INTERNATIONAL LAW AND ITS OTHERS

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Reassessing international humanitarianism: the dark sides

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In the American foreign affairs tradition, the word 'humanitarian' signals at least five important commitments. First, a commitment to engagement with the world, engagement by our government and, perhaps more important, engagement by our citizenry. Secondly, a commitment to multilateralism and intergovernmental institutions. Thirdly, a renunciation of power politics, militarism and the aspiration to empire. Fourthly, a commitment to moral idealism and projects of ethical, spiritual and political betterment for other nations and the world – projects of moral uplift, religious conversion, economic development and democracy. Finally, a commitment to cosmopolitanism – attitudes of tolerance, moderation of patriotism and respect for other cultures and nations – an aspiration that we might rise above whatever cultural differences divide our common humanity.

At this quite general level, these are commitments shared by our allies in European international law, in the world of international human rights, and in the broad United Nations system. These are noble ideas. Yet the history of their transformation into international legal regimes is complex, and made more so by the tensions *among* these commitments, tensions that leave those who espouse them uneasy about the exercise of power and leadership in the world.

My intention here is to explore some of the difficulties that arise when humanitarian sentiments like these are transformed into legal and institutional projects in human rights, efforts to humanize global trade, and a century of humanitarian efforts to limit the violence and frequency of warfare. My basic argument is this: humanitarians are conflicted – seeking

* This chapter introduces themes developed in David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, 2004).

to engage the world, but renouncing the tools of power politics and embracing a cosmopolitan tolerance of foreign cultures and political systems. These conflicts have been built into the tools – the UN, the human rights movement, the law of force – that humanitarians have devised for influencing foreign affairs.

As a result, we humanitarians have a hard time acknowledging our own participation in rulership, preferring to think of ourselves off to one side speaking truth to power, or hidden in the policy apparatus advising other people, the princes, to humanize their means and ends. We commonly chalk any doubts up to the weaknesses of the humanitarian tradition – a meek David facing the Goliath of foreign policy establishments in a harsh world of power politics. But humanitarians increasingly provide the terms in which global power is exercised. We speak the same language as those who plan and fight wars, the language of humanitarian objectives and proportional, even humane means. Our legal and professional terminology has seeped into popular parlance – collateral damage, rules of engagement, humanitarian intervention, self-defence, collective security – and has become the vocabulary of governance. Human rights has elbowed economics aside in our development agencies, which now spend billions once allocated to dams and roadways on court reform, judicial training and 'rule of law' injection. The UN High Commissioner for Refugees designs and manages asylum and immigration policies with governments around the world.

Humanitarians need to face the dark sides of our humanitarian tradition by acknowledging costs that can sometimes swamp our activism and policy-making efforts. But our hesitation to see ourselves as powerful, as rulers, makes it difficult to look honestly at the consequences of our work and to take responsibility for the damage we sometimes do. In a word, to be responsible partners in governance, humanitarians should become more *pragmatic*, should do more to acknowledge and take responsibility for the costs as well as the benefits of their work.

But pragmatism also has its own limits. After sketching the sorts of costs and background considerations I propose humanitarians bring to the surface, I turn to the law of force to explore the limits of humanitarian pragmatism.

Before turning to war, I would like to look briefly at two quite familiar global humanitarian projects: the human rights movement, and efforts to soften the impact of global trade through the adoption of global labour and other social standards.

International human rights

Let me start by stressing that the human rights movement has unquestionably done a great deal of good, freeing individuals from great harm and raising the standards by which governments are judged. The human rights tradition makes a series of promises: to engage individuals directly, as activists and as victims, giving a global voice to individual pleas for justice; to give the non-governmental institutions of civil society a voice on the global stage, establishing, if you will, a humanitarian profession; and, most importantly, to establish a universal vocabulary for ethics – a value orientation for international law and foreign affairs.

These are enormously appealing ideas, but, when translated into governance, they also create costs. Human rights professionals I have known rarely place these costs centre stage, where they can be assessed and either refuted or taken into account. We discuss the dark sides only privately, often cynically, rarely strategically. Let me offer a brief list of the sorts of costs I have in mind.

I worry that the international human rights movement can occupy the field, crowding out other ways of pursuing social justice and other emancipatory vocabularies that may sometimes be more effective, such as religious vocabularies, local traditions, and tools focused more directly on economic justice or social solidarity. There are lots of ways to pursue social justice. Human rights is but one, and not always the most appropriate. I worry, moreover, that human rights, given its origins, its spokesmen, its preoccupations, has often been a vocabulary of the centre against the periphery, a vehicle for empire rather than an antidote to empire.

It is nothing new to point out how narrowly the human rights tradition views human emancipation by focusing on what governments do to individuals, on participatory rather than economic or distributive issues, and on legal rather than social, religious or other remedies. Problems that are hard to formulate as rights claims for individuals – collective problems, economic problems, problems of poverty or health – are easy to overlook. Emancipating people as rights holders, moreover, stresses their individual claims, their personal relationship with the state. This can encourage a politics of queue-jumping among the disadvantaged, propagating attitudes of victimization and entitlement while making cross-alliances and solutions that involve compromise and sharing more difficult.

I am concerned that human rights often excuses government behaviour by setting standards below which mischief seems legitimate. It can be easy

to sign a treaty and then do what you want. But even compliance may do more harm than good: a well-implemented ban on the death penalty, for example, can easily leave the general conditions of incarceration unremarked.

There is often a 'tips of the iceberg' problem – focus on the real problems of refugees can make it more difficult to contest the closure of borders to economic migration. Indeed, the legal definition of refugee has done as much to exclude people in grave need from protection as it has to legitimate UN engagement. Even Abu Ghraib – sexually humiliating, even torturing and killing prisoners – is not the worst or most shocking thing the coalition has done in Iraq. Our horror at the recent photos may also be a way of not thinking about other injuries, deaths and mutilations our government has wrought.

Human rights criticism can get us into things that we are not able to follow through on, such as by triggering interventions in Kosovo, Afghanistan and even Iraq with humanitarian promises that it cannot deliver. The universal vocabulary of human rights can seem to promise the existence of an 'international community' that is simply not available.

By defining justice as a relationship to the state rather than simply a condition in society, human rights can distract our attention from background norms and economic conditions that often do far more damage. Perhaps most disturbing, the international human rights movement often acts as if it knows what justice means, always and for everyone; all you need to do is adopt, implement and interpret these rights. But justice is not like that. People must build it anew each time, struggle for it, imagine it in new ways.

Of course, human rights professionals worry about these things, but they are terribly difficult to take into account, to weigh and balance against the real upsides of human rights work. It can be all too easy to say 'let us at least begin'. Normally, of course, such an attitude in government would be completely irresponsible. Imagine a proposed road. It will contribute to national welfare by creating jobs, improving traffic flow and stimulating economic growth. But, before the government builds the first mile, we expect it also to look into the costs of the endeavour, such as lost homes, neighbourhoods, increasing sprawl and environmental damage. Only when officials have done so, when the choices have been squarely faced and democratically made, do we expect the project to proceed.

The attitude 'let us at least begin' is possible only if we blind ourselves to the exercise of power, the governing, that the human rights activist or the policy-maker does, and if we deny that we have any responsibility

to take costs into account. Yet, when human rights initiatives succeed, when the movement gains power in the world, when our advocacy has an effect, we invariably create winners and losers. And human rights can be intoxicating precisely because it often works. Human rights has succeeded in becoming a vocabulary of power, a tool not only for a global village of NGOs, but also for George W. Bush, the World Trade Organization and Texaco.

It is common to attribute the costs of human rights advocacy to a misuse of the vocabulary. When President Bush drops bombs for human rights, we accuse him of misusing the concept. But we have worked hard to make human rights as user-friendly as possible. Where nails are bent, we may be right to look first to the carpenter, but sometimes the hammer is also off balance. We should be suspicious if custodians of the tools blame every downside on the carpenter, just as we would be suspicious were he to blame only his tools.

The most significant challenges for the human rights movement in the years ahead will not only be to address problems difficult to formulate as rights claims – collective problems, economic problems – but to understand what it means to be a participant in governance and not just a critic of it. If we are to be a responsible participant in power and to remain attentive to the downsides of promoting human rights, we must also focus on the quotidian routines of humanitarian work more than on the sporadic and symbolic. The prisoner of conscience released is an easily visible success of which human rights advocates should be proud. Incarceration legitimated is less visible, an ongoing and routine effect that is far more difficult to pinpoint and assess.

The significance of attention to background in assessing humanitarian initiatives is perhaps best illustrated by efforts to humanize trade flows through global labour and other social standards.

Humanitarianism and trade

In the field of trade, humanitarian voices have led us seriously astray. By and large, humanitarians have responded to the expansion of global commerce by seeking to preserve the potential for top-down public regulation. Where national regulatory capacity seems threatened by the opening of markets to foreign products, services, capital or labour, humanitarians have sought either to restrain these global flows or to develop international regulatory replacements for national social welfare arrangements. In doing so, humanitarians focus on *public* ordering, on the

visible machinery of national sovereignty and international institutional standard-setting. Virtually ignored is the world of background norms, such as private law, corporate standards, transnational administrative arrangements, and rules of corporate governance and liability.

Take the WTO. We have long known that in some sense, as the saying goes, 'fair trade is free trade's destiny'.[1] As tariffs came down, industrial nations began to challenge elements of one another's regulatory environment as 'non-tariff barriers to trade'. There seemed no natural limit to this practice, as the EU's legal order has amply demonstrated. It is an old legal realist insight, after all, that the reciprocal nature of a comparison between two legal rules or legal regimes makes it impossible to say which causes the harm, or which is 'discriminatory'. Is it the railroad's right of way that damages the farmer's wheat, or the farmer's property right that imposes cost on rail transport?

In the trade context, we might ask whether Mexico's low minimum wage (or failure to implement its own minimum wage scheme) is an unfair 'subsidy'; or whether Chinese manufacturers who benefit from non-enforcement of local law are 'dumping' when they export to American markets. But we might equally well ask whether it constitutes a 'non-tariff barrier', an unfair or unreasonable extraterritorial reach of US law, for the US to demand higher labour standards for production of goods to be imported to its market.

To decide, conventional legal analysis relies on an assumption about which legal scheme is 'normal' and which not. If farmers normally grow wheat, a new railroad may appear to impose the cost. If the difference between American and Mexican wages is 'normal', American efforts to raise Mexican standards will seem an abnormal non-tariff barrier. Deciding what is 'normal' and what is not is rulership – an unavoidable political decision about the allocation of costs.

The WTO provides a mechanism for settling disputes between nations when each asserts that its background rule is normal and that the trading partner is imposing unfair costs or offering unfair advantages. In processing routine trade disputes, the WTO system generates a string of decisions about globally tolerated levels of differentiation among labour and other regulatory standards. Meanwhile, however, humanitarians are struggling, largely in vain, for adoption of a 'social charter' within the

[1] Brian Alexander Langille, 'General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)' in Jagdish Bhagwati and Robert E. Hudec (eds.), *Fair Trade and Harmonization* (2 vols., Cambridge, MA, 1996), vol. II, pp. 231–66 at p. 236.

WTO, for new international 'soft law' social norms, for implementation of international economic and social rights. If only the international legal order were powerful enough, we moan, to take on the question of labour rights. But the international legal order is doing that every day as it provides an interface between national regulatory schemes. The difficulty is in finding opportunities for politically contesting the results it generates.

The Right has had no trouble focusing on the world of background norms by developing a complex network of financial and payment systems to facilitate the free movement of capital, extraterritorial uses of national regulation to combat terrorism or money-laundering, and more. Unfortunately, the humanitarian vocabulary has impeded similar work on the Left by focusing our attention on the foreground of public regulation.

Humanitarian efforts to restrain war

In thinking about human rights and trade, I have stressed the need for humanitarians to grasp the nettle of rulership and to be realistic about costs and benefits. The good at heart and the gentle in spirit should relate to power pragmatically, consequentially, functionally – in a word, *realistically*.

In many ways, the modern law of force represents a triumph of just this sort of pragmatism. Humanitarians have been 'realistic' and have successfully infiltrated the decision-making of those they would bend to humanitarian ends, yet something is still amiss. It turns out that the complex partnership – dance, even – between idealism and realism that has been the hallmark of twentieth-century international legal humanitarianism can be part of the problem as much as the solution.

Modern international law has offered two large visions for restraining warfare: 'law in war', the tradition of 'humanitarian law' itself, or jus in bello, limiting the use of force in war by outlawing weapons and providing standards for conduct on the battlefield and for the just treatment of casualties, prisoners and civilians; and 'law of war', rooted in 'just war' ideas, limiting the situations in which states can legitimately resort to force, a tradition that finds its best modern expression in the multilateral commitments and institutional framework of the Charter of the United Nations.[2]

[2] San Francisco, 26 June 1945, in force 24 October 1945, UKTS (1946) 67 ('UN Charter').

Humanitarian law: the law in war

The 'law in war' tradition, associated most prominently with the International Committee of the Red Cross, has always prided itself on its pragmatic relationship with military professionals. The most significant codifications have been negotiated among diplomatic and military authorities and codified as expressions of sovereign will. Of course, reliance on military acquiescence limits what can be achieved: military leaders outlaw weapons which they no longer need, which they feel will be potent tools only for their adversaries, or against which defence would be too expensive or difficult. Narrowly drawn rules permit a great deal, and they legitimate what is permitted.

Recognition of these costs is one reason pragmatism in international law has meant more than positivism, more than deference to sovereign consent, more than legal clarity and more than old-fashioned realism about the power of nation-states. Pragmatism has also meant *antiformalism.* Since at least 1945, a parallel vocabulary of principles has grown up alongside tough-minded military bargains over weaponry. The detailed rules of The Hague or Geneva have morphed into simple standards that can be printed on a wallet-sized card and taught to soldiers in the field. The means of war are not unlimited, and each use of force must be necessary and proportional – these have become the ethical baselines for a universal modern civilization. The move to principles has allowed the law in war to infiltrate the vocabulary of military professionals while blending smoothly with the new ethical vocabularies of human rights.

The vocabulary of standards accompanied the rise of courts and the inauguration of judicial review of battlefield behaviour. The laws of war are increasingly expressed in the language of criminal justice: war crimes, war criminals. This is also language that has merged with human rights. If states agree to treat prisoners of war humanely, should we not say that each prisoner of war has a *right* to humane treatment? For that right to have remedy and to be enforced, we will need courts. In the 1990s, ad hoc criminal tribunals were established in loose imitation of Nuremberg, and, in 1999, international humanitarians successfully promoted the establishment of a permanent International Criminal Court.

Today, we see this merger from the other side: terrorism migrating from the world of criminal law to that of war. The pragmatism of this new regime – as opposed to its idealism or its wishful thinking – lies in the transformation of the law in war from a system of restraint into a vocabulary for judgment, or, more accurately, for debates about judgment.

Rare is the commander who orders 'unnecessary', 'wanton' or 'disproportional' violence, if for no other reason than that doing so might waste ammunition. We do not need international law for what the military itself seeks. The real work begins where militaries disagree. Typically, it is the tactics of other forces that seem excessive. Wherever tactics seem extreme – carpet bombing, siege, nuclear first use, suicide bombing, terrorizing the civilian population – the condemnation and the defence seem to converge on the vocabulary of necessity, proportionality and so forth. Think of Hiroshima.

As a vocabulary for debate and judgment, the law in war offers the possibility of embracing the unavoidability of making trade-offs, balancing harms, accepting costs to achieve benefit – a calculus common to both military strategists and humanitarians. Just as military planners rarely order wanton violence, professional humanitarians no longer categorically preclude the use of force for humanitarian objectives. The point is to weigh and balance.

Take civilian casualties. Of course, civilians will be killed in war. Civilians are also part of the war machinery – they man factories, repair communications infrastructure and provide political and economic support for the regime. During the NATO bombardment of Belgrade, justified by the international community's humanitarian objectives in Kosovo, strategists discussed the targeting of those civilian élites most strongly supporting the Milosevic regime. If bombing the bourgeoisie would have been more effective than a long march inland towards the capital, would it have been proportional, necessary – humanitarian – to place the war's burden on young draftees in the field rather than on the civilian population whose actions caused them to be sent there? Some argued that targeting civilians supporting an outlaw (if democratic) regime would also extend the Nuremberg principle of individual responsibility. Others disagreed. But they were disagreeing in a common vocabulary.

Limiting civilian deaths has become a pragmatic commitment – *no unnecessary damage, not one more civilian than necessary.* All we need to do is figure out just what is necessary. This is the spirit in which every target in the Iraq conflict was pored over by lawyers. Or in which American Major General James Mattis, poised to invade Falluja, concluded his demand that the insurgents stand down with these words: 'We will always be humanitarian in our efforts. We will fight the enemy on our terms. May God help them when we're done with them'.[3]

[3] As quoted in Thom Shanker, 'US Prepares a Prolonged Drive to Suppress the Uprisings in Iraq', *New York Times*, 11 April 2004, p. 13.

But it is troubling that this so often has been a vocabulary for judgment of the centre against the periphery. When the Iraqi insurgent quoted on the same page of the *New York Times* as Major General Mattis threatened to decapitate civilian hostages if the coalition forces did not withdraw,[4] he was also threatening innocent civilian death – less of it actually – but without the humanitarian promise. When the poor deviate from the best military practices of the rich, we face a hard choice. Either their struggle is illegitimate, or their deviance is excused because we see them as 'backward', not yet up to the demands of humanitarian civilization.

In 1996, I travelled to Senegal as a civilian instructor with the US Naval Justice School to train members of the Senegalese military in the laws of war and human rights. At the time, the training programme was operating in fifty-three countries, from Albania to Zimbabwe. The training message was clear: humanitarian law is not a way of being nice. By internalizing human rights and humanitarian law, you will make your force interoperable with international coalitions, suitable for international peacekeeping missions. To use the sophisticated weapons we sell, we explained, your military culture must have parallel rules of operation and engagement to our own. Most importantly, we insisted, humanitarian law will make your military more effective – will make your use of force something you can sustain and proudly stand behind.

When we broke into small groups for simulated exercises, a regional commander from a border area plagued by guerrilla raids repeatedly asked the hard questions – when you capture some guerrillas and need to interrogate someone in a hurry, isn't it better to place a guy's head on a stake for deterrence? Well, no, our officers would patiently explain – this will strengthen the hostility of villagers to your troops – and imagine what would happen if CNN were nearby. They would laugh – of course, we must be sure the press stays away.

Ah, but this is no longer possible – if you want to play on the international stage, you need to be ready to have CNN constantly by your side. You must place an imaginary CNN webcam on your helmet, or, better, just over your shoulder. Not because force must be limited and not because CNN might show up – but because only force which can imagine itself to be seen can be enduring. An act of violence one can disclose and be proud of is ultimately stronger, more *legitimate.* This was a lesson apparently lost on those who considered the interrogation of 'high value targets' in our own war on terror. Nevertheless, the Senegalese had learned – as

[4] Christine Hauser, 'Iraqi Claims US and Falluja Foes Agree to a Deal', *New York Times*, 11 April 2004, pp. 1, 13.

Secretary of Defense Donald Rumsfeld now seems to be learning – what was required for a culture of violence to be something one could proudly stand behind. What was required, in a word, for warfare to be civilized.

But there is a further problem. The promise of weighing and balancing is rarely met. If you ask a military strategist, 'Precisely how many civilians *can* you kill to offset how much risk to one of your own men?' you will not receive a straight answer. He or she will say, 'It's a judgment call'. Indeed, there is no background exchange rate for civilian life. What you find instead are rules kicking the decision up the chain of command as the number of civilians increases, until the decision moves offstage from military professionals to politicians.

In the early days of the Iraq war in 2003, coalition forces were frustrated by Iraqi soldiers who advanced in the company of civilians. Corporal Mikael McIntosh reported that he and a colleague had declined several times to shoot soldiers for fear of harming civilians. 'It's a judgment call', he said. 'If the risks outweigh the losses, then you don't take the shot.' He offered an example: 'There was one Iraqi soldier, and 25 women and children, I didn't take the shot.'[5] His colleague Sergeant Eric Schrumpf jumped in to describe facing one soldier among two or three civilians, opening fire and killing civilians: 'We dropped a few civilians, but what do you do? . . . I'm sorry, but the chick was in the way.'[6]

There is no avoiding decisions of this type in warfare. The difficulty arises when humanitarian law *transforms decisions about whom to kill into judgments.*

When military planners say that every target was carefully evaluated for necessity and proportionality, the word 'evaluate' could cover a multiplicity of inquiries not undertaken. They did not, in fact, have a metric in mind for comparing enemy civilian lives with those of coalition pilots, or for factoring in future deaths from disease or anything else.

But neither did the humanitarians. If you ask leading humanitarian law experts how many civilians you can kill for this or that, you also will not get an answer. Rather than 'It's a judgment call', however, they are likely to say something like, 'You just can't target civilians' – thereby refusing to engage in the pragmatic assessments necessary to make that rule applicable in combat.

In psychological terms, it is hard to avoid interpreting this pragmatism-promised-but-not-delivered as a form of denial: a denial of participation

[5] Quoted in Dexter Filkins, 'Either Take a Shot or Take a Chance', *New York Times*, 29 March 2003, pp. A1, B4 (emphasis added).

[6] *Ibid.*

in the war machine. Schrumpf 'dropped a few civilians' as an exercise of '*judgment*'. Humanitarians are free to be horrified – civilians are inviolable. But saying so denies the partnership with military and political authority they have carefully built for more than a century. Effects *are* hard to calculate, but they are not hard to imagine. Is it responsible not to take them into account? To turn from judgment precisely when the principle begins to bite?

The military's *own* culture of discipline can be difficult for civilians to grasp. It is part bureaucratic necessity, part instrumentalism, central to the effectiveness of the mission and to the safety of colleagues. All this is wrapped in honour, integrity, in a culture set off from civilian life, a higher calling.

Although military discipline is a social production, it is also, and perhaps more importantly, a work on the self. The US Army runs a recruitment commercial which implores 'become an army of one'.[7] The promise is power, to be sure. But also discipline – self-discipline. If you join, you will be transformed inside – *you* will become an army, coordinated, disciplined, your own commanding officer, your own platoon, embodying within yourself the force of hundreds because of the work you will do, and we will do, on you.

Of course, there is opportunity for individual judgment, error. Soldiers who run amok. We remember the pilots who flew beneath the Italian ski-lift, slicing the cables. Or the precision guided missile fired in Kosovo with the tail fins put on backwards – spinning ever further from its programmed target until it exploded in a crowded civilian marketplace. The American pilots who bombed their Canadian allies. Or, for that matter, My Lai, the abuse of prisoners in Baghdad, and all the other tales of atrocity in war.

But it is not clear that humanitarianism offers any more workable limits than military discipline – indeed, it may be the opposite. Take the Abu Ghraib photos. The humanitarian tradition offers us two quite different vocabularies for reacting to the photographs, neither satisfactory.

First, instrumentalism. 'The idiots! This will undermine the whole project.' And so it has. But the military knows this – they don't need international law for that. International law may well help drive such photographs underground.

Or, secondly, moral outrage. We have repeatedly heard it said that the administration was shocked by the photos. Perhaps, but, again, this is not the most shocking thing to have occurred. And, were they really shocked?

[7] US Army, 'How to Join', http://www.goarmy.com/contact/how_to_join.jsp (accessed 1 November 2005).

If Rumsfeld was indeed shocked, might he not be just a bit too naïve to be entrusted with taking the country to war? He was shocked as we all were, in part because the violence was gratuitous, unnecessary . . . And, of course, because it was photographed. But was it really not necessary? How effective *is* humiliation as an interrogation technique? How does it compare to sleep deprivation – which is more humane?

I was struck that Iraq war reporting was filled with anecdotes about soldiers overcome by remorse at having slaughtered civilians – and being counselled by their officers, their chaplains, their mental health professionals, who explained that what they had done was necessary, proportional, and therefore just.[8]

When soldiers are tried for breach of military discipline, their defence is often *stronger* under the vague standards of international humanitarian law than under national criminal or military law. We should remember that the now infamous Justice Department memo was not only a brief against application of international law to the American executive – it was also an interpretation of what international law permits and can legitimate.[9] Indeed, the standards of self-defence, proportionality and necessity are so broad that they are routinely invoked to refer to the zone of *discretion* rather than limitation. I have spoken to numerous Navy pilots who describe briefings filled with technical rules of engagement and military law. After the lawyer leaves, the commanding officer summarizes in the empowering language of international law – 'just don't do anything you don't feel is necessary, and defend yourself – don't get killed out there'.

After the Gulf War, it was widely acknowledged that the decision to take down the electrical grid by striking the generators had left power out for far longer than necessary, contributing to unsanitary water supply and the unnecessary death of many tens of thousands from water-borne diseases such as cholera and typhoid.[10] Military planners now readily admit this was a mistake – and they have revised their procedures accordingly. In

[8] For an account of this kind of counselling, see for example John Brinsfield, 'A War without End', *New York Times*, 26 May 2003, p. A15.

[9] Office of Legal Counsel, Department of Justice, 'Memorandum for Alberto R. Gonzales Counsel to the President: Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A' (1 August 2002), as reproduced in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (New York, 2005), pp. 172–217 at pp. 184–91.

[10] See World Health Organization, 'Potential Impact of Conflict on Health in Iraq' (March 2003), discussing the impact of the Gulf War on water supply and health; Harvard Study Team, 'Special Report: The Effect of the Gulf Crisis on the Children of Iraq' (1991) 325 *New England Journal of Medicine* 977 at 978–9; Alberto Aschiero *et al.*, 'Effect of the Gulf War on Infant and Child Mortality in Iraq' (1992) 327 *New England Journal of Medicine* 931 at 934–5.

Kosovo, and now Iraq, such a devastating blow to the electrical grid was not struck. But they will *not* say that the Gulf War strike lacked proportionality or necessity, or that it was excessive given what they knew then and what they were trying to achieve. These legal standards remain the solid ground on which their acts, and the deaths of many thousands, can remain legitimated.

The law of war

From at least the mid-seventeenth century, 'just war' doctrines have addressed the causes as well as the conduct of war. It is not clear, of course, that the 'unjust' war idea ever really limited the use of military force. We can easily imagine just war doctrine having done less to restrain than to encourage war by de-legitimating the enemy and justifying the cause. In any event, in the nineteenth century world of increasingly autonomous national states, the distinction between just and unjust war faded, a casualty of a loss of faith among policy élites in the plausibility of natural law limits on statecraft. International law had very little to say about the decision to go to war, a silence rooted in the assumption that war was an unrestrained prerogative of sovereign power. The modern law of war is a century-long reaction against this nineteenth-century legal silence, rooted in jurisprudential frustration with conceptualism and formalism, and promoted by successive generations as a turn to realism, to pragmatism, and to engagement with the world of politics.

After the First World War, international law took a historic turn – a move, we might say, from doctrine to institutions. Through the League of Nations, the global community could sanction and deter aggression and provide a framework for the peaceful settlement of 'disputes'. After the Second World War, again in the name of pragmatism, this scheme matured into a comprehensive constitutional system. The UN Charter aimed to establish an international monopoly of force and placed responsibility for maintaining the peace with the Security Council. War was prohibited, except as authorized by the UN Charter. Not as authorized *by the UN*, but as authorized by the *Charter*.

The Charter, like a constitution, is drafted in broad strokes. Force is permitted in 'self-defence'.[11] Or when authorized by the Security Council.[12] Or when the use of force does not threaten the territorial integrity of a state,[13] thus exempting civil war and internal strife from international

[11] UN Charter, Art. 51. [12] See *ibid.*, Art. 42. [13] See *ibid.*, Art. 2(4).

scrutiny. Or when compatible with the 'purposes of the United Nations',[14] thus opening the door for humanitarian intervention, anti-colonial wars of liberation, and intervention for democracy.

Like any complex constitutional order, this scheme would need to be interpreted and kept up to date in a changing political world. And it was repeatedly reinterpreted. Other than the first Gulf War, no military conflict since 1945 has gone off precisely as envisioned in San Francisco. We might blame the Cold War for 'departures' from the original Charter – but the result has also been a remarkable achievement of legal imagination. Increasingly permissive interpretations of the Charter have been developed and defended in functional, pragmatic and realist styles of analysis familiar from American postwar constitutional law. What began as an institutional effort to monopolize force became a constitutional regime to legitimate justifications for warfare.

This modern vocabulary of force has a jurisprudence, an attitude about the relationship between law and power. Oscar Schachter gave perhaps the best description in his eulogy for Dag Hammarskjold, who epitomized the new jurisprudential spirit. It is worth quoting at length:

> Hammarskjold made no sharp distinction between law and policy; in this he departed clearly from the prevailing positivist approach. He viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and directions of collective action . . . It is also of significance in evaluating Hammarskjold's flexibility that he characteristically expressed basic principles in terms of opposing tendencies (applying, one might say, the philosophic concept of polarity or dialectical opposition). He never lost sight of the fact that a principle, such as that of observance of human rights, was balanced by the concept of non-intervention, or that the notion of equality of states had to be considered in a context which included the special responsibilities of the great Powers. The fact that such precepts had contradictory implications meant that they could not provide automatic answers to particular problems, but rather that they served as criteria which had to be weighed and balanced in order to achieve a rational solution of the particular problem . . . He did not, therefore, attempt to set law against power. He sought rather to find within the limits of power the elements of common interest on the basis of which joint action and agreed standards could be established.[15]

[14] See *ibid.*

[15] Oscar Schachter, 'Dag Hammarskjold and the Relation of Law to Politics' (1962) 56 *American Journal of International Law* 1 at 2–5, 7.

Following Hammarskjold we increasingly understand international affairs as a conversation among players – national states, private actors, intergovernmental organizations, courts, legislatures, military figures – about the legitimacy of state behaviour. Conversing before the court of world public opinion, statesmen not only assert their prerogatives, they also test and establish those prerogatives through action. Political assertions come armed with little packets of legal legitimacy, just as legal assertions carry a small backpack of political corroboration. As lawyers must harness enforcement to their norms, states must defend their prerogatives to keep them. They must back up their assertions with action to maintain credibility. A great many military campaigns have been undertaken for just this kind of credibility: missiles become missives.

In a conversation about legitimacy, everything depends on audience reaction. How, for example, should one weigh civilian casualties? From the military point of view, they should be taken as heavily as they would de-legitimate the campaign. We can imagine calculating a 'CNN effect', in which the additional opprobrium resulting from civilian deaths, discounted by the probability of their becoming known to relevant audiences, multiplied by the ability of that audience to hinder the continued prosecution of the war, will need to be added to the probable costs of the strike in calculating its proportionality and necessity.

The 'international community' of professional humanitarians becomes a stand-in for the views of this broader public, a proxy for the CNN effect. In this, of course, the humanitarian participates in deciding how many civilians to kill. But there is more. To function as a proxy, humanitarian judgment must in fact match that of the broader public. The hope is that promoting humanitarianism will alter future CNN reactions. As a result, it makes sense to *enchant humanitarian tools*. For example, the existence of an international criminal court can seem more significant than whether using it after any particular massacre promotes or retards humanitarian objectives on the ground. Indeed, it is important not to find out how the costs would net out. Finding out could undermine the vocabulary of humanitarianism itself.

Looked at this way, the strategic choices are strikingly similar to those faced by military planners. We must weigh current deaths against future humanitarian gains, or future humanitarian losses against civilians saved today. Before interpreting humanitarian obligations more strictly than the military does, we might calculate a *reverse CNN effect*: the additional opprobrium resulting from our seeming unrealistic, discounted by the probability of its becoming known to relevant audiences, multiplied by the ability of those audiences to deny support to our ongoing institutional efforts to promote humanitarianism. This must be weighed against the upside of our ability to de-legitimate this particular military action.

Like the military planner, we must decide when to draw down and when to pay into our legitimacy stockpile – and therefore when to accept civilian casualties as necessary for longer-term objectives. In such a calculation, it can easily seem more important to promote the humanitarian vocabulary than to use it, particularly if using it might entangle it in the pros and cons of a contentious military campaign.

Although humanitarians talk about the long-run benefits of building up the UN system or promoting the law of force, they do not make these kinds of calculations. Belief in the humanitarian project seems enough. Current costs are discounted, future benefits promised. It is as if there were nothing to weigh against expansion of humanitarian institutions and ideas, no civilians who needed to be allowed to die for the legitimacy of the UN. In this, we depart from pragmatic calculation altogether and enter the domain of ***absolute virtue.***

Yet there is no doubt that this system has legitimated a great deal of warfare. Indeed, it is hard to think of a use of force that could not be legitimated in these terms. It is a rare statesman who launches a war simply to be aggressive. There is almost always something else said – the province is actually ours, our rights have been violated, our enemy is not in fact a state, we were invited to help, they were about to attack us, we are promoting the purposes and principles of the UN.

And there is the problem of institutional fetishism. For a time in 2003, the question of whether war would be humanitarian seemed less significant than that the dispute over its legitimacy be held in the UN. But would the situation really have been all right had France gone along? France had done so in the first Gulf War, and the 'coalition of the willing' continues to rely on this acquiescence to legitimate invasion in the second. And the war would not have made any more sense had it been approved by the UN apparatus.

The Charter scheme also has the unfortunate effect of changing the subject by making it more difficult to address the motives for a war and to devise alternatives. Let us take Deputy Secretary of Defense Paul Wolfowitz at his word. Let us say that after 9/11 we needed a completely new political and military strategy for dealing with the Middle East, for maintaining security at home, and for protecting oil supplies. And it is, of course, completely legitimate for Western political leaders to worry about a stable

oil supply; they would be abdicating their responsibility were they not to do so. Let us say, moreover, that these ends could no longer be ensured in a region of unstable though friendly dictatorships. Let us say it was necessary to 'change regimes' from eastern Turkey to western Pakistan. Indeed, let us go further and say that only by changing regimes throughout the region could a stable and just peace be achieved for Israel and Palestine. This set of ideas has true humanitarian appeal: democracy and middle class stability for millions.

Notice, however, how difficult it is to discuss these ideas. Ideas about sovereignty and the limits of the Charter, alongside core humanitarian commitments to the renunciation of empire and the vocabulary of power politics, all render the desire to change regimes undiscussable.

If we go back six or eight months before the Iraq war, the Bush team did defend their proposed Iraq policy in these terms: we must change their regimes and bring them to market, to democracy, and, of course, to heel. Then they tried to enlist the UN, where no project defended in such terms could get a hearing. So they focused instead on Saddam Hussein – his threat to his neighbours, his violations of international law, his weapons of mass destruction and his defiance of the UN inspection teams.

We might see this as a great triumph for international law in establishing a new basis for the coalition's work and a new standard for measuring the success of the venture. But it was also a way of changing the subject. It focused attention on weapons – which, when not forthcoming, delegitimated the entire enterprise. It focused attention on Saddam Hussein, whose capture made the occupation seem ready to be wrapped up. It reinforced the idea that Iraqi sovereignty was a significant and fixed star.

This frame makes it difficult to talk about the ongoing and legitimate ways in which supposedly sovereign regimes are already entangled with one another. The Charter vocabulary makes it difficult to acknowledge that we – our economy, our government, our international financial institutions, our media, our humanitarian agencies – influence regimes across the globe every day. We make their governments accept structural adjustment policies, open their markets, exploit their resources and change their cultures. Wilful blindness to this ongoing entanglement makes it difficult to see how long, how intense and how expensive our intervention would need to be to accomplish anything like Wolfowitz's objectives. It makes it all too easy to think that our intervention in Iraqi affairs began with the invasion and will end with the handover of 'sovereignty'. It has prevented the emergence of a nuanced vocabulary for thinking about the

economic side of the story. What development policy for Iraq will come with the invasion? Humanitarians have been too busy debating last year's intelligence reports about weapons of mass destruction to notice.

In short, our humanitarian vocabulary gave progressives and Europeans an easy and irresponsible way out. We never needed to ask, *how should* the regimes in the Middle East – our regimes – be changed? What is the humanitarian way to proceed? Is Iraq the place to start? Is military intervention the way to do it? Can it be done?

And what would it mean for Europe to take the global challenges of terrorism and Middle Eastern instability as seriously as they did the collapse of the Soviet world? Might they draw on Europe's own experiences with 'regime change' along its borders – in Spain, Portugal and Greece in the 1980s, the old East Germany in the 1990s, and now the ten new European Union member states in Central and Eastern Europe?

The World Bank reports that the promise of membership in the EU, along with the plodding process of accession negotiations, has a better track record for transforming governance in transitional and less developed countries than anything tried elsewhere. The prospect of assimilation into EU legal and political structures can concentrate the mind. No factor has been more significant than the allure of Europe in breaking the Cyprus deadlock and easing relations between Turkey and Greece.

Imagine the Europeans extending that promise to countries of the Middle East, beginning with accession negotiations for Turkey, followed by an offer to put Morocco, Jordan and Tunisia on the road to membership. There is no reason to think Israel and Palestine and even Iraq and Syria might not eventually respond to the allied promises of belonging, respect and market access. We would never have predicted Muammar Gaddafi meeting with EU President Romano Prodi in Brussels either.

Membership does not happen all at once. It is preceded by years of preparatory negotiations and reforms, and followed by transition periods that can last for decades. The EU, moreover, is a collage of varied legal arrangements. Workers from the new members will not enjoy free movement for years, and their farmers may never enjoy the rich flow of subsidies that have supported agriculture in the West.

Extending the European deal of peaceful coexistence and reform through legal and economic integration would be expensive, but not by comparison to the Iraq war or the efforts Europe has already taken along its borders. The expansion of NATO and the expansion of the EU each cost Europeans more than Americans have spent on war and occupation in Iraq, already topping US$200 billion.

But Europe would also need to think in global rather than regional terms. Until now, European governments have only been willing to spend such sums close to home, integrating the former East Germany, ensuring the cohesion of poorer regions, supporting European farmers as markets opened, and preparing the European East for membership.

Unfortunately, Europe thinks about Europe and about the broader world in different terms. The vocabulary of legal, economic and political community gives way on the global stage to the old language of multilateralism and international law. Europe urges us to respect Iraqi sovereignty, making it all too easy to think our intervention in Iraqi affairs began with the invasion and will end with the handover of 'sovereignty'. Europe encourages us to use the UN and to think of global policy as a combination of short multilateral police actions and humanitarian assistance.

These, however, are not the tools they use in Europe. There they focus on economic prosperity, legal security, democratic governance and cultural integration with the West. Indeed, the middle powers persist in thinking their internal affairs follow a different logic from the international world. Their pragmatism is a tale of two architectures, European and global.

But the UN world of independent sovereigns is an increasingly dangerous fantasy. The West – our economies, our governments, our international financial institutions, our media, our humanitarian agencies – is deeply entangled with regimes across the globe.

It now seems clear that Iraq was not the right place to begin and war was not the right instrument. But it was surely right that we could no longer afford to rely on the stability of shaky dictatorships across the Arab and Islamic worlds that cannot provide for the basic welfare of their citizens. Europe understands this for Europe, and Europe could help us on the global stage by applying the lessons of its own recent history. Regime change through law rather than force, and through European law rather than UN law. And economic development through phased accession to the complex internal regime of the most advanced economies rather than military intervention, humanitarian assistance and market shock.

It has become routine to say that international law had little effect on the Iraq war – arguments by a few international lawyers that the war was illegal failed to stop the Bush Administration and its allies, who were determined to go ahead regardless, and who had, after all, their own international lawyers. But this lets international law off the hook too easily. The laws of force are not the only rules that affect the legitimacy, violence and incidence of war. The military conducts its campaigns in

the shadow of endless background rules and institutions of public and private law, national and international. If we expand the aperture from the decision to invade, then war looks ever more to be a product of law: the laws in war that legitimated targeting, the laws of war that provided the vocabulary for assessing its legitimacy, the laws of sovereignty that defined and limited Saddam's prerogatives and have structured the occupation, not to mention commercial rules, financial rules and private law regimes through which Iraq gamed the sanctions system and through which the coalition built its response. The UN law of force makes these background rules seem matters of fact rather than points of choice.

We act as if we lived in a roiling world of power, which we struggle vainly to cover in a veil of legal rules. But the situation is more the reverse – a global thicket of legal rules and institutions with only the slightest opportunities for political engagement or contestation. An effective humanitarianism will need to find space in that world for political struggle if we are to become responsible protagonists over the terms and future of global justice.

Conclusion

Where does this leave the humanitarian objective to beat swords into ploughshares? About where Clausewitz left it when he wrote: 'Is not War merely another kind of writing and language for political thoughts? It has certainly a grammar of its own, but its logic is not peculiar to itself.'[16]

Humanitarians and military officers now speak the same pragmatic language of legitimate objectives and proportional means. We have met the empire, and it is us. After more than a century of insistent demands that humanitarians face the need to weigh and balance, and that the military become a civilized profession of discipline and instrumental calculation, it is hard to think how else we would want them to speak about the use of force.

Humanitarians have come into rulership. They have become, in a word, political. Yet modern humanitarianism remains a Gordian knot of participation and denial, wilful blindness posing as strategic insight. Just when we have gotten in the door and found them speaking *our language*, we turn back. Drop this bomb, here? Kill those people, there? No, we prefer to think of ourselves as outside power, judging the powerful, opposing government, speaking to it with the truth of law or ethics. Despite a century's

[16] Carl von Clausewitz, *On War* (trans. J. J. Graham, 3 vols., London, 1908), vol. III, p. 122.

work of pragmatic renewal, humanitarianism still wants to be outside of power, even if the price is ineffectiveness. Or better, it wants to seem pragmatic and effective while continuing to be experienced as outside power – effectiveness without responsibility.

The Democratic Party in the US excoriates the Bush Administration's foreign policy – its militarism, its lack of attention to human issues of poverty and health, its disengagement from multilateral institutions, its unwillingness to renounce the language of and aspiration to empire. But, if the Democrats had been elected, what exactly would be different? What do they now propose to do about the humanitarian, political and economic disaster that is the contemporary Middle East? Nothing expensive. Nothing that disturbs their ambivalence about exercising global power. Nothing that would change any regimes.

The problem on the Left is not an unwillingness to be tough or macho – humanitarians have advocated all manner of forceful action in the name of humanitarian pragmatism. The problem is an unwillingness to do so *responsibly*, facing squarely the dark sides, risks and costs of what we propose. Humanitarians have become partners in governance but have not been able to accept politics as our vocation.

I would like to end with a list of suggestions – or maxims or heuristics – to help international humanitarians who wish to develop such a posture.

1. *International humanitarianism is powerful*

Every international humanitarian practice I know presents itself as weak, needing fealty, barely able to hold its own against the world of power. We think of ourselves in terms of identifying with the dispossessed and marginal. We fall easily for the idea that we must refrain from deconstructing what has hardly been built. Instead, I propose that we foster our will to power and embrace the full range of our effects on the world.

2. *Indeed, international humanitarianism rules*

There is scarcely a humanitarian practice that does not act as if governance were elsewhere – in government, statecraft, the member states, the states parties, the Security Council, the field, the headquarters, the empire. And yet we *do* rule. We exercise power and affect distributions among people. Let us no longer avert our eyes from humanitarian rulership.

3. *The background is the foreground*

International humanitarians think we know where politics happens: in the public institutions that host an explicit clash of ideological positions and social interests. Yet decisions taken by experts managing norms and institutions in the background of this public spectacle are usually more significant. To hear the workings of these gears, we must mute the clamour calling us to identify power with the sites of conventional politics. Public ceremonies, theatrical commitments and magic incantations, even of human rights, do not bring justice. Justice must be made by people in their background vocabularies, each time for the first time.

4. *Weigh outcomes, not structures*

We have focused on structures – institutions, constitutions – rather than outcomes. We have preferred procedures to substance. We have substituted the forms of political organization for the experience of political life. Let us rather heat up our politics and acknowledge our conflicts about consequences, our uncertainty about what to do, and our realization of the necessity for responsible decision.

5. *It's not about 'intervening'*

Imagine an international humanitarianism that took a break from preoccupation with the justifications for 'intervention', no longer imagined the world from high above as the 'international community', and instead saw itself in a location as one interest, one culture, among many. Such a humanitarianism might avoid fantasies of a costless, neutral engagement in faraway places. It might more easily acknowledge its part in the quotidian and its ongoing responsibility.

6. *Ask not for whom the humanitarian toils*

Humanitarians think we speak truth to power as representatives of someone else – the under-represented, the powerless, the victimized, the voiceless. But we have enchanted the unrepresented, have acted as if speaking for them absolved us of responsibility. Let us speak in our own name, remembering that we, like they, are uncertain where virtue lies. Doing so might centre us in governance as people with projects, with our feet to the fire of participation in power.

7. *Tools are tools*

We have treated our norms as true rather than as reminders of what might be made true. We have substituted multilateral decisions for humanitarian decisions, and the work of the UN for humanitarian work. We have mistaken a pragmatic vocabulary of instrumental reason for responsibility. The idolatry of tools disguises itself as the wisdom of the long run. But let us assess those long-term promises with cold and disenchanted eyes.

8. *Progress is not programme*

Every humanitarian discipline I have encountered has a shared sense of its own progressive history. International law is 'primitive' and must be allowed to mature before it can bear the scrutiny of criticism. Progress narratives give direction to our work, but they also still our hand with the easy promise that humanitarianism will be achieved in the final days. Only by forgoing dreams of progress can we live again in history, as responsible for what we do next as for what they did before.

9. *Humanitarianism as critique*

We have used criticism but we have not been critical. We have treated criticism as an instrument to return us to our ideals or to perfect our assessment of consequences. Imagine a humanitarianism whose knowledge was critique, human rights not as a codification of what we know justice to be but as a lexicon for criticizing the pretences of justice as it is. Imagine human rights training in critical reasoning, with treaty instruments reminding us to ask again what justice requires. Imagine a humanitarianism that invigorated our political life for heterodoxy.

10. *Decision, at once responsible and uncertain*

As international humanitarians, we have sought power but have not accepted responsibility. We have claimed to know when we were unsure. We have advocated and denounced while remaining content that others should govern. We have made policy while turning our eyes from consequences.

The most difficult heuristic is this: to take responsibility for more than we can see. Imagine a humanitarianism that embraced the act of

decision – allocating stakes, distributing resources, making politics, governing, ruling – with all the ambivalence and ignorance and uncertainty we know as humans. A humanitarianism that no longer spoke as if we knew but did not act, and instead acted as if we governed and were not sure.

There is freedom here – the freedom of discretion, of deciding in the exception, a human freedom of the will. It is at once pleasurable and terrifying. It entails responsibility to decide for others, causing consequences that elude our knowledge but not our power. I imagine this humanitarianism in the language of spirit and grace, at once uncomfortable and full of human promise.