

Just War and Human Rights: Fighting with Right Intention

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ABSTRACT

Under the nonideal conditions of our world, war is sometimes morally permissible, perhaps even required. Just war theory aims to make sense of this. It does so, on my view, by allowing war only if pursued with ‘right intention.’ In order permissibly to go to war, a state must not only have a just cause and limit its war-making activity to that necessary to vindicate the just cause, both required in order to engage in war with ‘right intention,’ but it must also seek to vindicate its just cause in a manner likely to yield a ‘just and lasting peace.’ To fight without or unconstrained by this latter aim is to fight without the required ‘right intention.’ A lasting peace is not possible unless certain standards of basic justice are secure. These include those given by human rights, by principles of political self-determination and international toleration, and by the recognition of international responsibilities to protect. I argue further that these norms governing ‘right intention’ should be realized as international legal norms.

My aim is to make the case for some needed reforms to just war theory in order to give more adequate content to the idea that war is impermissible unless it is engaged and fought and concluded with ‘right intention.’ Aligning the just war tradition with human rights is essential because human rights constitute the core of international justice. Securing and respecting human rights; protecting noncombatants from the residual effects of war during the postwar period; tolerating illiberal but decent regimes; allowing for reasonable political self-determination; establishing when military intervention in accordance with the Responsibility to Protect is required; and updating, facilitating, and adjudicating a revised Fourth Geneva Convention that better protects civilians, can all be argued for as necessary if force is to be governed by a ‘right intention’ oriented toward peace with justice.

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INTRODUCTION

The nonideal conditions we face often involve conditions or circumstances of unjust international attacks and/or unjust domestic institutions that might seem to call for war as a just response. While war might be permissible as a response to severe injustice, there are limits on the conduct of war even when it is permissible (or even required) as a response to severe injustice. A state pursuing a just war must do so with ‘right intention.’ The idea of right intention is the overarching constraint on war (that has been developing over the last century); a right intention aims at a just and lasting peace. A lasting peace is not possible unless certain standards of basic justice are secure.

The aim of my dissertation is to explore certain key elements of the claim that a just war is one fought with the right intention of not only vindicating a just cause and doing so in a just manner but also reliably serving as a means to a just and lasting peace. Fighting with right intention and establishing conditions for a just and lasting peace demand certain reforms to just war theory. Establishing a lasting peace is predicated on safeguarding basic human rights, fidelity to the principle of noncombatant immunity, political self-determination and international toleration, and the recognition of the international responsibilities to protect. I argue further that these norms governing right intention should be realized as international legal norms.

Just war theory has been a part of Western political philosophy for the past two thousand years. Theologians such as St. Ambrose, St. Augustine of Hippo, St. Thomas Aquinas, and Francisco de Vitoria as well as the jurist Hugo Grotius and the philosopher Emmerich de Vattel have been the frontrunners in advancing moral arguments (regarding obligations, restrictions, and proscriptions) that states and their armies should abide by in the three phases of war: before,

during, and after. More specifically, just war theory establishes a moral framework regarding when the use of force is not only morally justified (such as self-defense) but also sets limits to the destructive acts of war by appealing to standards of conduct that incorporate discrimination, proportionality, and necessity. Just war theory also frames what is morally required of the victor and vanquished regarding rebuilding, reparations, and reconciliation during the postwar period.

Contemporary just war philosophers such as Michael Walzer, Brian Orend, Jeff McMahan, and Larry May have made considerable contributions to the just war tradition. Contemporary human rights philosophers such as Henry Shue, Allen Buchanan, Charles Beitz, and David Reidy have made considerable contributions to political philosophy. My dissertation is an amalgamation of their work. More than any other philosopher, John Rawls has significantly influenced my view. Rawls's perspective in *The Law of Peoples* relating to human rights and just war is the template for my work, and I believe that in order to improve upon the just war tradition, honoring basic human rights has to be a central theme, because human rights are a class of rights that play a special role in foreign policy: "They restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy."¹ I take Rawls's articulation of traditional principles of justice (in particular the right to self-defense and observing certain restrictions in war and the honoring of human rights) that can reasonably be accepted by states that are neither internally aggressive toward their own citizens nor externally aggressive toward other states as my guide.

The human rights movement has marked the latter half of the last century and shows little sign of losing its history shaping force. Political control of a territory and population no longer guarantees the moral right to non-intervention. Although this was thought sufficient to

¹ John Rawls, *The Law of Peoples*, (Cambridge: Harvard University Press, 1999), 79. This is just one view of human rights and their role, and the view that I endorse.

underwrite political sovereignty and so a right to non-intervention, it is now thought merely necessary. The additional requirement of meeting basic human rights is also necessary. The idea of sovereignty is still tied to the right to non-intervention. However, we have come to recognize/accept that sovereignty is something that depends on certain moral conditions being met to include basic human rights being reasonably safeguarded. In addition, resorting to war for reasons of self-defense does not just entail fighting until a state's rights have been vindicated. Rather, "the aim of a just war waged by a just well-ordered people is a just and lasting peace."²

Aligning the just war tradition with the norm of right intention is essential in order to set conditions for a just and lasting peace. There can be no lasting peace without justice, and justice is predicated on the fulfillment of human rights which constitute the core of international justice. Unjust war, oppression, and genocide arise from unjust state institutions. Hopefully, by engaging in discourse about right intention we can determine what "policies and courses of action are morally permissible and politically possible as well as likely to be effective"³ in our long-term goal of reaching a stable and peaceful international global order. A just war tradition that places significant emphasis on human rights can be squarely made part of a state's foreign policy.

Although the nonideal conditions that we face present some demanding challenges, I cannot take up all just war issues, but I want to address key issues. These issues are pressing now and can all be argued for from the root idea that if force is to be governed by a right intention oriented toward peace with justice, various reforms are required.

I will focus on four main issues: that just war is governed by an overarching principle of right intention; that the residual effects of war continue to kill civilians after the fighting is over,

² Ibid., 94.

³ Ibid., 89.

so there are obligations to mitigate these harms; that states are morally required to intervene when a state has failed in its responsibility to protect its own citizens' physical security, subsistence, and basic liberty rights; and that the Fourth Geneva Convention needs to be updated in order to reflect right intention and the human rights movement.

First, right intention is what unifies *ad bellum*, *in bello*, and *post bellum* (of, in, and after phases of war). A state with right intention establishes conditions for a just and lasting peace by respecting human rights, taking due care to insulate civilians from the harms of war, allowing for political self-determination, and by educating its military and political culture. Furthermore, a state's public acts are evidence of its intention. There is no way to determine if a state actually fights with right intention without looking at the totality of its conduct.

Second, we need to address what we owe to the civilians of a state with which we are militarily engaged. The old notion of noncombatant immunity needs to be rethought within the context of both human rights and into the postwar phase. For instance, although the laws of war declare the utmost protection of civilians, in modern war more civilians have died than soldiers. This has been the case in World War II (not even including the Holocaust), the Vietnam Conflict, the Persian Gulf War, the Second Iraq War, and in the current conflict in Afghanistan. Over the past century, tens of millions of civilians have been killed in warfare.

Although military technological advances have grown leaps and bounds in the last 30 years with the development and use of precision strike weapons (smart munitions, laser guided bombs, and unmanned aerial vehicles (drones)), even in the 21st century, conservative estimates suggest that civilian deaths in war are at least fivefold to that of soldiers killed. Overwhelmingly these high death rates (in the wars over the past 10 years) are not from civilians being

intentionally targeted by military forces but from the residual effects of war, many of which stem from the targeting of dual purpose facilities.

No doubt, civilians will be killed in war. However, much more can be done during and after the fighting to protect civilians' basic human rights from the ills of war. I argue for making belligerents accountable *ex post* by requiring them to repair destroyed dual purpose facilities that are essential for securing basic human rights of the civilian populace. I argue also that a belligerent's targeting decisions should be reviewed *ex post* by an impartial commission.

Third, the Responsibility to Protect (R2P) is the doctrine that supports intervention into a state that has failed (whether deliberately or not) to reasonably protect a group of its citizens' physical security rights. However, civilians—whatever their religious, national, ethnic, or racial group—have the basic human right to not only physical security but also subsistence and basic liberty. The idea is that rights entail duties, and that the duties must be assigned to determinate parties but that they may be assigned to parties in a kind of order. For example, the duty falls first to X, but if X fails, then the duty falls to Y (as a back-up addressee), and so on. States have the initial duty to protect the human rights of persons within their borders and then back-up duties to protect the human rights of persons outside of their borders. When there is a systematic and widespread manifest failure to protect citizens from grievous harms, other states are obligated as back-up addressees to protect and aid those people.

Although a state loses its moral right to non-intervention because it has committed acts that violate its citizen's physical security, subsistence, or basic liberty human rights, only physical security violations (i.e., genocide, war crimes, crimes against humanity, or ethnic cleansing) entail possible military intervention. My view is that to have a right to non-intervention a state must secure basic human rights, but that it does not follow from its lack of a

right to non-intervention that any particular intervention is morally permissible or required. It only follows that an intervention would not violate the state's right to non-intervention since it does not have one. When states violate basic liberty rights and/or subsistence rights but not basic physical security rights other states might permissibly intervene but only through less intrusive measures (public condemnation, economic sanctions, etc.). A state losing its moral right to non-intervention because it committed acts of genocide does not entail that this is a sufficient condition for required military intervention. Rather, military intervention is required and so permissible only if a number of further necessary conditions are fulfilled. The only sufficient condition is the fulfillment of all the necessary conditions.

Lastly, the Fourth Geneva Convention (which is the convention that specifically deals with the treatment of civilians during and after war) needs to be updated and revised. It can be argued for from the root idea that if force is to be governed by right intention oriented toward peace with justice, then the Fourth Geneva Convention is currently inadequate because it does not reflect current human rights practices and standards which are essential if our goal is establishing conditions for a just and lasting peace. Just like human rights should be realized not only as moral but also as (international) legal rights, so too the norms of just war that follow from right intention should be realized. Just war norms should not only be realized as moral norms but as (international) legal norms to point parties more squarely toward justice and because without legal embodiment justice becomes more difficult to secure or maintain.

Additionally, the UN is the appropriate institution not only to facilitate this process but also to play a role in institutionally expressing and adjudicating the relevant treaty. First, the UN is the global structure that specifically deals with fostering the cooperation of states regarding

issues of peace and security. Second, the UN should monitor and report compliance failures much like the UN already does when it comes to grave human rights violations.

To some considerable degree my just war perspective is inevitably tied to and has been shaped by being a US soldier for over the last twenty years. Although I take up some just war issues that might have some reference to the point of view of a US soldier, what I propose is my own view and not that which is representative of all US soldiers or even the US government. I do though reference key examples from US history as a way to help substantiate certain claims that I make. These empirical facts are important because they provide real world situations that allow us to realize moral obligations that might otherwise go unnoticed.

Although there are plenty of other examples, I lean on mostly US based examples predominately because those examples are not only applicable but also I am most familiar with US based operations based on my background. In addition, being a member of the US Army I am better qualified to critique, criticize, and commend the organization that I am a part of than a foreign military of which I have never served. However, just because most of my examples are US based does not suggest that right intention and the philosophical advancements that I propose do not apply to other states and other wars.

I recognize that a complete account of proposing to reorient just war theory around a particular idea of what it means to fight with right intention would need to address examples outside US history and issues (e.g., nuclear weapons, supreme emergency, outlaw regimes at war with one another, etc.) beyond those that I currently address. For now, I have limited aspirations but hope in the future to pursue these other areas which fighting with right intention would also regulate.

The aim of this dissertation is not that this is last word about fighting with right intention but rather the starting point from which I hope further discussion will follow; and my hope is that the exploration of what fighting with right intention entails leads to improvements in just war theory.

CHAPTER 1

Right Intention and a Just and Lasting Peace

Historically, the norm of *right intention* has been a constitutive part of the *ad bellum* phase of just war theory, and “aims to overcome the possibility that a state may have a just cause, but still act from a wrong intention.”¹ Wrong intentions aim or intend acts or effects (e.g. punishing the state one is at war with, using the resources of that state, causing more destruction than what is needed, or pursuing a war longer than is necessary) that are not warranted by and do not serve to vindicate a state’s just cause.²

Having a just cause does not necessarily entail that the state leaders and citizens will not have ulterior motives. A state can have a just cause and yet (its leaders and/or citizens) still hope for, perhaps even be moved by a desire for, many other results (securing of other national interests: maintaining open sea lanes, stabilizing the world’s oil supply distribution, and having more influence in regional or global politics) in addition to vindicating its just cause. Achieving these other types of ends does not seem particularly problematic as long as these results and the means to achieve them are not inconsistent with the norm of right intention. If vindicating a just cause with right intention can possibly be expected to bring other goods, then those are acceptable.

Although right intention has habitually been tied to just cause as a way to ensure that the fighting is only conducted long enough to vindicate the rights that were originally violated, this cannot be all that ‘right intention’ entails. Fighting with right intention is not merely a matter of

¹ Annalisa Koeman, “A Realistic and Effective Constraint on the Resort to Force,” in *Journal of Military Ethics*, (Vol. 6, No. 3, 2007), 201.

² “Having the right reason for launching a war is not enough: the actual motivation behind the resort to war must also be morally appropriate; the only right intention allowed is to see the just cause for resorting to war secured and consolidated” (*Stanford Encyclopedia of Philosophy*, < <http://plato.stanford.edu/entries/war/#2.1>>).

having a just cause and fighting with the intention to vindicate one's just cause. On my view, 'right intention' is a separate requirement from just cause, with its own content. In order permissibly to go to war, a state must not only have a just cause and limit its war-making activity to that necessary to vindicate the just cause, but it must also seek to vindicate its just cause in a manner likely to yield a 'just and lasting peace' which is the overarching result at which acts of war must always be directed. In order to establish conditions for a just and lasting peace, there are two elements that need to be addressed.

These two elements—peace and justice—place their own constraints and requirements on just war theory. Intended aims of war are 1) those that derive from the requirement that states aim at peace (fighting with restraint, immunizing civilians from the harms of war, and educating its military); and 2) those that derive from the requirement that states aim at justice (fighting only until the rights that were violated have been vindicated, respecting human rights, leaving its enemy in a position to secure human rights, allowing for political self-determination, tolerating regimes that honor basic human rights, and supporting a public political culture that adheres to just war).

This chapter aims to accomplish the following: 1) to establish that a state with right intention fights only as necessary to vindicate a just cause in a manner likely to yield a just and lasting peace; 2) to show that public acts are decisive as evidenced criteria of right intention; 3) to specify that a state with right intention establishes conditions for a just and lasting peace by a) respecting human rights, b) taking due care to insulate civilians from the harms of war, c) allowing for political self-determination, and d) educating its military and political culture; and

4) to demonstrate that there is no way to assess whether a state fights with right intention without looking at the totality of its conduct.³

1) General Conduct Required for a Just and Lasting Peace

In addition to having a just cause and limiting its fighting to the vindication of that just cause a state must fight with right intention and this means that it must, generally speaking, fight only as necessary and with constraint and with an eye towards peace. A belligerent must think about a wide range of longer term impacts of their fighting, because any acts that “unnecessarily increase the destruction and bitterness of war endanger the prospects for true peace.”⁴ The main point, as John Rawls notes, is that since “The way a war is fought and the deeds done in ending it live on in the historical memory of societies,”⁵ overly aggressive and indiscriminate attacks will undermine peace and future relations with the state one is currently at war with. States must not fight in a way likely to poison future relations, but rather their actions must be aimed at peace. Future justice requires peace and trust and a shared commitment to the priority of certain norms and human rights.

A state abides by right intention by vindicating the wrong that is its just cause which means requiring “that it behave in a certain way, specifically, that it do no more in the war than what would be consistent with that goal.”⁶ Moreover, Steven Lee remarks “The state’s actions should not go beyond those necessary to achieve that intention.”⁷ This perspective is also echoed in the US Catholic Bishops’ letter: *The Harvest of Justice is Sown in Peace*. “Even in the midst

³ In section 2, I address the fact that public acts are our best evidence for interpreting a state’s intention, whereas in section 4, I make the case that an overall assessment regarding if a state has met the requirements of right intention can only be done after the totality of a state’s conduct has been completed.

⁴ William O’Brien, *The Conduct of Just and Limited War*. (New York: Praeger Publishers, 1981), 34.

⁵ John Rawls, *The Law of Peoples*, (Cambridge: Harvard University Press, 2002), 96.

⁶ Steven Lee, *Ethics and War: An Introduction*, (Cambridge: Cambridge University Press, 2012), 84.

⁷ Ibid.

of conflict, the aim of political and military leaders must be peace with justice, so that acts of vengeance and indiscriminate violence, whether by individuals, military units or governments, are forbidden.”⁸

Although violent acts are pursued, each state should attempt to maintain a peaceful disposition which will facilitate a continuation of negotiations between states. Fighting must be conducted in a way that allows for a conclusion other than unconditional surrender. Acts of war that continue beyond what is necessary or continue even though the rights that were originally violated have been vindicated violate right intention.⁹ Any excessive and wanton violence

⁸ *The Harvest of Justice is Sown in Peace*, (<<http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/the-harvest-of-justice-is-sown-in-peace.cfm>>).

⁹ Unconditional surrender of the Nazi regime was a necessary and a morally justified undertaking. In addition to the blatant acts of aggression, the Nazi regime propagated hatred toward some non-Aryans and was responsible for not only the murder of certain groups within its own borders (mentally disabled, homosexuals, Jews, and Catholic clerics) but also incorporated a genocide campaign that killed millions of Jews and Slavs. Some historians see Germany's aims as globally, ultimately. However, other historians believe that Germany never intended to take over the world. Its realist aims were in conquering Europe, North Africa, and western Russia. For example, Germany's objectives in the East were “first, the destruction of the Russian armies in western Russia; and then an advance into Russia deep enough to secure Germany against the risk of air attack from the east, carried as far as a line from Archangel to the Volga” (Liddell Hart, *History of the Second World War*, (New York: Da Capo Press. 1970, 144). It is hard to imagine that Germany had any desire to push the bounds of its empire further east than the Volga River or that it would have attempted a cross-Atlantic invasion into the US. Although Nazi Germany's aims could have been more limited than what some have suggested, Germany's sovereignty was not recognized by the Allies. Nazi Germany's sovereignty was not recognized as legitimate because of its evidenced and repeated acts of aggression toward other sovereign states and its extreme brutality toward civilians and prisoners of war (on the East front). Therefore, there were no negotiations during the war. The Allies realized that unconditional surrender was the only option because the National Socialist Party's ideology could not be rehabilitated. The German state would in a sense have to be captured and its political and social institutions completely reconstructed. Unconditional surrender is a punitive policy where the moral right to political self-determination is denied. Nazi Germany is a case where the denial to political self-determination was morally justified.

However, Imperial Japan was a different matter. It can be argued that forcing unconditional surrender on Japan was neither necessary nor morally justified. Japan's aggression was based more on the imperial aims of territory and resource expansion and not genocide and domination. By late 1945, Japan's Navy and Air Force had been decimated. The Japanese Army had been beaten back to its mainland. Japan's aspirations of expanding its empire had been crushed. According to some historical interpretations, there was definitely potential for negotiations to continue and for Japan to surrender with some dignity instead of the US coercing it to unconditionally surrender by not only firebombing Tokyo but then striking Hiroshima and Nagasaki with atomic munitions. Although all three cities had military targets located in them, the blast radiuses of the atomic munitions and the destruction of the firebombing were so overwhelmingly high that to somehow consider those bombings as either necessary or proportionate would be farcical. There is though, some evidence to suggest that Emperor Hirohito could not have negotiated with the Allies for a conditional surrendered. If the Emperor had attempted to do so there would have been a military coup which might have had even more catastrophic results to the Japanese people, e.g. the Japanese military would have made civilians and soldiers continue to fight even after the death and destruction that unfolded at Nagasaki and Hiroshima. Although this may have been the case, this does not change the fact that the rights of the

increases the harshness of war, and has the real potential to not only escalate further violent acts but also significantly degrade any communication between belligerents. Fighting with constraint and only as necessary does not preclude a state from fighting with other acceptable intentions nor does it require that the state have in mind (whatever that would mean) the specific intention of securing a just and lasting peace, but it does govern how a state fights.

2) Public Acts

“It is not clear what it means for a state to have an intention, since it has no mind, and the mind is normally thought to be where intentions reside.”¹⁰ However, we do know—to some degree—the intention of the state through observing the state’s actions.

Underlying motives and mental states can be hard or even impossible to discern but acts can be observed. This is one way in which we can understand a state’s intention conceived of in terms of its actions. We cannot adequately assess a state’s intention until we observe its public acts. Darrell Cole echoes the same perspective and suggests, “right intention is determined by observing a belligerent’s acts during and after a conflict,”¹¹ because “right intention is a communal, public act, for the observable circumstances are how intention is determined.”¹² We look to those public acts because we are keen to determine whether a state has right intention because right intention is what matters. Observing public acts gives a way to assess right intention. We look at public acts not only because they are constitutive of right intention but also

US had already been vindicated, but the US decided to continue the fight even though Japan had already been beaten. The US continued the fight in order to press for unconditional surrender and this seems unjust. “People have a right not to be forced to continue fighting beyond the point when the war might be justly concluded” (Michael Walzer, *Just and Unjust Wars*, (New York: Basic Book Press, 1977), 268). To press the war further until there is unconditional surrender violates right intention, but also kills many more people (both civilians and soldiers) than what is in fact truly necessary.

¹⁰ Lee, 84.

¹¹ Darrell Cole, “War and Intention,” in *Journal of Military Ethics*, (Vol. 10, No. 3, 2011): 174.

¹² Ibid.

because they are the best (maybe even the only) evidence of right intention by states. Observing public conduct can evidence acts of peace or justice or both. Acts of war are not only observable to the parties to the conflicts but to the international community as well. Observing acts provide evidence of what states intend.

The way a belligerent fights has special importance because “their actions and proclamations, when feasible, foreshadow during a war both the kind of peace they aim for and the kind of relation they seek.”¹³ Having right intention, a state shows a commitment to a just society of states oriented around human rights and peaceful, respectful international relations, etc.

3) Specific Conduct Required for a Just and Lasting Peace

A state aiming at justice will respect human rights, leave its enemy in a position to secure human rights, exercise due care in order to further insulate civilians from war, fight only until the rights that were violated have been vindicated, allow for political self-determination, tolerate regimes that honor basic human rights, and educate its own public political culture.

So, a state going to war with just cause and right intention must conduct itself in a way that manifests its aim to secure a just and lasting peace in all of these regards. In doing so, a state meets the particular substantive account of what qualifies as setting conditions for a lasting peace with justice.

¹³ Rawls, 96.

a) Human Rights

In order to be a member in good standing in the international community a state must provide a political environment that fulfills human rights obligations.¹⁴ “Political entities are legitimate only if they achieve a reasonable approximation of minimal standards of justice, again understood as the protection of basic human rights.”¹⁵ Not only do states have to protect the human rights of their own citizens—to be a member in good standing—but they must also respect the human rights of persons in other states as well.

If a state has the responsibility to protect the human rights of its own citizens and to respect the human rights of persons in other states in order to be considered legitimate, then these responsibilities do not change or diminish just because states are involved in war. States must continue their commitment to basic human rights as best as possible even during war.

Although a just state’s immediate objective is to defend itself against unjust aggression, “The aim of a just war by a just liberal democracy is a just and lasting peace among peoples, and especially with the people’s present enemy.”¹⁶ A just and lasting peace is one within which all states are in full compliance with basic human rights. In order to achieve a just and lasting

¹⁴ The relevant understanding of human rights is Rawlsian. Basic human rights are those rights that are owed to all people and are the minimum reasonable demands upon the rest of humanity. They are universal in scope but are not prepolitical. Human rights are a practical political creation based on common ground and shared principles and provide a practical function within contemporary international relations. Rawls mentions that the parties would adopt as a first principle that “all persons have equal basic rights and liberties,” and “proceeding this way would straightaway ground human rights in a political (moral) conception of liberal cosmopolitan justice” (Ibid., 82). That is, we recognize that people have certain rights and that the instantiation of human rights is really just derivative of the political process. Within the international context or as a matter of international public reason, human rights need not be bound up with any particular conception of the person or comprehensive doctrine. They can be and on Rawls’s view are affirmed simply as conditions, affirmed by liberal democracies and other reasonable well-ordered polities that any polity must fulfill inside its borders and respect beyond its borders in order to enjoy a right to non-intervention. The Rawlsian idea of human rights tries to avoid giving human rights any particular ‘ground’ beyond their key role in a reasonable Law of Peoples or in reasonable principles of international relations. Instead, they are constituted as a fundamental basis of foreign policy.

¹⁵ Allen Buchanan, *Justice, Legitimacy, and Self-Determination*, (Oxford: Oxford University Press, 2004), 5. Here, I adopt Allen Buchanan’s view regarding legitimacy. Buchanan goes on to say, “The state is not merely an instrument for advancing the interests of its own citizens; it is also a resource for helping to ensure that all persons have access to institutions that protect their basic human rights” (Ibid., 8).

¹⁶ Rawls, 94.

peace, states must take some special responsibility for ensuring that the human rights of the civilian population of their enemy are secured (through and) after the war. A state going to war with just cause should conduct itself in a way that manifests its aim to respect the human rights of its enemy's civilian population (and soldiers).

States and their armies need to set/establish certain conditions in order to actually meet or attempt to meet this long-run aim, because as, Larry May indicates, “If the object of war is a just and lasting peace, then all of Just War considerations should be aimed at this goal.”¹⁷ The goal is not any old peace (achieved by power, impotence, *modus vivendi*, or *status quo ante bellum*) but peace with justice, and it is the realization of that state of affairs that constitutes the right intention for how belligerents should interact during and after war.

A state should fight in a way that not only respects human rights but also leaves its enemy in a position to secure human rights. A decimated, war-torn state will not have the ability to reasonably safeguard its population from standard threats to basic human rights. Lack of potable water, food, sewage removal, shelter, physical protection, and medical attention are standard threats to basic human rights that leave civilians vulnerable to significant harm and even death as well as at the mercy of others. Although civilians are not intentionally targeted, they inevitably suffer consequences just as serious as if they were. It is reasonable to believe that even the legitimate destruction of military targets (necessary and proportionate to the military advantage to be gained) can still gravely affect civilians. Even more so, the destruction of dual purpose facilities (those that have both a military and civilian purpose such as bridges, electrical grids, rail and road networks, etc.) leaves the civilian populace exposed to residual harm and standard threats. The harm that this situation presents to civilians should require a commitment

¹⁷ Larry May, *After War Ends: A Philosophical Perspective*, (Cambridge: Cambridge University Press, 2012), 13.

from a state to repair its enemy's dual use facilities (those dual use facilities that contribute to securing basic human rights) in order to protect those civilians.

Lack of potable water, food, shelter, medical treatment, sewage and trash removal, and physical security is detrimental to any authentic process of developing a just and lasting peace. The basic human rights of the people of a war-torn state need to be met before any realistic attempt at reconciliation and transitional justice is implemented. Doing so will also assuage hostility of the enemy's civilian populace.

A state that fights with right intention would commit *ex ante* to *ex post* obligations such as ensuring that the duration of the war does not extend longer than is actually necessary (fight only to the point where actually their rights have been secured), not demanding the unconditional surrender of their enemy when not warranted, repairing destroyed dual use facilities that are essential in securing core human rights, and treating and safeguarding noncombatants in a way that insulates them from the effects of war as best as possible during and after the cessation of hostilities.¹⁸

Some might say that all of this follows simply from the idea that a state should fight only to vindicate its just cause. However, it does not. My claim is that fighting with right intention requires more than fighting only to vindicate one's just cause. Of course, abiding by the principles of discrimination, proportionality, and necessity fit within the context of fighting only to vindicate one's just cause. However, fighting for the sake of peace with justice requires more than just fighting solely to vindicate one's just cause. Fighting with right intention requires positive efforts such as exercising due care which provides greater protection for civilians than what proportionality calculations require. Fighting for the sake of peace with justice also

¹⁸ In addition, to observing the principle of noncombatant immunity because it is right, Rawls states that it is also followed "to teach enemy soldiers and civilians the content of those rights by the example set in the treatment they receive; in this way the meaning and significance of human rights are best brought home to them" (Ibid., 96).

requires a state to repair the enemy's infrastructure that is essential to securing core human rights of the enemy's civilian populace. Furthermore, having right intention allows for self-determination (instead of believing that a coercive regime change can be justified within the bounds of vindicating a state's just cause). And lastly, a state educating its own military and political culture about fundamental just war principles is a necessary requirement of right intention. Fulfilling these obligations entails an easier transition toward reconciliation and facilitates the development of a more harmonious relationship between states.¹⁹

b) Due Care

Right intention not only requires fidelity to the war convention but a positive commitment to insulating civilians from the harms of war, and this will require that a state go out its way to avoid civilian casualties even if this means that their own soldiers face additional risks. Going out of its way, means that a state exercises 'due care.' Michael Walzer describes due care as "a positive commitment to save civilian lives."²⁰ Due care is "not merely to apply the proportionality rule and kill no more civilians than is militarily necessary,"²¹ but a positive effort to reduce further harm even if the dangers imposed are proportionate to the military advantage expected to be gained. "Whenever there is likely to be a second effect [foreseen but unintended civilian deaths as a result of a legitimate and proportionate military attack], a second intention is morally required."²² The second intention is implemented in order to reduce harms to noncombatant (even if the target attacked is considered necessary and proportionate and the

¹⁹ Although I recognized that there are specific *jus post bellum* norms such as norms relating to apology, forgiveness, reconciliation, etc. I will not be taking them up in this chapter.

²⁰ Walzer, 156.

²¹ Ibid.

²² Ibid.

tactical bomber pilot can be considered a justified threat to the civilians who are at or in close proximity to the military target).

Just because noncombatant's rights are straightforwardly overridden by more countervailing consideration does not suggest that belligerents cannot implement a second intention (due care) of reducing even 'acceptable' collateral damage. Reducing harm to civilians will inevitably place soldiers at greater risk while they conduct military operations. Although there is a limit to what additional risks we can ask of soldiers in order to further protect civilians, there are clearly some risks that could be acceptable. "The degree of risk that is permissible is going to vary with the nature of the target, the urgency of the moment, the available technology, and so on."²³

The urgency of the situation (bombing a particular bridge before the enemy crosses it) might impinge a belligerent's ability to take due care. However, taking due care can be applied in other situations such as the bombing a major munitions factory. In such a scenario where due care is exercised, soldiers have taken positive action in order to reduce the harm to noncombatants by plausibly accepting more risks. For example, a bomber pilot flying at a lower altitude or in daylight may expose himself to more risk but this could very well be reasonable to accept especially if the enemy's anti-aircraft defense systems (weapons designed to destroy incoming aircraft) have been previously neutralized. Flying in daylight at a lower altitude would improve the accuracy, because the pilot would not only be able to visually observe the target but flying at lower altitude mitigates the effects of wind, drift, and barometric pressure on munitions.

²³ Ibid. I am not discounting the rights of soldiers. There are inherent risks associated with the role of a soldier. I am merely suggesting that when soldiers can reasonably accept more risk in order to protect and immunize civilians from the harms of war then they should do so. I am not suggesting that soldiers have to accept a level of risk that has the potential to undermine the success of their mission or their lives. I provide some examples of what accepting more risk would encompass back in the main text in the following paragraph.

Using only the amount of force necessary (economy of force) and low-yielding collateral damage munitions are other viable options. The plan for bombing a specific facility should be assessed ahead of time in order to determine the required amount of ordinance that is necessary in order to make the target inoperable. In addition certain targets especially those nestled in center city locations should be targeted with appropriate size munitions that are sufficient to do the job but are not overkill—causing more collateral damage than what is truly necessary.

In addition, intelligence and target acquisition officers need the proper training in order to be able to analyze the significance and contribution of particular dual use facilities to the civilian population by incorporating residual (second and third order) effects into the proportionality calculation.²⁴ But also those officers need to be held accountable for their decisions. This will hopefully further facilitate thorough target planning instead of permitting the urgency of the situation to dictate the decisions.

Implementing control measures to notify civilians (e.g. dropping leaflets or transmitting radio broadcasts that declare when a certain facility (munitions factory) is going to be bombed so civilians can evacuate the area or not show up for work at the factory) of an impending attack is another way that exercising due care can save other innocent people from unnecessarily being killed. Of course, this can only be reasonably implemented when doing so does not affect the likelihood of the bombing mission being successful from a military standpoint.

Implementing these measures (in most cases) will not place unreasonable risks on soldiers but will, however, expose civilians to fewer risks. Trying to implement measures that

²⁴ For example, French, Italian, and British target acquisition officers that determined and planned the target array during the 2011 NATO air campaign against Libya lacked essential training. NATO's after action report concluded that, "allies struggled to share crucial target information, lacked specialized planners and analysts, and overly relied on the United States for reconnaissance and refueling aircraft" (Eric Schmitt, "NATO Sees Flaws in Air Campaign Against Qaddafi," in *The New York Times*. <http://www.nytimes.com/2012/04/15/world/africa/nato-sees-flaws-in-air-campaign-against-qaddafi.html?pagewanted=all&_r=0>, April 14, 2012).

further immunize and protect civilians from the harms of war is acting in a way that serves the cause of a just and lasting peace where such a peace is one which human rights are secured and respected.

Saint Thomas Aquinas's work regarding murder is applicable for this discussion.

Aquinas states:

Nevertheless it happens that what is not actually and directly voluntary and intended, is voluntary and intended accidentally, according as that which removes an obstacle is called an accidental cause. Wherefore, he who does not remove something whence homicide results whereas he ought to remove it, is in a sense guilty of voluntary homicide. [This happens], when he does not take sufficient care. Hence, according to jurists, if a man pursue a lawful occupation and take due care, the result being that a person loses his life, he is not guilty of that person's death: whereas if he be occupied with something unlawful, or even with something lawful, but without due care, he does not escape being guilty of murder, if his action results in someone's death.²⁵

Aquinas's point regarding killing someone as a result of negligence also pertains to bombing in war. If soldiers, pursuing their lawful occupation, take due care (they have made a positive effort (a second intention) to reduce the unintended but foreseen harms that they impose) then those soldiers should not be guilty for those civilians' deaths. Exercising due care when possible (as in the case of a munitions factory) is necessary. When belligerents have a duty to implement reasonable due care but fail to do so, those belligerents are guilty of negligent homicide or harm because as Rawls states, "Strategies and tactics that lead to avoidable casualties are inconsistent with the underlying intention of the just-war tradition of limiting the destructiveness of armed

²⁵ Thomas Aquinas, *Summa Theologica* II-II, Q. 64: On Murder, Art 8: Whether One Is Guilty of Murder Through Killing Someone by Chance. <<http://www.op.org/summa/>>.

conflict.”²⁶ States manifest right intention by securing human rights and exercising due care which can be evidenced through public acts.

c) Self-determination

Vindicating a just cause with right intention means vindicating it in a way that brings about a lasting peace with justice and the only way to set a lasting peace with justice is to allow for a significant degree of political self-determination for peaceful peoples that respect human rights. There are two sets of considerations in favor of prohibiting liberalization or democratization as intended aims of war: 1) those that derive from the requirement that states aim at peace by not fighting longer than necessary; and 2) those that derive from the requirement that states aim at justice by allowing for self-determination.

First, many believe that democratization is the only way to guarantee peace. Lots of theorists think that a just and lasting peace is a peace between states that are just and so liberal and democratic. For example, Darrell Cole states, “Thus, when one begins the business of regime change with the goal of a just and lasting peace, that regime must be transformed into a democratic one.”²⁷ And James Turner Johnson posits, “Americans would insist that a rightly ordered and just society—thus one at peace within itself and open to peace with other societies as well—is one whose people have personal freedom and whose government is democratic.”²⁸ Many will argue that there cannot be a just and lasting peace until all states are liberal democracies, either because only such states are just or because peace is likely to obtain only between such states or both.

²⁶ Rawls, 96.

²⁷ Cole, 182.

²⁸ James Turner Johnson, *The War to Oust Saddam Hussein: Just War and the New Face of Conflict*, (New York: Rowman & Littlefield Publishers, 2005), 22.

Rawls, aware of the benefits of liberal democracies, recognizes the fact and states, “The absence of war between major established democracies is as close as anything we know to a simple empirical regularity in relations among societies.”²⁹ Rawls’s democratic peace thesis is rooted in the empirical claim that war is much less likely to occur between two democracies (because of their democratic social and political institutions) than it is to occur between two nondemocratic states or between a democratic and a nondemocratic state. An instrumental value of democracies is that they do not go to war with other democracies.³⁰

However, even if empirical evidence suggests that democracies can be relied upon not to go to war with one another, it is an open question whether or not we can produce stable enduring democracies by coercive force.³¹ Even if history suggests that international peace is most likely

²⁹ Rawls, 52-3.

³⁰ “Democratic peoples, all of whose basic institutions are well-ordered by liberal conceptions of right and justice is stable for the right reasons” (Ibid., 53). Democracies are neither internally nor externally aggressive and citizens of democracies reasonably respect and honor the rights of other free and equal citizens of not only their own state but of other states as well. These citizens do not desire war and can usually get what they want through treaties, relations, and commerce and trade.

³¹ It can be argued that democracy can in fact be achieved by military coercion. Germany and Japan have become stable enduring democratic states that were implemented through coercion. Both Nazi Germany and Imperial Japan were both forced to accept the Allies’ stipulations for unconditional surrender which included democratization. The Allies refused to negotiate with the German government. The Allies stated in the terms of surrender that, “there is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers” (Terms of Surrender, <<http://www.pbs.org/behindcloseddoors/pdfs/TermsOfGermanSurrender.pdf>>). Nazi Germany had committed acts of genocide against millions of civilians, committed war crimes against millions of Russian prisoners of war, committed crimes against humanity against millions of Slavs, and had committed acts of aggression against no less than fifteen sovereign states. It can be argued that Nazi Germany had clearly lost its moral right to self-determination and anything short of the Allies’ transforming the German government to democratic reform was irresponsible. The decrepit Nazi political and social institutions had to be completely overhauled and developed anew. The Allies were justified and their coercive efforts were warranted in transforming Nazi Germany into a democratic state.

The proclamation defining the terms for Japan’s unconditional surrender stated, “The might that now converges on Japan is immeasurably greater than that which, when applied to the resisting Nazis, necessarily laid waste to the lands, the industry and the method of life of the whole German people; the full application of our military power, backed by our resolve, WILL mean the inevitable and complete destruction of the Japanese armed forces and just as inevitably the utter destruction of the Japanese homeland” (Potsdam Declaration, <<http://www.ibiblio.org/pha/policy/1945/450729a.html#1>>). Japan initially refused these terms, but realized that it could no longer resist the Allies’ demands after atomic bombs were dropped on Hiroshima and Nagasaki. Although the democratization of Japan has also become a success story that does not mean that coercing the Japanese government into a democratic state was morally justified. Coercing the Japanese government into democratic reform was a calculation in utility.

if the states involved are democratic, it is still not obvious that coercive military force is just or a likely effective means in producing stable enduring democratic states. In any case, it is an open empirical question whether decent peoples could be relied upon to remain peaceful with one another or with a democracy, but I believe that they in fact could because they have institutional constitutions.

I agree with Walter Riker's perspective on the matter. Much like Rawls, Riker believes that the conditions that secure the peace between democracies can be found in decent societies too. As constitutional republics, decent societies not only "meet minimal conditions of justice and legitimacy,"³² but also have "well-entrenched norms restricting the use of political power and regulating and defining the transfer of political power; any society committed to basic human rights and the equality of peoples must have constitutional restrictions on the ability of leaders to violate these commitments"³³ which restrict aggressive state behavior. Decent societies respect traditional principles of justice (safeguarding human rights, honoring a state's right to non-intervention, and conducting war in only self-defense) and see all peoples as equal and free. "They are non-aggressive and non-expansionist, and respect the duties of non-

³² Walter J. Riker, "The Democratic Peace is Not Democratic: On Behalf of Rawls's Decent Societies," in *Political Studies*. (Vol. 57, Oct.: 2009), 5. It is still an open question whether decent peoples will remain peaceful since we have not seen many decent illiberal constitutional republics in history yet. However, a decent society's political institutions encompass both justice and legitimacy. "Justice refers, in the broadest sense, to some appropriate distribution of benefits and burdens (however defined) among the morally significant entities (e.g., individuals, associations, peoples) in a society (domestic or global); and political legitimacy refers to a state's right or authority to use coercive force against its citizens to compel obedience to its laws" (Walter Riker, "Democratic Legitimacy and the Reasoned Will of the People," in *Coercion and the State*. eds. David Reidy and Walter Riker (Springer Science+Business Media B.V.: Netherlands) 2008, 80. Decent societies deserve full recognition and should be considered to be in good standing in the international community because they "have genuine law, i.e., law that is legitimately enforceable because they are genuine structures of political authority which is consistent with reciprocity and shared reason" (Ibid., 87). That is, the law involves public discourse and serves the common good (it respects their interests to some acceptable extent) and the ends of justice.

³³ "The Democratic Peace is Not Democratic," 21. Riker goes on to say that because "decent societies are constitutionally committed to fundamental norms that explicitly restrict aggressive behavior, e.g., rules defining *jus ad bellum* and *jus in bello*, and others that implicitly restrict such conduct, e.g., norms regarding basic human rights and the equality of peoples, these commitments bind members to certain political institutions, practices, and procedures, all of which reduce the chance of war" (Ibid., 19). Furthermore, such commitments support "a willingness to seek non-lethal remedies to disputes" (Ibid.).

intervention and aid; thus, the interests of decent societies are compatible with those of democratic and other decent societies.³⁴ In any case, “if decent societies pose no special threat to global peace, then the democratic peace thesis does not justify efforts to democratize them.”³⁵

Implementing a liberal democratic regime by coercive force runs counter to the just war tradition. If right intention is supposed to guide a state against pursuing a war longer than is necessary and fighting only until the rights that were violated have been vindicated, and also includes aiming at a just and lasting peace then instituting a type of government by coercive force against the will of its people seems at odds with the requirement that states aim at peace by not fighting longer than necessary.

I am not suggesting that an aggressive nondemocratic state does not require rehabilitation. Apparently, for one reason or another, an aggressive nondemocratic state did unjustly attack a liberal democracy. Therefore, something is amiss with the state that initiated war. Maybe in the imagined scenario, the resort to armed conflict is a result of a border dispute or an attempt to obtain more natural resources and territory. However, rehabilitation should end with reform that is decent and not democratic if the people of that state do not want democratic reform. Coercively transforming a nondemocratic state into a democracy is not necessarily consistent with aiming at an enduring peace with justice. Democracy, might be viewed “in some way distinctive of western political tradition and prejudicial to other cultures”³⁶ which has the potential to undermine a state’s comprehensive (religious) doctrine that fundamentally guides and “influences the government’s main decisions and policies.”³⁷

³⁴ Ibid., 14.

³⁵ Ibid., 2.

³⁶ Rawls, 68.

³⁷ Ibid., 75.

Furthermore, it would seem that if coercive implementation of a more liberal government is just, then this could possibly set precedent for democratic states to initiate war not on account of individual or collective defense but as a new just cause—one that attempts to transform all decent well-ordered nondemocratic regimes because they cannot be trusted to maintain the peace. Even if a decent well-ordered regime respected human rights and was nonaggressive this would not guarantee its safety, because empirical evidence has suggested that only democracies are acceptable because they can be relied upon not to go to war with each other. This cannot be a just cause to initiate a war. The democratic state's rights were neither violated nor has the decent state lost its moral right to non-intervention (since it has not been internally or externally aggressive).

Rather, pursuing such an armed conflict would be constitutive of a preventative war: liberal State A attacks nonliberal State B because of the possibility that sometime in the near or distant future nonliberal State B *might* attack liberal State A. Engaging in preventative war disregards the moral requirement of using force only when absolutely necessary and is not in alignment with the just war tradition. If preventative war is wrong and coercive liberalization/democratization is essentially preventative war, then coercive liberalization/democratization is wrong as well. Of course, this presupposes that preventive war is wrong.

In principle the question of whether a state can aim at liberalization or democratization in war arises only when there is also independently a just cause for war. However, if liberalization or democratization is believed to be a just aim of war, then this notion has the possibility to gain momentum where practical means-ends reasoning take over. Using such practical means-ends reasoning it would be permissible to attack nonliberal State B, because doing so would facilitate

it being transformed into a democratic state. The ends justify the means. However, given the complexities of our world, it would be utterly impossible to make headway towards a realistic utopia if we as liberal democratic people excluded nondemocratic and nonliberal polities as deserving recognition as equal members in the international community of states and instead targeted them for a regime change. Instead, liberal democracies should focus their finite ability, time, and resources toward the significant nonideal conditions that aggressive outlaw regimes and burdened societies present.

Second, fidelity to right intention requires that states aim at justice by allowing for self-determination. A key feature of right intention is affirming a liberal commitment to tolerating self-determination of nondemocratic, even nonliberal polities. Denying a state's right to political self-determination by making another society that is already well-ordered and liberal more just—more democratic or more liberal—is not a legitimate aim of coercive international force or war. A state that goes to war without allowing for self-determination (of polities that respect basic human rights) as among its 'intentions' lacks right intention.³⁸

³⁸ I do not intend to give a full defense of the Rawlsian position here, because that is not my focus. Instead, I appeal to the Rawlsian position precisely because his position allows for the possibility of illiberal or nondemocratic but still well-ordered decent polities. It is not that Rawls is a relativist about justice or does not stand foursquare with liberal democracy. Rawls does think that liberal democratic regimes are superior to other forms of government. However, he also thinks that those committed to liberal democracy ought to reject the use of force to bring about liberalization and/or democratization where the conditions of well-ordered decency are fulfilled, and that informs his understanding of the right intention of a just and lasting peace and aim of war. Rawls's viewpoint expresses a liberal democratic vision of just international relations. But that it is also a vision that at least well-ordered non-democratic or nonliberal peoples could also reasonably affirm. Rawls's assumption is that decent peoples could reasonably accept the Law of Peoples (respect basic human rights; respect freedom and independence; obey treaties and restrictions in war; treat other states as equals; and honor the right to non-intervention and the duty of assistance), and so, therefore, liberal democratic peoples have sufficient reasons to extend recognition/respect to them.

Rawls holds that a just and lasting peace is a peace between decent well-ordered states, whether liberal democratic or otherwise, who have just relations with one another. It does not require that all states be just so it is less demanding (in that sense) than many other views. While some theorists think a just and lasting peace demands more than what Rawls thinks it demands (that is, they think it demands that all states be just), all or nearly all theorists agree that it requires at least what Rawls says it requires. Therefore, I believe that the Rawlsian position can be realized as a more sensible view as something like a least common denominator among reasonable views. Others might demand more but everyone demands at least what Rawls demands regarding human rights. It is less demanding and so arguably less controversial and more likely to be taken up within just war theory as part of global

States have a moral right to self-determination which includes the possibility of having democratic institutions but the moral right to self-determination does not presuppose that democratic institutions and practices are the only form of permissible governance. States have the moral right to self-determination provided it is a reasonable political conception which is “understood as an irreducibly collective right held by groups that are willing and able to perform requisite functions.”³⁹ Even democratic governance “is itself an exercise in collective, not individual, self-determination.”⁴⁰ Individuals in a democracy rule themselves through elected officials and a representative government which possess the power to determine the outcome of political decisions. Therefore, “it is simply false to say that an individual who participates in a democratic decision-making process is self-governing; he or she is governed by the majority.”⁴¹ It is possible that some citizens will want democracy but simply find themselves insufficiently powerful to bring about an internal regime change because they are governed by the majority. Through an exercise in collective self-determination the form of governance remains nondemocratic. As long as “a nonliberal society’s basic institutions meet certain specified conditions of political right and justice and lead its people to honor a reasonable and just law,”⁴² then this is sufficient for democratic liberal regimes not to attempt to coercively force something more liberal or more just.

public reason. Some will still suggest that international justice demands more than what Rawls seems to think. However, one may still think it is wrong to aim at the more demanding notion of coercive regime change/denying political self-determination when going to war.

³⁹ Andrew Altman and Christopher Wellman, *A liberal Theory of International Justice*, (Oxford: Oxford University Press, 2009), 16.

⁴⁰ Ibid., 17.

⁴¹ Allen Buchanan, “Democracy and Secession,” in *National Self-Determination and Secession*, 14-34. ed. Margret Moore. (Oxford: Oxford University Press, 1998), 17. Buchanan goes on to say that individuals are governed by the majority, “Unless one (unpersuasively) defines self-government as government by the majority (perhaps implausibly distinguishing between the individual’s apparent will and her ‘real’ will, which the majority is said to express), an individual can be self-governing only if he or she dictates political decisions. Far from constituting self-government for individuals, majority rule, under conditions in which each individual’s vote counts equally, excludes self-government for every individual” (Ibid., 18).

⁴² Rawls, 59-60.

The right to political self-determination is not tied to which form of government is more reliable at bringing about just political outcomes but with that of legitimacy. Legitimacy refers to a state being able to perform requisite political functions that safeguard its members from standard threats (internally protecting human rights) as well as respecting human rights of citizens in other states (externally non-aggressive). As long as a state has a legitimate form of government—it is at least decent—then “due to the moral right to self-determination, it is impermissible for an external agent to interfere with a group’s exercise of its self-determination, even if the external agent could do a better job of protecting human rights.”⁴³

Most likely, once the war is over, a defeated war-torn state will need assistance from the victor (just liberal democracy) in repairing decimated essential services that secure core human rights of its populace, but this does not suggest that the vanquished loses its moral right to self-determination.

Of course, it is permissible to gradually shape and encourage progressive reform of a decent regime, but this should not be done by coercive means (military force, economic sanctions, etc.). Rather, a liberal democratic regime should be cooperative and provide assistance. Rawls states, “A liberal constitutional democracy should have the confidence in their convictions and suppose that a decent society, when offered due respect by liberal peoples, may be more likely, overtime, to recognize the advantages of liberal institutions and take steps toward becoming more liberal on its own.”⁴⁴ I think it is quite possible that Rawls would agree that a just and lasting peace is one in which all states are just but have become so as a matter of their own free development under conditions of peace. That is, decent and nonliberal states have become just and democratic by their own efforts and progression. Only then can we conclude

⁴³ Altman and Wellman, 41.

⁴⁴ Rawls, 62.

that a just and lasting peace is one in which all states are just. All states have become internally just through political self-determination, “the mutual agreement of men acting in choice of their government, and forms of government,”⁴⁵ and not as a result of coercion.

If we are trying to establish a lasting peace with justice, then allowing a state to decide for itself what type of reasonable political conception it wishes to pursue seems plausible. It should be allowed to find its own way to justice under conditions of peace. Forcing a state to become more liberal when it has already met the minimum necessary conditions of decency would most likely be met with hostility and animosity of the people it is being forced upon as well as “frustrate their vitality.”⁴⁶ In addition, it could hamper any authentic reconciliation after the war between the two states.

Right intention places some restrictions on a state. Its aim in or through war to move a state to liberalism or democracy against the will of its people is unjust. It is legitimate to aim at ensuring that human rights are met, but once they are met, a peoples’ right for political self-determination must be respected. States must refrain from pursuing such ends as democratization or liberalization; they should aim to end the war in a way that allows for respectful toleration, self-determination, etc., of well-ordered states. A just and lasting peace is one within which liberal democracies tolerate (in the sense of granting recognition/respect to) other non-liberal and/or non-democratic states provided that those states honor basic human rights and are well-ordered and externally non-aggressive.

⁴⁵ John Locke, *Second Treatise of Government*, ed. C.B. Macpherson, (Cambridge: Hackett Publishing, Inc., 1980), 55.

⁴⁶ Rawls, 62.

d) Education

Right intention is also evidenced by a state's education of its military and a public political culture that is committed to just war. Right intention involves actions taken long before war, namely educating the military and supporting a public political culture committed to conducting war subject to constraints. That is, a state should be cognizant of what is morally required of it in regard to adhering to restrictions in warfare as well as what is morally necessary in establishing conditions for reconciliation and peace with justice before war begins.

Long before politicians and generals determine strategic operations and soldiers map-out tactical decisions to meet those aims—just war—the moral framework for armed violence must be incorporated into the consciousness of the state. Without sufficient grasp of these moral norms and principles governing war and its applications, it becomes much easier to acquiesce or resort to practical means-ends reasoning. “Means-ends reasoning justifies too much, too quickly, and provides a way for the dominant forces in government to quiet any bothersome moral scruples.”⁴⁷

Rawls suggests that, “These principles [regarding specific restrictions in the conduct of war] must be in place well in advance of war and widely understood by citizens generally.”⁴⁸ Not only do states need institutions that provide a moral education to its citizens, but also incorporated into that education needs to be basic just war understanding along with the prevalent norms and principles that apply. “These matters need to be part of the political culture; they should not dominate the day-to-day contents of ordinary politics, but must be predisposed and operating in the background.”⁴⁹

⁴⁷ Ibid., 102.

⁴⁸ Ibid., 101.

⁴⁹ Ibid., 102.

For example, regardless of the fact that in 1945 when the Allies were clearly going to win the war against Nazi Germany and Imperial Japan, the US still decided to firebomb Dresden (killing an estimated 20,000 civilians) and Tokyo (killing an estimated 100,000 civilians) even though both targets offered little military value. At the time that these cities were decided to be bombed “there was not sufficient prior grasp of the great importance of the principles of just war for the expression of them to have blocked the handy appeal to practical means-end reasoning,”⁵⁰ so the murder that unfolded at Dresden and Tokyo was generally accepted as merely part of war.

It is too late to discuss conflicting principles or the issue of subordinating proportionality to military necessity when the situation is already at hand and when the general public and even a state’s military lack the basic education and awareness of such moral issues. It is difficult to respect the principles of just war when people are not even aware of such moral principles.

Although Winston Churchill was a dynamic and charismatic leader, his own view shows that there was not an awareness and recognition of just war principles in the public political culture. In a 1941 London radio broadcast regarding the British Air Force’s strategy of carpet bombing German cities, Winston Churchill stated that the Allies were making “the German people taste and gulp each month a sharper dose of the miseries they have showered upon mankind.”⁵¹ It is very hard to argue for the rights of others as well as obligations and restrictions in war when the political leaders of a country lack that perspective.

In the US there have been improvements in the public consciousness regarding just war through cable news, the internet, and social media. However, it is intermittent at best; most citizens have never even heard of it. In addition, US military culture lacks education regarding just war and the awareness and recognition of its principles. Of course, soldiers are given legal

⁵⁰ Ibid.

⁵¹ Walzer, 256.

briefings concerning the law of armed conflict, but soldiers are not taught just war. Even the education of the officer corps is problematic because not all military officers are privy to just war training.

Officers are responsible for planning combat operations and leading soldiers into combat. However, not all officers are taught just war. This is a significant US military shortcoming. All cadets at the United States Military Academy prior to becoming commissioned officers are enrolled in a semester long just war class where they are engaged in the discipline. However, other commissioning sources such as Reserve Officer Training Corps (college ROTC) and Officer Candidate School (OCS), which combined make up 2/3 of all commissioned officers in the US, are never enrolled in such a course. Over 60% of US Army officers are never formally educated in the principles of just war. In order to effectively recognize and deal with complex issues in war, just war theory should be an essential and abiding component of all officers' education curriculum.

Rawls states, "The grounds of constitutional democracy and the basis of its rights and duties need to be continually discussed in all the many associations of civil society as part of citizens' understanding and education prior to taking part in political life."⁵² A constitutive part of citizens' understanding and education prior to taking part in political life must be that of just war: understanding that states "have the right of self-defense but no right to instigate war for reasons other than self-defense and to observe certain specified restrictions in the conduct of war."⁵³

In order to abide by the norm of right intention, these principles must be in consciousness of politicians, citizens, and military officers before war even surfaces. Otherwise, the obligations

⁵² Rawls, 102.

⁵³ Ibid., 37.

and restrictions that the norm of right intention demands will be undermined. “Political leaders and military commanders have the chief responsibility to see that war is waged justly, but citizens have a responsibility to hold leaders and commanders accountable for the justice of their nation’s war conduct.”⁵⁴ In order for citizens to take this obligation seriously they need to be reasonably informed and educated so it becomes a part of the public consciousness.

4) Totality of Conduct

Although right intention is a constitutive part of *jus ad bellum* (justice of war), a state cannot suggest that it has met the conditions of right intention before the war has even begun which is the case for other *jus ad bellum* tenants. Legitimate authority, just cause, reasonable chance of success, last resort, and proportionate response can all be reasonably addressed and answered prior to the ensuing conflict. However, right intention is different. Political leaders may believe that they have right intention, but the only real way to evaluate right intention is by observing a state’s action throughout all phases of war because right intention is evidenced by observable acts that serve the cause of a just and lasting peace. There is no way to assess whether a state fights with right intention without looking at the totality of its conduct, from before the war, to the start of the war, through the war itself, and into the postwar context—the implications of the *ad bellum* ‘right intention’ requirement are, then, significant.

All *jus ad bellum* judgments regarding right intention are provisional until the entire process is concluded. Only then can we compare the actual prosecution and termination of the war (the observable evidence available to the parties to the conflict and the international community) to see if they square with each other. This would require the institutionalization of

⁵⁴ Richard Regan, *Just War: Principles and Cases*, (Washington, D.C.: Catholic University of America Press, 1996), 85.

an external impartial commission (maybe comprised of the permanent and non-permanent members of the UNSC as well as representatives from the parties to the conflict) which would be tasked with substantial *ex post* review and assessment of the conflict, the acts of war, and the rebuilding and reconciliation effort between the warring parties. The findings and evaluation would then be made public and disseminated among the international community.

This procedure would be the only way that we could, in fact, be confident that after reviewing all four phases of war (pre, of, in, and after) that an impartial decision could be made as to whether the conflict was just. Just because a belligerent might have a just cause to resort to war does not necessarily suggest that conducting the war and its aftermath will be just. If anything, maybe an impartial commission reviewing belligerents' actions might instigate further incentives for states to do what is morally required.

Conclusion

Saint Augustine's perspective that we fight so we live in peace⁵⁵ may be true; however, there is no peace—morally desirable—without justice. Having right intention, a state not only limits its war-making activity to that necessary to vindicating its just cause but also publicly conducts its activity in a manner favorable to a just and lasting peace.

The content of 'right intention' is given by the idea of a 'just and lasting peace' and the idea of a just and lasting peace is best understood by reference to what is required by peace and justice. A state must meet both aims: peace and justice. Aiming at both peace and justice will facilitate an enduring/lasting respectful relationship. A state aiming at peace fights with restraint, immunizes civilians from the harms of war, and educates its military. And a state

⁵⁵ St. Augustine of Hippo wrote in the *De Praesentia Dei Ep. 187 (On the Presence of God: Letter 187)*, "Peace should be your aim; one does not pursue peace in order to wage war; he wages war to achieve peace" (Louis Swift, *The Earthly Fathers on War and Military Service*. (Delaware: Michael Glazier Pub., 1983), 114).

aiming at justice respects human rights, leaves its enemy in a position to secure human rights, exercises due care in order to further insulate civilians from war, fights only until the rights that were violated has been vindicated, allows for political self-determination, tolerates regimes that honor basic human rights, and supports a public political culture that adheres to just war. In doing so, a just liberal democracy meets the particular substantive account of what qualifies as setting conditions for a just and lasting peace which can be assessed when looking at the totality of its conduct.

CHAPTER 2

Post Bellum Obligations of Noncombatant Immunity

War has three distinct phases: pre-war, war, and postwar. Within the just war tradition the postwar period has received the least amount attention. However, over the past decade a groundswell of discussion of the postwar phase has occurred. But, as of yet, no set of moral principles about how previously warring parties should conduct themselves has been agreed upon.

However, the legitimate wartime ends of resisting unjust aggression, reasonably preventing future aggression, and establishing a just and lasting peace¹ will inform any plausible account of the principles of justice after war (*jus post bellum*). But before moving solely into the *post bellum* phase and looking at norms that are relevant to only the postwar phase, we need to look at the norm of right intention. The aforementioned legitimate wartime ends specify not only going to war with right intention but also fighting with right intention as well as rebuilding relationships with right intention. The norm of right intention runs through all three phases of war. By having right intention, a state must not only have a just cause and limit its war-making activity to that necessary to vindicate the just cause, but it must also seek to vindicate its just cause in a manner likely to yield a just and lasting peace. That is, there are constraints that follow from aiming at a just and lasting peace which entails a commitment to civilian immunity to the idea that civilian immunity has, for dual purpose targeting, some *post bellum* implications. Therefore, we should explore the *post bellum* (postwar) implications of the *ad bellum* (of war)

¹ John Rawls, *The Law of Peoples*, (Cambridge: Harvard University Press, 1999), 94-6.

and *in bello* (in war) commitments before we move too far with *post bellum* thinking to distinctly *post bellum* norms which are germane to only the postwar phase.²

I will argue that a just state unjustly attacked and justly defending itself, acting with right intention, has an obligation to restore infrastructure destroyed as part of targeting dual purpose facilities if the damage done threatens core human rights. This obligation has not been adequately addressed and so needs full articulation. A liberal democracy victorious in a war justly fought against an unjust aggressor state has an obligation to the citizens of the unjust aggressor, even if the liberal democracy tried reasonably to honor necessity and proportionality targeting requirements, *ex ante*. The impact on civilians in a warzone—given the empirical facts of modern warfare—extends well beyond the cessation of hostilities even if the just war is fought justly.³

Adhering to the *jus in bello* principle of noncombatant immunity which is part of fighting with right intention imposes significant *jus post bellum* obligations. Belligerents must fulfill certain reconstruction obligations *ex post* even though those obligations arise really as a matter of *jus in bello* civilian immunity norms. Fighting with right intention would entail a more robust account of securing human rights and provides some of the impetus for the idea that a victor

² By stating *jus ad bellum* and *jus in bello* civilian immunity norm, I am referring to the *jus in bello* principle of noncombatant immunity and the *jus ad bellum* principle of right intention.

³ In the imaged case that I will be discussing, the unjust aggressor state has surrendered and the just victor has an occupation force. The occupation force will be used to enforce the rule of law, to assist with re-stabilizing basic necessities, and to help implement a regime change or with the rehabilitation of decrepit institutions. I recognize that many conflicts and wars do not have an occupation force. However, the US had an occupation force in both of its last conflicts (Iraq and Afghanistan). Iraq surrendered after only six weeks of major combat operations, but the postwar phase which included a US occupation force lasted over eight years. The shortcomings of how the US initially planned and the executed its postwar plan is what caused the groundswell of discussion regarding the postwar phase and its resurgence in just war theory. Prior to the 2003 Iraq war, contemporary just war theory focused primarily on the *ad bellum* and *in bello* phase which is evidenced by Michael Walzer's *Just and Unjust Wars* (which is one of the most influential contemporary just war theory books) which does not even address the postwar phase except to note that there are three legitimate wartime ends: resist aggression, restore the peaceful *status quo*, and reasonably prevent future aggression (Ibid., 121). Although an occupation force will not be the case in every war, it is important to discuss situations like these, since these types of wars are occurring. But even more so, hopefully by shedding light on such cases, states will not only recognize their *post bellum* obligations but also better plan and implement in order to meet their moral obligations.

should repair necessary infrastructure. I am not arguing for any new norms but rather arguing for a new requirement imposed in order to respect the core human rights of civilians which the principle of noncombatant immunity already recognizes.

Immunizing civilians from harms that threaten human rights fits into any plausible account of what the principle of noncombatant immunity requires. More specifically, belligerents are required to restore damaged dual use facilities to a level adequate to human rights even if the *ex ante* targeting was necessary, proportionate, etc. Not only does the new requirement render compliance with the existing norm much more likely than it would otherwise be (or has been), but also abiding by this requirement shows a commitment to a just society of peoples oriented around human rights and peaceful, respectful international relations, etc.

The following is a seven-section analysis of noncombatant immunity and its *post bellum* implications. Sections 1 and 2 detail the distinction between combatants and noncombatants and the link between noncombatant immunity and human rights. Section 3 demonstrates that destroying dual purpose facilities is detrimental to the civilian populace and, therefore, requires special treatment. Section 4 shows that the destruction of purely military targets may also kill civilians, but these types of targets do not cause residual effects on civilians and so do not require special treatment. Sections 5 and 6 advance the point that belligerents have an obligation to ensure that the human rights of their enemy's civilian populations are not compromised after hostilities are over because of damage it inflicted on dual use facilities, and that routine *ex post* independent review of all decisions to target dual use facilities needs to be instituted with follow up to see if facilities are restored. Lastly, section 7 distinguishes between a belligerent's primary obligations regarding noncombatant immunity and other states' back-up obligations regarding human rights.

1) The Distinction between Combatants and Noncombatants

From both an international law and just war standpoint, there are two distinct classes of persons during war: combatants and noncombatants.⁴ Soldiers are authorized to kill and liable to be killed by enemy combatants. Soldiers have a collective identity and represent the political identity for which they fight. As Michael Walzer states, “War itself isn’t a relation between persons but between political entities and their human instruments.”⁵ Soldiers acting on behalf of their state attempt to impose the will of their country upon the enemy. Whether actively shooting at the enemy, sleeping on their cots, or driving trucks, soldiers are viable targets, and an enemy soldier is morally and legally permitted to kill them.⁶ “The claim is that if a soldier is morally justified in killing a person in war, that is usually because the other person has acted in a way that has made him liable to be killed.”⁷ Although combatants are allowed to be killed, refusing quarter to those that wish to surrender, causing injury to soldiers who have surrendered, and causing unnecessary suffering (e.g., by using weapons such as lances with barbed heads, irregular-shaped bullets, projectiles filled with glass, and poisons) are strictly forbidden.

Soldiers are authorized to kill because they are given power rights that enable them “to act in a way that makes them morally liable to defensive violence.”⁸ Although combatants have power rights to kill enemy combatants, this authorization to kill is not extended to the point that it allows civilians to be intentionally killed. Rather, civilians do not occupy a recognized combatant role within the war convention because they neither pose a direct or current threat to

⁴ Guerrillas or insurgents meld the line of this distinction and want the privileges of both categories. Further discussion of this issue falls outside the scope of this chapter.

⁵ Walzer, 36.

⁶ I recognize the case of the naked soldier: a soldier tending to personal hygiene that is caught off guard by the enemy. Sure, it is legally permissible for a combatant to kill a naked enemy combatant, but morally it raises questions. I prefer to bracket that topic for now.

⁷ Jeff McMahan, *Killing in War*, (Oxford: Oxford University Press, 2009), 157.

⁸ Ibid.

others nor have they been officially designated as an official organ of the state.⁹ Because they are “non-combatants and do not themselves pose a direct threat to others, they are never legitimate targets of force.”¹⁰ Civilians have immunity rights and are not only exempt from being intentionally targeted, but should also be immune from the effects of war as best as possible.¹¹

Noncombatant immunity (the right to life and liberty) is a necessary feature of just war and a norm binding on belligerents. Regardless if a state enters justly or unjustly into armed conflict it does not forgo the noncombatant immunity of its citizens.¹² Article 27 (Part III: Status and Treatment of Protected Persons) of the Fourth Geneva Convention states, “Protected persons [noncombatants/civilians] are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious conviction and practices, and their manner and customs; they shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”¹³

⁹ In some cases, civilians do pose a threat of varying levels (in some cases even as much or potentially more than soldiers do, e.g. a scientist designing advanced munitions or a key propagandists generating popular support for the war compared to an average citizen buying war bonds to help finance the war, etc.) but these civilians still fall into the category of noncombatant and as such are not supposed to be intentionally targeted. Maybe there is more culpability with some civilians over others, and some philosophers believe that it is morally permissible to intentionally target those civilians that are. However, I prefer to bracket this topic as well.

¹⁰ David Rodin and Henry Shue, “Introduction,” in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*. eds. David Rodin and Henry Shue. (Oxford: Oxford University Press, 2008), 3.

¹¹ The principle of noncombatant immunity declares that intentionally targeting civilians is forbidden because civilians are currently harmless. However, civilians can impose a direct threat (riots, unruly crowd, hitting soldiers, etc.) to military forces. When this occurs, those civilians can be intentionally targeted with nonlethal munitions (rubber bullets, paintballs, sting grenades, tear gas, etc.). This would not only be a proportionate response since it would only cause temporary incapacitation without leaving permanent side effects, but also nonlethal munitions provide a way of subduing aggressive civilians and deescalating the current situation. Soldiers that do not have nonlethal options would mostly err on the side of using lethal force. Killing or permanently maiming civilians only lead to straining and compounding the current relations between both states. The use of employing nonlethal munitions is relatively new so much more analysis needs to be done. However, nonlethal munitions are potentially useful and permissible.

¹² In some cases, civilians play an informed role when it comes to the decision for a state to go to war, but I am focusing on the typical citizen of a state, not political leaders who make decisions without the approval of the civilian populace.

¹³ Department of the Army, Field Manual 27-10. *The Law of Land Warfare*. (July 1976), 108.

Noncombatant immunity entitles civilians to a level of protection of ‘more’ than just their basic human rights (e.g. respecting religious conviction and practices, honoring manners and customs, and barring threats and insults). Belligerents acting in accord with what the principle of noncombatant immunity demands, would not only have to protect civilians from the harms of war but also making special efforts to avoid harming their places of worship, museums, hospitals, schools, charities, and monuments.

2) Human Rights

Although the perspective that all persons have the right to a social minimum is not universally recognized, it is widely recognized. There is widespread agreement over basic human rights to subsistence, physical security, and certain basic liberties. Human rights consist of a combination of both positive and negative dimensions of rights that necessarily entail each other.¹⁴ Human rights just are valid claims to social guarantees against standard threats to certain goods, so the absence of the social guarantee just is the violation/failure to secure the human right in question. The fulfillment of these rights is necessary in order to reasonably safeguard persons from standard threats that would otherwise impinge upon the necessary conditions needed for any attempt at an adequate life. Without a social guarantee against standard threats one’s enjoyment of basic human rights will be significantly jeopardized. These valid claims to

¹⁴ Human rights can be given any number of deep philosophical, moral, or religious justifications. For example, a naturalistic account of humanity ‘as such’ approach; James Griffin’s autonomy, minimum provisions, and liberty approach; Immanuel Kant’s unconditional dignity and respect of persons approach; etc. I wish to remain agnostic to these particular groundings. The Rawlsian position does not aspire to give any deep grounding for human rights. Rather, they are part of global/international public reason and as such enjoy the support of an overlapping consensus between well-ordered peoples, liberal democratic or otherwise.

social guarantees against standard threats to certain goods do not change when states are at war. That is, the circumstance of war does not negate civilians' entitlement to this social minimum.¹⁵

The notion of civilian immunity is interpreted through the idea of basic human rights. The idea that noncombatants should be immunized from the activity of war can probably be taken for granted. While civilians are to be immune from war and its effects as best as possible, not all effects are equal: effects that threaten or violate basic human rights are especially problematic because they undercut the social guarantee that reasonably protect civilians against standard threats. So while civilians are to be immune from many effects of war, the most important effects they are to be immune from are those effects that threaten their basic human rights.

All civilians need to be able to make free decisions and choices that are void of fear, insecurity, strife, decimated expectations, and hunger. But in a war-torn state where food, drinking water, medical attention, and physical security are luxuries, it is not possible to live in any state of normalcy. In these deleterious conditions, persons are dominated or controlled by external factors which violate their core human rights. It is obvious that war threatens the basic human rights of civilians (who are located in the state where the war is being fought). Civilians who are subjected to the devastation of war cannot adequately develop, express, or follow any determinant rational plan until the infrastructure and other essential services are restored to a threshold that secures basic human rights (physical security, subsistence, and certain basic liberties) and enables civilians to live instead of merely exist.

Although noncombatant immunity entitles civilians to a level protection of more than just their basic human rights (e.g. respecting religious conviction and practices, honoring manners

¹⁵ Additionally, when the war is officially over, combatants lose their authority to kill and liability to be killed. They *en masse* join the civilian population and are afforded the same rights: life and liberty. These former combatants require the same basic necessities as well.

and customs, and barring threats and insults), civilians need to be immunized from costs that compromise their basic human rights, and that means that they must be left not only with potable water, food, shelter, access to medical attention, sewage and trash removal, etc., but also with a state that can effectively secure those rights for them. Without securing core human rights first, nothing else can reasonably follow.

Before any other rights can be secured, core human rights need to be safeguarded first in order to protect civilians from standard threats and harms. However, conventional military strategies—ones that focus on destroying dual purpose facilities as a way to undermine the enemy state and its army—affect the basic human rights of noncombatants. My main underlying concern is that if civilians are supposed to be immune from the harmful effects of war, then they should be immune from the harmful effects of war as best as possible. However, this does not happen when dual purpose facilities are targeted.

3) Dual Purpose Targets

Although the laws of war declare the utmost protection of civilians, in modern war more civilians have died than soldiers. This has been the case in World War II (not even including the Holocaust), the Vietnam Conflict, the Persian Gulf War, the Second Iraq War, and in the current conflict in Afghanistan. Over the past century, tens of millions of civilians have been killed in warfare. Even in the 21st century, conservative estimates suggest that civilian deaths in war are at least fivefold to that of soldiers killed. Overwhelmingly these high death rates (in the wars over the past 10 years) are not from civilians being intentionally targeted by military forces but from the residual effects of which many stem from the targeting of dual purpose facilities.

Civilians die as an effect of otherwise permissible conduct in war. That is, many die because of indirect effects of conduct that does not obviously violate civilian immunity.

Civilians die as a consequence of military necessity and legitimate acts of war.

Legitimate acts of war, although not directed at civilians, kill them just the same.¹⁶ Specifically what I am referring to is dual purpose (dual use) targets.¹⁷ Just as the name suggests, dual purpose targets serve dual purposes: generating plants provide electricity for residential use, but they also provide electricity for an army's command and control centers and barracks.

Destroying a belligerent nation's infrastructure (oil and fuel depots, communication centers, electric grids, transportation networks, and factories that contribute to the war effort) is, in theory, supposed to induce the enemy to capitulate faster because its center of gravity has been crushed since its communication network, infrastructure, and resupply capacity have been crippled.

Although it seems reasonable to suggest that hostility should be focused directly at the object that is actually causing the harm (such as enemy soldiers and their tanks, planes, and canons), this is not always the case in modern warfare.¹⁸ Modern war takes place in and around

¹⁶ "A legitimate act of war is one that doesn't violate the rights of the people against whom it is directed" (Walzer, 135). An intentional attack against an enemy combatant is allowed because it does not violate the rights of that soldier, because he is liable to be killed.

¹⁷ According to the international law of armed conflict, military objectives (legitimate military targets) are "combatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in circumstances ruling at the time, offers a definite military advantage—are permissible objects to attack (including bombardment)" (*The Law of Land Warfare*, 5). For example, a bridge could be deemed a dual purpose legitimate military objective that belligerents are legally allowed to destroy because its *location* is pivotal in resupplying enemy troops or by its very *nature* (bridge *qua* bridge) it is designed to enable movement of (military) traffic from one location to another so it can legally be destroyed. On a side note, museums, places of worship, and hospitals are protected buildings. It is not legally permissible to target protected buildings. Even if soldiers are being treated and triaged at a particular hospital, it is still not a permissible target because those soldiers have been incapacitated. By being incapacitated, they have lost their combatant status and are no longer liable to be killed. On another note, although a building can lose its protected status if a belligerent uses it for a military purpose, it is still best (if possible) not to attack such a building because of the enemy's propaganda and media exploitation that will follow from it.

¹⁸ Thomas Nagel advocates, "That hostility or aggression should be directed at its true object; this means both that it should be directed at the person or persons who provoke it and that it should aim more specifically at what is provocative about them" (Ibid., "War and Massacre," in *Philosophy and Public Affairs*. (Vol. 1, No. 2, 1972): 88.

cities, and populated areas provide essential features/facilities (power grids, road and rail networks, radio towers, etc.) that enable a state's war fighting abilities. These facilities are permissible targets since they contribute to military activity. However, it does seem as if attacking dual purpose facilities is not directing "one's hostility or aggression at its proper object, but at a peripheral target which may be more vulnerable, and through which the proper object can be attacked indirectly."¹⁹ Bombing dual use facilities is seen as an opportunity or as an easier path to one's goal. A belligerent is obviously not required to bomb dual purpose facilities yet chooses to do so for the expected military advantage to gain by it. Along with the usual considerable advantage for destroying dual purpose facilities, belligerents risk taking too permissive a stance toward the targeting of these facilities.

Belligerents bomb dual purpose facilities as a way to bringing about certain results and can do so as long as they abide by the war convention and apply the concepts of necessity and proportionality. There has to be a military necessity—a need not a desire (that is, these facilities must have a clear military use even if it also has civilian uses)—in order to engage specific targets, e.g. radio stations and radio cell site/base station towers could qualify as military necessity because (if destroyed) it cripples internal military communication between forces. Attacks on these structures are supposed to meet the requirements of proportionality in order to mitigate harm and collateral damage.²⁰ "Loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be

Nagel's point is that soldiers should be directing attacking enemy soldiers and that bomber pilots should be bombing purely military targets (military vehicles, army headquarters, army combatants, etc.).

¹⁹ Ibid., 87.

²⁰ I am not suggesting that a military use limited force when engaging enemy combatants. A military's mindset is to gain the freedom to maneuver and use decisive overwhelming force to impose its will on the enemy. However, operations need to be thoroughly planned to mitigate, as best as possible, collateral damage (to include residual effects).

gained.”²¹ But shock and awe campaigns, although legal, have serious moral underpinning issues. The side effects of attacking the belligerent’s infrastructure only become exacerbated over time.

The end of major combat operations does not necessarily entail that the death and dying for noncombatants is over. The devastation from the war phase carries over to the postwar phase. The residual effects of warfare continue to harm the civilians long after the fighting stops, and months later civilians continue to die as a result of inadequate living conditions. For example, “by the end of 1992 [after Operation Desert Storm], more than a hundred thousand Iraqi civilians died from the lack of clean water and sewage disposal, and the breakdown of electrical service to hospitals.”²²

A frayed or nonexistent defeated government coupled with inadequate, decimated city services will neither be able to enforce the rule of law nor prevent residual deaths because it cannot reasonably safeguard its citizens from standard threats to basic human rights. However, noncombatants are supposed to be insulated against the ills of war. As Richard Miller declares, “Noncombatants, whatever their political affiliation, have the right not to have war waged on them,”²³ but this seems furthest from the reality of the situation in a war-torn state.

The just war concepts of proportionality and necessity are essential in modern warfare because modern war is fought in and around cities; the battles of yore—where standing armies met in an open and non-populated area—are gone. Military necessity and proportionality are used in order to reconcile conducting legitimate acts of war with the absolute proscription of intentionally targeting civilians.

²¹ *The Law of Land Warfare*, 5.

²² George, Lopez “Iraq and Just War Thinking: The Presumption Against the Use of Force.” in *Common Wealth Magazine*. (Vol. 129, No. 16, 2002): 17.

²³ Richard, Miller, “Legitimation, Justification, and the Politics of Rescue.” in *Just War Reader*. ed. Louis Schwartz. 1st ed. (Mason, Ohio: Thomson Custom Publishing, 2004), 126.

However, in the context of war, it may not be enough just to have a moral and legal principle of civilian immunity and a moral and legal principle allowing for the targeting of dual use facilities when proportionality and necessity criteria are met. The empirical evidence suggests a need for institutional incentives because the costs to civilian immunity and the incentives to abuse the permission to target dual use facilities may be too high if we do not frame the legal permission to target dual use facilities with something like demanding more accountability from belligerents. The current way of thinking allows states to target many civilian facilities provided that they can point to some military use or link for military use.²⁴

The reason to single out dual use facilities for special treatment is two-fold: 1) their targeting presents a special risk of allowing war activities to slip beyond the range of conventional military targets, to spill over to the civilian sector. States might willingly aim at key civilian installations using a remote military use as a cover to legitimize their shock and awe campaign. In order to allow such targeting to continue we need to place specific heavy burdens (*ex post* stipulations) in order to justify making them targets. After all, we need to contain the activities of war to recognized role players and recognized sites of conflict if we hope to avoid a descent into some sort of no-holds-barred chaos. 2) Dual use targeting presents a special risk of miscalculation when it comes to the proportionality criterion, for the long term (residual) effects on civilians will almost always be more substantial than is expected. These miscalculations enable too permissive of a stance regarding the bombing of dual purpose facilities as if they were

²⁴ Media coverage and state and international concern has abounded regarding certain drone attacks (e.g., violating a non-belligerent's airspace, killing a suspected terrorist, targeting and killing the son of a terrorist, the secret authorization to kill US citizens deemed as terrorists by the US government, etc.). Drone attacks that strike or miss its intended target and cause excessive collateral damage such as killing innocent civilians are routinely broadcasted on the nightly news. Although the use of drones has brought attention to unintended but foreseen consequences (as well as many other issues), belligerents are not held accountable for their destructiveness of dual purpose facilities. There has been neither significant media coverage nor a demand by the international community for stringent accountability of belligerents' actions regarding the targeting of dual purpose facilities especially ones that seem to contribute significantly to the welfare of civilians.

nearly purely military in nature. That is, the importance of its civilian use is often sidelined and downgraded in order to conclude that the dual purpose facility should be targeted and destroyed.

4) Purely Military v. Dual Purpose Targets

Jeff McMahan states, “Sometimes an agent acts with objective moral justification but nevertheless threatens to inflict wrongful harm on an innocent person—that is, harm that would wrong the victim, or contravene his or her rights.”²⁵ A tactical bomber that drops a bomb on an important enemy military facility (e.g., an army headquarters, military vehicle motor pool, munitions factory, etc.) and in the process kills civilians (although unintentionally) is an example of what McMahan refers to as a *justified threat*. In such a case, McMahan argues that legitimate acts of war (that meet the criteria of military necessity and proportionality) override those civilians’ noncombatant immunity rights. The tactical bomber pilot is a justified threat to civilians and is “morally justified in acting in a way that infringes the rights of an innocent person as a foreseen but unintended effect.”²⁶

The military planners and pilot of the aircraft know that by bombing the military facility they will inevitably kill some innocent civilians who live nearby. However, the military planners and pilot also know that the number of noncombatant deaths is proportionate “in relation to the importance of destroying the facility.”²⁷ In this case, the planners and pilot were objectively morally justified (they are considered to be a justified threat to those civilians) although they killed civilians who had done nothing to lose their right not to be killed. The tactical bomber pilot justifiably threatened noncombatants because the important military facility was liable to attack, and there was not any other plausible way to successfully neutralize this facility except to

²⁵ McMahan, 173.

²⁶ Ibid.

²⁷ Ibid.

bomb it. McMahan notes that this is a familiar example in “debates about the doctrine of double effect.”²⁸ In deciding to bomb it, the military advantage realized is sufficiently large to justify the foreseeable (but unintended) death of a small number of innocent civilians. The collateral damage (causing foreseen but unintended damage) was proportionate to the overall good of destroying the military target.

Although discussing these types of examples is important, it does not adequately get to the heart of the matter. McMahan discusses the bombing of important military facilities but does not deliberate about the bombing of dual purpose facilities although he even notes that “it is important to identify the considerations that would be relevant in war.”²⁹ One of the considerations that is absolutely important to identify as relevant in war, is dual purpose targeting and destruction. Because the destruction of dual purpose facilities presents special problems, our discussion on bombing must evolve and incorporate the significant issues surrounding dual purpose targeting instead of lumping all bombing together and pointing to the doctrine of double effect as a way to alleviate any culpability regarding legitimate military targets.

Bombing a target that only has a military purpose (such as a munitions plant)³⁰ will inevitably (depending on what the target is) have foreseeable harms. Bombing a munitions factory would most likely kill civilian factory workers and possibly those civilians who happened to be in close proximity to the blast radius. However, bombing a target, having *both* military and civilian purposes, has not only foreseeable but also residual and even unforeseen

²⁸ Ibid.

²⁹ Ibid.

³⁰ A munitions plant does not provide any purpose to the civilian sector such as a rail network or electrical grid does. Sure, it employs civilians, but the facility itself is not needed by the civilian population. Therefore, I refer to such a facility as only having a military purpose. The factory makes bullets and bombs for its military to shoot at the enemy.

harms. The destruction of a dual use facility will likely kill civilians who are not only in close proximity to the intended target as well as the civilians who actually work at the facility, but more so will cause residual effects to civilians long after the dual use facility was bombed. Plenty of empirical evidence suggests that destroying dual use facilities (specifically those facilities that contribute to and or secure core human rights) continues to cause harm and kill civilians long after the bombing or even after the war is over. Second and third order (residual) effects will plague the civilian populations until the facility is repaired. When the long term effects of targeting a dual use facility involve a threat to the human rights of civilians, then special requirements apply.

Dual use target strategies are a mainstay in the bombing campaigns of the 21st century, because this strategy destabilizes a state's ability to wage war by destroying or impairing transportation networks, electrical grids, radio towers, oil refineries, fuel depots, industry, etc. But we must also recognize a way to most effectively try to compensate for dual purpose facility destruction, since it has lingering effects on civilians more so than the enemy military force for which the target was deemed legitimate to destroy in the first place.

It is one thing to suggest that civilians' rights during war can be overridden if certain conditions are met (legitimate act of war, proportionate, military necessity, urgency of the situation, military advantage to be gained, justified threat, etc.). However, it is quite another to continually harm civilians even after the war is over. For example, a tactical bomber pilot can be a justified threat to civilians working at a munitions plant because at the moment when the pilot attempts to destroy the factory those civilians who will be threatened is proportionate to the military advantage to be gained. That is, those civilians are allowed to be threatened, even

killed, because there is a military advantage to destroying the factory and denying bullets to one's enemy.

However, in the case of bombing a dual purpose facility, it cannot be the case that a tactical bomber pilot is not only a justified threat to civilians when he attacks the facility but that those civilians are then continually justifiably threatened not only throughout the war but after the war is over as well. It seems odd to suggest that civilians can continually be justifiably threatened by an act even after the war is over because at one point during the war the tactical bomber pilot was a justified threat to the civilians in or around the facility at the moment of the bombing.

Once the enemy capitulates, soldiers no longer have the right to kill enemy soldiers. That is, soldiers can no longer be considered a *just threat*.³¹ If there is no longer a just threat, then there is no longer an objective moral justification which means that a tactical bomber pilot can no longer be a justified threat to civilians either. However, it seems as if he still is, because his actions during the war still continue to harm and kill civilians long after the dual purpose facility was destroyed.

After the war ends, it is no longer permissible to inflict harm on civilians as an unintended side effect but decisions that were made during the war continue to effect civilians just the same. Destroying dual use facilities (ones that are essential to safeguarding basic human rights) continues to harm civilians during the postwar phase when there is not any permissibility to override the rights of noncombatants. Failing to repair destroyed dual purpose facilities ex

³¹ I am using McMahan's terminology here. A just threat is one in which a person is "objectively morally justified in posing a threat of harm to which the potential victim is morally liable" (Ibid., 174). In other words, the just threat is the threat justly posed, e.g. a soldier poses a just threat to an enemy soldier. "The harm that a just threat would inflict would neither wrong the victim nor infringe his or her rights" (Ibid).

post denies civilians their immunity rights of life and liberty which are the two main entitlements bestowed upon noncombatants.

My point is that when the destruction of dual use facilities threatens or violates noncombatants' basic human rights, two special obligations to correct that situation arise: 1) recognition of a state's obligation to ensure that the human rights of its enemy's civilian population are not compromised after hostilities, and 2) routine *ex post* independent review of all decisions to target dual use facilities. The first obligation (when fulfilled) insulates civilians from the harms of war, and the second obligation (when fulfilled) holds belligerents accountable if they unreasonably subordinated proportionality to military necessity as well as ensures that repair was conducted.³²

5) *Ex Post* Obligation: Belligerents Should Immunize Civilians from Residual Effects

Although military necessity and proportionality are obligatory criteria that need to be met before bombing of a facility is conducted, these two criteria allow for latitude and interpretation. Attacking dual purpose targets is a contested matter from a moral perspective but can also be contested from a legal perspective. There is a lot of gray area in the law when determining if a dual purpose target met the *nature, use, location, or purpose* conditions and if, in fact, the military advantage to be gained actually outweighs the incidental harm to noncombatants.

Given these difficulties in making and monitoring proportionality judgments at the front end, there are good reasons to not only affirm an *ex post* obligation to cover certain costs of

³² These are independent reforms. *Ex post* review might be warranted apart from the issue of repairing damages that violates the basic human rights of noncombatants.

targeting dual use facilities but also to hold belligerents accountable for their proportionality determinations.³³

Because unilateral actions can be problematic under international law provided that there is not *ex post* accountability, Buchanan and Keohane believe that key to authorizing force is that “accountability operates both *ex ante* and *ex post*.”³⁴ In similar fashion, the key to bombing dual purpose facilities is accountability that also operates both *ex ante* and *ex post*. There is a standing need for *ex post* accountability given the undesirability of *ex ante* authorization (which is usually determined while trying to account for incomplete data, the fog of war, etc.). The only way we can say that attacking a dual purpose target is morally permissible is if in addition to the criteria of proportionality and necessity, belligerents must protect civilians from the residual effects of war.

In order to allow the targeting of dual use facilities, specific heavy burdens (*ex post* stipulations) need to be placed on the belligerents that destroy them. Imposing *ex post* stipulations help contain the activities of war instead of allowing it to spill over unnecessarily into the civilian sector. Once hostilities are over, belligerents should be held morally accountable for repairing the destroyed dual purpose facilities that protect civilians from standard threats to their basic human rights.³⁵ This obligation on the part of a victor is fully consistent with *jus post bellum* considerations rooted in right intention aimed at a just and lasting peace.

³³ My perspective is analogous to Allen Buchanan and Robert Keohane’s regarding preventive use of force without Security Council approval. Although I am not discussing preventive use of force, Buchanan and Keohane’s concept fits nicely with my point.

³⁴ Allen Buchanan and Robert Keohane. “The Preventive Use of Force: A Cosmopolitan Institutional Proposal,” in *Ethics and International Affairs*, (Vol. 18, No. 1: 2004), 11. Buchanan and Keohane’s paper revolves around comparison of international bodies (UN as opposed to an external commission). Although I use their framework, I am more focused on the moral aspects than the legal aspects.

³⁵ Covering *ex post* repair costs can be accomplished multiple ways. Most likely it would include a combination of not only monies but also the use of the victor’s internal assets, e.g. some implementation and integration of the army corps of engineers, local construction, fabrication, and supply companies of the vanquished state, international and local contractors, outsourcing to private firms, etc. I wish to bracket this subject in order to stay on topic.

Surely a victor will be committed to a lasting and just peace rooted in mutual respect for human rights, etc., and defending itself in a way that evidences that (by restoring damaged dual purpose facilities if the damage threatens the human rights of civilians) will advance this end.³⁶

The victor should repair such facilities not to the level that is consistent with restitution (restoring what has been lost back to the *status quo ante*) but to the level that is consistent with reparations (not restoring it to the original condition, but to the good enough condition).

Dual purpose targets (those that help secure core human rights) should have to be repaired (to a level that is good enough) and not the *status quo ante* level, because it would just have to meet the minimum necessary standard that is needed to secure those physical security, subsistence, and basic liberty rights of civilians.

For example, if a bridge (located along a major arterial highway) was targeted and destroyed, that bridge would either be repaired or a new one erected, if that bridge was necessary in order to secure the basic human rights of some of the civilian populace because that bridge was the only viable means to get to a local hospital or to a drinking water well. The requirements for the bridge would only have to meet the ‘good enough standard,’ e.g. it would reasonably have to support commerce and vehicular traffic, but it would not have to support the maximum tonnage allowances which are necessary for military capabilities (the moving of tanks), even if the original bridge did. If for example, a power grid was destroyed, the whole grid does not have to be built anew, but repaired or rebuilt so it can adequately provide electricity to hospitals, shelters, food kitchens, government buildings, etc. From this point, it is up to the host state to do more. That is, the belligerent who destroyed these facilities is just assisting the

³⁶ If anything, fulfilling this obligation makes the occupation force more palatable to the defeated state. Repairing dual purpose facilities would help set the conditions toward reconciliation.

defeated state get back on its feet (by repairing destroyed dual use facilities in order to prevent more unnecessary deaths to civilians) as the defeated state starts to rebuild.

Civilians should be immunized from costs that compromise their basic human rights, and that means that those civilians should not only have potable water, food, shelter, physical security, sewage and trash removal, and access to medical attention, but they also require a state that can effectively secure those rights for them, e.g. courts, police precincts (which enables the rule of law), markets, etc. are going to have to be operational.³⁷ So, it looks like a victor committed to ensuring the noncombatant rights of civilians within the state it has defeated and a just and lasting peace must not leave them without these institutional prerequisites to their human rights. That is, noncombatant immunity requires immunity from residual effects and aiming at a just and lasting peace entails ensuring that civilians have institutions and resources necessary to basic human rights. That means more than just repairing government buildings, bridges, electrical grids, etc. Upon the cessation of hostilities, a defeated state will not be able to accomplish this restoration rapidly or effectively without the assistance of the victor.

Even if the state with destroyed dual use facilities was the unjust aggressor and has the resources to repair its own facilities, the state that destroyed them must offer to repair or pay for the damages if the facilities that were destroyed are needed to secure core human rights. Doing so is consistent with right intention. Not only fighting with constraint but also limiting harm to civilians by repairing or offering to pay for repairs is a necessary condition for establishing a lasting peace with justice. Doing so has the potential to facilitate reconciliation and trust between the warring parties as both states work through the postwar phase together.

³⁷ Disbanding the civil service of a state is most likely detrimental to any attempt to secure core human rights of the people of any state because civil service employees run city, state, and federal levels of government. Without these people a vacuum is created and government systems flat out fail to work.

In addition, there is an obligation to repair targeted dual use facilities even if the targeting satisfies necessity and proportionality criteria where the proportionality criteria included residual effects on civilians. For example, a bridge that the enemy is counterattacking across can easily meet military necessity and proportionality criteria (to include residual effects) and given the urgency of the situation can be justifiably destroyed. The tactical bomber pilot is a justified threat to the civilians in close proximity of the bridge. However, after that attack and after the war, civilians who previously used that bridge as a means to reach the local hospital are no longer able to reach the hospital because the closest bridge is now located ten miles away.

Although this was not only a legitimate dual purpose target but also met proportionality (to include residual effects) and necessity guidelines at the time of the bombing, a belligerent should repair that bridge after the war to the extent that allows local civilians access to their hospital. Necessary and proportionate military action poses a justified threat to civilians but this should only be the case during the time of the war, not after. The bombing of the bridge was a justified target at the time of the bombing, but after the war the bridge's destruction continually impairs civilians' chances of obtaining medical attention. And once the war is over it is no longer acceptable or justifiable to continually inflict harm on civilians as an unintended side effect because of a decision that was made during the war. In the postwar phase a tactical bomber pilot can no longer be classified as a justified threat because the war is over. However, the destruction that the tactical bomber pilot justifiably caused in the midst of war continues to harm civilians in the postwar phase when such damage can no longer be claimed to be acceptable or justifiable.

Although the victor should be held morally accountable for repairing dual purpose destruction that it caused, this does not suggest that the victor is responsible for fixing the

aggressor state back to the *status quo ante*.³⁸ Belligerents do not have obligations to cover the costs of destroyed infrastructure that was not essential to safeguarding core human rights. Of course, history is dotted with such cases where the victor has rebuilt, even transformed, the government of the unjust state, but this falls outside of the parameters of what is morally owed by the victor to the vanquished. Many of these endeavors—where the victor rebuilt the vanquished—were based on prudential considerations and a nation building ideology but not moral stipulations. Nation building, securing economic privileges, or using land as power projection platform for one’s own troops are beneficial to the victor, but these are not morally necessary undertakings.

Larry May posits that it seems unfair to hold victors responsible for restitution and reparations; this is an undue burden. May advocates a compensation fund and proposes a ‘world-wide-no-fault insurance scheme’ akin to something like a no fault insurance policy from which these restoration costs would be paid. This fund disconnects paying the costs from the question of ‘fault’ because all states (victor, vanquished, and bystander) would pay into this fund. May states that, “All parties in a war have equal responsibilities of restitution or

³⁸ It could very well be the case that by just ‘repairing’ basic infrastructure necessary for securing core human rights instead of restoring it to the *status quo ante* that civilians’ quality of life will likely be much less than what it was before the war. That is, the extent of non-basic rights that these civilians had before the war will most likely be curtailed for quite some time after the war. There is a worry though, that a victor that does not restore infrastructure, etc., to more or less the *status quo ante* will risk enmity from civilians who, when faced with blaming their own leaders or blaming another country for their losses may be all too easily baited into blaming another country. Just because the civilian populace blames the just victor for its decimated condition, does not suggest that more is required than repairing infrastructure that protects civilians from standard threats to core human rights. However, setting the stage for a just and lasting peace, the victor might have to do more than what is required on account of the civilian immunity norm. Postwar norms associated with reconciliation might require more than just rebuilding dual purpose facilities and basic institutions to a level that is just ‘good enough’ in order to assist a state return to its *status quo ante* as well as attenuate animosity.

On another note, in a different imagined scenario, it could be the case that civilians of the unjust aggressor state did not enjoy basic human rights on the front end before the war. Maybe this outlaw regime funneled all of its money into its military and neglected its citizens’ right to have a social minimum. In such a case, whatever dual purpose facilities that the just victor destroyed would have to be returned to the *status quo ante*, because even returning it to this level (*status quo ante*) is still subpar with a social minimum. Returning it to anything less than what those civilians already had *ex ante* is clearly wrong because it would be decreasing the already inadequate capacity of that state. Human rights norms would require more from not only the victor but also the international community as the back-up obligee for securing core human rights.

reparations whether they were defenders or aggressors during the war.”³⁹ May further goes on to say, “All States are complicit in war and no States can be fully said to be without fault concerning the ravages of war or mass atrocity.”⁴⁰

First, I empathize with May’s concern that holding victors responsible for restitution and reparations seems unfair because it is an undue burden. However, states committed to setting conditions for a just and lasting peace have an obligation to repair certain infrastructure (dual use facilities that safeguard core human rights). This might be a burden on the victor but it is not an undue burden. Although this places a burden on belligerents to repair the damage *ex post* that they caused, it is warranted. Belligerents do not have to destroy dual use facilities that gravely affect the basic human rights of the civilian population but choose to do so for the advantage to be gained. Holding belligerents accountable by incorporating an *ex post* commitment to repairing dual use facilities is fair and reasonable.

Second, on another note, maybe as a way to have all states agree to a compensation fund, we do not propose that all states are complicit in war. In some fashion we can say that states such as Switzerland, Finland, Luxemburg, etc. are complicit (at varying levels) in war especially during the middle ages. But I think that in order to get all states to agree to contributing to a compensation fund we should approach it from a different perspective. One that comes with realizing that our world is faced with many nonideal situations and some of those situations will inevitably lead to war. That being the case, then collectively all states should contribute to a fund that allocates reparation monies that can be used to help rebuild states that have been devastated by war as a way to help those states rebuild, secure basic human rights, and establish conditions for a just and lasting peace. This way, we do not universally place blame on all states

³⁹ Larry May, *Reparations, Restitution, and Transitional Justice*, 2011, 19-20.

⁴⁰ *Ibid.*, 22.

for their warring nature. Rather, we just recognize that a system is necessary, so states contribute financially to a fund that is designed to alleviate civilians from the ill effects of war.

Regardless of how the belligerent entered the fray (acting in self-defense or initiating an unjust war) all belligerents must be morally accountable for their actions. Just as a liberal democracy defending itself has a legal right to bomb dual purpose targets so does an aggressor state,⁴¹ but it too then should be morally obligated to cover the *ex post* reparation costs. There is a moral requirement of reparations regardless of financial hardship for both victor and vanquished. Of course suggesting that belligerents are morally obligated to cover those costs is a separate matter from whether pragmatically there is a way to make them pay or whether other issues might force us to the conclusion that overall it is best for the moral obligation to go unmet, e.g. the unjust state is destitute after the war, the just state although victorious has suffered overwhelming damage to its own infrastructure and needs to tend to it first, etc. The pragmatic consideration to forgo or temporarily suspend restitution because of financial hardship does not negate the moral obligation of belligerents. It also could be the case that when belligerents have extensive financial burdens other states might assist.⁴²

Although implementing *ex post* restoration obligations on belligerents that destroy important dual use facilities to the enemy's civilian population is important, so too is institutionalizing routine *ex post* independent review of all decisions to target dual use facilities.

⁴¹ I am referring to belligerent's legal rights regarding the law of armed conflict. I do recognize though that an aggressor state can be charged with the crime of aggression because the war is unjust. However, legally speaking in war all belligerents (whether just or unjust) have the same set of legal rules governing conduct.

⁴² I will discuss this in more detail in section 7.

6) *Ex Post* Obligation: Belligerents Should Be Responsible for Gross Miscalculations

We need to shore up the moral requirements for dual purpose targeting by incorporating residual effects into proportionality criteria.⁴³ Henry Shue and David Wippman suggest that the criteria for bombing dual purpose targets “unduly favors military efficiency over protection of the civilian population.”⁴⁴ Once a target is determined to be military, its relationship to the civilian community and its concurrent civilian contribution is usually sidelined. Doing so creates an obvious tendency to find any military use in order to legitimize attacking almost any target. However, dismissing the facility’s contribution to the civilian community does not change the fact that the damage to civilians, although “incidental or unintentional, is still real damage.”⁴⁵

Moreover, emphasis is given to the immediate effects rather than the residual effects most likely because this data is easier to ascertain. The tendency to ignore long term effects gives the targeting of a dual use facility a misleading look of permissibility, at least in terms of proportionality. Shue and Wippman suggest that if military planners correctly did the analysis regarding the permissibility of attacking a dual purpose target, the “expected incidental civilian harm [to include cumulative effects] would be excessive in relation to an anticipated military advantage”⁴⁶ to be gained.

Shue and Wippman would just as soon prohibit most dual use targeting. However, their position might be too restrictive because “if the law of armed conflict prohibited everything necessary to the effective conduct of warfare, it would simply be ignored and would quickly fall

⁴³ Shue and Wippman indicate that “the indirect costs stemming from the long-term effects ... are less visible and more difficult to ascertain and so often ignored” (Henry Shue and David Wippman, “Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions,” in *Cornell International Law Journal*, (Vol. 35, 2002), 564).

⁴⁴ Ibid., 560.

⁴⁵ Ibid.

⁴⁶ Ibid., 574.

into disuse.”⁴⁷ If the bombing of dual purpose targets was no longer authorized, belligerents (whether the unjust aggressor or the just liberal democracy) would not abide by these guidelines because it significantly degrades their war making ability. States would claim that they need to decisively engage their enemy. That is, it is a matter of necessity to strike such dual purpose targets, while others would claim that these targets violate proportionality.⁴⁸ In order to meet the demands of both necessity and proportionality, we need a system that works and that states will

⁴⁷ Ibid., 559.

⁴⁸ I believe that Shue, in a more recent article, attempts to press his point too far. Shue suggests that, “Current doctrine represents at least in part a daring attempt to return to moral-bombing” (*Targeting Civilian Infrastructure with Smart Bombs: The New Permissiveness*, 6). The goal of moral-bombing (directly bombing populated areas) is to break the psychological will of the people, hoping that the citizens will in turn demand that its government sue for peace. This tactic was used by the Allies and Nazi Germany during WWII. One of the reasons that this tactic was accepted as part of war was that collateral damage was incredibly high in the first place even when bombing military targets because of the limited technology associated with bombing at the time. In the 1940s there were not any smart or precision guided munitions so belligerents used carpet bombing. At best, American bombers could reasonably guarantee that only twenty-five percent of their payload would strike within three city blocks of the desired military target. Dropping hundreds if not thousands of bombs during a bombing run increased the likelihood that the military target would be destroyed. Collateral damage and incidental loss of civilian life was extremely high. In many cases, it would have been hard to tell if a specific bombing run was focused on a military or a civilian target because civilian deaths would be very high in both cases.

Shue wants to suggest that military forces—in particular the US—are now resorting back to indiscriminate bombing tactics like those used in WWII. In his paper, Shue reveals the United States’ joint targeting (“Joint” refers to all military forces: Army, Navy, Air Force, and Marines) doctrine which states, “Civilian populations and civilian/protected objects, *as a rule*, may not be intentionally targeted, *although there are exceptions to this rule*” (Ibid., 6). However, the US *Joint Targeting* doctrine further stipulates what qualifies as *an exception to the rule*. “Acts of violence solely intended to spread terror among the civilian population are prohibited; the protection offered civilians carries a strict obligation on the part of civilians not to take an active part in armed combat, become combatants, or engage in acts of war; civilians engaging in combat or otherwise taking an active part in combat operations, singularly or as a group, *lose their protected status* (emphasis added)” (*Joint Targeting*, E-2). That is, *the exception to the rule* that allows for the bombing of civilians is that those civilians have lost their protected status because they have picked up a weapon and joined the fight similar to the role of militia member, an insurgent, or a thug.

Shue’s point does have some merit though because the bombing doctrine does seem to suggest that bombings can cause terror so long as there is some military advantage that can be cited. Then again it seems hard to suggest that there would not be terror associated with any bombings. Even a purely military target such as a munitions factory that killed civilian workers as an unintended side effect would cause unease, fear, terror, and duress among the civilian population because civilians have neither control or insight into what will happen next.

US doctrine does attempt to mitigate harming the civilian population by incorporating a military lawyer (staff judge advocate (SJA)) into the target planning. “The SJA should be immediately available and should be consulted at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations; early involvement by the SJA will improve the targeting process and can prevent possible violations of international or domestic law” (Ibid., E-6). In addition to having a military lawyer review targets for legal permissibility, a plausible way forward is to better train and educate intelligence analysts (the military staff personnel who determine the facilities to be targeted) about the civilian contribution and residual effects imposed on the civilian population if specific facilities are targeted and destroyed.

also agree to. Although *ex ante* targeting criteria might be somewhat interpretative, belligerents should be accountable for gross errors in their proportionality calculations.

Discussing preventative force, Buchanan and Keohane suggest that there should be an *ex ante* impartial commission comprised of a group of states with diverse interests that can review and investigate the current situation in order to determine if preventive force is warranted. An *ex post* commission would then review the action of the initiator of the preventive war to determine if there were any unjust or unfounded activities and cover cases of emergency action when the *ex ante* tribunal is bypassed. If force was not warranted, sanctions would follow. Sanctions are essential, because without them, as Thucydides has remarked, “The strong do what they can and the weak suffer what they must.”⁴⁹

Although Buchanan and Keohane’s external commission (outside of the UN) could quite possibly be used to determine if preventive force is warranted, the same concept for the *ex ante* requirements of dual purpose targeting cannot be used.⁵⁰ Belligerents wanting to bomb dual purpose targets should not be required to provide information to an impartial commission for their approval. It is nearly impossible to see how an external commission could police the tactical decisions of belligerents during combat. Ensuring that targets meet legal criteria and requirements should be left to the belligerent and not an external commission.

With this comes the fact that we will have to basically accept belligerents likely flawed *ex ante* judgments of proportionality given the inevitable fog of war (limited information, confusion, impulsiveness, lack of long term (residual) effects considerations, etc.). However, an

⁴⁹ Buchanan and Keohane, 12.

⁵⁰ Military lawyers, versed in the law of armed conflict, are a constitutive element of military planning cells. These planning cells do not need or require outside control and oversight in determining legitimate military targets. It seems that trying to set up an *ex ante* external committee to oversee and analyze the full complement of potential dual purpose targets is way too demanding on any external committee and would severely hamper a belligerent’s rapid responsiveness which is critical in war.

ex post external commission should be created which could then review dual purpose target *ex ante* proportionality judgments to determine any unjust or unfounded activities in the targeting decision as well as review widespread effects on civilians of legitimate attacks on dual use facilities.⁵¹ Furthermore, there needs to be *ex post* accountability even if legal criteria and *ex ante* necessity and proportionality requirements were met.⁵²

If there is no accountability *ex post* besides just repairing infrastructure, it could possibly be the case that targeting determinations grossly err on the side of military advantage. That is, if the only accountability is nothing more than repairing a structure compared to that of an external commission's review and investigation of belligerents' actions, then belligerents might be apt to destroy even more dual purpose facilities. The point is that *ex post* review and sanctions will alter *ex ante* decisions/reasoning.

These stringent requirements might impact belligerents' decisions to bomb certain dual use facilities (e.g., a major highway interchange and an electrical generation plant), so belligerents instead bomb alternative dual purpose targets (multiple smaller road junctions and electrical substations (switching units)) that would have similar effects and military gains without causing as much collateral damage (residual effects). Of course lives will still be lost in the actual bombing, but lingering side effects would be minimized in the absence of the bombing of larger dual use facilities.⁵³

⁵¹ The bombing of purely military targets would not have to be reviewed by an *ex post* commission unless collateral damage is *prima facie* excessive.

⁵² An *ex post* review would be used just to enforce the *ex post* obligations.

⁵³ On another note, there will be hard cases. There will be cases that need to be reviewed to determine whether damage to a dual use facility caused by an attack or some other action is what threatens human rights. For example, suppose State A destroyed a power plant that is dual use (it provides civilian electricity but also provides the energy for a major munitions plant) in State B. After it is destroyed, State B opts not to divert power from another electric plant to its civilian population previously dependent on the damaged facility but rather to divert that power to the munitions plant. State B should be held accountable for taking electricity away from its own citizens to power the munitions plant. It is possible that State A will be obligated to repair the power grid if it decides to bomb it again in order to render no electricity to the whole geographical vicinity. Or if State A decides to bomb and destroy the

If the belligerent fails to acquiesce to *ex post* requirements of repairing infrastructure or an external commission's *ex post* investigation and findings, then the belligerent should not only be morally culpable for its failure but also be subjected "to sanctions according to rules that have been established in advance."⁵⁴

Although a belligerent that destroyed dual purpose facilities has an obligation to ensure that the basic human rights of its enemy's civilian population is safeguarded, this does not suggest that decimated human rights conditions in a vanquished state impose duties on other states outside of the belligerent that caused the damage.

7) The Difference between Noncombatant Immunity and Human Rights

General human rights' responsibilities should be fulfilled by back-up obligees if the primary addressee cannot fulfill its responsibility. If other states which were not involved in the war want to help or assist with the rebuilding and restoring in order to secure basic human rights or other needs of the vanquished state, then these obligations are fulfilled by obligations to human rights and not noncombatant immunity. Other states (those outside the parties to the conflict) that wish to do so are not required to do so because of the principle of noncombatant immunity. Rather, these other states, acting as back-up obligees, would be driven by human rights norms, not noncombatant immunity norms.

States not parties to the conflict can have two obligations: 1) helping the vanquished, and 2) holding the primary obligee accountable for its destruction.⁵⁵ Third party states have the

major munitions factory, State B can then divert that power back to its civilian populace since the major munitions plant has been completely destroyed.

⁵⁴ Buchanan and Keohane, 11. How institutionally to take up that moral terrain is through the use of some sort of international body which would review potential injustices. However, the organization and composition of such an external commission along with its rules and authoritative nature would have to be worked out.

⁵⁵ But also, it is possible, that if the victor was destitute after the conflict, other states would volunteer to assist the victor with repairing the dual purpose facilities in order to protect civilians from residual harms.

ability to pressure and push for the triggering of specified sanctions against the primary obligee (belligerent) if it fails to uphold its *ex post, jus in bello*, obligations. Back-up obligees should first pressure the primary obligee to fulfill its special obligation if the primary obligee does not initiate this on its own or to the extent that is needed.

If the primary obligee refuses or needs assistance, the back-up obligee should help as a matter of general human rights' assistance. States are the back-up addressee for other states that need assistance in securing the basic/core human rights of their citizens. If the primary obligee refuses to fulfill its special obligation, then back-up obligees should not only attempt to enact peaceful measures (public condemnation, targeted sanctions, etc.) against the primary obligee for its failure but also those back-up obligees now have the obligation to assist the vanquished state in safeguarding its citizens' basic human rights.

Noncombatant immunity norms are only between parties to the conflict. War is a special relationship between parties and with it comes a set of special entitlements, restrictions, and obligations. The principle of noncombatant immunity does the justificatory work and is particular to those two states—victor and vanquished—and their relationship in the context of the war. This special duty is constitutive of this type of special relationship. Of course noncombatant immunity is derived from human rights. However, noncombatant immunity is not ubiquitous. It only manifests as the driving norm within a specific special relationship: war.

Conclusion

War promises death not only to combatants but to the innocent as well. Francisco de Vitoria stated, “To see that greater evils do not arise out of the war than the war would avert”⁵⁶ is

⁵⁶ James Brown Scott. *The Spanish Origin of International Law: Francisco De Vitoria and His Law of Nations*, (Oxford: Clarendon Press, 1934), 231.

essential to fighting a just war. During the war phase, the civilian population is vulnerable and fatally exposed to the harms of war. However, it does not end there. Months after the conflict, civilians continue to die as a result of inadequate living conditions brought about by indirect and unintended results from major combat operations which involve the bombing of dual use facilities.

There is a lot going on when two states clash in armed conflict. However, they should not acquiesce to the exigencies of war. Derived from human rights, the principle of noncombatant immunity is an essential part of the war convention. Without it, force would be unconstrained, and wanton violence and destruction would ensue. Although noncombatant immunity is derived from human rights, the distinct principle of noncombatant immunity pertains to only the determinant parties to the conflict (the belligerents).

When destroyed dual use facilities threaten or violate the basic human rights of noncombatants, then special obligations apply to belligerents. Implementing *ex post* accountability is twofold: a) belligerents must immunize civilians *ex post* from the ills of war by repairing dual use facilities that contribute to securing basic human rights, and b) belligerents must be held accountable *ex post* if they grossly subordinate proportionality to military necessity.

Belligerents should acquiesce *ex ante* to these *ex post* requirements in order to insulate civilians from the lingering effects of war. Otherwise, there is no moral underpinning to support dual purpose target destruction since the residual effects of war will continue to harm the innocent long after the fighting stops. These obligations surface on account of abiding by the norm of right intention and the principle of noncombatant immunity. Although it is not particular to the *post bellum* phase, the *post bellum* or *ex post* implications of the immunity rights of civilians are more robust than we have commonly thought.

CHAPTER 3

Negative and Positive Corresponding Duties of the Responsibility to Protect

In the spring of 1994, the Hutus viciously slaughtered almost 800,000 Tutsis in a genocide campaign in Rwanda as the international community sat back and let the madness unfold. Not only were the Hutus morally culpable for their heinous acts, but every state (to some extent) was also morally to blame for the United Nations' failure to stop or even attempt to stop the Hutu rampage. Four years after the genocide in Rwanda, President Clinton apologized for the Western world's inaction in the face of such terrible acts. Then a year later as an ethnic cleansing campaign swept across Kosovo, and with the members of the United Nations Security Council (UNSC) divided on the decision to intervene, NATO decided to stop the Serbian ethnic cleansing of Albanians. However, NATO's bombing campaign produced thousands of civilian deaths by causing a lack of potable water, electricity, and medical necessities. In both cases the UN failed to act.

Even though NATO acted in Kosovo, it caused more harm than it should have.¹ In an attempt to respond to the international community's lack of action to the tragedies of genocide and crimes against humanity, Secretary-General Kofi Annan, during the 2000 United Nations General Assembly, made a plea to the international community "to try to find, once and for all, a

¹ The intervention in Kosovo only consisted of a NATO air campaign. No ground forces were used. The bombing focused on destroying dual use targets (electrical grids, highway interchanges, oil refineries, bridges, fuel depots, etc.) as a way of undermining Slobodan Milosevic's ability to wage war on the civilian population. Although this strategy brought the capitulation of Milosevic's forces, it also caused the death of thousands of civilians due to foreseeable but unintended results as well as residual effects (lack of potable water, food, shelter, and medical attention).

new consensus on how to approach the issue of humanitarian intervention and to forge unity around the basic questions of principle and process involved”² when it is required.

In 2000, the International Commission for Intervention and State Sovereignty (ICISS) was formulated to grapple with the surrounding legal, moral, operational, and political issues of the use of external military intervention for human protection. Many issues come into play when determining if using force to stop force is necessary. Nonetheless, I will focus on the moral aspects of military intervention. I will show that a state can lose its moral right to non-intervention, and when a state loses its moral right to non-intervention, military intervention can be required if further necessary conditions are met.

I plan to make the case for the Responsibility to Protect as well as examine its conditions and content in an eleven-section analysis. Section 1 shows the evolution of the emergent norm of the Responsibility to Protect but also exposes some of the worries raised by the doctrine. In sections 2 and 3, I will show where the conditions of sovereignty fail there is no right to recognition or right to non-intervention, but that the absence of a right to non-intervention is not sufficient to establish either a right or duty to intervene.³

The focus of this chapter turns to rights and duties in sections 4 through 8. Securing physical security rights taking precedence among basic rights is the topic of section 4. In sections 5 and 6, I will propose that safeguarding basic rights requires the fulfillment of both negative and positive duties while advocating that the international community can and plausibly should fulfill this duty via existing voluntary international institutions such as the UN. Later, I

² “The Responsibility to Protect,” International Commission on Intervention and State Sovereignty (ICISS), December 2001, vii.

³ In my view, there are a number of necessary conditions which are, when taken all together and fulfilled, sufficient to justify military intervention. These include the following: there must not only be serious, widespread violations of physical security rights but in order for a military intervention to be required and so permissible it must have a reasonable chance of success, must be a last resort, must be welcomed by those being harmed, must be all things considered proportionate, must be undertaken voluntarily by states, must not abridge the rights of the soldiers it involves, and the target state must have had ample opportunity to redress the problem itself.

suggest that the duty to intervene is not necessarily a military duty. I then turn to a discussion of the rights of soldiers.

In the remainder of this chapter (sections 9, 10, and 11), I will discuss aspects of the obligation to intervene by looking at the availability of resources which are provided by states voluntarily as bearing on whether the international community is obligated to intervene. I then explain that in the event that the international community fails to act where required, individual states may act. The chapter ends with my proposal that the UN also has a duty to improve in order to more efficiently and effectively respond to this obligation.

1) The ICISS, World Summit, and Implementing the Responsibility to Protect

In 2001, the ICISS published “The Responsibility to Protect” which replaced the term *Humanitarian Intervention* with the term *The Responsibility to Protect* (RtoP or R2P).⁴ The ICISS replaced the term because “1) state sovereignty implies primary responsibility for the protection of citizens rests with the state itself, and 2) where a state is unable to or unwilling to avert grievous issues,⁵ the principle of non-intervention yields to the international responsibility

⁴ The terminology changed because the commission believed that arguing for or against the right to intervene by one state into another was outdated and unhelpful. Humanitarian agencies have also had strong opposition to the term since it militarizes the word humanitarian. Military action, the intentional killing of others, should be seen for what it is—intervention or military intervention—but should not be called humanitarian because it denigrates the actual meaning of the word ‘humanitarian’ which should denote actual relief and assistance, not assistance by way of killing those who are trying to kill others.

⁵ In order to justify the use of military force, there has to be serious and irreparable harm occurring to human beings. Grievous issues—in this context—refer to genocide, war crimes, ethnic cleansing, and crimes against humanity. **Genocide** is “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group including: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group” (The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Article 2), <http://www.un.org/en/preventgenocide/adviser/genocide_prevention.shtml>). **War Crimes** “are namely, violations of the laws or customs of war; such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour [foreign forced labor] or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity” (Charter Nuremberg Trial 1945 (Article 6), <<http://www.icrc.org/ihl.nsf/WebSearch?>

to protect.”⁶ The Responsibility to Protect doctrine consists of three specific responsibilities: 1) The responsibility to prevent—to identify early warning signs of trouble and take action to mitigate underlying issues; 2) The responsibility to react—to respond to the situation with appropriate measures; and 3) The responsibility to rebuild—to provide (after military intervention) full assistance with restoration efforts.⁷ In order to justify the use of military force (the react phase), there has to be serious and irreparable harm occurring to human beings: 1) Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or the neglect or inability to act, or a failed state situation; or 2) Large scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.⁸

In addition, the ICISS states that the UNSC should take into account that if the UN fails to discharge its R2P obligations, then the UNSC may not rule out other means (states acting unilaterally, sub-regionally, or regionally) to meet the seriousness of the situation. Although the ICISS states that there is no better or more appropriate body than the UNSC to authorize military intervention for human protection, it recognizes the case that other states might act if the UN fails to and that this would greatly undermine the credibility of the UN.

SearchView&Query=war+crimes&SearchFuzzy=TRUE&SearchOrder=4>). **Crimes Against Humanity** “are namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated” (Ibid). Furthermore, “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan” (Ibid). **Ethnic Cleansing** is “the planned deliberate removal from a specific territory, persons of a particular ethnic group, by force or intimidation, in order to render that area ethnically homogenous.” (Genocide Prevention Project, <<http://www.preventorprotect.org/overview/definitions.html>>. 2009). However, “there is no formal legal definition of ‘ethnic cleansing,’ though its scope is within the definitions of war crimes and crimes against humanity” (Ibid.).

⁶ ICISS, xi. Although the ICISS states that the principle of non-intervention yields to the international responsibility to protect, I will make the case for an international responsibility to protect based on basic human rights as what we all owe to one another.

⁷ Ibid., xi.

⁸ Ibid., xii.

In 2005, at the World Summit (WS) the UN General Assembly agreed that the responsibility to protect was an important feature in safeguarding the innocent, and unanimously agreed (Resolution 63/308) to paragraph 139 of the 2005 WS regarding R2P: “The UN will be prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”⁹

The ICISS suggested that the duty to intervene was not only required in actual cases of genocide but also in large scale loss of life without genocidal intent. However, these stipulations that were incorporated in the 2001 ICISS were attenuated during the 2005 World Summit. Although the ICISS’s proposal was discussed during the 2005 WS, member states unanimously agreed to provisions that were less demanding than what the 2001 “The Responsibility to Protect” proposed.

The 2001 ICISS suggests that the UNSC has a duty to intervene. However, in the 2005 World Summit it seems that the UNSC only has a right (not necessarily a duty) to intervene. The justification for force is no longer large scale loss of life, ‘actual or apprehended’ with genocidal intent or not,¹⁰ *but* in cases of ‘actual’ genocide, war crimes, ethnic cleansings and crimes against humanity.¹¹ Also reacting to a crisis does not seem as paramount as it did in 2001 when the ICISS stated that the principle of non-intervention yields to the international responsibility to protect. Instead the 2005 WS consensus was that the UN will be prepared to act on a case-by-

⁹ United Nations General Assembly 2005 World Summit, para 139. <<http://www.un.org/summit2005/documents.html>>, 2005.

¹⁰ ICISS, xii.

¹¹ UN GA 2005 WS, para 139.

case basis. On another note, the World Summit does not make any reference to the international community's ability to take independent action if the UNSC fails to take action. This makes it seem as if the UN wants to position itself as the only institution that can decide when intervention is warranted.

In 2009, UN Secretary-General Ban Ki-moon issued "Implementing the Responsibility to Protect" to the General Assembly in an attempt to transform the results of the 2005 World Summit into a R2P operational policy. The operational framework consists of three pillars: Pillar One—the protection responsibilities of the state (secure and protect human rights and support work of the UN Human Rights Council); Pillar Two—international assistance and capacity building (develop mutual and active partnerships and assist those failing states that are "under stress before crises and conflicts break out"¹²); and Pillar Three—timely and decisive response (which can involve not only peaceful measures (UN Charter (Ch VI)), but also coercive measures (UN Charter (Ch VII)).¹³

Sovereignty implies responsibility. However, "it is the responsibility of the international community to take timely and decisive action to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity when a State is 'manifestly failing' to protect its population."¹⁴ But essential to employing coercive action when necessary is for the permanent members of the UNSC "to refrain from employing or threatening to employ the veto in situations

¹² "Summary of the Report of the Secretary-General on 'Implementing the Responsibility to Protect,'" International Coalition for the Responsibility to Protect (ICRtoP), <<http://www.responsibilitytoprotect.org/files/ICRtoP%20Summary%20of%20SG%20report.pdf>>, 2009, 2.

¹³ While things like 'freezing assets' may be 'peaceful' they do seem to involve compulsion or coercion. Within the context of the R2P doctrine, 'peaceful measures' refers to measures/actions that do not involve military intervention. Peaceful measures—depending on how intrusive they are—can be used as a form of persuasion or as a form of coercion; although possibly coercive, they are a lesser form of coercive means compared to that of military intervention.

¹⁴ Ibid., 3. Additionally, "The Security Council and the General Assembly can appoint fact-finding missions to investigate and report on alleged violations of international law; the Human Rights Council may also deploy a fact-finding mission as well as appoint a special rapporteur to advise on the situation" (Ibid., 4).

of manifest failure to meet obligations relating to the Responsibility to Protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect.”¹⁵ As of 2009, the General Assembly reaffirmed its respect for the UN’s Charter, recalled the results it had reached for R2P during the 2005 WS, and decided to continue its consideration of R2P.

In 2010, the Secretary-General published “Early Warning, Assessment and the Responsibility to Protect” not only to inform but also to strengthen interactive dialogue in the General Assembly. This was followed in 2011 by “The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect.” Three key points in this document detailed below are the essential nature of the regional and sub-regional actors, peaceful measures as a strategy to mitigate situations, and the necessity of coercive means to stop genocide.

First, the UN recognizes that regional and sub-regional actors are not only essential in monitoring human rights violations and assisting in capacity building, but also have a stake in a neighboring state’s protection of its citizens because violations or grave failures could possibly have spillover effects (refugees and potential violence) into one’s own state.

Second, the report recognizes that enacting peaceful measures can be a strategy to mitigate the situation; however, the UN wholeheartedly recognizes the shortcomings these measures have. “Financial tools like travel bans, targeted sanctions, and restrictions on arms and equipment often take too long to become effective, are difficult to implement and monitor, and can cause collateral damage to trading partners and neighboring countries.”¹⁶

Third, cognizant that sanctions can be problematic and unreliable, the report recognizes (although it is used as a last resort) the importance of coercive means, but also recognizes its lack

¹⁵ Ibid., 4.

¹⁶ “Summary of the Report of the Secretary-General on ‘The Role of Regional and Sub-regional arrangements in Implementing the Responsibility to Protect,’” International Coalition for the Responsibility to Protect (ICRtoP), <<http://www.responsibilitytoprotect.org/7%20July%20Summary%20of%20the%20SG%20report.pdf>>, 2011, 4.

of procedural development regarding the implementation of coercive means (military intervention) to stop genocide. “The Report notes that these methods [military intervention] are necessary but underdeveloped, needing further discussion.”¹⁷ This point is critical to explore since coercive means will on occasion be needed to stop or prevent acts of genocide, but the UN has no effective standing military capacity.

Although the UN has recognized this emergent norm and has taken positive steps to develop such a framework, it is still unclear on how the responsibility of using sanctions or using military force should be distributed, planned, resourced, and executed. Paragraph 139 of the 2005 WS (as the basis for the R2P doctrine) is inherently problematic because it states that the UNSC will review each violation on a case-by-case basis instead of universally declaring that it will take appropriate measures regarding all manifested failures to protect.

In addition some of the UN literature is ambiguous. Article 2.7 of the UN Charter states: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.”¹⁸ In addition, Article 138 of the 2005 World Summit, (which comes before Article 139 on R2P) declares that, “Individual sovereign states still bear the primary responsibility to protect their populations, and we accept that responsibility and will act in accordance with it.”¹⁹ The ambiguity in the doctrine encourages some to believe that the notion of sovereignty always entails a right to non-intervention instead of the realization that sovereignty is itself conditional on securing human rights, among other things. “Not surprisingly, governments tend to be very keen on the idea of political sovereignty; they tend to assume that they have an automatic right of military resistance

¹⁷ Ibid., 4.

¹⁸ Charter of the United Nations, <<http://www.un.org/en/documents/charter/>>.

¹⁹ UN GA 2005 WS, para 138. <<http://www.un.org/summit2005/documents.html>>.

to any violation of national sovereignty”²⁰ or perhaps they just believe that they are in fact legitimate.

Either way, I am not discounting that states should bear the primary responsibility for protecting their own citizens. However, better articulation and clarity of that concept is needed. Articles 2.7 and 139 have been cited by countries that do not consent to external coercion. In certain situations, when the UN has contemplated the use of external force to remedy human rights violations, the states that are responsible for these violations have posited that granting the use of coercive means is too rash because it is the state that has the primary responsibility to fix the issue and not the international community. Jennifer Welsh notes that some state violators have attempted to dissuade the international community from getting involved by trying to “delegitimize external involvement in their internal crises; in the case of Darfur, for example, the Sudanese government claimed that it had not yet manifestly failed to exercise its primary responsibility to protect its population and that outside intervention was therefore premature.”²¹

2) Sovereignty and the Right to Non-intervention is Conditional

Shortly after the 1648 Treaty of Westphalia, which denounced external influence into domestic affairs and established state sovereignty, Thomas Hobbes and John Locke developed their own nuanced version of the state sovereignty concept. Hobbes suggests that since man is always competing for honor and dignity he must be subdued and coerced in order to compel his obedience and performance. Hobbes states, “Coercive power is used to compel men equally to the performance of their covenants, by terror of some punishment, greater than the benefit they

²⁰ Richard Norman, *Ethics, Killing and War*, (Cambridge: Cambridge University Press, 1995), 156.

²¹ Jennifer Welsh, “A Normative Case for Pluralism: Reassessing Vincent’s view on Humanitarian Intervention,” in *International Affairs*, (Vol. 87, No. 5: 2011), 1200.

expect by the breach of their covenant.”²² Establishing a common power is the only way to protect citizens against the injuries by others and against an invasion by foreigners. The only way to establish such a common power is for members of a state “to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will.”²³ The sovereign commands his subjects but is himself above the rule of law. All of the subjects will obey those items which “concern the common peace and safety, and therein submit their wills, every one to his will, and their judgments, to his judgment.”²⁴

What follows is that, “nothing the sovereign representative can do to a subject, on what pretence [*sic*] so ever, can properly be called injustice, or injury,”²⁵ because the sovereign has ultimate power to decide what is best. Furthermore, a sovereign ruling and controlling a piece of territory has the right to rule as he sees fit, because for Hobbes the international domain is a state of nature, and no one really has secure rights in a state of nature. Not only does a powerful sovereign have absolute domestic power, but also international unchecked freedom since there is no global sovereign. States can be interfered with, aggressively attacked, and so on, without any violation of a right to non-intervention. Justice does not prevail. Rather, the international domain is predicated on survival of the strongest where wealth, power, and rational interests guide actions instead of justice. Peace between states is achieved by power, impotence, or *modus vivendi*.

Locke’s account of sovereignty is much different. For Locke, a state’s people are not considered subjects but citizens. Men voluntarily unite into a community of government—a body politic—for public good and safety. It is the consent of the people from which a ruler

²² Thomas Hobbes, *Leviathan*, ed. J.C.A. Gaskin, (Oxford: Oxford University Press, 1998), 95.

²³ *Ibid.*, 114.

²⁴ *Ibid.*

²⁵ *Ibid.*, 141.

derives his power. As Locke posits, “The governments of the world, that were begun in peace, had their beginning laid on that foundation, and *were made by the consent of the people*”²⁶ and not by absolute unchecked power and coercion of the people, because men agree to join and unite into a community “for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.”²⁷

Some reciprocity exists between ruler and citizen and both are subject to the rule of law. Citizens not only have certain basic constitutional rights but also have the right to evaluate, criticize, dissent, and even secede from their body politic. The sovereign’s rule, “in the utmost bounds of it, is *limited to the public good* of society; it is a power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects.”²⁸

If a sovereign uses its power to destroy, enslave, or impoverish its citizens, then that sovereign—failing to uphold the standards of conduct that it was charged with—will not only cause alarm and concern domestically but also internationally among the free system of states. “Actions of men and of rulers must be in conformity to the laws of nature.”²⁹ A sovereign who has renounced the way of peace and who has used force to accomplish his unjust ends such as a despot, “renders himself liable to be destroyed by the injured person, and the rest of mankind, that will join with him in the execution of justice, [against] any other wild beast, or noxious brute, with whom mankind can have neither society nor security.”³⁰ Locke’s view, arising out of natural law, supports a conditional notion of domestic sovereignty or legitimacy, and the idea

²⁶ John Locke, *Second Treatise of Government*, ed. C.B. Macpherson, (Cambridge: Hackett Publishing, Inc., 1980), 55.

²⁷ Ibid., 52.

²⁸ Ibid., 71.

²⁹ “The fundamental law of nature is the preservation of mankind” (Ibid.).

³⁰ Ibid., 90.

that the international order is bound by various moral norms rooted in natural law, supporting, perhaps, a right to non-intervention for legitimate sovereign states.

The Lockean notion of sovereignty has slowly taken hold of and begun to shape international law and politics and practice. This constrained notion of a state's power (subjecting itself to a limited authority both domestically and internationally) would inevitably become the world order that we have today. The Lockean conception of sovereignty is conditional upon the fulfillment of certain moral criteria. That is, we have moral criteria governing the legitimacy and recognition/standing of states. "Political entities are legitimate only if they achieve a reasonable approximation of minimal standards of justice, again understood as the protection of basic human rights."³¹ States that adequately protect core human rights are recognized as "a member in good standing of the system of states, with all of the rights, powers, liberties, and immunities that go along with that status."³² David Luban points out: "When State A recognizes State B's sovereignty it accepts a duty of non-intervention in B's internal affairs; in other words, it commits itself to pass over what B actually does to its own people."³³ If a state does not meet this minimum standard of justice then that state loses its moral right to non-interference, because "a state must be legitimate in order for a moral duty of non-intervention in its affairs to exist."³⁴

Sovereignty, insofar as it entails a right to non-intervention, presupposes legitimacy and legitimacy presupposes the effective realization of core human rights, including physical security, subsistence, and basic liberty rights. "Human rights set a necessary, though not

³¹ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, (Oxford: Oxford University Press, 2004), 5.

³² Such powers and liberties include the right to territorial integrity, to self-determination, to non-interference, to make treaties, to make just war, and to enforce legal rules within its boundaries (Ibid. 261-63).

³³ David Luban, "Just War and Human Rights," in *Philosophy & Public Affairs*, (Vol. 9, No. 2: 1980), 165. Although Luban uses this statement to explain that the UN has been indifferent regarding the moral dimension of legitimacy, I use his statement to explain that when State A recognizes State B's sovereignty that implies that State B has met necessary conditions that gives it the moral right to non-intervention.

³⁴ Ibid.

sufficient, standard for the decency of domestic political and social institutions.”³⁵ This necessary standard implies a dual responsibility: “externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.”³⁶ A state that adequately protects and respects the human rights of its own people as well as respects the human rights of citizens in its external relations with other states can be considered a member in good standing in the international community because “it successfully carries out the requisite political functions,”³⁷ needed in order to guarantee its legitimacy.

3) Intervention is Required

Although members of the international community share principles and common ground, these states do not take interests in everything other states do. However, they do take interest when states fail (whether deliberately or not) to reasonably secure these basic rights of their citizens. The key point here is that to guarantee a state’s right to political self-determination and non-intervention it must reasonably honor the core rights of its people.

States that manifestly violate core human rights (whether intentionally or not) lose their moral right to non-intervention because they not only violate the basic rights of their citizens but also “pose a fundamental threat to peace and stability within the international order.”³⁸ A state that has failed the moral conditions of legitimate sovereignty leaves the state system with a gap: there is a population neither organized nor represented by a legitimate state resulting in the destabilization of the state system/international community. It is as if a population becomes

³⁵ “Human Rights fulfillment is 1) a necessary condition of the decency of a society’s political institution and of its legal order, and 2) sufficient to exclude justified and forceful intervention by other peoples” (John Rawls, *The Law of Peoples*, (Cambridge: Harvard University Press, 1999), 80).

³⁶ ICISS, 8.

³⁷ Andrew Altman and Christopher Wellman, *A Liberal Theory of International Justice*, (Oxford: Oxford University Press, 2009), 3.

³⁸ David Reidy, “Political Authority and Human Rights” in *Rawls’s Law of Peoples: A Realist Utopia?*, eds. Rex Martin and David Reidy. (Oxford: Blackwell Publishing, 2006), 175.

‘stateless’ since its state fails to fulfill certain conditions necessary to recognition as a legitimate state in the international arena. The state system is a system of states. If we have moral criteria governing the recognition/standing of states, then the system is compromised where those conditions are not fulfilled.

There are many conditions, including a fairly wide range of human rights conditions, a state must fulfill in order to merit recognition and a right to non-intervention. Failing any of these will leave it without a claim to recognition and without a right to non-intervention. But other states cannot justify an intervention by simply pointing out that the ‘state’ they are intervening into has no right to non-intervention. That it has no such right to non-intervention is a necessary condition of the permissibility of an intervention, but not a sufficient condition.

Military intervention is required and so permissible only if a number of further necessary conditions are fulfilled. In my view, there are a number of necessary conditions which are, when taken all together and fulfilled, sufficient to justify intervention. I am not arguing for a view that picks out any one condition as sufficient to render intervention permissible. Rather, the only sufficient condition is the fulfillment of all the necessary conditions. In addition to a state’s inability or lack of intent to secure basic physical security rights, other necessary conditions must be satisfied, e.g. a military intervention should be a last resort, should have a reasonable chance of success, should be proportionate (all things considered judgment), should not abridge the rights of soldiers who are implemented, should be undertaken voluntarily by states that have the resources to do so, should be reasonable to suppose that the victims of the genocide campaign would actually welcome military intervention as a form of rescue, and the target state should have had ample opportunity to address/correct the problem itself.³⁹

³⁹ I will elaborate further on these necessary conditions in sections 7, 8, and 9.

4) Physical Security Rights take Precedence

Security, subsistence, and basic liberty rights, according to Henry Shue, are all necessary to the existence of any rights at all. If anyone is to have any rights at all then they must have basic security, subsistence and liberty rights which are necessary to the existence of any rights at all. The idea is that you cannot enjoy any rights as a matter of right unless you enjoy the basic rights as a matter of right. “Basic rights, then, are everyone’s minimum reasonable demands upon the rest of humanity; they are the rational basis for justified demands the denial of which no self-respecting person can reasonably be expected to accept.”⁴⁰

Although on Shue’s account genocide might engender our sympathies in an especially dramatic way, the human rights violation is not any more ‘basic’ than where subsistence or basic liberty rights were also violated. In a sense, the rights violation of any basic physical security, subsistence, or liberty right is equally ‘basic’ for Shue, so if societies are committed to honoring any rights, then they must be committed to honoring security, subsistence, and liberty rights since these are the most basic. However, R2P doctrine, as it currently stands, does not support this. But as a moral matter, R2P doctrine should be extended in order to cover all basic rights (physical security, subsistence, and basic liberty) violations because all of these rights are equally basic.

The widespread systematic violation of subsistence and basic liberty rights seems just as much a threat to agency as widespread killing, etc. Agency is “the capacity of each individual to achieve rational intentions without let or hindrance.”⁴¹ Agency is “individual empowerment.”⁴² When individuals have it, Michael Ignatieff states, “They can protect themselves against

⁴⁰ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. (Princeton: Princeton University Press, 1980), 19.

⁴¹ Michael Ignatieff, *Human Rights as Politics and Idolatry*. (Oxford: Oxford University Press, 2001), 57.

⁴² Ibid.

injustice, and they can define for themselves what they wish to live and die for.”⁴³ Without a reasonable guarantee of protecting subsistence, basic liberty, and physical security rights there cannot be any possibility of any type of agency or political agency by a population.

However, as a pragmatic matter, we should limit military intervention to that of protecting persons from widespread and systematic physical security rights violations. Resources are finite and to expand the list of what would require R2P military intervention to include subsistence and basic liberty rights violations is beyond the scope of what the international community can muster. Instead the international community can use lesser forms of intervention (political persuasion and pressure, sanctions, etc.) as part of the R2P platform in order to hold states accountable for their gross subsistence and basic liberty failures that do not have an immediate and irreparable impact on civilians like acts genocide do.

For a military intervention to be pragmatically acceptable and morally required it must be aimed at immediately occurring systemic physical security rights abuses of the most serious sort: genocide, ethnic cleansing, war crimes, and crimes against humanity. R2P military intervention should be reserved for grave cases where not only is a basic right being violated but so too is agency and the harm imposed is immediate and irreparable.

The physical act of murder cannot be undone nor can the psychological effects of being tortured, raped, or witnessing loved ones being killed, maimed, tortured, or raped be undone. Not all harms are equal. Some are more destructive, and R2P military intervention should be reserved for the most serious of harms. The basicness of the right, the irreparable, immediate, and grave harm incurred, and the deliberate stripping of agency is why the securing of physical security rights should pragmatically take precedence over all other basic rights.

⁴³ Ibid.

Of course, lack of freedom of movement (being quarantined) or lack of food/shelter cause harm but this is not the same kind of harm as being slaughtered. Pragmatically, physical security rights should be considered as having a special status compared to other basic rights. Genocide, war crimes, and crimes against humanity impose significant physical and psychological dimensions of harm that are immediate, extreme, and irreversible. Malnourishment or lack of freedom can be fixed, not discounting the fact that extreme malnourishment and quarantine (e.g., starving a population as a form of slaughter, keeping a group captive in a camp and subjecting them to forced labor, etc.) could possibly be used as a calculated means to achieving genocide or ethnic cleansing. In such a case, R2P military intervention should still be triggered because it is still a situation in which one group intends and has enacted the physical destruction (genocide) of another group, but instead of using machetes or gas chambers, this group uses starvation and forced labor as the vehicle to accomplish it.

This does leave at odds though some serious physical security rights violations of ethnic cleansing (e.g., quarantine, displacement, prevention of sexual relations, deportation). These violations could be resolved through the use of other peaceful/ less coercive measures instead of military intervention because these physical security rights violations are neither immediate (as in losing one's life) nor necessarily irreparable. Rather, these types of violations require time in order to produce the desired results. Therefore, implementing measures short of military intervention have the potential to resolve the situation.

5) Safeguarding Basic Rights

We can say that all persons have the right to life. All persons have the basic right to subsistence, physical security, and basic liberty but "the proclamation of the right is not the

fulfillment of the right.”⁴⁴ Rather, there needs to be assurance that the right is honored, because basic human rights are universal in the sense that they set the conduct for all states to “prevent, or to eliminate, insofar as possible the degree of vulnerability that leaves people at the mercy of others.”⁴⁵ The fulfillment of basic human rights is necessary for any attempt at an adequate life. All legitimate states are committed to the human rights of their citizens. This commitment requires states to do more than simply not violate the human rights of their own citizens. It actually requires the institutionalization of positive action. Otherwise, basic human rights cannot be reasonably safeguarded.

A basic right such as physical security entails both negative and positive corresponding duties in order to effectively safeguard that right and actually guarantee its fulfillment. The basic idea behind positive and negative duties is that the positive ones “require other people to act positively—to do something—whereas another kind of rights [the negative ones] require other people merely to refrain from acting in certain ways—to do nothing that violates the rights.”⁴⁶ The underlying distinction between the two categories is one of action and omission of action

Living in a polity, a person has a negative duty to refrain from intentionally harming others “but it is impossible to *protect* anyone’s rights to physical security without taking, or making payments toward the taking of, a wide range of positive actions.”⁴⁷ If the fulfillment of honoring these security rights is solely based on the negative duty to avoid doing harm, the negative duty would not reasonably guarantee the fulfillment of those rights. If there is not an institutional apparatus that protects citizens against threats to physical security, then some

⁴⁴ Shue, 16.

⁴⁵ Ibid., 30.

⁴⁶ Ibid., 36. The same can be said about subsistence and basic liberty rights which also require negative and positive corresponding duties in order to ensure that they are honored. I use physical security rights as an example to illustrate Shue’s point.

⁴⁷ Ibid., 37.

citizens might choose to violate this duty for various reasons, e.g. because of a lack of moral education, a lack of a willingness to comply, or a lack of penalty for noncompliance.

If the right not to be killed is taken seriously then efforts to enforce its correlate duty not to kill must be made. There has to be a social guarantee against standard threats that jeopardizes one's enjoyment of physical security rights. The institutionalization of positive duties helps enforce the negative duty. A society can safeguard the security rights of its members by way of restraint and protection against non-restraint. To ensure that security rights are honored, action/positive steps are taken to accomplish this since we realize that this will be an effective and efficient way to protect persons against non-restraint. Positive duties are used to stop and punish, and the most effective and efficient way to do this is by designing institutions to do just that. Members of the polity understand that the institutionalization of positive duties is necessary because it is the best way for coordinating requirements that are essential.

Members of the polity pay taxes which are used to fund a professional police force, criminal courts, prisons, educational system for criminal justice professionals, and the moral education of all members. States are the primary addressees for the implementation and operation of positive duties. That is, states are obligated to protect their citizens. Insofar as the positive duties can be most reasonably fulfilled by a state, then it follows that in order for there to be any rights at all there must be states or at least some type of social form that effectively distributes duties. Although they may not be absolutely necessary, states are the most obvious candidate since we not only live in a world comprised of states, but they also effectively distribute duties (enforcement, remediation, back-up addressees etc.). If we are going to have states, then they must protect core rights.

Persons not only have a negative duty to refrain from doing harm, but also a positive duty not to allow such action. If a perpetrator attacks someone and others witness the attack, they do not necessarily have an obligation to stop the ensuing attack but do have an obligation to assist when required, e.g. calling the police, providing an eyewitness account, testifying in court, etc. The negative duty to refrain from harm coupled with a basic social structure that protects the right provides a reasonable guarantee of a person's basic right to physical security. Murders although tragic will still occur. However, as long as that state is reasonably doing what it is expected to do in order to protect its citizens from violations of physical security rights that state meets a necessary condition towards legitimacy.⁴⁸

States that invest a reasonable amount of resources in order to arrest, prosecute, and punish perpetrators for their failure to comply with physical security rights meet a necessary condition of legitimacy since they not only sufficiently protect the security rights of their members but the state also aids/remedies the situation in which the victim has had his security rights violated. The state incarcerates the perpetrator as a form of retribution but also to prevent recidivism. The victim may also receive medical treatment, counseling, and even restitution. By protecting physical security rights, we can say that even a violated person's right to life/security was honored since the perpetrator has been brought to justice. Even if there is murder, or even potentially widespread but isolated murder, it does not necessarily mean that these are human rights violations. If a state reasonably fulfills its duty of policing, prosecuting, imprisoning criminals and aiding the victims, then it has acted reasonably within the domestic jurisdiction.

⁴⁸ There are some states that fail at least to some degree because of their citizens' failure in upholding what is reasonably required of them. For example, a state might have an adequate police force and legal system, but citizens of that state never report attacks on members of minority groups (or on women), never testify in trials against those charged with attacking minority groups, etc. States that find themselves in such a position need to educate their citizenry in an attempt to mitigate ignorance and discrimination.

6) The International Community should fulfill this Duty via the UN

Human rights are a practical political creation based on common ground and shared principles which are “minimum reasonable demands upon the rest of humanity.”⁴⁹ If states are committed to realizing human rights, then they must be committed to protecting them. This commitment requires them to do more than simply not violate the human rights of noncompatriots. States must also act together to ensure that there is some international system in place that will reliably protect the human rights of noncompatriots, remedy violations, etc. Without any effective international system that takes positive action to protect those rights, basic human rights will be violated by governments that either do not care or that are unable to provide for their people at one time or another.

This being the case, it is not enough for states to only be the primary obligee without any back-up addressees. Having back-up obligees provides a level of guarantee and protection of subsistence, basic liberty, and physical security rights that could not be met otherwise. This is important because basic human rights impose the same duties on all states. It binds all of us together. Human rights are what we owe each other. Every person is a duty bearer, so if a state fails in its responsibility then others have a duty to help through the auspices of their state.

In order to manage this responsibility and coordinate behavior we have two options: 1) create a new global institution to oversee the international community or 2) use the existing global structure that we have.

The practical choice is to use an existing global structure that is familiar with human security issues. The United Nations has been instituted to facilitate cooperation between states with regard to international law, trade, security, human rights, and peace. While it does seem problematic in many ways, the UN, ideally conceived, works in conjunction with regional and

⁴⁹ Shue, 19.

sub-regional arrangements by supporting dialogue, education, and negotiation. One major problem of the UN is that its membership includes some outlaw states and that its Charter language is ambiguous. Also problematic is the current veto rule of the permanent members of the Security Council. Furthermore, the UN's original purpose was mainly to facilitate diplomatic engagement, not to function as a vehicle for something like R2P. However, with modifications and improvements, the United Nations can make headway in order to adequately address and remedy R2P cases.

Having an organization of states reduces the burden on any one state. Using an institution that has the organization, potential military capacity, and ability to fulfill the positive duty is a plausible way to fulfill the obligation that the duty demands. Without any hierarchical organization to oversee the obligations, there are not any feasible strategies for most states on their own to fulfill their obligation to this duty. An international unified effort is more effective because it is equipped to implement a course of action that is not only necessary but also sufficient and feasible.

First, the use of a collaborative process (whether it is sub-regional, regional, or global) would help assuage concern that the hegemonic US would monopolize R2P and use it as a cover for advancing imperial ambitions. In addition, a collaborative process has the potential to encourage a state to assist that might otherwise be focused on self-interested motives (economic costs, public opinion, war fatigue, national interests). Furthermore, a cooperative effort can also mitigate other forms of inaction. For example, the bystander effect is the phenomenon that happens when people witness a person in distress. As the number of bystanders increases in a given situation, the possibility that one of the bystanders will assist the person in need decreases.

The more spectators the greater the chance for inaction because there is a false belief that another will intervene.

Each state waiting for another state to take the lead could lead to idleness. Moreover, entertaining the idea of conducting unilateral action could be so overwhelming (exorbitant economic costs, no clear exit strategy, lack of experience in dealing with these types of issues) that it leads to inaction. Although regional and sub-regional alliances, coalitions, and organizations can mitigate the bystander effect and play a considerable role in monitoring human rights violations and assisting in capacity building, they are not a global federation of states.

Regional and sub-regional alliances and coalitions can attempt to or possibly alleviate a particular situation, but the UN should be not only cognizant of such action but should also have the ability to agree to such action. Otherwise, cases could be hit or miss if left up to regional and sub-regional organizations. Leaving R2P implementation to regional or sub-regional alliances, coalitions, and organizations could quite possibly lead to inconsistent responses and to a varying degree of assistance just because of a state's particular geographical location. Hopefully, the UN as a federation of states can oversee all R2P cases and apply a level of impartiality, consistency, and uniformity to all states in duress.

It could also be the case that a state (in addition to supporting the actions of the UN) still wants to further assist in some fashion (maybe because of historical, political, or geographical ties). If a state decides to go above and beyond of what is required of it through the UN, this is permissible, supererogatory even, provided that the state is not doing so for personal gain. Risks may be associated with states acting unilaterally, even if supererogatorily though. The initiation of unilateral action, particularly extensive unilateral action (e.g. sending military advisors,

weapons, and equipment) should have to be agreed upon by the UN to assure that no ulterior motives are present, and if they are, to assure that those personal gains are not reached.

7) Intervention is All Things Required

In addition to the existence of severe, widespread, and systematic violations of basic physical security rights, it is necessary for the UN to evaluate the remainder of the necessary conditions that need to manifest in order for military intervention to be considered required.⁵⁰

Reasonable Chance of Success: Can the R2P military force not only defeat the target regime but also be able to accomplish such a task with limited loss and damage to its own force and resources? In cases where the failing state allows foreign military intervention or does not have a large modernized force to stop the military intervention, the peace-enforcing force⁵¹ has a greater chance of success because it can adequately interdict the harm to civilians without having to defeat the target state's large standing army. However, in other cases, military intervention will not be successful, e.g. a despot who not only refuses access to a foreign military force but also has a large modernized army with a significant air defense capability. In such as case,

⁵⁰ Necessary conditions which are, when taken all together and fulfilled, sufficient to justify intervention are as follows: there must be serious, systematic, and widespread violations of physical security rights; the military intervention must have a reasonable chance of success; must be a last resort; must be welcomed by those being harmed; must be all things considered proportionate; must be undertaken voluntarily by states; must not abridge the rights of the soldiers it involves; and lastly a stipulated timeline in which the state has an opportunity to redress its violations but fails (whether deliberately or not) to do so. Once the evidence establishes that the state either has no intention to fulfill or cannot fulfill its members' basic physical security rights then military intervention is required.

⁵¹ 'Peace-enforcing' and 'peacekeeping' forces are terms used by the UN and NATO. A peace-enforcing mission usually involves non-permissible borders. That is, at least one party to the conflict (the targeted state) does not welcome outside intervention, so the foreign military force is not given permission to enter the target state's territory. As a result, the peace-enforcing military unit enters the target state by force. A peace-enforcing mission will most likely involve combat operations in order to subdue forces that not only have failed to follow UNSC resolutions but also continue to pursue their unjust and aggressive aims. Peacekeeping missions are usually welcomed by the parties to the conflict. These parties have usually agreed to an armistice and prefer the assistance of UN sponsored troops to keep the peace between the two parties. Both peace-enforcing and peacekeeping missions are not necessarily about peace but about enforcing rights. R2P military intervention is limited to severe violations of physical security rights, so there is a sense in which it secures some measure of peace (in the sense of stopping a certain sort of violence), but the goal is vindicating the rights, not merely securing peace (which could be obtained perhaps by making large cash payments to despots, etc.).

military intervention seems counterintuitive, and intrusive conventional coercive measures should be ruled out by the nature of the adversary since success (if one can call it that) would come at a very high cost of loss of life to soldiers of the peace-enforcing force as well as significant destruction to back-up addressees' finite resources. At any rate, this does seem problematic because the use of R2P military intervention will be preferential toward weak or failing states as compared to those that pose a moderate to powerful military.

Last Resort: Have all other alternatives been tried before initiating a military intervention? The initiation of a military intervention should not be premature. Less intrusive (peaceful) measures should first be initiated in order to hold the offending state accountable. In addition, the offending state must be given an adequate amount of time to redress the situation. The UN should make every effort to achieve a pacific settlement because it recognizes that a full-scale military intervention is the last resort. However, this does not suggest that other less intrusive coercive measures are a last resort. It could be the case that peaceful measures coupled with less intrusive coercive measures (no fly zones, naval blockade, drones, etc.) are employed as a way to stop a state's conduct after initial diplomatic, cultural, and economic sanctions have failed to work.

Just because a state (as the primary addressee) has manifestly failed to protect the physical security rights of its citizens does not suggest that there is no other recourse for the UN (as the back-up addressee) but to expeditiously take on the actual requirement of fulfilling the human rights of those whose rights are violated. Rather, the UN as the back-up addressee can fulfill its duty by either pressuring the failing state to fulfill its primary obligation or by rescuing the victims because the state has failed in its obligation.

Given these two choices, the UN/international community will of course first attempt to persuade (e.g., negotiations, public criticism or condemnation (this is what James Nickel refers to as *jawboning*)⁵² and if needed compel/coerce the state (e.g., economic sanctions, withholding of assets, denying trade, etc.) to fulfill its primary obligations before any attempt at implementing military force to rescue the innocent and to physically force the culprit to change its behavior.⁵³ The UN cannot license intervention at the very first sign of a state's failure to secure basic human rights. This would essentially undercut a state's status as the primary addressee.

Welcome the Intervention: Do civilians who are being harmed by their own state actually welcome the military intervention? That is, would civilians reasonably subject themselves to further danger knowing that the force that is intervening is there to stop the genocide and ultimately protect them? I believe that in such an imagined scenario where other implemented actions (negotiations, sanctions, etc.) have not worked, civilians realize that they will continue to be harmed by acts of genocide, and so would willingly accept a military intervention even if there is a possibility of being unintentionally killed by UN forces for the chance to be saved from the horrors from which they currently suffer. Civilians in this dire circumstance recognize that if there is not a military intervention the murdering of the innocent will continue.

Stipulated Timeline: Military interventions should not be launched prematurely. States that have failed in their duty to reasonably safeguard the physical rights of their citizens are

⁵² James Nickel, "Are Human Rights Mainly Implemented by Intervention?" in *Rawls's Law of Peoples: A Realist Utopia?* eds. Rex Martin and David Reidy. (Oxford: Blackwell Publishing, 2006), 271.

⁵³ Although "the primary aim is to rescue not to punish,"⁵³ (Larry May, *Genocide: A Normative Account*, (Cambridge: Cambridge University Press, 2010), 231) there is a worry in the language that 'rescue' is too weak. Establishing refugee camps or no fly zones could temporarily rescue civilians from harm, but this does not solve or stop the problem; it just creates different problems. Any adequate long term solution will have to address the rehabilitation of decrepit political and social institutions as well as try offenders in the International Criminal Court. Military intervention should not be a never ending commitment or blank check, rather only what is adequately required to remedy the situation.

pressured to fulfill their duty to protect and fulfill the duty to aid/remedy the situation. The notion of allowing states to remedy internal issues is important. Giving states a chance to fulfill their duties as primary addressees of their citizens' human rights seems consistent with R2P and the Lockean conception of sovereignty.

However, a reasonable assessment and timeline must be stipulated to the offending state. If a timeline is not dictated to a state, then it is the state once again that has unlimited authority over its citizens, and this should not be the case. The question though is how much of an opportunity a state should have to bring itself into compliance with human rights before it loses its right to non-intervention. It seems reasonable to suggest that a state's moral right to non-intervention is questionable until the evidence establishes that the state either has no intention to fulfill or cannot fulfill its members' human rights.⁵⁴ We should assume no right to intervene unless it can be shown that there are widespread human rights failures and that there is no local prospect of them being corrected in a reasonable time frame. Once we see certain facts that establish a right to intervene, that state has lost its right to non-intervention, and military intervention is required (as long as all necessary conditions have been met). Implementing a military intervention would not only be used to stop the irreparable, immediate, and grave harm but also to secure the rights of those people. The international community only fulfills that obligation after the attempt to pressure the state has not worked and systematic and widespread harm remains.

⁵⁴ I endorse the existing R2P doctrine which limits application to only actual rather than apprehended widespread violations of physical security rights. This seems to be a better choice instead of allowing belief or perception to dictate that R2P intervention is necessary. It is not just enough that the state (primary duty bearer) fails the duty but that persons *actually* lack the object of the right. That is, the content or object of the right is not secured for them. Persons that are the victims of a genocide campaign are denied the object of the right, namely physical security. Specifically, civilians are *actually* being harmed by acts of genocide, ethnic cleansing, war crimes, or crimes against humanity.

All Things Considered Proportionate: Will the military intervention save and protect more lives than it will harm? If a military intervention has to first defeat a large standing army, the bombing of dual use facilities will be the lynchpin of such an operation in order to degrade its adversary's ability to communicate, resupply, and move forces. Such action would most likely kill thousands of civilians from unintended results and residual effects which clearly undermines why the UN used military force in the first place. This could very well violate the notion of proportionality. Of course this depends on what good is achieved on the other side of the balance. However, *prima facie* this type of strategy seems overly destructive.

In addition to analyzing this type of proportionality, an 'all things considered' proportionality analysis must be conducted as well. The proportionality analysis should not only pertain to the states that are about to take up arms. Evaluating the proportionality criteria must be an all things considered analysis that encompasses the effects on not only the warring parties but also takes into account sub-regional, regional, and global effects. The proportionality analysis pertains to the ability to secure the just cause in light of the harm (to include accounting for destructive second and third order effects not only to the parties to the conflict but to other states in the region as well). I call this an 'all things considered' judgment to draw attention to the fact that second and third order effects (instigating greater regional instability, escalating a sub-regional conflict into a regional war, etc.) need to be accounted for instead of myopically relegating the proportionality analysis to merely the initial belligerents of the conflict.

It could quite possibly be that the UN has *pro tanto* reasons in favor of committing forces. However, in conducting a thorough all things considered judgment, the UN recognizes that although it has a genuine reason for committing troops it is not so decisively because by doing so it could instigate a larger conflict in the region or even a World War III type scenario.

The UN has a genuine reason for action, but the implementation of force does not necessarily override competing reasons that are also present. In such a case, the expected good to be achieved does not outweigh the harm done.

In sum, military intervention is required and so permissible when all necessary conditions have been met. If one of the necessary conditions is not met then a full-scale military intervention is not justified. However, just because a robust military intervention is not justified, this does not suggest that the UN is excused for inaction in situations that fall within the scope of R2P. The UN must fulfill its duty to protect and aid as best as possible in every situation. However, the extent of the intervention can change depending on the situation. It is possible that lesser coercive forms (naval blockade, weapon caches, drones, etc.) are required (if they do not trigger worse results) even though a conventional R2P military intervention could not be justified. There will also be cases where pacific means have been or will be exhausted but with little effect but are really the only reasonable options to pursue. Sometimes the UN as the back-up addressee—although it might have potential peaceful and coercive measures at its disposal—will not be able to fully intervene to the extent necessary to stop severe physical security rights violations because of one or more of the necessary conditions not being met. However, the UN is all things considered required to intervene to some degree for all R2P cases.

The UN has a positive duty to protect and aid in every case of genocide, ethnic cleansing, war crimes, and crimes against humanity, but this leaves unanswered the question of how other states ought to treat a state's failure of sovereignty arising out of something other than a systematic widespread violation of physical security rights. A possible proposal is tying certain sorts of failures to meet the conditions necessary to sovereignty to certain sorts of treatment in order to effect the delinquent state to reform its current practices or failures. One possibility is to

create a kind of sanctions scale ranging from low- to mid- to high-level sanctions/actions in order to compel a state to redress its widespread and systematic violations. R2P peaceful measures is appropriate/permissible in response to a certain kind of failure of sovereignty (widespread and irreparable violations of basic rights (physical security, subsistence, and basic liberty)) but that R2P coercive measures (military intervention) is only appropriate/permissible in response to only widespread and systematic violations to physical security rights: genocide, (some forms of) ethnic cleansing, war crimes, and crimes against humanity. (See Table 1. Sanction Scale).⁵⁵

Table 1. Sanction Scale

Human Rights Violation	Initial Response	Follow-up Response
Religious discrimination, violations of free speech rights, arbitrary arrests and imprisonment, sexual and gender based violence, summary executions, etc.	Low-level Peaceful Measures Diplomatic and cultural sanctions—e.g. concern, non-recognition, refusal to participate in cultural exchanges, exclusion from various undertakings within global civil society, etc.	These human rights violations although serious do not constitute military intervention. Depending on the severity though the international community would implement low-level and possibly mid-level peaceful measures. These would be implemented as a result of triggering R2P.
Large-scale recruitment and use of child soldiers, refusal of humanitarian aid to its people, widespread gender based violence, and R2P specific issues: genocide, ethnic cleansing, war crimes, and crimes against humanity	Mid-level Peaceful Measures Diplomatic, cultural, and economic sanctions which include public criticism and condemnation, denial of trade, freezing assets, etc. in addition to implementing low-level peaceful measures	Low-level* Coercive Measures Coercive measures which include implementing peacekeeping envoys, naval blockades, providing arms and supplies to the civilians who are being harmed, etc.
		Mid-level Coercive Measures Coercive measures which include establishing no fly zones, disabling electronic network systems, using drones and special forces advisors, etc. in addition to implementing low-level coercive measures
		High-level Coercive Measures Coercive measures which include destroying the targeted state's air assets (jetfighters and attack helicopters) to a full-scale military intervention in addition to implementing both low- and mid-level coercive measures
* Coercive measures are only implemented once all necessary conditions have been met. Coercive measures range from low- to high-level depending on what level of force is reasonable and proportionate and in alignment with all things considered.		

⁵⁵ Demarcating measures into peaceful and coercive is consistent with R2P doctrine terminology. As stated earlier, some peaceful measures are coercive in nature. However, the distinction between the two categories lies with the use of military force which is deemed as a 'coercive measure.' Everything short of implementing military force falls into the 'peaceful measures' category.

At the less intrusive end would be various low-level forms of diplomatic and cultural measures/sanctions (non-recognition, refusal to participate in cultural exchanges, exclusion from various undertakings within global civil society, etc.) that would be initiated in order to show the international community's intolerance for violations of free speech rights, arbitrary arrests and imprisonment, sexual and gender based violence, etc. These infractions would trigger R2P peaceful measures designed to deal with the aforementioned human rights violations.⁵⁶

Mid-level sanctions would be focused on undermining serious widespread and systematic violations such as large-scale recruitment and use of child soldiers, refusal of humanitarian aid to its people, widespread gender based violence, and R2P specific issues: genocide, ethnic cleansing, war crimes, and crimes against humanity. In these type scenarios, both low-level (diplomatic and cultural sanctions) and mid-level (public criticism and condemnation) and economic sanctions (from denial of trade to freezing assets, etc.), would be implemented in order to pressure the state in violation to redress the situation.⁵⁷

If the targeted state does not redress its violations and widespread and systematic violations continue such as genocide and crimes against humanity, then in addition to the previous sanctions listed various forms of coercive sanctions as the most intrusive form of correction should also be implemented. Coercive sanctions range from low-level (peacekeeping

⁵⁶ While a state that widely denies free speech rights will fail to satisfy the conditions of sovereignty thus will have no right against intervention, other states may not permissibly intervene militarily since that is not the kind of human rights violation that justifies military intervention though it might justify cultural, diplomatic, or economic sanctions or some other sort of response.

⁵⁷ Cases of genocide could quite possibly invite 'high-level' action, but 'mid-level' sanctions could be initiated right away. It is not that genocide only calls for 'mid-level' sanctions. Rather, the UN implementing its R2P doctrine could start pressuring the failing state by imposing peaceful but stringent 'mid-level' measures right from the start. Implementing these measures would show the state in question that the international community does not tolerate a state's failure to safeguard core physical security human rights. It would have the added benefit of giving the UN time to evaluate that states' compliance with the international community's demands before deciding whether some level of military intervention has met all necessary conditions.

envoys, blockading sea routes, supplying weapons to the civilians that are being harmed, etc.) to mid-level (creating no fly zones, disabling electronic network systems, using drones and special forces advisors, etc.) to a high-level (from destroying the targeted state's air assets (jetfighters and attack helicopters) to a full-scale military intervention).

Developing a detailed account here of such a spectrum by listing all of the various sorts of failures that could jeopardize or revoke a state's moral right to non-intervention along with the various sorts of sanctions that should be applied at each level of transgression would be difficult, if not impossible.

Rather, these suggestions offer a framework for the proposed R2P military intervention previously defined. The international community led by the UN has a series of sanctions (peaceful and coercive) that it can implement depending on the given situation. When there is a case of genocide, ethnic cleansing, war crimes, or crimes against humanity, intervention of some sort by the international community is all things considered required. Sometimes peaceful measures will be the only viable actions. Other times it might be possible to implement mid-level peaceful sanctions along with low-level coercive measures (naval blockade and providing weapons).

Although it would be nice to think that the UN will always initiate a military intervention to stop acts of genocide, this is more of an ideal than realistic. However, in cases where the UN has done what it reasonably can and the killing continues, the moral stain—blame—rests with the state (primary addressee) which is killing its citizens rather than with the international community which as the back-up addressee has fulfilled its positive obligations as could reasonably be expected.

Although the UN is all things considered required to intervene, “how much sacrifice can reasonably be expected from one person for the sake of another, even for the sake of honoring the other’s right?”⁵⁸ This question leads to the two remaining necessary conditions that must be addressed—not abridging the rights of the soldiers it involves and using one’s resources for someone else.

8) Rights of Soldiers

Charles Beitz indicates that, “The experience of the period since 1990 is mixed and suggests that the prospects for success vary with the particular political aims of an intervention, the circumstances of the society intervened in, and the military capabilities and political will of the intervening agent.”⁵⁹ As Beitz suggests, the political will of those that intervene plays a serious role in determining if intervention will even take place or if it does, then to what extent. Thomas Hill and Kok-Chor Tan both raise points about this issue. Tan posits that, “The right of a state not to intervene, or its right to remain neutral, is an aspect of its sovereignty.”⁶⁰ And Hill raises a broader point: “Should we use the state’s resources to help others?”⁶¹ Additionally, it maybe one thing to spend money and provide supplies to another state in order to assist its population, but it is definitely quite another—as Larry May notes—to jeopardize/sacrifice the physical security rights of one’s own soldiers in order to protect non-compatriots. In these military intervention type scenarios, Jeff McMahan notes that it would not be hard to imagine that soldiers would want to resist taking part in such an operation even by falsely claiming to oppose it on moral grounds.

⁵⁸ Shue, 114.

⁵⁹ Charles Beitz, *The Idea of Human Rights*, (Oxford: Oxford University Press, 2009), 39.

⁶⁰ Kok-Chor Tan, “Military Intervention as a Moral Duty,” in *Public Affairs Quarterly*, (Vol. 9, No. 1: 1995), 31.

⁶¹ Thomas Hill, “Kant and Humanitarian Intervention,” in *Philosophical Perspectives*, (23, Ethics, 2009), 230.

No doubt, if coercive means are used, the UN peace-enforcing force will have casualties, but this should not be seen as a reason to forgo coercive measures if warranted. However, a state's soldiers dying on behalf of non-compatriots do raise some concerns that need to be addressed. May states, "It is especially problematic for one state to abridge, or risk of abridging, the special human rights of its own citizens so as to protect the general human rights of the citizens of another state."⁶² May further advances, "A State's soldiers and other citizens have human rights that may, and sometimes should, be taken into account whether to wage humanitarian war,"⁶³ because "the justness of the cause does not mean that the rights of those that serve in defense of that cause should always be overridden."⁶⁴ It is not that the rights of soldiers should be an overriding concern, but they should not be dismissed either. Rather, they should factor into the analysis of whether initiating a military intervention is morally acceptable. Some believe that sacrificing the basic rights of soldiers to save non-compatriots—in most cases—seems like a disservice to a state's soldiers. For this reason, May believes, "It is especially difficult to justify jeopardizing the lives of soldiers and the basic interests of civilians when we are talking not about wars of self-defense but about wars undertaken for humanitarian reasons."⁶⁵

Fundamentally the role of soldiers is to defend their state from acts of aggression by other state or non-state actors. That is, by defending their state's political sovereignty and territorial integrity, they protect the lives of their innocent compatriots. Another way that soldiers protect the lives of their innocent compatriots is by participating in R2P military interventions. The volatility of an outlaw regime has the potential to effect the stability and order of the

⁶² Larry May, "Conflicting Responsibilities to Protect Human Rights," 2012, 7.

⁶³ Ibid., 1. May states that not only are soldiers' rights being affected but citizens' rights as well since they will have to bear the financial burden of the military intervention.

⁶⁴ Ibid., 11.

⁶⁵ Ibid., 13.

international domain. Outlaw regimes do not abide by arrangements or treaties nor do those states effectively control their population from instigating aggressive and criminal acts domestically. So soldiers that are implemented as a R2P military intervention force to stop acts of genocide and end an outlaw regime's reign are—in a sense—defending their homeland and the international community against instability and spillover effects as was the case with the Allies against Nazi Germany.

Multiple states working in tandem form a collective self-defense force that is used not only to stop acts of genocide but also to protect the international community. However, there is a limit to this perspective. The actual threat that Nazi Germany posed cannot be generalized to all cases of genocide, since most cases—like that of Rwanda, Darfur, and Cambodia—did not truly affect the international community. In most cases, soldiers used in an R2P mission will not be indirectly defending their homeland, and ultimately in most cases soldiers would be placed in harm's way in order to save noncompatriots. Although we can recognize that soldiers accept risk in helping others, it is one thing to volunteer for military service and yet quite another to be dragooned into it.

Conscripts are forced to serve the state (such is the case in Russia, Austria, Brazil, Turkey, and Norway).⁶⁶ A state may have the right to force its citizens into military service and make them fight to defend their compatriots and government. However, it seems unreasonable to suggest that they should fight in a distant land to save civilians of another country when they never volunteered for military service in the first place.

A volunteer force is different. Some believe that there is a high-level of patriotism among those citizens who freely elect to enlist. Whether there is a high level of patriotism or

⁶⁶ Russia, Austria, Brazil, Turkey, and Norway have compulsory military service for all males. The period of enlistment is limited to twelve months of service. However, the officer corps of these states is comprised of an all-volunteer force.

not, one can reasonably understand why—as McMahan suggests: “Professional soldiers would not be tempted to try to exploit a provision for selective conscientious objection as a means of evading service in a just war of national defense,”⁶⁷ because by fulfilling one’s role as a soldier in a just war of national defense, that soldier not only has fulfilled his professional obligation but more importantly has protected friends and family, compatriots, and one’s way of life. However, key factors such as protecting one’s compatriots and one’s way of life in a just war of national defense are immaterial when it comes to R2P military intervention into another state.

For this reason, McMahan suggests that, even if the military intervention is just, “it would not be surprising if some soldiers sought to exempt themselves from fighting in such a war by spuriously claiming to be opposed to it on moral grounds.”⁶⁸ That is, some soldiers would want to shirk their professional obligation because they would believe that protecting others in a distant land is not what they in fact enlisted for and falls outside of the scope of their responsibility.⁶⁹ Therefore, they would in any way imaginable figure out how not to participate in such an operation.

I understand McMahan’s concern that some soldiers would attempt to evade or believe that they in fact have no obligation.⁷⁰ However, before we rush to impose significant penalties against those soldiers as McMahan advocates, I think that we need to first take into account

⁶⁷ Jeff McMahan, *Killing in War*, (Oxford: Oxford University Press, 2009), 100.

⁶⁸ Ibid.

⁶⁹ In order to hold these soldiers accountable for their lack of willingness to fulfill their professional obligation, McMahan indicates that a partial solution is “to impose significant penalties on active-duty conscientious objectors; soldiers granted selective conscientious objector status after receiving wages, training, and so on from the military would have to submit to these penalties as a means of demonstrating their sincerity; penalties could range from forfeiture of the benefits of military service, such as educational assistance and retirement funds, through compulsory public service to imprisonment” (Ibid., 101). McMahan does go onto to say “If, on the one hand, he refuses to fight and the war is in fact just, he will fail in his duty, as a soldier, to protect innocent people” (Ibid., 141). If he refuses then someone else will have to replace him. “Perhaps the real victim of his refusal to fight would be the person who would have to replace him and be exposed to the risks of war in his stead” (Ibid.)

⁷⁰ Soldiers, at least those conscripted and perhaps those who volunteer to get out of poverty or without any real knowledge of what they are volunteering for, will deny that they have any obligation to risk their lives for the human rights of noncompatriots.

soldiers' basic human rights as Larry May does. Key to honoring soldiers' rights is that the peace-enforcing force (military intervention) should be comprised of volunteers; a detailed mission analysis should be conducted prior to disembarkation; and the justness of initiating military intervention operations should be decided by the international community. Fulfilling all three of these requirements still places soldiers' basic rights in jeopardy, but it precludes unnecessary risks or rights abridgment.⁷¹

My own view is that states have an obligation to participate in R2P efforts to protect non-compatriots, but sending troops to save non-compatriots is only permissible if a state's soldiers actually volunteer for military service and that those that volunteer are aware of the many types of missions that they might be involved in before they enlist. That is, soldiers have a duty to save non-compatriots but only if they freely volunteer and are cognizant of the fact that they might be implemented for R2P efforts.

Although there has been a growing trend over the last few decades of states (e.g. the US, United Kingdom, France, China, Canada, New Zealand, Sweden, Poland, Japan, and Australia) having an all-volunteer military, the term volunteer is still problematic in two ways: 1) we can say that citizens freely choose to enlist, but wherever unjust background conditions exist we can infer that low-income citizens with less opportunities will most likely make up the

⁷¹ Only then (after these three conditions have been met) can we justifiably subject soldiers to significant penalties for refusing to participate in military intervention operations.

preponderance of a state's military,⁷² and 2) of those who enlist, they may not fully understand the role (in addition to national self-defense and natural disaster relief) that they might play.⁷³

Of course we can give some weight to the fact that they voluntarily enlist. However, we cannot place the whole crux of the point that they volunteered unless those two conditions have been met. In order for a citizen to be truly deemed a volunteer, that citizen would not only have to reside in a state which has just background conditions but also that citizen would have to be aware of all of the potential roles that a soldier could be used for.⁷⁴

Maybe currently there are only a few countries that have just background conditions. If citizens, as co-legislative members of the state (with just background conditions and fully understanding what they are volunteering for) freely consent without mental reservation to enlist to serve their state, then we can say that those soldiers actually comprise an all-volunteer force. Therefore, in either case, defending their state and compatriots or defending non-compatriots in a distant land, an all-volunteer force is not being used against its will. However, as it currently stands, the preponderance of military forces will most likely be comprised from states that have substantial militaries like that of the US and China, but these states do not have just background conditions.

⁷² Citizens who enlist might be patriotic. However, there are other reasons that attract low-income persons to join the military as well, e.g. college money, financial bonuses, job security, occupation training, family medical insurance coverage, or even a ticket out of an economically depressed town are reasons that play a considerable role (in addition to being patriotic) in determining if one should enlist or not. In such cases, are citizens freely deciding to enlist or is it that given these unjust background conditions, many citizens really do not have many alternatives to joining the military?

⁷³ Being cognizant that as a soldier one will defend one's own country or assist one's compatriots is one thing. However, being implemented as a UN peace-enforcing or peacekeeping force in a distant land or as a part of collective defense to assist an ally is quite another.

⁷⁴ Recruiting commercials, literature, and brochures would have to express this reality in order for it to be prevalent in public culture. There would have to be a shared understanding of both state and citizen regarding all of the potential operations (police force, intervention, etc.), so citizens who were thinking about enlisting understood the multifaceted nature of a state's military. Soldiers should not be significantly penalized for not wanting to contribute in a military intervention when a person enlisting was not even aware of being involved in such a role. Defending one's state is by far the first priority, but if one's compatriots are secure from harm (they are not being attacked by another state), then it is possible that soldiers could be implemented in a peace-enforcing/peacekeeping force if such a situation arises.

Second, a detailed mission analysis is needed. Subjecting soldiers to risks is one thing, sending them to their death is quite another. As Michael Walzer states, “Risking one’s life is not the same as losing it.”⁷⁵ By suggesting that troops should be committed to a peace-enforcing force in a distant land, I do not believe that states should not give special weight to the human rights of its own soldiers, but giving special weight to the rights of soldiers does not entail that soldiers should not be implemented when needed. Rather, a state honors the rights of its soldiers not only by using military intervention as last resort but also by developing clear attainable military objectives, fully analyzing the risks and costs associated with the operation, and having a coherent exit strategy that avoids an endless entanglement. Development of a unified and synchronized plan helps achieve political and military aims and saves soldiers’ lives because it neither needlessly places soldiers in harm’s way nor continually exposes them to the ills of war while politicians figure out what the next step is.

Third, the choice to initiate military intervention should be decided by the international community. Not only is this decision the result of collective reasoning but also such a decision may in fact epistemically assist soldiers that are to be involved in the intervention.

McMahan suggests, “We should offer soldiers a source of guidance about the morality of war that would be more impartial and more authoritative than their own government, this could provide a basis for holding them accountable for their participation in unjust wars—perhaps accountable in law but certainly accountable to their own consciences.”⁷⁶ Although McMahan’s point is about establishing an impartial international court that would review all matters of *jus ad bellum* (justice of war) for all wars in an attempt to prevent the initiation of unjust wars by

⁷⁵ Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship*, (Harvard: Harvard University Press, 1970), 83.

⁷⁶ McMahan, 154.

eliminating epistemic excuses available to unjust combatants, we can also use an international collective body to epistemically reinforce the justness of R2P military intervention.

A collective body or the UNSC might on some level seem more authoritative than a state's own government but it is highly unlikely that soldiers from State A would agree with the international body requiring military intervention if its own state did not. State A's soldiers are not going to agree to going to war if the political leadership and even popular consensus of State A does not agree with it in the first place. In addition, if State A does not endorse the intervention, then its soldiers are not going to war. There is little prospect of an international commission ordering a state to participate in an R2P mission against its own will and so soldiers will never face the prospect of going into an R2P mission solely because an international commission judged it warranted.

However, a collective body (the international community) deciding all things considered that military intervention is warranted provides some assurance to soldiers that the intervention their state is asking them to undertake really is justified and is not just an attempt to pull off some sort of imperialistic land grab, etc. This is assuming that it is reasonable to suppose that the international community, or UNSC, can be trusted. Even if it can be trusted more than any one state or one's own state, it may still not be particularly trustworthy. However, if there is a level of trust, then soldiers could reasonably believe that what they were doing was morally justified. Soldiers acting as part of a R2P force would be able to satisfy their own consciences regarding the moral justification of the operation that they were involved in since the international community in addition to their own state has collectively recognized that action needs to be taken.

9) The Volunteering and Availability of Military Resources

Tan's point is broader and focuses on whether a state has a right to remain neutral. The international community has an obligation to protect and aid when a state has failed to do so, regardless if the host state is unable or unwilling to avert grievous acts. However, each state should be left to judge for itself if it can assist or not. The international community should in good faith defer to a state's own judgment about its ability to assist. Within this decision making process there must be some scope for reasonable disagreement.

That is, if a state decides that it is not able to assist, then the international community should accept this answer. Reasonable disagreement parameters encompass a state's capability to assist. If a state believes that by assisting another state, it could possibly jeopardize the fulfillment of basic human rights (such as subsistence rights) to its own people then it is not required to assist.⁷⁷ If states simply refuse to contribute to R2P efforts but have the resources to do so, then these states are morally culpable for their inaction. Refusing to assist is unreasonable and such states should be publicly criticized for their failure. Although a capable state has a duty to act, other states do not have the right to compel/coerce that state to fulfill its duty.

Even if a state is not capable of supporting an R2P mission with money, soldiers, or supplies, it can still show solidarity by publicly supporting the UN's decisions to implement R2P efforts. To remain absolutely neutral—neither denouncing a state that is committing acts of genocide nor supporting UNSC resolutions to stop such a state—is reprehensible.

⁷⁷ If states simply claim that they do not have the ability to assist so as to 'free ride' on the willingness of other states to bear the burden, then those states are morally culpable for their inaction. Assuming states have a right to decide for themselves whether they have the ability to assist, and even to make a (reasonable) mistake about whether they have such ability, there is still the problem of states making an unreasonable mistake or simply refusing to assist so that others bear the burden of R2P. When this is the case, those states that are assisting have the right to jawbone or publicly criticize those states that prefer to free ride or make an unreasonable mistake.

Some states might disagree because this places R2P efforts and the rights of others ahead of one's own compatriots. However, "the objection that a state can never have a duty to sacrifice some of its own for others no matter how grave the situation is rests on the false premise that moral duties begin and end at the border of states."⁷⁸ Tan declares that (of course) states have a responsibility to their own people. Nevertheless, if a state's people are adequately cared for (this includes its army being comprised of a volunteer force) and somewhere in the world innocent people are being slaughtered, then that state's ability to assist and protect should be focused toward those that need its assistance urgently, since its own members have already been provided for.⁷⁹

Tan does not specify what he means by adequately cared for, but if a state reasonably protects its members' basic rights, then this is the tipping point where those states should help those whose basic rights are being violated.⁸⁰ In such a case, "our priority ought to shift from our immediate community to the larger community of humanity."⁸¹ That is, "our general duties to humanity in these cases ought to override our special duties to compatriots."⁸² I adopt Shue's position here. Shue argues for the priority of basic rights (physical security, subsistence, and basic liberty) over non-basic rights, such that states like the US must take measures in international relations aimed at securing the basic rights of others around the world before they can permissibly invest in various non-basic rights of their own citizens.⁸³ Wealthy states such as

⁷⁸ Tan, 39.

⁷⁹ There may be cases where citizens of a certain state want to invest in a space program or attempt to find a cure for cancer. These are great programs. However, R2P should not be discounted on account of these projects. I recommend that a portion of the monies and resources that would go to these projects needs to be diverted and then allocated to R2P. If states do not recognize the importance of protecting persons against widespread physical security rights violations, then R2P is a hollow concept.

⁸⁰ States in this position might have the potential to assist. However, I recognize that some states that secure their own members basic rights might have very little military resources.

⁸¹ Tan, 39.

⁸² Ibid.

⁸³ Shue, 111-18.

the US would be not only able to fund R2P efforts but also secure the non-basic rights of its own citizens. Most likely US citizens and citizens of comparable states aiming at securing the basic rights of others around the world would only lose some of their own satisfaction preferences.⁸⁴

Over two and a half centuries ago, Emmerich de Vattel, a distinguished thinker whose writings are influential to international law and political philosophy, recognized this fundamental point. Vattel posits a similar concept: “Hence whatever we owe to ourselves, we likewise owe to others, so far as they stand in need of assistance, and we can grant it to them without being wanting ourselves.”⁸⁵ No state can invoke the non-basic rights of its citizens as a ground for not acting to secure the basic rights of others, because in the case of basic rights “the duty to avoid deprivation must be universal.”⁸⁶ So states that affirm R2P maybe be putting the non-basic rights or at least preference satisfaction of their citizens at risk. Most likely, very many states and their citizens will not be happy about this, especially those states that provide extensive non-basic rights and preferences to their citizens.

What I conclude from these critical points that May and Tan both present, is twofold: a) there is no algorithm for determining whether a particular state ought all things considered contribute, as often the issue will be difficult and subject to reasonable disagreement, and b) given the voluntarist nature of the international community, states have a right to act on their own reasonable judgments here, even if those judgments are viewed, even correctly viewed, by others as incorrect.

⁸⁴ Of course, as Shue suggests, there must be limits and guidelines set. Otherwise, “it is possible for the costs to be unreasonably high if the scope and magnitude of alleged duties is indefinite and open-ended” (Ibid., 111-12). Able states would deny assistance because it would be a never ending commitment to help others in every way imaginable.

⁸⁵ Emmerich de Vattel, *The Law of Nations*. trans. and ed. C. G. and J. Robison Paternoster-Row. (London, 1758, trans in 1797), (Bk II, Ch1), 135.

⁸⁶ Shue, 112. Shue states, “One is required to sacrifice, as necessary, anything but one’s basic rights in order to honor the basic rights of others” (Ibid., 114).

The international community has no right to compel any state to contribute militarily to an intervention that it, the international community, has a duty to undertake. This is one sense in which one might say that states retain a right to remain neutral. However, it is not the traditional idea of neutrality in the sense of taking no moral stance.

10) If the UN Fails to Act Individual States May Act

States in the international context are analogous to individual persons in the domestic context. Just as individual persons cannot fulfill their duties to secure and protect the rights of one another except through coordinating their efforts together and constituting/acting as a domestic state, so too individual well-ordered states cannot fulfill their duties to secure and protect the rights of persons beyond their borders except through coordinating their efforts together and constituting/acting as an international community or federation of states (e.g., the UN). A world state is not required since we already have a system of states, and most of those states adequately protect their citizens' basic human rights. Forcing states into a nonvoluntary global/international order is similar to conscripting civilians into military service. It violates their autonomy. In addition, it does not seem any more practical than the system of states that we already have. Both the strength and weakness of the UN comes from the voluntary aspect of it. If the international community or federation of states fails in its duties, then individual well-ordered states may have a duty to act individually (indeed, it was their duty to act individually that they were rationally fulfilling by coordinating their efforts with other well-ordered states).

This is, presumably, analogous to the domestic case: if a state is functioning as it should, then a person has no duty perhaps to do more than call the police or testify in court as a contribution to protecting the rights of his fellow citizens. But if the state fails, then a person

may have a duty to do more to actually come to the aid of those whose rights are being violated. For example, if there was a house fire and if members of the local fire department were on strike, then citizens would have to attempt to alleviate the situation without state assistance.

11) The UN's Duty to Improve

Awareness goes a long way. The international community recognizes that R2P is a positive duty, and with that the UN has a duty to improve. The UN recognizes that one of the best ways to reduce R2P cases is by not only working directly with countries but by also involving regional and sub-regional communities which assist in the education and monitoring of neighboring states. The UN has made positive gains by addressing its concern for physical security rights of all people. Just as there is legal enforcement at the state level—a positive obligation to protect—there also needs to be legal enforcement at the international level as well. Beitz states, “It is unrealistic to believe that analogous conditions are likely to be satisfied at the global level in the absence of global institutions that enforce them.”⁸⁷ I believe what Beitz is referring to is that there is a strong demand for competent global institutions that decisively enforce positive duties when states fail to. Human rights are supposed to be capable of guiding political action. If states not only fail to adequately protect basic human rights but even more so—commit genocide—there needs to be a global institution that is capable of stopping the situation.

Recognizing that R2P is a positive duty also gives impetus to develop operational—not just conceptual—doctrine because if the UN recognizes that it has a positive duty to act in every case (using peaceful or a combination of peaceful and coercive measures) then it would want to develop a system that could plausibly do just that by responding to grievous violations in an

⁸⁷ Beitz, 151.

efficient and effective manner. As it currently stands, the UN is more prepared to implement peaceful measures although these are less effective, so it would need to operationalize coercive measures. However, the practical problem is the fact that the UN does not have a standing military. The state system constrains what sort of military capacity the UN can have at its disposal. States have argued about an array of military concerns: command structures issues, costs, unclear mission objectives, troops committed to the UN *ex ante*, etc.⁸⁸ Although working out this issue is no small task, it needs to be done in order for the UN to effectively and efficiently handle military intervention if warranted.

McMahan points out that one possibility would be to create “a special force under international control whose only purpose would be to carry out humanitarian military operations.”⁸⁹ He further goes on to say that, “This would have to be a volunteer force composed of individuals who would not be members of any national military force.”⁹⁰ Along with McMahan, I too believe that there needs to be a specific force for R2P. However, I believe that his concept is impractical.

It is difficult to imagine that many countries would fund such a force. In addition, what soldiers get paid in the US and in the UK is much different from what they get paid in countries like Bangladesh and the Republic of Sudan. Whatever salary the UN would be able to muster for this special force (a result of state contributions) would most likely only draw enlistment from third world countries. The result would be as if the UNSC had outsourced R2P missions: first

⁸⁸ For example, “During the 2004 Presidential election, candidates Bush and Kerry raised concerns about any measures that might tie US hands in advance, thereby compromising the sovereign right of the US to decide when to go to war” (Jennifer Welsh, “The Security Council and Intervention,” in *The United Nations Security Council and War*, (Oxford: Oxford University Press, 2008), 557). On another note, state autonomy is probably one of the key factors that led to “state representatives failing to endorse the Secretary-General’s set of criteria for the use of force at the UN Summit of World Leaders, held in September 2005” and instead unanimously agreed to relegate intervention to a case-by-case basis (Ibid., 557).

⁸⁹ McMahan, 100-01

⁹⁰ Ibid., 101.

world nations would pay third world enlistees to fight in order to implement their policies. In addition, such an international volunteer force would lack expertise, top-notch training, and state of the art military equipment. It would be comprised of a motley lot of people from some of the poorest nations on earth looking for work. In addition, who would lead such a force?

Like McMahan, I also believe that there is a need for a standing R2P force. However, the preponderance of money, special equipment, and military trainers for this force should come from the permanent members of the UNSC.⁹¹ The benefit of having more political control and power should also come with the burden of funding, equipping (to some extent), and training the military force for R2P missions.⁹² In addition, the ten non-permanent members of the UNSC should be tasked to provide logistical support (sea and airlift capabilities, training facilities, etc.) for the R2P force. Soldiers for R2P would remain as members of their own state's military but would be assigned to an R2P role under the direction of the UN.

One benefit of this type of approach would be that the R2P force composed of soldiers from third world states could quite possibly have regional or sub-regional commonalities with the failed state that they are to militarily intervene in. An R2P force having cultural, historical, and/or political ties with the failed state as well as possibly a common language would only

⁹¹ Fair cost sharing definitely needs to be thoroughly addressed; however, I will bracket this topic for now except to note that a plausible way forward would be to institute an international tax system to support R2P missions. Although there has been a lot of discussion about changing/updating the UNSC, I do not foresee the five permanent members' status as changing in the near term. That is, I believe that they will remain permanent members. Maybe additional members (e.g. Germany, India, Brazil, etc.) will be added as permanent members. Regardless of what changes to the UNSC will occur, the permanent members will continue to play a decisive role in global politics. On another note, the UN's Military Staff Committee (which consists of the Chiefs of Staff of the permanent members of the Security Council) can advise in the development of such a R2P force.

⁹² The permanent members of the UNSC would equip the R2P force with state of the art equipment for intelligence, surveillance, and reconnaissance but also with armed drones. In addition, the permanent members of the UNSC would also incorporate their own air assets (fighter, bomber, and refueling aircraft) into an R2P campaign. Soldiers (from the five permanent members of the UNSC) would be used in an advisory and trainer role in order to develop this cosmopolitan R2P force (of which the preponderance of soldiers would come from third world nations) with the necessary skills needed to be implemented successfully. Other first-world nations would also be required (but to a lesser extent than permanent members of the UNSC) to contribute monies and equipment to funding this R2P force.

further benefit the situation. On another note, not having American soldiers deployed to some distant country for an R2P mission might actually help the situation because many states view the hegemonic US as unjustifiably having its hand in everything. Many people view US soldiers deployed in other states as imperial expansionism or as the securing of natural resources for its own use.

Having an earmarked R2P force that is properly funded, trained, and equipped would not only be operationally ready to engage in military intervention in a timely and decisive manner, but even more so, it might be seen as a deterrent to states that intend to deliberately harm a group of people in their own state.

Conclusion

The honoring of basic rights (physical security, subsistence, and basic liberty) can only be adequately protected by institutionalizing positive measures which provides protection from and punishment for non-restraint. It is essential to the very idea of a right that there are not only negative duties not to harm but positive duties to create institutions to protect and that these often involve the institutionalization of back-up-addressee obligations to protect and aid where primary addressees fail to protect their members.

The Lockean notion of state sovereignty and right to non-intervention is predicated upon securing core human rights. Sovereignty implies responsibility. States that violate any basic rights in a systematic way lose their standing as states with a right to non-intervention. However, military intervention is not considered permissible just because a state has lost its moral right to non-intervention. In addition to widespread systematic violations of physical security rights, there are further necessary conditions (a last resort, a reasonable chance of

success, all things considered proportionate, the rights of soldiers, undertaken voluntarily, welcomed, and a reasonable timeline) that would have to be satisfied before a military intervention was required and so permissible. Intervention is all things considered required, although depending on the situation the response might be limited, but that does not change the fact the back-up addressee (the UN) must assist in some fashion (negotiations, condemnation, sanctions, etc.) when military intervention is not a viable option.

Having an institution that can reasonably deal with every nonideal case is a step toward this goal. The UN is an organization which is united together to protect and promote the basic human rights of all persons. As Vattel states, “Nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.”⁹³

Over the past decade, the R2P norm has emerged and is continuing to evolve. When a state does not reasonably safeguard the basic rights of its citizens, the international community, headed by the UN, must make timely decisions and take decisive action (peaceful or a combination of both peaceful and coercive) in order to protect and aid those who have been targeted. Regardless of what group is the victim of these atrocities, all persons should be respected and their basic human rights should be observed with equal weight and equal concern because “basic human rights bind all states regardless of their consent.”⁹⁴

⁹³ Vattel, (Preliminaries, lv).

⁹⁴ Reidy, 185.

CHAPTER 4

Updating the Fourth Geneva Convention

The postwar phase has an established history in just war theory but has also received a considerable amount of attention over the last decade. Although the postwar phase seems to be the focus of many current just war debates and philosophical work, law and practice concerning the postwar phase has received considerably less attention over the same period. International law regarding the *ad bellum* and *in bello* phases is currently more developed than international law stemming from the moral principles that are relevant to the *post bellum* phase.¹

Both the *ad bellum* and *in bello* phases have both moral and legal force but the *post bellum* phase is currently inadequate. This can be fixed by not only expanding the range of *jus post bellum* moral norms to include fighting with right intention but also by giving legal embodiment to those norms. That is, obligations stemming from the norm of right intention should be realized not only as moral norms but as (international) legal rights as well. If civilians/noncombatants are to be “at all times humanely treated, and protected against all acts of violence or threats thereof,”² then belligerents should attempt to immunize civilians from the harmful effects of war as best as possible. Although civilians are to be protected, belligerents’ obligations to civilians can be ambiguous because the current international treaties regarding the

¹ For instance, in the pre-war phase, the international community oversees the implementation of war by its charter that specifically declares when a state has a moral and legal right to resort to war (collective or self-defense according to UN Charter Art 2.4 & 51). States overwhelmingly recognize that they should petition the UN for approval before initiating any military endeavor that is different from the traditional definition of acting in collective or self-defense, i.e. preemption, law enforcement, military intervention, etc. Regarding the war phase, the international community has signed treaties (Hague and Geneva Conventions) derived from moral norms and customary law regarding how states and their armies can morally and legally fight a war.

² *The Laws of War: A Comprehensive Collection of Primary Documents Governing Armed Conflict*, eds. W. Michael Reisman, and Chris Antoniou, New York: Vintage Books, 1994, (Art 27, Part III: Status and Treatment of Protected Persons, GCIV), 240.

treatment of civilians do not adequately express the necessary undertakings that belligerents must fulfill.

This shortcoming needs to be addressed because ultimately it is civilians who die as a result of threats that compromise their basic human rights. The fulfillment of core human rights is necessary in order to reasonably safeguard persons from standard threats to certain goods that would otherwise gravely affect the necessary conditions (such as having food and water, shelter, security, medical attention, basic liberties, etc.) for any attempt at an adequate life. There needs to be a social guarantee for a social minimum. The absence of which is a failure to secure human rights.

States acting with right intention recognize that basic human rights need to be reasonably safeguarded during and after war. Fighting with right intention entails a more robust account of securing core human rights which the principle of noncombatant immunity already recognizes. Immunizing civilians from harms that threaten basic human rights fits into any plausible account of what the principle of noncombatant immunity requires, because noncombatant immunity even entitles civilians to a level of protection of ‘more’ than just their basic human rights (e.g. respecting religious conviction and practices, honoring manners and customs, and barring threats and insults). Therefore, belligerents acting with right intention and in accord with what the principle of noncombatant immunity demands would have to reasonably protect civilians from the harms of war.³

³ I am not suggesting that war cannot be waged when civilians are in the proximity. Article 28 (Part III: Status and Treatment of Protected Persons) of the GCIV states that, “the presence of a protected person [noncombatant/civilian] may not be used to render certain points or areas immune from military operations” (*The Laws of War*, 240). However, belligerents should be accountable for their destruction and should take reasonable measures (as the situation dictates) to insulate civilians from standard threats to their basic human rights (physical security, subsistence, and basic liberty).

Although there has been a lot of work regarding the moral principles of *jus post bellum*, the norms governing the transition⁴ and postwar need to be informed by not only the aim of lasting peace but also of justice.⁵ Legal embodiment of those governing norms is also essential. Without legal embodiment of those relevant moral norms governing transition, postwar expectations, and obligations are left to the interpretation of powerful states.

Furthermore, occupation law which is the primary legal rules for governing the postwar period is outdated, inadequate, underdeveloped, and vague. As it currently stands, there is a normative gap in the law of transition from war to peace. Although current occupation law possibly provides a framework which if fulfilled would achieve some level of peace, it surely does not aim at peace with justice. Moreover, if the long-term aim of just war is establishing a just and lasting peace then substantive legal embodiment of the relevant moral principles is necessary in order for occupation law to be aligned with meeting this long-term aim. This is a necessary undertaking not only as a way to point parties more squarely toward justice but also to inform parties of what is required of them. If we do not have clear legal rules then justice becomes much more difficult to secure or maintain. Without clear governing rules, a state's duties, obligations, and restrictions are somewhat left to interpretation and bargaining.

As it currently stands occupation law neither adequately addresses the positive efforts needed for basic human rights fulfillment nor does it address reasonable political self-determination—both of which give content to peace with justice. As a result, “the law of

⁴ “Transitional justice concerns situations where a State, or a people, tries to move from a conflict situation to a post-conflict situation” (Larry May, *After War Ends: A Philosophical Perspective*, (Cambridge: Cambridge University Press. 2012), 44).

⁵ Elements of justice are required by right intention and so required in the period of transitional justice as well as the *post bellum* phase. Transitional justice and *jus post bellum* overlap and “both concern how to regard just practices and institutions after war” (May, 6). Although both transitional justice and *jus post bellum* are focused toward a just and lasting peace, “transitional justice often concerns the way to move from an authoritarian regime that did not respect the rights of the people to a regime that does respect rights, and *jus post bellum* normally concerns how to move to a situation of stability after war” (Ibid).

occupation is inadequate to the realities of modern occupation, and to the demands of modern peacebuilding and post-conflict reconstruction.”⁶

My argument is a three-section analysis of relevant postwar moral norms and their legal embodiment. In section 1, I will show that the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*⁷ (which is the treaty that covers the treatment of civilians during and after war) does not reflect current moral norms regarding human rights. Therefore, the Fourth Geneva Convention needs substantive reform and legal embodiment of relevant moral principles. In section 2, I will argue that *ad hoc* legal arrangements are problematic because these obligations are determined *ex post* which is too late. Rather overarching legal rules (ones that always pertain to any conflict) should be formulated and instituted ahead of time. In addition, these *ad hoc* legal arrangements cite specific treaties that belligerents should comply with, but those very treaties favor the victor and do not allow for political self-determination. In section 3, I will propose that the UN needs to take a larger role in postwar operations. This reason is twofold: 1) the UN is the global structure that specifically deals with fostering the cooperation of states regarding issues of peace and security; and 2) the UN should monitor and report compliance failures much like the UN already does when it comes to grave human rights violations.

⁶ Kristen Boon, “Obligations of the New Occupier: the Contours of a *Jus Post Bellum*,” in *Loyola of Los Angeles International and Comparative Law Review*, (Vol. 31, No. 57: 2009), 63.

⁷ This treaty is commonly known and referred to as the Fourth Geneva Convention or the GCIV.

1) Revised Geneva Convention

The 1907 Hague Convention IV and 1949 Fourth Geneva Convention (Section III: Occupied Territories) are commonly referred to as occupation law.⁸ Occupation law “establishes the rights and duties of the occupier, the duties of the civilian population of the occupied lands, the limitations on exercises of power against the civilian population, and the continuing rights of the ousted sovereign.”⁹ However, these stipulations only help maintain the *status quo ante* (negative duty of do not harm) and focus on conflict termination but not on peacebuilding. But as Kristen Boon notes “peace is no longer limited to a minimalist negative core but increasingly contains positive duties linked to the conditions that make peace practicable.”¹⁰

Although occupation law, in particular the GCIV, was ratified in 1949 after the implementation of the 1948 UDHR, the GCIV needs to be revised so it is consistent with the human rights movement that has gained considerable momentum over the last forty years. The realization that human rights are essential to developing and maintaining international peace and stability has since been slow and intermittent. It has taken decades to move from the UDHR to the two main conventions¹¹ and then decades more for those conventions to become anything

⁸ At the conclusion of a conflict, there may or may not be an occupation force because it is not obvious that such a force is permissible or required as a transition to peace with justice in every case. Moreover, I am not suggesting that every war that has a clear victor will have an occupation force. For example, the 1991 Gulf War did not result in the Coalition forces having an occupation force but the 2001 war in Afghanistan and the 2003 war in Iraq did have a US lead occupation force. However, the implementation of an occupation force (if warranted) can play an essential role in enabling a war-torn state to become autonomous once again. The role of an occupation force is generally focused on six main areas: conducting combat operations against any hostile state or non-state actors that have refused to surrender; re-establishing the rule of law; training the vanquished state’s internal defense forces; repairing of essential facilities and infrastructure that secure core human rights; fostering legitimate governance; and promoting economic pluralism. The final *post bellum* goal is restoration of the losing state as an independent sovereign state that is internally legitimate and externally peaceful. Depending on the situation, an occupation force may or may not contribute to bringing about this end.

⁹ *The Laws of War*, 231.

¹⁰ Boon, “Obligations,” 66.

¹¹ 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the 1966 the International Covenant on Civil and Political Rights (ICCPR).

close to effective. But human rights standards have taken hold, and “the rise of human rights obligations have set certain benchmarks for behavior.”¹²

Human rights “provide protections of basic human interests against standard threats to those interests; the character of the standard threats and what serves as adequate protections against them both reflect the nature of the kind of social world in which human beings now find themselves.”¹³ Just as human rights should be realized not only as moral but also as (international) legal rights in order to hold states accountable for providing adequate protection against standard threats, so too the norms of just war that follow from right intention should be realized not only as moral norms but as (international) legal rights. If we can adequately identify the character of standard threats in our social world then we can also adequately identify the character of standard threats that harm civilians during and after war.

Empirical evidence provides plenty of reliable information “about what makes for human misery and degradation”¹⁴ in modern war. As Allen Buchanan notes, “Once we appreciate the importance of factual premises, it becomes clear that the task of specifying human-rights norms is *ongoing*: as conditions change, new threats to basic interests may present themselves and new institutional arrangements for countering them may be needed.”¹⁵

Just as we have updated and revised human rights treaties that better reflect our world, we must do the same with treaties that concern human rights and the welfare of civilians in the postwar period. The point is that we need to update and revise international treaties regarding war in order to adequately accommodate our commitment to right intention and human rights.

¹² Carsten Stahn, “Jus Post Bellum: Mapping the Discipline(s),” in *American University International Law Review*, (Vol. 23, No. 2: 2007), 325.

¹³ Allen Buchanan, “Human Rights and the Legitimacy of the International Order,” in *Legal Theory*. (Vol. 14, No. 1: 2008), 56.

¹⁴ *Ibid.*, 58.

¹⁵ *Ibid.*, 60.

Moreover, if resorting to war justly is more than vindicating a just cause but is also conducting war in such a manner that will set necessary conditions for a just and lasting peace then new (updated) institutional arrangements are needed in order to counter those new or at least newly recognized threats to basic interests.

On another note, institutionalizing norms is not “merely a mechanism for translating independently justified moral rights into legal ones.”¹⁶ Rather, these institutions constitute, as Buchanan notes, “modes of public practical reasoning [structured by legal institutions] that contribute to our understanding of moral rights and to their justification.”¹⁷ Public practical reasoning allows for greater “inclusive representation of interests and viewpoints than is likely to be available at the domestic level and to that extent can mitigate the risk of culturally biased understandings of basic human interests, of what threatens them, and of what institutional arrangements are needed to counter the threats.”¹⁸ Allowing for public practical reasoning structured by legal institutions can help us know “what our obligations are regarding human rights by providing principled, authoritative specifications of human rights when there is a range of reasonable alternative specifications.”¹⁹ Of course there will be differences, even reasonable disagreement, but public practical reasoning provides a forum to discuss the issue of occupation and transition law as the two components of a legally embodied *jus post bellum* regime. Engaging in such a discussion, would not only (hopefully) shed light on the current inadequate legal protection that the GCIV specifies for civilians in the postwar phase but also what

¹⁶ Ibid., 48.

¹⁷ Ibid.

¹⁸ Ibid., 64.

¹⁹ Ibid.

authoritative specifications are needed in order to adequately account for protecting civilians' core human rights (physical security, subsistence, and basic liberty).²⁰

Historically, the GCIV was instituted as a way to capture all of the necessary considerations that the 1907 *Hague Convention IV Military Authority Over the Territory of the Hostile State* never addressed, because “the experience of Axis belligerent occupation during World War II made it clear that more precise standards and enforcement mechanisms were necessary for the security of civilians and their property in occupied territories.”²¹ But even so, the 1907 Hague Convention IV left much to the imagination and interpretation regarding the rights of the civilians in occupied territory. Articles 43 and 46 of the Hague Convention IV state that the “lives of persons must be respected, private property cannot be confiscated, and that the Occupying Power shall take all measures to ensure as far as possible public order and safety,”²² but it does not provide a specific account of what constitutes public order and safety. In addition, it does not make any reference to ensuring that the civilian population has food, water, shelter, or medical supplies or that the occupying power has any positive obligation to facilitate these necessities.

Since the ratification of the CGIV²³ in 1949, occupation law has applied in the Six Day War (1967) where Israel occupied former territories of Egypt (the Gaza Strip), Jordan (the West Bank), and Syria (the Golan Heights); the 1976 Syrian occupation of Lebanon; the invasion of

²⁰ It is permissible for basic liberty to be somewhat restricted in an occupied territory. Displaced persons might be temporarily placed in a refugee camp or restricted from travel for their own safety until essential infrastructure services are restored.

²¹ *The Laws of War*, 233. Even if there were treaties that required more stringent accountability and responsibilities of the occupying powers prior to WWII, it is hard to imagine that Nazi Germany would have actually abided by them then during WWII.

²² *The Laws of War*, (Hague Convention IV), 233.

²³ The primary focus of occupation law is the following: The occupier must take necessary steps to identify and register children in an attempt to reunite families, ensure food and medical supplies of the populations, maintain public health and hygiene services, ensure that penal laws of the occupied state remain, allow relief schemes by other states and/or the Red Cross, not compel protected persons (civilians) to work unless they are over eighteen years of age, not restrict employment opportunities, and must not conscript protected persons into its own army (*The Laws of War* (GCIV, Articles 47-78, 245-54).

Kuwait by Iraq (1990), the US invasion of Grenada (1983) and Panama (1989), as well as the invasion of Afghanistan (2001) and Iraq (2003) by the US and UK.²⁴

Though more explicit than the Hague Convention IV, the GCIV neither fully reflects nor aligns with the human rights movement. Article 55 of the GC IV states, “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”²⁵ In addition, Article 56 states that, “The Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.”²⁶

Although Articles 55 and 56 of the GCIV are clear improvements to the Hague Convention IV, this still is inadequate. For example, ensuring the food and medical supplies of the population does not mean that the occupying power has to provide any particular sort of access to these supplies. It just suggests that the occupying power has to provide these supplies most likely at centralized locations such as refugee or displaced person camps. In addition, Article 56 notes that prophylactic and preventive measures need to be enacted in order to combat the spread of contagious diseases and epidemics. But this Article does not elaborate on what that actually entails. Administering vaccinations, washing hands, breast feeding, and eating fruits

²⁴ Some states have flat out denied occupation law. For example, Israel believed that occupation law was not relevant because it had a legitimate claim in annexing the occupied territories that it gained during the Six Day War, and “Iraq did not apply the law of occupation to Kuwait, insisting that it was the nineteenth province of Iraq” (*Laws of War*, 232).

²⁵ *Laws of War* (GCIV), 247.

²⁶ *Ibid.*, 248.

and vegetables are all prophylactic and preventive measures. Is an occupation force that only supplies vaccines, hand soap, and fruits and vegetables doing all that is required within the spirit of the law?

It may be the case that articles rarely specify details because that is left to other documents and procedures. However, again this sounds like a bargaining process where powerful states have the upper hand in negotiating those procedures. I am not suggesting that articles in a general convention must incorporate all details. This would not only be overly taxing but most likely impossible. The level of specificity appropriate to a general convention must be at least to a level which addresses essential requirements. Otherwise, the article fails to give any definitive guidance. For example, articles governing the conduct of an occupation must include baseline criteria such as identifying the rudimentary prophylactic and preventive measures that are required as well as provide more detail about what ‘access’ to food and medical supplies actually requires.

Infrastructural services are an essential element to prophylactic and preventive medicine but the CGIV makes no reference to this. I would suggest that both Articles 55 and 56 needs to be significantly revised or additional articles need to be added to the GCIV that articulate the need for the occupying power to assist the host state with sewage disposal, trash removal, and electricity. These basic services are essential to a state’s ability in safeguarding the core human rights of its people. In addition, the civilian population must have access to potable water, food, and medical supplies that the occupying power is responsible for providing if the defeated state cannot. But this means that roads, highways, bridges, and rail lines will have to be repaired in order to grant the civilian population access to these necessities.

Article 64 of the GCIV states that, “Penal laws of the occupied territory shall remain in force.”²⁷ Just because these penal laws remain does not entail that they can be reasonably enforced when the infrastructure has been decimated. Rather, the occupying power would have to assist in the repairing of infrastructure necessary to enable the rule of law, but the current GCIV does not address this.

Civilians should reasonably be immunized from harms that compromise their basic human rights. Civilians should have potable water, food, shelter, physical security, sewage and trash removal, and access to medical attention. In addition, civilians require a state that can effectively secure those rights for them, e.g. road networks, power grids, courts, police precincts (which enables the rule of law), etc. are going to have to be operational. We cannot leave them without these institutional prerequisites to their human rights.

The 1977 *Geneva Protocol I Additional to the Geneva Conventions (1949) and Relating to the Protection of Victims of International Armed Conflicts* calls for additional protection of the civilian population of a war-torn state.²⁸ Article 69 of Protocol I states, “In addition to the duties specified in Article 55 of the Fourth Geneva Convention concerning food and medical supplies, the Occupying Power shall also ensure the provision of clothing, bedding, means of shelter, and other supplies essential to the survival of the civilian population of the occupied territory.”²⁹

This is clearly an improvement, because the GCIV does not mention anything about the

²⁷ Ibid., 250.

²⁸ Protocol I provides additional protections, such as Article 54 that states, “Starvation of civilians as a method of warfare is prohibited; it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations, and irrigation works” (*Documents on the Laws of War* (Protocol I), eds. Adam Roberts and Richard Guelff, (Oxford: Clarendon Press, 1982), 417). In addition, Article 55 states, “Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage” (Ibid., 418). On a side note, in 1991 Iraq violated Article 55 of Protocol I by dumping oil into the Persian Gulf and igniting hundreds of oil wells in Kuwait. Although Iraq claimed military necessity for these two actions (producing an oil slick to impede a possible Coalition amphibious landing operation and producing a smoke screen/haze in order to hamper Coalition bomber attacks), its actions were not proportionate to the environmental damage that was caused.

²⁹ *Documents on the Laws of War* (Protocol I), 428.

occupying power being responsible for clothing, bedding, or shelter. However, as stated previously, infrastructure needs to be operational in order for civilians to have their basic human rights reasonably secured. Furthermore, neither the GCIV nor Protocol I address other serious issues such as the repatriation and resettlement of refugees and displaced persons, children returning to school, and integrating combatants into the civilian population. Maybe it is believed that all of these issues will work themselves out in due time. However, not addressing or implementing positive measures in order to accommodate these issues are a serious shortcoming. Civilians returning home, children attending school, and former soldiers and other civilians finding work are essential for a country to return to a state of normalcy.

2) *Ad Hoc* Legal Arrangements

Historically, international law regarding the relationship between states has been basically broken into two categories: war and peace. The problem is that this binary split does not properly account for the transition period from conflict to peace which creates a normative gap in the law of transition from war to peace. 20th Century, pre and post-World War II international law focused on developing and demarcating two sets of rules (the law of war and the law of peace). Consequently, “the transition from war to peace was not treated as a paradigm in terms of law.”³⁰ International law should not be binary (war or peace), because both International Humanitarian Law and International Human Rights Law apply in war’s aftermath.³¹

³⁰ Stahn, 316.

³¹ Although human rights law applies before, during and after war, International Humanitarian Law (IHL) is a set of international rules which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. IHL’s main treaty sources are the four Geneva Conventions (1949) and their Additional Protocol I (1977). International Human Rights Law (IHRL) is a set of international rules on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments. IHRL’s main treaty sources are the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966) as well as the Convention on Genocide (1948). While IHL and IHRL have historically had a separate development, recent treaties (the Participation of Children in Armed Conflict and the

The period from conflict termination to establishing a just and lasting peace cannot adequately be subsumed by the laws of war or the laws of peace because these laws do not adequately address the positive efforts needed in order to secure human rights in the postwar phase nor the moral right to political self-determination and international toleration needed to establish peace with justice. Postwar is a confluence of both categories (war and peace) and needs its own division and classification of transitional law.

Attempting to address postwar issues by incorporating them into the laws pertaining to the conduct of war is insufficient because that corpus of law is centered on fighting and not on rebuilding. *Ad hoc* legal arrangements are insufficient because constituting such legal arrangements after the conflict not only delays postwar implementation but also creates shortfalls. In addition, states and international organizations (the UN, IMF, World Bank, WHO, etc.) are sometimes unaware of their respective postwar obligations and responsibilities before a war begins which creates inadequacies. “These inadequacies have created complexities on the ground because the duties and obligations of the various international actors are uneven and often unclear.”³² Furthermore, because “there is not a consensus on the obligations that unilateral or multilateral actors incur when they engage in transformative occupations and interventions; powerful states jockey for resolutions that favor their own interests.”³³

Working through and establishing a legal framework that can be implemented in all postwar scenarios would greatly reduce issues that surface in the postwar phase.³⁴ In addition to

Rome Statute of the International Criminal Court) include provisions from both. (International Committee of the Red Cross, “International Humanitarian Law and International Human Rights Law,” 2003, 1-2).

³² Boon, “Obligations,” 59.

³³ Ibid., 57.

³⁴ May states that, “reconciliation as a *just post bellum* concept involves a process of returning previously warring parties to a point not only where they do not engage in violence toward each other but also where there is sufficient trust so that a robust and just peace can be attained—and where a just peace means that human rights are protected” (May, 86). I believe that having clearly defined and updated rules (legal embodiment of relevant moral norms) governing the obligations and restrictions of the parties to the conflict is essential to the reconciliation process.

its political or practical application of having a particular legal document that encompasses all specific rules, regulations, and responsibilities of all parties regarding postwar, an updated convention on postwar would bring international focus and emphasis on the importance of the postwar phase. It would also provide a set of comprehensive requirements of what is required of warring parties before states ever resort to war instead of waiting to after the war to see and agree upon what is required. Agreeing to postwar stipulations after the conflict seems too late. Rather, rules need to be developed and articulated before the conflict.

Having an updated pre-existing legal document would (hopefully) guide a state's actions. For example, if the US had been more aware of its obligation in the postwar phase, it would not have disbanded the Iraqi civil service. Disbanding the civil service created a nonfunctioning government almost overnight which fostered animosity, chaos, fear, and lack of physical security which exposed the civilians of that state to greater harms than necessary.³⁵

Additionally, not having a pre-established fixed legal framework gives way to the very real potential of undue influence of powerful states or a hegemon which has historically been the case during postwar negotiations. That is, "peacemaking itself largely was conceived as a process governed by the discretion of states"³⁶ with the victor having the largest degree of discretion. Negotiation between victor and vanquished does not exactly facilitate a neutral,

Having an updated pre-established legal framework facilitates a working relationship in which each party not only understands its own obligations ahead of time but is also aware of the other party's responsibilities and obligations.

³⁵ It can be argued that the US did not adequately anticipate the consequences of disbanding the civil service. But the decision that the US made was a problem of principle and not just misjudging the facts on the ground. There was no pre-planning or planning for the postwar period until right before the six week war began. This is way too late. In addition, there was not any interagency planning and coordination between the State and Defense departments although the US State Department would oversee the political rehabilitation of Iraq. For more detail please see Todd Burkhardt, "Reasonable Chance of Success: Analyzing the Postwar Requirements of *Jus Ad Bellum*," in *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century*. On another note, Iraq is an example case of why it is important to have an updated pre-existing legal embodiment of relevant moral norms regarding occupation and postwar obligations. In doing so, every state knows ahead of time what is required of it in the postwar phase. If anything, an updated Fourth Geneva Convention regarding occupation law could quite plausibly have informed the US planners that disbanding the civil service would have been catastrophic at any attempt to enabling any form of governance.

³⁶ Stahn, 317.

even-handed approach to securing peace with justice. As a result, the terms of agreement were essentially “set by a bargaining process of the victors of the rights and obligations of the vanquished.”³⁷ Carsten Stahn posits, “Self-determination was not viewed as a binding legal principle, but as a flexible principle; it had to yield where it conflicted with overriding strategic interests of the victorious powers.”³⁸ Victors have been prone to make extensive internal legal and institutional reforms of the vanquished state most of which had nothing to do with improving the war-torn state but because “the occupant usually wishes to export its own institutions, or to establish a regime that will be friendly to its security interests.”³⁹

If anything, “the presumption of neutrality during occupations has generally been disproved in practice.”⁴⁰ Citizens of the war-torn state do not necessarily agree to the reform but welcome it as a “pragmatic desire for the rule of law.”⁴¹ Citizens want physical security so they acquiesce to the occupier’s reforms. However, we need to put limits on powerful states in the *post bellum* context. One way to do this is by having an updated, pre-established, and fixed legal framework that embodies the relevant moral norm of reasonable political self-determination which will foster political inclusiveness, popular legitimacy, and international toleration. As it currently stands, resolutions (formulated *ex post*) cite outdated treaties which favor the victor. The GCIV was written shortly after the formulation of the UN Charter (Chapter 1, Article 1.2) which “calls for respect for the principle of equal rights and self-determination of peoples.”⁴²

³⁷ Ibid.

³⁸ Ibid., 318.

³⁹ Karen Boon, “Legislative Reform in Post-Conflict Zones,” in *McGill Law Journal* (Vol. 50: 2005), 297.

⁴⁰ Ibid.

⁴¹ Ibid., 298.

⁴² United Nations Charter, <<http://www.un.org/en/documents/charter/chapter1.shtml>>.

However, the norm of reasonable political self-determination has “evolved from a principle into a right under international law”⁴³ and that evolution should be reflected in the GCIV.

After a conflict, a United Nations Security Council Resolution (UNSCR) is usually drafted and passed as a way to capture all of the necessary items that need to go into postwar justice. However, these resolutions cite outdated and unhelpful regulations. For example, both the 2003 UNSCR 1483 on Iraq and the 2009 UNSCR 1885 on Liberia “Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”⁴⁴ But the issue is that the Fourth Geneva Convention and Hague Convention IV which are referenced specifically as the treaties that need to be fully complied with do not reflect human rights standards of the 21st century (which I discussed previously in section1).

In addition, UNSCR 1483 “stresses the right of the Iraqi people freely to determine their own political future and welcomes the commitment of all parties concerned to support this.”⁴⁵ However, Article 54 of the Fourth Geneva Convention (which is the primary reference for an occupying power to abide by) gives “the right of the Occupying Power to remove public officials from their posts.”⁴⁶ The GCIV does not provide any additional information for what would constitute reasonable removal of public officials from their positions; it just gives the occupying force permission to do so. The GCIV allows the occupying power to decide what is best. The authority given to the occupying force can clearly obstruct a peoples’ right to reasonable political self-determination. Article 54 clearly favors the victor and the victor’s interests, because it allows for any public official to be dismissed based on the occupying power’s discretion. Article

⁴³ “Indigenous Affairs: Self-determination,” International Work Group for Indigenous Affairs. <<http://www.iwgia.org/human-rights/self-determination>>, 2002, 7.

⁴⁴ United Nations Security Council, <<http://www.un.org/en/sc/documents/resolutions/index.shtml>>, 2012.

⁴⁵ Ibid.

⁴⁶ *Laws of War* (GCIV), 247.

54 of the CGIV does not reflect Part I, Article 1 of both the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) which states, “All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁴⁷ In many cases, the defeated state or government does not itself express or constitute the reasonable political self-determination of the population over which it ruled, and so if the occupying force is to allow for reasonable political self-determination, it may have to remove officials, provide for some transitional process like a new constitutional convention, etc. However, the GCIV does not adequately address this concept. It just states that the victor may remove public officials from their posts, instead of expressing that the victor may remove public officials from their post as a way to help facilitate a peoples’ right to freely choose their own reasonable form of governance.

I am not discounting the importance of a resolution(s) after a conflict, but these should be used to address specific case-by-case issues whereas an updated Geneva Convention could be used as a uniform legal document to regulate the postwar phase to the level at which the pre-war and war phases are currently regulated. I suspect that there will always be a need for *ad hoc* legal arrangements that cover the specific issues of a given case. However, currently *ad hoc* legal arrangements reference outdated treaties (CGIV and Hague Convention IV) as the primary legal documents to which belligerents must abide by. But this is unhelpful, if we are trying to establish conditions for a just and lasting peace. Rather, we need to allow for political self-

⁴⁷ “ICCPR” and “ICESCR,” <<http://www.unhcr.org/refworld/docid/3ae6b36c0.html>>. There is no recognized international legal definition of ‘peoples’ but the term refers to a group of persons that “enjoy some or all of the following common features: a common historical tradition, ethnic identity, cultural homogeneity; linguistic unity, religious or ideological affinity, territorial connection, and common economic life” (“Indigenous Affairs: Self-determination,” 8). In the context of an occupied territory the term ‘peoples’ applies to the entire population within the occupied territory. The entire population has the moral and legal right to freely choose the type of government that they want without coercion or interference. Because the state exists to serve and to protect the peoples of a given territory, those peoples should be permitted to reform their own government in their own way.

determination as well as protect the basic human rights of the civilian populace as well as enable (repair) institutions that can reasonably do just that.

Allowing for political self-determination is consistent with right intention and establishes conditions that aim at a lasting peace with justice. In order permissibly to go to war, a state having right intention must not only have a just cause and limit its war-making activity to that necessary to vindicate the just cause, but it must also seek to vindicate its just cause in a manner likely to yield a just and lasting peace. Vindicating a just cause with right intention means vindicating it in a way that brings about a lasting peace with justice and the only way to set a lasting peace with justice is to allow for a significant degree of political self-determination for peaceful peoples that respect human rights and by not fighting longer than necessary to vindicate the just cause.

Some scholars, lawyers, and politicians might suggest that substantive legal framework for *post bellum* obligations are not necessary on the grounds that every *post bellum* context or circumstance is so unique that only *ad hoc* responses make sense. I grant that every war is different and has its own unique intricacies. However, I would think that we could at least all agree that at the bare minimum the treaty (GCIV) that is referenced by *ad hoc* legal arrangements needs to be updated in order to better reflect the positive efforts needed in order to reasonably secure core human rights of the civilian populace.

3) United Nations' Postwar Obligations

The UN is the appropriate institution not only to facilitate this process but also to play a role in institutionally expressing and adjudicating the relevant treaty. First, the UN is the global structure that specifically deals with fostering the cooperation of states regarding issues of peace

and security. Second, the UN should monitor and report compliance failures much like the UN already does when it comes to grave human rights violations.⁴⁸

Regardless of what states are involved in a conflict, the UN should oversee the postwar phase. Although the international community (signatories to the UN Charter) has delegated to the UN this power in Article 39 (Chapter VII, UN Charter),⁴⁹ which stipulates that the UN can decide what measures shall be taken in order to maintain or restore international peace and security, there are still shortcomings that need to be addressed.

For example, the UN primarily focuses on peace and security and not peace with justice. In addition, many of the states that comprise the UN have heterogeneous political perspectives which can lead to inaction, competing interests, and even adversarial relationships within the community of states. Even members of the UNSC have very different conceptions of domestic and international justice which can be evidenced by the two most powerful states in the Council: US and China. Although member-states of the UN clearly have different political perspectives, the UN is still the best international organization at overseeing the implementation of an updated and revised GCIV as long as we give some common content to the idea of international justice that all reasonable members of the UN might be expected reasonably to accept or affirm.

It might be difficult to exactly specify what a commitment to an enduring peace with justice requires in terms of the specific legal embodiment of noncombatant immunity and *post bellum* norms given the various disagreements between nations over what justice requires, either domestically or between states. However, the GCIV should at least reflect a commitment to

⁴⁸ “The Security Council and the General Assembly can appoint fact-finding missions to investigate and report on alleged violations of international law” (“Summary of the Report of the Secretary-General on ‘Implementing the Responsibility to Protect,’” International Coalition for the Responsibility to Protect (ICRtoP), <<http://www.responsibilitytoprotect.org/files/ICRtoP%20Summary%20of%20SG%20report.pdf>>, 2009, 4).

⁴⁹ Article 39 (Chapter VII, UN Charter) stipulates that, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security” (United Nations Charter. <<http://www.un.org/en/documents/charter/>>).

safeguarding the basic human rights to physical security, subsistence, and basic liberty as well as the right of peoples to self-determination in an occupied territory. In a sense this would provide a baseline of what justice requires because a consensus on what justice demands beyond the most obvious cases would be difficult to formulate, adopt, and ratify in the international arena.

Although the international community adopted the Genocide Convention in 1948 as a way to define and punish genocide in legal terms so as better to prevent it, it still saw a need to develop the Responsibility to Protect (R2P) as a complementary legal doctrine in 2001. Implementing R2P is a holistic attempt to stop genocide by understanding all three phases of conflict (before, during, and after): the Responsibility to Prevent, React, and Rebuild. The recognition of these three phases is very important because it “implies the responsibility not just to prevent and react, but to follow through and rebuild.”⁵⁰ This means that if military intervention is taken “there should be a genuine commitment to helping to build a durable peace and promoting good governance and sustainable development.”⁵¹ That is, R2P is not just a commitment to stopping egregious human rights abuses, but also a commitment to securing institutions necessary to peace with justice.⁵² This is important because the International Commission on Intervention and State Sovereignty (ICISS) that was commissioned by the UN to find the best way to implement R2P recognized that, “Conditions of public safety and order have

⁵⁰ “The Responsibility to Protect,” International Commission on Intervention and State Sovereignty (ICISS), (International Development Research Centre: Ottawa, 2001), 39.

⁵¹ Ibid.

⁵² In Chapter 3 on R2P, I focused almost entirely on the 2nd tenant of the R2P doctrine (the responsibility to react using peaceful and/or coercive measures) and briefly mentioned the 1st tenant (the responsibility to prevent using sub-regional and regional education, awareness, and early warning signs). However, there is a 3rd tenant which is the responsibility to rebuild which addresses the securing of institutions necessary for peace with justice, and I think that this R2P doctrine is a good fit to explain that there is also a need for the Geneva Convention to address some of these essential postwar issues that the R2P doctrine has already recognized as essential in postwar rebuilding.

to be reconstituted by international agents acting in partnership with local authorities, with the goal of progressively transferring to them authority and responsibility to rebuild.”⁵³

One can reasonably infer that this is not only essential to cases of genocide but to other conflicts in addition to R2P military intervention. Non-R2P wars and conflicts will also have a rebuilding (postwar) phase in which there needs to be genuine commitment to building a durable peace and promoting good governance. Conditions of public safety and order have to be reconstituted by international agents acting in partnership with local authorities, with the goal of progressively transferring the authority back to the host state.

If the UN and ICISS have recognized that there needs to be a genuine commitment to helping to build a durable peace and promoting good governance and sustainable development for R2P cases, then surely the same has to be done for all postwar scenarios. The UN is the best organization to try to orchestrate a concerted effort of states to review, update, and amend the CGIV in order for that international treaty to readily articulate what the legal embodiment of the relevant moral norms are. This would be much like what the UN and international community has done regarding its analysis on genocide and its preventing, reacting, and rebuilding doctrine in order to adequately deal with the situation from beginning to end. R2P doctrine has significantly evolved from its original sourcing document (the 1948 Genocide Convention) and so must the Fourth Geneva Convention of 1949.

This does raise questions though regarding a ‘post-bellum’ legal order that aims squarely at peace with justice which might prove equally controversial or problematic as the R2P platform has. Just as there are questions and concerns regarding what level of ‘justice’ R2P actually aims at so will there be concerns regarding an updated ‘post-bellum’ legal order. However, a commitment to safeguarding civilians’ core human rights and a peoples’ right to political self-

⁵³ “The Responsibility to Protect,” 39.

determination should not be controversial, and I believe that this level of justice is one that both liberal and decent well-ordered states could reasonably affirm. Although the R2P doctrine is oriented toward peace with justice, it is centered on only intervening in order to protect persons from grave physical security rights violations. However, the R2P doctrine would also have to protect other core rights (subsistence and basic liberty), as I have suggested in Chapter 3, if it is to be truly oriented toward peace with justice.

On a different but related note, the ICISS also recognizes, “Too often in the past the responsibility to rebuild has been insufficiently recognized, the exit of the interveners has been poorly managed, the commitment to help with reconstruction has been inadequate, and countries have found themselves at the end of the day still wrestling with the underlying problems that produced the original intervention action.”⁵⁴ This is also analogous to postwar scenarios. If the ICISS and UN recognize this shortcoming when it comes to military intervention, surely it recognizes these issues are commonplace in other types of conflicts as well and should position itself as the multilateral organization that is best situated to oversee postwar guidelines and as the appropriate institution at the center of this process—presumably its offices being used to monitor, report, and even adjudicate the relevant law.

The UN also recognized that it should assist in re-establishing the rule of law in post-conflict situations outside of just R2P cases. UN Secretary-General Kofi Annan stated, “The modern international legal system comprised of international human rights law, international humanitarian law, international criminal law, and international refugee law represents the universally applicable standards adopted under the auspices of the United Nations and must

⁵⁴ Ibid.

therefore serve as the normative basis for all United Nations activities in support of justice and the rule of law.”⁵⁵

As a result, in 2005 the UN instituted the Peacebuilding Commission (PBC) as a way to help advance the rule of law in post-conflict states.⁵⁶ The Peacebuilding Commission has a “mandate to integrate peacebuilding strategies from the outset of UN interventions and is emerging as a coordinating power dedicated to peacebuilding strategies that have a more representative basis than traditional UN activities.”⁵⁷ Although this is a step in the right direction, the PBC has significant drawbacks. First, the PBC needs to focus on peace with justice instead of peace and security.

In addition to helping with the securing of basic human rights the PBC also needs to support reasonable political self-determination and just institutions. Second, the PBC is only an advisory board, and it is not designed to operate in an environment where security is lacking. “Therefore, they [the PBC] support countries in a situation of positive peace not those in a situation of negative peace, the latter being the starting point of application of a *jus post bellum* framework.”⁵⁸ But in order for the UN to be able to effectively monitor and assist in all post-conflict situations, the PBC would have to be implemented in a negative peace situation right after there is a cessation of major combat operations. The occupation forces could provide security for the PBC and the PBC could help provide direction to both victor and vanquished.

⁵⁵ “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,” United Nations Rule of Law, <<http://www.unrol.org/files/2004%20report.pdf>>, 2004, 2.

⁵⁶ The Peacebuilding Commission (PBC) is an intergovernmental advisory body that supports peace efforts in countries emerging from conflict, and is a key addition to the capacity of the international community in the broad peace agenda. The Peacebuilding Commission plays a unique role 1) in bringing together all of the relevant actors, including international donors, the international financial institutions, national governments, troop contributing countries; 2) marshaling resources; and 3) advising on and proposing integrated strategies for post-conflict peacebuilding and recovery and where appropriate, highlighting any gaps that threaten to undermine peace (UN Peacebuilding Commission, <<http://www.un.org/en/peacebuilding/>>, 2012).

⁵⁷ Boon, “Obligations,” 84.

⁵⁸ Osterdahl and Zadel, 197.

Conclusion

Although belligerents must abide by occupation law, it is outdated, vague, favors the victor, and fails to adequately address many issues that peacebuilding and establishing a just and lasting peace require. The legal embodiment of the relevant *jus post bellum* norms ought to be welcomed by states committed to the idea that undergirding and unifying just war theory is the idea that military force must be deployed always and only with the right intention of aiming at an enduring peace with justice.

Updating the Fourth Geneva Convention would point parties more squarely toward justice but also would inform parties (states as well as international organizations) of their role and what is required of them. If we do not have clear legal rules then justice becomes much more difficult to secure or maintain. Without clear governing rules, a state's duties, obligations, and restrictions are somewhat left to interpretation and bargaining. An updated convention would articulate the conditions necessary for establishing a just and lasting peace, and would provide legal accountability for a state's failure to abide by relevant governing norms. Although *ad hoc* legal arrangements will most likely always be necessary, this does not entail that the Fourth Geneva Convention should not be updated in order to institute legal rules that would apply in all situations, e.g. the securing of basic human rights and allowing for political self-determination.

The UN is the best organization to oversee the facilitation of a revised Fourth Geneva Convention because the UN specifically deals with fostering the cooperation of states regarding issues of peace, security, and international justice. Second, the UN should monitor and report compliance failures much like the UN already does when it comes to grave human rights violations. In addition to developing the Responsibility to Protect and the Peacebuilding

Commission as instruments that assist in the rebuilding of war-torn states, the UN has experience with postwar issues and provides a multilateral approach to rebuilding. With some adjustments the UN could assist in establishing conditions for a just and lasting peace.

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