From Berlin to Bonn to Baghdad:
A Space for Infinite Justice

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In 1884, after their respective military expeditions had laid claim to different parts of Africa, colonial powers convened in Berlin to pour over maps, argue boundary lines, and divvy up the continent among themselves.[1] The Berlin conference explicitly concerned the contours of European sovereignty over different parcels of Africa. No Africans were present at the gathering. Over one hundred years later, in 2001, Bonn was the chosen venue for another conference convened by the great "Western" powers; this time the maps were of Afghanistan. Yet in the twenty-first century, with the ghost of Berlin hovering over the current discourse of intervention, the Bonn conference ostensibly addressed the contours of Afghan sovereignty. The U.N. searched across the world, from the hills of Rome to the beaches of Cyprus, to find Afghans to attend. Less than two years later, in the 2003 "liberation" of Iraq, Baghdad became yet another venue for "recognizing" sovereignty—in an effort that President George W. Bush claims (and apparently with little intentional irony) is focused on Iraqis choosing their own regime.[2]

Production of legitimacy through the concept of humanitarian intervention is often contrasted with the imperial interventions epitomized by Bismarck's Berlin conference.[3] Thus, concepts including "humanitarian intervention," "cosmopolitan humanitarianism," and "the responsibility to protect"

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1. German Chancellor Otto von Bismarck convened this conference, 1884–1885. This event proved a critical milestone in the consolidation and expansion of the empire, as well as in the closely imbricated history of the slave trade. *See, e.g.,* BARBARA HARLOW & MIA CARTER, THE ARCHIVE OF EMPIRE, VOL. 2: THE SCRAMBLE FOR AFRICA (2003); ADAM HORSCHILD, KING LEOPOLD'S GHOST (1999).

2. President George W. Bush argued that the Coalition Forces' intervention in Iraq was to "midwife" the democratic will of the Iraqi people: "We're working closely with Iraqi citizens as they prepare a constitution, as they move toward free elections and take increasing responsibility for their own affairs . . . . The establishment of a free Iraq at the heart of the Middle East will be a watershed event in the global democratic revolution . . . America has put our power at the service of this principle." George W. Bush, Remarks at the 20th Anniversary of the National Endowment for Democracy, *available at* http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html (Nov. 6, 2003).

3. *See, e.g.,* HORSCHILD, *supra* note 1.

are championed by liberal internationalists, who support the use of military force to address humanitarian concerns.[4] Yet the occupation of Iraq in 2003 demonstrates that this liberal internationalist terrain may itself be "occupied." Perhaps in recognition of this, Ian Williams has warned that "we should not let" George W. Bush's "misappropriation of humanitarian intervention alienate the concept from its natural owners, the left."[5] Lamenting the Bush-Blair duet regarding the humanitarian goals that guided their policies in the second Gulf War, proponents of humanitarian internationalism are anxiously seeking to formulate universal principles to distinguish illegitimate from legitimate intervention, conquest from protection, and militarism from humanitarianism.[6]

This Article examines how legitimacy is sought in contemporary approaches to international engagement through proposed legal and normative distinctions between military offensives and humanitarian intervention. It contends that humanitarianism functions not only in opposition, but also as a complement to militarism. Ironically, the foundation for the widespread invocation of humanitarian intervention by Anglo-American policy makers supporting the 2003 conquest and occupation of Iraq was generated precisely by the principles of multilateral humanitarianism—protection of the vulnerable and internationalist solidarity. In fact, these same principles were previously invoked regarding the bombing of Kosovo, the genocide in Rwanda, and the plight of the Kurdish community in the first Gulf War. By 2001, the world's super powers buttressed their military aspirations in Afghanistan with the language of humanitarianism and human rights and succeeded in gaining U.N. support. As the U.S. Defense Department's original title of the intervention ("Infinite Justice") conveyed, advocates of a humanitarian entry point for military intervention relied upon a normative algebra to help legitimate the massive bombing campaign in Afghanistan.[7]

Part I of this Article examines the faultlines of legitimacy in the relationship between internationalist humanitarianism and military intervention. It explores both the larger context in which this humanitarian discourse has taken shape, as well as internal debates within the humanitarian intervention field as it has evolved over the past decade. Part II comprises a case study of how the discourse of humanitarianism permeated the military offensive in Afghanistan. It discusses the *Responsibility to Protect*, a report prepared by the International Commission on Intervention and State Sovereignty

4. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PRO-
TECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY
(2001), *available at* http://www.dfait-maeci.gc.ca/iciss-ciise/report-en.asp (last visited Feb. 9, 2004).
    5. Ian Williams, *Intervene with Caution*, IN THESE TIMES, Aug. 11, 2003, at 23, 24.
    6. For instance, Michael Smith notes, "We still have to maintain and even raise barriers to illegitimate
intervention" while also ensuring that we "define the areas, conditions and procedures for legitimate
ones." Michael Smith, *Humanitarian Intervention: An Overview of the Ethical Issues*, 12 ETHICS & INT'L
AFFAIRS 1, 77 (1998).
    7. Arundhati Roy, *The Algebra of Infinite Justice*, GUARDIAN, Sept. 29, 2001, Saturday Review, at 1.

(The Commission).[8] The report proposes a framework shift from the "right to intervene" to the "responsibility to protect" in developing guidelines for distinguishing legitimate humanitarian intervention from illegitimate militarism. The Article concludes by addressing the two Gulf Wars in light of the internationalist allegiance to humanitarian principles to produce legitimacy for military intervention. The Article argues that efforts to fortify the ramparts of humanitarianism against the grasp of imperial interventionists may prove futile. Indeed, looking back on the rise of humanitarian militarism over the last decade, important questions arise about humanitarians' own complicity in enabling the linkage between humanitarian and militarist arguments in some contexts,[9] even as that linkage is resisted in others.[10]

I. Debates in the Field: Securing the Legitimacy of Cosmopolitan Humanitarianism

The end of the twentieth century and the beginning of the twenty-first marked a moment when the founding assumptions about large-scale humanitarian intervention underwent a tectonic shift. This transformation simultaneously unnerved and emboldened cosmopolitan humanitarians. The erosion of old assumptions about non-intervention meant that the ground on which they stood became less secure. At the same time, this less secure ground allowed for a more expansive terrain for humanitarian action and catalyzed an earnest quest for firm principles to determine the contours of legitimate intervention.

To some extent Kosovo marks a great temporal dividing line, since for vast sectors of the international law and policy community it legitimized the use of military force for humanitarian purposes and increased states' humanitarian confidence in the ability to use military power for good. As David Chandler notes, "Humanitarian militarism, widely advocated during the 1999 Kosovo war, would have been an oxymoron before the 1990s; today it has become a tautology."[11] The decision to intervene in Kosovo without U.N. authorization emphasized the humanitarian/military dichotomy and overlap; it signaled a new era in which the ground for intervention became more fertile while concerns about its legitimacy became increasingly intense. As Professor David Wippman noted:

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8. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 4, at VII.

9. Widespread criticism of military inaction in response to the Rwandan genocide is the paradigmatic example.

10. Perhaps Iraq is an instance in which a considerable segment of the cosmopolitan humanitarian community sought unsuccessfully to assert a restrictive hand on intervention. Some opposed military intervention (often on the argument that the intervention was not guided by "right intentions"). Others called for alternative routes of engagement, including giving more time to the weapons-inspection team (often on the argument that war should be the choice of last resort, or that war did not constitute "proportionate" and "effective" means to the desired ends). Yet others supported the war but urged respect for international humanitarian law in the conduct of war.

11. David Chandler, *The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda*, 23 HUM. RTS. Q. 678, 698 (2001).

in the aftermath of NATO's military intervention in Kosovo, in-
ternational lawyers, diplomats and others vigorously debated the
use of force as a means to terminate gross human rights abuses,
whether actual or threatened. . . . Scholars advanced and debated
legal and moral justifications for such intervention. Distinguished
international commissions issued reports on particular cases and
the subject as a whole. Governments proposed criteria for identi-
fying conflicts warranting intervention, and for circumscribing the
use of the veto to block humanitarian intervention in cases satis-
fying the relevant criteria. Conferences were held, and books were
published.[12]

This tectonic shift forms the constitutive backdrop to the current discourse
of humanitarian intervention.

While Kosovo serves as a central moment in the development of a new
discourse, the shift should be situated in a broader context that expanded the
ground for humanitarian intervention. There are two important elements to
this context: first, the global political backdrop within which the discourse
of cosmopolitan humanitarianism was and continues to be situated, and sec-
ond, the discourse's internal dynamics and debates.

A. *The Context of Cosmopolitan Humanitarianism*

Changes in the international context both influenced the development of
the humanitarian discourse and extended its reach in the global public
sphere.[13] Three elements of the international context warrant mention. First,
struggles in many postcolonial countries led to disillusionment with the
defense of sovereignty as a guarantor of democratic rights.[14] Second, devel-
opments linked to the new contours of post–Cold War global politics gave
rise to an emboldened liberalism on the world stage.[15] Third, the daily op-
erational challenges of humanitarian work led to both increasing dependence
on donor agendas for funding and direction and a concomitant questioning
of political neutrality as the foundation for international engagement.[16]

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12. David Wippman, Book Review, 97 AM. J. INT'L L. 457, 457 (2003) (reviewing BRIAN D.
LEPARD, RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDA-
MENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS (2002)).

13. Although this Section pays attention to the influence of the international context on the evolution
of the discourse of humanitarian intervention, it recognizes that the relationship has never been unidirec-
tional; as suggested in the rest of this Article, the development of that discourse also shapes the lens
through which we interpolate the international "context."

14. *See generally* GEOGRAPHIES OF RESISTANCE (Steve Pile & Michael Keith eds., 1997), broadly ana-
lyzing such struggles in many countries. See PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE
COLONIAL WORLD: A DERIVATIVE DISCOURSE? (1993), for an India-focused interrogation of postcolonial
nationalism's appropriation of subaltern struggles in the name of anti-colonialism.

15. *See, e.g.*, FRANCIS FUKAYAMA, END OF HISTORY (1992); SAMUEL HUNTINGTON, CLASH OF CIVILI-
SATIONS (1996).

16. *See* Thomas Weiss, *Principles, Politics, and Humanitarian Action*, 13 ETHICS & INT'L AFFAIRS 1, 2
(1999).

Each of these developments enabled the creation of the cosmopolitan humanitarian discourse on legitimate intervention. The disillusionment with sovereignty meant that intervention was no longer automatically equated with imperialism.[17] In many contexts, sovereignty has been rendered passé and deemed an ineffective tool complicit with repressive structures, even when touted as the shield to resist imperial repression.[18] The new world order is fraught with injustice and inequity in ways that have required ongoing struggles against neo-colonial structures and discourses. Thus, although colonialism remains a current preoccupation, it is understood in a manner fundamentally different from conceptions that were dominant even fifty years ago. Today, colonialism is increasingly viewed as a relationship of economic exploitation and political marginalization that is not necessarily captured by tracking the fate of territorial sovereignty.[19]

Second, in addition to a transformative understanding of colonialism, the narrowing ideological terrain of the post–Cold War era (marked by the hegemonic reach of global liberalism) created a climate where even many of those critical of the new world order were infused with an uncritical missionary zeal for human rights and humanitarianism as global public goods. With the end of the Cold War, the Washington consensus consolidated around a particularly self-satisfied brand of liberal internationalism.

Finally, as the agendas and self-conceptions of human rights and humanitarian NGOs were influenced by the new world order, NGOs engaged more openly with the political nature of their work, although largely within the terms of liberal internationalism. Humanitarian work in the field was shaped by a complex interplay of changes in how human rights and humanitarian institutions were funded and how their projects were defined. As international institutions linked aid to rule-of-law programs that absorbed human rights agencies and reduced state structures, more of these sectors worked intimately with donor countries, aid agencies and the U.N. As David Rieff has noted:

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17. In some ways this mapping is oversimplified. There were also contradictory tendencies that likely affected the humanitarian discourse. For example, the packaging of liberalism with economic imperialism in the Washington consensus created a resurgence of sovereignty as a key counter-response from the global south. Yet, to the extent that sovereignty was also asserted as a shield by repressive regimes, it eroded the normative reach of this resurgence. Moreover, since the anti-globalization movement mobilized opposition to the Washington consensus through transnational civil society, calling for global distributive equity and economic democracy rather than sovereignty, the sovereignty claims of nation states had a more limited impact in the global public sphere. It would be valuable to look more carefully at these contradictory tendencies in the historical context of the development of cosmopolitan humanitarianism discourse over the last decade.

18. The debate regarding intervention is often understood as one between the "values of sovereignty" and the "values of human rights." This is a misleading dichotomy on many counts. For instance, in many early anti-colonial struggles these values were joined with sovereignty and asserted in efforts to advance rights for democratic participation. However, it is equally true that over the last few decades, claims to territorial integrity have often been deployed to defeat the democratic aspirations of minorities and dissenters.

19. *See* CHATTERJEE, *supra* note 14. *See also* SELECTED SUBALTERN STUDIES (Ranajit Guha & Gayatri Spivak eds., 1988).

by the time the war in Afghanistan began, it was increasingly difficult to distinguish between the rhetoric or even the policies of humanitarian NGOs, the U.N. system and Western governments. The difficulty was compounded by the fact that few agencies today either choose to or are in a position to refuse contracts from donors or the U.N. And this trend toward seeing themselves as, in effect, subcontractors for major donors has only increased since human rights considerations began to be incorporated more and more systematically into the plans and programs of the mainline NGOs.[20]

Not only was human rights and humanitarian work increasingly intertwined with the structural contexts of the field, intimacy with donor constituencies also changed NGOs' understandings of the political impact of their work. Earlier ideological vagueness was shed, and many human rights and humanitarian NGO workers were driven by liberal idealism and a perceived cosmopolitan calling.[21] This led to a greater willingness to accept intervention as an option to be considered and perhaps embraced.

B. Debates in the Field

The evolving environment of humanitarian and human rights work both rendered sovereignty a potentially ineffective tool and made Cold War "neutrality" anachronistic, as humanitarian NGOs' increased donor dependence produced tensions and concerns about their role in the political and military agendas of donor countries. Even humanitarian workers began to unpack the myth of political neutrality that had been the mainstay of their work in the past.[22] It is not that the field itself became more complex, but humanitarians saw the inherent complexities as critically connected to the core normative foundation that guided the mandate of their work. If humanitarianism means an apolitical approach to doing good, there was a "new conventional wisdom that there are no humanitarian solutions to humanitarian problems."[23]

As Thomas Weiss has recently argued, this identity crisis was fueled by "severe criticism of the aid establishment."[24] The work of analysts such as Mary Anderson spoke to the complexities of relief efforts in the context of war. The books that now inform the U.S. State Department's optimism[25] about compassionate militarism in Afghanistan and Iraq prompted considerable soul-searching among aid workers concerned that relief programs could

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20. David Rieff, *Humanitarianism in Crisis*, 81 FOREIGN AFF. 111, 117 (2002).

21. For instance, see the work of Freedom House, *available at* http://www.freedomhouse.org. (last visited Feb. 8, 2004).

22. The unpacking of political neutrality is not unconnected to the end of the Cold War. For obvious reasons, in the course of the Cold War the imperatives for claiming neutrality and non-alignment were much stronger.

23. Rieff, *supra* note 20, at 111.

24. Weiss, *supra* note 16, at 2.

25. See Part II.B.4 on poverty alleviation, below, for the U.S. State Department's articulation of its "optimism."

do more harm than good. Michael Ignatieff anguishes that "almost everyone who tries . . . has a bad conscience; no one is quite sure whether our engagement makes things better or worse."[26]

These concerns extend to the defining principles of humanitarian action—neutrality between different sides of a political conflict and impartiality in the distribution of aid. In the context of ongoing civil wars, ethnic cleansing, and genocide, humanitarian agencies find it difficult to operate according to the principles of neutrality and impartiality. "Humanitarian principles," Weiss says, "are no longer sacrosanct."[27] Over the last decade, in a day-to-day operational sense, practitioners engaged in humanitarian relief have developed a widespread sense of disillusionment about the possibility of neutral engagement, and many even urge that the aspiration to neutrality is moral hypocrisy.

This shift has not gone unchallenged. Some in the field lament the move away from a "nonpolitical approach," arguing that this has provoked an unfortunate "retreat from the principles of neutrality and universalism, and the development of military humanitarianism . . . legitimizing the politics of international condemnation, sanctions, and bombing."[28] Chandler longs to return to a demilitarized and impartial ethos of "relying on empathy with suffering victims."[29] David Rieff similarly argues that the "core assumptions" of humanitarianism—"solidarity, a fundamental sympathy for victims, and an antipathy for oppressors and exploiters"—are distinct from political goals.[30] While "western military intervention in a case such as Bosnia is justified," we should not confuse arguments "for military intervention on political grounds" with promoting "military intervention on humanitarian grounds."[31] In fact, Rieff asserts that "to promote military intervention on humanitarian grounds . . . will always be a contradiction in terms. It is a perversion of humanitarianism, which must be either neutral or nothing."[32] This is the position adopted by Médicins sans Frontières (MSF), which Rieff describes as the only humanitarian NGO that has resisted politicization. Eric Dachy of MSF is quoted as saying that discussions about humanitarian intervention and peace-keeping operations "accompany, or mask, a deliberate political choice with gestures of generosity and compassion."[33]

While Chandler, Rieff, and MSF long to return to principles of neutrality and universalism, others in the field have accepted military humanitarianism. Weiss situates military humanitarianism in a more strategic and pragmatic approach that he believes is merited by the contemporary context.

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26. Weiss, *supra* note 16, at 7.
27. *Id.* at 2.
28. Chandler, *supra* note 11, at 700.
29. *Id.*
30. Rieff, *supra* note 20, at 121.
31. *Id.* at 120.
32. *Id.*
33. *Quoted in id.* at 116–17.

Arguing that the classical humanitarian approach of "neutrality" is no longer available given that "humanitarian tragedies have become 'normal'" and "belligerents . . . undisciplined," he advocates an "instrumental humanitarianism" that is more engaged with the particularities of context, cognizant of the complexities of political choices, and more pragmatic about balancing different goals.[34] He calls for a recognition that the "goals of humanitarian action often conflict; good intentions can have catastrophic consequences; there are alternative ways to achieve ends; and even if none of the choices are ideal, victims still require decisions about outside help."[35] This is partly an allusion to the fact that humanitarian action often works in tandem with military intervention. In contrast, U.K. Prime Minister Tony Blair abandons any residual diffidence in his own demand for military intervention in such contexts: "It's right for the international community to use military force to prevent genocide and protect human rights, even if it entails a clear violation of sovereignty."[36]

Not surprisingly, Blair's unqualified confidence in humanitarian intervention is not universal. Others are concerned that more work must be done to clarify the conditions for the legitimate use of force. Referring to Tony Blair as the shrillest supporter of "humanitarian" war, Daniele Archibugi has argued that there is no coherent philosophy that guided politicians and political commentators who advocated military intervention in Kosovo and elsewhere. For Archibugi and other supporters of cosmopolitan democracy, the lack of a coherent philosophy fundamentally undermines the legitimacy of intervention. Thus, "a decade after the fall of the Berlin wall, the seventeenth century notion of state sovereignty is threatened by something older still: the law of the jungle."[37]

Seeking, however, to arrest that regression and return to the path of progress, authors of the Commission's, *The Responsibility to Protect*, are keen to articulate a vision aimed at precisely the legitimacy questions that tax Archibugi. Chaired by Gareth Evans and Mohamed Sahnoun, and convened by the Canadian government, the Commission was formed to address the legitimacy crisis provoked by the past decade's history of intervention and non-intervention: "External military intervention for human protection purposes has been controversial both when it has happened—as in Somalia, Bosnia and Kosovo—and when it has failed to happen, as in Rwanda."[38] U.N. Secretary-General Kofi Annan has argued that responses to this crisis must be developed: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—

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34. Weiss, *supra* note 16, at 2.
35. *Id.*
36. *Quoted in* Daniele Archibugi, *Cosmopolitics,* NEW LEFT REV. 4, at 147 (July–Aug. 2000).
37. *Id.* at 148.
38. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 4, at VII.

to gross and systematic violations of human rights that affect every precept of our common humanity?"[39]

The next Part examines how the Commission sought to answer this question by developing a humanitarian framework for the use of force. With particular attention to the 2001 intervention in Afghanistan, this Part will explore whether humanitarian arguments served to prevent or to legitimize military action. In fact, examining both the organizations that worked on human rights and humanitarian issues in Afghanistan as well as the governments that argued for intervention in Afghanistan, this Part points to how the discourse regarding protection that is identified with the former was also key to the rationale for intervention advanced by the latter.

II. FROM "THE RIGHT TO INTERVENE" TO "THE RESPONSIBILITY TO PROTECT": THE MILITARY OFFENSIVE IN AFGHANISTAN

A. *Cosmopolitan Humanitarianism and the Illusory Compass for Intervention*

The work of the International Commission on Intervention and State Sovereignty is instructive in demonstrating both the impetus for identifying principles that will define legitimate intervention, as well as the inability of those principles to provide a secure compass for distinguishing legitimate from illegitimate action. In fact, the same principles are used to defend intervention by some and protest intervention by others. In many cases, the doves and the hawks may be flying in the same skies of cosmopolitan humanitarianism. As is argued below in the case of Afghanistan, while principles of cosmopolitan humanitarianism may have constrained the use of force to follow the rules of war, cosmopolitan humanitarianism also fundamentally legitimized the intervention.

Constituted by a range of prominent international actors with state and civil society affiliations, the Commission outlines four principles for the legitimate use of military action: right intention, last resort, proportional means and reasonable prospects.[40] The Commission notes that to some extent its proposals also require a fundamentally different nomenclature to capture its vision—the "the duty to protect" rather than "the right to humanitarian intervention."[41] It argues that the debate regarding humanitarian intervention (particularly within the U.N. General Assembly) has been mired in a fundamentally misguided conversation about the right to intervene on the one hand and territorial sovereignty on the other. Instead, the Commission argues for focusing on the notion of sovereignty as responsibility. This responsibility includes both the responsibility states owe to their own people as well as the responsibility the international community owes to all peoples:

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39. *Id.*
40. *Id.* at IX.
41. *Id.* at 11.

>The most compelling task now is to work to ensure that when the
>call goes out to the community of states for action, that call will be
>answered. There must never again be mass killing or ethnic
>cleansing. There must be no more Rwandas . . . . The Commission
>has sought to give clear articulation to this consensus, and calls on
>all members of the community of nations, together with non-
>governmental actors and citizens of states, to embrace the idea of
>the responsibility to protect as a basic element in the code of
>global citizenship, for states and peoples, in the 21st century.[42]

Accordingly, the "responsibility to protect" is offered as the new guiding
normative and legal framework for transnational cosmopolitan engagement.
Because people will sometimes require protection through intervention, the
Commission views its report as about "compelling human need, about popula-
tions at risk of slaughter, ethnic cleansing, and starvation. It has been about
the responsibility of sovereign states to protect their own people from such
harm—and about the need for the larger international community to exer-
cise their responsibility if states are unwilling or unable to do so them-
selves."[43]

The Commission's discussion of "protection" and related humanitarian
imperatives for the use of force are hardly isolated. For instance, Daniel Ar-
chibugi, expressing concern about the lack of a coherent philosophy to dis-
tinguish legitimate from illegitimate intervention, sought to address this
problem by developing his own basic legitimacy guidelines. Writing in the
pages of the *New Left Review*, these guidelines reflect a left-liberal project
shaped by both a resolute internationalism and an anti-imperialist ethos
concerned with illegitimate "military adventures." In his words, the princi-
ples informing a "cosmopolitical perspective on humanitarian intervention"
are tolerance, legitimacy and effectiveness.[44] Arguing that racism and preju-
dice were constitutive of colonial brutality, Archibugi seeks to ensure that
tolerance is built into a commitment to cosmopolitan democracy which in
turn provides the foundation for humanitarian intervention. Similarly, inter-
national legal legitimacy and legitimacy with key actors in international
civil society is a necessary condition for humanitarian intervention. Thus,
norms linked with international law, such as the use of force as a last resort
and the conduct of military intervention in accordance with the laws of war,
are crucial for securing legitimacy.

The principles articulated in the *Responsibility to Protect* are echoed in Ar-
chibugi's principles for "cosmopolitical responsibility." The "duty to protect"
closely mirrors Archibugi's vision of "cosmopolitical responsibility." The prin-
ciple of right intention is similar to the "tolerance" test, the principles of
last resort and proportional means are contained in legal legitimacy, and the

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42. *Id.* at 70, 75.
43. *Id.* at 69.
44. Archibugi, *supra* note 36, at 147–48.

principle of reasonable prospects is quite close to the notion of "effective-ness."

The Commission's work is also echoed in the work of another liberal internationalist who has articulated a vision for transnational engagement, Richard Falk.[45] Carrying strong normative resonance with the vision of the "responsibility to protect," yet arguably even more sensitive to the weight of colonial and neo-colonial militarism, Falk's guidelines for legitimate transnational engagement are captured in *On Human Governance*.[46] Falk, particularly in his work with the World Orders Project, has been one of the most influential voices articulating a transnational idealism in international law and policy.[47] His approach provides an "instance of discourse" informing the normative vision of humanitarian intervention.[48]

Paralleling the shift from the "right to intervene" to the "responsibility to protect," Richard Falk characterizes his normative vision for transnational engagement as a shift from "geopolitics" to "humane governance."[49] Three overarching dichotomies form the basis of legitimacy in the Falk's vision of humane governance: internationalist solidarities over state interests, an effective peace over an anarchic state of war,[50] and international law over arbitrary power.[51] While the latter two resonate with the Commission's criteria on when and how the responsibility to protect triggers intervention, Falk's

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45. Falk is the Albert G. Milbank Professor, Emeritus, of International Law and Practice, Woodrow Wilson School of Public and International Affairs, Princeton University.

46. RICHARD FALK, ON HUMAN GOVERNANCE: TOWARD A NEW GLOBAL POLITICS: THE WORLD ORDER MODELS PROJECT REPORT OF THE GLOBAL CIVILIZATION INITIATIVE (1995).

47. *See, e.g., id.* at 149. I take Falk's oeuvre as indicative of one slice of the current debate on humanitarian cosmopolitanism. I focus on Falk and the text *On Humane Governance* not only because Falk has long been one of the most prominent and prolific international lawyers of the last few decades, but also because the specific context of the book's emergence in the transnational conversations of a nongovernmental collective, the World Order's Project, is itself exemplary of internationalist engagement. This paradigm of engagement sees itself as enabling agency in new locations—not in the nation-state or in global capital, but in transnational democratic tendencies. *Id.* at 3.

48. I borrow the phrase "instances of discourse" from Foucault. The discourses of humanitarian cosmopolitanism are internally heterogeneous and contested. To this extent, my effort here is not to provide a comprehensive discussion of humanitarian cosmopolitanism, but rather to focus on one influential instance of it and to explore its internal tensions and heterogeneity.

49. Here I am reminded of Anthony Appiah, who describes his project in similar terms but also warns against conflating cosmopolitanism and humanism, arguing that liberal cosmopolitanism values diversity, as humanism may or may not always do; *see* THE DICTIONARY OF GLOBAL CULTURE (Anthony Appiah & Henry Louis Gates eds., 1997). Falk's vision would also highlight pluralism as an important characteristic of his cosmopolitanism and his conception of humanist values.

50. Arguing that "military means can destroy, but cannot create," Falk asserts that "[t]he more fundamental struggle, at the very center of the normative project, is to challenge war itself, the social and political process of mass international killing in the name of the state . . . allegedly on behalf of security in self-defense." *Supra* note 46 at 15, 244.

51. Falk speaks of "many stages of institutionalization" in the international sphere "that seem to be on the path to human governance. . . . These include the strengthening of international law in relation to the foreign policy of major states, the expansion of international law to the activities of the global market place, the expansion of the authority of the world court, the establishment of peace forces under U.N. command, and many others." *Supra* note 46 at 7. The importance of law and legal institutions in Falk's project is underscored when contrasted with the geopolitical worldview that he characterizes as resorting to war rather than law.

first theme resonates most closely with the focus on the core normative aims of intervention: the "right intentions" captured by Falk's call for a focus on internationalist solidarities over statist interests.

Against the geopolitical model's reduction of security to "the well-being of the territorial state in relation to its foreign enemies,"[52] Falk is keen to advance a cosmopolitan humanitarianism premised on "a global civil society"[53] and "human rights for all the peoples of the earth."[54] In the Sections that follow, using the intervention in Afghanistan as a test case, this Article interrogates the contrast between geopolitics and humane governance, between the right to intervention and the responsibility to protect, and particularly the claim that humanitarian principles will provide a secure shield against deterring militarism. It was these issues, not merely those of geopolitical security and self-defense, that laid the ground for intervention in Afghanistan.

B. The Responsibility To Protect Afghanistan

Proponents of the war in Afghanistan couched much of the normative rationale for intervention on the responsibility to protect, not just the right to intervene. Although legal briefs submitted to the U.N. supporting intervention in Afghanistan were based upon the right to self-defense, this rationale proved less critical than expected in legitimizing the intervention.[55] Moreover, efforts by liberal internationalists to keep self-defense and humanitarian rationales separate proved less than successful. For example, the Commission presents self-defense and the protection of peoples as two distinct and contrasting imperatives for intervention and argues that the intervention in Afghanistan was based on self-defense rather than the imperatives of humanitarian protection. However, these were in fact overlapping and mutually reinforcing rationales. Thus, although the Commission's co-chairs assert that interventions like Afghanistan concern "the scope and limit of a country's right to self-defense—not their right or obligation to intervene elsewhere to protect peoples other than their own," humanitarian imperatives were vigorously invoked by advocates of the intervention.[56] In fact, these advocates follow the Commission's own proposed shift of the appropriate nomenclature for humanitarian intervention. The Commission argues that what has

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52. Falk, *supra* note 46, at 149.

53. *Id.* at 3. *See also* Richard Falk, LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE (Richard Falk ed., 1998).

54. Falk, *supra* note 46, at 3.

55. Christopher Bertram, *Afghanistan: A Just Intervention,* 6 IMPRINTS: A JOURNAL OF ANALYTICAL SOCIALISM 2 (2002), *available at* http://eis.bris.ac.uk/~plcdib/imprints/bertram.html (arguing against looking only at self-defense issues without seeing how other humanitarian issues contributed to meeting the threshold *jus ad bellum* considerations for war and arguing that humanitarian issues regarding the protection of the Afghan people tipped the legal legitimacy scales in favor of intervention in Afghanistan).

56. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 4, at 99–100.

previously been termed "humanitarian intervention," meaning "coercive action against a state to protect people within its borders from suffering grave harm," should be reclassified in terms of the "responsibility to protect."[57] Strikingly, the American and British arguments favoring intervention in Afghanistan also recast a self-defense issue in terms of the responsibility to protect.[58]

International law scholars note that the American government's *jus ad bellum* rationale for the attack on Afghanistan was based on a rather unconvincing legal premise: if a state is attacked by militant groups such as Al Qaeda, the right to self-defense extends to retaliating against states that harbor such groups. Richard Falk asserts that this rationale "stretched traditional notions of self-defense by attributing to a government ultimate legal accountability for operations emanating from its territory regardless of whether it favored such terrorists activities or had the capacity to suppress them."[59] Steve Ratner argues that "on the issue of state responsibility" none of the legal tests set forth by the "ICJ, the ICTY, or the ILC supports the harboring theory of the United States . . . normally states would not hold another state responsible per se for the actions of nonstate actors on its territory absent proof of a connection closer than harboring, and certainly not to justify the use of force."[60] That said, Ratner notes that notwithstanding the contestable legal rationales, the military intervention in Afghanistan did not draw widespread condemnation from other states and major NGOs. Clearly much criticism was muted because other states were bullied or self-regulated into compliance by the "either you are with us or against us" political terrain of geopolitics. What puzzles Ratner, however, is that even human rights-focused states, particularly those in the E.U., as well as NGOs like Human Rights Watch that strongly condemned America's conduct of the war in Afghanistan, failed to challenge the American rationale for the war. For instance, even those "[m]ainstream human rights NGOs" that "were harshly critical of aspects of the treatment of detainees, claiming violations of the Geneva conventions" were "silent or cautious on the decision to use force."[61] Thus, the actions of the international community suggest considerable leniency regarding *jus ad bellum*, even when there was harsher scrutiny that *jus in bello* accord with international humanitarian law and norms.

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57. *Id.* at 99.

58. *See infra* Subsections 2, 3, and 4 for a discussion on the prominent role accorded to women rights, multiculturalism, and poverty alleviation in the U.S. and U.K. government's discussion of the rationale for intervention. *See also* Richard Falk, *Appraising the War Against Afghanistan*, Social Science Research Council, *available at* http://www.ssrc.org/sept11/essays/falk.htm (noting the shift in emphasis from self-defense to humanitarian goals in the Bush administration's discussion of the rationale for the war) (last visited Feb. 9, 2004).

59. *Id.*

60. Steven R. Ratner, Note and Comment, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905, 908–09 (2002).

61. *Id.* at 913.

This Article contends that part of the explanation for this phenomenon is that the legalistic elaboration of self-defense arguments was not crucial to legitimizing U.S. military actions. In fact, the international legitimacy accorded to U.S. actions would appear less puzzling if considered in the context of the normative rationale for military intervention, and specifically how the "need to protect" rationales complemented and advanced those of the right to defend. Rather than scrutinize the hermeneutics of legal terminology in self-defense doctrine, it may prove more useful to trace the development of humanitarian intervention norms with respect to Afghanistan over the last decade.

Employing normative arguments to support a military campaign is not a new feature of militarism. What was remarkable about the military assault against Afghanistan, however, was the particularly conspicuous role of humanitarian arguments and the uncanny resonance with the guidelines proposed in the "responsibility to protect" framework. Although, as noted earlier, the Commission views Afghanistan as more appropriately discussed in terms of a self-defense-based right to intervene, the war's biggest proponents, including George W. Bush, underscored the "responsibility to protect" as a rationale justifying war. Granted, the American and British government reports outlining their evidence against Osama bin Ladin for the events of September 11, 2001 constituted the formal briefs supporting the case for a military attack.[62] Yet in many ways the evidence cited in these reports, and indeed the international law of self-defense, were largely irrelevant to the ongoing legitimation of the offensive. The past decade's post–Cold War dialogue on humanitarian intervention in furtherance of international norms proved much more crucial. Not surprisingly, human rights, and particularly women's rights, were heavily emphasized, as were less obvious discourses regarding inter-civilizational dialogue, poverty alleviation and economic development, democratization, multi-culturalism, cultural authenticity and peace. These discussions created the space for militarism by giving the Anglo-American coalition the moral authority to challenge the policies and practices of the Taliban government. They also enabled movement in the reverse direction, from the coalition's military rout of the Taliban government to the Bonn processes of the U.N., to be seamless.

The Commission argues that a major advantage of the shift from the right to intervene to the language of responsibility is that "it implies evaluating the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention."[63] Ironically, America's sense of its role in the world and its attendant moral responsibilities to those

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62. *See* Press Release, British Government, Responsibility for the Terrorist Atrocities in the United States *at* http://news.bbc.co.uk/2/hi/uk_news/politics/1579043.stm (the British dossier concluded that "Osama Bin Laden and al-Qaeda were able to commit these atrocities because of their close alliance with the Taleban regime, which allowed them to operate with impunity in pursuing their terrorist activity") (Oct. 4, 2001).

63. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 4, at section 2.29.

seeking and needing support may be one of the enabling conditions of its military offensives. To the extent that critics of the Bush Administration's military attacks on Afghanistan and Iraq fashion their arguments against a militaristic world power selfishly focused on its domestic goals, they may be missing the mark entirely. Rather, such interventions legitimated by human rights and humanitarian discourse may in fact represent a particularly Anglo-American voice speaking about "the responsibility of sovereign states to protect their own people from such harm—and about the need for the larger international community to exercise their responsibility if states are unwilling or unable to do so themselves."[64]

1. Right Intentions

Against the backdrop of calls for intervention based on responsibility and protection, the dubious character of arguments based on national interest and self-defense (that were the ostensible legal foundation for the Afghanistan intervention) were less than worrying to many commentators in the human rights and humanitarian field. Afghanistan had been under international scrutiny long before September 11. As Tom Franke points out, "In October 1999, the U.N. Security Council duly censured the Taliban by a unanimous resolution. The General Assembly, too, has shown its disapproval by refusing to accept the credentials of the Taliban's delegation."[65] Richard Falk describes pre–September 11 Afghanistan as an "outlaw state," and cites the Special Rappoteur's annual reports on the "severe human rights abuses and crimes against humanity that were taking place routinely in Afghanistan."[66] With specific reference to genocide and "female apartheid" in Afghanistan, the Institute for the Study of Genocide has "for the past fourteen years" berated foreign policy on intervention for being so narrow that it has not taken into account such atrocities. They "regularly . . . questioned U.S. and international responsibility for tolerating these and encouraged reflection on humanitarian intervention."[67] Thus, commentators like Falk merely express regret that Bush initially promoted self-defense as the rationale for intervention in the fall of 2001 "when the case against the Taliban was relatively easy, and could have been made stronger had it been linked to a case of humanitarian intervention."[68] In fact, Falk approvingly emphasizes a change in the rhetoric from that initial focus on self-defense. In particular, he notes the attention given in the 2002 State of the Union address to "the emancipatory impact of the American-led victory on the peoples of Afghanistan, particu-

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64. *Id.* at section 8.1.
65. Thomas M. Francke, *Are Human Rights Universal?*, FOREIGN AFF., Jan.–Feb. 2001, at 191.
66. Falk, *supra* note 58.
67. Helen Fein, *Editorial: Intervention and Responsibility: Afghanistan and Iraq Reconsidered*, 28 INST. FOR STUDY GENOCIDE NEWSL. 1 (Spring 2002), *available at* http://www.isg-iags.org/newsletters/28/Fein. html.
68. Falk, *supra* note 58.

larly its women."[69] Human rights and humanitarian concerns were offered to
limit and target the use of force. These same human rights concerns simul-
taneously, however, facilitated the use of force and enabled a military offen-
sive that self-defense arguments failed to fully legitimize.

2. *Women's Rights*

Women's rights have emerged at the centerpiece of aspirations for post-
Taliban Afghanistan.[70] "Because of our recent military gains in Afghani-
stan," Laura Bush told the American people, "women are no longer imprisoned
in their homes."[71] Echoing her optimism, the Northern Alliance Interior
Minister, Younis Qanooni, expressed hope that a new climate will enable an
enlightened law including "rules to ensure women are not disadvantaged."[72]
In fact, he claimed "the rights of women in Afghanistan" were "one of the
aims of our resistance."[73] Laura Bush urged that the American government's
military offensive is motivated by similar principles. "The fight against ter-
rorism" is, she said, "a fight for the rights and dignity of women."[74]

This marriage of feminists and military hawks is not merely an ex post
facto appropriation of Afghan women to launder a dirty war. Many feminists
had long been critical of the international community's inaction to protect
Afghan women. For example, British film maker Sairah Shah traveled to
Afghanistan to shoot "Behind the Burqa" in 2000. Against the backdrop of
the Kosovo intervention, this film revealed "scenes of massacres to match
anything in Kosovo or Bosnia."[75] Guglielmo Verdirame's article in the
August 2001 issue of *Human Rights Quarterly* condemned the U.N. Security
Council "for failing to adopt more pressing measures against sexual apart-
heid in Afghanistan."[76] The Feminist Majority Foundation had been cam-
paigning to pressure the American government and the U.N. "to do every-
thing in their power to restore the human rights of Afghan women and
girls."[77] Many argue that failure to intervene was equivalent to denying that
Afghans were eligible for the same rights enjoyed in the "West." Invoking

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69. *Id.*
70. For example, The Feminist Majority Foundation urges that "[t]he defeat of the Taliban means the
liberation of women from the regime's draconian decrees." Feminist Majority Foundation, *The Taliban
and Afghan Women: Background, available at* http://www.feminist.org/afghan/facts/html (last visited Feb. 1,
2004).
71. Laura Bush, Radio Address to the Nation *available at* http://www.whitehouse.gov/new/releases/
2001/11/20011117.html (Nov. 16, 2001).
72. *Afghan Women to Attend Talks,* BBC, *available at* http://news.bbc.co.uk/2/hi/south_asia/1671186.
stm (Nov. 22, 2001).
73. *Id.*
74. Bush, *supra* note 71.
75. Polly Toynbee, *There is Blood on Our Hands But the Taliban are Worse,* GUARDIAN, Oct. 31, 2001, at
20, *available at* http://www.guardian.co.uk/waronterror/story/0,1361,583906,00.html.
76. Guglielmo Verdirame, *Human Rights in the Arab World: A Regional Perspective,* 23.3 HUM. RTS. Q.
733, 750 (2001).
77. Feminist Majority Foundation, *The Taliban and Afghan Women: Background, available at* http://
www.feminist.org/afghan/facts.html (last visited Feb. 1, 2004).

Shah's film and female apartheid in Afghanistan in her contribution to *The Guardian's* special report, *Attack on Afghanistan*, Polly Toynbee accuses the anti-interventionists (the "peace party") of "a coy form of cultural imperialism" in lacking "the will to spread the same freedoms to others for fear of trespassing on cultural sensitivities . . . as if these rights are only for us, not for 'them'."[78] Thus, failing to ensure "human rights for all the people of the earth" may constitute what Toynbee describes as a fundamental "moral dereliction" that is "imperialist" in its own way.[79] For Falk, this may in fact be a dereliction of the responsibilities of humane governance. Rather than romanticizing global civil society in resisting imperial states, human governance suggests a responsibility to recognize that "[f]rom civil society flow destructive and nihilistic responses as well as compassionate and reconstructive initiatives . . . . Who is free and who is not free to act democratically at the grassroots is itself a dimension of the liberating concerns of adherents of humane governance . . . . Regressive tendencies . . . must be neutralized if the positive prospects of humane governance are to be realized."[80] In such contexts, Toynebee notes, reluctance to intervene may be akin to "wincing at a surgeon's curing knife."[81]

3. Multiculturalism

Even before September 11, 2001 there was considerable pressure for a strong response against religious intolerance in Afghanistan. A year earlier, the U.S. government listed the Taliban as a particularly severe violator of religious freedom, as it undoubtedly was. In March 2001, the Taliban implemented its edict against worshipping idols by destroying the famous Buddha statues in Bamian. *The Washington Post* noted that despite widespread condemnation of this act, the international community "found no leverage" to dissuade the Taliban.[82] In May 2001, condemning the Taliban's plans "to require non-Moslems to wear identifying clothing and yellow badges," there were calls for "the United Nations, international human rights organizations, and other world bodies to protest this gross violation of human and religious rights and to take firm action."[83] As far back as spring 1998, the Institute for the Study of Genocide made "a legal case based on the UN Genocide Convention," against the treatment of the Bahai in Afghanistan.[84] Helen Fein

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78. Toynbee, *supra* note 75.
79. *Id.*
80. Falk, *supra* note 46, at 4.
81. Toynbee, *supra* note 75, at 20.
82. Molly Moore, *Taliban: Most Statues Destroyed*, WASH. POST, Mar. 4, 2001, at A22, *available at* http://www.calguard.ca.gov/ia/Taliban/Taliban%20Most%20statues%20destroyed.htm.
83. Betty Ehrenberg, Director of International and Communal Affairs of the Orthodox Union, analogized this call to the racial classification policies of Nazi Germany. Orthodox Union, *Orthodox Union Condemns Outrageous Taliban Repression, available at* http://www.ou.org/public/statements/2001/betty9.htm (May 31, 2001).
84. Fein, *supra* note 67, at ¶ 2.

laments that the realists who make foreign policy believe that "national in-
terests alone should motivate intervention" while "genocide, potential geno-
cide and terrible violations of human rights cry out for international atten-
tion."[85]

Multiculturalism created a backdrop to military decisions throughout the
Afghan war. Thus, Blair urged that "especially at this time . . . we celebrate
the diversity in our country, get strength from the cultures and races that go
to make up Britain today."[86] Linking domestic multiculturalism and foreign
policy, Bush also situated the military attack as a "crusade" for a multicul-
tural world bringing together "the Christian faith . . . Judaism . . . the
Hindu faith and . . . Islamic tradition."[87] Prioritizing this normative com-
mitment over military goals, "our coalition," Bush said "is more than just
one to rout terrorism out of the world. It's one to bind together, to knit
those traditions in a way that helps people in need."[88] Situating September
11 in narratives about the clash of civilizations, the multilateral coalition
underscored the importance of dialogue and inter-civilizational discourse. In
a fortuitous coincidence, the U.N. designated 2001 the International Year of
Dialogue Among Civilizations. Underscoring these sentiments, Kofi Annan
stated that "[i]ndeed, the perception of diversity as a threat is the very seed
of war. Diversity is not only the basis for the dialogue among civilizations,
but also the reality that makes dialogue necessary."[89] Thus, in shaping the
Bonn agenda, Lakhdar Brahimi has followed the urging of the "Six plus
Two" group[90] that there should be the "establishment in Afghanistan of a
broad based, multi-ethnic, politically balanced, freely-chosen Afghan admini-
stration."[91] In fact, reconstruction assistance has been explicitly tied to this
vision of representative government.[92]

4. *Poverty Alleviation*

Reconstruction assistance has also been linked to a deeper normative vi-
sion of poverty alleviation and economic development. Assistance to refugees

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85. *Id.* at ¶ 1.

86. Tony Blair, Labour Party Conference *in* GUARDIAN. Oct. 2, 2001, *available at* http://politics.
guardian.co.uk/labour2001/story/0%2C1414%2C562006%2C00.html.

87. President George W. Bush, Remarks to the U.S. State Department Employees, *available at*
http://usinfo.state.gov/topical/pol/terror/01100415.htm (Oct. 4, 2001).

88. *Id.*

89. Secretary-General Kofi Annan, Welcoming Remarks at the UNESCO Round Table: Dialogue
among Civilizations, *available at* http://www.unesco.org/dialogue2001/en/annan.htm (Sept. 5, 2000).

90. China, Iran, Pakistan, Tajikistan, Turkmenistan, Uzbekistan, the United States and Russia.

91. Judy Aita, *Afghanistan's Neighbors Call for Broad-Based Government: "Six plus Two" Ministers Meet at
UN*, *available at* http://usinfo.state.gov/topical/pol/terror/01111208.htm (Nov. 12, 2001).

92. "Until there is a government that is broadly representative and recognized by us, there's not going
to be any reconstruction assistance," a senior U.S. official close to the talks said. This comment was made
as talks were proceeding near Bonn in a "luxury hotel overlooking the Rhine River" and "overseen" by a
U.S. policy statement stating that aid "is contingent on a broad-based, inclusive government." *Afghan
Factions Meet in Germany*, *available at* http://www.pbs.org/newshour/updates/november01/govttalks_11-27.html
(Nov. 27, 2001).

was pressed as a key motivation accompanying the military offensive. In the speech first declaring that British troops would be deployed in Afghanistan, Blair announced "a coalition of support for refugees which is as vital as the military coalition."[93] Thus, the political and geographic access created by the Taliban's defeat transformed the war into a humanitarian relief operation.

Notwithstanding the claim of commentators such as Falk that his guidelines for cosmopolitan engagement distinguish him from more militaristic interests and imperatives, Falk's rationales for intervention are not dissimilar from those of the American government. "What does seem clear," Falk says, "is that the appalling economic incompetence and record of human rights abuse during the period of Taliban rule is likely to be superceded by a much improved quality of Afghan governance resulting in material and political benefits for a large majority of citizens."[94] On October 4, 2001, the eve of the U.S. attack, American officials urged that "you can initiate . . . development programs in the middle of a civil war and a famine."[95] Encouraging reporters to become familiar with the literature on opportunities to pursue humanitarian goals in the context of military engagement, officials cited books such as *Rising from the Ashes* and *Disasters and Development* to urge a learned optimism about compassionate militarism. Similarly, a State Department fact sheet summarizing the U.S. government's "humanitarian funding" for Afghanistan in the first six weeks of the war announced over $246 million of aid that had already been contributed.[96]

Gender, pluralism, and development relief are three powerful markers in a complex and multifaceted normative space interpolating the war in Afghanistan. Undoubtedly, a more militaristic discourse was also a prominent part of the Anglo-American coalition's approach. By drawing attention to the prominence accorded to issues such as women's rights and multiculturalism, this Article does not intend to suggest that self-defense, racism, machismo, and other factors did not inform the discourse surrounding the attack. However, although the traditional discourse of military muscle remains potent, it does not dominate public debate as it did even as recently as the first Gulf War. In fact, the conflict in Afghanistan marks an extraordinary moment in the international public sphere: against the backdrop of a decade-long tussle with humanitarian engagement, the normative force of "the responsibility to protect" constituted a different space for war.

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93. Prime Minister Tony Blair, Statement Announcing Deployment of British Troops in Afghanistan, *available at* http://www.number-10.gov.uk/output/Page1615.asp# (Oct. 7, 2001).

94. Falk, *supra* note 58.

95. Administrator of the U.S. Agency for International Development Andrew Natsios, Remarks in U.S. State Department Briefing on U.S. Assistance To Afghan Refugees, *available at* http://usinfo.state.gov/topical/pol/terror/01100417.htm (Oct. 4, 2001).

96. This money came from three sources: the U.S. Agency for International Development (USAID), the State Department's Bureau of Population, Refugees and Migration (PRM), and the Department of Defense. Of these, the Department of Defense was by far the biggest donor, accounting for about 50% of the U.S. government's humanitarian funding. *Fact Sheet: U.S. Assistance to Afghan People Since Oct. 1, 2001*, *available at* http://usinfo.state.gov/topical/pol/terror/01112305.htm (Nov. 23, 2001).

Indeed, some of the most established human rights organizations criticized the military intervention in Afghanistan for not going far enough. Concerned with the Brahimi approach, Human Rights Watch argued that:

> A light footprint has failed to protect human rights in western Afghanistan. It is now time to make a larger imprint on the ground in Herat and other parts of Afghanistan experiencing serious human rights violations. . . . Western Afghanistan, like other areas of Afghanistan, would greatly benefit from the presence of international peacekeepers. Currently, the International Security Assistance Force (ISAF) is only stationed in Kabul. It is vital that ISAF be expanded as soon as possible. In the absence of an expanded ISAF force (or even in addition to one), U.S. troops stationed around Herat could make a valuable contribution to the security of the region. U.S. forces should take on a greater role in peacekeeping activities, patrolling Herat and other sensitive areas in the west, and using civil and political affairs officers to identify and assist vulnerable persons.[97]

The call for a larger military presence is based not on self-defense rationales but the responsibility to protect. This is not the familiar voice of empire as conquest and occupation arguing for expanding territorial ambitions, but a human rights voice calling for assistance to the vulnerable. This distinction has been underscored by the NGOs themselves. Thus in November 2001, even as the Bonn process was moving forward, CARE called for a "military presence to protect the delivery of aid" to demonstrate that the intervention was not a military presence of a "conqueror or occupying power" but was intended to "assist Afghans."[98] Two years later, in October 2003, CARE continued to call for an expansion of ISAF in Afghanistan, with a stronger mandate to better enable ISAF to take military action for the "protection" of Afghans.[99]

In the Cold War and pre–Cold War era, neutrality and impartiality were the constitutive myths of humanitarian intervention. Today, does the new context that is said to require "military humanitarianism" carry its own mythologies and misconceptions about its role in the proliferation of spaces for violence? As Doris Lessig notes, "The hearts of innumerable men and women responded with idealistic fervor to [Cecil Rhode's] clarion, because it went without saying that it would be good for Africa, or for anywhere else, to be made British. At this point it might be useful to wonder which of the ide-

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97. Human Rights Watch, *All Our Hopes are Crushed: Violence and Repression in Western Afghanistan*, *available at* http://www.reliefweb.int/w/rwb.nsf/0/3145e3df5e5451e249256c69002bf304?OpenDocument (Nov. 5, 2002).

98. Press Release, CARE, CARE Outlines the Role of International Forces to Protect and Assist Afghan People, *available at* http://www.careusa.org/newsroom/pressreleases/2001/nov/11302001_afghanistan.asp (Nov. 30, 2001).

99. *Id.*

alisms that make our heart beat faster [today] will seem wrong headed to people a hundred years from now."[100]

The Commission situates its work in an idealistic commitment to addressing human need rather than the right of intervention. Thus it says that its "[r]eport has been about compelling human need, about populations at risk of slaughter, ethnic cleansing and starvation."[101] In fact, Falk argues this kind of focus on humanitarianism and law as the guiding lights of intervention will be important in not creating conditions that unleash "the dogs of war."[102] But Afghanistan may have been available for a military offensive before September 11. The ideological ground was laid not by the dogs of war, or by macho bombastic talk of the axis of evil and military conquest. Rather, it was established by the soft promise of the intervention's reluctant advocates, in the name of religious tolerance, women's freedom, human rights, and liberal modernity.

III. FROM BERLIN TO BONN TO BAGHDAD: CONNECTING THE DOTS

An Iraqi solider presses down an American soldier he has taken captive, asking what the war was about—and then proceeds to answer his own question by trying to pour oil down the prisoner's throat. No, this was not another news clip on CNN from the gulf, but rather from Hollywood—more specifically, from the 1999 movie *Three Kings*.[103] Set in the wake of the first Gulf War, four American soldiers seek to do some bounty hunting before returning to the United States at the end of Operation Desert Storm. Cynical and war weary, their goal is to track down and steel a stash of Kuwaiti gold hidden in Iraq. *Three Kings* presents, with at times brilliant satirical verve, the political economy supporting the war at many levels—the oil revenues that fuel American militarism and also the tough economic conditions of the American working poor that feed military recruitment. The movie also tests the gravitational pull of economic motivations against the humanitarian demands of those who were perhaps Operation Desert Storm's biggest losers, the Kurds. By the movie's end, disillusioned and critical of American policy, the quest for gold both thwarted and abandoned, the four soldiers flout all rules and work in solidarity with a Kurdish community to enable their escape. In so doing, the soldiers maneuver and fight against the charge of their superiors and indeed the policy advanced by the American government itself.

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100. *Quoted in* COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION 345 (Pheng Cheah & Bruce Robbins eds., 1998).

101. The INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 4.

102. Falk, *supra* note 58.

103. In fact, against the backdrop of the first Gulf War making its appearance in our living rooms via CNN's tele-drama of smart bombs, one of the interventions made by the movie is stylistic experiments with technical stunts about the theater of militarism. It speaks to the production of news as popular culture, while itself being a newsworthy product for popular cultural consumption.

Thus, one principle narrative thread of the movie is the shift from an imperial militarism to military humanitarianism. How do we understand the politics of this shift: is military humanitarianism an alternative to imperial militarism, or is it part of the same project? The argument is not that humanitarianism is used conspiratorially to launch a stealth attack but rather that humanitarian discourse and practice has both advanced and curtailed the space for militarism.[104] In placing humanitarian impulses and imperial impulses for intervention side-by-side, *Three Kings* draws attention to how the legitimacy afforded by arguments for humanitarian intervention and arguments for imperial intervention simultaneously compete with and complement each other. It even suggests that humanitarian rationales for intervention fundamentally support and legitimize more imperial claims for intervention so effectively precisely because, in discrepant local battles, humanitarianism also competes with and may restrain militarism's excesses.

Howard Zinn calls on the United States to "pull back from being a military superpower, and become a humanitarian superpower."[105] The question is whether there is a clear line of distinction between these roles. Efforts by the left-liberal intelligentsia to provide normative signposts for legitimate humanitarian action by the international community do not seem to travel in the expected direction. A discourse aimed at situations for protection, like Kosovo, appears indistinguishable from the discourse used in situations described as self-defense, like Afghanistan. While the Commission seeks to distinguish between rights and responsibilities, self-defense and protection of the other, it is less than clear that their distinctions provide reliable guides. International lawyers and policymakers advocate a transnational idealism to define internationalist norms as opposed to statist norms, pacifist from militaristic goals, efforts grounded in international law again those that are not. Yet it appears these polarities fail to provide a reliable compass for humanitarian action.

Today, after the second Gulf War, liberal internationalists lament that "one of the worst misdeeds that George W. Bush committed, in collaboration with Tony Blair, was to bring humanitarian intervention into disrepute" by appropriating its rhetoric to justify the war.[106] The Institute for the Study of Genocide regrets the fact that the question of humanitarian inter-

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104. I situate this project within a broader examination of the intimate relationship between violence and the normative. From Walter Benjamin to Jacques Derrida, many scholars have explored the ways in which the normative assumptions of law have been constitutive of the very violence against which law defines itself. In the context of international law, the darker "underside" of law has been visited from many angles by a range of legal scholars including Illeana Porres, David Kennedy, and Tony Anghie. In a different disciplinary track, Pradeep Jeganathan is occupied with negotiations with the categories, conventions, and performative spaces for "violence" in relation to anthropological technologies for reading. Pradeep Jeganathan, *A Space for Violence, in* COMMUNITY, GENDER AND VIOLENCE, SUBALTERN STUDIES XI (Partha Chatterjee & Pradeep Jegnanathan eds., 2001).

105. Howard Zinn, *A Just Cause, Not a Just War,* PROGRESSIVE, Dec. 2001, at 6, *available at* http://www.progressive.org/0901/zinn1101.html.

106. Williams, *supra* note 5, at 23.

vention in Iraq emerged only when self-defense was at stake and not in response to, for example, violations of the Genocide Convention. From 1988 to 1991, the Institute convened discussions on genocide and potential genocide in Iraq and the need for humanitarian intervention. The treatment of the Kurds and Marsh Arabs in particular constituted violations of the Genocide Convention that warranted intervention. But these facts were ignored at the time by policy makers. If the humanitarian discourse on issues such as violations of the Genocide Convention had gained more traction in the international community, would that have made it easier to legitimize the second Gulf War? Is the widespread international opposition to that war partially explained by that fact that many atrocities of the Iraqi regime were somewhat overshadowed by the atrocities of sanctions, oil interests and other factors that complicated the humanitarian discourse? Or is there now space for humanitarian operations to be mobilized only to offer post hoc legitimation of Anglo-American military adventures?

The *Responsibility to Protect* has been criticized precisely because it could be appealed to with equal vigor by both supporters and critics of the war. Ramesh Thakur reports that the Canadian Prime Minister Jean Chretien tried valiantly to promote the Commission's report at a recent Progressive Governance Summit in England. He encountered difficulty because some at the conference feared that the concept of "responsibility to protect" could be appropriated to justify war in Iraq.[107] Expressing indignation at this prospect, Thakur argues that the Iraq war would have failed the tests laid out by the report for justified intervention: "We argued that all military intervention must be subject to four precautionary principles: right intention, last resort, proportionate means and reasonable prospects. Iraq would likely have failed on all four principles." Yet it is also true that some of Thakur's fellow commissioners, including Ignatieff, have in fact defended the war. Ignatieff argues, against anti-interventionists, that "[t]o oppose an intervention that was bound to improve the human rights of Iraqis because the man leading that intervention was late to the cause would seem to value good intentions more than good consequences."[108] Thus the compass for legitimate humanitarian intervention has been lost even within the pages of the report.

IV. CONCLUSION

The crisis of cosmopolitan humanitarianism in its quest for a secure compass for legitimate transnational engagement has come to a critical point with the second Gulf War. As critics and advocates of the intervention base their arguments upon humanitarian goals, cosmopolitan humanitarianism both advances and constrains intervention. It is in this context that we must

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107. Ramesh Thakur, *It's Time to Redefine a "Just War,"* UNU Update, Issue 27 (Sept.–Oct. 2003), *available at* http://update/unu.edu/archive/issue27.htm.

108. Michael Ignatieff, *Why Are We In Iraq? (And Libya? And Afghanistan?),* N.Y. TIMES, Sept. 7, 2003.

grapple with the question of whether humanitarian initiatives for the "re-construction of Iraq" will fill in the legitimacy gaps that the war left behind.

The discourse of humanitarianism is not always easy to adapt and assimilate to legitimize military intervention. Notwithstanding humanitarian arguments from Ignatieff to the State Department, to the extent that the Iraq war was not only about cruise missiles that "shock and awe," but also about ideological discourses that legitimize and rationalize, the Anglo-American coalition faced real skepticism as well as defeat.

The movie *Three Kings* exhibits a shift from a narrative of imperial intervention to one of humanitarian intervention following the first Gulf War. In the wake of the second Gulf War, aspirations towards such a shift inhere in efforts to generate post hoc legitimacy for the military intervention through the mobilization of humanitarianism. The strength of the anti-war movement that rallied against the intervention ensured that "coalition" forces were unsuccessful in their invocation of the humanitarian discourse to legitimize intervention for the "liberation" of Iraq. By critically examining the structure of global power and its distributive consequences, unpacking the political economy of oil, asserting democratic claims for accountability regarding the misuse of political, economic, and military power as well as coalition-building across multiple frontiers, the dominant interpretation of the intervention in Iraq was conquest rather than humanitarianism. With the intervention characterized by the marginalization of humanitarian concerns and the mobilization of humanitarian discourse, humanitarianism haunts both the frontline of imperial brutality and the rearguard of imperial ambition. Thus the intervention in Iraq remains mired in a legitimacy crisis—faultlines connecting the dots from Berlin, 1844 to Baghdad, 2003.