

# THE IMPORTANCE OF DEFINING ‘WAR’: TERRORISM, TORTURE, HUMANITARIAN INTERVENTION AND PRIVATE MILITARY COMPANIES

*Joseph Runzo, Ph.D.\**

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## I. INTRODUCTION

As the immediate aftermath of 9-11 illustrated, war—and the threat of war—brings people in a society closer together as they look for security. But war also produces an underlying and deeply disturbing sense of insecurity. Hence, one of the most important ideas to be defined for the twenty-first century is the notion of “war.” For too ready an application of the term “war” to conflicts can bring unwanted adverse effects, whereas the reluctance to call conflicts “wars” undermines the unity of purpose which the perspective of warfare brings to a threatened society.

Any viable definition of warfare today must address the exigencies of the fight against international terrorism. Now, one military response to terrorism can be humanitarian intervention. And one military means of supporting humanitarian intervention can be the employment of private military companies (PMCs). Another suggested method for combating radical terrorism during warfare is the use of torture. So how are these kinds of issues which are prominent in the legal and public policy debates—combating terrorism, torture, humanitarian intervention and PMCs—relevant to how we define war in the twenty-first century?

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\* Professor of Philosophy and Religious Studies, Chapman University and Life Member, Clare Hall, Cambridge University. I am grateful to Christa Lorenz and Nancy Gregory for their invaluable help in the preparation of this manuscript.

## II. CATEGORIZING TYPES OF WAR

The great British war historian John Keegan identifies war as “collective killing for some collective purpose.”<sup>1</sup> The collective nature of the killing points to the difference between police actions and military actions, and the collective nature of the purpose points to the difference between the skirmishes of adventurism and the organized violence of military operations. However, the state of war may not involve the active implementation of killing. This is why the long stand off between the United States and the Soviet Union (and the allies of each) was reasonably termed the “Cold War.” Moreover, there are many different types of wars. There are state-to-state conflicts—or collections of states versus collections of states—which are the focus of Sun Tzu’s *The Art of War*, Clausewitz’s *On War*, and Western Just War Theory.<sup>2</sup> But, for example, there are also civil wars, such as the Russian or Chinese revolutions; colonial wars against indigenous peoples, such as the so-called “American Indian wars” or the British Zulu wars in South Africa<sup>3</sup>; and wars between states and non-state actors, such as the Boer War. As we begin the twenty-first century, one relatively new form of warfare not easily assimilated to the old categories is military humanitarian intervention. And importantly for the present discussion, there is the “war on international terrorism,” a putative form of warfare which involves non-state actors, such as Al-Qaeda, that transcend state boundaries. This last form of warfare has elements of guerilla warfare but is actually very different from inner state guerilla warfare like that during the Boer War or the Philippine-American War in the early part of the twentieth century.

Compounding the fundamental complexity of the term “war,” we currently face a bewildering proliferation of the use of “war” to describe a wide range of struggles: *e.g.* the current “War in Iraq,” “guerilla war,” “religious war,” the “War on Terrorism,” the “War on Cancer,” the “War on Drugs,” and the “War on Poverty.” A quick Google search reveals some of the current darlings of political groups: *e.g.* the “Taliban War on Women,” “Rupert Murdoch’s War on Journalism,” the “Republican War on Science,” and the “War on Christmas.” My own personal favorites are the fight for gun rights, ironically named the “War on Guns,” and best of all, the self-reflective “War on Hype.”

As the last named “War on Hype” illustrates, there clearly are overblown and misleading contemporary uses of the term “war.” So it is important to keep

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1. JOHN KEEGAN, *WAR AND OUR WORLD* 72 (Vintage Books 2001) (1998).

2. See SUN TZU, *THE ART OF WAR* (Samuel B. Griffith trans., 1963); CARL VON CLAUSEWITZ, *ON WAR* (Col. J.J. Graham trans., 1976).

3. However it is not clear, for example, that the genocide conducted by Australian European settlers against the aboriginal peoples of Australia and Tasmania was a war *per se*.

in mind at least five different, though not mutually exclusive, ways to use this potent term, listed here in descending order of strength:

- 1) *The act of waging military conflict* against a clearly designated enemy. Here, we would place the American Civil War, the Philippine-American War, the two World Wars, and the Korean War.
- 2) *The legal state* produced by a declaration of war against a designated enemy. While WWI and WWII fit this category, the Korean War, which was designated a “police action,” and the so-called 1899 “insurrection” in the Philippines do not.
- 3) *The profession of warmaking*. Prolonged warfare or the prospect of war leads organized states and movements to institute military training and develop a professional military class. Here we might ask whether the training given to members of private military companies rises to the level of the military professionalism of warmaking.
- 4) *A campaign to terminate a destructive condition in society*. Struggles which fit this category are the “War on Terror,” the “War on Drugs,” and the “War on Poverty.”
- 5) *strenuous struggle between competing groups*. Here we have “price wars,” “culture wars,” and the ineptly named “Republican War on Science.”

Category I—the act of waging military conflict—is the foundational category from which the other uses of “war” are derivative. So while category I is a primary use of “war,” categories II and III—*i.e.*, the legal status of war and the profession of warmaking—derive their meaning from the more fundamental state of actual military conflict. Category IV—campaigns to end destructive conditions in society—is a secondary or parasitic sense of “war,” which is not primarily military. Category V is also secondary and is the most parasitic of the usages. Thus, when we ask the question “Are we at war?” *vis-à-vis* the struggle against international terrorism, while this struggle clearly rises above category V and at least fits category IV, the question is whether it fits categories I and II. A fundamental problem with the public discussion of the fight against international terrorism is the tendency to confuse the attenuated senses of “war” in category IV and even V, with the robust and fundamental sense of war in categories I and II.

### III. THE POTENCY OF THE TERM “WAR”

“War” is a steamer trunk of a term, laden with complex conceptual baggage and enormous emotional impact. Few terms rise to this emotive level:

perhaps “death,” “murder,” and “evil” do so. For some, such as Helmuth von Moltke, category I war is positive: “[e]verlasting peace is a dream, and not even a pleasant one; and war is a necessary part of God’s arrangement of the world . . . [w]ithout war, the world would deteriorate into materialism.”<sup>4</sup>

More typically, military professionals have a negative view of category I war. As Robert E. Lee said after the Battle of Fredericksburg, “It is well that war is so terrible, or we should grow too fond of it.”<sup>5</sup> And speaking from the northern side of the horrific American conflict, William Tecumseh Sherman said in a post-war speech in 1880, “There is many a boy here today who looks on war as all glory, but, boys, it is all hell.”<sup>6</sup>

The very use of the term “war” to describe a struggle marshals deep passions and potentially strong commitments. These deep passions tend to exaggerate and prolong category I war and, as Sun Tzu observes in his *Art of War*, “there has never been a protracted war from which a country has benefited . . . War is like unto fire; those who will not put aside weapons are themselves consumed by them.”<sup>7</sup> Thus it is crucial to carefully distinguish category I war from the derivative senses of “war,” so that the terrible things which are inevitably done to human beings during warfare are not in part induced by a tragically misleading use of this powerful term.

General A. M. Gray, Commandant of the Marine Corps, wrote a small volume *Warfighting: The U.S. Marine Corps Book of Strategy*, which became official doctrine for the Corps in 1989.<sup>8</sup> He opens with this definition of war:

War is a state of hostilities that exists between or among nations, characterized by the use of military force. The essence of war is a violent clash between two hostile, independent, and irreconcilable wills, each trying to impose itself on the other . . . the object of war is to impose our will on our enemy. The means to that end is the organized application or threat of violence by military force.<sup>9</sup>

This identifies many wars in the sense of category I, though I think this pre-9/11 description needs to be expanded to include military hostilities between or among both state and *non-state* actors. The object of war is to

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4. Letter from Helmuth von Moltke to Dr. J.K. Bluntshli (Dec. 11, 1880), in DANIEL HUGHES, MOLTKE ON THE ART OF WAR: SELECTED WRITINGS 22 (1993).

5. ROY BLOUNT, JR., ROBERT E. LEE 1 (2003).

6. William Sherman, Speech at Columbus, Ohio (Aug. 11, 1880), in LLOYD LEWIS, SHERMAN: FIGHTING PROPHET 636 (1932).

7. SUN TZU, *supra* note 2, at 73.

8. See generally A.M. GRAY, WARFIGHTING; THE U.S. MARINE CORPS BOOK OF STRATEGY (1994).

9. *Id.* at 3.

impose one's will; the further object of *just* war is imposing one's *will for peace*. (As Aristotle said in an early intimation of Just War Theory, "[w]e make war that we may live in peace.")<sup>10</sup>

Now, General Gray goes on to point out that "disorder is an integral characteristic of war [itself]; we can never eliminate it."<sup>11</sup> He concludes that

War is among the greatest horrors known to mankind; it should never be romanticized . . . violence is an essential element of war, and its immediate result is bloodshed, destruction, and suffering.<sup>12</sup>

Thus, the most extreme social means of settling disputes—warfare—has the curious property of at least suspending if not destroying the very state of security and peace which is war's *raison d'être*. It is especially important to note in the current world situation that insecurity results from war not just in the land where active combat occurs, but even in the non-war-zone homeland of distant combatants. As U.S. Chief Justice William H. Rehnquist has said, "without question, the government's authority to engage in conduct that infringes civil liberty is greatest in the time of declared war,"<sup>13</sup> and this is true whether the "declared war" is declared in the legal sense of category II or in a more generalized declaration like the "War on Terror."

#### IV. WAR VERSUS PEACE

We see, then, that "war" is a contrast term, only fully explicable in the context of the character of the intended peace. Analyzing this further, consider the restrictive view of peace which Oliver O'Donovan presents in *The Just War Revisited*.<sup>14</sup> He says that "the peace which any conflict aims at is still indeterminate, known only negatively as *the correction of the grave injustice that afforded the cause*."<sup>15</sup> But surely O'Donovan is mistaken. Achieving the absence of war—negative peace—often simply perpetuates the unjust structures of the society which caused war in the first place. The goal of war must be positive peace—or what Immanuel Kant called "perpetual peace"—*i.e.*, establishing the conditions for a just society.<sup>16</sup> In Iraq the United States does not want to simply reproduce the relatively stable prewar Iraqi society *sans*

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10. RICHARD MCKEON, *THE BASIC WORKS OF ARISTOTLE* 1105 (1941).

11. GRAY, *supra* note 8, at 10–11.

12. *Id.* at 14.

13. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218 (1998).

14. OLIVER O'DONOVAN, *THE JUST WAR REVISITED* 59 (2003).

15. *Id.*

16. *BASIC WRITINGS OF KANT* 384 (Allen W. Wood ed., 2001).

Saddam Hussein, but rather *correctly* sees peace as the establishment of a new and just social order, even if it is not entirely to the current Administration's liking.

Consider now a too liberal construal of "war." In *Leviathan*, Hobbes postulates a sort of generalized "warfare" of the human condition: "during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war is of every man against every man."<sup>17</sup> This is not particularly helpful for identifying the primary sense of the term "war," for it does not distinguish war from other forms of human conflict. A somewhat better understanding of war can be found in *Evolution of War*, Maurice Davie's classic study after the First World War:

The struggle for existence is a process in which a group and nature are parties . . . each group, besides struggling with nature for its existence, has to compete with every other group with which it comes into contact; rivalry and collision of interests appear, and when these issue in a contest by force, we call it war.<sup>18</sup>

That is, in order to have distinctive content, the term "war" should be used to demarcate a state of society or a type of conflict which is markedly different than other portions of human existence.

However, one should not think of the "state of war" as an exactly separable unit of time from two contrasting "states of peace." For two nations could be in a state of war without actually engaging in warfare, and warfare might cease between two nations even when there is no legally determined armistice, so that technically and legally the two nations are still in a state of war, though they have ceased all warfighting. Hobbes suggests that:

As the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together; so the nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary.<sup>19</sup>

While Hobbes' views are infelicitous for identifying war itself, he does identify the disruptive psychological state which results from war in the sense of category I, which is quite distinct from the legal sense of war identified in category II.

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17. THOMAS HOBBS, *LEVIATHAN* 84 (J.C.A. Gaskin ed., Oxford University Press 1998) (1996).

18. MAURICE R. DAVIE, *THE EVOLUTION OF WAR: A STUDY OF ITS ROLE IN EARLY SOCIETIES* 12 (Dover Publications 2003) (1929).

19. HOBBS, *supra* note 17, at 85.

## V. WAR AS A FAMILY RESEMBLANCE

Once we have narrowed our primary use of “war” to categories I—III, all of which emphasize the essential *military* nature of war, we still confront a wide range of types of war. Wars may or may not involve professional armies, may or may not involve mercenaries or PMCs, may or may not stretch over long periods with few actual battles (such as the Punic Wars or the 100 Years War), may or may not be recognized by international law, may or may not be recognized by national law, may or may not be declared, may involve little actual combat (such as the Cold War), and might not come to a clear end (such as the Congolese Wars of the last twenty years). The cessation of war may or may not be a goal (if not, the war is not just), war may or may not be fought as a defensive action, war may or may not be fought to take back something stolen (such as land), war may or may not be fought on religious grounds (such as the First but not Fourth Crusades), and war may be limited or total. To take only the latter dichotomy, limited wars push the boundaries of the use of the term “war.” While the U.S. is not currently at war *with* Iraq, is the U.S. currently “at war” *in* Iraq (there was, after all, a presidential declaration that the war is over)? Or is Japan, with its security deployment in Iraq, “at war” in Iraq? In general, is humanitarian military action a war?

No one comprehensive set of features is definitive of all warfare in the category I sense. However, it does not follow that there are no necessary conditions for “war” or that there are no sufficient conditions which identify “war.” For instance, prolonged military conflict involving collective killing for a collective purpose is a sufficient condition for “war.” On the other hand, it would seem that there are some necessary conditions for war in the primary sense of “war.” First, military force (and this may include PMCs) must be involved either by threat or actual use. Second, soldiers must be involved, and hence war in the sense of category III is involved. Third, the aim of the military action must be to force a perceived enemy to conform to one’s will. And fourth, the aim must be to defeat the perceived enemy. This last condition is important, because as soon as a conflict is designated a “war,” then it becomes possible to lose by not defeating the “enemy.”

Now, given the fact that there is no definitive set of necessary and sufficient conditions for “war,” this term undoubtedly functions as a “family resemblance.” As Ludwig Wittgenstein famously explains in the *Philosophical Investigations*, certain terms function as collectives, as for example, does the term “game.”<sup>20</sup> There is no one definitive set of features which identifies all

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20. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1968).

games.<sup>21</sup> Rather, games share “family resemblances,” for just as members of the same human family do not have the same features, two members of the family might share one set of features while two other members share another set of features, even as one member of each of those two pairs form another pair, sharing other features, creating overlapping sets of shared features.<sup>22</sup> So too, games can have one, two, or many players, games can be physical or mental, games can have time limits or not, and so on.<sup>23</sup> Thus, solitaire, chess, basketball, and cricket have a family resemblance, as species of games.<sup>24</sup> In the same way, civil wars and colonial wars and world wars share a family resemblance of the species “war.”

## VI. PARAMETERS FOR EMPLOYING “WAR”

There are at least four salient parameters for identifying “war” in a clear, accurate and substantive primary usage. First, this term must be used in a balanced way which avoids two extremes. On the one hand, if the term is restricted to a narrow usage applying only to professional armies and nation-state conflicts, many contemporary conflicts, which are arguably the most dangerous for our world, would not be treated as wars. On the other hand, if this term is used in a virtually unrestricted sense to apply *e.g.*, to confrontations not primarily involving military force, then the dilution of the term will make it impossible to construct a viable Just War Theory and impossible to articulate viable international law to condemn, restrict and punish the unjust use of military force.

Second, it is best to err on the side of caution in applying the term “war” to a conflict or potential conflict since this emotionally charged term can unleash forces of fanaticism and disregard for law. As Cicero famously observed more than two millennia ago: laws are silent in times of war.<sup>25</sup> Third, another reason for caution in labeling any conflict a “war” is that once declared wars are either won or lost. The attempt to avoid “losing a war” at all cost can be extraordinarily destructive to a society.

Fourth, once a war is declared, far reaching governmental war powers go into effect both explicitly and implicitly, subverting the normal mechanisms of civilized society. As Stefan Halper and Jonathan Clarke argue in *America Alone: The Neo-conservatives and the Global Order*:

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. CICERO, PRO MILONE Chapter 11 (1992).

Neo-conservatives argued—and continue to argue—that military force is the preferred option responding to foreign challenges. The neo-conservatives for have actively encouraged the interpretation of counterterrorism as a war, which mobilizes all national resources and legitimizes all available means.<sup>26</sup>

In times of war, the populous rightly places immediate self-preservation over more nuanced approaches to security. Procedures like torture, which would normally not be contemplated, are seriously contemplated in public. People are incarcerated without trial; businesses are forced to change their trading partners; their merchandising, and even their products; mothers and fathers willingly give up their sons and daughters to the machinery of death and; most crucially, others who were once perceived as fellow human beings often become denigrated as sub-human, through the process I call “verminification,” which has extraordinarily adverse affects on any eventual peace. Since “war” is importantly defined in terms of the intended peace, the effect on peace of the methods of warfare should be calculated into what one is willing to designate a “war.”

## VII. THE “WAR ON TERROR”

Turning now to the “War on Terror,” this is clearly a war in sense IV, though it is sometimes erroneously characterized as a “clash of cultures” and thus further categorized as a “war” in sense V. The putative “War on Terror” is not like typical wars in category I because Western societies are not in fact generally mobilized against the enemy and the “war” does not require an acknowledged general sacrifice from society. The question of whether the “War on Terror” fits category II is a question about the legal status of this “war.” And the extent to which it fits category III, the science of warmaking, is in part determined by the degree of military professionalism of the large numbers of PMC personnel which are engaged.

There are many threats against any modern society—threats to economic well-being, threats to cultural well-being, threats to security—but only the gravest and most specific threats to peace itself justifiably call forth the collective killing for collective purpose which is the horror of war. Generalized threats of competition, of cultural erosion, or erosion of security, do not merit the grave social burden of war. General calls to “fight against terrorism” are not legitimate calls to war, though the struggle against a specific terrorist system or network which can be identified, and against which there is some reasonable hope of success, may merit a war response. The general so-called

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26. STEFAN HAPLER & JONATHAN CLARKE, *AMERICA ALONE: THE NEO-CONSERVATIVES AND THE GLOBAL ORDER* 281 (2005).

“War on Terror” is a counter-terrorism struggle. Like the “War on Drugs,” it is a struggle against a heartless, murderous enemy. International drug lords and their weapons of cocaine, heroin, etc., have much the same deleterious effects on society as terrorists with their bombs and guns. The struggle against these two enemies is not a war in the primary sense of category I, for neither is principally military.

One way to see this distinction is to step outside the super-heated American context and look at the struggles of another country. Israel is constantly struggling with terrorism. Israel has also fought several distinct and notable wars. It is valuable both conceptually and practically for Israel to be able to distinguish between the two forms of conflict. Israel’s overall counter-terrorism struggle is not a war in the category I sense.<sup>27</sup> The distinguishable Six Days’ War, the Yom Kippur War, and the recent incursion into southern Lebanon are category I wars. Similarly, the initial 2003 second war with Iraq was a category I war, while the overall counter-terrorism struggle against Al-Qaeda is a war in the derivative sense of category IV.

In political society, the quest for truth is always too easily set aside in the quest for rhetorical effect, and whenever this happens, it can be a dangerous time for a nation. In our country, every time the current Administration declares that the nation is at war, and every time the media blithely puts the words “War on Terror” on the nation’s television screens, the deep fears, animosities and even hatred which this term can illicit are tapped. Importantly, this also posits a war which can be won or lost, rather than a struggle with degrees of success. It is worth keeping in mind Sun Tzu’s admonition some 2500 years ago: “War is a grave matter; one is apprehensive lest men embark upon it without due reflection.”<sup>28</sup>

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27. I should note that my friend the esteemed Israeli ethicist Asa Kasher does not agree with me about this.

28. SUN TZU, *supra* note 2, at 63.