# UC Berkeley
## International Law Workshop

**Title**
Humanitarian Intervention and Pretexts for War

**Permalink**

**Author**
Goodman, Ryan

**Publication Date**
2004-09-14

# Humanitarian Intervention and Pretexts for War

# Ryan Goodman[†]

## *Draft: Sept. 14, 2004*

### Table of Contents

### INTRODUCTION

The legal status of humanitarian intervention poses a profound challenge to the future of global order.[1] The central question is easy to formulate but notoriously difficult to answer: Should international law permit states to intervene militarily to stop a genocide or comparable atrocity without Security Council

---

[†] J. Sinclair Armstrong Assistant Professor of Foreign, International, and Comparative Law, Harvard Law School. J.D., Yale Law School; Ph.D., Sociology, Yale University.

[1] Kofi A. Annan, The Question of Intervention: Statements by the Secretary-General, Statement Before U.N. General Assembly, Sept. 20, 1999 (stating that humanitarian intervention presents a "core challenge to the Security Council and the United Nations as a whole in the next century"); David J. Bederman, *Globalization, International Law and United States Foreign Policy*, 16. 50 Emory L.J. 717 (2001) ("[H]umanitarian interventions have … become a central issue of the foreign policies of many nations, great powers and small nations alike.").

authorization? That question has acquired even greater importance in the wake of military interventions in Kosovo and Iraq and nonintervention in the Sudan.[2] Concerted deliberation on these issues, however, has reached an impasse. A key obstacle to legalizing unilateral humanitarian intervention (UHI)[3] is the concern that states would use the pretext of humanitarian intervention to wage wars for ulterior motives. In this Article, I argue that the opposite is true. Drawing on recent empirical studies, I contend that legalizing UHI should *discourage* wars with ulterior motives, and I discuss changes to international legal institutions that could bolster that effect.

The key problem—that states would exploit a humanitarian exception to justify aggressive or expansionist wars—has long dominated academic and governmental debate. Dating back to the earliest treatises in international law, proponents of legalizing humanitarian intervention have struggled with the objection that their proposals would be abused as a pretext for war.[4] The

---

[2] *See, e.g.*, Ramesh Thakur, *Commentary, Why We Shouldn't Rush to War over Darfur Save us from Humanitarians on the March*, GLOBE AND MAIL, Sept. 11, 2004, at A21; Ivo H. Daalder, *Opinion, It's Time to Intervene in Sudan Europe Must Lead*, INT'L HERALD TRIBUNE, Aug. 14, 2004; Ken Roth, *War in Iraq: Not a Humanitarian Intervention*, *in* HUMAN RIGHTS WATCH WORLD REPORT 13 (2004); *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824 (1999).

[3] A conventional definition of "humanitarian intervention" is "the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights." SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 11-12 (1996). The term "unilateral humanitarian intervention" commonly refers to the threat or use of force by one or more states acting without Security Council authorization. *See* Michael Byers & Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DIMENSIONS 177, 178 (J. L. Holzgrefe and Robert O. Keohane eds., 2003).

[4] The legal doctrine of humanitarian intervention traces its root to one of the earliest international law treatises, written by seventieth century Dutch jurist Hugo Grotius. Upon introducing the idea, Grotius directly dealt with the prospect of its being abused as a pretext for war. 2 H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, ch. XXV, pt. VIII(4) (Carnegie ed., F. Kelsey trans. 1925) (1625) ("Hence, Seneca thinks that I may make war upon one who is not one of my people but oppresses his own, . . . a procedure which is often connected with the protection of innocent persons. We know, it is true, from both ancient and modern history, that the desire for what is another's seeks such pretexts as this for its own ends; but a right does not at once cease to exist in case it is to some extent abused by evil men. Pirates, also, sail the sea; arms are carried also by brigands."). Interestingly, eighteenth century Swiss jurist Emer de Vattel took Grotius to task specifically on the pretext issue. *See* EMER DE VATTEL, THE LAW OF NATIONS II(ii) at § 8 (Joseph Chitty trans., 1883) (1758) ("What led [Grotius] into this error, was, his attributing to every independent man, and of course to every

proponents were most influential in the late nineteenth century,[5] a period in which international law permitted states to wage war on many and varied grounds. Today, however, the proponents have essentially lost the debate.[6] Over the past few decades, leading public international law scholars—including Richard Bilder,[7] Iain Brownlie,[8] Tom Franck,[9] Louis Henkin,[10] Oscar Schachter,[11] and

---

sovereign, an odd kind of right to punish faults which involve an enormous violation of the laws of nature, though they do not affect either his rights or his safety. . . . Could it escape Grotius, that, notwithstanding all the precautions added by him in the following paragraphs, his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts?"). The debate continued into the nineteenth century. *See, e.g.*, Rolin-Jacquemyns, Note sur la Théorie du Droit d'Intervention, 8 Revue de Droit International et de Legislation Compare 675, 679 (1876) (revisiting issue of pretext objection to humanitarian intervention raised by Vattel).

[5] *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 338 (1963) (explaining consensus that formed "[b]y the end of the nineteenth century [in which] the majority of publicists admitted that a right of humanitarian (*l'intervention d'humanité*) existed").

[6] In the last five years, more than 133 states (representing over 3.5 billion people) have issued or joined official statements rejecting the legalization of UHI. *See, e.g.*, Declaration of the South Summit, Movement of the Non-Aligned Countries, XIII Ministerial Conference, Cartagena, Colombia, Apr. 8-9 (2000), Final Document, at ¶¶ 11 & 263. The weight of academic opinion is also against it. Richard B. Bilder, *Kosovo and the "New Interventionism": Promise Or Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153, 1661(1999) ("[M]ost scholars have rejected the claim that humanitarian intervention is a legitimate exception to the prohibition of the use of force in the UN Charter."); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1620-21 (1984) ("[G]overnments by and large (and most jurists) would not assert a right to forcible intervention to protect the nationals of another country from atrocities carried out in that country.").

[7] Bilder, *supra* note __, at 160-61 ("[H]istorically, claims of humanitarian intervention have typically served simply as a pretext for what are, in fact, selfish assertions of national interest, power, and greed.); *see also id.* at 166-67.

[8] Ian Brownlie, *Humanitarian Intervention*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 217-28 (J. Moore ed. 1974); Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, *in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139, 147-48 (Richard B. Lillich ed., 1973) ("Whatever special cases one can point to, a rule allowing humanitarian intervention, as opposed to a discretion in the United Nations to act through the appropriate organs, is a general license to vigilantes and opportunists to resort to hegemonial intervention.").

[9] Thomas M. Franck and Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67American Journal of International Law 275, 304 (1973) ("[A] law derived from the Bangladesh precedent is an unlimited fiat for larger states to oppress their smaller neighbors. . . . History shows that when the humanitarian justification has been invoked, it has mostly been under circumstances in which there is at least a strong suspicion that the facts and usually the motive, were not as alleged."); *but cf.* THOMAS

Bruno Simma[12]—have powerfully argued against legalizing UHI specifically on the basis of the pretext problem.[13] Governments have also rejected legalizing UHI out of this concern.[14] And, for the same reason, even governments that have

FRANCK, RECOURSE TO FORCE, STATE ACTION AGAINST THREATS AND ARMED ATTACKS 172, 185-86 (2002).

[10] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 144-45 (2d ed. 1979) ("To me, these pressures eroding the prohibition on the use of force are deplorable, and arguments to legitimize the use of force in those circumstances are unpersuasive and dangerous…. '[H]umanitarian intervention can too readily be used as the occasion or pretext for aggression.'"); see also Louis Henkin, *Kosovo and the Law of Humanitarian Intervention*, 93 American Journal of International Law (1999) (reasserting view that "the law is, and ought to be, that unilateral intervention by military force by a state or group of states is unlawful unless authorized by the Security Council" and that "[h]umanitarian intervention on the authority of the Security Council recognizes that … intervention authorized by the Security Council affords the strongest safeguard against abuse of humanitarian intervention that the contemporary political system provides").

[11] OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 126 (1991) ("[I]t is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention.").

[12] Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 Eur. J. Int'l L. 1, 8 (1999) (favorably quoting earlier British view that "'the scope for abusing such a right argues strongly against it'" and questioning whether "recent or current instances of 'military humanitarianism' show themselves to be uninfected by the less laudable motives that characterized such actions in the past") (citation omitted).

[13] *See also* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 67 (2001) ("Commentators have drawn comparisons between 'humanitarian intervention' and medieval just war criteria. . . . As a rule interventionists believe they pursue a higher goal: 'the ideal of justice backed by power.' The trouble is that … there is too much room to abuse the law in the name of justice."); Hans Köchler, GLOBAL JUSTICE OR GLOBAL REVENGE?: INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS 313 (2003) ("[I]n an environment in which no checks and balances exist to retrain the arbitrary use of power[,] 'humanitarian intervention' has become one of the key terms to legitimize what otherwise would have to be called 'act of aggression' or interference in internal affairs."); Michael Akehurst, *Humanitarian Intervention*, *in* INTERVENTION IN WORLD POLITICS 95, 111 (Hedley Bull ed. 1984).

[14] *See, e.g.*, United Kingdom Foreign Office, Policy Document No. 148, *reprinted in* 57 British Yearbook of Int'l L. 614 (1986). ("[T]he overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention. . . . on prudential grounds, that the scope for abusing such a right argues strongly against its creation ... In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law."); S.C.O.R. (LIV), 4011th Meeting, June 10, 1999, at 9 (Government of China) (arguing that practice of UHI "promote[s] hegemonism under the pretext of human rights"); *see also* SCHACHTER, *supra* note __, at 1629 ("The reluctance of governments to legitimize foreign invasion in the interest of humanitarianism is understandable in the light of past abuses by powerful states. … Most governments are

recently engaged in humanitarian interventions without Security Council approval have refrained from defending their actions as legally justified by a doctrine of UHI.[15]

The overriding concern about pretext wars turns on assumptions about state opportunism and the power of law and legitimacy in regulating state behavior. To address this problem thus requires understanding empirical patterns of interstate hostilities and the influence that international institutions might exert in regulating state conduct. Fortunately, a treasure chest of social science research addresses many of those issues. Of special interest for this Article are theoretical and empirical insights into the relationship between international and domestic political process. Indeed, an important turn in political science recognizes that international relations and domestic politics are interrelated and that those connections are central to explaining the causes of war.[16] Whether a permissive international legal environment for humanitarian justifications would spur undesirable uses of force should accordingly be analyzed with these structural factors in mind.

In Part I, I describe the law on the use of force and outline the theoretical model that serves as the basis for the pretext concern. In Part II, I contend that the academic debate over legalizing UHI fails to account for sociological effects resulting from the process of justifying the predicate for war. Specifically, I contend that encouraging aggressively minded states to justify using force as an

---

acutely sensitive to this danger and show no disposition to open article 2(4) up to a broad exception for humanitarian intervention.").

[15] Nicholas J. Wheeler, *The Humanitarian Responsibilities of Sovereignty*, *in* HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 29, 42 (Jennifer M. Welsh ed. 2004) (discussing concerns of the United States with respect to pretext wars); FRANCK, RECOURSE TO FORCE, *supra* note __, at 170 (discussing concerns of the Netherlands with respect to pretext wars); *cf.* Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures And Opinion Necessitatis*, 10 EUR. J. INT'L L. 1, 791, 792-93 (1999) (discussing concerns of Germany and Belgium not to set "precedent" for UHI); ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 136 (1993) ("By their words and by their actions, the great majority of target states, observer states, and even intervening states have consistently rejected the 'humanitarian intervention' doctrine.").

[16] *See, e.g.*, James Fearon, Domestic *Political Audiences and the Escalation of International Disputes*, 88 American Political Science Review 577 (1994); BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993); T. Clifton Morgan & Sally Howard Campbell, Domestic Structure, *Decisional Constraints, and War: So Why Kant Democracies Fight*?, 35 The Journal of Conflict Resolution 187 (1991); Zeev Maoz & Nasrin Abdolali, *Regime Types and International Conflict, 1816-1976*, 33 Journal of Conflict Resolution 3 (1989).

exercise of humanitarian intervention can facilitate conditions for peace. That result is of course paradoxical. However, its insights are grounded in empirical studies of unintended constraints on state action. As the discussion in Part II shows, leaders can become caught in their own public justifications for a military campaign. Consequently, framing the resort to force as a pursuit of humanitarian objectives, or adding humanitarian issues to a military pursuit, can reorient the character of an interstate conflict and the political foundations for war. I conclude that—compared with the existing baseline of interstate disputes that escalate to war—the net effect on aggressive war should be advantageous. In Part III, I consider potential objections to and refinements of the argument against the pretext objection.

In short, the claims presented in this Article include both a strong and a modest position. The strong position holds that legalizing UHI should, on balance, discourage aggressive wars. If this position is correct, concerns about pretext wars should be retired. The modest position is more easily defended but also highly important. It holds that some wars of aggression that would be fought under the current legal system would not be fought in a system that permits UHI. On this view, it is dubious for the pretext concern to remain an obstacle to legalizing UHI, especially without knowing whether the number of aggressive wars would be greater than the status quo. Common to both positions is the insight that negative consequences of legalizing UHI can be significantly, if not completely, curtailed. Once the dynamics that produce those limiting effects are revealed, institutional schemes can be designed to strengthen and support them. At bottom, the leading prudential objection to legalizing UHI rests on highly contestable empirical assumptions concerning the effects of legal change on state behavioral patterns. Given the potential value in authorizing states to end genocides and similar atrocities, a substantial misspecification of countervailing effects must be corrected and efforts to mitigate those effects closely considered.

## I. THE MODEL OF PRETEXT WARS

In this Part, I first briefly outline the modern international law on UHI, as the issue is amply covered elsewhere.[17] Second, I analyze the leading prudential argument against legalizing UHI. That discussion is necessarily more detailed, because an exposition of the components of the argument has not been presented before.

---

[17] *See, e.g.*, Adam Roberts, *The So-Called "Right" of Humanitarian Intervention*, 3 Yearbook of International Humanitarian Law 3 (2001); Report of the International Commission on Intervention and State Sovereignty, The Responsibility To Protect 155-75 (2001).

A. The Law against Unilateral Humanitarian Intervention

International law strictly prohibits states from threatening or using force except in self-defense or pursuant to Security Council authorization. Although some commentators have tried,[18] it is difficult to escape the conclusion that international law forbids the unilateral use of force to rescue victims of a humanitarian catastrophe. In terms of treaty law, the U.N. Charter does not exempt UHI from the prohibition on the use of force.[19] And, prominent General Assembly resolutions strongly support that interpretation.[20] In terms of customary international law, in *Nicaragua v. United States*, the International Court of Justice rejected the proposition that custom permits UHI.[21] Admittedly, that decision is nearly two decades old and the relevant pronouncements are arguably dicta. However, the consensus of treatises and public international law experts remains that UHI is unlawful under any source of international law, custom included.[22]

For the purpose of our discussion, it is important to understand the scope of this legal prohibition. The rule applies to all degrees of armed violence: war and uses of force short of war. The rule also prohibits two types of practice: the

---

[18] For one of the strongest legal arguments that UHI is lawful, see Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 Finnish Year Book of International Law 141 (1999).

[19] THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma ed., 2d ed. 2002).

[20] *See* Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1975); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among State in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1971); *see also* Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51 (1981).

[21] Military and Paramilitary Activities (Nicaragua v. United States), 1986 I.C.J. 14, 134-35 (Merits). ("[W]hile the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. . . . The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States . . . .").

[22] *See, e.g.*, Indep. Int'l Commission on Kosovo, The Kosovo Report 166-76 (2000); Anne Ryniker, *The ICRC's Position on "Humanitarian Intervention*," 842 International Review of the Red Cross, 527, 530 (2001) (statement by Legal Adviser and Deputy Head of the Legal Division of the International Committee for the Red Cross); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 710-12 (6th ed. 2003); see also text accompanying notes __-__.

*threat* to use force and the *actual* use of force. The prohibition on UHI is an absolute ban on all these measures. Yet, as the analysis in Part II demonstrates, we might consider various interactions between these levels including: whether legalizing the use of force *short of war* for UHI may reduce the outbreak of other wars; and whether legalizing the *threat* to wage war for humanitarian purposes may reduce the outbreak of other wars.

The remainder of this Part explicates the pretext objection to UHI. For the purpose of that analysis, it is important simply to understand that modern international law flatly prohibits UHI. The question is should it?

B. The Case against Legalizing Unilateral Humanitarian Intervention

Significant common ground may exist over whether states should be able, when all diplomatic efforts fail, to employ armed force to stop a genocide or comparable atrocity. Commentators fundamentally differ, however, on the consequence of openly endorsing such a principle. The key concern is how to contain the practical implications of legal authorization. The concern that states would initiate wars by using humanitarianism as a pretext constitutes perhaps "the most compelling"[23] and certainly the "most common"[24] argument against legalization.

To sharpen the point, it is worth considering that similar prudential concerns animated the framers of the UN Charter. States designed the Charter partly in response to perceived lessons of World War II. And one of the more powerful memories of that period was Hitler's use of humanitarian justifications for military expansion. It is well known that Hitler invoked the "right of self-determination" of German nationals as a pretext for his incursions into Austria and Czechoslovakia.[25] Probably less well known is the striking resemblance between Hitler's rhetoric and contemporary humanitarian initiatives. In a letter to Chamberlain, Hitler justified his military objectives in the Sudetenland on the

---

[23] Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1727 (2000) ("Perhaps the most compelling argument against recognizing a right of humanitarian intervention is that it might be used as a pretext for military intervention actually motivated by other, less noble, objectives.").

[24] Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005, 1020 (1998) ("The most common criticism leveled at the right of humanitarian intervention is that its incorporation into the system of the law of nations would enhance the opportunities for the abusive use of force, the long-term effect of which would be to bring the international normative system into disrepute.").

[25] *See, e.g.*, AMOS YODER, WORLD POLITICS AND THE CAUSES OF WAR SINCE 1914, at 58 (1985); [cite].

grounds that "Germans as well as other various nationalities in Czechoslovakia have been maltreated in the unworthiest manner, tortured, … [and denied] the right of nations to self-determination;" "in a few weeks the number of refugees who have been driven out has risen to over 120,000;" "the security of more than 3,000,000 human beings" was in jeopardy; and the German government was "determined by one means or another to terminate these attempts …to deny by dilatory methods the legal claims of oppressed peoples."[26] Hitler's efforts represent, perhaps in the starkest terms possible, what is at stake. Those considerations help to focus, but do not answer the central empirical inquiry. Whether changes in international legal norms permitting such diplomatic representations would (or did) increase the likelihood of military invasion is a fundamentally different question.

To address that line of inquiry, it is important to identify the structure and empirical assumptions of the pretext argument—the case against legalizing UHI. The argument relies on particular views about the relationship between state conduct and international legal norms. It assumes that international law affects how states—particularly duplicitous, aggressive states—orient themselves to the international order. More specifically, the argument proceeds from the premise that legalizing humanitarian intervention will affect, even if only on the margins, the use of force by such states. Otherwise the argument is a nonstarter. Scholars have advanced only slightly different versions of the pretext argument. In general, their analyses contain similar elements, which comprise what I call the "model of pretext wars":

A. Static condition: The leadership of the revisionist state (State R)[27] is driven by aggressive/expansionist beliefs and interests in its determination to escalate hostilities with the defending state (State D)

---

[26] Letter from Reich Chancellor Hitler to Prime Minister Chamberlain, Sept. 23, 1938, in *The Crisis in Czechoslovakia, April 24-October 13, 1938*, 19 INT'L CONCILIATION 433, 433-35 (1938) (on file with author). Hitler also rallied domestic support for his initial military expansions by asserting that foreign governments were flagrantly violating the "right of self-determination" of German nationals. Speech by Chancellor Adolf Hitler at the National Socialist Party Congress at Nuremberg, Germany, Sept. 12, 1938, in *The Crisis in Czechoslovakia, April 24-October 13, 1938*, 19 INT'L CONCILIATION 433, 433-35 (1938) (on file with author).

[27] The term "revisionist state" is widely used in social scientific studies of war. Here, the term refers to the state that is dissatisfied with status quo conditions prior to the onset of a militarized interstate dispute and seeks to overturn those conditions through the threat or use of force. *See* Daniel M. Jones, et al., *Militarized Interstate Disputes, 1816-1992: Rationale, Coding Rules, and Empirical Patterns*, 15 Conflict Management and Peace Science 163, 178 (1996).

B. Dynamic interactions: Expanding the international legal exception increases the likelihood that State R will go to war with State D

Step 1. State R undertakes efforts to justify escalating hostilities in terms of purposes that conform to the new legal exception

Step 2. The effort to justify escalating hostilities as such an exception convinces actors or institutions to relax pressure that they would otherwise apply were State R to attack State D

Step 3. The actual or expected reduction of pressure prompts State R to wage war against State D

Admittedly, empirical studies and state practice support aspects of the pretext model. At a general level, numerous studies suggest that international legal institutions can influence patterns of interstate hostility.[28] Additionally, nontrivial evidence supports specific elements of the model. With respect to Step 1, states do attempt to justify their use of force within terms permitted by international law. Christine Gray finds that "[i]n practice, states making their claims to self-defense try to put forward arguments that will avoid doctrinal controversy and appeal to the widest range of states. Especially since the *Nicaragua* case,[29] states have taken care to invoke Article 51 to justify their use of force. They do so even when this seems entirely implausible and to involve the stretching of Article 51 beyond all measure."[30] In *Recourse to Force*, Thomas

---

[28] *See, e.g.*, Beth A Simmons, *Capacity, Commitment, and Compliance: International Law and the Settlement of Territorial Disputes*, 46 Journal of Conflict Resolution 829 (2002); William J. Dixon, *Third-Party Techniques for Preventing Conflict Escalation and Promoting Peaceful Settlement*, 50 International Organization 653 (1996); H. K. Tillema & J. Van Wingen, *Law and Power in Military Intervention: Major States after World War II*, 226 Int'l Stud. Q. 220 (1982); Charles W. Kegley & Gregory A. Raymond, *International Legal Norms and the Preservation of Peace, 1820-1964: Some Evidence and Bivariate Relationships*, 7 International Interactions 171 (1981).

[29] Article 51 of the UN Charter requires that measures taken by states in exercise of the right of self-defense must be "immediately reported" to the Security Council. In *Nicaragua*, the Court held that failure to "report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence." *Nicaragua*, 1986 I.C.J. at 105.

[30] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 87 (2000).

Franck details the content of public justifications advanced by revisionist states and supporting or opposing arguments by other governments.[31]

Other studies empirically support aspects of both Steps 1 and 2. In a leading analysis of the origins of war, political scientist Richard Lebow identifies a class of international crisis in which leaders use pretextual justifications for initiating war.[32] He explains that, across numerous historical cases, leaders "employed strikingly similar means," if not a "formula,"[33] in advancing justifications for war. One of the principal "step[s] in [this] formula for justifying hostilities consists of legitimating one's demands in terms of *generally accepted international principles*. By claiming to act *in defense of a recognized interest or right*, leaders may succeed in masking aggression or at least in maintaining the fiction of innocence. This may be very important to third parties or domestic public opinion."[34] Other scholars have made similar observations about the tendency of states to employ international legal justifications to sell the use of force to domestic and international audiences.[35]

In the balance of this Article, I analyze the pretext model and broader issues that it engenders. I do not contest all of the premises of the pretext argument. Instead, I offer an affirmative theory that shares some of the same empirical foundations. My argument also diverges from the pretext model in

---

[31] THOMAS FRANCK, RECOURSE TO FORCE 53-108 (2002); see also MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE (2003); id. at 15 ("Every intervention leaves a long trail of justification in its wake . . . . When states justify their interventions, they draw on and articulate shared values and expectations that other decision makers and other publics in other states hold. Justification is literally an attempt to connect one's actions with standards of justice or, perhaps more generically, with standards of appropriate an acceptable behavior.").

[32] RICHARD NED LEBOW, BETWEEN PEACE AND WAR 23 (1981).

[33] Id. at 29.

[34] Id. at 34 (emphasis added).

[35] SCHACHTER, *supra* note __, at 110 ("[I]n virtually every case the use of force is sought to be justified by reference to the accepted Charter rules. . . . [T]he felt need to issue a legal justification . . . demonstrates that states require a basis of legitimacy to justify their actions to their own citizens and even more to other States whose cooperation or acquiescence is desired."); FINNEMORE, *supra* note __, at 149 ("[A] consistent finding of the cases is that the use of force has increasingly been shaped by Weberian rational-legal authority structures—international organizations and international law in particular. States' decision making about when force is desirable and effective increasingly takes place within the context of multilateral institutions and is justified by appeals to international law, to mandates for multilateral institutions, or to both."); *id.* at 18 & 21 (describing relationship between justifying intervention through rational-legal authority and expected acceptance by other states and domestic publics).

significant respects. Exponents of the pretext model fail to articulate a baseline of interstate hostilities to compare with the effect of legalizing UHI. However, not only is the status quo level of interstate military conflicts high, legalizing UHI should substantially discourage some of those conflicts from erupting into war. More fundamentally, the pretext model disregards sociological effects of state-sponsored justifications for using force. The model assumes that the leadership's interests and beliefs remain static. State R begins and ends with the design to wage an aggressive war against State D. State R lacks only the opportunity or permissive legal environment to do so. In Part II, I discuss domestic social and political processes that confound this seemingly straight line and static set of preferences. The process of justification not only builds domestic political support; it also changes collective beliefs and preferences with respect to the conflict. Those changed domestic political conditions have important implications for constraining leaders' actions and, more specifically, determining whether a dispute will spiral toward war. Indeed, one of the issues raised in this Article is whether the "felt need for justification"[36] in international politics can shape how leaders ultimately pursue state interests and how those interests are defined through subsequent domestic political processes.[37]

## II. THE INSTITUTION OF WAR

Wars result from interactions at the international level—e.g., exchanges between adversarial states—and conducive domestic political conditions. Identifying important aspects of these relationships can help both to predict the consequence of making specific justifications for war more acceptable and to regulate resulting changes in state behavior. In each of the following sections, I discuss significant features of the institution of war including the "steps to war" (practices states adopt that increase the likelihood of war); sources of conflict (what states fight over); and the politics of justification (the generation of public support for escalating hostilities).

On the basis of these features, I contend that encouraging aggressively minded states to justify force as an exercise of humanitarian intervention can facilitate

---

[36] In his famous insider's account of the Cuban missile crisis, Abe Chayes describes "the felt need for justification" that led the U.S. government to appeal to international legal institutions. ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW (1974). Notably, an insider's account by another eminent public international law scholar, Martti Koskenniemi, also emphasizes the experiential need for legal justification felt by Security Council members at the height of the Iraq-Kuwait crisis. Martti Koskenniemi, *The Place of Law in Collective Security*, 17 Mich. J. Int'l L. 455, 477-78 (1996).

[37] This relationship might be modeled as a two-level game. Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 41 Int'l Org. 427 (1988).

conditions for peace. As I discuss in detail below, justifications that leaders contrive in order to build political support for war can meaningfully constrain subsequent governmental action. Appeals to humanitarian interest as the justification for war can have two types of pacifying effects. First, it can frame— or reframe—an interstate dispute in a manner that is ultimately less escalatory. That is, alternate frameworks are, in general and on average, less controllable and more incendiary than humanitarian frameworks. In this regard, the most relevant mechanisms involve domestic sociopolitical processes, including public and elite support for bellicose foreign policy behaviors. Second, the addition of humanitarian issues to an existing framework can facilitate negotiations to avert war. It can do so by providing opportunities for issue-linkage and face-saving settlements. The following discussion analyzes these effects and the associated prospects for impeding wars of aggression.

A. Steps to War

Wars are generally the outcome of an extended, interactive process. Political scientist, William Dixon, describes interstate conflict as a "dynamic evolutionary process, consisting of several phases."[38] Another political scientist, John Vasquez, also explains that "wars grow out of a long-term political relationship that has become increasingly intractable, conflictive, and hostile."[39] Notably, even in the periods in which international law permitted states wide latitude to wage war as an instrument of national policy—indeed, as a sovereign right—the general expectation was for states to resort to war only as a last resort.[40] History is replete with examples of states undertaking efforts of justification and employing peaceful and coercive measures before initiating an armed attack.[41] Indeed, at the point states begin developing war plans, the process can still be protracted. Accordingly, it is necessary to understand features of this process and associated empirical patterns of state behavior. More specifically, we need to understand the conditions under which states progress from an initial stage of a diplomatic dispute to a militarized interstate dispute (MID)[42] to war itself.

---

[38] William J. Dixon, *Third-Party Techniques for Preventing Conflict Escalation and Promoting Peaceful Settlement*, 50 International Organization 653 (1996); *see also id.* at 655-56.

[39] VASQUEZ, THE WAR PUZZLE, *supra* note __, at 42.

[40] BROWNLIE, *supra* note __, at _.

[41] Jack S. Levy, *On the Evolution of Militarized Interstate Conflicts*, *in* THE PROCESS OF WAR: ADVANCING THE SCIENTIFIC STUDY OF WAR 219, 221-22 (Stuart A. Bremer and Thomas R. Cusack eds., 1995) (discussing general patterns of state practice in the period since 1816); Lebow, *supra* note __, at 26.

[42] MIDs involve disputes between states below the threshold of war. They are characterized by a threat to use force, a show of force, or the use of force.

In detailing this process, Vasquez coined the expression—"the steps to war"—to denote practices that states adopt in response to a dispute which can, regardless of intentions, increase the likelihood of war. For Vasquez, these steps include elevating individuals who adhere to a "power politics" paradigm (realpolitik) to positions of greater governmental influence, engaging in arms buildups, and forging military alliances. Vasquez contends that these practices have the perverse effect of intensifying insecurity, distrust, and hostility between opposing states. Whether Vasquez is correct about these particular practices is not relevant for the moment. Here, the key point is that the road to war generally involves a long-term process and that changes in domestic political configurations and in interstate relationships can unintentionally ease or aggravate the conflict in ways that are capable of prediction.

Understanding war in these terms has two specific implications for legalizing UHI. First, considering war as the outcome of a process focuses attention on different phases and dimensions of that process. Depending on when it occurs, the invocation of humanitarian justifications can shape how actors respond to the conflict and effects on the steps to war. For example, actions taken under the banner of humanitarianism may affect which expert groups are empowered within governmental circles and which collective beliefs about the situation develop during the conflict.[43] Second, the "steps," "roads," or "paths" to war—however one puts it—imply a qualification: war does not result from a single, inexorable process. Rather, "there are quite a few roads to interstate war, and all of them have fairly frequent exit ramps."[44] If the idea of humanitarian intervention is considered normatively appealing, the task for institutional design is to permit needed humanitarian actions to remain on the road to war (solving the Rwanda problem) while encouraging other military actions to exit.

B. Framing Humanitarian Intervention

---

[43] *Cf.* Stuart A. Bremer, *Advancing the Scientific Study of War*, *in* THE PROCESS OF WAR: ADVANCING THE SCIENTIFIC STUDY OF WAR, *supra* note __, at 1, 12 ("[T]he genesis and evolution of militarized interstate conflict can be better represented by a process model because the transition from peace to war . . . is a multistage procedure in which the sequence of events and choices plays a critical role."); Dixon, *supra* note __, at 656 ("Thinking of conflict as a dynamic process that unfolds through a series of stages directs attention to transitions between stages and, in particular, to the question of why only some interstate disputes escalate to the point of military resolution.")..

[44] J. David Singer, *The Etiology of Interstate War: A Natural History Approach*, *in* WHAT DO WE KNOW ABOUT WAR? 3, 19-20 (John A. Vasquez ed. 2000).

A vast empirical literature examines the likelihood that a militarized dispute, or MID,[45] will end in war. These studies are, therefore, especially helpful in analyzing humanitarian intervention and pretext concerns. The studies isolate situations in which states are involved in a dispute that goes beyond diplomatic disagreement; at least one state has shown an interest in using force against the other. Some MIDs are more likely to result in war, while others are more likely to be resolved peacefully or at lower levels of violence. As discussed below, the most war-prone MIDs are framed around issues such as territory. In contrast, MIDs framed around humanitarian issues are among the least escalatory. In section A, I argue that were revisionist states encouraged to downplay territorial or security issues and instead justify the instigation or escalation of hostilities on the basis of humanitarian violations, such disputes would be less likely to eventuate in the outbreak of war. In section B, I discuss sociopolitical processes that, propelled by officially promulgated justifications, tend to shape leaders' subsequent conduct of hostilities.

*1. Issues Matter*

A growing body of social science scholarship demonstrates that the particular issues in dispute can constitute an important variable in shaping the course of interstate hostilities. The first generation of empirical studies on the origins of war did not consider this aspect of state interaction. Political scientists instead concentrated on characteristics of the international system (e.g., the distribution of power among states) and characteristics of states (e.g., forms of domestic governance) as the key explanatory variables.[46] However, research agendas have substantially broadened in the past fifteen years. In this period, "[s]everal studies have identified substantial differences in conflict behavior over different types of issues."[47] The available evidence shows that states are significantly more inclined to fight over certain issues even in the face of likely overall material and strategic losses.[48] And, studies have illuminated possible causal explanations for these

---

[45] *See supra* note __ (defining MIDs).

[46] Paul Diehl, *What Are They Fighting For?: The Importance of Issues in International Conflict Research*, 29 Journal of Peace Research 333, 337 (1992); RICHARD W. MANSBACH & JOHN A. VASQUEZ, IN SEARCH OF THEORY: TOWARD A NEW PARADIGM FOR GLOBAL POLITICS (1981) (proposing an issue-based paradigm to study interstate conflict).

[47] Paul R. Hensel, *Theory and Evidence on Geography and Conflict*, *in* WHAT DO WE KNOW ABOUT WAR? 57, 69 (John A. Vasquez, ed., 2000).

[48] *See, e.g.*, id.. While our discussion concerns the origins of war, it is noteworthy that, once at war, states tend to incur higher battle deaths when particular issues are at stake. *See* Paul D. Senese, *Geographical Proximity and Issue Salience: Their Effects on the Escalation of Militarized Interstate Conflict*, *in* A ROAD MAP TO WAR TERRITORIAL DIMENSIONS OF

empirical patterns. Namely, domestic popular and elite constituencies more readily support bellicose behavior by their government when certain salient cultural or ideological subjects are in contention.[49] Particular issue areas may also determine the expert communities that gain influence in government circles, which can shape the hard-line or soft-line strategies adopted in the course of the dispute.[50] In short, domestic political organization and processes exert significant influence on whether the contest between states will escalate to violence and all-out war.

Turning specifically to humanitarian intervention, the relevant studies generally use a popular data set provided by the Correlates of War project.[51] Three factors make the data set and the attendant studies especially valuable. First, some of the most innovative and useful studies, and the ones I discuss below, consider state "dyads" (pairs of states) as the primary unit of analysis. This vantage point allows researchers to identify relational factors that can influence the likelihood of war between two states over time.[52] Second, the database takes into account the particular issues in contention: "Each dispute is coded in terms of the revision a disputant is trying to bring about."[53] The database classifies three general revisionist pursuits: (1) territorial claims ("territory"); (2) claims that conflict with the other state's foreign policy behavior ("policy"); and (3) claims

---

INTERNATIONAL CONFLICT 147 (Paul F. Diehl ed., 1999); Hensel, *Theory and Evidence on Geography and Conflict*, *supra* note __, at 73-74.

[49] See *infra* text accompanying notes __-__.

[50] John A. Vasquez, *The Probability of War, 1816–1992, Presidential Address to the International Studies Association*, 48 INT'L STUD. Q. 1, 2-3 (2004) [hereinafter Vasquez, *Presidential Address*]; Vasquez 1993. Cf. Peter M. Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 International Organization 1 (1992) (discussing studies demonstrating effect of international regimes in empowering groups with specialized knowledge, and the influence those groups exert in framing policy and shaping institutional processes).

[51] The Correlates of War data set is used extensively by political scientists. The bibliography provided by the project lists over 185 scholarly pieces from 1963 to 1991. See <www.umich.edu/~cowproj/bib.html> (last visited Aug. 12, 2004).

[52] John Vasquez & Christopher S. Leskiw, *The Origins and War Proneness of International Rivalries*, 4 Ann. Rev. Poli. Sci. 295, 298 (2001) (describing "consolidated shift" toward using dyadic analysis within origin of war studies); DANIEL S. GELLER & J. DAVID SINGER, NATIONS AT WAR: A SCIENTIFIC STUDY OF INTERNATIONAL CONFLICT 22-24, 68 (1998) (describing theoretical importance of dyadic-level of analysis); *see also* Stuart A. Bremer, Dangerous Dyads: Conditions Affecting the Likelihood of Interstate War, 1816-1965, 36 Journal of Conflict Resolution 309 (1992).

[53] Vasquez & Henehan, *supra* note __, at 125.

with respect to changing the other state's government ("regime").[54] The latter encompasses "claims pertaining to the type of government of another state or its current regime."[55] While it has some limitations, this category is the one in which humanitarian interventions most clearly fit.[56] These MIDs include the U.S.-led intervention in Haiti, The U.K. and U.S. No Fly Zones in northern and southern Iraq, and Nigeria/ECOMOG's intervention in Sierra Leone. This category also includes military interventions to stop the suppression of national liberation groups, which, as a factual matter though not as a precise legal matter, resemble humanitarian interventions.[57] Disputes are often characterized by multiple issues. Consequently, studies generally classify MIDs according to the issue that becomes the principal claim. Third, the Correlates of War coding rules define a revisionist state as one that "*openly* attempts to challenge the pre-dispute condition" by expressly raising one of these claims as a predicate for the use of force.[58] Overall, these definitions and coding rules serve our purposes well in analyzing the pretext model and issues placed on the agenda by the intervening state.

The available evidence suggests that if a revisionist state is encouraged to portray humanitarian grounds as the predicate for escalating hostilities, a road to aggressive war may be diverted. Militarized conflicts in which the revisionist state makes a claim to changes in the opposing regime are generally among the least incendiary, or least war-prone. In sharp contrast, territorial MIDs are the most likely to lead to war. Indeed, although territorial disputes comprise only a minority of MIDs, territorial disputes constitute the majority of wars.[59] Across several studies of state dyads, the results are nearly perfectly consistent: territorial MIDs have the highest likelihood of escalating to war; regime MIDs and foreign policy MIDs are substantially less escalatory; and the relative likelihood for regime and foreign policy MIDs is usually very close together.

---

[54] Daniel M. Jones, et al., *Militarized Interstate Disputes, 1816-1992: Rationale, Coding Rules, and Empirical Patterns*, 15 Conflict Management and Peace Science 163, 178 (1996).

[55] Vasquez, *Presidential Address*, *supra* note __, at 10.

[56] *Cf.* John Tures, *Expanding the Issue Correlates of War (ICOW) Project: Regime-Based Claims, Disputes, and Means of Settlement, 1816-1996*, Paper presented at the Annual Meeting of the International Studies Association, Minneapolis (1998) (describing coding methods for humanitarian interventions and other regime-based conflicts in Issue Correlates of War database).

[57] *Cf.* SCHACHTER, supra note __, at 118 (describing common human rights and legal issues as well as distinctions between types of intervention to help foreign nationals).

[58] See Jones, et al., supra note __, at 178 (emphasis added).

[59] John A. Vasquez, *Reexamining the Steps to War: New Evidence and Theoretical Insights*, in Handbook of War Studies II 371, 385-87 (Manus I. Midlarsky ed., 2000); *see* Hensel, *Theory and Evidence on Geography and Conflict*, *supra* note __, at 65-66.

Consider some of the studies that present these correlative findings. A recent study by two of the leading political scientists in the field demonstrates that 30 percent of territorial, 6 percent of regime, and 5.5 percent of foreign policy MIDs escalate to war within five years of initiation.[60] Notably, the authors employ a five-year "window of opportunity" due to the theoretical expectation that war is a process resulting not simply from the MID itself but from political interactions preceding and proceeding the MID.[61] Another important study compares the probability of various MIDs escalating to war with the overall base probability of war.[62] That study finds "only territorial dyadic disputes . . . increase the probability of war . . . [and] both policy and regime have a statistically significantly lower probability of going to war than expected by chance."[63] These patterns also persist across dyads with different balances of power: major-major states disputes,[64] major-minor states disputes,[65] and minor-minor states disputes.[66]

---

[60] Paul D. Senese & John Vasquez, *A Unified Explanation of Territorial Conflict: Testing the Impact of Sampling Bias, 1919-1992*, 47 INT'L STUD. Q. 275, 292-93 (2003). The regime and foreign policy MIDs are clustered so closely together that the range of the former (measured by a 90 percent confidence interval) completely overlaps the latter. *See id.* at 293.

[61] *Id*. at 285; *see also id.* ("This indicates that a research design that looks only at whether the current MID escalates to war is a misspecified test. It cannot be overemphasized that a properly specified test requires a window of opportunity; otherwise important patterns might be suppressed."). The authors also conduct an analysis to determine whether individual MIDs escalate to war with no five-year window. While the results are consistent with the authors' theoretical conclusion that territorial MIDs are significantly more war prone than regime or foreign policy MIDs, the results demonstrate a wider gap between regime and foreign policy MIDs. With no five-year window, 19.6 percent of territorial, .025 percent of regime, and .004 percent of foreign policy MIDs escalate to war. However, the difference between regime and foreign policy MIDs is less significant when one considers that the lower confidence bound of regime MIDs (.009) is the same as the higher confidence bound of foreign policy MIDs (.009). Additionally, the prevalence of foreign policy MIDs is fairly low. And, if prevalence is taken into account, regime MIDs are 3.6 times less likely to escalate to war than the alternative territorial and foreign policy MIDs.

[62] John Vasquez and Marie T. Henehan, *Territorial Disputes and the Probability of War, 1816-1992*, 38 Journal of Peace Research 123 (2001).

[63] Id. at 131. Cf. Paul R. Hensel, *Charting a Course to Conflict: Territorial Issues and Interstate Conflict, 1816-1992*, *in* A ROAD MAP TO WAR: TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT 115 (Paul F. Diehl, ed., 1999) available at <http://garnet.acns.fsu.edu/~phensel/Research/chart98.pdf> (last visited Aug. 13, 2004) (using aggregated dispute rather than dyadic model but finding that "the odds of escalation to war over three times higher for disputes involving territorial issues than for disputes over other types of disputes").

[64] In disputes between two major states, territorial disputes show a much higher probability of escalating to war (.42), which is well above the base probability of war (.246).

Finally, according to another influential study, territorial MIDs are nearly twice more likely than nonterritorial MIDs to be followed by a renewed conflict between the same adversaries in the future.[67] The subsequent conflict also tends to occur much sooner after a territorial MID, "with territorial issues producing almost two years less 'stability' before the outbreak of the next dispute than other types of issues."[68]

One might speculate that the issues that dominate disputes between two states—e.g., if states have a longstanding dispute over territory—will swamp the effects of recasting a particular MID as driven by humanitarian issues. However, a recent study by Vasquez finds that, even when controlling for the issue that generally dominates disputes between two states, whether a single incident involving the threat or use of force (an MID) is cast as a regime issue instead of a territorial or foreign policy issue should still dramatically affect the likelihood that the dispute will escalate to war.[69] Specifically, the probability that the MID will result in war is remarkably lower for regime issues (1.179) than territory (1.493) or foreign policy (1.544) issues.[70]

---

Foreign policy disputes (.177) are nontrivially higher than regime disputes (.056). Id. at 135. All variables are statistically significant.

[65] In disputes between a major and minor state, territorial disputes again show a much greater likelihood of escalating to war (.478), which is still well above the base probability of war (.206). Regime disputes (.122) are higher than foreign policy disputes (.091) but only marginally so. Id. at 135. All variables are statistically significant.

[66] In disputes between two minor states, territorial disputes retain the highest probability of escalating to war (.235), again well above the base probability (.147). Here, regime disputes (.133) are nontrivially higher than foreign policy disputes (.05). Id. at 135. However, the regime variable lacks statistical significance.

[67] See Hensel, *Charting a Course to Conflict*, *supra* note __, at 25. Hensel finds that these results also persist when the different outcomes of the initial MID—stalemate, decisive victory, compromise—are taken into account. Id. at 26-27. Comprise outcomes, however, are not statistically significant. Id. at 27.

[68] Id. at 26.

[69] This part of the study examines a particular pattern: the issue-specific MID is followed by an alliance and then another MID regardless of type. Vasquez explains that "[p]osing the pattern this way assures that alliance making [one of the common steps to war] is connected with involvement in MIDs." Id. at 21.

[70] All three variables are statistically significant in this analysis. The same pattern of disparities between the different MIDs holds when independent variables for arms races and enduring rivalries are added. However, the variable for regime MIDs loses statistical significance. When these additional variables are included, regime MIDs are still less likely to escalate to war (.686) than foreign policy (1.127) or territory MIDs (1.533). Id. at 21. Due to lack of statistical significance, however, one should be cautious in drawing descriptive inferences on the basis of those results.

The scholars who have demonstrated the incendiary nature of territorial disputes generally attribute these findings to the cultural and political salience of territory within domestic popular or elite circles. Admittedly, some commentators assume that the salience of territory corresponds to security and material interests of the state.[71] On this view, such disputes accord with realist expectations of global politics in which territory constitutes a possession over which states fight to maximize absolute or relative power. However, fine-grained analyses of these conflicts provide contrary evidence. Disputes frequently arise over territory of negligible strategic or material value.[72] States take inordinate security risks in claiming materially unimportant territory.[73] Among the most escalatory categories of territorial disputes are irredentist claims involving geographic areas of historical or cultural significance.[74] Weak states frequently initiate territorial disputes with powerful states despite the risks of escalation.[75] Specific findings are so dramatic that some scholars postulate that the explosive character of territorial MIDs may reflect the influence of evolutionary biology and intergenerational tendencies of human communities.[76] This is not to say that territorial disputes are inevitable or intractable, only that, when raised, they tend to be associated with especially volatile or destructive behavior. Other scholars attribute the disproportional importance of territory to the symbolic and emotive power of nationalism, cultural heritage, and, on occasion, ethnic affiliation.[77] Regardless of whether biology, nationalism, or other social institutions explain the importance of territory, it is notable that these explanations generally turn on public or elite support for escalatory behavior.[78] These theoretical insights are also

---

[71] *See, e.g.*, [cite]; Charles S. Gochman & Russell J. Leng, *Realpolitik and the Road to War: An Analysis of Attributes and Behavior*, 27 Int'l Stud. Q. 97, 100 (1983) (making this assertion with respect to territory within and contiguous to the national borders of a state).

[72] *See, e.g.*, PAUL K. HUTH, STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT (1996).

[73]

[74] Huth, *supra* note __, at _.

[75] Huth, *supra* note __, at _.

[76] Senese & Vasquez; Vasquez.

[77] Hensel, *Charting a Course to Conflict*, *supra* note __, at 4 ("In short, territory is argued to have 'a psychological importance for nations that is quite out of proportion to its intrinsic value, strategic or economic,' and territorial disputes seem to arouse sentimens of pride and honor more rapidly and more intensely than any other type of issue.") (citation omitted); Paul K. Huth, Why *are Territorial Disputes Between States a Central Cause of International Conflict?*, *in* WHAT DO WE KNOW ABOUT WAR? 85, 100 (John Vasquez ed., 2000); David Newman, *Real Spaces, Symbolic Spaces: Interrelated Notions of Territory in the Arab-Israeli Conflict*, *in* A ROAD MAP TO WAR: TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT 3, 16 (Paul F. Diehl ed. 1999).

[78] *See, e.g.*, Huth, Why are Territorial Disputes a Central Cause, *supra* note __, at 100.

remarkably consistent with studies that demonstrate the significance of domestic politics on leaders' ability to deescalate territorial disputes with other states.[79]

\* \* \*

The model of pretext wars assumes aggressively minded states would use the cloak of humanitarianism to conceal their true intentions in escalating hostilities. One question is whether such strategies could (unintentionally) shape the substantive nature of issues in dispute. In the following Part, I argue that such effects can, and should, be expected. I discuss how the official promulgation of rationales for escalating hostilities can frame—or reframe—shared beliefs and attitudes about a conflict. Additionally, I discuss how the official promulgation of such rationales, by adding secondary issues to a dispute, can also help interstate bargaining efforts to avert war.

*2. The Politics of Justification*

In the study of interstate war and crisis management, social scientists have identified a phenomenon alternatively called "blowback,"[80] "propaganda boomerang,"[81] or "strategic culture."[82] These terms refer to situations in which the imagery and justifications that leaders use to build support for their policies at one stage of hostilities return to constrain their actions at later stages. To be clear, a very different set of studies address cognitive frameworks that distort how state actors perceive options, outcomes, and probabilities in interstate disputes.[83] Those constraints on rational behavior inhere in individual psychology. In contrast,

---

[79] Beth A. Simmons, *Capacity, Commitment, and Compliance: International Law and the Settlement of Territorial Disputes*, 46 Journal of Conflict Resolution 829 (2002).

[80] SNYDER, MYTHS OF EMPIRE, *supra* note __, at 41; Stephen Van Evera, Cause of War, Ph.D. Dissertation, Berkeley: University of California, 1984, at 400; *cf.* Stephen Van Evera, *Primed for Peace: Europe after the Cold War*, 15 International Security 7 (Winter 1990-1991) [hereinafter Van Evera, *Primed for Peace*].

[81] Greg J. Rasmussen, *Aggression or Humanitarian Intervention: International Rules and the Domestic Politics of Threat Perception*, International Studies Association Annual Convention, Minneapolis, Minnesota, Columbia International Affairs Online (CIAO), available at <www.ciaonet.org/conf/rag01> (last visited July 29, 2004).

[82] CHARLES A. KUPCHAN, THE VULNERABILITY OF EMPIRE 87 (1994).

[83] J. M. Goldgeier, P. E. Tetlock, *Psychology and International Relations Theory*, 4 Ann. Rev. Poli. Sci. 67 (2001); Jack S. Levy, *Loss Aversion, Framing, and Bargaining: The Implications of Prospect Theory for International Conflict*, 17 International Political Science Review 177 (1996); Jervis;; James Richardson; Geller & Strange.

"blowback effects" inhere in political and sociological processes.[84] In some cases, these effects can result from calculated efforts by political opponents to invoke leaders' original justifications and factual representations. In other cases, these effects can result from processes of socialization in which individuals internalize images and form collective beliefs about the situation based on the government's framing of the dispute.

Analysis of blowback effects can illuminate important interactions between international and national levels of political organization. The invocation of international legal norms by leaders—as well as factual representations that international legal institutions encourage them to make—can affect the content of political discourse. For example, in order to pursue a bellicose military agenda, legal norms limiting the use of force to self-defense may encourage leaders to represent the rival state as incorrigibly hostile and unfolding events as an impending threat to security.[85] Popular or elite views formed around these images and associated justifications can restrict leaders' freedom of action (e.g., the ability to make conciliatory gestures toward a rival) in later phases of the conflict.

Empirical studies have identified these effects (with some variation) across domestic political systems. For instance, Andrew Cortell and James Davis posit that "domestic actors—state or societal—can appropriate international norms and rules to further their interests in the domestic political arena" and through making these appeals in policy debate, "under some conditions, [these actors] influenc[e] the type of policy a country pursues."[86] As one of their case studies, Cortell and Davis examine the U.S. domestic political processes following Iraq's invasion of Kuwait. Specifically, the authors analyze President Bush's invocation of the international norm of collective security to justify a U.S. military response to Iraq.[87] "Through these repeated invocations, the president enhanced the salience of the collective security norm domestically, and in doing so, framed the terms of the subsequent domestic debate."[88] At two important junctures, Congress later employed the collective security norm to compel the

---

[84] *Cf.* Snyder, *supra* note __, at 31 (distinguishing between cognition-based explanations, on the one hand, and, on the other hand, beliefs "bound up with the social order, the political balance of power within it, its legitimation, and the justification of policies favored by particular social groups").

[85] See LEBOW, at 29, 34-35 (discussing states' employing justifications that conform to internationally accepted standards); cf. also *supra* text accompanying notes __-__.

[86] Andrew P. Cortell & James W. Davis, *How Do International Institutions Matter? The Domestic Impact of International Rules and Norms*, 40 INT'L STUD. Q. 451, 471 (1996).

[87] Id. at 464-71.

[88] Id. at 466.

President to abandon a unilateral strategy and instead seek a U.N. mandate: first, to enforce trade sanctions through a military blockade and, second, to drive Iraqi forces from Kuwait.[89] Cortell and James conclude: "Principally, President Bush's appropriation of the collective security norm to justify a U.S. response to the Iraqi response ultimately enabled the Congress to constrain his range of responses to the Iraqi invasion."[90]

In *Myths of Empire: Domestic Politics and International Ambition*, Jack Snyder identifies deeper forms of socialization that may result from leaders' efforts to justify escalating hostilities with another state. Snyder hypothesizes and ultimately concludes that logrolling among domestic political coalitions explains incidents of self-defeating expansionism by powerful states. However, the empirical evidence compels Snyder to conclude that "blowback effects" also have significant explanatory power.[91] In several cases that Snyder studies, government officials and opinion leaders propounded "strategic myths" to justify expansionist policies, and these images were internalized by members of the public, elite groups, and, at times, proponents of the rationalizations themselves.[92] For example, in the Crimean War, members of the British ruling party promoted conceptions of Russian hostility and security-based rationales to justify foreign military adventures.[93] The same leaders later found themselves unable to rescind bellicose policies due to hardened public and elite opinions formed around the original myths.[94] Similarly, at the turn of the nineteenth century, leaders in Wilhelmine Germany, in justifying militarist endeavors, promulgated and supported strategic myths about adversaries' (British and Russian) aggressive intentions, the balance of power, their nation's relative strengths and prospects for success.[95] However, the German leadership was subsequently unable to change

---

[89] Id. at 465.

[90] Id. at 469.

[91] See id. at 314 ("In some cases ideology was so integral to the political process that it played a central role in determining what the individual 'interest groups' wanted. . . . Sometimes ideological dynamics merely exaggerated the outcome of interest group logrolling and made it harder to reverse. But in other instances ideological blowback outlived the political circumstances that gave rise to the strategic ideologies. In this case, without reference to ideology there is no explanation at all."); see also id. at 63.

[92] Snyder, *supra* note __, at 310.

[93] Id. at 154, 165-74.

[94] See, e .g., id. at 179 ("But if Palmerston himself could distinguish between rhetoric and reality, many of his supporters could not, and sometimes he felt constrained to act on his rhetoric. Palmerston's letters to Britain's peace negotiators continually remind them that 'the eyes and thoughts of all England are fixed on this negotiation' and constantly trying to stiffen them against concessions.") (citation omitted); id. at 179-80.

[95] Id. at 75-80, 84-91.

course once powerful domestic actors internalized those strategic myths. Those domestic groups came to expect and demand aggressive behavior abroad and became unable to recognize adequately flaws in contemporary policies.[96] Notably, other scholars' examination of these historical cases largely supports Snyder's conclusions.[97] Charles Kupchan also shows that these theoretical explanations extend to strategic myths used to justify self-defeating *cooperative* foreign policy agendas (not only self-defeating competitive agendas).[98]

To help explain internalization within a governing coalition, Snyder's findings can be usefully supplemented with studies of "bureaucratic politics." Lebow contends that once governmental leaders have propounded a guiding rationale and beliefs with respect to a crisis situation, subordinate organs and individuals within the governmental bureaucracy are often loathe to contest, and eager to substantiate, those commitments.[99] Lebow calls this dynamic "cognitive closure."[100] However, another scholar has correctly re-described the dynamic as sociological in nature and thus theorized the effect as "social closure."[101] In a similar vein, Kupchan also identifies institutional effects that produce

---

[96] *See, e.g.*, id. at 102 ("[M]any participants in the logrolling had fully internalized the myths of empire and consequently were unable to recognize that the big stick policies were failing. This was especially true of the Protestant, urban, upwardly mobile professionals, who voted for the fleet for ideological reasons . . . .. and were appalled by what they saw as the criminally weak stance of the German government during the Moroccan crisis.") (citing Roger Chickering, We men who feel most German: A Cultural Study of the Pan-German League, 1886-1914, 261-66 (1984) & Geoff Eley, Reshaping the German Right: Radical Nationalism and Political Change after Bismarck (1990)); id. at 104 ("Though the elites helped shape mass preferences, they found they could not limit the mass passions they had unleashed, especially when newly emerging elite groups found they could use nationalist arguments to flog the more cautious old elites."). Snyder finds these relationships are more pronounced in regimes governed by cartels and in democratic regimes with partial cartelization. Snyder, supra note __, at _. *Cf.* Cortell & Davis, *supra* note __ (organizing theoretical expectations according to regime types).

[97] *See, e.g.*, KUPCHAN, THE VULNERABILITY OF EMPIRES, *supra* note __, at 23 ("To rally domestic support for extraordinary policies, decision makers propagate specific strategic conceptions. But, by selling powerful strategic images to the polity—molding public opinion and reshaping the roles and missions of the broader decision-making community—elites unwittingly entrap themselves in a strategic culture that later prevents them from reorienting grand strategy and avoiding self-defeating behavior."); id. at 9; id. at 87-102; Stephen Van Evera, *Why Cooperation Failed in 1914*, 38 World Politics 80, 83-99 (1985); Van Evera, *Primed for Peace*, *supra* note __, at 18-20.

[98] KUPCHAN, THE VULNERABILITY OF EMPIRES, *supra* note __, at _ (discussing British and French cooperative strategies in the European theater pre World War II).

[99] LEBOW, *supra* note __, at 153-54 & 293.

[100] Id. at 154.

[101] Rasmussen, *supra* note __; SNYDER, *supra* note __, at _.

bureaucratic conformity: "Even if strategic images are crafted primarily for public consumption, they gradually spread through the top-level elite community, the bureaucracy, and the military services. They become, as it were, organizing principles for the broader decision-making community."[102] As a result, members of the bureaucracy become less directed by "inference-based strategic pragmatism" or by "strategic conceptions informed by logic alone."[103] The originating rationales, and associated beliefs about the conflict, dictate their subsequent actions.

The politics of justification contain three lessons for regulating humanitarian intervention. First, the institution of war is often founded upon a process of justification with audiences potentially including the public, elites, or members of the governing coalition.[104] Second, rationales that leaders may contrive to justify hostilities can meaningfully shape the content of social and political discourse. Accordingly there are strong reasons to believe that justifying hostilities on the basis of humanitarian purposes can shift the terms of the conflict by disrupting competing rationales or, more affirmatively, by establishing humanitarian issues as the dominant framework for the dispute. The articulation of a humanitarian justification can produce—through various causal pathways such as bureaucratic conformity, internalization by relevant members of society, strategic manipulation by political actors—a new normative equilibrium or shared beliefs about the conflict, its aims, the interests at stake, and the nature and inclinations of the opposing state.

Third, an important consequence of new beliefs and normative commitments taking root is the constraint placed on subsequent action. Though slightly dramatic, one scholar describes blowback effects as "the Procrustean bed that decision-makers create for themselves when, after persuading the public of a theory which justifies expansion, they can no longer diverge from it."[105] In short, these effects suggest the potential strength and durability of humanitarian justifications for escalating hostilities.

---

[102] KUPCHAN, *supra* note __, at 92.

[103] Id. at 492-93.

[104] This process is especially relevant in considering the effects of a permissive rule for humanitarian intervention. Indeed, the pretext objection—concern that states will use a humanitarian exception to justify aggressive wars—implicitly relies on this understanding of the politics of persuasion.

[105] Richard Rosecrance, *Overextension, Vulnerability, and Conflict: The "Goldilocks Problem" in International Strategy*, 19 International Security 145, 149 (1995) (review essay).

These insights can also help address views that skeptical readers might hold about the process of war—that the fundamental cause of a war, the underlying conflict of interest between two states, is real and cannot be suppressed simply by the promulgation of different justifications for the conflict. To sharpen this point, one might argue that the studies showing territorial MIDs escalate to war, indeed, reflect the fact that those states have an outstanding territorial problem leading them to war, a situation left unaltered by a new, or newly characterized, dispute. Of course there is some truth to this perspective, and many wars will not be affected or averted.[106] That said, this view relies on a narrow conceptual understanding of the origins of war. For example, much scholarly attention has been given to "diversionary theories of war" as a frequent path to interstate conflict;[107] and various empirical studies suggest leaders who pursue aggressive foreign policies to deal with domestic political turmoil will create or accentuate foreign disputes. Foreign ambitions may also emanate from less calculative, more prosaic efforts of political actors to gain or maintain popularity. The question is whether international institutions can direct those political ambitions toward salutary paths by providing other options for raising foreign policy claims.

Furthermore, the initiation of a war frequently serves multiple foreign policy objectives (e.g., regional balance of power, global prestige, sea lanes, alliance relations).[108] Which objectives officials emphasize or which interests eventually define the principal framework of the dispute is flexible. Similarly, leading blowback studies show how foreign policy behaviors can be rooted in the harmonization of diverse domestic interests (e.g., logrolled coalitions among parochial groups) though not openly expressed as such. Instead, public rationales are offered to legitimize policy.[109] Theoretically multiple options exist for how these public presentations may be framed. Once again, a goal for international institutions is to encourage representations that avoid explosive, unintended consequences.

---

[106] As I discuss below, this line of argument—that some paths to war will not be diverted—also discredits the pretext objection as a reason to reject legalizing UHI. See *infra* discussion at __.

[107] Jack S. Levy, *The Causes of War and the Conditions of Peace*, 1 ANN. REV. POLI. SCI. 139, 151-57 (1998) (discussing the literature on "societal-level" explanations, especially including diversionary theories of war).

[108] *See, e.g.*, K. J. HOLSTI, PEACE AND WAR: ARMED CONFLICTS AND INTERNATIONAL ORDER, 1648-1989 (1991); [cite].

[109] *See, e.g.*, Snyder, *supra* note __, at 306 ("The very structure of these ideas suggests they were ex post facto justifications for policy and elements of a strategic ideology rather than mere beliefs or perceptions. In many cases the concepts underlying the policy of security through expansion came close to self-contradiction."); id. at 76.

Finally, it is incorrect to interpret the empirical studies of MIDs as inconsistent with these insights. Indeed, some of the principal authors of those studies speculate that political opportunism in the initial framing of a dispute and blowback effects constitute highly plausible explanations of their findings. Huth states that "[c]ompared to … conflicts of political ideology and regime change, I would argue that leaders can more effectively draw on popular and elite sentiments of patriotism and nationalism to justify support for territorial claims."[110] Huth describes blowback effects of this strategy:

> While nationalism can be used to mobilize domestic support and undercut political opponents, it also constrains the diplomatic options of state leaders . . . . Having invoked nationalist principals to legitimize territorial claims, leaders open themselves up to charges of hypocrisy and deceit if they subsequently make substantial concessions to settle a territorial dispute. Thus nationalist arguments once relied on to build support can also be used to discredit a government and its leadership. Put differently, the domestic political costs of accommodation in territorial disputes should be higher compared to most other foreign policy issues given that ruling elites are more likely to draw on nationalism to justify their policy position.[111]

Senese and Vasquez make a similar argument but do not emphasize nationalism in their theoretical explanation. In their view, the most incendiary issues—territorial claims—are vulnerable to exploitation due to an assortment of cultural and political factors that imbue territory with special salience. Similar to Huth, Senese and Vasquez identify blowback effects from leaders' justifying foreign ambitions on grounds that foster confrontational domestic attitudes:

> [L]eaders may use territorial issues to ride to power, but these issues are highly susceptible to creating their own domestic hard-line constituencies, so leaders find themselves pushed to take increasingly hard-line actions until the issue was resolved in favor of the state. Such a logic is consistent with existing evidence that territorial MIDs are more prone to fatalities and to war than other types of MIDs. Given these findings, it is plausible to expect that leaders who do engage in a territorial MID are going to be less hesitant and less able to resist

---

[110] Huth, *Why are Territorial Disputes a Central Cause*, *supra* note  __, at 100.
[111] Huth, *Why are Territorial Disputes a Central Cause*, *supra* note  __, at 101.

escalation to war, compared to leaders who initiate a nonterritorial MID and who will be more willing and able to 'bail out' if pursuing the dispute becomes too costly.[112]

Admittedly, some of these points might raise questions about whether a humanitarian rationale can alter the course of events if leaders have already embarked on different justifications. That is, preexisting public rationales might preclude leaders from re-framing a dispute along humanitarian lines. This observation raises a plausible concern, but it does not undermine the present analysis of UHI. First, the extent to which such preclusive effects foreclose the promulgation of alternative rationales should blunt the pretext objection to legalizing UHI. Concerns about states' abusing a humanitarian exception are misplaced or exaggerated if leaders are unable to succeed with a justification after having espoused an earlier one.[113] Second, such considerations of preclusion should only add support to the current project: fashioning institutions to take account of empirical patterns of state practice. The prospect of an early lock-in simply helps to set the tasks for institutional design. Accordingly, in Part III, I propose institutional reforms to encourage the early and emphatic articulation of humanitarian purposes in interstate disputes. Third, recall that the studies on MIDs take into account that multiple issues might be at stake in a dispute. The question is which one becomes the principal claim raised by the revisionist state. Accordingly, a humanitarian claim need not completely replace or retire an earlier claim; it is more a matter of emphasis.[114]

Finally, if the assertion of humanitarian claims only supplements–rather than de-prioritizes or displaces—other issues, a road to war may yet be averted. One means for achieving crisis de-escalation is through issue linkage: the introduction of humanitarian issues can facilitate conflict resolution by expanding bargaining opportunities for trade-offs with other issues in the dispute and for compromises to occur.[115] Moreover, studies of international crises suggest that issue linkage is more likely to succeed when the salience ascribed to an issue is

---

[112] Senese & Vasquez, *supra* note __, at 277-78.

[113] Indeed, the same may be said for the skeptic's argument above. See discussion supra note __.

[114] Also recall that even if an interstate rivalry is dominated by other issues, whether a lone incident concerns a territorial, foreign policy, or regime issue may significantly affect the preservation of peace between the rivals. *See supra* text accompanying note __.

[115] Diehl, *supra* note __, at 338; Michael D. McGinnis, *Issue Linkage and the Evolution of International Cooperation*, 30 The Journal of Conflict Resolution 141 (1986); Mansbach & Vasquez, *supra* note __, at _.

different for the parties[116]—a situation we should expect to prevail frequently when the issue involves human rights conditions in one of the countries.  Finally, as Senese and Vasquez posit, other disputed issues can propel leaders unwittingly to a point from which they have trouble "bail[ing] out." In this context, the addition of humanitarian issues might allow leaders to climb down. As one review of the literature explains, an "important finding related to crisis bargaining" is that the presence of secondary issues can allow leaders to make face-saving, de-escalatory moves: "diplomatic policies that include flexibility and a willingness to compromise and negotiate on secondary issues, combined with a refusal to concede on vital security issues . . . can help leaders of attacker states to retreat from their threats by reducing the domestic or international political costs of backing away from a military confrontation"[117] However, for such a strategy to succeed the secondary issue would have to be considered a genuine part of the dispute. The discussion in this section suggests that a proffered humanitarian rationale can create that genuine result even if the initial justification is pretextual and the outcome is unintended.

<p style="text-align:center">* * *</p>

In summary, casting the terms of an interstate dispute primarily according to a humanitarian framework rather than other alternatives may temper domestic passions as a conflict unfolds. Also, adding humanitarian issues to the dispute may facilitate bargaining and the prospects for a negotiated settlement. …**

## III. ADDITIONAL CONSIDERATIONS AND COMPLICATIONS

The preceding discussion examined the conceptual model of pretext wars, and evaluated the plausibility of the model against an analysis of the institutional processes that lead states to war. In this Part, I consider potential criticisms and refinements of that analysis.

---

[116] T. Clifton Morgan, *Issue Linkages in International Crisis Bargaining*, 34 American Journal of Political Science 311, 322-33 & 329 (1990).

[117] Paul Huth, *Deterrence and International Conflict*, 2 ANN. REV. POLI. SCI. 25, 38 (1999); id. ("Leaders can claim that defender concessions on certain issues were a major gain, or that a defender's willingness to negotiate was a promising diplomatic development. In either case, foreign policy leaders can use even limited accommodative diplomatic actions of the defender to fend off domestic or foreign political adversaries who claim that the government of the would-be attacker state has retreated under pressure.").

A. Inducing Humanitarian Justifications

One issue raised in the preceding discussion is that humanitarian justifications might not appear early or emphatically enough in a dispute to change the course of hostilities. As discussed above, this concern is, if anything, a reason to reject the pretext objection to legalizing UHI.[118] Nevertheless, the preceding discussion reveals potential pacifying effects from inspiring aggressive states to use humanitarian justifications for escalating hostilities. That discussion should, therefore, encourage us to consider additional ways to mobilize—early and often—the sociological forces that produce such results.

The mechanisms identified in Part II involve institutional dynamics within domestic political process. Beyond the important step of legalizing UHI, the international legal regime could attempt to bolster those effects even further. First, in terms of procedural rules, a robust notification system could amplify the salience of officially promulgated justifications by requiring states to report measures taken in exercise of the right of humanitarian intervention. The forum for reporting should emphasize features such as publicity, accessibility, and transparency. A reporting process could yield additional benefits by specifically encouraging or reinforcing the participation of members of the national bureaucracy in the process of justification.[119]

Second, in terms of substantive rules, various approaches might help to inspire the invocation of humanitarian justifications at an early phase of hostilities. For example, one might consider attribution rules that determine when a state is legally responsible for the acts of armed opposition groups that it supports within a foreign country.[120] Attribution rules may offer an exceptional opportunity to influence the course of a conflict because they often concern an initial stage, or lower level, of hostilities.[121] This area of law is currently in flux,

---

[118] *See* discussion *supra* __.

[119] Reporting procedures could also promote linkages with specific national counterparts to encourage the participation of members of particular epistemic communities (such as human rights and humanitarian experts). The important point is to strengthen blowback effects by fostering bureaucratic politics and the involvement of particular epistemic communities in order to help build and entrench humanitarian justifications.

[120] *See* General Assembly Res. No 56/83, UN Doc No A/RES/56/83, Annex, at art. 8 (2001) (annex containing Draft Articles on Responsibility of States for Internationally Wrongful Acts).

[121] At the stage in which attribution for foreign support of armed opposition groups is most relevant, revisionist states frequently have not openly or fully committed to intervention.

and the threshold of responsibility appears to differ in various contexts.[122] One option is to apply a higher threshold in determining attribution for use of force issues. The question would arise, for instance, in considering whether a revisionist state is responsible for an "armed attack" and, accordingly, whether the right of self-defense and collective-self defense is available for the defender. The generic rule could set a low threshold for triggering state attribution, and a higher threshold would apply for humanitarian efforts.[123] The important point here is to encourage leaders in revisionist states to characterize or rationalize their early steps in a conflict according to the purposes of humanitarian intervention. That goal should inspire creative thinking about other substantive doctrines collaterally related to the use of force.

## B. Rational Learning by Governmental Leaders

A critic might contend that the constraining dynamics, described in Part II, should be self-defeating over time. That is, a critic could argue that if the invocation of a humanitarian pretext tends to constrain leaders' subsequent action, rational leaders will learn not to adopt the initial invocation. First and foremost, it is important to relate such an argument to the central project of this Article. The critic's contention, if valid, repudiates the pretext objection to legalizing UHI. Although this line of argument is not the one I have pursued, it would reach the same conclusion. That is, one could accept, first, that the analysis in Part II shows that initial justifications subsequently constrain leaders' actions and, second, that leaders will learn over time not to promulgate those justifications. Accordingly, the blowback effects—rather than constraining leaders' subsequent action—will constrain leaders' *ex ante* willingness and ability to use the humanitarian justification as a pretext.

Nevertheless, several reasons suggest rational learning will not operate in the manner described by the critic, and thus this objection provides no reason to reject the analysis in Part II. First, this notion of rational learning rests on questionable empirical grounds. The various studies of strategic myths and blowback effects demonstrate that leaders, time and again, trap themselves in

---

[122] *See* Report of the International Law Commission on the work of its Fifty-third session, UN Doc No A/56/10 at 59, 103-09 (2001) (discussing Prosecutor v. Tadic, Case No. IT-94-1-I, Judgment, Appeals Chamber (July 15, 1999) & Military and Paramilitary Activities (Nicaragua v. United States), 1986 I.C.J. Rep. 14).

[123] Alternatively, the attribution test could be uniform, and interpretive presumptions or burdens of proof could be adjustable. That is, the same threshold would apply across substantive domains, but revisionist states engaged in humanitarian efforts would enjoy a favorable interpretative presumption in determining whether the facts meet the standard.

justifications that render it difficult to escape self-defeating military behavior. Notably, many of these cases involve situations in which other states already underwent a remarkably similar set of experiences. Hence, cross-national historical learning does not appear to be taking place in these contexts. Second, rational learning might function properly if the leaders are repeat players. However, it is doubtful that the leaders will have a sufficient set of "negative" experiences (unintentional constraints on their actions) from which to learn. And, each time that they do experience such constraints is valuable from the perspective of minimizing aggressive campaigns. Third, leaders may have difficulty in avoiding the process of constraint even if they become aware of it. As mentioned in Part I, international processes of justification may operate as a two-level game with domestic political process. Accordingly, leaders may seek to satisfy international audiences through the use of the pretext despite the risks entailed in subsequent constraints placed on them in the domestic political order. Finally, the mechanism that operates on the international level may not translate into a cost-benefit calculation that can be compared with domestic constraints. Indeed, if the mechanism at the international level is sociological in nature—such as the felt need for legal justification in an effort to conform[124]—such "tradeoffs" might be incommensurable. …

## C. Variations in Domestic Political Structure

This Article focuses on theoretical explanations of the effects of domestic sociopolitical processes. An additional question is, therefore, whether blowback effects "work" within different domestic political structures. Should liberal and illiberal states, for example, be expected to exhibit similar results? . . . [To be completed.]

<div align="center">CONCLUSION</div>

The overarching purpose of this Article has been, first, to identify core assumptions of the pretext objection to legalizing UHI and, second, to subject those assumptions to critical evaluation. The main obstacle to an internationally recognized right of humanitarian intervention is the concern that aggressive states would use the pretext of humanitarianism to launch wars for ulterior motives. In the past few decades, such prudential considerations have stymied the development of a doctrine of humanitarian intervention. Out of these concerns, leading public international law scholars and the great majority of states—including the very states that have engaged in humanitarian intervention—refuse

---

[124] *See, e.g.*, FINNEMORE, supra note __.

to endorse the legality of UHI. If they were relieved of this apprehension, the law could begin to flourish.

Examining the pretext model systematically demonstrates that it rests on flawed understandings of international society and the political foundations of war. Accordingly, this Article substantially vindicates the proposed right of humanitarian intervention, at least against what is widely considered its most significant detraction. In short, concerns about aggressive wars should not forestall the legalization of UHI. Considerable evidence suggests, on the contrary, that legalizing UHI would significantly obstruct recourse to wars of aggression.