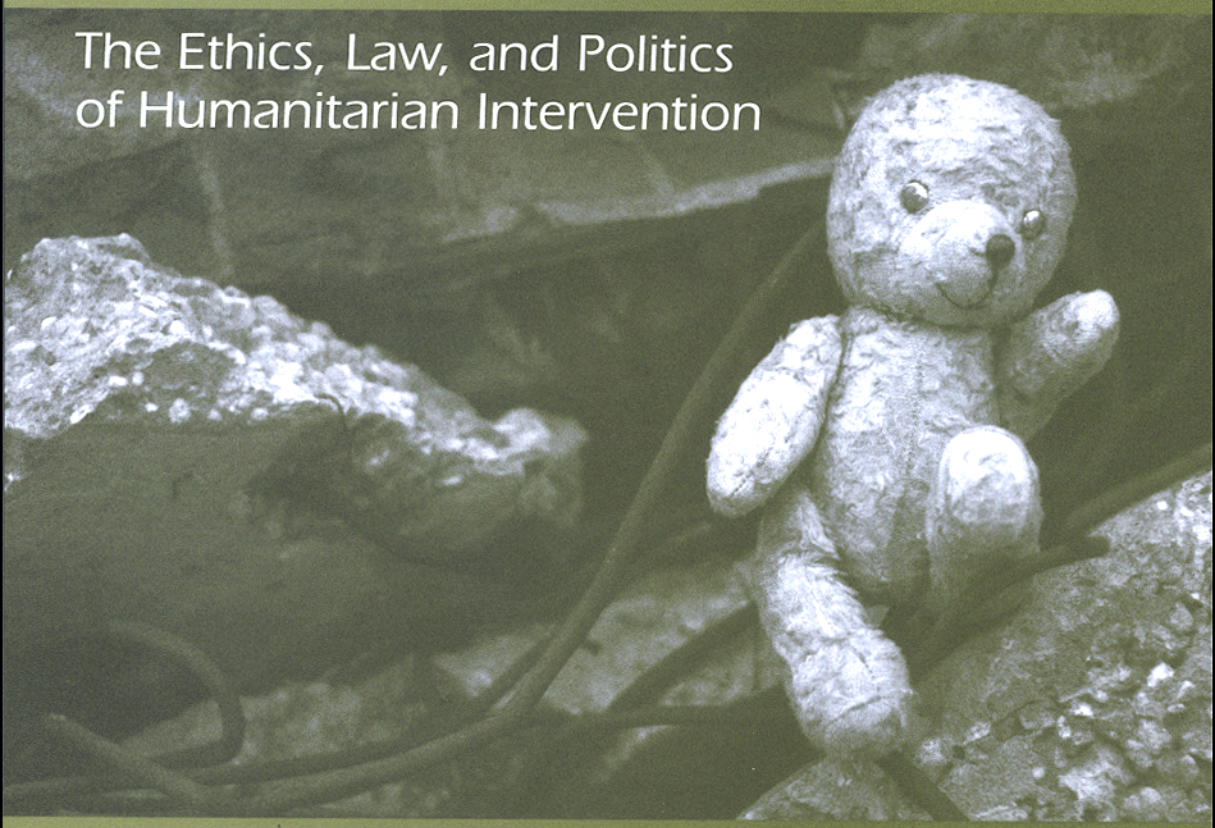
Waging Humanitarian War

The Ethics, Law, and Politics of Humanitarian Intervention



Eric A. Heinze

This page intentionally left blank.

Waging Humanitarian War

This page intentionally left blank.

Waging Humanitarian War

The Ethics, Law, and Politics of Humanitarian Intervention

Eric A. Heinze

SUNY PRESS

Published by
State University of New York Press, Albany

Printed in the United States of America

For information, contact State University of New York Press, Albany, NY
www.sunypress.edu

Production by Eileen Meehan
Marketing by Anne M. Valentine

Library of Congress of Cataloging-in-Publication Data

Heinze, Eric.
Waging humanitarian war : the ethics, law, and politics of humanitarian intervention / Eric A. Heinze.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-7914-7695-6 (hardcover : alk. paper)
1. Humanitarian intervention. I. Title.
JZ6369.H445 2009
327.1'17—dc22

2008024985

10 9 8 7 6 5 4 3 2 1

Contents

Preface and Acknowledgments		vii
Introduction:	The Concept of Humanitarian Intervention	1
Chapter 1:	The Morality of Intervention in International Theory	15
Chapter 2:	The Consequentialist Ethics of Humanitarian Intervention	33
Chapter 3:	Humanitarian Intervention in International Law	57
Chapter 4:	Universal Jurisdiction as Normative Legal Grounding	85
Chapter 5:	Who Intervenes and Why it Matters: The Politics of Agency	111
Chapter 6:	Conclusion	137
Notes		147
Bibliography		177
Index		197

This page intentionally left blank.

Preface and Acknowledgments

This book represents the culmination of eight years of thinking on the subject of humanitarian intervention. Like many who have written on this subject, I first became intrigued by it in the aftermath of the 1999 Kosovo intervention by NATO, which influenced my views on this subject a great deal. By the time I entered my doctoral program in 2001, I had decided that this was the area in which I would focus my research. Having just completed a Master's degree and written a thesis on the Kosovo intervention, my ideas about humanitarian intervention upon entering my Ph.D. program were notably interventionist. In other words, I believe that the world needed more, not fewer, military interventions to promote human rights abroad, and I was highly critical of the legal and normative barriers that stymied humanitarian interventions where there was a moral imperative to intervene and stop human suffering.

September 11, 2001, occurred less than a month into my doctoral studies, and like most observers, I knew 9/11 would affect almost every aspect of international relations, including the subject I had so passionately begun to investigate. Then came the U.S. invasion of Afghanistan, and soon after, numerous scholarly articles began to appear with titles like "Humanitarian Intervention after September 11" and "Humanitarian Intervention and the War in Afghanistan." After Afghanistan and the toppling of the repressive Taliban regime, there was a sense among some scholars and students of humanitarian intervention (including myself) that at last states now have compelling national security reasons to take gross human suffering in other countries seriously. With the new terrorist threat emanating from such brutal, even genocidal, regimes, military interventions could be now used for both counterterrorist and humanitarian purposes.

This moment of euphoria was short-lived, however, as the U.S. soon began preparing for its invasion of Iraq, which took place in March of

2003. Aside from perhaps the Kosovo intervention, the U.S.-led invasion of Iraq influenced my thinking on this subject more than any other event. The U.S. administration portrayed the invasion of Iraq as somehow part of the global war on terrorism, implying—though never actually stating—that Iraq had something to do with September 11, and that its alleged possession of weapons of mass destruction (WMD) were an intolerable threat to U.S. security. As the subsequent occupation of Iraq entered its second year, such arguments grew increasingly empty and were eventually debunked by the bipartisan 9/11 Commission. By this time, however, the justification for the U.S.-led invasion of Iraq had changed. All of a sudden, it was not Iraq's ties to al-Qaeda or its possession of WMD that compelled the U.S. invasion; it was Saddam Hussein's brutality toward his own people. In other words, the invasion of Iraq was a genus of humanitarian intervention intended to liberate the oppressed people of Iraq from the yoke of tyranny. This argument was, not surprisingly, received with much skepticism by scholars of humanitarian intervention and raised well-founded fears about how the humanitarian argument could be used as a pretext to mask the exercise of hegemonic power. In my own mind, the invasion of Iraq was not humanitarian, in either its motivation or its outcome to date. It has been widely characterized by well-respected scholars, public officials and foreign policy practitioners as a mistake, while its deliberate conflation with humanitarian intervention by administration officials has done untold damage to any moral credibility that the U.S. has as a force for good in international affairs. As I argue in chapter 5 and elsewhere, it is largely a result of the Iraq war that so many people continue to suffer and die in Darfur, Sudan.

The effects of these events on my views about humanitarian intervention are manifested in the pages that follow. Above all, this book is an attempt to develop prescriptions about humanitarian intervention at the theoretical level that strike a balance between intervening in these cases that cry out for military intervention, yet constraining the kind of military adventurism that brought about the debacle in Iraq. In short, I am much more cautiously "interventionist" today than I was when I first began investigating this subject.

Yet this book is also perhaps unique in that it hopes to say something of interest to scholars and students of several disciplines. Armed conflict—especially humanitarian intervention—has several dimensions that cross traditional disciplinary boundaries. Moral theorizing about war has been around since at least medieval times, yet it is only fairly recently that humanitarian intervention, in particular, has been the subject of ethical, legal, and political analyses alike. Unfortunately, like moral, legal, and political dimensions of humanitarian intervention,

various ethical, legal, and political inquires into this subject have often reached dramatically different conclusions about when and if it should be undertaken. Therefore, this book aspires to develop theoretical prescriptions about humanitarian intervention with an eye toward reconciling the often competing claims of morality, international law and political possibility.

Having said that, my formal training is in the political science subfields of international relations and political theory, yet I investigate this subject using techniques from the fields of ethics, international law, and international relations. The inherent danger in this approach is when a scholar from one discipline enters the territory of others, his relative lack of familiarity with the terrain often leads him to step on landmines. For instance, even though this book begins with a very simple philosophical proposition, it proved to be controversial among some of those who read the manuscript prior to publication. Yet the interplay among ethics, law, and politics inherent in this subject necessitates an interdisciplinary approach that actively engages with the distinctive characteristics and literature of the various dimensions of this subject. Treating each discrete dimension of humanitarian intervention in isolation has been done far too much and has led to arid and unhelpful prescriptions. I am therefore willing to take the risk of stepping on a few landmines by writing what already seems to be a provocative book if the result is a text that reflects and synthesizes the insights of these different disciplinary perspectives in a coherent and logical fashion. I suspect, though, that some philosophers will take issue with my playing fast and loose with the philosopher's toolkit, as due to certain restrictions, I was not able to comprehensively address every objection or potential critique of my line of reasoning. Nevertheless, I stand by my contention that the ethics of humanitarian intervention are *primarily* and *fundamentally*—though certainly not exclusively—consequentialist in nature, and if this serves to provoke further debate on this issue then this book will have achieved one of its main purposes.

Likewise, some international lawyers may take issue with my drawing of normative parallels between the legal principle of universal jurisdiction and the act of humanitarian intervention. Yet, such an argument still merits consideration. If conclusions about a potential normative grounding of humanitarian intervention in international law can be derived from legal principles to which the law is already committed, this tells us something very important about those legal commitments and how we might go about interpreting their normative underpinnings. For too long, the moral imagination of humankind has been limited by what is thought to be politically possible. Thus, if this book accomplishes anything, it is to remind its readers that reconciling what morality

demands, what the law permits, and what is politically possible, should never be thought impossible or not even merit the attempt to do so.

Like any other book, this one would not have been possible without the assistance of a number of friends, family, colleagues and sponsors. I am especially indebted to Dave Forsythe, who directed a very different version of this project when it was my doctoral dissertation at the University of Nebraska. Dave and I probably disagreed on about as much as we agreed during this process, but that disagreement—as well as Dave's patience, professionalism, and guidance—are no small reason why this book exists today. Jeff Spinner-Halev, who also served on my doctoral committee, was also instrumental in the early stages of this project. Jeff went out of his way to provide extensive comments not only on my dissertation, but also on this manuscript. I am also indebted to David Rapkin, Jean Cahan, and Lloyd Ambrosius for their assistance during the conceptual stages of this project. Numerous other colleagues provided invaluable insight and feedback. Tony Lang, Fran Harbour, Michael Freeman and Brian Lepard all read the manuscript and provided extremely helpful comments and criticisms, which have undoubtedly improved its quality. Others who read and provided invaluable feedback not only on parts of this manuscript, but on some of my other related work, include Nick Wheeler, Greg Russell, Peter Penz, Howard Adelman, Peter Baeher, Ken Rutherford, Doug Borer, Mutuma Ruteere, and numerous others with whom I have been on conference panels or engaged in other scholarly exchanges. However, I alone take responsibility for the views, mistakes or omissions in this book. I especially want to thank Doug Borer for his professional and personal advice throughout my short career as an academic, but especially for his friendship.

My colleagues at the University of Oklahoma have also provided an extremely supportive environment that enabled me to successfully carry out this project. Among others, these include Suzette Grillot, Greg Russell, Bob Cox, Mitchell Smith, Bob Franzese, Greg Miller, Josh Landis, Kelly Damphousse, Paul Goode, Justin Wert, Yong Wook Lee, Giovanna Gismondi, Pete Gries and John Fishel. I would also like to thank Sara Sherman, Megan Carlson, Katherine Ensler and Tamy Burnett for their thorough and competent research and/or editorial assistance. I am also grateful to the support staff in both of my departments at OU, most notably Sandi Emond, Jacque Braun, Malin Eichman, and Cathy Brister.

I am especially appreciative of the support I have received at the University of Oklahoma. Few universities offer junior faculty so many resources to pursue their research agendas, and this book would not have been possible without this emotional, moral and financial support. Both the Department of Political Science and School of International and Area Studies at Oklahoma University have supported this project whole-

heartedly, not only by funding my trips to various academic conferences, but by providing the kind of comfortable and collegial academic environment that scholars can often take for granted. I am also grateful to the College of Arts and Sciences, the Vice President for Research, the Office of the President, and the OU Research Council for their generous funding of my work and travel related to this project. Outside the OU system, this research was supported in part by a grant from the Oklahoma Humanities Council (OHC) and the National Endowment for the Humanities (NEH). Findings, opinions, and conclusions do not necessarily represent the views of OHC or the NEH.

Some of the material in this book is revised from articles I authored that were previously published elsewhere. Chapter 2 is a revised version of "Maximizing Human Security: A Utilitarian Argument for Humanitarian Intervention," *Journal of Human Rights* 5 no. 3 (2006): 283–302. I would like to thank Taylor and Francis (www.informaworld.com) for granting permission to reprint portions of this article. Likewise, I thank the Centre for Conflict Studies at the University of New Brunswick for permission to reprint portions of "Law, Force, and Human Rights: The Search for a Sufficiently Principled Legal Basis for Humanitarian Intervention," *Journal of Conflict Studies* 24 no. 2 (2004): 5–32, which is an early version of the analysis in chapter 3.

Finally, my family has given me the support and love that makes it possible to complete such a daunting undertaking without losing one's mind. My parents, grandparents, siblings, and in-laws have had nothing but perfect confidence that this book would become a reality. This kind of moral support and personal validation are what having a family is all about, and I am extremely lucky to have a wonderful family. My parents, Greg and Kathy Heinze, are the most generous, loving and supportive people I know. I can only hope to someday be the kind of parent to my children as they have been to me.

My wife, Melissa, has also unflinchingly stood by me from the very beginning of this project. Her understanding and tolerance for the many late nights in the office, the frequent travel and the long sessions of me complaining and stressing about this book cannot be understated. Perhaps the most refreshing thing about Missy in this regard—though she does work in the field of higher education—is that she is not an academic. Time spent with her has thus been a most welcome escape from the pressures and anxieties of writing a book and searching for a publisher. Lunch and afternoon pints with colleagues may have been dominated by talking shop, but thankfully, dinner and evenings spent with my wife were not. Yet Missy's patience, support and love were instrumental to this book coming to fruition. It is therefore with love and appreciation that I dedicate this book to Her.

This page intentionally left blank.

Introduction:
The Concept of Humanitarian Intervention

In March of 1999, member states of the North Atlantic Treaty Organization (NATO) led by the United States commenced what would become a seventy-eight-day bombing campaign against the Federal Republic of Yugoslavia. The purpose of this military operation was to halt what most reports indicated was ongoing and escalating ethnic cleansing in Kosovo, the victims of which were the mostly ethnic Albanian population of that province. On the eve of what would become *Operation Allied Force*, U.S. President Bill Clinton stated that ending this tragedy was a moral imperative, a view shared by leaders of many Western democracies.[1] A central problem, however, is that NATO's use of military force was technically a violation of international law because it was not in self-defense and did not obtain prior authorization from the United Nations (UN) Security Council. Since then, the Kosovo intervention has been widely portrayed, rather paradoxically, as an "illegal but legitimate" humanitarian intervention.[2] It was morally justified, yet it violated international law. The humanitarian crisis in the Darfur region of western Sudan that began in 2003, likewise triggered calls for armed intervention to stop government-sponsored militias from terrorizing the civilian population and forcing them into displacement camps.[3] As in Kosovo, there again seemed to be a sufficient moral imperative to intervene militarily to stop the atrocities in Darfur. This time, however, developments in international politics since the Kosovo intervention served to militate against armed intervention by those actors otherwise in a position to do so.

Cases such as these raise serious concerns in the theory and practice of armed humanitarian intervention. How are we to reconcile what is thought to be morally imperative with what is legally permissible and politically possible? Can one develop a prescriptive framework for

humanitarian intervention that reconciles the often competing claims of morality, law, and politics? This book is an attempt to address these issues.

This book contributes to the growing body of literature on what is commonly referred to as humanitarian intervention, generally understood as the transboundary use of military force for the purpose of protecting people whose government is egregiously abusing them, either directly, or by aiding and permitting extreme mistreatment. A topic of great academic interest in recent years, the idea of humanitarian intervention has its philosophical roots in the just war tradition, which dates back to the fifth-century writings of the theologian, Saint Augustine, and was revived in the thirteenth century by Saint Thomas Aquinas. By the sixteenth and seventeenth centuries, the writings of Francisco de Vitoria and Hugo Grotius situated the subject of humanitarian intervention within the discourse on the law of nations, the precursor to contemporary international law.[4] The debate over humanitarian intervention has remained principally the purview of international lawyers, as it is part of the broader international legal discourse on the use of force under the UN Charter legal paradigm. Nevertheless, the past fifteen years have witnessed sustained efforts by scholars to explore the moral and political dimensions of this debate, as well as its myriad legal nuances.

A fundamental predicament arising from any subject that embodies multiple dimensions, that in turn attracts scholars from several disciplines (law, philosophy, ethics, political science, and international relations), is that the various facets are inevitably investigated separately, or by using analytical frameworks that cannot easily be applied to the different dimensions of the subject. The literature on humanitarian intervention is rife with analyses by enterprising legal scholars, who construct sophisticated arguments about the status of humanitarian intervention under international law.[5] But this tells us very little about when humanitarian intervention is morally justified, or which actors in international society are best suited to effectively undertake such a difficult and demanding task. While ethical and political analyses of humanitarian intervention abound, scholars have only recently begun to address the ethical, legal and political dimensions of this subject with an eye toward reconciling their competing and often conflicting imperatives.[6] In this sense, scholarship on humanitarian intervention is very much a reflection of its problems in practice—that is, its ethical, legal and political dimensions rarely seem to cohere.

In light of this reality, *Waging Humanitarian War* seeks to address the subject of humanitarian intervention in a way that permits a synthesis among its ethical, legal and political dimensions. This book offers a normative argument for humanitarian intervention and articulates the

conditions under which humanitarian intervention is morally permissible—the ethical dimension—establishes whether such ethical prescriptions can be grounded in international law—the legal dimension—and identifies which actors are best suited to undertake humanitarian intervention under prevailing political realities—the political dimension. Rather than developing an all-encompassing theory of humanitarian intervention, I elucidate its different dimensions within a logically consistent and empirically precise normative argument that draws from the same basic analytical framework.

- What level or severity of human suffering must be imminent or ongoing before humanitarian intervention is morally permissible?
- Is there a corresponding body of international law that supports this moral argument, thus providing a legal basis for humanitarian intervention under certain conditions?
- Which actors should then undertake humanitarian intervention and why do they merit this task?

These are the ethical, legal, and political questions this book answers.

The Ethical, Legal, and Political: A Synthesis

Each of these questions is individually important in the ongoing debate over humanitarian intervention, although the common thread that connects them is the underlying concern for the suffering of people who are being abused or neglected by their own government. After all, the ultimate goal of humanitarian intervention is to effectively alleviate human suffering. Even though the intent is to halt or avert human suffering, the well-known moral dilemma of humanitarian intervention is that it inevitably brings a certain degree of harm to innocents when it deploys deadly force—even if this violence is directed against those perpetrating harm against innocent civilians. This is why virtually every serious scholarly treatment of humanitarian intervention argues—but more often simply assumes—that humanitarian intervention should be reserved for extreme cases only, or supreme humanitarian emergencies, to avoid doing more harm than good.[7] Thus, there are very good reasons why most proponents of humanitarian intervention consider an imminent genocide as morally defensible grounds for intervening militarily, while precluding intervention for lesser abuses like political repression or denying voting rights. The risks involved in armed conflict are simply too great to justify using force to avert small-scale or otherwise minor abuses.

This reasoning involves a logic that is inherently *consequentialist*, whereby the moral rightness of human action is judged according to the consequences it brings about in terms of a certain value or good.[8]

How severe must atrocities be within a state before armed rescue is justified? To this, a consequentialist would answer: severe enough so that the consequences are likely to be better—or at least not worse—than those that would have occurred without intervention. But, without an account of the various factors that determine the goodness of an outcome—that is, an account of "the good"—such a prescription provides little practical guidance. Because the purpose of humanitarian intervention is to alleviate human suffering, it follows that it is appropriately conceptualized in terms of the welfare or well-being of those at risk. While a more precise account of human well-being is required, this is the basic consequentialist logic that constitutes the starting point for this inquiry. This is why the basic analytical framework of this book as a whole draws from and builds upon an explicitly consequentialist logic that posits the suffering of innocent people as the referent object of concern in the conduct of humanitarian intervention.

A crucial assumption that follows this reasoning is that if humanitarian intervention is to be justified at all, then it must be done primarily with reference to the well-being of those on whose behalf the intervention is allegedly undertaken. Yet it must also be done but also with reference to the well-being of the broader community of humankind. The first element of this assumption is rather obvious, because there is no point in undertaking a humanitarian intervention if it fails to alleviate suffering or endangers people further. One must also consider the broader implications that humanitarian intervention has for other innocent people who may be affected by the inherent death, destruction, and destabilization that accompanies military force. For example, if an ethnic minority in a state is being massacred by its government, then reference to the well-being of this group of people suggests that humanitarian intervention against the government or its agents is justified. But one must also consider the effects that the intervention will have on innocent persons that may not be members of this group and make the unenviable decision of whether the risks are worth it. Whether or not the risks of going to war are worth it depends on the extent and severity of the human suffering at issue. The purpose of the ethical inquiry in this book is to put meat on this bare bones consequentialist logic, and to arrive at a more precise account of the conditions of human suffering under which humanitarian intervention is likely to promote well-being more than imperiling it.

The aim here is not simply to rehash conventional arguments about reserving humanitarian intervention for exceptional cases. Most schol-

arship simply assumes that humanitarian intervention is permissible in extreme cases only, but, the aim of this ethical inquiry is to develop a more detailed threshold of human suffering that observers can employ to recognize situations wherein humanitarian intervention stands a reasonably successful chance of doing more good than harm. When the plight of human beings is such that it demands the attention of others, those who intend to take action must be guided by acceptable moral principles that act as a general guide on what to do in given circumstances. The purpose of this ethical inquiry is to develop prescriptive principles using a fundamentally consequentialist argument.

In addition to contributing to the scholarly debate, the practical advantage of delineating prescriptive principles is to facilitate decision-making on how to respond to particular humanitarian emergencies. Simply put, to have morally coherent and agreed on principles in crisis situations provides a general sense of what to do in response. When considering humanitarian intervention, what is lacking is not information or intelligence as much as analysis and translation of data into agreed policy prescription.[9] Therefore, prescriptive ethical principles serve a vital function in the practice of intervention because they prescribe calculated action based on our best moral judgments about how to respond to particular circumstances.

This is also the role of law in an ideal sense—to fix a policy response to a societal need and provide a stable framework of expectations to organize international activity.[10] From a legal standpoint, it is crucial that moral prescriptions find grounding in international law, lest employing them in practice derides the legitimacy of the legal rules themselves, and the rule of law in general. Law also serves to codify ethical norms in order to increase the obligation actors to engage in moral behavior. The overarching concern among legal analyses, therefore, is whether there is a *legal right* to humanitarian intervention, and if so, under what circumstances and according to what body of law? The lawfulness of humanitarian intervention is important precisely because legal rules themselves often have a fundamental moral dimension. For instance, the principles of nonintervention and the nonuse of force enshrined in the UN Charter speak to international society's basic moral convictions about the dangers of reckless military crusades and the undesirability of war in general. Likewise, the human rights principles in the Universal Declaration of Human Rights (UDHR) peak to the position we are willing to accord individual well-being in international relations.[11] In the tradition of legal positivism, however, these norms serve mainly to prohibit humanitarian intervention, irrespective of persuasive moral arguments that endorse it in specific cases.[12] As a result, the power of positive law is diminished if the gap between it and coherent moral

convictions is allowed to become too wide. To paraphrase Thomas Franck, there is no sense in having law if it offends what our moral convictions consider to be right and just.[13] In this sense, international law stands to gain by narrowing the gap between itself and what accepted morality requires. Thus, the purpose of this legal inquiry is to ascertain whether existing international law can accommodate an essentially consequentialist moral argument for humanitarian intervention. Does international law reflect the consequentialist insight that intervention is only permissible under exceptionally severe conditions, and if so, to what extent does the law articulate such conditions?

Even if one makes a persuasive moral argument for the conditions under which humanitarian intervention is permissible, and such an argument is firmly grounded in international law, as a practical matter there is still the problem of identifying which actors in international society should undertake this task. There may be sufficient ethical and legal grounds for the act of humanitarian intervention, but to say that armed intervention is likely to do more good than harm—if undertaken in certain extreme and exceptional cases—is to make certain assumptions about the agent undertaking it. Namely, that the agent is sufficiently more militarily powerful than the entity against whom the intervention is directed. A consequentialist logic that posits the suffering of the imperiled population as the foremost concern necessarily considers the military wherewithal of the potential intervener to be paramount. Humanitarian intervention can only achieve its aims if the intervener prevails militarily, and it is even more successful if the operation is swift and decisive. But raw power and the material ability to deliver it, are certainly not all that matter—even for consequentialists.

One of the defining features of humanitarian intervention is the inherent danger that a state may use humanitarian justifications to cloak its ulterior motives and wage an aggressive war or engage in some other type of self-aggrandizing adventurism. Indeed, one of the key obstacles to legalizing humanitarian intervention is the widespread concern that certain states might abuse this legal permission as a pretext for nonhumanitarian war.[14] Even if an actor is adequately powerful, it may possess other attributes that diminish the likelihood its intervention will produce a positive humanitarian outcome—in terms of both its proclivity and ability to do so.

For instance, international society should be suspicious of a state waging war for ostensibly humanitarian purposes if that state is a flagrant violator of the most basic international human rights or has a history of brutal and exploitative military interventions. Even the perception of a potential intervener as partisan, or otherwise illegitimate, can strongly militate against its ability to do more good than harm, particularly if such

an intervention provokes opposition from other actors.[15] Thus, whether a certain actor maintains the requisite characteristics in order to meet the basic consequentialist moral requirement of doing more good than harm depends crucially on politics—that is, "the meeting ground of norms, distributions of power, and the search for consensus."[16] The potential agent must be sufficiently powerful, but to increase the likelihood of an effective and successful intervention, it must also possess attributes that render it a legitimate agent of humanitarian intervention.

The attributes of the agent undertaking humanitarian intervention therefore have profound implications for its ability and proclivity to alleviate human suffering, thereby offering up another moral dilemma. Is it more important for a potential intervener to be militarily powerful or maintain legitimacy as an agent of intervention in order to effectively halt the abuse of innocent persons? Certainly, there are situations in which actors, who are otherwise militarily capable, might not be the most appropriate agents of intervention. But, the adequate resolution of this moral concern depends crucially on existing power realities and how these realities relate to the perceived legitimacy of the potential agent in international society—that is, it depends on politics. The purpose of this political inquiry book is to examine the relationship among state power and the various political realities that determine the extent to which actors are considered legitimate agents of humanitarian intervention, therefore enhancing their overall ability and proclivity to minimize human suffering.

Conceptual Concerns

Humanitarian intervention is a subject about which there is much controversy and confusion. Military intervention comes in many forms, most of which are far from humanitarian, while international intervention by humanitarian aid organizations is the farthest thing imaginable from military force. Therefore, it is not surprising that humanitarian intervention is a term popularly used to designate a wide range of activities related to both armed conflict and alleviating human suffering in other countries. For this reason, it is imperative to be very clear about what this book investigates.

The definition of humanitarian intervention used in this work is

> the use of military force by a state or group of states in the jurisdiction of another state, without its permission, for the primary purpose of halting or averting egregious abuse of people within that state that is being perpetrated or facilitated by the de facto authorities of that state.

While this definition is quite similar to many definitions of humanitarian intervention found in the literature, some may nevertheless take issue with it, or even contest the use of the term "humanitarian intervention."[17] A lengthy defense or explanation of each aspect of this definition is not intended, but a few areas of potential confusion deserve further clarification.

First, humanitarian intervention involves the transboundary use of military force and is distinct from crossing borders to provide humanitarian aid, which does not entail military force. Providing humanitarian aid involves actors crossing borders for purposes such as the delivery of food and medical relief to civilians or refugees, but does not entail a coercive aspect and is normally conducted with the consent of the target state. This activity has historically been the purview of aid organizations, typically involving one or more UN agencies like the High Commissioner for Refugees and various nongovernmental organizations (NGOs) such as Médecins Sans Frontières and the International Committee of the Red Cross.[18]

A second important distinction is between humanitarian intervention and the rescue of nationals. Like humanitarian intervention, rescuing nationals can involve military coercion within another state, without its permission, to rescue people from harm. The difference is that the people being rescued are nationals of the intervening state who face extreme danger in the territory of another state, the government of which is unable or unwilling to protect the endangered nationals. Rescue missions to save one's own nationals have, at times, been referred to as humanitarian intervention, but because they are premised on the legally recognized relationship between a state and its citizens, they are more accurately characterized as acts of self-defense or even self-help.[19] Humanitarian intervention, by contrast, is saving nationals of a state other than one's own.

A more subtle yet crucial distinction is between peacekeeping and humanitarian intervention. The source of this confusion stems from the fact that both of these activities involve the deployment of foreign military forces in the territory of other states, but this is essentially where the similarities end. Peacekeeping involves the deployment of military and civilian personnel to war-torn states to "promote the termination of an armed conflict or the resolution of longstanding disputes."[20] It requires a cessation of hostilities among warring factions, usually in the form of a ceasefire or peace agreement, and the consent of the state on whose territory the operation takes place. Peacekeeping must be neutral with respect to the belligerents involved, because it is essentially a form of conflict resolution whereby a nonbelligerent party engages in various confidence-building measures and assists conflicting parties in imple-

menting the terms of peace agreements they have concluded. Peacekeeping also typically maintains deterrent or defensive rules of engagement designed to ensure stability and order with the minimal use of coercion. While conducted mainly by military personnel, peacekeeping missions also involve certain nonmilitary functions, such as electoral support, promoting the rule of law, crowd control, disarming civilian agitators, and other quasi-police functions.[21] So, whereas peacekeeping involves limited military capability, neutrality, permission of the host state and defensive rules of engagement, humanitarian intervention requires substantial military capability along with proactive or offensive rules of engagement and militarily engages one party in order to disable its capacity to cause human suffering. In short, peacekeepers are (lightly) armed mediators, whereas actors conducting a humanitarian intervention are tantamount to belligerents in an armed conflict.

A related source of confusion involves UN enforcement operations, which are distinct from peacekeeping, but may or may not be considered humanitarian interventions as defined here. Most peacekeeping operations take place under the auspices of the UN, are directed by the UN's Department of Peacekeeping Operations (DPKO) and are conducted by personnel on loan from member states—so-called UN blue helmets. UN enforcement operations are different primarily because they entail more proactive and coercive rules of engagement permitted under Chapter VII of the UN Charter. Enforcement operations are also frequently carried out by state militaries (as opposed to blue helmets under the direction of the DPKO) that have been authorized by the UN Security Council but are acting more or less autonomously. While some peacekeeping missions under the DPKO have evolved into more robust Chapter VII peace enforcement operations, such as the UN Organization Mission to the Democratic Republic of the Congo (MONUC),[22] peacekeeping operations are not humanitarian interventions. The reason for this is that the blue helmets are not engaged in armed conflict in the same way as the intervening agents of a humanitarian intervention—even though their mandate is more robust than traditional peacekeeping. United Nations enforcement operations in which the Security Council has authorized states to take any means necessary (the euphemism for using force) to alleviate human suffering are humanitarian interventions. In these cases, states have essentially been granted the legal authority to wage armed conflict for humanitarian purposes. The UN Security Council has authorized humanitarian interventions of this sort in Somalia (1993), Haiti (1994), Rwanda (1994) and Bosnia (1995). Humanitarian intervention as understood here is therefore only carried out by states or groups of states (e.g., NATO or ad hoc coalitions), either with or without UN authorization. When it comes to humanitarian intervention, the United

Nations is more appropriately construed as a framework rather than an actor.[23] I therefore do not consider the UN a potential agent of humanitarian intervention.

Organization and Overview

This book is organized around the central task of bridging the gap between the ethical, legal, and political dimensions of humanitarian intervention. In attempting to address three discrete questions with an eye toward reconciling the different dimensions of humanitarian intervention that each occupies, I employ insights from several academic fields and a broad array of theoretical orientations. My overall argument incorporates insights from various strands of political and international relations theory—including variants of liberalism, realism, the English school and social constructivism—while also utilizing principles from just war theory, natural law theory, and legal positivism. I do not reconcile these diverse and arguably irreconcilable approaches, but rather utilize insights from each and incorporate their ideas into my own argument. But the underlying logic running through the book as a whole remains a fundamentally consequentialist one. It is this consequentialist logic and the overarching concern for minimizing overall human suffering that comprise the basic normative structure in which the ethical, legal, and political concerns converge to constitute a coherent and consistent theoretical argument.

While this book is primarily an exercise in normative theory, it is not the case that it is devoid of empirical considerations. First of all, my ethical argument develops an empirical account of the conditions of human suffering under which humanitarian intervention will most likely achieve a humanitarian outcome. This task requires very close attention to the empirical realities of armed conflict and its effects on civilian populations, as measured against the human abuses being perpetrated in a given situation. I thus incorporate various historical and contemporary examples of military intervention—humanitarian and otherwise—as well as actual situations of atrocities and gross human abuse that might reasonably suggest potential grounds for military intervention. The rationale for these examples is to illustrate the applicability of normative propositions to real-world situations and reveal how these principles, if implemented as policy, might operate in practice. Such examples include, but are not limited to, the 2003 U.S. invasion of Iraq, the humanitarian crisis in Darfur since 2003, and the 1999 Kosovo intervention.

Unlike many recent books on humanitarian intervention, this project

is not a traditional social-scientific case study approach in which the theoretical framework is laid out in the first chapter and then followed by a series of empirical case study analyses. Rather, various empirical examples are woven into the narrative. I am not testing a theory in the social-scientific sense—for which a traditional case study format would be appropriate—but rather seek to advance normative principles about the ethical, legal and political desirability of a particular type of armed conflict. In this sense, I aspire to follow in the (rather large) footsteps of Michael Walzer, who once suggested that the proper method of practical moral inquiry is casuistic.[24] Like Walzer's well-known book *Just and Unjust Wars*, this book is also concerned with actual judgments and justifications relevant to the use of force—a concern that necessitates frequent reference to historical cases.

Overview of the Chapters

This inquiry begins by addressing the fundamental moral dilemma of the level and severity of human suffering that must be imminent or ongoing before humanitarian intervention is permissible. Chapter 1 situates this general concern in the context of contending theoretical arguments about the moral foundations of nonintervention in international affairs. What are the moral justifications for states' claim to the right of nonintervention into their internal affairs and when, if ever, do states forfeit this right, thus making them legitimate targets of intervention? The prevailing arguments about this concern are most clearly articulated by two variants of international thought commonly referred to as statism and cosmopolitanism. Statists, such as Michael Walzer and R. J. Vincent, argue in favor of the primacy of nonintervention because it is within sovereign states that human beings can create their own meaningful political community, regardless of the domestic legitimacy of the government.[25] Cosmopolitans, such as Charles Beitz and Fernando Tesón, contend that the right of nonintervention is contingent upon the extent to which the government of a state protects and upholds the human rights of its citizens.[26] I argue that these approaches are insufficient as they pertain to humanitarian intervention because they fail to consider that the effects of intervention on overall human well-being will vary depending on the extent and severity of the human suffering at issue. In other words, if we are truly concerned with the welfare of individuals, then we must weigh the benefits of humanitarian intervention against the costs in terms of some measure of human well-being. This balance of benefits and costs requires an account of human well-being as

well as a consequentialist calculation aimed at maximizing it, both of which statism and cosmopolitanism fail to provide.

Chapter 2 provides such an account by developing an explicitly consequentialist approach to humanitarian intervention that I call a "consequentialist concern for human security." While this principle is necessarily a qualified version of consequentialism that encompasses elements of just war theory (among other discourses), it nevertheless follows from the fundamental consequentialist insight that the use of force is itself harmful to human well-being, and must only be undertaken in circumstances where its adverse effects will not eclipse its accomplishments toward promoting human well-being. A substantial part of this chapter is dedicated to providing a precise empirical description of these circumstances. Importantly, I use the concept of *human security* as the general account of human well-being—or "good"—that the conduct of humanitarian intervention ought to promote or maximize. The decision to undertake humanitarian intervention must therefore consider whether and to what extent such intervention is likely to promote or diminish this good in specific instances. This approach also considers the prevalence of certain threats to human security throughout the globe, and therefore aims to reserve humanitarian intervention for those exceptional cases of human suffering, such that the use of force is not conducted with such frequency that it becomes an affront to global stability and overall human security.

Beginning the analysis of the legal dimension of humanitarian intervention, Chapter 3 surveys international treaty and customary law relevant to the use of force and human rights. Here I explore whether certain bodies of international law reflect the consequentialist insight that intervention is only permissible under certain extreme conditions, as well as the extent to which these bodies of law specify such conditions. The central question addressed in this chapter is whether international law relevant to humanitarian intervention contains principles that delineate the conditions of human welfare under which military force may be pursued, and to what extent these principles parallel those advanced by a consequentialist concern for human security. In examining UN Charter principles relevant to the use of force, in addition to human rights treaty law and evidence of customary law, I find that these legal bases fail to govern humanitarian intervention in such a way that it is lawfully permitted only under exceptional and extreme cases, as would be prescribed by consequentialist logic.

Chapter 4 explores an alternative international-legal grounding that recognizes the consequentialist insight that not all instances of human suffering constitute equal moral grounds for humanitarian intervention. This legal grounding is not international law on the use of force or

human rights treaty law per se, but rather jurisdictional principles of international human rights and humanitarian law. According to J. L. Brierly, "law is not a meaningless set of arbitrary principles to be mechanically applied by the courts, but . . . exists for certain ends, though those ends may have to be differently formulated in different times and places."[27] For Brierly, while law at times functions as technical, morally neutral precepts, it also maintains clear normative implications for what kinds of behavior are permissible on the international scene. A legal right to humanitarian intervention may be elusive, but insofar as moral understandings of intervention can be couched within this normative legal framework, it can be said to have a "legal basis within the normative framework of international law," although still technically illegal.[28]

The argument of this chapter is that international law does regard certain forms of human abuse as fundamentally more important with regard to their prevention and punishment in order to achieve these normative ends that Brierly suggests. I refer here to international human rights and humanitarian crimes that entail universal jurisdiction. According to the logic of the principle of universal jurisdiction, international law considers some crimes as such an affront to human dignity and well-being that it grants states the right (even the duty) to try in their domestic courts those accused of committing such crimes, regardless of where the crimes took place.[29] International law considers these acts particularly heinous, not unlike how a consequentialist concern for human security argues that certain human suffering is more detrimental to individuals than other forms, and that it is these conditions only that may be subject to the use of force. This chapter explores crimes to which universal jurisdiction is attached—generally, genocide, crimes against humanity, and certain war crimes—and the extent to which these categories of crimes parallel those threats to human security that justify humanitarian intervention according to a consequentialist concern for human security. To the extent that this parallel exists, I argue that these principles of international law create normative space in which violations of this kind can find a legal basis as more extreme categories of human suffering, which are rightly halted and averted with more extreme measures such as the use of force.

Chapter 5 addresses the third and final concern of this inquiry, exploring which actors in international society are best-suited to undertake humanitarian intervention in a way that most effectively minimizes human suffering. This chapter explores characteristics that affect the ability of potential agents of humanitarian intervention to effectively undertake this operationally and politically demanding task. Continuing with the consequentialist logic that underlies the book as a whole, this chapter identifies and articulates the relevant material and nonmaterial

factors that either facilitate or impede an actor's ability to mount an effective humanitarian intervention. While the military wherewithal of the intervener is fundamental, the potential intervener's international legitimacy as an agent or enforcer of humanitarian norms is also crucial in determining whether and to what extent it is a suitable agent. In other words, the efficacy of a potential intervener depends not only on its military wherewithal, but also on nonmaterial factors than can affect its ability to effectively exercise this power. These nonmaterial factors are a function of what can be described as the politics of legitimacy, which involves judgments about the humanitarian credentials of the intervener, whether it should be constrained multilaterally, and its position in the prevailing international political context. What is ultimately a moral concern is therefore driven by what are essentially political considerations—that is, the relationship between power, norms and consensus on the international scene. It is the complex relationship among these various power-political considerations that influences the extent to which an actor can undertake humanitarian intervention such that it meets the consequentialist moral requirement of minimizing human suffering.

Drawing on arguments in the previous chapters, chapter 6 reflects on the possibilities for the theoretical principles I propose to be implemented in practice. This concluding chapter outlines central findings of the inquiry as a whole, emphasizing that important ethical, legal, and political dilemmas of humanitarian intervention can find common resolution by appealing to human security as the referent object of concern within a consequentialist framework. While tension and even conflict among the ethical, legal and political dimensions of humanitarian intervention will continue in practice for the foreseeable future, reconciling them in theory is an important step toward developing a workable approach to humanitarian intervention. The practice of humanitarian intervention has at best yielded mixed results over the past decades, largely because there has been little or no international consensus on the issues explored in this inquiry. Until international society collectively develops a comprehensive framework that includes an exacting standard for the conditions under which humanitarian intervention is permissible, when it should be considered legal, and who should undertake it, I maintain that the approach outlined in this book represents a reasonable way to conceptualize its conduct so that persuasive ethical judgments about humanitarian intervention cohere with prevailing legal and political realities. If the present effort helps move the debate even a modest step toward this goal, then this book will have achieved its purpose.

1

The Morality of Intervention in International Theory

Humanitarian intervention presents a difficult moral dilemma and invites moral appraisal for at least two reasons. First, through the use of military force it is tantamount to war, which disrupts international order, destroys human life, and inevitably brings about human suffering. Moral reasoning in this vein tells us that humanity is best served by limiting the occurrence of such war. Second, humanitarian intervention may be morally desirable insofar as it is the only way to rescue innocent people from gross mistreatment by abusive authorities. While one position aims to prohibit that which the other wishes to permit, both positions are inevitably the products of moral reasoning because both take human life as the fundamental value worth preserving.[1] When each of these moral positions is articulated in the form of a normative theory, both appeal to human welfare as a normatively privileged approach to moral discourse that confers definite moral value on the well-being of individuals.

As a starting point for this inquiry, I examine the reasoning of theorists on opposing sides of the general debate on the moral foundations of the nonintervention principle. This chapter considers two general theoretical dispositions in international thought that encompass both veins of moral reasoning, each making normative arguments about the desirability of the nonintervention principle in general and humanitarian intervention in particular. These two theories are statism, which is by and large noninterventionist, and cosmopolitanism, which has a more interventionist ethos and tends to perceive state boundaries as having a merely derivative significance. While international theory has been plagued by accusations of "intellectual and moral poverty,"[2] I focus on these schools of thought because each contends that making moral judgments about relations among sovereign political communities is just as appropriate as making such judgments about human relations within

them. Theorists of these schools recognize the possibility that the rules of international relations might sometimes require states and individuals to act in ways that are not always exclusively self-serving. States either refrain from or engage in military intervention out of a sense of moral obligation to others. This is not to say that states always (or even often) behave this way in practice, or that there is anything approaching a true universal morality that governs their relations. Rather, at some level of abstraction, "everyone seems to think that the establishment of such a morality would be a good idea."[3] From the point of view of states, the moral obligation to comply with the norm of nonintervention is desirable, while individuals might prefer that international society have a moral obligation to rescue them from violence perpetuated by their own government. Statists hold that this moral obligation is to other states, while cosmopolitans argue that there is a moral obligation to individuals. Both, however, consider states fundamentally capable of moral responsibility.

Statism, also referred to as liberal statism, communitarianism, or morality of states theory, argues for the primacy of nonintervention because human beings can create their own meaningful political community within sovereign states.[4] While most commonly associated with the political theorist Michael Walzer in his seminal work *Just and Unjust Wars*, statism is well represented in the scholarship of others, including R. J. Vincent, Hedley Bull, and Charles de Visscher.[5] The noninterventionist premises of statism, however, are best articulated by Walzer. His is the most comprehensive account of statism, while also having the most direct relevance to the morality of humanitarian intervention. Therefore, this analysis of statism focuses on Walzer's writings, and makes reference to other representatives of statism where appropriate.

Cosmopolitanism takes global distributive justice as one of its chief concerns, but it also speaks to questions of intervention. Thomas Pogge's institutional cosmopolitanism, for example, argues that participants of the existing global order share a responsibility for the human rights violations brought about by this order, and as such, are obligated to rectify these injustices by intervention, if necessary.[6] Charles Beitz's more systematic theory of cosmopolitan morality shares such sentiments, although it is more concerned with reforming unjust institutions at the state level.[7] Beitz even demonstrates certain Rawlsian tendencies when dealing with the morality of the nonintervention principle, as does Fernando Tesón in his influential dissertation on the morality of humanitarian intervention.[8] Nevertheless, to the extent that a cosmopolitan morality suggests the state is rightfully the subject of external moral scrutiny for how it treats its citizens, this study equates cosmopolitanism most directly with the writings of Beitz. Because his writings represent

the most complete account of an international cosmopolitan morality, Beitz is the main focus of the discussion of this theory and its criticisms. However, it also references Tesón's work because it applies this understanding of cosmopolitanism specifically to humanitarian intervention.

This chapter discusses the implications these two theories have for when, why, and under what conditions, humanitarian intervention is morally permissible, and judges the extent to which each theory employs moral reasoning that treats human well-being as the highest moral good—as it relates to the conduct of humanitarian intervention. If one accepts that human life and well being have definite cross-cultural moral significance, then it reasonably follows that the discourse on human rights encompasses much of the current moral reality of international political life.[9] There are powerful pragmatic reasons for grounding moral reasoning on humanitarian intervention in the language of human rights, although as demonstrated in chapter 2, rights-talk is not the only conceptual discourse that grants moral priority to human welfare. The theories at issue generally agree that a human rights based account of humanitarian intervention requires limiting the conduct of intervention to exceptional cases. The argument of this chapter is that the moral underpinnings of such normative prescriptions are derived from a consequentialist form of moral reasoning that both theories explicitly reject, but that both theories implicitly rely upon to be logically and morally consistent.

Understanding Statism and Cosmopolitanism

The most distinguishing element of statism is the idea that the rules of international relations are derived analogously from domestic society. States are the international analog of individuals in domestic society and as such, states maintain the same rights and privileges in the international arena as individuals do in the domestic setting. The difference is that there is no authority in the international arena analogous to the state in the domestic setting. To address the problem of maintaining order in international society absent a global sovereign, statists emphasize the principle of nonintervention. R. J. Vincent argues that observance of the rule of nonintervention is a minimum condition for states' orderly coexistence. According to this view, because states are constitutive of an international society, tranquility can only be preserved if states respect the juridical boundaries that delineate discrete spheres of authority and tolerate the diverse institutional arrangements and political behavior that transpire within them.[10] Thus states, have a legal and moral claim against outside interference and are free to organize their domestic politics free from interference by other states.

Walzer's formulation of the domestic analogy follows this logic, though as a contrast to Vincent's advocacy of a mostly legal right to sovereignty, Walzer champions a moral appeal. Walzer argues that nonintervention and territorial integrity maintain moral value because it is only within states where men and women can build a political community they can call their own.[11] These rights of states to territorial integrity and nonintervention are therefore founded upon the rights of individuals living in a political community within the state—specifically, the right to an autonomous process of social development. The moral character of the state is thus viewed in terms of the social contract, in that the "rights of states rest on the consent of their members."[12] Consent, however, is not to be taken as actual consent, but rather understood metaphorically as "a process of association and mutuality, the ongoing character of which the state claims to protect against external encroachment."[13]

It is easy to see why Walzer underscores the metaphorical nature of consent, because, if he meant it literally, there would be a significant number of states that could not make a claim to territorial integrity or political sovereignty on this basis. Walzer qualifies this metaphor in his later writings as "fit." In other words, there is a certain union between a state's government and its subjects that does not necessarily rest on explicit or even implicit consent in the liberal democratic sense, but rather is most appropriately characterized as "a people governed in accordance with their own traditions."[14] A state may not enjoy internal legitimacy construed in the democratic sense, but the society of states is obligated to treat it in international relations as if it were legitimate in the eyes of its own subjects. That is, a government's internal illegitimacy is no reason to deny it external recognition as a sovereign state. The concept of fit therefore serves to conceptually distinguish internal legitimacy from its external counterpart, while the presumption that there is fit is one that foreigners owe to an historic community out of a sense of morality. A state enjoys full sovereign rights, including the right of nonintervention, because of the existence of fit, regardless of the justice of that state's internal institutions. For Walzer, foreigners are in no position to criticize the internal legitimacy of a state's institutional composition because they simply lack the knowledge to adequately judge the reality of a meaningful political union between government and the governed.[15] International society is morally required to allow for the political processes within states to take their course, despite their "messiness and uncertainty . . . and frequent brutality."[16]

If the central claim of statism is that the international community of states should maintain a certain mutual disinterestedness to one another's internal politics, then the cosmopolitan critique of statism is

one that demands more sensitivity to the wrongdoings of states in the interest of global justice. As a direct challenge to statism, cosmopolitanism opens the state up to external criticism and treats individuals (as opposed to states) as the principal subjects of international morality. Cosmopolitanism does not make the distinction between internal and external legitimacy, or it at least suggests that this distinction is morally unfounded. Under what conditions, the cosmopolitans ask, should states have the right to be respected as autonomous sources of ends in the same way as do persons?[17] The cosmopolitan view therefore challenges the statist domestic analogy on both empirical and normative grounds. That states are as free in international society as individuals are in domestic society is an empirical question, not an a priori assumption, and is to be settled by observation.[18] As one critic of statism suggests, since states (governments) are largely composed of men who are enamored with the exercise of power, it makes more sense to assume that states are not entitled to any presumptive legitimacy.[19]

Beitz's theory of cosmopolitan morality—outlined most clearly in his book, *Political Theory and International Relations*—is largely inspired by these familiar criticisms of statism. Beitz's own theory of international morality takes statism to task on the two analogies fundamental to statist reasoning: the analogy of states and persons, and the resulting analogy of nonintervention and individual autonomy.[20] This criticism essentially amounts to a moral critique of the principle of nonintervention enshrined by Walzer and other statists. Beitz is sympathetic to the view that a state might obtain moral standing by constructing its own rights and liberties on a foundation of individual rights, as it is reasonable enough that consent by a state's citizens justifies the possession of the right of nonintervention for their government. However, Beitz rejects the notion that consent—either explicit or tacit—is sufficient to establish the legitimacy of government.[21]

Though Beitz does not pursue this line of reasoning, a powerful objection to consent as the basis of legitimacy comes from John Stuart Mill's notion of tyranny of the majority.[22] Such an objection is simply that a democratically elected government can brutalize a despised minority just as easily as an authoritarian one can. As such, majoritarian democracies are founded on consent as an empirical reality, but it is hard to say that such a state has rights by virtue of the rights of its citizens if significant portions of them are denied basic individual rights, or even massacred. What is important for Beitz, however, is that the weakness of the link between consent and legitimacy also undermines that between consent and nonintervention. For statists, a state supposedly maintains the right of nonintervention because it seeks to protect its citizens against (external) coercion against their will.[23] Beitz counters that if legitimate

governments exercise coercion against their populace without consent—even in carrying out the everyday operations of government—one needs a justification for why this type of coercion is legitimate and external coercion is not, since neither take place under the auspices of consent.[24]

Beitz's answer to this conundrum is that "only those states whose institutions satisfy the appropriate principles of justice can legitimately demand to be respected as autonomous sources of ends"—that is, to claim the right of nonintervention.[25] In other words, only states that treat their citizens as autonomous sources of ends can demand the right of nonintervention. Beitz is cryptic here. He references a hypothetical contract, which suggests he is arguing that the only kind of legitimate political association is one that conforms to principles chosen by individuals in some sort of original position, á la John Rawls.[26] While he is sympathetic to the Rawlsian argument, Beitz does not explicitly put it forth as his own position. However vague the notions of just institutions and autonomous sources of ends are, in his argument, it is clear that what Beitz requires, for states to be able to claim nonintervention, is a higher standard of human rights protection than is entailed by Walzer's notion of fit. It is also clear that Beitz consciously employs the language of individual human rights, broadly construed, as a condition for state sovereignty and its corollary nonintervention. Walzer's claim for nonintervention rests on the state as the arena in which a political community can thrive, though his critics have charged that this is simply the invocation of the well-known right to freedom of association.[27] Beitz counters that if Walzer had taken the right of political association seriously, he would have considered other rights that are indispensable to realizing such association in practice, such as freedom of speech and press, and a minimum standard of living.[28] While both theorists claim to justify the right of nonintervention with the language of human rights, it is clear Beitz would permit intervention as a response to specific human injustices that Walzer certainly would not. Exactly where and how each author draws this line is the subject of the remainder of this chapter.

Implications for Humanitarian Intervention

The Moral Poverty of Statism

For Walzer, state sovereignty is valued because it provides an "arena within which freedom can be fought for and (sometimes) won," not because the governments within it conforms to a particular institutional arrangement. [29] Intervention violates a state's rights because it is violating the right of a people to live undisturbed by foreigners in a political community of their own. Walzer is therefore suggesting that the

mere existence of a political community within a state means that there is fit between that community and its government. So as long as there is a political community whose government fits it, a government's sovereign prerogative gives it a moral license to treat its subjects however it wishes, with one important exception. According to Walzer, "the ban on boundary crossings is subject to unilateral suspension . . . when the violation of human rights is so terrible that it makes talk of community . . . seem cynical and irrelevant, that is, in cases of enslavement and massacre."[30]

Walzer's reasoning is plainly relevant to humanitarian intervention but serves to prohibit it unless governments are engaged in the widespread massacre or enslavement of their people. However, the reason for Walzer's exception to the general prohibition of intervention is curious. The crux of his argument is that the international community must be prepared to tolerate unjust states and presume that such governments have legitimacy in the eyes of their own citizens. This, of course, is the concept of fit and is grounded in human rights only insofar as the principle of nonintervention exists to protect the right of a people to build a political community unmolested by foreigners. While other statists take this argument a step further and claim that the existence of such communities within states is the foundation for order among them,[31] Walzer places value solely on political communities, full stop. For Walzer, it is only in cases of massacre and enslavement—when talk of a political community is cynical and irrelevant—that the presumption of legitimacy is reversed. In such cases, observers are entitled to presume that there is either no fit between the government and the community, or that there is no community at all, in which case a state's right to nonintervention is revoked and external intervention would presumably be permissible. What is striking about this reasoning is that while the moral basis for intervention in such instances is ostensibly premised on human rights (i.e., right to community), Walzer writes as if intervention is only justified when the existence of massacre and enslavement leads one to question the existence of fit, and not necessarily as a response to egregious human rights violations.[32] In this sense, massacre and enslavement do not themselves justify the forfeiture of a state's sovereignty, but lead us to question the existence of fit, which does provide sufficient grounds for revoking a state's claim to nonintervention. It is therefore fit that Walzer suggests gives state boundaries their moral content, not the fact that the governments operating within them refrain from massacre, enslavement, and mass expulsion.

A common criticism of Walzer that flows from this reasoning is that that there have been, and currently are, many states that do not permit their citizens to organize a community or a political association

according to a preferred tradition.[33] For instance, it is difficult to argue that Saddam Hussein's regime in Iraq fit its Kurdish or Shiite Muslim populations, (who constitute a majority in Iraq), or that they were "a people governed in accordance with their own traditions."[34] Consequently, if the protection of the right to a political community is the raison d'être of Walzer's prohibition on intervention, then such a concern is scarcely served by the nearly unconditional protection of sovereignty that Walzer advocates.

Furthermore, Walzer's implicit connection between massive human rights violations and the absence of fit does not necessarily follow. There are indeed a number of states that have fit—often in the democratic sense of the term—that have violently oppressed religious or ethnic minorities. Nor is it entirely obvious that even violations of genocidal proportions demonstrate the absence of fit as Walzer construes it. The existence of fit cannot automatically be assumed to be a morally compelling reason to grant an oppressive government the right of nonintervention. Indeed, if fit is the only criterion for nonintervention, then a majoritarian democracy that commits genocide is morally shielded from any external interference.[35] A more consistent position would be to directly appeal to human rights and welfare—without the detour of fit—in order to justify revoking nonintervention and permitting humanitarian intervention. Walzer attempts this, but succeeds only in part.

Walzer perceives that independence from external military intervention is one of the highest goods for states in international relations—if not the highest good—for it is this independence that allows people to create a political community of their own that is not influenced by foreigners.[36] The qualification that this independence is forfeited in cases of massacre and enslavement, however, seems to be less motivated by a concern for human rights and human welfare than by the need to provide an account of when the absence of fit is "radically apparent."[37] Given the difficulties with this concept of fit, as it pertains to a state's presumed legitimacy when dealing explicitly with the question of humanitarian intervention, Walzer provides a slightly different exception to the nonintervention rule. That is, humanitarian intervention is justified in response to acts that "shock the moral conscience of mankind."[38]

There are two other possibilities for why Walzer suggests such a criterion for humanitarian intervention instead of relying on the presence or absence of fit. First, it makes Walzer's general prohibition of military intervention more plausible by removing an obvious objection to it—that Walzer's theory could plausibly condone genocide.[39] The second possibility is that he is attempting to more firmly ground his nonintervention theory in the moral discourse of human rights. However,

as Jerome Slater and Terry Nardin rightly indicate, Walzer fails in this attempt because once he opens up the door to humanitarian intervention, he provides no compelling reason for closing it as restrictively as he does.[40] On the surface, Walzer's argument might benefit from the conscience shocking criterion, but if it is the shocking character that makes certain human rights violations subject to humanitarian intervention, the arbitrary nature of such a criterion actually weakens Walzer's overall argument. As Peter Singer aptly points out, the conscience of mankind, at various times and places, "has been shocked by interracial sex, atheism and mixed bathing."[41] There is no end to the list of abuses by governments that shock our moral conscience; and if the logic of Walzer's theory obliges him to permit humanitarian intervention in response to all of these abuses, he completely undermines the strong moral case for nonintervention that is the cornerstone of his entire theory.

Where Walzer errs in formulating his theory is his attempt to articulate human rights exceptions to his argument for nonintervention without appealing to the consequences of intervention. To put it simply, if the goal is to promote human rights or maximize human rights enjoyment, a consequentialist argument suggests that humanitarian intervention is permissible only if it is likely to promote human rights enjoyment more than it impedes it. While it is true that Walzer's general theory of aggression draws from J. S. Mill—who is himself a utilitarian—Walzer believes it a mistake to embrace utilitarianism.[42] Some have even argued that Walzer has conceded that the tension between a utilitarian calculation and respect for human rights is irresolvable.[43] Walzer's conscience shocking criterion is nevertheless meant to lead us to the conclusion that humanitarian intervention is a permissible response to genocide-type activities, but not routine political repression. In this way, the argument limits intervention to exceptional cases, by ensuring war does not occur in response to everyday abuses. However, there is nothing inherent in Walzer's reasoning to suggest this is the conclusion his theory will produce, because it can only produce such a conclusion if it delineates what specific quality of conscience shocking crimes creates reasonable grounds for humanitarian intervention. The consequences of war, in terms of human rights, are only rightly paid if the consequences of not going to war are likely to be worse. Such reasoning is undeniably consequentialist.

Walzer wants to limit the occurrence of armed conflict, but if not for the sake of overall human well-being, then why? His argument seeks to preserve the autonomy of political communities, and he does so with his concept of fit. But, as Walzer construes it, the presence of fit can still plausibly exist in harmony with a genocidal regime. A more consistent

position is to argue that states that massacre or enslave their citizens forfeit their claim to nonintervention, not because this is evidence of the absence of fit, but because these crimes are so terrible that the well-being of more individuals in such a state would be better protected by the initiation of war intended to stop such abuses rather than by unqualified respect for state sovereignty. Walzer hints at such consequentialist logic when he deals directly with humanitarian intervention, but he consciously refrains from invoking a consequentialist argument when he appeals to acts that arbitrarily shock moral conscience. This is precisely why, as Slater and Nardin point out, that when Walzer allows the exception of humanitarian intervention for conscience shocking crimes, he provides no plausible argument for allowing it in response to genocide-type crimes but not to the everyday brutalities perpetuated under authoritarian rule.[44]

However, a consequentialist approach could make this case. A consequentialist could consistently argue that massacre, enslavement, and mass expulsion are among the only crimes that warrant humanitarian intervention because, if left unchecked, these crimes are likely to do more harm than a war aimed at averting such crimes (whereas a war aimed at securing free speech rights, for example, would do more harm than good). Because there are far more regimes that commit lesser human rights violations than there are states that massacre, enslave and expel their citizens, the occurrence of war is therefore limited, and it is done successfully by appealing to human rights and human welfare as the most relevant moral issues.

Cosmopolitanism and Excessive Permissibility

If the problem with Walzer's statism is its dubious consideration of human welfare, via human rights, as the central concern in justifying intervention, then cosmopolitanism suffers from a similar deficiency, although beginning with different assumptions. Beitz's appeal to just institutions, as a criterion for states' claiming the right of nonintervention also has clear implications for the human rights conditions under which he would allow for humanitarian intervention. It must be said, however, that in his book that most clearly lays out his international theory, humanitarian intervention is not his primary concern, although he does apply his theory to humanitarian intervention in his later writings.[45] Both Beitz and Walzer lay out the conditions under which a state's claim to the right of nonintervention may be forfeited, though Beitz suggests that this is when a state's institutions do not conform to the appropriate principles of justice, or at least when institutions fail to be as just as their

circumstances permit. It is unclear as to what is meant by just institutions other than that these institutions must be something approaching democratic and respectful of human rights, construed rather broadly. Unlike Walzer, however, Beitz explicitly requires that a state's sovereignty (and its corollary nonintervention) is contingent on whether it respects human rights. The question is whether this eagerness to undermine sovereignty potentially undermines human rights to the extent that respect for sovereignty can be said to be beneficial to human rights.

According to Beitz's theory so far, a potentially large number of states remain whose governments are not protected against military intervention because of their institutional composition and human rights performance. Carrying such reasoning to its logical theoretical conclusion suggests that states whose governments do not possess an ideal complement of human rights appear to be the legitimate targets of armed intervention aimed at reforming internal institutions so that they conform to appropriate principles of justice.[46] To the extent that Beitz's notion of just institutions implies justice in the Rawlsian distributive sense—and there are reasonable grounds for concluding this is the case—there would be no reason in principle why a democratic state with Nozickian (read: libertarian) institutions would not be equally subject to reform intervention just as much as a totalitarian state would.[47] An obvious objection to cosmopolitanism is that it permits humanitarian intervention in too many instances and creates a prescription for global instability and potentially provides moral sanction for what might otherwise be self-serving aggression. Such an outcome would undermine global order and as a result, have a detrimental effect on the overall enjoyment of human rights. Like Walzer, then, Beitz puts forth a set of qualifications aimed at removing the obvious objections to his theory.

Beitz argues that while reform intervention is legitimate when aimed at states whose governments fail the just institutions test, such intervention might still be wrong for "other reasons."[48] Short of these other reasons, however, Beitz seems to prefer a general presumption in favor of intervention, as reform intervention is morally permissible when a state's institutions are unjust or do not respect human rights. Beitz argues, however, that a potential intervening agent may wish to not make use of this permission because of a plethora of what he calls strategic calculations, which might include considerations of the likelihood of a successful intervention as well as concerns for international stability (both of which have implications for human rights).[49] It therefore seems that Beitz is attempting to exploit consequentialist considerations, though without making a consequentialist argument. Since he does not invoke consequentialist reasoning as part of his general theory, the logic of his own reasoning is only insulated from crippling objections (on conse-

quentialist grounds) because it appeals to the assumed prudence of the states that might potentially be the intervening agents. That is, instead of making the consequentialist case himself in order to elevate the primacy of human welfare by limiting humanitarian intervention (i.e., for the sake of international stability), the determining factor for whether intervention actually occurs against unjust states lies outside his theory and is left to the discretion of the states that would presumably be conducting the intervention.

Beitz does not adequately consider that the human rights implications of permitting intervention as a legitimate response to all unjust regimes requires the precarious assumption that states have both the ability and the desire to subject their decisions to intervene to moral considerations of aggregate human rights enjoyment. It is presumptuous at best to assume that when given a carte blanche to intervene, states will restrict themselves based on such moral considerations. In other words, the way Beitz has structured his argument actually gives states more of an opportunity to conduct self-interested nonhumanitarian interventions under the guise of reform intervention. As a theory that justifies humanitarian intervention by appealing to human rights, Beitz's cosmopolitanism is dangerously permissive, even given his strategic calculation qualification. The theory does not adequately consider the full range of human rights concerns that arise when one seeks to permit war as a legitimate way to reform the numerous unjust states of the world, while attempting to mitigate such sweeping permissibility with the hope that states might not want to intervene for other reasons.

Fernando Tesón adopts a similar cosmopolitan logic in his influential dissertation on humanitarian intervention, and like Beitz's reasoning, Tesón's suffers from a similar deficiency. Tesón's main argument is that because the ultimate justification for the existence of states is the protection and enforcement of individual rights, a government that abuses individual rights "betrays the very purpose for which it exists" and is therefore subject to humanitarian intervention.[50] He also requires that the intervention be proportionate to the abuse it is intended to suppress, and that the intervention is welcomed by those citizens it is aimed at protecting. Tesón questions the moral preference of order and peace over justice and rights, and is largely motivated by a desire to revoke the right of nonintervention for those states who fail to protect human rights, but allow for the use of military force only in response to "egregious cases of human rights violations, such as genocide, enslavement or mass murder" and other "serious oppression."[51]

Like Beitz, Tesón demonstrates certain consequentialist tendencies, but he does not explicitly employ consequentialism as part of his theory. In fact, Tesón is loath to use consequentialist reasoning. He consciously

provides "a nonutilitarian account of those interventions in which, although we expect that innocent persons will die, we still want to claim that the war effort is morally justified."[52] While he wishes to avoid making cold utilitarian calculations, Tesón's aversion to utilitarianism exists for very compelling moral reasons, because the problems with consequentialism are well-known.

In its purest form, and when applied to human rights, consequentialism concerns itself with only aggregate enjoyment of human rights, offering no real moral consideration of the fact that it promotes an ends justify the means ethos. For example, a pure utilitarian ethos would sanction the deliberate slaughter of thousands of innocent civilians by an intervening agent as a means to rescuing a million others. However, Tesón provides no reason, other than consequentialist concerns, for his proposition to revoke the claims of nonintervention by illegitimate states that abuse human rights, only allowing humanitarian intervention in egregious cases. Even though he explicitly rejects consequentialism, at times Tesón relies on consequentialist reasoning to make his case. Aside from the consequentialist undertones in the doctrine of proportionality that Tesón advances, he also argues that "[w]hile racial discrimination is a serious human rights violation, there is little doubt that, say, genocide and widespread torture are worse," thereby suggesting he would permit humanitarian intervention only in the latter case and not in the former.[53] There is no other plausible reason why Tesón should permit intervention to stop genocide—but not racial discrimination—other than the likelihood that intervention in the latter instance would have a detrimental effect on overall human rights enjoyment, or, that if we sanctioned intervention against all states that engaged in racial discrimination, the resulting disruption of international order would be to the detriment of human welfare throughout the world. If Tesón's aim is to limit the occurrence of humanitarian intervention for some other reason, then it is insufficiently argued in his overall theory. Tesón's aversion to consequentialism is therefore peculiar since he wishes his theory to produce a specific outcome (permitting humanitarian intervention for egregious cases only) for a specific reason (to avoid disproportionate harm) that can only be reached using some form of consequentialist reasoning.[54]

Statism, Cosmopolitanism and the Invasion of Iraq

The U.S.-led invasion of Iraq in 2003 has entered the discourse on humanitarian intervention with much controversy.[55] The reason being that the invasion was not initially justified as a humanitarian intervention, but

rather as an act of preemptive self-defense, whereby the United States perceived Saddam Hussein's alleged illegal weapons programs and his potential ties with al Qaeda terrorists as an intolerable threat to its security. But in neutralizing this threat, the United States and its allies would also be deposing a cruel and brutal tyrant who had routinely engaged in serious human rights abuses. Once the original justification for the invasion turned out to be largely overstated and based on faulty intelligence, the George W. Bush administration continued to insist that the invasion was still justified on humanitarian grounds because it liberated Iraq from the yoke of tyranny.[56] Aside from the troubling concern that the Bush administration seemingly abused the humanitarian rationale for ulterior, and self-serving ends, the question of whether or not this invasion was justified permits an illustrative application of the theoretical approaches examined in this chapter.

Applying Walzerian statism to the question of whether the Iraq war constitutes a legitimate humanitarian intervention yields some rather curious conclusions, not surprisingly regarding the idea of fit. If it is the fit between the government and the governed that gives states the right to nonintervention, then Iraq under Saddam Hussein had no moral right to this claim and was thus a legitimate target of intervention in the spring of 2003. By no stretch of the imagination could one argue that Saddam's regime fit with the traditions of the Kurds, who Saddam attempted to exterminate in the 1988 Anfal campaign, and the Shia, who were brutalized following the first Gulf War.[57] On this basis, then, the 2003 invasion was justified, not necessarily as a humanitarian intervention intended to alleviate acute human suffering, but because Saddam's regime had forfeited its moral claim to nonintervention by massacring its own civilians, making the absence of fit radically apparent. Again, according to Walzer's argument, the basis for denying Saddam's regime the right of nonintervention was not necessarily the atrocities perpetrated against innocent people, but rather the fact that such brutality was indicative of an absence of fit between the government and the governed. But in the debate building up to the invasion of Iraq in 2003, Walzer himself argues that "there is no compelling case to be made for humanitarian intervention in Iraq," since neither massacre nor enslavement were occurring or impending.[58] Walzer here is relying not on an application of fit, but rather his conscience shocking criterion for humanitarian intervention. In other words, at the time the invasion was being considered, Saddam's regime was not engaging in crimes that shock the moral conscience of mankind. But an application of Walzer's theory fails to adequately address two fundamental concerns in this regard.

First of all, in determining the justice of the invasion of Iraq, Walzer provides no reason for privileging the conscience shocking criterion over

the fact that the lack of fit was radically apparent, which would abolish Iraq's moral right to nonintervention. On the one hand, Walzer's argument serves to justify the 2003 invasion of Iraq on the basis that Saddam's regime did not fit with the traditions of a majority of the population of Iraq (the Kurds and Shia). Yet on the other hand, Walzer wants his theory to prohibit this invasion on humanitarian grounds because at the time the invasion was being considered, Saddam's regime was not engaging in what he considers to be conscience shocking crimes. Walzer thus utilizes a temporal element to reach the conclusion that the Iraq war was not justified. That is, a justified humanitarian intervention now seems to require that the conscience shocking crimes are ongoing at the time the intervention is undertaken, whereas the absence of fit as justification for intervention can refer to atrocities that took place in the past as evidence of the lack of fit. The conclusion Walzer wishes to reach about the justice of the Iraq invasion thus dictates which principal he uses to appraise it.

But even if we accept his preference for using the conscience shocking criterion, Walzer still gives no reason why crimes of this nature would not include the daily barbarities of life in Saddam Hussein's Iraq, with routine extra-judicial executions, torture, amputations and acts of arbitrary violence against political enemies.[59] The only way that applying the conscience shocking criterion leads to the conclusion that the Iraq invasion was not justified as a humanitarian intervention is if one assumes a consequentialist logic in Walzer's argument. Such logic is implicit in his insistence that the conscience shocking crimes be in progress, as well as his assumption that these, and not lesser crimes, are grounds for intervention. In other words, Walzer wants us to conclude that the Iraq invasion was not justified because there were no large-scale atrocities occurring or imminent in Iraq at the time, presumably because a humanitarian intervention to avert lesser crimes would not prevent large-scale suffering, but only bring about the death and destruction that accompanies military force. This may be correct, but there is nothing in Walzer's exposition of statism that necessarily leads to this conclusion unless one incorporates a consequentialist logic into the conscience shocking criterion, which Walzer is loath to do.

Cosmopolitanism applied to the Iraq invasion leads to more consistent prescriptions than Walzerian statism, but nevertheless to morally dubious outcomes. First, it is clear that Saddam Hussein's Iraq at the time of the invasion would not meet Beitz's just institutions test, thus forfeiting its claim to nonintervention and opening itself up to intervention aimed at reforming its unjust institutions. The first problem with this, of course, is that Saddam's Iraq in the spring of 2003 was not engaging in large-scale massacres. So unless such conditions were

transpiring at the time the invasion was being considered, a reform intervention would not immediately serve to rescue large numbers of people from imminent abuse and/or murder, but rather only bring about the destruction that accompanies a military invasion intended to depose a regime. In the case of the U.S. invasion of Iraq, according to a 2006 study by the Johns Hopkins Bloomberg School of Public Health, as many as six hundred thousand Iraqi civilians have died in violence across Iraq since the United States invaded in 2003.[60] Beitz was no doubt concerned that his theory might be construed in this way as overly-permissive, which is why he argued that there are other reasons that states may not wish to make use of this permission.[61] In the case of Iraq, however, we can only conclude that the United States and its allies did not make any strategic calculations that might have advised restraint in the decision to invade and overthrow the Iraqi regime, or at least that such calculations were either ignored or were far off the mark. By leaving it to states to make these consequentialist calculations and not doing so in his own argument, applying Beitz's prescriptions would actually create more opportunities for states to abuse humanitarian justifications in order to engage in self-aggrandizing aggression. Leaving aside the actual sincerity of the United State's humanitarian justification for invading Iraq, the fact that Iraq under Saddam Hussein was unjust—and would therefore have no moral claim to nonintervention according to Beitz—would provide a convenient moral cover if the United States did, in fact, want to invade for exploitative or otherwise selfish reasons. Not only does this serve to justify armed conflict in situations where there is tyranny but no ongoing atrocities or massacre to avert, it also serves as a basis for justifying intervention that seems to be particularly morally problematic, given the number of governments in the world today that demonstrate something less than the ideal compliment of human rights protections.

Tesón's cosmopolitan approach has similar implications. In applying his general theoretical approach to the Iraq war, Tesón has concluded that the invasion of Iraq was justified because it ended "severe tyranny," which he defines as involving past and present atrocities as well as "pervasive and serious forms of oppression."[62] While Tesón is correct that tyrannies like Iraq are more likely to engage in genocide and massacre than other regime types, he nevertheless treats the existence of tyranny, not the existence of genocide or massacre, as grounds for humanitarian intervention, even though the tyrant Saddam Hussein was not engaging in such crimes when the United States invaded. Like Beitz, Tesón thus chooses to focus on the character of the regime to be overthrown as opposed to averting specific massacres or atrocities. Furthermore, according to Tesón the fact that a regime has committed

atrocities in the past is sufficient grounds for invasion, thus rendering humanitarian intervention a tool for punishing the bad behavior of a government rather than a means to halt or avert large-scale suffering of innocent people.[63] In justifying the Iraq war, Tesón's argument, like Beitz's, dangerously lowers the bar for the conditions under which humanitarian intervention is thought to be permissible and casts serious doubt on the moral value that cosmopolitanism gives to the imperative that humanitarian intervention should seek to minimize overall human suffering, not just depose tyrants.

Conclusion

Both Walzer's statism and Beitz's and Tesón's cosmopolitanism consciously avoid making consequentialist arguments in their efforts to subject the conduct of humanitarian intervention to moral scrutiny. However, both theories implicitly rely on some form of consequentialist calculation in order to achieve the desired outcome when put into practice. This aversion to consequentialist reasoning among these representatives of statism and cosmopolitanism is not unfounded. In avoiding such reasoning, these theorists have successfully avoided the common criticisms of consequentialism as it relates to human rights. One of the most damaging criticisms is that such an approach fails to prohibit some actions that intuitively seem quite wrong, such as condoning the murder of innocent civilians, if doing so would prevent the same evil being done to even more innocent people by others. It is this criticism of utilitarian versions of consequentialism that has resulted in it being referred to as cold, harsh, and callous.[64] Nevertheless if one's interest is to achieve the best possible human rights outcome that a given situation permits, consequentialist reasoning must be employed in some form, even if not in its most unqualified variety.

Most theoretical and empirical treatments of humanitarian intervention, while agreeing that it should only take place under the most extreme human rights conditions, fail to outline, justify, or even identify the underlying logic involved in arriving at such a conclusion, presumably for fear of being accused of making cold utilitarian calculations.[65] As a result, there is a pronounced gap in the literature with respect to a precise account of the human rights conditions under which humanitarian intervention is morally permissible. We are thus left with the vague assertion that it must only occur when human rights violations are severe or extreme, while lacking reasoned moral principles that prescribe action based on empirical conditions of human well-being. This makes it unknowable whether the reasoning of those who suggest

that humanitarian intervention is only permissible in response to egregious human rights violations is genuinely grounded in a fundamental concern for the welfare of individual human beings, or out of a concern for preserving political communities or ending tyranny. One is thus left with the question of which rights and how severe or egregious they must be violated before humanitarian intervention is a morally permissible way to avert such abuses.

The concept of basic rights, famously propounded by the philosopher Henry Shue, provides a useful starting point for addressing this question and is concerned mainly with the human rights that are the most fundamental to human well-being.[66] The idea of basic rights has certain sympathies with consequentialism, in that both take certain values or goods (rights in Shue's case) as lexically prior to others. More importantly, however, since consequentialism requires that we elevate a certain value or good, and then act to maximize that good, consequentialist reasoning on when to employ military force requires a conception of human well-being, as well as an account of the conditions under which the use of military force is likely to promote this conception.[67] This is particularly the case since human well-being is itself imperiled by humanitarian intervention. Therefore, the purpose of the next chapter is to provide an empirical account of human welfare or well-being and articulate moral principles that appeal directly to such a condition to describe the type and extent of human suffering under which humanitarian intervention would promote this condition.

2

The Consequentialist Ethics of Humanitarian Intervention

This chapter develops a prescriptive ethical framework and provides an empirical account of the conditions of human suffering under which humanitarian intervention is permissible. In keeping with the general consequentialist insight that the goal of humanitarian intervention must be to alleviate human suffering to the extent possible, and considering the realities of armed conflict, the level of human suffering at issue must necessarily involve life threatening conditions on a significantly large scale. The consequentialist framework developed in this chapter therefore seeks to provide a more precise empirical account of what these conditions entail, as well as morally reasoned arguments that explain why humanitarian intervention is only morally permissible under these specific conditions. This framework advances a constrained version of consequentialism, mainly to address certain obvious objections to consequentialist ethics (namely from Kantian ethics), but also to facilitate incorporating elements from just war and international relations theory. I refer to this framework as a "consequentialist concern for human security." The framework clearly prescribes a higher threshold of human suffering than cosmopolitans such as Beitz and Tesón would tolerate before revoking a state's claim to nonintervention, while it admittedly produces a threshold similar to Walzer's appeal to conscious-shocking crimes. What distinguishes this formulation from those in the previous chapter is that this framework is more precise as to the nature of the atrocities that must be at stake, while also providing a straightforward ethical argument for why these specific kinds of acts are grounds for armed intervention and other lesser atrocities are not. Another distinguishing feature is that this framework appeals directly to human well-being as the basis for undertaking armed intervention—without diversions of states' rights, "fit" or the vagaries of conscience shocking

crimes—while also considering more completely the implications that military force has on human security at the global level.

The underlying assumption of the consequentialist argument advanced here is that whatever value or good an individual or institution adopts, the proper response to such values or goods is to promote, or maximize them.[1] Because the consequences of actions are the key to their moral evaluation according to consequentialist logic, the moral appraisal of humanitarian intervention rests on the extent to which its consequences promote a certain value or good.[2] I posit *human security* as the good to be promoted by our actions and suggest that unless the impairment of human security is sufficiently severe, humanitarian intervention fails to promote this good and is therefore morally impermissible. In essence, this chapter fleshes out the meaning of sufficiently severe.

Human security is the good to be upheld by humanitarian intervention primarily because of the moral appeal of its inherent focus on human dignity and welfare, which like the human rights discourse, encompasses much of the moral reality of international political life. But human security is also a useful organizing concept that touches upon "all the menaces that threaten human survival, daily life, and dignity."[3] Such menaces include not only violations of human rights, but other conditions such as sudden and harmful disruptions to human existence, abject poverty, famine, disease, and even crime. The theories examined in chapter 1 advanced moral arguments in what was purported to be in the interests of human rights—the right to community in the case of statism and human rights via just institutions in the case of cosmopolitanism. The approach advanced here is also concerned with the best interests of human dignity and welfare, using the concept of human security—instead of community or just institutions—as the empirical account of this general condition. The crux of the consequentialist argument of this chapter is that humanitarian intervention is only permissible when threats to human security constitute "deprivations of basic human goods that are large-scale, deliberate, and imminent or ongoing."

There are essentially two reasons, in theory, why these threshold conditions for humanitarian intervention promote overall human security, and are, effectively, functions of consequentialist reasoning.

The first reason has to do with what is at stake in undertaking humanitarian intervention. In consequentialist terms, we can only measure what the consequences of humanitarian intervention will be toward promoting human security if we consider the general security of individuals before such action, and have a general idea of what risks we take in terms of seeking to promote their security. In other words, humanitarian intervention involves the use of lethal military force, which imperils human security both long and short term. Thus, unless similar

or worse conditions are already present, or an undeniably worse situation is imminent, humanitarian intervention risks disrupting human security more than promoting it.

The second reason has to do with the critically important global reality that human security is so broadly and dramatically imperiled throughout the world that permitting the use of force to counter any threat to human security would be to give a carte blanche for humanitarian intervention virtually anywhere in the world.[4] This would severely undermine the norm of nonintervention and any value that it has toward preserving international order. To the extent that such global instability and disorder affect human security—and it certainly would—its effects would almost surely be deleterious.[5] Using military force to rectify all forms of human insecurity risks a situation in which traumatic and acute disruptions to everyday life are potentially the norm. Such conditions are much less favorable for overall human security than a relative state of global stability in which less urgent and less severe threats to human security are addressed noncoercively.

For the purpose of the present inquiry, this chapter proceeds in four sections. The first section provides a concise explanation of the idea of human security and explains why this concept is an appropriate account of human welfare. The second section applies this concept to a general account of consequentialist moral theory, and addresses how and why consequentialism is the proper ethical approach for developing moral prescriptions to guide the conduct of humanitarian intervention. The third section comprises the main argument and describes the conditions of human well-being that result from a consequentialist concern for human security, therefore permitting humanitarian intervention only under these conditions. The fourth section considers some important implications of using a consequentialist concern for human security as the ethical framework for examining humanitarian intervention, as well as considering other practical advantages of this approach.

A Goal of Human Security

The traditional notion of international security references the use of militaries to defend the interests and territory of sovereign states.[6] A state is thus secure when its military can successfully defeat or deter threats to its sovereignty or other tangible interests. After the end of the Cold War, however, scholars and analysts began to recognize that even successful examples of territorial security did not necessarily guarantee the security of individuals within a state.[7] Herein lies the origins of the idea of human security. In the tradition of modern political thought, the

function of a state is to ensure the welfare of its citizens—to protect them from a life that is solitary, poor, nasty, brutish and short, as Hobbes famously put it. The fact that states have fared poorly in this function—even turned savagely against their populations to inflict a great deal of suffering on them—suggests that the strategy of preserving the state, as a good in its own right, as statists like Walzer advocate, is too narrow an approach.[8] Particularly in the developing world, states are increasingly becoming the major security threat to people when they violate human rights, allow people to starve, carry out ethnic cleansing, and leave their citizens vulnerable to threats by criminals, militias, and terrorists.[9] Today, it is something of a truism that the most deadly threats to people throughout the world come from within their own state, not from military threats posed by rival states.[10] Thus, the movement of the referent object of security from states to individuals is not only justified on empirical grounds, but is also morally desirable as a normative project that advances human values and needs.[11]

Given this general backdrop, the 1994 *Human Development Report* (the Report), published by the United Nations Development Programme (UNDP), laid out the first attempt to provide a redefinition of security—in which threats at the individual level were to be institutionalized in the practice of security—to conform to a changed security environment.[12] The *Report* gives a two-fold conceptualization of human security as (1) "safety from chronic threats as hunger, disease and repression," and (2) "protection from sudden and hurtful disruptions in patterns of everyday life."[13] This is the general conception of human security provided by the UNDP and used in this chapter, for the purposes of the analysis. This is not to say that humanitarian intervention is a morally desirable strategy to promote all aspects of human security. Instead, the decision of whether or not to resort to force should be guided by a consequentialist concern for human security as that idea will be developed here, which is to say that sometimes the best way to promote human security will be to refrain from undertaking humanitarian intervention.

Human Security as Morally Desirable

Proceeding from a general conception of human security as the absence of both direct and structurally caused violence, one can see that the most fundamental element of the idea of human security is the primacy of threats to the quality of life of human beings.[14] This point refers to the reality that international relations premised on a concern for the security of states often neglects the welfare of the people residing within the states. The territorial integrity of a state and the mechanisms of institu-

tional control within it may be secure, but this reality provides little comfort to people who may be suffering as a result of such a condition.[15] In theory, then, positing human security as the paramount goal for international pursuits forces states to consider the consequences of their actions or omissions for the well-being of individuals and not just for the well-being of the state. This focus on the quality of life of individuals also maintains a certain humanist value that draws from the moral appeal of international human rights discourse—namely, that human beings are to be held as the fundamental objects of moral concern. As suggested in chapter 1, conferring moral priority to the rights, security or well-being of individuals has powerful normative and moral appeal. As in human rights discourse, then, the normative character of human security serves to elevate the moral claims and needs of individuals, and therefore brings with it large moral ideas about right and wrong conduct, the nature of obligation, the demands of justice, and how human beings ought to conduct their relations with one another.[16] The primacy of the individual in world affairs thus maintains a certain appeal as the proper language for international ethical discourse.

Another crucial element of the idea of human security, and another reason why it is a morally desirable goal is that it includes structurally-caused threats to human well-being. In other words, overt abuses perpetrated by governments against their own citizens—from relatively mild political repression to ethnic cleansing and wholesale massacre—are not the only, or even most important, threats to human welfare according to a human security agenda. In conferring moral significance upon a broad array of threats to human well-being, the idea of human security not only encompasses these types of abuses, but also the various structural or ostensibly unplanned threats to human well-being, such as famine, disease, poverty, and pollution. Such threats can be equally harmful to human welfare and facilitate conditions that permit state authorities to utilize such natural disasters to engage in more covert abuses of their people, although no less deliberate and certainly no less insidious.

The concept of human security encompasses a broad array of threats that originate from within states and as often perpetrated by the authorities of the states themselves. This has typically been considered the domain of the human rights discourse. But the concept of human security also importantly includes the sudden and disruptive threats to individuals that come from external aggression, which is the traditional domain of the national security discourse. In essence, human security redirects the concern over external aggression from how it affects states to how it affects the individuals residing within them, while scrutinizing how states themselves treat their citizens.

Therefore, concern for human security not only focuses on those abuses being perpetrated (the basis for the intervention in the first place), but also considers the adverse effects that the intervention will inevitably have on human welfare. Whether human suffering is brought about internally by state authorities, or is a result of external aggression, is less important than the fact that such threats are injurious and must be averted or at least assuaged.

Perhaps most important, a concern for human security, while encompassing human right abuses, transcends the rights discourse as a conceptual avenue to underscore moral concerns for human well-being. The language of rights can only carry us so far in this vein, given its juridical foundation, particularly in the contemporary international setting. While it has been submitted that human rights norms define the meaning of human security,[17] the similarity between human rights and human security is that both appeal to the moral worth of the individual and are concerned with welfare and dignity. However true this may be, to have a concern for bringing about human rights for all—meaning all individuals have legal recourse to claim certain protections or goods from one's government or society—while morally desirable, is quite different than an empirical state of human security for all—meaning an actual state of safety and protection from deprivation and danger.[18] Human rights are an important component of, and means to achieving, certain aspects of human security, such as health security, economic security and political security. But having human rights and a legal recourse to invoke their protections is not equivalent to living in a condition of security. Human rights are a set of legal processes that entitle individuals' access to certain goods that are necessary for human dignity, while human security is a measure of actual human dignity.[19] Although still in its conceptual infancy, human security is arguably the more appropriate framework for the moral elevation of actual human dignity and welfare instead of simply having recourse to legal processes that may or may not bring about human dignity.

Maximizing Human Security

Human security is a general condition of human dignity and welfare that includes safety from threats originating from both inside and outside the state, threats that are acute and disruptive (e.g., armed conflict), and threats that are structurally-caused and chronic (e.g., poverty). It has therefore been argued that a human security agenda is an inherently preventive agenda.[20] International society prevents wide-

spread human suffering by ensuring that the components of human security are being adequately met. This is a tall order, as it entails, among other overwhelming tasks, eradicating world poverty and eliminating environmental degradation. As a result, the breadth of the concept of human security has come under some scrutiny. The purpose of anointing these various issues as security issues is to change the status of such issues in a policy hierarchy, thus making them a matter of security, worthy of "special attention, better resources, and a higher chance of satisfactory resolution."[21] When every conceivable threat to human well-being is securitized, the skeptics argue, we end up prioritizing everything and therefore nothing at all.[22]

There are obviously too many and too diverse a range of human security concerns for them all to be addressed through the implementation of a particular macro-strategy.[23] While a human security agenda does and should entail continuous and varied efforts toward goals such as sustainable human development, poverty reduction and crime prevention, there is a general sense that the immediate focus of an international human security agenda must be on those threats that have the potential to escalate into emergency situations where very large populations are at risk.[24] Therefore, it follows that a general condition of poverty, for instance, while certainly a threat to human security, might receive fewer resources and would be lower on a policy hierarchy than a situation in which abject poverty has the potential to erupt into full-blown famine.[25] These clearly distinct conditions certainly require different strategies for satisfactory resolution. Such is the relationship between a concern for human security and the conduct of humanitarian intervention. Given present-day global realities, it is impossible to address each and every threat to human security; it is equally impossible, and profoundly unwise, to attempt to do so using military force. This is primarily because humanitarian intervention entails the use of deadly military force that, by its very nature, undermines human security, and requires that it be employed only as a strategy in circumstances under which the use of military force is likely to maximize human security. What this means in practice is that certain threats to human security will have a higher priority, in a policy hierarchy than others. This requires us to identify which threats most urgently require resolution. If we are to allow humanitarian intervention to be a strategy to promote human security, then our concern for human security must be a consequentialist one, whereby the moral permissibility of intervention is judged by reference to the likely consequences of the use (or nonuse) of military force in terms of its effects on human security.

A Consequentialist Concern for Human Security

In the discipline of normative ethics, consequentialism is considered to be a theory of the right, which means that it makes judgments about whether or not certain acts are morally the right ones to undertake under given circumstances. Consequentialism, of course, appeals to the consequences of such acts to determine their moral rightness. But we only have a fully determinate normative theory if we combine a theory of the right (such as consequentialism) with a theory of the good, which is an account of the factors that determine the goodness of an outcome.[26] Utilitarian theory is the result of combining a consequentialist theory of the right with a theory of the good that is usually described in terms of happiness.[27] At a fundamental level, utilitarianism is the moral theory that judges the morality of human actions based on the consequences or outcomes of these actions in terms of a specified value or good.[28] The present concern, however, is with a consequentialist theory of the right combined with a theory of the good that identifies human security as the chosen value, therefore taking the position that the proper response to this value is to promote or maximize it.[29] To have a consequentialist concern for human security, then, is to choose a course of action that is likely to achieve the best consequences in terms of human security. Although humanitarian intervention is a way to promote human security, exactly how human security is promoted varies according to different empirical realities in terms of threats to human security. Just like a general condition of poverty would call out for one particular response while famine would require a different one, my concern is with what conditions permit the use of military force such that this act serves to maximize human security. Unlike Walzerian statism, then, a consequentialist concern for human security is able to appeal directly to human welfare as the basis for the decision to go to war. Also unlike cosmopolitanism, consequentialism provides a morally principled reason to limit the use of force to only certain circumstances.

Taken as such, consequentialism holds that the proper relationship between agents and values is an instrumental one. For present purposes, therefore, agents are required to act in such a way that the consequences of their actions have the property of promoting or maximizing the good of human security. However, to promote a good and honor it are two different things. Taking human security as our designated good, one honors it by always acting so as to avoid disrupting it under any circumstances; one promotes human security by taking action that results in conditions under which human security will be maximally enjoyed. For example, if causing a certain amount of disruption in the daily lives of individuals—even causing the deaths of some individuals—serves to

rescue countless other individuals from a similar or worse fate, then that action can be seen to promote human security, even though it intuitively fails to honor it. This feature of consequentialism is particularly relevant to humanitarian intervention, since the very nature of such action is that it disrupts human security, often considerably. What must be decided, therefore, is whether this failure to honor human security is likely to result in the failure to promote it by creating conditions where human security cannot meaningfully exist in the foreseeable future beyond that which it did prior to intervention. In such cases, a consequentialist holds that humanitarian intervention would be impermissible.

Therefore, consequentialism can prescribe humanitarian intervention according to whether the circumstances at hand are such that taking that action will serve to promote or maximize the good of human security. Deontological or nonconsequentialist moral reasoning prescribes that we honor this good and therefore recommends that we act the in the same manner or follow the same principle (i.e. never impair human security) under all circumstances.[30] As callous as it might sound, if humanitarian intervention is to be permitted at all, then we must be prepared to sacrifice some aspects of human security—even some human lives—if our goal is to promote it overall. Nevertheless, unlike deontological reasoning, consequentialism maintains the necessary amount of flexibility in our choice matrix, such that the decision of whether or not to undertake humanitarian intervention depends on the actual conditions of human suffering and permits it only under conditions in which such suffering will not be eclipsed by the adverse effects of the intervention itself. Even some self-proclaimed deontologists admit that much of the moral desirability of the categorical adherence to certain maxims ultimately appeals to the desirable outcomes of such uncompromising observance, and not just the intrinsic desirability of such maxims (i.e., never use military force because it is disruptive to human security).[31] In this vein, the utilitarian Richard Brandt argues that "[a]ny reasonably plausible normative theory will give a large place to consequences . . . in the moral assessment of actions, for this consideration enters continuously and substantially into ordinary moral thinking."[32]

Threshold Conditions for Intervention: The Consequentialist Account

A consequentialist concern for human security requires that we ask what conditions must be present or imminent for the use of military force to have a positive outcome in terms of human security. To articulate this, we must first understand the risks involved when we resort to military force. The voluminous literature on the horrors of war need not

be revisited here.[33] Indeed, it is a truism that the use of military force kills, maims, destroys lives, and causes unimaginable suffering, even when conducted according to the rules of war. It is also documented that in the changing nature of armed conflict, civilians, not combatants, constitute the vast majority of casualties.[34] These statements are hardly surprising, but what is surprising are the findings of recent studies demonstrating that the life-threatening conditions caused by armed conflict extend well beyond direct casualties and the actual time span of the conflict itself.[35] While it is not contested that armed conflict kills people directly and immediately, there is now a growing literature that is documenting the extent to which armed conflict threatens lives by destroying private and public property, disrupting economic activity, and siphoning resources from health care.[36] In addition to the direct casualties of war, instigators of armed conflict must also consider a broad range of adverse effects. For example, refugee flows force people into crowded conditions without access to clean water and create conditions for infectious disease; crime and homicide rates rise during wars and often remain so for some time afterward; and as the Iraq conflict suggests, insurgency and sectarian strife are possibilities in the aftermath of initial combat operations.[37]

Of course, it is true that not all instances of military force will have the exact same consequences in terms of adverse effects on human security; some wars are clearly less devastating than others. One might expect this to be the case in the context of humanitarian intervention since the intervening parties are likely to have a vested interest in avoiding civilian casualties to the extent possible, not to mention an overwhelming military advantage. This does not, however, suggest that the resort to force be taken lightly. For example, NATO's 1999 intervention against Serbia over Kosovo—considered one of the cleaner humanitarian interventions—was carefully executed so as not to disrupt civilian life, and did avert a probable genocide in progress. The bombing campaign also directly caused between five hundred and two thousand Serbian civilian deaths.[38] It is also true that the start of NATO's campaign was followed by a substantial escalation of human rights violations by Serb forces in Kosovo, as well as massive human displacement.[39] Furthermore, between June and October of 1999, after Serb forces were expelled from Kosovo and displaced Kosovars began to return, some three hundred Serbian Kosovars were reported murdered in reprisal killings; a similar number were reported abducted.[40] However, these direct and immediate instances of human suffering were only part of the human toll. The extensive destruction to the civil infrastructure in Serbia-proper severely damaged the country's health care system, economy, and agricultural production capacity. Many of these effects linger to this day.[41]

Such a human toll risks much, which is why the use of force must be permitted only in situations where there is much to gain or prevent in terms of human security. Therefore a consequentialist concern for human security leads to the following threshold requirements. Humanitarian intervention is only morally permissible when threats to human security (1) involve the deprivation of basic human goods, (2) are large-scale, (3) are deliberately perpetrated, and (4) are imminent or ongoing.

Basic Human Goods

As defined by the philosopher Henry Shue, basic human rights are those that are not necessarily more valuable or intrinsically more satisfying to enjoy than other rights, but are fundamental to the enjoyment of all other rights.[42] Understood in this way, a basic right is one such that, when sacrificed or derogated, precludes the enjoyment of any other right. On this basis, Shue maintains that basic rights include personal (bodily) security (i.e., protection from murder, torture, rape, or assault); subsistence (i.e., an entitlement to food, clothing, shelter, and minimal health care); and certain liberties (i.e., freedom of physical movement).[43] For example, Shue's reasoning suggests that the right to life is essential to the enjoyment of all other rights, and therefore is in need of the most protection. Violating one's right to life through outright murder, starvation, or by any other means is to permanently deprive one of enjoying any other right. Similarly, to violate one's physical person—through rape, torture, or other such physical abuse—is also to potentially seriously undermine a person's ability to enjoy other rights. No individual can fully enjoy any right that is guaranteed by society if someone can credibly threaten him or her with bodily harm of any kind (rape, beating, torture, starvation, etc.) when he or she tries to exercise the right.[44] The same is true for the freedom of movement, such as in situations of arbitrary imprisonment or forced migration.

Although Shue uses the language of rights as the framework for his philosophical inquiry—and indeed considers at length the correlative duties to basic rights—the moral value of prioritizing the fulfillment of certain human needs as fundamental to the enjoyment of other aspects of human well-being still stands, even absent the social guarantees (or rights) to the provision of these needs. In practice, the concept of basic rights tells us is that certain basic human needs or goods—that is, the objects of basic rights—must be met before human beings can meaningfully pursue other social endeavors, which may or may not be socially guaranteed as rights. These fundamental human needs are basic human goods, and include the goods human beings require to engage in any

other social pursuit—one's life, physical bodily integrity, and the goods needed to sustain them, including subsistence goods. Although such goods do not guarantee a life of dignity, they are the absolute minimum required for one to lead a recognizably human existence. The discussion can easily be carried over into the human security discourse. People must achieve a minimal level of security to pursue other social endeavors which again may or may not be socially guaranteed as rights). The point is to enjoy these pursuits, not simply to have a right to them in some abstract or otherwise legalistic sense.[45] Thus, continued reference to basic human goods makes reference to the fundamentality of certain basic human needs. Framing the issue as rights-talk simply suggests, as Alan Gerwith does "that because every human being must have certain goods . . . in achieving his purposes, it follows that he has a right to these necessary goods."[46]

A consequentialist concern holds that permitting humanitarian intervention only for deprivations of basic human goods maximizes human security precisely because the conduct of humanitarian intervention entails deprivations of basic human goods—most notably death and other immediate physical dangers. Basic human goods are inherently enabling goods, meaning they are necessary for a condition of human security to exist and to be meaningfully enjoyed.[47] To use utilitarian terminology, basic human goods are lexically prior to nonbasic sources of human security, such as cultural goods and even the objects of certain political rights.[48] To deprive people of basic human goods in order to uphold non-basic goods is literally self-defeating, "cutting the ground from beneath itself," as Shue puts it.[49] It follows that, if we have a consequentialist concern for human security, then the only time we may use military force to promote human security is when these enabling goods are imperiled. The immediate death, injury, and displacement, political and social instability, and infrastructural devastation that accompany the use of military force brings about little in terms of human security unless not paying this high price would result in something inherently worse. This is why humanitarian intervention must take place only when threats to human security involve killing physically abusing, starving, enslaving, or forcibly expelling people from their homes.

Large-Scale Human Suffering

To justify military force is at some level to ask: "How many people must die, or must be in imminent danger of dying, before we risk a humanitarian intervention?" In terms of human lives, consequentialism

permits humanitarian intervention only when it rescues more lives than it endangers—promoting human life more than diminishing it. Commonsense morality tells us that we should not wage war to prevent the unjustified and arbitrary murder of a single person, which would clearly be inconsistent with a consequentialist concern for human security.[50] The problem, however, is the same one that has plagued the just war criterion of proportionality: establishing at what point we can be sure that a humanitarian intervention will do more aggregate good than aggregate harm.[51] It is thus tempting to try and quantify human suffering and set an arbitrary number of potential deaths, beyond which we would permit humanitarian intervention. As Barbara Harff suggests, however, a criterion that requires counting the dead implies that we cannot know whether or not a humanitarian intervention is morally permissible until after most of the abuses have occurred, defeating the purpose of recognizing and stopping such human suffering.[52]

To judge the morality of humanitarian intervention before it occurs requires that the consequentialist standard not be the actual consequences of humanitarian intervention, but rather its expected or foreseeable results weighed against the likely outcome of not intervening at the precise time that intervention is considered.[53] Unfortunately, it is exceedingly difficult to measure the good and bad consequences of an action in complex situations where full information is unavailable. In such circumstances, the situation to be avoided is most often a matter of speculation as opposed to calculation.[54] This problem, of course, is not unique to consequentialist thinking, but it is endemic in all strategic thinking on the a priori desirability of the use of military force.[55] Counterfactual historical analysis provides a general sense of what humanitarian intervention is likely to risk, but even this can vary, just like the breadth of the suffering sought to be averted will vary from case to case. On this particular point, then, a consequentialist concern for human security requires a case-by-case appraisal based on expected or foreseeable outcomes. Based on the general threat to human security posed by humanitarian intervention, the guiding principle provided by consequentialism is that the conditions to be averted must constitute repeated patterns of human suffering, demonstrating a certain continuity, with large-scale and widespread deprivations of basic human goods as the most likely outcome of such repeated patterns of suffering.[56] While isolated or otherwise small-scale deprivations of basic human goods are deplorable, preventing or averting such suffering with humanitarian intervention is inconsistent with a consequentialist concern for human security.

Deliberate Abuse

A consequentialist concern for human security would only permit humanitarian intervention in instances of large-scale deprivations of basic human goods. But, it still does not necessarily follow that such egregious human suffering can be meaningfully halted or averted by military force. For example, large-scale human suffering brought about entirely by the vicissitudes of nature would scarcely be assuaged or averted by military force, unless such suffering was deliberately prolonged or worsened by some agent. Therefore, the question as to whether or not the human suffering at issue was brought about through human agency or solely by the caprice of misfortune. If the former, was human suffering an unintended corollary of other (ostensibly benign) social processes, or was it intended as part of a more sinister plan? We must make the distinction between human suffering brought about deliberately and that which was unintentional, and permit humanitarian intervention only in the case of the former. Making this important distinction between deliberate and unintentional human suffering serves two basic consequentialist moral purposes:

(1) First, permitting intervention only in cases of deliberate abuse would serve to limit the instances that permit humanitarian intervention and only allow it in situations where there is an identifiable agent who is responsible for the abuses and against whom the use of force would be directed.
(2) Making this distinction addresses the objection raised in the previous chapter that consequentialism (especially utilitarianism) would permit interveners to deliberately commit atrocities as long as they achieved a greater good in terms of human security.

After defining the parameters of deliberate abuse, I explore these claims further; first by examining the problem of accidental abuse in the context of famine, and second by addressing what is essentially a Kantian objection to a consequentialist approach to humanitarian intervention.

Key to the requirement of deliberate abuse is the mens rea element of intent. According to most legal codes, to act with intent is to mean to engage in certain conduct and to mean to achieve a certain consequence from the conduct.[57] For example, a pilot who intentionally drops munitions on a specific target in combat operations against enemy combatants acted with intent to kill, which is permissible under the laws of armed conflict. Even if, in doing so, this pilot killed several noncombatants, he is said to have not committed a crime because this was not an intended consequence. The crucial question is to what extent did the pilot have

knowledge that substantial civilian casualties would be a consequence of his actions. If the pilot had this knowledge and did nothing to minimize unintended consequences, then intent may be implied from his actions, rendering his act criminal. Intent means to engage in a certain conduct in order to bring about a desired consequence, while knowledge is the awareness that a certain consequence is imminent or likely as a result of certain actions. The argument advanced here is that for an act to constitute deliberate abuse, the agent must have acted with the intent to cause human suffering or with the knowledge that the action would cause human suffering, yet, taking no steps to minimize it. But if suffering was brought about by mere chance, such as a natural disaster, and with no element of human agency involved, then the human suffering was unintentional, and is not grounds for humanitarian intervention. However, if human suffering is brought about entirely by chance and with no meaningful knowledge that such a calamity was imminent or stood a substantial risk of occurring, but is then prolonged or worsened by actions taken by an agent with the intent to exacerbate such suffering or the knowledge that such action will have this consequence, then such actions constitute deliberate abuse.

Deliberate abuse is easiest to judge in those cases where a government or other agents knowingly or intentionally engage in activity with the direct consequence of large-scale human suffering. It is when such human suffering comes about ostensibly by chance, and where abusive governments may seek to hide their sinister plans behind such natural catastrophes, that deliberate abuse is much more difficult to establish. One can therefore conceive of situations in which a government might intentionally instigate, inflict, or prolong human suffering in the context of an allegedly natural disaster, such as famine, for the purpose of terrorizing a despised ethnic minority. Such famine crimes would not only constitute the relevant level of intent, but also would involve knowledge of the outcome of the policy and thus constitute deliberate abuse par excellence.[58]

The Problem of Accidental Abuse

Perhaps no other country has endured more famines in recent history than Sudan. Not coincidentally, these famines occurred in the context of Sudan's prolonged civil war, the last round of which began in 1983 and only ceased in January of 2005 with the signing of a comprehensive peace agreement. This civil conflict pitted Muslim government forces in the northern half of the state against the rebel Sudan People's Liberation Army (SPLA), composed of the primarily non-Arab, non-Muslim peoples of southern Sudan, and was characterized by various localized food shortages and at least three major famines since 1983. There is evidence,

however, that the duration and severity of these famines that occurred in 1985, 1988, and 1998—which together resulted in nearly a million deaths—were a consequence of deliberate policies by the government in Khartoum intended to exploit famine as a cheap and clandestine means of waging war against the rebels and their civilian support base in the south.[59] By arming tribal Arab militias called *Murahaliin* and allowing them to loot the means of subsistence of the civilian population, the government in Khartoum essentially sought to exacerbate famine so as to diminish the popular bases from which the southern opposition drew its support.[60]

The Sudan government's exploitation of these famines followed very similar patterns of abuse each time, beginning with food shortages initially caused by severe drought. In fact, the drought that eventually drove the 1985 famine was so severe that food production was 25 percent of normal in some areas.[61] While the drought was certainly not the product of a plan or policy on the part of the government, Khartoum responded to this crisis by directing *Murahaliin* militias, supported by the Sudanese Army, to terrorize civilian villages in the south, permitting them to raze crops, steal cattle, confiscate grazing land, and deprive the population of the means to survive the drought.[62] The government used similar tactics to exacerbate famine in 1998, when it banned relief flights to the southern provinces, bombed food distribution centers, and timed attacks against farming villages to disrupt dry-season cattle movements and wet-season cultivating and planting cycles.[63]

In each of these situations, once the conditions of drought and food shortages were such that the threat of famine began to loom large over the southern Sudanese population, the government in Khartoum seized the opportunity and took action that was intended to have one unquestionable consequence—the starvation of a people. It is precisely this type of large-scale and deliberate abuse that the consequentialist framework advanced here suggests would be permissible grounds for humanitarian intervention. To constitute deliberate abuse, however, the agent allegedly responsible for causing human suffering must take some sort of action. For instance, if the Sudan Government had not acted to prolong or worsen famine, but rather did nothing and left the people to suffer their fate, then it would not constitute deliberate abuse and therefore not be grounds for humanitarian intervention. While omissions can indeed be purposive and intended to achieve certain sinister goals, because no actions would be taken by a government for an intervention to halt or avert, a humanitarian intervention in such an instance would necessarily either be aimed at forcing the government to take action to help its suffering people or intended as punishment for failure to take appropriate action. Such a prescription is highly problematic on consequentialist moral grounds for

two reasons. First, if people are suffering because their government failed to protect them from a natural disaster, one must seriously question how probable it is that this government would be more likely to do so after it was attacked militarily or exactly how this would help the people who are in dire need of assistance. Second, condoning military intervention against states whose people are made to suffer because of incompetent or otherwise indifferent leadership leads to the familiar problem of lowering the bar for military intervention, while also establishing yet another humanitarian pretext for war.

Large-scale and state sponsored atrocities of any kind—such as genocide, massacres, ethnic cleansing, and mass expulsion—are the easier cases in which to conclude that human suffering has been brought about deliberately. But as I suggest, the deliberate instigation or aggravation of a famine is infinitely more difficult to establish, although there are historical instances when it has been largely proven that famine was used as an inexpensive weapon of mass murder, such as the famines that took place during Sudan's North-South civil war. But even in the context of an ongoing famine, the absence of a state policy that guarantees the right to subsistence is morally distinct from a policy of actually withholding adequate food, politicizing food distribution, or intentionally exacerbating famine as a weapon of war.[64] Similarly, for example, not having a guaranteed legal right against torture by authorities is different from actually being tortured by the police. Again, to the extent that these protections are rights, the point is to enjoy the objects of these rights, not simply have a right in some abstract, legalistic sense. Thus, humanitarian intervention is only permissible when the purported right in question is in danger of being deliberately and actually violated, and not merely failing to be legally guaranteed. Having a guaranteed right is always preferable, but failure to guarantee a right is not grounds for war.

Using force against a regime to halt or avert a catastrophe that is not actively perpetrated by that regime is therefore counterintuitive, and would achieve little more than the inherent destruction that accompanies the use of military force. No international actor, for example, seriously considered military force as a way to avert the arguably foreseeable deaths of nearly 15,000 French citizens in the summer of 2003 from heat exposure—twice the number killed in the Srebrenica massacre of 1995—because the French government failed to uphold the most basic human right to life by providing air-conditioned units to its most vulnerable citizens.[65] Applying the argument above, these deaths were, at most, a result of the French Health Ministry's negligence and were in no way the intended or the known outcome. While admittedly an easier case to judge, this example illustrates a legitimate point: that unless it can be shown that the relevant internal power-holder is actively fomenting a

condition of human insecurity, or is exacerbating an existing humanitarian catastrophe to further some sinister social purpose, making war against such an authority will almost certainly bring about more human insecurity than would have otherwise occurred. The distinction between deliberate abuse and accidental harm, therefore, has clear consequentialist value in terms of promoting human security.

Addressing the Kantian Objection

The moral distinction between human suffering brought about deliberately and that which is unintentional again becomes relevant as a solution to the objection that a consequentialist approach to humanitarian intervention would permit an intervener to engage in horrendous crimes, so long as doing so would maximize aggregate human security. This charge against consequentialism essentially argues that the conduct of humanitarian intervention is too permissive, morally speaking, forbidding nothing absolutely; not even torture, murder, or other atrocities.[66] The maximization of human security could thus potentially allow some (or many) individuals to be treated as means to a larger and more impersonal aggregate end. This objection draws primarily from Kantian deontology—that persons always be treated respectfully as ends in and of themselves, and not as means to an end—and is a compelling counterargument to a consequentialism.[67] Indeed, there is nothing in consequentialism—especially its utilitarian variant—that would rule out using human life as a disposable means to achieve a greater good.

It is true that the conduct of humanitarian intervention is likely to harm and kill innocent people in attempting to promote human security in general. However, it does not follow that such human suffering is necessarily instrumental to the goal of promoting human security. In other words, such suffering is not meant to contribute materially to reaching the goal of halting or averting large-scale deprivations of basic human goods. Quite the opposite; if the intervention is conducted at all in accordance with the laws of war, such human suffering is accidental, while to the extent that interveners have knowledge that such suffering will occur, they take steps to mitigate it. For Kant, human respect consists of an evaluative attitude toward individuals as ends in themselves and not merely as means to an end. Treating people disrespectfully as means is not the same as bringing about conditions under which people are made to suffer in some way. Rather, treating people as means is when an agent who renders individuals as entirely disposable deliberately creates these conditions as instrumental to achieving some other purpose.[68] To overcome this objection on Kantian grounds, we must constrain the maximization of human security with requirements that the conduct of humanitarian intervention (1) not deliberately deprive innocent

bystanders of basic human goods and (2) be carried out in a manner consistent with minimizing unintended harm, or collateral damage, as much as possible. The consequentialist approach adopted here is therefore qualified by the just war prohibition of deliberately targeting civilians.

Kantians posit a clear moral difference between bringing about human suffering and doing so deliberately. The moral significance of deliberate (or disrespectful) human abuse is more than just the actual harm caused to human beings, despite the fact that the empirical significance of such abuse is reducible to what happens to innocent people. We consider deliberate human abuse worse because it not only deprives the victims of certain basic goods required for human security, but also because it is done as a means to achieve a certain end.[69] The worst kind of cruelty which uses human misery as an instrument or a means to achieve some sinister social purpose.[70] The worst atrocities are not random acts of violence, but are responses to governmental policy that abuses citizens in order to achieve policy goals,[71] such as those abuses perpetuated by the government of Sudan in the context of famine. Thus, there is an undeniable moral difference between, for example, deaths caused by an ethnic cleansing campaign or a deliberate famine, and deaths caused by a heat wave, a tsunami, or even a humanitarian intervention. Understood this way, even though we expect humanitarian intervention will cause suffering among innocent people, if such suffering is unintentional and avoided to the extent possible, intervention can still be morally justified on both consequentialist and non-consequentialist grounds.

Imminent or Ongoing Human Suffering

It is also important that the major affronts to human security under consideration as grounds for humanitarian intervention be imminent or already underway, but not already in the past. A humanitarian intervention that occurs well after an atrocity has taken place does not serve to promote human security unless another atrocity is imminent or already in progress. The better late than never mentality toward humanitarian intervention renders it a punitive instrument, not a strategy to promote human security.[72] Even though punishment is often desirable in such circumstances, the cost of military force as a punitive measure would be quite a high price to pay in terms of the threats to human security that accompany it.

To the extent that it has been construed as a humanitarian intervention, the case of the 2003 invasion of Iraq provides yet another useful

illustration. Saddam Hussein's regime was indeed murderous, and had committed large-scale atrocities against the Kurds and the Shia. However, at the time the intervention took place, in March of 2003, there was no imminent or ongoing humanitarian catastrophe of a magnitude such that a large number of people would have been saved from certain death or other gross physical abuse. It seems the invasion and its consequences have imperiled human security more than enhanced it. It is true, however, that the long-term benefits of the invasion may someday come to outweigh short-term costs. But if Saddam Hussein's Iraq, as of March 2003, is the standard for humanitarian intervention, then military intervention risks becoming either a routine response to the everyday brutalities perpetuated by the many nondemocratic governments of the world, or an instrument to punish states who have committed large-scale atrocities. Either way, this creates a dangerously permissible normative environment for the use of military force that would have profound effects on global stability and therefore global human security.[73]

Implications and Advantages of the Consequentialist Approach

A consequentialist concern for human security only permits humanitarian intervention in situations of large-scale, deliberate, and imminent or ongoing deprivations of basic human goods. I have explained how each of these elements individually makes a consequentialist contribution toward maximizing human security in the conduct of humanitarian intervention. Equally important is the contribution these requirements, as a whole, make as a general threshold or guiding principle toward promoting human security within normative theory of humanitarian intervention.

Each principle has been put forth as a way to denote the empirical conditions under which humanitarian intervention is likely to result in improved conditions in specific instances. The result that has emerged is a rather high threshold of human suffering that must be present or imminent before intervention is permitted. This high threshold—because of the relative exceptionality of such massive abuse in the world—has theoretical implications not only for promoting human security in specific humanitarian contingencies, but also in the broader global sense. The global reality is that pervasive human insecurity, in at least one of its manifestations, is part of daily life in a good part of the world, particularly the developing world, while the scale and severity of human suffering at issue here is much less common. By limiting the instances under which humanitarian intervention is permitted, the framework advanced here serves to limit the frequency of the use of force, which is

itself desirable in terms of global human security, while still permitting humanitarian intervention under the extreme and exceptional conditions where it is most likely to promote human security.

Limiting the use of force in international society—that is, disallowing it as a response to the type of human suffering that exists in many or most states—promotes human security on the macro level by preserving international order. The understanding of human security as "protection from sudden and hurtful disruptions in patterns of everyday life . . ." is very much related to the idea of social order, which denotes the regular, methodical, or harmonious arrangement in the position of human beings with respect to their relations to one another.[74] Human security on a macro global level therefore requires a certain amount of international order, which requires that the transboundary use of military force occur infrequently.

For example, political security is a component of human security, although lack of political freedom is not a condition that permits humanitarian intervention. The discussion of basic human goods suggests why this is the case in specific instances, but the broader picture provides further evidence for why this ought to be the case. According to Freedom House, out of one hundred and ninety-three states in 2006, ninety were considered free, fifty-eight were partly free, and forty-five were not free.[75] Given the scarcity of military resources and political will, it is highly unlikely that all forty-five nonfree states would actually be subject to humanitarian intervention. But unless a theory of humanitarian intervention puts forth principles that rule out humanitarian intervention as a legitimate response to such prevalent conditions in international society, the use of military force will find no shortage of disingenuous justifications that appeal to righting a wrong. Such justifications could appeal to promoting the multiple nonbasic aspects of human security, such as nonbasic human goods like democracy. This is not to deny the importance of democracy in bringing about human security. It is simply to rule out using military force as a tool for democratization and thereby eliminating a convenient justification for old-fashioned aggression. This is, after all, an important reason that criteria for humanitarian intervention are needed.

The same is true for infrequent and accidental instances of human abuse. A regime that deliberately and regularly murders a few political dissidents is indeed a criminal regime, and this says something very important about human security within that state and calls out for international action (though short of using force). But, the international response to such isolated abuse must not be to wage war because it would be inconsistent with a consequentialist concern for human security in specific instances. The point I make here is that the omnipresence

of such isolated incidents of political murder and extrajudicial killing throughout the globe precludes that a principled response to halt or avert such abuse should be military invasion.[76] The same logic applies for accidental or unintentional human suffering versus deliberate abuse. For example, according to the number of violent crimes reportedly committed in 1999 in South Africa, seven hundred thousand people were deprived of basic human goods because they were victims of violent crime.[77] If we were to be indifferent as to whether such human despair were deliberately perpetuated by the government, such widespread human suffering might plausibly be considered grounds for forcible humanitarian intervention, except for the fact that violent crime statistics are reasonably comparable in virtually every state in the world.[78]

The point of all this is to illustrate that there are two reasons that humanitarian intervention should be restricted to large-scale, deliberate, and imminent or ongoing deprivations of basic human goods, both of which are the result of having a consequentialist concern for human security. First, humanitarian intervention should be reserved for specific instances in which it is likely to do more to promote, rather than impair, human security. Second, the comparative exceptionality of such situations in international society also allows humanitarian intervention to be conducted less frequently, further promoting human security at the global level. But every condition must be present: If there is ongoing, large-scale human suffering (á la deprivations of basic human goods), but the suffering is not deliberately inflicted, then humanitarian intervention is not permissible. If there are ongoing, large-scale, and deliberate denials of certain nonbasic aspects of human security (e.g., the denial of education, voting rights, etc.), then humanitarian intervention is not permissible. And so on. Like Walzer's statism, then, this ethical framework aspires to limit the use of force in international society, but in contrast to statism, a consequentialist concern for human security provides compelling moral reasons for intervening in some cases and not in others.

Conclusion

A consequentialist concern for human security makes two important accomplishments where statism and cosmopolitanism fall short. First, it provides a reasonably precise empirical account for when human suffering is such that humanitarian intervention is morally permissible (and thus when it is not), and second, it does so by explicitly appealing to human well-being (via human security) and considering the full range of implications that military force has on human dignity and welfare.

As suggested, cosmopolitanism fails to provide a coherent theory of humanitarian intervention based on human well-being. To argue that states that lack the usual complement of liberal human rights are the legitimate targets of reform intervention—but then leaving it up to states to decide when they might not want to make use of such permission—provides little principled guidance.[79] Such a permissive theory also fails to fully appreciate the injurious effects of war. While appealing to human rights as the basis for the decision to wage war, cosmopolitanism fails to make the same appeal for when not to go to war. A consequentialist concern for human security, by contrast, provides a compelling moral rationale for both waging war and refraining from waging war.

Likewise, while Walzerian statism sets out the conditions under which it is hoped that the use of military force will be infrequently pursued, the underlying rationale for limiting the transboundary use of force in Walzer's conception is the preservation of the state, and necessarily not out of concern for individual human well-being, per se. Like a consequentialist concern, Walzer's formulation seeks to limit the occurrence of humanitarian intervention by setting a high threshold of human suffering—that being the conscience shocking standard. But instead of limiting the use of armed force because of its detrimental effect on human security, Walzer's theory of aggression is state-centered, or community-centered. Such a contrast is not unlike that between a human security approach to international relations and one based on the security of states.[80] The more important contrast between statism and the framework advanced here, however, is that once Walzer delineates an exception to his noninterventionist argument, his failure to make the distinction between conscience shocking and other crimes leaves him with no rationale for why some crimes are permissible grounds for humanitarian intervention and others are not. A consequentialist concern effectively accomplishes this: certain affronts to human security—clearly delineated above—warrant humanitarian intervention because these conditions, if left unchecked, are likely to do more to harm to human beings than an armed conflict aimed at halting or averting such conditions.

A consequentialist concern for human security therefore employs sound moral reasoning that draws from treating the individual as the appropriate object of such reasoning, while treating human security as the principal concern. This framework thus provides a reasonably detailed empirical account of when existing or potential affronts to human well-being may be subject to humanitarian intervention—that is, when what is at stake is large-scale, deliberate and imminent or ongoing deprivation of basic human goods. Adhering to this principle would permit humanitarian intervention in any situation where large-scale killing or life-threatening physical abuse of human beings is involved:

such as genocide, massive war crimes, crimes against humanity, widespread torture, ethnic cleansing, forced migration, enslavement, deliberate starvation, or the purposive creation of any other conditions intended to kill or displace large populations.

The next problem facing this inquiry is whether and to what extent these same conditions also permit humanitarian intervention under existing international law. Does international law maintain a sufficiently principled body of jurisprudence that identifies certain conditions relating to human well-being, human security or human rights as more severe, thus granting them special status in international law and allowing them to potentially endorse humanitarian intervention in such cases? In other words, to what extent is the prescriptive ethical framework developed in this chapter paralleled by international law? Beginning with a straightforward reading of international law on the use of force, human rights treaty law and customary law, the next two chapters address this concern.

3

Humanitarian Intervention in International Law

This chapter begins the analysis of the legal dimension of humanitarian intervention, wherein I inquire into its status under international law as well as the extent to which relevant international law is consistent with the consequentialist requirement that only certain extreme and exceptional affronts to human security are permissible grounds for humanitarian intervention. To what extent do traditional sources of international law designate certain affronts to human welfare as fundamentally more severe than others, such that international actors may legitimately violate the sovereignty of a state in order to alleviate these particular abuses? The central concerns addressed in this chapter are whether the international law relevant to humanitarian intervention maintains principles that specifically delineate the conditions of human welfare under which the resort to force may be pursued, and to what extent these conditions dovetail with those furnished by a consequentialist concern for human security as developed in the previous chapter.

While it would be a dramatic development for international law to explicitly provide for a legal right to humanitarian intervention, it remains contested that such a rule, as an outgrowth of the United Nations (UN) Charter's legal paradigm would necessarily maintain the requisite specificity to make an overall improvement in the international legal system.[1] This chapter inquires into the extent to which UN Charter-based law, related treaty law and potential customary law relevant to humanitarian intervention provide a legal basis for humanitarian intervention that would govern its conduct commensurate with a consequentialist concern for human security. Is humanitarian intervention permissible under international law? To what extent does international law relevant to humanitarian intervention govern it in a way that considers the consequentialist insight that only the most severe affronts to human security

are appropriate grounds for resorting to force? The purpose of this chapter is to address these concerns.

This chapter begins with a brief analysis of the concerns the law regulating humanitarian intervention must address if it is to provide a legal standard for judging the conditions under which humanitarian intervention is permissible. In other words, it describes what considerations a law of humanitarian intervention must take into account to be sufficiently principled in this respect. Drawing from natural law theory—namely the reasoning of legal theorist Lon Fuller,[2] to be sufficiently principled, any body of law governing humanitarian intervention must consider the fundamental consequentialist insight that intervention is permissible only under certain extreme and exceptional conditions that must be taken into account by maintaining clear principles that explicate such conditions.

The subsequent legal analysis proceeds in three steps:

(1) Examine the ordinary meaning of UN Charter principles relevant to humanitarian intervention using accepted approaches to treaty interpretation.[3]
(2) Approach the UN Charter as an organic document and judge its value to the present inquiry in light of subsequent human rights law and other developments in international law, namely the *Nicaragua* case.
(3) Examine the possible emergence of a customary rule that authorizes intervention on the basis of state practice, paying particular attention to the 1999 Kosovo intervention.

For each body of law, I examine:

(1) whether it provides a legal basis for humanitarian intervention,
(2) whether such law is sufficiently principled to govern humanitarian intervention, and
(3) the extent to which the conditions under which the law would permit intervention—if, in fact, it articulates such conditions—are consistent with a consequentialist concern for human security.

Ultimately, as one moves from a textual reading toward a broader construction of the UN Charter, that includes supporting treaty and customary law, arguments for the legality of humanitarian intervention remain weak. However, incorporating supporting treaty and customary law allows improvement regarding the legal specificity required of a law of intervention, but still falls quite short of governing humanitarian intervention according to the consequentialist ethical framework.

The Requirements of a Sufficiently Principled Law of Intervention

The Requirements of Law

While law and morality often occupy different positions with respect to the permissibility of humanitarian intervention, as this inquiry has emphasized, the need to reconcile the two is crucially important. Citing the legal theorist H. L. A. Hart, Fernando Tesón eloquently argued that legal principles are far from technical, morally neutral precepts, but rather "speak to some of our most basic moral principles, convictions and institutions."[4] In this sense, law can be understood as a purposive human activity that necessarily maintains a moral significance that is subject to moral duty, while also giving rise to moral responsibility.[5] To establish a legal obligation is not to require adherence to law simply because it is the law, but rather because the law itself is moral and just. The codification of moral precepts into law is intended to be prescriptive with respect to how actors coordinate their behavior. In the context of international law, this refers to the guidelines states follow in achieving their international policy goals. At a jurisprudential level, then, the role of international law is to fix a policy response to an international societal need by creating a legal obligation.

In the context of humanitarian intervention, the relevant societal need is morally-defined, but must be accompanied by a sense of legal obligation if states and international actors are to behave with a reasonable amount of predictability when contemplating the use of force for humanitarian purposes.[6] However, contemporary international law operates predominantly in the tradition of legal positivism, which holds that there is no necessary connection between the law and morality.[7] In order to truly uncover the moral underpinnings of the international legal order, one must utilize the theorizing techniques of natural law, which, especially in hard cases, permit moral inquiry and allow moral considerations as part and parcel of articulating legal propositions.[8] This is particularly appropriate for articulating legal propositions about humanitarian intervention, not only because this act is not explicitly dealt with by international law, but also because the legal principles relevant to humanitarian intervention—though not necessarily intended to govern it (i.e., the law regarding the use of force and human rights law)—were procured in the rather narrow tradition of legal positivism. This is why those areas of international law, commonly advanced as the legal basis for humanitarian intervention, are insufficient to effectively do so.

For natural law theorist Lon Fuller, whether or not a body of law is worthy of an obligation to abide by it depends not only on its substantive content, but also on certain procedural aspects,[9] understood as a

contrast to the substantive dimension of legal rules. For the purposes of this chapter, to judge whether a body of law is sufficiently principled to compel a legal obligation is to be concerned with the way a system of rules that governs human conduct should be constructed and administered if it is to be effective with respect to the activity that it purports to govern. Fuller proposes a set of procedural requirements that a hypothetical body of law must meet, several of which are relevant to the existing law that purportedly governs the conduct of humanitarian intervention.

Fuller's framework applied to the current international law relevant to humanitarian intervention requires that this body of law maintain reasonably clear, nonretroactive, substantive rules that are not contradictory.[10] At a very minimum, therefore, a sufficiently principled legal basis for humanitarian intervention requires (1) the existence of an actual set of noncontradictory rules, such that (2) every situation does not have to be decided on an ad hoc basis, and (3) that the course of action in a given circumstance is clearly prescribed by such rules based on the realities of the situation. For a law of humanitarian intervention to be worthy of an obligation to abide by such law, according to Fuller's analysis, not only must this law maintain clear and noncontradictory rules, but also it must be reasonably clear which modes of human suffering (e.g., expulsion, torture, starvation, mass murder) are legally permissible grounds for the use of force. One cannot, after all, have a legal obligation to behave a certain way if the rules supposedly governing behavior are inconsistent or otherwise unclear. If it is to be considered an adequate legal basis in which to ground moral reasoning, the law must be reasonably explicit on when human suffering is such that military force may be pursued. This chapter shall proceed based on this insight, while the moral standard at issue is that of a consequentialist concern for human security.

The Need for Moral Substance

With respect to the moral substance of legal principles in Fuller's analysis, recall that the ethical debate over humanitarian intervention hinges on the paradox of using an instrument of violence as a means to avert violence. This tension is, generally speaking, between the moral imperative argument in favor of intervention, and the notion that the moral reality of war is one that itself kills, maims, and destroys human life. This tension is addressed by employing a consequentialist concern for human security in order to ascertain an empirical account of human

suffering, such that waging a war as a means to halt or avert such suffering would result in an outcome that ultimately maximizes human well-being as measured in terms of human security. To introduce this substantive moral reasoning into Fuller's procedural analysis requires that the jurisprudence of potential international law governing humanitarian intervention be clear and consistent about the types and extent of human suffering that must be present before the use of force is permissible. It further requires that the types and extent of human suffering be large-scale, deliberate and immediate or ongoing deprivations of basic human goods, as suggested by the consequentialist account.

Such a substantive moral calculus is not necessarily required of a law of humanitarian intervention at a jurisprudential level. Nevertheless, as Fuller argues, it is integral that such jurisprudence, at the very least, speaks to these moral concerns. Otherwise, its resultant substantive law is incapable of articulating humanitarian exceptions to international law's general prohibition of the use of force. As a natural law theorist would interpret it, the UN Charter's general prohibition on the use of force speaks to the moral reality that war is inherently detrimental to human well-being. Likewise, any exceptions to this rule must endeavor to achieve the same end of human well-being. This can only be achieved if the principles that create the legal avenue for humanitarian intervention are reasonably explicit and consistent regarding the conditions of human welfare under which it may be invoked. Short of such legal clarity, permissive legal rules lend themselves to an expansive interpretation that requires less justification for departure from the norm of the non-use of force. Absent consistency, the law fails in its raison d'être to provide a stable framework of expectations. Both deficiencies adversely affect the ability of international law to regulate humanitarian intervention such that it serves to maximize human security. Whether or not traditional sources of international law relevant to humanitarian intervention can overcome these deficiencies is the subject of the remainder of this chapter.

Relevant UN Charter Law

The Prohibition of Force and Human Rights Provisions

Arguments about the legality of humanitarian intervention under textual readings of the UN Charter are well-known, and will therefore not be recounted in detail here. By way of summary, however, the (largely settled) debate on this issue has mainly centered on potential exceptions

to Article 2(4) of the Charter, which generally prohibits the 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*." [11] The argument in favor of the legality of humanitarian intervention under Article 2(4) is essentially that it entails using force that is *not* against the territorial integrity or political independence of states, and such force is therefore perfectly consistent with the purposes of the United Nations to the extent that one of the purposes of the UN is to promote human rights. In other words, Article 2(4) does not forbid all uses of force, just that which is directed against the territorial integrity and political independence of states, and that which is inconsistent with the purposes of the UN Charter.[12] Therefore, humanitarian intervention does not fall within this prohibition.

This interpretation of the UN Charter, however, has been largely refuted and prevailing legal opinion is that the language in Article 2(4) was not meant to create loopholes to the general prohibition of the use of force.[13] Even if these terms are intended to be exceptions to the general rule in Article 2(4), it does not follow that humanitarian intervention fails to have an effect on a state's territorial integrity and political independence. The reality of most humanitarian interventions is that they rarely achieve their purposes without the removal or at least disablement of an incumbent regime. Insofar as humanitarian intervention takes place within a state's territory and is aimed at preventing a state's governing apparatus from carrying out a policy (inflicting human suffering), it is unlawful under a strict interpretation of Article 2(4). In the words of Oscar Schachter, to understand humanitarian intervention as not involving violations of territorial integrity or political independence "demands an Orwellian construction of those terms."[14]

The same is true regarding the argument that humanitarian intervention is not inconsistent with the purposes of the UN. Since the purposes of the UN Charter include to promote and encourage respect for human rights, as suggested by Article 1(3), and also to maintain international peace and security as stated in the very first sentence in Article 1(1), the debate is arguably one of emphasis. If order indicates emphasis, then it seems clear that the drafters did not regard human rights to be on equal footing with peace.[15] To interpret the meaning of these provisions as contributing to an exception to Article 2(4) would thus seem to be stretching an interpretation of the Charter in light of its object and purpose. As a result, a textual interpretation of the Charter's provisions on the use of force in light of its object, context and purpose can be read as nothing other than a purposive effort to prohibit the unilateral use of force by vesting sole authority for the non-self-defensive use of force in the UN Security Council.[16]

Charter Law as Sufficiently Principled

Based on the discussion thus far, one can see that there are at worst, no legal avenues in the text of the UN Charter that allow for unilateral (read: not authorized by the Security Council) humanitarian intervention, while at best what we have are contradictory, unclear, and imprecise rules. Even if one could construe the language in the Charter as possibly permitting humanitarain intervention, the principal problem is that the Charter's rules relevant to humanitarian intervention are outwardly contradictory. According to Fuller, this denotes a failure of a body of law to effectively govern international activity.[17] In their defense, however, it is likely that the Charter's drafters were not writing the text with humanitarian intervention in mind. The Charter is therefore being employed to regulate an activity that it was not designed to manage. If one reads the relevant Charter rules prescriptively as saying promote and protect human rights, but do not use force, one must either assume that the framers did not intend the unilateral use of force to be a lawful response to human rights violations or accept the inherent repugnancy of this statement and conclude that the Charter is insufficient to properly govern unilateral humanitarian intervention.

But even if we were to assume that the human rights provisions in the Charter provide a loophole to the prohibition on the use of force, the Charter's rules provide no clear textual guidance regarding the specific human rights violations under which the use of force would be permissible. Given the scarcity of substantive human rights provisions in the Charter, this problem is obvious if we circumscribe the analysis to the Charter itself. We cannot say that a Charter approach to humanitarian intervention is consistent with a consequentialist concern for human security since it provides no elaboration on substantive human rights. I therefore deal with this issue in the next section where I incorporate supporting human rights treaty law.

If the Charter is to effectively govern humanitarian intervention at all, recourse must be had to the Chapter VII enforcement powers of the Security Council. Indeed, in the 1990s, the Security Council found it expedient to characterize human rights violations as threats to international peace and security under its Article 39 powers, and then authorize enforcement (intervention) pursuant to its powers in Article 42.[18] This explicit exception to Article 2(4) was to be subject to the rule of law in the form of the Security Council's legal monopolization of the use of force.[19] The framers therefore assumed that the decision on what constituted a "threat to or breach of the peace" could be safely left to case-by-case interpretations by the Council. Delegates at the San Francisco Conference simply did not consider the issue of whether the Security Council would

be required to treat "like cases alike."[20] If the Council had worked as intended, it would have obviated the need for the unauthorized, unilateral use of force, and the debate on the textual meaning of Article 2(4) would be unnecessary. But it is well-known that the Council has never operated as envisioned by the framers.

The present reality is that Security Council decisions under Chapter VII lack principled coherence.[21] As the only body legally authorized to sanction the non-self-defensive use of force, any such use of force without the Security Council's approval is illegal, despite the fact that the political realities of the Council are such that it is unable to assume its role as enforcer in a principled way. Even if it could, there exists no set of guidelines (formal or informal) for the Council to follow in determining threats to the peace, while the Council maintains no principled legal or moral criteria in determining when (potential) human suffering has become sufficient grounds for permitting the use of military force. If the Council possessed and followed such guidelines, the use of force would have been authorized to avert atrocities in Rwanda, Kosovo and Darfur, just as it was in Somalia, Haiti, and Bosnia.

Consequently, the UN Charter framework lacks principled criteria for determining the conditions of human welfare under which humanitarian intervention is permissible; there are only the ad hoc determinations of the Security Council, which is dominated by powerful states. This, according to Fuller's analysis, is another reason why the Charter's framework would be insufficient as a body of law. The Council operates giving us no stable framework of expectations, no legal certainty and no predictability, while the moral authority of its decisions has been tainted by the arbitrary and selective exercise of power by its permanent members.[22] In sum, the Council is more of a political organ than a legal one. At a very minimum, Fuller's reasoning suggests, the Council must provide some level of predictability for when it will authorize humanitarian intervention.[23] Relying on the Security Council to provide legal authority for humanitarian intervention is therefore not a sufficiently principled legal basis and is certainly not consistent with a consequentialist concern for human security.

Supporting International Human Rights Law

The Universal Declaration of Human Rights

The UN Charter enshrines the promotion of human rights as one of its purposes, yet provides no account of substantive human rights protections beyond the general duty to promote human rights and fundamental

freedoms. While the UN Charter requires that its members promote and respect human rights standards, the document itself does not specify what these standards are. This is partially why the Charter alone is insufficient to govern humanitarian intervention. However, numerous human rights instruments concluded subsequent to the Charter provide detailed descriptions of the human rights that are purported to be authoritative statements of the Charter's human rights standards—particularly the 1948 Universal Declaration of Human Rights (UDHR).[24] The UDHR is not a binding treaty, however, but a General Assembly Declaration, which has no immediate legal effect since the Charter does not give the Assembly the power to make authoritative legal interpretations of Article 1(3).[25] To the extent this aspirational declaration can be read as codifying the human rights principles of the Charter, and thereby potentially explicating human rights standards subject to protection and promotion, the UDHR can at best only offer evidence of state attitudes and, given consistent state practice, perhaps customary international law. However, neither governments nor courts have accepted the UDHR en bloc as anything other than what ought to become principles of law to be acted upon by states over time.[26]

Given its non legally-binding nature, it is unlikely that the UDHR could be utilized as the textual legal standard that specifies which human rights must be protected and promoted in the form of humanitarian intervention as an exception to Article 2(4). In fact, the General Assembly has passed several resolutions in support of Articles 2(4) and 2(7)—which also offer evidence of state attitudes—that are in tension with these human rights principles to the extent that they set standards for intervention.[27] Thus, even states' attitudes indicated by certain General Assembly declarations as bases for determining customary international law (the opinio juris requirement) are contradictory.

Legally-Binding Conventions

Legally-binding human rights treaties, however, place more explicit obligations upon states. According to Michael Reisman, the normatively uncertain place occupied by human rights in the UDHR has been elevated to an imperative level of international law supported by widespread demands for enforcement, as evidenced by the passage of various legally-binding human rights instruments.[28] Given the existence of a significant number of legally-binding multilateral human rights treaties, one can reasonably conclude that the human rights codified in these treaties are no longer within the essential domestic jurisdiction of states as a matter of law relating to the charter's Article 2(7).[29] The Genocide Convention, the Convention on the Elimination of Racial Discrimination,

the two principal Human Rights Covenants, the Convention on the Elimination of Discrimination Against Women, the Convention Against Torture, the Convention on Rights of the Child and the Convention on Rights of Migrant Workers represent a few of the more important legal developments in this regard.

There are two potential problems in using the rights enunciated in these instruments as a principled legal basis for humanitarian intervention. First, it is debatable whether these instruments maintain language calling for the use of force, or other violations of state sovereignty, to enforce the provisions therein. While we can reasonably conclude that human rights treaties have collectively had a profound influence on what matters are to be held within a state's domestic jurisdiction for the purposes of Article 2(7), the same cannot be said with respect to providing an exception to Article 2(4). Second is the issue of whether any of these treaties adequately address the fundamental concern of which human rights in these treaties may potentially be subject to humanitarian intervention. In other words, to ground humanitarian intervention in human rights treaty law, the relevant treaties must at least implicitly consider the fundamental moral dilemma of humanitarian intervention: that only certain extreme and exceptional affronts to human security are to be met with military force, which I have argued are large-scale, deliberate and immediate, ongoing deprivations of basic human goods. In other words, these treaties must express a prioritization of human rights, such that those rights of a higher priority maintain a unique legal status and are thus deserving of special protection and enforcement. This presents a particularly difficult problem if we consider the norms articulated by the General Assembly, which has asserted that all human rights are equal and interdependent.[30] Nevertheless, three multilateral human rights treaties that potentially create avenues relevant to a sufficiently principled legal framework for humanitarian intervention are: the Genocide Convention and the two principal Human Rights Covenants.

The Genocide Convention

The Genocide Convention speaks most directly to humanitarian intervention because of all the aforementioned multilateral treaties, it alone contains language that could potentially be construed as authorizing the use of force to achieve its purposes. In particular, it creates an obligation that requires state parties to prevent and punish the crime of genocide.[31] Such language suggests that if a government permits or itself commits genocide, then other state parties would be obligated to take steps to prevent, suppress and punish the crime. This language explicitly calling for action to be taken by states against other states that commit such a crime is unparalleled in human rights treaty law, as the human rights

provisions in the UN Charter only require that states take action to promote human rights.[32] As a result of the vague and ostensibly permissive language in the Genocide Convention, it has been argued that it could be read to permit humanitarian intervention to halt or avert the crime of genocide, though neither the convention itself nor its drafters explicitly discussed the unilateral use of force as a remedy.[33]

Reference to the *travaux préparatoires* of the Convention suggests that the obligation in Article I of the Convention to prevent and punish the crime of genocide refers only to legislative and judicial activity. In considering the Draft Convention on Genocide, the Sixth Committee of the General Assembly addressed the issue of punishment of genocide by discussing the establishment of an international tribunal to punish the crime.[34] The subsequent debate centered on whether states alone should take responsibility for preventing or punishing genocide, or whether an international tribunal should be established. But the preventative (contrast punitive) mechanism was always penal legislation, and neither punishment nor prevention was discussed in the context of military force. The consensus among the negotiators in the Sixth Committee was that their objective in considering the Draft Convention was to debate whether and the extent to which "states [should] provide for the prevention and punishment [of genocide] in their national legislatures."[35]

With respect to the prevention of the crime, the unilateral use of force was again never discussed as a remedy. The contemplation of preventative measures was debated in the context of national legislatures drafting legislation that would prohibit activities in preparation for genocide, such as "incitement and propaganda for racial or religious hatred … or racial superiority."[36] Remarks by the representative of the USSR reflected this sentiment when he declared that the prevention and suppression of genocide should be "provided for in the legislation of all democratic states … and must apply to all propaganda which stirred [sic] up the hatred leading to genocide."[37] The representative of Yugoslavia even suggested that a state would fail in its duty under the convention to prevent and punish only if it failed to proscribe genocide in its domestic legislation.[38]

It is thus highly unlikely that the drafters of the Genocide Convention intended that the unilateral use of force be a preventative or punitive measure for the crime of genocide, or that the crime of genocide was intended to act as a loophole to Article 2(4). Even if such a notion was on the minds of the drafters, it is worth mentioning that the representative of France made reference to genocide such that it could be construed as a threat to international peace and security. In such instances, he argued, the matter "should be brought before the Security Council."[39] Even if the use of force entered the thought processes of the Convention's drafters, it is

likely that they intended the use of force to remain a matter to be dealt with at the discretion of the Security Council. As argued, however, the ad hoc nature of the Security Council's approach is not a sufficiently principled legal grounding for humanitarian intervention because it gives us no legal certainty as to which activities are subject to the use of force.

To categorically say that genocide is subject to the use of force does take into account the moral content of the humanitarian intervention debate by addressing a specific mode of human suffering that involves large-scale, deliberate, and (at times) imminent, or ongoing deprivations of basic human goods. This is particularly notable because the Genocide Convention provides language that sets the crime of genocide apart from other human rights violations codified in other treaties. I deal more with humanitarian intervention in the context of genocide in the next chapter, but for now it is important to take note that the crime of genocide is not exhaustive of large-scale, deliberate, and imminent, or ongoing deprivations of basic human goods. Furthermore, to the extent that military force could be construed as a lawful way to prevent and punish genocide, the obligation in the Convention to punish as well as prevent the crime of genocide suggests that a humanitarian intervention could be a legitimate response to a genocide that was well in the past and not necessarily ongoing or imminent. More fundamentally, the Convention drafters' apparent deference to the Security Council on the matter of using force precludes a principled approach to the problem. Under that framework, genocide might be legal grounds for the use of force at some times, but not at others.

The International Human Rights Covenants

The principal purpose of drafting both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) was to develop in more detail the rights enumerated in the UDHR in the form of a legally-binding treaty.[40] If it is accepted that the rights in the UDHR are an expression of what ought to become the human rights principles of the UN Charter, then the development and codification of these rights in subsequent legally-binding form can be reasonably pronounced to be the human rights principles of the UN Charter as a matter of law.[41] As such, when Article 55 of the Charter requires that states "promote . . . universal respect for, and observance of, human rights," one could reasonably conclude that this is in reference to the human rights provisions embodied in the two Covenants, which, like the UN Charter, aspire to universal membership. Likewise, when Article 1(3) of the Charter pronounces the vague notion of respect for human rights as one of the purposes of the UN, it is again in the two Covenants where one can find

what human rights are for the purposes of UN Charter law. However, it is important to note, that the Covenants only bind those UN member-states that are parties to them. While the Covenants aspire to universal membership, as a technical legal matter, any standards gleaned from these instruments would only apply to UN members who have ratified the relevant Covenant, just as the duty to prevent and punish genocide theoretically only obligates parties to the Genocide Convention.

This proposed understanding of the relationship between the two Covenants and the UN Charter has important implications for interpreting Article 2(4) of the Charter as it pertains to humanitarian intervention. As suggested, it is possible that because promoting and encouraging respect for human rights is one of the purposes of the UN Charter, the use of force that is not inconsistent with the purposes of the UN Charter could include using force without Security Council approval to protect human rights, if only the UN Charter specified what it meant by human rights. Given the potential status of the Covenants as authoritative interpretations of the human rights provisions of the Charter, can one say that the use of force is permissible because the purpose of the UN is to protect and promote these rights, and the use of force is only prohibited if it is against the purposes of the UN? This is, at least, a plausible reading of the Charter as an organic document, although applying it to humanitarian intervention is morally dubious, based on a consequentialist concern for human security.

This approach, though reasonably clear, would ultimately permit humanitarian intervention as a way to defend *all* of the rights enumerated in the two Covenants. By permitting the use of force in the context of everyday human rights violations—ranging from freedom of expression and the right to marriage, to the right to form trade unions and the right to scientific research and creative activity[42]—this attempt at a legal grounding is inconsistent with a consequentialist concern for human security. Grounding humanitarian intervention in this legal framework can be understood as principled in the sense that are clear, nonarbitrary rules that appeal to precise human rights standards. Nevertheless, this body of law operates devoid of the consequentialist insight that permitting war as a response to all human rights violations risks undermining human security. Using the two Covenants en bloc as the human rights standard for the use of force thus fails as a legal grounding for a consequentialist concern unless the Covenants are shown to set aside certain human rights violations as fundamentally more injurious than others.

It is possible to interpret the ICCPR as doing just this. While there is no clear standard for how human rights ought to be prioritized legally,[43] Article 4(2) of the ICCPR provides a list of human rights therein that are to be considered nonderogable. These nonderogable rights are the right

to life, freedom from torture, freedom from slavery and servitude, freedom from imprisonment for failure to fulfill a contract, freedom from ex post facto laws, equality before the law, and freedom of thought, conscience and religion.[44] For the purposes of Article 4, these rights are to be specifically safeguarded and intended to retain their full strength and validity, in particular during times of public emergency.[45] However, reference to the travaux of the ICCPR reveals no intent on the part of the drafters to suggest that these nonderogable rights are deserving of any differential enforcement mechanism or punitive measure in response to their violation—as the crime of genocide is according to the Genocide Convention—much less that they are subject to the use of force. [46] These rights may simply not be suspended under any circumstances.

Using the UN Charter in tandem with the human rights provisions in the nonderogation clause in the ICCPR comes very close to providing a sufficiently principled legal basis for humanitarian intervention that coincides with a consequentialist concern for human security in the conduct of humanitarian intervention. However, this legal avenue must be regarded as tentative because the language in this clause pertains to categorically prohibiting the suspension of these rights, and does not suggest that violations of such rights are deserving of any special punitive or preventative activity, which is the case regarding the Genocide Convention. More importantly, the content of the nonderogable rights in Article 4 of the ICCPR as standards for humanitarian intervention only partly coincide with large-scale, deliberate, and immediate, ongoing deprivations of basic human goods as required by a consequentialist concern for human security, and, as standards, they are certainly not exhaustive of such conditions.

According to the consequentialist framework, not all of the rights enumerated in Article 4(2) of the ICCPR—even when violated on a large scale—are equally subject to humanitarian intervention. Pursuant to a consequentialist concern for human security, one should be quite hesitant to suggest, for example, that freedom of expression is morally on par with the right to life. In other words, the moral reality of humanitarian intervention as characterized by a consequentialist concern for human security is not fully addressed even if the use of force is reserved for violations of these nonderogable rights only.

Like the ICCPR, the ICESCR also undoubtedly maintains provisions that serve to legally prohibit violations of certain basic human rights, most notably, the rights to food, clothing and housing—what are collectively referred to as subsistence rights.[47] Unlike the ICCPR, however, the text of the ICESCR does not itself contain language that sets aside a core set of rights analogous to the ICCPR's nonderogation clause. The General Comments of the Committee on Economic, Social, and Cultural Rights

nevertheless recognize the fundamentality of subsistence rights as being "of central importance for the enjoyment of all [other] economic, social, and cultural rights."[48] While this is an authoritative statement about the relative importance, or "basic-ness," of subsistence rights vis-á-vis other rights in the ICESCR, the language in this General Comment does not provide for any enhanced legal obligation to safeguard right to subsistence goods compared to other socioeconomic rights, nor does it provide for any differential enforcement mechanism to prevent the deprivation of such goods. In fact, as the text of the treaty itself states, all rights in the ICESCR are to be realized progressively over time.[49] As indicated in another General Comment, the concept of progressive realization in the ICESCR creates a significantly different legal obligation than that found even in the ICCPR.[50] Thus, the ICESCR cannot be said to set aside a core set of rights for which there is a special legal obligation to promote and protect, and as worded, would be an even more inappropriate legal grounding for humanitarian intervention than the ICCPR.

The *Nicaragua* Case

While these treaties do not explicitly deal with the use of force as a means to enforce the human rights norms enshrined therein, the judgment of the International Court of Justice (ICJ) in the *Nicaragua* case over two decades ago dealt extensively with this very issue—if only dealing tangentially with humanitarian intervention per se.[51] The main issue in the *Nicaragua* case was whether the United States acted lawfully when it mined Nicaragua's harbors, destroyed its oil installations, and trained, armed and equipped the contras—the rebel force antagonistic toward Nicaragua's repressive Sandinista government. The United States officially withdrew from the legal proceedings after the jurisdictional phase of the case (and also withdrew its consent to the court's compulsory jurisdiction), though its primary defense while it was still participating was that it was acting under its inherent right of collective self-defense in support of El Salvador's efforts to repel armed attacks by forces supported by the Sandinistas. On this matter, the court ultimately ruled that Nicaragua's activity vis-á-vis El Salvador was not an armed attack, and because El Salvador never declared itself to be a victim of an armed attack, nor did it request assistance from the United States on this matter, the United States was in violation of its customary law obligation to refrain from the use of force.[52] However, aside from the final verdict about the lawfulness of U.S. military assistance to the contras, the Court's view on the relationship between human rights and the use of force is undoubtedly relevant to the present discussion.

The United States did not invoke humanitarian justification for its actions against Nicaragua, although a month after withdrawing from

the legal proceedings, President Ronald Reagan confirmed in a press conference that the goal of U.S. policy in Central America was the overthrow the Sandinista government.[53] While the U.S. could not divulge this policy to the Court without seriously undermining its litigating position, subsequent developments suggest that the United States perceived its actions to be justified as a step to promote democracy and human rights in Nicaragua. This refers to the formal finding by the U.S. Congress that the Nicaraguan government had breached its commitments to the Nicaraguan people, to the OAS, and to the United States with regard to its domestic (human rights) policies.[54] As such, the Court discussed this contention by the U.S. Congress. In essence, the Court suggested that if the United States applied (military) pressure in order to influence the policy choices of the Nicaraguan government, such pressure would be unlawful if the choices that are under pressure are those that states are free to make under international law, such as the choice of a political or economic system.[55] Whether the US intervention in Nicaragua is a legal humanitarian intervention thus hinges on the age-old question of what matters are legally held to be within the domestic purview of a state.

The stated policy of the United States was to remove the present structure of the Nicaraguan government. But the Court ruled that issues of government composition, political ideology and alignment, totalitarianism, and human rights are questions of domestic policy, for which Nicaragua has no obligation to the United States or the OAS concerning the structure of such policies, unless it has an obligation under international law.[56] Nicaragua, of course, was party to numerous human rights treaties, including the American Convention. However, the Court asserted that where human rights are protected by such international instruments, the enforcement of such obligations is only lawfully pursued through the treaty mechanism, though "the absence of such [legal commitments] does not mean that Nicaragua could with impunity violate human rights."[57] The Court further reasoned that while Nicaragua had committed itself to abide by human rights standards by consenting to certain human rights treaties, the United States may not demand human rights observance by Nicaragua because the United States was not itself a party to the relevant human rights treaties.[58] According to this reasoning, the only way to compel Nicaragua to comply with its human rights obligations is for a member-state to the relevant treaty to formally request such compliance through the procedures established by the treaty, no matter how weak and ineffective such procedures might be. The Court furthermore concluded that the specific actions taken by the United States (mining of ports, inter alia) against Nicaragua to (purportedly) ensure respect for human rights were incom-

patible with a humanitarian objective.[59] In other words, such methods were disproportionate.

If we interpret the Court's ruling in *Nicaragua* broadly, then the conclusion is that the use of military force is never an appropriate method to compel a state to comply with its human rights commitments. The only lawful way to do this would be through utilizing the formal procedures established by relevant human rights conventions. Read this way, the precedent of *Nicaragua* is that a purportedly humanitarian intervention as conducted by the United States in Nicaragua is illegal under international law. In this sense, *Nicaragua* has little value toward a potential legal grounding for humanitarian intervention. But the Court's language is quite broad, and if the opinion is read in close connection to the particular facts of the case, then it could be reasonably interpreted as declaring only the illegality of disproportionate military intervention to restore democracy.[60] The Court unequivocally rejected the legality of the use of force as a means to establish democracy. The issue, then, is whether force may be used to put an end to more severe human rights violations. While the human rights conditions in Nicaragua under the Sandinista government were less than ideal—and indeed, the contras were themselves guilty of human rights violations—a lesson to glean from the ruling in *Nicaragua* is that the use of force to compel democratization is illegal because it is disproportionate—that is, because it causes more harm than good. As Fernando Tesón has put it, "the use of force to restore democracy is disproportionate because the mere denial of political rights cannot be characterized as a deprivation of ... sufficient gravity, and is therefore illegal."[61] If this is indeed the Court's reasoning, then it seems to be a consequentialist concern for human security *par excellence*. Unfortunately, the Court does not explicitly expound this position, and while it is clear the Court holds that restoration of democracy is not legal grounds for military intervention, it does not elaborate on the humanitarian conditions under which intervention would be lawful. Though *Nicaragua* provides some legal evidence that humanitarian intervention is only lawful for more severe human rights violations, the Court's failure to specify these more severe violations renders the *Nicaragua* ruling insufficiently principled as a legal grounding for humanitarian intervention.

Customary International Law

The existence of a customary rule that permits humanitarian intervention is probably one of the more common arguments in favor of its legality. To have a customary rule permitting humanitarian

intervention would require a consistent pattern of repeated state practice of humanitarian intervention accompanied by a sense of opinio juris—the belief on the part of the state actors that the behavior in question is lawful (though in fact, it is not lawful when the norm is forming). While a comprehensive analysis of state practice is beyond the scope of the present inquiry, and has in fact been undertaken by several authors,[62] one can make a number of observations pertaining to the relevance and efficacy of a potential customary rule permitting humanitarian intervention.

Illegal State Practice and Customary Rules

The conventional approach to customary rule formation is that the activity at issue must form a persistent pattern of behavior by states.[63] While the modification of treaty law by subsequent state practice remains a contested area of international law, there are numerous examples of this happening, mostly having to do with the Law of the Sea. For example, the ideas of the twelve-mile territorial sea and the two hundred-mile economic zone both arose as a form of custom that effectively modified the 1958 Convention on the High Seas (and are now codified in the 1982 UN Convention on the Law of the Sea). A customary rule emerging from state practice therefore can potentially change existing treaty law. Assuming this to be true, the question for present purpose is whether there exists sufficient state practice of humanitarian intervention to constitute a modification of the UN Charter's rules on the use of force in the form of an exception for humanitarian intervention.

Initial efforts to create new customary international law are a risky venture, especially when the behavior in question consists of the non-self-defensive use of force. Furthermore, these initial efforts are necessarily illegal at the time that they occur, which in the case of humanitarian intervention is to violate the prohibition on the use of force—a norm that has arguably achieved jus cogens status as a peremptory norm of international law.[64] As Allen Buchanan has argued, "[t]he first acts a state performs hoping to initiate the process of creating the new norm will be illegal [because] they will violate the existing norms concerning the scope of sovereignty."[65] Thus, state behavior cannot modify existing rules unless the existing rules are broken. As a methodological matter then, much of the state practice of humanitarian intervention that has potentially contributed to the formation of a new permissive customary rule may not be considered as part of accumulated state practice of unilateral humanitarian intervention because it was authorized by the Security Council and was perfectly legal under

Charter law. Such instances include humanitarian interventions in the former Yugoslavia (1992–95), Somalia (1993), Rwanda (1994), Haiti (1994), and East Timor (2000). This is largely why numerous authors have pointed to the Kosovo intervention as indicative of state practice that supports a new customary rule—because it was widely considered illegal and is therefore suggestive of an emerging rule permitting military force absent Security Council authorization.[66]

Before addressing Kosovo, it is important to review the various contemporary incidents commonly suggested as humanitarian interventions that have potentially contributed to a customary rule. Simon Chesterman has identified eleven military interventions deserving of consideration for this matter: Belgium in the Congo (1960), Belgium and the United States in the Congo (1964), the United States in the Dominican Republic (1965), India in East Pakistan (1971), Israel in Uganda (1976), Belgium and France in Zaire (1978), Tanzania in Uganda (1978), Vietnam in Cambodia (1978), France in the Central African Republic (1979), the United States in Grenada (1983), and the United States in Panama (1989).[67] Of these interventions, most observers agree that the humanitarian elements in the United States interventions in the Dominican Republic, Grenada, and Panama are highly questionable. The intervention in the Dominican Republic was primarily conducted under the auspices of an evacuation of United States and other nationals, the intervention in Grenada was explicitly cited by U.S. officials as not being justified under a right of humanitarian intervention, and the intervention in Panama was undertaken, in the words of President George H. W. Bush, "to combat drug trafficking and to protect the integrity of the Panama Canal Treaty."[68] The same goal of rescuing nationals is also commonly associated with all three interventions in the Congo/Zaire, as well as Israel's intervention in Uganda,[69] while France's intervention in the Central African Republic was more in the nature of punishing the leadership of its former colonial possession for certain policy choices rather than averting a humanitarian catastrophe.[70] In fact, the only remaining of these interventions that are not widely contested as genuine humanitarian interventions are those in East Pakistan, Uganda, and Cambodia, which are held by many to be the only contemporary instances of predominantly "humanitarian" intervention before 1990.[71] One might also wish to include the interventions by the Economic Community of West African States (ECOWAS) in Liberia (1990) and Sierra Leone (1997) and the United States, the UK, and French enforcement of no-fly zones in Iraq (1991–2003) as potentially contributing to such a customary rule. The legal justifications of these interventions, however, are typically linked to Security Council resolutions, thus

precluding them from constituting an exception to a rule that is allegedly being respected.

But it is even uncertain whether one can accurately contend that the interventions in East Pakistan, Uganda, and Cambodia constituted genuine humanitarian interventions. If one takes as a requirement that the intervening parties must overtly invoke humanitarian concerns as justification for their action, the intervention in East Pakistan might qualify, while those in Uganda and Cambodia would not qualify as humanitarian interventions. One could make a persuasive case that each of these interventions achieved a positive humanitarian outcome.[72] However, only in India's intervention in East Pakistan were humanitarian justifications invoked, but they were invoked in tandem with self-defense justifications.[73] In neither Tanzania's nor Vietnam's interventions were humanitarian considerations invoked as the justification for the use of force.[74] To say these interventions constitute state practice supportive of a customary rule permitting humanitarian intervention therefore depends on how one defines the concept. As the International Commission on Intervention and State Sovereignty defines humanitarian intervention, and as I define it here, only India's intervention would potentially contribute to a customary rule that would permit humanitarian intervention.

Kosovo as a Turning Point

The most recent instance of the illegal use of force for primarily humanitarian purposes was, of course, NATO's intervention in Kosovo. Kosovo is widely touted as an almost perfect example of humanitarian intervention, where the intervening actors' primary purpose was to rescue innocent civilians from a brutal ethnic cleansing campaign.[75] Even UN Secretary General Kofi Annan believed that this intervention was defensible on moral grounds and supported NATO's effort.[76] Importantly, the action was predominately justified on humanitarian grounds, as suggested by President Clinton's statement that "[w]e act to protect thousands of innocent people in Kosovo from a mounting military offensive [and] to prevent a wider war . . ."[77] However, it is widely acknowledged that, as a legal matter, NATO's action was a violation of the UN Charter, though arguments for its legality have been put forth based on customary law and even innovative readings of certain Security Councils resolutions.[78] The Security Council resolutions prior to the intervention, however, lacked the explicit authorization of force, though it is noteworthy that a Russian-sponsored resolution condemning NATO was defeated twelve votes to three after the fact.[79] What is at issue here, however, is the extent to which

the Kosovo intervention—insofar as it was illegal under the UN Charter—contributes to the emergence of a customary rule permitting humanitarian intervention absent Security Council approval. Many of those legal experts who recognize Kosovo's illegality under existing law also argue that it is an initial instance of state practice that will eventually render humanitarian intervention lawful.[80] However, many of the details of Kosovo's intervention make even this conclusion uncertain.

The main problem for the Kosovo intervention is that the intervening agents did not demonstrate a sense of opinio juris. In fact, statements by U.S. officials suggest a desire to avoid setting a legal precedent at all costs. In a press conference shortly after the campaign, Secretary of State Madeline Albright stressed that "it is important not to overdraw the lessons that come out of [the intervention]."[81] In other words, the action in Kosovo was a response to a unique situation in the Balkans and is not to be applied elsewhere. Probably even more mindful of precedent, U.S. Government lawyers justified Kosovo using "fact-based factors," so as to preclude the emergence of any universal rule that could be used by other governments to justify similar military interventions.[82] For his part, British Prime Minister Tony Blair repeatedly emphasized the exceptional nature of the intervention.[83] Furthermore, according to the ruling in the *Nicaragua* case, activity aimed at challenging an existing rule of law (therefore initiating the creation of new law) must be predicated upon an alternative rule of law.[84] Throughout the campaign, however, the NATO states never argued that their humanitarian intervention was legal on a basis of law that existed apart from the UN Charter (i.e., new customary law).[85] It was only in the suits against many of the intervening European NATO states filed by Yugoslavia in the ICJ that the respondents began to provide legal justifications; and even then, only Belgium has used an alleged doctrine of humanitarian intervention as a possible legal defense.[86]

Customary Law as Sufficiently Principled

Even if it is conceded that Kosovo does contribute to an emerging customary rule, we are faced with the reality that there have been at most, four instances of illegal humanitarian intervention contributing to such a rule, and in all likelihood, only two (East Pakistan and Kosovo). Whether or not this is sufficient state practice is thus a matter for lawyers to further debate. Assuming these two to four instances of humanitarian intervention effectively create a permissive rule for humanitarian intervention, one must still judge the desirability of having such a rule in light of the need for a sufficiently principled legal standard and a consequentialist concern for human security. Drawing

from these instances of purported humanitarian intervention, one can make several observations regarding the content of this hypothetical customary legal rule.

With respect to whether a customary rule permitting humanitarian intervention is consistent with other international rules, we have a different framework of analysis than with the UN Charter and other treaty law. Pursuant to Fuller's reasoning, law governing a certain action (humanitarian intervention) must not be contradictory—a particularly difficult criterion to apply to noncodified customary norms. However, since customary law as presently discussed is procured by essentially breaking the law—therefore creating what is in essence a narrow exception to the general rule—customary law is, by definition, not contradictory to the general rule from which it departs. In other words, the strong nonintervention/nonuse of force presumption at the core of the UN Charter is affirmed, but a narrow exception to this rule is also affirmed by state practice that occurs under certain circumstances that most states supposedly find persuasive.[87] So the question of the consistency of a customary exception with Charter rules is largely irrelevant. What is relevant for Fuller's requirement of consistency is whether there exists evidence of other customary law that is contradictory to that which permits humanitarian intervention. However, having contradictory customary law is a misnomer, since what we really have is a preponderance of evidence either in favor of or against a customary law exception for humanitarian intervention. The fact that human rights violations on the scale of what occurred in the Balkans and in East Pakistan are hardly ever met with force, accompanied by the numerous General Assembly resolutions that explicitly condemn intervention, means that state practice and *opinio juris* stand against permitting humanitarian intervention as a matter of law. Such evidence sits uneasy with the general acceptance of the Kosovo intervention as well as India's intervention in East Pakistan. As such, if Kosovo were allowed to count toward the formation of customary law, since it took place subsequent to much of this activity and was more or less accepted by the international community, it might be indicative that customary practice is quite possibly taking a step in the direction toward permitting humanitarian intervention. Still, the absence of *opinio juris* in the case of Kosovo makes it a poor candidate for contributing to customary international law, even though there is something of a general tolerance for the norms of intervention emerging from both the Kosovo and East Pakistan interventions.[88]

Assuming that at least the interventions in Kosovo and East Pakistan could contribute to a customary rule, one can see that the conditions for humanitarian intervention would be addressed as a matter of law, by the empirical conditions present during these interventions. To what

extent, then, do these conditions dovetail with those proposed by a consequentialist concern for human security? Indeed, the moral reality of humanitarian intervention under the consequentialist framework *would* be addressed by customary law in that the human rights conditions under which the interventions took place would be those that were intended to be halted or averted. In this sense, a customary rule permitting humanitarian intervention *would* explicitly deal with the types and extent of human suffering that must be present or imminent before the use of force is permissible. The existence of a customary rule would by default suggest that states agree that the human suffering at issue in a given circumstance is that which may be opposed with military force as a matter of law. In East Pakistan, indiscriminate killing of Bengali civilians, attempted extermination of Hindus, arbitrary arrest and torture, and widespread looting and rape was perpetrated by the Pakistani Army.[89] Similar atrocities took place in Kosovo, including rape, torture, and indiscriminate killing of Albanian civilians by Serbian paramilitaries and the Yugoslav National Army.[90] Incorporating the interventions in Uganda and Cambodia, we find documented evidence of comparable atrocities.[91] The question is, are these conditions similar enough to conclude that the state practice of humanitarian intervention is consistent? The answer is most likely affirmative.

If it is agreed that these interventions can be employed as evidence of a customary rule for humanitarian intervention, then the resultant law is reasonably clear and consistent about the types and severity of human rights violations that are necessary to justify the use of force. However, it is highly unlikely that interventions in Uganda and Cambodia constitute genuine humanitarian interventions, while NATO states lacked the *opinio juris* requirement in Kosovo. Therefore, it is hard to argue for the existence of a persistent pattern of state practice when only one or two instances of humanitarian intervention can be counted as evidence of customary international law. While a potential customary legal basis for humanitarian intervention could plausibly be a sufficiently principled body of law that parallels a consequentialist concern, based on the accepted methodology for determining customary international law, it is unlikely that this body of law currently exists, therefore failing to provide adequate legal grounding.

Conclusion

Humanitarian intervention without approval by the UN Security Council is impermissible under international law as it stands today. Nevertheless, there is evidence suggesting that certain aspects of

human rights treaty law and customary law are sufficiently principled to govern humanitarian intervention and delineate specific conditions modestly similar to those rendered by a consequentialist concern for human security. To be sufficiently principled, Fuller's reasoning suggests that any law governing humanitarian intervention must articulate clear rules that are not in contradiction with other rules, that these rules must be formal and not ad hoc, and that they must prescribe action based on empirical conditions of human welfare that are reasonably are clearly identified. To the extent this latter condition is met, it is noteworthy that the nonderogable rights in the ICCPR, the contents of the Genocide Convention, and evidence of state practice possibly constituting customary law are similar to those conditions under which a consequentialist concern would permit humanitarian intervention. A textual reading of the UN Charter, however, suggests that humanitarian interventions not authorized by the Security Council are illegal, and the Charter framework fails as a sufficiently principled legal basis for humanitarian intervention. The legality question under Article 2(4) is largely settled among international law experts in legal circles. The latter problem is because of the lack of specific human rights provisions in the Charter and inconsistency among its rules, but mostly because the legality question itself necessarily relies on ad hoc determinations of the Security Council.

Reading the Charter in tandem with human rights treaty law leads to a slightly different conclusion. While human rights treaties—most notably the two principal Covenants—may be reasonably construed as authoritative statements of the Charter's human rights provisions, and thus have had a profound effect on what matters are to be held within a state's domestic jurisdiction, the same cannot be said with respect to what matters are lawfully grounds for military force. Furthermore, the drafters of the Covenants did not intend for them to set standards for differential punitive or preventative measures for certain human rights violations, as the Genocide Convention does. The nonderogation clause of the ICCPR and the core rights of the ICESCR emphasized by General Comments do speak to the moral reality of intervention by suggesting that certain human rights violations are more injurious than others. However, the content of the non derogation clause does not set a standard consistent with a consequentialist concern for human security and fails to even create duties aimed at the prevention or punishment of violations of these rights. Likewise, the General Commentary emphasizing the fundamentality of subsistence rights in the ICESCR does not create an enhanced legal obligation to promote or protect such rights. While the ruling in *Nicaragua* speaks more directly to the relationship between human rights and the use of force—and even insinuates that

humanitarian intervention might be permissible for "more severe" human rights violations—it fails to clearly identify these conditions in a principled way. The ruling did, nevertheless, set the precedent that prodemocratic military intervention is unlawful, which is consistent with a consequentialist concern for human security.

The Genocide Convention fares somewhat better as a potential legal grounding, though still falls short of providing a clear basis for humanitarian intervention under international law. Importantly, the crime of genocide as described in the convention is quite clear about the activities it proscribes, which are quite similar to those that would be subject to humanitarian intervention under a consequentialist concern for human security. Equally important is that unlike the core subsistence rights in the ICESCR, for which the General Commentary fails to create an enhanced legal obligation to protect, the Genocide Convention potentially creates such an obligation to prevent what I described in chapter 2 as deliberately perpetrated famine, which I argued may be moral grounds for humanitarian intervention. The same contrast regarding legal obligation can be made with the nonderogation clause in the ICCPR, for which the right to life has been described to include subsistence.[92] Indeed, deliberately starving people to death is reasonably encompassed by Article 2(c) of the Genocide Convention, which describes genocide as "inflicting the conditions of life calculated to bring about the physical destruction of a group."[93] What further sets aside the Genocide Convention from the core protections in the two Covenants is that the crime of genocide is criminalized—meaning that committing (or planning) the crime subjects its perpetrators to criminal responsibility, whereas suspension of nonderogable rights or the denial of subsistence rights incur no such criminal responsibility. There is thus a sense within the normative intent of the law that the crime of genocide requires a more urgent, immediate, and decisive remedy than do violations of nonderogable or core rights in the covenants. This issue thus merits further analysis in the next chapter.

Customary international law also remains an uncertain legal basis for humanitarian intervention. Although much of this discussion is hypothetical, a customary rule would not be inconsistent with UN Charter law, since by definition it would be an exception to it. It would be reasonably explicit about the human rights conditions under which the use of force is permissible, simply because the mere existence of a customary rule is indicative that states have allegedly accepted certain conditions as constituting a customary exception to the prohibition of force for humanitarian intervention. Unfortunately, the creation of customary law relevant to humanitarian intervention is fraught with methodological problems, largely having to do with the logic and role of

the Security Council, as well as the problem of establishing *opinio juris* in promising instances of state practice such as the Kosovo intervention. While a customary rule permitting intervention might be sufficiently principled, we lack the requisite empirical evidence for the existence of a customary rule at this time.

Taken as a whole, the normative framework of the international law relevant to humanitarian intervention leads us to two very general conclusions. First, there remains at the core of contemporary international law a strong presumption against the transboundary use of force, the exceptions to which are explicitly spelled out in the UN Charter and do not include humanitarian intervention unless authorized by the Security Council. Having said that, it is also true that contemporary international law has a very strong presumption in favor of protecting human rights, even at the expense of state sovereignty, traditionally understood. As such, if one reads international law as Professor J. L. Brierly does—that it exists to achieve certain ends, which themselves are differently formulated in different times and places—then the normative intent of international law can be construed as aiming to mitigate human suffering.[94] How this end is achieved, Brierly would argue, depends on the circumstances. Most of the time human suffering is minimized by refraining from the inherent destructiveness of the use of force, while in rare cases this end is achieved by actually using force to alleviate the most severe forms of human suffering. To perceive international law in this way, however, is to require that it maintain criteria for when the empirical realities (human suffering) are such that the use of force may be permitted. This is the basic moral reality of humanitarian intervention that informed the consequentialist argument in chapter 2, and that international law must encompass if it is to provide standards for when intervention is permissible. Unfortunately, these different areas of law either have no such standard or contain vague and all inclusive standards, while the customary law that may encompass such standards does not yet exist.

The most promising legal grounding for humanitarian intervention discussed thus far is the Genocide Convention. It is true that like the other bodies of law discussed, there are no clear grounds in the text of the treaty for the resort to military force as a means to halt or avert this crime. However, genocide comes closest to resembling large-scale, deliberate, immediate, ongoing deprivations of basic human goods as outlined by a consequentialist concern for human security. This crime stands out in that its relevant convention grants it special status in international law concerning the extent to which it should be tolerated. In other words, there are certain modes of human suffering that interna-

tional law proscribes but still tolerates (e.g., violations of certain political rights), while other forms of human suffering are considered intolerable (e.g., genocide) and maintain a fundamentally different legal status with regard to their rectification than do other violations. The next questions for inquiry, then, are: What are these intolerable modes of human suffering in international law? Why are they morally and legally different than other affronts to human security? To what extent are they similar to those conditions under which a consequentialist concern for human security would permit humanitarian intervention?

This page intentionally left blank.

4

Universal Jurisdiction as Normative Legal Grounding

The previous chapter reviewed international law relevant to humanitarian intervention and concluded that the bodies of law that purportedly govern and legally authorize humanitarian intervention either have not yet crystallized (i.e., customary law) or render humanitarian intervention illegal (i.e., the UN Charter). Importantly, the existing bodies of law relevant to humanitarian intervention also fail to spell out which atrocities are grounds for the resort to force, such that the legal principles that allegedly govern humanitarian intervention are commensurate with a consequentialist concern for human security. This chapter offers a reading of a different body of international law, not necessarily in search of rules that serve to legally authorize humanitarian intervention, but in search of legal principles that create normative space in which the conduct of humanitarian intervention may potentially be grounded. The challenge is not simply to interpret international law in such a way as to suggest that humanitarian intervention is legal, but rather to reveal a body of law that prescribes action based on the nature or severity of the human suffering in question. In other words, is there an existing body of international law relevant to humanitarian intervention that could potentially govern it in accordance with a consequentialist concern for human security?

As evidenced by the analysis in chapter 3, international law has been slow to adequately address the problem of humanitarian intervention in such a principled way. But according to legal scholar J. L. Brierly, "[l]aw cannot and does not refuse to solve a problem because it is new and unprovided for; it meets such situations by resorting to a principle … whose presence is not always admitted."[1] The principle I propose to advance as providing legal standards for the governance (contrast legal authorization) of humanitarian intervention is the principle of universal

jurisdiction, which permits the national courts of states to prosecute individuals based solely on the nature of an international crime.

The argument of this chapter is that the normative underpinnings of the legal principle of universal jurisdiction are to ensure that every avenue be available to end impunity for certain atrocities, and that these underpinnings are essentially the same as those of a consequentialist concern for human security in the conduct of humanitarian intervention. To the extent that the atrocities and human rights violations that legally permit the exercise of universal jurisdiction parallel those affronts to human security that morally permit humanitarian intervention, the law of universal jurisdiction is an appropriate normative legal framework in which humanitarian intervention can potentially be grounded. In the recent literature, the primary rationale for universal jurisdiction is an ethical one—that some crimes are so heinous and so universally abhorred that a state is entitled to undertake legal proceedings against the perpetrators, regardless of where the crime took place or of the nationality of the victims or perpetrators.[2] As Peter Singer has implied, if punishment can be justified for certain serious human rights crimes, even if such punishment severely encroaches upon the traditional boundaries of sovereign prerogative, "then so can intervention [be justified] to stop such a crime that is about to occur or is already in progress."[3] We must therefore require a certain similarity among the crimes to which universal jurisdiction is attached and the conditions of human suffering under which humanitarian intervention is morally permitted.

Using the principle of universal jurisdiction as a legal basis for humanitarian intervention is not to suggest that intervention is actually rendered legal by such a principle. It is merely to recognize the definite normative similarity between these two concepts in that both are only rightly employed under the worst cases of human suffering. Both concepts have a similar normative intent, but it is the principle of universal jurisdiction, not humanitarian intervention, that is recognized as an international legal construct and carries with it certain legal obligations. As Brierly has noted, however, because a certain activity has no treaty or international legal rule governing its exercise, "it cannot be said that there is no principle of international law applicable."[4] For example, humanitarian intervention is not exactly the equivalent of the legal concept of the use of military force as defined by the UN Charter. But because of the similarity of the conduct of the activity, the UN Charter's principles have nevertheless been used to regulate it (essentially proscribing it). The problem, of course, is that the Charter framework does not appeal in a principled way to the extent and severity of the human suffering under which the use of force may be morally permitted.

The conduct of humanitarian intervention and the exercise of universal jurisdiction are also unquestionably different, but their normative intent is inherently the same: to ensure that the most severe affronts to human welfare and dignity do not go unaddressed. There are also other similarities that I shall address below.

While the UN Charter and the universal jurisdiction approaches both apply legal principles to the conduct of humanitarian intervention that were intended to govern something else, the advantage of the latter approach is that it maintains a reasonably clear list of crimes under which the activity in question (the exercise of universal jurisdiction or conduct of humanitarian intervention) may be employed. According to Lon Fuller, this is a key requirement if the legal principles that purportedly govern international conduct are to clearly prescribe when a course of action may be lawfully taken based on the realities of the situation.[5] But unlike the UN Charter approach, the universal jurisdiction approach does not provide an authoritative answer to whether humanitarian intervention is permissible under existing international law.

Even though using the principle of universal jurisdiction as a legal grounding for humanitarian intervention does not provide a direct legal sanction, it potentially provides, in the words of Jane Stromseth, "a legal basis [for humanitarian intervention] within the normative framework of international law."[6] In this way, states that might engage in a humanitarian intervention, while not technically acting legally, can appeal to a set of legal norms that aspire to achieve the same ends—to ensure that the worst atrocities are dealt with decisively.[7] The fundamental question, then, is to what extent the crimes that trigger universal jurisdiction dovetail with the conditions under which humanitarian intervention is morally permissible. In sum, if a set of legal rules is to be considered an adequate legal basis in which to ground humanitarian intervention, the law must be reasonably explicit on when human suffering is such that military force may be lawfully pursued. Whether or not the law of universal jurisdiction can be applied to humanitarian intervention thus depends on two factors: (1) the suitability of the analogy between humanitarian intervention and universal jurisdiction as normative concepts, and (2) whether the conditions that permit humanitarian intervention according to a consequentialist concern for human security are empirically similar to the crimes that entail universal jurisdiction.

This chapter proceeds in three parts. I first describe the concept of universal jurisdiction and its historical origins. Here I distinguish between crimes that entail universal jurisdiction as a matter of morality (e.g., torture) versus as a matter of pragmatism (e.g., piracy). Next, I examine the analogy between universal jurisdiction and humanitarian intervention. To what extent do these concepts potentially draw from the

same normative underpinnings in international law and morality? Finally, I examine the specific human rights and humanitarian crimes to which universal jurisdiction is most commonly attached (genocide, crimes against humanity, and war crimes) and judge the extent to which each dovetails with the conditions under which humanitarian intervention would be permitted according to a utilitarian concern for human security.

Universal Jurisdiction

Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged perpetrator, the nationality of the alleged victim, or any other connection to the state exercising jurisdiction.[8] The point in examining the law of universal jurisdiction as a possible legal basis for humanitarian intervention therefore stems from the fact that this body of law maintains an unquestionable focus on the nature of the crime. Not all crimes are subject to universal jurisdiction—only those offenses considered "particularly heinous or harmful to mankind."[9] The law of universal jurisdiction sets aside certain crimes thought to be particularly heinous and pushes the limits of traditional jurisdictional bases to ensure that these crimes do not go unpunished. So it is with humanitarian intervention, which is to say that only the worst atrocities should trigger a military response. But there is no accepted legal prioritization of human rights crimes that provides an empirical account of the worst atrocities.[10] The allure of the law of universal jurisdiction for this inquiry should therefore be obvious: the fact that certain crimes are considered more severe and maintain a fundamentally different legal status with regard to their prevention and punishment than do other crimes is evidence for those who would argue that it is only the more severe suffering that ought to also trigger humanitarian intervention. If what is needed for a legal grounding for humanitarian intervention is an international-legal account of these more severe types of suffering, then the law of universal jurisdiction may provide it.

Universal jurisdiction is one of the five bases of jurisdiction recognized in customary international law and is probably the most controversial. The two best established jurisdictional bases are the territorial and nationality principles, in which states exercise jurisdiction over crimes committed in their territory or by their nationals, respectively. The other two jurisdictional bases are somewhat more controversial. The passive personality principle allows the home state of the victim of a

crime to assume jurisdiction, while the protective principle allows a state to exercise jurisdiction over individuals who commit or conspire to commit crimes against its security.[11] What is important is that these jurisdictional bases—including universal jurisdiction—are themselves derived from customary international law. In other words, there is no treaty or convention that provides a list of the crimes that are subject to universal jurisdiction. While certain conventions unambiguously call for the exercise of universal jurisdiction with respect to the crimes listed therein, such as the Torture Convention and the Geneva Conventions, other crimes entail universal jurisdiction as a matter of custom, such as various crimes against humanity. In any case, to understand the normative underpinnings of why a crime ought to entail universal jurisdiction, the customary legal development of the law of universal jurisdiction is crucially important.

There are generally two rationales for the exercise of universal jurisdiction—what Anne-Marie Slaughter refers to as "international morality" and "procedural convenience."[12] It is generally recognized among scholars that the principle of universal jurisdiction arose primarily out of a need for the latter—specifically, out of international resolve to abolish piracy (and later the slave trade).[13] That is, the crime of piracy historically took place on the high seas, more or less indiscriminately against citizens of different countries, making it difficult to exercise jurisdiction based on territory or nationality. Because the right of freedom of navigation on the high seas is universally applicable, it follows that an infringement of that right by pirates should be universally punished. The philosophical foundation of the theory of universal jurisdiction therefore relies on a pragmatic approach of pursuing certain shared international interests that in turn requires the existence of common values shared by the international community.[14] The common value, of course, is that citizens of all nations should have the freedom to navigate the high seas, and the exercise of universal jurisdiction is a pragmatic way to ensure that pirates are unable to operate in the absence of a criminal justice system that can or will prosecute their actions.

The international morality rationale also draws philosophically from the existence of common values in the community of states. The reason that these values are held in common, however, is not a pragmatic one, but rather an ethical one. In other words, both rationales require the existence of common values, but the reasoning inherent in this justification is that some acts are so heinous and such a grave affront to the international community that they strike at the "whole of mankind."[15] As a result, the whole of mankind (read all states) is legally permitted, or even obligated, to exercise jurisdiction over the perpetrator. The basis of

universal jurisdiction as it arose in connection with piracy relates primarily to the peculiar character of the *locus delicti* as opposed to the gravity or seriousness of the crime. The opposite is true of crimes such as genocide and crimes against humanity, which are generally committed within the territorial jurisdiction of a state. While not the only crimes or human rights violations proscribed in international law, acts such as genocide and crimes against humanity entail universal jurisdiction precisely because of the serious nature of the crime.

The legal development of universal jurisdiction—and indeed the entire movement toward ending impunity for serious international crimes—depends greatly on the shared moral assertion that certain acts should be regarded as serious crimes under international law and ought to be governed by legal principles that aspire to end impunity for such crimes.[16] The debate on humanitarian intervention depends on a very similar moral assertion, except the moral underpinnings of humanitarian intervention have not been translated into legal principles like those of universal jurisdiction. For the purposes of this inquiry, then, it is only crimes for which the basis of the exercise of universal jurisdiction is their seriousness or extreme gravity (as opposed to the peculiar character of the locus delicti) that shall be considered as crimes that may also permit humanitarian intervention.[17]

Shared Normativity: Universal Jurisdiction and Humanitarian Intervention

The act of exercising criminal jurisdiction for certain serious international crimes and using military force to halt or avert certain affronts to human dignity are clearly not the same thing—legally, morally, or empirically. When appealing to the behavior under which each are legitimately employed, both humanitarian intervention and universal jurisdiction nevertheless appeal to some form of moral reasoning. While the precise nature of this moral reasoning may be different, the conclusion is that both activities are rightly employed only when the abuse of human dignity is sufficiently severe to warrant a significant departure from the fundamental organizing feature of the international system—state sovereignty.[18] Therefore, the conflict with and impact on the doctrine of state sovereignty is a fundamental normative similarity between humanitarian intervention and universal jurisdiction, even though the former entails physical coercion and the latter is a judicial procedure.

The development of international human rights law over the past several decades is indicative of an increased willingness by states to

subject certain aspects of their internal affairs to international scrutiny. What began some three hundred and fifty years ago as an absolute right to rule as the ruler saw fit has to some extent been replaced by the recognition that states may be held accountable for breaching their international obligations. As a practical matter, however, perfect enforcement is impossible, and states are still more or less free to organize their internal politics as they see fit, with little fear of international sanction. Indeed, compliance with international human rights standards is mostly a function of voluntary state compliance, not necessarily the effective international enforcement of such standards. Thus, to the extent that adherence to international standards is voluntary, the foundations of state sovereignty—territorial integrity and political independence—remain fully intact.[19]

On rare occasions, however, the foundations of a state's sovereignty have been overtly violated in the name of enforcing universally recognized standards of human dignity. This enforcement has come in the form of humanitarian intervention as well as the exercise of universal jurisdiction—both of which violate certain fundamental (territorial) aspects of state sovereignty. When foreign armies cross an international border and coerce the authorities of that state to conform to certain behavior, then the territorial integrity of that state has unquestionably been violated and the de facto control of at least some of that state's internal affairs has effectively been transferred to the intervening power, even if for a short time. To the extent that such behavior becomes legitimate in international society, we must seriously begin to reconsider the normative foundations of state sovereignty. Likewise, when the legal system of a state tries nationals of another state in its courts—with no meaningful nexus between the accused and the state exercising jurisdiction—then the territorial jurisdiction of the state of which the defendant is a national has been usurped. Just as in the case of humanitarian intervention, then, an important territorial aspect of a state's sovereignty—in this case, the right to exercise criminal jurisdiction over its own nationals and people within its territory—has been effectively transferred to a foreign authority.[20] A similar sovereignty transfer was the jurisdictional basis for the Allies' trials of German war criminals at Nuremburg, whereby the authority to legislate offenses and prosecute and punish offenders was assumed by a foreign entity.[21] Indeed, Justice Robert Jackson's opening statement at Nuremburg implies that the transfer of sovereignty from Germany to the Allies was because of the "calculated, malignant, and devastating" crimes committed by the Nazis, which was in turn the jurisdictional basis for the Nuremburg Tribunal itself.[22]

Humanitarian intervention and the exercise of universal jurisdiction both entail the de facto transfer of certain fundamental features of state sovereignty to an external actor, and therefore alter the de facto locus of sovereign authority, at least temporarily.[23] While the moral foundation of both relies on the gravity and seriousness of the offense, engaging in humanitarian intervention or exercising universal jurisdiction equally alters how one normatively assesses the sovereignty of a state that engages (or whose nationals engage) in grave and serious atrocities. With respect to the normative assessment of sovereignty, humanitarian intervention and universal jurisdiction are analogous. In terms of the particularly heinous crimes that humanitarian intervention and universal jurisdiction are intended to address, these two activities equally affect the extent to which state sovereignty is a normatively desirable international principle.

The violation of territorial aspects of a state's sovereignty for certain crimes says something very important about the severity of the crimes under which such violations of state sovereignty are undertaken. To the extent that perpetrating such crimes equally permits universal jurisdiction or humanitarian intervention, the analogy between these activities becomes evident. This highlights another similarity between humanitarian intervention and universal jurisdiction, which is that if both are not limited in some way, they are particularly susceptible to abuse and can severely disrupt the orderly conduct of international relations. In short, they are inherently risky endeavors. Chapter 2 argued on consequentialist grounds why the use of military force should be limited to only large-scale, deliberate and imminent or ongoing deprivations of basic human goods. While the unrestrained exercise of universal jurisdiction may not affect global human security to the same extent as that of humanitarian intervention, the problem of too many self-declared sheriffs trying to assert their jurisdiction on the basis of different moral and legal standards is all too real a problem with both.[24] Just as a norm potentially allows military aggression by appealing to the ethical desirability of humanitarian intervention a norm permitting the exercise of universal jurisdiction also risks politicized prosecutions for lesser crimes being defended in the name of a higher principle of morality. The conviction that humanitarian intervention and universal jurisdiction are both "fearsome power[s] that should only be exercised in extraordinary circumstances" nevertheless flows from their shared normative limitations, which are based on the degree of depravity of the action that is necessary to invoke such "extraordinary measures."[25] As such, the practice of humanitarian intervention and universal jurisdiction must necessarily remain infrequent precisely because of their appeal to the exceptional circumstances under which each is appropriately permitted.

Just as the moral underpinnings of humanitarian intervention suggest that some human rights violations and international crimes are more tolerable than others, the law of universal jurisdiction is organized around a similar moral assertion—that only intolerable crimes are subject to universal jurisdiction.[26] To say that a legal prioritization of international crimes or human rights violations does not exist is therefore not entirely accurate. Chapter 3, of course, presented evidence that some treaties set aside certain human rights violations as fundamentally more injurious to human well-being than others—notably, the nonderogation clause in the International Covenant on Civil and Political Rights (ICCPR).[27] However, that treaty does not itself call for any special enforcement of such rights, and of the nine nonderogable rights enumerated in Article 4,[28] there are but three that are subject to universal jurisdiction according to other sources of international law and that are also prima facie moral grounds for humanitarian intervention according to a consequentialist concern for human security.[29] The point is that there are potentially several bodies of international law that are evidence of a prioritization of human rights or other international crimes.[30] But the body of law most relevant to the moral reality of humanitarian intervention is the law of universal jurisdiction. This is true in terms of the normative impact that each activity has on state sovereignty, the extent to which each is inherently limited according to the exceptional circumstances or conditions under which both are permissible and, most importantly, the empirical similarity of such conditions. The remainder of this chapter explores the extent to which crimes calling for universal jurisdiction dovetail with crimes that would permit humanitarian intervention according to a consequentialist concern for human security.

Crimes with Universal Jurisdiction as Standards for Humanitarian Intervention

This section will consider three main categories of crimes that are commonly held to be subject to universal jurisdiction due to the severity or the particularly heinous nature of the crime: genocide, crimes against humanity, and certain war crimes.[31] While there is no authoritative list of crimes recognized under international law as being subject to universal jurisdiction, this section refers to treaties that call for universal jurisdiction for crimes listed therein, evidence of customary legal norms permitting universal jurisdiction for certain crimes, jurisprudence provided by statutes of international judicial bodies, as well as the opinions tribunals that have decided cases relating to the exercise of universal jurisdiction.[32]

Genocide

The obvious place to look for evidence of whether genocide can be tried under the principle of universal jurisdiction is the Genocide Convention. As stated in chapter 3, the Genocide Convention requires that all state parties take action to prevent and punish the crime of genocide, though the convention itself does not oblige or permit the use of force as a means to halt or avert genocide.[33] Article 6 of the Convention states that persons charged with the crime of genocide "shall be tried by a competent tribunal of the State *in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[34] The ordinary language of the treaty therefore does not endorse universal jurisdiction, and the travaux confirm this as evidenced by the UN Sixth Committee's explicit rejection of a provision providing for universal jurisdiction.[35] Pursuant only to the Genocide Convention, then, the jurisdictional basis for prosecuting the crime of genocide is essentially territorial.

Subsequent developments in international law suggest an expansion of the jurisdictional bases for prosecuting genocide to include the universality principle. Most notably, in the *Eichmann* case, the District Court of Israel asserted jurisdiction over Adolph Eichmann on the protective, passive personality, and universality principles, asserting that "there is nothing in this [convention] to lead us to deduce any rule against the principle of universality of jurisdiction with respect to the crime in question."[36] The *Demjanjuk* extradition case in the United States also affirmed the applicability of universal jurisdiction to genocide.[37] While two cases are hardly indicative of customary international law, more recent developments have added force to the Eichmann precedent regarding the prosecution of genocide under the universality principle.

A highly relevant example of the application of universal jurisdiction to genocide can be found in dicta of the International Court of Justice (ICJ) in the provisional measures pertaining to *Bosnia and Herzegovina v. Serbia and Montenegro*. In this case, Judge Lauterpacht argued that Article 1 of the Genocide Convention was intended to "permit parties, within the domestic legislation they adopt, to assume universal jurisdiction over the crime of genocide."[38] Certain rulings of the two ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) provide even more recent evidence to this end. While the statutes of these ad hoc courts contain provisions making genocide a crime within their respective court's jurisdiction, these provisions themselves do not give these tribunals universal jurisdiction over genocide.[39] In essence, the basis for jurisdiction for all crimes covered by both the ICTY

and the ICTR is territorial. But in hearing cases and appeals, justices from both tribunals have provided evidence of the applicability of universal jurisdiction for genocide in their opinions as well as in dicta. When addressing genocide in the *Tadic* case, the ICTY Appeals Chamber asserted that "universal jurisdiction [is] nowadays acknowledged in the case of international crimes."[40] Likewise, in the *Ntuyahaga* case, the ICTR held that universal jurisdiction exists for the prosecution of genocide.[41] As a result, few international jurists today deny that the crime of genocide entails universal jurisdiction.[42]

Based on this and other evidence, most academic writing suggests that universal jurisdiction for genocide is generally accepted as a matter of customary international law.[43] It is also the case that several authoritative sources acknowledge the existence of universal jurisdiction for the crime of genocide, including the United States' *Restatement* (Third), the Final Report of the Commission of Experts established by the Security Council for the former Yugoslavia, the International Law Commission's (ILC) 1996 Draft Code, and the *Princeton Principles* of universal jurisdiction.[44] In addition, a number of states have enacted national legislation that permits the exercise of universal jurisdiction for genocide.[45] While the Genocide Convention does not itself permit the exercise of universal jurisdiction, the preponderance of evidence since this treaty has come into force suggests that genocide is accepted in international law as a crime that entails universal jurisdiction.

Genocide and Humanitarian Intervention

As it is described in the Genocide Convention, the crime of genocide would be subject to humanitarian intervention under consequentialist concern for human security. Genocide involves "intent to destroy, in whole or in part, a national, ethnical, racial or religious group," which essentially amounts to the widespread killing of, or attempts to eradicate, members of these groups.[46] To the extent that the activities listed in the five subparagraphs to Article 2 are conducted as a means to destroy the group, each activity undoubtedly entails de facto deprivations of basic human goods, even though, for example, causing mental harm is not itself a deprivation of basic human goods.[47] It is also true that genocide involves mass atrocities, thus meeting the large-scale criterion for humanitarian intervention. The elements of intent and knowledge, the mens rea for the deliberate abuse requirement, are equally present to warrant humanitarian intervention, as evidenced by the phrase "intent to destroy." According to the mens rea for criminal responsibility under the International Criminal Court (ICC), the plan or

circumstances must furthermore be known to the offender for the act to constitute genocide.[48] But if the act is committed in the absence of intent to do harm or knowledge of the circumstances, then, as argued in chapter 2, the act cannot be said to be deliberate and is therefore not morally grounds for humanitarian intervention.

Finally, the moral requirement that the crimes be imminent or ongoing for humanitarian intervention to be permissible does not easily transfer into the legal discourse of criminal responsibility. Universal jurisdiction cannot realistically be exercised before the crime has been committed or even while it is in progress. In other words, in any criminal prosecution, one does not usually judge the desirability of the prosecution based on when it takes place, whereas this is the case with humanitarian intervention. Thus, legal prosecution cannot be preventive in the same way that a humanitarian intervention endeavors to be. Thus, the analogy between humanitarian intervention and universal jurisdiction only holds when speaking of the severity and gravity of the crime—which after all, is the fundamental basis for the analogy between these two concepts—as opposed to when each takes place in reference to the crime. Empirically speaking, however, the crime of genocide under international law is such that it would permit humanitarian intervention under a consequentialist concern for human security when genocide is imminent or ongoing.

Crimes Against Humanity

While the atrocities associated with crimes against humanity are qualitatively similar to genocide, the scarcity of international instruments codifying this corpus of crimes beyond the Nuremburg Charter has made their conceptualization difficult.[49] The statutes of the three main international tribunals, however, have recently authoritatively defined what constitutes crimes against humanity. Importantly, the Rome Statute considers the following activities as crimes against humanity when committed as "part of a widespread or systematic attack against any civilian population, with knowledge of the attack"

(1) murder,
(2) extermination,
(3) enslavement,
(4) forcible deportation of a population,
(5) unlawful imprisonment,
(6) torture,
(7) rape and other sexual violence,

(8) racial or ethnic persecution,
(9) enforced disappearance,
(10) apartheid, and
(11) other inhumane acts causing great human suffering.[50]

There is no treaty pertaining to this corpus of crimes as a whole, although many of the enumerated crimes therein are codified in specific treaties, such as torture and apartheid.[51] With respect to the question of universal jurisdiction, each enumerated crime is treated individually as well as crimes against humanity as a whole. While some of the enumerated crimes themselves individually entail universal jurisdiction via treaty and customary law (e.g., torture), others (e.g., unlawful imprisonment) rely on their customary status as a crime against humanity to entail universal jurisdiction.

Among the ten enumerated acts regarded by the Rome Statute as crimes against humanity, there are up to seven crimes for which reasonably strong arguments can be made for the exercise of universal jurisdiction individually. First, in addition to their status as crimes against humanity, the crimes of torture, slavery, and apartheid all have individual international instruments codifying their definitions and permitting the exercise of universal jurisdiction for their prosecution.[52] Rape and related sexual crimes also carry extremely strong arguments for the exercise of universal jurisdiction, though largely outside of the treaty process. While the related sexual crime of forced prostitution is codified in an international instrument calling for universal jurisdiction, the jurisprudence of the ICTY and ICTR grants a special importance to the crime of rape and other physical invasions of a sexual nature, thus establishing rape and similar acts as among the core crimes against humanity.[53] Furthermore, trials that have dealt with rape as a crime against humanity in the ICTY and ICTR have frequently rendered rulings and dicta suggesting that universal jurisdiction exists for such crimes.[54] Again, in addition to its modest treatment in treaty law, the preponderance of evidence suggests that systematic rape is one of the principal crimes against humanity and is subject to universal jurisdiction as such.

Other grave atrocities listed in the Rome Statute as crimes against humanity are the crimes of murder and extermination—that is, the deliberate taking of human life. When committed in a widespread and systematic fashion, such crimes could potentially fall under the Genocide Convention, though murder and extermination as crimes against humanity undoubtedly include activities where certain elements of genocide may be lacking (i.e., killing members of designated groups). There is a growing academic consensus, however, that the international prohibition of systematic murder and extermination has achieved *jus*

cogens (peremptory norm) status, thus subjecting such crimes to universal jurisdiction.[55] It is clear, however, that murder and extermination are quintessential examples of crimes against humanity and entail universal jurisdiction to the same (if not a greater) extent as crimes against humanity as a whole.

Concerning deportation, imprisonment and racial or ethnic persecution, the argument for the exercise of universal jurisdiction is not as strong, as each relies on their classification as crimes against humanity to be subject to universal jurisdiction under customary international law. All three crimes are on the lists of crimes against humanity under not only the Rome Statute, but those of the ICTY, the ICTR, and the ILC's 1996 Draft Code.[56] Forcible deportation and persecution constituted part of the core list of crimes in the Nuremburg Charter.[57] However, the exercise of universal jurisdiction for these three crimes only exists to the extent that crimes against humanity as a whole are subject to universal jurisdiction. That is, crimes against humanity, such as torture, and extermination, permit universal jurisdiction via treaty or customary law through authoritative sources such as the *Eichmann*, *Demjanjuk*, and *Pinochet* opinions.[58] Universal jurisdiction for crimes against humanity as a whole is a separate question.

There is nevertheless evidence that all acts considered crimes against humanity are subject to universal jurisdiction. The *Eichmann* and *Demjanjuk* cases dealt equally with crimes against humanity as well as genocide under the principle of universal jurisdiction. State practice also indicates that universal jurisdiction is permitted for crimes against humanity, as evidenced by the Belgian ruling that those guilty of any crime against humanity committed abroad can be tried in Belgium under customary international law, while both Belgium and Canada have prosecuted such cases under relevant domestic legislation.[59] Although the customary legal basis for universal jurisdiction for crimes against humanity is not as strong as it is for genocide, legislation passed by Belgium, Canada, and Lithuania is highly indicative in this regard.[60] And again, authoritative sources such as the Restatement, the UN Secretary-General, the ILC, and the Princeton Principles lend further credibility to this conclusion.[61] It remains, however, that those enumerated crimes against humanity that entail universal jurisdiction outside of their categorization as such (i.e., in a separate treaty) have a somewhat stronger claim.

Crimes Against Humanity and Humanitarian Intervention

With few exceptions, there is notable similarity between the corpus of international crimes generally viewed as crimes against humanity, and the

human suffering that morally permits humanitarian intervention under consequentialist concern. First is the nature of the crimes themselves. The acts of murder, extermination, enslavement, torture, and rape obviously involve deprivations of basic human goods. Concerning deportation, the language of the Rome Statute suggests that individuals subject to such treatment are under the threat of either death or bodily harm. To the extent that deportation is pursued, in order to destroy a designated group of people, this act can also constitute genocide.[62] With regard to disappearance, most treatments of this crime suggest that when a person disappears he or she is oftentimes tortured and eventually murdered.[63] In any case, the Declaration on Enforced Disappearances suggests mitigating circumstances with respect to this crime if the disappeared are brought forward alive.[64] The reality of enforced disappearances, however, is that many disappeared are presumed to have been murdered. Thus, with the exception of persecution, imprisonment, and apartheid, each of the enumerated crimes against humanity entail a prima facie deprivation of a basic human good.

Persecution remains the least precise of the enumerated acts constituting crimes against humanity. Persecution does not itself entail a deprivation of a basic human good, though this crime implies that the persecuted person or group is subject to differential treatment that possibly constitutes such a deprivation. For example, in the *Tadic* case, the jurisprudence of the ICTY suggests that persecution must take place, as discriminatory intent, in connection with other crimes such as deportation or ethnic cleansing.[65] The Rome Statute requires that persecution take place in connection with genocide, war crimes, or other enumerated crimes against humanity.[66] To the extent this is the case, such persecution would permit humanitarian intervention.

The crime of apartheid also presents ambiguity. There is extremely strong legal evidence suggesting universal jurisdiction for this crime, though it would only morally permit humanitarian intervention when certain circumstances of its perpetration are present. Of the six substantive acts that constitute apartheid (when intended to achieve the racial superiority of one group over another), only three entail deprivations of basic human goods: murder (extermination), what essentially amounts to torture, and forced labor (as de facto slavery).[67] The other acts of apartheid, such as denial of participation in the political, social, economic and cultural life of the country, while despicable, are non-basic goods and would not permit humanitarian intervention under a utilitarian concern for human security.

Imprisonment also presents a challenge. Freedom of movement can be the object of a basic human right as defined by Henry Shue.[68] However, it is generally not considered a crime against humanity when

convicted criminals are denied the basic good of freedom of physical movement, though it is quite different if imprisoned criminals are systematically murdered or tortured. While it is presumed that imprisonment must occur without due process to be considered a crime against humanity, we must question the "basic-ness" of the deprivation of the freedom of movement. In essence, permitting humanitarian intervention for widespread and systematic arbitrary imprisonment depends greatly on factors such as the purpose of detention, the conditions in detention (i.e., the prevalence of torture or other mistreatment) and the prospects for release. In general, the consequentialist framework developed in chapter 2 would not permit humanitarian intervention for imprisonment unless the circumstances of imprisonment were especially unlawful, prolonged, and grave.

With respect to the requirement of large-scale abuse for permitting humanitarian intervention under a utilitarian concern for human security, we find significant convergence with the law of crimes against humanity. To be considered a crime against humanity, the requirement that the enumerated acts must be perpetrated on a large scale is supported by an overwhelming body of legal authority. In particular, the statutes of the ICTY and the ICTR have suggested, respectively, that that the acts be directed against "any civilian population" and that they be "part of a widespread or systematic attack against any civilian population."[69] The ICTR has even defined crimes against humanity as being "massive, frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims."[70] The Rome Statute as well as the ILC's 1996 Draft Code also require that the acts must be part of a widespread or systematic attack and/or committed on a large scale in order to be considered a crime against humanity.[71] The Draft Code even goes as far to exclude isolated acts not part of an overall policy. [72] As with the conditions that permit humanitarian intervention, crimes against humanity must also entail large-scale abuse.

Concerning the requirement of deliberate abuse, the jurisprudence of the three main international tribunals suggests that the perpetrator must at least act knowingly in committing crimes against humanity. The Rome Statute requires that a person commit the crime with intent or knowledge to be held criminally liable for any of the crimes over which it has jurisdiction, including crimes against humanity.[73] The ICTY has even established what has been called the *Tadic* test, where the court requires that the defendant have knowledge of the act (even if that person himself did not actually commit it).[74] The ICTR has adopted a similar test of knowledge, and requires that crimes against humanity entail "some kind of preconceived plan or policy," though not necessarily

a governmental policy.[75] Likewise, in the indictments of Radovan Karadzic and Ratko Mladic for genocide, crimes against humanity, and war crimes, the ICTY spoke of a "project" or "plan" to commit the acts.[76] According to these sources, then, crimes against humanity constitute deliberate abuse par excellence.

In sum, the elements constituting crimes against humanity under contemporary international jurisprudence are remarkably similar to the conditions that morally permit humanitarian intervention, though there are some differences. First, the consequentialist requirement that the crimes be large-scale and deliberately perpetrated finds significant support in international law. However, not all crimes against humanity entail deprivations of basic human goods—in particular, the crimes of persecution, apartheid, and imprisonment. It is worth mentioning, however, that persecution and imprisonment have somewhat weaker claims to universal jurisdiction than the other crimes, because they do not themselves entail universal jurisdiction outside their status as crimes against humanity. It is therefore noteworthy that those crimes that carry a weaker legal argument for the exercise of universal jurisdiction also tend to carry a weaker moral argument as a basis for humanitarian intervention. Therefore, even among the enumerated acts considered crimes against humanity, we can witness an implicit hierarchy of severity based on the strength of the argument for permitting the exercise of universal jurisdiction.

War Crimes

The most influential turning point in the development of modern conceptions of war crimes was the drafting of the four Geneva Conventions of 1949 and the supplemental Protocols of 1977 under the sponsorship of the International Committee of the Red Cross (ICRC).[77] As a category of human rights violations, acts constituting war crimes largely resemble those acts that constitute crimes against humanity. For example, willful killing, torture, and willfully causing great suffering all fall under the rubric of both war crimes and crimes against humanity. As a category of legal prohibitions, however, war crimes—or violations of humanitarian law—are fundamentally different in character than crimes against humanity based on certain contextual elements, particularly the required nexus to armed conflict. While the full range of the laws of war extend well beyond the base level protections provided to persons during times of conflict, I will focus on the laws of war relevant to the welfare of those individuals caught up in war, and to human welfare in general.

It is widely accepted that war crimes, broadly defined, are subject to universal jurisdiction under customary international law, although the relevant common articles in the 1949 Conventions do not specifically call for universal jurisdiction for all acts covered by the Conventions.[78] The recognition of universal jurisdiction for most war crimes has been driven by the writings of academics and jurists, as well as evidence in states' domestic legislation. However, the drafters of the Geneva Conventions implicitly prioritized certain acts through their adoption of a list of grave breaches for each convention. In each convention, there is a common article on the criminality of such breaches that explicitly calls for the exercise of universal jurisdiction with regard to these particular acts.[79] According to the ordinary meaning of the language in all four conventions and in Additional Protocol I, which pertains to victims of international armed conflicts, there is a sufficient basis to apply universality of jurisdiction to grave breaches of the conventions.[80] In fact, in contemporary international jurisprudence, the term "war crimes" now refers primarily to grave breaches of the Geneva Conventions. This list of grave breaches—also codified verbatim in the statutes of the ICC, the ICTY, and the 1996 Draft Code—includes:

(1) willful killing;
(2) torture or inhuman treatment;
(3) willfully causing great suffering or serious injury to body or health;
(4) extensive destruction and appropriation of property not justified by military necessity;
(5) compelling prisoners or civilians to serve in the forces of a hostile power;
(6) willfully depriving protected persons the right to a fair trial;
(7) unlawful deportation, transfer or confinement; and
(8) taking hostages.[81]

An important category of war crimes outside the grave breaches system of the Geneva Conventions is serious violations of Common Article 3 of the Geneva Conventions. Common Article 3 offers a minimal level of protection for those not taking part in hostilities in the context of noninternational armed conflict. It offers protection from

(1) violence to life and person including murder, mutilation, torture and other cruel treatment;
(2) the taking of hostages;
(3) outrages on personal dignity or humiliating and degrading treatment; and

(4) the passing of sentences and carrying out of executions absent previous judgment pronounced by a regular court.[82]

Furthermore, Additional Protocol II gives a broader definition of the protections given to victims of noninternational conflicts, though using a more rigorous standard for the application of such protections.[83]

Violations of Common Article 3 supplemented by Protocol II address internal conflicts as a matter of treaty law, though they are not per se part of the grave breaches system for which criminal responsibility and universal jurisdiction apply. Nevertheless, it is now accepted that such violations are criminalized as a matter of customary law, as suggested by the ICTR's raison d'être to try "serious violations of Common Article 3 and Protocol II."[84] The exercise of universal jurisdiction, however, is a more complex issue. The ICTR's (and the ICC's) competence in the matter of Article 3 violations may suggest a tendency in favor of a customary law basis for the exercise of universal jurisdiction.[85] Furthermore, while the ICTY does not share this competence in its statute, the *Tadic* judgment gave the court de facto jurisdiction over Common Article 3 violations.[86] While the ICTY did not expound the jurisdictional basis of its claim to litigate this crime, the principle of universality is the only basis that could have permitted jurisdiction. The increased promulgation of domestic legislation on war crimes that cover atrocities in civil disputes, without apparent protest, also suggests an emerging customary law basis for the exercise of universal jurisdiction for violations of Common Article 3 and Protocol II.[87] The customary law evidence for universality of jurisdiction for violations of Common Article 3 is thus fairly persuasive, though still probably not on par with grave breaches.

War Crimes and Humanitarian Intervention

The contextual elements for war crimes demonstrate a notable divergence from those of genocide and crimes against humanity. For example, unlike genocide and crimes against humanity, a war crime will only warrant the application of its respective treaty law if it occurs during a de facto state of armed conflict. Furthermore, the grave breaches provisions only apply to those acts against persons specifically protected by the Geneva Conventions. In Conventions I and II, these protected persons are wounded and sick members of armed forces, Convention III applies to prisoners of war, and Convention VI only applies to civilians in custody of an occupying power of which they are not nationals. The Protocols, however, apply to all civilians. Also unlike crimes against humanity and genocide, war crimes under the conventions and protocols do not require

any mass or systematic action in order to be considered a breach; each act, even if isolated, is considered a war crime.[88]

First, however, the type of human suffering that constitutes war crimes—at least those for which the most persuasive arguments for the exercise of universal jurisdiction can be made—is modestly similar to the human suffering that would permit humanitarian intervention under the ethical framework developed in chapter 2. Of the eight enumerated acts that constitute grave breaches, there are three that are shared among all four conventions: killing, torture, and causing great suffering or serious injury to body or health, each constituting deprivations of basic human goods. It could thus be argued that these three crimes constitute the core set of grave breaches. Of the other grave breaches provisions, only extensive destruction of private property is shared among three conventions (I, II, and IV), while the remaining provisions are shared only between conventions III and IV. While each of the grave breaches is equally subject to universal jurisdiction, only these core breaches—depending on the circumstances, deportation, the taking of hostages, and forced military service for a hostile power—would entail the type of human suffering that permits humanitarian intervention. Concerning these latter provisions, one could say that they would permit humanitarian intervention to the extent that they were pursued with the intent to deprive people of basic human goods (e.g., kill or otherwise physically harm them) or with knowledge that such acts would result in large-scale human suffering. However, there are at least two grave breaches that rarely constitute the type of human suffering that permits humanitarian intervention: destruction of private property and denial of the right to trial. According to the *travaux préparatoires* of the Rome Statute, these acts are the only grave breaches that do not involve an element of physical human abuse.[89]

With regard to Common Article 3 violations, all involve some element of basic goods deprivations and would permit humanitarian intervention if committed on a massive scale, except, under certain circumstances, the taking of hostages. Thus, there is some similarity between war crimes for which the strongest case for the exercise of universal jurisdiction can be made (grave breaches and violations of Common Article 3), and the mode of human suffering that would morally permit humanitarian intervention.

Concerning the large-scale abuse requirement, none of the four Geneva Conventions or Additional Protocols requires any mass or systematic action in order for individuals to be held criminally liable. This is in stark contrast to the special elements required for both genocide and crimes against humanity that make the commission of these

two crimes permissible grounds for humanitarian intervention. Some evidence, however, does suggest the possible requirement of a certain scale of perpetration. The Statutes of the ICC and ICTR both require that relevant war crimes be "committed as a part of a plan or policy or as part of a large-scale commission of such crimes" in order to assume jurisdiction, as does the ILC's 1996 Draft Code for the crime to be considered a "crime against the peace and security of mankind."[90] The ICTY Statute does not have such a requirement, though some of its cases and rulings dealing with war crimes have made mention of their systematic nature, while other cases explicitly accept that war crimes do not require systematic action.[91] There is thus conflicting legal evidence on whether war crimes need to be large-scale or systematic in order to entail criminal responsibility or universal jurisdiction, for that matter. Subsidiary sources such as the *Princeton Principles* make no mention of the scale of war crimes required to trigger universal jurisdiction.

The requirement of deliberate abuse is satisfactorily met in the case of war crimes. The question of mens rea in war crimes litigation is a complicated matter, given the complex and diverse rules concerning standards of culpability according to the doctrine of "superior responsibility."[92] While these rules need not be revisited here, what is important is that it is generally accepted that war crimes entail an element of intent to commit the act (even though superior officers may be held accountable for such acts committed by soldiers under their command, including acts they should have known about). The text of the Geneva Conventions says very little specifically about the required levels of mens rea, though the core provisions in the grave breaches system modified by the adjective "willful" (i.e., willfully causing great harm) suggest an element of intent.[93] The *travaux* of the Rome Statute concerning elements of war crimes consistently cite the jurisprudence of the ad hoc tribunals, concluding that "positive knowledge of the underlying acts is essential," and specifically concerning willful killing, that "at the time of the killing the accused or a subordinate had the intent to kill or inflict grievous bodily harm upon the victim."[94] Furthermore, the Rome Statute itself requires that war crimes be part of a plan or policy in order to come under its jurisdiction, which also suggests a requirement of command responsibility and thus deliberate abuse.[95] One can therefore conclude from cases rendered by the ICTR and ICTY that the term "willful" includes intent and knowledge, but not ordinary negligence.[96] In contemporary legal practice, then, the element of knowledge has been the mens rea for criminal responsibility for war crimes, just as it is for genocide and crimes against humanity. As such, genocide, crimes against humanity

and war crimes all constitute deliberate abuse for the purposes of morally permitting humanitarian intervention.

Other Contextual Elements

In addition to having no requirement that war crimes must entail large-scale or systematic action, it should also be mentioned that the Geneva Conventions (and international humanitarian law generally) require some link between the alleged crime and armed conflict. The Conventions thus only apply in the case of a "declared war or of any other armed conflict . . . even if the state of war is not recognized by one of them," or a "state of partial or total [military] occupation of the territory" of a state party.[97] The ICTY has interpreted this to mean that the crimes must be "closely related to the hostilities."[98] The precise level of hostilities required to trigger the conventions is, of course, subject to some debate. What matters is that the crimes discussed in this section cannot technically be considered war crimes if they occurred during peacetime. Of course the consequentialist ethical framework in chapter 2 does not require the existence of armed conflict for intervention to be permissible. If acts that otherwise constituted war crimes were in fact committed during peacetime, however, they would likely constitute crimes against humanity (if committed en masse and as part of a policy) and as such would be permissible grounds for humanitarian intervention. Nevertheless, this contextual requirement serves to further contrast the elements of war crimes from those of genocide and crimes against humanity.

Overall, war crimes subject to universal jurisdiction find some similarity with the human suffering that would morally permit humanitarian intervention. All but two of the enumerated acts that constitute grave breaches entail deprivations of basic human goods, while all acts covered by Common Article 3 involve such deprivations, except the passing of sentences without a trial (unless it should be a death sentence). Like genocide and crimes against humanity, war crimes also constitute deliberate abuse for the purpose of permitting humanitarian intervention. However, the conflicting evidence with respect to the large-scale requirement leads one to seriously question international humanitarian law as a proper legal basis in which to ground humanitarian intervention, as does the required nexus to armed conflict. What can be said, however, is that most war crimes that permit universal jurisdiction (i.e., grave breaches and violations of Common Article 3 of the Geneva Conventions) constitute human suffering that would morally permit humanitarian intervention, but only if they are perpetrated on a large scale.

Conclusion

The three categories of crimes discussed in this chapter provide a modest legal grounding for conducting humanitarian intervention according to a consequentialist concern for human security. However, it would not be accurate to assert—nor has it been the aim of this chapter to prove—that international human rights or humanitarian crimes that permit the exercise of universal jurisdiction also permit humanitarian intervention as a matter of law. Rather the aim of this chapter has been to understand the extent to which the conduct of humanitarian intervention—as envisaged according to the ethical principles developed in chapter 2—could find a legal basis within the normative framework of the international law relevant to universal jurisdiction for certain severe international crimes. Based on the overall similarity of the moral rationale, the normative underpinnings and the type, extent, and purpose of the relevant crime or act, the law of universal jurisdiction provides a valuable normative-legal foundation for the conduct of humanitarian intervention according to the framework developed in chapter 2. This legal basis primarily stems from the need for both activities to effectively expound a hierarchy of human suffering that considers the consequentialist requirement that only the most extreme and exceptional atrocities are actionable. The law of universal jurisdiction provides a body of jurisprudence that permits a reasonable determination of which affronts to human dignity international law considers the most severe, the perpetration of which constitute permissible grounds for taking decisive, even risky, measures to address such crimes. Thus, to the extent that these affronts to human security maintain empirical similarities with those that morally permit humanitarian intervention, a legal grounding has at least begun to emerge.

The three categories of crimes discussed in this chapter as entailing universal jurisdiction overlap significantly, though not perfectly, with the human suffering that would morally permit humanitarian intervention. The relevant legal principles are at times too restrictive and, at other times, too permissive. This is particularly the case with respect to humanitarian law, which is severely restricted by certain contextual elements in its application, such as the required nexus to armed conflict and the absence of a large-scale criterion. Considering all three categories of crimes together, however, one struggles to think of an act that would morally permit humanitarian intervention but would not be considered genocide, a crime against humanity or a war crime (that entails universal jurisdiction).

A problem with the three categories of crimes under examination—particularly crimes against humanity and war crimes—is that they

attach universal jurisdiction to some acts that would not themselves be permissible moral grounds for humanitarian intervention. With regard to crimes against humanity, it is important that this corpus of crimes requires mass, systematic and planned (deliberate) behavior to legally be considered a crime against humanity. The problem is that the legal definitions of two of the enumerated crimes against humanity—apartheid and imprisonment—include elements that entail deprivations of nonbasic goods. Three of the six enumerated acts that constitute apartheid according to the Apartheid Convention constitute deprivations of basic human goods, while the crime of unlawful imprisonment largely lacks a legal definition.[99] Importantly, however, the argument for universal jurisdiction for the crime of unlawful imprisonment is weaker than most other crimes against humanity, given the lack of specific treaty language or other customary evidence that would permit universal jurisdiction. While the same cannot be said about the crime of apartheid, it is still worth mentioning that the Rome Statute is the only international instrument to consider apartheid within the meaning of crimes against humanity. Nevertheless, crimes against humanity are morally permissible grounds for humanitarian intervention as a general rule, while the exceptions where this is less clear—imprisonment and certain elements constituting apartheid—would require decisions on a case-by-case basis.

War crimes are substantially more difficult to reconcile with the ethical framework advanced in chapter 2. This, of course, is because war crimes are not based on widespread or systematic practice, at least according to the Geneva Conventions. It is again important that several authoritative international sources do impose this requirement on war crimes, making it not unreasonable to perceive a shift in legal opinion towards having a large-scale requirement for war crimes, at least in order to permit universal jurisdiction. For the time being, however, grave breaches of the Geneva Conventions and violations of Common Article 3 have a very strong claim to universal jurisdiction without requiring systematic or large-scale action. However, this claim is somewhat nuanced, as scholars have recognized that the evolution of war crimes as acts permitting universal jurisdiction historically arose out of the peculiar character of their *locus delicti* (that they took place in an international context), and not exclusively the inherent heinousness of such acts, which is the case for genocide and crimes against humanity.[100] There is thus a sense that war crimes may not be construed as intolerable in the same way that genocide and crimes against humanity are. Since war crimes maintain a more nuanced association with universal jurisdiction, by analogy, one should necessarily suggest an equally nuanced association with humanitarian intervention, which seems to be the case empirically. In other words, since it is not the severity of the act alone that permits the

exercise of universal jurisdiction over war crimes, it should therefore not be surprising that war crimes, as defined in the Geneva Conventions, lack certain features of severity (i.e., the large-scale criterion) that would morally permit humanitarian intervention in the same way it is morally permitted for genocide and crimes against humanity. Given the current lack of a large-scale requirement for war crimes, in addition to its nuanced historical association with universal jurisdiction, I am not inclined to employ this body of law as one in which humanitarian intervention should be grounded.

The use of the universality principle as a legal standard by which we can subject the perpetration of certain crimes to humanitarian intervention leads to a number of conclusions. Clearly, not all crimes subject to universal jurisdiction also morally permit humanitarian intervention. The opposite, however—that those acts that morally permit humanitarian intervention are also legally subject to universal jurisdiction—is likely true. The truth in this statement remains even if we exclude international humanitarian law (war crimes) as a relevant body of jurisprudence for the present purposes, which I am inclined to do given its peculiar contextual requirements. This leaves us with the two main bodies of international human rights criminal law in which to find legal grounding for humanitarian intervention: genocide and crimes against humanity. The legal basis for the conduct of humanitarian intervention according to the moral principles in chapter 2 is therefore "international human rights (contrast humanitarian) crimes to which universal jurisdiction is attached," which requires very little qualification. As such, where humanitarian intervention occurs according to a consequentialist concern for human security, the evidence in this chapter suggests that one can legitimately appeal to jurisprudence relevant to genocide and crimes against humanity as normative legal grounding. While this does not provide an undisputed legal sanction, this chapter has nevertheless revealed a body of jurisprudence that clearly delineates those acts leading to human suffering that the law considers the most severe when committed on a large scale. This body of jurisprudence also permits decisive and exceptional measures to counteract the actions leading to human suffering. It is in this body of jurisprudence where the consequentialist ethical argument for humanitarian intervention finds the most appropriate grounding in international law.

This page intentionally left blank.

5

Who Intervenes and Why it Matters: The Politics of Agency

This book has thus far used consequentialist reasoning to posit the conditions of human suffering under which humanitarian intervention is morally permissible and attempted to provide normative legal grounding for this argument in international legal principles relevant to universal jurisdiction. Delineating the precise conditions of human suffering under which humanitarian intervention is permissible according to a straightforward ethical framework is a crucial step in developing workable principles. Likewise, grounding such an argument in international law serves an important legitimating function for humanitarian interventions that take place under such conditions, while also narrowing the gap between the moral and legal grounds for justified intervention. While the previous chapters that have developed these arguments focused on the permissibility, or legitimacy, of the act of humanitarian intervention itself, the purpose of the present chapter is to address similar concerns regarding the agent that undertakes humanitarian intervention.[1] In other words, in keeping with the general consequentialist approach developed in chapter 2, the purpose of this chapter is to explore the characteristics of potential agents of intervention that have a bearing on the consequentialist imperative that humanitarian intervention should endeavor to maximize human security.

To answer the question of when humanitarian intervention should be undertaken requires that we delineate clear principles, rules, and criteria that can be applied consistently to different cases over time (as those in chapter 4). Whether a particular actor is a suitable agent of intervention, on the other hand, can vary substantially with changes in the international distribution of power, prevailing political circumstances or other agent-specific factors.[2] The former concern necessitates reference to a sufficiently principled body of law, while the latter question entails

a heavy dose of political pragmatism. While chapters 3 and 4 sought to reveal a legal grounding for a consequentialist analysis of the conditions of human suffering that permit humanitarian intervention, this chapter uses the same basic consequentialist logic as a basis for examining the largely political dilemma of deciding which actors are the appropriate agents of intervention.

I begin by framing the question in consequentialist terms, essentially arguing that the overall efficacy of a potential intervener has important bearing on its ability to maximize human security in a given humanitarian catastrophe. The most basic element of such efficacy, of course, is the military wherewithal of the agent, though there are several nonmaterial factors that are largely a function of an agent's perceived legitimacy in international society. Drawing primarily from the English School of international relations theory concerning the relationship between power and legitimacy, I then identify and explain three additional and interrelated elements of efficacy: multilateral legitimation, the humanitarian credentials of the intervener, and the position of the intervener in the prevailing international political context. The final section of the chapter is an analysis of the ongoing humanitarian crisis in Darfur, Sudan, wherein I examine the suitability of various possible agents of a potential humanitarian intervention there based on the elements of efficacy relevant to intervention. Based on the analysis of Darfur, I ultimately suggest that the starting-point preference for agents of humanitarian intervention should be that of multilateral regional organizations, although departures from this preference are warranted, and even preferred, depending on the circumstances of the crisis at hand and the presence or absence of the other elements of efficacy.

Consequentialism and Power

The reasoning employed in chapter 2 to develop a consequentialist concern for human security suggests that the expected or actual consequences of human actions are the key to their moral evaluation, and that an act is only morally permissible to the extent that it promotes or maximizes a certain value or good.[3] The good upon which this analysis is based is human security, and I have argued that because of the high risk to human security presented by military intervention, the act of humanitarian intervention is only likely to promote this good more than imperil it in situations of large-scale, deliberate and imminent or ongoing deprivations of basic human goods. To come to such a conclusion, however, is to make certain assumptions about the nature of the agent undertaking

the intervention—namely, that it possesses the relevant military capability to do so effectively.

The imperfect but illustrative analogy of the drowning swimmer captures the consequentialist logic involved in addressing this moral dilemma.[4] If a person is drowning and there are a group of bystanders, one of whom can surely take action to rescue the person, then it seems fairly intuitive that the imminence of this person drowning is sufficient to justify this bystander taking the risk to save the drowning person, so long as the rescuer does not excessively endanger others in doing so. But who among the bystanders should undertake the rescue? Again, the most intuitive answer is the person who is the strongest and most experienced swimmer—perhaps an off-duty lifeguard. We would certainly not want a weak and inexperienced swimmer to undertake the rescue; he might get himself into trouble and require rescuing, imperiling more human lives. To minimize the risk of this happening, a consequentialist approach would conclude that the rightful agent is the one with the ability to render it most likely that more good than harm will come of the rescue attempt.

Applying the logic of this example to humanitarian intervention yields a similar prescription. Leaving aside the more difficult question of whether the actor with the greatest ability has a moral duty to intervene,[5] one can at least make the rather modest and uncontroversial claim that if anyone should intervene, it should be an actor with sufficient ability. In the just war discourse, this requirement is an essential part of ensuring that the intervention has a reasonable prospect for success.[6] According to consequentialist logic, an important morally relevant factor when it comes to identifying a rightful agent of humanitarian intervention is military capability, as measured by the traditional indicators: military expenditure, defense industrial base, technological capability, number and quality of troops and officer corps, rapid-reaction and lift capability.[7] After all, bringing about more good than harm in a humanitarian intervention not only requires that the intervener prevail, but that it does so quickly and decisively with as little collateral damage as possible.

Of course, it is not as easy as simply identifying the most militarily powerful actor in international society and designating it as the rightful agent of humanitarian intervention. There are several nonmaterial factors that influence the extent to which an appropriately powerful actor is able to effectively and decisively stop human suffering in other states. In other words, meeting the consequentialist requirement of doing more good than harm entails more than simply a power asymmetry between the intervener and the target. To return to

the above analogy, what if the bystanders or the victim do not trust the strong swimmer and his rescue attempt provokes some bystanders into trying to stop him, causing chaos and more drownings? Would a slightly weaker swimmer, but one that is considered more trustworthy, be preferred? If none of the bystanders are individually trusted to carry out a rescue, should they all do it together to ensure that no one is taken advantage of? What kinds of organizational and coordination problems might this present? Perhaps bystanders who know the victim well—neighbors or relatives—should be first in line to attempt the rescue and alleviate some of these problems. But what if the neighbors or relatives are hopelessly weak swimmers?

These dilemmas roughly correspond to dilemmas inherent in the problem of agency. A certain degree of power is an important, but not the only, attribute an agent must possess to be efficacious, which is to say to do more good than harm in carrying out the intervention. A consequentialist approach must also consider nonmaterial factors that can either enhance or impair an agent's efficacy, such as the moral standing and overall trustworthiness of the interveners, or the potential utility of multilateralism and regional actors. In other words, only by having an appreciation of both raw power and what I shall call the politics of legitimacy can consequentialism make progress toward solving the problem of agency in humanitarian intervention.

Power, Efficacy, and the Politics of Legitimacy

There is, of course, a voluminous literature on the concept of legitimacy, a comprehensive review of which is beyond the scope of the present effort.[8] Discussions about legitimacy in the context of domestic society commonly examine the legitimacy of institutions, such as governments, that purport to exercise political authority, wherein consent is often advanced as a key dimension of legitimate political authority.[9] In the international context, it is perhaps more common to refer to the legitimacy of acts (such as humanitarian intervention) which one might appraise in terms of their accordance with certain established rules or norms, be they of a moral or legal character. Broadly construed, then, an act is legitimate in international relations when it is in conformity with "internationally held norms, rules and understandings about what is good and appropriate."[10] What I am presently concerned with, however, is not the legitimacy of an act or an institution, but of an actor or agent, specifically with regard to those reasons (in addition to material power) that such an actor merits undertaking the act of humanitarian interven-

tion. In a similar vein as Nicholas Wheeler, I suggest that even the actions of powerful states will be constrained if the agent is perceived as an illegitimate agent for that particular task.[11] Power and legitimacy are clearly related in this context, but how?

A useful place to begin this discussion on the relationship between power and legitimacy is with classical realist thought, which emphasizes the acquisition and maintenance of material power as the driving force behind international relations. The fathers of classical realism nevertheless go to some length to distinguish legitimate power from illegitimate power. Hans Morgenthau, for instance, argues that the exercise of legitimate power is that which is somehow morally or legally justified, and that distinguishing the exercise of this kind of power from the exercise of naked power has profound implications for the conduct of state foreign policy.[12] For Morgenthau:

> [l]egitimate power, which can evoke a moral or legal justification for its exercise, is likely to be more effective than equivalent illegitimate power, which cannot be so justified. That is to say, legitimate power has a better chance to influence the will of its objects than equivalent illegitimate power.[13]

Legitimate power, in other words, is more efficacious than illegitimate power. The legitimacy of an act therefore depends on the extent to which it is undertaken in accordance with widely-shared norms and understandings about what is right, which are manifested in international law and morality. Applying this logic to appraising the legitimacy of an actor suggests that the exercise of power is most effective if the actor exercising it is generally perceived to be a just and decent force in history that pursues collective interests, not just its own selfish ones.

It is in English School theory, however, where one finds perhaps most direct engagement with the legitimacy of actors (states) at the international level, as well as the most refined understanding of the relationship between power and legitimacy. Martin Wight famously defined international legitimacy as "the collective judgment of international society about rightful membership of the family of nations. . . ."[14] English School scholarship has been especially interested in the criteria that permit rightful membership in international society. Though scholars differ on the degree to which membership in international society has (or should be) expanded or contracted, most equate membership in international society with a certain degree of legitimacy, which requires a general adherence to the norms, rules and institutions that constitute such a society.[15]

It follows that if this is the requirement for mere membership in international society, then acting on behalf of such constitutive norms (say, intervening militarily to stop genocide) not only requires that an actor maintain the requisite power, but also that it occupies a particularly privileged position vis á vis such norms. Again, such legitimacy enhances the efficacy of power, though power, in turn, "contributes to the substance of the principles of legitimacy that come to be accepted."[16] As Hedley Bull argues, legitimating principles of international law and morality derive their content and relevance from powerful states taking them up and acting on them.[17] Importantly, these legitimating principles change over time along with the normative structure of international society. Indeed, numerous scholars have argued that the legitimacy of the act of humanitarian intervention came about as result of a changed international normative context (namely, the end of the Cold War), whereby changes in the distribution of power led to normative shifts that brought new actors with new values to the fore of world politics.[18] The act of humanitarian intervention gained legitimacy (though under heretofore vague circumstances) because certain values or combinations of values relevant to human rights, human dignity, state sovereignty, and military force became privileged in international society. Actors in international society—knowingly or unknowingly—engaged in a process of legitimating of the "norm" of humanitarian intervention, which later caused this act to be considered legitimate, at least under certain circumstances.

Ian Clark similarly argues that the point at which legitimacy and legitimation overlap is the realm of politics—"the meeting ground of norms, distributions of power, and the search for consensus."[19] Legitimacy, in other words, is a political practice, which, in turn, requires political agents. According to Tony Lang, political agency is the status of actors within a society that provides them the ability to engage each other.[20] As such, if one wants to understand the politics of legitimacy relevant to potential agents of humanitarian intervention, one must engage the precise nature of this status that gives agents the ability to not only act within international society, but also to act on its behalf. What values, combination of values, or other characteristics must actors possesses for them to be considered legitimate political agents of humanitarian intervention? In what follows, I identify three factors commonly held to confer legitimacy upon the agents of intervention and explore how and why such characteristics enhance the legitimacy, thus the efficacy, of a potential intervening agent. Using consequentialist reasoning, I examine whether factors that enhance legitimacy may actually be at odds with material capability and how this affects the efficacy—and overall moral desirability—of intervening agents.

Multilateralism

The debate about multilateralism and unilateralism is common in the literature on humanitarian intervention, and the view that humanitarian intervention must be "multilateral" to be legitimate is widespread.[21] This sort of language requires elaboration. In everyday discourse, when we say that an intervention is unilateral, we typically mean that all or a vast majority of the operational aspects of the intervention were decided upon and carried out by one state. A multilateral intervention, therefore, is one involving several states acting collectively, possibly through a formal international organization. In international legal discourse, however, a unilateral humanitarian intervention is one that has not been authorized by the UN Security Council, whereas multilateral implies that it has. In this sense, a unilateral humanitarian intervention is synonymous with an unauthorized or illegal intervention, whereas multilateralism refers to the collective decision-making process used by the UN to deem the act of humanitarian intervention permissible (and legal) in a particular situation, regardless of how many states actually take part in carrying it out. As such, UN-sanctioned interventions confer multilateral legitimacy upon their agents in a somewhat different sense than those that are carried out collectively by several states. John Ruggie and others have referred to this aspect of multilateral legitimacy as its "qualitative" dimension.[22]

As to this qualitative dimension, when the UN Security Council authorizes a humanitarian intervention under its Chapter VII powers, it is essentially legalizing and providing legitimacy to the act of intervention more than it is designating specific actors as legitimate agents of intervention. Chapter 3, deals with the problematic aspects of this kind of ad hoc legality, so I will not do so again here. The point is that whatever legitimacy the agent accrues by undertaking a UN-sanctioned intervention is only partially derived from the act being deemed legal by the UN. As argued in chapter 4, there are other sources of legal authority that can confer legal legitimacy to the act of humanitarian intervention. Thus, the legitimacy that the agent accrues by undertaking a UN-sanctioned intervention is derived from the fact that an international body with near universal membership has authorized it in the spirit of consultation and coordination with other UN member-states. The act of intervention itself may even be conducted more or less by one state, though if it is authorized by the UN, the state undertaking it may be said to have, as Kofi Annan has put it, a "unique legitimacy that one needs to be able to act"[23] For example, the United States intervened in Haiti in 1994 more or less by itself, but both the United States and its intervention maintained a sense of multilateral legitimacy because it obtained prior Security Council authorization.

The other aspect of multilateral legitimacy is more straightforward—what Ruggie and his colleagues might refer to as its quantitative dimension.[24] Here the legitimacy of the agents is derived from the fact that waging war for humanitarian purposes has considerable potential for partisan abuse—a pervasive concern in the political discourse on humanitarian intervention. Smaller states are particularly apprehensive about any emerging right of humanitarian intervention for fear that they will be the targets of an invasion intended to serve the geopolitical interests of the intervener, though under the pretext of humanitarianism. According to this thinking, interventions involving several states are preferred in order to discourage adventurism or exploitation of the situation by a single state pursuing its own selfish interests.[25] So if an incident of human suffering is large-scale and severe enough to permit military intervention, then arriving at operational decisions collectively is the best means of ensuring that a particular state does not exploit the situation for its own ends to the detriment of a humanitarian outcome. This is especially true if operational decisions and other aspects of the conduct of the intervention must undergo a formal collective decision-making process, such as the one used by NATO. In this sense, multilateralism legitimates the agents of intervention by democratizing decision-making, which allows the interveners to benefit from collective wisdom and gain broader support, and it ultimately ensures that they are focused on the task at hand: saving lives.[26]

Quite apart from the unique qualitative multilateral legitimacy that UN authorization bestows upon agents of intervention, UN-sanctioned interventions, in theory, grant their agents the quantitative aspect as well. According to the UN Charter, UN enforcement operations (which include UN-authorized humanitarian interventions) are to be commanded and controlled by the Military Staff Committee—composed of representatives of the permanent members of the Security Council—so that the UN can exercise operational control over the military forces undertaking the intervention.[27] In this way, the military forces are held accountable to the international community, thus precluding any one state from pursuing its own selfish agenda under the aegis of the UN. In practice, however, UN enforcement has never worked this way. Once Security Council authorization is obtained, the UN becomes a spectator while the member-states essentially direct their militaries autonomously.[28] This becomes particularly problematic if one state has a preponderant role or is undertaking the intervention alone.

Despite the practical problems involved in assembling a pure multilateral coalition, there is substantial support for the proposition that potential agents of intervention maintain more legitimacy if they act

multilaterally—in both the literal quantitative sense and the unique qualitative sense. Both approaches confer legitimacy to the exercise of power by agents of intervention, which, according to prevailing thought in international relations theory, enhances the efficacy of the interveners. One could also argue that multilateralism in the quantitative sense enhances efficacy by bringing the combined force of many states to bear on the target, both politically and militarily.[29] On the face of it, then, a consequentialist approach to humanitarian intervention places a high value on the multilateral legitimacy of the agents of intervention. In practice, however, there are important ways in which multilateralism may actually undermine efficacy.

There is noteworthy empirical evidence that multilateralism—particularly through a formal collective organization—slows decision-making, facilitates hesitance, and runs contrary to basic military understandings of unified command.[30] Among the earliest evidence of this was during NATO's initial military involvement in the Bosnia crisis in May of 1993. In this case, NATO was to provide air support to UN peacekeepers on the ground in Bosnia protecting civilians inside safe areas from Serb assaults. In addition to NATO's own collective decision-making rules, however, there was a complex arrangement for authorizing airstrikes that required authorization from both UN civilian leadership and NATO authorities. This dual key arrangement required that officials from both organizations agree on airstrikes, while both held veto power over when and where strikes could take place. As a result of this elaborate process, the full force of NATO airpower was stifled, and because no authorization was forthcoming under the dual key arrangement, NATO was unable to act when Serbs overran the safe area of Srebrenica and subsequently executed seven thousand men and boys.[31]

Of course later NATO was much less hesitant to use force when it bombed the former Yugoslavia in 1999 in order to avert ethnic cleansing in the province of Kosovo. While the United States undeniably plays a preponderant role in NATO—both institutionally and militarily—the collective decision-making procedures were still a notable constraint on the projection of (mainly U.S.) force. According to some analysts, this unnecessarily increased the duration and intensity of the campaign.[32] NATO's political and military leadership had hoped that a sustained bombing campaign would force Serb nationalist Slobodan Milosevic to back down within days. But when he did not relent, and actually began to escalate his ethnic cleansing campaign in Kosovo, a debate ensued among NATO allies concerning how to proceed more aggressively.[33] The thrust of the controversy was over target selection and approval, which according to NATO rules requires the consent of

the North Atlantic Council (NAC), which consists of the permanent representatives of all NATO members-states (nineteen at the time).[34] Realizing the virtual impossibility of this, the NAC agreed to give its proxy on sensitive targeting decisions to Secretary-General Javier Solana, who participated in target selection along with the United States, Britain, and France, who each had a veto over any target.[35] Even with this streamlined selection process, NATO military commander General Wesley Clark complained intensely about the cumbersome process of acquiring allies' approval for attacking sensitive targets and the overall lack of consensus among allies on how to break the will of Milosevic.[36] The campaign that was initially predicted to last three days thus dragged on for seventy-eight. So frustrated was the United States by NATO's cumbersome decision-making process that toward the end of the conflict it began circumventing the NATO chain of command for missions involving U.S. planes, for which target approval was generally obtained in about thirty minutes.[37]

In both of these instances, while the legitimacy conferred by the multilateral decision-making arrangements rendered the interventions more politically acceptable to international society, the price for this in both cases was efficacy and rapidity of action. In the Bosnia crisis, for instance, it took over two years—during which there were multiple kidnappings of UN personnel, the massacre of seven thousand people at Srebrenica, and countless other atrocities—before NATO acted decisively. As for the Kosovo intervention, an exclusively U.S.-operated intervention may well have posed a greater opportunity for U.S. exploitation. But under the circumstances, the number of lives that could have been saved from a quicker and more decisive intervention might have rendered this a reasonable risk to take.

None of this is to say that the pursuit of multilateral legitimation is not worthwhile. The dangers of partisan abuse are still great enough to prefer that the agent of intervention be a multilateral coalition. Unilateral state power, however, might at times be the better choice during times when people are suffering and lives are being lost while waiting for a multilateral consensus on military strategy or attempting to collectively decide the legality of attacking certain targets. As Jack Donnelly observes, "[e]ven a single state may act on behalf of broader moral or political communities—which may offer active or passive support. . ."[38] Whether or not a single state or small group of states acting outside a formal multilateral framework maintain the requisite legitimacy to carry out an effective intervention thus depends on the extent to which they demonstrate other qualities of legitimacy as agents of humanitarian intervention.

Humanitarian Credentials

Another factor commonly found in the literature concerning the legitimacy of an agent of intervention is the extent to which such an agent itself engages in conduct that is consistent with prevailing norms concerning human dignity—specifically, human rights norms. Proponents of this view argue that only governments that respect the human rights and dignity of their own citizens are entitled to intervene militarily to protect the rights and dignity of people in other states.[39] This is why, according to some, that NATO's intervention over Kosovo maintained substantial legitimacy despite its illegality.[40] As an alliance of the world's foremost democratic, rights-respective and prosperous states, the NATO states collectively embody substantial credibility as purveyors of norms relevant to human rights and dignity, and maintain legitimacy as agents for humanitarian intervention. There are basically two reasons why international society should favor such a requirement of potential agents of intervention, one philosophical and the other more pragmatic.

The most sustained philosophical grounding for this argument comes from a liberal theory of the state, which argues that a state is only sovereign to the extent that its domestic institutions conform to democratic standards of good governance and respect the rights of citizens.[41] Sovereignty is thus the outward face of internal legitimacy—a motif that reflects the trend in international society that favors conformity with democratic standards of good governance.[42] This trend is noticeably evident in the requirements for admission into the world's principle regional organizations, such as the European Union (EU), NATO, the Organization of American States (OAS), and most recently the African Union (AU), whose charter insists that [g]overnments that come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.[43] Nevertheless, it follows from a liberal theory of the state that if an internally illegitimate government orders its armed forces to militarily intervene in another state, because such a government is illegitimate, it cannot act validly on behalf of its own citizens. Therefore, it cannot rightly order its own citizens to go to war because it lacks the authority, thus the moral standing, to compel obedience from those it rules.[44] International acts such as humanitarian intervention are therefore illegitimate if they are ordered or undertaken by an illegitimate government.

Even if we take it that a state's internal legitimacy—couched in terms of domestic democratic credentials—has a bearing on its external legitimacy, the philosophical argument by itself does not address how this influences the efficacy of a potential agent of intervention. Returning to

the analogy of the drowning swimmer, what practical reasons are there for forbidding a murderer from rescuing a person who is drowning? One might first reasonably argue that a tyrannical state is simply not to be trusted to use its military to promote human rights and dignity abroad because it has not enshrined these values toward its own citizens. Given such a state's utter disregard for the rights, dignity, and security of its citizens, it seems highly suspicious that a military intervention by such a state would meaningfully endeavor to promote and protect these values for people in other states. It is also likely that an intervention by a tyrannical state would provoke at least some resistance among the alleged beneficiaries of the intervention, as well as possibly other states. One can imagine such scenarios if states with scant domestic democratic credentials like North Korea, Zimbabwe, Sudan, or even China intervened ostensibly to protect foreigners from abuse by their own government. There are thus obvious cases where the internal legitimacy of a state would be grounds for disqualifying it as a potential agent of humanitarian intervention on consequentialist grounds.

While it is preferable that the intervening agent conforms to democratic standards of good governance, conformity to such principles in the domestic setting is not the only measure of a state's suitability as an intervening agent. On this view, the international legitimacy of a potential intervening state is largely detached from its internal practices, as such legitimacy is conferred by, thus is the property of, international society.[45] For instance, quite aside from its domestic democratic credentials, a state's past practice of military intervention can also affect the extent to which it is able to effectively undertake an intervention in a particular situation. To the extent that a state's controversial record of past interventions or its brutal and exploitative interventionist past in a certain part of the world provokes distrust of that state as an appropriate agent of intervention, that state's efficacy as an intervener can only be undermined.[46] Not only does this raise suspicions about the potential intervener's desire to genuinely protect people, but, as the example of Darfur demonstrates, it enhances the risk of provocation resulting in resistance from within the target state and from other external actors.

The relationship between multilateralism and the humanitarian credentials of the agents, however, can affect its overall legitimacy and therefore efficacy. In other words, an agent with strong humanitarian credentials would, theoretically, not require multilateral legitimation to the same extent as one with weaker humanitarian credentials in order to muster the requisite legitimacy to mount an effective humanitarian intervention. The Nigerian-led humanitarian interventions in Liberia in 1990 and Sierra Leone in 1997 serve as cases in point. During these interventions, and throughout much of its recent history, Nigeria was character-

ized by substantial political instability and repression, owing to several coups and successive military dictatorships that committed serious human rights abuses.[47] These are plausible reasons to insist that the projection of its power, however modest, be checked multilaterally. Yet, under the aegis of the Economic Community of West Africa States (ECOWAS), Nigeria spearheaded two moderately successful humanitarian interventions.[48] Accordingly, the legitimacy Nigeria lacked as an agent of intervention was compensated by the fact that these interventions were conducted under the multilateral authority of ECOWAS, with Nigeria contributing most of the troops (about 75 percent in the Liberian intervention) but with smaller contingents from Ghana, Gambia, Guinea, and Sierra Leone.[49]

This example illustrates that the agents of these interventions obtained legitimacy—thus efficacy—not from their humanitarian credentials, but by acting though a formal multilateral institution in order to check the preponderant Nigerian role. Importantly, the UN Security Council granted these interventions retroactive validation after they had been undertaken.[50] Had Nigeria unilaterally intervened in these crises, there would be reason to expect that the post facto approval would not have been forthcoming from the UN Security Council. The tentative conclusion to be drawn is that while it might be ideal for intervening agents to have strong humanitarian credentials and to act multilaterally, it is not necessarily the case that unilateral interventions or those conducted by nondemocracies should be forbidden. But the more repressive and abusive the potential intervener is, the stronger it must be insisted that the projection of its power be checked multilaterally. Likewise, if a potential intervener has substantial humanitarian credentials, and permitting it to project its power unilaterally increases the chances for a quick and decisive intervention, the less we should worry about checking its power multilaterally, particularly in extreme humanitarian emergencies. Yet, there is another related factor to consider.

Prevailing Political Context

The extent to which an actor must act multilaterally or demonstrate humanitarian credentials depends crucially on the position that an agent occupies in the prevailing international political context. One can conceive, for example, of a potential actor that has solid democratic credentials and a generally positive record of past interventions. Yet its position in the prevailing international political context is such that it is likely to struggle in mustering the requisite legitimacy to mount an effective intervention. Much of this depends on the extent to which the

potential actor is perceived to abide by widely shared international norms in its international behavior more generally, as well as precisely which norms are privileged at any given moment.[51]

There is, of course, a vast literature on the effect of norms on state behavior, and how normative or ideational structures (in additional to material influences) shape not only states' rational calculations, but also the very preferences and identities that underlie them.[52] According to this thought—usually associated with English school and social constructivist theory—the normative structure can change to privilege certain values or combinations of values at different times. Shifts in the normative structure thus socializes states to have different preferences or priorities internationally.[53] These shifts in normative structure usually accompany shifts in material structure, such as changes in the distribution of power, wherein the ascendance to primacy (or dominance) of new global actors brings increased emphasis on the norms and values these actors enshrine. As Nicholas Wheeler and others argue, when the Cold War ended, liberal Western democratic states (particularly the United States) ascended to primacy and with them, liberal norms of democratic governance and human rights became increasingly privileged vis-á-vis traditional norms of state sovereignty.[54] This created a normative context in which humanitarian intervention was perceived as increasingly legitimate, though still very controversial.[55] Likewise, actors associated with the spread of these norms became their "carriers,"[56]—those liberal democratic states associated with human rights and democracy that became the primary agents of humanitarian intervention during the 1990s and enjoyed a certain legitimacy in this role. Just as certain norms enjoy primacy, the purveyors of those norms enjoy a certain legitimacy as the rightful agents of norm enforcement.

Norm carriers, however, are in a particularly precarious position in international politics. While states' status as norm carriers grants them a certain degree of legitimacy as agents to act on behalf of these norms, interventional events can create a blowback effect. Purveyors of human rights norms are then perceived as abusing their privileged normative position because of frequent abuse of these norms or by engaging in double standards. If the credibility of a human rights norm carrier is diminished as a result of its rhetoric or behavior, it creates an international political context in which the actor finds it increasingly difficult to persuade other actors to support its agenda, possibly provoking opposition.

One obvious situation in which we can conceive of heretofore legitimate agents of humanitarian intervention currently finding difficulty mustering the legitimacy to effectively intervene has to do with the terrorist attacks of September 11, 2001 (9/11) and the ensuing global war

on terror spearheaded by the United States, which has affected the position of many Western liberal states in the prevailing international normative structure. This is not to say that international human rights norms relevant to democratic governance and the rule of law have somehow lost their currency in international politics. The problem is that the 2003 invasion of Iraq as particularly controversial globally, not only because of an alleged U.S. unilateralist impulse, but especially after the exposure of prisoner abuse in the Abu Gharib and Guantanamo Bay detention facilities and allegations of U.S. troops raping and murdering Iraqi civilians.[57] As a result, the United States's credibility as a carrier of human rights norms has been diminished, undermining humanitarian credentials that had previously lent it legitimacy as an agent of intervention during the 1990s.

More important is the fact that the United States administration began to justify the Iraq invasion by characterizing it as a humanitarian intervention because the original argument for the invasion—Saddam Hussein's alleged illegal weapons programs—turned out to be largely overstated and exaggerated.[58] This, in turn, has made it look as if the United States and its allies (principally the United Kingdom) used a human rights justification to mask the exercise of hegemonic power.[59] While the controversy over the Iraq war, and the war on terror more generally, has not directly affected norms relevant to human rights, democracy, or even humanitarian intervention, it has impacted negatively on the ability of the United States and its allies to act as norm carriers,[60] despite the fact that these states possess substantial domestic democratic credentials. The normative structure of international society itself has not necessarily changed, but the position of certain actors within it has, adversely affecting their legitimacy and efficacy as agents of humanitarian intervention. So, even if potential agents of intervention maintain the requisite military capability, possess relevant humanitarian credentials, and act multilaterally, their diminished normative position in international society may still render them ineffective as humanitarian interveners.

Nonintervention in Darfur

The humanitarian crisis in Darfur provides a particularly relevant illustration of the problems of agency. The conflict in Darfur, Sudan began in February of 2003, when two rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), attacked Sudanese government military installations in response to decades of political marginalization and economic neglect. Khartoum responded by arming

and supporting horse mounted Arab militias called *Janjaweed,* providing arms and air support and giving them free reign to terrorize, rape, and pillage the non-Arab villages of Darfur in an attempt to deprive the rebels of a civilian support base.[61] Since 2003, tens of thousands of civilians have been killed by both government bombardments and at the hands of the *Janjaweed,* while about two million have been forcibly displaced, resulting in tens of thousands more deaths in displacement camps due to starvation and disease.[62] At the time of this writing, there is a tenuous peace agreement in place between the Sudanese government and one of the rebel groups, while a force of seven thousand AU monitoring force patrols an area the size of France. Khartoum continues to accept the presence of this force as long as it lacks the mandate and capability to combat *Janjaweed* and government sponsored atrocities and until recently has vociferously opposed a UN peacekeeping presence in Darfur, which Sudan's President Omar Bashir characterized as reimposing colonial rule.[63]

The situation in Darfur stands as a relatively straightforward case for the permissibility of armed humanitarian intervention, particularly during the escalation of the atrocities in the spring of 2004, far before a meaningful peace process was underway and when many of the victims could have been saved. Human security in Darfur was and has remained imperiled to a degree that met, and even surpassed, the threshold conditions for military intervention developed in chapter 2. Based on these extreme conditions, a properly undertaken humanitarian intervention during the spring, or even early summer 2004, would have stood a strong chance of saving more people than it imperiled. But the extent to which this consequentialist requirement could be met would depend crucially on the nature of the agent(s) undertaking the intervention, particularly given the unique political context of this crisis.

Obstacles to Western Intervention

As the state with the greatest capability, the United States is the most obvious candidate for undertaking or leading such a difficult and demanding task. In addition to possessing the military wherewithal, the United States is, by most measures, a liberal democratic state whose citizens enjoy most internationally recognized human rights, a broad array of political freedoms and high levels of human security as compared to most other states.[64] Its record of past military interventions, however, is quite controversial, most dramatically, in Iraq in 2003. Indeed, of the factors articulated above that serve to militate against the United States as an appropriate agent of intervention in Darfur, the U.S.'s normative

position in the prevailing political context as a result of the Iraq invasion is undoubtedly the most prominent.

It is no big secret that the invasion of Iraq has severely damaged U.S. credibility throughout the world, prompting analysts to ponder America's legitimacy crisis, and what needs to be done to restore U.S. credibility in the world.[65] Even before 9/11, however, concerns about the U.S.'s unilateral, unconstrained projection of power had become widespread. It was during the Clinton administration, that French Foreign Minister Hubert Védrine coined the term *"hyperpuissance"* (hyperpower) to characterize the inescapable reality of American political, economic, and military dominance of the world.[66] Against this backdrop, international reaction to the invasion of Iraq served to both reflect and reinforce the fact that many people outside the United States simply do not trust America to use its enormous power wisely or well.[67] Mindful of the frustrations of alliance warfare experienced during the Kosovo crisis, the United States made no formal use of NATO when it invaded Afghanistan in 2001. When it undertook the invasion of Iraq in 2003, despite the protest of most governments of the world, unconstrained American unilateralism was perceived as a culmination of a tendency, rather than an isolated departure,[68] thus making suspicion of American power particularly acute in this case

If this general distrust of unrestrained American power alone were not enough to stymie a potential humanitarian intervention in Darfur, as the Iraq war unfolded, U.S. intentions became increasingly suspect. Of course the initial argument for the invasion of Iraq was that Saddam Hussein possessed, and had active programs to develop, weapons of mass destruction (WMD), which the U.S. administration feared might used against the United States, its allies, or given to terrorists.[69] But as the war raged on, and evidence in support of this assertion became increasingly elusive, the United States administration emphasized the humanitarian argument for the invasion, essentially arguing that the war was justified because it removed a tyrant and was bringing freedom and democracy to Iraqis.[70] Given the human toll the civilian population was sustaining and the torture and abuse of detainees in Abu Gharib, however, the humanitarian justification seemed even more disingenuous to outside observers than the WMD argument, prompting further suspicion that the United States was essentially after Iraq's oil and waging an imperialistic war against Arabs and Muslims.[71]

Amidst this controversy, events in Darfur came into the international spotlight, raising the issue of humanitarian intervention to put a stop to what the Bush administration itself characterized as genocide. The United States, however, found itself isolated from its international peers on the question of whether genocide had taken place in Darfur,

prompting accusations that the United States was essentially hyping the charge of genocide as a smokescreen behind which it could invade Sudan for other reasons, such as access to the vast oil reserves quite obviously coveted by U.S. oil companies.[72] The framing of the crisis as Arab on African violence was likewise criticized by prominent Arabs as yet another selective and unfair vilification of Arabs as *génocidaires*, particularly in a context in which the Western media routinely identify them as the instigators of terrorism.[73]

Given the international political context brought about by the U.S. involvement in Iraq, the United States could not have been in a worse position to undertake a humanitarian intervention in Darfur in the spring of 2004. The parallels were all too present: an unrestrained superpower unjustly killing Muslims and Arabs to access resources and expand its imperial influence, all behind the pretext of humanitarian intervention. If the mere accusation of genocide by the United States was exploited to such a degree as an assault on Arabs and Muslims, one could expect that the actual deployment of U.S. forces to Sudan would not only provoke outcry and opposition throughout the Muslim world and beyond, but also open up a new front for jihadist attacks against United States and accompanying forces. A statement by Osama bin Laden calling for Mujahedin and their supporters ... to prepare for long war against the crusader plunderers in Western Sudan attests to this concern.[74] An American intervention in Darfur would have thus added another layer of conflict to a region already devastated by war, causing more civilian suffering and further destabilizing the region. From a consequentialist perspective, therefore, the United States would have been a particularly unsuitable agent of humanitarian intervention for this particular crisis.

If the problem with a U.S. or U.S.-led invasion were simply fear of an unconstrained and thus exploitative U.S. invasion, then it might have made sense for such an intervention to be undertaken multilaterally by NATO, which is still a sufficiently capable agent but could act as a check on such unilateral opportunism. But even assuming the absence of such insidious ulterior aspirations on the part of the United States, or that such ambitions could be held in check by acting multilaterally through NATO, the fundamental problem is not the United States's purported ulterior motives, but the atmosphere of mistrust between the Western and the Muslim worlds, facilitated by the Iraq war and the war on terror more generally.[75] In other words, while acting through NATO would probably help to curb the danger of a partisan U.S. intervention to the extent this danger exists, it would do little to assuage the perception by many in the Arab and Muslim world of a NATO intervention as a neoimperialist crusade. Not only is the United States the leading member of

NATO, but the UK and several other member-states have also been involved in the Iraq war. With prominent Arabs and Muslims stoking fears of American-led Western neoimperialism, and calls by Islamic radicals for jihad against what they portray as Western attempts to subjugate Muslims, an intervention under NATO auspices would be just as susceptible to the risks outlined above as a unilateral U.S. intervention.[76] Multilateralism matters, but in this case it matters less.

The problematic position occupied by Western powers in the prevailing political context is thus inescapably intertwined with the highly controversial Iraq invasion and a global uneasiness about the war on terror in general, at least for the foreseeable future. While certain Western powers may otherwise be in the best position to undertake humanitarian interventions in places like Darfur, the position of Western agents of intervention in the prevailing political context is such that they would be increasingly likely to have to wage two conflicts if they were to intervene in Darfur: an offensive one against those committing atrocities, and a defensive one against forces provoked by a perceived Western invasion of the Muslim world, á la the Iraq invasion. This contextual dynamic would not be present, however, if the intervening agents were non-Western or comprised of an otherwise regional force. Intervening in Darfur would therefore seem to be a job for which other African or Middle-Eastern actors would be best suited.

Challenges to an African Solution

The idea of an African solution to this crisis is one that gained much traction in the debates over the Darfur crisis. There are good reasons to prefer that the agents of intervention in Darfur be African, or at least non-Western, given the profound difficulties outlined above that a Western intervention in Darfur would likely face. The African Union Mission in Sudan (AMIS) currently patrolling Darfur is not conducting a humanitarian intervention as that term is understood here. That is, AMIS has yet to conduct combat operations that employ offensive force against those committing atrocities against civilians.[77] The issue I deal with is the suitability of a multilateral AU force for undertaking a humanitarian intervention in Darfur in the spring of 2004, not necessarily whether the AMIS monitoring peacekeeping mission as it was initially deployed was the best of all possible options. I do, however, draw from the difficulties faced by the AU in undertaking AMIS as a general gauge of the difficulties the AU would face in deploying a humanitarian intervention.

While not undertaking a humanitarian intervention, strictly speaking, it is nevertheless important that the international force initially

charged with providing security in Darfur is organized multilaterally under the auspices of the AU. This is because if humanitarian intervention ever were to be undertaken in Darfur by an African force, there would be few individual African states that maintain the humanitarian credentials required for a state or small groups of states to intervene unilaterally. Furthermore, unilateral military interventions among African states—even well-intended ones—have had a bad tendency to provoke wider wars and cause untold human suffering. The decade-long civil war in Zaire/Democratic Republic of Congo (DRC), which began in 1996, is the most recent example of what can happen in Africa when states take it upon themselves to intervene militarily in one another's affairs (though not necessarily for humanitarian purposes). The government of Rwanda—which has been particularly enthusiastic about sending its troops to Darfur and has since been among the top troop contributors to AMIS[78]—played no small part in the chain of events that led to what has been called Africa's first world war.

Because of Rwanda's experience of enduring the horrors of genocide, and its desire to not have it repeated again while the world stands idly by, it seems intuitive that the government of Rwanda, led by Paul Kagame, would be especially keen on taking action to halt ethnic-based killings in Darfur.[79] Kagame is, of course, an ethnic Tutsi—the group that was targeted for genocide in Rwanda in 1994—and was the leader of the Rwandan Patriotic Front (RPF), which was the Tutsi-led rebel group based out of Uganda that invaded Rwanda and ultimately halted the genocide. These credentials as a humanitarian interventionist sit quite uncomfortably with his government's subsequent involvement in the war in Zaire/DRC, though this involvement was not for humanitarian purposes.

Rwanda's involvement in this conflict initially involved spearheading attacks on refugee camps in Eastern Zaire in 1996 to clear them of Hutu extremists perceived by Kagame to be a security threat, in which Rwandan forces committed numerous atrocities.[80] After gaining a foothold within Zaire and with help from Uganda, Burundi and Angola, Rwanda subsequently aided the Zairian rebel leader Laurent Kabila in overthrowing the Mobutu regime, triggering a decade-long spiral into regional war in which over three million civilians have been killed.[81] Rwanda again invaded the (renamed) DRC in 1998 with the help of Uganda and Burundi and engaged in extensive commercial exploitation of its mineral resources (namely coltan)—so much that it is alleged that Kagame even bragged that his war efforts in the DRC were self-financing.[82] Angola, Namibia, Zimbabwe and Chad intervened on the side of Kabila, for which they were permitted to essentially annex portions of the DRC for commercial purposes. These states, especially

Zimbabwe, have all profited from the war immensely, to the extent that their involvement in it became necessary to secure their own economic salvation in the face of collapsing domestic economies.[83] Essentially, what began as a Rwandan intervention to address a security threat in Eastern Zaire turned into regional armed conflict involving over a dozen rebel groups and at least seven governments that intervened under various pretexts, though ultimately sought economic gain.[84]

Given this recent bout of suspicious and exploitative interventions within Africa, as well as overall scarce domestic democratic credentials, the best African solution to the Darfur crisis would thus seem to be a multilateral one. The most recent effort at mustering a multilateral AU force to provide security in Darfur—again, while not constituting a humanitarian intervention—has nevertheless been plagued by many of the usual impediments to effective action inherent in formal multilateral military operations. For instance, the initial deployment of AMIS in June of 2004 was for the purpose of monitoring a ceasefire that really only existed on paper, prompting AU officials to rethink AMIS's operations before it even began.[85] It is at this point where the glacial pace of multilateral decision-making became an impediment to effective action, which was particularly apparent in this case because the AU was only created in 2002 and this was its first attempt at such activity. A month after deployment, AU officials requested an assessment of the situation by the Ceasefire Commission, although it was not until October 2004 that the Commission's chairperson proposed to increase the size and broaden the mandate of AMIS to include protecting civilians it encounters under imminent threat and in the immediate vicinity.[86] Once the proposal was approved by the AU Peace and Security Council, the enhancement of AMIS was scheduled to be completed within 120 days, during which time conditions of human security precipitously deteriorated. The thirteen-month evolution of AMIS from an essentially unarmed monitoring group to its status as a slightly more robust peacekeeping operation was directed by several such assessments, proposals and subsequent approvals by AU bodies. Thus, one could expect that an actual humanitarian intervention undertaken by the AU would experience similar bureaucratic hurdles and collective decision-making constraints.

The other problem, however, is the limited military capabilities that any AU force would have on the ground. AMIS, for instance, has suffered from logistical difficulties in deploying personnel, poorly-trained personnel, chronic lack of resources, strategic and operational gaps and debilitating intelligence and communications gaps.[87] The AU's own assessments have characterized the operation overall as lacking the "basic elements of a balanced military force . . . required to deal with the situation in Darfur."[88] These problems are slowly but surely being

addressed, however, as NATO states have been assisting the AU by providing airlift for AMIS personnel and engaging in extensive training of troops and officers. In addition, there is a current effort to fold AMIS into the existing UN peacekeeping mission running parallel to AMIS in the rest of Sudan, even potentially with NATO close air support. But even NATO officials are quick to admit that neither the Sudanese government nor the African Union ... "want to see white, European troops coming into Sudan."[89] It is nevertheless highly probable that a humanitarian intervention undertaken by the AU would require at least some help from NATO or some of its members.

Given the AU's experience in deploying AMIS, it should be expected that a humanitarian intervention in Darfur under the auspices of the AU would also take some time to materialize, during which countless innocent civilians would continue to be abused, displaced, or killed. In this light, an African solution to the Darfur crisis seems less than optimal. However, instead of settling for a sluggish AU to deploy what would probably be, at least initially, a second-rate intervening force, would it have been better if the United States or NATO had quickly and decisively intervened, thus running the risks associated with a Western intervention in the heart of the Muslim world? Would it have been better to shrug off the cumbersome and phased multilateral procedures of the AU in favor of a unilateral intervention by one or a few of Sudan's neighbors? There is, of course, no way of knowing with certainty what would happen in such scenarios, but the facts surrounding each possibility give us a general idea of the likelihood of what could go wrong in each of them. In this sense, the efficacy of an intervening agent depends on its ability to actually rescue people in the short term and to do so without itself provoking or instigating additional human suffering. The potential problems associated with a U.S. or NATO intervention, or a unilateral intervention by another African or Middle-Eastern state, profoundly militate against the efficacy of these potential intervening agents. The history of suspicious and exploitative military interventions in Africa, an overall lack of humanitarian credentials, and the relative military weakness of most African states weigh heavily against a regional unilateral intervention. And while the overwhelming military advantage of the United States or NATO might compensate for its lack of legitimacy to a certain degree, as we know from the U.S. experience in Iraq, quick and decisive victories in initial combat phases of a military intervention are only part of the story. And given the prevailing international political context, any Western intervention in a predominantly Muslim state runs an enormous risk of triggering indigenous and even foreign resistance.

A multilateral force under the auspices of the AU does not entail these same risks, but the trade-off is a much slower and less militarily

dominant intervening agent. A modestly-sized AU force of around seven thousand (the current size of AMIS) transported by NATO and armed with proactive rules of military engagement would still not prevail as decisively as a direct Western intervention. An AU force of this composition would have nevertheless been the most suitable agent for a humanitarian intervention in Darfur in the spring of 2004. Unfortunately, when the AU decided that it had the responsibility to protect Darfurians, humanitarian intervention, per se, was not the option on the table and was therefore not undertaken. Achieving minimum efficacy for an AU force may still also require the indirect support of some Western states to provide airlift and other logistical, communication and intelligence assistance. But under the circumstances of the Darfur crisis, the most effective agent for a humanitarian intervention would have been a multilateral regional force, appropriately armed and mandated, under the sponsorship of the AU.

Conclusion

The ideal agent of humanitarian intervention would maintain sufficient military power to prevail against a modest military force, have sound humanitarian credentials, occupy a privileged position in international society and enjoy multilateral legitimation. At a time when there is a shortage of actors willing to undertake humanitarian intervention, however, such requirements hardly seems realistic. These factors must still be considered in evaluating the suitability of a potential agent of intervention for a particular crisis. Adequate military power is, of course, the most basic element, though it is also the only element that cannot be compensated for by any or all of the others, and it is the only one that is by itself necessary (though not sufficient). If an agent does not have the minimum resources required to prevail militarily, it is not a suitable agent of intervention no matter how legitimate it otherwise may be. The only other factor that may itself be necessary is the agent's position in the prevailing political context, though even if certain actors do not enjoy a positive position, the projection of their power could plausibly be made more acceptable if undertaken though a formal multilateral organization. An actor's military power alone, however, is not sufficient. As the Darfur example illustrates, even the most powerful actor in the world may not be the most effective agent of intervention if it lacks any or all of the other elements to a significant enough degree. Likewise, the analysis above suggests that states lacking domestic democratic credentials are not necessarily precluded as agents if they act multilaterally, nor is unilateral intervention prohibited if the agent has strong humanitarian

credentials or, more importantly, enjoys a privileged position in international politics.

Having identified several factors relevant to the suitability of potential intervening agents, it is tempting to try and identify the most important, or otherwise rank them relative to on another. I resist this temptation primarily because which of these attributes is more important will vary according to the urgency and severity of the humanitarian crisis to be averted, the nature of the entities that are primarily responsible for committing the atrocities, and a host of systemic conditions that weigh heavily upon whether a particular agent is best-suited to undertake humanitarian intervention. As to the first point, for humanitarian intervention to be permissible by any agent, human suffering must meet the threshold conditions outlined in chapter 2. Though once the threshold is met, the speed with which the atrocities take place and the urgency of a response influences which factors will maximize the possibility of an effective intervention. For instance, while the Darfur crisis meets this threshold, the immediate need for a military response was probably not as urgent as it was during the crisis in Rwanda in 1994, where eight hundred thousand people were killed in one hundred days. While it sounds callous, the fact that Darfur was "Rwanda in slow motion"[90] would provide international actors with more time to ensure that the intervening agent meets the requirements for intervening in Darfur. In a Rwanda-style crisis, however, by the time a multilateral regional force was assembled and deployed, it would be too late. A crisis of this magnitude necessitates a much quicker response, and certain risks associated with unilateralism or a paucity of humanitarian credentials may be acceptable under the circumstances.

Related to this concern are the characteristics of the target of intervention—that is, the agent committing the atrocities. First of all, it is a harsh reality that there are no agents currently suitable to militarily intervene against extremely powerful states like the permanent members of the UN Security Council. This aside, however, we can say that the more powerful the target of a potential intervention, the more emphasis must be placed on the military power of the intervener, though one should be wary of this requirement translating into a prescription for war between major world powers. The nonmaterial characteristics of the target relative to the intervener are also crucially important, as evidenced by the Darfur example, and illustrates the profound importance that contextual elements have on the suitability of intervening agents. As the Darfur example shows, the prevailing political context today is such that barring an extremely urgent Rwanda-style genocide, Western powers are not in a good position to undertake a maximally effective humanitarian intervention in predominantly Muslim or Arab states. This does not mean, however, that the

Western states' (particularly the United States's) diminished credibility prevents them from intervening in regions where this dynamic is less pronounced—which at the present time, may be limited to Europe.

Political context, and the position that potential interveners occupy within it, therefore affects, to a substantial degree, the extent to which potential intervening agents must possess the other elements of efficacy. Under the circumstances of the 1999 Kosovo intervention, a unilateral U.S. intervention may well have been more effective than the more cumbersome multilateral approach. However, the diminished position of the United States in the political context of today would likely preclude unilateral humanitarian intervention by the United States in all but a few regions in the world. Likewise, while international society may have welcomed a unilateral intervention by the United States to halt or avert any number of the humanitarian crises in Africa during the 1990s (e.g. Liberia, Burundi, Rwanda, Sierra Leone, southern Sudan, DRC), this is quite far from the situation today.

A consequentialist approach to humanitarian intervention must consider both the material and nonmaterial attributes of potential intervening agents in appraising the extent to which certain actors would be effective agents of intervention. Material power is the most basic element of efficacy, but certain nonmaterial elements forged by the politics of legitimacy also play a crucial role in either facilitating or impeding military power to such an extent that they affect whether certain actors maintain the requisite efficacy to do more good than harm in a humanitarian intervention.

Applying the insights from the preceding analysis undoubtedly leads to close consideration of the prevailing political context in appraising the suitability of certain actors of agents of intervention. Taken together, the various elements of efficacy under the present international political milieu suggest a starting point preference for regional organizations as the best-suited agents of intervention. However, many regional organizations would undoubtedly face substantial difficulty in authorizing, organizing, and deploying an appropriate military force. Thus, there may be foreseeable situations in which departing from this preference in favor of unilateral interventions, or interventions undertaken by the United States or other extra-regional actors, may be the most effective. Nevertheless it behooves international society to encourage and assist regional organizations like the AU to develop more robust capabilities and more streamlined and reliable procedures for undertaking humanitarian intervention. This is far from a perfect prescription, but based on the analysis above, it is the best way to balance the need for both military power and legitimacy in a way that maximizes the efficacy of the intervener and minimizes human suffering.

This page intentionally left blank.

6

Conclusion

When and under what conditions is humanitarian interventional morally permissible? When is humanitarian intervention legal and to what extent do the legal grounds for intervention parallel the ethical arguments? Who should then undertake humanitarian intervention and why do they merit this task? To answer these questions, this book invokes two examples intended to illustrate that, even though humanitarian intervention might be morally desirable under certain circumstances, it does not always follow that it is legally permissible or politically possible in such cases. As the Kosovo intervention demonstrates, imminent or ongoing ethnic cleansing, of the kind perpetrated by Serbian forces against Kosovar Albanians presents a prima facie moral basis for using military force to avert such atrocities. Yet, the Kosovo intervention violated international law and presents a definite normative impediment to future interventions under similar circumstances that may otherwise be morally justified. Likewise, the Darfur crisis presents a strong moral case for humanitarian intervention, although, in addition to potential legal implications of doing so absent UN Security Council authorization, there remain serious concerns over which actors are best equipped to undertake such an operationally and politically demanding task. While these and other examples teach us a number of lessons, above all, they exemplify the profound difficulties that attempts at humanitarian intervention will inevitably encounter, and which, in many cases, boils down to conflicting imperatives of moral responsibility, prohibitive international law, and the politics involved in determining who should undertake the intervention.

This book not only addresses fundamental concerns about the ethics, law, and politics of humanitarian intervention, but does so in a way that alleviates some of the inherent conflict among these different

dimensions of the subject. The starting point for resolving these conflicts is the very simple proposition, drawn from an explicitly consequentialist logic, that if humanitarian intervention is to be justified at all, the referent object of concern must be that of the suffering of innocent people—including those on whose behalf the intervention is undertaken as well as those who may otherwise be adversely affected by it. In other words, humanitarian intervention is only morally justified in situations when its adverse effects will not eclipse its accomplishments toward promoting human well-being. The general argument of a consequentialist concern for human security is that humanitarian intervention is morally permissible only under situations of large-scale, deliberately perpetrated deprivations of basic human goods that are either imminent or ongoing. It follows that, if a legal grounding for humanitarian intervention is to parallel this ethical prescription, then it must similarly reflect the consequentialist logic that human suffering must be sufficiently severe to warrant resorting to force. The argument here is that the law of universal jurisdiction does just this. Like humanitarian intervention, the normative logic of universal jurisdiction is to be exercised sparingly, and with great caution. Therefore, it is only permissible under certain extreme and exceptional conditions. Furthermore, these conditions are empirically similar to those under which humanitarian intervention is permissible according to a consequentialist concern for human security. Finally, the actors who undertake this task must possess both the ability and proclivity to meet the consequentialist requirement of maximizing human security. This requires not only careful consideration of existing power realities, but also consideration of the politics of legitimacy, which concerns issues of multilateral legitimation, the intervener's humanitarian credentials and its position in the prevailing political context.

Limitations and Qualifications: Acts versus Rules

As this book demonstrates, and as others argue, what makes the subject of humanitarian intervention so compelling is that it involves the three most fundamental organizational systems of human social life.[1] While this feature of humanitarian intervention offers myriad opportunities for ethical, legal, and political analyses, it also renders the systematic study of this subject as vexing as the debate is compelling. As a result, any attempt at developing a truly integrated approach to resolving the disjuncture among the ethical, legal, and political dimensions of this subject is going to confront certain limitations. This book is no exception. While consequentialism constitutes the common underlying analytical framework for resolving fundamental dilemmas within each

dimension of humanitarian intervention, it does not apply to these distinct dimensions in precisely the same manner. More specifically, it is a form of rule-consequentialism that brings together the ethical and legal dimensions of humanitarian intervention, while bridging the gap between morality and pragmatic political concerns requires an application of act-consequentialism.

Concerning the former, the consequentialist argument developed in chapter 2 advances a set of threshold criteria that constitute the moral basis for resorting to armed intervention as a means to rescue imperiled populations. According to this argument, the moral desirability of humanitarian intervention is a function of the extent to which it is conducted according to a certain set of criteria—or rules—that if followed have the effect of producing the best possible consequences in terms of overall human welfare. Such an argument is necessarily a form of rule-consequentialism, whereby acts are justified to the extent they conform to principles, whose general adoption brings about more aggregate welfare than the adoption of any other set of principles.[2] Reconciling these ethical criteria with principles of international law is fairly straightforward in the sense that both rule-consequentialist ethics and international law take rules and the general adherence to them as the proper objects of normative evaluation. Although, importantly, such rules are promulgated with an eye toward bringing about the best possible consequences. Grounding ethical arguments for humanitarian intervention in international law is desirable because it imbues reasoned moral judgments that seek to maximize human welfare with the predictability and frameworks of expectations that are characteristic of international law, permitting states to coordinate their international activity according to legal rules that have definite moral content.[3]

By contrast, synthesizing the ethical concern of maximizing overall human security with the pragmatic political concern of which actor should undertake humanitarian intervention requires an application of act-consequentialism. According to this variant of consequentialism, the moral desirability of an act is not judged on the basis of its adherence to rules that are promulgated to render the best consequences, but rather on a case-by-case appraisal of consequences.[4] The concern over which agent should undertake the act of humanitarian intervention requires that we ask what the likely consequences would be if a particular actor undertakes humanitarian intervention in a particular situation—an infinitely difficult dilemma to address with the consistent application of prescriptive rules.[5] To be sure, which actor is best suited to intervene in a given situation is a function of the various attributes that it potentially possesses (material capability vis-á-vis the target state, multilateral legitimacy, humanitarian credentials and position in the prevailing political

context). Identifying attributes relevant for helping to determine the suitability of a potential intervener is quite different than developing principled criteria that tell us which specific actor should intervene where. In other words, the extent to which we require that a potential intervener must have any one or combination of these factors depends on the particular circumstances surrounding the crisis. At the same time, depending on the situation, an agent's possession of one or more of these attributes may or may not compensate for a paucity of any of the others. For instance, the United State's unrivaled military power and notable humanitarian credentials would normally enhance its status as a suitable humanitarian intervener. But as the Darfur case illustrates, these attributes have been largely overshadowed by the United States's current position in the international political context, which would very much impede its ability to do more good than harm in a military intervention in Sudan. The question of which actor is best suited to intervene under what circumstance therefore cannot be effectively governed by a principled set of rules, at least not in the same sense as can the question of what conditions the resort to force is likely to do more good than harm.

If the reconciliation of competing ethical and legal concerns is of a slightly different nature than that of ethical and pragmatic political concerns, it will in turn affect the possibilities for reconciling the competing imperatives of the law and politics of humanitarian intervention. While a general consequentialist framework can make progress toward bridging the gap between morality and law, and the gap between morality and politics, the same cannot be said with respect to reconciling the legal and political dimensions of humanitarian intervention. The act-consequentialist logic that applies to political considerations is inimical to the concept of the rule of law because it robs the law of that which makes it desirable in the first place—its predictability.[6] For legal scholars like Michael Glennon, such tension may ultimately be irresolvable because such ad hoc approaches amount to "an acknowledgement that no reasonable rule can be fashioned to govern all circumstances that can foreseeably arise."[7] But this is not to say that an act-consequentialist approach to the practical political dilemma of who intervenes is entirely unpredictable, even if it cannot be governed according to legal principles that can be applied consistently to different cases over time. Quite the contrary. Who is best-suited to intervene in a given humanitarian crises will certainly always vary, as will the reason or combination of reasons that this actor either is or is not considered to be a suitable intervener. But the basis on which one makes this conclusion remain the same, at least as I have formulated them in chapter 5. A suitable intervener has both the ability and proclivity to do more good than harm in undertaking humanitarian intervention, which is a function of the

various material and non-material attributes detailed in chapter 5. This is not a perfect solution, but, at the very least, provides a starting point to make such determinations by employing a framework that seeks to maximize human security.

Making Humanitarian Intervention Work: From Theory to Practice

The main purpose of this book is to contribute to the scholarly debate over humanitarian intervention by developing prescriptive theoretical arguments that address and reconcile important moral, legal, and political dilemmas. But, the conclusions reached in this book have implications for facilitating the successful practice of humanitarian intervention. Arguments about the morality, legality, and political acceptability of humanitarian intervention are, in a broader sense, about its overall legitimacy. It is a truism that large-scale operations such as humanitarian interventions are more easily and successfully undertaken by states, or actors in international society, to the extent that such acts are widely perceived to be legitimate. But what makes humanitarian intervention legitimate? A systematic discussion of the normative substance of legitimacy is beyond the scope of this present inquiry, but, at a basic level, its normative foundations draw heavily on norms of morality and legality, while implying a certain measure of social consensus, which is the realm of politics.[8] The legitimacy of humanitarian intervention is a cognate of its legality, morality and political acceptability, but it is not the equivalent of any of these in particular. The idea of legitimacy is therefore devoid of normative content without reference to norms flowing from these three dimensions, which, often pull in opposing directions.

Herein lies the problem of humanitarian intervention in practice. Unless one conceives of a way to reconcile the competing normative claims of morality, law, and politics at the level of theory, the overall legitimacy will remain in perpetual doubt, and militate against its effective practice. This is precisely because of the normative and potentially material transaction costs involved. The Kosovo intervention, for example, maintained a certain measure of legitimacy because of persuasive moral grounds, as well as the fact that it was undertaken by an alliance of the world's foremost liberal democracies, whose domestic practices generally demonstrate reverence for human rights.[9] But the dubious legality of the intervention entailed certain costs—most notably providing fodder for Russia and China to oppose the intervention (even if they obviously opposed it for reasons other than its illegality), while also providing grounds for legal proceedings to be initiated by Serbia-Montenegro

against several NATO states in the International Court of Justice for their purported unlawful use of force.[10] Generally speaking, such activity did not necessarily translate into meaningful physical deterrence of NATO. However, states do not like to be accused of violating international law or find themselves defendants in international legal proceedings, and they will usually avoid taking action to put themselves in such positions.[11] The belief on the part of states that undertaking a humanitarian intervention may shine the spotlight on them as flagrant violators of international law therefore creates a disincentive for them to undertake it when there are otherwise compelling moral reasons for doing so. Over time, the cumulative effects of this can serve to undercut the perceived legitimacy of humanitarian intervention, increasing its political costs and ultimately making it less likely to occur when and where needed.

If humanitarian intervention is to be successful in places like Darfur, then it is crucial that a strong moral case for intervention is paralleled by an equally compelling legal argument. Furthermore, it is essential that the attributes of agents who carry out the intervention do not provide grounds for widespread opposition because it would provide further obstacles to successful conduct. Rwanda is probably the most tragic example when the indisputable moral case for intervention was in conflict with what international law would permit—or more accurately, what the permanent members of the UN Security Council were willing to undertake. To be sure, the fact that intervention in Rwanda to stop the ongoing genocide would technically have violated international law, is an unlikely explanation as to why any intervention was not undertaken, because the issue of political will was undoubtedly decisive. But, this disparity between the legal and moral grounds for humanitarian intervention nevertheless presents an obstacle in that those in a position to intervene are then able to use its illegality as a normative shield to deflect the otherwise *moral* imperative to intervene. Even though this was certainly not the real reason states failed to intervene in Rwanda, the importance of finding common ground between morality and international law became evident. By providing a legal basis for what is otherwise a moral imperative, one has removed or reduced international law as a barrier behind which reluctant states could hide from such an obligation. This is a step forward, but only in a perfect world are moral imperatives and legal permissibility the equivalent of political incentive.

In practice, then, humanitarian interventions are more likely to be successful if they maintain maximum legitimacy, which requires a coherence among elements that furnish the normative content of legitimacy. If one cannot reconcile these competing normative claims at the level of theory, then the actual practice of humanitarian intervention will continue to be stymied or otherwise less effective. If this book makes

genuine progress toward reconciling the competing normative claims of morality, international law, and pragmatic politics at the level of theory (thereby laying the groundwork for a more workable approach to humanitarian intervention in practice), then it has achieved its main purpose. But the story does not end here. There are still serious obstacles to bringing a morally sound, legally permissive, and politically tenable prescription for humanitarian intervention to fruition. These all essentially boil down to the problem of international actors, namely states, mustering the will to engage in humanitarian intervention.

One aspect of the practice of humanitarian intervention that this book has not directly dealt with is state interest and the extent to which states' perceived national interests are at odds with the moral imperative to take decisive action. Most governments are extremely reluctant to expend resources in blood and treasure for a humanitarian intervention unless such costs are minimal, or unless undertaking the intervention furthers more self-interested objectives in addition to purely altruistic humanitarian ones. Examples abound. In response to domestic and international outcry over the graphic images of children starving and dying in Somalia in the early 1990s, the U.S. government dutifully (though not without some hesitance) deployed a U.S. military force to protect the delivery of humanitarian aid from warlords and marauders. But when the expenses and casualties of this intervention became increasingly hard to sell to domestic constituencies, the U.S. retreated and left starving Somalis to their fate. Likewise, the absence of any strategic interests in Rwanda in 1994 left the UN Security Council paralyzed over that crisis, while fear of another Somalia, and the shield of illegality, provided all the cover that states like the United States needed to avoid military involvment. Even in the Kosovo intervention, and despite its illegality, NATO states undertook a massive bombardment campaign against Serb forces poised to ethnically cleanse Kosovar Albanians. NATO states were clearly concerned about the violence spilling over into other states in southeast Europe and how that would effect regional stability. Furthermore, NATO's refusal to deploy ground troops in favor of high-altitude bombing demonstrated that concerns about casualties could easily outweigh any alleged moral imperative to save civilians from slaughter. Finally, whatever the role humanitarian concerns played in motivating the United States to invade Iraq in 2003, such concerns were clearly secondary to other more self-interested geostrategic interests the United States has in that region.

Therefore, it seems clear that while governments are more than happy to lend their rhetorical support to the idea that there is a moral imperative or a responsibility to protect innocent civilians from massacre and gross abuse, whatever norm of humanitarian intervention

that exists today is still highly contested.[12] In the short term, armed intervention in response to the kind of atrocities discussed in this book is only likely if states or other actors have some other perceived vital interest at stake and are sufficiently prepared to incur substantial material and political costs. It is precisely this rhetorical support for ideas like the "responsibility to protect," moral imperatives, human rights norms, and various other ethical principles relevant to humanitarian intervention that may serve to states' conceptions of what constitutes their vital national interests.

There has been a good deal of scholarship over the past decade—mainly informed by social constructivist theory—suggesting that the rhetorical endorsement of ethical principles eventually leads to behavior consistent with such principles.[13] The argument here is that the more states engage in discourse about the ethical desirability of certain practices in international affairs, the more they identify themselves as promoters of such practices. Eventually, states perceive it to be in their interests to engage in ethically desirable activity. The thesis put forth by Neta Crawford several years ago is highly indicative in this regard. Crawford essentially posits that ethical arguments about the desirability of undertakings such as decolonization have led to that activity to be viewed favorably by international society and that such a process is currently occurring with respect to humanitarian intervention.[14] Constructivist arguments such as these argue that humanitarian intervention is increasingly perceived as ethically desirable, and suggests that certain actors will inevitably acquire identities as humanitarian interventionists. The reinforcement of such an identity is consummated by engaging in this activity, carried out in fulfillment of their own perceived interests. It is therefore unsurprising, as David Reiff notes, that it is virtually impossible for a liberal democracy to wage war without emphasizing its humanitarian credentials.[15] But such pretext arguments, are problematic.

The challenge, as Crawford aptly points out, is to develop the appropriate framework for how recourse to humanitarian intervention will be decided, and when and in what manner it should be carried out. It is also important to reconcile clashing normative beliefs on these concerns.[16] After all, impulses in favor of humanitarian intervention are not terribly different from those that justified some of the most unjust and brutal undertakings in human history, the civilizing missions of colonialism being one example. Furthermore, the current global war on terror and the various military activities associated with it, are dangerously, even intentionally, conflated with the idea of humanitarian intervention, which provides a kind of moral cloak portraying activities that are only incidentally humanitarian as genuine altruism.[17] Unless the competing imperatives of commonsense morality, international law, and

practical political considerations can be reconciled, the normative impulses driving the discourse may serves to institutionalize or otherwise legitimize practices that have any number of outcomes. Like colonialism, these do not all promote overall human well-being. Once again, getting humanitarian intervention right in practice requires first getting it right at the level of theory. If our normative prescriptions about humanitarian intervention are fundamentally flawed or otherwise in conflict, then its practice will be found equally wanting.

Conclusion

Waging humanitarian war will always be a risky undertaking. It requires careful consideration of the dangers measured against the potential good. It is also clear that as events of the twenty-first century unfold, there will continue to be situations in which innocent people are egregiously abused, and which cannot be halted or averted by anything short of military force. Therefore, it is imperative that if humanitarian intervention remains a tool at the disposal of international society, it can be undertaken in a manner that increases the chances of doing more good than harm.

This book develops prescriptive principles to facilitate this goal at the level of theory, a critical step toward eventually consummating such a strategy in practice. By developing an approach that bridges the gap between the ethical, legal, and political dimensions of humanitarian intervention, and addressing the fundamental concerns that occupy each of these three dimensions, this book advances the theoretical debate, and takes an important step toward a more workable approach. At the very least, this book serves to refocus the debate on the task of achieving more to promote human security than imperil it.

One must also bear in mind that humanitarian intervention is one strategy. It is not realistically appropriate for all situations in which people are made to suffer. Nor, for that matter, can military intervention be expected to solve all the underlying social, political, or economic problems that manifest themselves in the form of gross human suffering.

In this sense, to engage in humanitarian intervention is to treat the symptoms of a more entrenched underlying disease, such as ethnic hatred, racism, political upheaval, bad or incompetent government, or underdevelopment. Military intervention is not, and cannot be, a panacea. It is only when the disease manifests itself with certain symptoms that military force is rightly pursued. While it may not cure the disease, symptoms need to be treated, but only if there is maximum confidence that the treatment will not make the symptoms worse.

This page intentionally left blank.

Notes

Introduction

1. Robert Burns, "US Leads NATO Assault on Serbia as 'Moral Imperative,' " *Associated Press*, 24 March 1999. Peter O'Donnell, "NATO Reaffirms Kosovo Goals," *United Press International*, 20 April 1999.
2. See Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, (Oxford: Oxford University Press, 2000), 4.
3. See Lansana Gberie, "The Darfur Crisis: A Test Case for Humanitarian Intervention," KAIPTC Paper, no. 1, September 2004.
4. Mona Fixdal and Dan Smith, "Humanitarian Intervention and Just War," *Mershon International Studies Review* 42 no. 2 (1998): 283–312. See also Terry Nardin, "The Moral Basis of Humanitarian Intervention," *Ethics and International Affairs* 16 no. 1 (2002): 57–70.
5. For example, John J. Merriam, "Kosovo and the Law of Humanitarian Intervention," *Case Western Reserve Journal of International Law* 33 (2001): 111–54. See also Klinton W. Alexander, "NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval," *Houston Journal of International Law* 22 (2000): 403–49.
6. The most sustained effort at an integrated approach to the subject that addresses these three dimensions has been J. L. Holzgrefe and Robert O. Keohane, ed. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003).
7. International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), 31. Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000), 34.
8. Philip Pettit, "Consequentialism," in Peter Singer, ed., *A Companion to Ethics* (Oxford: Blackwell Publishers, 1993), 231.
9. ICISS, 21.

10. Allen Buchanan, "Reforming the Law of Humanitarian Intervention," in Holzgrefe and Keohane, ed. 142. See also Sir Arthur Watts, "The Importance of International Law," in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 7.
11. Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Dobbs Ferry, NY: Transnational Publishers, 1988), 12.
12. Legal positivism, as a normative doctrine, is the view that norms are considered just only to the extent that they are enacted according to accepted lawmaking procedures. The norm's status as law, not its content, is thus the only relevant consideration as to its binding force. There is thus a moral obligation to obey law qua law. See Kenneth Einar Himma, "Positivism, Naturalism, and the Obligation to Obey the Law," *Southern Journal of Philosophy* 36 no. 2 (1998): 151.
13. Thomas M. Franck, "Interpretation and Change in the Law of Humanitarian Intervention," in Holzgrefe and Keohane, ed. 211.
14. Ryan Goodman, "Humanitarian Intervention and Pretexts for War," *American Journal of International Law* 100 no. 1 (2006): 107–41.
15. This insight draws from a broad consensus in international relations theory literature concerning the relationship between legitimacy and power. See, for example, Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, th7th ed. (Boston: McGraw Hill, 1993), 32. I explore this issue further in chapter 6.
16. Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), 3.
17. The ICISS report, for instance, advocates framing the issue as a responsibility to protect, rather than a right to humanitarian intervention because the language of intervention unnecessarily focuses attention on the right of the intervening actors, whereas the language of a responsibility implies evaluating the issue from the point of view of the potential beneficiaries of such intervention. ICISS, 16–17.
18. See Larry Minear, *The Humanitarian Enterprise: Dilemmas and Discoveries* (Bloomfield, CT: Kumarian Press, 2002). See also David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge: Cambridge University Press, 2005).
19. Jack Donnelly, "Genocide and Humanitarian Intervention," *Journal of Human Rights* 1 no. 1 (2002): 94.
20. Paul F. Diehl, *International Peacekeeping* (Baltimore, MD: Johns Hopkins University Press, 1993), 4.
21. Ibid., 4–14.
22. United Nations Security Council (UNSC) Resolution 1291, 24 February 2000, UN Doc. S/Res/1291, para. 8.
23. Thomas G. Weiss, David P. Forsythe, and Roger A. Coate, *The United Nations and Changing World Politics*, 4th ed. (Boulder, CO: Westview, 2004).
24. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 2000), xxii.
25. Walzer, *Just and Unjust Wars*. R. J. Vincent, *Nonintervention and International Order* (Princeton, NJ: Princeton University Press, 1974).

26. Charles Beitz, *Political Theory and International Relations* (Princeton, Princeton University Press, 1979). Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Dobbs Ferry, NY: Transnational Publishers, 1988).
27. J. L. Brierly, *The Law of Nations*, 6th ed. (Oxford: Oxford University Press, 1963), 23.
28. Jane Stromseth, "Rethinking Humanitarian Intervention: The Case for Incremental Change," in Holzgrefe and Keohane, ed., 244.
29. Kenneth C. Randall, "Universal Jurisdiction under International Law," *Texas Law Review* 66 (1988): 785, 788. See also Stephen R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy*, 2nd ed. (New York: Oxford University Press, 2001), 161.

Chapter 1: The Morality of Intervention in International Theory

1. William K. Frankena, *Thinking About Morality* (Ann Arbor: University of Michigan Press, 1980), 19.
2. Martin Wight, "Why Is There No International Theory?" in Herbert Butterfield and Martin Wight, eds., Diplomatic Investigations (Cambridge, MA: Harvard University Press, 1966), 20.
3. R. J. Vincent, Human Rights and International Relations (Cambridge, Cambridge University Press, 1987), 120.
4. See Richard A. Falk, Human Rights and State Sovereignty (New York: Holmes and Meier, 1981), ch. 1.
5. Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (New York: Basic Books, 1977). Hedley Bull, ed., Intervention in World Politics (Oxford: Oxford University Press, 1984). R. J. Vincent, Nonintervention and International Order (Princeton, NJ: Princeton University Press, 1974). Charles de Visscher, Theory and Reality in Public International Law, 2nd ed. (Princeton, NJ: Princeton University Press, 1968).
6. Thomas W. Pogge, "An Institutional Approach to Humanitarian Intervention," Public Affairs Quarterly 6 no. 1 (1992): 89–104. See also Thomas W. Pogge, "Cosmopolitanism and Sovereignty," Ethics 103 no. 1 (1992): 48–75.
7. Charles Beitz, Political Theory and International Relations (Princeton, NJ:, Princeton University Press, 1979). See also Charles Beitz, "Justice and International Relations," Philosophy and Public Affairs 4 no. 4 (1975): 360–89.
8. Beitz, *Political Theory*, 80. Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Dobbs Ferry, NY: Transnational Publishers, 1988).
9. David Luban, "Just War and Human Rights," *Philosophy and Public Affairs* 9 no. 2 (1980): 174.
10. Vincent, *Nonintervention*, 332–33.
11. Walzer, *Just and Unjust Wars*, 61.
12. Ibid., 54.

13. Ibid. See also Vincent, *Nonintervention*, 345.
14. Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy and Public Affairs* 9 no. 3 (1980): 212.
15. Walzer, "Moral Standing of States," 212.
16. Ibid., 229.
17. Beitz, *Political Theory*, 76.
18. Vincent, *Human Rights*, 116.
19. Luban, 173.
20. Beitz, *Political Theory*, 71.
21. Ibid., 79.
22. John Stuart Mill, *On Liberty*, ed. Edward Alexander (Ontario: Broadview, 1999).
23. Walzer, *Just and Unjust Wars*, 51–62. Vincent, *Nonintervention*, 332.
24. Beitz, *Political Theory*, 80.
25. Ibid., 81.
26. Ibid., 80. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).
27. Pierre Laberge, "Humanitarian Intervention: Three Ethical Positions," *Ethics & International Affairs* 9 (1995): 27.
28. Charles Beitz, "The Reagan Doctrine in Nicaragua," in Steven Luper-Foy, ed. *Problems of International Justice* (Boulder, CO: Westview, 1989), 188.
29. Walzer, *Just and Unjust Wars*, 89.
30. Ibid., 90. Walzer later adds "large scale expulsion" to this list in "The Moral Standing of States," 218.
31. De Visscher, 128. Vincent, *Nonintervention*, 337.
32. Jerome Slater and Terry Nardin, "Nonintervention and Human Rights," *Journal of Politics* 48 no. 1 (1986): 89.
33. Charles Beitz, "Bounded Morality: Justice and the State in World Politics," *International Organization* 33 no. 3 (1979): 413.
34. Walzer, "Moral Standing of States," 212.
35. Slater and Nardin, 90.
36. Gerald Dopplet, "Walzer's Theory of Morality in International Relations," *Philosophy and Public Affairs* 8 no 1. (1978): 10.
37. Walzer, "Moral Standing of States," 214.
38. Walzer, *Just and Unjust Wars*, 107. See similarly Vincent, *Nonintervention*, 346.
39. Richard A. Wasserstrom, "Book Review: Just and Unjust Wars," *Harvard Law Review* 92 (1978): 543.
40. Slater and Nardin, 91.
41. Peter Singer, *One World: The Ethics of Globalization* (New Haven, CT: Yale University Press, 2002), 122. See also David R. Mapel, "Military Intervention and Rights," *Millennium* 20 no. 1 (1991): 44.
42. Walzer, *Just and Unjust Wars*, 87–88, 268, 325–26. See also Wasserstrom, 543.
43. Beitz, "Bounded Morality," 412.
44. Slater and Nardin, 91–92.

45. Beitz, *Political Theory*, 72. Beitz, "Bounded Morality." Charles R. Beitz, "Nonintervention and Communal Integrity," *Philosophy and Public Affairs* 9 no. 4 (1980): 385–91.
46. Beitz, "Bounded Morality," 413.
47. Beitz, *Political Theory*, 80–81. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974). Laberge, 27.
48. Beitz, "Bounded Morality," 415.
49. Ibid., 415.
50. Tesón, *Humanitarian Intervention*, 15.
51. Ibid., 15, 81–82.
52. Ibid., 98.
53. Tesón, *Humanitarian Intervention*, 82.
54. Ibid., 15.
55. Kenneth Roth, "War in Iraq: Not a Humanitarian Intervention," in *Human Rights Watch World Report 2004: Human Rights and Armed Conflict* (New York: Human Rights Watch 2005), 13–33. Eric A. Heinze, "Humanitarian Intervention and the War in Iraq: Norms, Discourse, and State Practice," *Parameters* 36 no. 1 (2006): 20–35. Nicholas J. Wheeler and Justin Morris, "Justifying the Iraq War as a Humanitarian Intervention: The Cure is Worse than the Disease," in W. P. S. Sidhu and Ramesh Thakur, ed. *The Iraq Crisis and World Order: Structural and Normative Challenges* (Tokyo: United Nations University Press, 2006).
56. Terry M. Neal, "Bush Reverts to Liberal Rationale for Iraq War; Critics Still Oppose War Despite Hussein's Human Rights Record," *Washington Post*, 9 July 2003.
57. Human Rights Watch (HRW), *Genocide in Iraq: The Anfal Campaign against the Kurds* (New York: Human Rights Watch, 1993). Peter W. Galbraith, "The Ghosts of 1991," *Washington Post*, 12 April 2003.
58. See Michael Walzer, "No Strikes: Inspectors Yes, War No," *The New Republic*, 30 September 2002, 21.
59. US Department of State, *Iraq: A Population Silenced*, Bureau of Democracy, Human Rights, and Labor, Washington, DC, December 2002.
60. Cited by Sabrina Tavernise and Donald G. McNeil, Jr., "Iraqi Dead May Total 600,000, Study Says," *New York Times*, 11 October 2006.
61. Beitz, "Bounded Morality," 415.
62. Fernando R. Tesón, "Ending Tyranny in Iraq," *Ethics & International Affairs* 19 no. 2 (2005): 15.
63. Terry Nardin, "Humanitarian Imperialism," *Ethics & International Affairs* 19 no. 2 (2005): 21–22.
64. John Rawls in *A Theory of Justice* is explicitly skeptical of utilitarian reasoning in rights discourse. In direct reference to humanitarian intervention, see also Michael Philips, "Humanitarian Intervention and Moral Theory," in Aleksander Jokic and Burleigh Wilkins, eds. *Humanitarian Intervention: Moral and Philosophical Issues* (Peterbourough, Ontario: Broadview, 2003), 78–88.
65. The list of such works is too lengthy to cite comprehensively. Notably, Nicholas Wheeler uses the standard "supreme humanitarian emergency," for which he offers scant qualification. See Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford and

New York: Oxford University Press, 2000), 34. Another important example is the International Commission on Intervention and State Sovereignty (ICISS), which proposes a standard of "extreme cases only," which is described as "massacre, genocide, or ethnic cleansing on a large scale." See *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), 31. Finally, a recent edited volume by J. L. Holzgrefe and Robert O. Keohane at various points makes reference to "gross assaults on human rights" and "grave human rights violations." See generally J. L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003).

66. Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd ed. (Princeton, NJ: Princeton University Press, 1996).
67. Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999.), 25.

Chapter 2: The Consequentialist Ethics of Humanitarian Intervention

1. Philip Pettit, "Consequentialism," in Peter Singer, ed., *A Companion to Ethics* (Oxford: Blackwell Publishers, 1993), 231.
2. William H. Shaw, *Contemporary Ethics: Taking Account of Utilitarianism* (Oxford: Blackwell Publishers, 1999), 2.
3. Ministry of Foreign Affairs of Japan, *Diplomatic Handbook 1999: Japan's Diplomacy with Leadership toward a New Century* (Tokyo: Urban Connections, Inc., 1999). See also Gary King and Christopher J. L. Murray, "Rethinking Human Security," *Political Science Quarterly* 116 no. 4 (2001–2002): 585–10.
4. See J. Bryan Hehir, "Military Intervention and National Sovereignty: Recasting the Relationship," in Jonathan Moore, ed., *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (New York: Rowman and Littlefield, 1999), 44. Chris Brown, "Selective Humanitarianism: In Defense of Inconsistency," in Deen K. Chatterjee and Don E. Schneid, ed. *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003), 35.
5. See R. J. Vincent, *Nonintervention and International Order* (Princeton, NJ: Princeton University Press, 1974), 328.
6. See David A. Baldwin, "Security Studies and the End of the Cold War," *World Politics* 48 no. 1 (1995): 117–41.
7. King and Murray, 588.
8. William Bain, "The Tyranny of Benevolence: National Security, Human Security, and the Practice of Statecraft," *Global Society* 15 no. 3 (2001): 282.
9. See Nichole Ball, *Security and Economy in the Third World* (Princeton, NJ: Princeton University Press, 1988): 43–50.
10. See generally R. J. Rummel, *Death by Government* (New Brunswick, NJ: Transaction Publishers, 1994). See also Benjamin Miller, "The Concept of Security: Should it be Redefined?" *Journal of Strategic Studies* 24 no. 2 (2001): 18.
11. Matt McDonald, "Human Security and the Construction of Security," *Global Society* 16 no. 3 (2002): 278.

12. United Nations Development Programme (UNDP), *Human Development Report 1994* (New York: Oxford University Press, 1994), 22–46.
13. Ibid., 23.
14. McDonald, 279. See also John G. Cockell, "Human Security and Preventive Action Strategies," in Edward Newman and Oliver P. Richmond, ed. *The United Nations and Human Security* (New York: Palgrave, 2001), 15–30.
15. Mohammed Ayoob, *The Third World Security Predicament: State Making, Regional Conflict, and the International System* (Boulder, CO: Lynne Reinner, 1998).
16. Bain, 283–84. See also David Luban, "Just War and Human Rights," *Philosophy and Public Affairs* 9 no. 2 (1980): 174.
17. Bertrand G. Ramcharan, *Human Rights and Human Security* (The Hague: Martinus Nijhoff, 2002), 9.
18. King and Murray, 592. See also Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).
19. This line of reasoning is analogous to the common understanding of rights as social inventions that are *means* to achieve a certain state of human dignity or well-being. See, for example, Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca, NY: Cornell University Press, 2003), chapter 1.
20. Cockell, "Human Security," 16.
21. Yuen Foong Khong, "Human Security: A Shotgun Approach to Alleviating Human Misery?" *Global Governance* 7 no. 3 (2001): 231–37.
22. Ibid., 234.
23. Nicholas Thomas and William T. Tow, "The Utility of Human Security: Sovereignty and Humanitarian Intervention," *Security Dialogue* 33 no. 2 (2002): 182.
24. Cockell, "Human Security," 16.
25. Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (New York: Oxford University Press, 1981), 40.
26. Shelly Kagan, *Normative Ethics* (Boulder, CO: Westview, 1998), 59–62.
27. See, generally, David Lyons, "Human Rights and the General Welfare," *Philosophy and Public Affairs* 6 no 2 (1977): 113–29.
28. Russell Hardin, *Morality within the Limits of Reason* (Chicago, IL: University of Chicago Press, 1988), xv.
29. Pettit, 231. See also Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999), 25. Gerard Elfstrom, *Ethics for a Shrinking World* (London: Macmillan, 1990).
30. See, generally, Nancy (Ann) Davis, "Contemporary Deontology," in Peter Singer, ed., *A Companion to Ethics* (Oxford: Blackwell Publishers, 1993), 205–19. See also Russell Hardin, "International Deontology," *Ethics and International Affairs* 9 (1995): 133–45.
31. J. L. Holzgrefe, "The Humanitarian Intervention Debate," In J. L. Holzgrefe and Robert O. Keohane, ed. *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), 21. See also Andrew Mason and Nick Wheeler, "Realist Objections to Humanitarian Intervention," in Barry Holden, ed., *The Ethical Dimensions of Global Change* (Basingstoke: Macmillan, 1996), 106.

32. Richard B. Brandt, *Morality, Utilitarianism, and Rights* (Cambridge: Cambridge University Press, 1992), 113.
33. See, for example, Robert L. Holmes, *On War and Morality* (Princeton, NJ: Princeton University Press, 1989). Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995). James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, CT: Yale University Press, 1999). Simon Chesterman, ed., *Civilians in War* (Boulder, CO: Lynne Reinner, 2001).
34. *Human Security Now* 133. See also Ted Robert Gurr, "Containing Internal War in the Twenty-First Century," in Fen Olser Hampson and David M. Malone, ed. *From Reaction to Conflict Prevention: Opportunities for the UN System* (Boulder, CO: Lynne Reinner, 2002). C. Ahlstram, *Casualties of Conflict: Report for the Protection of Victims of War* (Uppsala: Uppsala University Department of Peace and Conflict, 1991).
35. This particular study deals with civil wars only: Hazem Adam Ghobarah, Paul Huth, and Bruce Russett, "Civil Wars Kill and Maim People—Long after the Shooting Stops," *American Political Science Review* 92 no. 2 (2003): 198–202.
36. *Human Security Now* 97. For an excellent review of the literature on this subject, see Duncan Penderson, "Political Violence, Ethnic Conflict, and Contemporary Wars: Broad Implications for Health and Well-Being," *Social Science and Medicine* 55 no. 2 (2002): 175–90.
37. World Health Organization, *World Report on Violence and Health* (Geneva: World Health Organization, 2002), especially chapter 8. See also Federico Girosi and Gary King "Short Term Effects of War Deaths on Public Health in the US," working paper, 2002, Harvard Center for Basic Research in the Social Sciences.
38. The former figure is the estimate of Human Rights Watch, the latter is the estimate of the Yugoslav government. *Human Rights Watch World Report 2000*, Human Rights Watch, 2001.
39. Eric Herring, "From Rambouillet to the Kosovo Accords: NATO's War against Serbia and its Aftermath," *International Journal of Human Rights* 4 no. 3/4 (2000): 229, 231.
40. Amnesty International, *Federal Republic of Yugoslavia: A Broken Circle: "Disappeared" and Abducted in the Kosovo Province*, AI Index: EUR 70/106/1999, October 1999, <http://www.amnesty.it/ailib/aipub/1999/EUR/47012499.htm> (23 February 2004).
41. Evidence of this is well-documented in media accounts. See, for example, Anthony DePalma, "Air War Hurts Stability of a Yugoslav Republic," *New York Times* 9 May 1999. "Kosovo's War Also Killed Half of Its Animals," *The San Francisco Chronicle* 16 June 1999.
42. Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd ed. (Princeton, NJ: Princeton University Press, 1996), 18–20. See also Jeremy Waldron, *Liberal Rights: Collected Papers: 1981–1991* (Cambridge: Cambridge University Press, 1993), ch. 1. Robert E. Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* (Princeton, NJ: Princeton University Press, 1988).
43. Shue, 20–29, 78–82. With respect to liberty, Shue includes political participation as a basic right under the rubric of liberty, though I do not

consider it so here. Shue's inclusion of this right is curious given that his arguments for security and subsistence as basic rights are in no small part premised on the assertion that no right, not even the right to meaningfully participate in one's government, can exist in the absence of these rights (24–25). The basicness of this aspect of liberty is also challenged by Goodin, 308: "If you care about liberty, you must also care about those elements that make liberty practically meaningful."

44. Shue, 21.
45. Ibid., 20.
46. Alan Gerwith, *Human Rights: Essay on Justification and Applications* (Chicago, IL: University of Chicago Press, 1982), 7, (original emphasis).
47. Geoffrey Scarre, *Utilitarianism* (London: Routledge, 1996), 18.
48. P.J. Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law* (Oxford: Clarendon Press, 1990), 72–73.
49. Shue, 19.
50. Henry Sidgwick, *The Methods of Ethics*, 7th ed. (Chicago, IL: University of Chicago Press, 1962). Eric A. Heinze, "Commonsense Morality and the Consequentialist Ethics of Humanitarian Intervention," *Journal of Military Ethics* 4 no. 3 (2005): 168–82.
51. Mona Fixdal and Dan Smith, "Humanitarian Intervention and the Just War," *Mershon International Studies Review* 42 no. 2 (1998): 304.
52. Barbara Harff, *Genocide and Human Rights: International Legal and Political Issues* (Denver, University of Denver Graduate School of International Studies, 1984), 12.
53. Shaw, 28–29.
54. Fixdal and Smith, 304.
55. Christopher C. Joyner and Anthony Clark Arend, "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" *United States Air Force Academy Journal of Legal Studies* 10 (1999/2000): 45.
56. This characterization is an integral component for what many observers have considered as "gross" human rights violations. See Cecilia Medina Quiroga, *The Battle for Human Rights: Gross, Systematic Violations and the Inter-American System* (Dordecht: Martinus Nijhoff, 1988), 12, 16. Federico Ermacora, "Procedures to Deal with Human Rights Violations: A Hopeful Start in the United Nations?" *Human Rights Journal* 7 (1974): 678–79. Maxime Tardu, "UN Responses to Gross Violations of Human Rights: The 1503 Procedure," *Santa Clara Law Review* 20 (1980): 582–84.
57. American Law Institute, Model Penal Code—Proposed Official Draft 1962, para. 2.02. Don Stuart, "Supporting General Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration," *Buffalo Criminal Law Review* 4 (2000): 13–51. See also Rome Statute of the International Criminal Court (Rome Statute), 17 July 1998, UN Doc. A/CONF.183/9, Article 30.
58. See David Marcus, "Famine Crimes in International Law," *American Journal of International Law* 97 no. 2 (2003): 245–81.
59. Alex de Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa* (Bloomington, IN: Indiana University Press, 1997), 91–105.
60. Douglas H. Johnson, *The Root Causes of Sudan's Civil War* (Bloomington, IN: Indiana University Press, 2003), 82.

61. De Waal, *Famine Crimes*, 91. Millard Burr, *Working Document II: Quantifying Genocide in Southern Sudan and the Nuba Mountains: 1983–1998* (U.S. Committee for Refugees: December 1998), 13.
62. David Keen, *The Benefits of Famine: A Political Economy of Famine and Relief in Southwestern Sudan, 1983–1989* (Princeton, NJ: Princeton University Press, 1994), 78–84. De Waal, *Famine Crimes*, 91.
63. James C. McKinley, Jr., "Famine Looming, Sudan Curbs Relief to Rebel-Held Areas," *New York Times*, 18 March 1998. See also Barbara Hendrie, ed. *Operation Lifeline Sudan: A Review* (Geneva: Department of Humanitarian Affairs, 1996), 200, 164.
64. The United States, for example, does not guarantee a right to food, even though most Americans have access to adequate food. By contrast, in some of the states who have ratified the ICESCR there are many people who do not have access to adequate food, even though it is a guaranteed right. Thus failure to guarantee subsistence rights is not the same as actually starving people, while having a right to food does not necessarily preclude starvation—intentional or otherwise.
65. This is certainly still the case even if France were not a democracy and militarily powerful. Florence Sebaoun, "Death Toll from Heat Wave in France Exceeds 14,000, Exceeding Prior Estimates," *Associated Press*, 25 September 2003. On Srebrenica, see generally Jan Willem Honig and Norbert Both, *Srebrenica: Record of a War Crime* (London: Penguin, 1996).
66. Pettit, 234. Holzgrefe, 22. For an example of such reasoning, see Richard B. Brandt, "Utilitarianism and the Rules of War," *Philosophy and Public Affairs* 1 no. 2 (1972): 145–65.
67. I refer generally to Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington (Indianapolis, IN: Hackett Publishing, 1785/1993).
68. Daniel F. Montaldi, "Toward a Human Rights Based Account of the Just War," *Social Theory and Practice* 11 no. 2 (1985): 142. See also David Cummiskey, *Kantian Consequentialism* (Oxford: Oxford University Press, 1996).
69. Montaldi, 138.
70. Barrington Moore, Jr., *Reflections on the Causes of Human Misery and upon Certain Proposals to Eliminate Them* (Boston: Beacon Press, 1972), 24–25.
71. Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Dobbs Ferry, NY: Transnational Publishers, 1988), 99–100. Quiroga, 16.
72. Kenneth Roth, "War in Iraq: Not a Humanitarian Intervention," in *Human Rights Watch World Report 2004: Human Rights and Armed Conflict* (New York: Human Rights Watch 2004), 18.
73. Charles W. Kegley, Jr. and Gregory A. Raymond, "Preventive War and Permissive Normative Order," *International Studies Perspectives* 4 no. 4 (2003): 385–94.
74. UNDP, 23. Vincent, *Nonintervention*, 328.
75. Arch Puddington, Freedom in the World 2007: Freedom Stagnation amid Pushback against Democracy, Freedom House Homepage, <http://www.freedomhouse.org/template.cfm?page=130&year=2007> (6 July 2007).

76. On the prevalence of political murder, see Amnesty International, *Getting Away with Murder: Political Killings and "Disappearances" in the 1990s* (London: Amnesty International, 1993).
77. See Gordon Barclay, Cynthia Tavares and Arsalaan Siddique, "International Comparisons of Criminal Justice Statistics," Home Page of the Home Office for the United Kingdom, May 2001, <http://www.homeoffice.gov.uk/rds/pdfs/hosb601.pdf> (24 July 2006).
78. Compare 1999 statistics for United States (1,430,690), United Kingdom (754,589), Canada (291,330), and France (215,968) in Ibid., 12.
79. Charles Beitz, "Bounded Morality: Justice and the State in World Politics," *International Organization* 33 no. 3 (1979): 415.
80. Bain, 282.

Chapter 3: Humanitarian Intervention in International Law

1. See Allen Buchanan, "From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform," in Aleksander Jokic and Burleigh Wilkins, ed. *Humanitarian Intervention: Moral and Philosophical Issues* (Toronto: Broadview, 2003), 155.
2. Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964). I am indebted to Brian Lepard for suggesting the work of Fuller to guide this analysis.
3. I rely on the accepted method of treaty interpretation as laid out in the Vienna Convention on the Law of Treaties (Vienna Convention), 23 May 1969, 1155 UNTS 331, Articles 31 and 32. See also Tom J. Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention," in Lori Fisler Damrosch and David J. Scheffer, ed. *Law and Force in the New International Order* (Boulder, CO: Westview Press, 1991), 185–186.
4. Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Dobbs Ferry, NY: Transnational Publishers, 1988), 12.
5. Philip Allott, "The Concept of International Law," in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 71.
6. Sir Arthur Watts, "The Importance of International Law," in Byers, ed., 7.
7. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon, 1979), 38. See also Philip Soper, "Some Natural Confusions about Natural Law," *Michigan Law Review* 90 no. 8 (1992): 2395.
8. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 81–90.
9. Fuller, 96.
10. Ibid., 39.
11. Charter of the United Nations (UN Charter), 26 June 1945, Stat. 1031, Article 2(4), emphasis mine.
12. Anthony D'Amato, *International Law: Process and Prospect*, 2nd ed. (Transnational Publishers: Dobbs Ferry, NY, 1995), 57–73. Laura Geissler, "The Law of Humanitarian Intervention and the Kosovo Crisis, *Hamline Law Review* 23 (2000): 323. Leslie A. Burton, "Kosovo: To Bomb or Not to Bomb? The Legality is the Question," *Annual Survey of International and*

Comparative Law 7 (2001): 60. See also Tesón, *Humanitarian Intervention*, 151.

13. See especially Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2002), 48–53. See also Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon, 1963), 267–68. Hersch Lauterpacht, ed., *Oppenheim's International Law*, 7th ed. (London: Longman's, 1952), vol. 2, 154. "Editorial Comments: NATO's Intervention in Kosovo," *American Journal of International Law* 93 no. 4 (1999): 824–62. United Nations Information Organization (UNIO), *Documents of the United Nations Conference on International Organization*, 22 vols. (New York, United Nations, 1945), vol. 1, p. 174; vol. 3 p. 3, 578–79; vol. 6 pp. 304, 334–35.
14. Oscar Schachter, "The Legality of Pro-Democratic Invasion," *American Journal of International Law* 78, no. 3 (1984): 649.
15. Mary Ellen O'Connell, "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy," *Columbia Journal of Transnational Law* 36 (1998): 473.
16. Michael Byers and Simon Chesterman, "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law," J. L. Holzgrefe and Robert O. Keohane, ed. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), 181.
17. Fuller, 39.
18. See Christopher C. Joyner and Anthony Clark Arend, "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" *United States Air Force Academy Journal of Legal Studies* 10 (1999/2000): 33.
19. Thomas M. Franck, "When, if Ever, May States Employ Force Without Prior Security Council Authorizations?" *Washington University Journal of Law and Policy* 5 (2001): 51.
20. Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach based on Fundamental Ethical Principles in International Law and World Religions* (University Park: Pennsylvania University Press, 2002), 312.
21. See Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon, 1990), 218–44.
22. Christine M. Chinkin, "Kosovo: A 'Good' or 'Bad' War?" *American Journal of International Law* 93 no. 4 (1999): 841.
23. Fuller, 47.
24. Universal Declaration of Human Rights (Universal Declaration), 10 December 1948, GA Res. 217 A (III).
25. James Shand Watson, *Theory and Reality in the International Protection of Human Rights* (Dobbs Ferry, NY: Transnational Publishers, 1999), 205. It is the case, however, that certain provisions of the UDHR have passed into customary international law or been subsequently codified in other legally-binding treaties.
26. Oscar Schachter, *International Law in Theory and Practice* (Boston: Martinus Nijhoff, 1991), quoted in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford: Oxford University Press, 2000), 229.

27. See, for example, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December, 1965, GA Res. 2131 (XX). Declaration of the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 9 December 1981, UN Doc. A/RES/36/103, Annex II.
28. W. Michael Reisman, "Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention," *European Journal of International Law* 11 (2000): 7–8.
29. Lepard, 122.
30. See Declaration on the Right to Development, 4 December 1986, UN Doc. A/RES/41/128.
31. Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 9 December 1948, 78 UNTS 277, Article 1.
32. Convention Against Torture and other Cruel, Inhumane or Degrading Treatment of Punishment (Torture Convention), 10 December 1984, 1465 UNTS 112, Part I. UN Charter, Articles 54 and 55.
33. Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Perennial, 2002), 58. See, generally, William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000).
34. Official Records of the Third Session of the General Assembly, Part I, Summary Records of the Meetings of the Sixth Committee (GA Third Session) (Paris: United Nations, 1948), 4–56
35. Ibid., 22.
36. Ibid., 30. See also William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide," *McGill Law Journal* 46 (2000): 141–71.
37. GA Third Session, 39.
38. Ibid., 50.
39. Ibid., 10.
40. International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171. International Covenant on Economic, Social, and Cultural Rights (ICESCR), 16 December 1966, 993 UNTS 3. David P. Forsythe, *Human Rights and International Relations* (Cambridge, Cambridge University Press, 2000), 39.
41. Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons, 1950), quoted in Steiner and Alston, 151.
42. ICCPR, Articles 19 and 23(2). ICESCR, Articles 8(1) and 15(3).
43. See generally, Theodor Meron, "On a Hierarchy of International Human Rights," *American Journal of International Law* 80 no. 1 (1896): 1–23.
44. ICCPR, Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18, respectively.
45. Ibid., Article 4 (1). See also Theo Van Boven, "Distinguishing Criteria of Human Rights," in Karel Vasak and Philip Alston, eds., *The International Dimensions of Human Rights* (Westport, CT: Greenwood Press, 1982), 45.
46. Marc J. Bossuyt, ed., *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Boston: Martinus Nijhoff, 1987), 81–96.
47. ICESCR, Article 11.

48. General Comment 4 of the Committee on Economic, Social and Cultural Rights, The Right to Adequate Housing, 1991 (Sixth Session), contained in UN Doc. E/1992/23 annex 3 at 114, para. 1.
49. ICESCR, Article 2(1).
50. General Comment 3 of the Committee on Economic, Social and Cultural Rights, The Nature of State Parties' Obligations, 1990 (Fifth Session), contained in E/1991/23 annex 3 at 86, para. 9.
51. *Case of Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), (hereafter *Nicaragu*") (Merits), Judgment, 27 June 1986, ICJ Rep. 14.
52. *Nicaragua*, paras. 230, 195, 199, 211. See also Monroe Leigh, "Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 ICJ Rep. 14," *American Journal of International Law* 81 no. 1 (1987): 206.
53. "President's News Conference," *New York Times*, 22 February 1985, A10.
54. Anthony D'Amato, "Nicaragua and International Law: The 'Academic' and the 'Real'," *American Journal of International Law* 79 no. 3 (1985): 657. House of Representatives Report no. 237, 99th Congress, 1st Session, 1985, 63–73.
55. *Nicaragua*, paras. 198–15. See also Tesón, *Humanitarian Intervention*, 208.
56. *Nicaragua*, paras. 257–58.
57. Ibid., para. 267.
58. Tesón, *Humanitarian Intervention*, 218. At the time this ruling was given, the United States had signed but not ratified a number of human rights conventions, including the ICCPR and the American Convention; the latter is still not ratified.
59. *Nicaragua*, para. 268.
60. This is how *Nicaragua* has been interpreted by Tesón, *Humanitarian Intervention*, 203–04, 235–44.
61. Ibid., 237.
62. See for example, Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996). Tesón, *Humanitarian Intervention*, 155–200. Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000). Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force* (London: Routledge, 1993), 114–31.
83. Buchanan, "Reforming the Law of Humanitarian Intervention," in Holzgrefe and Keohane, ed., 134. While others such as Michael Reisman have argued that customary law is formed each time an international incident occurs based on the way the international community reacts to it, it is generally accepted that the behavior be repeated in subsequent state practice before a new norm is crystallized as law. See W. Michael Reisman, "International Incidents," in W. Michael Reisman and Andrew R. Willard, ed. *International Incidents: The Law That Counts in World Politics* (Princeton, NJ: Princeton University Press, 1988).
64. See, for example, *Nicaragua*, para. 190.
65. Buchanan, "From Nuremburg to Kosovo," 129. See also Buchanan, "Reforming the Law," 135. See also Jonathan I. Charney, "Anticipatory

Humanitarian Intervention in Kosovo," *American Journal of International Law* 93 no. 4 (2001): 834, 836.

66. See Independent International Commission on Kosovo (Kosovo Commission), *The Kosovo Report* (Oxford: Oxford University Press, 2000), 4.
67. Chesterman, *Just War or Just Peace?*, 65–83.
68. See Ibid., 83. Richard B. Lillich, ed. *Humanitarian Intervention and the United Nations* (Charlottesville: University of Virginia Press, 1973), 77, 81. Marian Nash Leich, "Contemporary Practice of the United States Relating to International Law" *American Journal of International Law* 78 no. 3 (1984): 664. George H. W. Bush, "Address to the Nation Announcing United States Military Action in Panama," 20 December 1989, George Bush Presidential Library, <http://bushlibrary.tamu.edu/research/papers/1989/89122000.html> (1 August 2006).
69. Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on the Grounds of Humanity* (Dordrecht: Martinus Nijhoff, 1985). Chesterman, *Just War or Just Peace?*, 65–67, 76 notes, 141, 154, 155, 225.
70. Chesterman, *Just War or Just Peace?*, 82.
71. Ibid., 84. See especially, Wheeler.
72. See Tesón, 159–74, 179–87. Wheeler, 55–138.
73. Chesterman, *Just War or Just Peace?*, 73. Tesón, 207. Wheeler, 60–65.
74. Chesterman, *Just War or Just Peace?*, 84. Wheeler, 85–89, 117–22.
75. See, generally, Albrecht Schnabel and Ramesh Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship* (New York: United Nations University Press, 2000).
76. Kofi Annan, Address to the 54th Session of the UN General Assembly, 20 September 1999, in Kofi Annan, eds., *The Question of Intervention: Statements by the Secretary-General* (New York: UN Department of Public Information, 1999).
77. William J. Clinton, Address to the Nation, 24 March 1999, text from PBS Online News Hour, <http://www.pbs.org/newshour/bb/europe/jan-june99/address_3–24.html> (1 August 2006).
78. Walter Gary Sharp, "Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Force to Defend Kosovo," *Maryland Journal of International Law and Trade* 23 (1999): 295. Klinton W. Alexander, "NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval," *Houston Journal of International Law* 22 (2000): 403.
79. See A. J. R. Groom and Paul Taylor, "The United Nations System and the Kosovo Crisis," in Schnabel and Thakur, eds., 296.
80. John J. Merriam, "Kosovo and the Law of Humanitarian Intervention," *Case Western Reserve Journal of International Law* 33 (2001): 111.
81. Madeline Albright, "Press Conference with Russian Foreign Minister Igor Ivanov, Singapore, 26 July 1999, <http://secretary.state.gov/www/statements/1999/990726b.html> (1 August 2006).
82. Ruth Wedgwood, "NATO's Campaign in Yugoslavia," *American Journal of International Law* 93 no. 4 (1999): 828, 829.
83. Quoted in Byers and Chesterman, 199.

84. Cited in Charney, 836.
85. Ibid.
86. Ibid., 837.
87. Jane Stromseth, "Rethinking Humanitarian Intervention: The Case for Incremental Change," in Holzgrefe and Keohane, ed. 244.
88. On this point, see generally, Laura W. Reed and Carl Kaysen, ed. *Emerging Norms of Justified Intervention* (Cambridge, MA: American Academy of Arts and Sciences, 1993).
89. Subrata Roy Chowdhury, *The Genesis of Bangladesh: A Study in International Legal Norms and Permissive Conscious* (London: Asia Publishing House, 1972), 76–148.
90. See generally, Tim Judah, *Kosovo: War and Revenge* (New Haven, CT: Yale University Press, 2000).
91. See Wheeler, 78–136.
92. General Comment 6 of the Human Rights Committee, The Right to Life, 1982 (Sixteenth Session), contained in UN Doc. HRI/GEN/1/Rev.1 at 6.
93. Genocide Convention, Article 2(c).
94. J. L. Brierly, *The Law of Nations*, 6th ed. (Oxford: Oxford University Press, 1963), 24.

Chapter 4: Universal Jurisdiction as Normative Legal Grounding

1. J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. (Oxford: Oxford University Press, 1963), 24.
2. See generally Stephen Macedo, ed. *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2004), 4. See also Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy*, 2nd ed. (New York: Oxford University Press, 2001), 163–69, 180–82, 217.
3. Peter Singer, *One World: The Ethics of Globalization* (New Haven, CT: Yale University Press, 2002), 120.
4. Brierly, 68.
5. Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964), 96–97.
6. Jane Stromseth, "Rethinking Humanitarian Intervention: The Case for Incremental Change," in J. L. Holzgrefe and Robert O. Keohane, ed. *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), 244.
7. Brierly, 23.
8. *The Princeton Principles on Universal Jurisdiction* (Princeton, NJ: Program in Law and Public Affairs, Princeton University, 2001), Article 1(1). Darrin Hawkins, "Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality," *Global Governance* 9 (2003): 347–65. See also Kenneth C. Randall, "Universal Jurisdiction under International Law," *Texas Law Review* 66 (1988): 788.
9. Ratner and Abrams, 161.

10. Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach based on Fundamental Ethical Principles in International Law and World Religions* (University Park: Pennsylvania State University Press), 122–23.
11. Barry E. Carter and Phillip R. Trimble, *International Law*, 3rd ed. (New York: Aspen Law and Business, 1999), 716–17. *Restatement (Third) of the Foreign Relations Law of the United States* (hereafter *Restatement*), (American Law Institute, Tentative Draft no. 7, 1987), para. 402, 403. See also "Harvard Research Draft Convention on Jurisdiction with Respect to Crime," *American Journal of International Law* 29 Supplement: (1935): 439–636.
12. Anne-Marie Slaughter, "Defining the Limits: Universal Jurisdiction and National Courts," in Macedo, ed., 169.
13. Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht: Martinus Nijhoff, 1992), 102. Hugo Grotius suggested that this principle entailed the pursuance of enemies of the human race on the high seas. See generally his *The Law of War and Peace*, trans. Louise R. Loomis (New York: Walter J. Black, 1949).
14. M. Cherif Bassiouni, "The History of Universal Jurisdiction and its Place in International Law," in Stephen Macedo, ed., 42–43. See also Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge: Cambridge University Press, 1997).
15. Slaughter, 169. See also Henry A. Kissinger, "The Pitfalls of Universal Jurisdiction," *Foreign Affairs* 80 no. 4 (2001): 86. Kenneth Roth, "The Case for Universal Jurisdiction," *Foreign Affairs* 80 no. 5 (2001):150–54. An excellent recent case example of this understanding of universal jurisdiction can be found in *Regina v. Finta* (*Finta*), 24 March 1994, Supreme Court of Canada, 1 SCR 701.
16. Macedo, 3.
17. With respect to war crimes, scholars contend that they entail universal jurisdiction because of their serious nature and the fact that they take place in an international context. It is thus not only the seriousness of war crimes that subjects them to universal jurisdiction but also their *locus delicti*. This historical nuance has implications for the extent to which war crimes—as a category of serious offenses—are also subject to humanitarian intervention, which I shall address below. See also Bassiouni, "The History of Universal Jurisdiction," 50.
18. There is a vast literature on sovereignty as both a legal and political concept. Recent and well-known treatments include Stephen D. Krasner, ed., *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press, 2001). Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999). Thomas J. Biersteker and Cynthia Weber, ed. *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996).
19. David P. Forsythe, *Human Rights in International Relations* (Cambridge: Cambridge University Press, 2000), 56.
20. See Anthony Sammons, "The 'Under-Theorization' of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts," *Berkeley Journal of International Law* 21 (2003): 111–43.

21. Madeline H. Morris, "Universal Jurisdiction in a Divided World: Conference Remarks," *New England Law Review* 35 (2001): 342.
22. "[T]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated," quoted in Sammons, 125. Scholars have generally cited this statement by Justice Jackson as the first contemporary assertion of universal jurisdiction for war crimes. See Henry T. King, Jr., "Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremburg Precedent," *New England Law Review* 35 (2001): 281–87.
23. Hawkins, 362.
24. See Hans Köchler, *Global Justice or Global Revenge: International Criminal Justice at the Crossroads* (New York: Springer-Verlag Wien, 2003), 38.
25. Slaughter, 175–76.
26. Eric A. Heinze, "Humanitarian Intervention: Morality and International Law on Intolerable Violations of Human Rights," *International Journal of Human Rights* 8 no. 4 (2004): 471–90. See also Justice Cory's majority opinion in *Finta*, 812.
27. International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Article 4.
28. Right to life, freedom from torture, freedom from slavery and servitude, freedom from imprisonment for failure to fulfill a contract, freedom from ex post facto laws, equality before the law, and freedom of thought, conscience and religion.
29. See below.
30. Meron, "On a Hierarchy." See also Theo van Boven, "Distinguishing Criteria of Human Rights," in Karel Vasak and Philip Alston, ed. *The International Dimensions of Human Rights* (Westport, CT: Greenwood Press, 1982).
31. Draft Code of Crimes against the Peace and Security of Mankind (Draft Code, 1996), Report of the International Law Commission on the Work of its Forty-Eighth Session, 1996, UN Doc. A/51/10, Articles 8, 9, 17–20. Importantly, Article 19 of the 1996 Draft Code subjects crimes committed against UN personnel to universal jurisdiction, not because of the severity of the crime, but because these persons are representatives of the international community and crimes committed against them are crimes against the international community as a whole. Thus, the international community as a whole has the right to punish perpetrators of such crimes. See Comment # 2 under Article 19.
32. Importantly, the *Princeton Principles* represent the closet thing to an authoritative list of crimes that permit universal jurisdiction. The *Principles* are based on the aforementioned sources of international law, which are themselves among the accepted methods for determining the content of international law. See Statute of the International Court of Justice (ICJ Statute), 26 June 1945, 59 Stat. 1055, Article 38.
33. Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 9 December 1948, 78 UNTS 277, Article 1.
34. Ibid., Article 6, emphasis mine.

35. Report of the Ad Hoc Committee on Genocide, UN ESCOR, 7th Session, Supp. no. 6 (1948), UN Doc. E/794/Corr.1, 11–12.
36. *Attorney-General of Israel v. Adolph Eichmann* (*Eichmann*), District Court of Jerusalem, 12 December 1961, quoted in the International Law Reports 36 (1968): para. 25–27.
37. *In the Matter of the Extradition of John Demjanjuk*, discussed in Rena Hozore Reiss, "The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine," *Cornell International Law Journal* 20 no. 2 (1987): 281–15.
38. *Application of the Convention on Prevention and Punishment the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Order of the Court on Provisional Measures, 13 September 1993, ICJ Rep. 325, para. 110.
39. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991 (ICTY Statute), 25 May 1993, UN Doc. S/RES/827 and UN Doc. S/25704 at 36, Article 4. Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), 22 February 1995, UN Doc. S/RES/955, Article 2. Rome Statute of the International Criminal Court (Rome Statute), 17 July 1998, UN Doc. A/CONF/.183/9, Article 6.
40. *Prosecutor v. Dusko Tadic* (*Tadic*), Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94–1-AR72, para. 62.
41. *Prosecutor v. Bernard Ntuyahaga*, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999, ICTR-90–40-T.
42. See generally Johan D. van der Vyver, "Prosecution and Punishment of the Crime of Genocide," *Fordham International Law Journal* 23 (1999): 286–56.
43. See, for example, Ratner and Abrams, 364. William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), 362. Christopher C. Joyner, "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability," *Law and Contemporary Problems* 59 (1996): 159–60. Theodor Meron, "International Criminalization of Internal Atrocities," *American Journal of International Law* 89 no. 3 (1995): 570. Randall, 837.
44. *Restatement*, para. 404. Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, 27 May 1994, UN Doc. S/1994/674, annex, 13. Draft Code, 1996, Article 8. *Princeton Principles*, Principle 2(1)(6).
45. Data presented by Hawkins (355–58) suggest at least 20 states have enacted such legislation specifically for genocide, while between 109 and 125 states have enacted some form of universal jurisdiction legislation for one or more international crimes. See also A. Hays Butler, "The Growing Support for Universal Jurisdiction in National Legislation," in Macedo, ed., 67–77.
46. Genocide Convention, Article 2. Kurt Jonassohn with Solveig Björnson, *Genocide and Gross Human Rights Violations in Comparative Perspective* (New Brunswick: Transaction Publishers, 1998), 9–11.

47. These five subparagraphs read: "(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group."

    While there is little in the travaux on the subject, the academic consensus on the provision including serious bodily or mental harm requires that any mental harm be of a serious enough nature to lead to the destruction of the target group. See Bunyan Bryant, "Comment: The United States and the 1948 Genocide Convention; Part I: Substantive Scope of the Convention," *Harvard International Law Journal* 16 no. 3 (1975): 693–96.
48. Rome Statute, Article 30(3).
49. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (Nuremburg Charter), 8 August 1945, UN Doc. 82 UNTS 280, Article 6; includes murder, extermination, enslavement, deportation, and persecution.
50. List abbreviated. Rome Statute, Article 7.
51. Convention Against Torture and other Cruel, Inhumane or Degrading Treatment of Punishment (Torture Convention), 10 December 1984, 1465 UNTS 112, Article 5. International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention), 30 November 1973, GA Res. 3068 (XXVIII), Article 4(b).
52. Torture Convention, Article 5. Apartheid Convention, Article 4(b). The Crime of Slavery has numerous relevant conventions. The most important are the following: Slavery Convention, 60 LNTS 253, 9 March 1927; Protocol amending the Slavery Convention, 182 UNTS 51, 23 October 1953; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, 7 September 1956; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 2 December 1949, 96 UNTS 271, especially Article 11.

    See also Ratner and Abrams, 112–17. Richard A. Falk, "Assessing the Pinochet Litigation: Whither Universal Jurisdiction?" in Macedo, ed., 97–120. Jodi Horowitz, "Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet," *Fordham International Law Journal* 23 (1999): 489–527. Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 1999), 237–38.
53. See the Convention for the Suppression of the Traffic in Persons, Articles 4, 11. Robertson, 306–307.
54. See cases cited in Kelly D. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status," *American Journal of International Law* 93 no. 1 (1999): 97–123.
55. Ratner and Abrams (162) point out that when an offense relates to a *jus cogens* norm, the argument for universal jurisdiction is particularly strong. See also Randall, 788–89. Meron, "On a Hierarchy," 15. Joyner, 165–70. On *jus cogens*, see the Vienna Convention on the Law of Treaties (Vienna Convention), 23 May 1969, 1155 UNTS 331, Article 53.

56. Rome Statute article 7. ICTY Statute, Article 5. ICTR Statute, Article 3. Draft Code, 1996, Article 18.
57. Nuremberg Charter, Article 6(c).
58. Gary J. Bass, "The Adolph Eichmann Case: Universal and National Jurisdiction," in Macedo, ed. 79–81. Reiss, 281. Naomi Roht-Arriaza, "The Pinochet Precedent and Universal Jurisdiction," *New England Law Review* 35 (2001): 311–20.
59. Cited in Menno T. Kamminga, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses," *Human Rights Quarterly* 23 no. 4 (2001): 946 n. 24. Ratner and Abrams, 164 n. 16.
60. Hawkins, 356–68. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed. (The Hague: Kluwer Law International 1999), 228. It is worth mentioning that Belgium's law provoked considerable international protest and parts of it were subsequently repealed.
61. *Restatement*, para. 404. Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, 10 February 1993, UN Doc. S/25274, at 20. Draft Code, 1996, Article 8, 18. *Princeton Principles*, Principle 2(1)(5).
62. Rome Statute, Article 7(2). Genocide Convention, Article 2(c).
63. For example see Ann-Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton, NJ: Princeton University Press, 2001), 70–72.
64. Declaration on the Protection of All Persons from Enforced Disappearances, 18 December 1992, GA Res. 47/133, UN Doc. A/47/99, Article 4(2). See also the Inter-American Convention on Forced Disappearance of Persons, 28 March 1996, 33 ILM 1429.
65. *Tadic*, Trial Chamber Opinion and Judgment, 7 May 1997, IT-94–1, paras. 694–718, 710, 717. Again, ethnic cleansing may or may not entail a violation of a basic human right. See also Bassiouni, *Crimes Against Humanity*, 327.
66. Rome Statute, Article 7(1)(h). See also Nuremburg Charter, Article 6(c); "…when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."
67. Apartheid Convention, Article II.
68. That is, people cannot move freely they cannot enjoy the objects of their other human rights. See chapter 3 above.
69. ICTY Statute, Article 5. ICTR Statute, Article 3.
70. *Prosecutor v. Jean-Paul Akayesu* (*Akayesu*), Judgment, 2 September 1998, ICTR-96-4-T, paras. 579–81. (The ICTR here cited the Draft Code, 1996, Article 18: "A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale.")
71. Rome Statute, Article 7. Draft Code, 1996, Articles 18, 19.
72. Draft Code, 1996, Article 19.
73. Rome Statute, Article 30.
74. *Tadic*, Opinion and Judgment, 7 May 1997, IT-94–1-T, para. 692. See also Ratner and Abrams, 131.
75. *Akayesu*, Judgment, paras. 478–84, 580.

76. *Prosecutor v. Karadzic, and Mladic*, Initial Indictment, 24 July 1995, IT-95-5, and 16 November 1995, IT-95–18.
77. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31. Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, 75 UNTS 85. Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287. Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts, 12 December 1977, 1125 UNTS 3. Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 UNTS 609.
78. See generally Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, 3 December 1973, GA Res. 3074 UN Doc. A/9030. Articles 1 and 2 common to Geneva Conventions I, II, III and IV. Paul Arnell, "International Criminal Law and Universal Jurisdiction," *International Legal Perspectives*, 11 (1999): 62. See generally Theodor Meron, "The Geneva Conventions as Customary Law," *American Journal of International Law* 81 no. 2 (1987).
79. "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." Geneva Convention I, Article 49. Geneva Convention II, Article 50. Geneva Convention III, Article 129. Geneva Convention VI, Article 146.
80. Ibid., Protocol I, Articles, 11, 75, 85. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press for the International Committee of the Red Cross, 2003), 128–9.
81. List abbreviated. Geneva Convention I, Article 50. Geneva Convention II, Article 51. Geneva Convention III, Article 130. Geneva Convention VI, Article 147. Of these crimes, the only ones shared by all four Conventions are the first three. See Ratner and Abrams, 85. See also Rome Statute, Article 8. ICTY Statute, Article 2. Draft Code, 1996, Article 20(a).
82. List abbreviated. Geneva Conventions I, II, III and IV, Article 3. See also Rome Statute, Article 8(2)(c).
83. An internal conflict for the purposes of Protocol II must involve two sets of armed forces with responsible command and with sufficient control over a territory to carry out sustained operations. Protocol II, Article 1.
84. ICTR Statute, Article 4.
85. Rome Statute, Article 8(c).
86. *Tadic*, Opinion and Judgment, para. 562–68.
87. See legislation cited in Thomas Graditzky, "Individual Criminal Responsibility for Violations of International Humanitarian Law

Committed in Non-international Armed Conflicts," *International Review of the Red Cross* no. 322 (1998): 38–44.
88. Ratner and Abrams, 88.
89. Dörmann, 38–128, especially 81–96, 100–05.
90. Rome Statute, Article 8(1). ICTR Statute, Article 4. Draft Code, 1996, Article 20.
91. See, for example, *Prosecutor v. Dragan Nikolic* (*Nikolic*), Sentencing and Judgment, 18 December 2003, IT-94-2-S, paras. 107, 158, 213. The opposite view is put forth in *Tadic*, Opinion and Judgment, para. 644–51, especially 649.
92. See generally Ilias Bantekas, "The Contemporary Law of Superior Responsibility" *American Journal of International Law* 93 no. 3 (1999): 573–95.
93. E.g. Geneva Convention I, Article 50.
94. Dörmann, 41–43. *Prosecutor v. Tihomir Blaskic*, Judgment, 3 March 2000, IT-95–14-T para. 152. *Akayesu*, Judgment, paras. 12, 179, 182, 589.
95. Rome Statute, Articles 8, 30. See also *Tadic*, Opinion and Judgment, para. 207.
96. Dörmann, 43.
97. Geneva Conventions I, II, III and IV, Article 2.
98. *Tadic*, Interlocutory Appeal, para. 70.
99. Apartheid Convention, Article II. Bassiouni, *Crimes Against Humanity*, 362.
100. See Sammons, 127–34.

Chapter 6: Who Intervenes and Why it Matters: The Politics of Ageny

1. On the difference between reasons for judging actions and reasons for judging agents, see Fernando R. Tesón, "Ending Tyranny in Iraq," *Ethics and International Affairs* 19 no. 2 (2005): 10.
2. Chris Brown, "World Society and the English School: An 'International Society' Perspective on World Society," *European Journal of International Relations* 7 no. 4 (2001).
3. See chapter 3 above. See also Philip Pettit, "Consequentialism," in Peter Singer, ed., *A Companion to Ethics* (Oxford: Blackwell Publishers, 1993), 231.
4. Joel Fienberg, *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970). See also Kok-Chor Tan, "The Duty to Protect," in Terry Nardin and Melissa S. Williams, ed. *Humanitarian Intervention (NOMOS)* (New York: New York University Press, 2006), 96.
5. See Henry Shue, "Limiting Sovereignty," in Jennifer M. Welsh, ed., *Humanitarian Intervention in International Relations* (Oxford: Oxford University Press, 2004), 16–22. Iain Brassington, "Global Village, Global *Polis*," in Alexander Moseley and Richard Norman, ed. *Human Rights and Military Intervention* (Aldershot: Ashgate, 2002), 234. See also Tan, 84–16.
6. See Mona Fixdal and Dan Smith, "Humanitarian Intervention and Just War," *Mershon International Studies Review* 42 no. 2 (1998): 303–305.

7. See generally Ashley J. Tellis, Janice Bially, Christopher Layne, and Melissa McPherson, *Measuring National Power in the Postindustrial Age* (Santa Monica: RAND, 2000), Ch. 7.
8. See Thomas Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990). David Beetham, *The Legitimation of Power* (Basingstoke: Macmillan, 1991). Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Responsibility* (Cambridge: Cambridge University Press, 2002). Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005).
9. Beetham, 15–20.
10. Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996), 2–3.
11. Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).
12. Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 7th ed (Boston: McGraw Hill, 1993), 32.
13. Ibid.
14. Martin Wight, "International Legitimacy," *International Relations* 4 no. 1 (1972): 1.
15. See Wight. See also Hedley Bull and Adam Watson, ed. *The Expansion of International Society* (Oxford: Clarendon, 1984). Paul Sharp, "Herbert Butterfield, the English School and the Civilizing Virtues of Diplomacy," *International Affairs* 79 no. 4 (2003). I. Clark, 5.
16. I. Clark, 20.
17. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd ed. (New York: Columbia University Press, 2002). See especially Andrew Hurrell, "Preface to the Third Edition," xii.
18. See especially Nicholas J. Wheeler, "The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society," in Jennifer M. Welsh, ed., 31. Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Ithaca, NY Cornell University Press, 2003), 53.
19. I. Clark, 3. See also Inis L. Claude, "Collective Legitimization as a Political Function of the United Nations," *International Organization* 20 no. 3 (1966): 369.
20. Anthony F. Lang, Jr., *Agency and Ethics: The Politics of Military Intervention* (Albany: State University of New York Press, 2002), 8.
21. Finnemore, *Purpose of Intervention,* 78. See also International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), chapter 6.
22. John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution," in John Gerard Ruggie, ed., *Multilateralism Matters: The Theory and Praxis of Institutional Form* (New York: Columbia University Press, 1993), 6. See also Finnemore, *Purpose of Intervention,* 81.
23. "Annan Warns US over Iraq," BBC News, 11 September 2002.
24. See Finnemore, *Purpose of Intervention,* 80.

25. Jack Donnelly, "Genocide and Humanitarian Intervention," *Journal of Human Rights* 1 no. 1 (2002): 103. See also Finnemore, *Purpose of Intervention*, 81.
26. Terry Nardin, "The Moral Basis for Humanitarian Intervention," in Anthony F. Lang, Jr., ed., *Just Intervention* (Washington, DC: Georgetown University Press, 2003), 21.
27. Charter of the United Nations (UN Charter), 26 June 1945, Stat. 1031, Article, 47.
28. Thomas G. Weiss, David P. Forsythe, and Roger A. Coate, *The United Nations and Changing World Politics*, 4th ed. (Boulder, CO: Westview, 2004), 56.
29. Finnemore, *Purpose of Intervention*, 17.
30. See ICISS, 61.
31. Derek Chollet, *The Road to the Dayton Accords: A Study of American Statecraft* (New York: Palgrave Macmillan, 2005), 8–9, 184–85. See also Samantha Power *"A Problem From Hell:" America and the Age of Genocide* (New York: Perennial, 2002), 392.
32. See United States General Accounting Office (USGAO) Report to Congressional Requesters, *Kosovo Air Operations: Need to Maintain Alliance Cohesion Resulted in Doctrinal Departures* (GAO-01–784: July 2001). See also John E. Peters, Stuart Johnson, Nora Bensahel, Timothy Liston and Tracy Williams, *European Contributions to Operation Allied Force: Implications for Transatlantic Cooperation*, (Arlington, VA: RAND, 2001).
33. Dana Priest, "United NATO Front was Divided Within," *Washington Post*, 21 September 1999, A1.
34. Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Combat* (New York: Public Affairs, 2001), 422.
35. Dana Priest, "Bombing by Committee: France Balked at NATO Targets," *Washington Post*, 20 September 1999, A1.
36. W. Clark, 421. Priest, "Bombing by Committee."
37. Michael Ignatieff, *Virtual War: Kosovo and Beyond* (New York: Metropolitan Books, 2000), 102–103.
38. Donnelly, 104.
39. Fernando Tesón, *A Philosophy of International Law* (Boulder, CO: Westview, 1998), 59.
40. Adam Roberts, "NATO's 'Humanitarian War' Over Kosovo," *Survival* 45 no. 2 (1999): 107. See also Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2000).
41. Tesón, *Philosophy*, chap. 2. Charles R. Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979), 96.
42. Katherine Fierlbeck, *Globalizing Democracy: Power, Legitimacy, and the Interpretation of Democratic Ideas* (Manchester: Manchester University Press, 1998), 12.
43. Constitutive Act of the African Union, 26 May 2001, OAU Doc. CAB/LEG/23.15, Article 30.
44. Tesón, *Philosophy*, 59.
45. I. Clark, 186.

46. James Kurth, "Humanitarian Intervention After Iraq: Legal Ideals vs. Military Realities," *Orbis* 50 (Winter 2005), 90.
47. See Toyin Falola, *The History of Nigeria* (Westport, CT: Greenwood, 1999), chaps. 12–13. See also Bamidele A. Ojo, *Problems and Prospects of Sustaining Democracy in Nigeria: Voices of a Generation* (Huntington, NY: Nova Science Publishers, 2001), 120–27.
48. Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention in International Law* (Oxford: Oxford University Press, 2002), 134–37, 155–56.
49. Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996), 151.
50. United Nations Security Council (UNSC) Resolution 788, 12 November 1992, UN Doc. S/Res/788. UNSC Resolution 1132, 8 October 1997, UN Doc. S/Res/1132. See also Murphy, 153.
51. I. Clark, 193.
52. See especially Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999). See also John G. Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998).
53. Finnemore, *National Interests*, 23. See also Christopher Gelpi, *The Power of Legitimacy: Assessing the Role of Norms in Crisis Bargaining* (Princeton, NJ: Princeton University Press, 2003).
54. Wheeler, "Humanitarian Responsibilities," 32–41.
55. S. Neil MacFarlane *Intervention in Contemporary World Politics* (London: Routledge-Adelphi Paper 350: 2002), 60.
56. Alex J. Bellamy, "The Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian intervention After Iraq," *Ethics & International Affairs* 19 no. 2 (2005): 32.
57. See Human Rights Watch (HRW), *The Road to Abu Gharib*, (New York: Human Rights Watch, 2004). See also Ryan Lenz, "US Troops Being Investigated for Alleged Rape, Killing of Family in Iraq," Associated Press, 30 June 2006.
58. Kenneth Roth, "War in Iraq: Not a Humanitarian Intervention," in *Human Rights Watch World Report 2004: Human Rights and Armed Conflict* (New York: Human Rights Watch 2004), 13–33.
59. Paul D. Williams and Alex J. Bellamy, "The Responsibility to Protect and the Crisis in Darfur," *Security Dialogue* 36 no. 1 (2005): 37.
60. Bellamy, 39.
61. HRW, *Darfur Destroyed: Ethnic Cleansing By Government and Militia Forces in Western Sudan* (New York, Human Rights Watch, 2004). See also HRW, *Darfur in Flames: Atrocities in Western Sudan* (New York, Human Rights Watch, 2004).
62. Miriam Mannak, "UN Calls for Darfur Aid," Worldpress.org, 1 June 2006, available at <http://www.worldpress.org/Africa/2368.cfm> (25 June 2006).
63. "Annan 'Hopeful' of Persuading Sudanese Authorities to Accept UN Force in Darfur," *UN News Centre*, 22 June 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=18967&Cr=sudan&Cr1=> (23 June 2006).

64. This is, of course, notwithstanding the American tendency to not recognize socio-economic rights as true human rights and the fact that the United States has not ratified the International Covenant of Economic, Social and Cultural Rights, thus depriving U.S. citizens to a legal right to certain socioeconomic goods such as food, housing and health care.
65. Robert Kagan, "America's Crisis of Legitimacy," *Foreign Affairs* 83 no. 3 (2004): 65–87. Robert W. Tucker and David C. Hendrickson, "The Sources of American Legitimacy," *Foreign Affairs* 83 no. 6 (2004): 18–32.
66. Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York: Alfred A. Knopf, 2003), 43.
67. Michael Cox, "Commentary: Martians and Venutians in the New World Order," *International Affairs* 79 no. 3 (2003): 532.
68. I. Clark, 225.
69. George W. Bush, Address to the United Nations General Assembly, 12 September 2002, <http://www.whitehouse.gov/news/releases/2002/09/20020912–1.html> (25 July 2006).
70. Terry M. Neal, "Bush Reverts to Liberal Rationale for Iraq War; Critics Still Oppose War Despite Hussein's Human Rights Record," *Washington Post*, 9 July 2003.
71. Ramesh Thakur, "Western Medicine is No Cure for Darfur's Ills," *Financial Review*, 31 August 2004. See also Michael Clough, "Darfur: Whose Responsibility to Protect?" *Human Rights Watch World Report, 2005* (New York, Human Rights Watch 2006), 34.
72. Peter Beaumont, "US 'Hyping' Darfur Genocide Fear," *The Observer*, 3 October 2004. See also Samantha Power "Dying in Darfur: Can the Ethnic Cleansing in Darfur be Stopped?" *The New Yorker*, 30 August 2004, available at <http://www.newyorker.com/fact/content/?040830fa_fact1> (25 June 2006).
73. Alex de Waal, "Who are the Darfurians? Arab and African Identities, Violence, and External Engagement," *African Affairs* 104 (April 2005): 200–201.
74. "Osama bin Laden Issues Warning to the West," *Telegraph*, 23 April 2006. See also Edith M. Lederer, "Tribal Leaders Reject UN Force in Darfur, Threaten 'Holy War.'" *Washington Post*, 10 June 2006.
75. Meg Bortin, "For Muslims and the West, Antipathy and Mistrust," *International Herald Tribune*, 22 June 2006.
76. See "Big Demonstration Denounces Foreign Intervention in Darfur," UPI Arabic News Service, 26 June 2006.
77. HRW, *Imperatives for Immediate Change: The African Union Mission in Sudan* (New York: Human Rights Watch, 2006), 22–30.
78. "AU to Deploy More Troops in Darfur," *Pan-African News Agency Daily Newswire*, 1 October 2004. "AU Planning to Send 'Several Thousand' Troops to Darfur," Agence France Presse, 29 September 2004.
79. Anne Penketh, "Rwanda Tries to Stop Killings in Darfur," *The Independent*, 27 September 2004, 23.
80. United Nations General Assembly (UNGA), Report of the Joint Mission Charged with Investigating Allegations of Massacres and Other Human Rights Violations Occurring in Eastern Zaire since September 1996, 2 July 1997, UN Doc. A/51/942, para. 77.

81. William G. Thom, "Congo-Zaire's 1996–97 Civil War in the Context of Evolving Patterns of Military Conflict in Africa in the Era of Independence," *Journal of Conflict Studies* 19 no. 2 (1999): 93–123.
82. Dena Montague, "Stolen Goods: Coltan and Conflict in the Democratic Republic of Congo," *SAIS Review* 22 no. 1 (2002): 112.
83. Filip Reyntjens, "Briefing: The Second Congo War: More Than A Remake," *African Affairs* 98 (1999): 248. International Crisis Group (ICG), *Africa's Seven Nation War*, 21 May 1999, ICG Democratic Republic of Congo Report no. 4.
84. Ian Fisher and Norimitsu Onishi "Armies Ravage a Rich Land, Creating 'First World War' of Africa" *New York Times*, 6 February 2000.
85. HRW, *Imperatives*, 14.
86. AU Peace and Security Council, Communiqué of the Seventeenth Meeting, 20 October 2004, PSC/PR/Comm.(XVII), para. 6.
87. African Union, Pledging Conference for the African Union Mission in Sudan: An Opportunity for Partnership for Peace, 26 May 2005, CONF/PLG/3(I), para. 107. See also HRW, *Imperatives,* 20.
88. Quoted in HRW, *Imperatives,* 30.
89. Judy Dempsey, "Pressure Rises over NATO's Darfur Role," *International Herald Tribune*, 19 February 2006. See also Colum Lynch, "UN Chief Seeks Western Support for Darfur Force," *Washington Post*, 3 March 2006, A10.
90. Anthony Lake and John Prendergast, "Stopping Sudan's Slow-Motion Genocide," *Boston Globe*, 20 May 2004.

Chapter 6: Conclusion

1. See Jim Whitman, "Humanitarian Intervention in an Era of Pre-emptive Self-Defence," *Security Dialogue* 36 no. 3 (2005): 259–74.
2. J. L. Holzgrefe, "The Humanitarian Intervention Debate," in J. L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), 21.
3. Sir Arthur Watts, "The Importance of International Law," in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), 7. See also Robert E. Goodin, *Utilitarianism as a Public Philosophy* (Cambridge: Cambridge University Press, 1995), 18.
4. Holzgrefe, 21.
5. See S. Jack Odell, *On Consequentialist Ethics* (London: Wadsworth, 2004), 73.
6. Holzgrefe, 23.
7. Michael J. Glennon, *Limits of Law, Prerogatives and Power: Interventionism after Kosovo* (New York: Palgrave, 2001), 7.
8. Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), 191–226.
9. See Robert Kagan, "America's Crisis of Legitimacy," *Foreign Affairs* 83 no. 3 (2004):74–76.

10. "China Says Strikes Against Yugoslavia a Breach of International Law," Agence France Presse, 23 March 1999. Serbia and Montenegro brought suit against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, and the United Kingdom. In all these cases the Court found that it had no. jurisdiction to entertain claims made in the Application by Serbia and Montenegro. See International Court of Justice, Decisions of the ICJ, List of Contentious Cases, available at <http://www.icj-cij.org/icjwww/idecisions.htm> (15 September 2006).
11. See Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979).
12. International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).
13. See generally, Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, ed. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999). Nicholas J. Wheeler, "The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society," in Jennifer M. Welsh, ed., *Humanitarian Intervention in International Relations* (Oxford: Oxford University Press, 2004). Paul D. Williams and Alex J. Bellamy, "The Responsibility to Protect and the Crisis in Darfur," *Security Dialogue* 36 no. 1 (2005): 27–47.
14. Neta C. Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (Cambridge: Cambridge University Press, 2002). Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Ithaca, NY: Cornell University Press, 2003).
15. David Rieff, *A Bed for the Night: Humanitarianism in Crisis* (London: Vintage, 2002).
16. Crawford, 400–401.
17. Eric A. Heinze, "Humanitarian Intervention and the War in Iraq: Norms, Discourse, and State Practice," *Parameters* 36 no. 1 (2006): 20–35.

This page intentionally left blank.

Bibliography

Books, Monographs, Articles, and Internet Sources

Ahlstram, C. *Casualties of Conflict: Report for the Protection of Victims of War*. Uppsala: Uppsala University Department of Peace and Conflict, 1991.

Albright, Madeline. "Press Conference with Russian Foreign Minister Igor Ivanov." Singapore, 26 July 1999. http://secretary.state.gov/www/statements/1999/990726b.html (accessed 1 August 2006).

Alexander, Klinton W. "NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval." *Houston Journal of International Law* 22 (2000): 403–49.

Allott, Philip. "The Concept of International Law." In *The Role of Law in International Politics: Essays in International Relations and International Law*, edited by Michael Byers, 69–90. Oxford: Oxford University Press, 2000.

Amnesty International. *Federal Republic of Yugoslavia: A Broken Circle: "Disappeared" and Abducted in the Kosovo Province.* London: Amnesty International, 2000.

———. *Getting Away with Murder: Political Killings and "Disappearances" in the 1990s*. London: Amnesty International, 1993.

"Annan 'Hopeful' of Persuading Sudanese Authorities to Accept UN Force in Darfur." *UN News Centre*. 22 June 2006. http://www.un.org/apps/news/story.asp?NewsID=18967&Cr=sudan&Cr1= (accessed 23 June 2006).

Annan, Kofi. "Address to the 54th Session of the UN General Assembly, 20 September 1999." In *The Question of Intervention: Statements by the Secretary-General*, edited by Kofi Annan, 37–45. New York: UN Department of Public Information, 1999.

"Annan Warns US over Iraq." *BBC News*. 11 September 2002.

Arend, Anthony Clark, and Robert J. Beck. *International Law and the Use of Force*. London: Routledge, 1993.

Arnell, Paul. "International Criminal Law and Universal Jurisdiction." *International Legal Perspectives* 11 (1999): 53–63.

Askin, Kelly D. "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status." *American Journal of International Law* 93, no. 1 (1999): 97–123.

"AU to Deploy More Troops in Darfur." *Pan-African News Agency Daily Newswire*, 1 October 2004.

"AU Planning to Send 'Several Thousand' Troops to Darfur." *Agence France Presse*, 29 September 2004.

Ayoob, Mohammedited by *The Third World Security Predicament: State Making, Regional Conflict, and the International System*. Boulder, CO: Lynne Reinner, 1998.

Bain, William. "The Tyranny of Benevolence: National Security, Human Security, and the Practice of Statecraft." *Global Society* 15, no. 3 (2001): 277–94.

Baldwin, David A. "Security Studies and the End of the Cold War." *World Politics* 48 no. 1 (1995): 117–41.

Ball, Nichole. *Security and Economy in the Third World*. Princeton, NJ: Princeton University Press, 1988.

Bantekas, Ilias. "The Contemporary Law of Superior Responsibility." *American Journal of International Law* 93, no. 3 (1999): 573–95.

Barclay, Gordon, Cynthia Tavares, and Arsalaan Siddique, "International Comparisons of Criminal Justice Statistics." Home Office for the United Kingdom, May 2001. http://www.homeoffice.gov.uk/rds/pdfs/hosb601.pdf (accessed 24 July 2006).

Bass, Gary J. "The Adolph Eichmann Case: Universal and National Jurisdiction." In *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, edited by Stephen Macedo, 77–90. Philadelphia: University of Pennsylvania Press, 2004.

Bassiouni, M. Cherif. *Crimes against Humanity in International Criminal Law*, 2nd ed. The Hague: Kluwer Law International, 1999.

———. "The History of Universal Jurisdiction and its Place in International Law." In *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, edited by Stephen Macedo, 39–62. Philadelphia: University of Pennsylvania Press, 2004.

Beaumont, Peter. "US 'Hyping' Darfur Genocide Fear." *The Observer*, 3 October 2004.

Beetham, David. *The Legitimation of Power*. Basingstoke: Macmillan, 1991.

Beitz, Charles. "Bounded Morality: Justice and the State in World Politics." *International Organization* 33, no. 3 (1979): 405–24.

———. "Justice and International Relations." *Philosophy and Public Affairs* 4, no. 4 (1975): 360–89.

———. "The Reagan Doctrine in Nicaragua." In *Problems of International Justice*, edited by Steven Luper-Foys, 182–95. Boulder, CO: Westview, 1989.

———. "Nonintervention and Communal Integrity." *Philosophy and Public Affairs* 9, no. 4 (1980): 385–91.

———. *Political Theory and International Relations*. Princeton, Princeton University Press, 1979.

Bellamy, Alex J. "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq." *Ethics & International Affairs* 19, no. 2 (2005): 31–53.

Biersteker, Thomas J., and Cynthia Weber, eds. *State Sovereignty as Social Construct*. Cambridge: Cambridge University Press, 1996.

"Big Demonstration Denounces Foreign Intervention in Darfur." *UPI Arabic News Service*, 26 June 2006.

Bortin, Meg. "For Muslims and the West, Antipathy and Mistrust." *International Herald Tribune*, 22 June 2006.

Bossuyt, Marc J. edited by *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*. Boston: Martinus Nijhoff, 1987.

Brandt, Richard B. *Morality, Utilitarianism, and Rights*. Cambridge: Cambridge University Press, 1992.

———. "Utilitarianism and the Rules of War." *Philosophy and Public Affairs* 1, no. 2 (1972): 145–65.

Brassington, Iain. "Global Village, Global Polis." In *Human Rights and Military Intervention*, edited by Alexander Moseley and Richard Norman, 231–46. Aldershot: Ashgate, 2002.

Brierly, J. L. *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. Oxford: Oxford University Press, 1963.

Brown, Chris. "Selective Humanitarianism: In Defense of Inconsistency." In *Ethics and Foreign Intervention*, edited by Deen K. Chatterjee and Don E. Schneid, 31–50. Cambridge: Cambridge University Press, 2003.

———. "World Society and the English School: An 'International Society' Perspective on World Society." *European Journal of International Relations* 7, no. 4 (2001): 423–41.

Brownlie, Ian. *International Law and the Use of Force by States*. Oxford: Clarendon, 1963.

Bryant, Bunyan. "Comment: The United States and the 1948 Genocide Convention; Part I: Substantive Scope of the Convention," *Harvard International Law Journal* 16, no. 3 (1975): 686–96.

Buchanan, Allen. "From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform." In *Humanitarian Intervention: Moral and Philosophical Issues*, edited by Aleksander Jokic and Burleigh Wilkins, 123–58. Toronto: Broadview, 2003.

———. "Reforming the Law of Humanitarian Intervention." In *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, edited by J. L. Holzgrefe and Robert O. Keohane, 130–73. Cambridge: Cambridge University Press, 2003.

Bull, Hedley. *The Anarchical Society: A Study of Order in World Politics*. 3rd ed. New York: Columbia University Press, 2002.

Bull, Hedley. ed. *Intervention in World Politics*. Oxford: Oxford University Press, 1984.

Bull, Hedley, and Adam Watson, eds. *The Expansion of International Society.* Oxford: Clarendon, 1984.

Burns, Robert. "US Leads NATO Assault on Serbia as 'Moral Imperative.' " *Associated Press*, 24 March 1999.

Burr, Millard. *Working Document II: Quantifying Genocide in Southern Sudan and the Nuba Mountains: 1983–1998*. Washington, DC: US Committee for Refugees, December 1998.

Burton, Leslie A. "Kosovo: To Bomb or Not to Bomb? The Legality is the Question." *Annual Survey of International and Comparative Law* 7 (2001): 49–62.

Bush, George H. W. "Address to the Nation Announcing United States Military Action in Panama." 20 December 1989. George Bush Presidential Library. http://bushlibrary.tamu.edu/research/papers/1989/89122000.html (accessed 1 August 2006).

Bush, George W. "Address to the United Nations General Assembly." 12 September 2002. http://www.whitehouse.gov/news/releases/2002/09/20020912–1.html (accessed 25 July 2006).

Butler, A. Hays. "The Growing Support for Universal Jurisdiction in National Legislation." In *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, edited by Stephen Macedo, 67–76. Philadelphia: University of Pennsylvania Press, 2004.

Byers, Michael, ed. *The Role of Law in International Politics: Essays in International Relations and International Law*. Oxford: Oxford University Press, 2000.

Byers, Michael, and Simon Chesterman. "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law." In *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, eds. J. L. Holzgrefe and Robert O. Keohane, 177–203. Cambridge: Cambridge University Press, 2003.

Charney, Jonathan I. "Anticipatory Humanitarian Intervention in Kosovo." *American Journal of International Law* 93 no. 4 (2001): 834–41.

Carter, Barry E., and Phillip R. Trimble. *International Law*, 3rd ed. New York: Aspen Law and Business, 1999.

Chatterjee, Deen K., and Don E. Schneid, eds. *Ethics and Foreign Intervention*. Cambridge: Cambridge University Press, 2003.

Chesterman, Simon, ed. *Civilians in War*. Boulder, CO: Lynne Reinner, 2001.

Chesterman, Simon. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press, 2002.

"China Says Strikes Against Yugoslavia a Breach of International Law." *Agence France Presse*. 23 March 1999.

Chinkin, Christine M. "Kosovo: A 'Good' or 'Bad' War?" *American Journal of International Law* 93 no. 4 (1999): 841–47.

Chollet, Derek. *The Road to the Dayton Accords: A Study of American Statecraft*. New York: Palgrave Macmillan, 2005.

Chowdhury, Subrata Roy. *The Genesis of Bangladesh: A Study in International Legal Norms and Permissive Conscious*. London: Asia Publishing House, 1972.

Clark, Ann-Marie. *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*. Princeton, N.J.: Princeton University Press, 2001.

Clark, Ian. *Legitimacy in International Society*. Oxford: Oxford University Press, 2005.

Clark, Wesley K. *Waging Modern War: Bosnia, Kosovo and the Future of Combat*. New York: Public Affairs, 2001.

Claude, Inis L. "Collective Legitimization as a Political Function of the United Nations." *International Organization* 20, no. 3 (1966): 367–79.

Clinton, William J. "Address to the Nation." 24 March 1999. PBS Online News Hour. http://www.pbs.org/newshour/bb/europe/jan-june99/address_3–24.html (accessed 1 August 2006).

Clough, Michael. "Darfur: Whose Responsibility to Protect?" In *Human Rights Watch World Report 2005*, 25–39. New York, Human Rights Watch, 2006.

Cockell, John G. "Human Security and Preventive Action Strategies." In *The United Nations and Human Security*, edited by Edward Newman and Oliver P. Richmond, 15–30. New York: Palgrave, 2001.

Coicaud, Jean-Marc. *Legitimacy and Politics: A Contribution to the Study of Political Right and Responsibility*. Cambridge: Cambridge University Press, 2002.

Cox, Michael. "Commentary: Martians and Venutians in the New World Order." *International Affairs* 79, no. 3 (2003): 523–32.

Crawford, Neta C. *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention*. Cambridge: Cambridge University Press, 2002.

Cummiskey, David. *Kantian Consequentialism*. Oxford: Oxford University Press, 1996.

D'Amato, Anthony. *International Law: Process and Prospect*, 2nd ed. Dobbs Ferry, NY: Transnational Publishers, 1995.

———. "Nicaragua and International Law: The 'Academic' and the 'Real.' " *American Journal of International Law* 79, no. 3 (1985): 657–64.

Davis, Nancy (Ann). "Contemporary Deontology." In *A Companion to Ethics*, edited by Peter Singer, 205–19. Oxford: Blackwell, 1993.

Dempsey, Judy. "Pressure Rises over NATO's Darfur Role." *International Herald Tribune*, 19 February 2006.

DePalma, Anthony. "Air War Hurts Stability of a Yugoslav Republic." *New York Times*, 9 May 1999.

De Visscher, Charles. *Theory and Reality in Public International Law*. 2nd ed. Princeton, NJ: Princeton University Press, 1968.

De Waal, Alex. *Famine Crimes: Politics and the Disaster Relief Industry in Africa*. Bloomington, IN: Indiana University Press, 1997.

———. "Who are the Darfurians? Arab and African Identities, Violence, and External Engagement." *African Affairs* 104 (April 2005): 181–205.

Diehl, Paul F. *International Peacekeeping*. Baltimore: Johns Hopkins University Press, 1993.

Donnelly, Jack. "Genocide and Humanitarian Intervention." *Journal of Human Rights* 1, no. 1 (2002): 93–109.

———. *Realism and International Relations*. Cambridge: Cambridge University Press, 2000.

———. *Universal Human Rights in Theory and Practice*, 2nd ed. Ithaca: Cornell University Press, 2003.

Dopplet, Gerald. "Walzer's Theory of Morality in International Relations." *Philosophy and Public Affairs* 8, no 1. (1978): 3–27.

Dörmann, Knut. *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. Cambridge: Cambridge University Press for the International Committee of the Red Cross, 2003.

Dworkin, Ronald. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 1977.

"Editorial Comments: NATO's Intervention in Kosovo." *American Journal of International Law* 93, no. 4 (1999): 824–62.

Elfstrom, Gerard. *Ethics for a Shrinking World*. London: Macmillan, 1990.

Ermacora, Federico. "Procedures to Deal with Human Rights Violations: A Hopeful Start in the United Nations?" *Human Rights Journal* 7 (1974): 670–89.

Falk, Richard A. "Assessing the Pinochet Litigation: Whither Universal Jurisdiction?" In *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, edited by Stephen Macedo, 97–120. Philadelphia: University of Pennsylvania Press, 2004.

———. *Human Rights and State Sovereignty*. New York: Holmes and Meier, 1981.

Falola, Toyin. *The History of Nigeria*. Westport, CT: Greenwood, 1999.

Farer, Tom J. "An Inquiry into the Legitimacy of Humanitarian Intervention." In *Law and Force in the New International Order*, edited by Lori Fisler Damrosch and David J. Scheffer, 185–201. Boulder, CO: Westview Press, 1991.

Fienberg, Joel. *Doing and Deserving*. Princeton, NJ: Princeton University Press, 1970.

Fierlbeck, Katherine. *Globalizing Democracy: Power, Legitimacy, and the Interpretation of Democratic Ideas*. Manchester: Manchester University Press, 1998.

Finnemore, Martha. *National Interests in International Society*. Ithaca, NY: Cornell University Press, 1996.

Finnemore, Martha. *The Purpose of Intervention: Changing Beliefs about the Use of Force*. Ithaca, NY: Cornell University Press, 2003.

Fisher, Ian, and Norimitsu Onishi. "Armies Ravage a Rich Land, Creating 'First World War' of Africa." *New York Times*, 6 February 2000.

Fixdal, Mona, and Smith, Dan. "Humanitarian Intervention and Just War." *Mershon International Studies Review* 42, no. 2 (1998): 283–312.

Forsythe, David P. *Human Rights and International Relations*. Cambridge, Cambridge University Press, 2000.

———. *The Humanitarians: The International Committee of the Red Cross*. Cambridge: Cambridge University Press, 2005.

Franck, Thomas M. *Fairness in International Law and Institutions*. Oxford: Clarendon, 1990.

———. "Interpretation and Change in the Law of Humanitarian Intervention." In *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, eds. J. L. Holzgrefe and Robert O. Keohane, 204–231. Cambridge: Cambridge University Press, 2003.

———. "When, if Ever, May States Employ Force without Prior Security Council Authorizations?" *Washington University Journal of Law and Policy* 5 (2001): 51–71.

Frankena, William K. *Thinking about Morality*. Ann Arbor: University of Michigan Press, 1980.

Freedom House Country Ratings—Map of Freedom 2005, Freedom House Homepage. http://www.freedomhouse.org/ (accessed 24 July 2006).

Fuller, Lon L. *The Morality of Law*. New Haven, CT: Yale University Press, 1964.
Galbraith, Peter W. "The Ghosts of 1991." *Washington Post*, 12 April 2003.
Gberie, Lansana. "The Darfur Crisis: A Test Case for Humanitarian Intervention." KAIPTC Paper, No. 1. September 2004. http://64.78.30.169/kaiptc/The%20Darfur%20Crisis.pdf (accessed 21 August 2006).
Geissler, Laura. "The Law of Humanitarian Intervention and the Kosovo Crisis." *Hamline Law Review* 23 (2000): 323–48.
Gelpi, Christopher. *The Power of Legitimacy: Assessing the Role of Norms in Crisis Bargaining*. Princeton, NJ: Princeton University Press, 2003.
Gerwith, Alan. *Human Rights: Essays on Justification and Applications*. Chicago: University of Chicago Press, 1982.
Ghobarah, Hazem Adam, Paul Huth, and Bruce Russett. "Civil Wars Kill and Maim People—Long after the Shooting Stops." *American Political Science Review* 92, no. 2 (2003): 189–202.
Girosi, Federico, and Gary King. "Short Term Effects of War Deaths on Public Health in the US." Working Paper, 2002, Harvard Center for Basic Research in the Social Sciences.
Glennon, Michael J. *Limits of Law, Prerogatives and Power: Interventionism after Kosovo*. New York: Palgrave, 2001.
Goodin, Robert E. *Reasons for Welfare: The Political Theory of the Welfare State*. Princeton, NJ: Princeton University Press, 1988.
———. *Utilitarianism as a Public Philosophy*. Cambridge: Cambridge University Press, 1995.
Goodman, Ryan. "Humanitarian Intervention and Pretexts for War." *American Journal of International Law* 100, no. 1 (2006): 107–41.
Graditzky, Thomas. "Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-international Armed Conflicts." *International Review of the Red Cross*, no. 322 (1998): 29–56.
Groom, A. J. R. and Paul Taylor. "The United Nations System and the Kosovo Crisis." In *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, edited by Albrecht Schnabel and Ramesh Thakur, 291–318. New York: United Nations University Press, 2000.
Gurr, Ted Robert. "Containing Internal War in the Twenty-First Century." In *From Reaction to Conflict Prevention: Opportunities for the UN System*, edited by Fen Olser Hampson and David M. Malone, 41–62. Boulder, CO: Lynne Reinner, 2002.
Hardin, Russell. "International Deontology." *Ethics and International Affairs* 9 (1995): 133–45.
———. *Morality within the Limits of Reason*. Chicago: University of Chicago Press, 1988.
Harff, Barbara. *Genocide and Human Rights: International Legal and Political Issues*. Denver, CO: University of Denver Graduate School of International Studies, 1984.
Hawkins, Darrin. "Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality." *Global Governance* 9 (2003): 347–65.
Hehir, J. Bryan. "Military Intervention and National Sovereignty: Recasting the Relationship." In *Hard Choices: Moral Dilemmas in Humanitarian*

Intervention, edited by Jonathan Moore, 29–54. New York: Rowman and Littlefield, 1999.

Heinze, Eric A. "Commonsense Morality and the Consequentialist Ethics of Humanitarian Intervention." *Journal of Military Ethics* 4, no. 3 (2005): 168–82.

———. "Humanitarian Intervention and the War in Iraq: Norms, Discourse and State Practice." *Parameters* 36, no. 1 (2006): 20–35.

———. "Humanitarian Intervention: Morality and International Law on Intolerable Violations of Human Rights." *International Journal of Human Rights* 8, no. 4 (2004): 471–90.

Hendrie, Barbara, ed. *Operation Lifeline Sudan: A Review*. Geneva: Department of Humanitarian Affairs, 1996.

Henkin, Louis. *How Nations Behave: Law and Foreign Policy*. New York: Columbia University Press, 1979.

Herring, Eric. "From Rambouillet to the Kosovo Accords: NATO's War against Serbia and its Aftermath." *International Journal of Human Rights* 4, no. 3/4 (2000): 225–245.

Himma, Kenneth Einar. "Positivism, Naturalism, and the Obligation to Obey the Law." *Southern Journal of Philosophy* 36, no. 2 (1998): 145–161.

Holmes, Robert L. *On War and Morality*. Princeton, NJ: Princeton University Press, 1989.

Holzgrefe, J. L. "The Humanitarian Intervention Debate." In *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, eds. J. L. Holzgrefe and Robert O. Keohane, 15–52. Cambridge: Cambridge University Press, 2003.

Holzgrefe, J. L., and Robert O. Keohane, edited by *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*. Cambridge: Cambridge University Press, 2003.

Honig, Jan Willem, and Norbert Both. *Srebrenica: Record of a War Crime*. London: Penguin, 1996.

Horowitz, Jodi. "Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet." *Fordham International Law Journal* 23 (1999): 489–527.

Human Rights Watch (HRW). *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*. New York, Human Rights Watch, 2004.

———. *Darfur in Flames: Atrocities in Western Sudan*. New York, Human Rights Watch, 2004.

———. *Genocide in Iraq: The Anfal Campaign against the Kurds*. New York: Human Rights Watch, 1993.

———. *Imperatives for Immediate Change: The African Union Mission in Sudan*. New York: Human Rights Watch, 2006.

———. *The Road to Abu Gharib*. New York: Human Rights Watch, 2004.

Human Rights Watch World Report 2000. New York: Human Rights Watch, 2001.

Human Rights Watch World Report 2004: Human Rights and Armed Conflict. New York: Human Rights Watch, 2005.

Human Rights Watch World Report 2005. New York: Human Rights Watch, 2006.

Ignatieff, Michael. *Virtual War: Kosovo and Beyond*. New York: Metropolitan Books, 2000.

Ikenberry, G. John. *After Victory: Institutions, Strategic Restrains, and the Rebuilding of Order After Major War*. Princeton, NJ: Princeton University Press, 2001.

Ikenberry, G. John, and Charles A. Kupchan. "Liberal Realism: The Foundations of a Democratic Foreign Policy." *The National Interest* 77 (Fall 2004): 38–49.

Independent International Commission on Kosovo (Kosovo Commission). *The Kosovo Report: Conflict, International Response, Lessons Learnedited by* Oxford: Oxford University Press, 2000.

International Commission on Intervention and State Sovereignty (ICISS). *The Responsibility to Protect*. Ottawa: International Development Research Centre, 2001.

International Crisis Group (ICG). *Africa's Seven Nation War*. ICG Democratic Republic of Congo Report No. 4, 21 May 1999.

Iraq Body Count. Civilians Reported Killed by Military Intervention in Iraq. http://www.iraqbodycount.net/ (accessed 20 July 2006).

Johnson, Douglas H. *The Root Causes of Sudan's Civil War*. Bloomington: Indiana University Press, 2003.

Johnson, James Turner. *Morality and Contemporary Warfare*. New Haven, CT: Yale University Press, 1999.

Jokic, Aleksander, and Burleigh Wilkins, ed. *Humanitarian Intervention: Moral and Philosophical Issues*. Toronto: Broadview, 2003.

Jonassohn, Kurt with Solveig Björnson. *Genocide and Gross Human Rights Violations in Comparative Perspective*. New Brunswick, NJ: Transaction Publishers, 1998.

Jones, Charles. *Global Justice: Defending Cosmopolitanism*. Oxford: Oxford University Press, 1999.

Joyner, Christopher C. "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability." *Law and Contemporary Problems* 59 (1996): 153–72.

Joyner, Christopher C., and Anthony Clark Arend. "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" *United States Air Force Academy Journal of Legal Studies* 10 (1999/2000): 27–59.

Judah, Tim. *Kosovo: War and Revenge*. New Haven, CT: Yale University Press, 2000.

Kagan, Robert. "America's Crisis of Legitimacy." *Foreign Affairs* 83, no. 3 (2004): 65–87.

———. *Of Paradise and Power: America and Europe in the New World Order*. New York: Knopf, 2003.

Kagan, Shelly. *Normative Ethics*. Boulder, CO: Westview, 1998.

Kamminga, Menno T. "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses." *Human Rights Quarterly* 23, no. 4 (2001): 940–74.

Kant, Immanuel. *Grounding for the Metaphysics of Morals*, trans. James W. Ellington. Indianapolis, IN: Hackett, 1785/1993.

Keen, David. *The Benefits of Famine: A Political Economy of Famine and Relief in Southwestern Sudan, 1983–1989*. Princeton, NJ: Princeton University Press, 1994.

Kegley, Charles W., Jr. and Gregory A. Raymond, "Preventive War and Permissive Normative Order." *International Studies Perspectives* 4, no. 4 (2003): 385–94.

Kelly, P. J. *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*. Oxford: Clarendon Press, 1990.

Kennan, George. "Morality and Foreign Policy." *Foreign Affairs* 63 (Winter 1985/86): 205–18.

Khong, Yuen Foong. "Human Security: A Shotgun Approach to Alleviating Human Misery?" *Global Governance* 7, no. 3 (2001): 231–37.

King, Gary and Christopher J. L Murray. "Rethinking Human Security." *Political Science Quarterly* 116, no. 4 (2001–2002): 585–610.

King, Henry T. Jr., "Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremburg Precedent." *New England Law Review* 35 (2001): 281–87.

Kissinger, Henry A. "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny." *Foreign Affairs* 80, no. 4 (2001): 86–96.

Köchler, Hans. *Global Justice or Global Revenge: International Criminal Justice at the Crossroads*. New York: Springer-Verlag Wien, 2003.

"Kosovo's War Also Killed Half of Its Animals." *The San Francisco Chronicle*, 16 June 1999.

Krasner, Stephen D., edited by *Problematic Sovereignty: Contested Rules and Political Possibilities*. New York: Columbia University Press, 2001.

Krasner, Stephen D. *Sovereignty: Organized Hypocrisy*. Princeton, NJ: Princeton University Press, 1999.

Kurth, James. "Humanitarian Intervention After Iraq: Legal Ideals vs. Military Realities." *Orbis* 50, no. 1 (2005): 87–101.

Laberge, Pierre. "Humanitarian Intervention: Three Ethical Positions." *Ethics & International Affairs* 9 (1995): 15–35.

Lake, Anthony, and John Prendergast. "Stopping Sudan's Slow-Motion Genocide." *Boston Globe*. 20 May 2004.

Lang, Anthony F., Jr. *Agency and Ethics: The Politics of Military Intervention*. Albany: State University of New York Press, 2002.

Lang, Anthony F., Jr., ed. *Just Intervention*. Washington, DC: Georgetown University Press, 2003.

Lauterpacht, Hersch. *International Law and Human Rights*. London: Stevens and Sons, 1950.

Lauterpacht, Hersch, ed. *Oppenheim's International Law*. 7th ed., vol. 2. London: Longman's, 1952.

Lederer, Edith M. "Tribal Leaders Reject UN Force in Darfur, Threaten 'Holy War.'" *Washington Post*, 10 June 2006.

Leich, Marian Nash. "Contemporary Practice of the United States Relating to International Law." *American Journal of International Law* 78, no. 3 (1984): 655–65.

Leigh, Monroe. "Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 ICJ Rep. 14." *American Journal of International Law* 81, no. 1 (1987): 206–11.

Lenz, Ryan. "US Troops Being Investigated for Alleged Rape, Killing of Family in Iraq." *Associated Press*, 30 June 2006.

Lepard, Brian D. *Rethinking Humanitarian Intervention: A Fresh Legal Approach based on Fundamental Ethical Principles in International law and World Religions*. University Park: Pennsylvania University Press, 2002.

Lillich, Richard B., edited by *Humanitarian Intervention and the United Nations*. Charlottesville: University of Virginia Press, 1973.

Luban, David. "Just War and Human Rights." *Philosophy and Public Affairs* 9, no. 2 (1980): 160–81.

Lynch, Colum. "UN Chief Seeks Western Support for Darfur Force." *Washington Post*, 3 March 2006.

Lyons, David. "Human Rights and the General Welfare." *Philosophy and Public Affairs* 6, no. 2 (1977): 113–29.

Macedo, Stephen., ed. *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*. Philadelphia: University of Pennsylvania Press, 2004.

Mannak, Miriam. "UN Calls for Darfur Aid." Worldpress.org. 1 June 2006. http://www.worldpress.org/Africa/2368.cfm (accessed 25 June 2006).

Mapel, David R. "Military Intervention and Rights." *Millennium* 20, no. 1 (1991): 41–55.

Marcus, David. "Famine Crimes in International Law." *American Journal of International Law* 97, no. 2 (2003): 245–81.

Mason, Andrew and Nick Wheeler. "Realist Objections to Humanitarian Intervention." In *The Ethical Dimensions of Global Change*, edited by Barry Holden, 94–110. Basingstoke: Macmillan, 1996.

McDonald, Matt. "Human Security and the Construction of Security." *Global Society* 16, no. 3 (2002): 277–95.

MacFarlane, S. Neil. *Intervention in Contemporary World Politics*. London: Routledge-Adelphi Paper 350, 2002.

McKinley, James C. Jr., "Famine Looming, Sudan Curbs Relief to Rebel-Held Areas." *New York Times*, 18 March 1998.

Meron, Theodor. "The Geneva Conventions as Customary Law." *American Journal of International Law* 81, no. 2 (1987): 348–70.

———. "International Criminalization of Internal Atrocities." *American Journal of International Law* 89, no. 3 (1995): 554–77.

———. "On a Hierarchy of International Human Rights." *American Journal of International Law* 80, no. 1 (1896): 1–23.

Merriam, John J. "Kosovo and the Law of Humanitarian Intervention." *Case Western Reserve Journal of International Law* 33 (2001): 111–54.

Mill, John Stuart. *On Liberty*. edited by Edward Alexander. Ontario: Broadview, 1999.

Miller, Benjamin. "The Concept of Security: Should it be Redefined?" *Journal of Strategic Studies* 24, no. 2 (2001): 13–42.

Minear, Larry. *The Humanitarian Enterprise: Dilemmas and Discoveries*. Bloomfield, CT: Kumarian Press, 2002.

Ministry of Foreign Affairs of Japan. *Diplomatic Handbook 1999: Japan's Diplomacy with Leadership toward a New Century*. Tokyo: Urban Connections, 1999.

Montague, Dena. "Stolen Goods: Coltan and Conflict in the Democratic Republic of Congo." *SAIS Review* 22, no. 1 (2002): 103–18.

Montaldi, Daniel F. "Toward a Human Rights Based Account of the Just War." *Social Theory and Practice* 11, no. 2 (1985): 123–62.

Moore Jr., Barrington. *Reflections on the Causes of Human Misery and upon Certain Proposals to Eliminate Them*. Boston: Beacon Press, 1972.

Morgenthau, Hans J. *In Defense of the National Interest: A Critical Examination of American Foreign Policy*. New York: Knopf, 1951.

———. *Politics Among Nations: The Struggle for Power and Peace*, 7th ed. Boston: McGraw Hill, 1993.

Morris, Madeline H. "Universal Jurisdiction in a Divided World: Conference Remarks." *New England Law Review* 35 (2001): 337–61.

Murphy, Sean D. *Humanitarian Intervention: The United Nations in an Evolving World Order*. Philadelphia: University of Pennsylvania Press, 1996.

Nardin, Terry. "Humanitarian Imperialism." *Ethics & International Affairs* 19, no. 2 (2005): 21–26.

———. "The Moral Basis for Humanitarian Intervention." In *Just Intervention*, edited by Anthony F. Lang, Jr., 11–27. Washington, DC: Georgetown University Press, 2003.

———. "The Moral Basis of Humanitarian Intervention." *Ethics and International Affairs* 16, no. 1 (2002): 57–70.

Nardin, Terry, and Melissa S. Williams, eds. *Humanitarian Intervention (NOMOS)*. New York: New York University Press, 2006.

Neal, Terry M. "Bush Reverts to Liberal Rationale for Iraq War; Critics Still Oppose War Despite Hussein's Human Rights Record." *Washington Post*, 9 July 2003.

Norman, Richard. *Ethics, Killing and War*. Cambridge: Cambridge University Press, 1995.

Nozick, Robert. *Anarchy, State and Utopia*. New York: Basic Books, 1974.

Nye, Joseph S. *The Paradox of American Power: Why the World's Only Superpower Can't Go it Alone*. Oxford: Oxford University Press, 2002.

———. *Soft Power: The Means to Success in World Politics*. New York: Public Affairs, 2004.

O'Connell, Mary Ellen. "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy," *Columbia Journal of Transnational Law* 36 (1998): 473–92.

Odell, S. Jack. *On Consequentialist Ethics*. London: Wadsworth, 2004.

O'Donnell, Peter. "NATO Reaffirms Kosovo Goals." *United Press International*, 20 April 1999.

Ojo, Bamidele A. *Problems and Prospects of Sustaining Democracy in Nigeria: Voices of a Generation*. Huntington, NY: Nova Science Publishers, 2001.

"Osama bin Laden Issues Warning to the West." *Telegraph*, 23 April 2006.

Penderson, Duncan. "Political Violence, Ethnic Conflict, and Contemporary Wars: Broad Implications for Health and Well-Being." *Social Science and Medicine* 55, no. 2 (2002): 175–90.

Penketh, Anne. "Rwanda Tries to Stop Killings in Darfur." *The Independent*, 27 September 2004.

Peters, John E., Stuart Johnson, Nora Bensahel, Timothy Liston, and Tracy Williams. *European Contributions to Operation Allied Force: Implications for Transatlantic Cooperation*. Arlington, VA: RAND, 2001.

Petitt, Philip. "Consequentialism." In *A Companion to Ethics*, edited by Peter Singer, 230–40. Oxford: Blackwell, 1993.

Philips, Michael. "Humanitarian Intervention and Moral Theory." In *Humanitarian Intervention: Moral and Philosophical Issues*, edited by Aleksander Jokic and Burleigh Wilkins, 71–92. Peterbourough, ON: Broadview, 2003.

Plattner, Denise. "The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflict." *International Review of the Red Cross*, no. 278 (1990): 409–20.

Pogge, Thomas W. "An Institutional Approach to Humanitarian Intervention." *Public Affairs Quarterly* 6, no. 1 (1992): 89–104.

———. "Cosmopolitanism and Sovereignty." *Ethics* 103, no. 1 (1992): 48–75.

Power, Samantha. "Dying in Darfur: Can the Ethnic Cleansing in Darfur be Stopped?" *The New Yorker*, 30 August 2004. http://www.newyorker.com/fact/content/?040830fa_fact1 (accessed 25 June 2006).

———. *A Problem from Hell: America and the Age of Genocide*. New York: Perennial, 2002.

"President's News Conference." *New York Times*, 22 February 1985.

Priest, Dana. "Bombing by Committee: France Balked at NATO Targets." *Washington Post*, 20 September 1999.

———. "United NATO Front was Divided Within." *Washington Post*, 21 September 1999.

Princeton Principles on Universal Jurisdiction. Princeton, NJ: Program in Law and Public Affairs, Princeton University, 2001.

Quiroga, Cecilia Medina. *The Battle for Human Rights: Gross, Systematic Violations and the Inter-American System*. Dordecht: Martinus Nijhoff, 1988.

Ramcharan, Bertrand G. *Human Rights and Human Security*. The Hague: Martinus Nijhoff, 2002.

Randall, Kenneth C. "Universal Jurisdiction under International Law." *Texas Law Review* 66 (1988): 785–841.

Ratner, Stephen R., and Jason S. Abrams. *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy*. 2nd ed. New York: Oxford University Press, 2001.

Rawls, John. *A Theory of Justice*. Cambridge: Harvard University Press, 1971.

Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon, 1979.

Reed, Laura W., and Carl Kaysen, eds. *Emerging Norms of Justified Intervention*. Cambridge, MA: American Academy of Arts and Sciences, 1993.

Reiss, Rena Hozore. "The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine." *Cornell International Law Journal* 20, no. 2 (1987): 281–315.

Reisman, W. Michael. "International Incidents." In *International Incidents: The Law That Counts in World Politics*, edited by W. Michael Reisman and Andrew R. Willard, 3–24. Princeton, NJ: Princeton University Press, 1988.

———. "Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention." *European Journal of International Law* 11 (2000): 3–18.

Reyntjens, Filip. "Briefing: The Second Congo War: More Than A Remake." *African Affairs* 98 (1999): 241–50.

Rieff, David. *A Bed for the Night: Humanitarianism in Crisis*. London: Vintage, 2002.

Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink, eds. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press, 1999.

Roberts, Adam. "NATO's 'Humanitarian War' Over Kosovo." *Survival* 45, no. 2 (1999): 102–23.

Robertson, Geoffrey. *Crimes Against Humanity: The Struggle for Global Justice*. New York: New Press, 1999.

Roht-Arriaza, Naomi. "The Pinochet Precedent and Universal Jurisdiction." *New England Law Review* 35 (2001): 311–20.

Ronzitti, Natalino. *Rescuing Nationals Abroad through Military Coercion and Intervention on the Grounds of Humanity*. Dordrecht: Martinus Nijhoff, 1985.

Roth, Kenneth. "The Case for Universal Jurisdiction." *Foreign Affairs* 80, no. 5 (2001): 150–54.

———. "War in Iraq: Not a Humanitarian Intervention." In *Human Rights Watch World Report 2004: Human Rights and Armed Conflict*, 13–33. New York: Human Rights Watch 2005.

Rubin, Alfred P. *Ethics and Authority in International Law*. Cambridge: Cambridge University Press, 1997.

Ruggie, John G. *Constructing the World Polity: Essays on International Institutionalization*. London: Routledge, 1998.

Ruggie, John Gerard. *Multilateralism Matters: The Theory and Praxis of Institutional Form*. New York: Columbia University Press, 1993.

———. "Multilateralism: The Anatomy of an Institution." In *Multilateralism Matters: The Theory and Praxis of Institutional Form*, edited by John Gerard Ruggie, 3–48. New York: Columbia University Press, 1993.

Rummel, R. J. *Death by Government*. New Brunswick, NJ: Transaction Publishers, 1994.

Sammons, Anthony. "The 'Under-Theorization' of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts." *Berkeley Journal of International Law* 21 (2003): 111–43.

Scarre, Geoffrey. *Utilitarianism*. London: Routledge, 1996.

Schabas, William. *Genocide in International Law: The Crime of Crimes*. Cambridge: Cambridge University Press, 2000.

Schabas, William A. "Hate Speech in Rwanda: The Road to Genocide" *McGill Law Journal* 46 (2000): 141–71.

Schachter, Oscar. *International Law in Theory and Practice*. Boston: Martinus Nijhoff, 1991.

———. "The Legality of Pro-Democratic Invasion." *American Journal of International Law* 78,, no. 3 (1984): 654–50.

Schnabel, Albrecht, and Ramesh Thakur, eds. *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*. New York: United Nations University Press, 2000.

Sebaoun, Florence. "Death Toll from Heat Wave in France Exceeds 14,000, Exceeding Prior Estimates." *Associated Press,* 25 September 2003.

Sen, Amartya. *Poverty and Famines: An Essay on Entitlement and Deprivation*. New York: Oxford University Press, 1981.

Sharp, Paul. "Herbert Butterfield, the English School and the Civilizing Virtues of Diplomacy," *International Affairs* 79, no. 4 (2003): 855–78.

Sharp, Walter Gary. "Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Force to Defend Kosovo." *Maryland Journal of International Law and Trade* 23 (1999): 295–330.

Shaw, William H. *Contemporary Ethics: Taking Account of Utilitarianism*. Oxford: Blackwell, 1999.

Shue, Henry. *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd ed. Princeton, NJ: Princeton University Press, 1996.

———. "Limiting Sovereignty." In *Humanitarian Intervention in International Relations*, edited by Jennifer M. Welsh, 11–28. Oxford: Oxford University Press, 2004.

Sidgwick, Henry. *The Methods of Ethics*, 7th ed. Chicago: University of Chicago Press, 1962.

Singer, Peter. *One World: The Ethics of Globalization*. New Haven, CT: Yale University Press, 2002.

Slater, Jerome, and Terry Nardin. "Nonintervention and Human Rights." *Journal of Politics* 48, no. 1 (1986): 86–96.

Slaughter, Anne-Marie. "Defining the Limits: Universal Jurisdiction and National Courts." In *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, edited by Stephen Macedo, 168–92. Philadelphia: University of Pennsylvania Press, 2004.

Soper, Philip. "Some Natural Confusions about Natural Law." *Michigan Law Review* 90, no. 8 (1992): 2393–23.

Steiner, Henry J., and Philip Alston. *International Human Rights in Context: Law, Politics, Morals* 2nd ed. Oxford: Oxford University Press, 2000.

Stromseth, Jane. "Rethinking Humanitarian Intervention: The Case for Incremental Change." In *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, eds. J.L Holzgrefe and Robert O. Keohane, 232–372. Cambridge: Cambridge University Press, 2003.

Stuart, Don. "Supporting General Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration." *Buffalo Criminal Law Review* 4 (2000): 13–51.

Sunga, Lyal S. *Individual Responsibility in International Law for Serious Human Rights Violations*. Dordrecht: Martinus Nijhoff, 1992.

———. *The Law of War and Peace*, trans. Louise R. Loomis. New York: Walter J. Black, 1949.

Tan, Kok-Chor. "The Duty to Protect." In *Humanitarian Intervention (NOMOS),* edited by Terry Nardin and Melissa S. Williams, 84–116. New York: New York University Press, 2006.

Tardu, Maxime. "UN Responses to Gross Violations of Human Rights: The 1503 Procedure." *Santa Clara Law Review* 20 (1980): 559–602.

Tavernise, Sabrina, and Donald G. McNeil, Jr. "Iraqi Dead May Total 600,000, Study Says." *New York Times.* 11 October 2006.

Tellis, Ashley J., Janice Bially, Christopher Layne, and Melissa McPherson. *Measuring National Power in the Postindustrial Age*. Santa Monica, CA: RAND, 2000.

Tesón, Fernando. *Humanitarian Intervention: An Inquiry into Law and Morality*. Dobbs Ferry, NY: Transnational Publishers, 1988.

———. "Ending Tyranny in Iraq." *Ethics & International Affairs* 19, no. 2 (2005): 1–20.

———. *A Philosophy of International Law*. Boulder, CO: Westview, 1998.

Thakur, Ramesh. "Western Medicine is No Cure for Darfur's Ills." *Financial Review,* 31 August 2004.

Sidhu, W. P. S. and Ramesh Thakur, eds. *The Iraq Crisis and World Order: Structural and Normative Challenges*. Tokyo: United Nations University Press, 2006.

Thom, William G. "Congo-Zaire's 1996–97 Civil War in the Context of Evolving Patterns of Military Conflict in Africa in the Era of Independence." *Journal of Conflict Studies* 19, no. 2 (1999): 93–123.

Thomas, Nicholas, and William T. Tow. "The Utility of Human Security: Sovereignty and Humanitarian Intervention." *Security Dialogue* 33, no. 2 (2002): 177–92.

Tucker, Robert W., and David C. Hendrickson. "The Sources of American Legitimacy." *Foreign Affairs* 83, no. 6 (2004): 18–32.

United Nations Development Programme (UNDP). *Human Development Report 1994*. New York: Oxford University Press, 1994.

U.S. Department of State. *Iraq: A Population Silenced*. Washington, DC: Bureau of Democracy, Human Rights, and Labor, December 2002.

Van Boven, Theo. "Distinguishing Criteria of Human Rights." In *The International Dimensions of Human Rights*, edited by Karel Vasak and Philip Alston, 43–59. Westport, CT: Greenwood Press, 1982.

Van der Vyver, Johan D. "Prosecution and Punishment of the Crime of Genocide." *Fordham International Law Journal* 23 (1999): 286–356.

Vasak, Karel, and Philip Alston, eds. *The International Dimensions of Human*. Westport, CT: Greenwood Press, 1982.

Vincent, R. J. *Human Rights and International Relations*. Cambridge, Cambridge University Press, 1987.

———. *Nonintervention and International Order.* Princeton, NJ: Princeton University Press, 1974.

Waldron, Jeremy. *Liberal Rights: Collected Papers: 1981–1991*. Cambridge: Cambridge University Press, 1993.

Walzer, Michael. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 1977.

———. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 3rd ed. New York: Basic Books, 2000.

———. "The Moral Standing of States: A Response to Four Critics." *Philosophy and Public Affairs* 9, no. 3 (1980): 209–29.

———. "No Strikes: Inspectors Yes, War No." *The New Republic*, 30 September 2002, 19–22.

Wasserstrom, Richard A. "Book Review: Just and Unjust Wars." *Harvard Law Review* 92 (1978): 536–45.

Watson, James Shand. *Theory and Reality in the International Protection of Human Rights*. Dobbs Ferry, NY: Transnational Publishers, 1999.

Watts, Sir Arthur. "The Importance of International Law." In *The Role of Law in International Politics: Essays in International Relations and International Law*, edited by Michael Byers, 5–16. Oxford: Oxford University Press, 2000.

Wedgwood, Ruth. "NATO's Campaign in Yugoslavia." *American Journal of International Law* 93, no. 4 (1999): 828–34.

Weiss, Thomas G., David P. Forsythe, and Roger A. Coate. *The United Nations and Changing World Politics*. 4th ed. Boulder, CO: Westview, 2004.

Welsh, Jennifer M., ed. *Humanitarian Intervention in International Relations*. Oxford: Oxford University Press, 2004.

Wendt, Alexander. *Social Theory of International Politics*. Cambridge: Cambridge University Press, 1999.

Wheeler, Nicholas J. "The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society." In *Humanitarian Intervention in International Relations*, edited by Jennifer M. Welsh, 29–51. Oxford: Oxford University Press, 2004.

———. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press, 2000.

Wheeler, Nicholas J., and Justin Morris. "Justifying the Iraq War as a Humanitarian Intervention: The Cure is Worse than the Disease." In *The Iraq Crisis and World Order: Structural and Normative Challenges*, edited by W. P. S. Sidhu and Ramesh Thakur, 444–63. Tokyo: United Nations University Press, 2006.

Wight, Martin. "International Legitimacy," *International Relations* 4, no. 1 (1972): 1–28.

———. "Why is there no International Theory?" In *Diplomatic Investigations*, edited by Herbert Butterfield and Martin Wight, 17–34. Cambridge, MA: Harvard University Press, 1966.

Williams, Paul D., and Alex J. Bellamy. "The Responsibility to Protect and the Crisis in Darfur." *Security Dialogue* 36, no. 1 (2005): 27–47.

Whitman, Jim. "Humanitarian Intervention in an Era of Pre-emptive Self-Defence." *Security Dialogue* 36, no. 3 (2005): 259–74.

World Health Organization. *World Report on Violence and Health*. Geneva: World Health Organization, 2002.

Treaties, Court Cases, UN Resolutions/Declarations, and other Legal Documents

African Union. Pledging Conference for the African Union Mission in Sudan: An Opportunity for Partnership for Peace. 26 May 2005, CONF/PLG/3(I).

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (Nuremburg Charter), 8 August 1945, UN Doc. 82 UNTS 280.

American Law Institute. Model Penal Code—Proposed Official Draft 1962.

Application of the Convention on Prevention and Punishment the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Order of the Court on Provisional Measures. 13 September 1993, ICJ Rep. 325.

Attorney-General of Israel v. Adolph Eichmann (*Eichmann*), District Court of Jerusalem, 12 December 1961, quoted in the International Law Reports 36 (1968).

AU Peace and Security Council. Communiqué of the Seventeenth Meeting. 20 October 2004, PSC/PR/Comm. (XVII).

Case of Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), (Merits), Judgment. 27 June 1986, ICJ Rep. 14.

Charter of the United Nations (UN Charter), 26 June 1945, Stat. 1031.

Constitutive Act of the African Union. 26 May 2001, OAU Doc. CAB/LEG/23.15.

Convention Against Torture and other Cruel, Inhumane or Degrading Treatment of Punishment (Torture Convention). 10 December 1984, 1465 UNTS 112.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. 2 December 1949, 96 UNTS 271.

Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). 9 December 1948, 78 UNTS 277.

Declaration of the Inadmissibility of Intervention and Interference in the Internal Affairs of States. 9 December 1981, UN Doc. A/RES/36/103, Annex II.

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. 21 December, 1965, GA Res. 2131 (XX).

Declaration on the Protection of All Persons from Enforced Disappearances, 18 December 1992, GA Res. 47/133, UN Doc. A/47/99.

Declaration on the Right to Development. 4 December 1986, UN Doc. A/RES/41/128.

Draft Code of Crimes against the Peace and Security of Mankind (Draft Code, 1996). Report of the International Law Commission on the Work of its Forty-Eighth Session, 1996, UN Doc. A/51/10.

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780. 27 May 1994, UN Doc. S/1994/674, annex, 13.

General Comment 3 of the Committee on Economic, Social and Cultural Rights, The Nature of State Parties' Obligations. 1990 (Fifth Session), contained in E/1991/23.

General Comment 4 of the Committee on Economic, Social and Cultural Rights, The Right to Adequate Housing. 1991 (Sixth Session), contained in UN Doc. E/1992/23.

General Comment 6 of the Human Rights Committee, The Right to Life. 1982 (Sixteenth Session), contained in UN Doc. HRI/GEN/1/Rev.1.

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 12 August 1949, 75 UNTS 31.

Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea. 12 August 1949, 75 UNTS 85.

Geneva Convention (III) Relative to the Treatment of Prisoners of War. 12 August 1949, 75 UNTS 135.
Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. 12 August 1949, 75 UNTS 287.
"Harvard Research Draft Convention on Jurisdiction with Respect to Crime," *American Journal of International Law* 29 Supplement: (1935): 439–636.
House of Representatives Report No. 237. 99th Cong. 1st sess., 1985, 63–73.
Inter-American Convention on Forced Disappearance of Persons. 28 March 1996, 33 ILM 1429.
Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780. 10 February 1993, UN Doc. S/25274, at 20.
International Covenant on Civil and Political Rights (ICCPR). 16 December 1966, 999 UNTS 171.
International Covenant on Economic, Social, and Cultural Rights (ICESCR). 16 December 1966, 993 UNTS 3.
International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention). 30 November 1973, GA Res. 3068 (XXVIII).
International Court of Justice, Decisions of the ICJ, List of Contentious Cases. http://www.icj-cij.org/icjwww/idecisions.htm (accesssed 15 September 2006).
International Military Tribunal (Nuremburg). Judgment and Sentences. Reprinted in *American Journal of International Law* 41, no. 1 (1947): 172–333.
International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991 (ICTY Statute). 25 May 1993, UN Doc. S/RES/827 and UN Doc. S/25704.
Official Records of the Third Session of the General Assembly, Part I, Summary Records of the Meetings of the Sixth Committee (GA Third Session. Paris: United Nations, 1948, 4–56.
Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity. 3 December 1973, GA Res. 3074 UN Doc. A/9030.
Prosecutor v. Bernard Ntuyahaga. Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999, ICTR-90–40-T.
Prosecutor v. Dragan Nikolic (*Nikolic*). Sentencing and Judgment. 18 December 2003, IT-94–2-S.
Prosecutor v. Dusko Tadic (*Tadic*). Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94–1-AR72.
Prosecutor v. Dusko Tadic. Opinion and Judgment. 7 May 1997, IT-94–1-T.
Prosecutor v. Dusko Tadic. Trial Chamber Opinion and Judgment. 7 May 1997, IT-94–1.
Prosecutor v. Jean-Paul Akayesu (*Akayesu*). Judgment. 2 September 1998, ICTR-96–4-T.
Prosecutor v. Radovan Karadzic and Ratko Mladic. Initial Indictment. 24 July 1995, IT-95–5, and 16 November 1995, IT-95–18.
Prosecutor v. Tihomir Blaskic. Judgment. 3 March 2000, IT-95–14-T.

Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts. 12 December 1977, 1125 UNTS 3.

Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts. 12 December 1977, 1125 UNTS 609.

Protocol Amending the Slavery Convention. 23 October 1953, 182 UNTS 51.

Regina v. Finta (*Finta*). 24 March 1994, Supreme Court of Canada, 1 SCR 701.

Report of the *Ad Hoc* Committee on Genocide, UN ESCOR, 7th sess., Supp. No. 6 (1948), UN Doc. E/794/Corr.1, 11–12.

Restatement (Third) of the Foreign Relations Law of the United States. American Law Institute, Tentative Draft No. 7, 1987.

Rome Statute of the International Criminal Court (Rome Statute), 17 July 1998, UN Doc. A/CONF.183/9.

Slavery Convention. 9 March 1927, 60 LNTS 253.

Statute of the International Court of Justice (ICJ Statute). 26 June 1945, 59 Stat. 1055.

Statute of the International Criminal Tribunal for Rwanda (ICTR Statute). 22 February 1995, UN Doc. S/RES/955.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. 7 September 1956, 226 UNTS 3.

United Nations General Assembly (UNGA). Report of the Joint Mission Charged with Investigating Allegations of Massacres and Other Human Rights Violations Occurring in Eastern Zaire since September 1996. 2 July 1997, UN Doc. A/51/942.

United Nations Information Organization (UNIO). *Documents of the United Nations Conference on International Organization*, 22 vols. New York: United Nations, 1945, vol. 1; vol. 3; vol. 6.

United Nations Security Council Resolution 788. 12 November 1992, UN Doc. S/Res/788.

United Nations Security Council Resolution 1132. 8 October 1997, UN Doc. S/Res/1132.

United Nations Security Council Resolution 1291. 24 February 2000, UN Doc. S/Res/1291.

U.S. General Accounting Office (USGAO) Report to Congressional Requesters. *Kosovo Air Operations: Need to Maintain Alliance Cohesion Resulted in Doctrinal Departures*. July 2001, GAO-01-784.

Universal Declaration of Human Rights (Universal Declaration). 10 December 1948, GA Res. 217 A (III).

Vienna Convention on the Law of Treaties (Vienna Convention). 23 May 1969, 1155 UNTS 331.

Index

A

Abu Gharib, prisoner abuse in, 125, 127
abuse, deliberate versus unintentional, 46–50
act-cons sm, 139–141
Afghanistan, U.S. invasion of (2001), *vii*, 127
African Union (AU), 121, 129–133
African Union Mission in Sudan (AMIS), 129, 131–133
agents of humanitarian intervention, 111–135
  and act-consequentialism, 139–140
  and characteristics of target of intervention, 134–135
  and consequentialism, 6–7
  credentials of the intervener, 112, 121–123, 133
  legitimacy of, 13–14, 114–116
  military capability of, 113
  and past practice of military intervention of, 122
  and prevailing political context, 112, 123–125
  requirements of ideal agent, 133
aid organizations, humanitarian, 7, 8
al-Qaeda, *viii*, 28
Albright, Madeline, 77
American Convention on Human Rights, 72, 160n58
Angola, and involvement in Zaire/DRC civil war, 130
Annan, Kofi, 76, 117
apartheid, 99, 101, 108
Aquinas, Saint Thomas, 2
Augustine, Saint, 2

B

Bashir, Omar, 125
Beitz, Charles
  and consequentialist reasoning, 31
  and just institutions theory applied to Iraq war, 29–30
  and theory of international cosmopolitan morality, 16–17, 19–20, 24–27
  and threshold criteria for intervention, 11, 33
Belgium, crimes against humanity legislation in, 98, 166n47
bin Laden, Osama, 128
Blair, Tony, 77

blue helmets (U.N.), 9–10
Bosnia
  application of universal jurisdiction to genocide in, 94
  and UN enforcement operations, 9
Bosnia and Herzegovina v. Serbia and Montenegro, 94
Brandt, Richard, 41
Brierly, J.L., 13, 82, 85, 86
Buchanan, Allen, 74
Bull, Hedley, 16, 116
Burundi
  humanitarian intervention in, 135
  and involvement in Zaire/DRC civil war, 130
Bush, George H.W., 75
Bush, George W., 28, 127

C

Cambodia, intervention in, 75, 76, 79
Canada, crimes against humanity legislation in, 98
Central African Republic, intervention in, 75
Chad, and involvement in Zaire/DRC civil war, 130
Charter, U.N. *See* United Nations Charter
Chesterman, Simon, 75
China
  internal legitimacy of, 122
  and Kosovo intervention, 141
civil war, 130, 154n35
Clark, Ian, 116
Clark, Wesley, 120
classical realism, 115
Clinton, William J. (Bill), 1, 76, 127
Cold War, 35, 116, 124
communitarianism. *See* statism
Congo, intervention in, 75
conscience shocking crimes, 22–24, 29, 33
consequentialism
  acts versus rules, 138–141
  and concept of just institutions, 34
  and concern for human security, 40–41
  defined, 4
  and deontological moral reasoning, 41
  and ethics of humanitarian intervention, 33–56
  and genocide, 95–96
  and human security, 12
  implications/advantages of, 52–54
  and power, 112–114
  as theory of the right, 40
  and threshold criteria for intervention, 41–52
contras, 71
Convention Against Torture, 66
Convention on Rights of Migrant Workers, 66
Convention on Rights of the Child, 66
Convention on the Elimination of Discrimination Against Women, 66
Convention on the Elimination of Racial Discrimination, 65
Convention on the High Seas, 74

cosmopolitanism
  Beitz's theory of cosmopolitan morality, 16–17, 19–20, 24–27
  consent as the basis for legitimacy, 19–20
  contrasted with consequentialism, 40
  critique of statism, 18–19
  defined, 11, 15–16
  overview of, 16–17, 19–20
  and U.S. invasion of Iraq (2003), 29–31
Crawford, Neta, 144

crimes
  categories subject to universal jurisdiction, 13, 93–109
  conscience shocking, 22–24, 29
  legal prioritization of, 88, 93
  against U.N. personnel, 164n32
  See also crimes against humanity
crimes against humanity
  apartheid, 99, 101, 108
  extermination, 97
  imprisonment, 99, 101, 108
  list of crimes (Rome Statute), 96–101
  murder, 97
  persecution, 99, 101
  rape, systematic, 97, 99
  slavery, 24, 99
  and universal jurisdiction, 13, 96–101, 109
customary law, 160n83
  as basis for humanitarian intervention, 12, 73–79, 81–82
  and NATO intervention in Kosovo, 76–79
  nationality principle, 88
  passive personality principle, 88–89
  protective principle, 89
  territorial principle, 88
  and universal jurisdiction, 88–89

D

Darfur, Sudan
  African intervention in, 129–133
  genocide in, 127–128
  normative theory applied to, 1, 10
  and obstacles to Western intervention, 126–129
  and problems of agency, 112, 122, 125–132, 137
  and U.S. lack of moral credibility, *viii*, 140
de Visscher, Charles, 16
de Vitoria, Francisco, 2
Declaration on Enforced Disappearances, 99
Demjanjuk extradition case, 94, 98
democratization, use of force to compel, 73
deontology, Kantian, 50–51
deportation, 98, 99
disease as human security issue, 37
District Court of Israel, 94
Dominican Republic, intervention in, 75
Donnelly, Jack, 120
Draft Convention on Genocide. *See* Genocide Convention

E

East Pakistan, intervention in, 75, 76, 77–79
Economic Community of West African States (ECOWAS), 75, 123
Eichmann, Adolph, 94, 98
Eichmann case, 94, 98
El Salvador, role in *Nicaragua* case, 71
English School, 10, 112, 115, 124
ethnic cleansing
  in Kosovo, 1, 76, 137
  as threat to human security, 36, 37
  as violation of basic human rights, 167n65
European Union (EU), 121
expulsion, large scale, 24, 150n30

F

famine
  deliberate perpetration of, 81
  in Sudan, 47–49
  as threat to human security, 37, 39, 40
  and U.S. failure to guarantee subsistence rights, 156n64

fit, concept of (Walzer), 18–19, 20–24, 28
food, right to, 49, 70–71, 81, 156n64
France, heat exposure deaths in (2003), 49
Franck, Thomas, 6
Fuller, Lon
  and customary rule applied to humanitarian intervention, 78
  and natural law theory, 58, 59–60, 61, 80
  and U.N. Charter rules on humanitarian intervention, 63, 64, 87

G

Gambia, role of in ECOWAS interventions in Africa, 123
Geneva Conventions, 168n79, 168n81, 168n83
  Common Article 3, 102–106, 108
  and large-scale abuse requirement for intervention, 104–105, 108–109
  and modern concept of war crimes, 101–103
  supplemental Protocols of, 102–106
  and universal jurisdiction, 89
genocide
  as basis for humanitarian intervention, 3, 656–8, 81, 828–3, 949–6
  as conscience shocking crime, 22, 24
  in Rwanda, 142
  and universal jurisdiction, 13, 88, 94–96, 109
  See also Genocide Convention
Genocide Convention, 69, 70, 80
  as basis for humanitarian intervention, 656–8, 81, 828–3, 94–96
  crimes constituting genocide, 166n47
Gerwith, Alan, 44
Ghana, role of in ECOWAS interventions in Africa, 123
Glennon, Michael, 140
global distributive justice, 16
Grenada, intervention in, 75
Grotius, Hugo, 2
Guantanamo Bay, prisoner abuse in, 125
Guinea, role of in ECOWAS interventions in Africa, 123

H

Haiti
  and UN enforcement operations, 9
  U.S. intervention in, 117
Harff, Barbara, 45
Hart, H.L.A., 58
High Commissioner for Refugees, 8
high seas, law of, 74, 87, 89, 163n13
Hobbes, Thomas, 36
Human Development Report (1994), 36
human goods, basic, 43–44, 53, 54, 99, 101
human rights
  and ethnic cleansing, 36, 37, 76, 167n65
  gross violations of, 155n56
  and human security, 34
  individual, 20
  jurisdictional principles of, 13
  legal prioritization of violations, 88
  legally-binding conventions on, 65–71, 160n58
  as means to achieving human dignity, 153n19
  moral concerns for, 38
  nonderogable rights, 69–70, 80, 81, 93, 164n28

prioritization of, 43, 69–70
provisions for in UN Charter, 63
socioeconomic rights, 173n64
and theory of statism, 21–22
Human Rights Covenants, 66, 68–71, 80
human security
consequentialist concern for, 33, 40–41, 112
defined, 12, 36, 38
goal of, 35–36
and individual quality of life, 36–37
maximizing, 38–39
as morally desirable, 34, 36–38
and threats against a government's own people, 37
and threats from external aggression, 37–38
humanitarian aid, 7, 8
humanitarian intervention
agents of, 6–7, 13–14, 111–135, 139–140
conscience shocking criteria for, 22–24
consequentialist nature of ethics, *ix*, 43–52
and crimes against humanity, 98–101
and customary law, 81–82
defined, 2, 7–8
deliberate versus accidental abuse, 46–50
as distinct from peacekeeping, 8–9
as distinct from rescue of nationals, 8
as distinct from UN enforcement operations, 9–10
expected outcome of, 45
and genocide, 95–96
goal of, 3
and Human Rights Covenants, 68–71
justifications of, 4
and large-scale human suffering, 44–45
legal basis of, 5, 57–83
as a moral dilemma, 15, 61
multi-disciplinary dimensions of, *ix*, 1–3, 10, 138–141, 144
and multilateral legitimacy, 117–120
and national security, *vii*
philosophical roots of, 2
as pretext for nonhumanitarian war, 6–7
as a punitive measure, 51–52
risks of, 34–35
and state interest, 143
and theory of cosmopolitanism, 15–20, 24–27, 29–31
and theory of statism, 15–24, 27–29
threshold criteria for, 33, 41–52, 139, 151n64
and universal jurisdiction, 85–109
and war crimes, 103–106
Hussein, Saddam, *viii*, 22, 28, 29, 52, 125, 127
hyperpuissance (hyperpower), 127

I

imprisonment, 98, 99, 101, 108
India, and intervention in East Pakistan, 76
institutional cosmopolitanism, 16
International Commission on Intervention and State Sovereignty (ICISS), 76, 148n17, 152n65
International Committee of the Red Cross (ICRC), 8, 101
International Court of Justice (ICJ)
Bosnia and Herzegovina v. Serbia and Montenegro case, 94, 142, 175n10
Nicaragua case, 71–73

International Covenant on Civil and Political Rights (ICCPR)
Article 4, 93, 164n28
nonderogation clause, 80, 81, 93
purpose of, 68–71
U.S. failure to ratify, 160n58
International Covenant on Economic, Social, and Cultural Rights (ICESCR)
core rights of, 707–1, 80, 81
purpose of, 68
U.S. failure to ratify, 173n64
International Criminal Court (ICC), 95–96, 102
International Criminal Tribunal for Rwanda (ICTR)
and customary law, 103
and deliberate abuse requirement for intervention, 105
and genocide, 94
and *Tadic* test, 100
International Criminal Tribunal for the former Yugoslavia (ICTY)
and customary law, 103
and deliberate abuse requirement for intervention, 105
and *Tadic* test, 100–101
and war crimes, 102, 106
international law, 56, 578–3
and consequentialism, 6
customary law, 73–79, 85
and NATO intervention in Kosovo (1999), 1
treaty law, 12, 74–75
International Law Commission (ILC) Draft Code (1996), 95, 98, 100, 102, 105
Iraq, U.S. invasion of (2003)
no-fly zones, 75
normative theory applied to, 10
punitive nature of U.S. invasion, 51–52
and sectarian strife, 42
and theory of cosmopolitanism, 29–31
and theory of statism, 22, 27–29
and U.S. moral credibility, *vii-viii*, 25, 126–129, 143
Israel, and the *Eichmann* case, 94

J

Jackson, Robert, 91
Janjaweed, 126
Johns Hopkins Bloomberg School of Public Health, 30
Journal of Conflict Studies, *xi*
Journal of Human Rights, *xi*
Just and Unjust Wars (Walzer), 11, 16
just institutions, 24–25, 29
just war theory, 2, 10, 12, 45, 113
Justice and Equality Movement (JEM), 125

K

Kabila, Laurent, 130
Kagame, Paul, 130
Kant, Immanuel, 33, 50–51
Karadzic, Radovan, 101
Kosovo, NATO intervention in (1999), *vii*, *viii*
costs of military intervention, 42
and customary law, 59, 76–77
intervention as violation of international law, 1, 137
legitimacy of intervention, 141–142
and multilateralism, 119–120
normative theory applied to, 10
and state interest, 143
and state modification of treaty law, 75

L

Lang, Tony (Anthony F.), 116
Lauterpacht, Hersch, 94

law
  moral significance of, 59–60
  role of, 5
law, customary. *See* customary law
law, international. *See* international law
law of nations, 2
Law of the Sea, 74, 87, 89
legal positivism, 10, 59, 148n12
legitimacy
  multilateralism, 117–120
  politics of, 114–116
  and power, 148n15
  quantitative dimension of, 117, 118
liberal statism. *See* statism
liberalism, 10
Liberia, intervention in, 75, 122–123, 135
Lithuania, crimes against humanity legislation in, 98

M

majority, tyranny of, 19
massacre, wholesale, 37
Médecins Sans Frontières, 8

military force
  capability of possible agents, 113–114
  indirect casualties of, 42
Military Staff Committee, 118
Mill, John Stuart, 19, 23
Milosevic, Slobodan, 119, 120
Mladic, Ratko, 101
moral reasoning, deontological, 41
morality, international, 89
morality of states theory. *See* statism
Morgenthau, Hans, 115
movement, freedom of, 167n68
multilateralism and legitimacy, 112, 117–120
murder, political, 53–54, 97, 99, 157n76

N

Namibia, and involvement in Zaire/DRC civil war, 130
Nardin, Terry, 23, 24
nationals, rescue of, 8
NATO
  and intervention in Bosnia (1993), 119
  and intervention in Darfur, Sudan, 128–129
  and intervention in Kosovo (1999), *vii, viii,* 1, 42, 76–77, 119–120, 142, 143
  moral credibility of, 121
  and UN enforcement operations, 9
natural law theory, 10, 58, 59, 61
Nicaragua case, 58, 71–73, 77, 80–81
Nigeria, role of in humanitarian interventions, 122–123
nonderogable rights, 69–70, 80, 81, 93, 164n28
nonintervention, principle of, 11, 16, 17, 19, 54, 55
norm carriers, 124–125
normative theory, 10
North Atlantic Council (NAC), 120
North Atlantic Treaty Organization. *See* NATO
North Korea, internal legitimacy of, 122
Ntuyahaga case, 95
Nuremburg Charter, 96, 98
Nuremburg tribunal, 91

O

Operation Allied Force, 1
Organization of American States (OAS), 121

P

Panama, intervention in, 75
partisanship in humanitarian intervention, 6–7
passive personality principle, 88–89
peacekeeping operations, 8–9
persecution, as crime against humanity, 98, 101
Pinochet case, 98
piracy and universal jurisdiction, 87, 89
Pogge, Thomas, 16
political repression, 3, 37
Political Theory and International Relations (Beitz), 19
pollution, environmental, 37, 39
poverty, 37, 39, 40
power and legitimacy, 114–116
Princeton Principles, 98, 105
procedural convenience, 89
proportionality, doctrine of (Tesón), 26, 27

R

rape, systematic, and universal jurisdiction, 99
Rawls, John, 16, 20, 25, 151n64
Reagan, Ronald, 72
realism, 10
Red Cross, International Committee of, 8, 101
Reiff, David, 144
Reisman, Michael, 65
Restatement (Third), 95, 98
rights
  basic (Shue), 32, 434–4, 154n43
  nonderogable, 69–70, 80, 81, 93, 164n28
  socioeconomic, 173n64
  subsistence, 49, 70–71, 81, 156n64
  See also human rights
Rome Statute, 96–101, 104, 105, 108
Ruggie, John, 117, 118
rule-consequentialism, 139–141
Russia, and Kosovo intervention, 141
Rwanda
  and application of universal jurisdiction to genocide, 94
  and intervention in Darfur, Sudan, 130
  and U.N. enforcement operations, 9, 142, 143
  undesirability of unilateral U.S. intervention in, 135
Rwandan Patriotic Front (RPF), 130

S

San Francisco Conference, 63–64
Sandinistas, 71, 72
Schachter, Oscar, 62
Secretary General. *See* United Nations Secretary General
security, human. *See* human security
Security Council. *See* United Nations Security Council
September 11 (9/11), *vii, viii,* 124–125, 127

Serbia-Montenegro, 49, 94, 141–142, 143, 175n10
  See also Kosovo, NATO intervention in (1999)
Shue, Henry, 32, 43–44, 154n43
Sierra Leone, intervention in, 75, 122–123, 135
Singer, Peter, 23, 86
Slater, Jerome, 23, 24
Slaughter, Anne-Marie, 89
slavery, 24, 99
Social Constructivist theory, 10, 124, 144
social contract, 18
Solana, Javier, 120

Somalia
and U.N. enforcement operations, 9
and U.S. intervention in, 143
South Africa, violent crime in, 54
Srebrenica, 119, 120
starvation, deliberately perpetrated, 47–49, 81, 156n64
state interest, 143
state, liberal theory of, 121
state sovereignty, doctrine of, 90–93, 163n18
statism
and conscience shocking crimes, 22–24, 29
contrasted with consequentialism, 40, 54
cosmopolitan critique of, 18–19
defined, 15–16
moral poverty of, 20–24
overview of, 17–19
and primacy of nonintervention, 11
right to community, 34
and U.S. invasion of Iraq (2003), 27–29
and Walzer's concept of "fit", 18, 20–24
Stromseth, Jane, 87
subsistence rights, 49, 70–71, 81, 156n64
Sudan, *viii*
famine in, 47–49
internal legitimacy of, 122
undesirability of unilateral U.S. intervention in, 135
See also Darfur, Sudan
Sudan Liberation Army, 125
Sudan People's Liberation Army (SPLA), 47

T

Tadic case, 95, 99, 103
Taliban, *vii*
Tanzania, 75, 76
terrorism, war on, *vii-viii*, 124–125, 144

Tesón, Fernando
and consequentialist reasoning, 26–27, 31
and cosmopolitan morality, 17
cosmopolitanism theory applied to Iraq war, 30–31
and moral significance of law, 59
on principle of nonintervention, 11, 16
and threshold criteria for intervention, 33
on the use of force to compel democracy, 73
torture
and deliberate abuse requirement for intervention, 49
and universal jurisdiction, 87, 89
Torture Convention, 89
treaties, human rights, 65–71, 80
treaty interpretation, 157n3
treaty law
and consequentialism, 12, 58
state modification of, 74–75

U

Uganda, intervention in, 75, 76, 79, 130
United Kingdom, 125, 129
United Nations
blue helmets, 9–10
crimes against UN personnel, 164n32
Department of Peacekeeping Operations (DPKO), 9–10
enforcement operations, 9–10, 63
and the Universal Declaration of Human Rights (UDHR), 5, 64–65, 158n25

United Nations Charter, 61–65, 68–70, 74–75, 78, 80, 81–82
and enforcement operations, 9–10, 118
and legal right to humanitarian intervention, 57–58
and principles of nonintervention, 5
and respect for human rights, 62–63
and universal jurisdiction, 86–87
and the use of force, 2, 12, 616–2
United Nations Convention on the Law of the Sea (UNCLOS), 74
United Nations Development Programme (UNDP), 36
United Nations Organization Mission to the Democratic Republic of the Congo (MONUC), 9
United Nations Secretary General, 98
United Nations Security Council
and authorization of intervention, 1, 137
and enforcement operations, 9–10, 63
and intervention in Rwanda, 142, 143
and Kosovo intervention (1999), 76–77
limitations to powers, 64
Military Staff Committee, 118
and multilateralism, 117
and Nigerian-led interventions, 123
United Nations Sixth Committee, 94
United States
and aid to Somalia, 143
intervention in Haiti (1994), 117
intervention in Kosovo (1999), *vii*, *viii*, 1, 135
invasion of Iraq (2003), *vii-viii*, 10, 125
moral credibility of, *viii*, 125, 126–129, 140, 143
and obstacles to intervention in Darfur, 126–129
and socioeconomic rights, 173n64
and unsigned human rights conventions, 160n58
See also Iraq, U.S. invasion of (2003)
Universal Declaration of Human Rights (UDHR), 5, 64–65, 158n25
universal jurisdiction, 85–109, 163n15, 163n17
categories of crimes subject to, 93–109
and crimes against humanity, 96–101
and crimes against UN personnel, 164n32
defined, 88
and genocide, 94–96, 165n45
international morality rationale, 89–90
and legal prioritization of crimes, 88, 93
passive personality principle, 94
protective principle, 94
state sovereignty, doctrine of, 90–93
susceptibility to abuse, 92
universality principle, 94
and war crimes, 101–106, 164n22
utilitarianism, 23, 27, 40, 41, 44, 151n64

V

Védrine, Hubert, 127
Vietnam, and intervention in Cambodia (1978), 75, 76
Vincent, R.J., 11, 16, 17
voting rights, infringement of, 3

W

Walzer, Michael
  concept of "fit", 18, 20–24
  and conscience shocking crimes, 22–23, 24, 33, 55
  and consequentialist reasoning, 31
  noninterventionist argument of, 11, 16, 19, 54, 55
  and state sovereignty, 36
  statism theory applied to Iraq war, 28–29
war crimes
  list of crimes (Geneva Conventions), 102–103
  and universal jurisdiction, 13, 101–106, 108–109, 163n17, 164n22
weapons of mass destruction (WMD), *viii*, 28, 125, 127
Wheeler, Nicholas, 115, 124
Wight, Martin, 115

Y

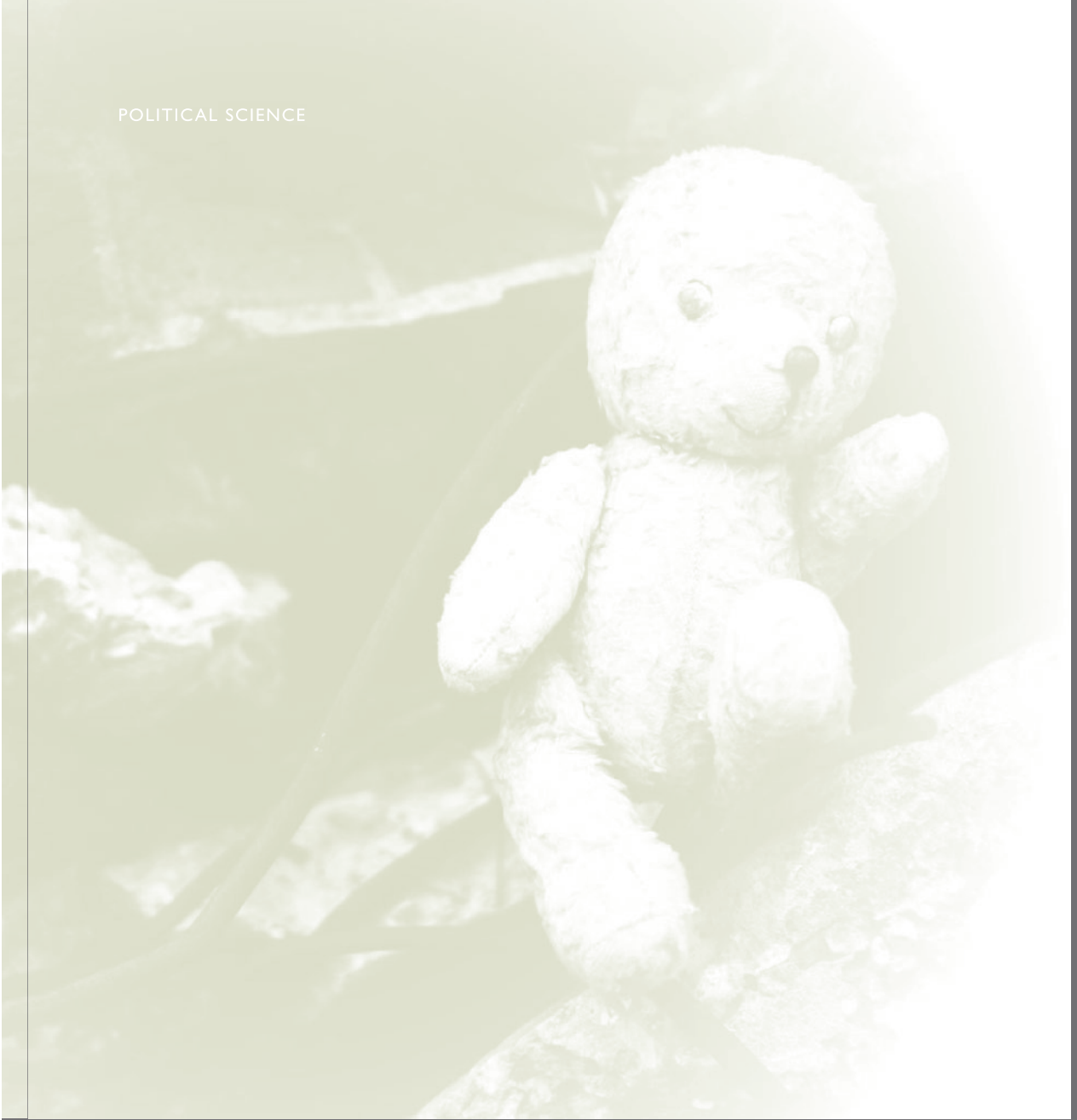
Yugoslavia
  See International Criminal Tribunal for the former Yugoslavia (ICTY); Kosovo, NATO intervention in (1999)

Z

Zaire/Democratic Republic of Congo (DRC)
  civil war in, 130, 135
  intervention in (1978), 75
Zimbabwe
  internal legitimacy of, 122
  and involvement in Zaire/DRC civil war, 130, 131

This page intentionally left blank.

POLITICAL SCIENCE



SUNY PRESS
State University of
New York Press
www.sunypress.edu

ISBN: 978-0-7914-7695-6
EAN
9 780791 476956
90000>