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The Law of War in the 21st Century: Weaponry and the Use of Force

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War and International Law: Distinguishing Military and Humanitarian Professions

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Introduction: a Common Profession

I would like to begin by thanking Admiral Shuford, Professor Dennis Mandsager and Professor Charles Garraway, as well as Major Richard Jaques and Commander Dale Stephens, who have given me—and my students—a warm welcome at the Naval War College. I appreciate their generous hospitality and good counsel.

For civilian students and academics like me, who have never served in uniform, the military profession can seem to be a different universe. But how different are we, professionals within and outside the armed services? How different are the professions of war and peace?

When I was a young man, they could not have seemed more different. I registered as a conscientious objector after the Christmas bombings of Hanoi in 1972, and eventually became an international lawyer. I hoped I would find work promoting peace, economic development, humanitarian and progressive values on the global stage. Nothing seemed as different as the humanitarian and military

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professions—the one made war, the other sought to limit war’s incidence and moderate war’s violence.

Indeed, the military seemed to me then all that international law was not—violence and aggression in contradiction to our reason and restraint. It was only later that I learned how many international lawyers serve with the military—and how readily humanitarians have rushed to legitimate the use of force.

War and peace. I studied history and political science. War, we learned, "broke out" when "disputes" could not be resolved peacefully, when cosmopolitan reason gave way to nationalist passion, when the normal "balance of power" was upset by abnormal statesmen. These bad guy statesmen pursued outdated projects of aggrandizement, domination, aggression or imperialism. They were in cahoots with what we called "the military industrial complex"; not knowing we were quoting Eisenhower.

Realpolitik was the disease; the softer wisdom of international law and international relations was the cure. The key to peace was wise statecraft and conflict management. We put our faith in negotiations among the disputing parties—which we hoped to facilitate. We were sure that reasonable aspirations for peaceful change should—and would—be accommodated by wise leaders, for whom we would serve as advisors. Leaders who would act for the common good, in a global humanitarian and cosmopolitan spirit. Leaders like that would address the roots of war in poverty, cultural backwardness, nationalist isolation, or ideological fervor. They would need—and want—help from the institutional machinery of the international community.

More than anything else, management for peace would require procedures—good practices, good offices, a steady and imaginative institutional framework and a cadre of dedicated humanitarian policy experts who could express and implement the world’s general interest in peace. The United Nations, the non-governmental organizations (NGOs), and civil society, the peacemakers and peacekeepers, needed to succeed so that the military would never again be needed.

How did we imagine the military? Our knowledge was limited, our imagery vague. All that ceremony and hierarchy, training to kill. They were hot, passionate; we were cooler heads prevailing. We were dry, focused, pragmatic and managerial. I think we imagined war as it is depicted in films of the ancient world. The troops mass at the border, a command is given and everyone rushes forward helter-skelter, applying lethal force as fast and furiously as possible.

But of course it is not like this at all. Scoundrels do rule—often there simply is no wise and benevolent ruler waiting for our advice about the general good.

More importantly, military and civilian professionals, although certainly different, are no longer oil and water. War must also be managed by experts. The more I have known military officers and military lawyers, the more obvious the parallels between our professions have become. The more I’ve come to see us all as managers. And the more I’ve seen that when we differ, it is often the military that are the cooler heads.

Some years ago, before the current war in Iraq, I spent some days on board the USS Independence in the Persian Gulf. Nothing was as striking about the military culture I encountered there as its intensely regulated feel. Five thousand sailors, thousands of miles from base, managing complex technologies and weaponry, constant turnover and flux. It was absolutely clear that even if you could afford to buy an aircraft carrier, you couldn’t operate it. The carrier, like the military, is a social system, requiring a complex and entrenched culture of standard practices and shared experiences, rules and discipline.

The carrier is also a small town. I remember the eager salesman in a crowded mess hall selling Chevrolets for delivery when the crew next hit shore. I came away completely ready to believe that, at least in principle, no ship moves, no weapon is fired, no target selected without review for compliance with regulation, not because the military has gone soft, but because there was simply no other way to make modern warfare work. Warfare has become rule and regulation.

In a way, of course, the routinization of law—humanitarian law—in the military professions is a terrific achievement. Military professionalism affirms civilian control. But more, our military and humanitarian professions have merged, yielding a humanitarian military and a realistic, pragmatic humanitariansim.

But I worry. Was there nothing valuable in the separation of military and humanitarian professions? As our professions merge, what happens to the virtues of standing outside, speaking humanist truth to military power? And what happens to the real political necessity for the military to break some eggs when the going gets tough? What, moreover, happens to the legal "principle of distinction?"—the principle that military and civilian professions must be distinguished.

My project this morning is to retrace the laws about warfare to illuminate, as best I can, the ways in which the military and legal professions have marked and unmarked the boundary between war and peace, and some of the virtues and vices of strengthening and weakening our sense that humanitarian and military professionals march to different drummers.

Looking back, the legal mind has sometimes sharply distinguished war and peace, and sometimes blurred them together. The modern laws of war inherit both traditions—and now offer us a confusing mix of distinctions that can melt into air when we press on them too firmly. A law of firm rules and loose exceptions, of foundational principles—and counter principles. This complex professional language can certainly limit our vision. For the legal professional—whether serving in
the military or the humanitarian world—the challenge is to engage this slippery body of material strategically as a partner in, rather than a substitute for, political leadership and command responsibility.

The narrative line in this very complex historical story is actually quite simple—the rise and fall of a distinction between war and peace. For the early 19th-century jurist, war and peace were far less distinct than they came to seem in the half century before the First World War. After that war, 20th-century international lawyers sought to bridge the gap that had opened between war and peace, to routinize humanitarianism in the military profession and pragmatism among humanitarians.

Although they were quite successful—our professions have merged—the potential to distinguish has not been eliminated. Instead, the relationship between war and peace has become, for the humanitarian lawyer and military professional, itself something to be managed. We now have the rhetorical and doctrinal tools to make and unmake the distinction between war and peace. And we do so as a tactic in both war and peace. The result is less a difference between the outside of humanitarian virtue and the inside of military violence than a common profession whose practitioners manage the relationship between war and peace within a common language; all the while working in the shadow of a new outside, the world we think of as “politics.”

**Historical Backdrop: the Rise of “Modern War”**

Our laws of war were forged in the shadow of a new “modern” conception of warfare. In the late 18th and early 19th centuries, what had been an aristocratic endeavor of the old regime became the general project of a nation—an extension of public policy, an act of the whole.

This is the development crystallized by Clausewitz as a continuity between war and peace. We have come to treat his formulation as classic:

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\text{We know, certainly, that War is only called forth through the political intercourse of Governments and Nations; but in general it is supposed that such intercourse is broken off by War, and that a totally different state of things ensues, subject to no laws but its own. We maintain, on the contrary, that War is nothing but a continuation of political intercourse, with a mixture of other means.} \]

The new attitude Clausewitz proposes had been building for a generation. But the revolutionary break with the ancien régime—and the Napoleonic wars that followed—drove it home. The transformation of war from the interpersonal, dynastic and religious struggles of an aristocracy to the public struggles of a nation—a citizens’ army, the levee en masse, the army “of the republic”—made war visible as an extension of national policy, as a project of the whole society.

War became continuous with the political intercourse of peacetime as it became the public affair of a nation—an instrument of national policy, an expression of national sovereignty, a sign of national honor. The ancient marks of military distinctiveness, the uniform, the profession, the codes of honor, became synonymous not with aristocratic status, but with public life—and often with submission to civilian leadership.

Latent in the merger of war and public policy lay a distinction between the old war and the new—wars of chivalry, honor and passion, versus wars of reason, calculation and policy.

It took some time for this new vision to take hold. In 1838, a few years after Clausewitz wrote, and long before he would become a wartime president, Abraham Lincoln spoke of the abolitionist cause in these terms: “Passion has helped us, but can do so no more. It will in future be our enemy. Reason, cold, calculating, unpasioned reason, must furnish all the materials for our future support and defense.”

In saying this, Lincoln was understood to set himself against war—the just cause would need the calm determination of cooler peacetime heads. Two and a half decades later, however, Lincoln would be embroiled in a war that would confound this easy opposition of passionate war and reasoned peace.

Our Civil War—birthplace for so much of the law in war—is often remembered as the first “modern” war. In part, this is winner’s history—a war of the modern North against the antebellum South, a war of industrial power and the Federal Nation, against the old military order of chivalry and the old sectarianism of region. A culture of commerce defeating a culture of honor, cold Northern reason slowly quenching the hot passions of the South in the name of a National Whole.

But the Civil War’s modernity lay not only in the Northern victory. For both sides, this was a war pitting the full economic and spiritual powers of their imagined community against another in a struggle for national identity. Modern war conducted as total war, war of the whole, war for the whole. In this sense, Lincoln’s unpasioned reason would not forestall war; it would become war. But neither would it remain split from passion, as Lincoln’s inspired vocabulary of sacrifice, sanctification—“we cannot dedicate, we cannot consecrate, we cannot hallow this ground”—would attest.

More than anything, the modernity of the Civil War lay in the strange brew of reason and passion through which the struggle was understood by both sides. The Northern cause was also a crusade, the Southern military also a redoubt of professional skill, thought, and art, against an often brutal Northern campaign. The
rhetorical tools for distinguishing war and peace, new wars and old wars, were there, but they were redirected to define the relations between the warring parties. This mix of passion, reason and national expression on both sides conjured up a war of singular ferocity. In a sense, the Clausewitzian vision had been realized—war had become continuous, in reason and passion, with the great political struggles of the nation.

Legal War: Modern War Encounters Modern Law

On the one hand, 19th-century legal developments contributed to this emerging vision of warfare. The private modes of warfare associated with the old regime, now thought incompatible with a unitary public sovereign monopoly of force, were progressively eliminated. The 1856 Paris Declaration, for example, eliminated “privateering,” a complex legal institution through which “letters of marque” authorized private vessels to carry out belligerent acts. Henceforth there would be one sovereign, one military.

At the same time, however, late 19th century changes in legal consciousness transformed what it meant for war to be the exclusive act of a public sovereign. Most crucially, by the end of the 19th century, it no longer meant that war was continuous with peace, or a project of the whole—more the opposite.

The emergence of a sharp distinction between public and private brought with it the image of a transnational commercial space that should be kept free from contamination by public force. Private armies, mercenaries, privateers; all these were outmoded, not only because they were part of an aristocratic past, but because they did not fit with the new, exclusively public nature of sovereign war powers.

The public realm had become one sphere of power among many, marked off from the private realm of the market and the family. Public warfare that had seemed general, continuous with the whole society, now seemed, in legal terms, specific—the project of the government, not the society.

Law’s Allies: Humanitarians Speaking Virtue to Violence

Humanitarian voices supported the legal separation of war from the domain of peace. Broad pacifist campaigns arose from diverse sources: church leaders, proponents of woman’s suffrage, heirs to the abolition movement, as well as political activists of all types—anarchists, socialists, populists, progressives, Catholics.

These diverse voices marked the distinction between war and peace in various ways—as ethics against politics, as faith against the cruel logic of commerce, as calm reason against fanaticism, modern logic against the primitive culture of honor. In fact, the terms with which they marked the line from peace to war parallel those by which both sides distinguished North and South.

All these voices spoke to war, to the statesmen and military who made war, from outside—in the name of an alternative ethical vision, sometimes national, more often universal. War and peace were separate—Clausewitz was now the problem. We might now say they paled for peace by speaking truth to power. The point was to shrink the domain of war through moral suasion, agitation, shaming, and proselytizing. In their view, blurring war with peace was both dangerous and immoral.

This conviction lent an ethical urgency to the emergence of a sharp legal distinction between war and peace. Each was now a legal status, separated by a declaration. Combatants and noncombatants, neutrals and belligerents have different bundles of legal rights and privileges. The battlefield, the territory of belligerency, was legally demarcated. The legal treaties of the period began to place the law of peace and the law of war in separate volumes. In part, these distinctions aimed to limit the carnage of war by expanding the privileges of civilians and limiting the military privilege to kill.

These distinctions were also part of a broader reorganization of legal thought, sharpening the distinction between the public and the private sphere, hardening private rights and limiting public powers to their respective spheres.

For all, peace and war were to be legally separated, for example, private rights were increasingly thought to be continuous across the boundary. It is here that we began to see the logic of thinking that when the dust settles after a war claiming the lives of millions, destroying empires, and remaking the political and economic landscape of the planet, people might reasonably feel they are still entitled to get their property back.

In short, the late 19th century developed an alliance between two rather different sets of ideas. A moral conviction that the forces of peace stand outside war, demanding that swords be beaten into ploughshares, and a legal project to sharpen the distinction between public powers and private rights.

The result was a legal conception of war as a public project limited to its sphere. The legal distinctiveness of war reinforced the idea that war was itself a discrete and limited phenomenon—over there, the domain of combat. It seemed reasonable to expect that warriors stay over there—and that protected persons, even women soldiers, stay outside the domain of combat.

This alliance of ethics and legal form has continued across the 20th century and is with us still. We see it in the effort to restrain war by emphasizing its moral and legal distinctiveness—by walling it off from peace and shrinking its domain. We see its echo in the many varieties of 20th-century pacifism, in efforts to revive “just war” theory as an exogenous truth that can limit military power, and in the struggle
to bring the language of human rights to bear on the military, that is, to judge the effects of war by a different and higher ethical standard. But we also see it in efforts to treat combat and "police action" as fundamentally—ethically, legally—different; the one the domain of human rights, the other the proper domain of the law of armed conflict.

I have a great deal of sympathy for this outsider approach. It is where my own professional and ethical journey began; in a moral world for which the Clausewitzian perspective was precisely the problem. To think war and peace continuous was to think the unthinkable. And to embrace a cynical, realpolitik point of view which, because it could think war, would also find itself making war, was similarly unthinkable. If you can't tell the difference between war and peace, how can we even have a conversation about limiting war's violence? In this view, our only hope is to bring an external reason to bear on the violence of war—and an external ethical passion to the cold calculation that war might sometimes make sense.

**The Dark Sides of Outsider Virtue: Limits to the Alliance**

Nevertheless, the dark sides of this outsider's perspective are now familiar. There is, and I will come back to this, the uneasy feeling that war simply is no longer as distinct as all that. Even assuming war might be conducted "over there," in its own domain, it has always been difficult to keep one's ethical distance from warfare in modern discussions of international affairs.

There is the nagging problem that force also has humanitarian uses in a wicked world. Moreover, war can strengthen our moral determination. We know that great moral claims often become stronger when men and women kill and die in their name. There is some kind of feedback loop between our ethical convictions and our use of force. Moreover, we know how easily moral clarity calls forth violence and justifies warfare. It is a rare military campaign today that is not launched for some humanitarian purpose.

Looking back, this was a great lesson of the Civil War—both parties experienced their project and exacerbated their opponents as both cool reason and hot crusade. Both battled in the name of the National Whole. Everyone was speaking truth to power as they went at one another tooth and nail.

In the years since, we have learned how easily ethical denunciation and outrage—triggering intervention in Kosovo, Afghanistan, even Iraq—can get us into circumstances where we are not able to follow through and cause the making of humanitarian promises which war cannot deliver. The universal claims of human rights can seem to promise the existence of an "international community" which is simply not available to back them up.

Indeed, the discourse of ethical denunciation often has a tip of the iceberg problem. Take Abu Ghraib. Sexually humiliating, even torturing and killing prisoners is probably not, ethically speaking, the worst or most shocking thing our Coalition has done in Iraq. We should worry that our outrage at the photos may also be a way of not thinking about other injuries, deaths and mutilations our government has wrought.

Outrage can distract us from the hard questions. Was the problem in Abu Ghraib a legal violation—or a failure of leadership? Was the failure one of human dignity—or tactics? The whole episode was clearly a military defeat. But we are left with the nagging question. If it could be kept secret, if it could be done pursuant to a warrant, perhaps sexual humiliation can help win the war; might, on balance, reduce the suffering of civilians and combatants alike.

We know, moreover, that following absolute ethical precepts in wartime—as any other time—can become its own idolatry. Is it sensible to clear the cave with a firebomb because pepper spray, lawful when policing, is unlawful in "combat"? Absolute rules lead us to imagine we know what violence is just and what is unjust, always and for everyone. But justice is not like that, it must be imagined, built by people, struggled for, and redefined, in each conflict in new ways. Justice requires leadership—on the battlefield and off.

Of course, for all these difficulties, much can sometimes be achieved by bringing humanitarian reason to bear on cultures of violence and by opposing the cruel calculations of cynical statesmen with ethical commitment.

Still, an external moral discourse may not be able to stay all that external. Often, the trouble begins when it hits the problem of exceptions. What if it were Hitler, what if there were genocide, what if they were raping your mother? What about self-defense? What about deterrence? These classic questions take us straight to the doctrinal world of flexible standards, balancing conflicting considerations, assessing proportionality that is familiar to the professional weighing costs to achieve gains. To figure out when and how much self-defense is "just," we need technical, professional military expertise.

Some commentators reacted to the 1996 International Court of Justice opinion on the *Legality of the Threat or Use of Nuclear Weapons*—a fabric of legal equivocations—by shaming the Court for speaking with nuance about an apocalypse; for parsing the "slaughter of the innocents" into the awkward categories of Article 38; for worrying more about the validity of norms than the future of humanity.

The horrors of warfare, the dead and mangled bodies, the lives and families ripped apart, the intense anxiety and suffering on and off the battlefield, the pain of a single wounded child crying out, it seems obscene to speak of these things in any language but that of moral clarity, regret and outrage.
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But is there, in fact, an alternative mode of discussion on which to ground this sensibility? Once we set out to speak of nuclear war as "slaughter the innocents," we would soon enough need a definition for innocent. We would need to account not merely for the horrors of Hiroshima and Nagasaki, but also for their singularity. How can the dangers of nuclear proliferation, nuclear error, nuclear first use best be prevented? Serious, difficult questions. What about deterrence, does it work? When? And, of course, what about torture? When does it work?

Moreover, presuming we speak about the slaughter of the innocents in order to reduce the likelihood of nuclear war—rather than merely to bear witness, we will need to assess ethical denunciation itself in tactical terms. What are the costs and benefits of denunciation? When should we trim our sails a bit, hold back, even flatten those whose fingers are on the button, in the name of an effective pacifism? Of course, if we hold our rhetorical fire this time people may die. People whose death we might have prevented, whose torture we acquiesce, whom we sacrifice for the larger ethical objective of a stronger law in war, or a more legitimate International Committee of the Red Cross (ICRC).

Strategy Switching: Humanitarian Pragmatism and Antiformalism

Over the last century, these difficulties and ambiguities have eroded confidence in the outsider strategy; an erosion sped by the fate of the legal consciousness with which this strategy had been allied. The first half of the 20th century saw a widespread loss of faith in the formal distinctions of classical legal thought; in the wisdom, as well as the plausibility, of separating law sharply from politics, or private right sharply from public power.

This loss of faith has had consequences for efforts to limit the violence of warfare through law; both undermining classic distinctions, between belligerent and neutral, for example, and opening new strategies for moving more fluidly between military and humanitarian professional vocabularies.

As a result, the strategy of external denunciation—naming and shaming—has never had the grip in the law of force that it has had, say, in the field of human rights. Indeed, the modern law of force represents a triumph for grappling the nettle of costs and benefits and infiltrating the background decision-making of those whom it would bend to humanitarian ends.

The result was a new, modern law in war. This is the law known to the ICRC and much of the European international law establishment as "humanitarian law," and to the US military as the "law of armed conflict." They are speaking about the same thing. I prefer the classic term "laws in war" or *jus in bello*.

David Kennedy

As early as the Civil War, the humanitarian project sought less to distinguish war from peace, or just war from unjust war, or good guys from bad guys, than to limit the violence of all sides through an insider strategy of professionalization. It is not surprising that Francis Lieber, author of an early code of conduct for battle had relatives on both sides in our Civil War. The law in war we have inherited eloquently illustrates the strengths and weaknesses of this professionalization strategy.

The "law in war"—associated most prominently with the International Committee of the Red Cross—has always prided itself on its pragmatic relationship with military professionals. It is not unusual to hear military lawyers speak of the ICRC lawyers as their "partners" in codification—and compliance—and vice versa. They attend the same conferences, and speak the same language, even when they differ on this or that detail.

Developing a common insider vocabulary did not mean jettisoning rules; it meant first of all placing the rules on a firmer footing in the militarily plausible. Rules are not external expressions of virtue, but internal expressions of professional discipline.

Already in the 19th century, many humanitarians thought the best way to proceed was to work with the military to codify detailed rules they can respect—no exploding bullets, respect for ambulances and medical personnel, and so forth. To this day, the most significant codifications have indeed been negotiated among diplomatic and military authorities.

In this, the codified 19th-century law in war was something of an exception to the prevailing spirit of classical legal thought—and a precursor for what would follow in the 20th century. Rather than elaborating private rights against public powers, it harnessed the authority of public sovereignty to the articulation of limits; foreshadowing an international legal positivism that would be theorized only in the early decades of the 20th century as a repudiation of 19th-century efforts to ground law outside sovereign consent.

Of course, this reliance on military acquiescence limited what could be achieved—military leaders outlaw weapons which they no longer need, which they feel will be potent tools only for their adversaries, or against which defense would be too expensive or difficult. Narrowly drawn rules permit a great deal—and legitimate what is permitted.

Recognition of these costs is one reason the pragmatism of the law in war has always meant more than positivism; more than deference to sovereign consent; more than legal clarity; more than realism about the power of nation States. Pragmatism has also meant antiformalism—principles and standards replacing rules.

As you all know, since at least 1945, a vocabulary of principles has grown up alongside tough-minded military bargains over weaponry. The detailed rules of
The Hague or Geneva law have morphed into standards—simple ideas which can be printed on a wallet-sized card and taught easily to soldiers in the field. “The means of war are not unlimited,” “each use of force must be necessary” and “proportional.” These have become ethical baselines for a universal modern civilization.

Humanitarians have sought to turn rules into principles to render the narrow achievements of negotiation in more general terms; transforming narrow treaties into broad custom. Military professionals have done the same for different reasons—to ease training through simplification, to emphasize the importance of judgment by soldiers and commanders operating under the rules, or simply to cover situations not included under the formal rules with a consistent practice. Apparently, for example, a standard Canadian military manual instructs that the “spirit and principles” of the international law of armed conflict apply to non-international conflicts not covered by the terms of the agreed rules.

It is not just that rules have become principles—we as often find the reverse. Military lawyers turn broad principles and nuanced judgments into simple bright line rules of engagement for soldiers in combat. Humanitarians comb military handbooks and government statements of principle promulgated for all sorts of purposes, to distill “rules” of customary international law. The ICRC’s recent three-volume restatement of the customary law of armed conflict is a monumental work of advocacy of just this type.

In the modern law in war, both rules and standards are simultaneously understood in the quite different registers of “validity” and “persuasion.” In the world of validity, the law is the law—you should follow it because it is valid. If your battlefield acts do not fall under a valid prohibition, you remain privileged to kill. Full stop. On the other hand, however, as a tool of persuasion, the law in war overflows these banks. It will be hard to argue—particularly to persistent opponents—that many of the purportedly customary rules in the ICRC restatement are, strictly speaking, “valid.” But there is no gainsaying their likely persuasiveness in many contexts and to many audiences.

We are used to working with the law of armed conflict in the key of validity. We make rules by careful negotiation. We influence customary rules by intention and public behavior. We send ships through straits or close to shorelines both to assert and to strengthen rights.

But we will need to become more adept at operations in the law of persuasion. The domain in which the image of a single dead civilian can make a persuasive case for a law of armed conflict violation trumps the most ponderous technical legal defense.
outrage. We have repeatedly heard it said that the administration, like so many others, was “shocked by the photos.” They may have been—but I wonder. If Rumsfeld was indeed shocked, might he not be just a bit too naïve to be entrusted with taking the country to war? He was shocked in part, as we all were, because the violence was gratuitous, unnecessary, not instrumentally justified, and, of course, because it was photographed. But was it really not necessary? How does sleep or sensory deprivation compare to humiliation, or to chills, or to intense fear? Which is more humane? Which more effective? Can we still distinguish the two questions?

Asymmetry—Severing the Laws of Validity and Persuasion

There is something else about this new vocabulary that is disturbing. You may remember Major General James Mattis, poised to invade Falluja, concluding his demand that the insurgents stand down with these words: “We will always be humanitarian in all our efforts. We will fight the enemy on our terms. May God help them when we’re done with them.”* I know I shivered at his juxtaposition of humanitarian claims and blunt threats.

It is troubling, of course, that this so often has been a vocabulary for judgment of the center against the periphery. When the Iraqi insurgent quoted on the same page of the New York Times as Mattis threatened to decapitate civilian hostages if the coalition forces did not withdraw, he was also threatening innocent civilian death—less of it actually—but without the humanitarian promise. And he also made me shiver.

It is no secret that technological advances have heightened the asymmetry of warfare. In the framework of validity, it is clear that all are bound by the same rules. But as persuasion, this assumption is coming undone. When the poor deviate from the best military practices of the rich, it is tempting to treat their entire campaign as illegitimate. But before we jump to the legitimacy of their cause, how should we evaluate the strategic use of perfidy by every outgunned insurgency battling a modern occupation army? From an effects-based perspective, perfidious attacks on our military—from mosques, by insurgents dressing as civilians or using human shields—may have more humanitarian consequences than any number of alternative tactics. And they are very likely to be interpreted by many as reasonable, “fair” responses by an outgunned, but legitimate force.

There is no question that technological asymmetry erodes the persuasiveness of the “all bound by the same rules” idea. It should not be surprising that forces with vastly superior arms and intelligence capacity are held to a higher standard in the
decision of world public opinion than their adversaries. As persuasion, the law in force has indeed become a sliding scale.

Persuasion and the CNN Effect

In 1996, I traveled to Senegal as a civilian instructor with the Naval Justice School from here in Newport to train members of the Senegalese military in the laws of war and human rights. At the time, the training program was operating in 53 countries, from Albania to Zimbabwe. As I recall it, our training message was clear: humanitarian law is not a way of being nice. By internalizing human rights and humanitarian law, you will make your force interoperable with international coalitions, suitable for international peacekeeping missions. To use our sophisticated weapons, your military culture must have parallel rules of operation and engagement to our own. Most importantly, we insisted, humanitarian law will make your military more effective—will make your use of force something you can sustain and proudly stand behind.

I was struck when we broke into small groups for simulated exercises, by a regional commander who kept asking the hard questions—when you capture some guerrillas, isn’t it better to place a guy’s head on a stake for deterrence? Well, no, we would patiently explain, this will strengthen the hostility of villagers to your troops, and imagine what would happen if CNN were nearby. They would all laugh, of course, and respond “we must be sure the press stays away.”

Ah, but this is no longer possible, we said, if you want to play on the international stage, you need to be ready to have CNN constantly by your side. You must place an imaginary CNN webcam on your helmet, or, better, just over your shoulder. Not because force must be limited and not because CNN might show up, but because only force which can imagine itself being seen can be enduring. An act of violence one can disclose and be proud of is ultimately stronger, more legitimate.

Our lesson was written completely in the key of persuasion, not validity. It was a lesson apparently lost on those who considered the interrogation of “high value targets” in our own war on terror. Nevertheless, the Senegalese had learned, as Secretary Rumsfeld now seems to be learning, what was required for a culture of violence to be something one could proudly stand behind. What was required, in a word, for warfare to be civilized. The more I thought about that, however, the more it made me shiver as well.
I have been speaking about the law in war as if we could rather easily identify its terms. But what law governs the battlefield? If you ask an international commercial lawyer, what law governs the transaction, the answer will be anything but straightforward. Treaty law on the subject—even the World Trade Organization agreements—would only be the beginning. There would be international private law, of course. But far more importantly, national regulation with transnational effects, and the national private law built into the transaction through private ordering. Assessing the significance of these various bodies of law requires not only inquiry into their formal jurisdictional validity, but also their sociological effect. Who will want to regulate the transaction? Who will be able to do so? What rules will influence the transaction even absent enforcement?

The answer for warfare is no simpler, particularly for coalition operations, or for campaigns that stretch the "battlespace" across numerous jurisdictions. Who will try to apply what rules, who will succeed? When the Italians decide to prosecute CIA operatives for their alleged participation in a black operation of kidnapping and rendition, the law of the battlefield has shifted. The practice of military law today requires complex and shifting predictions of fact and law. Whose interpretation will prevail and before what audience?

This kind of analysis will require sophisticated comparative law, for there are more than one laws of armed conflict. The rules simply look different if you anticipate battle against a technologically superior foe, or live in a Palestinian refugee camp in Gaza. Moreover, although a national military may translate the words of the international law of armed conflict directly into its operations manual, the interpretation and intent may well be different. More often, different nations, even in the same coalition, will have implemented and interpreted the shared rules and principles quite differently. Humanitarians looking at the same rules might lean toward restrictive interpretations, adopting the perspective of the potential "victim," while the military might lean towards greater freedom of maneuver. Although we might disagree with one another's interpretation, we must recognize that our professional materials are elastic enough to enable quite diverse interpretations. Military law is comparative law.

As humanitarians, when we compare international rules with the military's rules of engagement, we might well be surprised: the military rules might well be the stricter. The strength and significance of the military's own culture of discipline can be difficult for civilians to grasp. I have tried to explain it to civilian audiences by saying it is bureaucratic necessity, central to the effectiveness of the mission and to the safety of colleagues. But my sense is that military discipline is as much passion as reason; instrumentalist wrapped in honor and integrity in a culture set off from civilian life—a higher calling.

As a social production, military discipline is also of course, and perhaps more importantly, a work on the self. The United States Army runs recruitment commercials which implore "see your recruiter, become an Army of One." The promise is power, to be sure. But also discipline—self-discipline. If you join, you will be transformed inside—you will become an army, coordinated, disciplined, your own commanding officer, your own platoon, embodying within yourself the force of hundreds because of the work you will do, and we will do, on you.

Of course, there is opportunity for individual judgment—and error. Soldiers who run amok. We remember the pilots who flew beneath the Italian ski lift slicing the cables. And the precision guided missile fired in Kosovo with the tail fins put on backwards, spinning ever further from its programmed target until it exploded in a crowded civilian marketplace. We remember the American pilots who bombed their Canadian allies. Or, for that matter, My Lai, the abuse of prisoners in Baghdad, and all the other tales of atrocity in war.

It can be particularly hard for civilians to grasp that when soldiers are tried for breach of military discipline, their defense is often stronger under the vague standards of international humanitarian law than under national criminal or military law. Or that international law provides the framework less for disciplining the force than for unleashing the spear at its tip.

Indeed, the international legal standards of self-defense, proportionality and necessity are so broad that they are routinely invoked to refer to the zone of discretion rather than limitation. I have spoken to numerous Navy pilots who describe briefings filled with technical rules of engagement and military law. After the military lawyer leaves, the commanding officer summarizes in the empowering language of international law—"just don't do anything you don't feel is necessary" and "defend yourself, don't get killed out there." The fighter pilot heads out on a leash of rules, assembled in a package coordinated by a complex transnational array of operating procedures. Only at the last moment, in contact with the enemy, is he released to the discretion framed by the law of armed conflict, that is, necessity, and self-defense.

What are we to make of the widespread sense that military professionals are the most disturbed by the current administration's efforts to shrink or skirt humanitarian standards in their war on terror? Has the military gone soft? Become less willing than their civilian masters to condone harsh tactics? Or is the scandal that the JAG Corps has been more courageous in their opposition to harsh tactics than those civilian humanists who stand outside, wringing their hands, but uncertain
whether they are in fact qualified to judge? Perhaps the scandal is our sense that to
torture or not to torture has become a professional judgment in the first place, un-
avoidably linked to the question of whether harsh treatment will work. Again, how
effective, in fact, is sexual humiliation, or isolation, or torture?

After the Gulf War, it was widely acknowledged that the decision to take down
the electrical grid by striking the generators had left power out for far longer than
necessary, contributing to unsanitary water supply and the unnecessary death of
many thousands from cholera. Military planners involved had admitted this was a
mistake, and they have reportedly revised their procedures accordingly. In Kosovo
and Iraq, such a devastating blow to the electrical grid was not struck.

But in reviewing the Gulf War experience, they will not say that taking out the
generators lacked proportionality or necessity, or that it was excessive given what
they knew then and what they were trying to achieve. These legal standards remain
the solid ground on which their acts, and, ultimately the deaths of many thousands,
can remain legitimated.

Weighing and Balancing—What Exactly?

The transformation of the law in war into a vocabulary of persuasion about legiti-
\macy is not the end of the matter. We still need to figure out, for a given purpose, a
given argument, just what is, in fact, necessary or proportional. And of course, it is
in this spirit that targets in the recent Iraq conflict were pored over by lawyers. But
even in the best of times, the promise of weighing and balancing is rarely met.

I have learned that if you ask a military professional precisely how many civil-
ians can you kill to offset how much risk to one of your own men, you won’t receive
a straight answer. When the Senegalese asked us, we’d say “it’s a judgment call.” In-
deed, at least so far as I have been able to ascertain, there is no background ex-
change rate for civilian life. What you find instead are rules kicking the decision up
the chain of command as the number of civilians increases, until the decision
moves offstage from military professionals to politicians.

In the early days of the Iraq war, coalition forces were certainly frustrated by
Iraqi soldiers who advanced in the company of civilians. A Corporal Mikael
McIntosh reported that he and a colleague had declined several times to shoot sol-

diers in fear of harming civilians. “It’s a judgment call,” he said, “if the risks out-
weigh the losses, then you don’t take the shot.” He offered an example: “There was
one Iraqi soldier, and 25 women and children, I didn’t take the shot.” His col-
league, Sergeant Eric Schrumpf chipped in to describe facing one soldier among
two or three civilians, opening fire, and killing civilians: “We dropped a few civi-
lians, but what do you do. I’m sorry, but the chick was in the way.”

There is no avoidance of decisions of this type in warfare. The difficulty arises
when humanitarian law transforms decisions about whom to kill into judgments.
When it encourages us to think the chick’s death resulted not from an exercise of
human freedom, for which a moral being is responsible, but rather from the ab-
stract operation of professional principles.

We know there are clear cases both ways—destroying the village to save it, or
minor accidental damage en route to victory—but we also know that the principles
are most significant in the great run of situations that fall in between. What does it
mean to pretend these decisions are principled judgments? How should we evalu-
ate the irreducibly imaginary quality of the promise that costs and benefits will be
weighed, that warfare will be proportional, its violence necessary?

I was struck that Iraq war reporting was filled with anecdotes about soldiers
overcome by remorse at having slaughtered civilians, and being counseled back to
duty by their officers, their chaplains, and their mental health professionals, who
explained that what they had done was necessary, proportional, and therefore just.

Of course, if you ask leading humanitarian law experts how many civilians you
can kill for this or that, you will also not get an answer. Rather than saying “it’s a
judgment call,” however, they are likely to say something like “you just can’t target
civilians,” thereby refusing to engage in the pragmatic assessments necessary to
make that rule applicable in combat; defaulting, if you will, to the external strategy
of denunciation abandoned a century ago by humanitarian law.

In psychological terms, it is hard to avoid interpreting this pragmatism-promised-
but-not-delivered as a form of denial; a collaborative denial—by humanitarians
and military lawyers—of their participation in the machinery of war.

In the military vernacular, it might be more accurate to sense a collaborative
avoidance of command responsibility and leadership; a willingness to push res-
ponsibility up to the domain of politics or down to the domain of rules. The ten-
dency to blame the civilian leadership—or the lawyers—is well known. But we also
know lawyers, whether inside or outside the military, who make that easy by pre-
tending the law is more decisive—or more open—than it is.

The Law in War Comes Unstuck

In this audience, I do not need to emphasize the extent to which the traditional
law in war is becoming unstuck; questioned from every angle.

In part this is a matter of blurring boundaries—new technologies and new
modes of warfare pressing a doctrinal world imagined in the wake of wars that
seemed “modern” in the 1860s. The language has proliferated—self-defense, war,
hostilities, the use of force, resort to arms, police action, peace enforcement,
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peacemaking, peacekeeping. Who can align them confidently, like "chop," "whip," "blend" on the Cuisinart? They are all technical terms in military parlance and legal doctrine, but also in ethical and political discourse.

Earlier this month I participated in a lengthy discussion at the Council on Foreign Relations on "post-conflict" reconstruction. All agreed we were far from 19th-century warfare. Who was the enemy and where was the battlefield? The old days of industrial warfare are over; you're not trying to blow stuff up on the battlefield until the political leadership surrenders. It's asymmetric, it's chaotic, it's not linear. The battlespace is at once global and intensely local; there are no front lines. Here at home, we hardly seem at war—the enemy, the conflict, the political goal, all have become slippery.

For the military, everything important and difficult seems to happen in a kind of grey area between war and peace. The idea of a boundary between law enforcement, limited by human rights law, and military action, limited by the laws of armed conflict, seems ever less tenable. In the same city troops are at once engaging in conflict, stabilizing a neighborhood after conflict, and performing humanitarian, nation-building tasks.

I heard military men with experience in Bosnia, Kosovo, and Iraq all stress the continuities of the transition from war to peace; they insisted the term "post-conflict" was a misnomer. In principle, planning and training for the post-conflict phase should begin before the conflict, even if it seems hard to imagine identifying "spare" troops in the preparation phase who might be saved for later tasks. In any event, restoring water or eliminating sewage after the conflict are part of winning the war. To paraphrase Clausewitz, post-conflict action is the continuation of conflict by other means. Anyway, they wondered, when did the war start—on 9/11? In 1991? In 2003?

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permissible in domestic riot control and policing—non-penetrating bullets, certain gases—not be available on the battlefield if combat blurs easily with stabilization and law enforcement? In close quarters on board a ship interdicted during a blockade should seamen be issued weaponry appropriate for combat or law enforcement? To what extent does law shape or limit this decision?

In this new environment, we hear that humanitarian law will have to be rethought. But this is more than simply a more complex legal situation requiring more sophisticated analysis. Adjusting the law in war to post-modern warfare will require more than doctrinal ingenuity. It will require a new way of thinking about the role of law—and warfare.

Indeed, it might be more accurate to say that the fluid modern vocabulary of clear rules and sharp distinctions, broad principles and vague calculations of proportionality and necessity was designed precisely for this. It is a professional vocabulary for making distinctions and eroding them, for applying principles and simply invoking them. What will be required is a new understanding of the work of law—and of the responsibilities of command.

Sophisticated analyses of necessity and proportionality, no less than the external vocabulary of distinction and denunciation, seem ever less convincing. Each has, in its own way, become a vocabulary of warfare. More importantly, we are increasingly likely to interpret whatever military or humanitarian professionals say about the use of force in strategic terms, that is as things said for a reason, things said for tactical advantage. As professionals, civilian or military, we know how to make—and unmake—the distinctions between war and peace, between civilian and combatant.

Brigadier General Charles Dunlap gave me the arresting term "lawfare," using law as a weapon, offensively and defensively, to legally condition the battlefield. But in this "public relations" shaping expectations about what will happen and
not battlefield opens a "space" for humanitarian action. For both professions, distinguishing, like balancing, has become at once a mode of warfare and of pacifism.

Ending conflict, calling it occupation; ending occupation, calling it sovereignty; then opening hostilities, calling it a police action; suspending the judicial requirements of policing, declaring a state of emergence, a zone of insurgency. All these things are also tactics in the conflict. We are occupying, but Fallujah, for a few weeks, is again a combat zone, and so on. Defining the battlefield is both a matter of deployed force and a rhetorical claim. This is a war, this is an occupation, this is a police action, this is a security zone. These are insurgents, those are criminals, these are illegal combatants, and so on. And these are all claims with audiences. The old legal issues are there—the claim must have a plausible validity; we must understand its persuasive potential.

Audience reaction matters. For detainees at Guantanamo the "war" may never end. What war, which war? The war on terror? The war on poverty? Al Qaeda? In Iraq? The Taliban? Afghanistan? The war for security, for oil, for . . . ? What is, precisely, the objective that once achieved will end their war? What limits our ability to extend the war for which they are held indefinitely—doctrines of the law of armed

operation. Humanitarians and military professionals are used to thinking about influencing the law in peacetime through careful negotiations, through codification, through advocacy, and through assertions of right. It can be hard, in combat, to see that the law is, if anything, more open to change. When humanitarian voices seize on vivid images of civilian casualties to raise expectations about the required accuracy of military targeting, they are changing the legal fabric.

In the Kosovo campaign, news reports of collateral damage often noted that coalition pilots could have improved their technical accuracy by flying lower, although this would have exposed their planes and pilots to more risk. The law of armed conflict does not require you to fly low or take more risk to avoid collateral damage; it requires you to avoid superfluous injury and unnecessary suffering. But these news reports changed the legal context—flying high to reduce risk seemed "unfair." Humanitarians seized the moment, developing various theories to demand "feasible compliance" that would hold the military to technically achievable levels of care. In conference after conference, negotiation after negotiation, representatives of the US military have argued that this is simply not "the law." Perhaps not, but the effect of the legal claim is hard to deny.
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Clausewitz might well be surprised, however, by the extent to which the turn to language has revitalized the distinction between warfare and the political. In my experience, military and humanitarian professionals operating in this vocabulary share a sense that somewhere else, outside or beyond their careful calculations, somebody else makes decisions in a different way—exercises political judgment and discretion. This is why the absence of a clear exchange rate for civilian lives is untroubling; if the number is high enough, it will become a political decision.

The Law of War—Do Politicians Think Differently?

This takes us directly to the law of war. Normally, of course, for military professionals, the law of war is far less present. Civilian leadership means leaving ques-

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In any event, by the late 19th century, international law had very little to say about the decision to go to war, a silence rooted in the assumption that war was an unrestrained prerogative of sovereign power. The modern law of war is a century long pragmatic reaction against this 19th-century legal silence.

The right and capacity to make war was so central to the late 19th-century legal definition of sovereignty that even in the 1920s, we still find jurists assessing the international legal personality of the League of Nations by asking whether it has the “right” to make war. But the League’s purpose was another.

The diplomats who made the League sought to replace legal doctrines with a political institution that could sanction and deter aggression, while providing a framework for peaceful change and the peaceful settlement of “disputes.” The brave new world of institutional management was born.
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the particular problem... He did not, therefore, attempt to set law against power. He sought rather to find within the limits of power the elements of common interest on the basis of which joint action and agreed standards could be established.¹¹

There is no doubt that this system of principles has legitimated a great deal of warfare. Indeed, it is hard to think of a use of force that could not be legitimated in

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in his account would be a direct transfer from the United Nations. Of course, it was a risk; but the United Nations was also daring, and risking in resisting.

When the United Nations withholds approval or refuses to participate, it may de-legitimize the military campaign. Let us suppose it does not stop it; a determined coalition pushes ahead in the name of Charter principles. In the easy cases, the campaign succeeds; the United Nations has missed out. Or the campaign fails;
and standards of humanitarian law, teachers instructing soldiers in the limits to warfare. Humanitarian rulership is often rulership denied.

The transformation of the law of war into a set of constitutional standards at once defined and enforced through an ex-post assessment of legitimacy earned and

International law urges us to respect Iraqi sovereignty, making it all too easy to think our intervention in Iraqi affairs began with the invasion and ended with the handover of the bundle of rights we have decided to call “sovereignty.”

Those who now admire or deplore our motives...
war and peace that once marked the line between their respective domains. If ours has become a culture of violence, it is a shared culture, a product of military and humanitarian hands. If ours is history's most humane empire, that also is the collaborative achievement of humanitarian and military professionals.

The laws of force increasingly provide the vocabulary not only for restraining the violence and incidence of war, but also for waging war and deciding to go to war. We should be clear; this bold new vocabulary beats ploughshares into swords as often as the reverse. It forecloses our attention to other causes, consequences and alternatives to warfare.

The problem for humanitarians is no longer an unwillingness to be tough; humanitarians have advocated all manner of tough and forceful action in the name of humanitarian pragmatism, and their words have legitimated still more. The problem is an unwillingness to do so responsibly—facing squarely the dark sides, risks and costs of what they propose.

The problem for military professionals is no longer a lack of humanitarian commitment. The military has built humanitarianism into its professional routines. The problem is loss of the human experience of responsible freedom, of discretion to kill, and a loss of the political experience of free decision.

The worry I find most unsettling is the difficulty of locating a moment of responsible political discretion in the broader process. We are all experts, humanitarians, military professionals and statesmen, speaking a common military and humanitarian vocabulary.

The way out will not be to tinker with doctrines of the laws of force. The way forward will require a new posture and professional sensibility among those who work in this common language. When speaking to civilian audiences, I use the vocabulary of decisionism to evoke what I have in mind. Rather than fleeing from the exercise of responsible decision to the comfortable interpretive routines of their professional discourse, humanitarians should, I argue, learn to embrace the exercise of power, acknowledge their participation in governance, and cultivate the experience of professional discretion and the posture of ethically responsible personal freedom. International humanitarians, I argue, inside and outside the military, have sought power, but have not accepted responsibility. They have advocated and denounced, mobilized and killed, while remaining content that others governed and others decided.

The military vocabulary of command responsibility and leadership evokes many of the same ideas. The new law of armed conflict requires a different collaboration between the legal and military professions. The lawyer is brought along to carry the briefcase of rules and restrictions rather than as a participant in discussions of strategy for which he or she would share ethical, if not command, responsibility.