

Discourses of difference: civilians, combatants, and compliance with the laws of war

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Introduction

Why have President Bush and his administration consistently, and publicly, stated their commitment to fully comply with the laws of war protecting civilians while, simultaneously, refusing to fully comply with the laws of war protecting prisoners of war? How do we understand President Bush and his administration's unquestioning acceptance of the protection of civilians, but the rejection of the same for prisoners of war? Are the strategic and normative costs of each so dissimilar as to justify this difference? Considering the recent exposé of abuses and torture of prisoners of war held in both Iraq and Cuba, the answers to these questions are not merely academic.

I contend that an understanding of this difference in compliance is to be found through a close analysis of the persistence and influence of discourses of civilisation and barbarism invoked by the administration. First, these discourses of barbarism and civilisation facilitate the construction of a barbarous enemy akin to 'fascism, and Nazism, and totalitarianism', against which 'civilization' must be protected, which, in turn, legitimates the suspension of the laws of war extending rights and protection to those detained.¹ Second, what marks President Bush and his administration as the right defenders of 'civilization' is their claim to protect 'civilians'. Indeed, insofar as the war on terror can be claimed as war in defence of civilisation, it must be constituted as a war in defence of civilians. Thus, discourses of barbarism and civilisation enable the particular construction of categories of violence – detainee (combatant) or civilian – the treatment of which iterates the fundamental opposition of civilisation and barbarism by which the war on terror proceeds. Accordingly, this essay responds to the recent challenge by Christian Reus-Smit to 're-think long held assumptions about the nature of politics and law and their interrelation'.² Most significantly, it does so by introducing an analysis of the relations of international law and international relations as explicitly productive – to date, a neglected dimension of compliance.³

* I would like to acknowledge the assistance of Tarak Barkawi, Neta Crawford, Bud Duvall, Theo Farrell, Patrick T. Jackson, Colin Kahl, Richard Price, Tonya Putnam, participants in the 2004 CISAC social science seminar, and the two anonymous reviewers.

¹ President Bush, 20 September 2001, (<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>), accessed October 2004.

² Christian Reus-Smit, 'Introduction', in Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), pp. 1–13, at 2.

³ Martha Finnemore and Stephen J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', *International Organization*, 55:3 (2001), pp. 743–58; see also Reus-Smit, 'Introduction' 2004, Christian Reus-Smit, 'Politics and International Legal Obligation', *European Journal of International Relations*, 9:4 (2003), pp. 591–625, at 593.

As Martha Finnemore and Stephen Toope note, approaches to compliance primarily treat international law as a constraint.⁴ Consequently, international law is simply regulative, and the role of international law in constituting international relations is obscured. Hence, the relationship of international law and international relations is conceived of as primarily strategic or instrumental, one in which the *techne* of international relations is regulated and evaluated according to the relationship of means to ends designed and instituted by sovereign actors. In fact, Kenneth Abbott writes ‘designing institutions capable of affecting behavior in desirable ways’ is not only at the centre of studies of compliance, but lies at the ‘heart’ of the interdisciplinary collaboration of international relations and international law.⁵ As a result, studies of compliance focus on how to fabricate stable artifices of institutions and law, and how to regulate and evaluate compliance. But, notice how this determination of the relationship of international law and international relations is only enabled by a very specific conception of politics. Reus-Smit defines this conception of politics as one of ‘strategic action’, marked by ‘rationalist assumptions’.⁶ Compliance scholars agree. In their own words, Steven Ratner and Anne-Marie Slaughter call it an ‘intermediate instrumentalist’ conception of politics.⁷ Such a conception emphasises a study of ‘behavior as a reaction to norms in order to explain compliance’.⁸ Law acts on international relations and upon political subjects through restraint and regulation. This, however, is an impoverished conception of international politics, reducing its flux and contingencies to questions of right design, consensual communication, and regulative institutions so as to manage and secure consistent behaviour. Overlooked, then, is the mutually constitutive relationship of international relations and international law, a relationship that is not simply or solely regulative but is also productive. As Michel Foucault specified, regulation has productive effects, in part because to be subject to regulation is also to become subjectivated through that regulation. In other words, the subject is not (contra conventional understandings of compliance) established prior to politics: there is no subject who participates in or presides over politics, that is not also produced by politics. Rather, it is precisely through regulation that the subject is incited and produced. Let me provide an example to demonstrate this point, and also to provide a historical detailing of the relationship among discourses of barbarism and civilisation, international law and international politics that, I argue, is still evident today.

The failure to observe the Geneva Convention of 1864 during the Franco-Prussian war of the 1870s deeply disturbed prominent lawyers of the nineteenth century. ‘(A) savagery unworthy of civilized nations’ characterised these wars, betraying the hope that, at the least, ‘undoubtedly civilized European nations’ would conform *as a matter of course* with the laws of war.⁹ With the memories of these wars lingering, the Russian Czar convened the 1899 Hague Conference, which codified the laws and

⁴ Finnemore and Toope, ‘Alternatives’, 2001.

⁵ Kenneth Abbott, ‘International Relations Theory, International Law and the Regime Governing Atrocities in Internal Conflicts’, in Steven Ratner and Anne-Marie Slaughter (eds.), *The Methods of International Law* (Washington, DC: ASIL, 2004), p. 130.

⁶ Reus-Smit, ‘Politics and International Legal Obligation’.

⁷ Steven Ratner and Anne-Marie Slaughter, ‘The Method is the Message’, in Ratner and Slaughter (eds.), *Methods of International Law*, pp. 239–65, at 251.

⁸ Antje Weiner, ‘Contested Compliance: Interventions on the Normative Structure of World Politics’, *European Journal of International Relations*, 10:2 (2004), pp. 189–234, at 190.

⁹ Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2002), p. 84.

customs of land warfare. As was expressed by the delegates in attendance in 1899, a fighting *worthy* of civilised nations was a fighting governed and moderated by appropriate rules of engagement – rules which, by the late nineteenth century, included ‘the distinction between members of armed forces and civilians’.¹⁰ The conference was deemed a success and, at the close, one delegate announced assuredly that warfare would hitherto be restricted not only by the positive laws of war, but also ‘by the laws of the universal conscience, and no general would dare violate them for he would thereby place himself under the ban of civilized nations’.¹¹ Notice here how the regulation of war, that is the positive codes of war and the laws of universal conscience, does not simply mark the difference of civilised and uncivilised nations, but also constitutes that difference which was otherwise obliterated in the conduct of past wars. I argue that by continuing to trace these reciprocal relations among discourses of barbarism and civilisation and the laws of war, we shall see how President Bush and his administration also come into existence as ‘civilized’ through compliance with the protection of civilians, a performance that is now threatened by the revelation of abuses at Abu Ghraib and elsewhere.

The structure of this essay is as follows. To provide the context for my argument I first introduce and discuss the ‘war on terror’ and the response of President Bush and his administration vis-à-vis the laws of war, specifically the protection of civilians as codified in the 1949 IV Geneva Convention (4th Convention) and the 1977 Protocol Additional I and the protection of prisoners of war as codified in the 1949 III Geneva Convention (3rd Convention) and the 1977 Protocol Additional I. Second, I explain the decisions made by President Bush and his administration regarding the detainment and treatment of the prisoners of war currently incarcerated in Guantánamo Bay or, as it is more prosaically known, Camp X-Ray. Third, I analyse possible alternative explanations for disparity in compliance with the laws of war. I focus on the two, strategic considerations and normative obligations, forwarded by President Bush and his administration, and central to the literature on compliance.¹² In reviewing these alternative explanations, I detail their inability, on their own terms, to explain the *disparity* in compliance. Finally, I show how tracing the discourses of barbarism and civilisation that inform the actions of President Bush and his administration elucidates the disparity in compliance.

Do the laws of war apply?

Although scholars may debate the degree to which the global war on terror is indeed ‘new’ and ‘different’, for President Bush and his administration, the war on terror is

¹⁰ Gerrit Gong, *The Standard of Civilization in International Society* (Oxford: Oxford University Press, 1984), p. 75.

¹¹ Arthur Eyffinger, *The 1899 Hague Peace Conference: The Parliament of Man, The Federation of the World* (The Hague: Kluwer Law International, 2000), p. 313.

¹² For general discussions of compliance, see Abram Chayes and Antonia Handler Chayes, ‘On Compliance’, *International Organization*, 47:2 (Spring 1993), pp. 175–205; Jeffrey Legro, ‘Which Norms Matter? Revisiting the “Failure” of Internationalism’, *International Organization*, 51:1 (Winter 1997), pp. 31–63; Oona A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ *Yale Law Journal*, 111:8 (2002); Kal Raustiala and Anne-Marie Slaughter, ‘International Law, International Relations and Compliance’, in Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (eds.), *Handbook of International Relations* (London: Sage, 2002), pp. 538–58; Christian Reus-Smit, ‘Politics and International Legal Obligation’ (2003), and Antje Wiener, ‘Contested Compliance’ (2004).

a war without precedent.¹³ A simple review of comments made by President Bush and members of his administration captures the centrality of this presumption. In his address to the nation two months after September 11th, President Bush described the 'global war on terror' as a 'different war than any our nation has ever faced'. Approximately one year later, the National Security Strategy of the United States argued that war waged against global terrorism is 'different from any other war in our history'. In her daily briefings during this time, Pentagon spokeswoman Victoria Clark consistently referred to the global war on terror as a 'very unconventional war'.¹⁴ In 2003, Secretary of Defense Donald Rumsfeld iterated that '(w)e have to deal with these new threats in different ways, for the world's changed and business as usual won't do it'.¹⁵

For President Bush and his administration the difference of this war goes so far as to potentially render the conventional understanding and use of the laws of war obsolete. As evidenced in his 7 February 2002 memo responding to the legal categorisation of those detained in Camp X-Ray, President Bush holds that the war on terrorism requires a 'new paradigm . . . new thinking in the laws of war'.¹⁶ Clark had earlier suggested, 'every aspect of it, including the Geneva Convention and how it might be applied, should be looked at with new eyes and new thoughts as to what we're experiencing right now'.¹⁷ They refer not simply to the *ius ad bello*, that is the laws of war governing the resort to force, but also to the *ius in bello*, that is the laws governing the use of force itself. Speaking of the rights and protections offered to prisoners of war, Alberto Gonzales, the legal counsel for the White House, argued 'as you (President Bush) have said, the war against terrorism is a new kind of war . . . this new paradigm renders obsolete Geneva's strict limitations . . . and renders quaint some of its provisions'.¹⁸

In the months following September 11th, the laws of war were subject to renewed scrutiny and analysis, with no satisfactory conclusions reached as to their applicability. Reflecting the widely held contemporary opinion, one legal scholar noted, 'attempting to apply existing international law to the novel circumstances . . . yields substantial controversy and reveals possible gaps in the law', while another confirmed that, most immediately, 'terrorism is disrupting some crucial legal categories of international law'.¹⁹ After all, as the US ambassador for war crimes argued, '(t)he war on terror is a new type of war not envisaged when the Geneva Conventions were negotiated and signed.'²⁰ Many have argued that the laws of war did not apply to the specific conflict of Afghanistan or to the larger war on terror because the Geneva

¹³ 'Is This a New Kind of War?' (<http://www.crimesofwar.org/expert/paradigm-intro.html>), accessed October 2004.

¹⁴ CNN News, 28 January 2002, (<http://www.cnn.com/2002/US/01/28/ret.wh.detainees>), accessed October 2004.

¹⁵ Secretary of Defense Rumsfeld, 10 September 2003, (<http://www.defenselink.mil/transcripts/2003/tr20030910-secdef0661.html>), accessed October 2004.

¹⁶ President Bush, memo signed 7 February 2002, (<http://news.findlaw.com/hdocs/docs/dod/62204index.html>), accessed October 2004; see also (<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>), accessed October 2004.

¹⁷ CNN News, 28 January 2002, (<http://www.cnn.com/2002/US/01/28/ret.wh.detainees>), accessed October 2004.

¹⁸ John Barry et al. 'Torture and the Road to Abu Ghraib', *Newsweek*, 24 May 2004 pp. 26–32, at 30–1.

¹⁹ Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', *European Journal of International Law*, 12 (2001), pp. 993–1001.

²⁰ Quoted in Kim Sengupta, 'Geneva Conventions are Outdated', *The Independent*, 22 February 2002.

Conventions (the 1st–4th) are formally applicable only in wars among states and the war between Al- Qa’ida, which is a network of individuals and organisations, and the US is a war that does not fit easily into the state-centric categorisation of international humanitarian law. Others argue that the war on terror would be better fought as a police action, with criminal law becoming the applicable referent and not the laws of war.²¹

Yet, President Bush and his administration have not taken this position. From the start, however contested the description may be, President Bush and his administration have emphasised that the United States is engaged in a ‘war’ on terror and nothing less. At the same time, President Bush and his administration have never attempted to argue that the ground wars of Afghanistan and Iraq were beyond the reach of the Geneva Conventions altogether, nor did President Bush refuse to acknowledge that the parties involved were responsible to the dictates of the 1949 Geneva Conventions. More significantly, the potential ambiguity if the laws of war are applicable to the war on terror does not explain the *difference* in acceptance of the 3rd and 4th Conventions. Regardless of one’s evaluation of the proper relationship between the laws of war and the global war on terror, the essential question remains: What makes compliance with the principle of distinction a certain element of military operations, while compliance with prisoner of war provisions remains uncertain?

Before I explain further, let me clarify two points. First, the argument in this article is concerned with compliance; that is, ‘whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have instituted.’²² It does not evaluate the efficacy – ‘the question of whether the goals . . . are achieved’ – of either the 3rd or the 4th Geneva Convention in protecting civilians and prisoners of war.²³ This is an invaluable question, made all the more so in light of the abuses and torture of prisoners of war and efforts to determine numbers of civilian casualties in both ground wars. However, it is a distinct question for it evaluates the efficacy, or success, of the law once compliance is established. Second, this focus also means that compliance with the laws of war does not rest upon assessing the (greater or lesser) numbers of civilian deaths in the ground wars on terror. This essay focuses on *comparative* compliance with the laws of war, the 3rd and the 4th Convention, not with the efficacy of those laws. Moreover, it draws attention to the construction of the categories of ‘combatant’ and ‘civilian’ that, in turn, are then used to evaluate both compliance and efficacy.²⁴

Disparity in compliance between the III and IV Geneva Conventions

President Bush and his administration accept the principle of distinction – that is the injunction to distinguish between combatants and civilians at all times during armed

²¹ Mark Drumbl, ‘Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order’, *North Carolina Law Review*, 81 (2002), pp. 1–114.

²² Dinah Shelton, ‘Introduction: Law, Non-Law and the Problem of “Soft Law”’, in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Cambridge: Oxford Press, 2002), p. 7.

²³ Dinah Shelton, ‘Introduction: Law, Non-Law’, p. 7.

²⁴ The controversy over the Lancet study captures the difficulties of identifying and counting civilian dead. Les Roberts et al., ‘Morality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey’, *Lancet*, 5:364 (2004), pp. 1857–64.

conflicts and to direct military attacks only against the former. This principle was first codified in the 1949 IV Geneva Convention Relative to the Protection of Civilians in Times of War. It was supplemented in the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims in International Armed Conflicts. President Bush and his administration repeatedly emphasise the principle of distinction as central to their military operations although, as late as 2003, opinions were not unanimous. Voicing the concerns of some scholars and practitioners of the laws of war, one high ranking military officer argued that in a 'post 9/11' world what 'remains to be seen is whether it . . . provides an accurate, relevant, and ultimately credible basis upon which to regulate modern armed conflict.'²⁵

Nonetheless, one month after the September 11th attack, the horror of which arises in part from the purposeful violation of the principle of distinction, the permanent representative of the United States to the United Nations stated that the 'United States is committed to minimizing civilian casualties'.²⁶ Referring to the ground war in Afghanistan, President Bush made clear that he would only intervene in targeting decisions if they would otherwise put civilian lives at risk and, likewise, operations in Iraq were designed to be 'laser precise' to avoid 'avoid endangering or humiliating Iraqi civilians'.²⁷ Most broadly, Charles Allen, Deputy General Counsel for the US Department of Defense, stated in an interview on 16 December 2002: 'With regard to the global war on terrorism, wherever it may reach, the law of armed conflict certainly does apply . . . in the sense of the principle of distinction.'²⁸

Active military operations in both Afghanistan and Iraq conformed to the laws of war insofar as targeting decisions were evaluated with regard to the principle of distinction. In referring to the operations in Afghanistan, General Myers said, 'the last thing we want are any civilian casualties. So we plan every military target with great care.'²⁹ 'No nation in human history has done more', said Rumsfeld, speaking of the effort to avoid civilian casualties.³⁰ When assessing the ground war, legal historian and scholar Adam Roberts observed, 'there are strong reasons to believe US statements that civilian deaths were unintended'.³¹

Regardless of intention, the number of civilians killed – even when we isolate a reliable number – does not necessarily indicate a degree of US compliance because compliance does not necessarily lead to fewer civilian deaths. The principle of distinction does not outlaw the death of civilians; it outlines the responsibility of military commanders and their forces, as well as other civilians in positions of authority, to refrain from directly attacking civilians and civilian objects, to take reasonable precautions to avoid and to minimise civilian deaths, and to avoid and

²⁵ Colonel K.W. Watkin, 'Combatants, Unprivileged Belligerents and Conflicts in the 21st Century', Unpublished paper prepared for the Harvard Program on Humanitarian Policy and Conflict Research, 2003.

²⁶ *International Legal Materials*, 40 (2001), pp. 1281.

²⁷ Michael Gordon, 'Marines plan to use velvet glove more than iron fist in Iraq', *The New York Times*, 12 December 2003; Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (New York: Human Rights Watch, 2003), p. 5.

²⁸ Charles Allen, (www.crimesofwar.org/onnews/news-pentagon-trans.html), accessed October 2004.

²⁹ 21 October 2001 (<http://www.defenselink.mil/news/Oct2001/briefings.html>), accessed October 2004.

³⁰ Craig Nelson, 'Concern Grows over US Strategy, Tactics in Afghanistan', *Cox News Service*, 29 October 2001.

³¹ Adam Roberts, 'Counter-Terrorism, Armed Force, and the Laws of War', *Survival*, 44:1 (2002), pp. 7–32.

minimise the destruction of civilian property and/or objects necessary to civilian survival. Indeed, high value military targets can be attacked, even if a large number of civilians are killed, insofar as the potential casualties are assessed as proportional and the target is classified as militarily necessary. As one military lawyer explained, 'I've approved targets that could have caused 3,000 civilian casualties and I've raised questions about targets predicted to risk fewer than 200 civilian lives. The issue is the importance of the target.'³²

Yet, regardless of the prioritisation of military target/necessity allowed by the principle of distinction, President Bush and his administration did *not* unilaterally decide on targets. Rather, there was intra-governmental and non-governmental collaboration on target selection and prioritisation, and each target was subject to multi-level legal review during military operations and high collateral targets received extra review. Legal analysts reported that strikes were averted for fear of causing civilian deaths.³³ The controversial use of cluster bombs in Afghanistan by the Air Force was not repeated in Iraq – evidence of the importance placed on conforming to the principle of distinction. Moreover, the 2004 assault on Fallujah ended when President Bush and his administration ordered the Marines to withdraw, citing civilian casualties as too high.³⁴ This was a risky strategic and tactical decision that, in fact, facilitated a renewed Iraqi insurgency. Consequently, it underscores the central importance of compliance with the principle of distinction.

These statements and decisions attest to the acceptance of the principle of distinction as a legitimate, and undisputed, dimension of military operations – to the degree that criticisms of a particular strategy in Afghanistan led to alterations in military operations in Iraq. Additionally, it can be argued that United States exceeded its formal treaty obligations by implementing targeting criteria found in Additional Protocol I – a treaty that the United States has not ratified and for which the customary status of some of its provisions is still uncertain – or by taking extra precautions.³⁵ Thus, even if we wished to argue that President Bush and his administration complied with the principle of distinction *solely* because military necessity provides sufficient strategic flexibility in targeting decisions, this would not explain their relinquishing substantial control over the selection of targets, modification of specific strategies of war, and studied compliance with targeting criteria.

Nevertheless, it is only in the sense of the principle of distinction that the laws of war apply. President Bush and his administration have simultaneously concluded that the laws of war protecting prisoners of war are not fully applicable to US

³² Carr Center, Harvard University, *Understanding Collateral Damage* (Cambridge, MA: Carr Center, Harvard University, 2002) ; see also Theo Farrell, *The Norms of War: Cultural Beliefs and Modern Conflict* (Boulder, CO: Lynne Rienner, 2005).

³³ William Arkin, 'Fear of Civilian Deaths May Have Undermined Effort', *Los Angeles Times*, 16 January 2002, A12, (<http://www.latimes.com/news/nationworld/world/la-011602milmemo.story>), accessed October 2004; Arkin writes 'avoidance of civilian casualties has become institutionalized even to the point of rejecting important targets if there is a high probability of civilian harm'. In 'Civilian Casualties and the Air War', *Washington Post*, Sunday 21 October 2001; personal interviews with Arkin, and with Col Lyle Cayce 2003–2004; see also T. E. Ricks, 'Target Approval Delays Cost Air Force Hits', *Journal of Military Ethics*, 1:2 (2002), pp. 109–12.

³⁴ 'Army will Shift Emphasis to Protecting the New Iraqi Government and the Economy', *New York Times*, 11 June 2004, A9; Edward Wong, 'Truce Extended in Falluja Siege, and Talks Go On', *New York Times*, 26 April 2004, A1.

³⁵ Filkins Dexter, 'Choosing Targets; Iraqi Fighters or Civilians? Hard Decision for Coverters', *New York Times*, 31 March 2003.

operations in the current war on terror. Although the suspension of the rights and protections of prisoners of war was first publicised in regards to detainees at Camp X-Ray, the torture and abuse at Abu Ghraib provides further evidence.³⁶

President Bush stated in early 2002 that those detained at Camp X-Ray are 'killers', unprotected by the laws of war; and further that 'Al Qaeda and Taliban detainees are not prisoners of war'.³⁷ President Bush and his administration since modified their initial claim, but have only agreed that those detained shall be treated in a manner 'consistent with' the principles of the 3rd Geneva Convention.³⁸ Those captured, detained, or deported (the practice is known as rendering) outside of Camp X-Ray are privy to less than 'consistent' treatment – the parameters of which are left to the discretion of the holding states, the practical interpretation of individual military commanders, or private contractors untrained and ungoverned by the laws of war. Although President Bush and his administration did not publicly argue that those captured in the ground war in Iraq were to be denied the legal rights and protections of the 3rd Geneva Convention, confidential memos from his legal counsel did.³⁹

Battlefield detainees or prisoners of war?

The debates over the provision of Prisoner of War status to those captured by the United States in Afghanistan engage the extension of Prisoner of War status to the arbitrarily named 'battlefield detainees', approximately 600 of whom have now been held since 2002 in Guantánamo Bay, Cuba. The Bush administration maintains that these detainees or – returning to a phrase more in accordance with international humanitarian law (and current United States military manuals) – these 'unlawful combatants' are not entitled to the protection established by the 3rd Convention because their conduct and their chain of command did not meet the requirements outlined therein.⁴⁰ Rumsfeld pithily stated: 'they did not go around in uniforms, with their weapons in public display, with insignia and behave in a manner that an army behaves in, they went around like terrorists'.⁴¹

This position of the Bush administration is premised upon its interpretation of the requirements for the status of combatants set forth in the 3rd Convention. The Convention, like its 1929 predecessor, is primarily based upon the 1907 Hague

³⁶ See the 'torture memo' by Jay S. Bybee, 1 August 2002. (<http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>), accessed October 2004.

³⁷ He uses the same description for the combatants in Iraq, see (http://www.dod.gov/news/Oct2003/n10272003_200310272.html), accessed October 2004. Alberto Gonzales, 25 January 2002. 'Memorandum for the President', (http://pegc.no-ip.info/paust_the_plan.html), accessed October 2004.

³⁸ CNN News, 28 January 2002, (<http://www.cnn.com/2002/US/01/28/ret.wh.detainees>), accessed October 2004.

³⁹ Department of the Army, Article 14-6, Investigation by Major Gen. Antonio Taguba at (<http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>). See also (<http://news.findlaw.com/hdocs/docs/dod/62204index.html>), Seymour Hersh, 'Torture at Abu Ghraib', *New Yorker*, 30 April 2004, and Mark Danner, 'Abu Ghraib: The Hidden Story', *New York Review of Books*, 7 October 2004.

⁴⁰ United States Army, Operational Law Handbook, JA 422 1997 (Virginia: JAG School, US Army), pp. 18, 19.

⁴¹ Rumsfeld, 28 January 2002. (http://www.defenselink.mil/transcripts/2002/t01282002_t0127sd3.html), accessed October 2004.

Convention Respecting the Laws and Customs of War on Land, in which combatant status belongs to those who fulfil the following: (1) they are commanded by a person responsible for his subordinates; (2) have a fixed recognisable sign visible from a distance; (3) carry arms openly and; (4) conduct operations in accordance with the laws and customs of war. The 3rd Geneva Convention extended its purview to include combatants of regular armed forces who profess allegiance to a government or an authority not recognised by a Detaining Power (in this case, the United States) and to combatants of resistance movements (partisans) in occupied territories that belong to a specific Party to the conflict. Consequently, the 3rd Geneva Conventions broadened the definition of a lawful combatant. The significance of this status should not be underestimated for, as stated in the 3rd Convention, 'once one is accorded the status of a belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The most important of these is the right, following capture, to be recognized as a prisoner of war, and to be treated accordingly'.⁴² Thus, the relationship between combatant and prisoner of war status can be understood as *reciprocal* and is made expressly so within the 1977 Protocols Additional.

In February of 2002, the Bush administration modified its initial stance. It agreed that the four 1949 Geneva Conventions were applicable to the conflict in Afghanistan and to these detainees.⁴³ Arguably this was a result of both pressure from Secretary of State Colin Powell and other military officers, for it occurred after Powell sent a memo to the President requesting he review his decision to withhold prisoner of war status from those detained. Powell voiced concern about potential repercussions for US soldiers who might be captured in the future and pointed out that such a move would overturn a 'century of US policy and practice'.⁴⁴ As US special operation forces in Afghanistan at that time would themselves have had difficulty qualifying under the criteria Rumsfeld set forth, this was no minor request.⁴⁵ Other influences included international pressure from Mary Robinson and other NATO allies who believed the 3rd Convention deserved absolute respect.

Nevertheless, the Bush administration decided that although all four of the Geneva Conventions were acknowledged to be generally applicable, only three would be so applied in their entirety and, in a notable feat of differentiation, those three would only be applied to the Taliban. As a senior US official explained, even the Taliban did not meet the basic regulations and would not be recognised as combatants and, thus, as prisoners of war. The Taliban 'did not have a responsible

⁴² Jean De Preux, *Commentary on the III 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: International Committee of the Red Cross, 1960), Article 4, pp. 46–7.

⁴³ White House (<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>), accessed October 2004; Rumsfeld, 8 February 2002. (http://www.defenselink.mil/transcripts/2002/t02082002_t0208sd.html), accessed October 2004.

⁴⁴ Memo from Colin L. Powell, 26 January 2002, in Michael Ratner and Ellen Ray, *Guantánamo: What the World Should Know* (Vermont: Chelsea Green, 2004).

⁴⁵ After photos were published of Special Operations forces in Afghanistan with full beards and turbans, and the debate over the detainees began, the Pentagon ordered that there be 'no more beards'. US soldiers were required to wear their arms openly and have a patch of the US flag on their clothing. James Brooke, 'Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right', *New York Times*, 12 September 2002. The alteration in policy, which instructed both Special Operations Forces and Civil Affairs officers to don uniforms, overrode 'force protection' issues and may have placed SOF at a tactical disadvantage. Regardless, this policy was instituted because of concerns that non-uniform wearing SOF endangered the distinction of combatant and civilian – evidence that the distinction is institutionalised in military practice. Scott Holcomb, 'View from the Legal Frontlines', *Chicago Journal of International Law*, 4 (2003), pp. 561–9, at 563.

military command structure, turbans aren't a recognized uniform that distinguishes them, and, although they carry arms openly, everyone in Afghanistan carries their arms openly. They repeatedly failed to observe the customs and laws of war.⁴⁶ As a result, the 3rd Geneva Convention, which determines a specific regime of rights and protections stemming from the designation of POW status, would only be implemented in regard to the *treatment* of the detainees at Camp X-Ray. In Rumsfeld's words, 'we plan, for the most part, to treat them in a manner reasonably consistent with the Geneva Conventions, to the extent that they are appropriate'.⁴⁷

This selective approach did not help when, as Powell feared, US soldiers were captured in March 2003. President Bush's injunction – 'we expect them to be treated humanely, just like we'll treat any prisoners of theirs that we capture humanely. If not, the people who mistreat the prisoners will be treated as war criminals' – was met with a certain scepticism by the international community; a scepticism now mixed with horror and disgust as the abuses at Abu Ghraib were publicised.⁴⁸ Likewise, the Bush administration's fury at the parading of the captured US soldiers was skewered by matching images of the detainees bound and blindfolded arriving at Camp X-Ray. More than a few commentators observed, 'there cannot be one rule for America and another for the rest of the world'.⁴⁹ Indeed James Rubin argues it was the Bush administration's position on Camp X-Ray that 'actually marked the beginning of the end of European sympathy for and solidarity with the United States after September 11'.⁵⁰ Out of the numerous condemnations of the Bush administration, it was Judge Steyn of Britain who inveighed against Camp X-Ray as a 'monstrous failure of justice', introducing the now famous description of the Camp as a 'black hole' into public conversation.⁵¹

To summarise, the Bush administration decreed that while the detainees at Camp X-Ray are not granted the protections of the 3rd Geneva Convention, it would treat them in accordance with the regulations found within. By parsing the rights of treatment and protection, the Bush administration creates for itself a unique position that at once extends and refuses the realm of rights and protection articulated within the 3rd Geneva Convention. These 'battlefield detainees' remain exactly within the reach of the laws of war, but decidedly outside the realm of its protection wherein protection is understood as the extension of particular rights of Prisoner of War status to the Taliban, the full application of the 1949 Conventions against all parties to the conflict including Al Qa'ida, and the extension of humane treatment to all

⁴⁶ Thomas Shanker and Katherine Q. Seelye, 'Who is a Prisoner of War? You Could Look it Up, Maybe', *New York Times: Word For Word/The Geneva Conventions*, 10 March 2002.

⁴⁷ Rumsfeld, 11 January, (http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html), accessed October 2004; violation of the customs and laws of war is subject to legal sanction, but it does not automatically disqualify individuals from prisoner of war status – which must be judicially determined. The fact that all Afghans carry arms openly is irrelevant to the question of whether the Taliban did. In addition, there are no strictures that limit exactly what is a 'fixed recognizable sign'. The Commentary on the 3rd Convention notes that no agreement was reached during the conferences, but that a 'coat, a shirt, an emblem or a coloured sign' suffices. Moreover, none of these arguments invalidate the extension of Prisoner of War status to the detainees until, and at such a time, their status may be determined by a 'competent tribunal'.

⁴⁸ 23 March 2003, (<http://www.whitehouse.gov/news/releases/2003/03/20030323-1.html>).

⁴⁹ *The Daily Mirror*, 25 March 2003; George Monbiot, 'One Rule for Them', *The Guardian*, 25 March 2003.

⁵⁰ James Rubin, 'Stumbling into War', *Foreign Affairs* (September/October, 2003), pp. 46–66, at 59.

⁵¹ Lord of Appeal Johan Steyn, 'Guantanamo Bay: The Legal Black Hole', Address at the Twenty-Seventh F. A. Mann Lecture, 25 November 2003.

captured individuals. The 'battlefield detainees' are produced through the articulation of the laws of war with the particular war on terror in the service of President Bush and his administration.

Explanations for disparity in compliance

When confronted with this disparity in compliance with the laws of war, in an extant war that challenges the laws held to govern it, it is tempting to infer strategic or material considerations as 'trumping' all others, or to seek substantive differences in treaty obligation, formal or informal.⁵² Certainly, the actions of the Bush administration suggest as much. After all, upon being asked why the US was not letting the 3rd Geneva Convention 'officially apply', Rumsfeld responded quite matter of factly 'well, first of all we don't have to'.⁵³ That is, due to its unique position in the world and the unique threat it faces, the US can decide not to comply with the Geneva Conventions, and its obligations to such treaties are minimal. The administration relied on similar arguments consistently to select out of international treaties, most notably the International Criminal Court. Likewise, scholars of international relations and international law focus on formal and informal obligation, as well as 'robustness', as a potential influence on compliance, and security or material concerns remain a central factor. Upon further reflection, however, neither element (security or obligation broadly defined) is sufficient to explain the disparity in compliance. For as significant as these elements are, and as surely as they are factors in understanding such a complicated series of events, they are not sufficient.

In assessing both formal and informal obligation for the protection of prisoners of war, note that it is the rights and protections of combatants in situations of vulnerability (sick, wounded, or prisoners of war) which have been the central subject of the laws of war since their inception.⁵⁴ It was this preoccupation, and not the protection of civilians, that prompted the founding of the International Committee of the Red Cross. It is not until 1949, under the 4th Convention, that the 'civilian' is formally made a subject of treaty law. And, it is not until 1977, in the Protocols Additional, that the civilian is given extensive protections within the laws of war. Certainly, the laws of war protecting prisoners of war and of civilians are both 'robust', but it is the protection of prisoners of war that is by far the older, more expansive law. The 4th Convention, for example, restricts the protection of civilians only to protection from 'arbitrary acts' on the part of the enemy. Thus generally, the protection of prisoners of war is certainly a 'robust' international norm, with a high degree of formal and informal obligation attached to it.

In terms of treaty law, or formal obligation, both the 3rd and the 4th Geneva Conventions are signed and ratified by the United States, as well as Afghanistan and Iraq. Both treaties have passed into customary law, binding on all states

⁵² Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), Richard K. Herrmann and Vaughn P. Shannon, 'Defending International Norms: The Role of Obligation, Material Interest, and Perception in Decision-Making', *International Organization*, 55:3 (2001), pp. 621–54.

⁵³ Rumsfeld, 11 January 2002, (http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html), accessed October 2004.

⁵⁴ Jeffrey Legro, 'Which Norms Matter', 1997.

regardless of individual ratification. The US is a signatory to Protocol Additional I – which supplements and develops both the 3rd and 4th Geneva Conventions – but it has not ratified and neither has Iraq or Afghanistan. The US accepts Protocol I's relevant provisions on the protection of civilians as expressive of customary law and has acted in concert with these provisions in past conflicts, especially in recent conflicts when the US conducted its multilateral military operations in accordance with substantive principles of the laws of war, regardless of individual treaty ratification.⁵⁵ But, at the same time, the US has been a vocal critic of the broader definition of combatants and, thus, of prisoners of war found in the Protocol I. Nonetheless, President Bush and his administration do not explain their interpretations of US obligations in reference to Protocol I and, in fact, there is little public reference to Protocol I. Considering the failure to ratify could be a potential justification for the actions of President Bush and his administration, the absence of reference suggests an effort to minimise the status of Protocol I in the laws of war, or at least ignore its potential.⁵⁶

Importantly, the customary status of the 3rd and the 4th Geneva Conventions is not affected by debate over particular provisions of Protocol Additional I. Thus, in terms of formal obligation and acceptance of the essential protections of prisoners of war, the US has already signalled its agreement. More specifically, it is the refusal of the President and of his administration to form competent tribunals to adjudicate the status of the detainees of Camp X-Ray and its abysmal treatment of those detained in Iraq that draws the most criticism. The US already conformed to these proscriptions by forming 'Article 5 tribunals' during the Vietnam war – when the status of those captured was no less complicated and no less uncertain – and quite recently by doing the same during the Gulf War, and in the current conflict in Iraq.⁵⁷ It has also included competent tribunals in the US manual on the laws of war, while its past record of humane treatment of suspect POWs is exemplary.⁵⁸ Moreover, the 1998 Department of Defense directive 5100.77 holds compliance 'with the law of war

⁵⁵ For example, the NATO bombings of Kosovo were governed by Protocol I.

⁵⁶ This is exemplified in Scott Horton's statement that Douglas Feith, the #3 civilian in the Pentagon, had a 'derisive attitude towards the Geneva Conventions', quoted in Chris Sullentrop, 'Douglas Feith: What Has the Pentagon's Third Man Done Wrong?', 20 May 2004, (<http://slate.msn.com/id/2100899/>), last accessed October 2004; Seymour Hersh, 'The Gray Zone', *The New Yorker*, 24 May 2004. Considering Feith wrote an article entitled 'Law in the Service of Terror: The Strange Case of Protocol I' in 1985, in which he dismissed Protocol I as illegitimate international law, it stands to reason he would be *both* derisive and dismissive.

⁵⁷ Briefly, the strategic 'benefits' of holding captured detainees without granting prisoner of war status to allow interrogation and to prevent repatriation are ambivalent at best. Not only may prisoners of war be questioned, thus overriding the need to deny such status, but also the intelligence 'benefits' from torture (facilitated by the extra-legal status of those detained) are deeply debated. Repatriation can occur at the discretion of the holding state when there is no longer a threat to security and, as this war on terror is one without seeming end, those detained need not be denied recognition of prisoner of war status to be detained for extensive periods of time. Those detained who have criminal charges pending may continue to be held. Therefore, there is no clear strategic need to deny prisoner of war status to prevent repatriation, nor is there necessarily an intelligence benefit from so doing. Finally, the relationship between the evaluation of prisoner of war status (in a military tribunal) and trial proceedings for violations of the laws of war (in military commissions) is unclear. Thus far, the two appear to be utterly unrelated, although certainly the general illegality of the US military commissions suggests that *regardless* of the status of the detainees – prisoner of war, civilian, illegal combatant – their trials will proceed according to the discretion of President Bush and his administration. On this subject see Human Rights First: (http://www.humanrightsfirst.org/us_law/detainees/militarytribunals.html).

⁵⁸ Advocate General Operational Law Handbook, 2004.

during all armed conflicts, however such conflicts are characterized', is a matter of United States policy, so both law and policy convene.⁵⁹

In evaluating informal obligation, by tracing US socialisation and internalisation of the laws of war, the United States possesses a unique relationship with the laws of war personified by Francis Lieber.⁶⁰ Lieber was a Prussian immigrant and political science professor who drew up the first modern code of warfare, the 1863 General Orders 100, during the American Civil War. Importantly, the impetus for this code was the difficult question of how to discern the difference between combatants, civilians, citizens and seditionists, and thus decide the rights and obligations accorded to each. In other words, who was to be identified as a combatant? Referring to the disputed status of captured Confederate combatants and the contested character of their crimes, General Orders 100 declaimed that the laws of war 'admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider wanton and unjust assailant'. Accordingly, the very founding of the United States involved questions not so dissimilar to those asked today.

General Orders 100 was the foundation for the Hague Conventions of 1899 and 1907 and not formally replaced in the United States until 1956.⁶¹ Thus, it was the experience of the American Civil War, and the laws of war that developed from it, that informed the great surge of international codification of the law of war in the nineteenth century. Indeed, the US was at the forefront of codification of the 1949 treaties after World War II, and its delegates at both of the preparatory conferences for the 1949 and the 1977 treaties played pivotal roles in the development of the treaties.⁶²

Finally, as I have earlier described, the training that US military forces receive in the laws of war reflects the importance attached to both formal obligation, but, even more tellingly, informal obligation as well. The laws of war are invoked as an example of the moral standards and ethical conduct expected and exemplified by the US military. For example, the immediate socialisation of Army recruits into the 'soldier's rules' that lay out the essential components of humane treatment and respect – such as that soldiers only fight enemy combatants – is justified for both legal

⁵⁹ <www.dtic.mil/whs/directives/corres/pdf2/d510077p.pdf>, p. 4.

⁶⁰ See Kal Raustalia and Anne-Marie Slaughter, 'International Law, International Relations and Compliance', (2002); Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', *International Organization*, 52:4 (1998), pp. 887–917; Harold Hongju Koh, 'Address: The 1998 Frankel Lecture: Bringing International Law Home', *Houston Law Review*, 35:623 (1988), pp. 641–63; Harold Hongju Koh, 'Why Do Nations Obey International Law?', *Yale Law Journal*, 106 (1997), pp. 255–99.

⁶¹ General Orders provided the basis for the Brussels Conference of 1874, which produced a (nonbinding) International Declaration Concerning the Laws and Customs of War and the 1880 Oxford Manual of the Institute of International Law. These documents were the principle sources of the 1899 and 1907 Hague regulations that codified protections of prisoners of war.

⁶² George Aldrich and Richer Baxter negotiated the troublesome issue of combatant/prisoner of war status – informed by US experiences in Vietnam with US and enemy prisoners of war – achieving a compromise position and ensuring the success Protocol I. George Aldrich, 'The Laws of War on Land', *American Journal of International Law*, 94:1 (2000), pp. 42–63.

and normative reasons.⁶³ And, even when denying the full coverage of the 3rd Convention to those detained at Camp X-Ray, President Bush iterated that the US 'has been and will be a strong supporter of Geneva and its principles'.⁶⁴

Consequently, it is difficult to attribute disparity in compliance to formal or informal obligation. As its history evinces, the protection of prisoners of war exceeds the scope of the formal treaty and is inextricably intertwined with the founding of the US. The protection of prisoners of war has been deeply 'internalized' in US domestic political and military structures – no less so that that of protecting civilians.

Perhaps then it is pure strategic or material concerns, certainly an acceptable explanation in the context of the war on terror. But, again, upon reflection, the disparity in compliance is not accounted for by these factors. Take the most frequently forwarded strategic arguments for compliance with the laws of war – the presumption of reciprocity that founds the laws of war and the unique 'threat' posed by those detained.⁶⁵ Scholars of the laws of war and of international relations argue that compliance with the 3rd Geneva Convention is a strategic decision. Compliance increases the chances that, as in this case, captured US soldiers will be treated with due consideration. In fact, it was this logic that prompted Powell to petition President Bush, and it was this logic that contributed to the US decision to uniform its Special Operations Forces, clearly identifying them as combatants (and distinguishing them from civilians) in case of capture. The kidnapping and beheading of US and its allies' soldiers and civilians in explicit retaliation for the treatment of the detainees tragically confirms the accuracy of this argument. Yet, what has received less commentary is that the exact logic holds for the entirety of the laws of war – that is, the presumption of a reciprocal obligation as integral to compliance – and directly affects the protection of civilians. It is this presumption that the war on terror has so directly dispelled.

In both ground wars, and in the larger war on terror, Al-Qa'ida purposefully targets civilians; the Taliban purposefully hid military equipment in civilian quarters and sought refuge among civilians. For example, the Taliban placed 'a tank and two large antiaircraft guns under trees in front of the office of Care International', while the Iraqi forces purposefully placed civilians in direct danger as human shields.⁶⁶ Yet, the Bush administration complies with the 4th Geneva Convention, that is, with the principle of distinction, even as it is painfully clear that there will not be a reciprocal response from Al-Qa'ida or from Taliban and Iraqi forces. But, President Bush and his administration did not comply with the 3rd Geneva Convention, extending the

⁶³ Paragraph 14-3, Army Regulation 340-41, Training in Units, 19 March 1993. See the US Army 'The Considerations of Others'. 'KEY AREA #1: ETHICAL DEVELOPMENT – INDIVIDUAL AND ORGANIZATIONAL, 1. *The Army is a values-based institution. We reflect the values of American society and the values of the profession of arms. These values have both individual applications (for example, personal integrity) and organizational applications (such as selfless service or obedience to the Laws of War).*' (http://chppm-www.apgea.army.mil/co2/CO2_book/Intro.html).

⁶⁴ Memo from President Bush, 7 February 2002.

⁶⁵ Jeffrey Dunoff and Joel P. Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict', in Ratner and Slaughter (eds.), *Methods of International Law*, pp. 211–38; James Morrow, 'The Institutional Features of the Prisoners of War Treaties', *International Organization*, 55:4 (2001), pp. 971–91.

⁶⁶ Mark Mazzetti and Kevin Whitelaw, 'Into the Thick of Things', *U.S. News and World Report*, 5 November 2001; Bradley Graham and Vernon Loeb, 'Taliban Dispersal Slows US', *Washington Post*, 6 November 2001.

rights and recognition of prisoners of war even before there was evidence of a possible response from Al-Qa'ida or, in the case of Afghanistan, the Taliban. If reciprocity is a signal strategic element in compliance, why *pre-emptively deny* prisoner of war status while *maintaining* compliance with the principle of distinction? More pointedly, why bother with the principle of distinction at all? To return to Rumsfeld's remark, why would the US not 'have to' comply with the 3rd Convention, but 'have to' comply with the 4th?

In light of past actions and compliance of the United States vis-à-vis prisoners of war, President Bush and his administration repeatedly argue that the detainees are different from any others. Those detained at Camp X-Ray, and elsewhere, are a potential threat to international and domestic security. As Deputy Assistant Defense Secretary Paul Butler explained: 'We are holding enemy combatants in a global war on terrorism for security reasons, to prevent them from returning to the battlefield and injuring American soldiers and civilians, and civilians throughout the world'. 'They're dangerous'.⁶⁷ Compliance with the 3rd Geneva Convention is said to compromise security because it would facilitate the release of these combatants who, as Attorney General John Ashcroft explained, 'are terrorists . . . (and) are uniquely dangerous'.⁶⁸

Yet, compliance with the principle of distinction is potentially no less dangerous, as any soldier can attest. Errors in judgment lead not simply to the deaths of civilians mistakenly killed, but also of US soldiers who mistake combatants for civilians – the 'Americans do not really know who they are aiming at'.⁶⁹ General Myers noted in discussing Iraq, 'some of the biggest losses we have taken are due to Iraqis . . . dressing as civilians and luring us into surrender situations and opening fire on our troops'.⁷⁰ Nevertheless, the principle of distinction, as codified within the Protocol I, requires combatants to do everything possible to avoid harming civilians, to take 'constant care' to distinguish between combatants and civilians and in 'case of doubt whether that person is a civilian, that person shall be considered to be a civilian'. Doubt extracts a high cost within armed conflicts where the 'dividing line between combatants and civilians is frequently blurred'.⁷¹

This is a consistent refrain voiced almost in unison by both witnesses and participants in war. The immediate reasons are many: the use of civilian infrastructure for military support confuses distinctions of legitimate targeting, while the merging of the 'home' and the 'front' into one makes any easy distinction between combatant and civilian difficult – especially as women and children, traditionally considered *de facto* civilians, are increasingly participating in war. The increased integration of civilians into contemporary militaries, in support operations and in the use of private security companies, does little to clarify the distinction. And, while there are legal repercussions for combatants who purposefully disguise themselves as

⁶⁷ Paul Butler, 13 February 2004, (<http://www.globalsecurity.org/security/library/news/2004/02/sec-00>), accessed October 2004, quoted in Bill Dedman 'US to hold detainees indefinitely', *Boston Globe*, 25 April 2004, (http://www.boston.com/news/nation/washington/articles/2004/04/25/us_to_hold_detainees_at_guantanamo_indefinitely/), accessed October 2004.

⁶⁸ Quoted in Bob Franken, 'Ashcroft Defends Detainees' Treatment', (<http://edition.cnn.com/2002/US/01/21/ret.detainees/>), 22 January 2002.

⁶⁹ Doug Struck, 'Casualties of US Miscalculations', *Washington Post*, 11 February 2002, A1.

⁷⁰ Human Rights Watch Report, 2003.

⁷¹ Kofi Annan, S/1999/957, 'Report of the Secretary General to the Security Council on the Protection of Civilians In Armed Conflict'.

civilians, a crime of war known as perfidy, it is still incumbent upon every combatant to essentially hold their fire in cases of doubt. As the wars of Afghanistan and Iraq illustrate, the consequences of such caution for the United States' military in the face of such confusion are deadly.

Strikingly, in the codification of the 4th Convention, it was exactly this problem that worried the delegates. In an exact inversion of the argument of President Bush and his administration, the International Committee of the Red Cross Commentary on the 4th Convention states, 'wounded and prisoners of war are human beings who have become harmless, and the State's obligation towards them are not a serious hindrance to its conduct of the hostilities; on the other hand, civilians have not in most cases been rendered harmless, and the steps taken on their behalf may be a serious hindrance to the conduct of war'.⁷² It is not the prisoners of war that are uniquely dangerous, hidden killers in wait – it is the civilians.

There are other effects as a result of compliance with the principle of distinction. Increased combatant deaths can lead to potentially less national support for the war or, at the very least, create a volatile public environment in terms of support. Violation of the principle it is said to uphold exposes the US to international criticism and censure. And, consistent iteration of compliance with the principle of distinction may, conversely, create expectations of compliance that increase the bar for United States military operations that, when not met, results in resentment and anger from the 'enemy' population. Rumsfeld was aware of this effect, arguing that 'if you kill a lot of civilians, the people inside of Afghanistan will believe you are not discriminating and that you are against the people of Afghanistan'.⁷³ Now, interviews with Iraqis and returning military officers only confirm this point. 'At first they were filled with grief, but now they are angry. The Americans said no civilians were targeted . . . (w)hy did Americans tell the world they hit only places of the army. Why did they hit civilian homes?'⁷⁴ As one member of the Operation Iraqi Freedom team observed, 'President Bush had told civilians they would not be harmed, therefore many concluded that United States forces targeted the civilian population'.⁷⁵ Further, some have argued that complying with the principle of distinction hampers swift and decisive war fighting, protracting the war and ultimately making victory more difficult. To quote the author of the first modern code of war, Francis Lieber, the 'more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.'⁷⁶

Irrespective of these strategic and normative considerations, President Bush and his administration have not engaged in such debates. Most significantly, US soldiers were told, even after it became clear that combatants and civilians were often indistinguishable, that they needed 'positive identification' before firing.⁷⁷ Thus the principle of distinction and its correlate injunction to protect and respect 'civilians'

⁷² Oscar Uhler and Henri Coursier (eds.), *Commentary on the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1960), p. 5.

⁷³ Rumsfeld, 7 November 2001, (http://www.defenselink.mil/transcripts/2001/t11082001_t1107pbs.html), accessed October 2004.

⁷⁴ Human Rights Watch, 2003.

⁷⁵ Sarah Sewall, *Targeting Humanity: Minimizing Civilian Suffering in War*. Unpublished manuscript.

⁷⁶ General Orders 100, para #6.

⁷⁷ Human Rights Watch, 2003, p. 101.

remains 'imperative and salutary'.⁷⁸ Indeed, it holds to the degree that Rumsfeld, in a sentiment shared by President Bush, *justifies* the disqualification of the Taliban from POW status on the basis of protecting 'innocent civilians'.⁷⁹

But, why does uncertainty over who, precisely, are those detained at Camp X-Ray or elsewhere lead to the denial of the 3rd Convention, whereas uncertainty over who, precisely, are 'civilians' in Iraq and Afghanistan does not? The production of the detainees as the 'ultimate' threat does not necessarily correspond to the immediate situations in either Afghanistan or, now, Iraq. Rather, what *is* revealed is the continued construction of particular threats and obligations that differ according to the subject – combatant or civilian – of the action. This leads us to ask not only *why* does President Bush and his administration differentially comply with the laws of war, but *how* is this made possible? How is one subject produced as worthy of the rights and protections of the laws of war and the other not? By what means are the 'combatant' and the 'civilian' constructed? It is here that the analysis of discourses of barbarism and civilisation shows its worth, for such an analysis centres the production of *how* this difference in compliance is made possible, and in so doing highlights reasons *why* it was done.

Discourses of barbarism and civilisation

In the cognate scholarship on international law and international relations, discourse has a conventional use as 'verbal or written statements' or a form of Habermasian 'argumentation'.⁸⁰ While significant, by this definition discourse is understood as a mode of transparent exchange conducted for specific ends. Even those authors arguing for a more complex relationship of international law and international relations do not explicitly explore how an analysis of discourses, conceptualised differently than practical reasoning, give us purchase on the way the two are recursively constructed.⁸¹ In this essay, drawing from Michel Foucault, discourses are open systems of meaning and authority, generative of specific subjects and specific practices. Discourses are not tools to be wielded by rational actors, nor is the influence of discourse measured by the belief or intention of said actors.⁸² Instead, discourses are conditions of possibility that enable, or not, particular actions by particular individuals at particular times. Accordingly, subjects do not precede discourse (and thus cannot simply use, or be used by, discourses) but come into being through discourse. I contend that discourses of barbarism and civilisation condition

⁷⁸ Antonio Cassese, 2001, p. 998.

⁷⁹ Rumsfeld, 8 February 2002, (http://www.defenselink.mil/transcripts/2002/t02082002_t0208sd.html), accessed October 2004.

⁸⁰ Ellen Lutz and Kathryn Sikkink, 'International Human Rights Law and Practice in Latin America', *International Organization*, 54:3 (2000), pp. 633–60, at 634; Thomas Risse, 'Let's Argue! Communicative Action in World Politics', *International Organization*, 54:1 (2000), pp. 1–39; Michael Barnett and Raymond Duvall (eds.), *Power and Global Governance* (Cambridge: Cambridge University Press, 2005).

⁸¹ Reus-Smit, *Politics of International Law* 2004, *Politics and Legal Obligation* 2003; Friedrich Kratochwil, 'How do Norms Matter?', in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000); however, see Neta Crawford, *Argument and Change in World Politics* (Cambridge: Cambridge University Press, 2002), pp. 35–68.

⁸² Richard K. Herrmann and Vaughn P. Shannon, 'Defending International Norms' (2001).

the extension of rights and protections to civilians and the denial of the rights and protections to prisoners of war, and, in turn, index a hierarchy of practices that distinguish the 'civilized' from the 'barbarians'.

At the origins of the laws of war lies a distinction of barbarism and civilisation that excluded 'barbarians' from the laws of war. This is captured most famously in the line of amity drawn during colonial endeavours of the sixteenth and seventeenth centuries, beyond which the laws of war no longer applied. But it is also conjured quite explicitly during the great surge of codification in the laws of war in the nineteenth century. Legal publicists held that 'public law, with slight exceptions, has always been and still is, limited to the civilised and Christian people of Europe or to those of European origin'.⁸³ The conviction that the laws of war were necessarily suspended in colonial wars had already been well expressed in the 1894 text of the international legal scholar John Westlake who held that 'savages of half-civilized tribes' should be treated quite differently in combat.⁸⁴ Furthermore, in the United States, the ardent supporters of the 1899 Hague regulations were among those who most fervently advocated the torture and extermination of Filipinos, accepting those practices as the reasonable counter to the innate barbarism of the Filipinos.⁸⁵ It was not until the twentieth century that laws of war applied to the 'barbarous' wars of decolonisation and liberation, and the previously 'barbarian' peoples of Africa and India participated in the formulation of the laws of war.⁸⁶

But it was not solely that discourses of civilisation and barbarism limited the *scope* of the applicability of the laws of war, in which discourses of civilisation demarcate *static differences* between 'us' and 'them'. Discourses of civilisation also denote *processes of transformation* – from barbarism to civilisation – which immediately undermine the presumption of static or stable differences. Conformity with the laws of war distinguished individuals as restrained, moderate in their violence, and differentiated them from barbarians who are 'like children who allowed their passions to rule their behavior'.⁸⁷ At the 1899 Hague Conference, the prominent scholar Johann Bluntschli advocated the laws of war for this very reason. The laws of war would provide the progressive discipline necessary to excite self-control and moderation. He was convinced that the laws of war refined 'the fighting men's sensibilities so as to bring about those traits of character that were associated with civilized behavior'.⁸⁸ Bluntschli would applaud the fact that almost a full century later, this argument still compels: 'A world without armies – disciplined, obedient, and law – abiding armies would be uninhabitable. Armies of that quality are an instrument and also a mark of civilization.'⁸⁹

What, then, does it mean to discipline? Michel Foucault uses the concept of discipline as a historical analytic to identify the elaboration, refined in the eighteenth

⁸³ Henry Wheaton (1866), *Elements of International Law*, ed. George Grafton Wilson (New York: Carnegie Institute, 1964), p. 15.

⁸⁴ Martti Koskenniemi, *The Gentle Civilizers*, p. 86.

⁸⁵ Roxanne Doty, *Imperial Encounters: The Politics of Representations in North/South Relations* (Minnesota: University of Minnesota, 1996), pp. 40–3.

⁸⁶ See my 'The Image Before the Weapon: A Critical History of the "Combatant" and "Civilian" in International Law and Politics', unpublished manuscript.

⁸⁷ Koskenniemi, *The Gentle Civilizers*, p. 76.

⁸⁸ *Ibid.*, p. 85.

⁸⁹ John Keegan, *A History of Warfare* (London: Pimlico, 1994), p. 384.

century, of complex systems and tactics of power regimenting and producing selves and subjectivities. Specifically, he relies on military discipline as the paramount example of modern disciplining. It formed and informed subjects both in the rote sense of regulation and repetition and in the productive sense of constituting a specific character. The laws of war discipline in this sense; they do not simply act to prohibit and restrain violence, but also to *produce* and *identify* civilised entities – both states and men – and to differentiate the lawful violence of the civilised from the unlawful violence of barbarians. President Bush's own statements continue to link military conduct, military discipline, to civilisation, claiming that in 'every conflict, the character of our nation has been demonstrated in the conduct of the United States military'.⁹⁰

And, yet, as the outcry over abuses at Abu Ghraib now illustrate, however crucial these distinctions are – of barbarism and civilisation – they are not stable. Indeed, it was the crises of the two World Wars that so brutally demonstrated to the 'civilised' world, that the distinctions of barbarism and civilisation were not so easily maintained. As the legal scholar Josef Kunz declared, the World Wars marked 'the total crisis of Western Christian culture, a crisis which threatens the very survival of our civilization' for each demonstrated that the 'cultured man of the 20th century is *no more than* a barbarian under a very superficial veneer of civilization'.⁹¹ In a striking parallel to contemporary events, it was the practice of torture by the French during the Algerian war of liberation that exposed the savage artifice of the French claim to represent civilisation. Using France's claim against itself, one primary architect of the Algerian liberation, Franz Fanon wrote, '(I)n a war of liberation, the colonized people must win, but they must do so cleanly, without barbarity. The European nation that practices torture is a blighted nation, unfaithful to its history.'⁹² The referent for the difference of barbarism and civilisation remains the capacity for self-control and moderation, a putative hallmark of civilised entities – that is of both states and men. We hear the echoes of this recognition in the cautionary words of a military officer, 'in the final analysis, the law of armed conflict keeps us from becoming the enemy we fight'.⁹³ Thus, we can see how subjectivation occurs through the regulation of war according to discourses of barbarism and civilisation that inform the relations of international law and politics.

Indeed, it is impossible to ignore the invocation of civilisation that suffused any and, seemingly all, statements from President Bush describing and defending the current parameters of the war on terror. In his address to the nation in September 2002, the actions of the US were portrayed not solely as defending national security, but the very security of civilisation itself. 'This is the world's fight. This is civilization's fight.'⁹⁴ A month later, in his speech to the United Nations, President Bush reiterated this broader theme stating that the conduct of the US was in

⁹⁰ 11 November 2002, (<http://www.whitehouse.gov/news/releases/2002/11/20021111-2.html>), accessed October 2004.

⁹¹ Josef Kunz. 'The Chaotic Status of the Laws of War', in Judith Gardam (ed.), *Humanitarian Law* (Dartmouth: Ashgate, 1999), pp. 81–106, at 86.

⁹² Franz Fanon, *A Dying Colonialism* (New York: Grove Press, 1965), p. 24.

⁹³ Carr Center, Harvard University, *Humanitarian Issues in Military Targeting* (Cambridge: Carr Center, Harvard University, 2002).

⁹⁴ 'President's Remarks to the Nation', (<http://www.whitehouse.gov/news/releases/2002/09/20020911-3.html>).

accordance with the 'most basic commitment of civilization'. That commitment, shared by all 'civilized nations', is to 'defend ourselves and our future against lawless violence'.⁹⁵ The 2002 United States National Security Strategy (NSS) identifies 'global terrorism' as the outstanding threat to national security and the security of all 'civilized nations'.

The NSS underscores that this threat stems from both its source – transnational 'shadowy networks' working in clandestine cooperation with rogue states – and its tactics. Specifically, these individuals, networks and states do not and will not seek to 'attack us using conventional means' or by selecting conventional targets. Instead, in an inversion of the modern laws of war, their target is 'innocents' with the specific objective of 'mass civilian casualties'. This killing of the 'innocent' is a primary measure, in the eyes of President Bush, of the existence of lawless violence, of evil itself. This lawless violence is painstakingly contrasted to measures taken by the US against 'these outlaws and killers of the innocent'.⁹⁶ For, as President Bush explains, the strikes undertaken by the United States 'seek to minimize, not maximize, the loss of innocent life'.⁹⁷

President Bush and his administration underscore that it is this practice that demarcates 'civilized' from 'barbarian' actors and distinguishes the military actions of the US and its allies from its foes. As President Bush iterated in his memorial speech of 2002, the attack on 9/11 was not simply an attack on our nation. It was also an attack on the sanctity of innocent life. Crucially, he declared, what differentiates 'us' from the enemy we fight is our valuing of 'innocent life'.⁹⁸ This difference is presented as an example of the distinction to be made between lawful and lawless violence and, in turn, between lawful and unlawful combatants. One legal scholar 'held that the president appeared to have concluded that it was assaults on civilian targets like the World Trade Center that made the attackers unlawful combatants'.⁹⁹ For President Bush and his administration, compliance with the injunction to distinguish at all times between combatants and civilians is not only an explicit military consideration, but also a highly significant normative identification, and a fundamental means by which the conflict itself is defined. As the high-ranking Judge Advocate General explained, 'it is our heritage, it is our culture as the most civilized nation in the world' to obey the laws of war.¹⁰⁰

It is here that observance of the distinction between combatants and civilians is invoked to order the difference between civilised and barbaric states. This observance equally cites a hierarchy of lawful, moral violence and an unlawful, immoral violence. Further, a categorical distinction between lawful and lawless violence, where the

⁹⁵ 'Remarks to the United Nations General Assembly', 10 November 2001. This construction has not disappeared. On 23 September 2003, President Bush was explicit: *All governments that support terror are complicit in a war against civilization*. (<http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>), 21 September 2004; (<http://www.whitehouse.gov/news/releases/2004/09/20040921-3.html>), accessed October 24.

⁹⁶ Remarks, 10 November 2001.

⁹⁷ Ibid.

⁹⁸ 11 September 2002, 'President's Remarks to the Nation'. (<http://www.whitehouse.gov/news/releases/2002/09/20020911-3.html>).

⁹⁹ William Glaberson, 'Critics Attack on Tribunals Turn to Law Among Nations'. *New York Times*, 26 December 2001. (http://www.pcpafg.org/organizations/Human_rights/hrweb/Class2/Homepage/critics_Attack_on_Tribunals_Turns_to_Law_Among_Nations.html).

¹⁰⁰ Author interview with Department of Defense Judge Advocate General, June 2004.

emphasis falls on the target (or object) of violence (that is combatant or civilian), becomes, in the words of President Bush and his administration, a characterological distinction, where the emphasis falls upon the agent (or subject) of violence – the violence of barbarians, the violence of evil-doers, murderers, and the violence of terrorists. This is not merely a rhetorical move, as is demonstrated in my reading of the debates on the extension of the rights and protections of POW status to those detained. Discourses of barbarism and civilisation legitimate what could otherwise be understood as an arbitrary *interpretation* of or straightforward *denial* of the laws of war – the refusal to contemplate the extension of POW protection to the detainees at Camp X-Ray and, now, in the denial of humane treatment for those imprisoned in Iraq. Specific rights of war are granted only to those so identified as already within the ambit of civilisation and, so it appears, humanity itself. By constructing a barbarous enemy, ‘akin to fascism, Nazism, and totalitarianism’ whose ‘murderous ideology’ may be different, but no less horrendous, as those of the early twentieth century, the rights and protections of war are rendered beyond their due. What is so significant about the Bush administration’s suspension of specific rights of war to those imprisoned at Camp X-Ray and beyond is that it is *justified* in the name of humanity – underscoring the inherent ambiguity of the laws of war which are said to establish the rights of all of humanity, yet nevertheless allows the denial of those rights on the basis of barbarism.¹⁰¹

The second move, which I already touched upon, is that this exclusion and denial, premised upon the projection and assessment of barbarism, finds its referent in the figure of the ‘innocent’. The immunity and defence of the innocent – which functions as synchecoché for civilian to the degree that ‘guilty civilian’ sounds oxymoronic – is presented as an unassailable ground of judgment for the actions of President Bush and his administration. Nonetheless, the sacredness of the innocent is sufficiently flexible as to also provide a rationale for war.¹⁰² Thus, we must ask in a world where, according to President Bush, ‘you are either with us or against us’ what allows a determination of, much less a distinction between, combatants and civilians? Who possesses the right to judge innocence?

In a war in which the distinction of ‘us’ and ‘them’ is allied to the values of the civilised world, discourses of civilisation mark the authority of the ‘civilized’ to judge exactly who is worthy of protection, and who shall be considered innocent. In the ground wars against terror, especially in Afghanistan, discourses of gender and civilisation intersected in profound ways. As Gayatri Spivak demonstrated, ‘the espousal of the woman as an object of protection from her own kind’, and the concerted efforts of ‘white men saving brown women from brown men’, has long been a hallmark of civilisational efforts.¹⁰³ Moreover, discourses of gender invest ‘women and children’ with the innocence, an innocence seemingly derived from a pitiful corporeality of injury, necessary for rescue and, therefore, for the

¹⁰¹ ‘Remarks’, 10 November 2001, in which the civilised world first comes to stand ‘for humanity’, but this continues throughout his speeches during 2003.

¹⁰² Bush seeks to ‘minimize’ the loss of innocent life in the strikes against Afghanistan, a locution that underscores differences of value attributed to innocent life of ‘civilization’ and that of ‘barbarism’.

¹⁰³ Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’, in Cary Nelson and Lawrence Grossberg (eds.), *Marxism and the Interpretation of Culture* (Urbana, IL: University of Illinois Press, 1998), pp. 271–313.

re-establishment of the purity of civilised and manly rescue.¹⁰⁴ But, as I argue elsewhere, the intersection is more profound than that. Discourses of gender also render *visible and stable* the very distinction of combatant and civilian that is most threatened by the conduct of this war on terror, yet absolutely necessary for its success.¹⁰⁵

By waging war on behalf of civilians against those who would target civilians, the Bush Administration justifies and enforces the claim to represent and defend 'civilization'. Invoking discourses of barbarism and civilisation to denigrate those who target civilians as 'barbarian', the Bush administration places those individuals outside the 'realm of obligation', a zone of exclusion, whereby those detained are recognised, but only by the mercy of President Bush and his administration.¹⁰⁶

Once again we see how the observance of the distinction between 'combatant' and 'civilian' that demarcates civilised nations from their barbarous brethren, but also distinguishes *men* from 'savage hordes', and *honourable men* from dishonourable.¹⁰⁷ In turn, this distinction remains the means by which such differences may be indexed and identified. Therefore, the laws of war form a pivotal and *productive* dimension of international politics, constituting the distinction of barbarism and civilisation upon which they rest. By complying with the principle of distinction President Bush and his administration legitimated their claims to defend civilisation.¹⁰⁸ Discourses of barbarism and civilisation conditioned the extension of the rights and protection of prisoners of war and of civilians and, in turn, articulated compliance with the principle of distinction to the constitution of civilised entities – men and states. The politics of identifying the 'combatant' and the 'civilian', and the rights and protections granted to each, are revealed in an analysis of the discourses of civilisation and barbarism – discourses that are not 'outside' the laws of war, but integral to its history and formulation.

Currently, the tensions and ambiguities of discourses of barbarism and civilisation, and their relationship to the 'combatant' and the 'civilian' are brought into relief by the cases before the Supreme Court and in the debacle over the abuse of prisoners of war. For no longer accepting a determination of what 'civilized nations' require, it is President Bush and his administration that are held to 'violate the values we share with a wider civilization'.¹⁰⁹ In the debate over *to whom the rights and protection of war refer*, our contemporary struggle to determine and distinguish the 'combatant' and the 'civilian' resonates with the conflicts and contests of the past.

¹⁰⁴ See the work of Liisa Malkki, 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization', *Cultural Anthropology*, 11:3 (1996), pp. 377–404; Anne Orford, *Reading Humanitarian Intervention* (Cambridge: Cambridge University Press, 2003) and 'Muscular Humanitarianism', *European Journal of International Law*, 10 (1999), pp. 679–712; R. Charli Carpenter, 'Women, Children and Other Vulnerable Groups: Gender, Strategic Frames and the Protection of Civilians as a Transnational Issue', *International Studies Quarterly*, 49:2 (2005), pp. 295–334.

¹⁰⁵ See Helen M. Kinsella, 'Sex and Gender in the Laws of War', in Barnett and Duvall (eds.), *Power and Global Governance*; Helen M. Kinsella, 'Gendering Grotius', in *Political Theory*, forthcoming.

¹⁰⁶ Helen Fein, *Genocide: A Sociological Perspective* (London: Sage, 1993).

¹⁰⁷ Josef Kunz, 'The Chaotic Status', p. 103.

¹⁰⁸ Although I do not have the space to adequately address it here, the very fact that President Bush and his administration comply with the principle of distinction in wars against barbarians points to a significant change in the laws of war and understandings of the requirements of civilisation. This can be dated, perhaps, from post-World War II. See my unpublished manuscript.

¹⁰⁹ Brief of Amici Curiae Bipartisan Coalition of National and International Non-Governmental Organizations in Support of Petitioners for 03-334 and 03-343.

For the question of what civilisation requires – of whom and in relation to whom – is one that lies at the nexus of the laws of war and politics. It is here that an analysis of discourses can facilitate our recognition of what is ‘rich, complex, and intriguing’ about international law and politics by surfacing their productive, recursive effects.¹¹⁰ However, this requires an explicit engagement with the history and structure of international law and international politics – an engagement that the paradigmatic study of international law and international relations still only ‘implicitly examines’.¹¹¹

¹¹⁰ Christian Reus-Smit, *Politics of International Law*, p. 44.

¹¹¹ Kal Raustiala and Anne-Marie Slaughter, *International Law and Compliance*, p. 548.