

Rules of Conduct During Humanitarian Intervention

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The Russian Orthodox Church recently canonized the last Czar of Russia, Nicholas II. A fantasy of mine is that the Church will at some point also consider for sainthood (assuming his private life met appropriate standards) the czar's legal adviser, Baron Feodor de Martens, who was responsible for the wording of what has come down to us as the "Martens Clause."

As it first appeared in the Preamble to the Second Hague Convention of 1899, the Martens Clause reads:

Until a more complete code of the laws of war is issued, the high contracting parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.¹

In common articles of the 1949 Geneva Conventions, the Martens Clause is substantially repeated, with the substitution of the word "dictates"

1. Preamble, Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, U.S.T.S. 403, 32 Stat. 1803, 1 Bevans 247.

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for “requirements” in relation to the public conscience.² The Clause also appears in the 1977 Additional Protocols to the Geneva Conventions.³

The Martens Clause is a powerful reminder that in situations of armed conflict, of whatever kind, there is never a total gap in the law, never a situation in which there cannot be an appeal to law in order to mitigate the horror and the suffering. Baron de Martens correctly foresaw in 1899, and again in 1907, that unscrupulous commanders and their cunning legal advisers might seek to exploit loopholes or ambiguities in the written law. An egregious example is the “general participation clause” of the Hague Conventions of 1907, according to which the provisions of the Conventions did not apply to any of the belligerents unless all of them were parties to the Conventions. Thus, the detailed Hague Regulations might not apply but, according to the Martens Clause, standards of civilized behavior deriving from custom, humanity and the public conscience do.

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Article 63, 6 U.S.T. 3114, 75 U.N.T.S. 31, DOCUMENTS ON THE LAWS OF WAR 197 (Adam Roberts & Richard Guelff eds., 3d ed., 2000) [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, Article 142, 6 U.S.T. 3217, 75 U.N.T.S. 85, *id.* at 222 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Article 142, 6 U.S.T. 3316, 75 U.N.T.S. 135, *id.* at 244 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Article 158, 6 U.S.T. 3516, 75 U.N.T.S. 287, *id.* at 301 [hereinafter Geneva IV].

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts, Jun. 8, 1977, Article 1(2), 1125 U.N.T.S. 3, *id.* at 422 [hereinafter Protocol I]. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, Preamble, 1125 U.N.T.S. 609, *id.* at 483 [hereinafter Protocol II].

I take this as my starting point in the discussion of the *jus in bello* in relation to humanitarian intervention operations.⁴ Whatever may be the uncertainties in the identification and application of this law to a relatively new form of armed conflict, at least we can be confident that we start from a firm, albeit general, basis in humanitarian law. That basis is indeed becoming more detailed in content as consensus emerges that certain principles and rules of the *jus in bello* have achieved recognized status in customary law. Note should be taken in this regard of ongoing discussions in Geneva to identify those parts of Protocol I that may be regarded as customary, notwithstanding the inability of certain States to ratify the Protocol by reason of particular objections.⁵

The other firm foundation for my approach is that the application of the *jus in bello* is not dependent upon the demonstration of a legal basis for the resort to armed force in the *jus ad bellum*. The law of armed conflict (which term I regard as including international humanitarian law) applies its protection equally to the just and the unjust sides to a conflict. This is an established and undoubted proposition.

What is “Intervention”?

We may consider first a number of actions that constitute (for the most part) non-forcible and thus uncontroversial forms of intervention. These are sometimes listed under the heading “Military Operations Other than War” (MOOTW) and include disaster relief, humanitarian assistance, peace

4. Some recent literature on the topic includes: Hilaire McCoubrey and Nigel White, *THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS* (1996); Daphna Shrager and Ralph Zacklin, *The applicability of international humanitarian law to UN peacekeeping operations: conceptual, legal and practical issues*, in *SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS* (Umesh Palwankar, ed., 1994); Willy Lubin, *Towards the international responsibility of the UN in human rights violations during peace-keeping operations: the case of Somalia*, 52 *BULLETIN OF THE INTERNATIONAL COMMISSION OF JURISTS* 47 (1994); Julianne Peck, Note: *The UN and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?*, 21 *SYRACUSE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 283 (1995); Brian Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to UN Peace Operations*, 33 *STANFORD JOURNAL OF INTERNATIONAL LAW* (1997); Garth Cartledge, *Legal constraints on military personnel deployed on peace-keeping operations*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW* (Helen Durham and Timothy L.H. McCormack eds., 1999).

5. Yoram Dinstein, *The Thirteenth Waldemar A. Solf Lecture in International Law*, 166 *MILITARY LAW REVIEW* 93 (2000).

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operations, arms control, military support to the civil authorities, enforcement of sanctions, foreign internal defense, counter-drug operations, evacuation of noncombatants, hostage rescue, and others.⁶ The law applicable to such operations consists principally of the norms of human rights, as recognized in the major international covenants and conventions, and established as general international law. The domestic law of the country where the intervention takes place will also call for respect, except in so far as it may conflict with established international human rights law or the provisions of a higher law, such as a resolution of the United Nations Security Council.

Some of these examples may, of course, in the circumstances, involve the use of armed force or grow through “mission creep” to require the use of armed force. A hostage rescue almost certainly requires the use of armed force, but the swiftness of the insertion and withdrawal of force hardly allows for the application of the law of armed conflict as such: only the general principles of proportionality and humanity guide us here. Lengthier presences, such as the operation in Somalia, may come to pose questions of the applicability of the laws of armed conflict as the situation escalates from a peaceable and unopposed intervention to armed conflict. A peacekeeping operation authorized by the United Nations may envisage the necessity of the use of force beyond the elementary right of UN forces to defend themselves against armed attack.⁷ These are sometimes referred to as “robust” peacekeeping operations. This type of operation also raises the question of application of the laws of armed conflict.

Finally, intervention may be avowedly a forcible action—a peace enforcement action usually authorized by the UN Security Council (as in the case of Iraq’s invasion of Kuwait), but in certain cases not authorized by it (as in the case of the bombing by NATO forces of Yugoslavia by reason of the situation in Kosovo). This is the type of intervention most clearly requiring the applicability of the laws of armed conflict. But what laws?

6. Chairman of the Joint Chiefs of Staff, U.S. Department of Defense, Joint Publication 3-07, *JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR* (1995).

7. In September 1992 the Secretary-General of the United Nations announced that peacekeeping troops in Bosnia-Herzegovina “would follow normal peace-keeping rules of engagement [and] would thus be authorized to use force in self-defense. . . . It is to be noted that in this context self-defense is deemed to include situations in which armed persons attempt by force to prevent UN troops from carrying out their mandate.” *Cited by* LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 344 (2d ed. 2000).

*The Applicability of the Conventional Laws of Armed Conflict
to Forcible Intervention*

We speak more narrowly of the law of armed conflict (LOAC) as “Hague Law,” since it finds its principal elaboration in the now rather dated Hague Conventions of 1907. We speak of international humanitarian law (IHL) as “Geneva Law”, since it derives principally from the Geneva (Red Cross) Conventions of 1949. These two sets of laws, of separate origin in the nineteenth century and flowing in separate if parallel streams through most of the twentieth century, were brought together in one stream and updated in Additional Protocols I and II to the Geneva Conventions, adopted in 1977.⁸ Those Protocols have since been widely (although not universally) ratified. It is now usual to speak of “the law of armed conflict” and “international humanitarian law” interchangeably. Either expression generally includes the other.

What is the threshold of application of these laws? The Hague Conventions are silent on the point, assuming that their application to “war” was objectively ascertainable by reason of a declaration to that effect by one or more parties. The Charter of the United Nations no longer envisages declarations of war as a right of States and restricts the use of force by States against other States to situations of self-defense and actions authorized by the Security Council under Chapter VII of the Charter. (Some also believe that there is a limited range of uses of armed force which are not prohibited by Article 2(4) of the Charter, such as “humanitarian intervention.”) Hence, the UN Charter does not establish a definition of a state of war or armed conflict. The Geneva Conventions of 1949, however, adopted soon after the creation of the United Nations, do establish a threshold in general terms, a threshold that is also adopted in Protocol I. Common Article 2 of the Geneva Conventions provides:

In addition to the provisions which shall be implemented in peacetime, the present Convention[s] shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

...

The Convention[s] shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.⁹

8. Protocol I and Protocol II, *supra* note 3.

9. See Article 2 in each of the four Geneva Conventions, *supra* note 2.

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The threshold of application of the Geneva Conventions and of Protocol I is thus not set high: it merely requires the objective existence of an “armed conflict,” which presumably exists from the first moment after an exchange of fire.

The Conventions and Protocol I apply between “the Contracting Parties.” Can the United Nations, as such, be a Contracting Party? Following the Advisory Opinion of the International Court of Justice in the *Reparations for Injuries Suffered in the Service of the United Nations* case,¹⁰ the United Nations could, if it chose, become a party to such conventions. But it has not done so for reasons to be discussed further below. The national contingents of UN forces participating in an armed conflict would, however, be bound by the conventions to which their States are parties.

It is also necessary to note that under the Geneva Conventions and Protocol I they may apply between Contracting Parties and other parties to the conflict which are not represented by a government or an authority recognized by the adverse party. These latter forces must, however, “be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.”¹¹ Essentially this means voluntary de facto compliance by a entity not competent to become a Contracting Party to the Conventions, which—if offered—must be reciprocated. More formal status, however, is accorded by Protocol I, Article 96(3) to the particular case of an “authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4 [self-determination struggles against colonial, alien, or racist regimes]” provided that the authority undertakes to apply the Conventions and the Protocol by means of a declaration addressed to the depositary (the Swiss Federal Council).

So far as non-international armed conflicts (civil wars) are concerned, Common Article 3 of the Geneva Conventions similarly refers merely to the objective existence of an armed conflict, and applies as between “the parties to the conflict,” an expression distinct from, and wider than, “Contracting Parties.” Protocol II supplements this by defining such a conflict in terms of the parties being the armed forces of the Contracting Party in whose territory the conflict takes place and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over

10. 1949 I.C.J. 174 (Apr. 11).

11. Protocol I, *supra* note 3, art. 43.

a part of its territory as to enable them to carry out sustained and concerted military operation and to implement this Protocol.” Thus, police-type actions against armed individuals or bands that do not fulfill these conditions do not engage the application of Common Article 3 of the Geneva Conventions or Protocol II.

As can be seen, there are a number of issues of interpretation and application of the above instruments to particular situations. Notwithstanding these, one must always remember the Martens Clause and the growing body of customary law of armed conflict and human rights law as relevant sources of law to apply to any situation.

The United Nations and International Conventions Relating to Armed Conflict

The United Nations is not, as an international personality in its own right, a party to any of the conventions relating to armed conflict. It is sometimes suggested that it should become a party. This, however, could impede its peacekeeping missions. The problem is the threshold of application of the conventions. There are situations in peacekeeping, especially those that require—or come to require—“robust” measures, that may cross the threshold, but it may be undesirable for the operation to “change gears” notionally from a peacekeeping mission into an armed conflict. This could well be escalatory in effect. Moreover, there would be something odd about a situation in which the United Nations, in the name of the international community, is conducting an essentially peaceful operation in accordance with the United Nations Charter, which could be characterized nonetheless as an “armed conflict” in which United Nations forces and opposed forces are equally “combatants.” It has rightly been suggested that the threshold of armed conflict must be set higher than that set by the Geneva Conventions and Protocols where United Nations peacekeeping operations are concerned.¹²

Notwithstanding that understandable view, the United Nations has consistently taken the view that “the principles and spirit of general international

12. JOSEPH BIALKE, UNITED NATIONS PEACE OPERATIONS: THE APPLICABLE NORMS AND THE APPLICATION OF THE LAW OF ARMED CONFLICT, LLM thesis, University of Iowa College of Law, published by Defense Information Systems Agency, Defense Technical Information Center, Ft. Belvoir, Virginia, AD No. ADA380930 (2000); Joseph Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 AIR FORCE LAW REVIEW 1 (2001).

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conventions applicable to the conduct of military personnel” shall be observed by forces participating in United Nations peacekeeping operations.¹³ This, of course, is to underline the fundamental consideration that the absence of formal applicability of the laws of armed conflict/international humanitarian law does not open up a vacuum in which no laws apply.

It might stick in the throats of right-thinking people that there should be an equality of arms (and the equal moral stature that might be implied by the formal applicability of international conventions relevant to armed conflict) in the case of enforcement actions carried out under the authority of the United Nations Security Council acting under Chapter VII of the Charter. After all, in such a case there is a party clearly identified by the Security Council as being in the wrong, and United Nations forces are being deployed to right that wrong. That, however, would be a wrong approach, if it led to the proposition that the conventions could not apply. Both the law of armed conflict and international humanitarian law have throughout their development been consistently agnostic so far as the rightness or wrongness of a belligerent party’s position is concerned. The *jus in bello* applies equally among the parties however strong or weak their claims may be to have the right to resort to force under the *jus ad bellum*. And of course that must be so, otherwise the conflict could be fought without restraint.

Peace enforcement personnel acting on behalf of the United Nations are essentially engaged in hostilities as belligerents and “are treated in exactly the same way as the armed forces of a state.”¹⁴ Looked at from the practical point of view, as Professor Greenwood has remarked, if those laws did not apply

13. In 1991 the United Nations formulated a Model Participation Agreement, to be concluded between itself and Member States contributing forces, to be used in peacekeeping operations. Paragraph 28 of the Model Agreement provides:

[The United Nations peacekeeping forces] shall observe and respect the principles and the spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the Event of Armed Conflict. [The participating State] shall therefore ensure that the members of its national contingent serving with [the UN peacekeeping force] be fully acquainted with the principles and spirit of the Conventions.

U.N. DOC. A/46/185 (1991).

14. Christopher Greenwood, *Protection of peacekeepers: the legal regime*, 7 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 185, 189 (1996).

then a commander of the force opposed to the UN force could well conclude that he “might as well be hanged for a sheep as for a lamb.”¹⁵

The Convention on the Safety of United Nations and Associated Personnel

The difference between peacekeeping and peace enforcement operations is clearly marked by the Convention on the Safety of United Nations and Associated Personnel, adopted by the General Assembly and opened for signature on December 9, 1994.¹⁶ The convention applies to protect military, police or civilian personnel engaged or deployed in a “United Nations operation.” It is made a crime for any person to murder, kidnap, or otherwise attack personnel so engaged or deployed. The convention provides for quasi-universal jurisdiction over offenders.¹⁷ The term “United Nations operation” is defined to mean:

[A]n operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:

where the operation is for the purpose of maintaining or restoring international peace and security; or

where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

Thus there is no “equality of arms” between UN personnel and others in peacekeeping operations authorized under what Secretary-General Dag Hammarskjöld, referring to the situation in the Congo, once dubbed “Chapter VI and a half”—even “robust” ones under what some others have dubbed “Chapter VI and three quarters.” However, as mentioned above, the policy of the United

15. *Id.*

16. 34 INTERNATIONAL LEGAL MATERIALS 482 (1995). Note also the protection of peacekeepers contained in Protocol I (1977), art. 37(1)(d), *supra* note 3.

17. By “quasi-universal jurisdiction” is meant jurisdiction of a pattern common in modern conventions creating international crimes (aircraft hijacking, torture, etc.) which provide that any State may exercise jurisdiction over offenders in accordance with its national law. If a suspected offender is in the territory of any contracting State, that State must either prosecute the offender itself or extradite to a State competent and willing to prosecute: *aut dedere aut judicare*. It is not truly universal jurisdiction as in the case of piracy.

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Nations is that “the principles and the spirit of the general conventions applicable to the conduct of military personnel” apply to those operations.

In relation to peace enforcement operations the situation is different. Article 2(2) of the Convention provides:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

This provision thus indirectly recognizes that while the principles and spirit of LOAC/IHL apply to peacekeeping, the letter of that law applies to peace enforcement.

The UN Secretary-General’s Bulletin of 1999

On August 6, 1999 the Secretary-General of the United Nations issued a Bulletin entitled “Observance by United Nations forces of international humanitarian law.”¹⁸ In this document one can discern that United Nations parlance has come out of the shadows of “the principles and spirit” formula and has embraced “international humanitarian law” as such, which the document then proceeds to summarize in substance (sections 5 to 9). These sections are “promulgated” by the Secretary-General “for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to UN forces conducting operations under United Nations command and control.”

It will be noted that these principles and rules apply only to UN forces “conducting operations under United Nations command and control.” While this covers most UN peace operations, it would not have applied in the case of Iraq, where the Security Council approved the operations of a “coalition of the able and willing,” led by the United States, acting in support of the right to self-defense of Kuwait. Nor does it apply to current operations in the Balkans, which have been approved by the UN Security Council but the command of which has been entrusted to NATO.

18. *Observance by United Nations forces of international humanitarian law, Secretary-General’s Bulletin*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), reprinted in 2 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 563 (1999).

The statement in Section 1 of the Bulletin—“Field of application”—is of importance. It provides:

1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

1.2 The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the law of armed conflict.

There are some possible problems of interpretation of the first paragraph of this provision. In the first place, one wonders whether, in the course of a single operation, UN forces can move in and out of “situations of armed conflict” and “engagement” as the paragraph implies. Thresholds of application are not so neatly marked in situations of the kind likely to be encountered. In the second place, rather than to search for some more polite and more exact definition of “robust peacekeeping,” such situations are described as “peacekeeping operations when the use of force is permitted in self-defence.” Just as self-defence is described in the UN Charter, Article 51, as an “inherent” right of States, it is also in all major legal systems of the world an inherent right of individuals to use necessary, proportionate and reasonable force in personal self-defence. The right of members of UN forces to use force in immediate personal and unit self-defence in all operations should be assumed; it should not be used in order to characterize a particular type of operation.

Conclusions

While the difference between interventions authorized by the United Nations and those not so authorized may have everything to do with the debate regarding the *jus ad bellum*—the right to use force—it is, for all the reasons given above, not relevant to the *jus in bello*—the law applicable in armed conflict. Whether an intervention is carried out under the authority of the United Nations, or by a single State, or by a coalition of States (e.g., NATO) without

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the authority of the United Nations, the participants are equally bound by the law of armed conflict.

The effect of the various statements and documents discussed above regarding the applicability of the law of armed conflict and international humanitarian law to forces acting under the authority of the United Nations is to make the entire corpus of that law, as presently understood to represent customary international law, applicable. National contingents may, in addition, apply various rules and interpretations of that law contained in conventions binding on them (notably Protocol I) that may not have reached customary law status. In the interests of consistency in adopting combined rules of engagement among the participating forces and for the avoidance of disagreement, US forces acting against Iraq in 1991 applied certain of the provisions of Protocol I de facto, even though that instrument has not been ratified by the United States.

The application of the law relating to armed conflict is not a difficult matter, at least for most of the armed forces of the world likely to contribute forces to UN operations. They are trained constantly in their use, secured through rules of engagement. It would be difficult indeed for them to act in any other way.

Michael Ignatieff has recently observed that “legal constraints are necessary if wars are to preserve public support. The real problem with the entry of lawyers into the prosecution of warfare is that it encourages the illusion that war is clean if the lawyers say so. A further illusion is that if we play by the rules, the enemy will too.” Then, after describing the way in which Serbian forces behaved in Kosovo, he concludes: “The lesson is clear: it is a form of hubris to suppose that the way we choose to wage a war will determine how the other side fights. Our choice to wage ‘clean’ war may result in wars of exceptional dirtiness.”¹⁹ That may be so, but neither public opinion nor the training and instincts of modern armed forces in civilized countries would have it any other way.

The real problem may lie elsewhere. It lies not so much in the observance of the laws of armed conflict as in the manner of conducting operations. The problems of discrimination in targeting, illustrated by certain tragic errors in the bombing campaign against Yugoslavia, do not result in any sense from a desire to ignore or avoid the law, but may have more to do with the tendency of forces, especially Western forces, to be averse to taking casualties. As another writer has observed: “In recent years the key results of these concerns

19. MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 200 (2000).

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for the military have been rules of engagement and force-protection directives—designed largely to protect political and military leaders from recriminations that often follow casualties.”²⁰ “*Dulce et decorum est pro patria mori.*” But human sentiment, and public opinion, may be less understanding when a life is lost in the course of nasty wars between other peoples. To die, or suffer injury, for the human rights of other people is indeed a noble, even heroic, act.

20. John Gentry, *Complex Civil-Military Operations: A U.S. Military-centric Perspective*, 53 NAVAL WAR COLLEGE REVIEW 57, 61 (2000).