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Humane wars? International law, Just War theory and contemporary armed humanitarian intervention

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The contemporary international law of war is torn between the pressure to incorporate a doctrine to legitimize limited armed humanitarian intervention and its traditional concerns for nations' sovereignty. Especially because of its organic, interconnected nature, the theoretical tradition of just war theory, when concretized through explicit linkage to specific standards of contemporary human rights law, offers an approach to resolving this dilemma that does not unduly privilege war-making. This approach is both consistent with international law and useful as an example of the relevance of drawing on humanistic reasoning about justice in international jurisprudence. The argument is illustrated by reference to the cases of the failure of humanitarian intervention in Rwanda in 1994, the armed intervention in Kosovo in 1999 and the US-led wars in Iraq in 1991 and 2003. *Law, Culture and the Humanities* 2006; **2**: 373–398

In the years since the end of the Cold War, the issue of military action in cases of humanitarian necessity or tragedy has become central to discussions of international politics and law.[1] The importance of humanitarian intervention has put considerable pressure on one of the core tensions of contemporary world order. On the one hand, the state-focused nature of international law and organization has enshrined as their principle of reference the internal sovereignty of states and, thereby, created the presumption that only self-defense can justify the use of military force by one country against another. On the other hand, severe humanitarian crises in Rwanda, former Yugoslavia and elsewhere, along with the lack of a military counterweight to the power of the United States and its allies, have

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1. See, for example, L.H. Gelb and J.A. Rosenthal, "The Rise of Ethics in Foreign Policy," *Foreign Affairs*, 82 (May/June 2003), pp. 2–7 and J.L. Holzgrefe and Robert O. Keohane, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge, UK, Cambridge University Press, 2003).

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expanded pressures on the international legal regime to determine when the use of force is legitimate.[2]

International law faces a major challenge in responding to pressures to form standards for when or whether humanitarian intervention is justifiable. Yet the traditional privilege in modern international law towards state sovereignty means that accommodating humanitarian intervention may be difficult, or impossible.[3] Though sovereignty was not the reason for the United States' unwillingness to stop the 1994 Rwanda genocide, the international legal presumption that intervention is illegal is likely to affect the calculations of countries in a position to intervene and increase the vulnerability of such countries to international opprobrium if they do act.

This essay flows out of two basic questions. Can a system of law that is grounded in a norm of protecting nation-states' internal integrity be used to articulate standards for when that integrity can be forcefully violated in a manner that is not subject to the manipulation of powerful states? If deterring or preventing humanitarian crises is an important contemporary goal, is it at all prudent to think about expanding international legal justifications for war when the United States and other nations seem willing to bypass international law for their own sovereign-centric view of when war should be waged?

I suggest that this conundrum for international law can be sidestepped and the problem of creating standards in international law mitigated by a renewed focus on just war theory. Just war theory offers a set of ideas and considerations which de-emphasize state sovereignty and prioritize justice. Furthermore, the possibility of linking just war considerations to contemporary human rights law creates some hope that just war is not so flexible as to be indeterminate in considerations of humanitarian intervention. Especially if connected ultimately to some new or revitalized institutional mechanism that can provide interpretative specificity, if not the neutral adjudication, of just war claims, the just war tradition can enhance international legal deliberations relevant to humanitarian intervention.

My argument below does not provide exact criteria through which a revived and reconfigured just war tradition would legitimize military interventions undertaken for humanitarian purposes. Rather, I try to illustrate generally the possible utility of just war theory with the explicit motivation of also asserting the relevance of humanistic traditions of discourse more generally to contemporary global law and politics.

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2. Gelb, "Ethics," p. 6.
3. See, for example, T. Nardin, "The Moral Basis of Humanitarian Intervention," *Ethics and International Affairs*, 16 (2002), pp. 57–70 at 57.

I. International Law and Humanitarian Intervention: Two Concerns

In the past decade, the international legal order has not proven particularly adept at either responding to or helping to standardize arguments about humanitarian intervention. Some pacifists, legalists or cosmopolitans would argue that this is as it should be. After all, international law in general and the post-World War II United Nations-based legal order in particular were established to deter the resort to war by powerful states.[4] Thus, any doctrine that would help legitimize war should be viewed with suspicion.[5] Perhaps an improved set of legal grounds for specifying when military intervention in the pursuit of humanitarian ends is legitimate might detract from other, non-violent strategies to resolve or prevent a crisis.

A similar argument has been made by some theorists who are motivated by the importance of consolidating and continuing the growth of international law in recent decades. For example, Michael Byers and Simon Chesterman believe that taking seriously the possible legality of armed humanitarian intervention would require "a radical change in the international legal system – a change that is, in our view, as unwarranted as it is unsound."[6] Byers and Chesterman worry less that powerful states will fear using their military might unilaterally than that they will use any new legal rationalization of force to further undermine the international legal order. As a result, they recommend that states which carry out military humanitarian interventions accept the illegality of their actions, with the hope that the world will accept their actions in particular cases of acute crisis like Rwanda or Kosovo.[7]

In addition, a cosmopolitan theorist might assert that only a system of truly global, rather than statist, intervention in a country's domestic politics would be a reliable measure of global consensus on humanitarian crises.[8] Absent non-statist global institutions, perhaps humanitarian intervention should be consigned to the quasi-legal, quasi-moral gray zone of legitimation in which it currently resides. Otherwise, such intervention will amplify, rather than decrease, the critical role of a global policeman state or states.

While acknowledging the importance of such arguments, I nonetheless maintain that both humanitarian catastrophes, like the Rwanda genocide, and the success of powerful states in waging wider wars that they justify in part on humanitarian grounds, like the 2003 Iraq case, suggest a need for

4. L. Freedman, "War," *Foreign Policy* (July/August 2003), p. 18.
5. I. Atack, "Ethical Objections to Humanitarian Intervention," *Security Dialogue*, 33 (2002), pp. 288–90.
6. "Changing the rules about rules? Unilateral humanitarian intervention and the future of international law," in Holzgrefe and Keohane, *Humanitarian Intervention*, pp. 178–9. See also S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford, UK, Oxford University Press, 2001), pp. 226–32.
7. Byers and Chesterman, "Changing," pp. 198–201.
8. See, for example, R. Falk, *The Great Terror War* (Northampton, MA, Interlink, 2003), pp. 123–6.

the international legal order to address two major inter-related problems at the core of the use of force for humanitarian purposes. These problems are (1) the primacy of protecting state domestic sovereignty over protecting individuals in international law and (2) the inadequacy of the United Nations Security Council as it is currently structured to carry out its role effectively as the institutional arbiter of the legitimate recourse to force by states.

The progress of human rights law in recent decades is one clear indication that the sovereignty of nations is no longer the shibboleth that it once was. Yet, the principle that countries should be free of military incursion from other states remains central to the basic logic of international law. Indeed, the only undisputed international legal logic to justify war is self-defense. Given the strong statism at the heart of international law, it is difficult to imagine that a doctrine within the general rationales of this law that would justify humanitarian intervention could develop anytime soon.

To be sure, the lack of existence of international legal justification to stop a humanitarian crisis is not the only, or perhaps even major, obstacle in the way of intervention. For example, the US failed to commit troops to Rwanda in 1994 out of a sense that its citizens didn't care about this issue. Yet, sovereignty failed to over-ride Washington's willingness to intervene militarily through NATO in Kosovo in 1999. Despite this, I believe that international law's clarity that state self-defense is the only unassailable legal reason for the use of force and its corresponding murkiness regarding other plausibly vital grounds, like genocide, constitutes a barrier to global action with respect to the latter, if not an insurmountable one in all cases.

Indeed, arguments such as Byers' and Chesterman's above appreciate the contemporary ambivalence in international law between its state-centric core and the increasing humanitarian orientation of its content. Byers and Chesterman understand well that international law has developed around prioritizing national governments' decisions about law and politics that favor their own citizens' interests above the interests of other people. If asserting and maintaining state sovereignty remains the prime directive of the international legal system, then the current legal ambiguity regarding state-led humanitarian intervention may be preferable to establishing a stronger legal basis for intervention, as the latter could legitimate abusive state self-interested military action as well as stopping future Rwandas or Darfurs.

The logic of this argument is intertwined with the assumption that the nation-centric basis of international law is likely to continue unchallenged for the foreseeable future. If this assumption is valid, then the system's legitimacy and the legitimacy of its institutions ought not to be questioned, as they are better than the potential abuse if important issues such as the use of force are re-imagined in law. But what if international law is moving towards a stage of development in which the ambivalence between its statist core and global humanitarian norms precludes an obvious sense of whether upholding the legal order as it currently exists would best serve global humanitarian needs?

Coming from an explicitly moral philosophical perspective, Allen Buchanan believes that it is both necessary and desirable for states and other actors in global politics to advance humanitarian needs by challenging extant international law through illegal acts when necessary.[9] More specifically, he asserts that a reformer of international law should act both to influence state behavior and "to contribute to a shift in consciousness regarding the legal status" of humanitarian intervention.[10] What distinguishes Buchanan's and my perspective from that of Byers and Chesterman is the sense that the bad fit between the core statism of international law and the increasing globalism of its humanitarian content and non-state actors suggests a logic for prioritizing humanitarian reform over doctrinal stability and legitimacy.

The approach of this essay is to mitigate this trade-off and attempt to foster Buchanan's reform goals without unduly straining international law in general. I do not argue that international law can or should be changed so that states' tendency to use force for usually narrow self-oriented ends will be bolstered by a new general right of humanitarian intervention that would be hard to interpret. Rather, I suggest that the particular contemporary linkage of accepted and codified human rights law and the tradition of just war theory provides an alternate way of justifying and encouraging intervention that is different and not necessarily less subject to clear-cut case-by-case evaluation than current international law. If recent developments in international law allow the just war tradition to be applied in a more focused manner than in the past, the growing influence of human-rights non-government organizations (NGO's) may further this possibility.

There is added reason to emphasize reform over current international legal systemic stability when one considers the second problem noted above, namely, the UN Security Council's role in deciding when the use of force is appropriate. Articles 24 and 41 of the United Nations Charter confer upon this body the primary responsibility for determining and recommending actions to remedy threats to international peace and security. In practice, particularly since the end of the Cold War, the Security Council has been the major arena for determinations of the justifiability of the use of military force by states.

There is nothing inappropriate or even unusual about the delegation to an inherently political body of legal or quasi-legal issues. Yet the extent of the Security Council's political polarization and paralysis because of the vetoes of permanent members has singled it out for special concern and criticism as a forum for resolving issues of global security.[11] As for its role in deciding when the use of force can be authorized, the Council, despite the general inconsistency of its decisions, has most clearly authorized military

9. 'Reforming the International Law of Humanitarian Intervention,' in Holzgrefe and Keohane, *Humanitarian Intervention*, pp. 158–9.
10. Op. cit., p. 168.
11. C. Joyner, ed. *The United Nations and International Law* (Cambridge, UK, Cambridge University Press, 1997), pp. 115 and 456.

force in situations of national self-defense, such as Iraq's invasion of Kuwait in 1990. It has generally not legitimized the use of force in a more direct humanitarian emergency like Rwanda or Kosovo.

Moreover, the Security Council's frequent political polarization has meant that states interpret its resolutions to support the use of force in questionable humanitarian situations, such as the US did in going to war in Iraq in 2003. The very currency of Washington's arguments in portraying an invasion of a weak state by a strong one as individual or collective self-defense in the Security Council adds potency to the common charge that international law can be manipulated too easily by powerful nations.

The past century achieved remarkable progress in the promulgation, growth and general acceptance of international law. At the same time, it will be remembered for its proliferation of wars and other organized violence on a frighteningly vast level. Outrage about the latter should not detract from the former accomplishment. International law may not have within its statist logic an obvious solution for how to meet concerns about stopping massive humanitarian violence, but it remains the critical terrain for the development of global rules. Given this, I argue that the theoretical tradition of just war provides the potential for injecting arguments useful to focusing arguments about humanitarian intervention without threatening international law itself.

II. Just War Theory and Contemporary Humanitarian Interventions

With its emphasis on the inviolability of sovereign state integrity, international law is generally not predisposed to make clear distinctions concerning when a country or countries might be justified intervening in another country's humanitarian problems. The crucial connection of sovereignty to the international legal order has meant in theory and facilitated in practice that questions of justice usually take a back seat to national self-interest. The just war tradition provides an alternative set of considerations that connect more clearly to the growing international legal and political importance of humanitarian issues. My analysis below builds on two basic points from just war theory, an early understanding of the nature of just cause for war and the interconnectedness of cause, intent, means, and results in justifying war.

Certainly what is just is open to subjective interpretation. Yet this characterizes most broad principles in law. Indeed, at least some emphasis on a humanistic and culturally-contested norm such as justice would appear to be crucial to the task of making judgments about when a humanitarian crisis might call for a military response. In addition to stressing considerations of justice, just war theory takes into account the connection of when a cause for war is just, what means are justifiable, and how the aftermath of the conflict is handled.

Just war theory predates modern international law, but, like it, includes principles and rules that are meant to bind the leaders of societies. Where the two traditions differ markedly is that just war theory was initially conceived as a set of guidelines to constrain the behavior of rulers who shared a moral

framework, while modern international law applies to diverse contemporary nation-states with no assumed common values. The just war tradition was developed by Christian philosophers, and, in a parallel way, by philosophers of Islam, on the assumption that leaders of political entities that could engage in military force would see themselves, to some extent, as constrained by moral considerations of when this use of force was proper.[12] International law replaced just war as the primary normative framework within which broad calculations about interstate conflict are made and legitimized, but nonetheless held on to some ideas from the older tradition.

It is common to place the origins of just war theory with the fifth-century Christian philosopher St. Augustine. Yet, as James Turner Johnson has observed, Augustine's total just-war writings take up a few pages of modern text.[13] The elaborations on the early scholar's work by later theological thinkers such as Aquinas, and more secular jurists like Vitoria and Grotius, actually established guidelines that are now understood as the essence of the just war tradition.

Central to just war theory, and going back to Augustine, is an emphasis on legitimizing a war undertaken by a society's leader if and only if it serves a just cause. For Augustine, war could only be undertaken to attain peace, and just cause in particular meant preventing harm to innocents.[14] This idea from early just war thought, and stemming from religious ethics of charity, that armed conflict should be launched first and foremost to help human beings in need, contrasts with the emphasis of contemporary international law on self-defense as the justifiable cause for war. Indeed, a focus on justifying war in terms of protecting other peoples' lives might actually delegitimize self-defense as a ground for war. On the other hand, making the protection of innocent lives the prime factor in determining the legitimacy of an armed conflict sets up a humanitarian crisis as the typical, rather than unusual, cause for a justifiable war.

Although the original formulation of just war doctrine by Augustine and Aquinas stressed the importance of just cause and articulated just cause in terms of building peace and helping innocents, development of just war thinking after the Middle Ages tended to mute scholars' judgments about cause in favor of respect for sovereign authority.[15] There are a variety of reasons for this, such as the recognition of secular jurists like Grotius that two sides in a war could articulate a claim of just cause, the post-Westphalian development of statist political theory with its emphasis on amoral maximization of self-interest and the growth of the modern

12. See, for example, T. Nardin, "The Comparative Ethics of War and Peace," in T. Nardin, *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, Princeton University Press, 1996), pp. 245–64.
13. http://www.eppc.org/publications/pubID.1596/pub_detail.asp; "Just War and Jihad: Two Views of War: A Conversation with James Turner Johnson and Christopher Hitchens," Ethics and Public Policy Center; date of access October 29, 2004, p. 1.
14. J. Elshtain, *Just War against Terror: The Burden of American Power in a Violent World* (New York, Basic Books, 2003), p. 57.
15. J. Turner, "Just War and Jihad," p. 2.

economy through wars of expansion. In the end, just war theory shifted generally from a morally-grounded calculus that subjects rulers' decisions to make war to limiting questions of justness in war primarily to whether the means used are proportional.

Yet, not only does the just war tradition stress the critical importance of assessing just war, it explicitly links just cause to other aspects of war-making, including the means.[16] Thus, international law's consideration of whether a war's means are justifiable without explicit consideration of a conflict's broader legitimacy is distinct from the general approach of just war theory. The latter includes assessments of six issues: whether a war is being fought for (1) just cause, (2) by a just authority, (3) using just means, (4) with right intention, (5) as a last reasonable resort and (6) with a reasonable hope of success.

A key aspect of this tradition is that these calculations are inter-related. If a society is governed by an unjust authority, or a just ruler's authority is usurped, the justness of a war more generally is unlikely. A cause for war that may seem just will not be considered just if there are reasonable alternatives that might achieve the just cause short of war. Both of these examples of interconnections between aspects of just war theory have potential relevance to the 2003 US war in Iraq.

International law has retained use of some just war terms and themes, but has largely lost this tradition's twin foci on assessing just cause in terms of peace and human need and on interweaving explicitly the calculations about the intent, means, and results of war. Hence, the argument to re-infuse international law with just war considerations is essentially an argument for the relevance of these two foci.

Arguments from the just war tradition have regained influence in recent decades, but mostly from theologians and ethicists. Such arguments have mostly been elaborated in terms of conceptualizing just cause. Yet the slipperiness of arguments about just cause, coupled with the varied causes for which states have gone to war, especially in the twentieth century, have facilitated a trend to limit a just cause to international law's category of wars of self-defense.

Michael Walzer's influential reworking of aspects of the just war tradition provides an elaborate argument that essentially reformulates incursions into a state's sovereignty as the only true just cause for war.[17] While Walzer does not dismiss the possible importance of humanitarian intervention, the basic just cause for war is to resist aggression, which he defines as "the violation of the territorial integrity or political sovereignty of an independent state."[18]

While the justness of fighting against external aggression is easy to understand, limiting the acceptable justifications for war to national

16. C. Coady, "The Ethics of Armed Humanitarian Intervention," *United States Institute of Peace Peaceworks* 45 (2002), p. 19. See also, J. Turner, "Just War and Jihad," p. 3.
17. B. Orend, *Michael Walzer on War and Justice* (Montreal, McGill–Queen's University Press, 2000), p. 88.
18. M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York, Basic Books, 1977), pp. 51–2; the discussion of humanitarian intervention is on pp. 101–8.

self-defense does not comport with contemporary concerns about stopping governments that directly threaten the well-being of their citizens or the citizens of other states. As important as the objective of deterring war is for international law, continuing to privilege national sovereignty as the primary means of serving this objective does not correspond with the clear evolution of global activism and governance towards acknowledging the centrality of humanitarian rights.

Indeed, because human rights standards have been promulgated clearly and have entered international law through treaties and, possibly, custom, they provide a general principle for framing discourse about justifying war that is no less obviously determinate than that of sovereign self-defense. A state or states may justly undertake war when it is the only reasonable means to prevent or stop a clear and imminent mass violation of people's fundamental rights. Of course, this general principle is a modern restatement of the essential characteristic of a legitimate war in the just war tradition.

As with any simply-stated legal or moral criterion, crucial questions of interpretation are posed by an emphasis on rights violations as the major way of framing justifiable war. Of particular salience is the need to resolve what level and type of human rights violations would meet the standard. An obvious case is a situation like the 1994 Rwanda genocide, where a military intervention might have prevented the slaughter of over 400,000 Tutsis.[19] Yet the more constant level of major rights violations combined with the severity of the police state in a context such as Saddam Hussein's Iraq could certainly frame a plausible humanitarian justification for war, whether or not it did so in 1991 or 2003. It is also worth considering whether large-scale violations of people's economic rights within a society could justify a war, even though the history and practice of human rights law has generally emphasized the primacy of civil and political rights.

Moreover, a focus on mass violations may seem to imply that an intervention's justness can be determined quantitatively, based on a particular number of human lives at risk. In asserting that stopping violations of recognized human rights on a large scale is a contemporary way of reframing just cause's traditional emphasis on protecting people and building peace, I do not mean to suggest that this broad principle yields a clear-cut formula or numerical cut-off that can resolve every argument about a potential humanitarian war.[20]

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19. S. Power, "*A Problem from Hell*" *America and the Age of Genocide* (New York, HarperCollins Perennial, 2003), pp. 370–85.
20. I refrain here from defining in detail the simple standard I list, both because I believe that this can and should be worked out by actors in the international legal order in general and specific cases. Indeed, I do not believe that the approach of fusing just war theory and human rights standards in international legal norm-building requires an exact or single standard to be useful or free from excessive manipulability or indeterminacy. Nonetheless, I recognize that deciding the conditions under which intervention is justifiable in just war theory and human rights law is likely to be a contested and political process. My argument is that the codified nature of human rights law and the interconnected planks of just war calculus need not make such a process of international legal specification more malleable or vague than is the current international legal process for discussing the legality of the use of force.

Rather, decisions about when a particular humanitarian crisis might justify intervention are inherently, and should be, resolved in context. My contention here is that a large-scale human rights threat as a justification for war is no more subject to diverse interpretation than self-defense has been. This is both because of the nature of the contemporary global human rights regime and of the interconnectedness of just war theory itself.

Human rights have developed in recent decades into a powerful, even hegemonic[21] discourse precisely because they speak to crucial general issues on which there exists a significant amount of basic global agreement. This agreement means that it is at least arguable that international consensus is possible on the basic parameters of serious rights violations in general terms and specific cases, even if how such violations should be addressed is less clear. For example, a situation where a government sponsors or supports genocide, an international crime subject to a contemporary legal definition, tends to elicit widespread agreement around the need for global action, even though the nature and form of this action is subject to a wide array of political and legal considerations.

General global revulsion for patterns of human rights violations has animated and legitimated the work of human rights NGO's. Such NGO's operate with a plausible claim of neutrality, documenting and advocating policies to respond to human rights problems. This, in turn, provides one crucial resource for judgments about when such problems might demand military solutions. This NGO documentation also allows for the quantification of comparative measures of states' violations of their citizens' human rights, such as those provided by Charles Humana,[22] or, more controversially, Freedom House.[23] In short, human rights violations are arguably more thoroughly and consistently documented by neutral arbiters than are standards for justifying wars of self-defense, suggesting that the world community might be able to agree on frameworks to guide the analysis of when serious violations legitimate humanitarian military intervention in particular cases.

In addition, the interconnected nature of just war theory itself helps with the problem of clarifying when widespread rights violations constitute a just cause. A cause that may seem just can only actually legitimate war when an additional five considerations are satisfied of legitimate authority, right intention, a reasonable hope of success, war as the last resort and just means. Each of these conditions is subject to complex, debatable and fallible processes of deliberation. For this reason, in an approach similar to my own, one recent discussion of just war theory in fact advocates that all of the traditional just war criteria for evaluating a war should be combined into the assessment of when a cause for war is just.[24]

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21. J. Donnelly, *Universal Human Rights in Theory and Practice*, Second Edition (Ithaca, Cornell University Press, 2003), 38–40.
22. C. Humana, *World Human Rights Guide* (Oxford, UK, Oxford University Press, 1992).
23. http://www.freedomhouse.org/research/freeworld/2004/table2004.pdf; date of access July 30, 2004.
24. I. Holliday, "When is a Cause Just?," *Review of International Studies*, 28 (2002), pp. 557–575, at 560–1.

My argument is that the traditional criteria of just war remain useful as mutually-dependent grounds for evaluating when a war is just. When their linkage is stressed, they serve to limit when war is justifiable and increase the priority of wars to stop mass and massive human rights violations. In particular, the criteria of just intention and just means establish standards that are unlikely to be met obviously in cases of a nation's use of humanitarian justifications to legitimate a self-interested or aggressive war. On the other hand, a genuine war of self-defense would probably be considered just, given that massive rights violations are likely to be inflicted by an outside aggressor, and the inter-related conditions would generally be satisfied.

Thus, the interdependence of just war criteria, when married to the concreteness of contemporary human rights treaties, allows this tradition to be more responsive to diverse situations of when force might be appropriate than the accepted standard of sovereign self-defense without being so flexible to justify nearly any war. International law's embrace of self-defense in war has also tended to sideline considerations of just authority, intent and outcome. Indeed, the international legal regime's marginalization of humanistic considerations of justice in war has accompanied the separation of laws of when war can be fought from laws about how it can be waged and from laws about victors' responsibilities in the post-war order. The just war tradition insists that all three of these sets of issues be considered as part of the same legal package. Though this may add complexity to the calculus of when war is legitimate, the seriousness of war itself would seem to demand such revision.

Reinserting just war arguments into contemporary international legal doctrines about war could therefore rearticulate and reify the prospect for law to privilege considerations of justice in interstate conflict, rather than cede this terrain entirely to amoral concerns for state integrity or, even, power. The growth of human rights laws and transnational actors means that just war considerations need not magnify the political nature of international deliberations on war. In fact, I think that just war arguments based on stopping massive human rights violations allow for no less precision than contemporary legal arguments about war that lack explicit linkage to humanitarian law. I illustrate this contention below by comparing the reasoning of international law and of just war theory on the contemporary humanitarian issues of how military intervention might be justified in Rwanda in 1994, Kosovo in 1999 and Iraq in 1991 and 2003.

III. Applying Just War Considerations to Contemporary War: Four Case Studies

An interesting consequence of the interconnected theoretical planks of the just war tradition is that the least problematic cases for waging war arise when states do so for a just cause and use means that are not obviously self-serving. This contrasts with arguments from the influential realist tradition

of international relations that prioritize state self-interest and assume that states will not, and perhaps, should not undertake policies that fail a test of self-interest, usually defined narrowly in terms of the maximization of military power. The just war tradition, at least when it is read other than to limit just cause to self-defense, prioritizes humanitarian intervention as just war, as questions of the justness of cause, authority, intent and means will be easiest to settle when a country goes for war to protect or help others.

Thus, the military intervention that failed to happen in Rwanda and stop the 1994 genocide would be an easy case for a revived just war calculus that connects massive human rights violations with just cause. Had one or several states made the case before it was too late to intervene to stop the genocide, experts familiar with the case believe that such intervention would have both been necessary and sufficient to achieve this purpose.[25] Potential intervening states such as the United States and France had little, if any, expectations of increasing their own economic, geostrategic or military clout by acting to halt mass murder.

Indeed, the lack of American self-interest in Rwanda, narrowly defined, is one of the major reasons that former President Clinton encumbered, rather than facilitated, humanitarian military action in Rwanda. Because of (1) the importance of the cause of stopping the genocidal slaughter, (2) the *prima facie* justness of intent, given the likelihood that military intervention was the only thing that could halt the genocide, and (3) the high probability that a relatively small amount of forces could have done so, a military intervention in Rwanda in 1994 would have satisfied just war criteria in an exemplar manner. Also of note in Rwanda was the subsequent groundswell of frustration that emerged from international lawyers and human rights activists and, arguably, increased the costs to the US and French governments for failing to halt the genocide.[26]

Of course, with hindsight, counterfactuals may be easier to discuss than impending situations of military involvement with a humanitarian component. The US-dominated NATO intervention in Kosovo in 1999 in part arose out of the West's and President Clinton's shame for standing by while Rwanda's genocide occurred. In the years of discussion that followed Rwanda, arguments about state-led intervention to stop massive humanitarian crises became common, and the Serbian efforts to demonize and attack Kosovar Muslims galvanized loud calls for action. The NATO military intervention that resulted and succeeded in halting another potential genocide did not fit squarely within current international law; it was neither sanctioned by the UN Security Council nor did it fit into an obvious category of state self-defense. Was this intervention nonetheless

25. Power, Hell, pp. 382–3.
26. As this article goes to press in the fall of 2006, the ongoing genocide in Darfur and other parts of the southern Sudan fit the Rwanda template well, while the slowness of powerful countries to intervene even after the Rwanda example underscores the need for stronger international legal norms to legitimate a just war along the lines that this article suggests.

legitimate within the just war tradition as concretized by contemporary human rights law?

The answer is not so straightforward as in the case of Rwanda. The justness of the cause was relatively clear; Kosovar Albanians were in genuine danger of genocide, based on patterns of murder, rape and forced displacement similar to earlier ethnic cleansing in other parts of the former Yugoslavia. This danger could be reduced or eliminated through military intervention, and the situation seemed to leave no other reasonable means that could halt the potential for genocide.

Yet both just intent and just means concerns were subject to more ambiguous interpretation than in Rwanda. On the question of intent, the NATO members undoubtedly responded to a humanitarian crisis in which the victims themselves wanted military intervention. Moreover, efforts were made to validate the intervention through the UN Security Council. Finally, the intervention that occurred to stop the Serbian government under Milosovic from the forcible displacement of Kosovar Albanians was genuinely multilateral. In sum, the intervention had at least partially a humanitarian motive and was pursued by a group of states in a way intended to achieve international legal legitimacy.

Despite all of this, the fact that the intervention was carried out by a group of nations with a direct stake in the outcome because of the humanitarian crisis' geographical locus in Europe raises potential concerns about whether NATO military action was needed or proper. Russia, hardly a neutral party itself, voiced such concerns. It is possible that NATO members were also motivated by a perceived need to revive the importance of the multilateral western alliance, although such concerns in themselves have not generally been regarded as delegitimizing the intervention by NGO's.[27]

However, the question of just means is also problematic. NATO's military strategy in Serbia relied heavily on high-level bombing from planes that inflicted greater Serbian casualties than might have been necessary in the express aim of limiting the attackers' exposure to direct combat and the risk of injuries or deaths. This strategy was pursued specifically to limit political opposition to the intervention within NATO countries. The problem of generating support for humanitarian interventions cannot be dismissed easily; yet the idea that intervention with a humanitarian purpose may occur based on failing to prioritize the lives of the population within the target country is very troubling for a just means analysis.

Clearly, more detailed analysis of the relation of just war means to the very possibility of humanitarian intervention in the contemporary world is necessary to better specify how and whether the need to make a case for intervention within a regime that is accountable to popular opinion can mitigate problems of the proportionality of means. Part of the suggestion of this paper is that efforts to change the relative importance of humanitarian

27. See, for example, Human Rights Watch, quoted in D. Steiner and P. Alston, *International Human Rights in Context* (Oxford, UK, Oxford University Press, 2000), pp. 659–60.

intervention as a legitimate grounds for war may themselves affect governments' analysis of the political costs and benefits of such intervention.

In the meantime, the facts that (1) intervention in Kosovo seemed both necessary to stop the humanitarian crisis of Kosovo, (2) that it actually did stop it, saving hundreds of thousands of lives, and (3) that it led to Milosovic's democratic defeat from power in Serbia, are important reasons to assert that NATO's military action was, on balance, just.[28] The utility of just war theory here is that it fosters an analysis on the justifiability of intervention that connects cause, means and results more explicitly than would more traditional criteria of international law, which would most likely consider the intervention unjustified for its failure to meet a clear self-defense standard and achieve explicit Security Council endorsement.[29]

I am not suggesting that international legal debates on Kosovo were simplistic or unproductive. Instead, my point is that thinking about the Kosovo intervention in just war terms refocuses the calculus somewhat away from the form and forum in which NATO justified its actions initially to a more general interconnection of the intervention's methods and its end results. A just war analysis of Kosovo may be open to different interpretations, but its emphasis on protecting civilians and peace would tend to legitimize the intervention more than would a strict reading of international law, with the latter's focus on self-defense.

The same shift towards human rights considerations is provided by just war theory when it is used to analyze two somewhat different military interventions, the American-led wars against Iraq in 1991 and 2003. It may seem strange to consider these wars alongside the cases of Rwanda and Kosovo. However, both American-led military conflicts with Saddam Hussein's Iraq can be illuminated in terms of a focus on humanitarianism coming out of the just war tradition, especially when juxtaposed with an analysis in more conventional international legal terms. I have summarized this consideration and comparison of just war and more conventional international legal criteria related to these two wars in Table 1.

The 1991 American-led coalition that went to war to end Iraq's military occupation of Kuwait enjoyed general approval among most international jurists because it so clearly connected with international law's emphasis on self-defense as the acceptable grounds for the use of force. Iraq evidently violated the sovereignty of Kuwait, the UN Security Council had clear authority to respond to this violation of a member state and its response in Resolution 678 clearly included the possibility of the use of force by member states in the language "all necessary means." Questions of international law were raised by the war, such as the accountability of the US-led forces to the Security Council and the subsequent reparations demands imposed on Iraq.[30] Yet these issues are subsidiary to the basic clarity that a multilateral

28. S. Power, Hell, p. 473.
29. S. Chesterman, "Just War or Just Peace?," pp. 213–17.
30. P. Malanczuk, *Akehursts' Modern Introduction to International Law* (London, Routledge, 1997), pp. 396–7.

Table 1 Just War versus Legalist Frameworks for US Gulf Wars I (1991) and II (2003)

CASE 1: 1991	
Gulf War I: US-led coalition goes to war against Iraq to end Iraqi occupation of Kuwait	
JUST WAR	INTERNATIONAL LEGAL ORDER
(1) Was it a just cause?	(1) Was the war legitimate in international law?
Yes; Kuwait's self-defense (but humanitarian concerns are critical)	Yes; Kuwait's self-defense (UN Charter) (clear, uncontestable principle of int'l. law)
(2) Was authority used justly?	(2) Did the coalition have right to carry out war?
Mostly yes; represented international order	Yes; UN Security Council resolution.
(3) Were means just?	(3) Was the conduct of the war legal?
Yes and no; unclear on proportionality	Yes; US control & actions rationalized as necessary
(4) Was intent just?	(4) Was US acting properly in carrying out war?
Yes and no; US prominence suspect	Generally yes; defense of int'l. law by sole superpower
(5) Was war last resort and likely to succeed?	(5) Was war the right way to resolve this conflict?
Yes. Kuwait was physically occupied by Iraq.	Yes; forceful conclusion to forceful occupation
(6) Was aftermath of war handled justly?	(6) Was aftermath of war handled appropriately?
Most likely not, given harshness of sanctions imposed by victors.	Yes; UN Security Council resolution authorization.
Verdict: Just War (with some doubts)	Verdict: Justified War (no doubts)
CASE 2: 2003	
Gulf War II: US and several allies go to war against Iraq to overthrow government in power	
JUST WAR	INTERNATIONAL LEGAL ORDER
(1) Was it a just cause?	(1) Was the war legitimate in international law?
Most likely not (but could be if mainly about human rights)	Probably not, because not in US self-defense (but assertion of extension of UN actions possible)
(2) Was authority used justly?	(2) Did the coalition have right to carry out war?
No; US acted mostly alone (and domestic authority of Bush a problem)	Probably not, but US argued UN precedent existed.
(3) Were means just? Yes and No; concerns with proportionality	(3) Was the conduct of the war legal? Mostly yes; US actions rationalized as necessary
(4) Was intent just?	(4) Was US acting properly in carrying out war?

No; concerns about true intent of US in war.	Generally not; but self-defense asserted
(5) Was war last resort and likely to succeed?	(5) Was war the right way to resolve this conflict?
No. Other means available; ends unclear.	Probably not.
(6) Was aftermath of war handled justly?	(6) Was aftermath of war handled appropriately?
Unknown, but occupation raises problems.	Unknown, but occupation has raised problems.
Verdict: NOT a Just War	Verdict: Probably NOT justifiable, but debatable

NOTE: For the purposes of the table, questions relevant to the analysis of the justifiability of a given conflict in terms of just war theory are juxtaposed to their nearest equivalents in international legal discourse.

UN-mandated use of force to end the Iraqi occupation of Kuwait had legitimacy in the sovereign-centered paradigm of international law.

A just war analysis of the 1991 conflict would also be likely to lead to the conclusion that the multilateral military removal of Iraqi forces from Kuwait was proper, but just war theory would refocus this conclusion in a more tentative way that takes into account other humanitarian concerns, including subsequent American actions towards Iraq in the aftermath of the war itself. This is because just war theory refocuses arguments away from the self-defense letter of international law towards the broader questions of humanitarian improvement. Kuwait's self-defense thus remains important, but not necessarily the issue that trumps all others, particularly when just cause is reassessed in terms of subsequent effects on the Iraqi people.

In fact, Iraq's articulated rationalization for its invasion of Kuwait, the illegitimacy of Western-imposed national boundaries during colonialism and the severe economic inequalities that resulted, could be assessed and discussed more easily in a just war framework than using international law's tendency for sovereignty to sideline other concerns about global fairness. Given the nature of Saddam Hussein's regime, just war theory would certainly not have legitimized his invasion of Kuwait. Yet the theoretical tradition would at least have allowed discourse on the core questions of fairness that tended to divide many Westerners and Arabs during the Gulf War and its aftermath.

In addition to allowing for arguments regarding the 1991 war other than defending the sovereignty of Kuwait, just war theory adds subtlety to the analysis of the war's legitimacy by insisting that means and results be considered as important and as linked to the calculus of whether the cause was just. The facts that the coalition was dominated by American forces, that these forces, as in Kosovo, used combat strategies that are likely to have caused unnecessary loss of life to Iraqis and that the United States stood to benefit economically by the restoration of Kuwait's government all introduce elements of doubt regarding the justness of the war.

Furthermore, the end result of the war raises special concerns. The reparations and other conditions imposed on Iraq after the war are very problematic and may have been unnecessary for, and even unrelated to, remedying Saddam Hussein's regime's violation of Kuwaiti sovereignty. In fact, there may be a connection between the brutal crackdown of Hussein's forces on a variety of Iraqis after the war and the harshness of the conditions imposed by the victors. If these concerns in the end are unlikely to undermine definitively the justification for the UN-mandated coalition in the 1991 war, they raise important and appropriate questions about specific aspects of the war's legitimacy.

In particular, in raising the importance of connecting the humanitarian aftermath of this war to its initial legitimacy, just war theory encourages an appreciation of the many Westerners and Middle Easterners who voiced deep concerns with the punitive cease-fire terms and economic sanctions on Iraq after 1991. While international law clearly has doctrines that address these issues, the just war tradition is more direct that arguments favoring the war in the first place should not be isolated from problems of human justice which the war produced.

If just war considerations grounded in contemporary humanitarian principles introduce new sources of complexity with respect to 1991, they are more definitive than international law with respect to the second full-scale US-led war against Iraq in 2003. This is true at least for just war analyses that truly consider the interconnection of just cause, authority, means, intent, war as a last resort and likely success.

International legal analyses of the 2003 American invasion to overthrow Saddam Hussein generally cast doubt on the war's legality for much the same reason that they approved of the 1991 war, national sovereignty.[31] If sovereignty is sacrosanct in international law, then the legal standard that Washington must meet to justify overthrowing a sovereign government is very high. Few specialists in international law accept the argument that the United States presented to legalize its invasion, that it acted pre-emptively in self-defense "in the face of the past actions by Iraq and the threat that posed" to the international community.[32] A doctrine that allows a strong military power to overthrow a much weaker government in the name of self-defense and, thereby, to establish a precedent that legitimizes pre-emptive warfare, threatens the general state-centric structure of international law. Furthermore, the lack of an explicit Security Council authorization for the United States to invade Iraq and the much more narrow nature of the invading coalition stand in marked contrast to the 1991 war.

Despite all of this, the ability of American officials and others to assert the legality of the 2003 war is based on either an expanded reading of the needs

31. See, for example, the diverse contributions that are largely critical of the legality of the war in "Agora: Future Implications of the Iraq Conflict,' *American Journal of International Law*, 97 (July 2003), pp. 553–642.
32. W. Taft and T. Buchwald, "Preemption, Iraq and International Law," *American Journal of International Law*, 97 (July 2003), p. 563.

of American self-defense in the aftermath of 9/11[33] or the importance of the Security Council and that international institution's vulnerability to pressure from powerful states. The many Security Council resolutions that addressed Iraqi obligations after its invasion of Kuwait, mostly at Washington's instigation, left behind a paper trail with some international legal force. This has given the minority of international lawyers within or allied with the Bush Administration argumentative ammunition for the 2003 war in the form of Iraq's material breaches in its obligations to the Security Council.[34]

International law encourages a focus on the letter of sovereign-based law, rather than on underlying questions of justice or the power a military and economic hegemon like the US can exercise in pressuring a statist organization like the Security Council. This allows for some uncertainty as to the legality of a war that, in its straining of the idea of self-defense to a situation where a military hegemon overthrows a much weaker government, seems to contradict the very essence of the global legal order.

If international law, or at least some international lawyers, allow for some ambiguity with respect to the legitimacy of the 2003 war, just war theory is more clear. Each of the major planks of just war theory yields doubt about the second American war against Saddam Hussein.

Interestingly enough, the question of just cause is the most open to interpretation. This is because Saddam Hussein's brutality and qualitatively worse record on human rights than that of many other leaders raise the possibility that a war fought against his regime on humanitarian grounds might be justifiable. The problem is that the US did not make a humanitarian argument as its legal legitimation for the war, which would have been a much stronger claim for a just cause than was pre-emption out of concern for Iraq's weapons of mass destruction (WMD).[35] Indeed, the fact that a possibly oxymoronic claim of superpower self-defense seemed a stronger legal argument in Washington than an argument based on sustained mass human rights violations underscores the problem that international law has in its present form with legitimizing humanitarian intervention.

However, the usefulness of just war thinking is that an analysis about the legitimacy of a conflict cannot be separated from the justness of the authority that initiated it, of the means through which it was fought, of the intent of the conflict's instigators, of the genuine necessity of the war and of the likely and actual results. When these categories are considered in tandem, there is little to support the conclusion that the 2003 war was

33. See, for example, C. Greenwood, "International Law and the 'War against Terrorism'", *International Affairs*, 78 (2002), pp. 301–17.
34. See, for example, J. Yoo, "International Law and the War in Iraq," *American Journal of International Law*, 97 (July 2003), p. 575 and N. Rostow, "Determining the Lawfulness of the 2003 Campaign against Iraq," *Israel Yearbook on Human Rights* (2004), pp. 15–33.
35. http://www.fpri.org/enotes/americawar.20021204.johnson.militaryagainsthusseinmoralissues.html; J. Turner, Using Military Force Against the Saddam Hussein Regime: the Moral Issues; date of access October 31, 2004 , p 3 and p. 5.

just. There are, in fact, questions of the authority of the US to start the war, given that it was opposed by most other governments, was not explicitly mandated by the Security Council and was fought almost exclusively by American troops. Indeed, there are even possible questions about the justness of the Bush Administration's authority within the US, between the disposition of the 2000 election and the mistakes or misrepresentations of Washington officials regarding the immediate threat posed by Saddam's regime and its alleged connections with al-Qaeda.

As with all of its recent uses of military force in other countries, the US war in Iraq presents real concerns about whether the means employed were truly designed to minimize casualties, especially civilian casualties, to the other side. Even if, in contrast to what human rights groups reported,[36] one accepts American army claims that targeting was more precise and Iraqi civilians more likely to be spared in this conflict than in previous wars, the violence after the conclusion of the war and the mistreatment of Iraqi prisoners are also sources of inquiry into the justness of the war's means. In a war involving an invasion to overthrow a government where longstanding humanitarian issues exist but do not present themselves with particular urgency, questions of just means become especially critical.

Just intent is even more of a problem. The problem with just intent is not primarily the absence of evidence for the major reason that the Bush Administration gave for the war, the Iraqi regime's WMD program. This is because the failure to find WMD in Iraq after the war would not undermine the justness of the war-planners' intent to wage war based on a reasonable belief of the danger they represented, assuming that this would constitute just cause for the war. Just cause and intent are not negated because of unforeseen or unforeseeable facts after the war.

However, besides the fact that destroying Iraq's WMD program may not obviously satisfy a humanitarian-based standard of just cause, other issues cast doubt on whether the Bush Administration's intent in invading Iraq was truly to accomplish what it claimed. That members of Bush's leadership team had prioritized the overthrow of Saddam Hussein's government before 9/11, used innuendo and distortion in public statements to build support for war in Iraq and stood to benefit or did benefit by the award of lucrative contracts to close political and economic allies once Iraqi reconstruction and oil reserves were placed under American management, all cast significant doubt on the reliability of official statements of the war's intent. Especially when humanitarianism was not the primary stated grounds for a war, just intent would not seem to connect to a war in which the initiator has the clear potential for economic and other gain.

On the question of the just war criterion of last resort, no evidence has yet emerged that war was needed to remove the threat that Iraq's government posed to other societies. In particular, the lack of evidence for a robust WMD program in Iraq after the war suggests that the global pressures on it

36. http://www.hrw.org/press/2003/12/us-iraq-press.htm 'U.S.: Hundreds of Civilian Deaths in Iraq were Preventable,' Human Rights Watch; date of access October 31, 2004.

prior to 2003 sufficed to mitigate Washington's stated reason for its war. While Saddam's overthrow might have been justified on humanitarian grounds as the only way to end his gross violation of Iraqis' basic human rights, there was no particularly urgent salience for this unasserted argument in 2003.

Finally, though it is too early to make a definitive pronouncement on the outcome of the war for Iraqis, the ongoing problems of disorder, violence and political justice do not seem to point towards a case that all of the other problems that the US invasion raises in terms of just war will be overcome or mitigated. Indeed, this is a mild statement in light of the near unanimity of scholarly and military opinion that the war in Iraq was undertaken with far too little planning for the subsequent occupation and the mounting chaos and widespread death to Iraqis and other civilians that have dominated the country's security landscape in the years since the US overthrew Saddam Hussein.

In sum, the interconnected nature of the basic concerns from the just war tradition, when viewed through a contemporary version of the tradition's original emphasis on humanitarianism, raises too many issues to allow a conclusion that the 2003 American-led war in Iraq was just. This is not to say that just war theory cannot or has not been read to support the war.[37] My claim is not that just war theory is less subject to diverse interpretation than international law. Rather, I argue that the fusion of the just war tradition with modern human rights law and a renewed emphasis on the multifaceted, interlinked nature of this tradition allow for arguments about war that are not necessarily any less clear than those of international law.

Moreover, inserting just war reasoning explicitly into international law shifts alleviates the latter's basic problem with humanitarian intervention. International law must either find a way of reading state self-defense in a broad and possibly self-contradictory manner to fit humanitarian interventions into its basic grounds for lawful war, or else create an entirely new category of legal warfare outside of its normal parameters. Analysts such as Simon Chesterman are rightly concerned about the problems of creating an entirely new legal right for humanitarian intervention. However, the just war tradition speaks pretty clearly to reorient legal reasoning about war in the direction of humanitarianism, as opposed to establishing a new category

37. For example, see the second of four perspectives from a roundtable that took place at the United States Institute of Peace prior to the invasion, Robert Royal's argument that trying to contain WMD in Iraq satisfied just war criteria. However, Royal's perspective also took as "axiomatic" that the US would satisfy just war criteria other than just cause, in contrast to my argument of the importance of looking at these criteria specifically and in an interconnected way. The other three perspectives from the roundtable all conclude that war against Iraq would not satisfy just war criteria, using similar arguments to my own. United States Institute of Peace, *Would an Invasion of Iraq Be a "Just War"?* Special Report 98 (January 2003), esp. p. 10. While J. Turner, "Using Military Force" suggests that American arguments in favor of the war might satisfy just cause, his analysis took place before the war, its primary legitimation in the less compelling WMD argument and the concerns about intent, means and success became clearer once the conflict actually took place.

of law. In redirecting the focus of arguments about war in line with the increasing humanitarian content of international law, the just war tradition favors military intervention where it is truly needed to save lives, while casting doubt on warfare that may seem defensive but actually raises major human rights problems.

IV. Conclusion: Towards Containing Violence through Law (and Justice)

Just war theory yielded pride of place to statist international law on definitive arguments about the use of force in the twentieth-century world for a simple reason. Once the original requirement of just authority lost resonance in the just war tradition, its concerns about justice seemed more subject to manipulation by leaders than did legal principles in a post-Westphalian world, in which governments did not necessarily share common values other than sovereign self-preservation. Yet international law has changed to embed through treaties and possibly custom a real claim that human rights are shared moral values that can trump sovereignty.

Moreover, crises like Rwanda have concretized the failure of the logic of statist self-preservation to resolve through law the devastating humanitarian challenges in a contemporary globalized order where non-state militias and other actors are growing in impact. In short, international law may need new sources of norm-building with a moral dimension that erode, rather than enhance, the prime role of state self-interest. I have argued that such sources need not entail significantly increased malleability over current international law when they are linked with principles which are already established in the global legal order. The contemporary codification of human rights law embeds moral arguments about justice that can be married explicitly to legal arguments about war.[38] Instead of creating an elastic right of intervention for states, such a doctrinal shift adds legitimacy and pressure for states to intervene where humanitarian needs are greatest.

Four points are worth elaborating by way of conclusion. First of all, my argument that humanitarian-based just war considerations ought to inform explicitly the contemporary international legal regime on the use of force is meant to reflect a different focus for containing international violence, rather than to expand the overall likelihood that states will go to war. Certainly, since any set of legal or ethical considerations is prone to broad readings, a suggestion to rethink the nature of discourse that justifies war should elicit some caution. Separate arguments using the just war tradition have been made recently that would apply it to tackling a war on hunger[39] and to legitimizing the American "war on terror."[40]

38. For an argument that is consistent with my approach but argues that humanitarian intervention can enter international law on the basis of a moral principle derived from historical ethical discourse, see T. Nardin, "Moral Basis," and especially pp. 58 and 66–70.
39. Holliday, "Cause," pp. 571–2.
40. J. Elshtain, Just War, pp. 59–70.

Nonetheless, the possibility that just war theory can be read in an overly broad way and therefore justify many more conflicts than would international law is problematic mostly when the interconnected nature of the actual tradition is de-emphasized. Just war theory requires not only a just cause, but links between the cause, the relevant authority, the means, the intent, the necessity of armed conflict and the results. Satisfying all of these criteria requires a fairly high standard, and questions of just intent, means and results all cut strongly against the legitimacy of a war of aggression. Just cause itself is open to quite varied interpretations. However, the connection of just war theory to human rights standards that are increasingly accepted and clarified by the international legal order suggests that just cause could actually reflect a loose contemporary consensus on important questions of international justice.

Of course, as is true generally with respect to concretizing the content of contemporary international law, just war as a discourse for making arguments about the use of force will be more salient if non-state institutions exist that can arbitrate credibly when a war is actually justifiable. This is my second concluding point. The ultimate guarantee that just war theory and humanitarian law, taken together, can help shift international legal discourse towards more consistent responses to contemporary crises would be institutional mechanisms entrusted to judge the legitimacy of a war that enjoy a presumption of neutrality.

Such institutions can easily be imagined. Recently-created global courts, such as the tribunals for Rwanda and the former Yugoslavia, and the International Criminal Court, each have elaborate mechanisms to foster fairness. A special advisory or consultative body on the use of force either within or outside of the UN could also be envisioned and designed with some insulation from the influence of powerful states. Given the nature of the just war tradition, such a body might include theologians and humanists from diverse perspectives, as well as jurists, academics and human rights experts.

The establishment of a diverse consultative body with competence to issue advisory opinions on the justness of a war could also serve as an explicit recognition and institutional concretization of the actual influence that diverse NGO's, such as human rights watchdogs, wield in global politics. This, in turn, could address arguments that such NGO's are not accountable to anyone other than their donors. Drawing on humanitarian groups' expertise and claims of freedom from government influence to link them to a broad, autonomous consultative body thus suggests a possible link between just war norms and global institutional reform.

Indeed, non-state institutional mechanisms that attempt to arbitrate when the use of force is legitimate based on just war and humanitarian considerations are not merely hypothetical. Human rights NGO's, which have labored hard to build an image as consistent, reliable and neutral, have themselves begun making arguments about humanitarian intervention. For example, Human Rights Watch's 2004 World Report includes an extended discussion by its Director of just war theory and international human rights

law and concludes that the 2003 US-led war in Iraq would not satisfy the criteria of a humanitarian intervention.[41] Another international lawyer has gone so far as to assert that the Kosovo case created a right of humanitarian intervention that is largely-fleshed out through just war considerations.[42] Just war arguments are common both within and outside of the normative framework of contemporary international law.

Thus, my argument here is merely a more specific theoretical formulation and proposal of marriage for two sets of arguments that some jurists and non-state bodies already believe cohabitate. General and specific arguments from the just war tradition are definitely seeping into international legal discussions of war, and continue to exist in religious and philosophical discourse outside of the realm of law. My point is merely to make this process more explicit through some sort of institutional mechanism that acknowledges and embraces the interconnected inquiry embedded in this humanistic tradition.

The humanism of the just war tradition is important and points to my third concluding point. I have emphasized above the potential danger posed by working more centrally into international law any doctrine that states might read to legitimize wars of aggression. However, by highlighting this potential danger, I do not mean to suggest that there exists any sort of international legal discourse or standard that is so neutral or precise as to eliminate the danger that states will abuse it. The promise of neutrality and fairness of law is a major possible ground to keep moral considerations out of law's domain. However, this promise is compromised by the manipulability of many legal doctrines and the particular ways in which the international order favors powerful states. If international law falls short of being neutral or fair, it is worth pondering the possible advantages for world order of embracing a tradition of legal thinking stemming more from moralism.

I see at least two such advantages. First, as I have stressed above, the interconnectedness of criteria in the just war tradition can lead to more supple considerations of legitimacy in international politics. The humanistic nature of just war theory arguably highlights broad, connective, organic thinking, in contrast to legalism's frequent tendency towards reading and interpreting the particular. One main problem with the Bush Administration's expansive reading of self-defense in Chapter VII of the UN Charter is its tendency to contradict the broad spirit against wars undertaken by powerful states that motivated the UN's very emergence. A more organic way of thinking about warfare and law, such as just war, encourages a focus on the basic moral tissue that links provisions and arguments about global justice.

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41. http://www.hrw.org/wr2k4/3.htm K. Roth, War in Iraq: Not a Humanitarian Intervention; date of access July 30, 2004.
42. G. Robertson, *Crimes against Humanity: The Struggle for Global Justice* (New York, The New Press, 2002), pp. 448–51.

A second advantage that international legal reasoning grounded in a moral tradition such as just war conveys is the prospect of a shift from rules and order to principles and change. A basic impetus of contemporary international law has been, not without reason, jurists' concern that the inequities of interstate power are so apt to create a global Hobbesian state of nature that strict legal rules are needed. One way of describing the success of international law since World War II is that fewer observers of world order would argue than was common several decades ago that legal rules do not constrain nations at least in part.

Yet, if the contemporary international legal order has successfully hampered the unfettered dominion of powerful states, its emphasis on rules and constraint can also shackle imagination. A tradition of reasoning, such as just war, that is connected to humanism emphasizes the importance of moving politics and law towards justice, rather than subordinating a hope for global change to faith in the inevitability of states' and statesmen's selfish instincts. Linking international law to humanistic thinking and concerns highlights the importance of trying to conceptualize and attain an ideal like justice, rather than assuming that the global order at best can mitigate the worst problems of an inevitably unjust world. It is possible to argue that, despite the claims of international relations theory Realists, humanistic reasoning about justice has been, to some extent, embedded in the way leaders argue about war in any case.[43]

One problematic issue that I have left until now is the potentially self-contradictory nature of juxtaposing war and humanistic justice. Can an argument that assumes the importance of reframing, or perhaps even expanding, the grounds on which international law can justify the resort to force against a state really have any connection to realizing justice? One important response to this question is to insist that the emphasis on this essay on military humanitarian intervention should not be construed as a call to use force early or generally in human rights crises. Rather, non-coercive, diplomatic efforts to resolve humanitarian problems ought to be much more consistent, creative and constant. I assume that the resort to war on which I focus is only for situations of impending humanitarian catastrophe, such as the Rwanda genocide.

Nonetheless, I would go further to suggest that a focus on war that uses an organic process of reasoning as its touchstone could indeed foster justice. The international law scholar and activist David Kennedy recently concluded that contemporary humanitarian activism can fail to see its own dark sides, but that these dark sides can be mitigated by self-examination, including explicitly recognizing its own connections to power and recovering the "pleasures and insights of skeptical – rather than instrumental – reason."[44] One of the issues that he discusses is international

43. D. Welch, *Justice and the Genesis of War* (Cambridge, UK, Cambridge University Press, 1993), p. 1.

44. D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, Princeton University Press, 2004), pp. xiv–xx, 236 and 357.

law's turn away from just war theory other than *jus in bello*. Bringing back a humanistic tradition of reason about war that fosters skepticism because of its requirement of constantly examining in tandem ends, means and results could be a step in the direction of making both humanitarianism and the law of war more self-consciously reflexive. Thus, just war theory, even though it could allow for new grounds to authorize force in global politics, might also be part of a move in international law that would facilitate discourse and conditions that might reduce the use of force in the world in the long run.

This very hope raises a fourth concluding point. As the Rwandan case showed, and as the grim reality of the southern Sudan reinforces, states have, in fact, undertaken genuinely humanitarian interventions reluctantly. Should we be less concerned with whether just war considerations would constrain war-making than with why any doctrinal shift would increase the slim prospect for a government to risk its citizens' lives to abate a human rights crisis outside of its borders?

There is no perfect answer to this question. Yet I have suggested earlier that an international legal climate that stresses more centrally a humanitarian mandate may help shift states' estimation of the perceived costs and benefits in favor of intervention.[45] This is more likely to be so should a body emerge to help legitimize and adjudicate international action grounded in just war concerns, as suggested earlier. Giving up on the possibility that an amplified emphasis on humanitarianism in international law will facilitate state and multilateral action consistent with this emphasis is similar to denying more generally that the normative thrust of law influences political outcomes. If international law can embrace humanistic reasoning about justice, the traditional state subjects of the international legal order may find grounds to embrace such reasoning as well. Indeed, just war theory weighs into the current tension within international law between cosmopolitan humanitarianism and amoral statism on the side of providing a clear doctrinal boost for the cosmopolitan side.

The academic and policy debates surrounding humanitarian intervention that arose after the shock of Rwanda in 1994 respond to a single problem. The attempt by the contemporary international legal order to contain massive violence by restricting claims that war is legitimate largely to amoral state self-defense failed. The failure is clear, whether its cause was the enduring primacy of state power over legal norms, the emergence of varied international and local actors that has accompanied globalization or, indeed, the problematic nature of removing explicit considerations of justice and morality from international law. Can contemporary international law do a better job of both containing and contextualizing violence?

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45. For a recent argument with empirical data suggesting that the social construction of norms, including ethical considerations, is important to shaping the use of force for international humanitarian purposes, in a way that amplifies my points in this paragraph, see M. Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Cornell, Cornell University Press, 2003), especially pp. 129–46.

The basic argument developed in this essay is that the international legal order can address humanitarian challenges without scrapping either its norms or its institutions. Instead, the fusion of the ethical tradition of just war theory and the contemporary legalization of human rights norms allows for a distinct set of criteria for addressing the use of force that amplifies the growing trend to pierce the statist, amoral veil of international law. Whether grafting a specific and legalistic reformulation of just war theory onto contemporary international law can provide principles for when states may go to war which favor genuine humanitarian justice over great-power "Infinite Justice" is open to debate. What is clear, however, is that contemporary international law, without rethinking and reform, shows little hope of doing so.

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