and its deeds. At the same time Bush was formulating his use of norms, al Qaeda’s official spokesman, Suleiman Abu Ghaith, posted the following on al Qaeda’s web site in June

³⁸ This term refers to Colin Powell’s oft-quoted admonition to President Bush that in Iraq, “you break it, you own it.” Explained in David Samuels, “A conversation with Colin Powell,” *The Atlantic*, March 2011 2007.

2002. Using the same language of WMDs that Bush was using, he wrote a justification for killing Americans based on American behavior toward Muslim civilians:

Due to the American bombings and siege of Iraq, more than 1,200,000 Muslims were killed in the past decade...The Americans have still not tasted from our hands what we have tasted from theirs. The [number of] killed in the World Trade Center and the Pentagon are but a tiny part of the exchange for those killed in Palestine, Somalia, Sudan, the Philippines, Bosnia, Kashmir, Chechnya, and Afghanistan. We have not reached parity with them. We have the right to kill four million Americans – two million of them children – and to exile twice as many and wound and cripple hundreds of thousands. Furthermore, it is our right to fight them with chemical and biological weapons, so as to afflict them with the fatal maladies that have afflicted the Muslims because of [Americans'] chemical and biological weapons. America knows only the language of force. America is kept at bay by blood alone.³⁹

Iraq: Post Invasion 2003-4

The U.S. enjoyed its brief, shining moment in Iraq in the immediate aftermath of the invasion, which was militarily successful by most accounts in the sense that it achieved its goal of defeating and removing the previous regime. Cheers for the liberators soon gave way to chaos, however, as it became apparent that there was a lack of any real post-invasion plan or even capability for state-building. Thomas Ricks documents the “fiasco” of those years when many ordinary Iraqis turned from optimism to suspicion: a failure to police the unruly mobs who destroyed Iraqi cultural heritage; a lack of civilian capacity to assist the military in building infrastructure and institutions; de-Baathification and the dissolution of the Iraqi military by L. Paul Bremer produced

³⁹ Quoted in Carl J. Ciovacco, "The Erosion of Noncombatant Immunity within Al Qaeda," *Small Wars Journal* (2008, June 11), accessed February 25, 2013, online: <http://smallwarsjournal.com/jrnl/art/the-erosion-of-noncombatant-immunity-within-al-qaeda>.

angry, unemployed, and well -armed Sunnis who began resisting what they correctly predicted would be a Shia-majority dominated government.⁴⁰

What is less acknowledged by most accounts of the invasion and early post-invasion period is that the lack of planning included an absence of clear, unified expectations and training on how to treat civilians. While the air strikes in the “shock and awe” campaign employed precise weaponry and careful collateral damage planning, they also used cluster munitions in residential areas.⁴¹ Civilian immunity considerations were institutionalized in air strike targeting procedures, but how ground troops behaved toward civilians fell to the ethical leadership exhibited (or not) by individual leaders. Though some units were expected to (and did) exercise ethical judgment in distinguishing between combatant and civilian, others describe a free-for- all environment in which, as one soldier put it, the rules of engagement were to “kill anything that moves.”⁴² Others described the mood as vengeful and dark after 9/11, and all agreed that force protection was an absolute, unquestioned priority: “better to send a bullet than a soldier” was mentioned as a common slogan of the time.

Despite the words of President Bush, who characterized the invasion as "one of the swiftest and most humane military campaigns in history,"⁴³ the reality of the war on

⁴⁰ Thomas E. Ricks, *Fiasco: the American Military Adventure in Iraq* (New York: Penguin Press, 2006).

⁴¹ Human Rights Watch, "Off Target: The Conduct of the War and Civilian Casualties in Iraq," (New York, December 2003).

⁴² Personal interview.

⁴³ George W. Bush, "Address of the President to the Nation," (The White House, September 7, 2003), cited in Human Rights Watch, "Off Target."

the ground was experienced differently by many of those in uniform and the civilians with whom they interacted. Bush, in an address to the nation (which was of course transmitted throughout the world by global media), said “the people you liberate will witness the honorable and decent spirit of the American military. In this conflict, America faces an enemy who has no regard for conventions of war or rules of morality.” After condemning Saddam Hussein on the grounds of his violations of human rights, Bush adds, “I want Americans and all the world to know that coalition forces will make every effort to spare innocent civilians from harm.”⁴⁴ In the meantime, the military was not, as General Tommy Franks put it, “in the business of doing body counts,”⁴⁵ but an initial damage assessment by Human Rights Watch estimated that the invasion killed thousands.⁴⁶

In the face of the grave material disaster forming on the ground, the lack of basic needs being met and the massive disruption to an already severely damaged society and economy, the War of Ideas faded into the background. Neither the State Department nor the DoD thought much about what would be required to implement it or even how it would relate to the war on the ground. While the military had always engaged in psychological operations, the goal of manipulating perceptions was negative: to support the use of destructive force and defeating the enemy. The last U.S. experience with a war

⁴⁴ George W. Bush, "President Bush Addresses the Nation," The White House, accessed March 1, 2013, online: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html>.

⁴⁵ Quoted in Harold Pinter, "Nobel lecture 7: Art, Truth and Politics," (2005).

⁴⁶ Human Rights Watch, "Off Target."

of ideas meant to promote positive U.S. values, identity, and power occurred during the Cold War, when the state department ran a fairly vibrant public diplomacy effort. As was the case with many of the other traditionally civilian responsibilities, this capability did not exist early in the war. Perhaps more importantly, it was only gradually becoming apparent that what happened on the battlefields and in the neighborhoods of Iraq had any bearing on the larger ideological war of perceptions relating to the GWOT. As President Bush had explained, the War of ideas was meant to address and remedy the fertile ground for terrorism and anti-American feeling, yet those very enabling conditions were taking root in Iraq.

In the meantime, the Project for the Means of Intervention continued to hold conferences and meetings continued between a core of approximately 60 “veteran participants” along with a diverse crowd described as consisting of “intergenerational, international, senior to junior; analytic and operational, [and] “unusual” suspects.” Some could be considered “norms entrepreneurs,” and others were not. As events in Iraq heated up, the meetings became “informal, off-the-record, and intensive.” The causes of civilian suffering and how to reduce it was the main topic of discussion, and assumptions and perspectives of human rights experts and the military were far off. Issues were raised about the utility and difficulty of keeping track of civilian casualties, along with discussions about what was and was not within the control of the U.S. government. It was noted that while the location, capabilities, and intentions of the adversary were not in control of the U.S., the “rules of engagement (ROE), quality of intelligence, and strategy”

were. No consensus, or even emphasis at this time suggested that both sides had decided that civilian suffering was itself a strategic consideration, though it was assumed that the issue was a matter that impacted the “Western ‘center of gravity’ in the sense of affecting “local political and military allies, coalition partners, domestic political support, and international legitimacy.”⁴⁷

By 2003, the outcomes of the conferences showed an acknowledgement of the salience of civilian casualties, and despite the tensions between a military that tended toward the presumption that progress toward civilian suffering was already as good as it gets, the results of the conference highlighted the need to

- ‘increase communication among military, political leadership, human rights groups, and broader public’ about CD issues
- Develop greater understanding of how conduct of U.S. military operations and other factors affect civilians during war
- Help make U.S. use of force as consistent as possible with humanitarian principles
- Make U.S. use of force more effective⁴⁸

Back inside the military, it became clear to many that an insurgency was brewing from the beginning, but that fact did not compel a *unified* doctrinal response.⁴⁹ Rather, in the absence of a clear doctrine to address such a contingency, early attempts at building

⁴⁷ Sarah Sewall, "Final Report: Project on the Means of Intervention 2001-2003," (Carr Center for Human Rights Policy: John F. Kennedy School of Government, 2003), 2.

⁴⁸ *Ibid.*, 18.

⁴⁹ Ricks puts the first insurgent attack at day one of the Iraq War, with the first suicide bombing to come only days later, *Fiasco*, 118.

infrastructure, providing basic services, and working to restore order and stability took place within the context of a disintegrating relationship between soldiers and civilians. Anti-occupation sentiment grew in key areas, and as soldiers experienced the terror tactic of road-side IEDs, suspicion and tension built between the populace and the military. Checkpoint incidences of killing civilians increased, and soldiers kept their physical distance from the people, which exacerbated an already shaky foundation undermined by poor communication, cultural distance, and the sense of soldiers as outsiders. The initial euphoria about U.S. liberation that was touted (and by most accounts generally believed) by the administration, was soon clearly being experienced as occupation by many Iraqis.⁵⁰ Promises of prosperity and freedom instead gave way to destitution, insecurity, and growing chaos.

U.S. forces were trained for conventional war, in which destroying the enemy is the goal, and civilians in many cases became indistinguishable from insurgents, both in their physical appearance, but also, some interviewees suggest, in the minds of some of the soldiers. One remarked: “we began to look at them as the enemy.” Lacking in training and preparation for such a development, many confirmed a widespread mood of avenging 9/11. Other interviewees suggested that most events involving civilian casualties and abuse were never brought to light by the media: “there are lots of things you’ve never heard about on the news.” This is likely due to the practice of controlling the media by

⁵⁰ Recognition of a “cultural” problem was confirmed in interviews, though some suggested it was not seen as a problem until later. This is also well documented in the military debates published throughout 2005 in the internal military journal, *Military Review*, which will be analyzed later.

embedding reporters; one interviewee mentioned a specific incident in which a soldier went on a rampage against civilians in the Iraqi town of Hit after losing several of his buddies to an IED attack. According to this account, the soldier was prosecuted, but this was not a big media hit, at least in the U.S. Two events that did attract global media attention, however, were seen by most of the interviewees as tarnishing the reputation of the military in a significant way,⁵¹ contributing to the spread of an already growing insurgency, and represented a tipping point in the early stages of the war. These two events both centered on perceptions of the unethical treatment of Iraqi civilians by American soldiers: the scandal at Abu Ghraib and the first battle of Fallujah in April of 2004.

The scandal at Abu Ghraib resulted from the brutal, degrading, sometimes deadly treatment of detainees that was captured in film clips, photographs, journals, stories, and official reports by the ICRC and Human Rights Watch.⁵² The investigation began within the military, but traditional media brought it to life—a special on *60 Minutes* and then an article by the famed journalist Seymour Hersh of the *New Yorker*.⁵³ Photographs were leaked and disseminated across the globe via the internet, and the world was shocked by

⁵¹ (and this was reflected in the military journals)

⁵² International Committee of the Red Cross, "Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons in Iraq during Arrest, Internment, and Interrogation," (2004, February); Human Rights Watch, "The Road to Abu Ghraib," (2004).

⁵³ Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10 2004.

the depraved, sadistic images of torture and sexual degradation against the prisoners.⁵⁴

Further, it was mentioned that the released photos were relatively tame compared to the still unreleased photos of rape, torture, beatings, intimidation, and death. Hersh notes that military officials described American soldiers ‘severely beating an Iraqi prisoner nearly to death, having sex with a female Iraqi prisoner, and ‘acting inappropriately with a dead body.’ The officials said there also was a videotape, apparently shot by U.S. personnel, showing Iraqi guards raping young boys.’⁵⁵

Military officers describe this exposure as devastating to the war cause, but interestingly, several sources note that the Iraqi reaction was not the main concern, since this was not surprising to many of them—this was a surprise to those outside of Iraq. Despite the public stance of the civilian administration that this was the result of a few bad apples, one interviewee said that the abusive attitudes in Abu Ghraib reflected a wider attitude toward civilians. He described his own reaction to the outing of Abu Ghraib as consistent with the general reaction of those around him: “Well, we’d been caught is what I thought when I first heard” he said. When asked if it was the global public or the Iraqi public he was concerned about, he indicated it was the perceptions of

⁵⁴ Abu Ghraib proved to be a salient news item even in 2006, when Pew reports that “reports about U.S. prison abuses at Abu Ghraib and Guantanamo have attracted broad attention in Western Europe and Japan – more attention, in fact, than in the United States. Roughly three-quarters of Americans (76%) say they have heard of the prison abuses, compared with about 90% or more in the four Western European countries and Japan. Accessed January 10, 2012, online: <http://www.pewglobal.org/2006/06/13/americas-image-slips-but-allies-share-us-concerns-over-iran-hamas/>.

⁵⁵ Seymour Hersh, "Chain of Command," *The New Yorker*, May 17 2004.

the American audience they most feared: “we were afraid they’d find out we were acting like animals.”⁵⁶

The response of public officials at the time indicated grave concern that the damage to the U.S. image undermines the war in a way that transcends domestic support.

TIME magazine published the following:

Senator Joe Biden, ranking Democrat on the Foreign Relations Committee and a supporter of the decision to invade Iraq, characterized the revelations of abuse as the single most significant blow to U.S. prestige in the Arab world over the past decade. Anthony Cordesman, the widely respected defense analyst at the Center for Strategic and International Studies was equally forthright: “Those Americans who mistreated the prisoners may not have realized it, but they acted in the direct interests of al-Qaeda, the insurgents, and the enemies of the U.S.,” he said. The reason is that they came at a point when U.S. standing in the Arab world was already at an all-time low. Says Cordesman, “These negative images validate all other negative images and interact with them.” In other words, they function as a multiplier by providing photographic “proof” of the demonic picture of the U.S. painted by anti-American propagandists.⁵⁷

As if Abu Ghraib were not bad enough, in the same month the U.S. became embroiled in the single most damaging battle of the war thus far: Fallujah. Fallujah is a city in Iraq that was initially friendly to U.S. forces. It eventually became a hotbed of insurgency, however, fueled by anti-occupation resentment. An overwhelmingly Sunni city, its residents suffered high unemployment from the de-Baathification policies undertaken by the Coalition Provision Authority (CPA).⁵⁸

⁵⁶ Personal interview.

⁵⁷ Tony Karon, “How the Prison Scandal Sabotages the U.S. in Iraq,” *TIME*, May 4, 2004, accessed July 18, 2009, online: <http://www.time.com/time/world/article/0,8599,632967,00.html#ixzz2EO0lvPPP>.

⁵⁸ Mark Manning, “The Road to Fallujah,” (Conception Media, 2009).

A series of incidents occurred that sparked mistrust and anger between the soldiers and citizens. First, only a month into the invasion, 700 troops entered the city and took over a local school as part of their base. Residents resented the closure of the school, and within five days, protests around the school grew more ominous, with evidence of rock-throwing by citizens, some children, and claims by soldiers that they were taking fire. While other reports confirm sporadic violence against soldiers over time, Human Rights Watch did not find credible evidence to support that soldiers were under fire on the day in question. The event culminated with soldiers climbing to the roof and opening fire on the crowds, resulting in about seventeen civilian deaths.⁵⁹

As unrest and resistance grew over the next year, troops pulled out of the city, and, in keeping with Bush's policy goal to hand over control to local forces, Iraqi security forces attempted to keep control. The situation grew more volatile as insurgents massacred police, and as they gained mass support of the city's residents. Moreover, the lack of control in the city allowed it to become inundated with foreign fighters, most notably Al Qaeda in Iraq (AQI).⁶⁰ The event that sparked major combat operations was when four American Blackwater contractors accidentally took a wrong turn into the city and were killed by insurgents. Images of a cheering crowd who then mutilated the corpses and hung them from a bridge enraged Americans, including President Bush and

⁵⁹ For a more military-centric view, see Ricks, *Fiasco*, 330-35.

⁶⁰ James Conachy, "Attack on Fallujah Police Highlights Lack of US Control in Iraq," no. 7-30 (2004), accessed July 9 2013, online: <http://www.wsws.org/articles/2004/feb2004/fall-f23.shtml>.

CPA head, L. Paul Bremer.⁶¹ Troops were hurriedly called in, before there was really time to “shape” the terrain or empty the city of civilians, and the goal of searching out and killing insurgents resulted in an estimated 700-2000 Iraqi deaths (some claim 700 civilians), and from 38-100 U.S. soldiers. The city was destroyed, and many of the people displaced. Several of my interviewees confirmed a “shoot anything that moves” mentality and noted that Fallujah is known for what was a common practice in the early days of Iraq, which was to count all males of a certain age as insurgents. None of the soldiers I spoke with were in the battle and instead relied on the internal accounts and stories spread amongst soldiers. Such a characterization has become almost conventional within the military because even some of the newer soldiers have been taught that Fallujah was the antithesis of what good counterinsurgency should be. It is also known at this time that white phosphorous was used to drive insurgents from houses, and an amateur American filmmaker who entered Fallujah right after the battle interviewed residents, (and later soldiers), who showed him hateful graffiti left by soldiers on the furniture of a resident: “I hate Iraq and all Iraqis.”⁶²

What is remarkable about the preceding events is not necessarily the brutality of war, but the spirit of openness and self-reflection about such incidents that is increasingly evident in the military today. The military literature is filled with monographs seeking to make sense of such events in the interest of organizational learning. Major Sherry Oehler,

⁶¹ Manning, "Road to Fallujah."

⁶² Ibid.

for example, who writes on the unintended consequences of killing civilians, confirms my own assertion that the instrumental use of international norms matters for what happens on the ground: she notes that “the Bush administration’s policy on denying “unlawful combatants” privileges as prisoners of war under the Geneva Conventions enabled troops freedom of maneuver to accomplish these missions, however, the policy contributed to the ambiguity on the ground with regard to the treatment of civilians.”⁶³ Bush at the time of Fallujah demonstrated little recognition of this, as evidenced by the fact that his public comments leading up to Fallujah continued to justify force by instrumentally employing the norms-language of democracy, civilian immunity, and human rights: “they want to kill innocent life to try to get us to quit,” he said. Bush promised that “U.S. troops will use whatever force is needed to quell uprisings in Fallujah...and “we will deal with those who want to stop the march to freedom.”⁶⁴

Bush’s determination to make an example of Fallujah for killing American “civilians” and his stated willingness to use all available means suggest that he was no longer concerned with the image of the U.S. military or state as being in line with civilian immunity. His attempts to signal resolve are indicative of a sovereignty-oriented reading of the CIN wherein military necessity enables more civilian casualties. I suggest that this is a tipping point in the war whereby it became very clear that killing civilians entailed damage to the U.S. social reputation, and that the importance of the War of Ideas was

⁶³ Oehler, "Unintended Consequences," 12.

⁶⁴ "Bush Vows to Win in Fallujah," *Washington Times*, April 2004.

first connected to success in the physical war. This is so because, despite the tough talk about force, the political pressure created by the carnage was immense, and it was decisive in stopping the battle despite material definitions of “winning.”⁶⁵

Some of the interviewees present in Iraq during the Fallujah period named Fallujah as a tipping point: “We looked around, and we’d killed all these people, but now what? What were we doing?” This was not lost on many Iraqis. One Iraqi man spoke to the American press weeks after Fallujah, and

he recalls that his growing uneasiness with the US occupation turned into something steelier a few weeks ago, when he saw the first images of civilian casualties carried from Fallujah on the Arab satellite channels Al Jazeera and Al Arabiya. ‘They showed us what they really are.’⁶⁶

The military denied that there were many casualties or that ROE were broken, but according to an intelligence report leaked to Wikileaks, it was immediately recognized that the perception of civilian casualties had damaged the legitimacy of the American mission by creating “political pressure” and building on anger already present from Abu Ghraib.⁶⁷

A very influential series of articles published in *Military Review*, the Army’s internal journal, in 2005 demonstrate that the thinking of the leadership was in keeping with both the general sentiment expressed by my interviewees and that of the intelligence report. Metz writes

⁶⁵ Edwards Sean A., “Complex Environments: Battle of Fallujah I, April 2004,” (Wikileaks: <http://wlstorage.net/file/fallujah.pdf3-6-2006>).

⁶⁶ Dan Murphy, “Siege of Fallujah Polarizing Iraqis,” *The Christian Science Monitor*, April 15, 2004.

⁶⁷ Edwards, “Complex Environments.”

U. S. forces unilaterally halted combat operations after a few days due to a lack of support from the interim Iraqi Government and international pressures amid unsubstantiated enemy reports of collateral damage and excessive force. Marines won virtually every combat engagement throughout the battle and did so within the established rules of engagement. The missing element was an overall integrated information component to gain widespread support of significant influencers and to prepare key populations for the realities of the battle plan. Without such advance support, the finest combat plan executed by competent and brave Soldiers and Marines proved limited in effectiveness. The insurgent forces established links with regional and global media outlets that had agendas of their own. The failure to mass effects in the global information sphere proved decisive on the battleground in Fallujah.⁶⁸

Metz, who works in information operations, highlights that perceptions are directly relevant to the larger war on terror, which now had direct links to the battlefields of Iraq. He cites Ayman al-Zawahiri, who was writing to al- Zarqawi about the War of Ideas from the perspective of Al Qaeda and now AQI as well, and that this was based on civilian casualties: “. . . I say to you: that we are in a battle, and that more than half of this battle is taking place in the battlefield of the media. And that we are in a media battle in a race for the hearts and minds of our Umma.”⁶⁹ Metz adds that it is specifically the perception “that combat operations are indiscriminate, disproportionate, and in violation of the rules of war” that caused the failure of the April 2004 incursion into Fallujah.⁷⁰ It became quite clear after Fallujah that communication was seen as not simply words but

⁶⁸ Thomas F. Metz et al, "Massing Effects in the Information Domain," *Military Review*, (May-June 2006), <http://usacac.army.mil/cac2/CALL/docs/09-11/ch-4.asp>.

⁶⁹ Ayman al-Zawahiri, "Intercepted Letter to Abu Musab al-Zarqawi," (9 July 2005), as quoted in Metz et al, "Massing Effects."

⁷⁰ Ibid.

as strategic interaction, and that winning the War of Ideas was now seen as directly connected to winning the ground war.

Furthermore, the military began to realize what Bush did not: that the U.S. was light years behind the enemy in acknowledging this basic fact: “[Our] units are facing an adaptive, relentless, and technologically savvy foe who recognizes that the global information network is his most effective tool for attacking what he perceives to be the center of gravity- public opinion, both domestic and international.”⁷¹ By early 2006, Bush’s own former Deputy Assistant Secretary of Defense for Stability Operations, Joseph Collins, published an open letter in the *Armed Forces Journal* warning Bush that ‘[i]f our strategic communications on Iraq don’t improve, the strategy for victory will fail and disastrous consequences will follow.’”⁷²

Transitioning Counterinsurgency: Ideas within the Military

By 2004, post Fallujah, the insurgency was spreading, and now the multi-faceted character of it was becoming clear. The Shiite cleric Muqtada al-Sadr’s faction had also revolted after L. Paul Bremer shut down his region’s television station and arrested one of his men.⁷³ The battle was not nearly as damaging as Fallujah because the civilians separated themselves from the fighter and literally stood aside. As David Kilcullen explains in the *Small War Journal Blog*, however, refraining from killing civilians while going after the enemy is not the end of the road because they still have to choose sides: “in that instance [in Sadr City], and a couple of others, the local Shia population actually stood to one side and

⁷¹ Metz et al, "Massing Effects"

⁷² Quoted in *ibid*.

⁷³ Ricks, *Fiasco*.

waited for us to secure them, but once they saw we weren't planning to stay permanently they were too exposed to support us.”⁷⁴

According to a Shiite cleric at the time, Fallujah had for a brief time united Iraq—against the United States. “What happened in Fallujah made every Iraqi think it could happen in their own town, and that united us.”⁷⁵ The battle in Fallujah however, in destroying much of the city, had displaced both insurgents and civilians, which destabilized other areas in the North and contributed to later sectarian tensions.⁷⁶

With Iraq further destabilizing and beginning to fragment, it became clear to many in the military that the character of the conflict required a change in approach. While information operations were about controlling the narrative and thus perceptions, John Nagl, co-author of the final C.O.I.N. manual (FM3-24) attributes the need for a change to the Information revolution’s effects not only on the image of the U.S., but on the “nature of warfare, especially insurgency.”⁷⁷ The debate within the military about counterinsurgency began to view the actual place of the civilian and ethical treatment toward them as a strategic matter. Despite popular conceptions, the foundations for the C.O.I.N. manual were being laid months before General Petraeus took over the Combined Arms Center and began the famous re-writing of the field manual.

⁷⁴ David Kilcullen to Small Wars Journal Blog Post, January 19, 2007.

⁷⁵ Imam Jawad al-Kalasi, quoted in “Siege of Fallujah Polarizing Iraqis.”

⁷⁶ Linda Robinson, *Tell me how this Ends: General David Petraeus and the Search for a Way out of Iraq* (New York, NY: PublicAffairs, 2008). 72; Manning, “The Road to Fallujah.”

⁷⁷ Booktv, “Interview with John Nagl.”

As I continue with my case, a caveat is in order: at the highest levels of the military, I have not heard my thesis confirmed in public speech, though most lower and mid-level military participants in my study⁷⁸ confirmed the idea that civilian casualties early in the Iraq conflict were a significant reason for the later change in doctrine toward population protection, and many elaborated that the doctrine was needed to get soldiers to “change their attitudes toward the Iraqi people and quit seeing them as the enemy.” “We had to learn that they’re not all terrorists, that they have a culture of their own, and that hurting them hurt the mission.” Nagl’s characterization draws a direct line between civilian casualties and material effects on the battlefield, however, when he wrote in the *Small Wars Journal Blog* that

the key to success in a counterinsurgency environment is not to create more insurgents than you capture or kill. A stray tank round that kills a family could create dozens of insurgents for a generation. Thus, it is essential to use force as carefully and with as much discrimination as is possible.⁷⁹

Nagl also described the need for a change in doctrine as arising because counterinsurgency was previously a special forces task. They needed to “reenergize the force” as a whole. The “big army, conventional war-fighting army needed to be reminded that fighting counterinsurgency” was their job, and the temporary manual that had been

⁷⁸ Interviewees totaled twenty two and consisted of ordinary enlistees who had served in one or both conflicts at various times, mid-level officers, and high level officers. Moreover, military academics and human rights practitioners also provided information and insight. By mutual agreement, no identifying information is being used in this study other than broad groupings (lower level, et cetera).

⁷⁹ John Nagl, to *Small Wars Journal Blog* January 26, 2007, <http://smallwarsjournal.com/blog/spilling-soup-on-myself-in-al-anbar>. This “lesson learned” is now ubiquitous and part of the conventional wisdom of COIN, though my aim is to make apparent that this was not always the case.

hastily put together in October 2004 was about to expire.⁸⁰ What has been left unsaid by military leadership is that the history of special forces and CIA running counterinsurgency operations (in Latin America for example) were secretive and far removed from both the spirit and letter of LOAC. The CIA “murder manual,” for example, was described as a training manual for the Nicaraguan guerrillas in “how to kidnap, assassinate, blackmail, and dupe civilians.”⁸¹

Counterinsurgency Debate: More Carrots, Less Sticks

The doctrinal change that eventually occurred addresses the deficit in military culture toward civilians, and the debate leading up to the new manual in 2005 seemed to recognize this deficit. What the debate in 2005 achieved was to help clarify the logic of counterinsurgency in accordance with the changing political/strategic environment. Ironically, while the public and legal discourse in the U.S. had exploded with questions as to whether or not the civilian immunity norm was obsolete or should be discarded in the face of irregular warfare, military insiders were carefully interrogating assumptions about the use of force, exploring and explicating new goals, and starting to identify what needed to change in order to reach those goals. The community of innovators that shaped the debate engaged in a redefinition of some of the key counterinsurgency concepts in a way that took into account the need to remedy the existing legitimacy gap with the moral content of civilian immunity and by doing so, attempt to bridge the war of ideas with the

⁸⁰ Ibid.

⁸¹ "The CIA's Murder Manual," *The Washington Post* October 21, 1984.

war on the ground. The body of published works taken as a whole attempted to change ideas about how to fight by matching them with revised interests and American identity, creating a conceptual link between the ethical treatment of civilians and national security imperatives and foreign policy goals.

In response to perceptions of failure associated with failing to live up to civilian-centered human rights norms, the debate found in the 2005 (post-Fallujah but pre-Petraeus period) issues of *Military Review*⁸² are indications that human rights demands are having an effect: adaptation, moral consciousness-raising, argumentation, and persuasion are all present. Processes of institutionalization and habitualization would not be expected to come until later, after the adoption of C.O.I.N., which this chapter will not cover.⁸³

The first counterinsurgency manual put out in October, 2004 was a hurried attempt to draw lessons learned from past counterinsurgencies.⁸⁴ The manual shows that prior ideas about how to manage insurgencies emphasize the tactical and operational levels, but not the strategic level, which is the vital difference between it and the later FM3-24. Meant for “division-level leaders and below,” it was not meant to challenge the prevailing assumptions in the military about the utility of force and the way it should be

⁸² This record of the internal transformation of the military’s views on counterinsurgency was recommended to me by one of the higher level interviewees.

⁸³ Risse-Kappen, Ropp, and Sikkink, *Power of Human Rights*, 11.

⁸⁴ This manual was titled, FMI 3-07.22 Counterinsurgency Operations. See Crane 2010, 59, cited in “Clark Innovation under Fire,” 111.

employed. Furthermore, it reflected Rumsfeld's priority that responsibility for the aftermath of the Iraq War was to be shifted onto Iraq,⁸⁵ the host nation (HN): "a basic premise of counterinsurgency is that the ultimate responsibility rests with the HN." And, "one of the key recurring lessons is that the United States cannot win other countries' wars for them, but can certainly help legitimate foreign governments overcome attempts to overthrow them." Lessons from past counterinsurgency experience were thus interpreted in a manner meant to uphold current strategic assumptions, and despite the change in circumstances, the manual reflected an understanding of the U.S. as having a supporting role in the counterinsurgency (as it did in Latin America) rather than as a primary actor: "the use of combat forces is a presidential decision and serves only as a temporary or provisional solution until HN forces are able to stabilize the situation and provide security for the populace."⁸⁶ However, since the war was one of choice by the U.S., and ostensibly for the purposes of humanitarian intervention, the situation in Iraq hardly matched the traditional model of insurgency as resulting from the internal organic uprising of elites with grievances. Instead, it was the result of an invasion and post-invasion policies, including the dismantling of its prior institutions.

⁸⁵ Bob Woodward, *The War Within: A Secret White House History, 2006-2008* (New York: Simon & Schuster Paperbacks, 2009).

⁸⁶ "Field Manual—Interim No. 3-07.22 Counterinsurgency Operations," ed. Department of Army (Washington, D.C.2004), vii, vi, vii.

Though the first manual contained the basic elements of C.O.I.N. in terms of population protection as a goal,⁸⁷ and it emphasized that officers should “prevent indiscriminate use of force,” this is overshadowed by force protection. The manual notes that human rights are a likely grievances and something to be taken into consideration, but it sees them as competing with the use of force and kinetic operations: “Counterinsurgency operations must balance elimination of grievances (that is, reform to include elimination of human rights abuses) and security force action that eliminates the insurgents.”⁸⁸ The manual also emphasizes the media effects of collateral damage and the psychological effects on the populace as damaging to the mission: “Do not hurt the people, but kill the insurgents. Where US forces violate this dictum, US policies may fail.”⁸⁹ However, consistent with remarks by one of my interviewees that “civilians were treated as objects, not human beings,” civilians are mentioned in the same subheading as “Resource Control.” “Combat operations are developed to neutralize the insurgent and, together with *population and resources control measures*, establish an environment within which political, social, and economic progress is possible.”⁹⁰ An entire section discussed coercive practices toward civilians, which included the extreme measure of forceable relocation of populations if deemed necessary.⁹¹

⁸⁷ Ibid., viii

⁸⁸ Ibid., section 1-38.

⁸⁹ Ibid., section c-2:

⁹⁰ Ibid., viii, my emphasis.

⁹¹ Ibid., section 3-4.

In contrast to the inconsistent focus of the prior counterinsurgency manual, which emphasizes that combat operations are in tension with population protection, the series of articles published in *Military Review* during 2005⁹² emphasize the importance of limiting force and protecting the civilian, both for ethical and strategic reasons. In doing so, it lays the intellectual groundwork for shifting the “center of gravity” from the insurgent to the civilian.

The articles in the year preceding C.O.I.N. emphasize the synthesis of moral identity, moral behavior, and strategic goals in the war in Iraq. There is an emphasis on developing Information Operations capabilities, but also on how information operations require challenging the assumption that force produces victory: “U.S. forces find, engage, capture, and kill terrorists, but this traditional approach to counterinsurgency does not adequately counter the insurgents’ information environment strategy.”⁹³ There was a growing recognition that all negative experiences and images of the U.S. hurt the mission, but that changes are not simply about controlling the story through counter-stories, but about changing the hearts and minds of soldiers as well. In acknowledging the damage done by Abu Ghraib, the author emphasizes the changes that must occur as a result: “The stark images from Abu Ghraib prison fade from the news only until the next

⁹² *Military Review* is used to disseminate military scholarship. It is a part of the institutional curriculum. Petraeus gained control of it at the end of 2005 and used it to publish key articles supporting the new doctrine (some authors were invited to write about C.O.I.N. after writing for *Military Review*).

⁹³ U.S. Army Major Norman Emery, U.S. Air Force Major Jason Werchan, and Jr. Major Donald G. Mowles, U.S. Air Force, “Fighting Terrorism and Insurgency: Shaping the Information Environment,” *Military Review* LXXXV no. 1 (January/February 2005), 32.

U.S. soldier must answer formal charges for what happened there. The Army is ensuring what happened will not happen again.”⁹⁴

Competing perspectives appear on occasion, for example, one that argues for the primacy of force protection. The author defends force protection as a strategic necessity because of the casualty sensitivity of the American public: “the enemy also learned that America’s vulnerable center of gravity is dead American soldiers.”⁹⁵ The overwhelming tenor of the publication at this time though is of change, not one of maintaining the status quo. Part of this change is a concerted effort to explain the importance of ideas and the physical war as being connected and of drawing distinctions between terrorists and insurgents versus the U.S. military through their actions: “The United States must also understand that when its forces react negatively and kick down doors in night raids, they are helping the enemy improve his own information environment. Their actions will annoy and alienate citizens who might no longer cooperate or who might begin actively supporting the insurgents.”⁹⁶

Others seek to bring the context of the current war back into its original humanitarian framework: “If the military is to conduct the Global War on Terrorism in an

⁹⁴ U.S. Army Major James F. Gebhardt, Retired, “The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience,” *Military Review* LXXXV no. 1 (January-February, 2005), 44.

⁹⁵ U.S. Army Major General Robert H. Scales, Retired, “Urban Warfare: A Soldier’s View,” (January-February 2005): 9.

⁹⁶ U.S. Maj. Norman Emery, U.S. Army; Maj. Jason Werchan, U.S. Air Force; and Maj. Donald G. Mowles Jr., U.S. Air Force, “Fighting Terrorism and Insurgency: Shaping the Information Environment,” *Military Review* (January-February 2005), 55, Accessed March 1, 2013, online: http://www.army.mil/professionalWriting/volumes/volume3/may_2005/5_05_3.html.

effects-based campaign, then all military operations must become part of that plan. Consider, for instance, the secondary effects of a humanitarian relief operation. As part of the Global War on Terrorism, such an operation well executed serves the campaign plan.”⁹⁷ Even suicide attacks are explained, not as Arab or Muslim cultural defects—which was common in the U.S. at the time, but as strategic aims of insurgencies, including al Qaeda, which increased with anti-occupation resentments. The author argues that closer engagement with the people could defuse the underlying conditions that give rise to such strategies.⁹⁸

A British officer, in a frank and rather controversial article, observed the effects of U.S. military culture and made an explicit criticism: “It was apparent that many considered that the only effective, and morally acceptable, C.O.I.N. strategy was to kill or capture all terrorists and insurgents; they saw military destruction of the enemy as a strategic goal in its own right.”⁹⁹ Others attempted to show what went wrong in past operations to demonstrate the strategic utility of ethical behavior and to counter the tendency to rely on excessive force and permissive ROE. Brian Mcallister Linn drew lessons from the Philippines counterinsurgency about the “necessity of having officers of

⁹⁷ U.S. Army Brigadier General Mick Bednarek, U.S. Army Lieutenant Colonel Thomas P. Odom, Retired, and Stephen Florich, “Expanding Jointness at the Joint Readiness Training Center,” *Military Review* LXXXV, no. 1 (2005), 55.

⁹⁸ Robert J. Bunker and John P. Sullivan, “Suicide Bombings in Operation Iraqi Freedom,” *Military Review* LXXXV, no. 1 (2005): 79.

⁹⁹ Brigadier Nigel Aylwin-Foster, and British Army, “Counterinsurgency Operations,” *Military Review*, no. 2 (2005): 5.

character, initiative, and humanity in counterinsurgency operations.”¹⁰⁰ Another author discussed how important maintaining or repairing perceptions of moral character were in British counterinsurgencies and yet another in the French Algerian War. Montgomery McFate, an anthropologist working for the DoD, argued that as soon as coalition forces toppled Saddam Hussein, they became de facto players in the Iraqi social system.”¹⁰¹ She encouraged cultural knowledge, both in terms of understanding Arab culture and on reflecting on the military’s own strategic character and how that affects outcomes: “the American solution to the conflict [in Vietnam] was the use of overwhelming force in the form of strategic bombing and the Accelerated Pacification Campaign, neither of which resulted in victory.”¹⁰²

C.O.I.N. Revision

By the time David Petraeus was installed as the head of the Combined Arms Center in November 2005, the raw mass of intellectual ideas that formed the foundation of C.O.I.N. had been circulating throughout the organization. Petraeus almost immediately announced that there would be a revision, and the process sped forward, making extensive use of some of the articles already published in *Military Review*. He

¹⁰⁰ Brian McAllister Linn, "The Philippines: Nationbuilding and Pacification," *Military Review* 85(2005): 46.

¹⁰¹ Montgomery McFate, "Anthropology and Counterinsurgency: The Strange Story of their Curious Relationship," *Military Review* (March-April 2005): 24.

¹⁰² Ibid., 31, 34.

employed John Nagl as editor and Conrad Crane, the military historian, as primary author.

The Human Rights Conferences at the Carr Center had, in the meantime, been ongoing, and the mood had shifted within the meetings as well. The November 2005 meeting was attended by Petraeus, Crane, Susan Rice, and about 85 others. Participants looked back at historical counterinsurgencies, seeking to learn lessons, and most agreed that giving up on the idea of force used in a conventional way was a necessity. When discussing how some states employed brutal methods against populations even within counterinsurgencies, most agreed that this was no longer possible for “Western nations prosecuting counterinsurgency campaigns as they would be viewed as collective punishments that deny fundamental human rights to innocent populations.”¹⁰³ Indeed, “conference participants were generally critical of what they called ‘terrorism to fight terrorism’ employed by the French in Algeria.”¹⁰⁴ Not only were they critical in ethical terms, but they spoke of past brutality as counterproductive: “in Vietnam, too, indiscriminate force was counterproductive and undermined overall political objectives.”¹⁰⁵

The general feeling at this time was that political considerations required an ethical stance and that this had to trump military considerations, and not vice versa.

¹⁰³ Sarah Sewall, "Counterinsurgency in Iraq: Implications of Irregular Warfare for the U.S. Government," (John F. Kennedy School of Government: Harvard University, 2005), 3.

¹⁰⁴ Ibid., 4.

¹⁰⁵ Ibid.

While some questioned the possibility that an insurgency could be eliminated without dirty tactics, another claimed that such assertions being “floated around: were “garbage.”¹⁰⁶ As a consensus emerged about the limited utility of force in such situations, the discussion turned to more technical aspects of putting counterinsurgency into practice: how institutions were to be built, what was needed from the U.S. government, and what difficulties lay ahead.

The relationships built between the human rights community and the military was consummated with the C.O.I.N. revision conference in February 2006, when Crane and Petraeus included the Human Rights Policy group as part of the 150 total academics, journalists, CIA and State Department members that were invited to provide criticism and feedback. Tyler Mozelle, of the Carr Center, says in an interview, “this work was a major milestone in American history and throughout the world of military policy because we were able to broaden the aperture of thinking about US national security to include a more humane approach to thinking about war, civilian casualties, and the ethical dimensions of US foreign policy.”¹⁰⁷

The C.O.I.N. manual (FM3-24) was published a year later in December 2006, and it was downloaded more than a million times. Sarah Sewall, of the Carr Center, wrote the introduction for the University of Chicago Press version published shortly thereafter, and she calls it “radical” in the way it challenges the “American way of war.” Sewall notes

¹⁰⁶ Ibid., 12.

¹⁰⁷ Rahim Kanani, “Human Rights at Harvard: An Interview with Tyler Moselle,” *Forbes*, July 26, 2011.

that the manual's purpose transcends the immediate need to find a workable strategy and claims that its direction "raises some fundamental questions about the legitimacy, purposes, and limits of U.S. power."¹⁰⁸

The manual is directed toward practitioners, but its engagement in a redefinition of interests and identity is clear: protecting the population is the new center of gravity, and given the strength of the moral, human rights dimensions of civilian immunity, and their instrumental connection to the justification of the war, this was the only possible choice that allowed the U.S. to salvage its identity, other than walking away from the fight. The War of Ideas and the war on the ground needed to be consistent; indeed, Petraeus describes the shift in Iraq as a "surge of ideas."¹⁰⁹ Concerned about whether the soldiers would embrace the ethical stance deemed necessary, he urged them to accept one of the key tenets of the manual, which is to "live our values."¹¹⁰ He states:

Realize that we are in a struggle for legitimacy that will be won or lost in the perception of the Iraqi people. Every action taken by the enemy and our forces has implications in the public arena. Develop and sustain a narrative that works, and continually drive the themes home through all forms of media....Live our values. Do not hesitate to kill or capture the enemy, but stay true to the values we hold dear. Living our values distinguishes us from our enemies.¹¹¹

¹⁰⁸ Sewall, "Introduction to the University of Chicago Press Edition."

¹⁰⁹ David H. Petraeus, "Speech at AEI: The Surge of Ideas," (2010).

¹¹⁰ See interview on Guantanamo closure and torture: "Fox News: Interview with David Petraeus," (May 29, 2009).

¹¹¹ David H. Petraeus, "Multi-national force-Iraq commander's counterinsurgency guidance," *Military Review* (September-October 2008): 4.

In sum, I find strong support for my central hypothesis that civilian-centered norms helped to shape the civilian-centric population protection doctrine known as C.O.I.N.. Attitudes toward civilian casualties show movement ranging from early sovereignty-based attitudes about military necessity and proportionality (collateral damage as inevitable), even overtly abusive attitudes, toward an increasing emphasis on distinction over time; this movement is relative to the political pressure resulting from the civilian casualties that drew press attention. The result was a period of self-reflection in which the U.S. foreign policy goal of instituting a democratic state friendly to the U.S. and unfriendly to terrorist ideology was seen to be endangered. As it became clear that a new doctrine was needed, members of the military and human rights experts, in interaction, decided that this doctrinal change needed to be based on the moral or at least ethical actions of the U.S. military regarding the treatment of civilians. My interviews confirm this, with one recently trained cadet stating that they are now taught to be extremely careful of civilian casualties because “we are the human instrument of U.S. foreign policy, and everything we do reflects on the whole nation.” Compare this to some of the stories told to me by enlistees—that he was never told what the Geneva Conventions were, or that civilians were looked at as enemies. Emma Sky, adviser to Petraeus and Odierno in Iraq, remarked that “the biggest mindset change was for the U.S. to look at Iraqis as not the enemy, but to look at the Iraqis as people who needed protecting.”¹¹²

¹¹² Quoted in Peter Bergen, “How Petraeus Changed the U.S. Military,” CNN.com, (November 11, 2012).

Further, it was recognition of the strength and salience of the norms protecting civilians that drove concern for the presence of media rather than the other way around; this is clear from the lack of concern about abuses before they hit the media. Media is an empty vessel, but the strategic narrative that is woven from available norms can either legitimize or delegitimize the actions of actors. Since the legitimacy gap was eventually seen to fuel the insurgency, both global and local, the legitimacy gap created a crucial juncture which required at some point either changing the U.S.'s purported values—in this case abandoning or at least downplaying identification with human rights and civilian immunity, or changing behavior and thus the definition of what it means to “win.” My argument is that the military took on the political burden handed it by Bush, and attempted to change its behavior.

Furthermore, documenting the increasing interaction between human rights organizations and the U.S. military reveals the diffusion of human rights norms, beginning with the instrumental use of the CIN, to argumentation about civilian casualties, to efforts to persuade members of the strategic value of abiding by a more human rights-orientation toward civilians. Finally, I find support for the three conditions under which this transformation in strategy occurs: the questionable legitimacy of the initial invasion, the need to delegitimize terror, and the recognition of a loss of a monopoly of force.

CHAPTER FIVE

AFGHANISTAN

While the invasion of Iraq was widely condemned as the aggressive, even illegal use of force, the GWOT campaign in Afghanistan enjoyed a higher level of legitimacy and enjoyed broad international support—at least in the beginning. Though polling data suggests that many foreign publics would have preferred a law-enforcement rather than a military approach,¹ the general feeling was that, since the U.S. was attacked, the war complied with the spirit if not the letter of international law by acting in accordance with the right to self-defense, as defined in the U.N. Charter, Chapter I, Article 2 (4).² This initial legitimacy surplus, I argue, explains why civilian casualties, though politically salient, were not perceived with the same urgency as they were in Iraq. Indeed, the crisis in Iraq overshadowed Afghanistan, siphoning away resources, attention, and manpower, creating the conditions for worsening civilian casualties over time. It was not until after

¹ Gallup International “Gallup International Poll on Terrorism in the US,” (2001), accessed January 20, 2013, online: <http://www.gallup-international.com/surveys.htm>.

² Mary Ellen O’Connell, “Crying War,” in *International Law and International Relations: Bridging Theory and Practice*, ed. Thomas J. Biersteker, (London: Routledge, 2007), 94-5. Legitimacy here refers to its social (perception) rather than its technical, legal sense. For an argument that the war was neither moral nor legal, since it neither gained approval of the security council nor constituted self-defense against the Taliban, who did not attack the U.S. See Marjorie Cohn, “Bombing of Afghanistan Is Illegal and Must Be Stopped,” *Jurist*, November 6, 2001, online: <http://jurist.law.pitt.edu/forum/forumnew36.htm>; Marjorie Cohn, “Afghanistan: The Other Illegal War,” *AlterNet*, August 1, 2008, online: http://www.alternet.org/world/93473/afghanistan:_the_other_illegal_war.

the surge, when the level of violence in Iraq began to cool, that serious attention was paid to Afghanistan, and civilian casualties were seen as a serious strategic threat. I will argue that Afghanistan's version of C.O.I.N. and its emphasis on the protection of civilians served not only as an attempt to reverse the previous strategic failure, but also to repair the American image and rebuild the legitimacy of the American use of force by regaining what others have called its "moral authority." Because of this, the military habituates and institutionalizes civilian-centered human rights norms into its future vision of American military culture and war-making. Moreover, since this case study is entangled with that of Iraq because it constitutes a second theater of war within the overarching GWOT, I will treat this case as distinct from, but overlapping with Iraq in terms of the C.O.I.N. doctrine.

Early Invasion, 2001-2002: Framing and Legitimacy

In contrast to the unilateral approach in Iraq, President Bush emphasized global unity in the days leading up to Afghanistan. Operation Enduring Freedom was understood by many in the military as multilateral—a broad-based struggle against terrorists, whose political program was delegitimized by their threat to the international social order. This threat comes particularly from their rejection of international norms, especially that of civilian immunity. Bush labeled terrorism not only in terms of a strategy or behavior but also as an immutable identity of murderous "outlaws and killers of innocents."¹ This notion of "outlaw" builds on contemporary ideas of terrorists as

¹ President George W. Bush, "Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan," Washington DC: The White House, October 7, 2001.

criminals and as such reinforces the idea of international society as the realm of law; but as I argue in the previous chapter about Iraq, the reluctance to treat terrorists as merely criminals triggers international humanitarian law, or the laws of war protecting innocents and banning torture.

Moreover, as I explained in chapter two, the definition of terrorism is inherently political in that its meaning has always been tied to legitimacy claims about the state monopoly on the use of force; the anti-terror norm has therefore traditionally been conceptualized as resting on foundational (or meta) norms of sovereignty. Even more recent is the idea that terrorism, through the expansion of its destructive capability, now constitutes a threat to the international order itself by threatening this monopoly. Since the Munich Massacre of 1972, however, the anti-terrorism norm has been popularly framed primarily in terms of the civilian immunity norm (as the killing of innocent civilians). Since then, this definition of terrorism has been a crucial axis in the legitimacy struggle between Israel and Palestinian resistance groups; the legitimacy of political claims to disputed lands and rights to sovereignty have been constructed in close alignment with identity based on the legitimate use of force. This particular conflict draws from the larger international normative environment whereby newly independent states sought recognition of anti-colonial resistance groups fighting wars of independence. Such groups attempted to legitimize their own identity claims as legitimate

fighters by asserting the priority of *jus ad bellum*, or just cause, over *jus in bello*.

Powerful states such as the U.S. worried that resistance groups would be effectively granted exemptions from IHL and thus would gain an advantage in the battlefield, since the legal strictures of civilian immunity seek to protect the principle of distinction by demanding that combatants distinguish themselves from civilians through visible symbols such as uniforms and openly carrying their weapons. The U.S. rejected certain parts of the 1977 Additional Protocols not so much on the possible damage to civilian immunity incurred by subordinating the *jus in bello* to the *jus ad bellum*, but on the grounds that “terrorists” must not be legitimized as parties to a conflict at all. In order to demonstrate its own support of the moral dimensions of civilian protection in contradistinction to terrorists, and in affirmation of its innate liberal values/identity, President Reagan promised that the U.S. would respect civilian immunity irrespective of international law.²

In Afghanistan, President Bush builds on this already established civilian-centered identity contest between states and non-state actors by defining the particular threat of terrorism against the United States not only as a global threat in terms of its broad territorial reach but as a universal threat in terms of the *normative order* of the entire international society of states. By tapping into the larger normative context of terrorism and civilian immunity, Bush, in the early post-9/11 days, ties the legitimacy of the initial

² President Ronald Reagan, “Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions,” January 29, 1987, online: <http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM>.

Afghan invasion to the global interests of states and by extension to “innocent civilians.” The legitimacy of the U.S. invasion of Afghanistan is framed not only as a single act of self-defense but as an act in the unified interests of the international order of states *that uphold civilian interests*: “many nations understand what NATO expressed, that an attack on us is really an attack on legitimate governments and on freedom.”³ The Taliban’s draconian style of rule and blatant disregard for human rights made it easy to conflate it with Al Qaeda and override concerns about sovereignty that intervention and “regime change” would otherwise likely trigger. The legitimacy of the invasion of Afghanistan was widely seen as just despite the fact that no state or regime had actually attacked the United States. As Ballard, Lamm, and Wood write,

Though there are people who believe that the cost of war is never justifiable, the campaign in Afghanistan will always stand out as one of the very few conflicts in history that was avidly supported in its initial stages by most of the nations of the world. In the aftermath of the terrorist attacks that occurred on September 11, 2001, nearly seventy nations actively voiced support for a response against the Taliban and Al-Qaeda. The Taliban had been vilified in the international press and had twice before been sanctioned by the United Nations. This was initially therefore *both a just and internationally popular* war.⁴

³ George W. Bush, “Remarks Following Discussions With Secretary General Lord Robertson of the North Atlantic Treaty Organization,” October 10, 2001, available on the American Presidency Project. <<http://www.presidency.ucsb.edu/ws/index.php?pid=64548&st=terrorists&st1=afghanistan>>

⁴ My emphasis, J. Ballard, D. Lamm, and J. Wood, *From Kabul to Baghdad and Back: The U.S. at War in Afghanistan and Iraq* (Annapolis: Naval Institute Press, 2012), 275.

While Bush's war plans found explicit support in the *jus ad bellum* traditions ensconced in international law, *jus in bello* formed the normative background for not just the defeat but the destruction of Al Qaeda. It would soon become the foreground as well when Bush drew a sharp contrast between the Taliban and Al Qaeda on the one hand, and American *identity* on the other by invoking the moral aspects of the *jus in bello*, especially the principle of distinction. Clearly demarcating the line between civilian and combatant, Bush promises the American people that even as the enemy is being pursued, "at the same time, the oppressed people of Afghanistan will know the generosity of America and our allies. As we strike military targets, we'll also drop food, medicine, and supplies to the starving and suffering men and women and children of Afghanistan."⁵ Though Bush does not explicitly promise at this time to minimize harm to civilians that would result from the use of force, he reinforces the identity of the U.S. as the legitimate protector of all, not just American, innocent civilians. The Afghanistan war thus begins with a surplus of legitimacy, resting largely on the moral consensus regarding the illegitimacy of the terrorists' use of force as opposed to that employed by the coalition led by the United States, and later the ISAF and NATO.

Early Attitudes Toward Civilian Casualties

During the initial stages of Operation Enduring Freedom, a mix of precision weaponry was employed, and some interviewees with experience or opinions on

⁵ George W. Bush, "Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan," Washington DC: The White House, October 7, 2001.

Afghanistan characterized the initial airstrikes as precise and careful, while acknowledging that, as one person put it, “it was shit for civilians.” The emphasis on precision weaponry and careful targeting fits with the earliest attitudes of many military personnel expressed in the Carr Center’s Human Rights Conferences, who saw criticism of U.S. targeting practices as rather unfair, idealistic, and lacking in historical perspective. According to reports published by Carl Conetta, civilian casualties in the initial weeks of the invasion were estimated at 1000-1400 attributable to direct military action.⁶ Conetta points out, however, that the rate of civilians killed per bomb dropped was higher than would be expected when compared to the recent Kosovo conflict because the “mission objectives, operational plans, and the character of the enemy might interact to exert considerable upward pressure on the civilian casualty count.”⁷ Notably, since the objective was regime change as well as rooting out and destroying Al Qaeda, targets included residential areas where both groups lived and operated close to civilians.⁸ Targeting was not purposefully indiscriminate, but “targeting residential areas meant a much reduced margin for error in attack, generally,” and extending the battle into outlying areas as fighters fled endangered refugee flows. Cluster bombs were also

⁶ See Carl Conetta, “Strange Victory: A Critical Appraisal of Operation Enduring Freedom and the Afghanistan War’s Report,” Project on Defense Alternatives, February 12, 2002, online: <http://www.comw.org/pda/0201oef.html#note20>.

⁷ Ibid.

⁸ This is true for the Taliban as well as Al Qaeda because of the informal nature of Afghanistan rule at that time. For an excellent close up look at the challenges of tribal governance in both Afghanistan and Pakistan, See Robert M. Cassidy, *War, Will, and Warlords*, Washington DC; Government Printing Office, 2012.

employed to a greater extent in this conflict than in Kosovo two years before. Further, relying on local intelligence meant that sometimes locals exploited or falsified intelligence in order to bring harm to their own enemies. Strategically partnering with the Northern Alliance, comprised mostly of ethnic minorities, against the Pashtun Taliban, while pragmatic in the short run, facilitated brutality and human rights abuses and exacerbated ethnic divisions between the Pashtuns on the one hand, who had always ruled, and the Tajiks, Uzbeks, and Turkmen on the other.⁹

Although the earliest phases of the campaign were seen by many of those I interviewed as relatively precise, attitudes at the highest levels indicate a recognition of a conventional trade-off between military necessity and minimizing civilian casualties, mediated by the emphasis on force protection. This is evidenced by the willingness to incur more civilian casualties than would otherwise be necessary in order to accommodate foreign policy objectives that saw the destruction of the enemy as the overriding goal. The “nature” of non-state actors, who are intermingled with the civilian population, was seen to some degree as an enabling rather than constraining factor in the use of force. The *New York Times* published an investigative report of eleven bombing sites over a period of six months and concluded that the focus on overwhelming force and force protection, along with a reluctance to rely on ground troops for better intelligence, meant that “the American air campaign in Afghanistan, based on a high-tech, out-of-harm's-way strategy, has produced a pattern of mistakes that have killed hundreds of

⁹ Conetta, “Strange Victory.”

Afghan civilians."¹⁰ The report also documented that denying civilian casualties was often the first public response, even in the face of contrary evidence. Responding to the *Times* article in a Pentagon briefing, Rumsfeld defended the performance of the military regarding civilian deaths, insisting that the campaign represented historical progress in minimizing civilian casualties. Thom Shanker, *New York Times* reporter, notes that Rumsfeld appeared to balance the “tragedy of innocent civilian deaths” against the accomplished goals of driving the Taliban and Al Qaeda from Afghanistan: “Today the Taliban are no longer in power; Al Qaeda is on the run,” said Rumsfeld. “The humanitarian crisis has been averted, and the Afghan people have been liberated. And Afghanistan is once again a free nation.”¹¹

In the early years, since civilian casualties were viewed as an unavoidable cost of doing business, little credence was given to the possibility that civilian casualties could become more than a temporary public relations challenge. Interestingly, however, a small number of enlisted soldiers reflected a “common sense” assessment that Afghans would rebel against any force that killed its innocent bystanders. Higher level interviewees (officer level) recalled little to no discussion in the early years about the idea that civilian casualties might grow into a political problem that would reverberate directly back onto

¹⁰ Dexter Filkins, “Flaws in U.S. Air War Left Hundreds of Civilians Dead,” *New York Times* (July 21, 2002), online: <http://www.nytimes.com/2002/07/21/world/flaws-in-us-air-war-left-hundreds-of-civilians-dead.html?pagewanted=all&src=pm>.

¹¹ Quoted in Thom Shanker, “Rumsfeld Calls Civilian Deaths Relatively Low,” *New York Times*, (July 23, 2002), online: <http://www.nytimes.com/2002/07/23/world/rumsfeld-calls-civilian-deaths-relatively-low.html>.

the battlefield, let alone a political problem that would affect the long term ability of the U.S. to achieve its foreign policy goals in the region.

This was so despite the fact that civilian casualties became an issue for local and regional audiences almost immediately, particularly in Pakistan. The *Boston Globe* reported only weeks into the campaign that “the president, General Pervez Musharraf, is under pressure both from fundamentalist political parties that have called on the army to oust him and from some moderates who say he is ignoring Pakistanis' concerns for their fellow Muslims in Afghanistan.”¹² The *New York Times* report documented rising anger in areas like the hamlet of Kakrat in Oruzgan Province where four entire villages were strafed, and some Afghan officials warned of the resulting pressures on their ability to govern: “We have to be given a larger role,” said Dr. Abdullah, the Afghan foreign minister, in an interview. “If things do not improve, well, I will certainly pray for the Americans and wish them success, but I will no longer be able to take part in this.”¹³

Moreover, the earliest indications were that the enemy saw civilian casualties as a propaganda tool, not only for a local audience, but for a regional, even global audience of Arabs and Muslims who already believed in the U.S. willingness to kill their own kind.¹⁴

¹² Anne Barnard, “Rumsfeld says air strikes must go on,” *Boston Globe*, (November 5, 2001), A8.

¹³ Filkins, “Flaws.”

¹⁴ Experts on the region say that many in the Middle East already believed this, thus “many Arabs and Muslims accuse the United States of killing innocent Afghans in its war on terrorism,” in, “U.S., Taliban Fight War of Words as Well as Military Conflict; Rumsfeld Calls Enemy’s Claims of Civilian Afghan Casualties ‘Fiction,’ Sally Buzbee, The Associated Press, *St. Louis Post – Dispatch* (November 7, 2001), A7.

The Taliban reported what the U.S. claimed were inflated civilian casualty figures,¹⁵ accusing the U.S. of intentionally killing civilians, and called it a “global bully. News reports repeated the Taliban’s message that ‘urged Muslims to rise up against the United States and to kill Americans wherever they can.’”¹⁶

Early assessments by some political and military personnel outside of the immediate circle around Bush, however, did see civilian casualties as politically problematic. Former assistant defense secretary under Reagan, Lawrence Korb, noted two reasons to worry: “No. 1, we are a moral country. These people aren't aiding and abetting bin Laden; they're terrified by him. And No. 2, the more you kill, the more you run the risk of inflaming the Muslim world and breaking apart the coalition.”¹⁷ This assessment competed with a more prevalent idea that held that civilian casualties required merely the correct spin: one member of the House Armed Services Committee, Representative Todd Akin, a Republican from Missouri, believed that the problem was not casualties per se but the way they were being perceived. Urging the administration to take notice, he stated,

I think we have to underscore the fact that the terrorists have intentionally targeted civilian targets. They have intentionally done that, whereas we are making every effort not to hit civilian targets. So there is a black-and-

¹⁵ The Taliban claimed 1500 civilian deaths in the first weeks of the conflict, Ibid.

¹⁶ Philip Dine, “Taliban Defenses Still Pose Threat, Rumsfeld Says; Official Stresses U.S. Efforts to Avoid Civilian Casualties,” *St. Louis Post – Dispatch* (October 12, 2001), A.11.

¹⁷ Ibid.

white contrast. We feel so strongly on this principle that we are even assuming additional military risks.¹⁸

The response from the administration came mostly from Secretary of Defense Donald Rumsfeld, and echoed (or perhaps helped to construct) the prevailing attitudes of some of the military participants in the Human Rights conferences at the time, who believed that because the enemy manipulated and propagandized civilian casualties, it garnered an unfair, even unjust advantage. This sentiment was reported by some of the interviewees under study to be widely held. Emphasizing—even acknowledging in some cases—casualties was seen as feeding into the enemy’s illegitimate and distorted narrative. Nevertheless, the players were embedded in an identity contest, and Rumsfeld’s response was thus to place the moral onus on the enemy, claiming that the enemy was responsible for the civilian casualties that did occur and by implicating civilians as cooperators or supporters of the regime:

There's no question but that people who were in close proximity to these isolated ammunition dumps, who very likely were there for a good reason, because they were part of that activity, may very well have been casualties ... They were not cooking cookies inside those tunnels.¹⁹

Civilians who were acknowledged to be innocent were the victims of the enemy’s unethical ways of war:

¹⁸ Ibid.

¹⁹ Julian Borger, “Rumsfeld Blames Regime for Civilian Deaths: Bombing US Planes Make Heaviest Daylight Strikes Yet,” *The Guardian* (October 15, 2001), online: <http://www.guardian.co.uk/world/2001/oct/16/afghanistan.terrorism8>.

Rumsfeld said that while the U.S. has been ‘very careful’ about avoiding civilian casualties when possible, the Taliban is making it increasingly difficult not to hit civilians. ‘They are systematically using mosques and schools and hospitals for command-and-control centers [and] for ammunition storage,’ Rumsfeld said. ‘They are placing artillery and tanks and armored vehicles in close proximity to hospitals and schools and residential areas.’²⁰

Even so, the administration recognized the need to sway the populace, though early attempts at hearts and minds were crude and took for granted that the claim that killing was “unintentional,” a key concept in the civilian immunity norm that permits for the possibility of foreseeable collateral damage, would absolve the U.S. from moral culpability in the eyes of multiple audiences, including the local population. Planes dropped leaflets “in an effort to reassure them the bombardment was not aimed at them. One leaflet showed a western soldier in camouflage and helmet shaking hands with a man in traditional Afghan dress in front of a mountain scene.” Other attempts used war planes to broadcast news in Afghan dialects “in the ongoing battle for the hearts and minds of the Afghan people.”²¹

With faith in the utility of conventional force and in the American attitude that, as one interviewee put it, “we were so sure we were the good guys,” the war of ideas aimed at only the vaguest goal of countering anti-Americanism. However, the U.S. information Agency, whose once vibrant public diplomacy program was given short shrift once

²⁰ Esther Schrader and Tempest Rone, *Los Angeles Times* (October 29, 2001), A.6.

²¹ Ibid.

relegated to the State Department, was under-resourced and under-prioritized.²²

Interagency cooperation attempted public diplomacy initiatives, but no meaningful connection was made between the conduct of the military and the goals of anti-Americanism. For example, soon after the initial fall of the Taliban, when Al Qaeda had retreated to Pakistan, President Bush announced that Radio America would be broadcast and that the media infrastructure would be built up in the country. There was a notable lack of any discussion within the administration that directly linked the use of overwhelming force or civilian casualties to a damaged American image, nor was this issue tied in any important way to battlefield conditions in Afghanistan. While discussion between the military and the human rights workers at the Carr Center Conventions focused on the trade-off between force protection and civilian casualties as a human rights issue, no linkage was yet made between American *interests* and protecting civilians. The separation between politics and military force was assumed, and according to one high level military official, little thought was given to civilian casualties as one factor contributing to the influx of Pakistani fundamentalist fighters crossing the border to assist the Taliban.

Whereas initial indicators were that American image would suffer, politicians and military decision-makers alike traditionally focus on domestic public opinion; the masses make up the “passions” in what Clausewitz calls the trinity of war, providing the patriotic

²² See for example, Anthony H. Cordesman, *The War After the War: Strategic Lessons of Iraq and Afghanistan*, (The Center for Strategic and International Studies, Washington, D.C.: 2004), 49.

fervor, political and financial support to keep the war going. At this point, American domestic public opinion gave little cause for concern. Though some peace-oriented groups protested, expressions of mainstream public opinion demonstrated a tendency to tolerate civilian casualties, a predictable pattern for the American public, who has proved quite willing in the past to trade civilian lives for “security.”²³ A letter to the editor responding to the July 2002 *New York Times* report on civilian casualties captures the mood of the country and its preference for force protection over minimizing civilian casualties:

If only hundreds of Afghan civilians died as we liberated their country for them, that's a relatively small price for them to pay. It was their country; why should we take the ground losses? We must minimize mistakes, but your article places more credence on the reports and opinions of a few civilians with little knowledge of tactics of modern warfare than it does on our own personnel who are risking and giving their lives for these people. Like much of Europe and the Middle East, Afghans are biting the hand that feeds them and frees them.²⁴

Despite the mood of the U.S. public, the importance of civilian casualties for America's image and its ability to prevail in the long run was not lost on elected officials like John Kerry who worried that “the U.S. appears to be losing the propaganda war in Afghanistan and in the Arab world. Strikes that hit civilians, and bombing during

²³ Conway-Lanz, “Collateral Damage,” demonstrates that American public discourse in war has demonstrated the same pattern for decades—the assertion of a humane national identity while easily making moral exceptions for large-scale civilian casualties in the name of security. Further, the mainstream American public does not tend to see such trade-offs as moral inconsistencies in need of reconciliation. High level military officials, on the other hand, have been much more conscious and verbal about the trade-offs involved.

²⁴ Mark R. Godburn, “Letter to the Editor,” (Salisbury, Conn., July 21, 2002), online: <http://www.nytimes.com/2002/07/23/opinion/L23AFGH.html>.

Ramadan, they said, can do nothing for the U.S. case.”²⁵ Stephen Tanner argues that the damage to American image was in its loss of “moral authority.”

After a month of the U.S. bombing campaign rumblings began to reach Washington from Europe, the Mideast, and Pakistan where Musharraf had requested the bombing to cease. Having begun the war with the greatest imaginable reservoir of moral authority, the U.S. was on the verge of letting it slip away through high-level attacks using the most ghastly inventions its scientists could come up with.²⁶

Still, little evidence exists that civilian casualties were recognized at the time as a strategic issue among those positioned as top decision-makers or even among junior officers or enlisted personnel interviewed for this study. One special forces enlisted soldier who was one of the first to land in Afghanistan remarked that he received no training at all in complying with the Geneva Conventions, and indeed, was not even vaguely familiar with the treaty throughout the duration of his service.

Even if the moral issue of civilian casualties contained the seeds of a broader, strategic problem in the minds of some, this issue receded among coalition forces not long after the Taliban had been toppled and al-Qaeda had been driven out. Just as non-state combatants melted away only to recoup and return another day, the damage set into motion by civilian casualties soon took a back seat to larger issues of legitimacy concerning U.S. foreign policy, especially fears about its intentions to project its military

²⁵ Ibid., Schrader and Tempest, *LA Times*.

²⁶ Quoted in Tanner and Stephen, (*The Americans in Afghanistan: A Military History from Alexander the Great to the War against the Taliban*, (Cambridge, Mass.: Da Capo Press, 2009), 300; Peter Bergen also makes this claim, though his account is based more on the torture issue, *The Longest War* (New York: Free Press, 2011).

power across the globe. It was only months after 9/11, in January 2002—before the smoke had even cleared in Afghanistan—that Bush gave his State of the Union speech in which he famously named Iran, Iraq, and North Korea as the “axis of evil.” As a result, the image of the U.S. in the eyes of international publics suffered tremendously. Pew reports a decline across the board in global public opinion toward the U.S. during the Bush years but notes that the decline began in the early days of the Afghanistan and continued through Iraq:

America won a measure of global sympathy after the terrorist attacks of Sept. 11, 2001, but the inaugural Pew Global Attitudes survey showed that by spring 2002 favorability ratings for the U.S. had already dropped in many countries since the start of the decade. Surveys conducted after the U.S.-led invasion of Iraq in 2003 found further declines. Positive views of the United States declined in 26 of the 33 countries where the question was posed in both 2002 and 2007.²⁷

The U.S. image suffered especially with the publics of some Arab and Muslim countries, and this drop correlated with disturbingly high levels of confidence in Osama bin Laden and higher than would be expected support for suicide bombings as a legitimate tactic in war. The percentage of Jordan’s population that saw the U.S. in a favorable light dropped from an already low twenty five percent in 2002 to a staggeringly low one percent in 2003. Fifty three percent of Jordanian Muslims likewise expressed a favorable view of Osama bin Laden, specifically responding in a positive way to the

²⁷ Pew Center for the Study of Global Public Opinion, “Global Public Opinion in the Bush Years, 2001-2008,” online: <http://www.pewglobal.org/2008/12/18/global-public-opinion-in-the-bush-years-2001-2008/>.

statement that “bin Laden would do the right thing in world affairs.”²⁸ In Jordan in 2002, forty three percent said that suicide bombing was often or sometimes justified, and that number crept up to nearly the sixty percent mark until 2005, when it dropped precipitously. Not coincidentally, 2005 is the year Amman experienced firsthand what it means to be the object of terrorism when the Iraqi branch of Al Qaeda (AQI) bombed three hotels in Amman, one of which was hosting a wedding party with hundreds of guests. The bombing was said to be in retaliation for the Jordanian government’s cooperation in the GWOT. The attack sparked massive public protests, but in a stunning reversal, they were directed not toward government policy but against the attacks and al-Qaeda itself. Fares Braizat, a political scientist in Jordan University's Center for Strategic Studies remarked that

in an opinion poll conducted [the year before] by his office, 67 percent of Jordanian adult respondents had considered al Qaeda in Iraq ‘a legitimate resistance organization’. That attitude may be changing, he said Friday, explaining that he had spoken since the attacks to 10 survey participants who held favorable views of al Qaeda; nine of them had changed their minds.²⁹

To the extent that the support of Arab and Muslim publics was seen as relevant in the GWOT by both terrorists and their state foes, the Jordan case demonstrates the centrality of civilian casualties to shifting the balance of legitimacy *to either side* in the larger war of ideas. Yet, this was not apparent at the time and reflected a severe

²⁸ Ibid.

²⁹ Jonathan Finan and Naseer Mehdawi, “Hotel Bombings in Jordan Fuel Anger at Exiles,” *Washington Post Foreign Service*, (November 12, 2005), online: <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/11/AR2005111100362.html>.

disconnect between the U.S. self-understanding about its own identity and the legitimacy of its use of force versus that of others. Paul Rogers writes in February 2002 about the “mood of the majority” in the global south as being fundamentally at odds with the U.S. perception of its own actions: “The U.S. sees the legitimacy of a war on terror born of the shock of its own vulnerability. Much of the rest of the world sees it as a further example of the control of the international system by an elite minority.”³⁰ Identity, however, is inherently social and thus is negotiated, which means that one cannot simply assert identity; rather, it must be accepted, or at least not contested. Since the war of ideas was about countering anti-Americanism and promoting American values in opposition to that of terrorists, civilian casualties in the early days of Afghanistan had already cost the U.S. in the war of ideas with key audiences well before it appeared to be losing control of the ground war in Afghanistan and even before the Iraqi insurgency—it just didn’t know it yet.³¹

To what extent damage to a state’s image induces a change in behavior is another matter. Anthony Cordesman, a respected military strategist writing in 2002 about the lessons of the Afghanistan conflict, saw the potential for civilian casualties to become a political problem for a global audience, but he also determined that when the world

³⁰ Paul Rogers, *A War on Terror: Afghanistan and After* (London: Pluto Press, 2004), 78. Original observations made in 2002, book published as collection in 2004.

³¹ Interestingly, however, the turn in Jordanian public opinion against terrorism occurred in the same year that the coalition began to see civilian casualties in Afghanistan as an operational problem (2005). None of the higher level interviewees under study were able to recall a link between the two.

supports the use of force, they will also allow for a level of civilian casualties as a cost of doing business:

The global reaction to the fall of the Taliban and Al Qaeda shows that the United States and its allies can continue to act in spite of enemy propaganda and the use of collateral damage as a political weapon, and that media and human rights criticism that ignores reality and attempts to make any use of military force impossible has little effect. The media and the public will—and they should—react to every attack that produces any form of civilian casualties, friendly fire, or collateral damage. *If the world accepts the need for military action, however, it will also accept the inevitability of such losses.*³²

Translated in terms of this study, the willingness to incur civilian casualties is at least partly a function of legitimacy, and reputational damage alone, among limited audiences, did not necessarily equate to a loss of legitimacy. It is not until the U.S. sees that reputational consequences deriving from civilian casualties impact its ability to “win” the ground war, and no other options appear consistent with U.S. and military identity, that the war of ideas is seen as essential to the war on the ground. Eventually, what it means to win, however, will have to be redefined within the moral limits of civilian immunity, at least in Afghanistan.³³

Middle Years, 2003-2007: A Secondary Effort

If all signs pointed to the beginning of a downward slide in American image among local and regional publics, the Afghanistan conflict nevertheless dropped out of

³² My emphasis, Cordesmann, “Lessons of Afghanistan,” 42-43.

³³ Pakistan and the use of drones would constitute an area for further study. It would be interesting to test the thesis in the Pakistan case since the U.S. may enjoy a higher level of perceived legitimacy for its objectives of killing Al Qaeda. Moreover, it bears little direct responsibility for “breaking” Pakistan and thus may interpret civilian immunity in a more permissible, sovereignty-oriented manner. Even so, relative to a ground invasion or manned airstrikes, drones still produce relatively less civilian casualties.

the headlines once international attention shifted to Bush's plans to invade Iraq. With the Taliban initially defeated and Al Qaeda's training camps and bases destroyed, Afghanistan became, as one high-level military official put it, a "secondary effort" for many years.³⁴ In reality, as has been well documented elsewhere, the Taliban and Al Qaeda both had merely retreated, and much of the leadership that remained had crossed into the mountainous Pakistani Pashtun region known as the Federally Administered Tribal Areas (FATA). Robert Cassidy documents the rise of the (neo)Taliban, writing that Pakistan provided a safe haven whereby they recouped, assessed their losses, and gathered up funds from people as geographically diverse as

‘businessmen in Karachi, goldsmiths in Peshawar, wealthy Saudis and Kuwaitis,’ and even ‘sympathetic officers’ in the Pakistani army and ISI. *Pashtuns who resented the harsh treatment of Afghan civilians at the hands of the Coalition forces* and a host of new recruits were assembling in the tribal areas of the North-West Frontier Province.³⁵

Civilian casualties were therefore producing recruiting effects, but at this point in the conflict, casualties were one of the many factors that made up the complex internal political dynamics taking place between the Pakistani government and the Taliban, not to mention the emerging Pakistani Taliban insurgency. Nevertheless, with popular support for Pakistan's alliance with the U.S. in the GWOT at only fifteen percent by 2007, it is

³⁴ Personal interview.

³⁵ My emphasis, Cassidy, *War, Will, and Warlords*, 71.

reasonable to assume that civilian casualties were fuel for the fire, especially among those predisposed to sympathize with Salafi-Jihadist movements.³⁶

Against the backdrop of this “unfinished and temporarily forgotten war in Afghanistan,” U.S. attention and energy was drawn into Iraq like moth to a flame. As I have documented in chapter four, strategic failure in an invasion already lacking legitimacy came to be defined increasingly in terms of a failure to view the population protection as the goal. What was key in Iraq was that the humanitarian basis for the invasion and foreign policy goal of democratizing the country and turning it into an ally on the war on terror guided the idea that civilians themselves had to buy into the package of ideas being sold to them by primarily the United States military. The fact that invading Iraq at all was a priority so early in the beginning of the Afghanistan war, however, was a political choice independent of effects induced by civilian casualties. What this meant for Afghanistan was a shortage of troops and thus an excessive reliance on airpower, which affected how and to what extent the military was able to pursue its goals of destroying the al Qaeda and Taliban leadership, providing stability and security—the goal of ISAF shortly after the initial invasion—and fighting the emerging insurgency as it became evident that this was occurring. An overreliance on airpower constrained the decision calculus toward more civilian casualties, and between the initial heavy bombing of

³⁶ International Republican Institute Polling Data, cited in Cassidy, *War, Will, and Warlords*, 75.

Afghanistan and then Iraq, a dearth of precision guided munitions meant that other less precise weaponry would be used as needed.³⁷

The lack of resources and attention feeding into Afghanistan created optimal material conditions for the gradual resurgence of the Taliban and Al Qaeda. As Richard Holbrooke put it in an interview, Afghanistan “was abandoned a second time by the previous administration more or less in 2004, 2005. The administration almost eliminated the foreign aid assistance programs, went in the wrong direction, and the Taliban took advantage of it. ...”³⁸ Civilian casualties at this time worked to confirm the narrative of the Taliban and Al Qaeda that had begun in the invasions, feeding into local and regional recruitment efforts.³⁹ This assessment, however, is retrospective, for as will be detailed below, it was not until 2005 that civilian casualties were seen as a “key operational issue,” and Karzai began to complain privately.⁴⁰ Even then, it was not until 2009 that the International Security Assistance Force (ISAF), which by then came under joint U.S. leadership with Operation Enduring Freedom, consistently prioritized reducing civilian casualties as the core of a population protection strategy.⁴¹

³⁷ Rogers, *War on Terror*, 39-40.

³⁸ *Frontline Interview: Richard Holbrooke*, Special Representative for Afghanistan and Pakistan (Sept. 14, 2009), online: <http://www.pbs.org/wgbh/pages/frontline/obamaswar/interviews/holbrooke.html>.

³⁹ Personal Interview, high level U.S. military official. See also Cassidy, *War, Will, and Warlords*, 102-103.

⁴⁰ *Afghanistan Civilian Casualty Handbook*; also Sarah Sewall, “The Civilian in American Warfare,” as cited in Rudra Chaudhuri and Theo Farrell, 273.

⁴¹ Center for Army Lessons Learned, website discussing the handbook published in June 2012, *Afghanistan Civilian Casualty Prevention*, No. 12-16., available online [publicintelligence_net_call-afghan-civcas_.pdf](#). Accessed 12-15-2012.

Torture and Effects on Legitimacy

In the meantime, the U.S. suffered severe damage to its image among a broader, global audience due to the infamous torture and illegal detainment debates associated with Guantanamo Bay. While these issues may seem largely beyond the scope of this study since they do not bear directly on the treatment of civilians, they do feed directly into issues of legitimacy and the U.S. use of force. Torture and civilian immunity rest side by side in the 1949 Geneva Conventions, the third and fourth conventions respectively, of the treaty at the core of contemporary international humanitarian law.⁴² Further, the debates surrounding torture formed the backdrop for U.S. decisions about how to approach civilian casualties in the years leading up to an Afghanistan-specific version of C.O.I.N..

The torture controversy affected U.S. reputation based on its conduct, its reversal on customary international law, and its place in the larger international order.⁴³ This hinged on the fact that the U.S. staked its identity and force claims on its stewardship of the international liberal order of law and rights on the one hand, while actively promoting

⁴² International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, 75 UNTS 287. <<http://www.unhcr.org/refworld/docid/3ae6b36d.html>> [accessed 28 December 2012]; Relative to the Treatment of Prisoners of War (Third Convention). Geneva, August 12, 1949.

⁴³ This was a concern even within the Bush administration. Colin Powell circulated a counter memo in 2002 spelling out the consequences of the U.S. turning its back on the Geneva Conventions. Instead he argues for a position that supports IHL since “it presents a positive international posture, preserves U.S. credibility and moral authority by taking the high ground, and puts us in a better position to demand and receive international support.” In “Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan,” Department of State, Washington D.C., January 26, 2002. <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf3>>

the idea of a space free from the rule of law on the other. This hypocrisy was not lost on many outside of the United States. Denying prisoners *habeus corpus*, detaining them in Guantanamo Bay where U.S. laws of due process did not apply, defending “enhanced interrogation techniques,” and then diverting detainees to more torture-friendly locations via extraordinary rendition—all damaged the American image among friend and foe alike. More specific to this study, it undermined the war of ideas by confirming the strategic narrative of Al Qaeda that U.S. values are hollow and particularistic in that they do not apply to Muslims. An assessment by Dennis Blair, Director of Intelligence under Obama, confirms that the U.S. government gradually came to this perspective. Blair, participating in a review of interrogation methods used by the CIA on high-value individuals suspected of terrorism during these years (between 2002 and 2006), wrote a memo summarizing his conclusions: “The bottom line is these techniques have hurt our image around the world,” and “the damage they have done to our interests far outweighed whatever benefit they gave us and they are not essential to our national security.”⁴⁴

While the torture and illegal detainment issues were not immediately related to the civilian casualties issue, the attempts to carve out legitimate space—through legal counsel, that is—for unrestrained state action in the international realm, while denying *both* criminal and legal combatant status to prisoners, triggered intense focus on both IHL and Human Rights law (IHRL). The public debate about the Geneva Conventions in

⁴⁴ Originally quoted in Joby Warrick, “Intelligence Chief Says Methods Hurt U.S.,” Washington Post, April 22, 2009. <<http://www.washingtonpost.com/wp-dyn/content/article/2009/04/21/AR2009042104334.html>>

particular had the effect of encouraging scrutiny of the contradictions and tensions in U.S. words versus deeds. John Yoo, the Bush administration's Chief of Legal Offices famously authored the Torture Memos, laying the groundwork for a legal defense against charges of war crimes and crimes against humanity.⁴⁵ Yoo claimed that the conflict in Afghanistan was exempt from the Geneva Conventions because al Qaeda is a "violent political movement" and, as a nonstate actor, cannot be a party to a treaty. Further, the Taliban is not a legitimate government since it presides over a failed state and is "functionally indistinguishable" from al Qaeda, "to the extent that the Taliban militia was more akin to a non-governmental organization that used military force to pursue its religious and political ideology than a functioning government."⁴⁶ Moreover, Yoo contended that the President was not bound by international law, nor even by domestic law in cases of security: "customary international law, whatever its source and content, does not bind the President, or restrict the actions of the U.S. military" and is strictly a matter of the President's ability to interpret such law.⁴⁷

⁴⁵ Yoo was the primary but not the only author of "Torture Memos." The New York Times provides a useful "Guide to the Memos on Torture," along with links to scanned .pdfs of the primary documents. <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html?_r=0>

⁴⁶ This memo was made public right after Abu Ghraib. John Yoo, "Memorandum for William J. Haynes II, General Counsel, Department of Defense," Washington DC, January 2002. <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>>

⁴⁷ Ibid.

While IHL is specific to warring parties, any remainders are swept into the jurisdiction of IHRL,⁴⁸ which claims the “equal and inalienable rights of all members of the human family” and as such “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁴⁹ A memo signed by Bush was circulated in response to the torture memos in 2002, which demonstrates some rhetorical recognition of this fact as well as a desire to reinforce the notion that U.S. values are aligned with international human rights. Without acknowledging that detainees have human rights, Bush invokes the language of human rights and aligns himself, however imperfectly, with the “spirit of the law.”⁵⁰

Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.⁵¹

This memo, made public in June 2004, was written as an acceptance of the legal positions asserted in the Torture Memos. It was completely declassified and made public in June 2004 just as the Torture memos were leaked to the press. Meant to balance the

⁴⁸ See for example, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989).

⁴⁹ Universal Declaration of Human Rights, Article 5, <http://www.un.org/en/documents/udhr/index.shtml>.

⁵⁰ Charles Babington and Michael Abramowitz, “U.S. Shifts Policy on Geneva Conventions,” *Washington Post*, July 12, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071100094.html>.

⁵¹ George W. Bush, Memorandum: “The Humane Treatment of al Qaeda and Taliban Detainees,” Washington DC: The White House, February 7, 2002, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

harsh legal position with a reassuring statement of the persistent U.S. commitment to international morality (if not law *per se*), the effects of such a statement are to thrust even greater attention and scrutiny on the American reputation and on its identity alone as a guarantor of moral behavior.

The administration continued to cling to its position even in the wake of public furor, however, and it was not until the 2006 Supreme Court case, *Hamdan v. Rumsfeld*, that it was forced to modify its stance.⁵² *Hamdan* essentially overturned the administration's official position—ruling that the Geneva Conventions do indeed apply. Even in its acceptance of the ruling of the Supreme Court, the administration was sure to invoke both the sovereignty and human rights aspects of international law as the moral basis for the illegitimacy of non-state actors (and even state actors in the case of the Taliban). Dan Bartlett, legal counsel speaking for the Administration, stated:

We strongly believe that terrorists picked up off the battlefield -- who don't represent a nation, revel in killing the innocent, and refuse to wear uniforms -- do not qualify for protections under Geneva," [the] White House counselor said. "Five members of the Supreme Court disagreed. As the president said, we will comply with the ruling."⁵³

The administration was thus legally coerced to alter its stance, and as such lagged well behind the military, which had already undertaken what the Washington Post called “wrenching internal and public debate since the Abu Ghraib prison scandal came to light

⁵² 548 U.S. 547.

⁵³ Quoted in Babington and Abramowitz.

in 2004.”⁵⁴ Importantly, the Torture Memos were only made public in June 2004, shortly after Abu Ghraib, which intensified an already feverish legitimacy crisis, affecting the image of the U.S. and by extension, that of the U.S. military.

The torture debate, in drawing attention to the Geneva Conventions and the “moral character” of the U.S., highlighted the fragility of the international legal order, particularly the laws of war. Bush, in his statement accepting the core of Yoo’s legal position on Geneva, had called for “new thinking in the laws of war” where terror is concerned.⁵⁵ This was made more salient as a result of the Israel-Lebanon War of 2006. Israel, whose tendency had long been to interpret IHL in an expansive manner in order to loosen constraints in fighting irregular wars, helped to contribute to this “new thinking” as it sought to undo the damage to its own reputation wrought by global perceptions that it had disproportionately harmed civilians when fighting Hezbollah. Embroiled in its own legitimacy struggle concerning the use of force, Israeli scholars closely linked to the Israeli government and the IDF produced reports that sought to direct “truth-seeking audiences,” to the correct conclusions and to provide direction on the issue of how killing civilians fits into the larger war on terrorism.⁵⁶

⁵⁴ Ibid.

⁵⁵ George W. Bush, Memorandum, “Humane Treatment of Al Qaeda and Taliban Detainees,” The White House: Washington DC, February 7, 2002, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

⁵⁶ Reuven Erlich, “Hezbollah’s Use of Lebanese Civilians as Human Shields,” Intelligence and Terrorism Information Center at the Center for Special Studies (November 2006): 4. This study was cited nearly verbatim in a house resolution in 2007 to condemn Hezbollah’s actions as violating the Geneva Conventions. See the U.S. Congress, *Congressional Record*, 153, pt. 7, April 18, 2007 to April 26 2007.

The IDF's air strikes and ground attacks against Hezbollah targets located in population centers were carried out in accordance with international law, which does not grant immunity to a terrorist organization deliberately hiding behind civilians supporting it, using them as human shield.⁵⁷

Israel's stance demonstrates the elasticity of the norm in the sense that it can enable or constrain—note the framing of the issue at hand as the immunity of the terrorist rather than the immunity of the civilian. Placing all blame on Hezbollah also echoes Rumsfeld's rhetorical strategy of holding the Taliban and al Qaeda responsible for all civilian casualties.

Perhaps most importantly as it pertains to this study, three things happen within a short time span (in 2006): Public and intellectual debates about the ability of anti-torture norms to withstand U.S. attempts to bend them to “military necessity” reach a zenith. Second, increasing civilian casualties begin to accompany a resurging Taliban in Afghanistan. Third, the civilian immunity norm debate begins to follow in the wake of the torture debate: interested parties begin to debate whether to loosen civilian immunity to confront the increased scope and urgency of the terrorist threat.

Helen Kinsella, scholar of international law and normative political theory, is one of the few to take notice of the close connection between the third (torture) and fourth (civilian immunity) conventions.⁵⁸ She argues that the Bush administration's willingness

⁵⁷ Erlich, “Hezbollah's Use of Lebanese Civilians,” 9.

⁵⁸ Helen M. Kinsella, “Discourses of Difference: Civilians, Combatants and Compliance with the Laws of Wars”, in *Force and Legitimacy in World Politics*, eds. David Armstrong, Theo Farrell and Bice Miguashca (Cambridge University Press: Cambridge, 2006).

to violate prohibitions on torture was seen through the lens of the Civilization versus Barbarism discourse, which enables (or expands the space for) non-compliance with international law. In keeping with historical precedent, since the identity of terrorists has been constructed as barbaric, they are seen as outside of the laws that govern civilization. On the other hand, the concept of the “civilian” is essential to the very idea of “civilization,” and Kinsella argues that Bush’s policy was very careful to strengthen and abide by the norms protecting civilians in order to reinforce the exemption of terrorists from the protections of international law. On Kinsella’s account, the variance in compliance between the third and fourth Geneva Conventions is thus explained by the need to reinforce the notion of terrorists as manifesting a wholly illegitimate identity in order to neutralize any justice-oriented political claims that might otherwise merit consideration.⁵⁹

While I accept Kinsella’s argument in its basic formulation, she does not account for variance in attitudes and policies toward civilian casualties over time. Since, as was documented in the Iraq chapter, an important part of Al Qaeda’s (and later the Taliban’s) strategic narrative is based on the U.S. treatment of Muslim civilians, my argument is that the reputational damage incurred as a result of the torture issue created more pressure for the U.S. to strengthen its position *vis a vis* civilians, in order to counter the opposing narrative in the war of ideas.

⁵⁹ Ibid.

The U.S. image of illegality that was central to its disadvantage in the war of ideas in Afghanistan derived from both its international reputation (damaged by the Iraq War and the torture issue),⁶⁰ as well as its local interactions with Afghans, which would be felt locally but viewed and interpreted by distant audiences through various media. As military scholar Robert Cassidy points out, the mere fact of occupying a foreign, culturally distant land provides opportunities for the enemy to attack the legitimacy of the mission, irrespective of the legitimacy of the initial invasion. Insurgents and terrorists rely on the constant stream of media images that highlight their own deeds and the deeds of the occupier:

The recurring images of Western soldiers and combat vehicles maneuvering through the streets of Muslim villages represent an illegal occupation of the Ummah by infidels to radicalized audiences in Muslim countries. Likewise, repeated images of uniformed Western troops and Muslim casualties animate opposition, if not hatred, for such endeavors.⁶¹

Making the decision to protect civilians, in addition to calming the insurgency, provides a legitimacy bridge by helping to repair the damage done from all sources to both the U.S. image in a broad sense as well as the U.S. military's professionalism more specifically, as I will argue below.

Driven more by concerns about counterinsurgency in Iraq than in Afghanistan, attempts to reform military culture in the direction of respect for civilian immunity and

⁶⁰ Peter Bergen also argues that the United States' moral authority was severely damaged by the torture issue, in *The Longest War: The Enduring Conflict Between America and Al-Qaeda* (Free Press: New York, 2011).

⁶¹ Cassidy, "War, Will, and Warlords," 102.

human rights took place within the military in the interim period of the Afghanistan conflict (2005-2007). While the C.O.I.N. manual was meant to shift military culture toward a new kinder, gentler, American way of war, in reality, the thinking behind the C.O.I.N. handbook was driven by the urgency of Iraq's particular situation. Military leadership had been increasingly convinced of the necessity to win hearts and minds by shifting the emphasis from winning the war of ideas as a secondary matter to a primary goal—one that would take precedence over and even, at times, supplant traditional ideas of “winning.” As I argued in the previous chapter, the sustained interaction between high level military personnel with the human rights community evidenced the shift toward a human rights-centered civilian immunity norm. Moreover, this normative orientation was central to what Petraeus called the “surge of ideas” whereby winning demanded paying attention to competing perspectives in order to get the “big ideas right.”⁶² The big ideas increasingly focused on the international normative context as constraining the strategic options. The idea that the military could revert to punitive population-centered strategies, which was considered legitimate not so long ago, was no longer the case. John Nagl acknowledges that civilian protection is not the *only* strategic option insofar as it does not flow directly out of the material conditions of counterinsurgency:

The history of counterinsurgency campaigns tells us that the way to succeed -- there are two options. You can either conduct the Roman method, where you kill everybody, sow the fields with salt and prevent

⁶² General David H. Petraeus, “The Surge of Ideas: C.O.I.N. and Change in the U.S. Army in 2006,” American Enterprise Institute, May 6, 2010, accessed July 28, 2011, <http://www.aei.org/article/foreign-and-defense-policy/regional/middle-east-and-north-africa/the-surge-of-ideas/>.

anybody from living there again. That defeats the insurgency, but it's illegal and immoral and absolutely not a solution we can think about.⁶³

Rather, he states, population protection “is the only way to succeed in the modern era, in a CNN era.”⁶⁴ Nagl, a key figure in the writing of C.O.I.N.—and along with Petraeus one of its most visible public champions—thus sees the international normative context regarding the treatment of civilians as directly constraining the range of possible strategies to those which are moral and consistent with U.S. identity. As in Iraq, early interagency early efforts at counterinsurgency in Afghanistan attempted counterinsurgency goals such as training the Afghan army (ANA) development, and diplomacy, but without resources or a coherent campaign plan, this was done alongside “punitive displays of lethal force.”⁶⁵ As Colonel Robert Cassidy writes, “perception creates reality and that perception stems from consistency in deed and message.”⁶⁶ The population must perceive the host nation’s government and its partners as legitimate. Information operations must understand the strategic nature of perceptions, since this is true not only for the U.S. and coalition forces, but for the insurgents and terrorists as well. Asserting certain criteria for legitimacy through the war of ideas also draws attention to inconsistencies in deed, which is exploited by the opposition.⁶⁷

⁶³ Frontline Interview: Lt. Col. John Nagl (Ret.), September 1, 2009, accessed October 2, 2011: <http://www.pbs.org/wgbh/pages/frontline/obamaswar/interviews/nagl.html>.

⁶⁴ Ibid.

⁶⁵ Cassidy, *War, Will, and Warlords*, 50.

⁶⁶ Ibid., 51.

⁶⁷ Ibid., 50-54.

Habitualizing: Changing Attitudes Through Identity

The backdrop to this study, which has been the subject of much recent attention for military scholars and journalists, is that the military also struggled to reform its own culture to align with the new doctrine.⁶⁸ Though insights gained in Iraq would not be applied directly to the Afghanistan conflict until later, how force was used increasingly came to be seen as directly relevant to the maintenance of an effective military. The willingness of the military to eventually embrace instead of resist the demands of the human rights community was therefore motivated at least partly by what Sarah Sewall calls its desire to protect its own professionalism.⁶⁹ In order to support what the new military leadership saw as the diminished utility of force and, as a result, its own transformed role in the implementation of foreign policy, it would need to learn some of the discarded lessons of Vietnam.⁷⁰ The military would also need to bring the lessons of Vietnam into the present by taking stock of the changes in the post-Vietnam normative context.

⁶⁸ See, for example, David Cloud and Greg Jaffe, *The Fourth Star: Four Generals and Their Epic Struggle for the Future of the United States Army* (Three Rivers Press, New York: 2009); Fred Kaplan, *The Insurgents: David Petraeus and the Plot to Change the American Way of War* (Simon and Schuster, New York: 2013).

⁶⁹ An interview with Charlie Rose: Sarah Sewall, December 23, 2007, <http://www.charlierose.com/view/interview/8848>; “Introduction,” in U.S. Army and Marine Corps Counterinsurgency Manual, University of Chicago edition, 2007.

⁷⁰ Both Petraeus and Nagl wrote PhD dissertations on the lessons of Vietnam. See John A. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam*. Chicago: University of Chicago Press, 2005; David H. Petraeus, *The American Military and the Lessons of Vietnam: A Study of military Influence and the Use of Force in the Post-Vietnam era*. Princeton, NJ: Princeton University, 1987.

The evidence suggests that it gradually became accepted among many in the high levels of the military, particularly among those whose work pertained to international law, that the strengthened civilian immunity norm had become an increasingly powerful symbol of international morality. According to Charles Dunlap, who looks at international law from a military perspective,

The practical impact of law on the war on terror is also well understood today. No observer of the post-9/11 era fails to recognize that the most serious setbacks for the American military involve not an adversary's battlefield successes, but rather alleged violations of the law by the U.S.'s own forces...for members of the American military profession who came of age in the era between Vietnam and September 11, the significance of legal legitimacy at the strategic, operational, and tactical levels had become virtually axiomatic.⁷¹

What is less evident in this characterization is that the demands of moral legitimacy can transcend even that of legal legitimacy, defined by compliance with LOAC. This shift toward legal legitimacy may have begun post-Vietnam, but military culture lagged behind the normative environment in terms of recognizing the significance of the moral and ethical dimensions of civilian immunity. Further, Dunlap expresses typical assumptions within military culture that see civilian casualties as relevant primarily because of the democratic character of the domestic public. This focus on the domestic public to the exclusion of foreign publics that was seen early on missed the point of what David Kilcullen, top counterinsurgency advisor to David Petraeus, termed a

⁷¹ Major General Charles J. Dunlap, Jr. "Foreword," in *The War on Terror and the Laws of War*, Oxford University Press, New York: 2009. vii-x., ix.

“global insurgency.”⁷² The excessive focus on domestic public opinion also reinforces the primacy of force protection since domestic publics tend to be more casualty sensitive toward their own soldiers than toward foreign civilians.⁷³ Take, for example, the “immaculate war” of Kosovo, so named because of zero troop casualties. Such a war only appeared immaculate from fifteen thousand feet in the air, but it was instrumental in ushering in a new optimism about war fighting based on perceptions that war would be freed from its vulnerability to losing domestic public support as a result of troop casualties.⁷⁴ This is exactly the sort of thinking that distinguishes pre-C.O.I.N. from post-C.O.I.N.; that is, perceptions of domestic audiences matter, but the civilians of foreign publics were not of great concern. Once top-level officials began to recognize the current human-rights centered international normative environment as a defining and permanent feature of the security environment, it became evident that a fundamental cultural shift within the military would have to be nurtured.

Whereas the issue of discrimination between combatants and noncombatants had previously been viewed through the prism of collateral damage modeling, targeting procedures, and the development and acquisition of precision weaponry, it became increasingly evident that the issue of civilian deaths was not merely technological nor

⁷² Lieutenant Colonel David Kilcullen, “Countering Global Insurgency,” www.smallwarsjournal.com/documents/kilcullen.pdf.

⁷³ See Feaver, Gelpi, and Reifler, 2006.

⁷⁴ Martin L. Cook, for example, sees the controversy about intervention in Kosovo as primarily about the “moral contract” between a state and its own soldiers. “‘Immaculate War’: Constraints on Humanitarian Intervention,” *Ethics and International Affairs*, vol 14, 2000.

even doctrinal; the basic attitudes of soldiers on the ground lagged behind. In the confusion of two wars with vague, shifting objectives, attitudes toward civilians had deteriorated, and consistent with interviews performed for this study, the priority of force protection had been thoroughly internalized. What became evident was that implementing a civilian-centered, human rights-based strategy was dependent on transforming military culture all the way down.

Appeals to civilian immunity as part of the core values and identity of the military began in earnest in 2006, after General David Petraeus was shocked to hear the results of an internal study that showed hostile attitudes toward civilians and indicators of high levels of acceptance for violations and abuse of civilians among enlisted members of the military. In response, Petraeus set into motion the later steps in the process of human rights diffusion known as habitualization and institutionalization.⁷⁵ Attempting to convince the troops that fighting effectively is contingent on “living our values,” including respecting civilian immunity *and* rejecting torture, he writes:

Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that *we - not our enemies - occupy the moral high ground*. This strategy has shown results in recent months. Al Qaeda's indiscriminate attacks, for example, have finally started to turn a substantial proportion of the Iraqi population against it. In view of this, I was concerned by the results of a recently released survey conducted last

⁷⁵ See Risse, Ropp, Sikkink, 11. Earlier processes were noted in the Iraq chapter of this study. Petraeus was in a unique position while writing the C.O.I.N. manual and had already begun the process of innovation by his role of doctrinal entrepreneur. His earlier bureaucratic position as head of education and training as Commander of the Army's Combined Arms Center at Fort Leavenworth, Kansas facilitated his early efforts. See Joseph Clark 2011; Robinson 2008; and Ricks 2009.

fall in Iraq that revealed an apparent unwillingness on the part of some US personnel to report illegal actions taken by fellow members of their units. The study also indicated that a small percentage of those surveyed may have mistreated noncombatants. This survey should spur reflection on our conduct in combat."⁷⁶

Note especially that the hallmark of terrorism—"indiscriminate attacks"—is emphasized in order to differentiate the virtuous U.S. soldier from what Bush had earlier called outlaws and enemies of civilization.

This effort to appeal to a soldierly ethic consistent with American values was not limited to Petraeus as a personality, but rather points to a concerted move that cut across the branches of the armed services. James Mattis, Petraeus's counterpart in the Marines and co-leader of the combined forces effort that led to the C.O.I.N. manual, gave the annual Stutt Lecture on Ethics in 2006, around the same time as Petraeus's "Open Letter." The lecture was notable for its intended reach; while the Stutt lectures were generally attended by the small numbers of soldiers taking ethics courses, the emphasis on ethical decisions in combat was held to be so important at that time that the entire brigade was required to attend. Speaking on the importance of morality and values as integral to military identity, Mattis was introduced as the embodiment of the just war values the military wanted the rank and file to internalize:

He [Mattis] has inspired his men and women, in the midst of intense combat, to engage the brain before the weapon and, above all else, to

⁷⁶ My emphasis, Commanding General David H. Petraeus, "Open Letter about Values," Headquarters Multi-national Force: Iraq, Baghdad, Iraq, May 10, 2007, accessed June 15, 2012, www.globalsecurity.org/military/library/policy/army/other/petraeus_values-msg_torture070510.htm.

demonstrate chivalry, decency, and soldierly compassion for both friend and foe.⁷⁷

As Mattis spoke in his straightforward style, he urged the audience to plan ahead for moral dilemmas and to never cross the line between killing innocents and combatants in order to maintain their own and their country's honor. Specifically relating being a moral soldier to the interests of the U.S., Mattis cites de Toqueville: "America is a good country, and if America ever ceases to be good, she will cease to be great."⁷⁸ Noting the examples of Abu Ghraib and its deleterious effects on efforts in Fallujah, as well as the French Algerian experience, he tells the soldiers that a lack of moral behavior has negative reputational effects that are strategically damaging and thus an affront against one's peers and one's country:

There is no one harsher about what those soldiers did in Abu Ghraib than your fellow sailors, Marines, and soldiers on the ground in Iraq right now. No one. There was no call for it. It was a bunch of punks is all it was, but a lack of moral fortitude cost our country greatly. If you read what happened to the French army in Algeria, the 10th Parachute Division breaks the back of the terrorists there, but does so in a way that the government falls, and France is held up to scorn and ridicule around the world. You must make certain that you never do something that brings that sort of scorn or ridicule on our own country.⁷⁹

Mounting Casualties in Afghanistan

By 2005, as demonstrated in the previous chapter on Iraq, attention within the U.S. military had begun to intensively focus on the problem of civilian casualties as

⁷⁷ Center for the Study of Professional Military Ethics, "Ethical Challenges in Contemporary Conflict: the Afghanistan and Iraq Cases," February 23 2006, 6.

⁷⁸ Ibid. 15

⁷⁹ Ibid. 15-16

anathema to the war of ideas and thus the war on the ground in Iraq. It was also at this time that civilian casualties in Afghanistan were starting to be recognized as an “operational issue” by ISAF.⁸⁰ By 2006, the Taliban had definitively re-emerged with a new strategy:

By 2006 there were clear signs that the Taliban were becoming an integral part of a wider supranational jihadist movement, to a much greater extent than the “older Taliban” ever were. They increasingly appeared to believe that the decisive factor in winning the war would not be Western public opinion..., but the support of their Muslim brethren...their priority would be to mobilize Muslim public opinion worldwide as a source of funding, moral support, and volunteer[s].⁸¹

At this point, the face of the conflict was international, because of the coalition, but also American since U.S. and British troops shouldered much of the burden for ongoing combat operations in the ongoing OEF.⁸² While the international presence may have diluted responsibility for (and therefore legitimacy problems associated with) civilian casualties, the “Americans” remained very much the face of the war to ordinary

⁸⁰ *U.S. Army 12-16 Handbook for Afghanistan Civilian Casualty Prevention*, Center for Army Lessons Learned, June 2012, vii, <http://info.publicintelligence.net/CALL-AfghanCIVCAS.pdf> ; Sarah Sewall, “The Civilian in American Warfare: Normative Pathways and Institutional Imperatives,” D.Phil. Thesis, St Antony’s College, Oxford 2011, cited in Rudra Chaudri and Theo Farrell, “Campaign Disconnect: Operational Progress and Strategic Obstacles in Afghanistan, 2009–2011,” in *International Affairs* 87, no. 2, 2011, 271-296.

⁸¹ Antonio Giustozzi, “The Neo-Taliban Insurgency: From Village Islam to International Jihad,” in *Afghanistan Transition Under Threat*, eds, Geoffrey Hayes and Mark Sedra, (Canada Wilfrid Laurier University Press, 2008), quoted in Adrian R. Lewis, *The American Culture of War*, (Routledge: New York; London, 2012), 411.

⁸² ISAF only extended its mission from Kabul to other parts of Afghanistan in 2006, but many states restricted their forces to stability and reconstruction efforts. Personal interview.

Afghans.⁸³ As civilian casualties increased, the Afghani population gradually became seen as increasingly strategically important, particularly since Karzai, President of Afghanistan, made first private, and then public statements condemning the killing of civilians.⁸⁴

As it became apparent that the insurgency was emerging in full force, more careful attention was paid to estimating the effects of fighting on civilians. Initial reports highlighting civilian deaths came not from the U.S., however, but from international concerns about the deteriorating security environment and its effects on the stabilizing mission of ISAF. The Joint Coordinating and Monitoring Board, “made up of the Afghan government, its key foreign backers and the UN” reported that in 2006, nearly four thousand people were killed in the fighting, with about one thousand thought to be civilians. Results of the report were publicized by the BBC, which noted that both corruption of the Afghan government and civilian casualties were “alienating” Afghans and “hampering those fighting the insurgency.”⁸⁵ Nevertheless, international support persisted, and pursuing kinetic operations to defeat the insurgency was seen as legitimate by many at this point. The Japanese ambassador Kenzo Oshima, part of the Security Council delegation,

⁸³ This is evident from scenarios depicted in the Civilian Casualty handbook above, in which it emphasizes that ordinary Afghan villagers often assumed “Americans” and American airstrikes were responsible for deaths and injuries even when they could not discern from where the attacks originated.

⁸⁴ See Barry Bearak, “Karzai Calls Coalition ‘Careless,’” *New York Times* (June 24, 2007), cited in Chaudhuri and Farrell.

⁸⁵ “Afghan Conflict Deaths Quadruple,” BBC News, (Nov 13 2006).

told reporters in Kabul that the most important challenge was the fight against the Taleban insurgency, and that opium production, which was fuelling the violence, was also a major problem. But he added that the international community would continue to support Afghanistan in its efforts towards peace and reconstruction.⁸⁶

Even in the face of civilian casualties, then, and with the growing recognition of an insurgency, the conflict in Afghanistan produced nowhere near the intense international pressure as did the war in Iraq. This was not clearly an issue of American legitimacy; corruption in the Afghan government meant that finger-pointing by Karzai about civilian casualties was tainted by his own efforts to deflect from more fundamental issues of governance and legitimacy that he faced.⁸⁷ The leadership of the ISAF, though it had been led by NATO since 2003, was changing frequently, which made it difficult to coordinate a sustained response. Probably most importantly, however, the U.S. was not in any position, because of the crisis in Iraq, to consider any large-scale strategic changes. The impetus toward C.O.I.N. and population protection in Afghanistan thus severely lagged behind material conditions. As one high level military official put it, it was not a conscious doctrinal decision to tolerate civilian casualties, but rather a response to a limited scope of alternatives. In terms of this study, the credibility and legitimacy issues associated with failure in Iraq, which at this point was disintegrating into civil war, crowded out that of Afghanistan, and therefore material factors such as a lack of resources took precedence in shaping operations.

⁸⁶ Ibid.

⁸⁷ Karzai's issues with corruption are widely discussed. See, for example, Cassidy, *War, Will, and Warlords*.

2007-2012: From Iraq to Afghanistan

By 2007, Iraq was beginning to turn because of the theater-wide adoption of C.O.I.N., the surge in troops, and the Anbar Awakening, and at the same time, civilian casualties in Afghanistan were becoming higher profile. Three things had occurred by November 2007: 1) U.N. figures showed that in 2007, more civilians were killed by pro-Afghan government forces than by the Taliban; 2) a U.N report showed that civilian casualties were the most important factor motivating suicide bombings in Afghanistan. Furthermore, suicide bombers did not favor targeting civilians, creating an unfavorable juxtaposition between terrorism and military behavior. 3) Finally, support for the coalition presence was disintegrating within Afghanistan.⁸⁸ Unlike the old Taliban, the neo-Taliban had become quite adept at using media to their advantage. Cassidy writes that after 2002, the group quickly adapted to the information environment and “now recognizes the importance of news media in determining the outcome of an irregular war of ideas.” He explains

Learning from al-Qaeda’s successes with information warfare, the neo-Taliban now relies on media as a powerful instrument in waging psychological warfare. The Taliban’s global media campaign has two audiences: their supporters and potential guerrilla recruits, and the populations of their enemies. The number of Coalition-induced “civilian casualties” has become an important focus of the Taliban’s information operations. In some instances, Taliban spokespersons have called the international media in Kabul within minutes of a NATO airstrike, thus getting their message on civilian casualties out before the official Coalition statement and shaping the information environment to fit the

⁸⁸ See Peter Bergen and Katherine Tiedemann, “Losing Afghanistan, One Civilian at a Time,” *Washington Post* (November 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/16/AR2007111601203.html>.

Taliban narrative...In Afghanistan, the first messages, whether correct or incorrect and regardless of the means of transmission—tend to stick and create a perception of reality.⁸⁹

At this time, however, most attention was still directed to Iraq. Early efforts to mitigate casualties were piecemeal and not successful.⁹⁰ According to the United Nations Assistance Mission in Afghanistan, the numbers of civilians killed in 2008 was 839, nearly three hundred more than in 2007. This was less proportionately than the Taliban, who had begun direct intimidation tactics against civilians, including using suicide bombings in residential areas.⁹¹ Though the scales were tipped in the identity contest between pro-government forces and the Taliban, it was still a lose-lose since the aim of pro-government forces is to not only refrain from casualties but to provide protection from insurgents.⁹² Even with the change of leadership to General McKiernan, who recognized the problem as a strategic one, the central problem was still seen as the necessity to militarily destroy the insurgency.

The Carr Center Conferences Conclude

In the meantime, the series of Human Rights conferences led by Sarah Sewall had been focused largely on Iraq. As the series came to a conclusion in 2008, the sentiments

⁸⁹ Cassidy, *War, Will, and Warlords*, 53.

⁹⁰ *Afghanistan Handbook*.

⁹¹ UN Assistance Mission in Afghanistan, UN Office of the High Commissioner for Human Rights, Afghanistan, “Annual report (2008)- Protection of Civilians in Armed Conflict,” (February 17, 2009), online: <http://reliefweb.int/report/afghanistan/afghanistan-annual-report-2008-protection-civilians-armed-conflict>.

⁹² Personal interview.

expressed by military, human rights, and at this point even government participants showed a remarkable convergence, especially considering the distance in perspectives that marked their beginnings in 2001. Specifically, the conference saw an emphasis on the strategic aspects of following civilian-centered human rights norms, with moral behavior and its importance to identity now seen as central rather than collateral to military operations. Legitimacy is now specifically seen as the key concept linking the moral and strategic aspects of civilian casualties:

Human rights embody the ideals of justice and fairness which should animate and undergird an “American version of COIN” – including when America provides support for countries carrying out COIN operations. Liberal, democratic countries face specific problems during COIN operations as they balance the competing demands of human rights, liberty, security, and violence. However, it is in *the strategic and moral interest* of liberal, democratic countries to affirm their adherence to human rights and civilian protection when carrying out COIN operations otherwise *they risk forfeiting moral and political superiority and thus legitimacy*.⁹³

Importantly, this last conference seeks to “learn lessons” that extend beyond Iraq and Afghanistan to carry into future operations. One of the lessons discussed is that the use of American force is tied to an ongoing problem of perceptions about its ideology, identity, and place in the larger international order. One discussion focused on power issues that form the context for C.O.I.N.:

American irregular warfare and COIN are often viewed as subsidiary to the question: is the United States a modern imperial power? American

⁹³ My emphasis, Tyler Moselle, “Overlooked and Understudied Counterinsurgencies: New Perspectives on Irregular Warfare,” Co-Sponsored by The Harvard Kennedy School’s Carr Center for Human Rights Policy And Joint Special Operations University of U.S. Special Operations Command (Washington D.C., October 1-2, 2008), 5.

irregular warfare and COIN can be viewed as manifestations of Imperialism and thus can garner anti-imperial or at least anti-hegemonic responses.⁹⁴

Recognizing the war of ideas as an enduring feature of the new political landscape, some participants noted that “the liberal, democratic worldview must enter into the realm of debating opposing ideologies connected to the problem of political legitimacy.”⁹⁵ One participant put it this way: “there is one golden rule in COIN: does the government or the insurgent have greater legitimacy or a ‘credible vision of the future’?”⁹⁶ Someone from within the government posed the question as to how ideologies are best countered. A panelist responded by saying: “we should embody our ideals in the actions of our soldiers on the battlefield by ensuring that they conform to the rule of law and human rights.” Another participant noted that COIN should focus on discrediting insurgents by demonstrating how they harm civilians which can contribute to undermining the appeal of their movement.⁹⁷

Still others noted the need for thought directed toward non-military strategic communication efforts. The danger of concentrating this issue within a military context lies in the inherent tensions in using force as an instrument for what are primarily moral and ethical problems, which means that though “moral and ethical issues lie at the core of

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid., 8.

⁹⁷ Ibid., 9

COIN thinking, [they] are often relegated to the sidelines in favor of “harsher force.”⁹⁸ A more comprehensive and far-reaching conception of the war of ideas was discussed wherein “the liberal, democratic countries...consolidate and articulate a broadly appealing worldview that does not focus solely on the benefits of capitalism.”⁹⁹

C.O.I.N. Goes to Washington: Diffusion of Ideas

Other developments within the government show the diffusion of the ideas developed in dialogue with the military and human rights communities. One example is the increasing strategic concern for public opinion viewed through the idea of a strategic narrative focused on civilians as the key to winning the *global* war on terror. The annual security threat assessment delivered by the National Intelligence Director to the Senate Select Committee on Intelligence echoes the concerns of the military:

Are the United States and its allies losing the war of ideas to the virulent message of the terrorists? Does the continued existence and operation of a separate CIA system of -- for terrorists employing secret interrogation techniques undermined our moral standing and the willingness of other countries to cooperate with us? Is our continued military presence in Iraq generating more terrorists and more Islamic radicals around the world than we are capturing or that we are killing?¹⁰⁰

Though the statement mentions Iraq, the global political implications rather than just theater implications are being emphasized. Furthermore, al Qaeda begins to re-enter

⁹⁸ Ibid., 7.

⁹⁹ Ibid., 10.

¹⁰⁰ Senator John D. Rockefeller, “Hearing of the Senate Select Committee on Intelligence, Annual Worldwide Threat Assessment,” (Washington D.C., February 5, 2008): 2, 3, online: http://dni.gov/files/documents/Newsroom/Testimonies/20080205_transcript.pdf.

the conversation about public opinion and civilian casualties, and connections are made between regions and theaters:

We have seen notable progress in Muslim opinion turning against terrorist groups like al-Qa'ida. Over the last year and a half, al-Qa'ida has faced significant public criticism from prominent religious leaders and fellow extremists primarily regarding the use of brutal and indiscriminate tactics—particularly those employed by al-Qa'ida in Iraq (AQI) and al-Qa'ida in the Lands of Islamic Maghreb (AQIM)—that have resulted in the deaths of Muslim civilians. Given the increased pressure posed by these criticisms, al-Qa'ida leaders increasingly have highlighted enduring support for the Taliban and the fight in Afghanistan and Pakistan and in other regions where they portray the West being at war with Islam and al-Qa'ida as the vanguard of the global terrorist movement.¹⁰¹

The Obama/McChrystle Era and Afghanistan's C.O.I.N.: 2009-2010

Regardless of the growing recognition of civilian casualties as a core strategic problem, it was not until 2009, when Obama's foreign policy reprioritized Afghanistan and General Stanley McChrystal assumed command, that Afghanistan got its own population-protection centric C.O.I.N. strategy. One participant interviewed for this study suggested that as more attention was paid to the perspectives and beliefs of Afghans themselves, it became evident that Afghan perceptions of the U.S. were shaped against the backdrop of the memory of past experiences with a foreign presence, especially of the harsh, punitive strategies adopted by the Soviet Union against the population, and of the U.S. abandonment after the Soviet withdrawal. A deficit of trust and legitimacy thus already existed to some extent in the local population, made worse by

¹⁰¹, Senate Armed Services Committee, "Intelligence Community annual Threat Assessment: DNI Statement for the Record," 3-4, online: http://dni.gov/files/documents/Newsroom/Testimonies/20090310_testimony.pdf.

the civilian casualties over time. Moreover, the strength of the U.S. and its ability to protect the population from the Taliban was seen as key to changing perceptions of the Afghans toward the national government and the entire state system they were trying to implement.

As part of the institutionalization of C.O.I.N. principles, in 2009, the Marine Corps University and Marine Corps Foundation co-hosted a symposium focused on the importance of leadership in counterinsurgency operations. In attempting to apply lessons from Iraq to the ongoing challenges of “winning” in Afghanistan, a renewed emphasis on the war of ideas as crucial to the war on the ground was articulated in terms of a redefinition of “strength” as communication via deeds:

Convincing these ultimate arbiters—the Afghan people—and defeating the Taliban’s strategy requires an effective communications strategy. The difficulty of persuading local populations and communicating effective messages of strength and resolve in a foreign culture cannot be overstated. An effective communications strategy can only be delivered by Afghans themselves—and *must be underwritten by coalition deeds and acceptable behavior, not just hollow rhetoric*. Actions inevitably speak louder than talking points. The most powerful message is the conduct of the various actors on the ground: U.S., Afghan, and Coalition security forces.¹⁰²

It was against this backdrop, along with the change in administrations from Bush to Obama, that General David McKiernan, who had framed the fight in conventional terms of destroying the enemy, was replaced with General Stanley McChrystal.¹⁰³ In

¹⁰² My emphasis, taken from the edited, published volume derived from the symposium, David Barno and John Wood, “Winning in Afghanistan,” in *Counterinsurgency Leadership in Afghanistan, Iraq, and Beyond*, eds. Nicholas J. Schlosser and James M. Caiella (Marine Corps University Press: Quantico, Virginia, 2011): 111-122.

¹⁰³ Chaudhuri and Farrell, “Campaign Disconnect,” 272.

McChrystle's recently published memoirs, he tellingly introduces his experience in Afghanistan by way of Thomas Hobbes's *Behemoth*: "The power of the mighty hath no foundation but in the opinion and belief of the people."¹⁰⁴ McChrystle went further than had even David Petraeus in Iraq in attributing failure on the battlefield to civilian casualties. One of the first things he did when arriving in Afghanistan was to consult with Karzai, who immediately told him that civilian casualties were the biggest threat to success. While Karzai's assessment alone may have been regarded with some suspicion, and indeed he was considered by Karl Eikenberry to be the main impediment to success in Afghanistan,¹⁰⁵ McChrystle also listened intently to public opinion within Afghanistan, which overwhelmingly suggested a lack of trust based on civilian casualties. The reasoning within the population was that since the U.S. could avoid casualties with its precision weaponry, it must have therefore not valued Afghan lives in comparison to American lives.¹⁰⁶

¹⁰⁴ General Stanley McChrystle, *My Share of the Task: A Memoir* (Portfolio/Penguin, New York: 2013), 273.

¹⁰⁵ Eikenberry's famous leaked cable characterized Karzai as an "inadequate strategic partner" because of his primary commitment to maintain his hold on power over a corrupt patronage system, "C.O.I.N. Strategy: Civilian Concerns," (U.S. Department of State, November 2009), online: <http://documents.nytimes.com/eikenberry-s-memos-on-the-strategy-in-afghanistan>. The timing of the memo was key, since it was delivered to the administration without the military's knowledge for the purpose of opposing McChrystle's request for a resourced counterinsurgency strategy. See Kaplan, *Insurgents*, 312-315.

¹⁰⁶ Kaplan, *Insurgents*; "An interview with Charlie Rose: General Stanley A. McChrystle," (2013), online: <http://www.charlierose.com/view/interview/12725>. This was substantiated by a later study conducted by Open Society Foundation's Regional Policy Initiative on Afghanistan and Pakistan, "The Trust Deficit: the Impact of Local Perceptions on Policy in Afghanistan," *Policy Brief no. 2*, (October 7, 2010).

McChrystle's earliest response was to publish a "Tactical Directive" meant for both American and ISAF personnel, imploring them to "avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people."¹⁰⁷ McChrystle's reasoning evidenced little concern for the effects of casualties extending beyond the local Afghan audience, though portions of his Directive were publicly released "to ensure a broader awareness of the intent AND SCOPE OF General McChrystle's guidance to ISAF and USFOR-A forces." What is notable is that he internalizes Petraeus's new civilian-centric counterinsurgency logic and pushes it even further, defining victory¹⁰⁸ as contingent on the moral perceptions of the Afghan people:

While this is also a legal and a moral issue it is also an overarching operational issue—clear eyed recognition that loss of popular support will be decisive in this conflict. The Taliban cannot defeat us but we can defeat ourselves.¹⁰⁹

While McChrystle does not articulate a connection between the moral, legal, and operational issues, his statements support my argument that the normative (especially the moral) environment provides the crucial social context in which the fight occurs and therefore becomes imbued with strategic weight.

¹⁰⁷ Quoted in Kaplan, *The Insurgents*, 325.

¹⁰⁸ Avoiding civilian casualties did not comprise the entire strategy, but was within the context of bolstering the legitimacy of the host government more generally and training the Afghan security forces to take over. Moreover the counterterrorism (CT) operations were still to take place in the rural areas.

¹⁰⁹ "Unclassified, Revised Tactical Directive," (International Security Assistance Force Headquarters, Kabul, Afghanistan, July 6, 2009), online: http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf.

One interviewee conducted for this study stated that the perspective of some within the military is that McChrystle's Directive may even have overplayed the case for civilian casualties. His particular reading of civilian casualty mitigation was controversial because it was too restrictive about the use of force, allowing little room for flexibility and judgment, for example requiring special permission for operations involving "air to ground munitions and indirect fires against residential compounds."¹¹⁰ McChrystle wanted his men to understand the idea that civilians were the new center of gravity, and so soon after the Directive he released the *ISAF Commander's Counterinsurgency Guidance*, which specifically addressed the identity contest between the intervening force and the insurgents as dependent on a contrast between those who hurt civilians and those who protect civilians:

If civilians die in a firefight, it does not matter who shot them-we still failed to protect them from harm...Think of counterinsurgency as an argument to earn the support of the people...We must undermine the insurgent argument while offering a more compelling alternative."¹¹¹

In his Initial Commanders' Assessment, the study resulting from Obama's ordered strategic review, he "redefines the fight" calling for a more highly resourced C.O.I.N. strategy. In his bid for more troops and a new direction,¹¹² he specifically addresses the war of ideas and its reliance on deeds:

¹¹⁰ Ibid.

¹¹¹ Quoted in Kaplan, *The Insurgents*, 326.

¹¹² General Stanley McChrystal, Commander NATO, International Security Assistance Force, and US Forces, Afghanistan (COMISAF/CDR USFOR-A), "Commander's Initial Assessment," (August 30, 2009), 2.

Many describe the conflict in Afghanistan as a war of ideas, which I believe to be true. However, this is a 'deeds-based' information environment where perceptions derive from actions, such as how we interact with the population and how quickly things improve. The key to changing perceptions lies in changing the underlying truths. We must never confuse the situation as it stands with the one we desire, lest we risk our credibility.¹¹³

McChrystle, it should be noted, is hardly a proponent of nonviolence. Rather, he was a Ranger whose most notable accomplishment in Iraq was supervising the killing of AQI's al Zarqawi as well as Saddam Hussein's sons Uday and Qusay. It is safe to assume, then, that McChrystle's emphasis does not derive from a personal preference; rather, he emphasizes that the goal must change to recognize the increased importance of the social aspect of military behavior in counterinsurgency, and that military culture in Afghanistan must change to accommodate the goal: "Pre-occupied with protection of our own forces, we have operated in a manner that distances us -- physically and psychologically -- from the people we seek to protect."¹¹⁴

Obama's approved strategy called for a mixture of force, both in rolling back the momentum of the Taliban and in going after Al Qaeda, and improving governance, with a very short timeline in which to accomplish any gains at all. Creating a sense of legitimacy about the behavior of the intervening forces is supposed to work in partnership with improved governance and increased training of the Afghanistan Security Forces. Legitimacy problems in Afghanistan were not limited to the issue of civilian casualties,

¹¹³ Kaplan, *Insurgents*, 326.

¹¹⁴ Ibid.

however, and so McChrystle's emphasis on this aspect came to be seen by some as an over-emphasis. Even Sarah Sewall agreed.

Petraeus, head of CentCom at this time, suggested that McChrystal allow an independent team to assess the conditions concerning civilian casualties on the ground. Sarah Sewall, the human rights scholar who partnered with Petraeus in leading the C.O.I.N. revision conference, was to lead the team, and McChrystle accepted her offer, hoping to gain insight as to why some of his men did not seem to understand or embrace his Counterinsurgency Guidance. While Sewall had long worked for and appreciated the measures implemented to protect civilians, she noted the "toxic" atmosphere of fear about civilian casualties that had been created by too restrictive guidelines.¹¹⁵ Attributing the atmosphere to groupthink at the highest levels, she boldly told the General that he had forgotten to include force in the equation. Kaplan describes it vividly:

Sarah Sewall, the Ivy League human –rights scholar and the only woman in the room, looked unblinkingly at Stan McChrystal, the peerless professional killer, and said, "General, counterinsurgency is a combination of offense, defense, and stability operations. Don't forget the offense. McChrystal growled, "Don't tell me how to run my war."¹¹⁶

When McChrystle resigned summarily in 2010 for a media scandal involving an article published by Rolling Stone magazine,¹¹⁷ Petraeus took over. Obama had earlier

¹¹⁵ Kaplan, *Insurgents*, 326-327.

¹¹⁶ Ibid. 328-329.

¹¹⁷ "McChrystle Resigns Afghan Command," *New York Times*, (June 23, 2010), online: <http://www.washingtontimes.com/news/2010/jun/23/mcchrystal-leaves-white-house-war-meeting/?page=all>.

declared Afghanistan as a “necessary war” as opposed to Iraq as a “war of choice.”¹¹⁸

This necessity was framed in terms of Afghanistan’s dire condition providing a safe haven for terrorism. With time running out, Petraeus emphasized attacking al Qaeda and the Taliban directly (CT or counterterrorism), while still trying to lessen civilian casualties. Civilian casualties figured into the calculus, but the goal became making whatever progress was possible, and so Petraeus issued a new tactical directive loosening the guidelines.¹¹⁹

2012: Institutionalization Continues post-C.O.I.N.

It soon became evident that Afghanistan held poor prospects for a successful counterinsurgency. This was partially seen as a lack of time commitment, given that NATO countries were losing public support for the war effort, but also because the aims of the intervening forces to create a stable government that the local tribes could support and identify with appeared to be at odds with the power-maintenance goals of Karzai. Beyond Karzai himself, corruption pervaded nearly every aspect of rule—in many ways it formed the foundation for whatever order did exist. Moreover, the mountainous terrain and the fact that Pakistan provided a safe haven, with some elements supporting the

¹¹⁸ President Barack Obama, “Remarks by the President at the Veterans of Foreign Wars Convention,” (Phoenix, Arizona, August 17, 2009), online: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-Veterans-of-Foreign-Wars-convention/.

¹¹⁹ Kaplan, *Insurgents*, 353-354.

Taliban and al Qaeda, meant that it was impossible to fully defeat the insurgents, who could always retreat and reappear.¹²⁰

As troops were reduced and counterinsurgency goals took a back seat to counterterrorism,¹²¹ the military's efforts to institutionalize the lessons learned about civilian casualties continued. The *Afghanistan Handbook of Civilian Casualties* was published in 2012, and in contrast to McChrystal's emphasis on only local effects of civilian casualties, this handbook takes a longer, broader view of its effects on American war-making. Emphasizing civilian immunity as a core value, it begins by stating that

The U.S. military has long been committed to upholding the law of armed conflict and minimizing collateral damage. This includes the killing or wounding of noncombatant civilians — described in this handbook as civilian casualties or CIVCAS — as well as damage to facilities, equipment, or other property.¹²²

Importantly, the handbook links the need for altered behavior toward civilians to the larger normative context, which has become strategic because publics now know what happens on the battlefield due to communications technology:

Due to several factors, the impact of CIVCAS has increased to the point that single tactical actions can have strategic consequences and limit overall freedom of action. These factors include: the increased transparency of war, where tactical actions can be recorded and transmitted worldwide in real time; increased expectations for the United States' conduct of war in light of improved precision and overall

¹²⁰ Kaplan, *Insurgents*, 345-347. See also Cassidy, *War, Will, and Warlords*.

¹²¹ Kaplan, *Insurgents*, 351-354

¹²² Center for Army Lessons learned, *Handbook no. 12-16, Afghanistan Civilian Casualty Prevention: Observations, Insights, and Lessons* (June 2012), 1, online: <http://info.publicintelligence.net/CALL-AfghanCIVCAS.pdf>.

capabilities; and the enemy exploitation of CIVCAS *to undermine U.S. legitimacy* and objectives.¹²³

Note that the legitimacy problem is seen as directly attributable to the identity contest on the ground, and it is connected to American image and the use of force in the larger, global sense.

The military has also worked to institutionalize the lessons learned about civilians in a way that looks past Afghanistan to the future of war, regardless of whether it is counterinsurgency or not. Working with human rights groups such as the Center for Civilian Protection, founded out of the specific experience in Iraq and Afghanistan, various doctrinal materials have integrated “best practices” on civilian protection. The organization notes its involvement with the military in developing these plus the first handbook on civilian casualty mitigation, which came out in July 2012:

We were the only NGO on the drafting committee of the US Army’s first handbook on the protection of civilians The US Army Civilian Casualty Mitigation ATTP (Army Tactics Training Procedures), published in July 2012. We are working with the Combined Arms Doctrine Directorate, the US Army’s Peacekeeping and Stability Operations Institute, and the Joint Center for Operational Analysis to insert civilian protection concerns and amends throughout all relevant publications.¹²⁴

The *Civilian Casualty Mitigation Handbook* seeks to make sense of the issue of civilian casualties in terms of broad effects. Much like the Afghanistan handbook, it first

¹²³ My emphasis, Ibid.

¹²⁴ Center for Civilians in Conflict, “Our Work: Military Engagement,” Webpage accessed December 12, 2012, online: <http://civiliansinconflict.org/our-work/military-engagement>.

appeals to the ethical identity of the soldier and then states that what is legally permissible is not always the issue:

Protection of civilians is at the heart of the profession of arms. Consistent with law and ethics, a Soldier must balance the necessity of using force with the likely effects of using force. While the use of force may be legally justified, not all permissible force is necessary in every case, and forces must also consider second-order effects. A U.S. legal investigation summarized this point: “Just because we can shoot does not mean that we should shoot.”¹²⁵

Viewing the normative environment as inherently part of the strategic environment, the handbook expresses recognition of the social-political aspects of war:

Army units conduct unified land operations in complex and populous environments. To the extent possible, civilians (including those loyal to the enemy) must be protected from the effects of combat. In addition to legal and humanitarian reasons, Army units must mitigate CIVCASs because they create lasting repercussions that impair post-conflict reconstruction and reconciliation. CIVCASs lead to ill will among the host-nation population and political pressure that can limit freedom of action of military forces. If Army units fail to protect civilians, for whatever reason, the legitimacy of U.S. operations is likely to be questioned by the host nation and other partners. CIVCAS mitigation is critical to ensure that Army units uphold Army values and comply with legal authorities while conducting operations... Focused attention on CIVCAS mitigation is an important investment to maintain legitimacy and ensure eventual success. Failure to prevent CIVCASs will undermine national policy objectives as well as the mission of Army units, while assisting adversaries.¹²⁶

¹²⁵ Department of the Army, *ATTP 3-37.31: Civilian Casualty Mitigation Handbook* (Washington DC: July 2012,) 3, online: <https://armypubs.us.army.mil/doctrine/index.html>.

¹²⁶ *Ibid.*, 1-5.

Conclusion

The postponed adoption of a variant of C.O.I.N. focused on civilian protection (and the waning commitment to the more difficult long term goals of C.O.I.N. soon after it was adopted) presents an interesting contrast to Iraq. While the Iraq case study represents the early phases of human rights diffusion that occurred early in the development of C.O.I.N. doctrine within the military at large, I find evidence that the later years of the Afghanistan conflict see a continuation of human rights diffusion in the form of habitualization and institutionalization, which was particularly evident in the role that human rights groups assumed (as advisors on the ground rather than as partners in dialogue). Appeals to military values and identity were employed to promote the processes of habitualization of civilian immunity within the military. I find little support for the direct influence of the human rights community in shaping the adoption of Afghanistan's version of C.O.I.N.; however the presence of human rights scholars in the later phases of norm diffusion were noted, particularly in the institutionalization of the norm through tracking, assessing, and documenting lessons learned. Earlier forms of human rights diffusion are present in this conflict as well, but not definitive. The instrumental use of CIN was employed early in the Afghanistan conflict, but the perception across two administrations was that the legitimacy of the invasion in Afghanistan was not in question (even though the later growing civilian casualties did present legitimacy problems).

Evidence for the conditions under which civilian protection occurs is mixed. As the recognition grew that a loss of monopoly of force could not be overcome by escalation of force alone, and that attempting to regain control would entail unacceptable levels of civilian casualties and increase oppositional recruiting, efforts to shape strategy and doctrine in keeping with civilian protection took root. Based on the evidence presented about perceptions of some important actors within the military as well as non-military personnel involved in the C.O.I.N. efforts, I find strong support for the argument that material conditions alone do not determine the content nor adoption of innovated doctrine. In fact, material conditions were thought to run counter to a successful counterinsurgency campaign, particularly the geopolitical complications of a hostile population and porous border in neighboring Pakistan. However, material conditions did matter insofar as a lack of resources created the conditions for increased civilian casualties for many years. Moreover, it was only with the risk of failure in Afghanistan that other strategies were considered.

The evidence presented supports the argument that ideational factors associated with civilian casualties were seen as a primary driver in the strategic choice of C.O.I.N.. Furthermore, empirical evidence supports the argument that the civilian immunity norm, as embedded in the global normative environment, constrained counterinsurgency options to those in line with its legal strictures and especially its moral spirit, even beyond what is required by law. Finally, I find mixed support for my main thesis that legitimacy based on a strategic narrative in the context of the war on terror is a primary factor driving the

content and adoption of a population protection strategy in Afghanistan. Evidence of a concern for strategic communication is definitely present, but legitimacy in Afghanistan was more variable and complex than this study had anticipated—the surplus of legitimacy present in the beginning did not carry through the conflict. Legitimacy issues that might have concentrated on the U.S. alone were spread amongst many actors in Afghanistan—coalition partners and the leadership and power brokers within Afghan society, Pakistan, the Taliban itself. Despite the state of legitimacy concerns at any given point in the conflict, the overall thrust of the military was to recognize civilian casualties as an enduring issue of legitimacy whenever force is used.

CHAPTER SIX

CONCLUSION

As has been shown in the previous chapters, in two theaters of war in the last decade, the U.S. military changed its attitudes toward civilian casualties, demonstrating a profound and significant movement from pushing the limits of civilian immunity by favoring the norm's sovereignty dimensions toward interpreting the norm through a human rights lens, transcending even its legal requirements under IHL. In each case, the campaigns were both considered conventional successes in the invasion phase, when toppling the regime was the goal. Each experienced local resistance combined with foreign "terrorist" intervention, and both went through a difficult period in which a lack of initial planning for post-invasion stability operations contributed to inconsistent and ineffective responses to what would grow into full-blown insurgencies. Most importantly, all of this took place within the context of globalized communications media that produced multiple audiences for the United States, its allies, and its foes.

Key leaders within each campaign read the signs of impending strategic failure long before the actual strategic failure. A core group within the human rights community participated in assessing each conflict, although in different ways—as part of shaping the initial C.O.I.N. doctrine in Iraq and as part of the assessment of the situation on the ground in Afghanistan.¹ As summarized in Table 2 (below), I have identified a crucial

juncture in each case that preceded a shift in doctrine, and in both cases, this juncture was defined by an increasing concern for and emphasis on the effects of civilian casualties on the ability to prevail according to the foreign policy commitments defined by the civilian administration. Whereas civilian casualties were seen as collateral damage in the initial phases of each conflict, such casualties became seen as a key issue of legitimacy as each war progressed.

In order to assess the significance of the empirical chapters, I will break down the claims and compare each. Since both Iraq and Afghanistan were fought under the overarching framework of the Global War on Terror, an overall pattern of becomes evident when the cases are shown side by side. In this sense, each case impacts the other, and the U.S. military demonstrates an overall organizational shift toward defining human rights as a strategic concern rather than as a constraint that entails strategic costs. Further, the relationship between the cases is important to consider since they competed for the attention and resources of the same institution, and involved many of the same personnel.

Regulative Effects

Regulative effects of the CIN were indicated by the movement in attitudes toward civilian casualties. When a norm is treated as a variable, the norm itself cannot be measured through behavior, so attitudes about behavior were used. The invasion of each conflict was used as a baseline, and in both conflicts, sovereignty-based, or enabling attitudes were present toward civilian casualties. This was evident in the early rhetoric

¹ Interestingly, the agenda of the human rights community most closely involved in shaping doctrine followed the priorities of the military. Afghanistan was barely mentioned in the conference records, for example, while Iraq was the primary focus of the military. It was only when the military shifted toward Afghanistan that key human rights advocates were invited to conduct civilian casualty reports.

and public statements in response to criticism about civilian casualties. A temporal element is also present and is supported by the identification of crucial junctures at which civilian casualties were seen to be strategically problematic by at least some in the military. These crucial junctures preceded the innovation process as well as the attitudes toward civilian casualties. The innovation process likewise was also identified as a key marker for each case, since this study is not about the actual increase in resources that marks a “surge” or visible strategy change but rather the shift in perception and analysis that triggered the process of adopting a civilian-protection focus.

Table 2 shows that both cases went through a similar process in terms of an invasion that was uneventful in terms of civilian casualties (that is, from the perspective of the military at the time,). Both experienced a turning point in the war marked by a growing concern for civilian casualties (CIVCAS), followed by a concern for a legitimacy crisis in terms of damage to the American war-fighting image, and then both underwent a process of doctrinal innovation. The differences in time are striking, however. In Iraq, the rising civilian casualties, the crucial juncture and the legitimacy crisis are compressed and intensified within a short time frame. The innovation process begins in earnest within the organization within a very short time after the crisis is perceived.

In Afghanistan, on the other hand, the time frame stretches out over a decade, and there is a significant period of almost no attention to civilian casualties in the global press, nor any real sense that the war had reached a crisis in any other way during that

time (about 2002-2004). The table above shows a lag; the period of growing concern for civilian casualties was relatively long (3-4 years), and the innovation response was slow.

Table 2. Summary of Findings

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
IRAQ: SOVEREIGNTY ATTITUDES			HUMAN RIGHTS ATTITUDES								
Baseline Attitudes Toward Civilian Casualties and Human Rights Community		Iraq Invasion: CIVCAS	*Crucial Juncture: Fallujah and Abu Ghraib; legitimacy crisis	Persuasion Within Military: C.O.I.N. revision with human rights community	Doctrinal Innovation	Surge (full adoption phase not covered by this study)	Institutional Change Continues				
AFGHANISTAN: SOVEREIGNTY ATTITUDES								HUMAN RIGHTS ATTITUDES			
Afghanistan invasion	Afghanistan's "Forgotten Years"			CIVCAS	Torture memos; values studies of soldiers	Attempts to reduce CIVCAS unsuccessful	Growing CIVCAS	*Crucial juncture: legitimacy crisis: Human rights community does CIVCAS study	Population protection adapted to Afghanistan	Counterterrorism And C.O.I.N. mixed	Institutional Change continues

Overall, civilian casualties appeared to be perceived as a less urgent problem than in Iraq. Below I will examine whether the same is true of the constitutive effects.

Constitutive Effects

Constitutive effects were supported by analysis of some of the key points of the narrative; specifically I looked for whether and how the constraining normative environment came to be seen as a key part of the security environment. Since a narrative is the way actors literally tell the story of events in a way that creates meaning, these do not represent variables because they are not independent. Rather, they rather represent overlapping, mutually constitutive relationships. Indicators included the use of the language of CIN, the invocation of identity in relation to interests, and the eventual connection between words and deeds in the form of linking the outcome of the war of ideas to the outcome of the operational war.

The use of CIN language (just war, civilians, rule of law, et cetera) indicates a constitutive effect insofar as it is seen as a legitimizing resource by which to locate one's actions and interests in relation to one's identity within the social order. This was demonstrated to be the case in both Iraq and Afghanistan. Furthermore, I argued that the constitutive effects of the CIN are such that the legitimizing language creates both a positive resource and a potential rhetorical trap. This was also found to be the case in both theaters. Specific articulations of the connection between identity and interests were made in response to the legitimacy crisis suffered as a result of civilian casualties (as

explained above). The rhetorical trap² was created through the appeal to CIN early on by the civilian leadership. The threat to reputation or identity pertaining to civilian casualties was increasingly seen as problematic over time, and interests were redefined in each case to support a definition of “winning” that was consistent with civilian-protection.

Moreover, the effect of this was not only in language but in action, since the language was followed by actual changes in policy, as well as attempts to institutionalize those changes in policy and in attitudes within the organization.

Finally, the interpretive analysis found evidence that the war of ideas was increasingly seen as important, not just for ideological advantage and for curbing anti-Americanism in general, but for how perceptions about American values and identity affected support for the opposition. Civilian casualties were seen as the key link between the two in Iraq, particularly since targeted audiences for the war of ideas existed at the local, regional, and even global levels. Direct material results in Iraq were evident in the form of foreign fighters feeding into Iraq to support AQI. In Afghanistan, however, the connection between the war of ideas and the war on the ground is not as strong. The reason for this is that, although the local population was seen as important to win over—and reducing civilian casualties were definitive in this regard, a lesser degree or intensity of concern was conveyed about the effects of losing the war of ideas for regional audiences (the Pakistani audience, for example, who did provide a source of foreign fighters).

² Rhetorical trap refers to the position created when a party employs a norm strategically and then is pressured to live up to the norm. This is a term used by Frank Schimmelfennig, "The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union," *International organization* 55, no. 01 (2001).

I suggest two possibilities for the exertion of uneven effects: first, strategic distinctions were made about audiences in terms of fence-sitters versus irreconcilables. Anti-American sentiment in Pakistan, especially in the FTA, was already extremely high. Identity loyalties may already have been decided and so “hearts and minds” may have been calculated to already have been lost. Second, the conflict in Afghanistan was truly an international effort, especially as time progressed. This means that responsibility for casualties is dispersed, along with damage to image or reputation. This also means that the attention of global audiences would likely be diffuse as well; in other words, with so many horses in the race, many different possible focal points exist, or a single diffuse focal point, such as N.A.T.O., for example. While foreign audiences focused responsibility for the war almost exclusively on the United States in Iraq, domestic audience costs within member states would likely figure more highly in Afghanistan.³ One other possibility will be discussed below.

³ Domestic audience cost is a term originally employed by James Fearon, "Domestic Political Audiences and the Escalation of International Disputes," *American Political Science Review* 88, no. 3 (1996).

Conditions

Table 3. Conditions of Strategic Effects

	Iraq	Afghanistan
Loss of Monopoly on Force	High	Moderate
Legitimacy of Invasion	Weak	High
Need to Delegitimize Terror	High	Moderate

The above table summarizes my findings on the three conditions I identified as impacting when the CIN becomes seen as part of the strategic environment. My argument was that, based on a social conception of power, state interests change over time and that this is evident as sovereignty-based attitudes toward civilian casualties move toward a more constraining, human rights-based outlook. I identified three conditions under which this occurs: when the normative/discursive framework of protecting civilians is seen as essential to delegitimizing the enemy; when the legitimacy of the initial invasion is in question, and civilian casualties are seen as damaging to the international image by increasing that gap; finally, when regaining a monopoly on force is seen as impossible to achieve through material force alone because civilian casualties increase support for the insurgency. I argued that, together, these provide the conditions

under which aligning with human rights-centered norms eventually comes to be seen as the only viable strategy in fighting insurgencies.

Aspects of the normative environment highlighted in this study derive from the observation that terrorism, which has been discursively shaped in recent decades by the U.S. and Israel in their attempts to maintain control over the strategic narrative about illegitimacy of force as used by opposing non-state actors. Drawing on the normative strength of the CIN to rhetorically strengthen anti-terror norms has resulted in global publics that increasingly accept the definition of terrorism as “killing civilians.” The first condition posited in this study was that CIN would be seen as part of the strategic environment when drawing attention to enemy violations of the CIN is seen as crucial to delegitimizing terrorism—and thus the ends, means, and identities of enemy non-state actors. The rhetorical trap is created when a state fails to live up to its own rhetoric—when words do not match the deeds. The evidence suggests that targeted publics and those who identify with them are quick to recognize the contradiction, even hypocrisy of applying double standards. While in the past, states have found plenty of room to maneuver within the norm through the “collateral damage” claim, the war on terror has forced powerful states such as the U.S. to clarify its own moral purpose, and by extension, its own claims to the use of just force.

The strategic use of the norm thus creates pressure to live up to the standards previously identified as morally non-negotiable. The evidence presented in this study supports the conclusion that this was the case in Iraq because AQI and its foreign fighters were creating anti-American and anti-government alliances in the Sunni triangle. For

regional and global audiences, the fact that the conflict in Iraq had become characterized by an actual war on terrorists needed to be brought to the fore. It was also necessary to delegitimize terrorists based on their identity as killers of civilians in Afghanistan because of the alliances between al Qaeda, the Taliban, and the Pakistani Taliban. I list this condition as weak or variable in the case of Afghanistan because of the previously mentioned reason that delegitimizing terrorism was not as urgent in Afghanistan because, relative to the U.S. identity, the Taliban was already widely considered as illegitimate because of the group's proximity to the events of 9/11.

I find that the recognition of the loss of a monopoly of force coincided with the shift toward the recognition of the importance of ideational/ethical factors within the normative environment, specifically CIN. For Afghanistan, however, the shift away from conventional force may have been less complete because although avoiding civilian casualties was an important focus of doctrinal change, the physical destruction of al Qaeda was the original legitimating discourse for the war. This leads to the next condition, the impact of the legitimacy of the war itself.

First, I argued that the recognition of the loss of a monopoly on force was one of those conditions. This refers to a shift in attitude rather than a material loss—as well as an acceptance that exerting more force was an insufficient strategy to regain that monopoly. This shift was seen within the military as a gradual understanding of the evolution of the character of war that renders political solutions more important than purely military solutions. This understanding as it applied to the particular conflicts came earlier in Iraq than in Afghanistan. In Iraq, the intensity and spread of the violence was

seen as creating conditions for political failure, and adding to civilian casualties was seen as contributing to the chaos, for example in Fallujah. In Afghanistan, however, late in the war (especially after the departure of McChrystle in 2010), counterterrorism was pursued alongside counterinsurgency, and that strategy, as directed toward al Qaeda, was conventional in its goals (search and destroy). As such it reflected a more sovereignty-oriented approach by attempting to regain a monopoly on violence, at least as it pertains to terrorist foreign fighters. In such cases, no political solution was seen as a possibility, and the existence of such groups remained unacceptable, leaving as the only possibility conventional defeat through destruction.

I find that the legitimacy of the initial invasion in each conflict, while initially used in this study to provide a baseline level of legitimacy, may weigh more heavily than I initially thought. In Iraq, the legitimacy of the invasion was extremely low, and the damage to the image of the U.S. was high and became higher throughout the war as conditions worsened. The rhetorical trap was stronger because the humanitarian rationalization for the war (liberation from tyranny and democratization) left few options for “winning” in a conventional sense, that is by destroying the enemy. The “enemy” was an elusive term because many fighters began as civilians and later became fighters. The enemy that emerged after the invasion was created out of the occupation that was waged for reasons that increasingly were seen as illegitimate, for example, the WMDs that failed to materialize. Thus killing civilians was especially egregious given this lack of legitimacy for the initial invasion. This left few avenues to repair the credibility and restore the moral authority of the U.S. other than to embrace a more ethical stance that

helped to define its own identity post-invasion. “Protector of civilians” was strategically a better identity because it was consistent with the humanitarian rationalization of the invasion, and it provided a communicative bridge between multiple publics—the Iraqi public, the Arab/Muslim public, the domestic public, and even the larger global public. As one of the strongest of all international norms, the legitimating power of the CIN provided a core moral purpose on which all could agree.

In Afghanistan, the initial invasion did not suffer from the same legitimacy deficit as Iraq, and this is found to be correlated with a weaker commitment to innovating doctrine toward population protection. The invasion was broadly construed as legitimate since the Taliban openly defied demands to turn over al Qaeda after 9/11. Thus the justification of the Afghanistan conflict was more persuasively part of the “Global War on Terror” in that it involved terrorists and their allies. However, as time went on, and it became apparent that the long term foreign policy outcome was in question (bringing the war to a successful conclusion by producing a stable, democratic Afghanistan), the original legitimacy surplus became less of a factor. As in Iraq, killing civilians worked against the desired political outcome. As I stated above, however, when the conflict was finally given attention and resources, the original legitimation for the war—destroying al Qaeda—was invoked once again.⁴ In Afghanistan, a sovereignty-orientation was reasserted based on that original just cause. Thus, the rhetorical trap set by strengthening the association between terrorism and CIN violation produces uneven effects, as

⁴ Further research might examine whether or not Obama’s refocusing the war on the destruction of Al Qaeda contributed to a widened berth for civilian casualties in the FATA of Pakistan.

evidenced by the relative weight and urgency assigned to civilian casualties in both conflicts. While the evidence suggests that protecting civilians is a way to remedy a legitimacy gap, the gap is not attributable directly to the contradiction between words and deeds; rather, indications are that it is mitigated or aggravated by just cause (the *jus ad bellum*). Thus the initial legitimacy undergirding the purpose of the entire war weighed more heavily than was originally anticipated

Material Factors

Finally, though this study aimed to background material factors, one of the limitations of foregrounding ideational factors is that the material factors are assumed to be present but not independent. So while this study did not seek to measure the impact of material factors in such a way, it became apparent from interviews and other sources that in Afghanistan, the lack of material resources devoted to the war effort was a major factor in tolerating civilian casualties for a much longer time than in Iraq. Air power was employed in direct relation to the paucity of ground troops available, and while air power is more discriminate than some alternatives in the context of conventional wars, civilian casualties are hard to avoid in the context of using air power in insurgencies. Moreover, a fully resourced C.O.I.N. strategy in Afghanistan was only considered once there was a change in civilian leadership. Even then, the timeline for achieving results would be extremely short. All of these material conditions helped to shape what was possible in terms of implementing a civilian-centered strategy.

Still, if one looks at the situation as two interrelated cases (occurring within a single organization), the two wars were competing priorities, and Iraq took the lion's

share of attention and resources. Viewing this through the lens of legitimacy, however, Iraq could have been made a bigger priority over time because it was a bigger risk for U.S. reputation. If so, legitimacy would still be the driving factor, with material conditions an intervening factor.

Material factors also formed the background to these cases in the sense that global communications technology allows for a more potent counter-narrative to the one being offered by powerful states. The U.S. military came to realize that the ability to control the narrative was no longer possible and that civilian casualties were a major strategic boon to the other side. One former intelligence person interviewed told stories of the Taliban rushing to the site of an aerial bombardment, killing civilians and their bodies in the wreckage, then using cell phones to spread the images—all before the U.S. military even knew what had happened. Strengthening the CIN becomes a sort of damage control and prevention in the face of such pressure. Without a strong norm, however, and without identity claims resting on the norm, such images would have less import.

Comprehensive Timeline of Both Cases: Sovereignty versus Human Rights

The last visual representation below shows an overall timeline of the events covered in both cases. I had argued earlier that I expected to see a shift in attitudes over time from a sovereignty orientation toward civilian casualties to a more human rights orientation toward civilian casualties. The key indicator used was not based on numerical outcomes of civilian casualties due to highly problematic data collection issues,⁵ but

⁵ See discussion about this. (docs on HR conferences plus email documenting problems. Plus reports of what does exist).

rather on what arguments were made about behavior toward civilians and whether the interpretation of civilian immunity was made in enabling, expansive ways (military necessity) or in constraining, minimizing ways (emphasizing precaution and distinction). Critical discourse analysis⁶ was employed in order to separate the always problematic issue of reading intention into arguments and claims about behavior. This is not as problematic in this study as it might otherwise be since the premise of this study is that ethical arguments relating to identity claims are used strategically, but that ultimately this has a constraining effect. My findings are that each conflict demonstrates the predicted shift from a sovereignty interpretation of CIN to a human rights interpretation of CIN.

As I argued in chapter two, the CIN is one of the constitutive norms of warfare and thus of the international order that is produced within the context of warring states, their soldiers, and non-state actors, both combatants and civilians. The struggle for power between states and non-state actors is material but also social in that each seeks the recognition of and cooperation with civilians. The struggle for legitimacy is thus an important part of the social relations between states and their non-state challengers, and it is thus to be expected that the norms of war will evolve according to the political-social context. The shift from sovereignty attitudes toward human rights attitudes is visually demonstrated in Table 3.

⁶ Explanation of critical discourse analysis and its hermeneutic aim of discerning social and power relations.

Further Research and Implications

The implications derived from this study are that morality and ethics have constraining effects even in the realm of political behavior most closely approximating anarchy. Power in this case is shown to entail social dimensions articulated by the constructivist paradigm but still not adequately accounted for in positivist approaches to international relations. This study has attempted to bridge the divide between rationalism and constructivism through the examination of one norm in an important set of conflicts. One of the more striking observations I made about the orientation of military decision-makers is that they are often much more attuned to war as a human endeavor and in many ways seem to intuitively reject theories of state behavior that abstract too much from this basic fact. Therefore, many in the military demonstrated a surprising openness to considering the ethical aspects of war—indeed, some of the early fascination I had with military perspectives grew out of discussions with military scholars about just war theory.

Furthermore, one implication that derives from the exploration of ethical aspects of power is that intervention itself means intervening into a social and political setting. Again, a striking observation made about how doctrinal innovation developed has to do with how the military eventually sought help from anthropologists, human rights organizations, and other academics in order to better understand and perform as a social actor within not only local social settings, but global ones as well. Implications are that IR theory about state behavior and interests has much to gain from considering the role the military plays not just as an instrument of foreign policy but as an actor in foreign policy, especially regarding its role as a strategic communicator. Perhaps the most

important policy relevant implication is that reputation, especially among foreign publics, matters for democracies when using force, with the result that perceptions of the illegitimate use of force profoundly affect the scope and range of military options available in cases of intervention and long term occupation.

The limitations of generalizing from this study are great since it looks at the behavior of a single state, in a single time period, within a single overarching political context (the GWOT). It may well be that the extraordinary turn taken by U.S. foreign policy in the post 9/11 years will not be repeated. Areas of further research suggested by this study would entail comparing cases with more variation on the dependent variable, as well as cases that are not fought as counterinsurgencies. Furthermore, one might see more variation among states that are not superpowers and that do not rely as heavily on their moral identity claims in order to maintain their positions within a given international order.

While the generalizability of the two cases I examine may be limited, the basic question asked in this study is part of a growing inquiry about the relationship between morality and power more generally, and the role of the civilian in defining the limits on the use of force more specifically. An interesting comparison might include the relative effects of the war on terror on the strategies and doctrines of Israel versus the United States since Israel's own struggles with legitimacy have been caught up in a similar net of terrorism, civilian casualties, and public opinion. A just released study on the impact of international criticism about civilian casualties in Israel echoes to some extent the findings of this study. Yagil Levy commented on Israel's forced reckoning with its own

“hierarchy of death” as a result of international pressure, and its resulting relative restraint in its November 2012 operations against Gaza, Operation Pillar of Defense:

Three years after Operation Cast Lead, Israel could no longer shift the risk to the Gazan noncombatants—that is, it could not reduce the soldiers’ exposure to danger by using a liberal fire policy that could potentially claim more Gazan civilian casualties. The international community has grown more vocal in its opposition to ground operations, and Israel more sensitive to a changing post-revolution Egypt. No less important, Israel learned to exercise some caution after the UN-commissioned Goldstone Report accused it (along with Hamas) of war crimes during Operation Cast Lead.⁷ Such cases call for a more thorough testing of all alternative explanations. For example, Downes’ findings that states will victimize civilians when they wish to annex land may suggest a relative weighting of the competing foreign policy goals of legitimacy versus expansion.

Finally, the constraints democracies face based on the identification with human rights norms may loosen in the case of interstate war. Interstate war provides the basis for more permissive sovereignty-based legitimacy claims about how and when force is used. What the findings of this study does support is that the use of force takes place within a social context, and that norms provide the resources and limitations by which states claim the legitimate use of force.

⁷ Yagil Levy, "Israel's New Hierarchy of Death," *Moment*(January/February 2013), <http://www.momentmag.com/opinion-israels-new-hierarchy-of-death/>. Accessed 5-4-2013. The author’s full academic argument is made in Yagil Levy, *Israel's Hierarchy of Death* (New York: New York University Press, 2012).

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VITA

Before beginning Loyola University Chicago's PhD program, Sherri Stone Replogle attended Illinois State University, where she earned a Bachelor of Science and a Master of Arts in Political Science, both with distinction. Her thesis compared the politics of moral universalism and particularism in the political theories of Gandhi, Foucault, and Havel. While at Loyola, she became interested in the politics of morality and power in war, and her emphasis turned toward international relations. At the time of this writing, Sherri is an Instructional Assistant Professor of Political Science at Illinois State University, teaching courses in international politics, conflict, and peace studies.