

Forging new just war principles for the virtuous war era

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Abstract

The Just War ethic, with its two pillars *jus ad bellum* and *jus in bello*, is central to the evaluation of the morality of entering into and the conduct of war. Whether grounded in custom and tradition, or based on developments in divine, natural, international, or positive law, the Just War ethic exists as a model capable of defining the bounds of the morality of going to and waging war in a just manner in specific social and political contexts. The ethic developed in response to technological, social, and paradigm shifts tied generally to five historical periods: (1) antiquity; (2) the late Hellenistic/early medieval period; (3) medieval period; (4) the early modern period; and (5) the late-modern contemporary period.

The world is experiencing another paradigm shift: *virtuous* war. Professor James Der Derian coined the phrase to describe conflicts where technological mastery by digitally advanced states has removed their death from their calculation of whether there is just cause to intervene and just means for how to do so, and those technological capabilities are deployed with an ethical imperative for global humanitarian engagement.

Strictly construed, the contemporary formulation of the Just War ethic is insufficient to address the moral, political, and legal dimensions of *virtuous* war. But the ethic is supple; its history replete with reformulations. It is also versatile enough to permit improvement through assimilation of a new, more contemporary set of principles mined from the historical record and forged into a new model capable of meeting the *virtuous* war moment. Doing so will (1) improve international relations discourse, (2) make international conflict debate more precise during an era where technological capability lowers barriers to intervention while humanitarian crises command it, and (3)

improve collective security by striking the appropriate balance between humanitarian exigencies and traditional Westphalian sovereignty norms.

This thesis identifies new moral principles and forges them into a new Just War ethic capable of being adopted by actors (individuals and states) to meet the *virtuous* war moment. The thesis first analyzes the evolution of the moral rules from antiquity to the modern period, focusing on the development of the Just War ethic. Starting from the beginning provides contour for a broader discussion of *virtuous* war, how it differs from prior periods and thus requires new rules, and how the Just War ethic makes room for those new rules. Principles imported from the *jus ad pacem*, *jus in pace*, and *jus post bellum* academic discourses are discussed to address conceptual confusion and bring coherence to *virtuous* war's new moral territory. The thesis continues with a discussion of recent engagements that create a genetic through-line describing how the West moved toward and adopted *virtuous* war. This discussion is organized around "failed," "rogue," and "inept" states, starting with Somalia, Kosovo, Iraq, and Libya, and concluding with the recent *jus cogens* intervention in Syria. The thesis concludes with a discussion of how international norms and legal frameworks should respond to meet the moral challenges imposed by *virtuous* war, and then closes with a proposed international scheme in the form of a proposed Model United Nations Resolution that adopts the newly forged Just War principles grounded in *jus ad pacem*, *jus in pace*, and *jus post bellum*.

Dedication

To my wife, Kris, and my son, Bennett, both of whom endure my frolics and detours with humor, grace, patience, and love. They light my way.

Acknowledgements

I would like to acknowledge and thank Professor Thomas M. Nichols for his support and advice. I am in fact a lawyer and I am also not in fact “Balzac.” Thank you for guiding me with humor and grace to land somewhere in between those extreme left and right limiting lines.

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Chapter I

Introduction

In *The Peloponnesian War*, Thucydides described how the innately human frailties of “fear, honor, and interest” lead to a state of war.¹ Plato observed that the root of war was the necessity to enlarge borders.² Immanuel Kant, in his 18th century work *Perpetual Peace*, said that “war” is “ingrained in human nature, and even regarded as something noble....” In the 20th century, realist theorist Kenneth Waltz wrote *Man, the State, and War*, which considered that war is caused by interrelated “images” of individuals (e.g., the nature of statesmen and political leaders), states (i.e., the domestic makeup of them), and the international system of world politics.³

Whatever its causes, what has doubtless changed are attitudes cultures have adopted toward war, including the justifications for how it is entered and how it is fought. Indeed, for centuries,⁴ humanity has debated what justice means in both contexts, and has sought to reach agreement – with varying results – on war’s limits and its means.⁵

The twin pillars of the Just War ethic, *jus ad bellum* (justice *before* war) and *jus in bello* (justice *during* war), is a moral grammar for thinking about those limits. It is a language for understanding when force is permissible in certain circumstances, and for

¹ Thucydides, translated by R.B. Strassler (ed), *The Landmark Thucydides: A Comprehensive Guide to The Peloponnesian War* (New York: Touchstone, 1998), 15.

² Plato observed that “The original healthy state is no longer sufficient ... the country which was enough to support the original inhabitants will be too small now.” PLATO, THE REPUBLIC, II, 373 b, Fitzgerald, *op cit.*, 14, 79.

³ Kenneth N. Waltz, *Man, The State, and War: A Theoretical Analysis* (New York: Columbia University Press), 1959, vii – 213.

⁴ Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: The Macmillan Company, 1954), 10-11.

⁵ Richard J. Regan, *Just War: Principles and Cases* (1996) (“Regan: Just War 1996”).

debating whether it is so in a particular context. The ethic's strength is its open acceptance that force is often necessary in the conduct of international politics, combined with its insistence that force should not be used unless in service of defined goals. At the same time, the ethic, specifically the *jus in bello* feature of it, controls the particular given it relies on the equal application of the law to all conflict participants.⁶

It has become increasingly clear in the late twentieth and early part of the twenty-first century that certain Western States are undergoing what has been described by some as a revolution in military technology and diplomatic affairs⁷ (RMA) around what Professor James Der Derian has called 'virtuous war.'⁸ Professor Der Derian coined the phrase to describe the technical military capabilities that form the basis of virtual war, *i.e.*, war in which "technological mastery removed death from our experience of war,"⁹ with an emphasis on the way those capabilities are, through the help of media complexes, deployed with a new ethical imperative for global humanitarian intervention.¹⁰ This

⁶ Emmerich De Vattel, *The Law of Nations*, Book III, Ch. XII, §§ 190-191, p. 591 (Kaposy & Whatmore eds. 2008) (The principle of equal application can be found as far back as late medieval writings on the laws of war. Major treatises emphasize that certain restraints in war must apply equally to all combatants; that "whatever is permitted to the one in virtue of the state of war, is also permitted to the other.").

⁷ Andrew Marshall, *Some Thoughts on Military Revolutions – Second Version*, Memorandum for the Record, Office of the Secretary of Defense (August 1993) (1993 memorandum from the Director of the Pentagon's Office of Net Assessment defining a "revolution in military affairs" as a new movement in military analysis in which information technologies combined with innovative military doctrine to transform the nature of war). See also *Prologue* to Laird, Robbin F., Mey, Holger, H., *The Revolution in Military Affairs: Allied Perspectives* 1 (1990).

⁸ James Der Derian, *Virtuous War/Virtual Theory, International Affairs (Royal Institute of International Affairs 1944-)* (2000), 771-88; Der Derian, James, *Virtuous War: Mapping the Military-Industrial-Media-Entertainment Network* (Westview Press 2001), xi. It must be noted that the virtuous war literature "is an imagined one...; no scholars explicitly call themselves virtuous war thinkers.... It simply denotes a way of thinking about war developed ... by combining the insights of many disparate scholars around Der Derian's phrase...." Banta: *Virtuous War* 2011, 279.

⁹ Michael Ignatieff, *Virtual War, Kosovo and Beyond*, (Metropolitan Books, 2000), 5 (Ignatieff writes of the Kosovo intervention, his case study of virtual war, as being a war in which "technological mastery removed death from our experience of war.").

¹⁰ Der Derian, *Virtual War/Virtual Theory*, 772.

revolution is driven by software, more than hardware, and enabled by networks, more than agents.¹¹

Central to the *virtuous* war idea is its virtual nature; and central to that virtual nature is the technological capacity, cunning, and ethical imperative to actuate violence from a distance with minimal resulting casualties for the intervenor.¹² Virtual war is clean on the battlefield and clean in its political discourse. It inspires a vision of bloodless and hygienic wars.¹³ Just as much as virtual wars create tactical and strategic advantages for the digitally superior, the phenomenon makes war a spectacle for the remote viewer by provoking emotions in the intense but shallow way sports do.¹⁴ And it does nothing to limit the impact on the target whose sovereignty has been disregarded and whose citizens have been confronted by superior military capacity.

As the RMA concept evolved (or at least the technological aspect of it), it became intertwined with more intense ethical imperatives for global humanitarian intervention because of a rise in failed states, rogue states, and inept states.¹⁵ With the United States setting the pace, liberal states and international organizations sought virtual solutions to long-running political conflicts. Permanent “peacekeeping” structures emerged for “rapid deployment.”¹⁶ Still other units were established as “rapid reaction forces” to “undertake regional humanitarian interventions.”¹⁷ In this way, the intervenor strived to

¹¹ Der Derian, 772.

¹² Der Derian, 772.

¹³ Der Derian, 772.

¹⁴ Ignatieff, *Virtual War, Kosovo and Beyond*, 4; see also James Der Derian, *Cyberwar, Video Games, and the Gulf War Syndrome*, *Antidiplomacy: Spies, Terror, Speed and War* (Cambridge, MA and Oxford UK, 1992), 173-202.

¹⁵ George R. Lucas, Jr., *From Jus ad Bellum to Jus ad Pacem: Re-thinking Just War Criteria for the Use of Military Force for Humanitarian Ends*, 72-96 in *Ethics and Foreign Intervention*, Eds. Donald Scheid and Deen K. Chatterjee (Cambridge Univ. Press, 2004), 72-96.

¹⁶ Der Derian, *Virtuous War: Mapping the Military Industrial Media Entertainment Complex*, xvi.

¹⁷ Der Derian, *Virtuous War: Mapping the Military Industrial Media Entertainment Complex*, xvi.

create physical, temporal, and emotional distance from its actions through technological supremacy while packaging its violence with moral virtue and low participation requirements so that it could be sold to its citizens. The effect is to lower barriers to the use of force while pressure builds on the international community to “do something” across established national borders to restore peace, maintain order, respond to natural disasters, prevent humanitarian tragedies, or attempt to reorder and re-build (maybe) rogue, failed, or inept states.¹⁸

The Just War ethic has not kept pace with these changes. Worse, many consider the ethic to be a “hopelessly contaminated normative framework,” a mere enabling discourse for war.¹⁹ Adjustments are necessary. To make them, an improved set of justifications for the use of force for humanitarian ends must be developed, particularly because the era is marked by technological superiority (of the powerful) and asymmetric warfare (by seemingly everyone). Authority for a new set of principles can be mined from the historical record and placed astride the Just War ethic; a new set of rules can be forged to meet the *virtuous* war moment.

My research begins in Chapter II where I discuss *virtuous* war, *i.e.*, what it is and why this new empirical reality causes moral dilemmas that can be remedied best through new rules. Chapter III offers a retrospective of the Just War ethic from antiquity to the contemporary period. It discusses the historical evolution and nature of the Just War ethic, emphasizing how it has adapted to meet shifts between transformations of values

¹⁸ Lucas, *From Jus ad Bellum to Jus ad Pacem* 2004, 72-73.

¹⁹ Benjamin R. Banta, *Virtuous war and the Emergence of Jus Post Bellum*, *Review of International Studies*, January 2011, Vol. 37, No. 1 (Cambridge University Press, January 2011), 277-299, 279-80 (quoting Anthony Burke and attributing to him the view that “just war theorists in the 21st Century represent an ‘ontological challenge to peace as a concept.’”); *see also* Anthony Burke, *Against the New Internationalism*, *Ethics and International Affairs*, 19:2 (2005), 84.

and technological, political, social, and cultural innovations throughout time. This thesis recognizes that it is the Just War ethic's historical elasticity that permits the forging of a new hybrid theory to address the dilemmas caused by *virtuous* war today.²⁰

Chapter IV discusses what this thesis describes as the “through-line” connecting “failed,” “rogue,” and “inept” states, each marked genetically for what would emerge as the *virtuous* war paradigm. This includes a discussion of the experiences around interventions (or not) in Somalia and Rwanda, each a “failed” state, discourse around the “virtuous wars” involving “rogue” states Kosovo, Iraq (2003), Libya, and Syria, and special problems caused by “inept” states such as the Congo, Sudan, Haiti, and Afghanistan.

Chapter V discusses the *jus ad pacem*, *jus in pace*, and *jus post bellum*, and why principles mined from them are foundational for addressing the *virtuous* war era and for discussing new international norms and developing a new legal scheme discussed in Chapter VI. Last, following a brief conclusion in Chapter VII, the Appendix suggests a solution to the problems posed by *virtuous* war: a Model UN Resolution.

²⁰ Robert E. Williams, Jr., *The Future of Just War, Jus Post Bellum – Justice in the Aftermath of War*, (Univ. of Georgia Press, 2014), 167-179 (“Just war theory, like ethical theory in general, develops where dilemmas are discerned.”)

Chapter II

Virtuous War

Technology in the service of virtue has given rise to a global form of violence known as *virtuous war*.²¹ Professor Der Derian²² coined the phrase *virtuous war* to describe the technical military capabilities that form the basis of ‘virtual war,’²³ with an emphasis on the way these capabilities are used in the modern era.²⁴ In Der Derian’s model, *Virtuous war* has two components: (1) *virtual war*, specifically conflict in which technological mastery has removed death from the calculus of whether war ought to be entered; and (2) an emphasis on the way those capabilities are, through the help of electronic media, “deployed with a new ethical imperative for global democratic reform [...] and humanitarian intervention.”²⁵

The implications of the *virtuous war* paradigm for the Just War ethic are significant, particularly with respect to how the West defines the issues of the morality of going to and waging war, on one hand, and going to and waging humanitarian

²¹ Der Derian, *Virtuous War: Mapping the Military Industrial Media Entertainment Complex*, xl; see also Der Derian, *Virtuous War/Virtual Theory*, 771-88 (nb *Virtuous war* has been variously described as “surrogate war” (Krieg and Rickli 2018); “risk transfer war” (Shaw 2005, 1); “vicarious war” (Waldman 2018); “liquid warfare” (Demmers and Gould 2018); “network war” (Duffield 2002); “coalition proxy war” (Mumford 2015); “postmodern warfare” (Earhardt 2017); and “transnational shadow wars” (Earhardt 2017)).

²² James Der Derian is the Michael Hintze Chair of International Security Studies and Director of the Centre for International Security Studies at the University of Sydney. His research and teaching interests are in international security, information technology, international theory, and documentary film. A more complete public bio can be accessed [here](#), last accessed on June 20, 2022.

²³ Ignatieff, *Virtual War, Kosovo and Beyond*, 5.

²⁴ Ignatieff, 5.

²⁵ Der Derian, *Virtual War/Virtual Theory*, 772.

engagement, on the other.²⁶ Unlike other forms of warfare, *virtuous* war possesses the power to commute death; to keep it out of sight, out of mind. And herein lies its most morally dubious danger: in virtual executions of war, there is a high risk that one learns how to fight and kill but not to take responsibility for it. To understand the moral and ethical implications of *virtuous* war, each of its two components are discussed next.

Virtual War

The first component of *virtuous* war is its *virtual* nature, *i.e.*, conflict in which technological mastery has removed death from the calculus of whether war ought to be entered.²⁷ Professor Der Derian observed:

At the heart of virtuous war is the technical capability and ethical imperative to threaten and, if necessary, actualize violence from a distance – *with no or minimal casualties*. Using networked information and virtual technologies to bring ‘there’ here in near-real time and with near-verisimilitude, virtuous war exercises a comparative as well as strategic advantage for the digitally advanced. Along with time (in the sense of tempo) as the fourth dimension, virtuality has become the ‘fifth dimension’ of U.S. global hegemony.²⁸

Western democracies, unique in their technical mastery, set the pace for *virtual* war. Since at least the 1970s, the United States has been planning for it. General William Westmoreland said then:

On the battlefield of the future, enemy forces will be located, tracked and targeted almost instantaneously through the use of data

²⁶ Going to and waging humanitarian engagement is what the international community did after the Cold War. Thomas M. Nichols observed in *Eve of Destruction: The Coming Age of Preventive War*, “[A]s the Cold War came to an end and the major powers began to pull away from involvement in the affairs of smaller nations, the fragility of the regimes they left behind became painfully evident. Civil war, mass rape, starvation, and genocide soon came to dominate much of the international landscape, and it is no coincidence that there were almost as many humanitarian interventions in the first decade after the end of the Cold War as there were in the previous thirty years before 1991.” Nichols, *Eve of Destruction*, 16.

²⁷ Der Derian, *Virtuous War/Virtual Theory*, xi (observing that “Technology in the service of virtue has given rise to a global form of virtual violence, *virtuous war*.”)

²⁸ Der Derian, *Virtuous War/Virtual Theory*, xi.

links, computer-assisted intelligence evaluation, and automated fire control ... I am confident [that] the American people expect this country to take full advantage of its technology – to welcome and applaud developments that will replace wherever possible the man with the machine.²⁹

In this way, the US military “has long anticipated a mode of high-tech war that would produce an electronic battlefield and eventually replace soldiers with machines.”³⁰ This would constitute a new stage of warfare in which cyborg warriors themselves would be part of a cybernetic-military apparatus marked by the merging of humans and technology and appearance of increasingly autonomous weapons systems, independent of human control.”³¹

War transformed further in the 1990s “with the incorporation of information technologies in the warfare state and the development of more de-centralized forms of social organization in a networked society.”³² The enhanced role of information technologies in postmodern war has led some theorists to reflect on “Network-Centric Warfare” and the RMA.³³ These shifts are the result of the “co-evolution of economics, information technology, and business processes and organizations,” and they are linked by three themes: shifts from platform to network; a change from viewing actors as independent to viewing them as “part of [a] continuously adapting military-techno

²⁹ General Westmoreland, July 1970 (cited in Douglas Kellner (2002) *Postmodern War in the Age of Bush II*, New Political Science, 24:1, 57-72 (DOI: [10.1080/07393140220122644](https://doi.org/10.1080/07393140220122644))).

³⁰ Douglas Kellner, *Postmodern War in the Age of Bush II* (New Political Science, 24:1, 57-72, DOI: [10.1080/07393140220122644](https://doi.org/10.1080/07393140220122644)), 57-72.

³¹ Kellner, *Postmodern War in the Age of Bush II*, 24:1, 57-72.

³² Kellner, 24:1, 57-72.

³³ Kellner, 24:1, 57-72.

ecosystem”; and the “importance of making strategic choices to adapt or even survive in such changing ecosystems.”³⁴

This view of war thus relates to the increasing displacement of humans by technology, with the next phase of technowar revealing more “smart machines” that can supplement and even replace human beings. Chris Hables Gray, professor and lecturer of Cultural Studies of Science & Technology at UC Santa Cruz, observed at the turn of the 21st century that:

There are projects to create autonomous land vehicles, minelayers, minesweepers, obstacle breachers, construction equipment, surveillance platforms, and anti-radar, anti-armor and anti-everything drones. They are working on smart artillery, smart torpedoes, smart depth charges, smart bombs, smart nuclear missile and brilliant cruise missiles. Computer battle-managers are being developed for Air-Land battle, tactical fighter wings, naval carrier groups, and spaced-based ballistic-missile defense...the Army even hopes to have a robot to ‘decontaminate human remains, inter remains, and refill and mark graves.’³⁵

Things came together for *virtual* war in the Persian Gulf War. Then, cyberspace came out of the research labs and into American living rooms. “[T]he technical preparation, execution, and reproduction of the Gulf War created a new virtual – and consensual – reality: the first *cyberwar*, in the sense of a technologically generated, televisually linked, and strategically gamed form of violence that dominated the

³⁴ See the account by Vice Admiral Arthur K. Cebrowsky and John J. Garistak at www.usni.org/Proceedings/Articles98/PROcebrowski.htm; see also Ignatieff: *Virtual War, Kosovo and Beyond 2000*, 164ff (describing the “revolution in terms of the deployment of precision targeting at a distance and use of computers, also noting conservative military resistance to call for dramatic transformation of the military [p. 171ff]).

³⁵ Chris H. Gray, *The Cyborg Soldiers: The US Military and the Post-modern Warrior*, in Les Levidow and Kevin Robins (eds), *Cyborg Worlds: The Military Information Societe* (London: Free Association Books, 1989), 54; Gray (1997); and Gray, *Cyborg Citizen* (Routledge, 2001).

formulation as well as the representation of US policy in the Gulf.”³⁶ ABC

correspondent Cokie Roberts’s interview of General Schwarzkopf at the time is revealing:

Roberts: You see a building in a sight – it looks more like a video game than anything else. Is there any sort of danger that we don’t have any sense of the horrors of war – that it’s all a game?

Schwarzkopf: You didn’t see me treating it like a game. And you didn’t see me laughing and joking while it was going on. There are human lives being lost, **and at this stage of the game** this not a time for frivolity on the part of anybody.³⁷

In a single soundbite, the distinction between warring and gaming collapsed.

And it was not as if it was not war-gamed for. On the contrary, General Schwarzkopf organized and led Exercise Internal Look ’90, a computer-simulated command post exercise.³⁸ There, according to a contemporaneous news release, “command and control elements from all branches of the military will be responding to real-world scenarios similar to those they might be expected to confront within the Central Command AOR consisting of the Horn of Africa, the Middle East and Southwest Asia.” When Iraq invaded Kuwait, the war game specialist who put Exercise Internal Look together, Lieutenant General Yeosock, was moved from fighting “real-world scenarios” in Florida to taking command of all ground troops.” The war gamers went to cyberwar.³⁹

³⁶ Der Derian, James, *Critical Practices in International Theory, Selected Essays*, (Routledge, 2009), 121 (emphasis original).

³⁷ Der Derian, *Critical Practices* 2009, 121 (emphasis added).

³⁸ Der Derian, 121.

³⁹ Der Derian, 126. (*but see* J. Der Derian, *Virtual War/Virtual Theory* at p. 5 where he notes that “[s]ince the [Gulf War] employed recently developed cruise missiles, it was heralded at the time as the first of a new age of wars. In retrospect[,] it was the last of the old wars: it mobilized a huge land force and the vast logistical support required to sustain it, and it was fought for a classic end, to reverse a straightforward case of territorial aggression against a member state of the United Nations. Soldiers were committed in full expectation of casualties.”).

The technologically advanced West perfected the ideas of and the political discourse around virtuous, bloodless wars in the intervening years between the Gulf War and 9-11. Prototypical virtuous conflicts during this time created a perverse pride in the perception of conflict with no casualties. In the Gulf War, for example, 270 American lost their lives (more than half through accidents), and the Kosovo air campaign resulted in zero casualties for NATO forces.

Unlike other forms of war, *virtuous* war can “commute death,” keeping it out of sight, out of mind. In simulated preparations and virtual executions of war, there is a high risk that one learns how to kill but not how to take responsibility for it, one experiences ‘death’ but not the tragic consequences of it. “In virtuous war[,] we now face not just the confusion but the pixilation of war and game on the same screen.”⁴⁰

The analysis of *virtual* war itself is often framed with reference to the debate around the changing character of warfare. The debate has been trying to ‘identify whether war is changing, and, if it is, how those changes affect international relations. But the *character* of war should not be confused with the *nature* of war. The character of war is understood simplistically as the way in which war is fought. The nature of war, by contrast, refers to war’s enduring essence, or what it is.

With each new technology, such as artificial intelligence, there exists a significant change to the human element of warfare, including, potentially, post-human warfare where machines have replaced humans on the battlefield. Viewed this way, a strong case starts to emerge that it is the *character*, rather than the *nature*, of warfare that has changed through the use of technology. Technology challenges traditional

⁴⁰ Der Derian, *Virtuous War/Virtual Theory*, *passim*.

understandings of battlefields and soldiers. ‘Intervening’ states are now far from the frontlines, providing training in fortified bases or support from the air through technology. Technological leaps have provided the means for states to wage warfare from great distances. From this perspective, the lines between war and peace are blurred, because there are now often few clear-cut declarations of war, and the geographical borders and legal frameworks that define conflicts have become difficult to discern.⁴¹

Virtual war carries significant risks. It often shifts the burden of risk onto civilians, aggravates the drivers of conflict, and undermines democratic oversight on the use of force.⁴² When the West resolves to use its technological superiority and partners with local on-the-ground forces to do so, the burden of responsibility is shifted to partner forces, thus increasing the risks to civilian populations because the local support partners often lack the capability, willingness, or training to protect civilians.⁴³

Ultimately, technological superiority and remote techniques make tracking civilian casualties difficult. Western intervenors have less capacity to organize their troops on the frontlines to carry out the same level of pre- and post-strike assessments.⁴⁴ Relying exclusively on intelligence, surveillance, target acquisition and reconnaissance (ISTAR) from UAVs to track civilian harm is ineffective because this approach cannot provide the eyes and ears on the ground needed to conduct thorough investigations.⁴⁵

⁴¹ Michael W. Doyle, *The Question of Intervention*, (Yale University Press, 2015), x (“[T]he United Nations has shifted from its Cold War commitment to sovereign inviolability to a new intrusiveness in settling civil wars, called peacebuilding. And, reacting to threats of international terrorism, states a claim a right to preventive intervention.”).

⁴² Abigail Watson and Alistair McKay, *Remote Warfare: A Critical Introduction*, (can be found [here](#). (Feb. 11, 2021), 5.

⁴³ Watson and McKay, *Remote Warfare*, 5.

⁴⁴ Watson and McKay, 5.

⁴⁵ Watson and McKay, 5.

Technological superiority also exacerbates the drivers of conflicts. In the contemporary era, most of the problems in the places where the West is engaged are deeply political and require political solutions. Yet technological superiority tends to be short-term and militarily focused. Accordingly, when the West fails to investigate and confirm the background of prospective partners, matters are often made worse because capacity of predatory, sectarian, or unrepresentative armed groups or national militaries is increased. This can prolong violent conflicts and help create ‘forever wars’ that have come to define today’s international security environment.⁴⁶

The risks of civilian casualties and the acceleration of the drivers of instability are increased by the lack of transparency and poor accountability technology and its standoff provide. The results fall through the gaps in mechanisms designed to oversee the use of force abroad. Train and assist operations are often not designated as ‘combat missions’ and do not necessarily fall under certain of the West’s varying war powers conventions.⁴⁷ Moreover, in a world of smartphones, social media, and expanding access to the Internet, controlling the flow of information on the West’s actions abroad and keeping certain missions secret, including scandals around civilian harm, have become even harder. The culture of comment is eroded, and with that so is transparency and its siblings accountability and legitimacy.⁴⁸

At the same time *virtual* war has broken into stride, ethical imperatives for global humanitarian engagement have accelerated.

⁴⁶ Watson and McKay, 5.

⁴⁷ Watson and McKay, 5.

⁴⁸ Watson and McKay, 5.

The Ethical Imperative for Global Democratic Reform and Humanitarian Interventionism

The second component of *virtuous* war is how technological superiority is “deployed” “with a new ethical imperative for global democratic reform and humanitarian intervention.”⁴⁹ Humanitarian intervention has been defined as “the injection of military power – or the threat of such action – by one or more outside states into the affairs of another state that has as its purpose (or at least one of its principal purposes) the relieving of grave human suffering.”⁵⁰

In *Thinking Politically*, Professor Michael Walzer offered the intuition that though the conditions for humanitarian intervention have not increased over previous periods, these conditions “are more shocking, because we are intimately engaged by them and with them [as] [c]ases multiply in the world and in the media.”⁵¹ Walzer’s observation recognizes two circumstances of the post-Holocaust and post-Cold war era: the ascendance of human rights norms and the advance of radically advanced technologies. And it is this ascendance and advance that have been more than sufficient to override the norm of nonintervention.⁵²

The profusion of significant humanitarian interventions relative to classic wars of aggression or self-defense “entwined the concepts of war and humanitarianism” to such an extent that even a post-millennium war of self-defense in Afghanistan is “justified

⁴⁹ Der Derian, *Virtual War/Virtual Theory*, 772.

⁵⁰ Stephen Garrett, *Doing Good and Doing Well: An Examination of Humanitarian Intervention* (Praeger, 1999), 3.

⁵¹ Michael Walzer, *Thinking Politically*, (New Haven and London: Yale University press, 2007), 237-238.

⁵² Doyle, *The Question of Intervention*, 19 (“Nonintervention is the norm of modern international law, international ethics, and the just war tradition. There is an obvious reason why this is so: states make the law; they shape the just war tradition; and from the standpoint of international ethics, wars are inevitably harmful and need to be justified as a necessary resort”).

partly as a rescue for the Afghan people.”⁵³ This is what makes *virtuous* war as a construct so intriguing – and challenging. The emergence of a new norm of humanitarian intervention sufficient to hasten the demise and overcome the norm of nonintervention is “exemplary of the starkest dilemmas within the current society of states.”⁵⁴ “[H]umanitarian intervention’ illuminates the profoundly tragic contours of political, social and moral agency in a non-ideal world of domestic, international and global, social and political, agents and structures that are morally limited, defective and fallible.”⁵⁵ As Professor Benjamin R. Banta observes, the United Nations, the “very organization charged with fostering our non-ideal world,” has established limits on the internal conduct of states with such documents as the 1948 Universal Declaration of Human Rights while also the illegality of the use of force by states unless in cases of self-defense.⁵⁶ At the same time, provisions of Chapter VII of the UN Charter state that the Security Council may authorize force to protect ‘international peace and security.’ It is not a hairbrained legal scheme, but it is close.⁵⁷

At the same time, human rights norms are embedded in many international regimes and organizations, and “increasingly define what constitutes a civilized state.”⁵⁸ Because of this, a perception has emerged that intervention on behalf of universal human rights is at the least a right and may even rise to the level of a duty (*see, e.g.,* Cicero’s

⁵³ Banta, *Virtuous War*, 282 (citing Lucas, *From Jus ad Bellum to Jus ad Pacem* 2004).

⁵⁴ Banta, 282.

⁵⁵ Banta, 282 (citing Catherine Lu, *Just and Unjust Interventions in World Politics* (New York: Palgrave Macmillan, 2006): 164-65).

⁵⁶ Banta, 282 (citing Wheeler, Nicholas J., *Saving Strangers: Humanitarian Intervention in International Society*, (Oxford Scholarship: 2002).

⁵⁷ Banta, 282 (citing Lu *Just and Unjust Interventions in World Politics* at 154 where she concludes that “[i]f we are living in a ‘cosmopolitan moment,’ ... it is decidedly half-baked.”).

⁵⁸ Thomas Risse, *International Norms and Domestic Change Arguing and Communicative Behavior in the Human Rights Arena*, *Politics and Society* 27, No. 4 (1999), 529-530.

conception of all duties being morally good in Chapter III, *infra*) for responsible members of the society of states.⁵⁹ But ours is a non-ideal world; accordingly, the right/duty couplet is *infrequently* the actual reason for intervention, and it is complicated (and perhaps exacerbated) by the media systems embedded in *virtuous* war:

Instead, humanitarian concerns are tagged onto more traditional justifications – self-defense, pre-emption or prevention – as a sometimes vital scale tipper for otherwise questionable motives. This is even more problematic once we consider the media complexes highlighted by Der Derian and others. Media cannot only bring to the fore far-off atrocities – placing pressure, because of the embedded human rights norms, on public officials to take action – but is a conduit for public officials to trumpet the supposed atrocities which give them recourse to war.⁶⁰

Technologically superior Western states can combine any intervention with an expectation of virtually no casualties for themselves. Thus, if we accept that militarism is not just about militaries, but the “whole social system of values and practices which promote and underpin the use of military approaches to a vast range of situations,”⁶¹ what is to be made of the society that is able to destroy without setting foot on foreign terrain and with relatively low participation requirements for its citizens? What is to be made of the society that has at its disposal the technology and *just* or *legal* reasons for fighting a war to stop human rights abuses from far away? After all, it is the humanitarian use of military force, aided by technological superiority and just or legal bases to fight, that actualizes violations of the sovereignty of states being attacked, and does so for allegedly good reasons that are deemed to prevail over the respect of the self-determination of

⁵⁹ Banta, 283 (citing to Wheeler and the “English School” concept of a society of states).

⁶⁰ Banta, 283.

⁶¹ Chris Rossdale, *The Contemporary politics of anti-militarism*. In: Gordon U and Kinna R (eds) *The Routledge Handbook of Radical Politics* (New York, NY, Routledge), 67-81.

states.⁶² This is “drastically new moral territory”⁶³ requiring new principles justifying action. These principles are discussed after laying foundation for doing so in Chapter III based on the labile nature of the Just War ethic, and after a discussion of the historical *through-line* to *virtual* war in Chapter IV.

⁶² After Operation Allied Force in Kosovo, discussed briefly below, it has been said that “the bargain of Westphalia, in which sovereign state’s internal matters was no business of any of its neighbors, was finally broken.” Nichols, *Eve of Destruction*, 31. *See also* Nichols, *Eve of Destruction*, where he observes that “[t]his quiet burial of the Westphalian idea of absolute sovereignty means that all the assumptions and institutions founded upon it are now in transition, especially the United Nations. By the time the NATO operation in Kosovo ceased, it was already clear that the UN Charter, and the international legal regime it represents, had been overtaken by the practice of states during the 1990s.”

⁶³ Banta, 285.

Chapter III

The Just War Ethic – From Antiquity to the Contemporary Period

The Just War ethic emerged from pre- and early Christian thought. Its abiding attraction is its emphasis on criteria that must be satisfied if a given use of force is to be considered just and legitimate. The ethic, which is mainly but not exclusively concerned with the *jus ad bellum*,⁶⁴ provides a language for understanding when force is permitted, and for debating whether it is so in a particular case. The ethic's strengths are its open acceptance that force is sometimes necessary in the conduct of international politics, combined with its insistence that force should not be used unless it serves well-defined purposes and is just. Balancing these interests is challenging; philosophers, theologians, politicians, scholars, and diplomats have struggled into the present to name, calibrate, and implement myriad competing interests, fluctuating cultural norms, and shifting technologies that call the ethic and its purpose into use and question.

History offers guideposts as to how to explain and implement the model. History reveals five paradigmatic shifts in the development of moral rules for going to and conducting war (whether or not framed explicitly as part of the “Just War” model), with each shift reflecting a trade-off between the kind of law and ethics invoked to judge the

⁶⁴ *Jus ad bellum* is the Latin term for the law governing the resort to force; that is, when a state may lawfully use force on the territory of another state. See Ian Brownlie, *International Law and the Use of Force by States*, 4-5 (1963); see generally Williams: *Jus Post Bellum* 2014 (“A common assumption throughout history has been that the decision to go to war – a decision, that is, to set in motion the forces of death and destruction that accompany war – is one that imposes grave ethical responsibilities but that the decision to make peace – to stop the killing – makes no serious ethical demands. Consequently, Just War thinkers have elaboratively theorized *jus ad bellum* without, until recently, giving much thought to *just post bellum*.”).

morality of war and the available technology of warfare, as facilitated by the political and social climate of the time.⁶⁵ Crucially, each paradigm represents a *greater* commitment to rules and their adoption in practice to meet shifting norms. Dedication to that *greater* commitment is important for the new rules discussed here.

Foundational to each shift has been the development of a specific kind of principle developed in response to fluctuating norms caused by the resort to violence. Communal and *quasi* legal norms, for example, emerged in the classical Greek and Roman periods, while divine law occupied thinkers in the late Hellenistic and early medieval paradigms. “Natural” law took root in the medieval period, while “right reason” became foundational to a reconstituted Just War ethic from the Reformation through the Peace of Westphalia (1648), with the latter giving rise to the “now familiar diptych” of *just ad bellum* and *jus in bello* framed by Grotius.⁶⁶ Each paradigm shift is discussed below, with a particular emphasis on how great thinkers developed, discussed, and implemented, moral principles for going to and waging war. This is important because the lessons from antiquity through the near-contemporary period support forging new principles in response to the *virtuous* war era today.

Antiquity

Religious and ethical norms corresponding to modern moral considerations for going to and waging war proliferate in the writings of Greek and Roman philosophers.

⁶⁵ William E. Murnion, *A Postmodern View of Just War*. In: Lee, S.P. (eds) *Intervention, Terrorism, and Torture.*, vol 1. Springer, Dordrecht. https://doi.org/10.1007/978-1-4020-4678-0_1 (2007), 24.

⁶⁶ Murnion, *A Postmodern View of Just War*, 24.

Ancient Greece

In Greece, war was not so much understood as a paramount ideal or practice based on a set of agreed rules, but as a compilation of thoughts advanced by prominent classical philosophers, historians, and tragedians.⁶⁷ Sophocles, for instance, wrote in *Antigone* about the Greek practice of allowing opponents time after a battle to bury their dead.⁶⁸ In his *Peloponnesian War*, Thucydides describes a number of customs prevailing among the city-states, such as giving immunity to emissaries, sparing women and children, and practicing religious places.⁶⁹ Today, the laws of war bear some of these markings. But these mores were not expressed in written agreements; rather, they simply arose from custom, tradition, or the fact of being human.⁷⁰

These mores also gesture not only to justice norms about going to war and returning to peace, but also a sort of privilege to engage in warfare to return a political system to what is just and natural. Aristotle is profoundly influential in this regard. For Aristotle, justice in warfare represented a sort of return to the ‘natural order’ through the use of force. He observed that, “[t]he art of war is a natural art of acquisition practiced against men who, though intended by nature to be governed, will not. War of such a kind is naturally just.”⁷¹ Aristotle’s observation about war, *i.e.*, it is a means of returning to something that “is just” and “natural” resonates in the *virtuous* war era because it suggests a sort of priority of place for legitimacy, justice, and a return to a natural order

⁶⁷ Robert J. Delahunty and John Yoo, *From Just War to False Peace*, 13 Chi. J. INT’L L. 1, 7 (2012), 2-3.

⁶⁸ Delahunty and Yoo, *From Just War to False Peace*, 2-3.

⁶⁹ See generally Adriaan Lanni, *The Laws of War in Ancient Greece*, 26 L. & Hist. Rev. 469, 476-82 (2008).

⁷⁰ Adriaan Lanni, *The Laws of War in Ancient Greece*, 471-72.

⁷¹ *Aristotle*: Book X, Ch. VI, XVII, 6; Politics, VII, 14; see also James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* 71 (1981).

of a peaceful government and a peaceful governed, which necessarily subdues the impulse to and the ready use of tools of war while also gesturing toward a moral permission to use force for peaceful ends.⁷²

Understanding Greece's contribution is likewise important in the present because it reveals that the resort to war and the conduct of war then was bounded by a set of conventions that align with the peculiar requirements implicated by the *virtuous* war era today. Though Plato described the human condition as a "lifelong war" of all against all,⁷³ the Greeks were sometimes restrained and sometimes focused on the concept of a just peace. Xenophon, for example, advised that even though the gods had ordained conflict as integral to human life, we should be "as slow as we can to start a war and as quick as we can to end it, once it has begun."⁷⁴ Herodotus bemoaned that war sows misery and disrupts the natural order: "In peace sons bury their fathers and in war fathers bury their sons."⁷⁵ What is more, as today, ancient Greeks focused on legitimacy; and to achieve it, the Greeks developed certain recognizable traditions that were to be met before engaging in conflict: proper authority; just cause; and right intention.⁷⁶

⁷² I do not wish to obscure the debate about whether Greece gave sufficient thought or weight to *jus post bellum* principles. They did not. Furthermore, war *between* Greeks differed from war with foreigners, so direct application of the ethic is, while interesting, seemingly foolish. See Plato, *4 Dialogues of Plato*, 156 (Houghton 1897) (Benjamin Jowett, trans.) (one of Plato's speakers observes in *The Laws*, "in reality every city is in a natural state of war with every other, not indeed proclaimed by the heralds, but everlasting.").

⁷³ Cian O'Driscoll, *Rewriting the Just War Tradition: Just War in Classical Greek Political Thought and Practice*, International Law Quarterly, Vol. 59, No. 1 (Wiley on Behalf of The International Studies Association, March 2015), pp. 1-10, 2.

⁷⁴ O'Driscoll, *Rewriting the Just War Tradition*, 2.

⁷⁵ O'Driscoll, 2.

⁷⁶ O'Driscoll, 2 ([1] *proper authority*: identifying war required approval of the community and was dependent upon the *performance* of certain rights and procedures; [2] *just cause*: proper authority rested, at least in part, on the possession of just cause, which in Aristotle's writings required consideration of "grievance;" and [3] *right intention*: discussing "interiority" and the "twin notions of honor and shame" that "dominated the Greek moral imaginary."

The Greeks were also concerned about the means of war. The orthodox view presumes that warfare in ancient Greece was one of pitched battles between massed ranks of heavy infantryman that played out as a sort of “game” “bounded by set rules and rituals.”⁷⁷ But examining the historical record more closely, one can discern familiar principles of discrimination and proportionality. The principle of discrimination is a cardinal feature of the ethics of and the basis for the rules of war.⁷⁸ It specifies that only those engaged in combat operations may be intentionally targeted. The Greeks subscribed to this principle, too, through the “protection of the sacred and the neutralized.”⁷⁹

Similarly, the Greek conception of “proportionality” specified that the means of war should be commensurate to the end being sought by the use of force.⁸⁰ Adherence to this principle is demonstrated by the Greek’s focus on “victory,” which meant that the conduct of war should be judged against whether it produced a definitive victory and was free from “winning dirty.”⁸¹

Last, the rules governing the termination of war in ancient Greece reflect a symmetry with the procedures and protocols attached to its commencement. They also fasten onto the ideal of victory. The Greeks adopted what we might think of as *jus post bellum* conventions directed toward a single objective, namely ensuring that wars produced clear-cut winners wherever possible.⁸² Decisive victory and its opposite,

⁷⁷ O’Driscoll, 4.

⁷⁸ O’Driscoll, 4.

⁷⁹ O’Driscoll, 5 (observing that “[a]nything society deemed dear to the gods was viewed as sacrosanct and inviolable. This applied not only to places and people, but also to particularly times of year.”)

⁸⁰ O’Driscoll, 5.

⁸¹ O’Driscoll, 5.

⁸² O’Driscoll, 5.

decisive loss, were crucial for war to serve its purposes as a means of settling disputes. This becomes clear when examining a central Greek practice of erecting battlefield trophies, which practice offers moral guidance to the idea of the *jus post bellum* today.⁸³

Ancient Rome

More formalized practices and rules grounded in justice emerged during the Roman Empire.⁸⁴ The Romans defined these standards in their legal writings⁸⁵ with two distinct categories of wars: they accepted war as part of *ratio naturalis*, the natural world order, dictated by laws of nature men could not alter; yet a specific impetus to war could only be justified by an injury accompanied by a lack of atonement by the wrongdoer.⁸⁶

The Fetiales – Rome’s “Spin Doctors”

⁸³ O’Driscoll, 7 (Greek ritual permitted the victorious army to erect a rudimentary trophy immediately after prevailing and *the* fighting ceased. The trophy’s distinctness was critical to its function as an advertisement of both victory and loss, with both presaging a transition from war to peace. But it was the transient nature of trophies that signaled the pursuit of a “just peace.” Trophies were made out of wood or other perishable materials, rather than stone or metal. They could not be renewed or repaired. Evidence of this is the reproach that the Amphictyony, the Greek religious authorities, issued to the Thebans for erecting a *bronze* trophy at Leuktra. It was not appropriate, they chastised, for Greeks to raise a permanent trophy to mark a victory. Plutarch similarly extolled the practice of permitting trophies to “disintegrate with the passage of time,” implying that the restoration of a trophy signified a malicious act, a refusal to let an old grudge fade away. The point of this practice is clear: trophies were designed to be ephemeral. They were intended to be vulnerable to “erosion and decay over time.” This is in keeping with their function. Once victory was affirmed, and the vanquished had accepted the outcome, the decay of the trophy symbolized the importance of relinquishing grudges in order that peace could prosper.)

⁸⁴ Heinz-Gerhard Justenhoven and William A. Barbieri, *From Just War to Modern Peace Ethics*, (Walter de Gruyter GmbH & Co. KG, Genthiner Str. 13, 10785, 2012) (attempting to rewrite the history of Christian peace ethics and observing that reducing violence or overcoming war has roots in ancient Roman philosophy and eventually grew to influence modern international law).

⁸⁵ Delahunty and Yoo, *From Just War to False Peace; See generally*, CICERO, DE OFFICIIS, BOOK I, p. 11 (Little, Brown 1887) (Andrew P. Peabody, trans.) and CICERO, ON THE COMMONWEALTH, IN MARCUS TULLIUS CICERO, TUSCULAN DISPUTATIONS: 37 (Harper 1899) (C.D. Young, trans.).

⁸⁶ Joachim von Elbe, *The Evolution of the Concept of Just War in International Law*, 33 AM. J. INTL L. 665, 66 (1939).

Wars of “*ratio naturalis*” were wars waged to remedy an injury suffered. The process required the intervention of the Fetiales⁸⁷ (members of the *Collegium Fetalium*) who would determine whether or not it would be just for the Empire to go to war.⁸⁸ The proceedings were organized as a sort of modern day trial where the *Fetiales* would ask the wrongdoer to atone for their conduct. If the wrongdoer did so and took steps to rectify it, conflict between the two could be avoided.⁸⁹ But if the antagonist refused, the *Fetiales* would seek rectification by waging a military intervention that would be just.⁹⁰

With the *Fetiales*, the Romans differed from the Greeks by introducing a divine aspect as to what was just, making the “gods” the arbiter. Of course, divining the purpose of the *Collegium Fetalium* is difficult but at least one explanation is that the *Fetiales* were the “spin doctors” of the Republic or Empire, employed in service of finding *post hoc* justification to attack Rome’s enemies while creating moral distance from their decisions as part of the sale process.⁹¹

This procedure provides a lesson for the *virtuous* war era. After all, creating moral distance, among other sorts of distances physical and economic, is key to the *virtuous* war paradigm. In fact, the paradigm permits coercive conduct without much

⁸⁷ *Fetiales* were a group of twenty priests who from the earliest times were charged with not only with religious functions, but also with public service, in particular in international relations with other states. Their duty was to observe whether or not the terms of international treaties were being fulfilled. They were involved in concluding treaties, extradition affairs, and were representatives of Rome in serving official declarations of war. In their missions abroad, they were headed by one whose official title at the head of the delegation was “*pater patratus*.” Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Transactions of the American Philosophical Society, New Series, Vol. 43, No. 2, 1953, 470).

⁸⁸ Cicero, *De Officiis*, Book I, Para. XI, 36 (Loeb Classical ed. 38-9 (W. Miller trans., 1913)). See also Cicero, *De Re Publica*, Book III, Para. XXIII, 35 (Loeb Classical ed. 212-13 (C. W. Keyes trans., 1928)).

⁸⁹ Coleman Phillipson, *The International Law in Archaic Rome*, (Johns Hopkins 1993), 2-3, and *The International Law and Custom of Ancient Greece and Rome*, (Macmillan, 1911) (quoting Dionysus of Halicarnassus).

⁹⁰ Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 339.

⁹¹ William V. Harris, *War and Imperialism in Republican Rome* (Clarendon Paperbacks ed., Oxford University Press, 1979), 171 (“The significance of the fetial procedure for declaring war was solely psychological.”).

concern for a corresponding (and equal) reaction, coupled with rhetoric toward action for humanitarian purposes, thus necessitating the *jus ad pacem*, *jus in pace*, and *just post bellum* principles discussed herein. Cicero tells us the same thing.

Cicero and the Bellum Iustum

Cicero appears to be the first to use the expression “*bellum iustum*.”⁹² Cicero’s thoughts on war and justice influenced the teachings of the Christian theory of Just War, from Saint Augustine to Thomas Aquinas.⁹³ Cicero’s ethical essay “*De officiis*” is the baseline. There, Cicero translated a book written by the Greek Stoic philosopher Panaetius: *Peri tou Kathekontos*. The Greek term “*kathekon*” is closely aligned with the notion of “duty,” which is aligned even further with an ethically required act.⁹⁴ Cicero translated the Stoic meaning into Latin, even expanding it to suggest that “all types of duties are morally good” and that duties can be derived from being honorable.”⁹⁵

Cicero attempted to answer how to decide whether an action is honorable, and if there are two honorable actions, which of the two is more honorable. Cicero described four cardinal virtues when evaluating an action, the most relevant one of which for our purposes is *justice*. For him, the “aim of justice [was] to preserve the fellowship among men.” Further, “the first office [of justice] is that no man should harm another unless he has been provoked by injustice....” Cicero later added that “certain duties must be observed even towards those at whose hands you may have received unjust treatment.

⁹² Keller, *Cicero: Just War in Classical Antiquity* in Justenhoven: *From Just War to Modern Peace Ethics* (“Keller, Cicero: Just War in Classical Antiquity”), 9 (citing Sigrid Albert, *Bellum iustum. Die Theorie des “gerchten Krieges: und ihre praktische Bedeutung für die auswärtigen Auseinandersetzungen Roms in republikanischer Zeit*. Frankfurter Althistorische Studien, vol. 10 (Kalmunz: 1980)).

⁹³ Keller, *Cicero: Just War in Classical Antiquity*, 9.

⁹⁴ Keller, 11.

⁹⁵ Keller, 11.

This is a limit to revenge and to punishment.” Thus, for Cicero, the “duties consist of restraining revenge and punishment, probably to the point where the man who did the harm repents his injustice. The purpose of punishment should be that neither the transgressor nor others act unjustly in the future.”⁹⁶

The duty to limit punishment must be observed in reference to the law of war.⁹⁷ Regarding war as punishment, Cicero developed ethical rules for correct behavior at the beginning, during, and after war. Differentiating between two types of conflict, *e.g.*, “the one that proceeds by debate, the other by force,”⁹⁸ Cicero held that “one should only resort to the latter, if the former is not possible, as debate is the proper concern of men, and force only appropriate for animals.”⁹⁹

Cicero’s teachings are essential to any discussion of *virtuous* war. They imply that one must intend to resolve conflict by debate and only if that is impossible is one allowed to wage war.¹⁰⁰ It follows naturally, then, that “[w]ars ... ought to be undertaken for the purpose that we may live in peace¹⁰¹, without injustice”¹⁰² For Cicero, and perhaps like Aristotle, war was a means to an end, *i.e.*, peace without injustice. This, according to his teachings, “obliges men to use reason and language” and, only if that is impossible, can one wage war; but even then “one should not wage war against another

⁹⁶ Keller, 11-13 (observing that “[m]ost likely ‘revenge and punishment’ here is a hendiadys, because in the Roman Republic both expressions had the same meaning. ‘Revenge’ as well as ‘punishment’ signified a penalty imposed by court because of a violation of law [citing Nikolaus Forgo, “Poena.”]).

⁹⁷ Keller, 13-14 (citing off. 1,34 and translating the Latin: “Something else that must very much be preserved in public affairs is the justice of warfare.”).

⁹⁸ Keller, 18.

⁹⁹ Keller, 18.

¹⁰⁰ Keller, 18-19 (citing Helga Boterman, Ciceros Gedanke zum ‘gerchecten Krieg’. In *De officiis* 1, 34-40, *Archiv fur Kulturgeschichte*, vol. 69 (1987), 1-29, 10.).

¹⁰¹ Keller, 14 (observing that the “Latin expression “pax” (peace) originates from “paciscor” which means “to conclude a contract. Pax designates a state of non-violence after a war which is achieved by a conquest or a contract.”)

¹⁰² Keller, 14.

unless one was harmed and is incapable of establishing peace without injustice by other means, except by war.”¹⁰³ Put differently, the pursuit of peace was the point, and it could be sought through force if harm was present, and debate proved futile.

What emerges from this brief discussion of antiquity is the sense that principles of justice were embedded culturally and later in the written law (procedural and substantive). It is those principles that permit the inference today that the use of force for humanitarian ends is appropriate so long as that use is guided by *jus*, which is why, in today’s *virtuous* war era, the ideas animating a *jus ad pacem*, *just in pace*, and *jus post bellum* resonate. The teachings of Saint Augustine in the late Roman and early medieval period provide even stronger foundation for these ideas.

The Late Roman and Early Medieval Period

The late Roman and early medieval period was critical to the formation of the Just War ethic. Early theologians helped structure the manner in which the ethic would develop to avoid likely and foreseeable abuses. The most prominent of the Just War philosophers – and considered, though not without debate, the “father of the just war”¹⁰⁴ – is Saint Augustine.

Saint Augustine witnessed the rise of Christendom in the western half of the Roman Empire. Thus, in his teachings, Saint Augustine considered the Hebrew/Old Testament, and the Roman law in the writings of Cicero; and his observations on the right to go to war became the authority for the medieval development of the Just War ethic by

¹⁰³ Keller, 14-15.

¹⁰⁴ John Mark Mattox, *Saint Augustine and The Theory of Just War* (Continuum Books, 2006), 14.

reconciling the use of force with the Christian principles of non-violence and pacifism.¹⁰⁵ In doing so, Augustine managed to combine two apparently irreconcilable views by adopting a formula that permitted the use of force under certain circumstances but not as a tool of foreign policy.¹⁰⁶

Augustine generally invoked *divine* law to authorize imperial forces to protect the church from heretical sects within the Roman Empire and to defend the Empire itself against barbarians from without.¹⁰⁷ He not only defined the characteristics used to consider the use of force, but he also articulated behavior while fighting a war. Such behavior revolved around three characteristics: (1) the just war has to be waged discriminatorily, *i.e.*, not unlike the Greeks, military action has to be inflicted against fighters and their commanders only, excluding non-combatants; (2) proportionality, *i.e.*, during the course of a just war, the harm inflicted to the enemy must not dramatically outweigh the harm suffered; and (3) setting aside proportionality, the use of force must be minimal and unnecessary violence is forbidden, *i.e.*, allowable force is the one necessary to lead to a successful war, meaning that war will be considered *unjust* if it seems from the start that it can't be won.

Key to Augustine's formulation was the relationship between justice, peace, and order. And central to that relationship were considerations concerning the just peace *after* war. In *City of God*, for example, Saint Augustine observed that, "it is an established fact that peace is the desired end of war. For every man is in quest of peace,

¹⁰⁵ Alex J. Bellamy, *Just Wars: From Cicero to Iraq* (Polity Press, 2006) ("Bellamy: Just Wars 2006"), 2006, 26.

¹⁰⁶ Murnion, *A Postmodern View of Just War*, 24.

¹⁰⁷ Murnion, 24.

even in waging war, whereas no one is in quest of war when making peace.”¹⁰⁸ In this way, Augustine places the concept of peace in stride with *jus ad bellum* and *jus in bello* in order for a war to be considered just at all. This suggests, as is argued in this thesis (see Chapter V-VII and the Appendix), that *jus ad bellum* principles are embedded with the Just War ethic and suggest strongly that the Just War ethic must be viewed as having three – not two – pillars given the moral implications of *virtuous* war.

The Medieval Paradigm

The Classical approach to a just war (represented by the Greek and early Roman thinkers and proceduralists) and the early medieval approach (represented in the writings of Augustine) were replaced at the end of the Roman Empire by one finding inspiration in Christianity.

The Roman Emperor Constantine, having converted to Christianity in 337 CE, paved the way. Before his conversion, Christians had been persecuted by successive Roman emperors. Christians (are alleged to have) abhorred violence and consequently refused to enlist in the Roman army; but Constantine’s conversion to Christianity created the conditions for religious reform more favorable to the Christians.¹⁰⁹ The Christians’ approach to war thus also began to change,¹¹⁰ and what constituted justice before and during war evolved in a similar fashion.¹¹¹ War from now on was not regarded by the Christian authorities as being exclusively something negative; rather, it was condoned when undertaken under defined circumstances.

¹⁰⁸ Murnion, 24.

¹⁰⁹ Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge University Press, 1975), 12-15.

¹¹⁰ Thomas L. Pangle and Peter J. Ahrensdorf, *Justice Among Nations: On the Moral Basis of Power and Peace*, (Kansas, 1999), 73.

¹¹¹ M.H. Keen, *The Laws of War in the Late Middle Ages* (Routledge, 1965), 8.

This third paradigm was formed within the social and political contexts of the part of the world where Christianity prevailed.¹¹² Here, the divine law deepened into the threads of the Just War fabric; and this development, like the prior two, was designed to rationalize necessary conflict with necessary peace.

Aquinas's teachings were instrumental in clarifying what a just war was or should be. Initially, this was a formulation in which "natural law provided a rational armature for divine law, and it was designed to *limit* feudal conflicts within Christendom rather than to authorize crusades within or outside the (now Holy) Roman Empire."¹¹³ But for Aquinas, the law also had positive functional purposes such as restraining the wicked or training men to do good.¹¹⁴ This "human law" was derived from analyses of the "natural law" and extracted from the Divine Commandment.¹¹⁵

At bottom, Aquinas was driven by virtue and the Christian notion of charity. For him, the conditions for *jus ad bellum* were legitimate authority, just cause, and right intention (including proportionate response, in addition to the pursuit of peace).¹¹⁶ Though Aquinas appears to have concurred with Augustine's theological perspective regarding war "as a sin against peace, a fruit of the supernatural virtue of charity," he

¹¹² The Roman Empire started to adopt Christianity around 312 Common Era (CE) and normalized Christianity in 313 (CE) with the Edict of Milano.

¹¹³ Murnion, *A Postmodern View of Just War*, 25 (emphasis added).

¹¹⁴ SAINT THOMAS AQUINAS, *POLITICAL WRITINGS* 240 (R.W. Dysone, ed. & trans., Cambridge University Press 2002).

¹¹⁵ *SUMMA THEOLOGICA*, ("Dominican Fathers" trans., London: R & T. Washbourne, Ltd., 1813-25, 21 vols.). See Jack Donnelly, "Natural Law and Right in Aquinas's Political Thought," *The Western Political Quarterly*, Vol. 33, No. 4 at p. 521 (1980) (Natural law is interpreted as a set of universal principles that men are naturally inclined to follow. It is defined by using deductive logic; the understanding being that such law is what the Eternal One desires men to follow.). See also Sean D. Magenis, "Natural Law as the Customary International Law of Self Defense," 20 *B.U. Int'l L. J* 413, 414-15 (2002).

¹¹⁶ Murnion, *A Postmodern View of Just War*, 25.

supported his discussion of divine law “with an argument from natural law in which justice was the paramount virtue.”¹¹⁷

Key to achieving that “paramount virtue” is something that “stands at the center of the Just War tradition today: the distinction between the use of force by public authority for the public good and that on private authority for whatever reason. The former was termed *bellum*, war, while the latter was *duellum*, literally a duel.”¹¹⁸ “The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.”¹¹⁹ “*Bellum* may be just or not, depending on the circumstances; *duellum* can never be.”¹²⁰

This distinction suggests that Aquinas would not “have understood the effort to make a distinction between the use of force for purposes of national interest and the altruistic use of force for humanitarian purposes.”¹²¹ In other words, so long as engagement was undertaken by a public authority and for the public good, conflict, whether to right a wrong or for humanitarian purposes, could be just.

Aquinas’s theological codification of this formulation in his *Summa Theologica* has come to be called the “classical statement” of Just War theory.¹²² Indeed, it is Aquinas’s conception of the Just War ethic that is the key link in the chain by which the canon law strictures about the justification for war in Gratian’s *Decretum* (1154),

¹¹⁷ Murnion, 25.

¹¹⁸ James Turner Johnson, *Aquinas and Luther on War and Peace: Sovereign Authority and the Use of Armed Force*, *The Journal of Religious Ethics*, Spring, 2003, Vol. 31, No. 1 (Spring, 2003), 5.

¹¹⁹ Johnson, *Aquinas and Luther on War and Peace*, 5 (citing *Contra Fasutrum*, xxii. 75).

¹²⁰ Johnson, 5.

¹²¹ Johnson, 5.

¹²² Johnson, 5 (citing Alfred Vanderpol, *La doctrine scholastic du droit de guerre* [Paris: A. Pedone Editeur, 1925], 287-496; corrected in part by Robert Regout SJ, *La doctrine de law guerre de Saint Augustin a now jours d’apres le theologiens et les canonistes catholiques* [Paris: Editions A. Pedone, 1935), 79-93.

reinforced by Decretists¹²³ and Decretalists of the twelfth and thirteenth centuries, “were converted into a purely rational ethic of war by Vitoria and Suarez in the fifteenth and sixteenth centuries, as well as by Grotius in the seventeenth century.”¹²⁴

Through these crucial centuries, the entire system of religious and secular, theological and legal maneuvers “coalesced into a consensus throughout Christendom about the recourse to and the conduct of war,” and it remains the “preeminent model for the contemporary Roman Catholic version of the just war ethic” today.¹²⁵

The Early Modern Paradigm

The medieval paradigm did not survive the destruction of Christendom, the rise of the nation-state, and the age of exploration and discovery. And the responses to these events once again shifted the development of the Just War ethic. The shift took two forms: (1) the reemergence of the Divine Law; and (2) the reconstitution upon the foundation of “right reason” and the development of international law based on the teachings of Francisco de Vitoria and Hugo Grotius.

Divine Law and the Defense of Religion

In the clash of competing Protestant and Catholic Reformations, many followed Martin Luther in revising the Just War ethic to make the defense of religion – and divine law – the primary justification for war. “They invoked the holy war ethic of the Hebrew Bible, combining it with Augustine’s authorization of war against heretics and the

¹²³ The term *decretists* refers in general to civil and ecclesiastical jurists of the Middle Ages whose main object of study was the laws of the Church.

¹²⁴ Johnson, *Aquinas and Luther on War and Peace*, 5 (citing Joan D. Tooke, *The Just War in Aquinas and Grotius* (London: SPCK, 1965)).

¹²⁵ Johnson, 5 (citing John Finnis, Joseph M. Boyle, Jr., and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Clarendon Press, 1987)).

precedent of the Crusades against Islam.”¹²⁶ For those advocating this method, the justice of the cause – suppression of heresy – “vindicate[d] a remorseless prosecution of war.”¹²⁷

War, for Luther, as it was for Aquinas at least in part, meant the sovereign’s use of force against both external and internal enemies.¹²⁸ For him, “[g]overnment has the dual obligation to ensure justice and peace for its citizens and to ensure their protection against injustice and violence imposed by others.”¹²⁹ While Aquinas divined the right to use force in a just case from “the natural order,” Luther allowed for the use of force in terms of a “broader theological Christian love.”¹³⁰ He said in *On War against the Turk*: “it is ... a work of Christian love to protect and defend a whole community with the sword and not let the people be abused.”¹³¹ In this way, like Aquinas, Luther “connected just cause to the authority necessary for war.... [And] [a]gain, like Aquinas, he also linked authority for war to the aim of peace....”¹³² In fact, for Luther, military service for a Christian was a duty, something required “as a way of contributing to order, peace, and justice in the kingdom of this world. For a private Christian individual, this is part of his good citizenship.”¹³³ For the rulers, it was only a matter of perspective. “[E]very lord and prince is bound to protect his people and preserve the peace for them. That is his office; that is why he has the sword, Romans 13[:4]. This should be a matter of

¹²⁶ Murnion, *A Postmodern View of Just War*, 25.

¹²⁷ Murnion, 25.

¹²⁸ Johnson, *Aquinas and Luther on War and Peace*, 16.

¹²⁹ Johnson, 16.

¹³⁰ Johnson, 16.

¹³¹ Johnson 16 (citing Luther’s Works. Vol. 46. Philadelphia: Fortress Press) (1967).

¹³² Johnson, 16 (citing a passage from *Whether Soldiers, Too, Can Be Saved?* and observing that Luther wrote “What else is war but the punishment of wrong and evil? Why does anyone go to war except because he desires peace and obedience?”); cf Aquinas, ST II/II Q. 40, A. 1).

¹³³ Johnson, 16.

conscience for him. And he should on this basis be certain that the work is right in the eyes of God and commanded by him.”¹³⁴

But the European conquest of the New World led away once more from Divine Law to a reorganization of the Just War ethic along the lines of *right reason*.¹³⁵ Interpreted first in terms of natural law, right reason came to be construed in terms of international law (*ius gentium*), a theoretical law which natural reason establishes for all men.

Right Reason and the Origins of Modern International Law

There were no greater teachers of *right reason* than Francisco de Vitoria (1483-1546) and Hugo Grotius (1583 – 1645). Both grappled with extraordinary internal and external change. Both grappled with cataclysm that demanded not immaterial reform in and the application of the Just War ethic.

Francisco de Vitoria followed Aquinas when he explained right reason in terms of natural law, arguing that right reason would mediate the “legitimacy of war both between Catholics and Protestants and between Christians and heathens.”¹³⁶ Vitoria, after all, was concerned not only with moderating imperial conflicts between England and Spain but also about restraining plunder by the Spanish in the New World:

Not only did he attempt to avert religious wars between Protestants and Catholics by restricting the causes of war to reasons of state; he stipulated that, if only because of invincible ignorance, these reasons could give ... ‘simultaneous ostensible justification’ to both parties to a conflict. Hence, Vitoria emphasized the necessity for both parties, in the absence of certitude about *ius ad bellum*, to adhere scrupulously to the prescriptions of *ius in bello*. Yet he

¹³⁴ Johnson, 16 (citing Luther 1967: 121).

¹³⁵ Murnion, *A Postmodern View of Just War*, 27.

¹³⁶ Murnion, 27.

qualified his own admonitions by allowing, in case of military necessity, for unintentional and indirect harm to noncombatants and, in the limit [sic] case of certitude about justice of one's cause, for intentional though indirect harm to noncombatants.¹³⁷

After the Peace of Westphalia (1648) ended the Thirty Years War, Catholic and Protestant theologians adopted Vitoria's Just War paradigm. Grotius, the founder of international law,¹³⁸ reimagined *right reason* by shifting it away from an innate natural law to a theoretical common law of all nations. He did so by codifying the doctrine "into the now familiar diptych of *ius ad bellum* and *ius in bello*."¹³⁹ *Jus ad bellum* was reduced, perhaps in recognition of the reality of modern nation-states, to the possession of sovereignty, while emphasizing even more than Vitoria did the necessity for moderation in *jus in bello*, to limit the brutality of war.¹⁴⁰ This new paradigm suited the sovereign wars that would follow in the next two centuries, yet it also became the model for the contemporary version of the Just War ethic in both Professor Walzer's *Just and Unjust Wars* and John Rawls's *Law of Peoples*, with their emphasis on a shared moral outlook about rights and justice among all people.¹⁴¹

¹³⁷ Murnion, 27 (citing de Vitoria, Francisco, *De Indis and Iure Belli Relectiones* (Washington D.C.: Carnegie Institution, 1917; Johnson, *Ideology*, 154-203; Scott, James B., *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford: Clarendon Press, 1934), 68-172.

¹³⁸ Murnion, 27 ("Grotius, the founder of international law, reinterpreted right reason ... not as an innate natural law but as a hypothetical common law of all nations or peoples.").

¹³⁹ Murnion, 27.

¹⁴⁰ Murnion, 27.

¹⁴¹ Murnion, 27 (citing Hugo Grotius, *On the Law of War and Peace*, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925); Walzer Michael, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edn (1977; New York: Basic Books, 2000), xviii-xxiii, 3-20; Rawls, John, *The Laws of Peoples* (Cambridge, MA: Harvard University Press, 1999), 3-89-105.

The Late Modern / Contemporary Paradigm

The contemporary paradigm of the Just War ethic arose in response to the total wars of the 19th and 20th centuries and is based on positive law.¹⁴² Carl Von Clausewitz in 1832 defined total war “as a prerogative of the law of sovereignty of nation-states, free to exercise politics by forcible as well as peaceable means and to prosecute war with their full resources, with the most devastating weaponry, and in the shortest period of time.”¹⁴³ And total war became possible after (1) the rise of national sovereignty after the French Revolution, (2) universal male conscription during the Napoleonic wars, and (3) the industrial revolution made possible the mass production of precision-made weaponry.¹⁴⁴ As Professor Murnion observed, “the response of governments with the endorsement of ethicists was to attempt to limit through positive law the resort to war as well as the prosecution of war.”¹⁴⁵

Following Aquinas and to a certain extent Luther, *jus ad bellum* was effectively reduced during this time to war skill.¹⁴⁶ As a result, *jus in bello* began to form into doctrine, starting with General Orders 100, the *Instructions for the Government of the Armies of the United States in the Field*. This document, issued over President Lincoln’s signature on April 24, 1863, was the “first official document to define the rights of both

¹⁴² James Turner Johnson, *Just War Tradition and the Restraint of War* (Princeton and Guildford, Surrey: Princeton University Press, 1981), 10-41.

¹⁴³ Murnion, *A Postmodern View of Just War*, 28 (citing Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1984), 75-77, 127-132, 190-209, 523-531, 577-605.

¹⁴⁴ Murnion, 28.

¹⁴⁵ Murnion, 28.

¹⁴⁶ Murnion, 28 (referring to “*competence de guerre*” and citing Yoram Dinstein, *War, Aggression, and Self-Defence*, 3rd edn. (1988; Cambridge University Press, 2001), 69-72.

combatants and noncombatants and to specify the weaponry appropriate for combat.”¹⁴⁷

This instrument of national law – ordered during a civil war – became a model for subsequent measures of international law, including the Brussels and Hague treaties and Geneva conventions.¹⁴⁸ But positive law also started to emerge in the *jus ad bellum* with the development of Article 10 of the Covenant of the League of Nations (1919), the Kellogg-Briand Pact (1928), and, in the aftermath of World War II, the Charter of the United Nations (1945).¹⁴⁹ These developments, joined with the Brussels and Hague treaties and the Geneva conventions governing *jus in bello*, have institutionalized the Just War ethic in international law.

* * *

The developmental record of the Just War ethic – from antiquity through the contemporary legalistic model – reveals several paradigms, each formulated in specific political and cultural contexts, to meet social challenges emerging from specific types of war. Each paradigm is founded upon a particular norm with the intent of limiting the incidence of and curtail the conduct in war. The early paradigms, have all been reformulated into contemporary models, while the late modern/contemporary paradigm has been endorsed by ethical and moral arguments. Though the paradigms all compete for a sort of primacy of place in academic discourse, and though they sometimes reach

¹⁴⁷ Murnion, 28 (citing James F. Childress, *Francis Lieber’s Interpretation of the Laws of War*,” in *Moral Responsibility*, 95-163).

¹⁴⁸ Murnion, 28 (citing Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1980).

¹⁴⁹ Article 10 was a pledge to respect and preserve one another’s territorial integrity from external aggression; the Kellogg-Briand Pact attempted to enforce the Covenant by renouncing war as a lawful instrument of national policy, while approving war as a means of self-defense; the Charter outlawing the threat or the use of wars of aggression, restricting the legality of war to individual nations acting in self-defense against aggression or to form syndicates of nations engaging with UN authorization in humanitarian intervention.

different results about the morality of particular wars and methods of war, the moral effect is actually one of mutually reinforcing paradigms, each one containing the possibility of appraising the morality of entering and executing war in specific circumstances.

The *virtuous* war era presents another paradigm shift. It is a sufficiently different circumstance and challenge that, like its predecessors, requires an adjustment to and recalibration of the Just War ethic. Central to contextualizing the discussion is the idea that the Just War ethic is about entering and conducting war whereas humanitarian engagement is not strictly about either. Yet, with *virtuous* war, technology has made intervention easier while humanitarian ideals compel action. It is this twilight zone between pure war, the entry and conduct of which, can be guided ethically by Just War theory, and pure humanitarian intervention, the entry and conduct of which does not yet seem to have a principles-based moral language. How the West moved into this precarious new moral territory is discussed next in a chapter titled *The Through-Line: The Building Blocks of Virtuous War Through Failed States, Rogue States, to Inept States*.

Chapter IV

The Through-line: The Building Blocks of *Virtuous* War Through the Lens of Failed, Rogue, and Inept States

The moral dilemmas posed by *virtuous* war can materialize in a variety of ways. Engaging with these ideas is made all the more complicated because interventions, whether or not spurred by an impulse to a *virtual* reality, are not undertaken to address solely political problems of *failed* states, nor only to contain or discipline the behavior of *rogue* states, but also to address the significant pressures placed upon the international community by *inept* states (nothing is illegal or immoral about being inept, though its effects are potentially significant and dangerous). Each type of state presents problems for the international community as it strives to maintain collective security and prevent human rights abuses. Analyzing the West's experience through this framing triptych is useful for identifying a sort of *through-line* as to how the West moved toward and ultimately embraced *virtuous* war, and why new principles must be forged from and added to the Just War discourse now.

Failed States

Somalia – 1993

The post-cold war world of humanitarian engagement began in 1993 when American troops intervened to deliver food and create order in Somalia. They departed when 18 Americans were killed in a fire-fight. This intervention and its aftermath are foundational to the drive toward the *virtuous* war paradigm. Historical context is required.

During the Cold War, Somalia was part of great power competition between the United States and Soviet Union.¹⁵⁰ Under General Siad Barre, Somalia allied with the Soviet Union while its neighbor, Ethiopia, allied with the U.S. In 1977, Barre turned on Ethiopia, which caused Western aid to stop flowing and forced Barre to become progressively more repressive to maintain control over rival clans.¹⁵¹ After riots and revolt, Barre left Somalia in January 1991, and the clans filled the power vacuum, with ethnic tensions between them leading to civil war for control. Drought followed, causing famine; and support from international organizations was almost immediate but these organizations struggled without appropriate security.

In April 1991, referring back to the Gulf War, perhaps with its *virtual* nature top of mind, the United Nations passed Resolution 688, which held that any UN member guilty of repressing its own people created “urgent humanitarian needs” and in turn comprised a threat to international security.¹⁵² Although Article 2 of the UN Charter was unclear, this new resolution compelled UN Member States to act to preserve security in humanitarian contexts.

Resolution 751 came next. This Resolution authorized immediate humanitarian relief operations under the helm of United Nations Operations in Somalia. The peacekeepers, however, were ill-equipped to prevent the large supplies of food from continuing to fall into the control of the rival clans. In response, Operation Provide Relief was commenced in August 1992 with the United States in the lead.

¹⁵⁰ Nichols, *Eve of Destruction*, 17-18.

¹⁵¹ U.S. Army Center for Military History, “United States Army in Somalia, 1992-1994.”

¹⁵² John R. Bolton, *Wrong Turn in Somalia*, *Foreign Affairs* January/February Vol. 17, Number 1 (1994).

Operation Provide Relief's initial mission was to airdrop food and medical supplies into Somali cities to sidestep looting that had plagued humanitarian efforts. It failed. President Bush reacted by calling for an international force of up to 30,000 troops under U.S. control to secure key infrastructure and allow for safe delivery of food necessary to avert famine.¹⁵³ By December 1992, the first elements of Operation Restore Hope reached Somalia. On December 9, 1992, the UN Secretary-General informed the Bush administration that he wanted troops to not only provide humanitarian relief, but also disarm the clans, diffuse landmines, and form a police force.¹⁵⁴

None of this worked. As President Clinton came into office, American soldiers were in the process of being replaced by UN counterparts from other nations. While Somalia remained contested, the Clinton administration was anxious to depart.¹⁵⁵ Then violence spiked, and several U.S. officials contemplated a larger contingent force that put the U.S. on a glide-path to nation building. Indeed, with U.S. support, the U.N. passed two additional resolutions, Resolutions 814 and 837: (1) Resolution 814 left 8,000 U.S. logistics personnel on the ground to continue humanitarian efforts and establish a quick reaction force (QRF). Mere weeks after Resolution 814 passed, General Aideed's forces attacked throughout Mogadishu, killing 23 Pakistani troops and injuring many more. The original humanitarian effort had to be immediately replaced with military action against Aideed's militia. (2) Resolution 837 officially sanctioned the arrest of Aideed making military intervention official.¹⁵⁶ In August 1993, Secretary of Defense Les Aspin released President Clinton's intentions stating, "President Clinton has given us clear

¹⁵³ Bolton, *Wrong Turn in Somalia*, 57-59.

¹⁵⁴ Bolton, 57-29

¹⁵⁵ Bolton, 59.

¹⁵⁶ Bolton, 59-62.

direction to stay the course with other nations to help Somalia” even as taking casualties normalized and bipartisan opposition increased.¹⁵⁷

Task Force Ranger, part of the QRF authorized by Resolution 814, conducted numerous raids throughout Mogadishu, principally to locate and find Aideed. Eventually, as is immortalized in the movie *Blackhawk Down*,¹⁵⁸ the situation disintegrated, and the humanitarian operation which had morphed into a military intervention had been completely transformed into a serious international conflict. Within six months of the Battle of Mogadishu (as it became known), U.S. forces withdrew.

Marine Corps General Anthony Zinni, speaking of the experience in Somalia, warned that traditional criterion limiting military forces has a special urgency and ambiguity in humanitarian circumstances. Militaries are not primarily oriented or well-suited to carry out the varieties of tasks a “true humanitarian exercise may require.”¹⁵⁹ Professor George Lucas goes further by observing that “it is difficult to predict just what sorts of activities [humanitarian operations] may compromise, but they certainly transcend the straightforward projection of lethal force to include civil engineering, police and law enforcement, and other functions of a stable civil society.” “[T]he need to resurrect a moribund legal system and to re-establish police, courts, and a working prison system may push intervening forces into roles they are ill-equipped and ill-prepared to play, with disastrous consequences.” General Zinni got to the point: “any attempt to

¹⁵⁷ Bolton, 63-65.

¹⁵⁸ Nichols, *Eve of Destruction*, 20 (“The infamous ‘Black Hawk down’ incident is a battle that has been recounted in great detail in a widely read book and a popular movie....”).

¹⁵⁹ Lucas, *From Jus ad Bellum to Jus ad Pacem*, 280.

avoid engaging in these necessary nation-building exercises is likely to doom the humanitarian mission to failure.”¹⁶⁰

Moreover, as the Clinton administration soon learned, “staying the course” proved unacceptable with the American public and lawmakers. Indeed, these events colored future policy-making with respect to and quelled public expressions of moral outrage with the events in Rwanda while simultaneously accelerating the Western attitude and drive toward technological innovation and mastery, including RMA,¹⁶¹ that would permit of greater distance from actual violence while still permissive of engagement for humanitarian and other reasons. As Professor Nichols, a “‘Somalia syndrome’ settled on Washington, with senior policymakers determined to prevent even one more U.S. soldier from getting killed in some intractable conflict in a part of the world most Americans had no idea even existed.”¹⁶²

Rwanda – 1994

Rwanda was a case of true failure. It was also a case where reasonably clear guidelines existed for peace-keeping established within the United Nations Charter that permit but do not require outside intervention to restore peace and order. It is the robustness and moral force of these legal permissions that might have permitted

¹⁶⁰ Lucas: From *Jus ad Bellum* to *Jus ad Pacem* 2004, 281

¹⁶¹ It is likely mere coincidence, but it interesting to note that Andrew Marshall’s seminal memorandum regarding RMA was published in 1993.

¹⁶² Nichols, *Eve of Destruction*, 22 (observing further that “Somalia might well have spelled the end of the humanitarian intervention debate, at least in the United States, for quite some time. It was not difficult, particularly in the America of the early 1990s, to get the electorate to turn away from helping people about whom they knew little, especially if the reward for delivering bags of food is a hail of gunfire and the desecration of the bodies of their dead. And in fact the Americans would stick to their guns on this matter – or more accurately, refuse to brandish their guns any further – even as evidence mounted in another part of Africa that something far worse than Somalia was in the offing.”).

engagement along humanitarian guidelines. But the world stood still. What happened only deepened future engagement with and a commitment to the idea of *virtuous* war.

A militia known as the Interahamwe began to round up and kill people based on their ethnicity,¹⁶³ clear evidence of genocide, which the U.S. and all Member States had a responsibility to prevent.¹⁶⁴ Within a period of 100 days (from April 8th through July, 1994), at least 800,000 had been killed while the U.S. and U.N. watched. The entire planning process of the genocide went entirely unnoticed by the Security Council and other powers.

With an eye on the “last war,” the U.S. was simply unwilling to send more soldiers abroad after the Somali debacle.¹⁶⁵ On April 7, 1994, the U.S. decided to withdraw all Americans from Rwanda. On April 9th, the U.S. ambassador and 250 Americans were evacuated.¹⁶⁶ As always, politics played a role. Indeed, clear evidence of bi-partisan support for evacuating Rwanda can be found in Republican Senate Minority Leader Bob Dole’s statement that, “I don’t think we have any national interest there, the Americans are out, and as far as I am concerned, in Rwanda, that ought to be the end of it.”¹⁶⁷

¹⁶³ Samantha Power, *Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen*,” *Atlantic Monthly* Vol. 288: 84-108 (2001), 84-108.

¹⁶⁴ The concept of R2P did not yet exist; but these events would presage significant works by the U.N. in 2004 and the International Development Research Centre in 2001.

¹⁶⁵ Nichols, *Eve of Destruction*, 24 (“The mayhem in Rwanda came only six months after the Battle of Mogadishu, and American policymakers didn’t even bother to pretend that the Somali fiasco was not uppermost in their minds. One senior official later told journalist Samantha Power than [sic] when news of the Belgian deaths got to Washington, ‘it was clear that it was Somalia redux.... It was a foregone conclusion that the United States wouldn’t intervene and that the concept of UN peacekeeping could not be sacrificed against,” while in the Pentagon the feeling was that Rwanda had gone from a ‘Somalia waiting to happen’ to a Somalia that was in fact happening.”)..

¹⁶⁶ Samantha Power, *A Problem from Hell: America and the Age of Genocide*, (HarperCollins, 2007), 350.

¹⁶⁷ Power, *A Problem from Hell*, 350.

International support was marginalized, with the U.S. inducing other states to stay out of Rwanda at least until the ethnic groups resolved their own conflict. The U.S. actively worked to block U.N. Security Council action and to manage its message, with the State Department going so far as to admit that “acts of genocide may have occurred” but refused to categorize the situation as genocide.¹⁶⁸

The dotted through-line for *virtuous* war was solidifying, with Somalia and Rwanda serving as its anchors. Both sparked a strong sense over the next two decades that humanitarian military interventions were varied, improvised, highly inconsistent, and inchoate experiences,¹⁶⁹ which contributed to a growing desire to engage militarily with the right technology in dire humanitarian contexts without having to put American skin in the game. Kosovo, Iraq (2003), Libya, and Syria – “rogue” states all – embodied this emerging *virtuous* war norm.

Rogue States

International law, grounded in sovereignty and the protection of identifiable national entities against aggression, is readily able to identify the behavior of “rogue” states in unambiguous legal terms. Kosovo broke new ground.

Kosovo - 1999

Kosovo was a war fought for a new end: the defense of a party to a civil war within a state. Professor Nichols observes that, “the experiences of the previous five years were finally having a cumulative effect on Western leaders. American Secretary of State Madeleine Albright ... along with the rest of the Clinton national security team,

¹⁶⁸ Power, *A Problem from Hell*, 350 (quoting State Department spokeswoman Christine Shelly).

¹⁶⁹ George R. Lucas, Jr., *New Rules for New Wars: International Law and Just War Doctrine for Irregular War*, 43 Case W. Res. J. Int'l L., 677 (2011), 678-680.

‘remembered Srebrenica, were still coming to grips with guilt over the Rwanda genocide, and were looking to make amends;’”¹⁷⁰

But, perhaps with Somalia on policymakers’ minds, Kosovo was fought without ground troops because of the expectation that there would be no casualties.¹⁷¹ On the other hand, perhaps with Rwanda and Srebrenica on the mind, the conflict looked and sounded like war: jets took off, buildings were destroyed, and people died;¹⁷² but for the citizens of NATO countries, the war was *virtual*. The West could mobilize and yet also *not* mobilize. Indeed, if they were mobilized, they were pressed into action not as combatants, but as spectators. “The war was a spectacle: it aroused emotions in the intense but shallow way that sports do.”¹⁷³ Professor Michael Ignatieff identifies the moral dilemma:

The events in question were as remote from their essential concerns as a football game, even though the game was in deadly earnest, the deaths were mostly hidden, and above all, they were someone else’s. If war becomes unreal to the citizens of modern democracies, will they care enough to restrain and control the violence exercised in their name?¹⁷⁴

This was the point. Virtual war was here but America could still be virtuous, *i.e.*, engage in a significant humanitarian engagement while not risking American lives. That this breaks down natural restraint on the very idea of intervention speaks for itself. Some, such as Professor Nichols, even observed that NATO’s commencement of

¹⁷⁰ Nichols, *Eve of Destruction*, 29 (citing Samantha Powers). While not discussed herein, it is important to flag the impact of the massacre at Srebrenica in 1995. As Professor Nichols observes, the “massacre at Srebrenica ... had a tremendous impact at the time. Srebrenica quickly became a symbol of what happens when civilized nations fail to act to protect the innocent, and the very name of the town, as one writer put it, is to this day ‘a conversation-stopper in polite Western circles.’” Nichols, p. 27.

¹⁷¹ Ignatieff, *Virtual War, Kosovo and Beyond*, 5.

¹⁷² Ignatieff, 3.

¹⁷³ Ignatieff, 3.

¹⁷⁴ Ignatieff, 3-4.

Operation Allied Force in Kosovo “represented nothing less than the beginning of the end of the Westphalian world order.”¹⁷⁵ In a single operation, the relaxation of the Westphalian world order merged with the giddy realization that it was a moral good to intervene with no casualties for the intervenor. Again, the West could mobilize and also *not* mobilize.

The After-Action Review, presented by Secretary of Defense Cohen and Chairman of the Joint Chiefs of Staff General Shelton before the Senate Armed Services Committee, spelled this out:

For 50 years, NATO has given caution to our foes and comfort to our friends. As a watershed in NATO’s long history, Operation Allied Force was an overwhelming success. NATO accomplished its mission and achieved all of its strategic, operational, and tactical goals in the face of an extremely complex set of challenges. We forced Milosevic to withdraw from Kosovo, degraded his ability to wage military operations, and rescued and resettled over one million refugees. We accomplished this by prosecuting the most precise and lowest-collateral-damage air campaign in history – with no U.S. or allied combat casualties in 78 days of around-the-clock operations and over 38,000 combat sorties.¹⁷⁶

As Professor Der Derian observes, “[t]he *virtue* of the conflict could be measured by the low casualties, the discriminate use of violence, and the application of international norms (or at least those that coincided with American values). The *virtual* was operationally evident: the real-time, distant detection, targeting, and destruction of architecture that had been emptied of humans by advanced signaling (bridges were bombed only on weeknights between 10 p.m. and 4 a.m.); the use of disinformation and information warfare, from denials and exaggerations of ethnic cleansing to going after the

¹⁷⁵ Nichols, *Eve of Destruction*, 30.

¹⁷⁶ Can be found [here](#). (last visited on August 21, 2022).

assets of Milosevic and his financial cohort; the widespread use of the Internet by all parties, civilian and military, to get out multiple and often conflicting versions of the ‘truth’; and finally, just as networked technologies closed strategic distances, so too did information networks collapse representational distinctions between fact and fiction.”¹⁷⁷

It was also a *virtual* war in a political and legal sense. The UN did not sanction it; the legislatures of the nations who went to war likewise did not do so. “It was prosecuted in an ambiguous legal haze[,] and it achieved a ‘military technical agreement,’ which decided nothing....” The result suggests that if we won a victory, it too was virtual.¹⁷⁸

General Wesley Clark said of Kosovo that, “I believe we got a glimpse of the future in Kosovo where NATO succeeded in righting a great wrong.” In spite of an unfamiliar battlefield – one “not known in the manual on the revolution in military affairs” – “we fought our campaign in the public, fully within internationally accepted and recognized legal standards, and we were held accountable on a daily basis.” Kosovo was not “about oil, sea lanes, conventional cross-border invasions,” it was about “fighting for our beliefs and values, for human rights and respects, for the freedoms of our own American dreams.”¹⁷⁹

Virtuous war had arrived. And it made possible the moral language used to support the Iraq war in 2003, which had nothing to do with humanitarian aims and objectives. The twilight – the “legal haze” – was now fully deployable by the West.

¹⁷⁷ Der Derian, *Virtuous War/Virtual Theory* (“The bombing of Serbia has become the first Internet war, with e-mail missives from local people providing day-by-day accounts of the conflict from the front lines in Belgrade and Pristina.” See Robert Uhlig, *Front-line news now travels by e-mail*, The London *Daily Telegraph*, March 27, 1999, at 4).

¹⁷⁸ Der Derian, *Virtuous War/Virtual Theory*, 200.

¹⁷⁹ Der Derian, 200.

The 2003 Iraq War epitomizes how *virtuous* war conditions manifest in new moral dilemmas because it was not a humanitarian intervention. But, crucially, even as a putative case of “pre-emption” to aggression, the U.S. still felt compelled to bolster the case for war by discussing liberal humanitarianism. Further, support for the war after the conclusion of major combat operations depended largely on the perceived need for a more humane and stable state than previously existed. Moreover, the Iraq War illustrates how technological hubris resulted in the abuse of humanitarian justifications.

The U.S. first attempted to justify the Iraq War through pre-emption in the hope of staying within the agreed ethical bounds of the Just War tradition. But controversy surrounded that justification because most concluded that the war was being justified through resort to *preventive* war principles that sit outside international law and Just War theory.¹⁸⁰ Then, after discovering that Iraq did not have large caches of WMD, the Bush administration showed the contextual trump cards of *virtuous* war: technological military superiority and the liberal sensitivities of the West in conducting war for humanitarian reasons.¹⁸¹

¹⁸⁰ Neta C. Crawford, *The Slippery Slope to Preventive War, Ethics and International Affairs*, 17:1 (Spring 2003), 36 (Dr. Crawford argues that the Just War requirement of *last* resort prohibits preventive war even in the face of rogue states, WMD and terrorism, because it is always “assume[s] perfect knowledge of an adversary’s ill intentions,” something that is not possible).

¹⁸¹ Banta, *Virtuous War*, 286 (citing as examples: Colin Powell stated before the World Economic Forum in January 2003 that “we are where we are today with Iraq because Saddam Hussein and his regime have repeatedly violated the trust of the UN, his people, and his neighbors, to such an extent as to pose a grave danger to international peace and security.”; THREATS AND RESPONSES: Powell on Iraq: “We Reserve Our Sovereign Right to Take Military Action”, *The New York Times* (27 January 2003); President Bush stated on 28 March 2003 that “the Iraqi regime will be ended and the long-suffering Iraqi people will be free.” Thom Shanker and Elizabeth Bumiller, A NATION AT WAR: HEADS OF GOVERNMENT; War to Keep Going Until Regime Ends, Bush and Blair Say, *The New York Times*; and for a view on how technology shaped war planning, see Matthew Brzezinski, The Unmanned Army, *The New York Times* (20 April 2003).

Central to *virtuous war*'s critique of Just War theory is that "theories and statements are recognized as productive of reality."¹⁸² Upsetting, then, is that while finding that all justifications given by the Bush administration, including pre-emption and enforcement of international law, can find agreement in Just War theory, the Bush administration seemed to intuitively know that it needed to justify the Iraq War through resort to Just War language without regard to reality but with regard to creating reality through false means.

At the same time, the *virtuous war* paradigm influenced the preparation for and use of certain means during the war. "Ideally, if 'the president felt it necessary to publicly defend the action in humanitarian terms, an implicit admission that this justification was a necessary enabling condition of the action',¹⁸³ this implies a large and lengthy troop presence."¹⁸⁴ But the Bush administration went further by both justifying war with reference to the *virtuous war* paradigm and also actively working against any discussion of and preparation for the post-war reality or post-war responsibility. For example, the Bush administration worked hard to refute the pre-war assessments of General Eric Shinseki, who had the temerity to tell the US Congress that hundreds of thousands of troops would be needed to secure Iraq after the end of combat operations. In response, Defense Department insiders, including Deputy Secretary of Defense Paul Wolfowitz, dismissed his assessment on the grounds that Iraq did not have a history of ethnic strife.¹⁸⁵

¹⁸² Banta, *Virtuous War*, 286.

¹⁸³ Banta, 287 (citing Nicholas J. Wheeler, 'Humanitarian Intervention after September 11, 2001', in A. F. Lang Jr. (ed.), *Just Intervention* (Washington D.C.: Georgetown University Press, 2003, p. 198).

¹⁸⁴ Banta, 287.

¹⁸⁵ Banta, 287 (quoting Eric Schmitt, 'Pentagon Contradicts General on Iraq Occupations Force's Size', *The New York Times* (28 February, 2003).

This was intentional. A 2005 unpublished report to the US Army, RAND concluded that because:

Building public support for any pre-emptive or preventive war is inherently challenging ... [a]ny serious discussion of the costs and challenges of reconstruction might undermine efforts to build that support [...] There was never an attempt to develop a single national plan that integrated humanitarian assistance, reconstruction, governance, infrastructure development and postwar security.¹⁸⁶

The UK was equally complicit in its antipathy toward post-war responsibility while deploying humanitarian rhetoric as a basis for engagement. In a document called the “Downing Street Memo,” written by British officials in July of 2002, officials observed that “not only were ‘intelligence and facts fixed around’ pre-war policy of US officials, but that the ‘US military plans are virtually silent’ on a post-war occupation plan.”¹⁸⁷

Thus, a war marked by the use of heavy air-power and precision guided weapons gave way to an initial post-war period that saw a withdrawal of troops. President Bush nonetheless based his decision to go to war, at least in part, on humanitarian rhetoric, saying as early as a month before war that “America’s interests in security, and America’s belief in liberty, both lead in the same direction: to a free and peaceful Iraq.”¹⁸⁸ But if a war is sold to the American public on how it will be won easily with few troops because of technical superiority, “realistic discussions of a lengthy occupation and reconstruction implied by humanitarian commitments must be ignored.”¹⁸⁹

¹⁸⁶ Banta, 287-88 (Quoted in M. R. Gordon, ‘Army Buried Study Faulting Iraq Planning.’ *The New York Times* (11 February 2008).

¹⁸⁷ Banta, 287-88 (citing to W. Pincus, ‘Memo: US Lacked Full Post-War Iraq Plan’, *The Washington Post* (12 June 2005).

¹⁸⁸ Banta, 287-88 (citing M.S. Ottoway, ‘One Country, Two Plans’, *Foreign Policy*, 137 (2003), p. 55.

¹⁸⁹ Banta, 287-88.

This *virtuous* war paradigm is now the American way of war. It, as noted, has been building to this point for years:

It must be stressed, though, that this is not some conspiracy hatched in smoky rooms by powerful men desiring to dupe the American public into wars which cannot be won. Rather, the material and discursive forces at play – seductive precision guided weapons technology, the experiences of Vietnam and the end of the Cold War bringing about personnel reductions, and the perception that international humanitarian crises should be stopped by force – lead to a perfect storm of sorts, where disastrous wars such as Iraq can be deemed necessary, and are justified by ease of victory and supposed humanitarian aid.¹⁹⁰

But just because circumstances were ripe for the resort to the *virtuous* war paradigm in Iraq and other adventures does not mean the paradigm must be accepted and advanced in every circumstance. Yet, here, it was. Explicitly. After all, the “Bush administration’s use of the military in Iraq is no anomaly, as even before 9/11 Mr. Rumsfeld was intent on further transforming the military into one in which wars could be fought virtually.”¹⁹¹

Senior aides promised to push aside what they described as hidebound volumes of doctrine in order to create an armed force emphasizing combat by long-range, precision strikes and expanding the most maneuverable military assets, mostly ships, jets, drones, satellites, and Special Operations troops.¹⁹²

This approach illustrates the incongruence between the perceived necessity to act as a humanitarian intervenor, or its use as a justification, and the *virtual* war model that has captured the imaginations of US defense officials and war strategists for years. This

¹⁹⁰ Banta, 287-88.

¹⁹¹ Banta, 287-88.

¹⁹² Banta, 287-88 (citing Bernard Weinraub and Thom Shanker, ‘A NATION AT WAR: UNDER FIRE; Rumsfeld’s Design for War Criticized on the Battlefield.’ *The New York Times* (1 April 2003).

is an obvious “crisis of the new Western way of war that has developed over the last quarter-century.”¹⁹³

Libya - 2011

The 2011 intervention in Libya, though viewed as an example of a successful military intervention organized to address a humanitarian crisis, requires something approaching deliberate non-knowledge given how it morphed into something much worse. The Libyan conflict started when a peaceful protest in Benghazi against the rule of Muammar al-Qaddafi turned violent. Instead of responding to these protests peacefully, Qaddafi responded with violence.¹⁹⁴

His rhetoric ordering the crackdown displayed genocide’s markers. He dehumanized his opponents as “rats” and “alien riffraff,” and vowed to “cleanse Libya, inch by inch, house by house, individual by individual, so that the country is purified from the unclean.” Qaddafi trained his verbal and kinetic attacks on Benghazi, blitzing armor and artillery to storm the renegade city. By mid-March, an indiscriminate massacre seemed imminent. Largely a result of his handling of the situation, the protests spread outwards from Benghazi and in turn, the number of dead protestors increased along with the adverse attention regarding Qaddafi.¹⁹⁵

In response, intervening states opted for remote approaches. With the desire to avoid the costly consequences of occupation seen in Iraq and Afghanistan, the Obama administration and its international allies supported Libyans to do the bulk of the fighting

¹⁹³ Martin Shaw, *The New Western Way of War: Risk-Transfer War and its Crisis in Iraq* (Polity Press, 2005) (“Shaw: The New Western Way of War 2005”), 139.

¹⁹⁴ NATO, “NATO and Libya”, October (2011) (can be found [here](#)) (last visited on October 1, 2022).

¹⁹⁵ NATO, “NATO and Libya”, October (2011).

against Qaddafi. Faced with a looming humanitarian crisis, the UN passed Resolution 1973 and called for the protection of civilians.¹⁹⁶

The initial response was confined to several air strikes, but later shifted to small numbers of ground troops. Nonetheless, despite the initial goal of protecting civilians, the intervention became one of regime change. Indeed, French, British, and Qatari special forces were sent to assist and train the Libyan rebels and intelligence assets were used to support the rebels as they advanced. Overall, the use of remote warfare was crucial in overthrowing Qaddafi.

Remote warfare and humanitarian rhetoric were essential to the intervention. In the immediate aftermath of Qaddafi's overthrow, President Obama celebrated the intervention's success by acknowledging its mission was to "save lives" and "demonstrate what the international community can achieve when we stand together as one." British and French leadership similarly boasted.

But was it just? In view of real operational developments, it appears that the notion of a "responsibility to protect" (or "R2P") was present, but it extended beyond its initial conception as expressed in Resolution 1973. After all, the coalition applied military and political objectives that had only an indirect link to threats to the civilian population. Furthermore, it appears that the military operations, at least in part, were aimed at supporting the forces assembled by the National Transition Council, the representative body of the Libyan opposition, in its efforts to rout elements loyal to the regime. Once the threat of massacre in Benghazi had been ruled out, but with actions by Qaddafi's troops against other cities continuing, the operations entrusted to NATO

¹⁹⁶ See UNSC Res. 1973, n. 2, preamble.

continued, with an increasingly blurred line between the prevention of massacres and a systematic air campaign aimed at dismantling the military apparatus and whose ultimate goal was regime change.

It is obvious that the humanitarian objective was defined broadly, going far beyond its declared objectives and provoking a strong reaction from those governments that had been forced into not opposing the adoption of Resolution 1973. In this way, the perception that the legitimacy of the use of force to “protect civilians” had been distorted. Put differently, evoking R2P to justify operations whose objective seemed more and more clearly oriented towards the overthrow of Qaddafi’s regime by supporting the rebel forces casts doubts not only on the intentions of the protagonists but also on the validity of the principle of using force to protect civilians. As the Overseas Development Institute concluded:

In Libya, as in Afghanistan, Iraq and Pakistan, any blurring of lines between humanitarian, military and political objectives may have a deep impact on the civilian population, ultimately jeopardizing efforts to achieve the shared objectives of saving lives and delivering assistance.¹⁹⁷

Though the NATO led engagement in Libya is considered a success, the post-war reality reveals the necessity of adopting *jus ad pace*, *jus in pace*, and *jus post bellum* principles. The intensity of the NATO led intervention swept away all governmental structures existing in Libya. This placed an enormous responsibility on the intervening forces for the rebuilding of the country, a responsibility the intervening states had not considered and were in any case unwilling to assume.

¹⁹⁷ Overseas Development Institute (ODI), ‘Friend or Foe? Military intervention in Libya’, Briefing Note, May 2011, available [here](#). (visited October 1, 2022).

The consequences are known: After a first stabilization as an immediate result of intervention, the security situation deteriorated steadily, finally ending in a chaotic situation that left the country in the hands of armed gangs, contracted militias, and Islamist militias. A 2014 Human Rights Watch Report reported an appalling picture about the human rights situation in this country.¹⁹⁸ The rich weaponry arsenals left behind by the Qaddafi regime have destabilized not only Libya but also neighboring countries. Efforts to establish a democratically elected government with effective power over the country were undertaken, but have largely failed.

Syria - 2018

Iraq and Libya are not the only examples of how virtual war and humanitarian ideals combined to justify intervention in “rogue” states. But Syria is slightly different inasmuch as technological superiority and humanitarian ideals were taken as a given, and intervention, though illegal, was still justified based on *legalist* doctrines. *Virtuous* war was now the north star driving engagement, and to a degree that officials attempted to imbue the Syrian intervention with *legal* significance, and did not discuss Just War at all.

On April 13, 2018, the US, UK, and France launched a coordinated attack on Syria, reportedly aimed at sites related to Syria’s chemical weapons program. President Trump said that he “ordered” the U.S. “to launch precision strikes on targets associated with the chemical weapons capabilities,” emphasizing that “the Assad regime again deployed chemical weapons to slaughter innocent civilians” and that “[t]he purpose of

¹⁹⁸ See 2014 Human Rights Watch report (can be found [here.](#)) (last visited October 1, 2022).

our actions tonight is to establish a strong deterrent against the production, spread, and use of chemical weapons.”¹⁹⁹

There was no domestic or international legal authority for the strikes. Instead, international legal scholars widely understood that these attacks were unlawful given that they were inconsistent with Article 2(4) of the United Nations Charter, were carried out without the consent of President Assad, lacked Security Council authorization, and were not conducted in self-defense. Nevertheless, states condoned the operations as normatively legitimate. The reasons reveal that the “through-line” of acceptable *virtuous* war was reaching its terminal point.

First, the US and the United Kingdom offered *legal* opinions justifying the attacks on humanitarian grounds. The U.S. Department of Justice Office of Legal Counsel issued an official opinion on the legality of the airstrikes on May 31, 2018, observing a convergence in the domestic and international law justifications focusing on “the U.S. interest in mitigating humanitarian disasters” and in “the deterrence of the use and proliferation of chemical weapons.” Second, the U.S. recognized that chemical weapons presented a special case. As President Trump explained at the time, “[c]hemical weapons are uniquely dangerous not only because they inflict gruesome suffering, but because even small amounts can unleash widespread devastation.”²⁰⁰

The UK issued a similar opinion by offering a four point Government Position on the legality of UK military action to “alleviate extreme humanitarian suffering of the

¹⁹⁹ The *White House* Office of the Press Secretary, Statement by President Trump on Syria, April 13, 2018 (can be found [here](#)) (last visited on October 1, 2022).

²⁰⁰ 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 16 (May 31, 2018). (Can be found [here.](#)) (last visited on August 13, 2022).

Syrian people by degrading the Syrian regime's chemical weapons capability and deterring further use, following the chemical weapons attack in Douma on 7 April 2018.

It should be underscored that the 2018 airstrikes were limited strikes, undertaken collectively, rather than by a single state. As such, the use of military force was not perceived as a pretext for a land grab or regime change. Further, for nearly a decade, Syria has represented the greatest humanitarian crisis on the planet. Moreover, the underlying humanitarian need was to stop the use of chemical weapons against a civilian population, which may be viewed as a *jus cogens* norm. Rather than target infrastructure, airfields, or government buildings, as has been the case of past humanitarian interventions, the targets of the April 2018 strikes were chemical weapons production and storage facilities.

These factors appear to have coalesced to remove Just War from the calculus. *Jus ad pacem*, *jus in pace*, or *jus post bellum* principles likewise were at a remove if they were present at all. While wider principles of humanitarian intervention might have been too much for the international community to absorb at the time, it is telling that a large majority of states appear to have been more concerned about the Assad regime's attempt to normalize the use of chemical weapons and Russia's willingness to prevent the Security Council from taking action against Syria than they were about the potential abuse. This suggests that Just War theory was not only irrelevant to the calculus, but that a transformative event in customary international law may be afoot. Indeed, these 2018 strikes may come to be viewed as a significant *legal* moment resulting in a rapid change in customary international law concerning the right to use force for humanitarian interventions under certain conditions.

Inept States – Congo, Sudan, Haiti, and Afghanistan

“Inept” states present a very hard case for *virtuous* war. Inept states are those nations with recognizable but ineffective governments unable to provide for the security and welfare of citizens, secure the normal functioning of the institutions of civil society, or maintain secure borders sufficient to control the operations of criminal elements in their midst. There is nothing inherently illegal about these circumstances. As Professor Lucas observes, each of the Congo, Sudan, Haiti, and Afghanistan represent situations where the borders, and the presumably “legitimate” government, are intact, as was (and now is once more) the case with the Taliban in Afghanistan.

However, the behaviors that provoke concern (refuge for terrorists in Afghanistan or permitting drug-running, diamond-smuggling, slavery, torture, and extortion in Congo) are not necessarily acts of the government, let alone the actions of the collective will of the people (in which case they would be classified as “rogue states”). Instead, the problem lies in the inability or unwillingness of the governments to enforce the rule of law or maintain the normal workings of civil society within their own, sovereign borders. These inadequacies invite insurgent forces or shadowy international entities to penetrate and operate within their borders at will, often wreaking as much havoc for the nation’s own citizens, as occurred in both Congo and Afghanistan, as for innocents abroad.

Professor Lucas observes correctly that it is not “against international law for a nation to lack the resources to field an effective Coast Guard to ward off terrorists or smugglers (as in Yemen), nor is it against the law for desperately impoverished or ineffective governments to find themselves powerless to prevent terrorist organizations

from operating within their borders (as in Sudan and Afghanistan).”²⁰¹ These are very different situations from promoting terrorism, aiding and abetting international criminals, as in Iraq, Libya, Iran, and North Korea, which is definable by and punishable under international law. But the international community cannot punish a nation for being poor and incompetent. Yet it is that poverty and incompetence, when it “results in the terrorizing and savage mutilation of citizens by insurgent armies in Congo, or the senseless destruction of innocents working in the New York Trade Center by misguided fanatics trained on Afghan soil, clearly results in a situation in which some sort of firm response is justified.”²⁰²

“Inept” states are a mortal wound for the legalist paradigm of international relations theory. The same can be said for Just War theory. Enter the *jus ad interventionem* principles identified in Chapter V, next. Applying these new principles to situations of legitimately “inept” states addresses the conundrum posed by *virtuous* war. Put differently, “inept” states is where new principles for morality in the *virtuous* war era are at high tide. It is where *jus ad pacem*, *jus in pace*, and (perhaps) *jus in bellum* criteria identified next might coalesce to permit intervention even where legal doctrine has not caught up with the new moral requirements.

²⁰¹ Lucas, *From Jus ad Bellum to Jus ad Pacem* 2004, 4-5.

²⁰² Lucas, 4-5.

Chapter V

From *Jus ad Pacem* to *Jus in Pace* and *Jus Post Bellum* in a *Virtuous* War Era

Just War does not apply to humanitarian operations as such operations are not intended to be and are not acts of war on the part of the intervenor.²⁰³ But political officials and Just War scholars do use humanitarian rhetoric to justify recourse to violence, even if doing so blurs the lines between interventions with a humanitarian motive and those interventions freighted with duties laid upon combatants during conventional hostilities between adversaries. The *virtuous* war paradigm recognizes these blurred lines and the moral dilemmas it causes. Professor Vivienne Jabri²⁰⁴ observes:

The agents of war, if defined in humanitarian terms [...] are at one and the same also the agents of peace engaged in the wholesale pacification, or indeed ‘domestication’, of the global arena [...] Humanitarian wars [lie] at the threshold of law, in a zone of indistinction that, in blurring the boundary between inside and outside, locates those involved, the agents of war and those targeted, somehow beyond the law, generating impunity for the former and subjection beyond the law for the latter.²⁰⁵

To grapple with these blurred moral lines embedded in *virtuous* war, a new set of criteria must be identified and then assimilated into, placed astride, or otherwise bolted onto the Just War ethic to justify the use of force for humanitarian or peaceful ends,

²⁰³ Lucas, *New Rules for New Wars*, 689.

²⁰⁴ Professor Vivienne Jabri is a Professor of International Politics in the Department of War Studies at King’s College London. Here biography can be found [here](#) (last visited on August 7, 2022).

²⁰⁵ Vivienne Jabri, *War and the Transformation of Global Politics* (New York: Palgrave Macmillan, 2007), 187-88.

particularly where, through the ownership of vast and superior technologies, intervention is so easy.

These new principles can be organized around three ideas: (1) *jus ad pacem*, which is defined as the “justification of the use of force for humanitarian or peaceful ends;” (2) *jus in pace*, which attempts to define the limitations governing the acceptable use of force in humanitarian operations; and (3) the *jus post bellum*, which embraces the idea that the aim of any conflict is a more secure and more just state of affairs than existed before war. Each idea is discussed next.

Toward a Jus ad Pacem and Jus in Pace

Background

As argued in Chapter IV, humanitarian military interventions (real or phony) have become the primary justification for raising, equipping, training and deploying military force.²⁰⁶ Professor George R. Lucas, Jr.,²⁰⁷ observes:

Military forces have been used sporadically for centuries for the decidedly secondary purpose of peace-keeping and nation-building in their own nation’s political or economic interest. It is extraordinary and utterly without historical precedent, however, to appeal to humanitarian exercises in the international arena, or to an admittedly elusive and ambiguous ‘interventionist imperative,’ rather than to national self-defense or the defense of vital national interests, as the primary justification for the use of military force.²⁰⁸

²⁰⁶ Lucas, *From Jus ad Bellum to Jus ad Pacem* 2004, 272.

²⁰⁷ Professor Lucas is an American philosopher and a professor of ethics and public policy at the Graduate School of Public Policy at the [Naval Postgraduate School](#). Previously he was the Distinguished Chair in Ethics in the Vice Admiral James B. Stockdale Center for Ethical Leadership at the [U.S. Naval Academy](#). His bio can be found [here](#) (last visited on August 7, 2022).

²⁰⁸ Lucas, *From Jus ad Bellum to Jus ad Pacem* 2004, 272-73 (defining the “interventionist imperative” as the “essence” of what he calls the “Albright Doctrine.” Professor Lucas concludes that Secretary Albright’s position at the time seemed to assert the following moral principle: “When a clearly recognizable injustice is in progress, and when we as international bystanders are in a position to intervene to prevent it, then it follows that we are under a *prima facie* obligation to do something.” In Kantian terminology, the imperative amounts to an imperfect duty of beneficence: we have a duty to prevent harm and injustice when we are able and in a position to do so, but what actions we choose to perform or

Accepting some variant of what Professor Lucas calls the “interventionist imperative” (and this thesis would summarily categorize as a variant of *virtuous* war) requires a “substantial alteration” and “renegotiation” of the “military-civilian” contract, the terms of which have sparked an “ongoing debate” within the U.S. military, prompted criticism and “even a few isolated protests,” and to have “prompted senior military leaders to suggest that a distinct humanitarian and peacekeeping division of our existing military forces should be established and separately maintained.”²⁰⁹

Still others, like Professor Stanley H. Hoffman, argued that the humanitarian use of military force represents an emerging new paradigm in international relations that calls into question some of the basic assumptions regarding the sovereignty of nations.²¹⁰

Professor Hoffman formulated preliminary criteria for guiding moral reasoning in the decision to override national sovereignty and deploy military force for humanitarian ends. He proposed, as a first provision, that collective intervention is justified when a nation state’s condition or behavior results in grave threats to other states’ and other peoples’ peace and security, and in grave and massive violations of human rights. But, crucially, sovereignty may be overridden whenever the behavior of the state in question, even within its own territory, threatens the existence of elementary human rights abroad, and whenever the protection of the rights of its own members can be assured only from

strategies we choose to devise to carry out this imperative, and the beneficiaries of our protection, are not specified.” (citing Julia Driver, *The Ethics of Intervention*, *Philosophy and Phenomenological Research*, 57, no. 4, (December 1997), 851-870; and John W. Lango, *Is Armed Humanitarian Intervention to Stop Mass Killing Morally Obligatory*,” *Public Affairs Quarterly*, (July 2001), 173-192.

²⁰⁹ Lucas, 274.

²¹⁰ Stanley H. Hoffman was the Paul and Catherine Battenwieser University Professor at Harvard University, specializing in French politics and society, European politics, U.S. foreign policy, and international relations. His bio can be found [here](#) (last visited on August 13, 2022).

the outside.²¹¹ These two provisions are referred to as a “universal maxim” of *jus ad interventionem*.²¹²

The first provision of Professor Hoffman’s formulation seems analogous to “just cause” in Just War theory. It would apply to events such as the Holocaust and extend to events such as Bosnia, Kosovo, and Rwanda.²¹³ And it serves as a constraint. After all, “grave and massive violations of human rights” must be tied into “threats to other states’ and other peoples’ peace and security.”

The second version of Professor Hoffman’s formulation addresses the sovereignty issue directly. There, perhaps similar to “legitimate authority” in the classical Just War sense, Professor Hoffman suggests that legitimate authority in humanitarian operations is restricted to the international community or some collective.²¹⁴ This provision gestures to constraint, occasioned, perhaps, by the existence of current agreements and U.N. policies on collective security. This of course begs the question whether collective humanitarian interventions carried out under the constraints imposed by existing U.N. agreements and other conventions address effectively the complexity of the humanitarian problem implicated by, *inter alia*, *virtuous* war.

Expectations and obligations differ greatly between combatants during conventional hostilities between military adversaries and interventions with a humanitarian motive. Whereas combatants are licensed to minimize risk to themselves in relation to the enemy, and to preserve their lives in combat, the same leeway does not

²¹¹ Stanley Hoffman, *The Ethics and Politics of Humanitarian Intervention* (Notre Dame, IN: Notre Dame University Press, 1996).

²¹² Hoffman, *The Ethics and Politics of Humanitarian Intervention*, 23.

²¹³ Lucas, *From Jus ad Bellum to Jus ad Pacem*, 277.

²¹⁴ Lucas, 277.

exist in humanitarian actions. This is because the “justification for such actions ... rest upon understanding the purpose of the intervening forces as primarily the enforcement of justice, the protection of rights and liberties..., and the restoration of law and order.”²¹⁵

Professor Lucas observes:

[T]hese high moral and legal purposes that provide the justification for humanitarian military intervention are seriously compromised if the intervening forces themselves deliberately, or even inadvertently, behave unjustly, violate rights, infringe liberty, or destroy the rule of law. Like domestic police forces, military personnel engaged in humanitarian actions are therefore not entitled to protect themselves first, or even to inflict unintentional collateral damage on non-military targets or personnel by the principle of double effect, as they might be at least excused for doing under the ‘war convention’ in traditional combatant roles. Rather, such forces are expected instead to incur some risk to themselves, to (as it were) ‘bend over backwards’ *to avoid even inadvertent commission of the kinds of acts as they are intervening to prevent.*²¹⁶

This *jus in pace* constraint is significant. And it is where *jus in pace* intersects with *virtuous* war most concretely. Given the lack of clarity and purpose of mission in terms of traditional national interests, leaders have been forced to “formulate policy on the fly, with unfortunate results.”²¹⁷ Citing Professor Ignatieff,²¹⁸ Professor Lucas notes that many commentators have come to lament the resulting emergence of a battlefield doctrine termed ‘radical force protection,’ in which field commanders are ordered to suffer few or even no casualties, for fear that public support for a ‘humanitarian’ mission will quickly erode when a nation’s own precious human resources begin to be consumed in its pursuit.²¹⁹ In this context, a paradox emerges (best conceptualized through the

²¹⁵ Lucas, 273.

²¹⁶ Lucas, 273 (emphasis original).

²¹⁷ Lucas, 273.

²¹⁸ Lucas, 273 (citing Ignatieff, *Virtual War, Kosovo and Beyond*).

²¹⁹ Lucas, 273.

lens of *virtuous war*) in which military forces kill but are not willing to incur risk. As several commentators note, asymmetric warfare and precision-guided weaponry – “both of which have made discrimination between military and non-military targets possible and more precise – have had precisely the opposite effect. The paradoxical quality of ‘immaculate’ or ‘riskless’ war is that is comparatively ‘riskless’ only for the combatants with superior forces, exporting virtually all risk of harm or death to non-combatants.”²²⁰ “Radical force protection” is the “logical outgrowth” of applying classical Just War theory to a “situation in which it is clearly inadequate.”²²¹ The theory needs updating.

Principles of *Jus ad Pacem*

The debate on humanitarian intervention involves two different underlying questions: “is there something like a humanitarian intervention and under what circumstances can it be justified” and “who is entitled to authorize such intervention?” According to Professor Sebastiano Maffettone, the answers to these two questions depends on and varies with respect to the theories adopted, *i.e.*, from those that turn it into an issues of strict legality and cause it to depend entirely on the authorization of the U.N. Security Council, to those that claim that international security is worth more than sovereignty “pure and simple.” In an attempt to summarize the criteria that make humanitarian intervention just and right, Professor Maffettone cites to International Peace

²²⁰ Lucas, 273 (citing Martin L. Cook, “Immaculate War: Constraints on Humanitarian Intervention,” *Ethics and International Affairs*, 14 (2000), 55-66; Joel Rosenthal, “Willing to Kill but not Willing to Die”; and Don M. Snider, John A. Nagl and Tony Pfaff, “Army Professionalism, the Military Ethic, and Officership in the 21st Century,” United States Army War College Strategic Studies Institute, December, 1999.).

²²¹ Lucas, 273.

Academy's principles: seriousness of the offense, urgency, objectivity, acceptability, practicability, proportionality of the means to be used and sustainability.²²²

But it is Professor Lucas, grounded in Professor Hoffman's formulation, that provides a more complete list of *jus ad pacem* or *jus ad interventionem* (including some preliminary provisions for restrictions on battlefield conduct, or *jus in pace*), sufficient to govern involvement in humanitarian interventions in this *virtuous* war era with its "interventionist imperative." His principles are guided by the seven conventional provisions of Just War theory modified and clarified for application in humanitarian interventions, and as is argued herein, can be placed astride, bolted onto the classical Just War ethic (Door #1 – Classical War; Door #2 – *Virtuous* war) to govern state intervention in the *virtuous* war era:

1. Justifiable Cause for Intervention

The humanitarian equivalent of "just cause" should be read, as follows:

"Humanitarian intervention is justified whenever a nation-state's behavior results in grave and massive violations of human rights."²²³

In this formulation, (a) humanitarian intervention is justified when these behaviors result in grave threats to the peace and security of other states and other peoples, and (b) intervention need not be restricted to such cases, but may be justified when the threats to human rights are wholly contained within the borders of the state in question.²²⁴

2. Legitimate Authority

²²² Sebastiano Maffettone, *Just War and Humanitarian Intervention*, Valdai Papers, #19, June 2015: 7. Professor Maffettone's biography can be found [here](#). (last visited on August 13, 2022).

²²³ Lucas, *From Jus ad Bellum to Jus ad Pacem* 2004, 278.

²²⁴ Lucas, 278.

Turning to the critical issue of what gives an intervening nation state the right to ignore borders and customary notions of sovereignty to respond to clear humanitarian emergencies, a second principle can, with some additional criteria, be stated, as follows:

Sovereignty may be overridden whenever the protection of the rights of that states' own citizens can be assured only from the outside.²²⁵

But there is still the issue of *legitimacy*. To meet that slippery idea, (a) sovereignty may be overridden whenever behavior of the state, even within its borders, threatens the existence of elementary human rights abroad, and (b) when there is no threat to human rights outside the borders of the offending state, provided, however, that the threat to that state's own citizens are real and immediate.²²⁶

Even with this formulation, there is the question of “who” is to determine whether and if such threats are “real and immediate.” To control for self-interested behavior of the type noted by Professor Jabri and to gesture (strongly) to the legalist paradigm articulated by Professors Walzer and Murnion that has receded as *virtuous* war has ascended, it is necessary to fasten a second clause to the first within this category:

“The decision to override sovereignty and intervene must be made by an appropriate collective international body.”

3. Right Intention

Observing that Grotius originally “licensed” military action for “clear” humanitarian actions (such as prevention of cannibalism, rape, abuse of the elderly, and piracy), and “simultaneously warned against the likelihood of hidden and less noble agendas, such as greed, religious and cultural differences, and national self-interest,

²²⁵ Lucas, 278.

²²⁶ Lucas, 278.

poisoning the presumptive humanitarian and disinterested motivations,”²²⁷ Professor Lucas formulates the following restriction on the use of force for humanitarian purposes, in terms of right intention:

“The intention in using force must be restricted without exception to purely humanitarian concerns, such as the restoration of law and order in the face of natural disaster, or to the protection of rights and liberties of vulnerable peoples (as defined by the United Nations Charter and the Universal Declaration of Human Rights).”

Related to this proposed maxim, “the intentions must be a publicly proclaimed and clearly evident without conflict of interest to the international community.”²²⁸

4. Last Resort

A governing principle for any intervention motivated by humanitarian ideals must be good faith efforts by the international community to avert humanitarian disasters within the borders of a sovereign state through diplomacy, *e.g.*, negotiation, sanctions, U.N. censure, and other non-military means. Thus, the Just War principle of “last resort” in the humanitarian intervention context can be formulated as follows:

“Military intervention may be resorted to for humanitarian purposes only when all other options have been exhausted.”

5. Likelihood of Success

Another important and distinct constraint on the decision to deploy force for humanitarian reasons is the concept of “likelihood of success.” This constraint can be formulated as follows:

“Military force may be utilized for humanitarian purposes only when there is a reasonable likelihood that the application

²²⁷ Lucas, 278 (citing Paul Christopher, *The Ethics of War & Peace*, 2nd edition (Upper Saddle River, NJ: Prentice-Hall, 1999).

²²⁸ Lucas, 278.

of force will meet with success in averting humanitarian tragedy.”

As Professor Lucas observes, “[t]his innocent and seemingly-obvious provision in fact imposes something like the Weinberger Doctrine constraints on those whose moral outrage or righteous zeal might tempt them into military adventures for which the intervening powers are ill-prepared and unsuited, or which might be an already-bad situation even worse.²²⁹

6. Proportionality of Ends

The “likelihood of success” prong in and of itself must also be constrained. To do that, *jus ad pacem* demands an evaluation of the likely overall outcomes (including the forms of military engagement and conduct) before the intervening state (or collection of states) decides whether to undertake the humanitarian mission. And that evaluation implicates the “proportionality of ends” or whether the expected damage to be inflicted in an effort to stop humanitarian violations is itself unduly large. This leads to the next principle:

“The lives, welfare, rights and liberties to be protected must bear some reasonable proportion to the risks of harm incurred, and the damages one might reasonably expect to inflict in pursuit of humanitarian ends.”

This principle is akin to the classical concept of *jus in bello* and is crucial to the *post hoc* analysis of the humanitarian intervention. Indeed, bridging the gap between *jus ad pacem* – with its emphasis on the initial justification for intervention – and *jus in pace* – with its emphasis on reasonable constraints on the conduct of military force during the

²²⁹ Lucas, 278.

humanitarian mission – is critical to the very idea of legitimacy and thus justice. This takes us to the final principle.

7. Just Means, Moral Means (or Proportionality of Means)

The morality of the means employed to carry out humanitarian interventions must be equal to the morality of the cause or ends for the sake of which the intervention is conducted, particularly in a *virtuous* war era marked by asymmetry, fast-paced communications, and the strong likelihood of no casualties to the intervenor and many casualties to the invaded sovereign state. Accordingly, to control for the paradox of using deadly force for humanitarian purposes, the following principle is suggested:

“Humanitarian intervention can never be pursued via military means that themselves are deemed illegal or immoral.”

This should be viewed as more, rather than less, constraining than traditional *jus in bello* or even the law of armed conflict (though both are assumed).²³⁰ In fact, what is required by intervening forces in this context is not merely that there exist no personal conflicts of interest in the enforcement of justice, protection of rights, and establishment of peace, but that these intervening forces be willing to incur risk and put themselves in

²³⁰ Professor Lucas provides the following guideposts for implementing this principle:

1. Captured belligerents must be treated as prisoners of war according to established conventions;
2. Prisoners of war accused of humanitarian crimes and abuses may be bound over for trial by an appropriate international tribunal;
3. Civilian noncombatants must never be deliberately targeted during a humanitarian military operation;
4. Military necessity during humanitarian operations can never excuse the use of weapons, or pursuit of battlefield tactics, already proscribed as illegal under established international treaties and conventional law of armed combat; and
5. Military necessity during humanitarian operations cannot excuse tactics or policies, such as “force protection,” that knowingly, deliberately, and disproportionately reallocate risk of harm from the peace-keeping forces and belligerents to non-combatants. It is insufficient that humanitarian military forces simply refrain from excessive collateral damage, or merely refrain from the deliberate targeting of non-combatants. The very nature of intervention suggests that the internal military forces (like domestic law enforcement personnel) must incur considerable additional risk, even from suspected guilty parties, in order to uphold and enforce the law without themselves engaging in violations of the law.

physical peril for the sake of these moral ideals, and with the stated objective of securing (and not repudiating or destroying) the rights and liberties to the vulnerable victims whose predicament prompted international calls for military intervention in the first instance.²³¹ As Professor Lucas correctly observes, “*in humanitarian interventions, as in domestic law enforcement, we cannot and do not forsake our laws and moral principles in order to enforce and protect them.*”²³²

These *jus in pace* principles are not unreasonable, particularly because we demand these same commitments of domestic law enforcement agencies. Indeed, as Professor Lucas argues (and this author agrees):

[I]t is in the nature of humanitarian intervention that it not only restores a legitimate role to morality in foreign policy, but **that** it begins to import some of the more cherished securities and civilizing protections of domestic civil society into the international sphere precisely to supplant the anarchy, ruthlessness, and terror that still too often flourish in the darker regions of our new global order.²³³

What of a just peace? Will deploying these reformulated principles in the runup to and the engagement in humanitarian operations, undertaken by warriors, increase the prospects of peace? Or must *jus post bellum* principles be suffused onto the Just War ethic, either through additional *jus ad pacem* (or *jus ad interventionem*) principles or by being added as a third pillar? Professor Lucas, particularly in the context of humanitarian engagement, finds this “redundant.”²³⁴ Others disagree. This thesis argues that explicit principles are better than assumed redundancy, particularly in the murky world of justice,

²³¹ Lucas, 282.

²³² Lucas, 282.

²³³ Lucas, 282 (*nb* Professor Lucas swipes at those IR practitioners of a certain era, observing that “an additional feature of humanitarian interventions is to re-introduce discussions of morality into foreign policy and internal relations [from whence they have long been banned since the days of George Kennan, Dean Rusk and the young Henry Kissinger].”

²³⁴ Lucas, 280.

conflict, and law.

Toward a Just Peace

In an age where strategic coercion is as important as war, and in which intervention in pursuit of the agreed purposes of states may assume such forms as humanitarian intervention, peaceful intervention by consent, and international peacekeeping, the Just War ethic needs to assimilate expressly a concept of “just peace” or *jus post bellum*.

As discussed at length, *supra*, the Just War ethic traditionally revolves around the justness of war and the justness of the way it is fought. Much less has been said about what happens after war, particularly after the end of the Cold War and the rise of *virtuous* war. But the aftermath is critical to the justness of the intervention itself. “Political leaders often invoke postwar developments like bringing democracy or stability as part of justifying or condemning a war; but political theorists have not yet fully come to terms with which of these arguments are morally compelling. It is important to better theorize postwar justice – *jus post bellum* – for the sake of a more complete theory of just war.”²³⁵

Jus post bellum, like all Just War theory, is not an absolute bar to war; rather, “it is a way of focusing it, hoping to temper the righteous and discourage the reckless.”²³⁶ *Jus post bellum* is connected to *jus ad bellum* in that the declared ends that justify a war – whether stopping genocide or preventing aggression – impose obligations on belligerent powers to try, even after the conclusion of the war, to bring about the desired outcome. “If a state wages war to remove a genocidal regime [say, Libya], but then leaves the

²³⁵ Gary J. Bass, *Jus Post Bellum* (Blackwell Publishing, Inc. *Philosophy & Public Affairs* 32, no. 4, 2004), 384-412.

²³⁶ Bass, *Jus Post Bellum* 2004, 385.

conquered country awash with weapons and grievances, and without a security apparatus, then it may relinquish by its postwar actions the justice it might have claimed in waging war.”²³⁷

Likewise, *jus post bellum* is connected with *jus in bello*. The *jus in bello* requirement of proportionality suggests that there must be restraint in the goals on behalf of which the fighting is being done – meaning that total war and total conquest are suspect.²³⁸ Lastly, states’ actions in bringing the war to a conclusion are clearly connected to their conduct during war’s aftermath, and so the obligations that a theory of *jus in bello* imposes on victorious states regarding the content of peace treaties, acceptable terms of surrender, and permissible reparations will have implications for the actions of those victorious states in the months and years following the war’s conclusion.²³⁹

The need for Just Peace criteria was first identified in 1994 by Michael Shuck, though broader theorization did not begin until Professor Brian Orend’s 2000 article in the *Journal of Social Philosophy*.²⁴⁰ There, Professor Orend identified five criteria based on Just War terms and the insight, taken from Professor Walzer, that the modern connection between human rights and peace necessitated that the aim of war was ‘a more secure and more just state of affairs than existed prior to the war.’²⁴¹ Professor Orend’s five criteria were: (1) Just cause for termination; (2) Right intention; (3) Public declaration by legitimate authority; (4) Discrimination; and (5) Proportionality.

²³⁷ Bass, 386.

²³⁸ Bass, 387.

²³⁹ Bass, 388.

²⁴⁰ Banta, *Virtuous War*, 296.

²⁴¹ Brian Orend, *Jus Post Bellum*, *Journal of Social Philosophy*, Vol. 31 No. 1, (Blackwell Publishers, Spring 2000), 117-137, at p. 122.

Explicitly grafting these *jus post bellum* principles onto classical Just War theory does not stretch the theory too far. It improves it by retrieving Augustine and linking his teachings more concretely to Professor Walzer's more legalistic formulation so that the decision to enter war and the conduct in war is suffused more explicitly by the need to consider the postwar goal of peace and more just outcomes.

But what of *virtuous* war and Professor Lucas's observation about "redundancy" in the humanitarian engagement context inasmuch as war must be fought for the aim of peace? This thesis argues that explicit principles are better than assumed redundancy. After all, a just use of force involves the punishment of some aggressor, but in a *virtuous* war, sometimes the "punishment" meted out (even when the word "punishment" is never used) is distorted by the fog of technology and notions of moral superiority such that it is disproportionate to the goal of a just peace.²⁴² At the same time, a just use of force must do what is necessary to remain motivated by the core ethical claim of the Just War tradition, which in the last phase of war must involve the vindication of rights.²⁴³ This should involve steps taken by the victor to restore order, refrain from celebrating,²⁴⁴ aid in reconstructing the state's infrastructure, and eventually allowing for self-determination and the restoration of sovereignty.²⁴⁵

²⁴² Banta, *Virtuous War*, 297.

²⁴³ Banta, 297.

²⁴⁴ Banta, 296 (citing Louis V. Iasiello, a Catholic priest, retired U.S. Naval officer, and Just War theorist, and discussing Iasiello's warning against the celebration of victory because it might be misinterpreted by those non-combatants in the defeated state.) This admonition is strikingly similar to the Greek tradition surrounding the use of ephemeral trophies discussed, *supra*, at n. 81.

²⁴⁵ Banta, 296.

With these ideas in mind, a *jus post bellum* embraces the promise of situating Just War as a more context sensitive theory.²⁴⁶ As Professor Banta observes, in a “world of very real aggression, lawlessness, and human suffering:

The addition of *jus post bellum* criteria within *just war* theory represents an acknowledgment that a new reality of vast technological asymmetry and pervasive human rights discourses demands that we re-evaluate how this non-ideal theory confronts the world. For ... in an era of virtuous war, where cause and means are ripe for injustice, the addition of explicit post-war considerations to the former categories of just war theory would be a proper step forward for theory and practice.²⁴⁷

Professor Lucas and Professor Banta are aligned. “Just war doctrine must henceforth be understood ... to consist of three (rather than merely two) parts,” each corresponding to war’s beginning, prosecution, and end: *jus ad bellum*; *jus in bello*; and *jus post bellum*, “the obligations of war’s victors to its victims to establish a just and lasting peace, sufficient to prevent the onset of future conflict.”²⁴⁸

Because historical and cultural dimensions of law and tradition regarding conventional war and the Just War theory haven been pushed to their limits, expressly adopting *jus ad pacem*, *jus in pace*, and *jus post bellum* principles in policy, war, and diplomacy discourses will ease those limits, bring it back from the redline. This is particularly noteworthy as we “wrestle with the structure and future of international institutions like the U.N., or debate the meaning of an ‘international community’ as a legitimate form of authority,” and “wonder together” about necessary reforms in

²⁴⁶ Banta, 298.

²⁴⁷ Banta, 299.

²⁴⁸ Lucas, *New Rules for New Wars*, 701.

international law sufficient to “authorize and event obligate the use of force in the interests of justice, and for the protection of human rights.”²⁴⁹

The foundation of and necessity for such *legal* reforms for the “international community”, as well as a proposed specific U.N. resolution, are discussed next in Chapter VI and in the Appendix.

²⁴⁹ Lucas, 701.

CHAPTER VI

Toward a New International Legal: *Jus ad Pacem*, *Jus in Pace*, and *Jus Post Bellum*

Instead of a more stable world where violence is restrained by nations committed to global order, rule of law, and collective security, we have entered an era of seemingly constant conflict coupled with an impulse or even the obligation to come to the aid of vulnerable nations or victimized populations.²⁵⁰ *Virtuous* war has made it easier to intervene, which presages enduring conflict.

This environment begs key questions of what rules should the international community apply in the *virtuous* war era, what is their provenance, and are they – or can they be – accepted by the international community such that they have a reasonable chance of adoption and compliance in the real world. As was discussed in Chapter V, new principles should form around the *jus ad pacem*, *jus in pace*, and *jus post bellum*. But interventions grounded in humanitarian rhetoric and questionable motives (and made easier through access to superior technology [and chauvinism]), occupy the twilight space between war and police actions. Put differently, these new principles have not achieved anything close to *jus cogens* status²⁵¹ (despite argumentation and advocacy around the 2018 Syrian engagement), though they might have the underlying feel of having done so.

²⁵⁰ Lucas, 701 (citing Gregory Reichberg & Henrik Syse, *Humanitarian Intervention: A Case of Offensive Force?* 33 *Security Dialogue* 309, Sept. 2002: 309).

²⁵¹ Rebecca M.M. Wallace, *INTERNATIONAL LAW* 33, (2d ed. 1994); see also Hossain: The Concept of *Jus Cogens* 2010, 73 (*Jus cogens*, the literal meaning of which is “compelling law,” is the technical term given to those norms of general international law that are argued as hierarchically superior. These are, in fact, a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances. The doctrine of international *jus cogens* was developed under a strong influence of natural law concepts, which maintains that states cannot be absolutely free in establishing their contractual relations. Put differently, *jus cogens* are rules that correspond to the fundamental norm of international public policy and in which cannot be altered unless a subsequent norm of the same standard is

For actual adoption and compliance to have any chance in the *virtuous* war era, international law must adapt: it must adopt *jus ad pacem*, *jus in pace*, and *jus post bellum* procedural and substantive mechanisms. Setting aside the supple nature of the Just War theory (and permitting room for the idea that the non-ideal theory may have become polluted and a mere enabling discourse for all manner of interventions), laws of humanitarian intervention *do* exist, *do* have some primacy of place, and *are* grounded in historical norms. But they are insufficient to meet the moment.

Laws of Humanitarian Intervention

Since World War II, international law has prohibited states from threatening or using force except in self-defense or pursuant to Security Council authorization. International law forbids the *unilateral* use of force to rescue victims of a humanitarian catastrophe. As a matter of treaty law, *unilateral* humanitarian intervention (UHI), which may be an object of *virtuous* war in a shifting pre-emptive / preventive legal and moral scheme, is not exempted by the UN Charter.²⁵² Moreover, as a matter of customary international law, the International Court of Justice concluded in *Nicaragua v. United States*²⁵³ that custom does not permit unilateral humanitarian intervention. This legal

established. This means that the position of the rules of *jus cogens* is hierarchically superior compared to other ordinary rules of international law.)

²⁵² Ryan Goodman, *Humanitarian Intervention and Pretext of War*, *The American Journal of International Law*, Jan., 2006, Vol. 100, No. 1 (Cambridge Univ., Press, Jan., 2006), 111. (Professor Goodman is the Anne and Joel Ehrenkranz Professor of Law at New York University School of Law. He served as special counsel to the general counsel of the Department of Defense. In addition to his posts at NYU School of Law, Goodman is an associated member of the Department of Sociology, an affiliated member of the Department of Politics at NYU, and a Distinguished Fellow at the National Institute of Military Justice. His full biography can be found [here](#). (last visited on August 20, 2022).

²⁵³ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. V. U.S.), Judgment of 27 June 1986 - Merits - Judgments [1986] ICJ 1; ICJ Reports 1986, 14; [1986] ICJ Rep 14 (27 June 1986). (Can be found [here](#).) (last visited August 20, 2022) (“[W]hile the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect The Court concludes that the argument derived

prohibition persists under both treaty and custom.²⁵⁴ And it is unlikely to change.²⁵⁵

Indeed, as noted *supra* (see, e.g., note []), the concern that states would initiate wars by using humanitarianism as a pretext constitutes perhaps the “most compelling”²⁵⁶ and certainly the “most common”²⁵⁷ objection to legalization.²⁵⁸

It is worth noting that the framers of the UN Charter were no strangers to these issues. After all, States designed the use of force regime partly in response to the horrors of World War II. One of the enduring memories of that war was that Hitler invoked the “right of self-determination” of German nationals as a pretext for his incursions into Austria and Czechoslovakia.²⁵⁹ Hitler in a letter to Chamberlain justified his military aims in the Sudetenland on the grounds that “Germans as well as the other various nationalities in Czechoslovakia have been maltreated in the unworthiest manner, tortured... [and denied] the right of nations of self-determination,” that “[i]n a few weeks the number of refugees who have been driven out has risen to over 3000 human beings”

from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States....”).

²⁵⁴ Goodman, Humanitarian Intervention and Pretext of War, 111 (citing, *inter alia*, Antonio Cassese, International Law 373-74 [2d ed. 2005] summarizing the legal authority).

²⁵⁵ Goodman, 112 (citing Alan James, *The Concept of Humanitarian Intervention Revisited, in Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*: 334, 342-43 (Albrecht Schnabel & Ramesh Thakur eds., 2000) (suggesting Kosovo conflict will not significantly alter legal norms against intervention).

²⁵⁶ Goodman, 113 (citing Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 Wm. & Mary L. Rev. 1583, 1727 (2000)).

²⁵⁷ Goodman, 113 (citing Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 Mich. J. Int'l L. 1005, 1020 (1998) (“The most common criticism leveled at the right of humanitarian intervention is that its incorporation into the system of law of nations would enhance the opportunities for the abusive use of force, the long-term effect of which would be to bring the international normative system into disrepute”).

²⁵⁸ Goodman, 114 (citing W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 Eur. J. Int'l L. 3, 16 (2000) (describing pretext concerns as “the primary judicial objection” to legalizing unilateral humanitarian intervention.).

²⁵⁹ Goodman, 114 (citing Amos Yoder, *World Politics and the Causes of War Since 1914*, at 558 (1986); see also Russian’s invocation of self-defense and the right of self-determination to justify its war with Ukraine. See Lieber Institute / Westpoint article [here](#). (last visited on August 20, 2022).

was in jeopardy, and that the German government was “determined by one means or another to terminate these attempts ... to deny dilatory methods the legal claims of oppressed peoples.²⁶⁰ Hitler’s rhetoric exposes what is at stake for UHI.²⁶¹ Yet, contemporary rhetoric in some humanitarian initiatives is strikingly similar to that – what we now know was pretextual – rhetoric.

Pretext wars thus frame the importance of institutional pressure on state behavior and the potential of international law to influence that pressure. Indeed, the law has unique significance in urging states to foster specific justifications for escalating conflicts. Something more is required than a mere *permissive* right, as Professor Walzer framed it. In fact, it is Walzer’s recognition of an aggressive *permissive* frame that compels the adoption of explicit moral and legal rules now. Walzer said:

Any state capable of stopping the slaughter has a right, at least, to try to do so. The legalist paradigm indeed rules out such efforts, but that only suggests that the paradigm, unrevised, cannot account for the moral realities of military intervention.²⁶²

Walzer also says:

The second, third, and fourth revisions of the paradigm have this form: states can be invaded and wars justly begun to ... rescue peoples threatened by massacre.... We permit, or after the fact, we

²⁶⁰ Goodman, 114 (citing letter from Reich Chancellor Hitler to Prime Minister Chamberlain (Sept., 23, 1938), in *The Crisis in Czechoslovakia, April 24-October 13, 1938*, 19 Int’l L. 3, 433, 433-35 (1938). As Professor Goodman observes, “Hitler also rallied a base of domestic support for his initial military expansions by asserting that foreign governments were flagrantly violating the right of self-determination of German nationals.”).

²⁶¹ It is not as if this approach to aggression has not been advanced since the proverbial dawn of time. Indeed, the *Fetiales*, discussed in Chapter II, reveal the conceptual difficulty between legitimate intervention and a “mystificatory and propaganda” function.” See Harris, W.V., *War and Imperialism in Republican Rome*, (Oxford, 1979), p. 11; and Scullard, H.H., *From the Gracchi to Nero*, (London, 1959), p. 2 (comparing scholarship that “Roman religious law (the *ius fetiale*) did not countenance wars of aggression designed to gain new territory” and “the Roman *mos maiorum* did not recognize the right of aggression or a desire for more territory as just causes of war” with the idea that “the *fetiales* [were] primarily ... a psychological mechanism for assuaging the guilty feelings which even Romans will have been unable to escape when initiating totally unjustified wars of aggression.”).

²⁶² Michael Walzer, *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, (Basic Books, 5th ed. 2015) (1977), 107-108.

praise or don't condemn these violations of the formal rules of sovereignty, because they uphold the values of individual life and communal liberty of which sovereignty itself is merely an expression. The formula is, once again, *permissive*....²⁶³

But permissions are insufficient. They need guidance from fixed rules precisely because there is no existing legal requirement to intervene when such intervention is a response to acts that “shock the conscience of mankind.”²⁶⁴ The need for more fixed rules becomes even more acute when the international community is controlling for but imperfectly policing *pretext*; and where the technological means to deploy violence from a distance and with limited risk is grounded in humanitarian rhetoric and an ethical imperative to act because of the “shocked” “consciences” of ordinary men and women “acquired in the course of their everyday lives.”²⁶⁵

New rules thus need to be adopted to arbitrate this twilight zone, so that an ethical imperative to humanitarian engagement does not encourage wars with “ulterior motives” (as Professors Goodman and Jabri fear),²⁶⁶ so that both pillars of the *virtuous* war paradigm do not relegate to the back of the bus necessary constraints traditionally imposed on international actors by Just War theory (as Professors Banta and others debate and deride),²⁶⁷ and so that an “absolute rule of nonintervention” does not emerge (as Professor Walzer expresses concern about).²⁶⁸ Professor Lucas in *New Rules for New*

²⁶³ Walzer, *Just and Unjust Wars*, 108 (emphasis added).

²⁶⁴ Walzer, 107.

²⁶⁵ Walzer, 107.

²⁶⁶ Goodman, *passim*; see also Jabri, *Discourses on Violence*; see also Jabri, Vivienne, *War and the Transformation of Global Politics* (New York: Palgrave Macmillan, 2007), 187-88.

²⁶⁷ Banta, *Virtuous Wars*, 278-280 (advocating that, “[t]hrough an in-depth reckoning with virtuous war, this article seeks to clarify significantly the necessity of adding a *jus post bellum* to mainstream just war theorizing and the vital contents of such an addition”).

²⁶⁸ Walzer, *Just and Unjust Wars*, 108 (observing that “[s]ince the constraints are often ignored, it is sometimes argued that it would be best to insist on an absolute rule of nonintervention (as it would be best to insist on an absolute rule of a nonanticipation). But the absolute rule will also be ignored, and we will then have no standards by which to judge what happens next.”).

Wars, identifies the table stakes:

There was a widespread and mistaken belief (then and now) that the U.N. Genocide Convention of 1948 specifically imposed such obligations [to intervene] on U.N. member nations, or at least upon the Convention's signatories or contracting parties. However, as became painfully obvious in more recent cases such as Darfur, that Convention most assuredly does not impose any such obligations. Accordingly, it gradually became apparent that attention needed to be focused more clearly on questions of formal or procedural authority at the international level for assigning or affixing responsibility for *jus ad pacem* in terms of ... an 'imperfect duty' (citing Kant) ... rather than ... merely a legal right or permission.

The issue is particularly obvious in humanitarian crises. Armed forces trained and equipped to defend the nation, consisting of men and women who have volunteered to risk their lives, are deployed to risk those lives in the defense of other nations and their peoples in a fashion that is not addressed under existing UN statutes pertaining to "collective security."²⁶⁹ They should be. After all, it is important to determine when we might incur *obligations* to undertake humanitarian intervention missions in a *virtuous* war era, as well as the legal and moral "right" to do so. That is the subject of the proposed resolution identified in the Appendix.

²⁶⁹ Lucas, *New Rules for New Wars*, 697.

CHAPTER VII

Conclusion

The discussion of Just War theory in the context of the new paradigm of *virtuous* war is meant to suggest that this new era is sufficiently unique to demand its own form of justification, its own regulatory environment, and its own limits governing the use of force where technological superiority is so sharp and humanitarian rhetoric so keen that it infuses interventions with something approaching a duty (*imperfect* now but perhaps *perfect* tomorrow). What is clear is that the proposals and principles set forth herein (*see* Chapters V and VI, and the Model U.N. Resolution set forth in the Appendix) are neither counter nor orthogonal to the traditional Just War formula; rather, they are designed to enhance the theory, something that this thesis has established has been part of the human project for millennia. This era is no different, and we ought not be overly deferential or slavish to the past such that we cannot recognize a paradigmatic shift in the present.

In the ordinary sense, *jus ad bellum* and *jus in bello* do not apply to humanitarian operations: they are not, as Professor Lucas observes, “acts of war on the part of the intervening force;”²⁷⁰ instead, they are not “war at all, but something more akin to domestic constabulary operations carried out by a non-constabulary force ... operating somewhat *ad hoc* in the international arena.”²⁷¹ There is a significant difference in the expectations and obligations laid upon combatants during conventional hostilities and

²⁷⁰ Lucas, 697.

²⁷¹ Lucas, 694.

interventions with a humanitarian motive. At the same time, as Professor Banta observes, many consider the Just War ethic to be a “hopelessly contaminated normative framework,” a mere enabling discourse for war.²⁷² Bluntly:

The challenge we now face as a result of these decidedly unfortunate developments is a stark and unpalatable choice between two alternatives. We may choose to adhere, on the one hand, to increasingly outmoded institutions and principles grounded in the ‘legalist paradigm’ or otherwise in the priority of sovereignty in the Westphalian system of nation-states, and cling stubbornly to the increasingly irrelevant structural deficiencies of the U.N. itself. The alternative, on the other hand, requires abandoning all these underlying conceptions and international institutions based on upon them, and instead allowing this ‘perfect storm’ of recent events ... to persuade us (as the “chicken hawks” propose) that there are no longer any ‘rules’ governing conflict, and that each side or participant is licensed to do whatever it takes to prevail in pursuit of their narrow interests.²⁷³

Adjustments to the international legal scheme are necessary, as was noticed by at least two key international bodies, the International Development Research Centre and the United Nations, after 9-11.

In 2001, the International Development Research Centre issued guidance concerning R2P. There, R2P is discussed in the Centre’s original report of the “International Commission on Intervention and State Sovereignty” (ICISS) organized along the lines of traditional Just War doctrine.²⁷⁴ The ICISS’s initial report in 2001 (in the wake of 9/11) drew a distinction between a nation’s responsibility to protect its own citizens and the responsibilities incumbent upon states confronting what the report called

²⁷² Banta, *Virtuous War* 2011, 277-299 (quoting Anthony Burke and attributing to him the view that “just war theorists in the 21st Century represent an ‘ontological challenge to peace as a concept.’”). *see also* Anthony Burke: *Against the New Internationalism*, at p. 84.

²⁷³ Lucas, *New Rules for New Wars* 2011, 689.

²⁷⁴ *See* REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY: THE RESPONSIBILITY TO PROTECT (International Development Research Centre 2001) (Can found [here](#).) (last visited on August 21, 2022).

“human protection claims in other states.”²⁷⁵ The report, conceived of the question in terms of “rights” of states to intervene, and the controversy this provoked regarding state sovereignty.²⁷⁶ Under the heading of “operational principles,” the report engaged the issue of the duties of caution and restraint experienced by intervening forces.²⁷⁷

The UN offered its input in 2004 when the then U.N. Secretary-General Kofi Annan commissioned a report from a “High-level Panel on Threats, Challenges and Change,” designed to re-think the ideal of collective security in the U.N. Charter.²⁷⁸ The Panel issued a report containing five basic guidelines:

1. *Seriousness of threat.* Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide or other large-scale killing, ethnic cleansing or serious violations of international human law, actual or imminently apprehended?
2. *Proper purpose.* Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
3. *Last resort.* Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
4. *Proportional means.* Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
5. *Balance of consequences.* Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?²⁷⁹

²⁷⁵ International Commission, VIII.

²⁷⁶ International Commission, 8.

²⁷⁷ International Commission, xiii.

²⁷⁸ REPORT OF THE SECRETARY GENERAL’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES, AND CHANGE: A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY (New York: United Nations, 2004).

²⁷⁹ Secretary General’s Report, para. 207; see also Alex Bellamy, *A Responsibility to Protect the Global Effort to End Mass Atrocities* (Griffith University, 2009); see also Lucas, *New Rules for New Wars*, 2011, 691.

These ideas were a good, but insufficient, start, in a *virtuous* war era where the nature of conflict tends to defy conceptual distinction. As Professor Lucas observes, “[a]bout the only distinction that survives experience ... is, once again, the acknowledgment that whatever these military actions are, they do not comprise conventional war in any meaningful sense ... and have radically different objectives than either traditional warfighting or traditional peace-keeping on the older U.N. model. In particular, any military operation will need to demonstrate in all cases going forward what Rwanda especially required: the ability and willingness to engage in much more robust action than traditional peace-keeping, as currently envisioned by U.N. guidelines,”²⁸⁰ a notion which contradicts rigid proscription against truly preventive wars, even those fought to impede, as Professor Walzer notes, a “gathering threat.”²⁸¹

New principles must be conceived, debated, and adopted by the UN and the International Development Research Centre (among other institutions), accepted and complied with by diplomats and the politicians that appointed them, and studied in military academies, ROTC units, officer candidate schools and mid-career professional schools globally. As discussed throughout this thesis, an improved set of justifications for the use of force for humanitarian or peaceful ends must be developed, particularly because the era is marked by technological superiority (of the powerful) and asymmetric warfare (by seemingly everyone). This new set of principles can be mined and forged from the Just War historical record and placed astride or bolted onto classical Just War theory to meet the *virtuous* war moment.

²⁸⁰ Lucas, *New Rules for New Wars*, 692.

²⁸¹ See Michael Walzer, *The Crime of Aggressive War*, 6 Wash. U. Global Stud. L. Rev. 635, 640 (2007).

All of the issues and variables introduced by the concept of *virtuous* war make a strong and persuasive case for the adoption of a specific U.N. Resolution capable of addressing to the moral muddle and bringing coherence to the theory in the current era. My proposal for an express *U.N. Resolution for Jus ad Pacem, Jus in Pace, and Jus Post Bellum (Interventions in a Virtuous War Era)* is found in the Appendix.

APPENDIX

A MODEL

A Proposed Resolution for *Jus ad Pacem*, *Jus in Pace*, and *Jus Post Bellum* (Interventions in a *Virtuous* War Era)

Resolution ##### (20XX)²⁸²

The United Nations Security Council,

Recalling that the then Secretary-General of the United Nations argued in September 2003 that the United Nations faced a “decisive moment” in particular with regard for the aspiration set out in the Charter to provide collective security for all;

Recalling that the then Secretary-General of the United Nations argued in September 2003 that deep divisions existed between Member States on the nature of the threats that we faced and the appropriateness of the use of force to address those threats;

Recalling that the then Secretary-General of the United Nations in 2003 challenged the Member States to make the United Nations more effective and concluded by announcing his intention to convene a high-level panel of eminent persons to provide him with a shared, comprehensive view about the way forward on critical issues;

²⁸² As noted in Chapter VII, Secretary-General Kofi Annan announced to the United Nations General Assembly his appointment of a High Level Panel on Threats, Challenges and Change. The 16 Panel members conducted an in-depth study on global threats and provided an analysis of future challenges to peace and security, which became the report identified at n. 269. The Panel recommended changes necessary to ensure effective collective action, including a review of the principal organs of the UN. Based on current research, the report has not been revisited, and discourse concerning the issues discussed in this thesis appear to remain the province of international relations, legal, philosophy, and Just War scholars. Accordingly, this Draft Resolution is designed to advance the discourse and to prompt action, so that the peculiar problems caused by *virtuous* war can be addressed more directly and concretely. The resolutions discussed herein are adapted from Professor George R. Lucas, Jr.’s *New Rules for New Wars* and his *From Jus ad Bellum to Jus ad Pacem* articles.

Recalling that the then Secretary-General of the United Nations asked the High-level Panel to assess current threats to international peace and security; to evaluate how our existing policies and institutions have done in addressing threats; and to make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century;

Recalling that the High-level Panel issued five basic guidelines regarding whether to authorize the use of military force in circumstances, among others, whether internal threats involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law. Those five guidelines were:

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

Observing that there is a fundamental difference between wars of aggression and humanitarian interventions and that the five guidelines above are insufficient in the current global collective security environment.

Observing that the nature of the current global collective security environment represents a new paradigm in that technical military capabilities and mastery have lowered barriers to engagement for some Member States while, simultaneously, and through the help of electronic media, increased the number of perceived threats and interventions grounded in an ethical imperative for humanitarian intervention;

Whereas, the immediately above recital has sometimes been referred to as *virtuous war*, surrogate war, risk transfer war, liquid warfare, network war, coalition proxy war, and transnational shadow wars (hereinafter, “Virtuous War”);

Whereas, Virtuous War represents an emerging new paradigm in international relations that calls into question some of the basic assumptions regarding the sovereignty of nations, thus requiring a set of justifications all its own;

Observing that the Just War doctrine of *jus ad bellum* and *jus in bello* are insufficient to address the peculiar requirements of the Virtuous War era;

Whereas, *jus ad pacem* refers to the justification of the use of force for humanitarian or peaceful ends; *jus in pace* refers to restrictions on battlefield conduct in a *jus ad interventionem* environment; and *jus post bellum* refers to the obligations of war’s victors to its victims to establish a just and lasting peace sufficient to prevent the onset of future conflict;

Whereas, criteria for *jus ad pacem*, *jus in pace*, and *jus post bellum* may be based on and formulated to match the seven conventional provisions of the Just War doctrine and its twin pillars of *jus ad bellum* and *jus in bello* so as to better address the moral context of Virtuous War;

Reaffirming that failed states, rogue states, inept states, and terrorism pose a threat to international peace and security and that countering this threat requires collective efforts on national, regional, and international levels on the basis of respect for international law and the Charter of the United Nations;

Reaffirming its commitment to sovereignty, territorial integrity, and political independence of all Member States in accordance with the Charter of the United Nations;

Recalling its Resolution 2396 (2017) of 21 December 2017, in which it called upon Member States to assess and investigate individuals they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters, and distinguish them from other individuals, including their accompanying family members who may not have been engaged in foreign terrorist fighter-related offenses, including by employing evidence-based risk assessments, screening procedures, and the collection and analysis of travel data, in accordance with domestic and international law, including international human rights and humanitarian law, as applicable, without resorting to profiling based on any discriminatory ground prohibited by international law;

NOW THEREFORE,

1. Determining and deciding that the situation constitutes a threat to international peace and security;
2. Determining and deciding that Just War theory in its current formulation is insufficient to address the current threat to international peace and security and needs to be updated to avoid its becoming an enabling discourse for interventions of any kind; and
3. Determining and deciding that new guidelines are necessary to justify interventions in a Virtuous War era, as follows:

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

- (i) intervention is justified when these behaviors result in grave threats to the peace and security of other states and other peoples; and
- (ii) intervention need not be restricted to such cases, but may be justified when the threats to human rights are wholly constrained within the borders of the state in question.

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

- (i) there is a manifest intent on the part of such parties to injure; and
- (ii) there is a degree of active preparation that makes that intent a positive danger; and
- (iii) both of the foregoing occur in a situation in which waiting, or doing anything other than deploying military force preemptively, greatly magnifies the risk.

2. (A) **“Sovereignty may be overridden whenever the protection of the rights of that state’s own citizens can be assured only from the outside.”**

- (i) sovereignty may be overridden whenever the behavior of the state in question, even within its own territory, threatens the existence of elementary human rights abroad; and
- (ii) sovereignty may be overridden even where there is no threat to human rights outside borders of the state in question, providing the threat to that state’s own citizens are real and immediate.

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

- (i) the *decision* to intervene, whether to protect human rights or enforce international law, *ought never* to be undertaken unilaterally; however,
- (ii) a unilateral agent of intervention may be authorized by an appropriate international tribunal; and also

- (iii) a regional security organization may be authorized by an appropriate international tribunal to undertake a military intervention for humanitarian or counterterrorist purpose; and
 - (iv) in the absence of prior approval, the burden of proof falls upon the intervening power to demonstrate that it has unilateral license to intervene, based upon *prima facie* compliance with all of the above.
- 3. The intention in using force must be restricted without exception either to purely humanitarian concerns, such as the restoration of law and order in the face of natural disaster, or to the protection of the rights and liberties of vulnerable peoples (as defined in the United Nations Charter and the Universal Declaration of Human Rights), or to halt or prevent violations of international law by nations or non-state actors that pose a clear and imminent threat of grave harm to other nations or peoples.**
- (i) intervening nations and their militaries should possess no financial, political or material interests in the outcome of the intervention, other than achieving the publicly proclaimed humanitarian ends, enforcing international law, or averting the risk of grave and substantial harm to other nations and peoples; and
 - (ii) the intervening nation or nations must establish a set of conditions under which the need for intervention will have been satisfied, together with a reasonable timetable for achieving their humanitarian ends or eliminating the perceived threat.
 - (iii) the intervening nation or nations and their militaries must before intervention establish a set of conditions for taking all available steps to develop the necessary capability and right intention to provide security to the citizens of and rebuild the state after the intervention.
- 4. Military intervention may be resorted to for humanitarian purposes, or to avert the risk of terrorism or enforce vital provisions of international law, only when all other options have been exhausted.**
- (i) this condition is deemed to have been met when reasonable nonviolent efforts have been unsuccessful and there is no indication that future attempts will fare any better.
- 5. Military force may be utilized for humanitarian purposes, or to avert the risk of terrorism or enforce vital provision of international law, only when there is a reasonable likelihood that the application of force will meet with success in averting a humanitarian tragedy.**

- (i) a resort to military force may not be invoked when there is a real probability that the use of such force will prove ineffective, or may actually worsen the prospects for a peaceful resolution of the crisis; and
 - (ii) military force may not be employed, either for humanitarian ends or for the purposes of counterterrorism and law enforcement, whenever collective, public debate and deliberation fail to determine straightforward and feasible goals to be achieved by the application of force.
- 6. The lives, welfare, rights and liberties to be protected from humanitarian disaster or terrorist attacks must bear some reasonable proportion to the risks of harm incurred, and the damage one might reasonably expect to inflict in pursuit of humanitarian ends.**
- 7. Military force use for humanitarian or counterterrorist purposes may never encompass the use of strategy, tactics, weapons systems or battlefield conduct that are themselves recognized as illegal or immoral.**
- (i) captured belligerents must be treated as prisoners of war according to established international conventions, and may not be mistreated or subject to trial or sentence by the intervening forces; and
 - (ii) prisoners of war accused of humanitarian crimes and abuses, or of engaging actively in planning for doing grave and indiscriminate harm to other nations and peoples, may be bound over for trial by an appropriate international tribunal; and
 - (iii) civilian noncombatants must never be deliberately targeted during a humanitarian or counterterrorist military operation; and
 - (iv) military necessity during humanitarian or counterterrorist operations can never excuse the use of weapons, or pursuit of battlefield tactics, already proscribed as illegal under established international treaties and conventional law of armed combat; and
 - (v) finally, military necessity during humanitarian or counterterrorist operations cannot excuse tactics or policies, such as “force protection,” that knowingly, deliberately, and disproportionately reallocate risk of harm from the peace-keeping forces and belligerents to non-combatants.
4. Requests the Secretary-General to submit for consideration by the Council no later than 60 days after the adoption of the present resolution, a report on all aspects of this matter, including specific proposals and, where appropriate, options for the effective

and expeditious implementation of the decision contained in paragraphs 1-3, above,
taking into account suggestions of Member States;

5. Decides to remain actively seized of the matter.

Adopted by the Security Council at its XXXXXth meeting, on XX/XX/XXXX.

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