

2001

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Recommended Citation

Matheson, Michael J. "Just War and Humanitarian Intervention: Comment on the Grotius Lecture by Professor Jean Bethke Elshtain." *American University International Law Review* 17, no. 1 (2001): 27-33.

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**JUST WAR AND HUMANITARIAN
INTERVENTION: COMMENT ON THE
GROTIUS LECTURE BY PROFESSOR JEAN
BETHKE ELSHTAIN ***

MICHAEL J. MATHESON**

I want first to thank Professor Bradlow for his kind introduction, and to thank the Society for the opportunity to comment on Professor's Elshtain's lecture today. She is clearly a very able political philosopher who has given a great deal of thought to the connections between political problems and ethical concepts, and I think it is very valuable for the international law practitioners and scholars gathered at this Annual Meeting to have the benefit of that perspective with respect to the question of humanitarian intervention.

In fact, it is very interesting to compare the elements of Professor Elshtain's concept of "just war" with the principles of contemporary international law concerning the resort to armed force and the conduct of hostilities. For example, her injunction that war must be only a last resort corresponds to the international legal principle of necessity, which demands that force not be used if alternative

* *Editor's Note:* The Following is a revised version of a response to the Grotius Lecture presented at the American Society of International Law's ("ASIL") 95th Annual Meeting on April 4-7, 2001. The Grotius Lecture Series is co-sponsored by the American University Washington College of Law, the ASIL, and the International Legal Studies Program. The purpose of the Grotius Lecture Series is to open the ASIL forum to distinguished scholars for discussion about new and important voices that might not be heard in international law and to create expanded space and opportunities to explore the intellectual underpinnings of international law and the issues of our time.

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peaceful means of accomplishing the same objective are available.¹ Likewise, her admonition that war must be waged in such a way as to minimize harm to non-combatants is reflected in the law-of-war principles of distinction and proportionality.² And so on. If these are the characteristics of “just war,” then all international lawyers are just warriors.

But of course the application of these principles can be difficult. The most difficult question for contemporary international lawyers with respect to humanitarian intervention has been the question of who may authorize the use of force in pursuit of humanitarian aims—an issue that echoes the historical just-war question of “right authority.”³ I think most observers would now agree that it is essential for the international community to find effective means for dealing with humanitarian catastrophes that threaten civilian lives on a massive scale. I think most would say that if the only effective means for averting such a catastrophe is the use of armed force, such action should be seriously considered—even in the absence of an armed attack that would trigger the right of individual or collective self-defense.

Fortunately, the UN Security Council has ample authority under Chapter VII of the UN Charter to authorize such action, once it determines that there is a threat or breach of the peace.⁴ And in fact, the Council has shown a willingness during the past decade to act on the basis of a robust appreciation of what might constitute such a threat. I think it is hard to imagine a humanitarian catastrophe, which endangers the lives of tens or hundreds of thousands of civilians that

1. See Jean Bethke Elshtain, Third Annual Grotius Lecture at The American Society of International Law and The International Legal Studies Program of the American University Washington College of Law (2001) in 17 AM. U. INT'L L. REV. 1 (2001) (describing the just war principles).

2. See *id.* at 5-7 (discussing the just war principal of non-combatant immunity).

3. See St. Augustine of Hippo, *Against Faustus the Manichaeon* XXII. 73-79, in AUGUSTINE: POLITICAL WRITINGS 222 (Michael W. Tkacz & Douglas Kries, trans., Ernest L. Fortin & Douglas Kries, eds., 1994) (stating that a war must be conducted under a legitimate and lawful authority).

4. See U.N. CHARTER arts. 39-51 (creating the authority for the Security Council to determine threats or breaches of the peace and acts of aggression, and take action concerning such acts).

could not validly be judged by the Council to be a threat to the peace.

Unfortunately, even in the post-Cold War period, it has not always been possible for the Council to exercise this authority. The crisis in Kosovo was one prominent example.⁵ In such a case, international lawyers have struggled with the question of whether regional organizations can lawfully authorize the use of force to end a humanitarian catastrophe—notwithstanding the prohibition in Article 53 of the Charter on “enforcement action” by regional organizations without the authority of the Security Council.⁶ They have also debated whether there are circumstances in which a state or group of states can lawfully use force for the same purpose—notwithstanding the prohibition in Article 2(4) of the Charter on the threat or use of force “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁷ These remain difficult and unresolved questions that go to the heart of the legitimacy of the use of power and armed force in the international community.

Generally speaking, four schools of thought have emerged. One school takes the view that international law permits military intervention by states or groups of states in such cases and that such intervention can be morally and politically justifiable. Another school takes the view that international law does not currently permit such action, but that it would be desirable to modify the law to permit such intervention in at least some circumstances, and that such a modification may now be under way in state practice. A third school takes the view that international law does not permit such action and that such action should not be taken in the absence of authorization by the Council, on the grounds that it would threaten the peace and the integrity of the legal structure. Finally, a fourth school takes the view that such intervention is not and should not be recognized as lawful, but that it would nonetheless be justifiable to

5. See Louis Henkin et al., *NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824 (1999) (evaluating NATO's unilateral intervention in Kosovo since the U.N. powers were limited by the threat of a Security Council veto).

6. See U.N. CHARTER art. 53, para. 1 (providing that with some exceptions that are no longer relevant, regional agencies cannot take action without the Security Council's authorization).

7. U.N. CHARTER art. 2, para. 4.

take such action in extraordinary circumstances, notwithstanding the lack of legal sanction. Obviously this debate involves fundamental political and ethical, as well as legal, issues.

Professor Elshtain acknowledges these problems, but the focus of her lecture is on what she refers to as the “*in bello* dimensions of the just war”—that is, the means by which force is used once a decision is taken to intervene for humanitarian purposes.⁸ This too is an important area of debate among international lawyers and policy-makers. Here Professor Elshtain very rightly reminds us that ethical considerations must play an important part in policy-making, not only with respect to the decision to use force in a particular situation, but also the means by which such force is used and the measures adopted after the conflict is over. She correctly emphasizes that the rightness of the cause for which force is used should not obviate a need to scrutinize the actual effect of the means used to achieve that just cause.⁹

Here, however, there is obviously room for differing judgments in particular cases, and I do find myself in disagreement with Professor Elshtain’s conclusions as to some specific aspects of the Gulf and Kosovo conflicts. In the case of the Gulf War, Professor Elshtain seems to accept that the overall level of Iraqi civilian casualties—while regrettable in human terms—was tolerable in light of military requirements. But on the other hand, she evidently considers unacceptable the civilian casualties produced in the Kosovo campaign by NATO targeting policies and techniques.

I think there is room for question about some of the specific tactical decisions made in the Kosovo air campaign. But on the whole, I do not agree with the extent of Professor Elshtain’s criticism, in light of NATO’s acute focus on potential civilian casualties in its targeting decisions, and the overall low level of collateral civilian casualties when compared to past air campaigns of similar scope and intensity. As we know, the Prosecutor of the International Criminal Tribunal did not believe that the allegations

8. See Elshtain, *supra* note 1, at 8-9 (outlining “*in bello*” rules in just war tradition such as avoiding targeting noncombatants).

9. See Elshtain, *supra* note 1, at 8 (stating just war analysis does not end with whether it is a justifiable cause of substantial importance; the means must also be considered).

that NATO violated the principles concerning indiscriminate attack and distinction in targeting merited further investigation.¹⁰

Much of Professor Elshain's criticism focuses on the extensive and remarkably successful efforts of U.S. commanders to minimize casualties among its forces, which was so notable in both the Gulf and Kosovo conflicts. In the case of the Gulf War, she points to the great disparity between U.S. and Iraqi military casualties. In fact, U.S. commanders made every possible effort to ensure that it would not be an even contest, and I see no legal or ethical problem with this, so long as the casualties inflicted on Iraqi military forces were reasonably directed at ensuring the success of Coalition operations.

A more significant issue is presented by Professor Elshain's assertion that U.S. efforts to protect its pilots in the Kosovo conflict—which she refers to as “combatant immunity”—led improperly to higher levels of civilian casualties. Here again, I think there is room to raise questions about certain NATO tactical decisions, but on the whole I do not agree with the extent of Professor Elshain's criticism. The fact is that NATO commanders went through an intensive and unprecedented level of scrutiny of their operations for the purpose of identifying and minimizing civilian casualties, and I believe this scrutiny was real and not merely formulaic.

I suppose that the alternative to the NATO air campaign might have been a ground campaign. And, in fact, I think there is room, on political and tactical grounds, to question the U.S. announcement at the outset that it would not conduct ground operations against the Federal Republic of Yugoslavia.¹¹ Nonetheless, I think it would be a mistake to think that a NATO ground invasion of Yugoslavia would

10. See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited Sept. 1, 2001) (recommending that no investigation be commenced in relation to the NATO bombing campaign).

11. See *Military Operations in Federal Republic of Yugoslavia Limitation Act of 1999*, H.R. 1569, 106th Cong. (1999) (prohibiting the use of Department of Defense funds from being used for deployment of ground forces in Yugoslavia, with the exception of missions specifically limited to rescuing U.S. military personnel or U.S. citizens in Yugoslavia, or rescuing air crew military personnel of a member nation of NATO).

have been a vindication of humanitarian principles. We have seen from the previous armed conflicts in the former Yugoslavia that ground operations in populated areas can be highly destructive to civilian lives and property. We also know from the Gulf War that the conduct of a ground campaign does not obviate the need for air strikes—if anything, it probably necessitates a wider and more intensive air campaign to ensure the success of ground operations.¹²

The bottom line is that, whatever one's degree of regret about civilian casualties caused by the NATO air campaign—or for that matter, the violence against Serb Kosovars that has occurred despite NATO's efforts to deal with it—the NATO campaign still, in the end, terminated Serb atrocities in Kosovo and brought about the safe return of hundreds of thousands of Kosovar civilians. It is right to debate the legal and ethical questions posed by NATO's armed intervention, but we should not lose sight of these basic facts.

Finally, I agree with Professor Elshain that it is important to scrutinize thoroughly the effect of economic sanctions on the civilian population of the targeted country, and wherever possible to find alternative means of accomplishing the same objectives with less harm to civilians. As I understand it, the Bush Administration is currently looking at ways to do this in the Iraqi context, while still pursuing the objective of keeping Iraq from acquiring weapons of mass destruction and other threatening military capabilities.¹³

We should nonetheless be clear—as Professor Elshain was—as to where the primary responsibility lies for the deprivation that Iraqi civilians have suffered during the course of UN sanctions against Iraq. The Security Council always made exceptions to the embargo for shipments of foodstuffs, medical supplies and other items of humanitarian significance, and repeatedly authorized large sales of Iraqi oil to finance such shipments. Iraq's response for years was to refuse these offers, and then grudgingly to accept them but to continue its attempts to discriminate among Iraqi civilians for

12. See generally *Air Power in the Gulf War*, RAND, at <http://www.rand.org/publications/RB/RB19/RB19.html> (analyzing the use of air power by the United States in the Gulf War).

13. See Sudarsan Raghaven, *Power Moves to Alter Iraq Sanctions*, PHILADELPHIA INQUIRER, Feb. 27, 2001 (stating that Powell sought Arab support to alter U.N. economic sanctions against Iraq).

political purposes. The UN can and should do better in its administration of such sanctions programs, but we need to put the primary blame where it belongs—which is with the current regime in Baghdad.

In any event, I hope that these points of difference with Professor Elshtain over some aspects of her presentation do not overshadow my appreciation of the thrust of her message. She has reminded us that decisions on war and peace—and specifically on the conduct of military operations—must give prominence to ethical as well as political considerations, and that we can learn much from the traditional concepts of just-war thinking. As she has so eloquently pointed out, we can never let the overall justice of a cause obscure the need to ensure that the means we adopt for carrying out that cause serve the interests of justice and preserve—to the maximum extent possible—the safety of the civilian population on both sides.