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Ethics and Intervention: The 'Humanitarian Exception' and the Problem of Abuse in the Case of Iraq*

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This article investigates the ethics of intervention and explores the decision to invade Iraq. It begins by arguing that while positive international law provides an important framework for understanding and debating the legitimacy of war, it does not cover the full spectrum of moral reasoning on issues of war and peace. To that end, after briefly discussing the two primary legal justifications for war (implied UN authorization and pre-emptive self-defence), and finding them wanting, it asks whether there is a moral 'humanitarian exception' to this rule grounded in the 'just war' tradition. The article argues that two aspects of the broad tradition could be used to make a humanitarian case for war: the 'holy war' tradition and classical just war thinking based on natural law. The former it finds problematic, while the latter it argues provides a moral space to justify the use of force to halt gross breaches of natural law. Although such an approach may provide a moral justification for war, it also opens the door to abuse. It was this very problem that legal positivism from Vattel onwards was designed to address. As a result, the article argues that natural law and legal positivist arguments should be understood as complementary sets of ideas whose sometimes competing claims must be balanced in relation to particular cases. Therefore, although natural law may open a space for justifying the invasion of Iraq on humanitarian terms, legal positivism strictly limits that right. Ignoring this latter fact, as happened in the Iraq case, opens the door to abuse.

Introduction

When is it morally justifiable to use force to change an oppressive foreign regime? On 20 March 2003, the United States and its allies (principally the UK and Australia) began Operation Iraqi Freedom with a series of missile attacks on Baghdad, aimed at 'decapi-tating' the Iraqi leadership. Around three weeks later, US troops entered Baghdad, taking control of the city in the following two days. It was not until 2 May, however, that George W. Bush formally announced the coalition's victory, aboard the USS *Abraham Lincoln*. According to the President, 'the Battle of Iraq is one victory in a war on terror that began on 11 September 2001, and still goes on' (*Washington Post*, 2 May 2003). As well as eliminating the 'threat' posed to the United States and its allies by Iraq, the coalition's leaders insisted that the war would also improve the lives of the Iraqi people by permitting the delivery of humanitarian assistance and

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creating an environment where Iraqis could determine their own fate peacefully and democratically (Blair & Bush, 2003). At the time of writing, authoritative Western accounts suggest that between 5,500 and 7,500 civilians had been killed by coalition forces.[1] It is likely, however, that the actual number of civilian casualties was considerably higher than this.

This article investigates whether, and when, using force to remove a foreign government is morally justifiable. It uses the case of Iraq to assess whether conservative interpretations of positive international law can be overridden by the moral right to uphold elements of natural law that are knowable to all.[2] I agree with some of the war's advocates in arguing that conservative interpretations of positive international law do not cover the full spectrum of moral reasoning on matters of war and peace (Sofaer, 2003). Positive international law only partly reflects Western traditions of moral reasoning about war that are bound together in the multifaceted 'just war' tradition. Another important element of that tradition is natural law, which, among other things, insists that sovereigns have a right to use force to uphold the good of the human community, particularly in cases when unjust injuries are inflicted on others (Grotius, 1925: Book II, chs 20, 25). However, although this 'humanitarian exception' (rooted in natural law) to positive law's ban on the use of force is morally appealing, the Iraq case demonstrates the dangers of 'abuse'. 'Abuse' refers to cases where moral arguments are used to justify a war that is not primarily motivated by the moral concerns espoused, but by the short-term interests of those instigating violence. When natural law is taken to overrule positive law as a general principle, the consequence is often a more disorderly international society with a much higher incidence of war. Thus, within the just war tradition, theological and secular scholars alike feared that sovereigns might make use of moral justifications for endeavours that were anything but just. As a result, I argue that natural law and positive law should not be understood as separate traditions but as complementary sets of ideas, the occasionally competing claims of which must be balanced in particular cases. The task that confronts us in a case like Iraq is therefore not one of deciding whether the responsibility to uphold natural law demands the derogation of positive law, or vice versa, but to find the appropriate balance between the two sets of claims.

At this point, it is important to briefly discuss the relationship between natural law and positive law and the way that they shape moral reasoning in international society. Until approximately 150 years ago, 'international law' was framed by the natural law tradition, largely because there was no world sovereign to create and enforce global laws. From Thomas Aquinas (1225–74) to Grotius (1583–1645), the theory and practice of the law of nations held that proper behaviour in international politics is governed by certain natural rights that accrue simply from being human, and are knowable to all through the exercise of moral reasoning. From the mid-19th century onwards, however, international law has become increasingly dominated by legal positivism – essentially, the belief that law is made up of what is written in treaties and the actual practices of states (see Hall, 2001). Among the other flaws of natural law, jurists held that it gave sovereigns a wide remit for judging the justness of their actions for themselves, thus providing a virtual carte blanche for sovereigns to wage war, sometimes offering nothing more that *raison d'état*

[1] The most comprehensive civilian casualty monitor can be found at http://www.iraqbodycount.org. It is constantly updated.

[2] In this article, I explore the question of whether natural law permits a right of intervention. Whether or not there is a moral duty to intervene in particular cases is a separate question that is not explored in this article.

as justification. However, legal positivists have consistently faced a number of dilemmas when applying their essentially domestic methodology to the international arena. First, there is no single authoritative lawmaker in international relations. Second, there is no authoritative judge that sits above the sovereign and interprets the law. Third, custom is as important a source of international law as written treaties, and it is very difficult to interpret custom objectively. Fourth, even in matters of war and peace, positive law is underdeveloped. That is, it does not cover every eventuality and there are many aspects of war that it does not deal with at all. Finally, unlike domestic law, international law does not reside within a community-based moral framework but instead sits uneasily alongside a variety of different moral frameworks. For these reasons, positive international law does not provide a comprehensive framework for assessing the ethics of war, but neither does natural law. The task for those who wish to unravel the ethical dilemmas posed by intervention is to balance positive law and natural law in particular cases.

I argue that if we incorporate both positive law and natural law into our analyses, it is difficult to support those such as Tesón who call for a broad right of intervention. Tesón (1997: 6–17) argues that the modern prohibition on the use of force for humanitarian purposes is a product of the 'fetishization' of the modern state and the dominance of legal positivism in contemporary international law. As a result, he argues, the inflexible prohibition on force exhibited in Article 2(4) of the UN Charter should be tempered by an acknowledgment that using force to protect the oppressed was a legitimate practice prior to these 19th-century legal developments, and that therefore the use of force for benign humanitarian purposes today should be considered both legal and morally legitimate. If validated, Tesón's argument would provide moral legitimacy for the war in Iraq on *humanitarian* grounds. However, Tesón overlooks the fact that the emergence of legal positivism was a response to the failure of natural law to regulate violence. Moreover, I argue that as they emerged from the broadly same tradition of thought, natural law and legal positivism should be understood as complementary sets of ideas.

This raises two important issues in relation to the problem of 'abuse'. First, it is important to understand that the danger of abuse was not first recognized in the 1990s debate about humanitarian intervention, but dates back to the Middle Ages in both theory and practice. Second, it is equally important to acknowledge that the problem of abuse is a practical as well as intellectual problem. Since 1202, when the Venetian Republic used a 'holy war' argument to justify the sacking of Zadar, an act primarily motivated by a desire to protect Venetian commercial interests in the Adriatic (Goldstein, 1999: 25), states have abused moral justifications for war to suit their own purposes. While a Machiavellian would respond by arguing that this demonstrates the futility of moral reasoning about war, I argue that historical epochs characterized by such 'abuse' also tend to be characterized by devastating wars and the breakdown of social order. The two clearest cases in this regard are the 'holy wars' fought by Catholics and Protestants (1618–48), in which each side claimed to be fighting for a just cause mandated by God, and Hitler's use of humanitarian justifications to legitimize the invasion of Czechoslovakia in 1939. The danger is that if contemporary international society seeks to accommodate 'abusers' of moral justifications for war or legitimizes their actions, states will become more likely to make use of such avenues, creating a more violent international society.

What are the implications of this for the

way we assess the justness of interventions to change oppressive regimes? In the case of Iraq, I argue that the moral case for war falls somewhat short of the conditions set out by both positive law and natural law. If that is the case, the challenge is not – as writers such as Byers (2002) and Daalder (2002) suggest – to reformulate the legal norms and moral principles that guide our thinking about the legitimacy of war, for past cases suggest that when 'abusers' are accommodated, international society becomes more disorderly (and may even be destroyed), and constraints on the use of force are weakened. Instead, the challenge is to expose the abuse as such, and to confront the perpetrators with the unjustness of their actions in order to constrain potential abusers through normative pressure at the domestic and international levels.

Positive International Law and the War in Iraq

The legal debate about the decision to wage war in Iraq was framed almost entirely by the interpretation of positive law. Moreover, the broader moral debate about the war was also often couched in legal positivist terms. The coalition members all suggested that there was enough authority in existing UN Security Council resolutions to justify the use of force against Iraq (see Arend, 2003; Roberts, 2003). When the Attorneys-General of the UK and Australia put forward a legal case for war, their argument rested principally on interpretations of Resolutions 678 (29 November 1990), 687 (3 April 1991), and 1441 (8 November 2002).[3] As the British Attorney-General put it, 'a material breach of Resolution 687 revives the authority to use force under Resolution 678'. The justification continues by pointing out that all subsequent resolutions on Iraqi disarmament (for instance, Resolutions 1154, 2 March 1998; and 1158, 25 March 1998) were passed under Chapter VII of the Charter and identified Iraqi non-compliance as constituting a threat to international peace and security. Resolution 1441 found Iraq to be in material breach of Resolution 687 and warned of 'serious consequences' if it did not comply. Thus, the British and Australian governments argued, the war with Iraq was legal because it was authorized by the Security Council.

By contrast, the US administration developed two legal arguments to justify the war. First, they agreed with the British and Australian argument that a revived Resolution 678 provided enough justification for war. Second, however, Bush emphasized the administration's belief that the war with Iraq was a continuation of the 'war against terror' and implicitly suggested that a legal argument based on self-defence, which was used with some success to justify Operation Enduring Freedom in Afghanistan, provided enough justification for the use of force against Iraq under the doctrine of pre-emptive defence outlined in the *National Security Strategy* (2002).[4]

Most international lawyers and states discounted the claim that the war was legal because it had been authorized by the Security Council for a number of reasons. First, there is nothing in Resolution 687 that implies that Resolution 678 might be reactivated if Iraq did not comply. Second, Resolution 687 only demanded that Iraq formally accept the terms, which it did in a letter to the Council. Third, the Council has never authorized the use of force to implement Resolution 687, and at the time it was passed

[3] The text of the statement of the legal advice given by Britain's Attorney-General, Lord Goldsmith, and tabled in the British Parliament advice can be found at http://www.smh.com.au/articles/2003/03/18/1046749750291.html, and the Australian Attorney-General's advice can be found at http://www.smh.com.au/articles/2003/03/19/1047749818043.html.

[4] See 'Letter from the President of the United States to the Speaker of the House of Representatives and Pro Tempore of the Senate', 21 March 2003.

none of the ambassadors to the Council implied that it did. Fourth, we know that between September and November 2002, the USA and the UK proposed a resolution that endorsed the use of force if Iraq continued to be in material breach of its obligations, but failed to persuade most other Council members to support it. Finally, when they launched Operation Desert Fox in 1998, the USA and the UK failed to persuade the Council to accept their interpretation of past resolutions and a significant majority (11–4) of Council members explicitly rejected it (Gray, 2002).

In the absence of a plausible argument demonstrating that the Security Council authorized the use of force, the US administration developed the concept of pre-emptive self-defence to bolster its justification for war. This doctrine was formally announced in the new National Security Strategy unveiled in September 2002. The strategy document insisted that:

> given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threat, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first. (*National Security Strategy*, 2002: 15)

The document argued that such a strategy was founded on international law. It insisted that 'for centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves' (p. 15). The National Security Strategy attempted to prove the existence of 'imminent threat' by linking the 'war against terrorism' with the so-called 'axis of evil' states of Iraq, Iran and North Korea. In order to justify the broadening of the right of pre-emptive self-defence, the strategy argued that the threat posed by terrorism could not be as readily identified beforehand as the threat of conventional attacks by states because many of the precursors to attack (such as arms buildups and concentrations) are not necessary for terrorists.

This is certainly a compelling argument when it comes to terrorism, and many states may have taken this into consideration when evaluating the legitimacy of Operation Enduring Freedom. Writers such as Glennon (2002) and Daalder (2002) have both argued that the threat of terrorism, evidenced by 11 September, justifies a broader understanding of self-defence because the threat may be imminent though not always evident. However, this argument is much less compelling when applied to states such as Iraq, because the administration failed to demonstrate that such states *do* present a new form of threat to international security. Such states may be 'rogues', but they are still states, and there is no evidence to suggest that they pose a threat that is uniquely different to threats posed by other states. The National Security Strategy therefore fails to identify the new type of threat posed by 'rogue states'. As a result, the argument that the United States holds a right of pre-emptive self-defence in relation to them is not compelling. Moreover, the US administration failed to convincingly demonstrate that Iraq did pose an imminent threat.

The legal case for war with Iraq was therefore untenable in terms of positive international law. The coalition offered two sets of justification: the implied authorization of the Security Council and the right of (pre-emptive) self-defence. Both arguments, it is clear, were flawed in important respects. In particular, to be plausible both required the stretching of key principles to such an extent that the principles themselves were called into question. For instance, if the supposed 'right' of pre-emptive self-defence extends to a state with negligible military capabilities that makes no discernable threat prior to the attack, the moral distance between 'self-defence' and

'aggression' disappears. That said, however, positive international law does not cover the full spectrum of moral reasoning about intervention. In 1999, for example, NATO intervened against Yugoslavia to halt and reverse the ethnic cleansing of Kosovo. In terms of positive law, the intervention was illegal, yet many writers – myself included – argued that it was nevertheless morally justifiable because it prevented a greater wrong from being committed (Bellamy, 2002; IIC, 2000). However, as suggested at the outset of this article, there is a further potential set of arguments that could be used to justify the war with Iraq, as one warranted by the moral rights bestowed on all individuals by natural law – while acknowledging that it was illegal under positive law. This argument holds that according to natural law, wars fought for humanitarian purposes are a moral good in themselves, though there is debate about whether the key moral good is humanitarian *intent* or humanitarian *outcomes* (compare Ramsbotham & Woodhouse, 1996 and Wheeler, 2000).

The Humanitarian Exception

Once it became clear that the UN Security Council was not going to authorize the use of force against Iraq, the leaders of all three main interveners began to emphasize the humanitarian necessity of war. As in the Kosovo case, the most ardent advocate of the 'humanitarian exception' was British Prime Minister Tony Blair. Blair used two broad arguments. The first was a moral argument for shifting tactics to enforce Iraqi disarmament. He argued that 'the alternative [to war] is to carry on with a sanctions regime which, because of the way that Saddam Hussein implements it, leads to thousands of people dying needlessly in Iraq every year' (Blair, 2003). Thus, Blair tacitly agreed with the many critics of the sanctions regime against Iraq (such as Simons, 1996, and Ismael & Heddard, 2003) by suggesting that the effects of the sanctions regime were morally impermissible. The argument followed that as sanctions had (apparently) not achieved their goals (Iraqi disarmament) and imposed a heavy burden of suffering on the Iraqi people (which could be counted in terms of 'thousands' of deaths), the use of force was morally required. It would simultaneously achieve the coalition's material goals and ease the suffering of the Iraqi people. In the move described above, Blair seemed to imply that war was being waged, in part, to minimize the negative consequences of the prior actions of those that were initiating the war. Those prior actions, it could be argued, were at least in part put in place as punishment for Iraq's mistreatment of the Kurds and Shi'ites in the aftermath of the Gulf War in 1991.[5] The argument follows that the coalition chose not to use force to 'right the wrong' but instead to apply economic sanctions. Once it became clear that economic sanctions were not serving the just cause and were proving disproportionately expensive, the allies chose the resort to force as a 'last resort' and more appropriate method of satisfying the just cause dating back to 1991.[6]

This is a sophisticated argument, but there are a number of problems with it. Most fundamentally, although the just war tradition permits wars that aim to 'right a wrong', there is almost unanimity of thought among secular and theological ethicists that the wrong must be committed by the state that war is being waged against. Even accepting the argument that the coalition had a just cause dating back to 1991 and were justifiably using nonviolent methods to

[5] The primary justification for sanctions was Iraq's noncompliance with Resolution 687, but humanitarian justifications also played a part in the way that political leaders explained the sanctions to their domestic publics (Wheeler, 2000: 145–165).

[6] I am very grateful to Nils Petter Gleditsch, editor of *Journal of Peace Research*, for putting this excellent argument to me.

accomplish their goals until it became apparent that this tactic was not working, there are three principal problems with this line of reasoning. First is the question of discrimination. As Grotius pointed out (1925: 507), a just warrior ought 'not to involve the innocent with the nocent in the same punishment', yet it is clear that the sanctions regime targeted the Iraqi population in the hope that they would overthrow their government. Benon Sevan, executive director of the UN's 'oil-for-food' programme in Iraq, reported that the Iraqi government's misappropriation of revenue from this programme was small, owing to the UN's close scrutiny of spending, and that it had virtually no effect on the quality of life of ordinary Iraqis.[7] The sanctions regime ignored the Kantian imperative that humans should be seen as ends in themselves, never as means to an end, by attempting to use the suffering of the civilian population to coerce the government. Second, it is doubtful whether the sanctions regime was proportionate, because between 1991 and 2003 sanctions appeared to cause more harm than the evil they were trying to undo.[8] Moreover, the fact that the sanctions regime was questionable on discrimination and proportionality grounds was evident long before 2003. Finally, and perhaps most important, the use of economic sanctions after 1991 was an inappropriate tool for responding to the humanitarian catastrophe of 1991. It did nothing to stop the killings in the aftermath of the Gulf War or to ease the plight of the Kurds and Shi'ites thereafter. This once again raises the spectre of abuse, because the methods chosen to pursue the ostensible just cause of halting mass killing and human rights abuse were evidently incapable of righting that wrong.

The second, and more persuasive, humanitarian argument levelled by Blair, Bush and Howard was that Saddam Hussein's record of human rights abuse alone warranted intervention. Once again, the British were at the forefront of making this argument. The Foreign and Commonwealth Office (2002) released a short report in November 2002 documenting the decades of human rights abuse in Iraq. It insisted that 'Iraq is a terrible place to live. People are in constant fear of being denounced as opponents of the regime. . . . Arbitrary arrests and killings are commonplace.' The Iraqi regime, the report points out, was guilty of torture, abusing women, abusing prisoners, conducting summary executions, persecuting Kurdish and Shi'ite minorities and gassing its own people. The report concluded that 'Saddam Hussein has been ruthless in his treatment of any opposition to him since his rise to power in 1979. A cruel and callous disregard for human life and suffering remain the hallmarks of his regime' (pp. 6–8). George W. Bush used his 2003 State of the Union Address to make a similar argument. Bush told his audience that 'I have a message for the brave and oppressed people of Iraq: Your enemy is not surrounding your country – your enemy is ruling your country', before insisting that 'if war is forced upon us, we will fight in a just cause and by just means – sparing, in every way we can, the innocent' (Bush, 2003).

These arguments echo the claims of cosmopolitan writers and others who suggest that there is a 'humanitarian exception' to the ban on force in positive international law. Such writers claim that there is agreement in international society about what constitutes a 'supreme humanitarian emergency' and that in such cases states not only have a right to intervene to halt human suffering, they have a moral duty to do so (Arend & Beck,

[7] Benon Sevan in informal consultations of the UN Security Council, 22 November 2002.

[8] For instance, in 1998 the UN's humanitarian coordinator in Iraq, Dennis Halliday, pointed out that the sanctions regimes created conditions where 'children are being permanently damaged by malnutrition and protein deficiency' (Cockburn, 1998).

1993; Tesón, 1997). Indeed, in 1992 Pope John Paul II (1992: 475) argued that 'the conscience of humanity and international humanitarian law' demands that 'the international community not only has a right but a duty of humanitarian intervention where the survival of populations and entire ethnic groups is seriously compromised'.

Advocates of the cosmopolitan position find evidence for a 'basic floor' (this term is Vincent's, 1986) of agreement in the contemporary international human rights regime that includes agreed and detailed standards of humane behaviour, accepted methods of governmental and nongovernmental surveillance, and increasing acknowledgement of universal criminal culpability. Just as this consensus has grown over time, they argue, so too has state practice developed towards a growing recognition that there is indeed a right of intervention in extreme cases. They argue that a precedent was set after the Gulf War by Operation Provide Comfort in northern Iraq (Wheeler, 2000). This operation was implicitly sanctioned by UN Security Council Resolution 688, which itself marked a revolutionary moment in international society because it implied that human suffering alone could constitute a threat to international peace and security and hence warrant a collective armed intervention by the society of states.[9] The argument follows that the subsequent interventions in Bosnia, Somalia and Rwanda reinforced this new norm. Sovereignty, Tony Blair once famously opined, is not a veil that human rights abusers can hide behind (Blair, 1999). Instead, 'state authorities are responsible for the functions of protecting the safety and lives of [their] citizens' (ICISS, 2001: 13). Thus, the cosmopolitanist argument seemingly endorsed by Bush, Blair and Howard holds that extreme cases of human suffering create a legitimate *moral* exception to the rule of non-intervention rooted in natural law.

There is little doubt that the Hussein regime had a terrible human rights record. In 1988, for instance, Iraqi forces crushed a Kurdish rebellion with chemical and conventional weapons, killing an estimated 100,000 people – the vast majority of them civilians (Stromseth, 1993: 81). Immediately after the 1990–91 Gulf War, Iraqi forces again went into action to suppress rebellion. This time, the Kurds and Shi'ites rebelled at the instigation of George Bush Senior and were brutally crushed. As Freedman & Karsh recount (1993: 419):

> the [Republican] Guard plunged into their new task with a degree of brutality that was exceptional even by the exacting standards of the regime. The holy cities of Najaf and Karbala were given a particularly harsh treatment. Thousands of clerics were arrested and hundreds were summarily executed.

By the end of April 1991, tens of thousands of civilians had been killed and over two million refugees had fled Iraq (Freedman & Karsh, 1993: 420). In order to make the link between Iraq's dire human rights record and the legitimacy of the invasion, however, two questions need to be addressed: first, is the 'humanitarian exception' grounded in Western traditions about the morality of war, or is it a more recent rhetorical device, as some of its critics (such as Chomsky, 1999) suggest? Second, even if we answer the first question in the affirmative, we need to ask whether the situation in Iraq at the beginning of 2003 constituted a *supreme* humanitarian emergency that required the immediate use of force to provide a remedy.

The Humanitarian Exception in Just War Thinking

Is it legitimate to use force to protect the citizens of another state from tyranny? Different traditions within just war

[9] I am not necessarily endorsing this interpretation of the Resolution. On the background to and importance of Resolution 688, see Chopra & Weiss (1992).

thinking, broadly defined, reveal two different answers to these questions. The first is the 'holy war' tradition that took hold in Europe in the late 16th and early 17th centuries. There are three particularly relevant aspects of holy war thinking. First, holy wars are wars fought to propagate 'right religion' or establish a social order in line with divine authority (Johnson, 2001: 38). Second, such wars are legitimate in order to enforce religious compliance and to punish deviation. Finally, 'holy wars' (rather than 'just wars') are wars in which the participants are either morally 'holy' or utterly unjust (Johnson, 2001: 38–39). It is clear to see how such holy war thinking, which was developed by a diverse range of theorists and statesmen including Francis Bacon, Stephen Gosson and Cardinal Allen (Johnson, 1974: 81–133), could lend itself to a moral justification for intervention to assist others. Underlying the holy war idea is the notion that God *commands* particular wars rather than merely *permits* them. Such wars are commanded not only to protect the religious way of life of the potential intervener but also to 'maintain truth and the purity of religion' (Gouge, 1631: 215).

This echoes the much more recent work of solidarist theorists of international society and law who argue that the obligation to help citizens of other states in distress is a moral duty founded in common humanity. Coming at the problem from very different perspectives, Franck & Rodley (1971) and Lepard (2002) conclude that there are sound moral grounds for humanitarian intervention, because there is 'common' agreement in a number of ethical traditions that crimes such as the mass killing of civilians are universally punishable. Thus, while a holy war is commanded by the Pope to protect Christian communities everywhere that are threatened by infidels, a 'humanitarian intervention' is commanded by 'humanity' to protect innocents under threat of mass execution. The logic is strikingly similar. Sinibaldo Fiesci, adviser to Pope Innocent IV in the 13th century, argued that the Pope was responsible for all humanity. Although the Pope could not punish infidels for simply being infidels, he was permitted to use force against infidels if they violated natural law and particularly if they did so in places where Christians (no matter how few) lived (Muldoon, 1979: 10–12). In the contemporary era, the cosmopolitanist logic replaces papal authority with either the legal authority of the UN Security Council or the moral authority of Western liberalism. The protected populations are no longer merely Christians, but all humanity.

However, many of the problems with the holy war doctrine extend to the modern idea of humanitarian intervention. Most relevant here, though, is the issue of 'right authority'. By the end of the 17th century, the idea that the Pope had authority to use force to protect Christians or enforce religious conformity had all but disappeared from the just war tradition. Early jurists such as the neo-scholastics (Vitoria and Suarez) and Grotius and Vattel were united in their rejection of holy war, and instead insisted that the primary just cause for war was 'reasons of state', with the grounds for war found in customary practice and natural law. Today, of course, the only authority above the state permitted to instigate war is the UN Security Council. In the absence of agreement about what constitutes 'common humanity' and how the obligations of humanity are to be interpreted, it is problematic to suggest that individual states may appeal to 'humanity' to seek justification for their actions. Although the holy war tradition seemingly provides a way into locating a universal moral obligation within an ethical tradition on war, it cannot serve the purpose of providing a framework for

justifying the Iraq war, for two principal reasons. First, the shift from 'Christendom' to 'humanity' as the legitimate object of protection is not self-evidently justifiable. Second, even the holy war idea presupposed authorization by an authority higher than the state. What we are left with by the end of the 17th century, and still today, however, is the state as the highest authority and war permitted only for 'reasons of state'. 'Reasons of state' only permit the use of force to protect the state and its citizens, not to deliberately conquer or compel the citizens of other states. Nevertheless, as we will see in the following section, Vitoria and Grotius did provide for the use of force to punish those who violate natural law.

The second, and more familiar, tradition of thought is the 'classic' just war thinking. It is this doctrine that provides us with the criteria of *jus ad bellum* (just cause, right authority, right intent, proper declaration) and *jus in bello* (principally proportionality and discrimination). The key questions, then, for this tradition of thought are whether the suffering of the Iraqi people constituted a 'just cause' and whether the coalition invasion was conducted with 'right intent'.[10] The principal 'just cause' that permeates the classic tradition is self-defence. According to Vitoria, even the unjust and the infidel have a right to bear arms in self-defence, creating the possibility that a war may be just on both sides (see Johnson, 1974: 154–156). This raises the question of whether the use of force to defend others is just. The classical tradition is clear in stipulating that the defence of other *states* is just, and – according to Walzer (1977: 14) – an act of necessity, not charity. The justness of the use of force to protect foreign nationals, however, is much more contentious.

To the extent that one can be found, the existence of such a right finds its roots in Aquinas's ideas about natural law, and the development of those ideas by Vitoria and Grotius. At this point, however, it is important to note a key difference between the classical just war tradition and the holy war tradition. While the holy war tradition speaks of a moral *duty* to intervene, Vitoria and Grotius speak only of a *right* to act: that is, we may act, but we are not morally compelled to do so. To use Walzer's phraseology, viewed from this perspective the use of force to defend the citizens of another state is an act of charity, not necessity.

In his discussion of the Spanish war against American Indians, Vitoria asked whether it was permitted to use force against infidels who practised cannibalism and human sacrifice. In answering in the affirmative, Vitoria argued that the use of force was permissible because the 'wrongs' it was intended to halt were wrong under natural law – which is knowable to all – not Christian law, which is knowable only to Christians. The context of Vitoria's discussion, however, was one where the (Spanish) sovereign had a degree of legal jurisdiction over the American Indians. In cases where no such jurisdiction existed, Vitoria demanded that no right of punishment existed (Nardin, 2000). Grotius went one step further in arguing that sovereigns have a right to punish acts that 'excessively violate the law of nature or of nations in regards to any persons whatsoever' (cited by Nardin, 2000: 8). As Nardin (2000: 9) suggests, the emerging doctrine in this period, evident in Grotius, was that every sovereign had a right to enforce natural law against every other sovereign. This state of

[10] The question of 'right authority' in the case of Iraq is something of a given for classical just war theorists, as the right to wage war is one held by states. Thus, whilst contemporary international law may suggest that the allies did not have proper authority to invade Iraq, this is not a question for classical just war theorists. The argument follows that if 'just cause' and 'right intent' can be ascertained, the lack of UN authorization need not undermine the case for war in natural law, though, as I argued earlier, it certainly does undermine the case in terms of positive law.

affairs was accompanied by almost perpetual war in Europe.[11]

Although the natural law argument does provide a basis for justifying humanitarian intervention, it is important to note that significant elements of the classic just war tradition rejected it, and that by the 19th century this tradition of thought had been almost entirely replaced by legal positivism, precisely because it justified perpetual war in Europe. Just war theorists identified two central problems with the idea of using force to uphold natural law in foreign states. First, among many classic just war theorists – Grotius included – the idea that sovereigns have a right to suppress rebellion is sacrosanct. Indeed, many writers suggest that sovereigns may not be bound by international customs in such cases, though Grotius insisted that they remain bound by natural law (Johnson, 1974: 141). This doctrine significantly limited the idea of a universal right to uphold natural law. Second, and more significantly, from Vattel onwards the 'right' to wage war became increasingly a matter of state-to-state relations regulated by ever more restrictive positive law. Giving sovereigns a licence to interpret and enforce 'natural law', it was found, led to anarchy and perpetual war. As one of the early legal positivists, Samuel von Pufendorf, put it (1672/1934: 837), it is 'contrary to the natural equality of mankind for a man to force himself upon the world for a judge and decider of controversies. . . . Any man might make war upon any man under such pretense.' Although Pufendorf went on to clarify his statement, the sentiment is clear. A 'right' that permits sovereigns to wage war to enforce 'natural law' opens the possibility of abuse in allowing sovereigns to wage war for *any* reason, particularly where there is no authority set above the sovereign to judge its claims. This was not an idle intellectual problem. As noted earlier, the problem of 'abuse' was a real one, and contributed to a context of perpetual war in Europe that only began to markedly decrease once these rights began to be removed by the emergence of legal positivism in the 18th and 19th centuries. Beginning with the Peace of Westphalia in 1648, positive international law asserted with ever-increasing vigour a sovereign's right to rule however he saw fit and the obligation of other sovereigns to respect his right to do so. This had the effect of making warfare much more rare, though at the cost of occasionally tolerating tyrannical rule domestically. Positive international law therefore developed as a response to the endemic abuse of natural law. As a result, natural law and positive law should not be viewed as separate bodies of reasoning. Instead, the application of natural law to contemporary moral dilemmas should be tempered by legal positivism in order to guard against abuse.

In order to sustain a natural law argument, as an exception to the established rules of positive international law, to justify interventions to topple repressive regimes, it would be necessary to demonstrate at least three points. First, it would have to be shown that the elements of natural law being violated are knowable to all. That is, it must be evident that those violating natural law are violating principles common to all. The modern corollary of this is acceptance by international society of a 'basic floor' of humane behaviour below which the rights of sovereign inviolability are invalidated (Vincent, 1986). Second, it must be demonstrated that the violation is widespread and systematic. Third, it must be shown that using force to defend these rights will save more than it injures. For, as Nardin (2000: 7) points out, many classic just war theorists

[11] Including, but not limited to, the Thirty Years War, the English Civil War, the Anglo-Dutch Wars, Catherine the Great's wars, Anglo-Spanish Wars, Franco-Italian wars and Habsburg–Ottoman Wars.

maintain that 'one is not justified in harming many to rescue a few'.

Thus, the classical just war tradition opens a space for morally justifying the invasion of Iraq in terms of a humanitarian exception to positive international law predicated on the upholding of natural law. Nevertheless, the problem of abuse that led to perpetual war and the virtual closure of the natural law tradition in the 18th century leaves proponents of the war with at least three hurdles to cross. These hurdles are brought together in the question of whether the situation in Iraq at the beginning of 2003 constituted a 'supreme humanitarian emergency' that necessitated the use of force.

In order to address these three criteria, contemporary advocates of the moral case for humanitarian intervention tend to limit the legitimacy of intervention to cases of 'supreme humanitarian emergency'. The notion of a 'supreme emergency' was first coined by Walzer (1977: 251–255). It has two components. The first is the immediacy of the danger, and the second is its nature. A supreme emergency occurs where the danger is very close, and in order to qualify it must be 'of an unusual and horrifying kind'. There is widespread agreement that if humanitarian intervention is to be contemplated at all, it must only be in situations of 'supreme humanitarian emergency'. As Vincent put it (1986: 126–127), 'humanitarian intervention is . . . reserved for extraordinary oppression, not the day-to-day'. More recently, the International Commission on Intervention and State Sovereignty (ICISS) concluded that military action for humanitarian purposes was only legitimate 'in extreme and exceptional cases' (ICISS, 2001: 31). Wheeler (2000: 34) provides an important outline of what constitutes a 'supreme humanitarian emergency', arguing that the concept of a supreme humanitarian emergency 'captures the exceptional nature of the cases under consideration'. Although he admits that there are no objective criteria for evaluating when a humanitarian emergency becomes supreme, he argues that such an emergency exists 'when the only hope of saving lives depends on outsiders coming to the rescue'.

Did the situation in Iraq at the beginning of 2003 constitute just such an emergency? It is important to begin by reiterating the fact that the Iraqi regime had an appalling human rights record. Moreover, it is important to also note that the regime had a track record of breaking both natural law and positive international law. The former were breached in the 1988 and 1991 pogroms against the Kurds and Shi'ites. The latter were breached in the 1981 and 1990 invasions of Iran and Kuwait, respectively. It is uncontroversial, however, to suggest that the human rights situation in Iraq did not worsen in the run-up to war and that Iraqi breaches of natural law had been worse – and had gone unpunished – in the past. This is not to excuse the Iraqi regime. What it does do, however, is question the necessity of using force for humanitarian purposes in 2003. The use of force against Iraq in either 1988 or 1991 would have been morally legitimate, because it would have been a direct response to state-led mass murder and hence an act of defence for others against breaches of natural law. For the use of force to count as a legitimate defence against breaches of natural law in 2003, however, one would expect to have seen either an escalation of human rights abuse in Iraq or evidence of the interveners attempting alternative means of accomplishing humanitarian goals. The UN's 'oil-for-food' programme may count as one such activity, but from the brief discussion of this above it appears that the Iraqi regime was not primarily responsible for the failure of this project. Other than this, the states that led the 2003 invasion did very little to help improve conditions in Iraq.

The question of timing is fundamental, for while there may be agreement that natural law is violated by a state's repression of its people – and particularly through acts of genocide and mass killing – both classical just war thinking and contemporary scholarship place a considerable degree of weight on the immediacy of the problem. The immediacy of the problem provides the link between the unlawful act and the act of prevention or punishment. To return to the 17th century, the key difficulties with the Grotian idea that all states may wage war on all other states to uphold natural law were: (1) identifying what counted as a breach of natural law and (2) linking the punishment to the act. As we noted above, at best today there is a consensus that intervention to halt mass killing may be morally permissible as an exception to the ban on the use of force contained within positive international law. There is virtually no suggestion that other forms of human rights abuse warrant armed intervention. In 1999, Iraq ranked 13th on *The Observer*'s human rights index.[12] Although such rankings are always flawed, it at least suggests that Iraq was not alone in the scale of its abuse. Interestingly, of those 13 states, only three (Yugoslavia, Indonesia and Iraq itself) have been subject to intervention.[13] In the two other cases of intervention – Kosovo and East Timor – intervention was a direct response to ongoing mass killing and ethnic cleansing. In cases where there are high levels of human rights abuse but no ongoing mass killing, which include Algeria, Libya and North Korea, a variety of methods short of war and punishing economic sanctions have been used. Whatever else the Iraqi regime was guilty of, it was not guilty of breaches of natural law as fundamental as mass killing at the beginning of 2003. We must conclude, then, that there was no *supreme* humanitarian emergency that required the use of force to alleviate it. Latter-day Grotians may argue that the requirement for past violations to be punished provides enough moral ground for war, but this argument again opens the door to abuse. If a right of punishment is not temporally limited, then it can be used by sovereigns to justify virtually any war they might wish to wage.

[12] The index was compiled by *The Observer* newspaper (UK). The index, and supporting articles, can be read at http://www.guardian.co.uk/rightsindex.

[13] Though it should be noted that the intervention in East Timor was authorized by the Security Council.

Conclusion

Although positive international law does not cover the full spectrum of moral reasoning about war, it nevertheless frames much of the contemporary debate about the legitimacy of particular wars. Thus, although the legal case for war with Iraq was quite weak, the coalition nevertheless chose to frame its justifications in legal positivist terms. The written law is helpful in this regard because it provides a common framework, accessible to all, for assessing legitimacy claims. The coalition put two legal arguments forward. First, it argued that the war was legal because it was authorized by the Security Council. This argument can be discounted, because the coalition has not demonstrated that its interpretation of the relevant resolutions reflects the clearly expressed will of the Council. Indeed, on closer examination it appears that the Council expressed the contrary view: that to be legitimate, any use of force would require *explicit* authorization. Second, the USA argued that the war was a legitimate act of pre-emptive self-defence. This argument, however, was invalidated by the USA's failure to demonstrate that Iraq posed a threat prior to the invasion.

It is difficult to conclude, then, that the invasion of Iraq was legal if we use positive international law as our benchmark. However, that does not necessarily mean that it was unjust. During the Kosovo intervention in

1999, most NATO leaders used moral rather than strictly legal arguments to justify their actions. Likewise, in 2003 the leaders of the three primary coalition countries argued that the Iraqi regime's mistreatment of its own citizens created a powerful moral case for war.

There are, I argued, two potential grounds for accepting this claim within the just war tradition. First, a secularized interpretation of the holy war tradition may permit the use of force to protect fellow members of humanity from defilement by uncivilized leaders. There were two key problems with this line of reasoning. On the one hand, the holy war tradition requires an authority higher than the state to demand such a war (be it God himself or his representative on earth). Today, the only authority above the state permitted to wage war is the Security Council, which takes us back to the positive law debate. On the other hand, a holy war requires the intervener to identify with the victims that are being saved. In the holy war tradition the common community was Christendom. Today, political leaders invoke 'humanity' as the common signifier, though in the case of Iraq they failed to demonstrate either what that common humanity was or how it was aided by the invasion. This is particularly problematic given that the overwhelming majority of humanity was resolutely opposed to the invasion.

A second line of reasoning could also be found, that of natural law. Natural law theorists, from Aquinas onwards, have argued that sovereigns do have a right (though not an obligation as it is in the holy war tradition) to wage war against those who violate natural law. The key problem was that although Vitoria and Grotius believed natural law to be knowable by all (and God to be the final arbiter of disputes), there were no guidelines nor any overarching authority to determine what natural law meant in particular cases and what action should be taken in response to violations. As a result, individual sovereigns became the final (earthly) judge of what counted as natural law. As a check on the possibility of abuse, Vitoria and Suarez both insisted that the prince consult others before deciding on the justness of his cause.[14] Nevertheless, the natural law argument *was* regularly abused. The breakdown of Papal authority and the widening of causes that could be considered 'just' precipitated a general breakdown of order in European politics and a state of perpetual war. The response came first of all in the reversal of the logic of 'natural law' in Vattel and Pufendorf and then its progressive replacement with legal positivism, which placed ever-greater restrictions on the use of force, culminating in the UN Charter's general ban.

Ethical thinking about war and peace today is largely framed by these two elements of the just war tradition: natural law and legal positivism.[15] It is important to recognize that the two traditions coexist and that the latter is, in large part, a response to the failings of the former. Thus, we ought to reject Tesón's call for a modern form of natural law to replace the rigid strictures of international legal positivism that view the law as an objective category of rules that we apply to particular cases through correct legal reasoning, and which adjudicates on the full scope of our moral dilemmas (Higgins, 1994; Kingsbury, 2002). Natural law provides a common way of thinking about the morality of war, while legal positivism acts as a vital brake on abuse. It is clear, however, that the problem of abuse was

[14] Vitoria said that the sovereign 'ought' to consult as widely as possible, whilst Suarez said 'must'. Having consulted, however, the sovereign remains the right authority to decide upon the justness of war according to Vitoria. See Johnson (1974: 181–182).

[15] Though the humanitarian intervention debate is not limited to these two traditions. See Holzgrefe (2003: 15–52).

integral to the narrowing of the rights of natural law.

The problem with using natural law as a foundation for a humanitarian justification for invading Iraq is that to make a compelling argument in this case requires a fairly broad understanding of what is permitted by natural law. In the case of Iraq, the coalition could not point to a 'supreme humanitarian emergency' as a just cause, nor could it demonstrate the exhaustion of peaceful alternatives. Moreover, as the legal debates revealed, it is not even clear that the invasion was launched with the intent of saving threatened Iraqis. As a result, it appears that humanitarian justifications were abused to justify a war that could not be justified by either positive international law or reasons of state (the defence of the state and its allies).

The application of natural law arguments to justify contemporary humanitarian wars must acknowledge legal positivism. In particular, if the problem of abuse is to be avoided, potential interveners must demonstrate both the egregiousness of the regime they are intervening against and the necessity of using force to halt violations of natural law immediately. The benchmark must be set high on both criteria because we are talking about a limited natural law exception to positive law, not a general moral principle in itself. We are admitting that in some circumstances the use of force without UN sanction may be morally permitted, though it is never commanded. It is for political communities to decide whether they are morally obliged to react, on a case-by-case basis. In the Iraq case, the coalition was able to demonstrate the egregiousness of the regime but not the necessity of using force when it did. Lowering this second condition while maintaining the general exception would create a space for the proliferation of abuse. This would lead to more 'intervention' not 'humanitarian intervention', and would undoubtedly make life nastier, more brutish and even shorter for those who already suffer.

On 15 March 1939, Hitler justified the invasion of Czechoslovakia by arguing that his forces would halt 'assaults upon life and liberty' committed by 'the intolerable terroristic regime of Czecho-Slovakia'. German troops, he argued, would 'disarm the terrorist bands and the Czech troops who are shielding them; they will take under their protection the lives of all who are threatened' (quoted by Chesterman, 2001: 27). This justification mirrors almost exactly the justifications given for countless humanitarian interventions since – including the invasion of Iraq. Although there are grounds – and a need – for moral exceptions to positive international law in time of mass killing and genocide, the danger of abuse should not be underestimated. Widen the exception by undermining key tracts of positive law and the incidence of war is likely to increase. Doing so also undermines the moral basis of the argument. If all wars can be 'humanitarian', then the humanitarian exception itself ceases to have meaning, just as natural law ceased to have meaning when sovereigns could use it to justify anything. The danger with accepting the legal and moral arguments for war with Iraq is that it will undermine the veracity of those arguments: Security Council resolutions can be interpreted so broadly as to mean anything and nothing; pre-emptive self-defence blurs into aggression; humanitarian wars become the norm, but selectivity on the basis of the 'national interests' of the interveners remains.

The post-Iraq era presents international society with a crucial dilemma. On the one hand, international society could attempt to amend its rules to accommodate the USA and its allies by loosening restrictions on pre-emptive self-defence and aggressive war for ostensibly humanitarian purposes. On the other hand, international society could recall

the importance of the relationship between natural law and legal positivism and acknowledge that a degree of legitimate order is provided by a combination of both types of law.

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