Ethical Issues in the Use of Military Force in Irregular Warfare

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In contrast to the conventional deployment of force in collective security operations, “irregular” military interventions may entail radically different rules of engagement and expectations regarding the lawful conduct of military personnel than anything they have previously trained for or encountered.

In a widely publicized incident on the night of May 20, 1997, a young Hispanic-American goatherd, 18 year-old Esequiel Hernandez, Jr., was killed in an altercation with a four-man Marine unit assigned, at the request of the U.S. Border Patrol, to guard a well-known drug smuggling route across the Rio Grande. Hernandez carried a .22 caliber rifle which he allegedly fired several times into the darkness in the general direction of the camouflaged Marines. Apparently believing the unit under fire from a suspected drug smuggler, 22 year-old Marine Cpl. Clemente Banuelos returned fire, killing the lad. I certainly do not wish either to revisit or to pass judgment on this unfortunate incident which, in any case, is not itself an example of humanitarian intervention per se. I stress the age, ethnicity, and circumstances of the incident, however, to emphasize that the young Marine in question behaved exactly as he was trained to do under the standard rules of engagement during combat. Unlike civilian-trained domestic peacekeeping and law enforcement personnel, a soldier in combat is not required to identify himself or give warning to an armed enemy, certainly not when under fire. Choosing to deploy these young Marines for a reasonable and important mission for which they had not been trained inadvertently created a situation in which such a tragedy was quite likely to occur.

Similarly, in decrying the allegedly “Widening Gap between the Military and Society,” Washington Post columnist (and author of Making the Corps) Thomas E. Ricks finds evidence of this gap in the example of Marine battalion asked to participate in restoring order during the Los Angeles riots of 1992. Domestic police officers asked some of the Marines to “cover them” while they confronted an armed suspect barricaded in his residence. The Marines (Ricks reports) shot approximately 30 rounds of covering fire into the building before the police stopped them. Such events are indicative of what we

*Prepared for the Carnegie Conference on “Ethics and Warfare in the 21st Century” (April, 1998); delivered to the NROTC brigade of midshipmen, University of California (Berkeley), April 1999.

1“U.S. Probes Marine’s Killing of Texas Teen,” Baltimore Sun, Saturday, 16 August 1997, p. 3A.

2Atlantic Monthly, July 1997, p. 77; see his book upon which this article is based, Making the Corps (NY: Scribners, 1997), which is replete with examples of these sorts, and discusses the growing problem with using this socially distinctive military organization increasingly for humanitarian political purposes abroad.
might label the “Bertolt Brecht” syndrome, in which specific sorts of conduct—licensed, encouraged, and even rewarded during wartime under combat conditions—become, in sudden or radically altered peacetime situations, criminally negligent.

These incidents merely point to a conflict between quite distinctive organizational cultures: in both examples, the Marines involved were responding exactly as they had been trained since boot camp to respond. The problem was not their actions, but the radically altered context in which they transpired—a context with which they were understandably unfamiliar, and for which they had not been primarily trained. Incredibly thus far the only lesson to be derived from such incidents is that one must exercise caution in deploying American military personnel in domestic operations!

The implications for humanitarian and peacekeeping activities abroad should, however, be just as plain and as potentially problematic. Using military forces alongside, or in place of, domestic civil authorities in any situation likewise confronts military personnel with a radically altered context of operation, in which the familiar and long habituated rules of engagement or laws of armed conflict may no longer apply. Hence, individuals trained as warriors under one set of ROEs will be expected to make a seamless transition to activities much more like those of domestic peacekeeping and law enforcement authorities, who (as the foregoing examples dramatically illustrate) operate under a very different set of constraints governing acceptable conduct under fire. If sophisticated political pundits and journalists, with the benefit of both leisure and hindsight from which to reflect on such issues, persistently misdiagnose the nature of the dilemma this presents (as the foregoing cases also unintentionally illustrate) it seems rather much to expect of a young Lance Corporal, or even a more thoroughly trained junior officer, that these should, in the midst of armed conflict, immediately intuit the relevant differences of context, call to mind the appropriate ROEs, and adhere without significant probability of error to the modes of professional conduct appropriate to wholly unfamiliar situations absent the training, and the supporting institutions of civil society. Police protect citizens of their own country from aberrations in the lawful order of that society, and do so with the consent and support of the laws and civil institutions of that society. By contrast, humanitarian interventions aimed not just at peacekeeping but at peace-making between hostile belligerents (as in Bosnia) inject military forces into a largely unordered society lacking wholly in the guidance and support that normal peacekeeping forces rely upon for guidance. In many instances, we who issue these orders are at a loss even to define clearly the problem that we want the military to fix.

This is not meant to excuse gross negligence, unprofessional behavior, or absence of reasonable common sense on the part of military personnel. Rather, I mean to suggest that in carrying out the “Albright Doctrine” we have recently committed, and will likely continue in the future committing, military personnel to the adjudication and resolution of circumstances of conflict that would challenge the common sense of the most seasoned and experienced professional. It would be well to reflect on how we ought to revise enlisted and officer training, and mission briefing procedures, to anticipate such problems.

Thus far, beyond discussing the principles of justifiable intervention (jus ad interventionem) that should govern the commitment of military force, our discussion of the practical problems of deployment and ROEs has been scanty, and consisted almost exclusively in case-based or case-driven analysis of past mistakes. From the Somalian intervention, the principle case-study lesson drawn has been as follows: when, if ever, should a humanitarian peacekeeping force, interposed to insure delivery of food and medical aid to victims of famine, permit itself to become involved in the competition between rival warlords and gangs whose own military incursions endanger both the rescue workers and the humanitarian coalition military force installed to protect them? The focus on so-called “mission creep” as the alleged “mistake” made by humanitarian forces there ignores a number of salient features of that case. Given the initial humanitarian mission, and reasonably competent assessments of the difficulties imposed by internal civil strife in realizing those initial mission objectives, it was certainly within the

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3In reference to Brecht’s classic, anti-war play, “Mother Courage and Her Children,” a persistent theme is the shifting context-dependence of certain act-descriptions: one of the heroine’s sons is decorated as a hero for committing actions in support of the army during wartime that when (unknowingly to him) peace is suddenly declared, become classifiable as theft and murder, leading to his arrest and execution.
bounds of common sense and professional experience to extend the military aspects of that mission to include forcible cessation of military hostilities and even attempted interdiction of the principals responsible for the disruptive behavior. Rival warlords were not only disrupting the production and distribution of local food supplies, they were intimidating relief workers and stealing the donated food and medical supplies from abroad. It was not unreasonable to seek to put a stop to this behavior. The “mistake” was less in the “creep”—which in fact represented a logical extension of the activities necessary to support the mission, to be carried out proactively by personnel better equipped and trained for that sort of activity than for the mission to which they had been originally assigned—than in the subsequent failure to recognize and obtain prior international approval and adequate support for the increased needs and costs in personnel and materiel that the additional activities would exact from mission participants.

On the other hand, as illustrated in the journalist Mark Bowden’s dramatic account, Blackhawk Down, the overall assessment of just what the nature of the conflict was in that country was far from competent or complete. Hence, military professionals representing a wide range of preparedness and battle-hardened combat expertise were drawn together into an altercation in behalf of a goal that may have been dramatically distorted. In any case, the nature of the conflict they would face, as that dramatic account indicates, was far more complex and confusing than anything for which they had prepared.

In any case, what lesson are we to draw from the Somalian experience to guide collective military intervention in the former Yugoslavia? Is there any logical reason to suppose that ad hoc and post facto principles drawn from the former experience will apply a priori to the subsequent crisis? Yet this is precisely the assumption that governed our response to the Bosnian crisis, beginning with our reluctance to become involved militarily at all (despite the obvious and desperate need for military intervention to halt the bloodshed), and continuing with the decision of UNPROFOR and NATO forces to maintain strict neutrality with regard to the warring factions. In light of Somalia, both reactions are reasonable. The net result, however, was disastrous: unnecessary prolongation of genocidal activities, followed by the spectacle of NATO forces turning a blind eye while individuals indicted and charged under international law with direct involvement in some of the most monstrous crimes since the Holocaust roamed the countryside with impunity, held jobs in the newly established civil authority, and in some cases even continued to threaten innocent civilians without fear of reprisal.

Are there any obvious lessons to draw from these experiences to govern our conduct in the next humanitarian altercation? How would we even begin to know?

The problem with the case-study approach to discerning the types of moral dilemmas attendant upon the use of military force for humanitarian purposes is that the methodology itself is (in these current instances, at least) hopelessly nominalistic and ad hoc, with no general lessons or principles yet emergent from the welter of particular and unique details. Analysis and adequate explanation, of the sort that leads to preparation for, and recognition in advance of, possible pitfalls inherent in these new military activities depends upon the emergence through induction of some general or “universal” principles from the particular cases. Thus far, I am suggesting, no reliable “covering laws” have emerged or been discerned amid the myriad details. Even worse, in the absence of such general principles or covering laws, we are reduced to a purely reactive (rather than proactive) stance: desiring to avoid the moral pitfalls encountered in the previous engagement, we constantly risk backing into new and wholly unforeseen, unrecognized pitfalls of a different variety in the latest altercation.

That is not to say that discussion and analysis of case studies have no value; only that, at present, we must use them as best we can and guard against false generalization. That very caution—that we cannot, in principle, know in advance precisely what we are doing, or how effectively we can conduct ourselves in humanitarian missions of these sorts—would be a tremendous advance upon the minimal training, reflection, and preparation that military personnel are given at present. For example, what ought to be the reaction of humanitarian peacekeeping forces installed in an unstable democracy such as Haiti if they discovered representatives of the local government whom they were installed to protect committing acts of unspeakable atrocity against the civilian population? Should

4"Wanted for Murder," Baltimore Sun, Friday 11 July 1997, p. 2A.

5Supporters of Aristide, for example, were prone to continue the unfortunate practice of throwing burning tires around the necks of their helpless opponents, actions which undermine the fundamental humanitarian intent of the initial U.S. intervention in his behalf.
the peacekeepers intervene to protect the victims as Capt. Lawrence Rockwood attempted—even in violation of rules of engagement? How, in what way, and to what degree (especially when, as in this instance, the related structures of civil society—e.g., legal and judicial systems—are either absent or suspect)?

Some (but by no means all) of the kinds of problems encountered in this fashion may turn out to be highly similar to the kinds of moral dilemmas routinely encountered in the use of force for domestic peacekeeping purposes. In short, in our search for relevant universal principles and applicable professional standards of conduct, the thoughtful use of case study methodology should lead us to examination of the professional codes, experiences, and well documented problems of our colleagues in domestic peacekeeping professions. These are general principles and guiding professional codes of conduct devised by persons who likewise volunteer to surrender their own individual autonomy and subject themselves to rigorous discipline in a chain of command, incurring risk and placing themselves in harm’s way for the sake of public protection (police, firefighters, the, DEA, FBI, and perhaps the Coast Guard). We would do well to consult such professional colleagues for insights, and even for advice and assistance, as we attempt to ascertain with some degree of foresight the problems our military personnel can anticipate routinely encountering in the new international context that Secretary Albright envisions.

Questions of Professional Military Ethics

I conclude by considering some nagging questions of professional ethics that the foregoing developments collectively portend. Unlike what has gone before, the following considerations, while significant, have received almost no formal analysis.

The Albright Doctrine formalizes a foreign policy gradually put into place by Presidents Reagan, Bush, and Clinton, in response to increasing demands from the international community and the United Nations. In effect, Ms. Albright suggests that, in the future, the military will serve as a kind of global police force, rather than as a political instrument for protecting U.S. interests or furthering U.S. foreign policy exclusively. This constitutes a direct contradiction and refutation of the earlier Weinberger doctrine, which specifically, proscribes (as does the international “legalist paradigm”) most such uses of military force. The so-called “Weinberger doctrine,” however, was developed through a lengthy process of careful and considered reflection and discussion by senior military and civilian defense analysts in this nation’s service academies and war colleges, all of whom were tasked to establish more reliable guidelines for the use of American military forces in the aftermath of Vietnam.

While it is the privilege in principle of the civilian authorities at the pinnacle of the military chain of command to establish, revoke, and reformulate foreign policy at their own discretion, this new change of direction could be seen as an act of bad faith, a violation of contractual trust and agreement established painstakingly through dialogue and consensus. Whatever its other moral attributes, the Albright doctrine decidedly lacks these features—it represents a repudiation of earlier policy without a similar process of consultation, consensus, or “buy in” on the part of those most intimately affected by it. Under the Constitution, this is, of course, perfectly legal and proper. The Albright Doctrine, despite difficulties of interpretation and appropriate enforcement, may be not only morally correct, but even morally superior to the policies it supersedes. It may represent the best and most politically astute and realistic response to international conflict in the “new global order.” Yet, I am prepared to argue, it still may not be prudent, and is perhaps not fair, inasmuch as those being asked to effect the policy have had little say in its formulation.

This concern may seem strange or even incongruous when applied to the military services whose communities of professionals pride themselves on their being accustomed to shouldering their mission and doing their duty, no matter what. To civilian authorities inclined to distrust the motives of the military, moreover, my intimation of some sort of thinly-disguised reluctance to embrace Secretary Albright’s policy may seem to license insubordination, or to pander to what Thomas Ricks worries are increasing tendencies toward political polarization and resistance within military culture itself.6 I take a sharply divergent view of these tendencies, based in part on considerations arising from the following kinds of examples:

6See “The Widening Gap,” pp. 72–75; see also Gregory D. Foster, “Confronting the Crisis in Civil-Military Relations,” The Washington Quarterly (Autumn, 1997), pp. 20ff, where he complains of the reluctance of the military to acquiesce to civilian authority in the matter of humanitarian intervention in Bosnia.
(1) A bright and able young individual with deep community spirit enlists in a local police academy, and spends years training and working her way up the career ladder of her local police force. Her desire, her abilities, and her training all make her an ideal police officer: fearless, physically able, fair, reliable, and entirely competent. Along the way she performs many different kinds of duties: cop on the beat, detective, desk watch—she likes some duties more than others, does not excel equally at all, and harbors no illusions about the morality or omniscience of the local government, or the purity of its citizens. But she clearly perceives the various duties she performs and the obstacles and frustrations she encounters as part of the work of a dedicated police officer. That is, until one day she and her colleagues are told that owing to changing community circumstances, their local unit is being reassigned for the foreseeable future to handle refuse collection. While crime has abated in their community, the problem of uncollected trash has mounted to crisis proportions, threatening the health and the beauty of the neighborhood. Our police officer, both in uniform and as a private citizen, has participated in neighborhood cleanups before; besides, she is loyal and dedicated, and willing in principle to do whatever is necessary for the health and welfare of the community she swore to defend and protect. This new professional transformation, however, forces her to consider whether, after all, she entered the right profession. Some of her police colleagues view it as outrageous that, without their advice or consent, the city government has chosen to solve its problem in this fashion at the cost of considerable negative impact on their professional careers.

(2) An exceptionally courageous and physically strong young man dreams all his life of becoming a professional firefighter. He eagerly goes through the years of requisite, arduous training, and is fortunate to be selected for a coveted position in his community’s professional firefighter’s unit. He amasses years of experience on the job, facing many harrowing encounters, saving lives, preventing damage to property, all at considerable risk to himself. Part of his job is fire prevention and community education; he and his fellow firefighters are so successful, that the radically reduced rate of fires occasions a decision by the local government to reallocate and redeploy the firefighters themselves. As it happens, the postal service has, for years, been unable to recruit sufficient numbers of postal workers, and delays in mail delivery have reached crisis proportions. Without so much as a “by your leave,” the government authorities order the firefighters to deliver the mail, not merely temporarily, but for the foreseeable future. When some of the firefighters complain that they did not volunteer, nor were they trained for or interested in such work, the authorities reply coldly that each had pledged himself or herself to following orders, doing their duty, and serving the community, subject to the authority of the elected governing officials. This is now the community need, and for the foreseeable future, notwithstanding their prior training and professional expectations, delivering the mail will become their job.

I certainly do not mean to equate trash collection or mail delivery with the protection of the lives and liberties of defenseless and vulnerable populations in other nations. These analogies are obviously far from exact. But I have deliberately chosen illustrations of professional communities whose members have volunteered for rigorous mental and physical training and agreed to place themselves at risk for the sake of protecting life, property, and preserving the security of their communities, and who pride themselves on character, integrity, and devotion to mission and duty over personal welfare. The questions these cases raise are, first, do the individual police or fire fighters have reason to complain of their circumstances, to feel puzzled, angered, cheated perhaps by circumstances, or even misused by their government supervisors? I think it self evident that an array of such feelings would hardly be unreasonable under these circumstances, and might even be justified. In fact, I suspect the reactions of the professionals themselves would be quite mixed and at variance with one another: some would see these events as an interesting evolution with unfortunate side effects, and think of retiring or choosing another career. Others would be angered that their oaths of office were so liberally interpreted, or that they themselves would not have been invited to provide inputs into the problems for which they had become the unwilling solution. A few might wonder whether they would, in fact, “be any good” at collecting trash or delivering the mail, both of which turn out to require considerable skill. Still others would berate the first group as “quitters,” and the second and third as “whiners,” citing their sworn duty to do whatever necessary to protect and defend the community. “Your job,” this fourth group of police or firefighters might argue, “is basically to do what you’re told! If collecting trash or delivering the mail are what needs doing urgently, and we’ve been ordered to do it, then our duty is to comply without comment or complaint, and learn the requisite new skills on the job!”
It is hardly a secret that just such a range of conversations has been provoked by the gradual evolution of the nature of military service since 1989. I think it entirely reasonable to expect such mixed reactions, and thoroughly unhealthy to deny or suppress them. Many members of different branches of the all-volunteer military service have argued with some justification that they were not asked, nor did they agree, to volunteer for the missions now being proposed as central to the profession of arms, and also that they, and military forces in general, are not in principle well equipped or properly trained to carry out the kind of global police and peacekeeping work that the Albright Doctrine envisions as the military’s principal new task. These, including the implicit charge of violation of informed consent, are legitimate concerns that deserve thoughtful consideration rather than rebuke.

It bears mention that U.S. Army General (and former Green Beret) Henry H. Shelton was invited, during his confirmation hearings to serve as head of the Joint Chiefs of Staff, to comment on Bosnia in particular and on the appropriateness of humanitarian and peacekeeping activities on the part of the military in general. While he did not find such use of military forces inappropriate, Gen. Shelton did suggest that “specially trained police” or “elite commandos” should be tasked with particular, unusual, and delicate actions such as interdicting war criminals in Bosnia - implying that such activities exceed the range of duties that the average soldier or sailor might normally be trained or expected to perform.7

Gen. Shelton’s comments run parallel to concerns raised by Professor Martin L. Cook, at the conclusion of his 1994 Reich lecture at the USAir Force Academy,8 addressing the “social contract” aspect of the commitment made by individuals in the military. Cook argues in effect that a Principle of Informed Consent (familiar in other professional contexts such as law, business, and medicine) also comes into play in the context of an all volunteer military force, especially since individuals volunteer to join these organizations with certain understandings. Military service, Cook suggests, of necessity involves the “unlimited liability clause” that one may be in a position where the loss of one’s life is required. One would therefore assume that thoughtful individuals are willing to acquire that risk because they believe that such sacrifice will not be asked of them except in circumstances where the cause truly warrants it. The customary expectations of the volunteers are that such sacrifices are reasonable to incur in the defense of one’s nation, or of its vital interests. Only rarely, Cook observes, would the defense of the lives and property of foreign nationals be connected clearly to these causes. Like Shelton, Cook suggests that a solution might be the recruitment of individuals into such a peacekeeping force—either as a specific branch of the existing military (such as the Rapid Deployment Forces) or as an additional command structure parallel to the existing three branches. Put forthrightly and straightforwardly, it is hard to imagine that such an opportunity for national and international service would not appeal on its own merits to a great many idealistic, dedicated, and patriotic young people, much as traditional military service or service in the Peace Corps did in times past. The difference in this case is that the matter is out in the open, and the knowledgeable consent of the would-be volunteer has been obtained in advance of assignment, deployment, and the incurring of risk.

The relevant point I would wish to stress is that some such process of deliberation is crucial for compliance with the principle of informed consent. This does not supplant the tradition of following orders, doing one’s duty, and respecting the chain of command—nor is it a call for a “softening” or democratization of that tradition. Rather, my point is that this fundamental element of trust is the foundation for that tradition, and it is this necessary foundation which is jeopardized by unilateral, dramatic changes in fundamental professional policy such as the Albright doctrine proposes.

7“Shelton Stresses Importance of Soldiers,” Baltimore Sun, Wednesday 10 September 1997, p. 5A.