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# The Just War Tradition and International Law against War: The Myth of Discordant Doctrines

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The international law regulating resort to armed force, still known by the Latin phrase, the *jus ad bellum,* forms a principal substantive subfield of international law, along with human rights law, international environmental law, and international economic law. Among theologians, philosophers, and political scientists, just war theory is a major topic of study. Nevertheless, only a minority of scholars and practitioners know both *jus ad bellum* and just war theory well. Lack of knowledge has led to the erroneous view that the two areas are in conflict. This article responds to this misapprehension, explaining the deep compatibility of international law and just war theory. Today's *jus ad bellum,* especially the peremptory norm against aggression, is not only the law; it also forms the minimum threshold of a just war under just war theory. In other words, for a war to be morally just, it must at least be lawful. To go to war in violation of the *jus ad bellum* is both a legal and a moral wrong. Compliance not only fulfills the general moral good of obedience to law; it forms the first step toward fulfilling moral obligations in the grave area of war. This characterization of the relationship between law and morality is seen in the history of the legal prohibition on force and in the actual set of rules that make up the contemporary regime. Comprehensive and persuasive accounts of the *jus ad bellum* and just war theory consistently reflect this thesis.

AS I WRITE, THE WORLD IS AWASH IN WAR: AFGHANISTAN, THE Central African Republic, Colombia, Darfur, the Democratic Republic of Congo, Kashmir, Iraq, Libya, Mali, Pakistan, Somalia, Sudan, South Sudan, Syria, Ukraine, Yemen . . . These are places where organized armed groups are engaged in intense, sustained fighting. The list signifies unfathomable suffering in the form of mass death, physical and mental injury, dislocation, disease,

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sexual violence, poverty, wildlife and habitat destruction, property damage, and loss of cultural heritage.

In the parallel world of ideas, we might expect to see major efforts toward ending this litany of tragedy. International law has a well-known rule at the heart of the United Nations Charter, Article 2(4), which imposes a broad, general prohibition on the use of armed force by states. Yet, instead of working to promote awareness and respect for Article 2(4), a major effort in the academy is toward finding exceptions to it. Few advocate compliance with the prohibition, let alone expanding its reach to, for example, prohibit civil war.[1]

Many international law scholars today advocate diluting the prohibition on force. They are joined by a number of prominent just war scholars.[2] Jean Bethke Elshtain is one who paid scant attention to the international law against war in her many publications on just war theory.[3] Omitting the law conflicts with the view that law is important to moral life and should be valued for its support of human flourishing.[4]

The theologian Nigel Biggar demonstrates the importance of international law in his book *In Defence of War*. Nevertheless, he is willing to dismiss international law when he determines that war is justified as a moral matter. His analysis omits the understanding that today's international legal regime against the use of force, especially the peremptory norm against serious violations of Article 2(4), is not only the law; it also forms the minimum threshold of just war theory. In other words, for a war to be just, it must at least be lawful. Thus, to go to war in violation of the UN Charter is both a legal and a moral wrong. This means that the peace regime of international law is a rare set of rules that is not only helpful as a general matter for fulfilling moral obligations; it also forms the first step toward fulfilling those obligations when it comes to war.

This characterization of the relationship between the law and morality of war is seen in the history of the legal prohibition on force and in the actual set of rules that make up the contemporary regime. Several reasons exist to explain how some just war theorists came to see the law and morality of war as separate and even discordant. Two explanations will be examined here. One concerns the effort to reduce international law to a system solely of positive law stripped of moral content. The other concerns the heavy influence of the political science theory of realism with its reliance on military force. Realism's normative support of war has filled the gap left by reliance on amoral positivism.

## Common Origins

Many just war theorists are familiar with the history of just war theory but may be less aware that today's international law on force, the *jus ad bellum*, shares much of that history. The *jus ad bellum* of international law is generally traced

to St. Augustine (354–430), who drew on earlier thinkers such as the Roman jurist Cicero to develop a concept of just war for his moral argument against the pacifism of early Christians.[5] International law historian Stephen Neff has written that the early Christians along with Confucians uniquely developed the concept that peace is the normal condition of human life and war the abnormal.[6] The Christian insistence on "the existence of a residual or background condition of peace in world affairs" was owing to "a powerful strain of radical pacifism inherent in Christian doctrine."[7] The "early Christian Church refused to accept war as moral in any circumstances and until AD 170 Christians were forbidden to enlist. This period of extreme pacifism lasted for three centuries after Christ."[8] Then Augustine introduced his just war theory, building on the work of St. Ambrose and others.[9] In a letter to St. Boniface, Augustine wrote: "Peace should be the object of your desire; war should be waged only as a necessity and waged only that God may by it deliver men from the necessity and preserve them in peace. For peace is not sought in order to [be] the kindling of war, but war is waged in order that peace may be obtained."[10] In addition to self-defense, Augustine considered it just to fight to restore stolen property, to deter future wrongs, and to promote Christianity.[11]

This last cause, the promotion of Christianity, helped to transform pacific Christians into persons for whom fighting to preserve and promote the faith and the interests of the church became a noble and virtuous thing.[12] Fighting in the Crusades or fighting to conquer and colonize all became justified under the argument that, once the world was converted to Christianity, peace would prevail and all fighting would end.

The list of just causes of war continued to grow, but some Christians sought to keep the ideal of pacifism alive. The "Peace of God" movement, for example, began in eleventh-century France and sought to protect the weak in time of war and to limit the days for warfare.[13] Faithful Christians respected the church's restrictions on war and its authority to enforce them. Historian Geoffrey Parker has found evidence that the rules against resort to war were effective, to an extent, in part because church teaching could be enforced through various sanctions. Bishops could compel obedience through the threat of excommunication or the withholding of sacraments. "We know, by the example of Henry IV, who knelt upon the snowy ground at Canoss before Gregory VII, how heavily such sanctions could weigh upon a rebel."[14]

Thomas Aquinas (1225–74) systematized the church's teaching on war into a set of law-like principles that famously included a declaration by a right authority, a just cause, and the right intention on the part of the authority.[15] Aquinas's restrictions on resort to war are part of his wider, general view of the importance of human law in the flourishing of humanity. As Cathleen Kaveny explains, "in considering human law, he shows how it can lead men and women to virtue in order to promote the common good."[16]

The fact that Aquinas had codified the just war theory proved helpful in preserving it through the long, bitter years of the Protestant Reformation and the era of imperial conquest of non-Christian people. As the Roman Catholic Church began to lose adherents, scholars like Francisco de Vitoria (1480–1546), a member of a group known as the Spanish Scholastics, built on Aquinas's work and began to see how the law itself could substitute for the authority of the pope and the Holy Roman emperor in intercommunal affairs.[17] However, Vitoria also promoted the idea that all parties to a conflict could be fighting with the right intentions and, therefore, doing nothing morally wrong.[18] This argument might be entirely appropriate when considering the fate of an individual's immortal soul. For constraining resort to war, however, it removed the just war theory's major objective constraint. If a leader deciding for war needed only to make up his own mind that his cause was just rather than consulting with authorities about whether the cause was objectively just and the opponent's cause unjust, the constraint of just war was lost. Another Scholastic, Francisco Suárez, pointed out the absurdity of considering all parties to a conflict as having a permissible just cause based on a leader's personal belief about his own cause. Suárez, however, still insisted on the ultimate authority of the pope to decide between competing claims of justice and had no ready solution when a party rejected the pope's authority.[19]

The idea of a subjectively just cause appealed to Protestant leaders. They believed they could rely on individual conscience when deciding for war, just as they had come to do when interpreting the Bible or in understanding their personal relationship with God. Alberico Gentili (1552–1608), an Italian Protestant who fled Italy for England and held the first Chichele professorship of public international law at the University of Oxford, is particularly associated with the individual leader's right to decide for oneself on the justness of a cause of war and the concomitant possibility that all sides in a conflict could be fighting lawfully. Writing in 1593, he said: "It is true, the prince is still considered as bound to examine the justice of his cause before he engages in war; . . . whatever the result of his decision may be, it never affects the legality of his action, since war is nothing more than a procedural device that may be resorted to even for the redress of a probable wrong without exposing either party to the blame of injustice."[20]

Hugo Grotius (1583–1645), the renowned Dutch Protestant legal scholar, theologian, and diplomat, argued strenuously for law as the substitute for the pope and the emperor. Grotius rejected the thinking of those, like Gentili, who wanted to leave each prince supreme in his own realm, relying on his own conscience as to the justice of his cause of war or the need to comply with a treaty.[21] Grotius disliked the results of leaving matters to the consciences of European leaders of his day. The devastating Thirty Years' War (1618–48) was, at least on the surface, about clashing consciences—Catholic versus Protestant

and Protestant versus Protestant. For Grotius, resort to war could be judged against objective standards, as he argued in his seminal work, *On the Law and War and Peace* (1625). He wanted to help end the Thirty Years' War and mitigate its barbarism. He hoped to inspire greater humanity in the conduct of the war and encourage the establishment of a legal order superior to the warring factions after the war. A group of legally coequal sovereign states did in fact emerge in western Europe under the treaties known as the Peace of Westphalia (1648). Grotius's comprehensive treatise provided the legal blueprint for the new world order.

To have an impact, Grotius responded to those who shared Gentili's view as well as to those who took seriously the advice of Niccolò Machiavelli (1469–1527) in his book *The Prince*.[22] Machiavelli's prince, like Gentili, saw no law above sovereigns, rejecting even the restraint of listening to conscience. For the prince, no action was unjust if a ruler found it expedient. Grotius, by contrast, according to Hersch Lauterpacht, saw "an intimate connexion between the rejection of the ideas of 'reason of State' and the affirmation of the legal and moral unity of mankind. [Grotius] insist[ed] that if no association of men can be maintained without law, 'surely also that association which binds together the human race, or binds many nations together, has need of law.'"[23] Grotius saw law as possible in every type of human community because he understood human beings as "being intrinsically moved by a desire for social life, endowed with an ample measure of goodness, altruism, and morality, and capable of acting on general principle and of learning from experience."[24]

By contrast, law above nations was impossible for Machiavelli's prince and the prominent seventeenth-century political theorist Thomas Hobbes because of their view that, again in the words of Lauterpacht, "man is essentially selfish, anti-social, and unable to learn from experience."[25] For them, "the basis of political obligation is interest pure and simple; the idea of a sense of moral duty rising supreme over desire and passion is a figment of imagination. . . . This is the typical realistic approach of contempt towards the 'little breed' of man."[26] Grotius felt no such contempt. He believed in the Christian law of love and held the optimistic view of people's capacity reflected in Christianity. He built his conception of international law on the Spanish Scholastics, moving further in the direction of a secular understanding of natural law than they had in order to avoid the religious controversies swirling as he wrote. He emphasized the use of human reason to understand the law ordained by nature and the universal principles of morality. He explained that while much of international law is positive law, natural law is the more important part because it provides the basis of positive authority of law and is the measure of the aspirations of law.

After Grotius, Emmerich de Vattel has had the greatest influence on international law. His principal work, *The Law of Nations* (1758), was widely read for

decades. He shared with Grotius an understanding that a higher law governed human affairs, but he left it to each individual sovereign to judge his own compliance. No sovereign could sit in judgment of another. Vattel preceded and inspired Jean Bodin (1530–96) and others usually given credit for the rise of the idea of absolute state sovereignty. Vattel's vaunted view of states and their leaders was also aligned with the rise of science and the importance of objective evidence. The combination undermined natural law theories supporting the authority of international law as law over states, leaving positivism as the dominant theory. Positivism holds that binding law comes through the affirmative acts of states and other international actors. Treaties, which require affirmative consent, and customary international law, which is built on state practice and state expression of *opinio juris*, can be explained by positivism. General principles and rules of *jus cogens*, however, require natural law explanations. Despite Vattel, natural law explanations persisted for decades to explain the legally binding nature of law against war.[27]

In many accounts of the nineteenth century, however, international legal historians write that the rise of positivism and the concept of absolute state sovereignty meant the end of legal restraint on force. In fact, scholars and government officials in Europe as well as North and South America continued to recognize just war theory. Few European governments failed to justify the use of force in terms of some lawful end. Prominent international law scholars in Britain and the United States crusaded to eliminate natural law jurisprudence from the "science" of international law, but natural law played too central a role and continues to do so.[28] Indeed, in recent years, new interest has emerged in understanding the place of natural law in the international legal system.[29]

Even as just war theory continued to play a role in international law, Christians committed to Christ's teaching of peace and love of neighbor continued to oppose war as immoral and to demand alternatives for the settlement of disputes. In the United States, pacifist Christians (including Quakers, Mennonites, and the Amish) who sought refuge from Europe inspired a significant secular peace movement. That movement, which spread back to Europe, made the advancement of peace through law a major goal.[30] By the time of the First World War, the global peace movement had grown to impressive size, calling for international law and tribunals to replace war. Largely through pressure from the peace movement, alternatives to war were added to the agenda of the first Hague Peace Conference of 1899. That conference resulted in multilateral treaties requiring states to attempt alternatives to war and led to the founding of the Permanent Court of Arbitration.

Many in the mass peace movements of Europe and North America, however, wanted more. They wanted robust legal obligations prohibiting resort to war, and they wanted an international court of law, not just arbitral tribunals.

Leaders of the movement reasoned that if the US Supreme Court could keep the peace among semisovereign states, a world court could do the same for the international community. In 1905 and 1906, techniques of mediation and fact-finding were used to good effect to end the Russo-Japanese War and to prevent a war between Russia and Britain. All of these factors and others led to the convening of another Hague Peace Conference in 1907. No court was established then either, but a treaty outlawing resort to force to collect debts was an important positive law step supporting the just war theory's restriction of war to just causes only.

Christians such as Jane Addams (1860–1935), of Hull House fame, advocated mediation and arbitration among European states as the first signs of impending war emerged prior to the outbreak of the First World War.[31] She and other campaigners were ignored, but following the disaster of the First World War, states agreed to far stricter positive limits on the right to resort to war in the Covenant of the League of Nations. League members also decided to finally form a world court. The United States, having not joined the League, worked to promote peace in another form, the Kellogg-Briand Pact, a treaty that comprehensively prohibited resort to war as an instrument of national foreign policy: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."[32]

It was at this time that the great Austrian jurist Hans Kelsen (1881–1973) began to lend his considerable talent to international law and the legal problem of war. He wrote that the contemporary just war theory was found in the Treaty of Versailles, the Covenant of the League of Nations, and the Kellogg-Briand Pact. He cited Augustine, Aquinas, and Grotius as the founders of the doctrine and identified nineteenth-century political theories of absolute state sovereignty as responsible for its decline. Kelsen argued against absolute sovereignty as destructive not only of the just war theory's limitations on war but of all of international law.[33]

During the Second World War, Kelsen fled to the United States where he continued to write on law against war and international organization. He wrote treatises promoting the United Nations and recognized the just war tradition in the UN Charter's prohibition on the use of force.[34] Within a few years following the end of the Second World War, however, it was not Kelsen but his intellectual rival, Hans Morgenthau (1904–80), who rose to greater and more enduring prominence. Morgenthau was a disciple of Hobbes; Kelsen, of Grotius. Morgenthau founded the realist school of American foreign policy and that school's view that a US president should not, as a normative matter, heed the UN Charter restrictions on the use of force.[35]

## Contemporary Convergence

In the United States today and increasingly in other countries, Morgenthau's view of the charter is dominant. This is a curious development when it comes to just war theorists since the contemporary legal regime on the use of force continues to reflect its origins in the teaching of Augustine and Aquinas. The charter, like just war theory, generally prohibits war, requiring an affirmative showing that resort to armed force is on the basis of one of the exceptions to the prohibition.[36] In the case of the charter, force is permitted in only two cases: when needed for self-defense and when authorized by the Security Council.

The international legal regime on the use of force includes other rules, most importantly the principles of necessity and proportionality.[37] These principles apply to uses of force in self-defense or with Security Council authorization. Necessity requires a demonstration that force is a last resort and has a good chance of success in achieving the lawful objective as defined by the charter.[38] If states can demonstrate necessity, they must also demonstrate that the method of force used will not result in disproportionate loss of life or destruction compared to the value of the legitimate objective. Necessity and proportionality are not expressly mentioned in the charter, but the International Court of Justice has held that they are a binding part of the law restricting resort to force.[39]

The principles of necessity and proportionality also apply to states taking part in civil war. Most states do not interpret the UN Charter as reaching the use of force within states, and we have many examples of states citing a right to assist governments in suppressing internal rebellion by organized armed groups. France, for example, has intervened in its former colonies more than twenty times since 1962 on the basis of an invitation by a government.[40] There is an argument, however, that Article 2(4) should prohibit outside intervention in civil war even on the side of a government. Assisting rebels is already prohibited as a violation of the principle of nonintervention, if not a violation of Article 2(4).

Other rules that may be relevant include the law of state responsibility and human rights law. State responsibility says that a state acting in self-defense may only attack a state responsible for the armed attack that gave rise to the right of self-defense.[41] Similarly, the Security Council would violate a state's rights if the council authorized resort to force against a state that bore no responsibility for a threat or breach of the peace. In addition to rules on responsibility, it is increasingly clear that human rights law has a wide and pervasive reach. In international armed conflict, a use of force without a right to resort to force means that the right to life of those killed would be violated.[42] Those who take up arms in a civil war violate the right to life of the people they kill.

Attempts to get around this comprehensive law on resort to force, the *jus ad bellum*, have centered on three groups of arguments: creative reinterpretation

of the meaning of self-defense, criticism of the Security Council for "inaction" when the council does not authorize force, and moral arguments for force asserted to be superior to the legal restrictions.[43] All three categories of arguments continue to be made despite the fact that in 2005, the United Nations' entire membership came together for a world summit. The purpose of the summit was to consider a three-year review of the charter and the United Nations as a whole following the 2003 invasion of Iraq. The preliminary report of the panel carrying out the review concluded that for the international community, the measure of legitimacy must be international legality. Law is the common code of all humanity. It is not the moral discernment of any particular national or religious leader, ethicist, or theologian. The UN's membership unanimously re-endorsed the charter's rules for peace in 2005. The only significant change was a clarification that the Security Council could consider serious human rights violations within one country to be a threat to international peace.[44]

UN members agreed to continue to support the Security Council as the only body with the legal right to authorize force in a situation other than emergency self-defense. No other institution presently exists that could command similar support. Biggar argues that only a world government is an adequate institutional substitute for unilateral assessment of the right to go to war.[45] Against this view, theologian Esther Reed writes that, in positing a requirement of world government that will never come to pass, Biggar deflects "attention from the need for laws to restrain and regulate armed conflict, and fail[s] adequately to expose the political 'loves' of great world powers in the determination of the laws of war."[46] Indeed, since Aquinas, just war restraint has relied on concepts of law, not government.

Biggar's view draws on a popular impression borne of accounts concerning the massacres in Rwanda (1994) and Srebrenica (1995): that the Security Council does not authorize military force when it should.[47] This impression has led some to conclude that states may disregard the Security Council because the council does not authorize force often enough. In fact the council had authorized "peace enforcement" missions for both Rwanda and Srebrenica, but the United Nations was never able to attract sufficient numbers of troops or the type of weapons specified by the UN's experts.[48] The presence of these inadequate troop deployments gave people a false sense of security. In Srebrenica, Bosnians would not have crowded into "safe areas" where they were slaughtered in large numbers. In Rwanda, Tutsis would not have trusted their Hutu neighbors as Tutsi rebels rolled back into the country to renew the civil war and oust the Hutu government. In these cases, as in so many others, the council failed to consider whether by authorizing this sort of force it did the United Nations would do more good than harm.[49]

Further, the argument for ignoring the council rests on the view that states will do a better job by deciding unilaterally or outside the council process for

war. The facts do not support this claim either. The abject failure of the 2003 Iraq invasion is well known. The results in Kosovo were little better. The failure of states to heed the limits a Security Council resolution placed on the use of force in Libya by outside states is another stark example. In March 2011 the council authorized the protection of civilians as the Libyan leader, Col. Muammar Gaddafi, sought to suppress an insurrection in Benghazi. The council authorized the use of military force by NATO countries and others to protect civilians. The United Kingdom and France quickly escalated the conflict on the legal argument that the only way to protect civilians was to remove Gaddafi. That was a wholly unreasonable interpretation of the resolution. Proponents of force argued that civilians in Benghazi were threatened imminently by Gaddafi's forces; they made no mention of their interest in ending the Gaddafi regime. Over thirty thousand people died in the four months of the NATO intervention. Violence, revenge attacks, and widespread fighting have continued ever since. Today Libya is spoken of as a failed state. Ample evidence demonstrates that outside intervention in civil wars does not lead to the positive outcomes predicted by unilateral intervention advocates.[50]

Even if states had a better track record, it would be no basis for ignoring the Security Council's authority. Discussing efficacy and the alleged need to use military force for various desiderata is reminiscent of the debate about the efficacy of torture. Jeremy Waldron believes that discussions of the law and morality against torture should not consider whether torture could be effective in generating intelligence.[51] He is correct that efficacy is irrelevant to the absolute legal and moral ban on torture. Still, academics with access to relevant facts have a responsibility to share them.

Too few people seem to be aware, for example, of the Statement on Interrogation Practices drafted and signed by twenty of the US Army's most accomplished interrogators with a combined two hundred years of interrogation experience.[52] Their statement rejects the use of coercive interrogation practices as unreliable. The statement is consistent with much of the academic literature on torture.[53] Similarly, the use of military force for various humanitarian purposes is unlawful and immoral; it is also a counterproductive tool of change.[54]

If the Security Council rejects a request for force, the law requires compliance with the decision and attention to lawful and effective alternatives for responding to the problems of human rights, governance, arms control, and terrorism. Invasions by superior military powers of weaker ones, such as in 1990 when Iraq invaded Kuwait or in 2014 when Russia occupied Crimea, are the sort of cases where military force might be justified to reverse unlawful outcomes.[55] Even for these cases and certainly for more complex ones, international law offers multiple forms of nonviolent response. The UN Charter calls on states to respect international law, to participate in global economic development, to protect human rights, and to rely on peaceful mechanisms

for the resolution of disputes. Charter Article 33 recommends negotiation, mediation, arbitration, adjudication, and the use of international institutions to resolve disputes.

By the 1980s the charter's prohibition on the use of force came to be spoken of as *jus cogens*—a norm of peremptory character. A standard account explains that "some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character."[56] Peremptory norms need to be explained according to natural law theory because positivism is inadequate to explain how a norm that has no basis in consent is binding and superior to consent-based rules.[57] The perception that Article 2(4) is a peremptory norm acknowledges the rule's origin in just war theory and its connection to fundamental moral teaching.

Indeed, the general contemporary regime of international law restricting the use of force bears close resemblance to the moral teaching of the Roman Catholic Church on resort to war as restated in the Catechism:

> The strict conditions for *legitimate defense by military force* require rigorous consideration. The gravity of such a decision makes it subject to rigorous conditions of moral legitimacy. At one and the same time:
>
> - the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain;
> - all other means of putting an end to it must have been shown to be impractical or ineffective;
> - there must be serious prospects of success;
> - the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition.
>
> The evaluation of these conditions for moral legitimacy belongs to the prudential judgment of those who have responsibility for the common good.[58]

The Catechism sets the bar above international law's minimum requirements. The injury must be "lasting, grave, and certain" and the response must not inflict "evils and disorders graver than the evil to be eliminated." Moreover, the Catechism only refers to "aggression" and "defense," not force in response to human rights violations, arms control, or terrorism.[59] Logically, therefore, an ethical leader in a case of self-defense or in seeking or giving Security Council authorization needs to first consider the law on resort to force and then, if resort would be lawful, consider whether it would also be moral. The World

Council of Churches reached this conclusion in 2011 when it developed its doctrine of "Just Peace," which is founded on considerations of international law as well as respect for the United Nations and grassroots peace activism.[60]

In one important respect, contemporary international law and the just war theory of Aquinas do differ. For the state *qua* state, international legal responsibility for wrongful conduct is generally found by looking at objective facts and not at what a leader intends. "In the conditions of international life, which involve relations between complex communities acting through a variety of institutions and agencies, the public law analogy of the *ultra vires* act is more realistic than a seeking for subjective *culpa* [fault] in a specific natural person."[61] In international law, if a state violates the prohibition on the use of force, it does not matter if the state's leader did not intend to violate the law. International law works more as a strict liability system than one based on fault. The response to such a violation, however, does not take the form of punishment. Force today is lawful only to counter force to end a continuing violation. Reprisals and force to deter future violations are strictly unlawful.

Since the Nuremberg Tribunal, however, international law has concerned itself with the intentions of national leaders. A national leader who violates the prohibition on the resort to force might be found guilty of the crime of aggression. Thus, Biggar's moral argument for waging wars to punish is morally retrograde when compared with the contemporary legal regime. Individuals may be punished for aggression in national and international courts. There is no right to use war to punish a whole people for a leader's wrongful conduct.[62]

## Ideological Division

How did it come to be, therefore, that so many just war theorists fail to take international law into account, do so imprecisely, or argue it is moral to override the rules against resort to force? We can find prominent examples of these positions in the just war literature assessing NATO's 1999 war against Serbia over Kosovo, the 2003 invasion of Iraq, and the use of military force on behalf of Syria's antigovernment rebels. Important causes of this disconnect are the tendency to rely only on positivism as the single explanatory theory of international law, excluding natural law, as well as the rise of realism as the dominant school of political science.

Positivism, based as it is on material evidence, is adequate to explain much of international law. It holds that treaties bind because of express consent, and rules of customary international law bind on the basis of tacit consent indicated by state practice and *opinio juris*. Positivism, however, does not explain why consent should bind a party that wishes to withdraw consent. Nor does positivism explain how rules, including certain general principles of law (e.g., good faith)

and international law's peremptory norms (e.g., against torture), bind without consent. These aspects of the international legal system are better explained by natural law theory.

Few international lawyers still have access to natural law explanations, however, owing to the dominance of positivism. Positivism today has no overt connection to religious and ethical traditions. It has no means of explaining why rules supporting peace might be morally superior to other rules or state interests—positivism is famously "amoral."[63] Realism has largely filled the normative gap left by the suppression of natural law. Realism provides evidently secular foundations for *raison d'état*, in particular, the amassing of military strength. Hans Morgenthau taught that a national leader's decision to use military force cannot be fettered, as a normative matter, by international law against war.[64]

Morgenthau deserves credit for beginning the decisive turn of political science and international relations toward realism and away from classic international law.[65] In Morgenthau's world, international law does play some role in the decisions of national leaders respecting trade, diplomacy, and the like—just not in the area of war.[66] He remains inordinately influential. His book *Politics among Nations* is read by every student of international relations, certainly in the United States.[67] Morgenthau's view of power and the importance of using military force is reflected in the work of his contemporary, theologian Reinhold Niebuhr. Niebuhr's "Christian realism" is also based on a dark view of human nature and advocates the use of military force against communism without much apparent regard for international law.[68] The theologian Paul Ramsey also wrote during the Cold War on the moral use of force.[69]

Certainly other scholars sought to retain a central role for international law. David Hollenbach, for example, warned in the 1980s that just war theory was moving away from Aquinas's position, presuming that war is sinful, to one presuming war is just so long as it is waged by legitimate authorities.[70] Elshtain was one who persisted in ignoring international law. In the spring of 2001 she was invited to give one of the prestigious "Grotius Lectures" at the opening session of the annual meeting of the American Society of International Law. In a twenty-six-page article developed from the lecture, she never uses the term "international law" and refers to the UN Charter only once when discussing a reference to it by Michael Walzer.[71] Yet Elshtain said she was analyzing the "*jus ad bellum*," the term used by contemporary international law scholars to refer to the international law on the use of force. She concludes that invading other countries to remove dictators or for other "humanitarian" reasons could meet the just war requirement of a just cause. She has nothing to say about the charter's prohibition on such a use of force. She omits any consideration of the morality and rationality of law compliance. Yet, as discussed above, international law on the use of force is the common code used by all states and intergovernmental organizations—regardless of the religious or ethical views

of individual leaders. International law is what the world shares in addressing the normative issue of resort to force. Failing to consider international law, even to explain why she found it unimportant to do so, before an audience of hundreds who explore international law as their principal scholarly discipline, underscores the point here of how isolated just war theory has become from international law.

A few years later in an interview in which she defended the morality of the 2003 invasion of Iraq, Elshtain did mention international law but got it wrong. She said, "Given the history of that regime [of Saddam Hussein], the violation of UN resolutions, the material breach of protocols at the end of the 1991 Gulf War—in international law, a material breach is a *casus belli*, a legitimate occasion for war—I can't think of anyone who said no case could be made."[72] The only just cause of war according to the consensus of the international community is reflected in the charter, which does not include "material breach." In using the term, Elshtain likely picked up on part of the attenuated argument of the United States and the United Kingdom for invading Iraq without a Security Council resolution. Lawyers for the two governments proposed that resolutions from 1991 provided authorization because Iraq was in "material breach" of them. As the world learned during the United Kingdom's inquiry into the decision to go to war in Iraq, Britain's experts on international law clearly advised that "fresh" authority was needed. The 1991 resolutions could not authorize force in 2003. While Elshtain was right that some sort of case for legality could be made, the great weight of opinion was that the invasion was unlawful.[73]

Some may argue that expecting Elshtain to know the international law on the use of force is asking too much. An academic, however, who publicly seeks to justify or advocate for the use of violence on the scale of war needs to have knowledge of the world's law on the subject. As set out above, to know the morality of war is to know the international law on the use of force.

Philosopher Jeff McMahan supplies a more worrying example. While Elshtain either ignores international law or gets it wrong, McMahan goes as far as saying that the UN Charter rules against resort to war are "crude," "simplistic," and "largely obsolete."[74] The only international law of any relevance to just war scholars is, in his view, the law on the conduct of war, such as the Geneva Conventions. Yet even this law, for McMahan, is "quite distinct" from morality, diverging in important ways.[75] This means apparently there is no moral duty to comply with international law on the use of force. He seems unaware of the points raised above concerning the convergence of just war theory and international law on the use of force. Given that the international community just recommitted to these rules in 2005, they are obviously not "obsolete." His other characterizations have no bearing on whether this law is binding. In fact, no state in the world officially denies that these rules bind.

Biggar has a more sophisticated understanding than McMahan of the international law on the use of force and the moral arguments in support of international law. He writes: "There are good moral reasons of a prudential sort why we should be loath to transgress positive law even for the noblest of motives."[76] Nevertheless, he is willing to defend as moral the unlawful resort to force by NATO over Kosovo and the 2003 invasion of Iraq. These were cases, he says, of "natural justice" trumping positive law.[77] As discussed above, however, Biggar's conclusion about Kosovo and Iraq rests on his misperception that positive law relies on punishment, which he believes is lacking in the international system, and on factual errors respecting the Rwanda and Srebrenica tragedies. His comment regarding "natural justice" indicates a failure to appreciate that the international law against the use of force incorporates the natural law peremptory norm against aggression. The resort to unlawful war violates both positive and natural law. The content of Biggar's "natural justice" may differ from the moral reasoning leading to the natural law norm against the use of force, but the analysis above urges caution in adopting any theory in conflict with twenty-one centuries of legal and moral teaching on war.

## Conclusion

Since the adoption of the UN Charter in 1945, respect for the general prohibition on the use of force appears to be in decline. Reasons include the rise of the political ideology of realism, which places great confidence in military power; the concomitant decline in knowledge of international law; and the development of just war theory that either ignores or rejects the legal prohibition on force. This last reason rests in some cases on failure to realize that the international law against war and just war theory today have the same roots in early Christian teaching. Today's legal prohibition of aggression is a peremptory norm explained on the basis of ancient natural law. Complying with the law as a general matter is thus consistent with moral conduct. To be moral, any resort to war must also be lawful, and—even if lawful—war may still not meet additional moral objections. In short, humanity has placed its most powerful normative barriers against the "madness" of war.[78]

## Notes

1. Two notable exceptions are Christine Gray of Cambridge University and Olivier Corten of the Free University of Brussels. See Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010); and Christine Gray, *International Law and the Use of Force*, 3rd ed. (Oxford: Oxford University Press, 2008).

2. For a recent example of such scholarship, and citations to Paul Ramsey and James Turner Johnson, who also promote greater resort to force with little regard for international law, see Johnathan Stonebraker and Sarah Irving, "The Just War Tradition Reconsidered: Protestantism and International Law," *Oxford Journal of Law & Religion* 3, no. 3 (2014), 373–92, doi:10.1093/ojlr/rwu043.
3. See, e.g., Michael J. Matheson, "Just War and Humanitarian Intervention: Comment on the Grotius Lecture by Jean Bethke Elshtain," *American University International Law Review* 17 (2001): 27–33; Richard Falk points to a similar weakness in Michael Walzer's promotion of humanitarian intervention in Michael Walzer, "On Humanitarianism," *Foreign Affairs*, July–August 2011, http://www.foreignaffairs.com/author/michael-walzer. See also Richard Falk, "Can Humanitarian Intervention Ever Be Humanitarian?" August 4, 2011, http://mwcnews.net/focus/editorial/12577-humanitarian-intervention.html?tmpl=component.
4. See, e.g., Cathleen Kaveny, *Law's Virtues: Fostering Autonomy and Solidarity in American Society* (Washington, DC: Georgetown University Press, 2012), 29, citing Aquinas, *Summa Theologica*, I-II, q. 91, art. 4. See also the famous defense of the morality of law, Lon Fuller, *The Morality of the Law* (New Haven, CT: Yale University Press, 1964). For a connection between international law and morality, see Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (Grand Rapids, MI: Eerdmans, 2010), 339–51; and for international legal restraints on resort to war and morality, see Esther Reed, *Theology for International Law* (London: Bloomsbury Publishing, 2013), chap. 4.
5. See also Wilhelm G. Grewe, *The Epochs of International Law*, trans. Michael Byers (Berlin: De Gruyter, 2000), 108–11; and Arthur Nussbaum, *A Concise History of the Law of Nations*, rev. ed. (New York: Macmillan, 1954), 35.
6. Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), 31, 39. See also his masterful newer treatment of the history of international law generally, *Justice among Nations* (Cambridge, MA: Harvard University Press, 2014).
7. Neff, *War and the Law of Nations*, 39–40.
8. Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 5 (citation omitted). Of course these are complex social facts. The critical issue for international law is that a persuasive argument began to develop supporting war as sometimes moral.
9. Ibid.
10. Leon Friedman, ed. *The Law of War: A Documentary History* (New York: Random House, 1972), 7.
11. Joachim von Elbe, "The Evolution of the Concept of the Just War in International Law," *American Journal of International Law* 33 (1939): 665.
12. Geoffrey Parker, "Early Modern Europe," in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George J. Andreopoulos, and Mark R. Shulman (New Haven, CT: Yale University Press, 1994), 43.
13. Ibid., 41.
14. Jacques Dumas, "Sanctions of International Arbitration," *American Journal International Law* 5 (1911): 937.
15. Grewe, *Epochs of International Law*, 109; see also Von Elbe, "Evolution of the Concept," 669; and Brownlie, *International Law*, 6.
16. Kaveny, *Law's Virtues*, 29.
17. Von Elbe, "Evolution of the Concept," 674–75; and Nussbaum, *Concise History of the Law of Nations*, 79–91.

18. See Nussbaum, *Concise History of the Law of Nations*, 80.
19. Ibid., 87–90.
20. Quoted in von Elbe, "Evolution of the Concept," 678.
21. Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (New York: Oxford University Press, 2008), chap. 1.
22. Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law* 23 (1946): 31. For an argument that *The Prince* was intended as satire, see Garret Mattingly, "Machiavelli's The Prince: Political Science or Political Satire," *American Scholar* 27 (1958): 482–91.
23. Ibid., citing Grotius, *De jure belli ac pacis* (1623), Proleg., 23.
24. Ibid., 24.
25. Ibid.
26. Ibid., 24–25.
27. Neff, *Justice among Nations*, 261–69.
28. O'Connell, *Power and Purpose of International Law*, 57–98.
29. See, e.g., opinions of Judge Antonio Cançado Trindade, especially his dissenting opinion in *Jurisdictional Immunities of the State (Ger. v. Italy)* 2012 I.C.J. 179 (February 10).
30. David Cortright, *Peace: A History of Movements and Ideas* (Cambridge: Cambridge University Press, 2008).
31. J. C. Farrell, *Beloved Lady: A History of Jane Addams' Ideas on Reform and Peace* (Baltimore: Johns Hopkins University Press, 1967), 140–41, 150–53.
32. Kellogg-Briand Pact 1928, http://www.yale.edu/lawweb/avalon/imt/kbpact.htm.
33. O'Connell, *Power and Purpose of International Law*, 48–51.
34. Douglas Johnston refers to the charter as the "sacred text of the world community." Douglas M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena* (Leiden: Martinus Nijhof, 2008), 164, 708.
35. See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2004), 454–55.
36. UN Charter Art. 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
37. Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004).
38. Ibid.
39. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8).
40. See Andrew Hansen, "The French Military in Africa," Report to the Council on Foreign Relations, February 8, 2008, http://www.cfr.org/france/french-military-africa/p12578. More interventions have occurred since the report was issued.
41. The International Court of Justice has ruled on this point in a number of important cases, in particular, *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), and *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, paras. 146, 301 (December 19).
42. See, e.g., William Schabas, "*Lex specialis*? Belt and Suspenders? The Parallel Operation of Human Rights and the Law of Armed Conflict, and the Conundrum of *Jus ad bellum*," *Israel Law Review* 40 (2007): 592–613.

43. "Military action for humanitarian purposes or to counter acts of terrorism is not easily accommodated within existing legal rules on the use of force." Ian Johnstone, "The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism," *Columbia Journal of Transnational Law* 43 (2005): 337.
44. 2005 World Summit Outcome, GA Res. A/60/L.1, September 15, 2005, 22–23.
45. Nigel Biggar, *In Defence of War* (Oxford: Oxford University Press, 2013), 241.
46. Esther Reed, "In Defence of the Laws of War," *Society of Christian Ethics*, 2013 (unpublished remarks on file with the author).
47. For accurate accounts of both tragedies, see Report of the Secretary-General Pursuant to General Assembly Resolution 53/55 (1998) (Srebrenica Report), UN Doc. November 15, 1999; and Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, UN Doc. December 15, 1999 (Rwanda Report).
48. See the Srebrenica and Rwanda Reports.
49. In addition to Rwanda and Srebrenica, consider the authorization of French interventions in Ivory Coast and other former colonies, peacekeeping missions to Haiti over many years, and the new Peace Intervention Brigade that has used offensive force in the complex conflict of the Democratic Republic of the Congo.
50. See, e.g., Goran Peic and Dan Reiter, "Foreign-Imposed Regime Change, State Power and Civil War Onset, 1920–2004," *British Journal of Political Science* 41, no. 3 (2011): 453–75; and Maria Stepan and Erica Chenoweth, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (New York: Columbia University Press, 2008).
51. These views were shared with the author during a four-year consultation sponsored by the Center of Theological Inquiry (2006–10) on the subject of theology and international law. The particular concern of the group was the use of torture by the United States after 9/11. For Waldron's wider views, see *Torture, Terror, and Trade-Offs: A Philosophy for the White House* (Oxford: Oxford University Press, 2010).
52. The Statement on Interrogation Practices by 20 Former US Army Interrogators for the US Congress Committee on Armed Forces, July, 2006, http://www.law.cam.ac.uk/faculty-resources/summary/statement-on-interrogation-practices-by-20-former-us-army-interrogators-for-us-congress-committee-on-the-armed-services-jul-2006/4848.
53. For a general overview, see Mary Ellen O'Connell, "Affirming the Ban on Harsh Interrogation," *Ohio State Law Journal* 66 (2005): 1259–64.
54. Stonebraker and Irving are among those who see war as efficacious, despite the facts, when they write, "churches speak out against evil, but do not advocate any form of effective means to stop that evil," by which they mean military intervention. Stonebraker and Irving, "Just War Tradition Reconsidered," 17.
55. Nor is the case as clear as that of Kuwait's liberation, given the questionable way the Ukraine government took power at the time Russia moved to occupy Crimea.
56. American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States § 102, cmt. k (1987).
57. For a more detailed discussion, see Mary Ellen O'Connell, "*Jus cogens:* International Law's Higher Ethical Norms," in *The Role of Ethics in International Law*, ed. Donald Earl Childress III (Cambridge: Cambridge University Press, 2011), 78–100.
58. *Catechism of the Catholic Church*, Part 3, *Life in Christ*, sec. 2, ch. 2, art. 5, para. 2309, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm.
59. In a May 2013 letter to the Obama administration, Bishop Richard E. Pates expressed doubts that drone attacks against terrorism suspects could meet the requirements of para.

2309. See Richard E. Pates, Letter to Mr. Thomas E. Donilon, May 17, 2013, available at http://www.usccb.org/issues-and-action/human-life-and-dignity/war-and-peace/arms-trade/upload/letter-to-administration-congress-on-drones-2013-05-17.pdf.

60. World Council of Churches, *An Ecumenical Call to Just Peace* (2011), http://www.overcomingviolence.org/fileadmin/dov/files/iepc/resources/ECJustPeace_English.pdf.
61. James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), 556.
62. Biggar's view conflicts with the law.
63. This was H. L. A. Hart's argument in the famous debate with Lon Fuller, published in the *Harvard Law Review* in 1958.
64. Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 5th ed. (New York: Knopf, 1978), 281.
65. See Christoph Frei, *Hans J. Morgenthau: An Intellectual Biography* (Baton Rouge: Louisiana State University Press, 2001), chap. 1–4.
66. Morgenthau was also influenced by the positivist-realist perspective of the anti–natural law international law scholar Lassa Oppenheim. Benedict Kingsbury, "Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law," *European Journal of International Law* 13 (2002): 435.
67. The first edition was Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (New York: McGraw-Hill, 1948). See also note 65 above for a citation to Morgenthau's fifth and final edition. Later editions revised by Morgenthau's students and followers have also appeared.
68. Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* (New York: Charles Scribner's Sons, 1932), 111.
69. Ramsey omits discussion of international law in his major work on war, *The Just War: Force and Political Responsibility* (New York: University Press of America, 1968).
70. David Hollenbach, *Nuclear Ethics: A Christian Moral Argument* (New York: Paulist, 1983), 14–16. See also John W. Lango, *The Ethics of Armed Conflict: A Cosmopolitan Just War Theory* (Edinburgh: Edinburgh University Press, 2014); and Michael W. Brough, John W. Lango, and Harry van der Linden, eds., *Rethinking the Just War Tradition* (Albany: State University of New York Press, 2007).
71. Jean Bethke Elshtain, "The Third Annual Grotius Lecture: Just War and Humanitarian Intervention," *American University International Law Review* 17, no. 1 (2001): 10, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1211&context=auilr.
72. Elshtain quoted in Ken Trainor, "Just War: Divinity School Professor Considers the Moral Necessities for War," *University of Chicago Magazine*, May–June 2010, http://magazine.uchicago.edu/1006/investigations/just-war.shtml.
73. Even a long-time US government lawyer who often defends US uses of force, Sean Murphy, concluded the invasion was unlawful; see Sean Murphy, "Assessing the Legality of Invading Iraq," *Georgetown Law Journal* 92 (2004), 173.
74. Jeff McMahan, "Laws of War," in *Philosophy of International Law* 493, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 496.
75. Ibid., 494.
76. Biggar, *In Defence of War*, 216.
77. Ibid.
78. Pope Francis referred to war as "madness." "War Is Madness," *New York Times*, September 13, 2014, http://www.nytimes.com/video/multimedia/100000003112598/pope-francis-war-is-madness.html.