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Law, Morality, and Armed
Conflict:
Preventive War and
Humanitarian Intervention

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Summary

In this thesis, I analyze the relationship between law and moral in the field of armed conflict, focusing on two controversial uses of force: preventive war and humanitarian intervention. I find that the legal status of humanitarian intervention is uncertain; it is hard to reconcile with the language of the UN Charter, but a more permissive norm may be developing in customary law. The legal status of preventive war is less disputed—it is simply not permissible under current international law.

The legal regulation stands in stark contrast to the results of my moral analysis, as I reach the conclusion that both preventive war and humanitarian intervention can be justified under certain conditions. Since law should reflect moral values, I argue that the gap between law and moral should be closed. This can be achieved through the development of customary international law. While this process already seems to be underway in the case of humanitarian intervention, the legal future of preventive war is more uncertain.

Sammanfattning

I den här uppsatsen analyserar jag förhållandet mellan lag och moral inom området väpnade konflikter, med fokus på två kontroversiella typer av våld: förebyggande krig och humanitär intervention. Vilken rättslig ställning humanitära interventioner har är oklart – FN-stadgans språk är avvisande men en mer tillåtande norm kan vara på väg att utvecklas i sedvanerätten. Beträffande förebyggande krig är rätten dock tydlig – det är helt enkelt inte tillåtet enligt gällande regler.

Den juridiska regleringen står i skarp kontrast till resultaten från min moraliska analys, då jag finner att både förebyggande krig och humanitär intervention kan vara rättfärdiga under vissa förhållanden. Eftersom lagen bör återspegla moraliska värderingar hävdar jag att klyftan mellan rätt och moral bör reduceras. Detta kan ske genom en fortsatt utveckling av sedvanerätten. När det gäller humanitär intervention verkar denna process redan vara igång medan den rättsliga framtiden för förebyggande krig ter sig mer osäker.

Abbreviations

GA	General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
NATO	North Atlantic Treaty Organization
SC	Security Council
UN	United Nations
US	United States
WMD	Weapons of Mass Destruction

1 Introduction

In the wake of a series of events taking place at the turn of the millennium—the NATO bombings in Kosovo, the US retaliation after the 9/11 attacks, and the Iraq war—the *Just War* doctrine has been revived. The morality and legality of these and other military operations have been debated vividly. Since the end of World War II, the legally permissible use of force in international conflicts is heavily restricted by the general prohibition in the UN Charter. Could it be that the strong legal restriction on the use of force suffers from a normative deficit in that it excludes situations where the use of force might be morally justified? Or does such a proposition erode the general prohibition on the use of force and spur further conflict? In this thesis I attempt to shed some light on these issues by linking law and moral in the field of armed conflict.

1.1 Purpose of the Study

The purpose of this study is to examine the legal regulation on the use of force in international relations from a moral perspective. Is there a gap between law and moral in this area? In other words, does the positive law reflect moral values? If not, what should be done about it? More specifically, the study focuses on the cases of preventive war and humanitarian intervention. The focus on these uses of force is motivated by the controversy surrounding them and their relevance for the international community.

1.2 Disposition

Chapter 2 deals with the current legal regulation on the use of force in international law. It focuses on the UN Charter and presents the main components of the legal framework surrounding the international use of force. Chapter 3 contains an introduction to philosophical reasoning on warfare, that is, just war theory. The origins and major components of the theory are outlined and the link to international law scrutinized. Chapter 4 and 5 deal with the moral justification of the use of force in two specific settings: in response to the threat of a future attack (preventive war) and as a response to grave violations of human rights (humanitarian intervention). In the final chapter I comment on the implications of my findings.

1.3 Research Design

The aim of this thesis is to evaluate the legal rules on the use of force from a moral perspective. In order to do so, both the legal and moral dimension of the use of force must be analyzed. Given the magnitude of these tasks and the limited scope of this study, the legal dimension is dealt with somewhat harshly in order to give room for the main part of the thesis, namely the

moral analysis of preventive war and humanitarian intervention. Consequently, the section on international law is conducted mainly by the application of secondary sources. Of course, the key articles of the UN Charter are reviewed, as well as relevant cases from the ICJ, but rather than conducting my own legal analysis, I rely on renowned scholars to identify the main features of the law, including contested areas.

In the moral analysis I review presented arguments in order to reach a position on the morality of preventive war and humanitarian intervention. I have tried to approach the arguments in an open-minded fashion, without the prejudice of a predetermined agenda. Nonetheless, complete objectivity is a utopia and this is especially important to acknowledge in the politicized field of international law.

2 International Law and the Use of Force

What is international law? Philosophers and lawyers have not fully agreed on a precise answer, but they largely agree that its modern origins lie in the rise of the nation-state and the monopolization of force in the sixteenth and seventeenth centuries. Together with the emergence of states, the increased destructiveness of war contributed to the development of modern international law through the creation of a perceived need to mitigate war's horrors. The initial concern was not to do away with war, it was rather to civilize it and bring it into line with humanitarian ideals. This resulted in efforts to formulate so called "laws of war".¹

Although there is a "world court" (ICJ), there is no world legislature that enacts legislation and sets penalties for its violation. International law thus has other origins. Exactly what these are is a matter of disagreement among scholars, but traditionally three sources stand out: natural law, custom, and convention. Natural law contains the criteria for judging moral rightness and wrongness and it provides a natural standard by which to judge human, or "positive" law, as well as the conduct of peoples who may not be bound together by positive laws. Custom, or customary law, is derived from the practices of states and represents a kind of international common law. Obviously, the practice of states may not always be right from a moral standpoint, which means that customary law and natural law may sometimes diverge. Conventional law refers to the enactments by treaty and convention.²

Today, it is widely recognized that customs and conventions are the two most commonly applied sources, although the reference to "the general principles of law" in article 38 of the ICJ Statute has by some jurists been interpreted as the incorporation of natural law into the corpus of international law. This was most likely not the intended purpose, given that states are reluctant to give away any power to "create" law.³ However, appeals to natural law have occasionally been applied in moral arguments on what the law should be. Examples include the Nuremberg trials and the contemporary debate on humanitarian intervention (which will be developed later on).

2.1 The Law before the UN Charter

Prior to the enactment of the UN Charter in 1945, there was a web of customary and treaty law which regulated the use of force by states. To what extent the pre-Charter rules still affect current international law is difficult to determine. Even though the enactment of the Charter has been interpreted

¹ Holmes 1992: 202f.

² *Ibid.*

³ Dixon 2007: 40.

by some as an attempt to establish a completely new order, awareness of pre-Charter law is necessary to understand the current law properly.

In the early days of international law, there were no legal restrictions on when states could resort to war. Instead, moral concerns stipulated by the *Just War doctrine* (which is the topic of the subsequent chapter) set up the framework for when war was legitimate. This meant that the decision to go to war was left at the discretion of the individual states. Consequently, it was not necessary to establish “rights” to use force for particular purposes since there was no general prohibition to which these “rights” could be an exception. It was not until the beginning of the twentieth century that the use of force by states was legally restricted. The Covenant of the League of Nations in 1919 limited the sovereign right to resort to war by introducing a set of procedural safeguards, but if these were followed a state remained entitled to achieve its objectives through war. In 1928, however, a serious attempt to outlaw war completely was made when the General Treaty for the Renunciation of War, also known as the Kellogg-Briand Pact, was enacted. In article I of the treaty, the parties “condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relationship with one another”. Parallel to this development, though, states had begun to classify the use of force by reference to the purpose it was intended to achieve, and more importantly, to claim that force used for certain purposes did not amount to a “state of war”. This meant that although there was a ban on war, there was no general prohibition on the use of force as such. In customary law, self-defense had emerged as an exception to any prohibition on the use of force and reprisals, rescue of nationals, and humanitarian intervention were seen as legitimate uses of “force short of war” or, alternatively, as legitimate exceptions to the general ban itself.⁴

2.2 The UN Charter Era

To ensure that the unimaginable destruction of World War II never would reoccur, the Framers of the UN Charter sought to put a definite end to the possibility for individual states to use force aggressively. Consequently, article 2(4) of the Charter states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This is one of the central obligations of the Charter and it stipulates a general prohibition on the use of force. The article has been reaffirmed many times, both in General Assembly resolutions⁵ and ICJ case law⁶. The

⁴ Dixon 2007: 310-312.

⁵ GA res. 2131 (XX), 1965; GA res. 2625 (XXV), 1970; GA res. 3314 (XXIX), 1974; GA res. 42/22, 18 November 1987.

⁶ Palestinian Wall Advisory Opinion, 2004 ICJ 136 para. 87.

prohibition also exists in customary law, as the ICJ made clear in the *Nicaragua case*.⁷

While there is no doubt that all states recognize and accept the fundamental importance of the ban on resort to force, there is far less consensus on the precise scope of the ban and the exception of self-defense in article 51 of the Charter. Slightly simplified, the debate on the extent of the ban on force is between “permissive” and “restrictive” interpretations of the relevant principles. Those in favor of the permissive position take the general view that the Charter did not alter the direction of international law and, therefore, the pre-1945 rules, where the restriction on force was weaker, are still valid. Supporters of the restrictive position take the view that the Charter fundamentally changed international law in the sense that article 2(4) laid down a total ban on the unilateral use of force and that any exceptions to this must be explicitly expressed in the Charter. In practice this means that unilateral force may only be used in self-defense.⁸

Obviously, both the restrictive and the permissive positions rely on policy considerations and value judgments in order to support their interpretations of the law. From a permissive standpoint it is argued that a total ban on the use of force limits a state’s ability to protect itself against the illegal conduct of other states and groups of individuals. In an international society where there is no police force or machinery for vindication of rights illegally denied, this is particularly foolish. A perfect example would be the Serbian/Kosovan crisis in 1998/9 where the lack of actions from the United Nations symbolized the failure of collective responsibility. On the other hand, it can also be argued that the harm caused on the international society by an outbreak of war almost always outweighs the “evil” the war was intended to counter. This is of course what those representing the restrictive position would argue. Additionally, they claim that permissive rules favor powerful states and encourage abuse.⁹

This short summary clearly indicates the close connection between policy and law imbedded in the rules on the use of force. Consequently, it is often hard to determine the exact meaning of the law. In the following subsections, I merely seek to present, roughly, in what situations the use of force might be permissible. In section 2.4 I then address areas of particular interest.

2.2.1 Article 2(4)

Article 2(4) of the UN Charter was clearly intended to outlaw war in its classic sense, that is, the use of military force to conquest territory from another state. But what other employment of force does the article ban? First of all, let us examine the meaning of “force”. Does this term include other types of coercion than merely physical (such as economic, political and psychological)? This has been argued by several governments (mainly in the

⁷ *Nicaragua v. United States*, 1986 ICJ 14.

⁸ Dixon 2007: 312f.

⁹ *Ibid.*: 313.

Third World), but it has been rejected by others (mainly in the West) and the use of force is normally interpreted as the use of *armed* force.¹⁰

Even limited to the use of armed force, a number of interpretation issues remain. The over-arching problem is of course the separation between lawful and unlawful usage of force. The mere fact that article 2(4) includes qualifying language to specify what kind of force it seeks to outlaw (that is force directed “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”), implies that there are situations where the use of force might be lawful even without authorization from the Security Council in a non self-defense setting. To what extent this language qualify the prohibition of the usage of force is however hard to determine simply by looking at the text of the article.¹¹ But the *travaux préparatoires* of the Charter indicate that the intention was not to weaken the obligation not to use force, but to strengthen it, and there are few cases where states have relied on the permissive view of article 2(4) to justify their course of action.¹²

In the selection of the language “use of force”, the framers of the UN Charter deliberately sought to avoid the disputed concepts of war and aggression. The reasoning behind this choice was to not leave out hostilities where the state of war had not been declared and to eschew the problem of defining of aggression, as well as the corollary dilemma of having to determine the aggressor of any given dispute.¹³ The concept of aggression has nonetheless had great importance in several of the issues related to the use of force, for instance in the determination of which party in a dispute who had the legal right of self-defense. It has been widely debated among scholars and in 1974 the United Nations General Assembly made an attempt to define aggression in a resolution. Its first article states that “aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other matter inconsistent with the Charter of the United Nations, as set out in this Definition”. Article 2 clarifies that “the first use of force by a State in Contravention of the Charter shall constitute *prima facie* evidence of an act of aggression” and article lists example of acts that qualify as aggression.¹⁴ The General Assembly definition is thus a “mixed” one, including both a general formula and a specific list of examples of aggression; definitions that only include one of the two components have also been suggested, as well as more holistic approaches where the full context of the conflict is taken into account.¹⁵

The prevailing view among the majority of states and most international lawyers is “that any coercive incursion of armed troops into a foreign State without its consent impairs that State’s territorial integrity, and any use of force to coerce a State to adopt a particular policy or action must be

¹⁰ Schachter 1991: 110-113.

¹¹ *Ibid.*

¹² Dixon 2007: 314.

¹³ Damrosch et al. 2009: 1149.

¹⁴ GA Res. 3314 (XXIX), 1974.

¹⁵ McDougal & Feliciano 1961; Moore 1974.

considered as an impairment of that State's political independence".¹⁶ This view was also taken by the ICJ in the *Corfu Channel case*. The court did not accept the defense presented by the United Kingdom, in which it claimed that the removal of mines located in Albanian territorial waters was a legal form of self-help. Instead it stated that "between independent states, respect for territorial sovereignty is an essential foundation of international relations".¹⁷

With regards to indirect use of force, understood as support to rebels involved in a civil conflict, the supporting state is responsible if it "effectively controls" the rebels. This standard was established by the ICJ in the *Nicaragua case*, where the support of the United States to the Contras guerilla was considered to be in violation of the territorial integrity of Nicaragua.¹⁸ The court upheld this conclusion in the *Bosnian Genocide case*,¹⁹ after it had considered a lower standard applied by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case *Prosecutor v. Tadic*.²⁰

In addition to prohibiting the use of force, article 2(4) of the UN Charter also outlaws the threat of force. This clearly covers the explicit threat to use military force to coerce a state to make concessions. The more complex situation is when the threat is not pronounced but might be inferred by subtle references to the preponderance of military strength made by a powerful state in relation to a weaker. To reach an affirmative conclusion, the particular circumstance of the specific case must be considered, but it seems clear that article 2(4) is applicable.²¹

2.2.2 Self-defense

The self-defense exception in article 51 of the UN Charter is the other major component of the framework that governs the international use of force. Although the general right of self-defense is widely recognized, the more specific meaning of this right is highly contested. This means that the law on the right to self-defense is bound to contain a certain degree of uncertainty. One of the most controversial issues is the scope of self-defense, that is, in what situations a state is justified to apply the use of force as a defensive measure. Traditionally the UN bodies have been reluctant to expand the right of self-defense to anything beyond the archetypical case of an armed attack on the territory or instrumentality of a state. The main argument from this position is that if the right of self-defense were to be expanded, the room for unilateral recourse to force would increase. However, it has been argued by international lawyers that a more liberal interpretation of the self-defense right is necessary to compensate for the

¹⁶ Schachter 1991: 113.

¹⁷ The Corfu Cannal Case (Merits), 1949: 35.

¹⁸ Nicaragua v. United States, 1986 ICJ 14.

¹⁹ Bosnia-Herzegovina v. Serbia, 2007 ICJ 191.

²⁰ ICTY Case No IT-94-1-A, 38 ILM 1518, Judgment on Appeal from Conviction, 1999.

²¹ Schachter 1991: 111.

lack of collective remedies against illegal force.²² The debate on some of the forms of self-defense will be reviewed later on in this chapter, but let us first look at some general considerations with regards to self-defense.

Two general restrictions on how the use of force in self-defense may be applied are prescribed by the principles of *necessity* and *proportionality*. These principles were formulated by US Secretary of State Daniel Webster in the *Caroline case* and require that the amount of force is reasonable and applied only in situations where no other course of action is possible.²³ In modern time, tribunals have referred to these principles in several cases, for instance when the ICJ rejected the construction of an Israeli wall in the occupied Palestinian territories. The court was “not convinced” that the wall was “the only means” to safeguard Israel.²⁴ In the *Oil Platform Case*,²⁵ the ICJ found that the US actions were neither necessary nor proportional under the circumstances and in the *Armed Activities on the Territory of Congo case*, the Court noted that: “the taking of airports and towns many hundreds of kilometers from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end”.²⁶

Another question is what amount of force that must be applied to justify an act of self-defense. The threshold in article 51 is “armed attack”, or in the language of the equally valid French version of the Charter “armed aggression” (*agression armée*). In the *Nicaragua case*, the ICJ did not consider Nicaragua’s conduct in providing arms to opposition forces in El Salvador to be sufficient (although one of the dissenting judges interpreted the evidence differently).²⁷

2.2.3 Collective Use of Force

Collective use of force can either be authorized by the Security Council in accordance with the provisions of chapter VII of the UN Charter or by a regional organization in accordance with the provisions of chapter VIII of the Charter. In this section I will focus on the collective use of force authorized by the Security Council.

To ensure peace and security, the UN Charter entrusted executive authority to the Security Council and its five permanent members, whose unanimity is required for non-procedural decisions. The Cold War split the former allies into opposing ideological blocks, which to a great extent paralyzed the Security Council. Not only did this incapacitation run contrary to the idea of the UN, it also shattered the creation of a permanent military force which was envisaged in articles 43-47 of the Charter. It was not until

²² Schachter 1991: 141f.

²³ Dixon 2007: 315.

²⁴ Palestinian Wall Advisory Opinion, 2004 ICJ 136 para. 140.

²⁵ Iran v. United States, 2003 ICJ 161.

²⁶ Democratic Republic of the Congo v. Uganda, 2005 ICJ 168 para. 147.

²⁷ Nicaragua v. United States, 1986 ICJ 14 and the dissenting opinion of judge Schwebel.

the Cold War ended that the Security Council started to function in a way more in line with the original intentions of the Charter.²⁸

The two major settings in which the Security Council has authorized the use of collective force in response to a threat to the international peace and security are the Korean War that began in 1950 and the Persian Gulf War of 1990-1991. However, the authorization of the use of force in the Korean War was only made possible since the Soviet Union was not represented at the Security Council at the time (it had left its seat in a protest to Chinese representation of Taiwan). The Gulf War, on the other hand, took place after the end of the Cold War and the Iraqi invasion was unanimously condemned by the Council who, after having urged Iraq to end its hostilities, authorized the use of force to “restore international peace and security in the area”.²⁹

The Security Council has, starting in the 1990s, broaden the Charter’s original understanding of “international” peace to a conception of “threats to peace”, embracing also certain internal conflicts. For instance, it has authorized the use of force for humanitarian causes in certain settings, thus conferring legitimacy and legality that perhaps would have been lacking had the intervention been unilateral.³⁰ An example of such an intervention was the operation in Somalia, authorized by the Security Council in 1992.³¹ In this case Somalia was considered a failed state without an effective government who could give consent to the intervention, and consequently the authorization of the intervention was fairly uncontroversial.³² Would the authorization have been inconsistent with the constraint on intervention into domestic matters in article 2(7) of the Charter if there would have been a stable government in place, actively objecting? No, since the article states that the non-intervention principle “shall not prejudice the application of enforcement measures under Chapter VII”. In another and more controversial case, the Security Council authorized the use of force to reinstall a democratically elected president and government on Haiti.³³ The intervention was requested by the ousted government, which gave the Council some comfort that the operation was not an intrusion into the sovereignty of Haiti.³⁴

2.2.4 Other Legitimate Uses of Force

Article 51 of the UN Charter not only preserves the right for individual self-defense, but also a right for states to collectively defend themselves. This means that whenever individual self-defense is lawful—and that of course depends on how one interprets the law—so is *collective self-defense*, understood as the use of force in self-defense by two or more states. But who of the defenders must have been attacked to make collective self-

²⁸ Damrosch et al. 2009: 1224.

²⁹ SC res. 678, 1990.

³⁰ Damrosch et al. 2009: 1224.

³¹ SC res. 794, 1992.

³² Damrosch et al. 2009: 1254.

³³ *Ibid.*: 1259f.

³⁴ Lepar 2002: 182f.

defense an option, only one of the states or all of them? In the *Nicaragua case*, the majority of the judges took the view that only one state must be attacked although they also suggested that the state under attack must “request” assistance before any action by other states can be lawful. This condition is intended to limit the possibility for a third party to take military action solely because it thinks collective self-defense is justified, but the requirement is not mentioned in article 51. Moreover, when Iraq invaded Kuwait in the beginning of the 1990s, the Western Powers that responded to this attack also appear to have acted according to this general view of collective self-defense. However, in a dissenting opinion in the *Nicaragua case*, judge Jennings argued that no substantial evidence of a right of collective defense can be found in customary law. Accordingly, collective self-defense would just be the joint exercise of individual rights and therefore all states taking part in the defensive action must be able to claim self-defense in their own right. This narrow view of collective self-defense may however be linked with judge Jennings’ opinion that individual self-defense is not limited to the “armed attack” situation. Consequently, when one state is attacked, others may be threatened and according to the more permissive view on self-defense supported by Jennings, this might be sufficient to give them an independent right to defend themselves. Nonetheless, it seems as if the opinion supported by most, is that collective self-defense is the response of several states upon an actual attack on one of them, possibly with the additional criterion that a formal request for assistance must be made by the victim state.³⁵

The use of force is also permissible in another state’s territory upon a request from that state. The reason why that type of force is permitted under international law is because it occurs with the consent of the territorial sovereign. Of course, the purpose of the force may not in itself be unlawful (e.g. genocide). A potentially complicating matter is whether consent actually has been given and if so, if it has been given by the proper authority. Other problems arise in the case of a civil war, which is perfectly lawful under international law. Since interference in the domestic affairs is prohibited by the general principle of non-intervention, a foreign state may not assist one side in the conflict with military aid. This makes the question of when an internal conflict amounts to civil war crucial, which can be very difficult to determine. The answer has probably to be found in the circumstances of the individual case, and in this fact-finding process international agencies, such as the UN, play an important role. Needless to say, this gives those states interested in intervening plenty of room to act.³⁶

2.3 Contested Issues

2.3.1 Anticipatory Use of Force

One highly controversial question in the debate on self-defense is whether it may be permissible in the anticipation of an attack. By just reading the text

³⁵ Dixon 318f.

³⁶ *Ibid.*: 319f.

of article 51, it appears clear that self-defense is limited to the case when an armed attack *has* occurred. However, it has been argued that the article did not limit the existing right of self-defense in customary law. This right, defined in the Caroline case, makes it lawful to use force in response to an *imminent* threat where no other measures are possible. Given that a state facing an imminent attack cannot be expected to just remain inactive and await an incoming attack, it makes sense to allow some form of anticipatory defense.³⁷ At the same time the dangers in doing so are obvious and require a careful consideration of what situations to include. Prominent legal scholars have dwelled upon this matter but no consensus has been reached.³⁸ A distinction between “interceptive” and anticipatory” self-defense has been suggested to clarify the scope of legitimate self-defense. Interceptive self-defense, which would be permissible, “takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way”.³⁹ This division highlights the need to limit the possibility of anticipatory self-defense but also creates new terms which must be interpreted. It is thus highly doubtful whether anticipatory use of force is permissible under international law and if it is, it is limited to cases where the threat is imminent and the only way to avert it is the use of force.

Was the initiation of the ongoing war in Iraq an act of self-defense? The legality of the actions taken by “The Coalition of the Willing” has generally been disputed, although there are those who argue that the operation was (and is) lawful.⁴⁰ The full range of arguments presented in this debate will not be scrutinized here, but one peculiar aspect of it deserves some attention. The Security Council Resolution 1441 and the previous resolutions 660, 678, and 687 were interpreted quite differently by those supporting the legality of the war and those who did not. Some claimed that the 1441 resolution “reactivated” the authorization to use force which had been made in the 678 resolution more than a decade earlier,⁴¹ while others rejected this argument firmly.⁴²

2.3.2 Humanitarian Interventions

The legality of humanitarian interventions, understood as the use of force by one state to protect persons within another state from massive atrocities such as genocide, has been debated for decades. Its lawfulness in the UN Charter era has been widely disputed; it is difficult to reconcile with the language of article 2(4) and there has been no evident indications that state practice or *opinio juris* have established the existence of a customary law right to humanitarian intervention in the post-World War II period. This position has for instance been taken by Professor Ian Brownlie. He has argued that the complexity of the moral issues involved makes the legalization of

³⁷ Schachter 1984.

³⁸ Jessup 1948: 166f., Friedmann 1964: 259f., Henkin 1979: 143ff., Gardner 1991: 51f.

³⁹ Dinstein 2005: 190.

⁴⁰ Damrosch & Oxman 2003.

⁴¹ Taft & Buchwald 2003.

⁴² Damrosch & Oxman 2003.

humanitarian intervention hazardous, as it would create room for harmful abuses.⁴³

Following the developments at the end of the twentieth century, new attention was brought to the humanitarian intervention controversy. The tragic massacre in Rwanda and the brutal ethnic conflict in the former Yugoslavia, among other savagery episodes around the globe, combined with an increased awareness of these atrocities through expanding media coverage, highlighted the need to stop the slaughter of innocent people. Although far from everyone now agrees that international law recognizes, or even should recognize, a right to intervene on humanitarian grounds, this argument has been made by political leaders and international lawyers on a broader basis than previously.⁴⁴ Even within the UN, where skepticism towards humanitarian interventions traditionally has been the prevailing norm, a slightly more liberal view seems to be evolving, as it now recognizes some multilateral responsibility to protect populations from genocide and other atrocities.⁴⁵

Those who support the legitimacy of humanitarian intervention have tried to establish a list of criteria that need to be fulfilled in order for an intervention to be lawful, agreeing that an exception to the prohibition on the use of force has to be very limited. Though these criteria differ in their specifics, most include some or all of the following conditions: The violation of human rights must be extremely grave, e.g. genocide or other atrocities on mass scale; there must be no other means to resolve the violation; the intervention should be supported (or at least not actively opposed) by those who are supposed to benefit from it; the intervention should be conducted in compliance with the law of war and with as limited use of force as possible; the intervention should be expected to cause less harm to the target state than what would be the case in the absence of the intervention; the interveners should withdraw once the objective of terminating the violations has been reached.⁴⁶

The Kosovo intervention, launched by NATO in the spring of 1999, is a controversial case of an episode where the right to humanitarian intervention was used as an argument to legitimize the use of force. In 1998, thousands of Kosovo Albanians had been driven from their homes in an “ethnic cleansing” campaign orchestrated by the Serbs.⁴⁷ The Security Council condemned this “excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army”,⁴⁸ but it did not formally authorize the intervention. Following a failed attempt to negotiate a solution to the conflict in January 1999, NATO leaders, determined not to allow a replay of the tragic events in Bosnia-Herzegovina, initiated a bombing campaign against Serbia on March 24.⁴⁹ Immediately after the attack had been commenced, Russia introduced a Security Council resolution to condemn

⁴³ Brownlie 1974.

⁴⁴ Damrosch et al. 2009: 1201.

⁴⁵ GA res. A/60/1, 2005.

⁴⁶ Damrosch et al. 2009: 1204.

⁴⁷ *Ibid.*: 1206.

⁴⁸ SC res. 1199, 1998.

⁴⁹ Damrosch et al. 2009: 1207.

the NATO action as a “flagrant violation” of the UN Charter. Unsurprisingly, the resolution was defeated, with only three votes in favor (China, Namibia, and Russia).⁵⁰

The legality of the intervention and its potential importance as a precedent for the legal development of the use of force on a humanitarian ground has for obvious reasons been widely debated. An independent commission conducted a comprehensive analysis of the situation and reached the conclusion that the intervention was illegal but legitimate. The commission argued that the right of humanitarian intervention was not consistent with the text of the UN Charter but that it reflected the spirit of the Charter since that would include the overall protection of people against grave abuse. To close this gap between legality and legitimacy the commission proposed that a framework of principles guiding the application of humanitarian interventions should be elaborated and incorporated into the UN Charter.⁵¹ Although there is no accepted right of humanitarian intervention in international law at present, it seems as if there might be a norm change underway, forming an exception to article 2(4) in customary law.

⁵⁰ UN doc. S/PV.3989, 1999.

⁵¹ Independent International Commission on Kosovo 2000.

3 Just War Theory

War has been thought about for thousands of years in a wide range of cultures spread around the world. So when we are facing the dilemmas of war in our time, we are not doing so for the first time without guidance.⁵² This chapter outlines the fundamental ideas of the just war tradition and its interplay with international law.

3.1 The Just War Criteria

Throughout history, the just war tradition has developed as a result of contributions from both secular and religious sources. The first just war theorists were theologians and canon lawyers who started to develop a theory based on Christian thinking and philosophical reasoning. In the modern period, however, the just war tradition has also been influenced by secular law, both domestic and international, as well as from experiences of war and practices of statecraft.⁵³

In a broad sense of the conception, the purpose of the just war tradition is to provide guidance for human behavior on different levels and in different situations. It provides a theory for statecraft on how to determine when the use of force is justified and when it is not, it guides military commanders in their decision-making on the battlefield, and it offers moral guidance when individuals are to consider the question of participation in the use of force and the degree of such participation.⁵⁴

The just war tradition can be divided into two major categories, focusing on two different questions: when it is justified to go to war (what in the just war tradition is called the *ad bellum* question) and how war is fought justly (the *in bello* question). The *ad bellum* question has historically been answered by applying a range of criteria that need to be fulfilled in order for a war to be justified: a war must have a *just cause*, be waged by *proper authority* and with *right intention*, be undertaken only if there is a *reasonable hope of success* and if the total good outweighs the total evil (overall *proportionality*), be a *last resort*, and be waged for *the end of peace*.⁵⁵ In this section I briefly describe the meaning of these criteria, and later on I analyze their connection to contemporary positive international law.

The *just cause* requirement means that the use of force is only justified for the protection and preservation of values. In the classical interpretation, this made the use of force possible in one or more of the following three situations: to defend the innocent against armed attack, to retake something wrongly taken, or to punish evil. The *proper authority* requirement limits the right to authorize force to sovereign political entities, that is, those with no superior. This requirement was developed to restrict the resort to force by

⁵² Sorabji 2006.

⁵³ Johnson 1999: 24.

⁵⁴ *Ibid.*: 25-27.

⁵⁵ *Ibid.*: 27.

denying it to local strongmen and armed individuals. *Right intention* in the just war tradition means that the intent must be in accord with the just cause and not value extension, such as territorial aggrandizement or coercion. This criterion was initially intended to keep individual soldiers from fighting with wrong intentions but was later, through the work of Thomas Aquinas, linked to the purposes of the sovereign authority responsible for the war. This line of reasoning has been applied also in contemporary thinking, where the criterion of right intention is closely related to the idea of *the end of peace*, which refers not to the individual soldier but to the purpose of the state employing military force. The remaining three criteria, *reasonable hope of success*, *overall proportionality*, and *last resort* are, for just war tradition in its classical form, all prudential tests to be applied as additional checks when the above mentioned requirements have been met. They are all derived historically from Roman practice and refer to political prudence at any time in any culture.⁵⁶

The *in bello* question circles around two criteria: discrimination and proportionality. This means that intentional harm of noncombatants and needless destruction must be avoided. The *jus in bello* concerns have historically and thematically been given a secondary role in relation to the *ad bellum* criteria since the question of how to fight a war justly is secondary to the question of how to justify fighting the war in the first place.⁵⁷ It should be mentioned, however, that the relationship between the *in bello* and *ad bellum* concerns is complex and that they cannot be completely separated. For instance, it could be argued that for a war to be justified, the means necessary to wage it must also be justified. Even though this study is mainly concerned with *ad bellum* questions, I do for this reason no strict distinction between the two branches of the just war tradition.

3.2 Can War Ever Be justified?

Just war theorists have been criticized for simply assuming that war can be justified.⁵⁸ War is clearly a terrible thing; it kills, limbs and traumatizes innocent people and the wounds it inflict on the affected societies can take generations to heal. The pacifist solution to this is the rejection of all reliance on armed force. This position offers several valuable insights, such as a strong general presumption against the use of force, but it also has weaknesses. Firstly, how, without violence, can one respond to violence? If a country lays down arms it becomes vulnerable to both internal and external threats from those who do not share the commitment to abstain from violence. Secondly, how do pacifist thinking account for contemporary issues such as the need to deter certain uses of force and the potential of strategic coercion to ensure observance of international norms? For these and other reasons, pacifism has remained a minority position in most countries.⁵⁹

⁵⁶ Johnson 1999: 34.

⁵⁷ *Ibid.*: 36.

⁵⁸ Holmes 1992.

⁵⁹ Roberts 2008: 22.

3.3 Just War Theory and International Law

As mentioned in the previous chapter, the current international law on the use of force originates from the just war theory. In fact, before any international legal system had been developed, the use of force was regulated solely by moral judgments based on the just war doctrine. This obviously made the application of force rather arbitrary and as technical advancements amplified the destructiveness of war, the demand for a more reliable regulation of the use of force grew stronger and stronger. With the enactment of the UN Charter this demand was finally met and the use of force was no longer only morally regulated, but also legally.

What, then, remain of the original just war ideas in the current legal regulation of the use of force? At a first glance, the traditional *jus ad bellum* requirements seem to be present in the current positive law only to a limited extent. In general, the scope of potential situations in which force may be applied has been limited. For instance, the classical meaning of just cause has been narrowed in contemporary law, where defense is established as the only justifying cause for the use of force. And the proper authority requirement, which in its classical version implied that interventions might be justified to uphold internationally recognized standards of justice, has in positive international law developed into restrictive rules on when states may resort to war, including a ban on interventions. The right intention and reasonable hope of success requirements are not explicitly addressed but the aim of peace is greatly stressed. When it comes to the proportionality of ends, focus has shifted from a cost-benefit assessment to a view where the first use of force is assumed to be the greater evil.⁶⁰

A closer look at the link between contemporary law and the traditional just war doctrine, however, reveals that the initial notion of discrepancy might not be entirely accurate. Much of what appears to be clear departures from the original ideas expressed in the just war doctrine is in fact merely terminological innovations, not necessarily reflecting a true change in direction. An example of this is a retaliatory second strike, what today is categorized as an act of “defense”, but previously would have been called “punishment of evil”. Another is the use of force to “retaking of something wrongly taken”, for instance Kuwait from Iraq. In the language of contemporary law this would be referred to as a “defense” against an “armed attack”. This means that the underlying ideas remain, but the vocabulary has changed to reflect the modern sentiment that the first use of force is morally suspect, while second use is not. In addition to terminological explanations, the gap between traditional just war thinking and contemporary law also shrinks when the ambiguities of international law are considered. Even though the UN Charter might be outlawing interventions, the right to do so have been defended and practiced by several states which makes the exact status of the legal situation somewhat hard to define.⁶¹

⁶⁰ Johnson 1999: 29-34.

⁶¹ *Ibid.*: 29-32.

The uncertainty of the law and its connection to the traditional just war theory is clearly reflected in the shift from the historical focus on justness to the contemporary emphasis on aggression. Throughout much of the twentieth century, the discussion has been dominated by the notion of aggressive and defensive wars, as opposed to the previous distinction between just and unjust wars. The shift was intended to reduce arbitrariness and make it easier to establish when a breach against the international rules of conduct had occurred. However, both the traditional and the modern sets of distinctions depend on definition and, as Holmes points out, issues relating to interpretation have not been solved by moving from one dichotomy to another.⁶²

If aggression is understood as the initiation of hostilities, regardless of whether this is right or wrong, then it is clear that a just war in the traditional sense can be either aggressive or defensive, since it does not matter for that theory who initiates a war. This interpretation, however, is at odds with the one most commonly applied in recent years, according to which an aggressive war is unjust virtually by definition. This normative version limits the scope of aggression to situations in which the initiation of hostilities is unjustified. But also even a third use of aggression, where not even initiation of hostilities is required, has been suggested. In Michael Walzer's *Just and Unjust Wars*, he contends that also cases of mere threats, provided that they are serious enough, can constitute aggression. If it is assumed that such threats provide a just cause for resorting to war, this makes it possible to initiate a just war—which is more in line with traditional just war theory than contemporary positive law.

Out of the three interpretations of aggression, the first one has an objective and neutral criterion for deciding when aggression has occurred, namely, when one of the parties fires the first shot. Its shortcoming is that many scholars and heads of states feel that there are situations in which one is justified in initiating wars, and thus that aggression is sometimes justified. Israel's attack on Egypt in the 1967 Arab-Israel War would be a case in point. The two latter interpretations, on the other hand, suffer from their dependence on judgment as they leave discretion to potential initiators of war to determine when hostilities are justified. The prolonged struggle of the UN to agree on a definition and the fuzzy qualification that finally was adopted, reflect the difficulties involved in this matter. So does also the failure of the parties to the Rome Statute of the ICC to agree on a definition, which is necessary for the court to exercise jurisdiction over the crime.

It becomes apparent then, that although the wording have changed, the fundamental questions involved in the traditional just war doctrine are highly relevant also in our time as the answer to them have not been reached.

⁶² Holmes 1992.

4 Preventive War

The renewed interest in thinking on preventive war is obviously a reaction to the Iraq War and the “anticipatory self-defense” argument put forward by the US government.⁶³ Although the preventive war policy was said to mark a total break with American tradition, it has in fact been an influential part of US foreign policy for decades.⁶⁴ Thus, the idea of preventive use of force is likely to remain relevant, even though the horrific implementation of the Bush administration might discourage further attempts in the immediate future. And, of course, a bad execution of an idea does not necessarily make the idea itself misguided.⁶⁵ In this chapter, thus, I analyze the morality of preventive war.

4.1 What Is Preventive War?

What is at stake in the debate on preventive war? In a very basic sense, it is about the content of the right of self-defense. Previously, I have outlined the legal regulation of self-defense; here I deal with its moral dimension. Most people believe that a person has the right to take defensive measures when he or she is being attacked and that in severe cases these measures may include the killing of the attacker. Transferred to state-level this implies that a state under attack has a right to defend itself. The question is how far-reaching this right ought to be? Could a state ever be justified in attacking before it has been attacked?

To clarify the content of the debate, a few terminological notes are necessary. A concept frequently mentioned in the normative literature on war is *preemption*. This has been defined by Walzer as the reflexive, last minute response to an actual, *imminent* attack.⁶⁶ This interpretation, which draws on the Webster criteria from the Caroline case, has been adopted by most current normative theorists. *Preventive war*, on the other hand, is launched when conflict is “not imminent”.⁶⁷ By this definition, the Bush doctrine definitely comprised preventive war, and not only preemption, which was the term used in Bushes’ National Security Strategies.⁶⁸

Under international law, as outlined previously, the right of self-defense gives every state a right to respond to an armed attack that has already taken place. Whether it also includes a right to use force in anticipation of an attack that has not yet occurred is contested. If it does, this right is limited to preemptive use of force. Preventive war is clearly outlawed. The dominant view among normative theorists, however, is that preemption can be legitimate if the Webster criteria are met, that is, when it is a response to immediate threats which pose great harm and the use of force is the last

⁶³ Luban 2007: 174.

⁶⁴ Trachtenberg 2007.

⁶⁵ Shue 2007: 222.

⁶⁶ Walzer 2000: 74f.

⁶⁷ Rodin and Shue 2007: 5f.

⁶⁸ *Ibid.*: 11f.

resort, necessary, and discriminates between combatants and noncombatants.⁶⁹ The relevant question thus, is rather whether preventive war ever can be justified. As will soon become apparent, this is far more controversial.

4.2 Arguments against Preventive War

The main arguments against preventive war are rooted in one of two major concerns. Either they relate to the issue of global security or to the rights of innocent individuals.

The first category focuses on the security dilemma that preventive war give rise to. The preventive war doctrine assumes military force is required and thus militarizes problems. Obviously, there are nonmilitary tools that might be used to dismantle long-term problems, and prospect of the resort to preventive force enhances the risk of military force being applied as actors will assume that this is necessary. More importantly, the threat and use of preventive force increases insecurity as others may respond by armament in fear of a preventive attack. In other words, preventive doctrines will promote military advancements and add pressure to conduct a preventive war in a vicious circle of mutual fear.⁷⁰ This classic security dilemma spiral, outlined by Thomas Schelling decades ago,⁷¹ has been referred to as “the spiral of anticipation”⁷² and “the self-fulfilling prophecy problem”.⁷³ In a world where general practice is committed to a principle of no first use of force, it seems reasonable for a state to assume that it is less likely to become involved in a military conflict if it does not strike first than if it does strike first, since its adversaries are unlikely to strike first. By contrast, in a world where the prevailing norm permits first strikes, the safer course may be to strike first, in order to prevent a potential preventive attack. This may be valid even if both sides in a conflict have only self-protecting purposes. To minimize the fear of surprise attacks, a generally accepted prohibition against all first strikes must therefore prevail.⁷⁴

The second category of arguments focuses on the violation of individual rights that preventive war inevitably will cause. At the core of these arguments lies the assumption that human beings have rights and that paramount among these is the right not to be killed or significantly harmed. Since this is exactly what happens in wars, including defensive wars, one must ask: what is it that makes a person liable to be harmed by defensive force? The best way to answer this is to point at the fact that the attacker committed wrong by engaging in an act of aggression. He thereby forfeits his right not to be harmed. Thus, one only has the right to life so long one respects the right to life of others. The problem with preventive war is that it includes the killing of those who have not yet committed any wrongful acts of aggression. From the perspective of a right-based theory of self-defense,

⁶⁹ Crawford 2007: 118.

⁷⁰ *Ibid.*: 120.

⁷¹ Schelling 1960: 205-29.

⁷² Crawford 2007.

⁷³ Luban 2007.

⁷⁴ Shue 2007: 232f.

it is difficult to see how there can exist liability to harm without the presence of active aggression.⁷⁵

A potential objection to this, which will be developed at length in the subsequent section, is that there are cases where one may be liable to defensive force without having committed “active aggression”. Sufficiently serious preparations for performing an act of aggression—conspiracy—may in itself be a culpable wrongdoing that justifies preventive self-defense. This account may at a first glimpse seem plausible, but according to David Rodin it is subject to an “unpalatable paradox”. By showing that any doctrine of prevention is in fact a conspiracy to engage in attack, he claims that all such doctrines are *ipso facto* morally wrong. “If manifest intent and active preparation together constitute a wrong sufficient to ground preventive war, then any doctrine of preventive war is impermissible. If, on the other hand, doctrines of prevention are permissible, then the combination of manifest intent and active preparation are presumably not in themselves wrong and this implies that there is no sufficient moral ground for preventive war.”⁷⁶

To evade this paradox, David Luban suggests that legitimate preventive force may only be applied to counter “large-scale attacks on basic human rights”. This, he argues, means that “unless the preventive war itself aims at a large scale attack on basic human rights, planning for it is not wrongful”, and the paradox is lost.⁷⁷ Rodin replies that even attacks in accordance with the principles of proportionality and necessity directed at military targets may violate human rights if the attack in itself is unjustified. Since the issue at stake is precisely whether preventive war can be justified or not, Luban’s distinction does not remove the basic dilemma of the paradox: if conspiracy to carry out a preventive attack is wrong then doctrines of prevention are also wrong. If such conspiracy is not wrong then the justification for preventive war dissolves because no prior wrongdoing has made the enemy liable. Consequently, the paradox remains.⁷⁸

4.3 Arguments for Preventive War

Most defenses of preventive war start with an appeal to the intuitive notion that if certain conditions are satisfied, preventive war can be justified. If there is compelling evidence of a future unjust attack by a state or a group of individuals and it is possible to eliminate this threat now, but not when the attack actually occurs, most people would probably agree that the use of preventive force would be just, given that peaceful means are ineffective.⁷⁹ For instance: Country A is a notorious aggressor. Country B has good evidence that it will be attacked by country A and that the only reason this attack has not yet occurred is the fact that country A awaits the completion of new missiles that can destroy B’s defense system and kill many of its people. B also has strong evidence that if it does not act now, and strike out

⁷⁵ Rodin 2007: 164f.

⁷⁶ *Ibid.*: 166f.

⁷⁷ *Ibid.*: 193.

⁷⁸ *Ibid.*: 168.

⁷⁹ McMahan 2006: 171.

the facilities where the missiles are being developed, it will be too late to prevent the future missile attack from A.⁸⁰

In addition to the intuitive appeal, another often mentioned argument in favor of prevention is that all forms of defense are preventive in the sense that one can only defend oneself against *future* harm. In other words, there is no defense against harm that has already been inflicted. Of course, one can defend oneself against the continuation of harm by an attack in progress, but it is still only possible to defend oneself against harm that has not yet occurred. Successful defense then, is the *prevention* of harm. Why then, do some moral theorists insist that the presence of an actual attack, or at least an imminent threat of attack, is necessary for the use of force to be justified? It appears as if the relevance of an actual or imminent attack is that it provides compelling evidence that if not stopped, the attacker will inflict unjust harm. While an actual attack obviously provides strong evidence for future harm, the weaker evidence offered by an imminent attack is nonetheless considered sufficient to meet the burden of evidence. According to this view, the objection to preventive war is that in the absence of an actual or imminent attack, the probability of future unjust harm is not high enough to justify the resort to war. Although these considerations might seem thoughtful, they do however not establish a sharp moral distinction between self-defense against an actual or imminent attack and preventive defense.⁸¹

As a response to the objection that preventive war sets bad examples that lead to further destruction, Allan Buchanan argues that this depends on how the particular cases are regarded. If the state engaging in preventive war makes a convincing case that its actions were necessary and at the same time defends a strong general prohibition on preventive war, a single violation of it might not increase the probability of future occurrences. Of course, there is always a risk that the actions taken by the state engaging in preventive war will create a “false precedent” which other states will follow; the risk for this depends on how strongly the norm against preventive war is entrenched and how well the responsible state can make the case that its actions were justified. Nonetheless, the “bad practice” argument is at best a plausible objection to a general rule allowing preventive war; it does not show that *all* cases of preventive war are wrong.⁸²

Buchanan also tackles the “right-based” objections to preventive war. He quickly dismisses the argument that preventive war punishes those who have done nothing wrong on the grounds that the conspiracy to harm is sufficient for liability. In a far longer section he then deals with what according to him is the most serious moral objection to preventive war, the “failure to discriminate” argument. The point of this objection is that only those who conspire are liable and thus that only they may be attacked. In a preventive strike, however, some or even many enemy soldiers who had no part in the conspiracy will be attacked, and thus unjustly so; making it impossible to justify preventive war. Buchanan argues otherwise and claims that in some cases the killing of “innocent obstacles” can be justifiable. This

⁸⁰ Buchanan 2007: 127.

⁸¹ McMahan 2006: 172.

⁸² Buchanan 2007:128-130.

requires that three conditions are satisfied: the attack must be necessary to avert the harm, sufficient measures must be taken to reduce the harm to the “innocent obstacles”, and the harm averted by the preventive action must be significantly greater than the harm to the “innocent obstacles”. The second condition includes a requirement to make a reasonable effort to inform the “innocent obstacles” that a preventive attack is about to be made and if they surrender, they will be treated well. This would remove the objection that the soldiers did not know that they were about to be at war.⁸³

On the conspiracy paradox, David Luban applies theoretical cases to illustrate that the alleged paradox is “more apparent than real”.⁸⁴ If state A unjustly plans to attack state B, state A forfeits its right to launch a preventive war against B’s preventive attack and there is no paradox. If both A and B reasonably believe that the other is planning a preventive war against it but falsely assumes that this would lead to large-scale violations of human rights, neither side’s preventive war is justified. The seeming contradiction is merely a reflection of the gap between the intentions of a state and the adversary’s knowledge of these and consequently there is no paradox. And finally, if both state A and B really do plan to unjustly invade one another and violate human rights on a large scale, neither side’s plan is morally justifiable, and there is still no paradox. Each state may justly plan a preventive war to forestall an attack but may not justly plan to make it a war of subjugation. A plan to launch a preventive war cannot simultaneously be both just and unjust, it is unjust if it includes subjugation, but not if it is restricted to the minimum use of force necessary to evade the enemy’s attack. If either state A or B plan a just preventive war, the case resolves into the first scenario, if both plan a just war, the case resolves into the second scenario. All of these situations are free from paradoxes.⁸⁵

4.4 Can Preventive War be Justified?

There is a deep divide within philosophical moral theory between those who hold that our behavior should only be guided by the consequences of our actions and those who claim that what we morally ought to do also depend on other factors, such as our action’s adherence to rules.⁸⁶ The former view is held by consequentialists and the latter by deontologists. The division between these theoretical stances is reflected also in the debate on preventive war.

The utility of consequentialism is questioned by Rodin, who claims that it tends to generate counterintuitive conclusions and that it suffers from epistemological difficulties. To prove his point, he refers to the case of the Allies’ war against Nazi Germany. From a strict consequentialist perspective, the view that this was a clearly justified war, he argues, would not necessarily be supported. The tendency to reach this type of counterintuitive conclusions is, however, not Rodin’s main objection against

⁸³ Buchanan 2007: 136-138.

⁸⁴ Luban 2007:193.

⁸⁵ *Ibid.*: 193-195.

⁸⁶ Sinnott-Armstrong 2007: 203.

consequentialism. Instead the difficulty in establishing the long-term outcomes of war and the reliance on counterfactual history makes it nearly impossible to estimate the consequences of war. The burden of evidence necessary to show that going to war would lead to better consequences than alternatives would therefore be exceptionally difficult to meet.⁸⁷

According to Sinnott-Armstrong, consequentialists may respond in several ways. They may deny that the war against the Nazis is “an easy case”, after all, the amount of death and destruction caused by the war should at least make this questionable. The fact that consequentialism raises doubts about cases that appears simple should not be seen as a vice, but as a virtue. Another possibility is to claim that it actually is relatively clear that the war against Nazi Germany minimized bad consequences. The massive slaughter of Jews, the potential continued aggression, and the loss of freedom and other values that would have followed if the Nazis took over Europe makes reasonable that the costs of the war were worth paying. Nonetheless, this does not prove that the war did more good than harm, even if it is likely. The uncertainty does not make consequentialism useless; it merely calls for caution when decisions with long-term effects are being made.⁸⁸

The disagreements amongst scholars on whether preventive war ever can be justified are, however, not only a reflection of the division between consequentialists and deontologists. In fact, there seems to be diverging views on both the consequences of preventive war and the risk that it will violate the rights of individuals. Two questions illustrate the different positions: Can it ever be justified to kill innocent individuals who “stand in the way” of those responsible for the conspiracy of a future unjust attack? And, is it possible to provide strong enough evidence of a future unjust attack?

The first question relates to the issue of potential violation of rights and here it seems as if the conflict is pretty straight forward: innocent people run the risk of being killed, but can that justify the killing of other innocent people? The “lesser evil” argument prescribes that it can be justified to kill some innocent people out of “moral necessity” in order to avert a much worse outcome, that is, the death of far more innocent people.⁸⁹ This argument is clearly based on a consequentialist view. From a right-based perspective this position would be rejected. Soldiers who have done nothing to assume liability to lethal force are being killed, which is unacceptable. The objection that innocent people are killed in all wars is not very persuasive since there is a sharp distinction between collateral killing and the direct targeting of innocent soldiers on the basis that their leaders are covertly conspiring to start a war.⁹⁰

The second question concerns the practical difficulties connected to preventive war. The intentions of international actors are not easily assessed, and even if some evidence of a future unjust attack can be provided, who should determine whether it is sufficient or not? And how could this

⁸⁷ Rodin 2007: 145-148.

⁸⁸ Sinnott-Armstrong 2007: 208-210.

⁸⁹ Buchanan 2007: 138.

⁹⁰ Rodin 2007: 169.

judgment be reviewed and evaluated?⁹¹ Additionally, what appears to be a proper description of a situation may in fact be nothing more than a social construction based on a false belief systems and commonly held assumptions. This was the case during the launch of the Iraq War, when everyone “knew” Saddam Hussein had WMD ready to be fired, even those opposing the war. Such consensus views on the nature of threats, which has been referred to as “security imaginaries”, could generate disastrous consequences if they were used to justify preventive wars – as the Iraq War clearly illustrates.⁹² For some scholars these concerns are severe enough to rule out the possibility that preventive war ever can be justified, while others maintain that these problems can be overcome.

Related to the second issue is the relevance of imminence. Again, there is disagreement on what significance the time factor should be given. Those opposing preventive war claim that a long time horizon for retaliation opens up for the possibility that the situation might change and war may no longer be necessary.⁹³ A possible objection to this is that the imminence requirement is only significant insofar as it affects the probability of a future attack.⁹⁴

The dilemma at stake can be summarized like this: If the right of self-defense is too broad, that is, if the scope of justified self-protective actions is drawn too expansively, innocent or at least nonculpable individuals will be put at excessive risk of being killed or wounded. If it is too narrow, an excessive risk is instead put on those who have to remain inactive while others intend to harm them.⁹⁵ But the line has to be drawn somewhere.

Out of the scholars I have studied, the majority seem to believe that some form of preventive war can be justified. I agree in the view that there are situations where the use of preventive force can be theoretically justified, but I also acknowledge the complicated practical concerns embedded in such an act. I believe that the previously mentioned conspiracy paradox fails to provide a compelling objection to preventive war as it does not take into account the intentions of the actors. Moreover, the scope of self-defense, which is essentially what we are dealing with here, is to a great extent a question of risk-distribution. Who should carry what risks and why? It is probably not possible to formulate a clear principle, instead I suggest, in accordance with Buchanan, that the distribution of risk should be guided by the idea of fairness.⁹⁶ Those who conspire to attack others must carry the risk of being attacked themselves since they have forfeited their right not be harmed. In the harder case of “innocent obstacles” the targeted soldiers have done nothing wrong and should thus be entitled to the right not to be harmed. However, if the choice is between letting a large number of innocent individuals be killed or killing a small number of soldiers who have been given the opportunity to surrender, as tragic as it may be, the least

⁹¹ Rodin 2007: 170.

⁹² Crawford 2007: 113f.

⁹³ *Ibid.*: 121.

⁹⁴ Sinnott-Armstrong 2007: 216f.

⁹⁵ Buchanan 2007: 141.

⁹⁶ *Ibid.*: 140f.

unfair choice is to kill the soldiers. Since this act would involve the killing of the innocent, the burden of justification has to be extremely high.

The “if” in the last hypothetical is of course a big one. And there are generally a lot of conditions that need to be met for preventive war to be justified. I have already mentioned the difficulties related to the burden of evidence and pointed to the fact that assessments of threats are often in the eye of the beholder. So even if preventive war can be theoretically justified, can it be a practical reality?

4.5 Preventive War in Practice

Clearly, justified preventive war is easier to imagine on a theoretical level than to carry out in practice. As Henry Shue puts it: “Can I imagine a hypothetical case? Yes. Have I seen a real case? No. Do I expect to? Not really”.⁹⁷

The obvious risk of abuse and escalation into a spiral of war calls for serious restrictions on when preventive war should be a justified option. A general rule permitting preventive war would thus be too dangerous and I have found no support for such a proposal in the literature. The suggestions that have been made are instead focused on how to restrain the use of preventive force, without excluding it completely.

One possible way of reducing the uncertainty that feeds the vicious circle of mutual fear would be to require approval of some authoritative multilateral institution before any preventive action can be taken. Whether the UN Security Council qualifies as such an institution is questionable (secret deliberations, permanent member domination, coerced votes etc.), nonetheless it is the first alternative that comes to mind. Besides, even a bad process that yields predictability is better than anarchy if unnecessary uses of force are prevented. So far, however, no major power has committed itself to refrain from preventive actions until it has the approval of the Security Council, and it seems unlikely that this will happen any time soon. Furthermore, the secrecy of the Security Council is a severe handicap as it makes constructive reviews of taken decisions impossible.⁹⁸

A similar, but more interesting proposal on how to put a procedural restraint on the use of preventive force has been elaborated by Buchanan and Robert O. Keohane. They argue that a “multilateral accountability regime” significantly could reduce the risks of preventive war justification, “chiefly by providing incentives and deliberative processes that would elicit accurate information about the supposed risk to be averted by preventive action and reduce the risk that preventive-war justification would be invoked to rationalize aggressive action”.⁹⁹ The first key feature of such an institutional arrangement is multilateralism. This is necessary since an individual state cannot be counted on to fully take into account the legitimate interests of others. The second key element is accountability, both *ex ante* and *ex post*. All relevant issues and options must be discussed before a decision-making

⁹⁷ Shue 2007: 246.

⁹⁸ *Ibid.*: 243.

⁹⁹ Buchanan 2007: 132.

body, where diverse interests are represented, *ex ante* to the preventive action. After a preventive attack has been conducted, the responsible states must report on their actions and allow an impartial commission, appointed by the decision-making body or some other appropriate body, access to the site of the military action as soon as possible. These requirements aim at holding states accountable for the justifications they offered *ex ante* for using preventive force. If meaningful accountability is to be achieved, there also have to be significant costs for the states that get a negative *ex post* evaluation of their *ex ante* justifications. For example, these states would have to compensate those whom they harmed and bear the costs of repairing damage to the target country's infrastructure. Additionally, the reputational damage of a negative *ex post* evaluation would make it a lot harder for these states to convince the decision-making body to authorize preventive action in the future.¹⁰⁰

Despite its intuitive appeal, there are a few problems with this proposal. First of all, is it really feasible? Just like the requirement of Security Council approval, it limits the operational freedom of powerful states; why would they agree to this? Buchanan and Keohane argue that the incentives for doing so would be strong. By submitting themselves to the constraints of the accountability regime they gain credibility, which in turn makes it easier to convince allies and find cost-sharers.¹⁰¹ Moreover, the Buchanan/Keohane mechanism does not require prior approval to the preventive attack, it only demands that states taking part in such acts agree, *ex ante*, to an *ex post* impartial review. This is arguably not too much to ask from anyone who claims to be a responsible actor in the international community.¹⁰² Still, why would powerful states agree even to this limited infringement into their operational freedom? The short answer to this would be that reason can matter, even in international affairs. Appearance is important for heads of states – they are keen to be seen as leaders of responsible states, not rouge states. In order to achieve this, they have to defend the actions of their states by providing arguments that others will accept.¹⁰³

Another problem with the Buchanan/Keohane mechanism is that it does not solve the problem of acquiring accurate intelligence. As Shue points out, multilateral authorization is a better solution for some problems than others.¹⁰⁴ While it very well may put an end to the Schelling spiral and provide the moral authority necessary to restrain powerful states from doing as they please, it is less likely to improve the accuracy in the assessment of threats. The idea is that the incentives created by the costs of flawed decisions provided by the accountability regime would discourage reliance on unreliable intelligence and thus lead to better decision-making. But it is questionable if this would really result in improved judgments and assessments of threats. Inaccuracy seems to derive from mainly two sources: threat-exaggeration and independent change of circumstances.

¹⁰⁰ Buchanan 2007: 132f.

¹⁰¹ *Ibid.*: 133.

¹⁰² Shue 2007: 238.

¹⁰³ *Ibid.*: 239.

¹⁰⁴ *Ibid.*: 232.

It seems far from certain that penalties on faulty decisions to conduct unnecessary attacks would decrease motivations for threat-exaggeration and even less obvious that indeterminacy would be reduced by such incentives.¹⁰⁵

In addition to procedural innovations, the risks of preventive war may also be constrained by substantive restraints; for instance a norm that prescribes a set of conditions that need to be satisfied before any preventive action can be taken.¹⁰⁶ Such a norm could, just like a procedure, provide predictability and moral authority, Shue claims, provided that the norm is generally known and accepted. For this “substantive multilateralism” to work, powerful states would have to act only in accordance with “widely shared norms” when protecting their security interests. Furthermore, they must commit themselves to formulate and establish “reasoned precedents” and then, once widely acknowledged, take them seriously.¹⁰⁷

Shue also notes that any procedure must presuppose a substantive norm, since the outcome of a procedure has to be based on a norm to be accepted. An outcome solely legitimized on the ground that it is the result of a given procedure, what John Rawls calls a “pure procedure”, is far too unreliable when matters of life and death on a grand scale is at stake. On the other hand, a procedural mechanism, like the one proposed by Buchanan and Keohane might generate guidelines for what the norm should look like. In this regard, it is crucial that the process contains no secrecy so that all relevant cases can be reviewed and decisions both to act and not to act evaluated. This requirement makes the Security Council ill-suited as the forum for this kind of procedure, since its self-inflicted handicap of secrecy rules out the establishment of precedential cases.¹⁰⁸

Substantive multilateralism prescribes that states should act in accordance with “widely shared norms” and “international public reason”. But is this possible when international law clearly outlaws preventive war and disagreement on its morality is abundant? At present, I do not think so. The notion of justified preventive war must be anchored on a broader international basis and its practical execution outlined in greater detail before it can be a reality. Clearly, several questions remain, for instance, is a procedural restraint necessary or may “substantive multilateralism” be sufficient? In the final chapter I examine potential ways forward.

¹⁰⁵ Shue 2007: 237.

¹⁰⁶ *Ibid.*: 242.

¹⁰⁷ *Ibid.*: 244, EMA (“Early Military Attack”) is Shue’s term for preventive war, which he deems carry a too heavy moral baggage to be applied.

¹⁰⁸ *Ibid.*: 243.

5 Humanitarian Intervention

In 1994, the international community did nothing to stop the genocide Rwanda. What, if anything, should have been done to stop the carnage? In Kosovo in 1999, the international community reacted differently. Through the actions of NATO, it intervened to prevent ethnic cleansing and further conflict. But the protection of human rights came at a price as not just enemy soldiers, but civilians too were killed during the bomb raids. Was this price worth paying or should others means have been sought to solve the conflict? During the first decade of the new millennia, humanitarian intervention has been considered, but so far not undertaken to aid the suffering in Darfur, Sudan. Is this right or wrong? In this chapter I analyze the morality of humanitarian intervention.

5.1 What Is Humanitarian Intervention?

The contemporary controversies surrounding humanitarian intervention are not new; they have been present for centuries, if not millennia. Although the exact wording of the central question have change from time to time, the essence of it has remained: should external actors intervene on behalf of suffering people, and if so, how? The dilemmas raised by this question became even more problematic as international society organized itself into a community of sovereign nation-states in the seventeenth century. The expansion of international law in the nineteenth century, with sovereignty at its core, made humanitarian intervention an even more contentious issue. Most recently, the process of globalization has propelled humanitarian intervention to the top of the international political agenda.¹⁰⁹

While there is general consensus on the importance of humanitarian intervention, there is also tremendous controversy on nearly every aspect of it, including its definition. As Anthony Land points out, there is no clearly defined understanding of the concept and any definition is dependent on normative assumptions.¹¹⁰ Bearing this in mind, most definitions of humanitarian intervention apply some version of the following list of criteria: the intervention by an external actor (most commonly a state or a group of states), into the territory of another state without its consent, through the use of military force, with the primary interest to prevent severe suffering among the inhabitants. However, even if there is some agreement on the general criteria, their exact interpretation are far from agreed upon and this is a great source of controversy, as will become apparent below.

The main dilemma of humanitarian intervention is the tension between one evil, the violation of human rights, and another, the application of military force. In the following I present the reasoning of theorists on opposing side of the general debate on the nonintervention principle.

¹⁰⁹ Hehir 2010: 2-6.

¹¹⁰ Lang 2003: 2.

5.2 Arguments against Humanitarian Intervention

Non-interventionist objections to humanitarian intervention come from several directions. One claim is that domestic politics ought to be an internal affair free from interference from other states. According to this view, norms are dependent on cultural beliefs and practices and these are created within the community of the sovereign state. This means that there is a crucial distinction between internal and external legitimacy. A government may thus be illegitimate internally but that does not give foreign states the right to intervene to restore legitimacy. This line of reasoning, which draws on John Stuart Mill's argument that any legitimate liberation must come from within the affected society, has been elaborated by Walzer.¹¹¹ In his version, nations have individual histories that shape their political process – a “communal integrity” – that should be protected. Walzer does however acknowledge that humanitarian interventions can be justified in a very limited number of cases, when it is a response to “acts that would shock the moral conscience of mankind”.¹¹² The argument can however be interpreted in several ways, some rule out humanitarian intervention entirely and some allow it in limited cases.¹¹³

The two main objections to preventive war are also relevant in the debate on humanitarian intervention. Permitting humanitarian intervention would, just like permission on preventive war, undermine the stability of the international order. According to the security dilemma argument, the availability of humanitarian intervention as a recognized exception to the general prohibition on the use of force would lead to illegal interventions and unnecessary uses of force. Unscrupulous decision-makers could argue that they are intervening to protect human rights, while they in fact are guided by national interests. Well-intending governments would occasionally misjudge the situation and warrant intervention when the required criteria are not at hand. Moreover, this would generate cynicism about the legal restraint on the use of force and thereby weaken the normative status of peace. Thus, the lack of a global authority means that a strict principle of non-intervention is necessary to maintain world order.¹¹⁴

The other main objection to preventive war, that it would comprise the killing of innocent people, is also applied. Although it is possible to engage in humanitarian intervention without the killing of significant numbers of non-combatants, this is more than likely considering the kinds of weaponry frequently used by governments who favor intervention. The idea that the long-term protection of human rights can justify the overriding of some people's rights is commonly referred to as the “utilitarianism of rights”. This position cannot be defended if one believes that there are limits to what one may permissibly do to another human being, regardless of how desirable the anticipated consequences are. This means that innocent people

¹¹¹ Walzer 1983: 312-313; Walzer 1980: 209-29.

¹¹² Walzer 2000: 107.

¹¹³ See for instance Bull 1984: 193.

¹¹⁴ Farer 2003: 78.

cannot be killed to save the lives of others. If one person is killed to promote the rights of others, there is no longer a collective entity whose rights are maximized.¹¹⁵

There is also a practical objection to military intervention as a means to promote rights. The coercive nature of the intervention makes it difficult to separate military operations and the work to establish rights-respecting institutions. The latter mission requires mutual trust and an atmosphere of openness and tolerance that is going to have to be built up over time. A military intervention, in contrast, is bound to be followed by a period of occupation. The lack of a tradition of civil institutions respecting rights, combined with coercive force from the occupying forces to maintain order, is all too likely to develop into a spiral of decline.¹¹⁶

Another objection points at the indeterminacy of human rights. Exactly what is the range of basic human rights? Even though views on what to count as human rights may not be arbitrary, they are at least contested. This could easily be established by a quick comparison between two of the most famous declarations of human rights, the UN Declaration of Human Rights (more than thirty rights) and the European Convention on Human Rights (thirteen rights). In an international order based on agreement, humanitarian intervention could not be permissible as individual states would rely on their interpretation of human rights to rationalize their actions.¹¹⁷

5.3 Arguments for Humanitarian Intervention

Quite opposite to the claim that states should mind their own business to preserve world order, those who favor humanitarian intervention argue that serious wrongdoings of states must be stood up against in the interest of global justice. This position relies on the assumption that the main purpose of the state is to respect individual autonomy and protect its citizens from rights abuses. If the state fails to deliver on this purpose and people are deprived of their autonomy, either because of an extreme lack of order (anarchy) or because of governmental suppression of individual freedom (tyranny), then the rest of the world has an obligation to help these people. This *prima facie* duty to help others is derived from the general duty to assist victims of grave injustice.¹¹⁸

Non-interventionists rely on the supposed moral significance of state sovereignty and national borders to make their case. Those who favor the right to military intervention generally question this significance since it makes an unwarranted distinction between internal and external intervention. If a local government in a state is committing atrocities against an ethnic group, no one would argue that the central government could not legitimately intervene to stop the massacre. But a non-interventionist would object if the very same troops had to cross an international border to stop

¹¹⁵ Norman 2006: 202f.

¹¹⁶ *Ibid.*: 203.

¹¹⁷ *Ibid.*: 204.

¹¹⁸ Tesón 2003: 96f.

similar violence in a neighboring state. Why is that? To be sure, national borders should be respected as long as states keep their end of the social contract, that is, so long they secure the autonomy of individuals. But if they do not, the moral significance of borders is no longer a valid reason to contain foreign acts aimed at stopping atrocities.¹¹⁹

In response to the argument that humanitarian intervention would undermine the stability of international order, an interventionist could first of all argue that preserving the current system is not worth the cost of mass slaughter and human suffering. Secondly, it is far from certain that allowing humanitarian intervention in appropriate cases would increase instability – ignoring tyranny and anarchy is at least as likely to cause chaos as intervention. The detrimental effect of internal turmoil on international stability is well-documented and anyone who is concerned with long-term stability ought to support a world order where humanitarian intervention is a part of the system.¹²⁰

The attack on a “utilitarianism of rights” can be rejected by the doctrine of double effect. It prescribes three conditions that need to be fulfilled for the killing of innocents to be legitimate: the consequences must be good, the actor’s intentions must be good and any bad consequences must be unintended, and the good consequences must outweigh the bad consequences. A strict deontological position, where no innocent person may be used as a means to an end, is rejected on the basis that the goal of saving lives is compelling enough to authorize humanitarian intervention even at the cost of some innocent lives. It could also be argued that restoring human rights and justice, through the establishment of democratic and rights-respecting institutions, is the right thing to do as it will have long-run benefits. The loss of lives is thus not the only indicator to consider when judging humanitarian interventions.¹²¹

5.4 Can Humanitarian Intervention Be Justified?

As with preventive war, the outcome of any ethical analysis of humanitarian intervention depends on theoretical moral assumptions about justice. These assumptions can be classified in several ways; here I delineate a method applied by J. L. Holzgrefe. He identifies four ethical divides. The first one is on the proper *source* of moral concern. Are international norms morally binding by nature or are they derived from the explicit or implicit consent of the agents subject to those norms (*naturalist* and *consensualist* theories)? The second divide is on the *objects* of moral concern, should the welfare of individuals or of groups be the primary concern (*individualist* and *collectivist* theories)? The third divide is on the *weight* of moral concern. Do the objects of moral concern have to be treated equally, or can they be treated unequally (*egalitarian* and *inegalitarian* theories)? The final divide concerns the *breadth* of moral concern. Are all human beings the proper

¹¹⁹ Tesón 2003: 102-104.

¹²⁰ *Ibid.*: 112f.

¹²¹ *Ibid.*: 115-118.

agents of moral concern, or only some (*universalist* and *particularist* theories)?¹²²

The principal moral theories on justice take different views on these fundamental concerns and as a consequence they reach contradictory conclusions on the justice of humanitarian intervention. As noted by Holzgrefe, however, the varying outcomes are not primarily caused by diverging conceptions of the *source* of moral concern but rather by different views on the proper *breadth* and *weight* of that concern. In other words, some consensualists support a duty of humanitarian intervention, some do not. The same goes for naturalists. But most egalitarians and universalists strongly favor this duty, while most inegalitarians and particularists strongly oppose it. The crucial questions for the assessment of the justice of humanitarian intervention thus seems to be: Do our moral concern extend beyond our family, friends and fellow citizens to strangers abroad facing grave human rights violations? And do the needs of these strangers weight as much as the needs of family, friends, and fellow citizens?¹²³

I believe so. The debate on communal integrity is mainly about *when* humanitarian intervention can be justified, not *if*. Those who share Mill's view that intervention is always wrong because the victims must do the fighting themselves have to explain why freedom only is valuable if one has achieved it by own effort. Surely, the will of the victims to be liberated is important when intervention is considered, but this, again, has to do with under what circumstances intervention may be justified, rather than if it ever can be justified.

Concerns about the appropriateness of applying military force to promote rights surely illustrate the practical difficulties of intervention but are not sufficient to make it unjustified in all cases. The same goes for the indeterminacy of human rights. The killing of the innocent argument has already been rejected once and this time the targeting dilemma is not present. If one agrees that wars can be justified, one must agree that the unintended killing of innocent people can be justified since this, unfortunately, is the unavoidable consequence of almost all wars. Consequently, the case for military intervention to end human rights violations is strong and the support for it, in some form, seems fairly widespread. As will become evident in the following section, however, there is far more controversy on the practical implementation of humanitarian interventions.

5.5 Humanitarian Intervention in Practice

If humanitarian intervention can be justified in theory, what are the specific conditions that limit its practical application? This question brings all the difficulties related to the definition of humanitarian intervention into play: Can anything but solely altruistic intentions be accepted? Must the victims consent to intervention? Who may intervene and how? What rights must be violated? These problems highlight the complexity of interventions and the

¹²² Holzgrefe 2003: 19f.

¹²³ *Ibid.*: 51.

difficulty in establishing criteria for when they may be justified. In this section I make no attempt at presenting a complete guide to permissible interventions, but I do argue that the complexity of this task does not make it insurmountable.

Traditional just war theory strongly emphasizes the importance of right intention, but does the reasons behind an intervention really matter if its consequences are benevolent? It seems fairly naïve to assume that politicians who decide to undertake humanitarian interventions have only altruistic motives and there is no reason to demand a “pure” moral free from self-interest since actions guided by mixed motives still can generate good outcomes. If, on the other hand, the act is completely guided by self-interest, it is more accurately described as military intervention with good consequences, rather than as humanitarian intervention. Mixed motives are thus acceptable, but there has to be some altruistic intentions in addition to self-interest for interventions to be justified.¹²⁴

Related to the motives of the intervening actors is the issue of consent. Intuitively it seems reasonable to require that the victims welcome the intervention or at least not oppose it. If the victims do not want to be liberated, and it has been argued that they do not, intervention cannot be justified. But whose consent is it that should be required? Clearly the consent of those collaborating with the abusers and the rent-seekers who benefit from the repressive regime must be irrelevant. Then the bystanders and the actual victims remain, and the former cannot validly refuse foreign help on behalf of the latter. What is required is thus the consent of those who suffer from repression and this may be either a majority or a minority of the population.¹²⁵

One of the most contested issues in the entire debate on humanitarian intervention is the matter of legitimate authority. Who decides when humanitarian interventions should be undertaken? Legally, the Security Council is the only body capable of authorizing interventions. However, it suffers from a perceived lack of legitimacy that derives from its biased composition, opaque procedures, and in many respects poor historical record. For these reasons it seems, as Geoffrey Robertson argues, unreliable to let the SC be the final arbiter on whether humanitarian intervention should be launched or not.¹²⁶ Nonetheless, SC authorization is likely to ensure that the humanitarian case is strong and should thus be sought before any unilateral action is taken.

The *jus in bello* framework proscribes uses of force that does not follow the principles of proportionality and discrimination. The previously mentioned principle of double effect is a part of that framework and if its conditions are fulfilled civilian casualties can be accepted. The question is what standard the intervening actors should be held against, that is, what level of proportionality and discrimination they should have to comply with. Two conflicting interests are at stake: the safety of the intervening soldiers and the lives of non-combatants in the target state. Leaders in the intervening states have an obligation to ensure that their troops are not put at

¹²⁴ Hehir 2010: 154.

¹²⁵ Tesón 2003: 106f.

¹²⁶ Robertson 2002: 382.

excessive risks and may choose less dangerous methods to reach military goals (such as bomb raids from unmanned aerial vehicles) which in turn may result in more civilian deaths than would have been the case if an alternative course of action had been taken. The tricky part is, of course, “to find a strategy that protects civilians without exposing military personal to excessive dangers”.¹²⁷ In short, the costs may not exceed the benefits for a strategy to be justified. This dilemma brings us to the most important factor in the assessment of humanitarian intervention.

In response to what human rights violations is a humanitarian intervention a justified course of action? I believe that some form of consequence-based approach is necessary to address this matter. It is true that too far-driven consequentialism can generate unintuitive conclusions, but so can strict deontological positions. I find it hard to see that the slaughter in Rwanda was a better outcome than the potential negative consequences of an intervention, even if they would have been worse than initially expected. If limited by frames of reasonableness, such as the principle of double effect, consequentialism can be a valuable tool in the assessment of when intervention is justified and when it is not. To me it is obvious that brutally murdering 800 000 people is a greater evil than accidentally killing a limited number of civilians while trying to save others, and that the latter is an acceptable cost to prevent the former. The problem is that not all cases are as, in my view, clear-cut as the Rwandan genocide. What about Darfur? Put bluntly, how much suffering is required for humanitarian intervention to be justified?

To answer this is admittedly difficult. Long-term as well as short-term consequences must be considered. War is inevitably destructive and will cause both immediate and lasting negative effects. The general presumption against war, of any sort, must therefore be strong. In the context of humanitarian intervention this means that only grave violations of basic human rights can warrant military action. Basic rights have been identified by Shue as those fundamental to the enjoyment of all other rights and include personal security, subsistence, and certain liberties, such as freedom of physical movement.¹²⁸ These rights must be violated on a grand scale and it must be obvious that the use of military force saves more lives than it endangers. The problem here is the same as the one posted by the proportionality criteria in just war theory: how can it be established if the use of force generates more aggregate good than aggregate harm?

Humanitarian intervention must be launched before the acts that justify it have ended because if not, the intervention would be an act of punishment, not of aid, and its costs would outweigh its benefits. The judgment on the morality of intervention must thus be based on expected rather than actual consequences. The complexity of the issue and the lack of complete information undeniably make this very difficult. Some guidance can be derived from counterfactual historical analysis but the particular context of the individual case should always be the point of departure. The general threat to basic human rights posed by humanitarian intervention suggests that there must be repeated violations of basic rights with a certain

¹²⁷ Wheeler 2003: 194.

¹²⁸ Shue 1996: 18-20.

level of continuity, as isolated or small-scale deprivations of human goods, albeit deplorable, are not severe enough to warrant intervention.¹²⁹

To sum up then, humanitarian intervention can be justified when actors with some degree of altruistic motives, with the consent of the victims, use military force in an acceptable way, to put an end to deliberate, imminent or ongoing, large-scale violations of basic human rights. Obviously, this proposition does not solve all of the problems related to the practice of humanitarian intervention – this was never intended – but hopefully it shows that there are fruitful ways to assess the justice of intervention. And if this is the case, how can humanitarian intervention become a legitimate part of the international system?

In a way, it already is. Several military operations throughout history, although not always under the official flag of humanitarian intervention, have been undertaken to further humanitarian causes. While questionable from a legal perspective, these actions have occasionally been praised on moral grounds. One example is the NATO operations in Kosovo which was deemed “illegal but legitimate” by the Independent International Kosovo Commission.¹³⁰ But if something is morally legitimate, should it not be legally legitimate too? In the final chapter I analyze different ways to deal with this dilemma.

¹²⁹ This paragraph draws heavily on Heinze 2009: 33-56.

¹³⁰ Independent International Commission on Kosovo 2000: 4

6 Need for Legal Reform—but How?

In the previous chapters I have examined international law and concluded that while the legal status of humanitarian intervention is somewhat uncertain, preventive war is clearly prohibited. I have also argued that both forms of force can be theoretically justified. Consequently, there is a gap between law and moral in the areas of preventive war and humanitarian intervention. In this final chapter I argue that legal reform through the development of customary international law is the best way forward.

The main reason why legal reform is necessary is the fact that law should reflect moral conscience. As Paul Christopher puts it, “surely in those cases where we find our legal and moral rules at odds, we should endeavor to reconcile these differences”.¹³¹ This intuitively makes sense as legitimate acts should not be criminalized.

Starting with humanitarian intervention, legal reform is hardly a new proposal. Attempts at reforming the law have been made on several occasions but so far with little progress. The need for at least limited exceptions to the non-intervention principle is nonetheless widely recognized, even by those who traditionally have opposed such a development, so reform should not be seen as impossible.¹³² How then, can the law be adapted to account for this justified use of force?

The most straight-forward proposal is of course to change the written law, either by amending the UN Charter, which was the proposal of the Kosovo Commission,¹³³ or by adopting a new treaty legalizing the unilateral right to launch humanitarian interventions under certain conditions.¹³⁴ A problem with this solution is that it requires the consensus of the international community on when intervention can be justified and this have proved notoriously difficult to achieve in the past. Until the necessary levels of agreement have been reached, it seems like a better idea to let the law continue to develop through the gradual process of normative evolution under the UN Charter framework on a case-by-case basis. This way, Jane Stromseth argues, the complex tensions between the non-intervention principle and the developing norm to protect victims of atrocities can be resolved in practice rather than by inflexible lists of criteria.¹³⁵

Critics of legal reform argue that any change would undermine the principle of sovereignty and affect global security negatively. They prefer status quo on the basis that interventions will always be in someone’s interest and that increases in the legitimate scope of prevention will lead to abuses.¹³⁶ I believe that adherents to this view are mistaken in their

¹³¹ Christopher 2004: 248.

¹³² Hehir 2010: 99f.

¹³³ Independent International Commission on Kosovo 2000: 186.

¹³⁴ Burton 1996.

¹³⁵ Stromseth 2003.

¹³⁶ Hehir 2010: 259.

assumption that humanitarian intervention never can generate more good than evil (see chapter 5). Others agree that there are situations where humanitarian intervention may have positive consequences but maintain that legalizing it would have overall negative effects. Proponents of this approach argue that if states admitted that they were breaking the law, the non-intervention principle would not be undermined and if the undertaken intervention was legitimate the consequences of the delict would be mitigated.¹³⁷ However, if the decision when to afford mitigation is not to be completely arbitrary, clear guidelines for what constitutes legitimate humanitarian intervention must be outlined. Once this is done, the process of legal change has been initiated and status quo broken.¹³⁸

The process on preventive war has not come as far, but a recent UN High-level Panel report opens up for justified preventive war with Security Council authorization and a norm change may thus be underway.¹³⁹ It is possible that the legal development of preventive war could follow the trajectory of humanitarian intervention and eventually become an accepted exception to the non-intervention principle, but this is far from certain. The nature of international law makes legal reform without illegality more difficult than in domestic systems. This may, as Buchanan points out, make illegal acts necessary to reform the law but attempts at doing so must comply with demanding conditions to be justified.¹⁴⁰ States who favor doctrines of prevention should seek to establish criteria for when preventive force can be used and convince others to support them. Precedents must be established and once accepted followed. If possible, review mechanisms, such as the one developed by Buchanan and Keohane, could be established to speed up the process. Whether a development like this is realistic is highly questionable, but if preventive war ever is going to be integrated into international law, it is, just like humanitarian intervention, through the channel of customary law.

¹³⁷ Byers and Chesterman 2003.

¹³⁸ Hehir: 261

¹³⁹ Crawford 2007.

¹⁴⁰ Buchanan 2003.

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