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“New Rules for New Wars”

-Military Ethics and Irregular Warfare-

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I. Thinking it Through

Good evening, and thanks for inviting me to Millsaps. You've probably anticipated all the jokes that go with my name, so I won't bore you with any more, except to say that many people often remark that the other George Lucas and I look very much alike. I protest that this is entirely untrue: he, I point out, is quite old, has grey hair, a grey beard, and has obviously "let himself go!"

A much funnier, and frankly, more interesting story comes from my good friend CAPT John Meyer, U.S. Navy (retired) who, together with RADM Tom Zelibor, heads up the College of Operational and Strategic Leadership at the Naval War College in Newport, RI. Tom, who is small and wiry, had been an F-18 pilot and what we call a CAG commander, while John, a surface warfare officer (SWO), had been Tom's executive officer, and the two were inseparable

friends. We used to call them “Mutt and Jeff,” after the now-defunct comic strip of that name.



The evening this picture was taken followed a day long conference discussing some of the issues I want to share with you tonight. After drinking that beer, John told a story regarding unpredictable human factors in combat. His destroyer had been on deployment in the Persian Gulf for several weeks, and was at last heading out to redeploy to the Mediterranean. As always, the weather had been unbearably hot and humid, and the duty quite tedious. As his destroyer passed through the narrow and treacherous waters of the Straits of Hormuz, a sailor suddenly jumped off the stern of the ship!! The crew reacted immediately with their “Man Overboard” drill; they threw the engines into reverse, and amazingly, without running aground, they were able to reverse course and actually pick the guy up. Orderlies brought the drenched sailor down

to the Captain's quarters. (Now you noticed that John is a big, big man, and he was furious!!).

“Sailor, what the [unprintable expletives deleted] were you doing?? More sympathetically:

“son, were you trying to take your own life?” “No sir,” the sailor answered uncomfortably.

“Actually sir, I was just hot. I wanted to go for a swim!” Incredulously, John asked, “son, how did you expect to get back aboard?” And the sailor squirmed uncomfortably again and answered, “well, sir...I guess I just didn't think it through!”

Well, my message tonight is: he's probably not the only one. Since the end of the Cold War, our nation has regularly been confronted with situations, from Somalia to Iraq, to which we've reacted, or sometimes failed to react, sometimes with the best of intentions. With the benefit of hindsight, we'd probably also admit with regret that, at the time, “we just didn't think it through.” Like that sailor, we may have a kind of weak excuse, in that virtually all of these situations, ranging from Iraq and Afghanistan to our present earthquake relief operations in Haiti, fall under a category that DOD labels, “irregular war” or unconventional war, or sometimes

“military operations OTHER than war.”



Those headings or classifications are meant to suggest that all these operations are the sorts of things that national militaries *do not* usually undertake. Instead, most military training and education are oriented, unsurprisingly, to the sorts of operations that national military forces **DO** routinely undertake: namely, defending the homeland, and responding, individually or collectively, to military aggression by other states. In regular or conventional war, such as WW II or the first Gulf War I, the armies (and navies and air forces) of opposing nation-states, properly uniformed, equipped, and clearly identifiable to one another, “duke it out” for supremacy according to principles laid down 150 years ago by Baron Karl von Clausewitz, according to whom, at bottom, war is mainly a contest of political will, in which the objective is

to destroy the enemy's army, occupy his cities, and break his will to fight.



Baron Karl von Clausewitz



- **Defeat the adversary's army**
 - **Occupy his cities**
 - **Destroy his will to fight**

That is certainly what the Japanese and German armies attempted to do, to America and western Europe, respectively, and in self-defense, the allied armies tried and eventually succeeded in doing that to them. That is exactly how then-Chairman of the Joint Chiefs of Staff, General Colin Powell, described our military operations in Kuwait against the conventional armies of Saddam Hussein in the first Gulf War in 1991.

Now you might think that military operations in Kosovo or Iraq, or chasing the Taliban and Al Qaeda in Afghanistan, do not really differ all that much from these regular or conventional military operations. There is some truth to that, certainly if you look at, say, the first three weeks of the Iraq war, up through the toppling of the statue of Saddam Hussein in Baghdad, after which the “conventional phase” of war was replaced by a post-war phase of

occupation, nation-building, and counterinsurgency.



Types of “Irregular” War

- ◆ Counterinsurgency (“COIN”)– Iraq
- ◆ Peacekeeping and Stability Operations– Bosnia, Kosovo
- ◆ Nation-building – Afghanistan
- ◆ Humanitarian Aid and Intervention – Somalia, Rwanda, Indonesia, Haiti

It is odd, perhaps even offensive, however, to call our current military presence in Haiti “conventional warfare.” It is likewise hard to see how trying to keep Hutus from slaughtering Tutsis in Rwanda constitutes “war” in the conventional or regular sense of the term. And even, as in Afghanistan, where it seems as if we are often engaged in conventional conflict with a rival army, in fact, the situation is markedly different from, say, the allied armies moving through France and Italy toward Germany during WW II.

Some have even claimed that traditional moral and political concepts of “just war” and of the Law of Armed Conflict (LOAC) are simply inadequate to handle these situations. Because those traditional conceptions are oriented toward governing conventional war, and because those traditional conceptions are, accordingly, grounded in assumptions about nations and their militaries, about national self-defense against aggression, and upon maintaining a clear

distinction between combatants and non-combatants, they are simply inadequate to guide our intuitions about how to handle these new kinds of “irregular” or unconventional war. We need, critics say, “new rules” for these new wars, as well as new conceptions of war-fighters and weapons, strategy and tactics, to handle these new armed conflicts of the 21st century. Let me sketch some of the new developments for you, in the time remaining, we’ll discuss them together.

II. Ethical Interoperability



Permit me to introduce Col. Georg Klein, of the Deutsche Bundeswehr, commanding officer of the German contingent of NATO forces stationed in Afghanistan. On Friday, September 4, 2009, Col. Klein ordered an air strike on two fuel trucks near Kunduz, Afghanistan

that were believed to have been hijacked by Taliban insurgent forces. Aerial surveillance revealed the two trucks stuck in the sand by the side of a road, and Klein believed the Taliban insurgents were trying to free them, on the way towards carrying out an attack on his position. Two U.S. F-15E fighters responded, dropping bombs on the trucks.



Unfortunately those “Taliban fighters” turned out to be local villagers. Realizing they were “sitting ducks,” the Taliban apparently fled, abandoning the stolen fuel trucks, whereupon local villagers, including many children, gathered from the surrounding area in hopes of scavenging some of the abandoned fuel. Most were killed or seriously wounded in the F-15 bombing attack,

including children, nearly 100 victims in all.¹



The event prompted a controversy in Germany, already nervous about its first postwar deployment of military troops outside its own borders. German citizens were incredulous, because they believed their troops were strictly engaged in “peace-keeping” operations, and were not authorized to use deadly force. As the former Dean of the Army War College, Col. Jeff McCausland, was obliged to explain to an audience of disconcerted citizens at the Frei Universität-Berlin: “My friends, in Afghanistan at present, there is no peace to keep!” Here is

¹ *The Washington Post* (Saturday, 5 September 2009): <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/04/AR2009090400543.html?sid=ST2009090400002>

the sequence of events, excerpted from a report later that month in Germany's leading international news magazine, *Der Spiegel*:

“The crews manning the F-15 fighters first asked German Colonel Klein and his forward air controller in Kunduz whether they should first fly their jets at low altitude over the tankers. Such a "show of force" would have given the Taliban fighters and civilians the opportunity to flee. Klein apparently turned down the request, thereby "omitting" one of the escalation levels which, according to NATO procedures, need to precede an air strike.

“The U.S. pilots then asked whether the situation posed an "imminent threat." Klein, through his forward air controller, responded with a terse "confirmed." Klein's forward air controller or air commander, was a master sergeant, code-named "Red Baron." The American pilots also asked Klein's air commander twice whether German forces had had "troops in contact" with the enemy. The response, once again, was: "Confirmed." In truth, however, it appears that German forces from the Kunduz base had not been deployed to carry out reconnaissance of the situation in the riverbed where the tanker trucks were. The fact that the tankers had been stuck in the riverbed for hours meant they probably posed no acute threat to the base.”²

In the absence of enemy contact or an acute threat, Col. Klein lacked the authority to order the air strike by himself. If a commander's own forces are not under acute threat, he is required to consult with the International Security Assistance Force (ISAF) headquarters in Kabul before ordering an air strike. And if there is a risk of civilian casualties, then an air strike

² *Der Spiegel*, International Edition (24 September 2009):
<http://www.spiegel.de/international/world/0,1518,k-6948,00.html>

can only be authorized by NATO's Joint Force Command in the Netherlands. At first it was thought that Klein acted with excess caution, invoking what is known as “force protection,” attempting to engage the enemy without putting his own troops at risk. NATO allied militaries have been excessively prone to do this: i.e., to use excessive force, or force from an indiscriminate distance, in order to avoid risk of harm to their own troops. Subsequent investigations, released only in late December, 2009, however, suggest that Klein and his air controller were instead eager to prove their “combat readiness,” to engage the enemy and finally have the chance to “kill some Taliban,” and perhaps show the allied forces what the Germans were capable of. In either case, whether motivated by excessive caution or excessive zeal, the results were tragic, and at very least, Col. Klein failed to “think it through.”

According to conventional or traditional thinking about just and unjust wars, civilian noncombatant casualties, to a certain extent, are a foreseeable consequence of any decision to go to war. That is why it is always a grave matter to do so, requiring justification in the form of a significant provocation, and the pursuit of every means short of war for resolving that provocation. International humanitarian law and the LOAC constraining behavior in the midst of armed hostilities, for their part, prohibit deliberately targeting civilians during those hostilities. Recognizing, however, the inevitability of “accidental” or inadvertent civilian casualties and deaths in the midst of armed conflict, that body of law otherwise demands merely that opposing sides take every reasonable precaution to limit the extent of these losses, so that such losses, when they do inevitably occur, will be found “proportional” to the significance of the case for war itself, or else proportional to the otherwise legitimate objective of any specific tactical military operation undertaken during that war. The law does not explain how we are to carry out the implied calculation, nor what a reasonable standard of proportionality might be. There are

numerous instances (as documented in Michael Walzer's *Just and Unjust Wars*, for example) where this calculus appeared to fail, and where military force was used with insufficient discrimination, but in which the resulting civilian casualties, while regrettable, made no significant impact on the overall war effort or its moral legitimacy.

By contrast, civilian losses in the case of an "irregular war" like AFPAK, are not simply "terrible tragedies" with no further implication: they are always devastating to the war's overall objectives, and call into question its moral legitimacy. Note that the German-ordered attack failed all the criteria cited above: attacking a few insurgents and destroying their stolen fuel trucks doesn't seem to warrant so large a number of civilian deaths, even had it been successful (which it was not). And in any case, the German commander appears to have ignored the procedures, the so-called "rules of engagement," that individual nations are required to put into place for their own military forces in compliance with LOAC, precisely to ensure only a limited and discriminate use of deadly force, and to help guard against such devastating mistakes.

The problem seems to be not simply that there are allegations of inappropriate use of force by NATO troops in Afghanistan. The deeper problem seems to be that such instances point to the lack of a common and widely shared interpretation, for example, of what these core moral concepts – "proportionality," military "necessity," "discrimination" (or what international humanitarian law labels "distinction") and non-combatant immunity – actually mean among the different national forces that make up the NATO coalition in this conflict. Those disagreements lead to inconsistent applications of force, to avoidable instances unwanted civilian casualties, which, in turn, jeopardize the NATO coalition forces' goals in their conduct of the COIN campaign against the Taliban in Afghanistan. That ongoing dilemma, the absence of what I term

“ethical inter-operability” among allied forces, is a key feature of what I am calling “irregular warfare.”

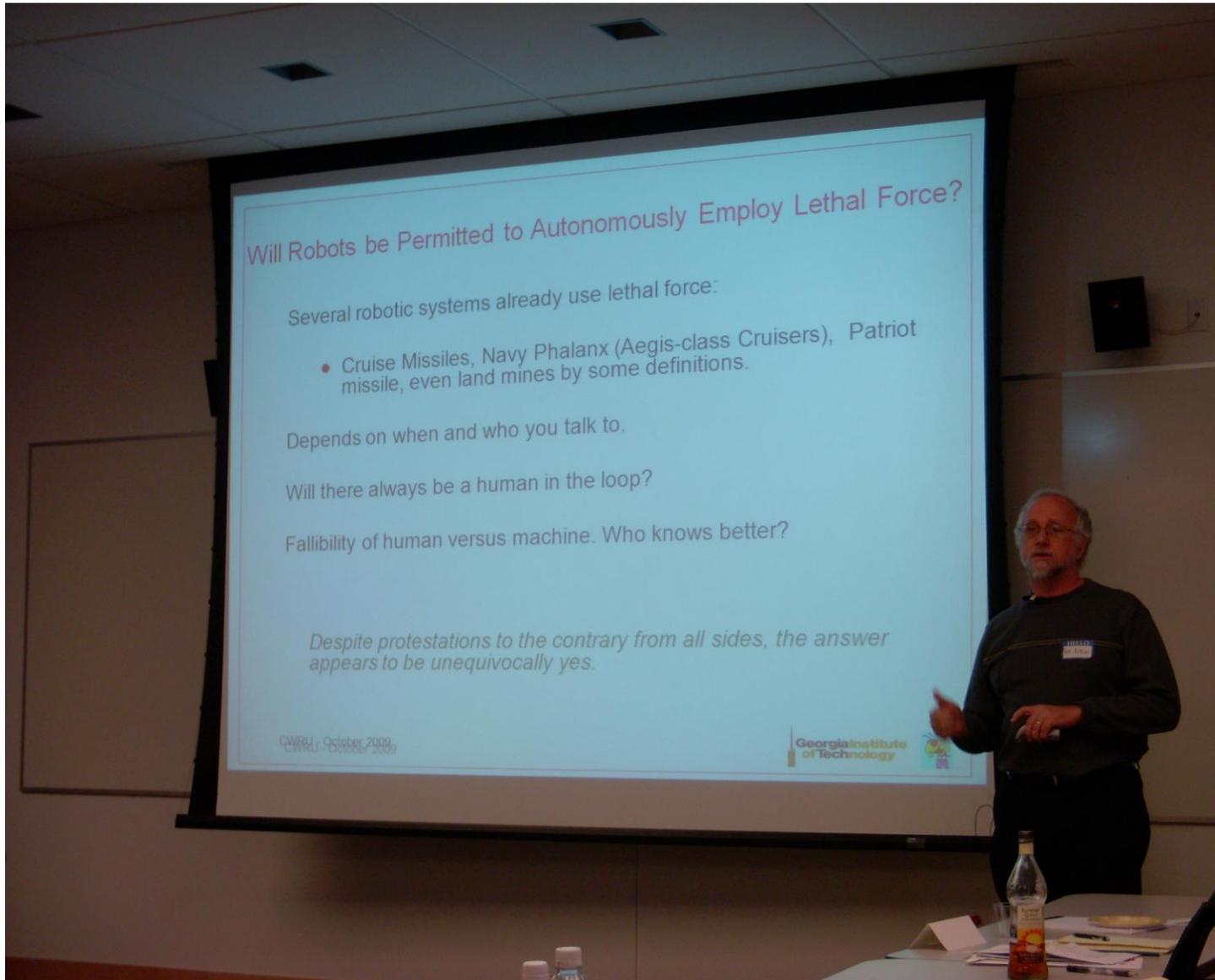
III. Responses and Solutions

One response to this widely recognized problem is, increasingly, to replace Col. Klein and his fallible, humanoid ilk with these.



The advocacy, and novel use of these new, exotic, almost sci-fi quality emergent military technologies is yet another characteristic of “irregular war.” In the case of military robotics, engineers and advocates, like my colleague, computer scientist Ron Arkin at Ga Tech, hold that these new kinds of weapons are better suited to IW, because robots, for example, don’t get scared, don’t get mad, don’t try to get even, and (he argues) could be more effectively

programmed to carry out military missions according to LOAC than human beings.

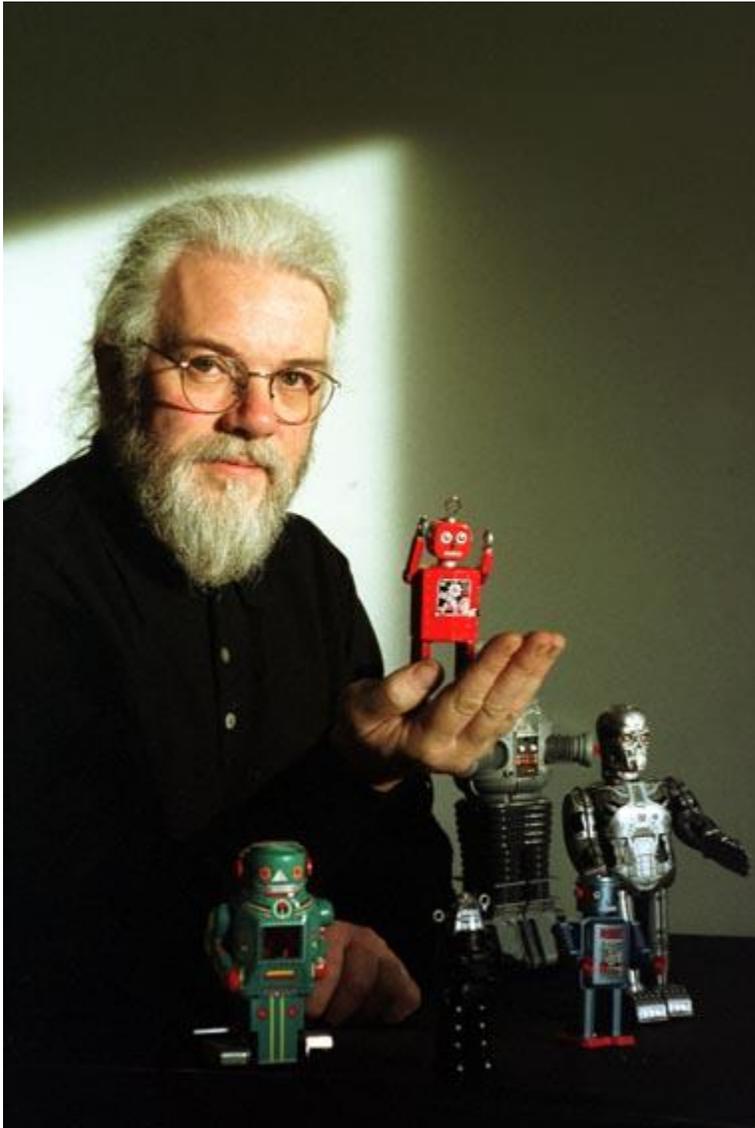


Other critics, such as Pete Singer at the Brookings Institution, in his recent book, *Wired for War* (2009), point out that, while this may be so, robots (especially autonomous platforms, armed with lethal force) certainly can and do make mistakes.



At present, for example, software aimed at character recognition cannot reliably distinguish between an apple and a tomato. How then would a robot distinguish between, say, a child versus a short soldier, or even a child soldier? Still other critics, like computer scientist Noel Sharkey at the University of Sheffield in the United Kingdom, think this entire program is bizarre and

dangerous, and reproach the U.S. for even entertaining such ideas.



In the middle, engineers like my Navy colleague, John Canning (Naval Surface Warfare Center, Dahlgren VA) suggest that armed robots may play a useful role in future IW, but by retaining human supervision (“in the loop”), and either arming the robots with non-lethal weapons, or else programming them to target an opponent’s weapons with the goal of disarming, rather than killing him. DARPA – the Defense Advanced Research Projects Agency (whom I sometimes

disparage as “nerds gone wild”)³ – are currently forging ahead with a bewildering and sometimes frightening array of such ideas and systems, from autonomous lethal battlefield robots, to medical/biological enhancement of human warriors, various forays into nanotechnology, and initiatives in so-called cyber-warfare, all in various stages of development and plausibility, driven in part by a Congressional mandate to field at least 30% of our fighting force as unmanned by 2012, and to have these platforms operate autonomously by 2015.



I am co-founder of a group called the Consortium on Emerging Technologies, Military Operations, and National Security (CETMONS), involving most of the individuals named above. We can explore the reasons for this headlong plunge into autonomous lethal systems in particular

³ G. R. Lucas, Jr., “Nerds Gone Wild: Can Moore’s Law Remain Valid Indefinitely?” *International Journal of Applied Philosophy* 24, no. 1 (Spring 2010): 71-80.

during the discussion, but I assure you we have not “thought this through.”



CETMONS
CONSORTIUM FOR EMERGING TECHNOLOGIES, MILITARY OPERATIONS AND NATIONAL SECURITY

“We are so busy finding out if we can, we never stop to consider whether we should.”

- Arizona State University
- Case-Western Reserve University
- U.S. Naval Academy
- Naval Postgraduate School
- Georgia Tech
- Cal State Polytechnic University

Another response differs by almost 180-degrees, in claiming that the solution is not less, but more human presence on the IW battlefield, keying, in particular, on the use of scholars and academics alongside combat troops to provide enhanced regional knowledge and cultural

expertise of regions and cultures that are complex and poorly understood.



We would avoid mistakes, like those of Col. Klein, and achieve greater mission success, if we did a better job of getting to know the locale, and especially the people. Initiatives like Project Minerva and the controversial Army “Human Terrain Systems” project, are grounded in the assumption that our coalition troops, in Afghanistan in particular, need better “human intelligence” (or HUMINT). General James H. Mattis, U.S. Marine Corps, the newly-appointed commanding officer of the U.S. Central Command, is famous for having observed that “Marines need to be able to navigate the human terrain with as much skill as they presently navigate the

geographical terrain.”



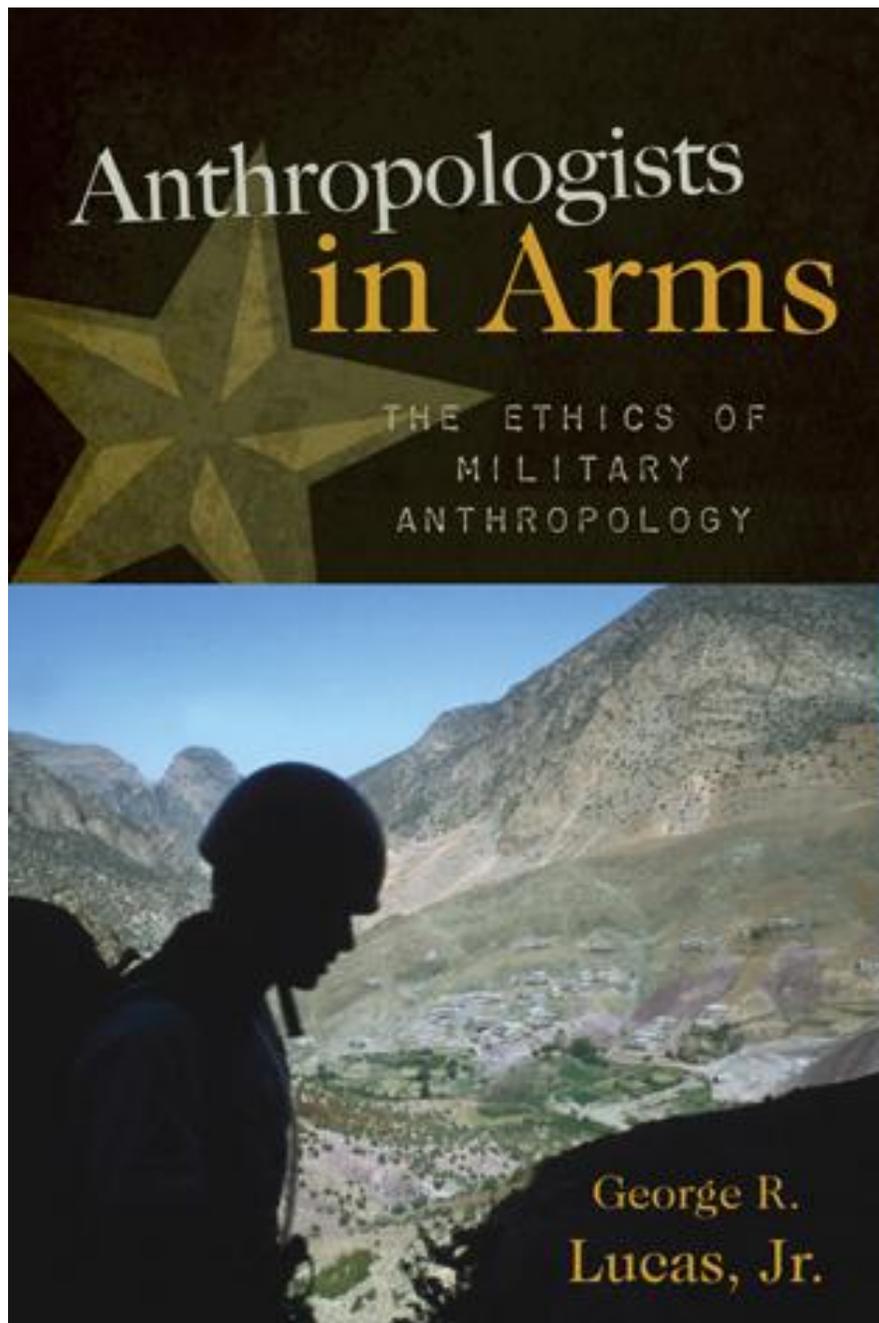
Critics of these initiatives, such as the members of academic and professional societies from whom these “human terrain team” (HTS) academics are recruited – such as the American Psychological Association, the American Anthropological Association, and an ad hoc group called the “Network of Concerned Anthropologists” – claim these initiatives amount to professional malfeasance, and would involve their members in violation of key provisions in the professional codes of ethics governing or guiding the behavior of psychologists and

anthropologists. Others, like myself, worry that “professional ethics” *per se* is probably not the root problem. Rather, this work is dangerous (these are photos of HTS social scientists killed in action in Afghanistan and Iraq),



its effectiveness is questionable, the programs aren't well conceived or designed or managed, nor have they succeeded in recruiting truly qualified scholars, and that all this is yet another example of the military and defense department trying to achieve a complicated goal quickly, on the cheap, or off the shelf, instead of having invested over the years in building these requisite skills

and intellectual capacities in their own ranks.



A third alternative response to the challenges of IW is to strengthen, and vastly increase, the cooperation of national militaries with the private sector. American HTS social scientists, for example, are not really Army or Marine Corps troops, even though they dress and look like them, and serve embedded along with them. Rather, these civilian academics are, in truth,

private contractors working, in this particular case, for a notorious private military contractor, BAE Systems, Inc.

THE WORK | The Human Terrain System (HTS) Program

BAE SYSTEMS
Human Terrain System

BAE Systems is the global company engaged in the development, delivery and support of advanced defense and aerospace systems in the air, on land, and at sea-with major operations across five continents, and customers and partners in more than 100 countries.

THE OPPORTUNITIES | Join us in one these exciting career opportunities.

You May Qualify

Over the past two decades, the U.S., involved in IW conflicts, has increasingly outsourced non-combat logistical operations, and even defensive security operations, to private contractors (PMCs). As I've become fond of pointing out, all the routine activities that used to be performed by Sergeant Bilko in the motor pool (comedians Phil Silvers and Steve Martin), or Beetle Bailey and his pals, Zero, Killer, and "Cookie," the mess hall cook, are now performed by private firms, many employing local villagers, or third-country nationals (TCNs), to perform the actual cooking, cleaning, maintenance, management, driving of supply convoys, and other logistical and support functions.

This is an enormous and complex issue which, once again, my colleague, P.W. Singer, senior fellow at the Brookings Institution, first called attention to mid-way through this decade in

his first major book, *Corporate Warriors* (2003). It has provoked tremendous debate over, for example, what constitutes “inherently governmental” functions as distinct from routine, generic (and therefore outsourceable) functions. Military who have served in Iraq and Afghanistan and eaten in the “DFAC” or even had their MRE’s convoyed out to forward positions would not want “Cookie” back in the mess hall. And, when you think about it, the fictitious “Sgt Bilko” was a corrupt, insubordinate, and largely ineffective motor pool manager, while Beetle and his friends should be out fighting the Taliban, or helping with Provisional Reconstruction Teams (PRTs) in Afghanistan, not back at “Camp Swampy,” scrubbing latrines or peeling potatoes on K.P. PMCs providing these functions often, as they themselves claim, do it “better, faster, and cheaper” than uniformed personnel, in part by employing locals to help, thereby providing employment and revenue opportunities vital to success in re-building war-ravaged economies. It is imperative, however, to have adequate governmental oversight of this process. That means complete transparency in advertising, bidding, and awarding these contracts, and oversight and accountability for performance. Absent that, corruption (long a background cultural problem in many of the societies embroiled in IW) becomes the new enemy, and charges of cronyism and corruption involving billions of dollars, alongside an acute shortage of DOD and military personnel qualified to carry out the requisite oversight, have constituted the chief objection to the public-private partnership in both Afghanistan and Iraq.

The problem you have no doubt heard about, however, is the problem of Armed Private Security Contractors (APSCs), which came to full public attention following the killing of 17 Iraqi citizens by employees of the former Blackwater Worldwide, Inc, during a shoot-out in Nisoor Square, Baghdad, in September, 2007. The Blackwater guards were providing security for U.S. State Department personnel under the terms of a government contract. Erik Prince, a

former Navy SEAL and (former) president of Blackwater (which has since changed its name in the aftermath of this controversy, to Xe), points proudly to the fact that not a single member of the State Dept has been killed or seriously injured while under the protection of Blackwater. That is true, and that is impressive, but it seems to miss an essential point about IW. If this otherwise enviable corporate record is achieved at the price of alienating, not to mention killing, members of the local population, then it is counterproductive, to say the least. Except as constrained by law, a corporation has no fiduciary responsibilities to those who are not its clients and paying customers. The constraints of law are precisely what is absent during irregular warfare. A government and its military, by contrast, have fiduciary responsibilities to all those whom its agents and personnel serve and protect. When deployed abroad as a de facto government or security force, as in Iraq and Afghanistan, and as is typically the case in IW efforts generally, this responsibility to provide equitable security and respect extends to all the citizens of the occupied country (think about what is unfolding daily in Haiti, for example). This is a point that the recent Army Counterinsurgency Field Manual (FM 3-25; Petraeus 2007) makes quite clear. It is not that there is anything inherently wrong with corporate profit motives and client relations. Instead, with the possible exception of humanitarian intervention,⁴ it is that

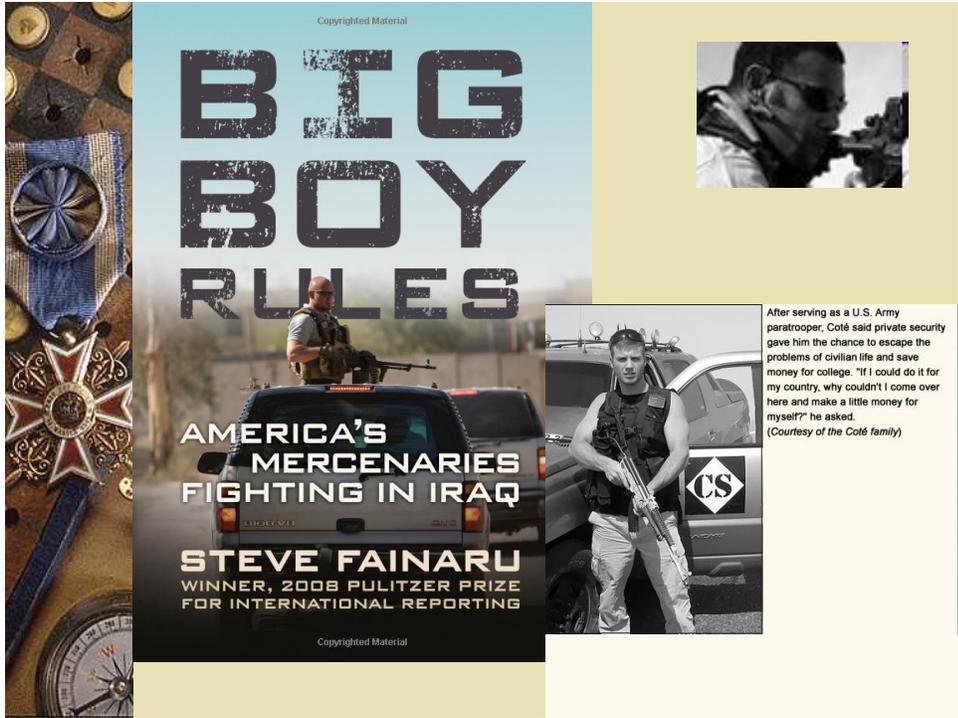
⁴ Professional APSCs, like Blackwater or Triple Canopy, might function well in humanitarian and peacekeeping operations, in that their business model would align, rather than conflict with the welfare of victims as their clients or customers (cf. Executive Outcomes in Sierra Leone in 1990s). However, poor nations in Africa currently use their militaries, in effect, as APSCs, contracting them out on U.N.-sponsored peace-keeping and stability operations. This helps keep their own forces trained, equipped, and, most importantly, paid (and perhaps keeps them from turning on their own inept governments). This is all a lucrative, but also troubling business. But poor nations don't wish, and perhaps can ill afford, to lose this business. Using them as de facto contractors, moreover, seems less unpalatable than "hiring mercenaries," even though, for practical (rather than legal) purposes, there is no difference in the practice, and the truly private firms are both better trained and vastly better equipped for those missions.

those vectors do not align well with the larger vectors defining overall intentionality during the COIN, peace-keeping, and stability operations so characteristic of IW. Indeed, as at Nisoor square, it may be that those vectors of the private corporate business model are inimical to those of the intervening government.

For that reason that, following a year-long study, culminating in a national conference on this topic sponsored each year at our institution by Senator and Mrs John McCain, my colleagues and I from the federal service academies and war colleges recommended that APSCs not be allowed to function in contested or combat areas during IW. This was and is a controversial suggestion, taken up in a subsequent report by the Congressional Research Service, and somewhat at odds with the public position of Senator McCain himself on this matter, and the topic of much deliberate misunderstanding. Advocates of the public-private partnership will argue that we cannot any longer do without PMCs, and that there is no “going back.” They are probably correct, if referring to logistics and support, and in any case, I suggested that no one would wish to go back to the days of Beetle, Cookie, and Sgt. Bilko. That is not the point. Nor is it my point to claim that we now cannot hire armed private security guards to provide police protection on military installations or man the guard posts, just as we do at shopping malls, schools, and universities. Those folks, often themselves retired police or military personnel, usually do a good job, and I’ve nothing against their use. It is only the estimated 10,000 or so APSCs we currently use for a variety of purposes in forward-projected bases and contested zones that are, in military parlance, “outside the wire” – meaning, in contested zones of conflict, precisely where the normal rule of law has broken down. We can provide Marines as sentries at forward outposts, or as guards for convoys passing through contested zones of conflict that we do not fully and thoroughly control. The State Department already has a uniformed government

security arm to provide security for its personnel. It can hire more people and do the job itself, rather than contracting such sensitive work out to a private company (no matter how competent in other respects). The vector of public service and mission performance, not that of corporate profit, ought to prevail in such situations.

There is a final moral component to this troubling debate. It is not merely the oft-lamented feature of private personnel being paid up to three times as much to perform hazardous duties as their uniformed military counterparts. Rather, it is the allure that such opportunities hold out to young people, often suffering from severe PTSD and adrenaline addiction, to continue in this line of work after separating from the service, in lieu of seeking treatment, and seeking to re-adjust properly to civilian life. The misleading allure of adventure and high financial reward tragically lures these people to act against their own long-term interests, and many end up killed, seriously wounded, or otherwise have their lives ruined without recourse, benefits, or even public gratitude, as Steve Fainaru documented in his Pulitzer-prize winning articles and book, *Big Boy Rules*. I fear, once again, that we have not adequately thought this all through.



Finally, there is the realm of cyber warfare, a topic which seemed, until recently, the stuff of science fiction and hyped techno-fantasy.



This is suddenly a threat that everyone is taking seriously, as we realize that a coordinated cyber attack on vital infrastructure can destroy or deny service as completely as a missile or bomb delivered on target. Apparently, lacking resources to compete at the equipment and *materiel* phase of war, China has set itself to become the leader in cyberwar.⁵ In practice, they accomplish this by outsourcing much of their espionage to third-party technology and academic contractors, diffusing the true purpose over several nations and companies so that, when discovered, there is plausible deniability.

The recent abrupt ban on the use of thumb drives in U.S. military computers was a response to the discovery that many had been manufactured with spyware or incipient viruses that quickly spread within government systems, allowing both espionage and potential for future coordinated “cyber sneak attacks” or “back door” attacks on water or electrical systems. America’s electrical power grid could be disrupted or shut down altogether during a period of seriously bad weather, causing confusion, chaos, and widespread injury or death. [Slide 22] Nuclear power plants might conceivably be programmed to self-destruct with consequences similar to Chernobyl, or worse. The global financial system might be disrupted, wiping out the assets of millions of ordinary citizens and leaving them destitute. In any kind of conventional conflict, finally, our highly sophisticated net-centric military operations themselves – communication, command and control, weapons guidance systems, in short, nearly every phase of conventional military operations – could be shut down or seriously disrupted. Precision guided weapons might be hijacked to turn on their owners. Satellite surveillance on the battlefield and its ensuing coordination between air and ground forces could be halted. Control

⁵ See *The Washington Post* (11 Nov 2009), and CBS “60 Minutes” (Sunday, 8 November 2009).

of robotic systems might be superseded or hijacked.



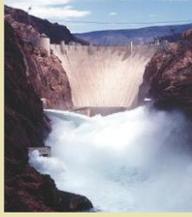
Infrastructure Vulnerabilities



- 22 Kt
- 1×10^{14} Joules



- 20 million pounds HE
- 2.7×10^7 acre feet stored water
- 8.6×10^{15} Joules



- 3×10^7 acre feet stored water
- 1.2×10^{16} Joules

- ◆ deprive 22 million people of water
- ◆ eliminate 50% electrical power in California
- ◆ destroy irrigation of 1.5 million acres US farmland

Dr. Andy Marshall, the long-time Deputy Secretary of Defense, has ordered a full review of the prospects for deploying lethal autonomous systems during conventional war as an effort to counter such threats. Cut off from the cybernetwork, such systems could continue to function effectively on their own. One doesn't need to be a fan of "the Matrix" or "Battlestar Galactica" to envision how badly all that might turn out. One last time I will remark that it is not clear that we've thought this all through.

IV. New Rules for New Wars?

What has this discussion to do with philosophy, and how in any case do the developments I've outlined pertain to you? I have deliberately tried to paint for you a picture that is bewildering, chaotic, unsettling, and decidedly unfamiliar. That is the face of war and

international conflict at present, and, I think, for the foreseeable future. You should know that our military is not happy about this. They prefer to train, and to purchase and use weapons systems, in familiar ways: large tanks, huge ships, expensive single-seat jet fighters that are, frankly, fun to fly, but utterly useless (or at least needlessly expensive) in the murky contexts I've sketched. And, as decent, caring people given to a career of sacrifice and public service, they feel human need as keenly as any of us, and are quite willing to respond, help, and even risk their lives in the process if we ask them to during a humanitarian disaster or crisis, as in Haiti or Somalia. They do not see such activities, however, as constituting the primary vocation of our nation's warriors. And that is a problem on many levels.

Historians, for their part, see, as I do, parallels between our current situation and a period in late medieval Europe, prior to the formulation of the present nation-state system, a form of international political order which dates only from the Peace of Westphalia in the mid-17th century (1648). The period just prior to this, roughly from the time of the Crusades up through the endless wars of Reformation, is known as a period of "distributed" sovereignty. Kings and rulers of territories with contested and uncertain boundaries vied with the Church, and even with rival religious orders like the Jesuits and Dominicans, for political supremacy or control of vital trade routes and mineral resources. Local war lords, like the Medicis in Florence, who were little more than tribal leaders or Mafia dons, hired private mercenary armies to make war on their neighbors. If you roughly substitute national governments, the United Nations, regional security organizations like NATO, NGOs, international trade and financial organizations (e.g., the WTO) for those medieval entities, you will quickly grasp the parallels. This is not a period to which we are especially anxious to return, but it is nevertheless one that repays closer study as we wonder how to cope with the challenges in what has increasingly been characterized as the post-

Westphalian, post-Nation-state era. We should not be lulled into the false hysteria that we have never seen anything like the present in the past.

Chief among the questions is, are the “Old Rules” of warfare, largely grounded as they are in that Westphalian nation-state paradigm, now irrelevant? Do we need totally new guidance to handle all these odd and unforeseen characteristics of IW that I have tried to portray? Specifically, can we meaningfully discriminate any longer between combatants and noncombatants, or have the tactical features of IW that I’ve described turned the whole globe into a zone of universal combat, in which every citizen and human being is also, whether willingly or unwillingly, a combatant? Is the resort to war itself increasingly becoming a first or early, rather than a last resort? Can we engage in IW preemptively, or even preventively, to halt the spread of terrorism and criminal conspiracies? And, how exactly does that troubling “proportionality calculation” work?

Though we are often not as familiar with it as we should be, there has been, for centuries, a very public conversation or discourse going on about precisely these topics. It is often dismissed as merely a religious conversation, a Christian or Catholic conversation, or else a Western conversation. But in fact, this conversation about when, and how properly, to fight wars transcends religions and cultures, and was as lively in non-Western and ancient pagan cultures as it is in our own, modern, liberal, post-Enlightenment setting. Arjuna and Krishna debate precisely these questions in the *Bhagavad Gita*, while laws in ancient India clearly defined those who were to be exempt from attack in the midst of war. Sun Tzu famously offers delicately nuanced and understated views on many of these questions in his classic, *The Art of War*. Chairman Mao denounced his own culture’s earlier forms of discourse and limitations on the practice of combat as “asinine,” but then proceeded to proclaim his own “Eight Points for Attention” governing the

behavior of his own insurgency forces in their conduct of guerilla war in 1938. The *Qur'an* and its accompanying *Hadith* declaim frequently and at length upon when, how, and to what extent to make war upon unbelievers, along with when, if ever, Muslims should raise the sword against fellow Muslims.

The renowned political philosopher, Michael Walzer, writes “For as long as men and women have talked about war, they have talked about it in terms of right and wrong....Reiterated over time,” he observes, “[these] arguments and judgments shape what I want to call *the moral reality of war* – that is, all those experiences of which moral language is descriptive or within which it is necessarily employed” (Walzer 1977).⁶ The “necessity” of this moral discourse, moreover, is not one born of compulsion, but precisely of our collective agency – our freedom – our ability to decide, to choose, to act or refrain from acting, and to offer better or worse accounts of what we have done, and why. Indeed, we owe to this classical, trans-cultural conversation even the present distinction between “regular” or conventional war, and so-called “irregular” war.

My own summary account of this extensive and multi-cultural history of “just war” reasoning is that it simply represents a form of what critical theorists (led by the Kantian philosopher, Jürgen Habermas) term variously “communicative action” or “ideal public discourse” (Habermas 1984/1987).⁷ When an individual decides to defy authority, break an

⁶ Walzer is, of course, the author of what I and my colleagues collectively celebrate as the preeminent contribution to “just war discourse” in the 20th century, now in its fourth edition. The quotes above are from the opening chapter, “Against Realism,” pp. 1, 15; the citation of ancient Indian law concerning classes of noncombatants can be found in chapter three, “Rules of War,” p. 43; and the description of Mao Tse-tung’s doctrine of just war in chapter 14, “Winning and Fighting Well,” pp. 225-27.

⁷ As the size of this two-volume work suggests, this is an immensely complicated topic. My account qualifies as falling under the third of three distinctions that Habermas makes regarding such discourse: logic, dialectic, and rhetoric. Moral discourse, in the third realm, aims at persuasion through appeal to criteria that are deemed by

important moral rule, or otherwise step outside the normal realm of justifiable behavior (as in an act of civil disobedience, for example), an account is usually given, and in fact demanded, to explain and justify the decision, often as much to the individual undertaking the action, as to skeptical others observing and criticizing it. Such reasoning is subject to public review and criticism – what any scholar or academic would immediately recognize as review by a *de facto* jury of peers. Just war reasoning, in all its historical and cultural manifestations, is exactly such a form of discourse concerning one of the gravest and most important moral decisions any society can make: deciding to commit its soldiers and citizens to the risks of harm in war.⁸ An account is demanded, and usually (even if only for political reasons) given, and, in any just society, at least, such an account is subject to criticism and review. This is true, no matter what political system or philosophical orientation towards morality reigns. The account may be framed in the language of “self-interest” or national interests, for example. But as such, even so morally-thin a justification is subject to review and challenge. The Greek historian, Thucydides (431 BCE), masterfully illustrates this procedure in his portrayal of public debates among

listeners as universal. And to make matters worse, Habermas differentiates moral discourse from “ethics” discourse, which is limited and culturally specific. Moral philosophers do not always or consistently follow Habermas in this respect, though the distinction emerges quite clearly in discussions of professional practice and discipline-specific “codes” of ethics. I have endeavored in my simplified account of just war discourse to avoid entangling my claims in the fine points of the critiques of Habermas’s discourse theory, and instead couch it in terms that readers who had never heard of any of this could nonetheless find intelligible and, I hope, not unreasonable.

⁸ Habermas has attempted to apply his theory of “communicative rationality” and the procedural emphasis of what he terms “discourse ethics” to problems of just war, such as the NATO Balkan intervention (Habermas 2000) and more recently to the significance of the global “war on terror” for his larger cosmopolitan project of international law (Habermas 2004). I have not found his own approach to these topics very enlightening, and endeavor to give a more coherent and, I hope, intelligible interpretation of what I take to be the thrust of these concerns in the account offered here.

Athenian citizens over rival military tactics and the proposed treatment of non-combatants during the Peloponnesian wars.⁹

Once we recognize this form of public discourse in its historical and multi-cultural richness, we might want to be cautious about too readily setting it aside, or disparaging it (as Kant himself impatiently did). Likewise, we might want to resist merely dismissing it either as parochial debate among medieval scholastic theologians, or as the limited, if otherwise-brilliant, discourse of a single, prominent analytic philosopher of Jewish background (Walzer). It may be that we need to do as Walzer himself did: engage in an extended reflection on the underlying principles of that discourse, and through use of historical cases and moral casuistry, subject those principles to rigorous reinterpretation in the present context.

For example, many of the criteria from the classical just war discussion were raised as moral dilemmas or problems in my foregoing summary. I made reference in passing to some of those principles, that just-war scholars are unfortunately prone to summarize mechanically in a

⁹ See, for example, not only the Melian dialogue, but the earlier debate between Cleon and Diodotus over the proposed military response to the rebellion by one of Athen's colonies at Mytilene. By including both, the author leaves us to judge which moral snapshot of Athenian society we more readily approve of as the appropriate expression of Athens' "self interest." See (Thucydides 431 BCE: Book III, Chs 36-49, pp. 176-183).

rather uninspiring laundry list: just cause, legitimate authority, public declaration, last resort,



Classical “Just War” Principles

- ◆ Just cause (compelling reason for war)
- ◆ Legitimate authority
- ◆ Public declaration
- ◆ Right intention
- ◆ Last Resort
- ◆ Proportionality
- ◆ Just wars fought by just means [i.e., that are discriminate, humane, proportional, and strictly necessary (military necessity)]

and so forth.

One of those, “public declaration,” for example, relates to Roman practices that predate the founding of the Republic. A representative of the aggrieved nation was required to proclaim to their enemies the nature of their grievance, and offer a plan for restitution, and even a time-table for reconciliation, before war commenced. That supposedly primitive pagan religious practice from the ancient world in fact honored some important moral and legal principles that we recognize today: wars should constitute the reluctant, last resort on the part of legitimate representatives of a nation or an international community of states, allowing the accused sufficient time for means short of war to prove effective in resolving the conflict, and presumably also for the gravity of the war’s cause to serve as an object of public debate among the peoples or nations proposing it.

One common theme running through many of the novel developments I outlined tonight is cumulatively to undermine those principles, which go by the names of just cause, legitimate authority, and last resort. An all volunteer force, supplemented by private mercenaries, as well as by unmanned robotic platforms and other military technology, helps hide the true costs of war from the public. This makes it easier for authorities in control of such forces to use war readily as a tool for international relations, rather than as a last resort, without the full knowledge and consent of the electorate, who alone, in a democratic, rights-respecting regime at least, are the “legitimate authority” referred to in that criterion. We say, in sum, of many of the recent developments described tonight, that they collectively risk *lowering the threshold for war*, and eroding the requisite authority of the electorate to authorize war on its behalf.



IW Challenges to Just War Doctrine

- ◆ Lowers the threshold for going to war
- ◆ Erodes the legitimate authority and responsibility of the electorate for deciding upon war
- ◆ Jeopardizes the status of non-combatants
- ◆ Renders war LESS destructive
- ◆ As opposed to terrorism, enhances our ability to avoid harming non-combatants

Likewise, it seems to many that the tactics pursued, especially by terrorists engaged in asymmetric IW, lower the threshold for discrimination: that is, these tactics (and those taken by opponents in response) have all served to erode and jeopardize the distinction between

combatants and noncombatants. As I complained earlier, the result threatens to turn the whole globe into a perpetual battlefield, and render everyone *hors de combat*. That may well be the goal of terrorists who are also nihilists, but terrorism itself (as we are often reminded) is a tactic, and we don't wage war against a tactic.

I believe our own recent experience, and reflection, on this problem provide ample evidence that the claim of justifiable indiscriminate action is simply false, and that we should not ourselves stoop to criminal action in order to fight criminal conspiracies. Instead, it is important to recognize that in IW, and with the use of terrorism in particular, the line that separates the legitimate soldier from the domestic police officer has blurred, and that the military are, as often as not, engaged in constabulary work, attempting to enforce the law and protect citizens (even in other countries) from those who wantonly disrespect it. It is a constant temptation for police to cut corners in their otherwise-legitimate attempts to pursue criminals and enforce the law. We ask them to resist this temptation, not to forsake the law in their enforcement of it. We now ask the same of our military, for the sake of moral consistency. How else can we, or anyone, distinguish between the police officer and the criminal in the domestic case, or between the soldier and the terrorist or murderer, in the analogous international case? To their great credit, it was the military that first recognized and responded to this challenge: criticizing the legal justifications that the Department of Justice issued to justify enhanced interrogation, citing law and principle in opposition to these cynical attempts to bypass both, and finally, blowing the whistle on those who advocated and pursued these illicit policies.

In like manner, critics of the use of robots and private contractors cite legal and moral accountability as their objections. We saw, in the case of the Nisoor Square incident, how problematic accountability is with respect to the private sector. Had those guards been military

personnel, they would have been court-martialed, with rules of jurisdiction and evidence as set forth for war crimes trials in the “Uniformed Code of Military Justice.” Military personnel know this, and it governs and constraints their behavior. Military contractors operate outside normal legal jurisdiction, and until after that unfortunate incident, were not subject either to local or to U.S. military jurisdiction. In an odd way they present the same problem as robots: if an autonomous military robot were to kill a non-combatant, it is not clear how, what or whom we would hold accountable? The manufacturer (product liability???), the Area Officer/CO, who might have ordered the overall operation, but not the indiscriminate killing? Treaties pertaining to weapons stipulate that weapons systems which inherently violate the LOAC cannot be developed, let alone deployed. As the main point of that body of law is to hold individuals and warring nations accountable for their behavior, an Australian philosophy colleague at the University of Melbourne, Rob Sparrow, has argued accordingly that military robots are illegal under that provision, precisely because they cannot be held accountable in any meaningful way for their battlefield conduct.

On the other hand, some of the proponents of the new military technologies, especially, argue that they render war less destructive, and more discriminate: that is, they comply more readily with the demand of just war doctrine that war’s damage bear some reasonable relation to the moral gravity its purpose, and, in any case, that due care be taken that the damage done not extend unduly to those who are not directly engaged in it. So the proponents of military robotics claim that their platforms are inherently “more moral” than the conventional war-fighter, because they do not get angry or frightened, or engage in indiscriminate killing as revenge or out of frustration. Likewise, and despite the frightening scenarios with which I concluded that discussion, some experts argue that an appealing feature of cyberwarfare is that it could be more

ethical than traditional warfare because the damage could be less, and could be more easily repairable. Damage done to data and programs (albeit not physical hardware) can be repaired by writing over damaged bits with correct data. That means that if during a war I deny cyber access to necessary services or property, I could undo that damage, un-encrypt the block, or otherwise provide a remedy for the denial as part of the peace treaty. It is much easier to do that than to rebuild a dam or electrical grid. Would that also mean, though, that it would be accordingly easier to contemplate fighting a war? Should there be rules preventing the targeting of vital civilian infrastructure via cyber attacks, as there are now for conventional attacks?

All of this has yet to get sorted out, and the sorting out will most assuredly result in new rules, new treaties, new protocols, new guidelines for starting, conducting, and ending wars, and most importantly, better moral comprehension of the challenges these new developments present to nations and their citizens, rightly concerned with averting war, maintaining peace, and providing for the rule of law and the respect for basic human rights. These kinds of discussions suggest, however, that the time-honored moral principles on which these new and challenging conversations will transpire have not themselves changed. Only our understanding and application of these principles must evolve to respond to the new challenges. Clausewitz, in his influential work, also recognized this feature, that each age has its own unique forms of warfare. “Irregular warfare” appears to be ours, and we share collectively a great responsibility for having to “think it through” with the greatest care.

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