

GOING NOWHERE:
THE RHETORIC OF WARFARE AND HUMANITARIAN INTERVENTION IN GLOBAL LAW AND POLICY
DEBATES

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ABSTRACT

From Kosovo and Iraq to Syria and Crimea, the specter of military intervention is a core theme within international law and policy literature. Rather than address 'warfare' and 'humanitarian intervention' as something actually occurring 'out there in the real world', this essay focuses on their functions within the text as a rhetorical device that helps constitute the structural conditions of disciplinary argument. In the face of what feels like escalating threats requiring immediate reaction, this essay seeks to demonstrate that it is instead exactly the right moment for reflection on the analytical toolkits that we take with us as partisans of a legal persuasion into given conflicts.

INTRODUCTION: WARFARE AS RHETORIC

In historical and contemporary contexts, warfare functions as a core theme within international law and policy arguments. Warfare is, in other words, not only something that exists 'out there', but is also a rhetorical presence within the knowledge production (for example, the literature, policy documents, legal instruments) of the discipline. That 'warfare' in the text is (doing) something different in the text than in the 'real' world does not imply that these two phenomena are disconnected. To the contrary, the conceptual vocabulary that structures the conditions and possibilities of legal assessment and strategic calculation is inherently engaged in power, in struggle, in types of battle. To define what is and is not warfare is perhaps as important, if not a key element, of how a war is fought. Legal texts matter not only to elaborate doctrines or provide enforceable normative principles to mediate conflict, but also help us

understand the ‘deep structure’ of legal argument and the ways that the language traps us unknowingly into certain determined patterns of thought.¹

The goal, then, is to approach the general terminology of ‘warfare’, and then more specifically the rhetoric engaged around the theme of ‘humanitarian intervention’, in terms of their functions as rhetorical tropes to uncover commonly ignored aspects of the argumentative logic that shape the knowledge production of the discipline. Rather than think of law as either complicit or policing violence, our aim is to think of ‘law-warfare’ and ‘law-humanitarian intervention’ as productive tensions that facilitate the conditions for the survival of international legal arguments (and international lawyers) as a privileged vocabulary (and professional expertise) within domestic and global governance.² In the first section, the essay begins by analyzing what I believe are four predominant ways that the rhetoric of ‘warfare’ functions within international legal scholarship within more canonical scholarship, and then introduces recent heterodox scholarship to demonstrate alternative questions that might challenge some of the mainstream assumptions toward the relationship between law and war. In the second section, the essay turns to look at how sub-level discussions within the literature concerning warfare – in this case, the example I will use is ‘humanitarian intervention’—may also be mapped and juxtaposed against more heterodox traditions of scholarship to reveal further disparate and overlapping logics operating within the conceptual environment of international law and policy.³ Of course, we could potentially choose other thematic gestures within the literature surrounding the organization of violence, which might contain additional patterns of argument, but it seems to

¹ See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

² See Akbar Rasulov, *New Approaches to International Law: Images of a Genealogy*, in DAVID KENNEDY AND JOSE MARIA BENEYTO (EDS), *NEW APPROACHES TO INTERNATIONAL LAW: THE AMERICAN AND EUROPEAN EXPERIENCES* 151 (2012).

³ See Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147 (2001).

me that ‘warfare’ and ‘humanitarian intervention’ enjoy a strong currency within these argumentative contexts and raise certain modes of debate, which once we understand, can be found throughout the literature more generally. The point here, in other words, is not to expose some ‘deep structure’ to legal argumentation concerning organized violence, but to elaborate some linguistic, or rhetorical, patterns of argument that condition the possibilities of international legal conversation concerning the sanctity and illegitimacy of regulated modes of violence, using ‘warfare’ and ‘humanitarian intervention’ as the site of analysis. The paper concludes with a brief reflection about what these debates signal concerning our posture as lawyers.⁴

FOUR FUNCTIONS OF THE RHETORIC OF WARFARE WITHIN LEGAL SCHOLARSHIP

There are at least four principle ways that the rhetoric of warfare operates within international legal scholarship today. First, warfare allows for narration whereby international law may track the trajectory of its disciplinary ideas as well as more generally trace out the historic and contemporary nature of political order and thought (the ‘narrative model’). The predominant version of this story charts an overlapping set of progressions that attest to the increasingly complex and dangerous nature of warfare, as well as the growing appreciation, or at least the necessity for transnational legal regulation: in terms of war, from privatized actors to state organizations to asymmetrical forms of conflict, from non-professional armies to sophisticated bureaucratized military forces, from rudimentary arms (for example, the pike, the musket, the cannon) to weapons of mass destruction (for example, machine guns, missiles, nuclear bombs); and in relation to law, justifications and restrictions on warfare grounded in a walk from Christianity to civilization to international peace and security, and from the law of

⁴ See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV 1627 (1991).

nations as the servant of national (or European) hubris to a cosmopolitan international legal order seeking to limit and restrict warfare in the interests of ‘humanity’.⁵

The next three operations of warfare within the literature play into the narrative model and are also inter-related to one another in their tendency to establish binary oppositions: law/politics, peace/war, and private/public. In the context of law/politics today, the predominant account posits that international law is meant, at least ideally, to limit and regulate the opportunities and conduct of warfare.⁶ On the one hand, diplomacy and legal channels that facilitate conversations and resolution of antagonism may prevent coercive military action. On the other hand, international humanitarian law is posited to restrain the savage excesses of warfare once a military action has commenced. To the extent that the law is unsuccessful, the disciplinary response tends to blame international law as inherently ineffectual or too easily susceptible to political capture—in either account, a line is drawn, at least conceptually, between law and politics. This dichotomy supports the claim within the narrative model that the discipline transitioned from being the handmaiden of empire, to being its constable, the night-watchman for all humanity.⁷ Law is warfare’s gentle civilizer; the institutionalized processes of intersubjective dialogue.

International legal literature also juxtaposes peace and war in relation to the narrative model, which carries the secondary effect of supporting the distinction between law and politics. The

⁵ See THOMAS SKOUTERIS, *THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE* 8, 10, 21 (2007). For a presentation of formal international legal norms as an important resource to restraint political ambitions and warfare, which developed slowly in the professional practices and vocabulary of international law, see e.g., OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 49 (2010).

⁶ See e.g., PHILLIP SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES* 222 (2006)(arguing that legal norms may be clearly discerned to hold bright line standards of legitimate and illegitimate action, and events such as the Iraq War by the Bush Administration are an example of simple ‘[d]isdain for global rules’).

⁷ See e.g., MARK MAZOWER, *NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS* 1-7 (2009)(arguing that international law, through its institutionalization in the UN framework, embodies an important utopian politics that stands against empire).

mainstream position holds that in the 19th century, international legal scholars felt the discipline could clearly treat the conditions of peace and warfare separately. Though there would undoubtedly be occasional strife within the territorial boundaries of particular nation-states or their colonies, these were matters best left to the governments of the state, free from any external intervention—in other words, these events were not ‘warfare’ per se, but rather inevitable political aberrations, and outside the scope of international law in the interests of state sovereignty. Peace within the state was the norm, and the aspiration of international law was to extend this ‘civilizing’ influence over all of Europe, and increasingly, at the ‘global’ level.⁸ The distinction between conditions of peace and warfare become more difficult to sustain in modern policing and ‘peace-keeping’ operations by the international legal order (for example, the ‘war on terror’), but tends to largely retain its conceptual and practical integrity to the extent that state governments very rarely encounter the realized threat of foreign military intervention to address internal conflicts, even when the violence is organized and severe (at least among the North Atlantic states and other ‘great powers’, such as China and Russia).⁹ Moreover, interstate conflict typically is not counted as warfare unless it rises to the level of direct military action, and even after the commencement of actual hostilities, the state governments often successfully characterize the nature of the engagement as something other than warfare.¹⁰ Peace continues to be considered the norm, albeit brokered and uneasy, within the international legal order.

The private/public distinction closely follows the binary logic of warfare in international legal scholarship. In relation to the narrative model, warfare was carried out by private and state

⁸ See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* 80, 83-88 (2002).

⁹ See GERRY SIMPSON, *GREAT POWERS AND UNEQUAL STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 347 (2004).

¹⁰ See e.g., PIERO IGNAZI, GIAMPIERO GIACOMELLO, AND FABRIZIO COTICCHIA (EDS), *ITALIAN MILITARY OPERATIONS ABROAD: JUST DON’T CALL IT WAR* 3-4 (2012).

actors from the medieval to late mercantile eras, ‘nationalized’ in the 19th century through technological advances and the centralization of political authority in state bureaucracies, waged between ‘great powers’ over the course of the 20th century, only to again begin to fragment in the mid-to-late 20th century with the rise of anti-colonial resistance, contract mercenaries, guerrilla fighters, and terrorist networks.¹¹ These non-state forces, however, are generally viewed as antithetic to the maintenance of peace, security, and the cosmopolitan ideals of the international legal order, and have not dislodged the nation-state as the dominant agent in warfare – in other words, to the extent that war is legitimate, it is quarantined to the realm of the ‘public’.¹² The inference for the ‘private’ in relation to its binary counter-parts is that it is meant to remain outside the sphere of ‘war’, and by extension, the ‘political’, and therefore most closely associated with ‘law’ and ‘peace’. To summarize these models: in one camp, politics-war-public; in the other camp, law-peace-private.

The canonical treatment of warfare within the discipline has met resistance in the last three decades from international legal scholars. In relation to the narrative model, scholars have challenged the progressive, or cosmopolitan, characterization of international law by demonstrating how disciplinary practice and vocabularies continue to be impacted by the legacies of colonialism and empire (e.g., *NAIL*, *TWAIL*). Likewise, scholarship has become increasingly skeptical to the traditional juxtapositions that frame the topic of warfare in the literature. First, in the last century, as warfare became a highly professionalized, bureaucratic apparatus within the state, it became simultaneously juridified—in military coinage, ‘lawfare’.¹³

¹¹ There is a rich scholarly tradition analyzing the changing dynamics and organization of warfare in relation to broader economic, legal, social, and political factors. *See e.g.*, MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE, 1975-1976* (2003).

¹² *See* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43(1) *COLUM. J. TRANSNAT’L L.* 47-55 (2004).

¹³ *See* DAVID KENNEDY, *OF WAR AND LAW* 12 (2006).

Military operations are not simply carried out in the name of international legal norms; these rules and the perceived importance of legality have been fully internalized within military practice whereby legal assessment and procedures are the norm in armed conflict.

Second, if warfare is to be conceived as a legal institution thereby collapsing the distinction between law/peace and politics/war, the distance is also transgressed between the spheres of the private/public. For instance, some scholars challenge the opposition of private/public by demonstrating, as mentioned earlier, how warfare is carried out through private agencies contracted by the state or through non-state actors regardless of state sovereignty, or even more problematically, how decisions to engage in military actions are the result of state capture by private politico-financial interests.¹⁴ Other scholars instead focus on the close relationship between the fiscal and political wellbeing of nation-states, and describe long-standing practices of states in their foreign relations to employ economic forms of coercion, which are potentially capable of heavy socio-political casualty on the rival state and its population that bear analogy to warfare.¹⁵

Finally, other scholars have demonstrated that, like warfare, the private realm (e.g., the market) is in many respects a juridical, and thereby public, institution—its infrastructure constructed and reliant on dense webs of legal enforcement and public funding.¹⁶ This movement to collapse the distinction between the public and the private sphere undermines traditional

¹⁴ See JAMES GATHII, *WAR, COMMERCE, AND INTERNATIONAL LAW* 223-255 (2010).

¹⁵ See ISTVAN HONT, *JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION STATE IN HISTORICAL PERSPECTIVE* 23, 28 (2005).

¹⁶ See generally KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (2001) (arguing that markets are embedded in socio-political relations and values). The theme of demonstrating the contingent, political nature of economics is a popular theme among progressive liberal and left-oriented scholars. For a classic example of this argument by the American Legal Realists, see e.g., Morris Cohen, *Property and Sovereignty*, 13 *CORNELL L. Q.* 11-14 (1927-1928). In the 20th century, the artificial (political) nature of economic institutions was widely observed by conservative economists, such as the ordo-liberals. For a discussion of ordo-liberal thought on this point, see PIERRE DARDOT AND CHRISTIAN LAVAL, *THE NEW WAY OF THE WORLD: ON NEOLIBERAL SOCIETY* 75-100 (English ed. 2013).

categorizations of wartime actors, challenges analysis over how and why military actions are carried out, and raises new questions about the role of international law. The outcome of all these realizations do not necessarily point to any programmatic legal or political vision, but highlight the difficulties of determining the capacity to identify the structural logic, key actors, and distributional stakes that embody the topic of international law and warfare.

FALSE DIFFERENCES WITHIN HUMANITARIAN INTERVENTION ARGUMENTS

To speak of warfare in the present day is often to enter discussions concerning humanitarian intervention. Scholars associated with heterodox international legal scholarship, such as the New Approaches to International Law movement (NAIL), have argued for more than 20 years that humanitarian law is often part of the very problem that it claims to address.¹⁷ This critique extends beyond proponents of humanitarian intervention (hereafter, HI) to encompass activists and scholars that denounce the practice. In other words, the analysis I want to raise here is not aimed specifically at whether or not HI is a ‘good thing’ or how it should be properly implemented, but instead concentrates on how these apologies and denunciations of HI operate within a discursive or conceptual space to frame and respond to (a potentially arbitrary) set of circumstances, and to map out the consequences of these vocabularies on our understanding of the possibilities and limits of the profession in these contexts.¹⁸ Treating humanitarian intervention at the level of rhetoric intervention within the literature bears interesting overlaps and deviations from how ‘warfare’ informs legal narratives. Humanitarian intervention, in other words, as a conceptual sub-set of ‘warfare’ suggests the paradox that the linguistic possibilities

¹⁷ See e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2005).

¹⁸ For a mapping of the legal arguments that make up warfare, Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43(1) COLUM. J. TRANSNAT’L L. 1 (2004).

of international legal argument can be simultaneously on the one hand, complex and indeterminate, and on the other hand, closed and predictable. This topic seems particularly relevant in the wake of military conflicts that have proliferated across the Middle East, and more recently within the former Soviet bloc, all of which potentially threaten to attract U.S. military intervention (e.g., Iran, Syria, Ukraine).¹⁹ Especially when faced with the immediacy of violence, the impetus for this section is that such moments are exactly when we need to step back and attempt to understand the argumentative framework and analytic moves that constitute contemporary disagreements within the literature.

Apologetic positions for HI may generally be organized according to three overlapping varieties of argument, or functions: didactic, pragmatic, and retributive justice. In other words, advocates of military intervention commonly frame action in humanitarian terms, invoking formal legal instruments or general principles of international law to sustain the legality, if not legitimacy, for intervention. Whatever their particular merits in a given situation, these claims tend to operate on one of these three levels, none of which carry any particular politics in that they can be linked to incommensurate political goals or ideologies.

First, the didactic function focuses not only on how to characterize events (for example, violence that warrants intervention), but also on the ways we assign roles and meaning to past and contemporary conflicts in global governance. In this context, the justification for intervention is situated to tell a specific narrative about the dynamics and trends of global governance. The justification of military force to protect a segment of the population or to stop a

¹⁹ For a brief but interesting overview of media hype to advocate military intervention in response to events after the Arab Spring, see Patrick Henningsen, *The Syria 'Chemical Weapons' Media Hype: Pushing for Military Intervention*, GLOBAL RESEARCH (August 24, 2013), <http://www.globalresearch.ca/the-syria-chemical-weapons-media-hype-pushing-for-military-intervention/5346834>. For a study of the relationship between media coverage and policy making since Vietnam, see JONATHAN MERMIN, *DEBATING WAR AND PEACE: MEDIA COVERAGE OF U.S. INTERVENTION IN THE POST-VIETNAM ERA* (1999). For a historical study of the relationship between the United States and the Middle East, see MICHAEL OREN, *POWER, FAITH AND FANTASY: AMERICA IN THE MIDDLE EAST 1776 TO THE PRESENT* (2008).

non-democratic or illegitimate regime from solidifying control or escalating state collapse, in other words, entails choices about how various actors are characterized, but also about the proper role of international law and the global community. For example, by invading Iraq, we uphold the United Nations charter, the spirit of democratic principles and national self-determination²⁰

The power of this approach is that it not only facilitates discussion of a wide range of themes that might be picked up, but also that its pedagogical function also feels policy-oriented (for example, invoking questions of competency and jurisdiction). The claims advanced not only serve to rationalize a certain policy direction, but intimates a set of background assumptions about our notions of international law and global politics.

Second, the pragmatic function emphasizes the imperfect nature of the world, and at once embraces the importance of accommodating ambiguity and responsibility. This again does not indicate any specific political preference on the part of the claimant. On the one hand, pragmatism might operate to legitimize an intervention, either by overriding humanitarian activists seeking to block the military action (for example, freedom requires getting your hands dirty). On the other hand, from within communities typically opposed to war, pragmatism might be an internal response to ambivalence (for example, the greatest danger is doing nothing).²¹ In short, the invocation of pragmatism serves to overcome counter-arguments by naming the opposition as idealistic or utopian, while at the same time not necessarily dismissing the spirit of

²⁰ Conversely, invading Iraq may be a demonstration of imperialist politics by great state actors (for example, the United States) overriding the principle of national sovereignty and the advances made by international law in the aftermath of World War II and the Cold War. For a militant liberalism, *see e.g.*, ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER: GOVERNMENT NETWORKS AND THE DISAGGREGATED STATE* (1st ed. 2004). For an ethical reflection on the potential necessity, but also inherent ambiguity, of holding out international law against intervention, regardless of its particular justifications, *see* Matthew Craven, Gerry Simpson, Susan Marks and Ralph Wilde, *We the Teachers of International Law*, 17 *LEIDEN J. INT'L L.* 363 (2004) (Neth.).

²¹ For an example of the compatibility between these positions, *see* President Barack Obama, A Just and Lasting Peace, Lecture at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize> (submitting to “the hard truth” that there are times when “the use of force [is] not only necessary but morally justified”, and that though there is “deep ambivalence about military action today”, he “cannot stand idle in the face of . . . [e]vil”).

opposition in general. We agree with pacifists about our dream of cosmopolitan peace, for instance, but argue that its closest approximation is through principled military action. They are, albeit benevolent, utopians; we are principled opportunists. The point here is that these positions are not in themselves independent positions, but rather symptoms of the ways the legal vocabulary structures the movement of meaning and available modes of argument and action within the discipline. Pragmatism is as much, if not primarily, a rhetorical gesture as it is an actual sensibility.

Third, the retributive justice function operates between didactic and pragmatic functions implicated in apologies for humanitarian intervention. It overlaps with the didactic function to name violence, the role of international law and the legitimate parties that have authority to carry out justice; but simultaneously, it avoids becoming a target of pragmatism's "utopian" label since it ultimately is advanced in order to achieve an outcome that openly carries distributional consequences. Likewise, it circumvents arguments that claim intervention serves purely political aims or is overly wrapped up in base human responses to grievances (for example, retribution), because it ultimately harkens to a higher ideal (for example, justice) that is understandably unattainable, but nevertheless demands fidelity. At the same time, the turn to a concept of justice will not ultimately escape counterarguments that it is either abstract or hegemonic, thereby tending to collapse into the very controversies it claimed to transcend.

Like its proponents, the opposition to HI takes three predictable varieties of argument: imperialism, cultural insensitivity, and pacifism. First, the critique of imperialism highlights that ethical (or formally universal) arguments for intervention may in fact disguise political agendas, which are antithetical to their claimed intentions—in other words, politics corrupts law. These arguments are closely related to the apologist position that the invocation of international legal

principles by a targeted actor are in fact a smoke screen for some illegal or illegitimate course of action (for example, Syria claims absolute sovereignty from intervention, but only in order to violate *jus cogens* principles of international law). The difference here is that the critique of imperialism is almost exclusively leveled at Western-oriented state bureaucracies whereas the critique of politically manipulating legal principles is more often used by Western-based voices to justify military (or other state) involvement abroad.

Second, the cultural insensitivity critique draws attention to the Eurocentric prejudice of even well-meaning intervention to the extent that all too often policy makers are ignorant about the particular institutions and cultural behaviors of the people they claim to aid. This critique of cultural insensitivity is closely related to the critique of imperialism and the didactic function in that it tends to invoke the legacy of colonialism that places the onus on the Western-based policymakers.²² “You say that you are helping us,” the argument goes, “but your interventions are in fact merely reproducing a set of binary relationships whereby the West takes on the role of savior to the moral depravity or material helplessness of the primitive ‘other’.”²³ In a slightly more interesting twist, the cultural insensitivity critique also draws close to the pragmatic function when it highlights that the given dynamics that are being used to justify a given intervention are off the mark. In other words, even if a particular actor abroad is identified as the immediate cause of violence, the character and the reason for that violence may actually implicate the root cause to be located in Western policy. For instance, what may look like the influence of radical Islam may in fact be the result of international trade policy set by developed

²² See e.g., Gathii, *supra* note 14; Antony Anghie, *The War on Terror and Iraq in Historical Perspective*, 43 OSGOODE HALL L.J. 46, 60–61, 63–65 (2005) (Can.).

²³ See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARVARD INT’L L.J. 201 (2001). Cataloguing a series of ways that human rights discourse presents the West as “saviors” and non-Western populations and institutions as “savages” and “victims” in need of saving, Mutua argues this “oppositional duality is central to the logic of Western philosophy and modernity. . . . [A] binary logic [that] constructs historical imperatives of the superior and the inferior, the barbarian and the civilized, and the tradition and the modern . . . with the superior and scientific Western civilization leading and paving the way for others to follow.” *Id.* at 201 n.2.

states, which led to the poverty, disenfranchisement and hostility that sparked the violence in question.²⁴

Third, the pacifist critique is reserved for absolute denunciations against violence, and usually takes a legal or distinctly activist form (for example, ‘not in our name’). Of course, rarely are arguments against intervention actually based on a commitment to pacifism in all instances, yet these critiques towards intervention are often presented as if violence is always a scandal. What is perhaps most interesting here is what gets posited as the standard of non-violence that would represent a normal or ideal civic space of foreign affairs: usually, a social order governed by a cosmopolitan sensibility that enjoys the distributional rewards of industrialization.²⁵ This is potentially ironic because this image of ‘peace’ is often only sustained through coercion, and always entails forms of exclusions and chosen losers. Moreover, what enables peace, especially when placed against the background of global value chains, is often implicitly and inextricably linked with the necessities of violence and war. In this sense, intervention is inseparable from pacifism, and could be thought less as an actual state of affairs in many instances, and more the rhetorical options in a given policy situation for describing the stakes.

In fact, apologists and opponents actually agree on a wide set of underlying ideas in relation to HI that are often backgrounded in the midst of heated rhetoric. Perhaps most importantly, both camps can share the commitment to international legal principles and the necessity of balancing various interests according to agreed-upon norms or conceptual ideas. For instance, though apologists may focus on the necessity of enforcing legal prohibitions while opponents stress the

²⁴ See Mahmood Mamdani, *Whither Political Islam?*, *Foreign Affairs* 1, 4 (2005).

²⁵ See David Kennedy, *Modern War and Modern Law*, Address at the Watson Institute for International Studies at Brown University (Oct. 12, 2006), available at <http://www.law.harvard.edu/faculty/dkennedy/speeches/BrownWarSpeech.pdf>. A central reoccurring ambition for Kennedy is to demonstrate the “dark sides” of virtue. In the context of war, Kennedy’s point here is that the cosmopolitan ideal, the examples of “peaceful” situations usually located in Western industrialized countries, rely on systematic violence and internal forms of coercion. What counts as war depends in part on what counts as peace, but this demarcation is not an empirical measurement, but a matter of rhetoric and persuasion.

sovereignty of states from foreign meddling, both encampments will tend to profess a commitment to liberal democratic rights and seek to ensure the cosmopolitan character of their endeavor in the language and processes of international law. In fact, as we have seen above, depending on the issue at stake, the apologist and opponents may flip sides—at times arguing for intervention, at other times denouncing its usefulness, but always in relation to international legal standards that reify political concepts, such as the formal equality of law, the sovereignty of the nation-state, the necessity of economic development, and so forth.

Mapping out argumentative moves that constitute debates surrounding humanitarian intervention suggests that rather than viewing the critiques and apologies of intervention in black-and-white terms, it may be more useful to understand them as oscillating positions within a common vocabulary and set of political commitments. They are, in other words, not so different in orientation—two sides of a single coin. Here, I want to focus specifically on two blind spots that I believe tend to haunt both parties to HI and require a more open accounting.

First, law does not stand outside power politics, but is constitutive of it.²⁶ Every legal system is only operational, and indeed derives from, massive indirect and direct forms of violence. If you scratch a Jürgen Habermas, you find a Carl Schmitt. Bob Dylan was correct: everyone serves a master—and rather than condemn violence as itself necessarily bad, the question should rather be recalibrated to ask violence against whom, and why, and what type of violence.²⁷ We should, in other words, understand we are always in a state of war, and we are always partisans, whether we are carrying books, bullets, or bank ledgers. While regulation that takes the form of ‘law’ rather than ‘politics’ ultimately means something, it is equally true that political actors operate against the backdrop of a legal architecture that frames the possibilities and limits of

²⁶ For an early classical explanation of this theme, see Robert Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 COLUM. L. REV. 149 (1935).

²⁷ See BOB DYLAN, *GOTTA SERVE SOMEBODY* (Columbia Records 1979).

policy. And vice versa: law does not simply regulate power, it is the formal expression of how power has been distributed and regulated in the midst of unending struggle over resources.²⁸ Whatever promise a formal rule of law mechanism can make real on, status and power always constitute an important characteristic of law's logic.

Second, HI is thrilling: it is naked and charred bodies, phallic bombs and messy eruptions, it opens the gates and rearranges government policy, it gives birth to new regimes.²⁹ But what usually gets left out in these accounts are socio-economic forms of violence that require armed enforcement and have enormous distributional stakes in terms of blood and booty. When we focus on the guilt of individual actors or states, we often ignore the underlying causes and context of why the situation arose in the first place, and more generally, ignore these more structural forms of violence which are so ingrained into the logic and practice of global law and society.³⁰ Unequal terms of production and trade that go into the price of a loaf of bread may have just as much to do with the destabilization of Egypt rather than radical Islam or secular democratic ideals among the youth.³¹ And whatever the case, there is a thrill in taking responsibility, a voyeuristic (if not colonial) pleasure in entering the fray when the suffering relates primarily to others and an almost spiritual ethic of compassion and solidarity that reinforces our own ideals. When the British colonial apparatus of the 19th century ensured its hegemony over more than 85 percent of the globe, they were for the most part well-meaning,

²⁸ F For an exposition of this line of argument dating back to American Legal Realism, see Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927–1928).

²⁹ See generally KENNETH CAIN, HEIDI POSTLEWAIT, AND ANDREW THOMSON, *EMERGENCY SEX AND OTHER DESPERATE MEASURES: A TRUE STORY FROM HELL ON EARTH* (1st ed. 2004).

³⁰ See SCOTT VEITCH, *LAW AND IRRESPONSIBILITY: ON THE LEGITIMATION OF HUMAN SUFFERING* (1st ed. 2007).

³¹ For an introduction into the literature of global value chains in relation to Egypt and other Arab speaking countries and the role of wheat in social management, see for example GHADA AHMED, DANNY HAMRICK, ANDREW GUINN, AJMAL ABDULSAMAD, AND GARY GEREFFI, *WHEAT VALUE CHAINS AND FOOD SECURITY IN THE MIDDLE EAST AND NORTH AFRICA REGION*, DUKE UNIVERSITY CENTER ON GLOBALIZATION, GOVERNANCE AND COMPETITIVENESS (2013), available at http://www.cggc.duke.edu/pdfs/2013-08-28_CGGC_Report_Wheat_GVC_and_food_security_in_MENA.pdf.

sophisticated experts—we should learn to more openly acknowledge that we may operate within their legacy, and that there is a horror and pleasure to it, whether we seek to escape or embrace its implications.³²

CONCLUSION: PARTISANS OF A LEGAL PERSUASION

Whatever position we take, law is a weapon and we are partisans. The first issue should not be to determine whether we are for or against intervention, but to acknowledge the underlying systemic pressures that guide our reasoning and the strategic choices available in any given context. This means thinking beyond ‘states’ or ‘cultures’ or even ‘individuals’ as the principle movers of history, and considering how each of these terminologies is a loose description of dense institutional processes, which are often at once contradictory and overlapping, indeterminate and predictable, and so forth. What we need here, in other words, is a sociological attitude towards assessing intervention that refrains from the twin evils of anti-theoretical empiricism (for example, just collecting the data ‘on the ground’ as if it were self-evident) and ethical stances (for example, asserting law as an answer to politics, without understanding they are symbiotic rhetorical moves within a professional terrain of argument). If the mainstream legal discourse is preoccupied with the questions of whether or not to intervene in an already designated emergency/conflict situation, the predictable circularity of their arguments might be an invitation for us to ask new questions that are premised on a different set of assumptions about the nature of international law and violence and how it might be assessed.

³² For an extensive study of the cosmopolitan motivations of 19th century British and other colonial administrations, see Koskenniemi, *supra* note 8, at 11–178. Equally, there is a rich body of historical literature on the professional acumen and the often sincerely benevolent ambitions of colonialists, despite the obvious (and often insidious) dark sides to their idealism. See e.g., LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900* (1st ed. 2001).

