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"NEW RULES FOR NEW WARS" INTERNATIONAL LAW AND JUST WAR DOCTRINE FOR IRREGULAR WAR

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This article traces the increasing pressures exerted upon international law and international institutions from two sources: the humanitarian military interventions (and failures to intervene) in the aftermath of the Cold War during the decade of the 1990s; and the "global war on terror" and wars of counterinsurgency and regime change fought during the first decade of the 21st century. Proposals for legal and institutional reform in response to these challenges emerge from two distinct and largely independent sources: a "publicist" or theoretical discussion among scholars in philosophy, law, and international relations; and a formal or procedural discussion among diplomats and statesmen, both focusing upon what the latter group defines as a "responsibility to protect" (R2P). This study concludes with recommendations for reform of international humanitarian law (or Law of Armed Conflict), and for reformulations of professional ethics and professional military education in allied militaries, both of which will be required to fully address the new challenges of "irregular" or hybrid war.

I. INTRODUCTION

The new era of "irregular warfare" (IW) is thought to consist primarily of the substantial changes and challenges in military tactics and mili-

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tary technology—the so-called "revolution in military affairs" (RMA).[1] On the one hand, asymmetric warfare, including a variety of types of terrorist attacks involving rudimentary technology, has largely replaced the massive confrontations between opposing uniformed combat troops employing high-tech and heavy-platform weaponry that previously characterized conventional war.[2] On the other, new kinds of "emerging technologies," including military robotics and unmanned weapons platforms, non-lethal weapons, and cyber-attacks, ever-increasingly constitute the tactical countermeasures adopted by established nations in response.[3]

The era of irregular or unconventional war also, however, requires another revolution—a cultural sea-change that has been much harder to identify, and much slower in coming. This radical cultural shift entails re-conceptualizing the nature and purpose of war-fighting, and of the war-fighter. This relatively neglected dimension of RMA requires new thinking about the role of military force in international relations, as well as about how nations raise, equip, train, and, most especially, about the ends for which these nations ultimately deploy their military forces. The new era of IW requires that military personnel develop a radically altered vision of their own roles as warriors and peacekeepers, as well as appropriate recognition of the new demands IW imposes upon the requisite expertise, knowledge, and limits of acceptable conduct for members of the profession of arms. Finally, the new era of IW requires that those institutions and personnel who educate and train future warriors be much more effective in helping them understand and come to terms with their new identity, the new roles they will be expected to play in the international arena, and the new canons of professional conduct appropriate to those roles.

This essay traces two parallel and independent discussions of the nature of this cultural transformation. The first, which I have attempted to document over the past two decades, consists in the discussion among philosophers, ethicists, political theorists, and international relations scholars concerning the evolution of "just war" doctrine.[4] These discussions exhibit

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[1] *See Prologue* to ROBBIN F. LAIRD & HOLGER H. MEY, THE REVOLUTION IN MILITARY AFFAIRS: ALLIED PERSPECTIVES 1 (1999).

[2] *See id.*

[3] *See id.*

[4] *See* George R. Lucas, Jr., *The Reluctant Interventionist: The Critique of Realism and the Resurgence of Morality in Foreign Policy in* GEORGE R. LUCAS, JR., PERSPECTIVES ON HUMANITARIAN MILITARY INTERVENTION (Univ. of California Institute of Governmental Studies/Public Policy Press 2001); George R. Lucas, Jr., *The Role of the International Community in the Just War Tradition: Confronting the Challenges of Humanitarian Intervention and Preemptive War*, 2 JOURNAL OF MILITARY ETHICS 122–144 (2003); George R. Lucas, Jr., *From Jus ad bellum to Jus ad pacem: Rethinking Just War Criteria for the Use of Military Force for Humanitarian Ends* , 72–96 *in* ETHICS AND FOREIGN INTERVENTION, Eds. Donald Scheid and Deen K. Chatterjee (New York: Cambridge Univ. Press, 2004); George R. Lucas,

what might be termed "theoretical authority," as contrasted with the "formal" or procedural authority inherent in a second, distinct discussion among diplomats and statesmen regarding the need for a more robust understanding of the role of military force in international affairs. In the aftermath of Rwanda and Kosovo in particular, this second, distinct category of deliberation reflected a widely held conviction that, though the international community had not done nearly enough in Rwanda, we might well have done as much harm as good in Kosovo.[5]

II. FIN DE SIÈCLE: A RETROSPECTIVE RECENT HISTORY OF JUST WAR

Shortly after the fall of the Berlin Wall in 1989, during what was heralded as the end of the Cold War in the early 1990s, it became increasingly clear to many of those working in military ethics, international law, and just war doctrine that conventional thinking about the ways in which national military forces were trained and deployed had to be radically re-conceived.[6] The impetus for this re-conceptualization came from many quarters, some more well-grounded (in hindsight) than others. The era of superpower nuclear rivalry seemed at an end, and the era of conventional nation-state conflict diminished in importance. Especially in the aftermath of the short and decisive first Gulf War in 1991, it appeared increasingly unlikely that any "rogue nation" would again undertake large-scale conventional military aggression against a neighbor without fear of an overwhelming response by the international community collectively.[7]

Sadly, the euphoria of what was then triumphantly described by U.S. President George H.W. Bush as the emergence of a "new world or-

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Jr., *Jus in bello for Nonconventional Wars*, Delivered at the International Studies Association 49th Annual Meeting (Mar. 26, 2008), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/2/5/3/5/9/p253594_index.html; George R. Lucas, Jr., *"Methodological Anarchy:" Arguing about Preventive War* 33–56 *in* EMPOWERING OUR MILITARY CONSCIENCE: TRANSFORMING JUST WAR THEORY AND MILITARY MORAL EDUCATION (Ed. Roger Wertheimer London Ashgate Press 2010).

[5] Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001), *available at* http://www.iciss.ca/pdf/Commission-Report.pdf; Gareth Evans & Mohamed Sahnoun, *Intervention and State Sovereignty: Breaking New Ground*, 7 GLOBAL GOVERNANCE 119, 119 (2001); Report of the High-level Panel on Threats, Challenges and Change, Gareth Evans, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

[6] Mary Caprioli & Peter F. Trumbore, *Rhetoric Versus Reality: Rogue States in Interstate Conflict*, 45 JOURNAL OF CONFLICT RESOLUTION 770, 770 (2005), *available at* http://people.reed.edu/~ahm/Courses/Reed-POL-358-2010-S1_SWP/Syllabus/EReadings/13.1.Rogues_CaprioliTrumbore2005Rhetoric.pdf.

[7] *Id*. at 776.

der,"[8] was supplanted by the growing recognition that the new order consisted largely of a new era of conflict, one that more typically involved the sorts of actions that militaries had hitherto undertaken only rarely and reluctantly. Instead of a stable world order, with violent conflict deterred by the collectivity of nations committed to an orderly rule of law, we had instead entered the era of asymmetric war, humanitarian intervention, peacekeeping, and stability operations—the sorts of conflicts that, at the time, were grouped variously under headings like "police actions" or MOOTW ("military operations other than war").[9]

The varied, improvised, highly inconsistent, and inchoate experiences of military interventions for humanitarian or law enforcement and peacekeeping purposes in Somalia, Haiti, Bosnia, East Timor, and, towards the end of that decade, Kosovo, contributed to this realization. Even more telling, however, was the dramatic failure of humanitarian military intervention by the United Nations (U.N.) in Rwanda.

The questions centered no longer on legal or moral *permissions* or the legal license to carry out conventional military campaigns of the sort that current international law pertaining to self-defense and collective security exclusively addresses. Instead, the even more troubling question in these new cases was, when should member-nations in the so-called "international community" recognize an *obligation* to come to the aid of vulnerable

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[8] Maj. Bart R. Kessler, Bush's New World Order: The Meaning Behind the Words 1 (Mar. 1997) (unpublished research paper, Air Command and Staff College), *available at* www.oldthinkernews.com/.../Bushs-New-World-Order-The-Meaning-Behind-the-Words.pdf.

[9] U.S. Dept. of Def., Irregular Warfare (IW) Joint Operating Concept (JCO) 1–10 (Sept. 11, 2007), *available at* http://www.au.af.mil/au/awc/awcgate/dod/iw_joc.pdf. The Department of Defense's designation has since been replaced by a somewhat more refined, tripartite distinction between "irregular" warfare (IW), major combat operations (MCO), and SSTRO: "stabilization, security, transition and reconstruction operations" (such as humanitarian intervention and disaster relief). IW itself is defined as "A violent struggle among state and non-state actors for legitimacy and influence over the relevant populations. IW favors indirect and asymmetric approaches, though it may employ the full range of military and other capabilities, in order to erode an adversary's power, influence, and will." The most recent "term of art" to describe the complex interplay between conventional and unconventional operations is "hybrid" war. These distinctions are somewhat artificial and for the most part, poorly drawn and even more poorly described. The message, however, is clear: the U.S. and other allied and coalition governments will face criminal and terrorist attacks of unconventional sorts, employing a variety of tactics and weapons, aimed largely at civilian populations rather than enemy governments or their military forces, and aimed at creating insecurity among the populations that are destabilizing to their respective governments. The joint doctrine is aimed at defining and formulating strategic responses to a variety of such conflicts.; *see also* Jeffrey Hasler, *Defining War*, 24 SPECIAL WARFARE 12, 15–17 (Jan.-Feb. 2011) (defining "Irregular Warfare" and "Hybrid Warfare" while cautioning that "[r]egular review and restatement of approved definitions and their descriptions are necessary as sources of doctrine" so that unofficial terms and theories like "Hybrid Warfare" do not get used incorrectly).

nations or victimized populations?[10] What sets of conditions or criteria would constitute, for example, not so much a "just cause" for going to war, as an *overriding obligation* to come to the aid of vulnerable victims? And, upon whom would such an obligation fall?[11]

The answers to such questions were far from clear then, and remain so even today. Especially after the Rwanda debacle, commentators invoked the image of the Kitty Genovese murder in New York City in the 1960s and wondered, by analogy, what sort of "community" the international community was, if its member-states consistently turned a blind and uncaring eye away from such tragic and seemingly avoidable cases of genocide.[12] Professor Stanley Hoffman, Harvard University, first began discussing criteria for what he termed "jus ad interventionem" in the mid-1990s.[13] Hoffman analogized to traditional *jus ad bellum*, in which he advocated primarily the legal *right* of individual nations and coalitions to intervene militarily, or otherwise override the prevailing legal principle of national sovereignty, in the face of massive abuses of human rights.[14]

While his learned analysis of the pending collapse of the traditional nation-state system of sovereignty was respectable, Hoffman's response was not quite rightly put. Instead, my own term at the time was *jus ad pacem*, stressing the peace-restoring intentions of military intervention, and discussing not the right, but the *obligation* to undertake such missions, even if reluctantly, in defense of the most basic human rights of vulnerable peoples.[15] Subsequently, the U.S. Secretary of State, Madeline K. Albright, long under intense criticism for her unwillingness to recognize such an obligation during the Rwandan genocide, began to argue for replacing the so-called Weinberger-Powell doctrine[16] governing the resort to military force in

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[10] Gregory Reichberg & Henrik Syse, *Humanitarian Intervention: A Case of Offensive Force?*, 33 SECURITY DIALOGUE 309, Sept. 2002, at 309, 313–14.

[11] I first highlighted this dilemma in 1998, in an essay entitled "The Reluctant Interventionist," for a working group hosted by the Carnegie Council for Ethics in International Affairs, and subsequently delivered as a colloquium at a meeting of the American Philosophical Association on Wednesday March 24, 1999, just hours after NATO began its air campaign in Kosovo. Lucas, *The Reluctant Interventionist*, *supra* note 4; George R. Lucas, *Ethical Issues in the Use of Military Force for Humanitarian Intervention*, (Carnegie Council on Ethics and Int'l Affairs and the Nat'l War Coll., Keynote Discussion Paper for the Third Conference on Ethics and Warfare in the 21st Century, February 5–6, 1998).

[12] Lucas, *The Role of the International Community*, *supra* note 4, at 122, 126–27.

[13] *See* STANLEY HOFFMAN, THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION (Notre Dame University Press 1996).

[14] *Id.*

[15] *See* Lucas, *The Reluctant Interventionist: The Critique of Realism and the Resurgence of Morality in Foreign Policy*, *supra* note 4; Lucas, *From Jus ad bellum to Jus ad pacem* , *supra* note 4.

[16] Also cited simply as the "Weinberger Doctrine" after Secretary of State "Cap" Weinberger, who first officially issued the guidance. The doctrine in fact reflects the collective

America, with what we briefly came to call the "Albright Doctrine."[17] American military might, she asserted, would henceforth be at the disposal of the U.N. and the international community to aid desperate peoples and nations ravaged by state failure and genocide.[18]

Simultaneously, the eminent just war theorist, Michael Walzer, argued in the preface to the third edition of *Just and Unjust Wars* that, on the one hand, while nothing concerning conventional war had changed sufficiently to prompt the re-writing or supervening of that classic work, on the other hand, everything else pertaining to justifiable war *had* changed.[19] In particular, he admitted that humanitarian military intervention—something viewed by him in that earlier work with some suspicion as a marginal military concern, undertaken by traditional nation-states with decidedly mixed motives—now properly occupied center stage in the debate over just war doctrine at the dawn of the new millennium.[20]

My own concern continued to be that these conversations all remained focused upon *permissions* to intervene, or the presumed legal *right* to intervene or override national sovereignty for humanitarian purposes. This did not seem adequately to address, at the time, the dilemmas faced in Rwanda, Bosnia, or Kosovo, in which other nations appeared reluctant to take on what otherwise appeared a moral (if not a legal) *obligation* to come to the aid of vulnerable victims of state failure, or of state-sponsored ethnic oppression.[21] There was a widespread and mistaken belief (then and now)

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thinking of Vietnam-era military veterans, including the eventual Chairman of the Joint Chiefs and Secretary of State Colin Powell. The doctrine chiefly held that U.S. military forces should never again be committed to armed conflict without a clear and widely supported mandate from Congress and the American public, including clear objectives defining mission success and an "exit strategy" to terminate hostilities, and the commitment of sufficient troops and *materiel* to ensure overwhelming military superiority in pursuit of the mission. It is patently obvious that most IW conflicts of whatever sort during the past two decades failed to satisfy most of these criteria. *See Excerpts from Address of Weinberger,* N.Y. TIMES, Nov. 29, 1984, at A5.

[17] Madeleine K, Albright, U.S. Secretary of State, *American Principle and Purpose*, Forrestal Lecture, U.S. Naval Academy (Apr. 15, 1997) (transcript available at http://secretary.state.gov/www/statements/970415.html); Madeleine K, Albright, U.S. Secretary of State , *The United States and Assistance to Post-Conflict Societies*, USAID Conference on Democracy, Human Rights, and Reintegration (Oct. 31, 1997) (transcript available at http://secretary.state.gov/www/statements/971031.html); Madeleine K. Albright, *Farewell Remarks*, Washington, D.C.: U.S. Department of State (Jan. 19, 2001) (transcript available at http://secretary.state.gov/www/statements/2001/010119.html).

[18] *Id.*

[19] MICHAEL WALZER, JUST AND UNJUST WARS xi–xvi (3d ed. 2000).

[20] *Id.*

[21] *See* Raymond Bonner, *The World; Begging for Mercy For Rwanda -- Earlier This Time*, N.Y. TIMES, Nov. 27, 1994, *available at* http://select.nytimes.com/gst/abstract.html?res=F4

that the U.N. Genocide Convention of 1948 specifically imposed such obligations on U.N. member nations, or at least upon the Convention's signatories or contracting parties.[22] However, as became painfully obvious in more recent cases such as Darfur, that Convention most assuredly does not impose any such obligations.[23] Accordingly, it gradually became apparent that attention needed to be focused more clearly on questions of formal or procedural authority at the international level for assigning or affixing responsibility for *jus ad pacem* in terms of what the German Enlightenment philosopher, Immanuel Kant, would term an "imperfect duty," rather than, as with Hoffman, merely a legal right or permission.[24]

Even more, I worried that no one in that discussion at the time was focusing on the equally important question that I labeled *jus in pace* (in

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[22] Karen Engle, *"Calling in the Troops": The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189, 211 (2007).

[23] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, *available at* http://www.hrweb.org/legal/genocide.html. The Convention offers a working definition of genocide, and binds its signatories and contracting parties not to engage in it or tolerate it within their borders, and to do all in their power to apprehend and bring to justice those individuals implicated in such acts. Only Article 8 addresses actions other than criminal prosecution of individual perpetrators, and it merely states that "any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide." It does not compel signatories or contracting parties to do this, *nor does it specify what actions might be required* of the United Nations or its member states in response, apart from the procedures for indictment, extradition, and criminal prosecution of perpetrators of genocide after the fact. The document was a product of its time, aimed at denouncing Nazi atrocities, and admonishing nations against harboring Nazi fugitives from justice. With the benefit of hindsight, it is clear that those, like Albright, who feared to invoke its provisions had not actually ever read them, and that many readers had merely imagined or extrapolated an idealistic, but wholly nonexistent responsibility of nations to employ military force, if necessary, to halt or prevent genocide. The Darfur example decisively refutes this interpretation. For a concise summary of current understanding and status of this convention, *see* William A. Schabas, *Convention on the Prevention and Punishment of the Crime of Genocide* (2008), *available at* http://www.un.org/millennium/law/iv-1.htm.

[24] Perfect duties, or what Kant later called "duties of justice," are those in which specific actions (or restrictions on action) are defined for obligors as duties owed to specific obligees, while "imperfect" duties, or "duties of virtue," describe categories of activities required of obligors, without defining either specific obligees, or specific actions owed them. The former category of moral duties are properly the subject of legislation within a legal system of justice (according to Kant), while the latter (e.g., the moral duty of philanthropy) cannot intelligibly be legislated because of this lack of specificity of obligee and obligation that would normally constitute the content of such legislation. This distinction is first introduced in the second chapter of Kant's *Grundlegung* (1783), and later refined in his *Rechtslehre*, or "Doctrine of Justice" (1795). *See, e.g.*, EMMANUEL KANT, METAPHYSICS OF MORALS (Mary Gregor, trans., Cambridge University Press, 1996) (1797).

analogy with *jus in bello*) concerning the constraints imposed on the motivations and conduct of those charged with use of deadly force during such campaigns. The chief difference, I argued, was that armed combatants in these new kinds of irregular or unconventional conflict did not face an enemy in the conventional sense, towards (or more properly, between) whom the customary law of armed conflict and relevant Geneva conventions comprising the bright-line statutes of international humanitarian law applied (affording protection to non-combatants, prisoners, and relief workers).[25] Instead, they functioned as a kind of international constabulary, charged with keeping order, making peace, providing security, and attempting to reestablish and maintain the Rule of Law in situations in which the normal order had broken down.[26] "War" in the twenty-first century had come to resemble less the invasion of Normandy, or Japan, or even of Kuwait, than it now resembled the activities of police and national guardsmen during a domestic riot, or similar situations in which domestic security forces are mobilized to counter a criminal conspiracy, gang violence, or to maintain order and provide relief during natural disasters such as earthquakes, hurricanes, tsunamis, or famine. The sudden elevation of such activities from occasional and marginal status to the principle justification for the use of military force in the international arena, however, required a radical rethinking of conventional military preparation and education, as well as of the relevant rules of engagement governing combat and occupation.

This claim was not well received at the time. In Afghanistan, it is not well received even now. Many colleagues in international relations countered in effect that "war is war," and that the same rules still governed the conduct of soldiers and protection of noncombatants in these humanitarian and peacekeeping operations as had governed, for example, their behavior toward German and Japanese soldiers and civilians during World War II.[27]

That conviction, however, seemed relatively easy to refute. There are sharp differences between conventional military operations and constabulary operations, even as vaguely defined at the international level, mostly involving risk, force protection, and the economical (or proportional) use of force. As one example, wholly unlike the rules of engagement during conventional combat, military troops engaged in constabulary operations, or otherwise providing security as part of an occupying military force, are only

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[25] *See, e.g.*, U.S. ARMY, FM 3-0, OPERATIONS vii (2008) *available at* http://www.army.mil/fm3-0/FM3-0.pdf ("Army doctrine now equally weights tasks dealing with the population—stability or civil support—with those related to offensive and defensive operations.").

[26] *Id.*

[27] *See, e.g.*, Cian O'Driscoll, *New Thinking in the Just War Tradition: Theorizing the War on Terror*, *in* SECURITY AND THE WAR ON TERROR (Alex J. Bellamy, et al. eds., 2007).

permitted to use lethal force in cases of individual self-defense, and only as a last resort.[28]

It has been a vindication of sorts to have those important differences between combat and police work subsequently recognized and affirmed as official doctrine, almost a decade later, in the current U.S. Army field manual on "counterinsurgency operations" or COIN.[29] As that manual itself now clarifies, the moral calculus in these areas changes substantially in a manner that frequently imparts more risk and responsibility for discrimination, proportionality, and non-injury to combatants, similar to the rules of engagement governing the use of force by domestic police.[30] As the interesting "7th Chapter" on "Leadership and Ethics during Counterinsurgency" makes clear, these restrictions are imposed equally on moral and legal, as well as prudential grounds.[31] Overall, this inescapable equivocation between roles, and the incumbent responsibility the manual demands to know both which role is which, and (even more importantly) *what* role the individual combatant is fulfilling at any given moment, has become the chief characteristic of IW.

At the time, a decade ago, my senior military colleagues were even more outraged at this suggestion. "We are not police, and ought not to undertake constabulary duties," several fumed. "We are the 'pointy end' of the spear! When normal order disappears, we are warriors who kill people and break things until someone tells us to stop."[32]

"No," I would reply. "It is now criminal conspirators, terrorists, and lawless gangs of genocidal vigilantes who are killing people and breaking things (or, most recently, engaging in piracy on the high seas). In this new era of warfare, you are the warriors who intervene forcefully to *protect the*

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[28] *See* U.S. ARMY, *supra* note 25, at vii.

[29] *See* HEADQUARTERS DEPT. OF THE ARMY, FM 3-24/MCWP 3-33.5, COUNTERINSURGENCY, vii (2006) ("This field manual/Marine Corps warfighting publication established doctrine . . . for military operations in a counterinsurgency (COIN) environment."), *available at* http://usacac.army.mil/cac2/coin/repository/FM_3-24.pdf.

[30] *See id.* at Foreword.

[31] See id. at 7-1.

[32] One routinely hears general characterizations of one's proper role such as this from military personnel. In this instance, however, I refer to principled disagreements I had between 1997 and 2005 with my counterparts in the Chair of Leadership at the Naval Academy: Admirals Leon A. "Bud" Edney, Henry "Hank" Chiles, and Vice Admiral Michael Haskins. All three were highly experienced and accomplished retired Navy flag officers. Bud Edney flew combat air missions over North Vietnam in Squadron VA-164 and had over 1,000 carrier landings in his career. Hank Chiles was a nuclear submariner, experienced on the front lines of the "Cold War" as former CO of "STRATCOM," America's strategic nuclear forces. Mike Haskins had completed his career as the Inspector General of the Navy, and, together with Admiral James Ellis, made all the final targeting decisions during the Kosovo air campaign.

intended victims, and who, with that same point of your spear, order *those perpetrators of violence* to stop." First and foremost, that is to say, warriors during IW provide protection and security for intended victims until their criminal oppressors are forced to desist.[33] That, I submit, constitutes an enormous departure from the warrior's role during conventional combat, and it has proved extremely challenging for contemporary military personnel to understand and adapt to this radically altered role. This constitutes the principal challenge in Afghanistan at present.

III. THE RISE OF THE GLOBAL WAR ON TERROR (GWOT)

Such was the state of the debate as of the Year 2001. It was an inchoate conversation, a kind of intellectual or methodological anarchy that is historically inherent in the publicist tradition of international law and international norms generally. No one is "in charge" of this conversation. Instead, in the absence of any clear-cut chain of command or "ecclesiastical authority," various individuals and communities opine, editorialize, lament, and propose without any clear hierarchy or structure of authority, or any systematic way of vetting their proposals. No organization or international body licensed or commissioned studies of these matters, and the extent to which anyone paid attention to the proposals I have cited in the literature and conversation of the time was largely a function of the prominence or visibility of their authors, rather than the merit of the proposals themselves. Recognizing this problem, my own efforts at the time were to gather and systematize these various discrete proposals and contributions with full attribution, in hopes of provoking a more reflective conversation about where we stood, and what problems (such as generating appropriate *jus in bello* constraints for irregular warfare) still needed to be more carefully addressed.

Meanwhile, concurrent with the aforementioned events in the 1990s, two decades of seemingly random and scattered terrorist attacks aimed increasingly at the United States and its citizens directly, came to a head in the coordinated suicide air attacks on the Trade Towers in New York and the Pentagon in Washington, D.C. Like genocide and humanita-

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[33] This was the position taught and advocated in leadership and ethics programs at the U.S. Naval Academy. It is consistent with the view of contemporary warriors. *See* MICHAEL IGNATIEFF, THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE 5–7 (1998) (discussing moral connections many Westerners feel for the rest of the world, the impact it has on ethnic accommodation in their own countries, and how countries heal after war and savagery); *see also* SHANNON E. FRENCH, THE CODE OF THE WARRIOR: EXPLORING WARRIOR VALUES PAST AND PRESENT 7 (1st paperback ed. 2003) ("By setting a standard of behavior for themselves, accepting certain restraints, and even "honoring their enemies," warriors can create a life-line that will allow them to pull themselves out of the hell of war and reintegrate themselves into their society.").

rian disasters, these acts signaled the dramatic weakening and the increasing irrelevance of the traditional nation-state system, and along with it the legal norms of state sovereignty and territorial integrity. The existing system of international law, organized specifically around the "legalist" or "Westphalian" paradigm, addressed the governance of states as collective entities treated under law like biological individuals.[34] This conceptual framework seemed pathetically unsuited to the task of discerning the appropriate response to "non-state actors" engaged in coordinated and large-scale acts of violence aimed indiscriminately at random citizens, even as that same body of law had failed miserably to confront the earlier dilemma of governments that turned violently against their own citizens.[35]

Into this legal and moral void, unfortunately, strode neoconservative advocates of a "new American realism," with relatively little experience in foreign relations and a decidedly contemptuous attitude for international law and international institutions generally.[36] They invoked these crises as occasions for promulgating doctrines of unrelenting vigilantism and unilateralism. They proposed to meet force with force, fight fire with fire, and unwittingly and unreflectively in the process, to stoop to the level of criminals and terrorists in order to combat them. The U.N. and other institutions of international law were ridiculed, by Richard Perle in particular, for their unfortunate tendencies toward ineffectiveness and corruption. Both of these admittedly undeniable tendencies appeared to ground the assertions of the "new realists" that these corrupt and ineffective international organizations

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[34] *See* John Davenport, *Just War Theory, Humanitarian Intervention, and the Need for a Democratic Federation*, FORDHAM UNIV. 36–37, http://www.fordham.edu/philosophy/davenport/texts/globalfed-justwar.pdf (last visited Mar. 11, 2011) (discussing the concept that state sovereignty should be conceived as "derivative from recognizing 'socially basic rights' and providing (to some significant degree) the goods to which they entitle individual citizens: for government [rights] are. . .derived from the rights of the people").

[35] As writers like Martin L. Cook and Henry Shue complained, the underlying conceptions of sovereignty and territorial integrity seemed, in the latter instances at least, unintentionally to grant the legal right to commit unlimited wrongs with the legally secure jurisdiction of one's own borders. As Cook remarked at the time, this seemed a steep moral price to pay for collective security. *See* MARTIN L. COOK, THE MORAL WARRIOR: ETHICS AND SERVICE IN THE U.S. MILITARY (2004); Henry Shue, *Limiting Sovereignty*, *in* HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 11, 12 (Jennifer M. Welsh ed., 2004); MARTIN L. COOK, *UNCHARTED WATERS*, 7th Annual Stutt Lecture, U.S. Naval Academy (Feb. 23, 2006), *available at* http://www.usna.edu/ethics/Publications/CookPg1-24_Final.pdf.

[36] Including former Vice President Richard Cheney, national security adviser Richard Perle, deputy defense secretary Paul Wolfowitz, Secretary of State Condelezza Rice, and a number of prominent neoconservative political theorists (including both William and Irving Christol), collectively known as "neocons" or derided by their critics as "chicken hawks." See Cheyney Ryan's recent assessment. CHEYNEY RYAN, THE CHICKENHAWK SYNDROME: WAR , SACRIFICE, AND PERSONAL RESPONSIBILITY 1–2 (2009).

and legal institutions could justifiably be ignored or overridden.[37] Commentators wondered whether the traditional distinction between combatants and noncombatants during asymmetric conflict was any longer sustainable, and whether maintaining a respect for the lives of bystanders merely disadvantaged the "law-abiding" side in these new conflicts.[38] Others wondered whether otherwise rights-respecting states or their representatives should now be authorized to engage in torture, or enhanced interrogation of unindicted suspects in these conflicts, or whether they were entitled to apprehend and detain (as well as interrogate) these suspects in ways that utterly flaunted existing domestic values, and represented clear and intentional violations of existing provisions of international law.[39]

That such pernicious doctrines could gain what turned out to be a devastating foothold in this country and abroad I finally attribute in part to the understandable confusion, fear, and anger that accompanied the sequence of events narrated above. But, it also reflected the fact that what might otherwise have constituted sober voices in this international conversation were "AWOL." While political scientists and scholars in international relations continued to debate the evolution of just war doctrine, largely in its conventional mode,[40] philosophers and ethicists had allowed their own participation in these ongoing conversations to lapse almost to silence in the aftermath of the Vietnam War. Legal scholars, for their part, remained blindly, almost pathologically wedded to their increasingly outmoded Westphalian paradigm, stubbornly invoking the bright-line provisions of international law to rail against the improvised, case-based responses of nations and their military forces as those forces, in turn, tried vainly to cope with these largely-unfamiliar problems.[41] Few were willing to admit that these crises presented problems which those laws and legal institutions themselves were poorly equipped to address.

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[37] Lucas, *The Role of the International Community*, *supra* note 4; Lucas, *Methodological Anarchy: Arguing about Preventive War*, *supra* note 4.

[38] *See* MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT (2010); Jeffrey Reiman, *Ethics for Calamities: How Strict is the Moral Rule Against Targeting Noncombatants?* 93–106, *in* EMPOWERING OUR MILITARY CONSCIENCE: TRANSFORMING JUST WAR THEORY AND MILITARY MORAL EDUCATION (Roger Wertheimer ed., 2010).

[39] *See* ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 162–63 (2002).

[40] *See generally* Richard Falk, *Legality to Legitimacy: The Revival of the Just War Framework*, HARV. INT'L REV. (May 6, 2006), http://hir.harvard.edu/interventionism/legality-to-legitimacy?page=0,2; Michael Walzer, *The triumph of just war theory—and the dangers of success*, SOCIAL RESEARCH (2002), http://rci.rutgers.edu/~tripmcc/phil/walzer-triumphof justwartheory.pdf.

[41] *See generally* John Dugard, *International Terrorism and the Just War*, 12 STAN. J. INT'L STUD. 21 (1977); Ruti Teitel, *The Wages of Just War*, 39 CORNELL INT'L L.J. 689 (2006).

The challenge we now face as a result of these decidedly unfortunate developments is a stark and unpalatable choice between two alternatives. We may choose to adhere, on the one hand, to increasingly outmoded institutions and principles grounded in the "legalist paradigm" or otherwise in the priority of sovereignty in the Westphalian system of nation-states, and cling stubbornly to the increasingly irrelevant structural deficiencies of the U.N. itself. The alternative, on the other hand, requires abandoning all these underlying conceptions and international institutions based upon them, and instead allowing this recent "perfect storm" of tragic events, from Rwanda to Iraq, to persuade us (as the "chicken hawks" propose) that there are no longer any "rules" governing conflict, and that each side or participant is licensed to do whatever it takes to prevail in pursuit of their narrow interests.

IV. THE NEW RULES FOR NEW WARS

Perhaps we should instead phrase the problem as a question. If the old rules, paradigms, and institutions are no longer adequate to ground our understanding and situate our responses to these new developments, what (other than "nothing") should take their place? What, for example, should be the rules governing entry into, and military conduct during, these new sorts of conflicts? When, how, and upon whom are obligations to intervene in the interests of the lives and welfare of vulnerable peoples to be imposed? How in particular should we address the criticisms of realists and "vigilantes" who claim that they are not bound by rules or conventions of any sort, and should be free to protect their citizens' lives and properties wholly as they see fit, by whatever means are deemed "necessary?"[42]

It is first incumbent to ask whether the discussions of the limited justification for such resort to force can be meaningfully made simply by appeal to traditional just war criteria. As stated, the proposed military operations, whether aimed at counter-terrorism, stability and peacekeeping or humanitarian intervention, are not "war" in the conventional sense. Ought we, therefore, in evaluating the justifications for such operations, to appeal solely to criteria designed to evaluate the moral justification of conventional

[42] To date, as I stated in the introduction to this paper, there have been two substantive answers: the collective set of guidelines emerging from what might be termed scholarly debate and analysis during the 1990s, to which I referred above (and which are re-printed in Table 1), and the work of international diplomats during the period 2000–2005, under the aegis of the Canadian government and the United Nations, addressed primarily to the dilemma of intervention to protect the peoples of failed states like Rwanda from harm. This work, originally undertaken by the International Commission on Intervention and State Sovereignty (2001) has come to be known as "The Responsibility to Protect" (R2P). *See* INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, http://www.iciss.ca/menu-en.asp (last visited Mar. 11, 2011).

war?[43] During the decade of post Cold War humanitarian interventions in the 1990s, for example, this question remained unformulated, but it can be seen in hindsight to have driven much of the discussion. Alternative criteria, proposed piecemeal by Michael Walzer, Stanley Hoffman, David Luban, and others began to emerge in order to adjudicate disputes concerning the moral legitimacy of military interventions in Bosnia, Rwanda, Somalia, Haiti, and Kosovo—interventions that frequently seemed to invoke moral obligations on the part of the "international community" that appeared sharply at variance with "bright-line" provisions of international law.[44] In 2001, I began to offer and promote a collective summary of those alternative *jus ad pacem* criteria emerging from a variety of voices and discussions that continued throughout the debate on preemptive self-defense in 2002–2003.[45]

Subsequently, U.N. Secretary-General Kofi Annan commissioned a report from a "High-level Panel on Threats, Challenges and Change," de-

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[43] As an illustration of the trouble one can generate: the three divisions of the American Philosophical Association, for example, considered a resolution opposing the proposed American-led intervention in Iraq, which offered as its chief justification for such opposition the claim that: "Both [JWT] and international law say that states may resort to war only in self-defense." *American Philosophical Association Resolution: Philosophers Vote Overwhelmingly Against the War*, Feb. 2003, VANDERBILT UNIVERSITY, *available at* http://www.vanderbilt.edu/peaceforum/apa.html. Neither, of course, says any such thing without considerable ambiguity, though this is a fair (if imprecise) summary of what might be termed the "historical vector" of JWT away from ambiguous moral discourse and toward the specificity and clarity afforded by the legalist paradigm, in which only self defense against aggression constitutes a justification for war. This resolution as stated initially was passed in the Eastern division by a margin of nearly five-to-one, notwithstanding its historical and factual inaccuracies. The Pacific division, by contrast, passed a modified resolution expressing "serious doubts about the morality, legality and prudence of a war against Iraq led by the United States," on somewhat less than a three-to-one majority, only after deleting as inaccurate the characterization of just war doctrine and international law contained in the earlier draft. *Proceedings and Addresses of the American Philosophical Association*, 77 AM. PHILOSOPHICAL ASS'N 2 (Nov. 2003), *available at* http://www.jstor.org/stable/3219744. (The Central Division wisely deferred the motion, on the grounds that its substance exceeded the range of their collective expertise).

[44] *See* Ragvi Mahalingam, *The Compatibility of the Principal of Nonintervention with the Right of Humanitarian Intervention*, 1 UCLA J. INT'L L. & FOREIGN AFF. 221 (1996), *see also* Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1278 (2010), *available at* http://nclawreview.net/wp-content/uploads/2010/05/Mohamed.wptd_.pdf.

[45] *See* Appendix; *see also* LUCAS, PERSPECTIVES ON HUMANITARIAN INTERVENTION, *supra* note 4; *see also* GEORGE R. LUCAS, JR. & WILLIAM RUBEL, ETHICS & THE MILITARY PROFESSION: THE MORAL FOUNDATIONS OF LEADERSHIP (Pearson, 2004; 3rd ed. 2010) (The table included in the appendix to this article is widely studied by future military officers in the United States).

signed to re-think the ideal of collective security in the U.N. Charter.[46] Led by Gareth Evans, president of the International Crisis Group in Brussels and former minister for foreign affairs of Australia, the High-level Panel issued five basic guidelines, in the form of questions for the U.N. Security Council to consider, when deciding whether to authorize the use of military force:

> (a) *Seriousness of threat*. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?
>
> (b) *Proper purpose*. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
>
> (c) *Last resort*. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
>
> (d) *Proportional means*. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
>
> (e) *Balance of consequences*. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?[47]

More detail and guidance, concerning "R2P" specifically, is offered in the original report of the "International Commission on Intervention and State Sovereignty" (ICISS), still largely organized (as are the above criteria) along the lines of traditional "just war" doctrine.[48] The initial report of the Commission in 2001, in the wake of 9/11, drew a distinction between the responsibilities of nations to protect their own citizens (e.g., the then-pending United States response to the 9/11 terrorist attacks), and the responsibilities incumbent upon states confronting what the report termed "human

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[46] REPORT OF THE SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES, AND CHANGE: A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY (New York: United Nations, 2004).

[47] *Id*. at para. 207; *see also* ALEX BELLAMY, A RESPONSIBILITY TO PROTECT THE GLOBAL EFFORT TO END MASS ATROCITIES (Griffith University 2009).

[48] *See* REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY: THE RESPONSIBILITY TO PROTECT (International Development Research Centre 2001).

protection claims in other states."[49] That report, in turn, conceived of the underlying question entirely, as did Stanley Hoffman and others at the time, in terms of the "rights" of states to intervene in other states, and the controversy this engendered regarding state sovereignty.[50] However, under the heading of "operational principles," it did engage the issue of the duties of caution and restraint incurred by the intervening militaries.[51]

In such a conceptual framework, humanitarian intervention and "R2P" does seem to be a concern that is quite distinct from counter-terrorism, COIN, and so-called preventive war, not to mention retaliation of the sort subsequently inflicted by the United States and NATO allies upon the Taliban and al-Qaeda operatives in Afghanistan. The International Convention on Intervention and State Sovereignty (ICISS) understood itself to be addressing only the "*right* of humanitarian intervention," and held that the remaining issues were, according to the Commission, "already well addressed" by prevailing international law and U.N. Security Council procedures.[52] With the benefit of hindsight, however, there are grounds for questioning the rigidity of those distinctions, and especially for questioning the adequacy of international law or institutions to handle any of them.

Our actual experience with such conflicts has taught, in contrast, that the nature of the conflicts themselves tend to defy and defeat any tidy conceptual distinctions we try to impose upon them. About the only distinction that survives experience with these conflicts is, once again, the acknowledgement that whatever these military actions are, they do not comprise conventional war in any meaningful sense, as the ICISS report itself explicitly acknowledges in its concluding sections on "Operational Dimensions,"[53] and have radically different objectives than either traditional warfighting or traditional peace-keeping on the older U.N. model. In particular, any military operation will need to demonstrate in all cases going forward what Rwanda especially required: the ability and willingness to engage in much more robust action than traditional peacekeeping, as currently envisioned under prevailing U.N. guidelines.[54] This is especially problematic for

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[49] INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY viii (Dec. 2001), *available at* http://www.iciss.ca/pdf/Commission-Report.pdf.

[50] *Id.* at 8.

[51] *Id.* at xiii.

[52] *See id.* at vii–viii.

[53] *Id.* at 57.

[54] INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 49, at 57 (2001). The later, and broader, U.N. High-Level Panel report put this matter succinctly in its executive summary:

> Long-established customary international law makes it clear that States can take military action as long as the threatened attack is imminent, no other means would

the U.N., because, as the 2001 report acknowledges, the U.N. does not wage (or traditionally to this point, has not waged) war, and lacks the kind of "logistic planning and support, and command and control capacity, that would make possible either war-fighting or military interventions of any significant size."[55] I would add a final caveat: that the approach taken by the Commission itself, in focusing on a *right* or *legal permission* to override sovereignty, failed in the end to fully engage the difficulty inherent in R2P itself: once again, the *obligation or duty* (rather than some sort of "right") to intervene in the face of an impending or ongoing humanitarian crisis.

Military commanders, for their part, likewise have now come to recognize that the real underlying issue is simply that IW/HI/COIN do not constitute "war" in any conventional meaning of the term. This is so, whether the "wars" in question are wars fought in response to provocation (as the U.N.-authorized, NATO-led war in Afghanistan that began in November, 2001), or intended instead either to prevent, or halt the progress of a humanitarian disaster in a failed state, or whether the war in question is a preventive war of counter-terrorism and regime change (as in Iraq). Whatever the view of the justification, advisability, or feasibility of such wars, they are definitely not "conventional."

Consider that in all the instances cited above, military operations resembling conventional war—for instance, the sort of conflict described and analyzed by Clausewitz, or illustrated by wars from WW I and II through Korea—were concluded in a very short period.[56] For example, Taliban forces were unseated from governance in Kabul and, along with al-Qaeda operatives, driven out of the country or into hiding in Pakistan, while Sad-

> deflect it, and the action is proportionate. The Security Council has the authority to act preventively, but has rarely done so. The Security Council may well need to be prepared to be more proactive in the future, taking decisive action earlier. States that fear the emergence of distant threats have an obligation to bring these concerns to the Security Council.

REP. OF THE U.N. HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY (EXECUTIVE SUMMARY) 4 (2004), *available at* http://www.un.org/secureworld/brochure.pdf. While implicitly a rebuke to the U.S. for waging unilateral or vigilante preventive war, the statement acknowledges the importance of considering this option at some level as an appropriate response to international criminal conspiracy or a pending humanitarian crisis. Taken in context, moreover, the issue is treated as part and parcel of a comprehensive approach toward international law and order that incorporates preventive war, counter-terrorism, and law enforcement with humanitarian intervention, peace-keeping, and stability operations. *Id.*

[55] INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 49. At the time of this writing, the U.N.'s attempt to respond to the rebellion and retaliation in Libya are providing a dramatic test of the structural limitations described in the report.

[56] Joseph J. Collins, *Planning Lessons from Afghanistan and Iraq*, 41 JOINT FORCES QUARTERLY, June 2006, at 10 (noting the difference between conventional warfare and the asymmetric wars in Afghanistan and Iraq).

dam Hussein's army was largely routed and dispersed, and Hussein himself driven from power and into hiding, all in a matter of weeks.[57] Conventional military operations (attacks against a conventional enemy, employing conventional weapons and tactics) were quickly replaced by the same kind of humanitarian peacekeeping and stability operations undertaken variously in Bosnia, East Timor, and Kosovo, or unsuccessfully in Rwanda.[58] These are precisely the operations (illustrated precisely, in turn, by the case studies) featured in the Army COIN field manual: the challenges of a military occupation, pacification of the countryside, re-building of the basic infrastructures of civil society, providing personal and community security through effective police work, re-establishing the rule of law, and basically building trust through other kinds of effective public relations with the local population of the occupied territory (the clichéd, but no less important, "winning hearts and minds").[59] They also, in both instances, resulted in an insurgency, or, more properly, the rise of a number of distinct insurgent groups, opposed to the occupation and determined at very least to impede or prevent success in the IW operations described and hoping eventually to wrest power from the occupation or from the resulting provisional governments the occupation supported.[60]

Counterinsurgency and humanitarian military interventions both have this property: that they are not, strictly speaking, war at all, but something more akin to domestic constabulary operations carried out by a non-constabulary force—sometimes, as in Iraq, comprised technically of "vigilantes"[61]—operating somewhat *ad hoc* in the international arena. There has been a good deal of discussion since 2003 of the justifiability of preventive wars of intervention, a sub-category of what medieval and early modern

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[57] *Id.*

[58] *See generally* INST. FOR NAT'L STRATEGIC STUDIES, GLOBAL STRATEGIC ASSESSMENT: AMERICA'S SECURITY ROLE IN A CHANGING WORLD 145–61 (2009) (describing the humanitarian interests involved after the close of conventional warfare).

[59] *See generally*, U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL, Forward (2006) http://www.fas.org/irp/doddir/army/fm3-24.pdf ("A counterinsurgency campaign is, as described in this manual, a mix of offensive, defensive, and stability operations conducted along multiple lines of operations.").

[60] *Id.*

[61] This is my terminology, introduced originally in a NEH-sponsored "Summer Institute on War and Morality" that I co-directed with Dr. Albert Pierce in 2004. Lucas, *Methodological Anarchy*, *supra* note 4, at 33 (Roger Wertheimer ed., 2010). The term is employed effectively by one of the participants in that institute, Prof. Jordy Rocheleau, in *Preventive War and Lawful Constraints on the Use of Force: An Argument against International Vigilantism*, 198–202, *in* RE-THINKING THE JUST WAR TRADITION (Eds. Brough, Lango, & van der Linden Albany, NY: State University of New York Press, 2007) (citing my then-unpublished work).

scholars termed *bellum offensivum.*[62] Much of this debate has centered on challenging the widely accepted views of Michael Walzer, who had argued that, in contrast to the limited justification afforded to preemptive wars of self-defense, truly preventive wars, even those fought to impede a "gathering threat" rather than an "imminent danger," could never under any circumstances be justified.[63]

This blanket proscription now seems to many of us, in the present era, yet another example of a stubborn and excessively rigid conceptual distinction that simply "does not answer" to the dilemmas of contemporary humanitarian and counter-insurgency (counter-terrorist) missions. Instead, we might turn out in fact to be extremely *reluctant* to condemn a preventive intervention in a nation's sovereignty for the purposes of avoiding or halting a massive humanitarian disaster, such as genocide. And, we might grant more latitude to such humanitarian-oriented missions than we would allow to preventive security interventions undertaken to combat terrorism, especially in the absence of concrete evidence (rather than speculation) concerning the existence or precise activities of an ongoing criminal conspiracy.

V. FROM *JUS AD PACEM* TO *JUS IN PACE*

There is a good deal to "muddle through" in all this, involving both entry into, behavior during, and perhaps just as importantly, wrapping up and walking away from such inherently messy, and morally (not to mention legally) vague military operations. It is nevertheless important to try to do a better job, since IW conflicts, for the foreseeable future, constitute the principal kinds of conflicts we will ask our military forces to undertake on our behalf.[64]

First, the set of distinctions that both international law and these recent U.N.-sponsored studies presuppose seem to suggest that the use of military force in response to, say, a terrorist attack is both more clearly de-

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[62] *See* Allen Buchanan & Robert Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT'L AFF. 1, 4 n.8 (2004) ("The humanitarian law of war can be seen as an imperfect institutionalization of some of the most important *jus in bello* principles of just war theory. However, given the distinctive risks of the preventive use of force, special institutional arrangements are required for responsible decisions to use force preventively, over and above better compliance with rules of humane warfare that are designed to apply to all uses of force."); David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 160, 173 (1980) ("In such circumstances a conception of jus ad bellum like the one embodied in the UN definition fails to address the moral reality of war. It reflects a theory that speaks to the realities of a bygone era.").

[63] *See* Michael Walzer, *The Crime of Aggressive War*, 6 WASH. U. GLOBAL STUD. L. REV. 635, 640 (2007) ("It seems to me that prevention is still wrong; ordinary brutality is not a just occasion for military attack.").

[64] *See generally* George R. Lucas, Jr., *"This Is Not Your Father's War" –Confronting the Moral Challenges of "Unconventional" War*, 3 J. NAT'L SEC. L. & POL'Y 329 (2009).

fined and legitimated, as well as utterly distinct from, a decision to use military force to halt a humanitarian disaster.[65] That may seem initially to be a straightforward demarcation. But after the ruling government and the terrorists themselves have been routed, it is less clear what governs the behavior of the intervening forces in rebuilding and restoring the rule of law in the nation it has invaded. The latter involves counterinsurgency in the form of constabulary and security work, but also reconstruction and humanitarian relief. And, in any case, if a nation is "clearly justified" in intervening in another to rout terrorists who have attacked its soil, does it not have a similar right to prevent such attacks, or the growth of such criminal conspiracies elsewhere as well—as the U.N. "High Level Panel" report on international security in 2005 strongly suggests?

Given all these uncertainties and contingencies, as well as the underlying similarities of the types of activities in which invading forces must finally engage in order to impose a workable economic and political solution to them, it seems unwise in the extreme to draw sharp distinctions stubbornly between them. Nor should we fail to acknowledge the underlying challenge that all of these "irregular" and unconventional military operations pose for our understanding of existing international law and institutions.

In his essay, *Why Serve the State?*, Martin L. Cook offers a telling historical synopsis of the current paradox of professional military ethics and military services. Cook links all the foregoing questions to the underlying tension between moral claims that are universal in scope on one hand, such as the respect for non-combatant immunity, and the protection of basic human rights, and the particular claims and responsibilities laid upon military personnel as employees or "servants" of individual nation-states.[66] They have as both moral agents generally, and especially as professional military personnel armed with deadly force, to protect and not harm the innocent, and to provide benevolent quarter to those in crisis.[67] Those universal moral claims and duties arising from the profession of arms, however, often come into tension with the duties of military personnel as servants of the state to carry out or defend the policies (as well as the citizens and the borders) of the particular state in which they happen to reside.[68] The resulting paradox of military professionalism that he describes drives many of the dilemmas we confront in humanitarian operations and other forms of IW, and them-

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[65] U.N. Secretary-General, Follow-up to the outcome of the Millennium Summit: Note by the Secretary-General, ¶¶ 5–11, U.N. Doc. A/59/565 (Dec. 2, 2004).

[66] *See generally*, MARTIN L. COOK, THE MORAL WARRIOR 39–53 (2004).

[67] *Id.* at 51.

[68] *Id.* These arguments originally appeared in the author's 1994 Reiff Lecture at the U.S. Air Force Academy: WHY SERVE THE STATE?: THE MORAL FOUNDATIONS OF MILITARY OFFICERSHIP.

selves are caused by, rather than resolved through reliance upon, international law grounded in the Westphalian nation-state paradigm.

Humanitarian intervention is a particularly pronounced, but by no means unique, manifestation of this underlying Westphalian dilemma. Troops trained and equipped to defend the nation, consisting of individuals who have sworn an oath to risk their lives in that endeavor, are instead deployed to risk their lives and expend their resources in the defense of other nations and their peoples, in a fashion that cannot easily be subsumed under the existing U.N. statutes pertaining to "collective security." Elsewhere, as in Afghanistan, hostilities may begin in a straightforward fashion, as the military forces of allied nations, under a conventional legal understanding of self-defense or collective security, invade that country in pursuit of criminal elements and rogue governments that shelter them. They quickly find themselves enmeshed in risky, highly fraught, and dangerous situations of peacekeeping, stability, security, and humanitarian reconstruction that looks for all the world like a COIN response to a local insurgency, or to internal political conflicts that are really none of the occupying coalition's business. On the other hand, if the insurgency or internal political rivalries and instabilities themselves constitute a regrettable result of having allowed a problem like Afghanistan or Rwanda to fester too long in the past, would it not be in some sense obligatory, as well as permissible, to try to "head off" such situations before they reach a tragic climax in the present?

For these reasons, I have linked both counter-terrorism and law enforcement with humanitarian intervention in the list of conditions I have compiled in Table One (appendix) from some two decades of wrestling with these questions and problems. In particular, I think it crucial to determine when we might incur *obligations* to undertake these missions, as well as the legal and moral "right" to do so. Issues of conflict of interest in decision-making and deployment likewise need to be carefully considered. And finally, guidance concerning the rules of engagement and the constraints on use of force needs to be radically re-thought in light of those obligations and underlying intentions. This is what the provisions summarized in Table One,[69] and those comprising the summary of R2P, attempt to accomplish.[70]

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[69] *See* Appendix, below.

[70] It bears mention that Martin Cook now questions the very intelligibility, as well as the practical feasibility, of attempting to do this. *See* Martin Cook, *Accountability for International Intervention/Protection Activities*, 29 CRIMINAL JUSTICE ETHICS 2 (2010). Alongside serious practical problems of poor performance and lack of accountability of peace-keeping forces themselves, he raises serious conceptual objections. If R2P, for example, constitutes an "imperfect duty" in the sense described above, then it is in principle impossible to legislate, because we cannot intelligibly compel nations to "do good works" for unspecified others. *Id.* This involves thinking clearly not only about "sovereignty" per se, but also about the purpose and function of nations themselves as guarantors of security and common life for their citizens. Using their militaries for benevolent but risky purposes in other, failing states

When comparing the two sets of proposals, however, there are some revealing differences. For example, there is no restriction in the diplomatic proposals baring blatant conflicts of interest, such as might tempt powerful nations from exploiting the difficulties of their neighbors in order to cloak a naked grab for territory or resources in the guise of a "humanitarian mission" of liberation or salvation.[71] More disconcerting is the relative lack of detailed emphasis[72] in the diplomats' discussion of the following points:

> (1) substantive reflections on how the intervening military forces, the combatants, should conduct themselves during the intervention (Table I, 7); and
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> (2) what has recently come to be called *jus post bellum*: namely, how and when the intervening military forces ought to declare their work completed, and withdraw (Table I, 3 (ii)).[73]

The first consideration is the traditional realm of *jus in bello*, the Law of Armed Conflict (LOAC). As with the discussion of conventional *jus ad bellum* above, the question is in large part whether or not our customary (and somewhat inchoate) understanding of LOAC in its conventional sense will cover the demands of what I have termed *jus in pace*. It is precisely this matter that the U.S. Army COIN field manual addresses, precisely because we cannot really rely on past practice and understanding as adequate guidance for these circumstances.[74]

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may constitute a violation of the tacit underlying agreement that any nation has with its own military personnel, and it would be beyond the legal reach of the U.N. or the international community to override this contractual arrangement by compelling any nation to utilize its military in this fashion.

[71] *See* Appendix, Table I, Provision 3(i).

[72] The ICISS report offers some, but not a great deal, of guidance regarding humanitarian operations, and none regarding any other features of IW. It holds principally that such operations must proceed on the basis of "clear objectives; clear and unambiguous mandate at all times; and resources to match" and entail what the report terms a "common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command." It cautions that such operations require acceptance by the intervening forces of "limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state." To this end, the report urges the adoption by intervening militaries of "rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law," and, in particular, that such forces accept "that force protection cannot become the principal objective" of the humanitarian mission. ICISS, THE RESPONSIBILITY TO PROTECT: PRINCIPLES FOR MILITARY INTERVENTION ¶ 4(a–d) (Dec. 2001), *available at* http://www.iciss.ca/report-en.asp.

[73] Appendix, Table I.

[74] U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL3-25 (2007). This is not to argue that these circumstances are new or unprecedented. President George Washington offered advice on just these points to Col. Benedict Arnold, during what American historian, Joseph J. Ellis, termed "America's first preemptive war" against Canada in 1775. Much

Like conventional *jus in bello*, *jus in pace* stresses the morality of means. Consider the final entry on permissible strategy, tactics, weapons systems, and conduct, in Table 1.[75] Alongside conventional *jus in bello* constraints, like noncombatant immunity (discrimination) and proportionality, these *jus in pace* guidelines also address issues specific to COIN and humanitarian interventions, such as the tactic of "force protection."[76] Force protection in normal instances is taking reasonable precautions to insure the safety and security of one's own military forces, ranging from posting sentries and establishing checkpoints, to avoiding the temptation to commit troops to domestic altercations or disturbances whose nature and cause are unclear.[77] Owing to the absence of national self-interest, however, NATO troops were famously told by their commanding officers in Kosovo, as in Haiti, that the political purposes of the intervention were "not worth the loss of a single one of your lives."[78] In Rwanda, Haiti, and Bosnia, this lack of the intervening military's identification with the military mission resulted in a transition from normal force protection to the extreme of "radical" force protection, in which intervening troops refused, or were even ordered not to provide, elementary protection or security to victimized populations (e.g., as in the case of Belgian Army Captain Luc Lemaire at the Don Bosco school compound in Rwanda, or the complaint of U.S. Army captain Lawrence Rockwood concerning the welfare of Haitian political prisoners).[79] In other instances, intervening NATO troops were initially ordered to refrain from attempting to interdict indigenous criminals, such as Radovan Karadžić and

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of his advice, like that of General Petraeus in the U.S. Army's current COIN manual, concerns showing respect to the inhabitants of occupied territories, whose affections we wanted at least not to alienate, treating POWs well, avoiding the commission of atrocities or acts of wanton cruelty and punishing its own individual members for any perceived infractions of these basic principles by the intervening army, and finally, showing "cultural awareness" and sensitivity, especially in matters of religion. *See* Brian O'Malley, *Lessons on Iraq From a Founding Father*, WASH. POST, Mar. 1, 2008, at A-15. Arnold's troops, the article avers, won the affections of Canadians initially, but squandered their good will through blatant and repeated violations of Washington's edicts.

[75] Appendix, Table I.

[76] *Id.* at 7(v).

[77] Ronald Rokosz & Charles Hash, *Changing the Mindset Army Antiterrorism Force Protection*, JOINT FORCES Q., Autumn/Winter 1997–98, at 112.

[78] George R. Lucas, Jr., *New Rules for New Wars: Just War Doctrine for Irregular War* (2006), http://www.allacademic.com//meta/p_mla_apa_research_citation/4/1/6/0/3/pages416035/p416035-1.php.

[79] In Rwanda, this was the case for Belgian Army Captain Luc Lemaire at the Don Bosco school compound, and U.S. Army Captain Lawrence Rockwood in Haiti concerning the welfare of Haitian political prisoners. Both cases are described in CASE STUDIES IN ETHICS AND THE MILITARY PROFESSION, EDS. GEORGE R. LUCAS, JR. AND W. R. RUBEL (3d ed., New York: Pearson, 2007).

Gen. Ratko Mladić, the so-called "Butchers of Srebrenicia," in Bosnia, lest in doing so they generate more conflict and imperil their own welfare.[80]

While no soldier generally wishes to die in war and competent commanders always do everything they can to avoid "taking casualties," the entire concept of risk and risk-aversion are very different in COIN than in conventional war. It is easier to bomb from on high than at lower, more discriminate, but also more risky altitudes. Likewise, it is easier to bomb, shell, or call in a missile attack, than to order a ground force to invade a local village, house-to-house. In conventional war, as Walzer demonstrates, there is no obligation that compels troops to undertake the riskier tactic other than the legal requirement to avoid intentional criminal negligence in the use to deadly force.[81] As Walzer's numerous cases on this topic indicate, compliance with that vague legal restriction is often a matter of considerable variance in judgment.[82] By contrast, in COIN operations, it is imperative that occupation security forces incur the greater risk, in order to avoid even the appearance, let alone the actual prospect, of harming those they have intervened to protect.[83]

The other peculiarity of interventions, as with police work, is what can and should be done with POWs who turn out to be wanted criminals, or who are at least subject to indictment under international law. Unlike the diplomatic provisions of R2P, the provisions of Table I, Section 7 above compel invading forces to arrest those (such as Milosovek, Karadžić, Mladić or, for that matter, Saddam Hussein) charged with, or suspected of crimes against international law, and compel them to turn over such suspected criminals to appropriate international authorities, such as the International Criminal Court, rather than to summarily try them in understandably hypersensitive and highly biased local venues.

VI. FROM *JUS IN PACE* TO *JUS POST BELLUM*: HOW LONG TO STAY AND WHEN TO "GO HOME"

Neither the academic nor the diplomatic discussions of proposed "new rules" for IW explicitly address so-called *jus post bellum*. Yet this, as I mentioned, is precisely what COIN and humanitarian interventions primarily are, or else what they quickly, and almost exclusively become. Thus, any attempt to encompass "new rules" for IW conflicts must surely take account of this recent development in just war theory. Just war doctrine

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80 *Id.*

81 Walzer, *supra* note 19, at 305.

82 *Id.* at 304–324.

83 Kevin Parker, *Worth the Risk: Balancing Force Protection to Achieve Effective COIN Results*, THE WRIGHT STUFF (Feb 3, 2011), http://www.au.af.mil/au/aunews/archive/2011/0603/0603Articles/MajParkerOnCOIN.pdf.

must henceforth be understood, on this new account, to consist of three (rather than merely two) parts, each corresponding to war's beginning, prosecution, and end: *jus ad bellum*, the justification of *entering into* war, *jus in bello*, the military conduct of adversaries *during* war, and *jus post bellum*, the obligations of war's victors to its victims to establish a just and lasting peace, sufficient to prevent the onset of future conflict. *Jus post bellum* is not merely an afterthought, but a preeminent and overriding obligation laid upon belligerents in the interest of justice. No war can be termed "just," and no belligerents exonerated for their participation in it, in which there is not, from the outset, a manifest intent (revealed in policy and practice) to ensure a stable peace that provides for both long-term security and the protection of basic human rights in that war's aftermath. This is part and parcel of the full import of "right intention" in classical *jus ad bellum.*[84]

In particular, the three dimensions of just war discourse are not neatly separable, and must not be compartmentalized.[85] One cannot discuss *jus ad bellum* in abstraction, distinct from the expectation that combatants, proposing to defend or enforce justice, must employ only just means in the realization of just ends (*jus in bello*). This intention must precede, and thoroughly infuse combat, even as the intention to restore peace with justice and to repair a society's ability to sustain and protect its citizens (*jus post bellum*) must infuse both deliberations about war and the subsequent conduct of it. War's onset, its conduct, and its aftermath flow seamlessly together, and policymakers, as well as combatants, are drawn together into a web of moral responsibility for war's advent and outcome. These new insights prove especially pertinent to the conduct of irregular war.

Regarding rules of engagement during *jus post bellum*, in the aftermath of more conventional hostilities undertaken for otherwise morally-justifiable ends, we might reasonably expect (and a minimally-just state itself should consistently demand) that its own military forces commit themselves to respecting the most basic elemental rights of noncombatants in the enemy state. This commitment must be sustained through education and training leading up to deployment, and reinforced consistently during the period of deployment. This is especially important when, as in humanitarian interventions or regime change, the opposing state and its rank-and-

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[84] *See* Brian Orend, *Just War Theory and the Ethics of War and Peace*, *in* THE ASHGATE RESEARCH COMPANION TO ETHICS AND INTERNATIONAL RELATIONS 115, 117 (Patrick Hayden ed., 2009); *see also* BRIAN OREND, MICHAEL WALZER ON WAR AND JUSTICE, 94 (2000) (presenting a discussion of "right intention" in Walzer's theory of *jus ad bellum*); *see also* BRIAN OREND, WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE 190 (2000) (discussing "right intention" from a Kantian point of view).

[85] *See* BRIAN OREND, THE MORALITY OF WAR 31 (2006) (presenting the history of just war theory and examining its multiple dimensions as being logically and conceptually distinct, but inextricably intertwined).

file citizens do not themselves constitute "the enemy" in any meaningful sense.

I have argued myself that, far from constituting a lofty or unrealistically high standard, this principle is simply a demand for consistency of purpose.[86] Commitment to noncombatant immunity, as well as to restraint, proportionality, and the economy of force, are not abstract ideals, let alone reducible to uncomprehending or cynical compliance with the requirements of international law. Instead, adherence to such principles essentially defines the intervening state or coalition's commitment to minimal justice in the first place, from which it derives its authority to wield the sword in defense of justice. By marked contrast, it is *not* the putative justice of their cause, but the sustained and intentional injustice of their means, that identifies and morally de-legitimates the tactics of both terrorists and so-called "rogue states."

It is this *jus in pace* and *jus post bellum* asymmetry in behavior and intentionality that, finally, allows us to discriminate with confidence between a warrior and a murderer, as well as between legitimate acts of war, and criminal activities. And it is this principle that must be taught, emphasized, and reinforced with unmistakable clarity in the education and training of legitimate military forces.[87] This demonstrates, in turn, that the historical and culturally bound dimensions of both law and tradition regarding conventional war and traditional just war doctrine are currently being pushed to their limits. This is especially noteworthy as we wrestle with the structure and future of international institutions like the U.N., or debate the meaning of an "international community" as a legitimate form of authority, and wonder together in good faith about the future reforms needed in international law to authorize, and even obligate the use of force in the interests of justice, and for the protection of human rights.

APPENDIX

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TABLE 1

Provisions for Jus ad Pacem and Jus in Pace
(Humanitarian and Counterterrorist Interventions)

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[86] *See* Lucas, *The Reluctant Interventionist: The Critique of Realism and the Resurgence of Morality in Foreign Policy*, *supra* note 4; Lucas, *From Jus ad bellum to Jus ad pacem*, *supra* note 4.

[87] *See* EMPOWERING OUR MILITARY CONSCIENCE, *supra* note 38 (Ed. Roger Wertheimer; presenting a collection of works on the education of just war theory and ethics for military personnel).

1. (A) "Humanitarian intervention is justified whenever a nation-state's behavior results in grave and massive violations of human rights, or poses an imminent threat of grave harm to other nations and peoples."

(i) intervention is justified when these behaviors result in grave threats to the peace and security of other states and other peoples; and

(ii) intervention need not be restricted to such cases, but may be justified when the threats to human rights are wholly contained within the borders of the state in question.

(B) States may use military force in the face of threats of war, or impending terrorist actions, or preparations by states or non-state actors actively engaged in doing, or imminently threatening, grave harm to other nations and peoples, whenever:

(i) there is a manifest intent on the part of such parties to injure; and

(ii) there is a degree of active preparation that makes that intent a positive danger; and

(iii) both of the foregoing occur in a situation in which waiting, or doing anything other than deploying military force preemptively, greatly magnifies the risk.

2. (A) "Sovereignty may be overridden whenever the protection of the rights of that states' own citizens can be assured only from the outside."

(i) sovereignty may be overridden whenever the behavior of the state in question, even within its own territory, threatens the existence of elementary human rights abroad; and

(ii) sovereignty may be overridden even when there is no threat to human rights outside the borders of the state in question, providing the threat to that state's own citizens are real and immediate.

(B) "The decision to override sovereignty and intervene must finally be subject to review and approval by an appropriate collective international body."

(i)The *decision* to intervene, whether to protect human rights or enforce international law, *ought never* to be undertaken unilaterally; however

(ii) a unilateral agent of intervention may be authorized by an appropriate international tribunal; and also

(iii) a regional security organization may be authorized by an appropriate international tribunal to undertake a military intervention for humanitarian or counterterrorist purpose; and

(iv) in the absence of prior approval, the burden of proof falls upon the intervening power to demonstrate that it has unilateral license to intervene, based upon *prima facie* compliance with all of the above.

3. The intention in using force must be restricted without exception either to purely humanitarian concerns, such as the restoration of law and order in the face of natural disaster, or to the protection of the rights and liberties of vulnerable peoples (as defined in the United Nations Charter and the Universal Declaration of Human Rights), or to halt or prevent violations of international law by nations or non-state actors that pose a clear and imminent threat of grave harm to other nations or peoples.

(i) intervening nations and their militaries should possess no financial, political or material interests in the outcome of the intervention, other than achieving the publicly proclaimed humanitarian ends, enforcing international law, or averting the risk of grave and substantial harm to other nations and peoples; and

(ii) the intervening nation or nations must establish a set of conditions under which the need for intervention will have been satisfied, together with a reasonable timetable for achieving their humanitarian ends or eliminating the perceived threat.

4. Military intervention may be resorted to for humanitarian purposes, or to avert the risk of terrorism or enforce vital provisions of international law, only when all other options have been exhausted.

(i) this condition is deemed to have been met when reasonable nonviolent efforts have been unsuccessful and there is no indication that future attempts will fare any better.

5. Military force may be utilized for humanitarian purposes, , or to avert the risk of terrorism or enforce vital provisions of international law, only when there is a reasonable likelihood that the application of force will meet with success in averting a humanitarian tragedy.

(i) a resort to military force may not be invoked when there is a real probability that the use of such force will prove ineffective, or may actually worsen the prospects for a peaceful resolution of the crisis; and

(ii) military force may not be employed, either for humanitarian ends or for the purposes of counterterrorism and law enforcement, whenever collective, public debate and deliberation fail to determine straightforward and feasible goals to be achieved by the application of force.

6. The lives, welfare, rights and liberties to be protected from humanitarian disaster or terrorist attacks must bear some reasonable proportion to the risks of harm incurred, and the damage one might reasonable expect to inflict in pursuit of humanitarian ends.

7. Military force used for humanitarian or counterterrorist purposes may never encompass the use of strategy, tactics, weapons systems or battlefield conduct that are themselves recognized as illegal or immoral.

(i) captured belligerents must be treated as prisoners of war according to established international conventions, and may not be mistreated or subject to trial or sentence by the intervening forces; and

(ii) prisoners of war accused of humanitarian crimes and abuses, or of engaging actively in planning for a doing grave and indiscriminate harm to other nations and peoples, may be bound over for trial by an appropriate international tribunal; and

(iii) civilian noncombatants must never be deliberately targeted during a humanitarian or counterterrorist military operation; and

(iv) military necessity during humanitarian or counterterrorist operations can never excuse the use of weapons, or pursuit of battlefield tactics, already proscribed as illegal under established international treaties and conventional law of armed combat; and

(v) finally, military necessity during humanitarian or counterterrorist operations cannot excuse tactics or policies, such as "force protection," that knowingly, deliberately, and disproportionately reallocate risk of harm from the peace-keeping forces and belligerents to non-combatants.

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