HUMANITARIAN INTERVENTION AND PRETEXTS FOR WAR

By Ryan Goodman*

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 authorization? That question has acquired even greater significance in the wake of military interventions in Kosovo and Iraq, and nonintervention in the Sudan. Conceived deliberation on these issues, however, has reached an impasse. A key obstacle to legalizing unilateral humanitarian intervention (UHI)2 is the overriding concern that states would use the pretext of humanitarian intervention to wage wars for ulterior motives. In this article, I argue that it is just as likely, or even more likely, that the impact on states would be the opposite. Drawing on recent empirical studies, I contend that legalizing UHI should in important respects discourage wars with ulterior motives, and I discuss changes to international legal institutions that would amplify that potential effect.

The concern that states would exploit a humanitarian exception to justify military aggression has long dominated academic and governmental debates. This concern pits the virtues of humanitarian rescue against the horror of having expanded opportunities for aggressive war. Dating back to Grotius, proponents of legalizing humanitarian intervention have struggled with the objection that their proposals would be abused as a pretext for war.3 The proponents

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1 See UN Press Release SG/SM/7136 (Sept. 20, 1999) (Kofi Annan explaining that humanitarian intervention presents a "core challenge to the Security Council and the United Nations as a whole in the next century"); see also David J. Bederman, Globalization, International Law and United States Foreign Policy, 50 EMORY L.J. 717 (2001) ("humanitarian interventions have . . . become a central issue of the foreign policies of many nations, great powers and small nations alike").

2 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 & Robert O. Keohane eds., 2003).

3 The legal doctrine of humanitarian intervention traces its roots to the treatise by the seventeenth-century Dutch jurist Hugo Grotius. Upon introducing the idea, Grotius tackled the prospect of its being abused as a pretext for war. 2 HUGO GROTIIUS, DE JURE BELLII AC PACIS LIBRI TRES, ch. XXX, pt. VIII(4) (Carnegie ed., Francis W. 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
were most influential in the late nineteenth century—admittedly a period in which international law permitted states to use force on many and varied grounds (and imperialism reigned). In the contemporary era, however, the proponents have essentially lost the debate. The terms of discussion have shifted at various points, and NATO’s intervention in Kosovo has, in particular, spurred one of the most nuanced discussions about the propriety of UHI and the ability to regulate it in the post—Cold War period. Nevertheless, the consensus of opinion among governments and jurists favors requiring Security Council approval for humanitarian intervention. And the pretext objection has been a significant factor in shaping that perspective; over the past few decades, it has figured importantly in the analyses of leading public international law scholars—including Richard Bilder, Ian Brownlie, Thomas Franck, Louis Henkin, Grotius to task specifically on the pretext issue. See Emer de Vattel, The Law of Nations bk. II, ch. i, §7 (Joseph Chtriy trans., 1879) (1758) ("What led [Grotius] into this error, was, his attributing to every independent man, and of course to every 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 the sacrifices of nations and empires to which he contended into the nineteenth century."

4 See generally Murphy, supra note 2; see also James Mayall, The Concept of Humanitarian Intervention Revisited, in Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship 319 (Albrecht Schnabel & Ramesh Thakur eds., 2000).

5 See, e.g., Editorial Comments: NATO's Kosovo Intervention, 93 AJIL 824 (1999) (including essays by Jonathan I. Charney, Christine M. Chinkin, Richard A. Falk, Thomas M. Franck, Louis Henkin, W. Michael Reisman, and Ruth Wedgewood); Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, 10 EUR. J. INT'L L. 1 (1999); Antonio Cassese, Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community? id. at 23.

6 In the past five years, more than 133 states (representing approximately 80 percent of the world’s population) have issued individual or joint statements rejecting the legalization of UHI. See infra text accompanying note 26. The weight of academic opinion is also against it. Richard B. Bilder, Kosovo and the "New Interventionism": Promise or Peril? 9 TRANSNAT'L & POLY 153, 161 (1999) ("most scholars have rejected the claim that humanitarian intervention is a legitimate exception to the prohibition of the use of force in the UN Charter"); Anthony Clark Arend & Robert J. Beck, International Law and the Use of Force: Beyond the UN Charter Paradigm 131 (1993) (describing view of the "majority of scholars"); Oscher Wachtler, The Right of States to Use Armed Force, 82 MICH. L. REV. 1620, 1629 (1984) ("governments 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 7, at 160–61 ("historically, 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 Brownlie, Humanitarian Intervention, in LAW AND CIVIL WAR IN THE MODERN WORLD 217–28 (John Norton Moore ed., 1974); 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 & Nigel S. Rodley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, 67 AJIL 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."). Although Franck subsequently modified his position, he maintains that the use of force regime is not ready for a humanitarian exception due to the prospect of self-serving interpretations by intervening states. See Thomas Franck, Comments on Chapters 7 and 8, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 264, 265, 267 (Michael Byers & Georg Nolte eds., 2003); Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks 172, 185–86 (2002); Thomas M. Franck, Interpretation and Change in the Law of Humanitarian Intervention, in Humanitarian Intervention: Ethical, Legal and Political Dimensions, supra note 2, at 204, 229–31.

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
Oscar Schachter,12 Bruno Simma,13 and Jane Stromseth14—who have argued against legalizing UHI.15 For the same reason, many governments have opposed legalizing UHI,16 and even in the case of governments that have engaged in humanitarian intervention without Security Council approval, there has been a reluctance to justify such actions by reference to a right to engage in UHI.17

The overriding concern about pretext wars turns on assumptions about state opportunism and the power of both law and perceived 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 on state conduct. Fortunately, an abundance of social science research addresses many of these subjects. Of special interest for this article are theoretical and empirical insights into the relationship between international and domestic 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 AJIL 824 (1999).

12 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.”).

13 Simma, supra note 6, at 5 (favorably quoting earlier British government’s view that “the scope for abusing such a right argues strongly against its creation” 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”).

14 Jane Stromseth, Rethinking Humanitarian Intervention: The Case for Incremental Change, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DIMENSIONS, supra note 2, at 232, 257 (rejecting notion that “formal adoption of a legal doctrine of humanitarian intervention with specified criteria would lessen the prospect of unwarranted, pretextual interventions” and arguing that “[e]stablishing an additional legal basis for resort to force, albeit with criteria attached, would provide another theory under which states determined to use force can seek to justify their actions”). Stromseth supports the gradual normative acceptance of UHI. However, she rejects proposals to codify or legally enshrine a right of UHI anytime soon.

15 See also HANS KÖCHLER, GLOBAL JUSTICE OR GLOBAL REVENGE?: INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS 313 (2003) (“in an environment in which no checks and balances exist to restrain the arbitrary use of power[,] ‘[h]umanitarian 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’”); Yoram Dinsteins, War, Aggression and Self-Defence 67 (2001) (“Commentators have drawn comparisons between ‘humanitarian intervention’ and medieval just war criteria. . . . As a rule, interventionists believe that they are pursuing 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.”); Jules Lobel & Michael Ratner, Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime, 93 AJIL 124, 153 (1999) (arguing that “great powers can use humanitarian concerns to mask geopolitical interest”); Michael Akehurst, Humanitarian Intervention, in INTERVENTION IN WORLD POLITICS 95, 111 (Hedley Bull ed., 1984).

16 See, e.g., United Kingdom Foreign Office, Pol’y Doc. No. 148, reprinted in 1986 BRIT. Y.B. INT’L L. 614, 619 (“the 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”); UN SCOR, 54th Sess., 4011th mtg. at 9, UN Doc. S/PV.4011 (June 10, 1999) (government of China arguing that UHI “promote[s] hegemonism under the pretext of human rights”); see also SCHACHTER, supra note 7, 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 acutely sensitive to this danger and show no disposition to open article 2(4) up to a broad exception for humanitarian intervention . . . .”).

17 Nicholas J. Wheeler, The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 29, 42 (Jennifer M. Welsh ed., 2004) (discussing concerns of the United States regarding pretext wars); Franck, supra note 10, at 170 (discussing concerns of the Netherlands regarding pretext wars); cf. Simon Chesterman, Hard Cases Make Bad Law: Law, Ethics and Politics in Humanitarian Intervention, in JUST INTERVENTION 46, 50 (Anthony F. Lang Jr. ed., 2003) (“Interestingly, despite the efforts by some legal scholars to argue for the existence of a right of humanitarian intervention, states themselves have continued to prove very reluctant to embrace such a right—even in defense of their own actions. . . . This reluctance appears to have stemmed in part from recognition that such a legal argument is dubious, but also that if any such right were embraced, it might well be used by other states in other situations.”); Antonio Cassese, A Follow-up: Forcible Humanitarian Countermeasures and Opinio Necessitatis, 10 EUR. J. INT’L L. 791, 792–93 (1999) (discussing concerns of Germany and Belgium not to set “precedent” for UHI); Byers & Chesterman, supra note 2, at 198–200.
political process. Indeed, an important development in political science research recognizes that international relations and domestic politics are interrelated and that those connections are central to explaining the causes of war. Whether a permissive international legal environment for humanitarian justifications would spur undesirable uses of force should accordingly be analyzed with these institutional dynamics in mind.

This article analyzes the determinants of war largely using available quantitative research and other political science studies. From this methodological vantage point, the gruesome nature of war may seem to recede into the background. Its presence is always felt, however. Since the patterns of interstate hostilities allow for such systematic analysis, it is crucial to examine closely whether laws designed to regulate the use of force are accordingly more or less likely to promote violence between states.

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 argument. In part II, I contend that academic discussions about the pretext objection do not adequately consider the sociological consequences of being required to justify starting a war. In particular, I contend that encouraging aggressive states to justify using force as an exercise of humanitarian intervention can facilitate conditions for peace between those states and their prospective targets. This result is, of course, paradoxical, but it is grounded in empirical studies of unintended constraints on state action. As the discussion in part II demonstrates, 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 an ongoing military effort, can reshape domestic political arrangements and the character of interstate relations that lead to war. In its most provocative form, my argument is that—compared to the existing baseline of interstate disputes that might escalate into war between such aggressor and defending states—the net effect on war would be desirable. That said, I do not purport to offer a comprehensive defense of UHI, and I do not suggest that these effects provide an affirmative justification to legalize UHI. I suggest only that they discredit the pretext objection. I also focus on just this one objection and address other concerns only insofar as they relate to the pretext issue. The essential point is that the very conditions that commentators suggest would unleash pretext wars by aggressive states may, in general and on average, temper the bellicose behavior of those states. In part III, I consider potential objections and refinements to the preceding analysis.

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 by states that use the pretext of humanitarianism. If this position is correct, concerns about pretext wars should be retired. The modest position, which is more easily defended, is also highly important. It holds that some aggressive wars that would be fought in the current legal regime would not be fought in a regime 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 prevalence of aggressive wars would likely be higher or lower than the status quo. Common to both positions is the insight that legalizing UHI holds the prospect of restraining some aggressive wars. Once

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the dynamics that produce those restraints are understood, institutional schemes can be
designed to strengthen and support them.

At bottom, a leading prudential objection to legalizing UHI rests on questionable assump-
tions. Those assumptions concern the effects of legal change on state behavior. Given the
potential advantages of authorizing states to stop genocides and similar atrocities, misconce-
tions of countervailing effects of proposed legal changes must be corrected, and efforts to mit-
igate such effects should be closely considered.

I. THE MODEL OF PRETEXT WARS

In this part, I first outline the contemporary international law on UHI. This analysis is rel-
atively synoptic, as the issue is amply covered elsewhere.\(^{19}\) Second, I analyze the pretext objec-
tion to legalizing UHI. This discussion is necessarily more detailed, because an exposition of
the components of the objection has not been presented before.

The Law Against Unilateral Humanitarian Intervention

Since World War II, international law has prohibited states from threatening or using force
except in self-defense or pursuant to Security Council authorization. Although some scholars
have argued otherwise,\(^ {20} \) it is difficult to escape the conclusion that international law forbids
the unilateral use of force to rescue victims of a humanitarian catastrophe. As a matter of treaty
law, the UN Charter does not exempt UHI from the prohibition on the use of force,\(^ {21} \) and
prominent General Assembly resolutions clearly support this interpretation.\(^ {22} \) As a matter of
customary international law, the International Court of Justice in \textit{Nicaragua v. United States}
concluded that custom does not permit UHI.\(^ {23} \) And according to leading international law
treatises, despite divergent state practices in the 1990s, the legal prohibition persists under both
treaty and custom.\(^ {24} \)

\(^{19}\) See, e.g., Adam Roberts, \textit{The So-Called “Right” of Humanitarian Intervention}, 2001 Y.B. INT’L
HUMANITARIAN L. 3; DANISH INST. INT’L AFF., \textit{HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL
ASPECTS} 77–95 (1999), \textit{at} <www.dupi.dk/www.dupi.dk/htdocs/en11240.ssi>; Tom J. Farer, \textit{An Inquiry into the Legitimacy
of Humanitarian Intervention, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER} 185 (Lori Fisler Dam-

\(^{20}\) For one of the most persuasive arguments that UHI is lawful, see Christopher Greenwood, \textit{Humanitarian


\(^{22}\) See Definition of Aggression, GA Res. 3314 (XXIX) (Dec. 14, 1974); Declaration on Principles of Interna-
tional Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the
United Nations, GA Res. 2625 (XXV) (Oct. 24, 1970); see also Declaration on the Inadmissibility of Intervention
and Interference in the Internal Affairs of States, GA Res. 36/103 (Dec. 9, 1981).

(June 27) ("While 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 jus-
tification for the conduct of the United States ....").

\(^{24}\) See, e.g., ANTONIO CASSESE, \textit{INTERNATIONAL LAW} 373–74 (2d ed. 2005) (summarizing
the legal authority); IAN BROWNLIE, \textit{PRINCIPLES OF PUBLIC INTERNATIONAL LAW} 710–12 (6th ed. 2003)
(summarizing the legal authority); MALCOLM N. SHAW, \textit{INTERNATIONAL LAW} 1046 (5th ed. 2003)
(summarizing the legal authority); PETER MALANCKZUK, AKERHURST’S \textit{MODERN INTRODUCTION TO
INTERNATIONAL LAW} 221 (7th rev. ed. 1997) (summarizing the legal authority); cf. Anne Ryniker, \textit{The ICRC’s Position on “Humanitarian Intervention,”}
83 INT’L REV. RED CROSS 527, 530–31 (2001) (statement by legal adviser and deputy head of the Legal Division
of the International Committee for the Red Cross); INDEP. INT’L COMM’N ON KOSOVO, \textit{THE KOSOVO REPORT}
To be sure, recent developments indicate that the legal regime may be subject to change in the coming years. Subsequent to ECOWAS interventions in Liberia and Sierra Leone and NATO’s intervention in Kosovo, many commentators agree that some form of exception to the prohibition may be gaining acceptance.\textsuperscript{25} Nevertheless, in the past five years, at least 133 states have issued individual or joint statements opposing legalization.\textsuperscript{26} Additionally, despite the prospect of wide-ranging UN reform, both the 2004 report by the UN High-Level Panel on Threats, Challenges and Changes\textsuperscript{27} and the 2005 report of the secretary-general on UN reform\textsuperscript{28} suggest maintaining the Security Council’s legal monopoly over the use of force for humanitarian purposes. At bottom, the legal prohibition on UHI remains largely in place, and powerful international actors are not inclined to support a fundamental revision of it.\textsuperscript{29}

For the purpose of our discussion, it is important to understand (or recall) the scope of the legal prohibition. The prohibition applies to all uses of force—the full spectrum of interstate violence. The prohibition regulates two practices: the \textit{threat} to use force and the actual \textit{use} of force. The formal rule against UHI categorically bans all these measures. Yet as the analysis in part II demonstrates, we might consider interactions between these various measures, including: whether the use of force short of war for humanitarian purposes may reduce the prevalence of wars, and whether the threat to wage war for humanitarian purposes may reduce the prevalence of states engaging in war.

The remainder of this part explicates the pretext objection to UHI. For the purpose of the analysis, it is important simply to recognize that modern international law precludes UHI. The question is: should it?

\textbf{The Pretext Objection to Legalization}

One might well support a state’s use of force to halt a genocide in a specific instance, yet be concerned about the consequences of openly endorsing a principle preauthorizing humanitarian intervention as a matter of law.\textsuperscript{30} A key concern is how to contain the practical implications

\textsuperscript{25} See, e.g., \textsc{Christine Gray}, \textit{International Law and the Use of Force} 99 (2d ed. 2004); \textsc{Murphy, supra note 2, at 366}; Stromseth, \textit{supra} note 14, at 233; cf \textsc{Indep. Int’l Comm’n on Intervention and State Sovereignty, supra} note 19, at 15–16, 47–51 (discussing emerging practice).

\textsuperscript{26} See, e.g., Declaration of the South Summit, Havana, Cuba, Apr. 10–14, 2000, para. 54, at <http://www.g77.org/Docs/Declaration_G77Summit.htm> (“We reject the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.”); Movement of the Non-aligned Countries, XIII Ministerial Conference, Cartagena, Colombia, Apr. 8–9, 2000, Final Document, para. 263, at <www.nam.gov.za/xiiiminconf/index.html> (“We reject the so-called ‘right’ of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law.”).

\textsuperscript{27} \textsc{Secretary-General’s High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility} 65–66 (2004); cf \textsc{Michael J. Glennon}, \textit{Idealism at the U.N.: The High-Level Panel’s High-Minded Errors}, 129 POL’Y REV. 3 (2005) (criticizing panel’s conclusions regarding Security Council authorization to stop genocide and similar atrocities).


\textsuperscript{29} Cf Alan James, \textit{The Concept of Sovereignty Revisited, in Kosovo and the Challenge of Humanitarian Intervention}, supra note 5, at 334, 342–43 (suggesting Kosovo conflict will not significantly alter legal norms against intervention).

\textsuperscript{30} Oscar Schachter made this distinction plain:

\[\text{[A]} \text{ State or group of States using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned. But, I believe it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.}\]

\textsc{Schachter, supra} note 12, at 126.
of legal authority. As noted earlier, the concern that states would initiate wars by using humanitarianism as a pretext constitutes perhaps "the most compelling" objection to legalization.\footnote{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.").} In order to sharpen the argument, it is worth considering that similar prudential concerns animated the framers of the UN Charter. States designed the use of force regime partly in response to the perceived lessons of World War II. One of the haunting memories 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.\footnote{Dino Krisiotis, 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.").} Perhaps 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 grounds that "Germans as well as the other various nationalities in Czechoslovakia have been maltreated in the unworthiest manner, tortured, . . . [and denied] the right of nations to self-determination," that "[i]n a few weeks the number of refugees who have been driven out has risen to over 120,000," that "the security of more than 3,000,000 human beings" was in jeopardy, and that 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."\footnote{See W. Michael Reisman, Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention, 11 EUR. J. INT’L L. 3, 16 (2000) (describing pretext concerns as "the primary juridical objection" to legalizing UHI).} Hitler’s rhetorical efforts reveal—perhaps in the starkest terms possible—what is at stake with regard to UHI. Such concerns, however, help only to focus, not to answer, the central empirical inquiry. Whether international legal norms that are consistent with such diplomatic representations would (or did) increase the likelihood of military invasion is a fundamentally different question. Whether a permissive legal regime would increase or decrease the aggregate number of aggressive wars is also part of that empirical quandary.\footnote{See, e.g., AMOS YODER, WORLD POLITICS AND THE CAUSES OF WAR SINCE 1914, at 58 (1986).}

It is helpful and important to identify the structure and empirical assumptions of the pretext argument—the case against legalizing UHI. The argument relies on particular conceptions of 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 UHI will affect, even if only on the margins, the use of force by such states. Otherwise, the argument is a nonstarter. Though scholars have advanced slightly different versions of the

\footnotetext[31]{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). Hitler also rallied a base of domestic support for his initial military expansions by asserting that foreign governments were flagrantly violating the right of self-determination of German nationals. Extracts from Speech by Chancellor Adolf Hitler at the National Socialist Party Congress at Nuremberg, Germany (September 12, 1938), in id. at 411, 412.\footnote{Using the Third Reich as an example also raises questions about whether the empirical patterns will vary by regime type. For a description of those aspects of the relevant studies, see infra text accompanying notes 115–18 (discussing expectations of constraining effects on nondemocracies, democracies with significant political cartelization, and democracies with weak political cartelization).}}
pretext argument, their analyses generally contain similar elements, which constitute what I call the "model of pretext wars":

1. Static condition: The leadership of a revisionist state (state R)\(^{37}\) is motivated by self-regarding and aggressive purposes to wage war against a defending state (state D)

2. Dynamic interactions: Expanding the international legal exception increases the likelihood that state R will wage war against state D

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

Element B. The effort to justify escalating hostilities is undertaken in order to convince actors or institutions to relax pressure that they would otherwise apply were state R to attack state D

Element C. The actual or expected reduction of pressure reduces the costs of state R to wage war against state D

Admittedly, there is some evidence supporting aspects of the pretext model. At a general level, empirical studies suggest that international legal institutions can affect patterns of interstate hostilities.\(^ {38}\) More specifically, nontrivial evidence supports particular components of the model. With respect to the first element, states generally do attempt to justify their use of force within the parameters set by international law. Christine Gray finds that

[i]n practice, states making their claims to self-defence try to put forward arguments that will avoid doctrinal controversy and appeal to the widest possible range of states. Especially since the Nicaragua case,\(^ {39}\) 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.\(^ {40}\)

In Recourse to Force, Thomas Franck details both the public justifications advanced by revisionist states and the supporting or opposing arguments made by other governments.\(^ {41}\)

\(^{37}\) The term "revisionist state" is widely used in social scientific studies of war. Here, the term refers to a state that is dissatisfied with status quo conditions prior to the onset of a militarized interstate dispute and that seeks to overturn those conditions through the threat or use of force. See Daniel M. Jones, Stuart A. Bremer, & J. David Singer, Militarized Interstate Disputes, 1816–1992: Rationale, Coding Rules, and Empirical Patterns, 15 CONFLICT MGMT. & PEACE SCI. 163, 178 (1996).


\(^{39}\) [Author's Note: 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.] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 200 (June 27).

\(^{40}\) GRAY, supra note 25, at 99.

\(^{41}\) FRANCK, supra note 10, at 53–108; see also MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE (2003) (analyzing professed normative justifications for use of force over time); 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 and acceptable behavior.").
Other studies support aspects of the first and second elements: states undertake efforts to justify the resort to force in accordance with international legal principles, and these efforts are intended to satisfy particular audiences. In a leading analysis of the origins of war, Richard Lebow identifies a class of international crises in which leaders use pretextual justifications for initiating war. He explains that, across numerous historical cases, leaders “employed strikingly similar means,” if not a “formula,” in articulating justifications for war. One of the principal steps in [this] formula for justifying hostility consists of legitimizing 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.

Other scholars have made similar observations about the tendency of states to employ international legal justifications to persuade domestic and international audiences.

In the balance of this article, I analyze the pretext model and some broader issues that it raises. I do not contest all of the premises of the model. Instead, I offer an affirmative theory that shares some of the same empirical foundations. But my argument also diverges from the pretext model in significant respects. First, exponents of the pretext model fail to articulate a baseline of interstate hostilities for measuring the effect of legalizing UHI. It must be remembered in this context that the level of militarized conflicts is already high; one vital question is whether legalizing UHI might substantially discourage some of those conflicts from erupting into war.

Second, the pretext model does not adequately consider relationships between international and domestic political process. Analyzing structural relationships between these two domains should help in determining the consequences of legalizing UHI. Indeed, the model seemingly accepts what some scholars have called “the felt need for justification”—the desire of leaders to show that their actions conform to international legal norms. Such justificatory appeals, however, have ramifications on the domestic political sphere that are not envisaged by the model. In the discussion below, I consider such ramifications. I also consider how affected domestic political processes can, in turn, influence the escalation of hostilities between states.

43 Id. at 29.
44 Id. at 34 (emphasis added).
45 SCHACHTER, supra note 12, 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 41, at 18, 21 (describing relationship between justifying intervention through rational-legal authority and anticipation of acceptance by other states and domestic publics), 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.").
46 In his famous insider’s account of the Cuban missile crisis, Abram 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 CRISIES AND THE ROLE OF LAW (1974); SCHACHTER, supra note 12, at 110 (discussing “the felt need to issue a legal justification” exhibited by states when resorting to force). Another valuable insider’s account also emphasizes the felt need for legal justification, as experienced by Security Council members during 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). Chayes, in particular, not only identified the experiential need for justification, but also analyzed domestic ramifications that can result from appealing to international legal institutions. The pretext model fails partly because it does not adequately consider ramifications on domestic processes of action.
47 This relationship might be modeled as a two-level game. Robert D. Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 Int’l Org. 427 (1988).
Third, and most fundamentally, the pretext model disregards the sociological effects of the process of justifying the resort to force. The model assumes that leaders’ interests and beliefs remain static. The leaders of state R begin and end with the design to wage an aggressive war against state D. They lack only the opportunity or permissive legal environment to do so. In the following part, I discuss domestic sociopolitical processes that confound this supposedly straight-line, static set of preferences. Indeed, justificatory practices not only build domestic political support, but also change collective beliefs and preferences with respect to the conflict. Those changed domestic conditions have important implications for constraining leaders’ actions and, more specifically, determining whether a dispute will escalate into war.

II. Framing Humanitarian Intervention

Wars result from interactions at the international level—for example, exchanges between adversarial states—coupled with conducive domestic political conditions. Identifying important aspects of these relationships can help to predict the effects of making specific justifications for war more acceptable. In this part, I discuss significant features of the institution of war, including the “steps to war” (that is, those practices adopted by states that increase the likelihood of war); sources of conflict (what states fight over); and the politics of justification (the political mobilization of 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 conditions for peace. As discussed in detail below, justifications that leaders contrive in order to build political support for war can meaningfully constrain subsequent governmental action. An appeal to humanitarian interest as the justification for war can produce two types of pacifying effects. First, it can frame (or reframe) an interstate dispute in a manner that is ultimately less escalatory. That is, non-humanitarian frameworks are, in general and on average, less controllable and more incendiary than humanitarian ones. In this regard, the relevant mechanism involves domestic sociopolitical processes, including public or elite support for foreign military ambitions. Second, the addition of humanitarian issues to an existing framework can facilitate negotiations to avoid war—in particular, by providing opportunities for issue linkage and face-saving settlements. The following discussion analyzes these effects and the associated prospects of averting wars of aggression.

Steps to War

Wars are generally the product of an extended, dynamic process. William Dixon describes interstate conflict as a “dynamic process that unfolds through a series of stages.” 49 Much to the same effect, John Vasquez notes that “wars grow out of a long-term political relationship that has become increasingly intractable, conflictive, and hostile.” 50 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 that recourse to war was an act of last resort. 51 History is replete with examples of states undertaking efforts of justification

49 Dixon, supra note 38, at 656.
50 VASQUEZ, supra note 48, at 42.
51 See, e.g., BROWNLEE, supra note 24, at 21–22.
and employing peaceful and coercive measures before initiating an armed attack.  Even at the point that states begin developing war plans, the process can still be protracted. Accordingly, it is necessary to consider features of the general process and associated patterns of state behavior. We need to understand the conditions under which states progress from an initial stage of a diplomatic dispute to a militarized interstate dispute (MID) and then to the onset of war.

In detailing this process, Vasquez coined an expression—the "steps to war"—to denote practices that states adopt in response to a dispute that 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 authority; engaging in arms builds; and forging military alliances. He contends that these practices have the perversive effect of generating dangerous levels of insecurity, distrust, and hostility between adversaries. Whether Vasquez is correct about these particular practices is not relevant for the moment. Here, the key points are that the road to war generally involves a long-term process, and that changes in domestic political configurations and interstate relations can unintentionally accelerate the speed with which the process unfolds—and increase the likelihood that it will, in the end, lead to war.

Understanding war in these terms has three implications for legalizing UHI. First, considering war as the outcome of a process focuses attention on political interactions during that process and on the sequence of events. Depending on when it occurs, the invocation of humanitarian justifications can shape both how actors respond to the conflict and subsequent steps to war. For example, actions taken in the name of humanitarianism may affect which expert groups are empowered within governmental circles and which collective beliefs about the situation develop in the course of the conflict.

Second, examining the onset of war as a process helps to illuminate not only the theoretical significance of relatively discrete stages in the process, but potential transitions between those stages. Most important in this respect are MIDs—conditions of tension between states that involve a threat to use force, a show of force, or the limited use of force. In considering humanitarian intervention, it is important to recognize that in some cases an aggressive state intends to act only or initially within the realm of an MID. Nevertheless, as Vasquez suggests, steps taken during or in reaction to that MID can escalate into war. As discussed below, the issues around which MIDs are framed can determine the likelihood of such escalation. In other cases, of course, leaders of aggressive states will, from the outset, intend to wage war. Even then,


53 The term "MID" is commonly used in the empirical study of war. An MID involves a conflict short of war that includes a threat, overt display, or use of force. Jones et al., supra note 37, at 168 ("The term 'militarized interstate dispute' refers to united historical cases in which the threat, display or use of military force short of war by one member state is explicitly directed towards the government, official representatives, official forces, property, or territory of another state.").

54 VASQUEZ, supra note 48, at 155.

55 Id. at 153–97.

56 Stuart A. Bremer, Advancing the Scientific Study of War, in THE PROCESS OF WAR, supra note 52, at 1, 12 ("The 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.").

57 Dixon, supra note 38, 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.").

58 See supra note 53.
however, it takes a complicated process to get there. The discussion below also elaborates the stages of that process and the prospect of moving through them.

Third, the "steps," "roads," or "paths" to war—however one puts it—imply a qualification: war does not result from a single or inexorable course of action. Rather, "there are quite a few roads to interstate war, and all of them have fairly frequent exit ramps." If the idea of humanitarian intervention is considered normatively appealing, the task for institutional design is to encourage warranted humanitarian actions to remain on the road to war (solving the Rwanda problem), and to discourage other military actions.

**The Foundation for Using Force**

A vast empirical literature examines the likelihood that an MID will end in war. These studies are especially helpful in analyzing humanitarian intervention and the pretext model. The studies isolate situations in which states are involved in a dispute that exceeds diplomatic disagreement; at least one state has shown an interest in using force against the other. Some MIDs are systematically more likely to result in war, while others are systematically 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 the first of two subsections below, I argue that were revisionist states encouraged to downplay territorial or similarly self-regarding interests and, instead, to justify the initiation or escalation of hostilities on the basis of humanitarian violations, such disputes would be less likely to end in war. These expected patterns likely reflect variations in domestic political and social responses to different issues in dispute. In the second subsection below, I discuss the formation of those domestic conditions and analyze sociopolitical processes through which official justifications, even if disingenuous, can shape collective beliefs and political commitments relating to the dispute.

**Issues matter.** A growing body of social science scholarship demonstrates that the type of issue in dispute can constitute an important variable in shaping the course of interstate hostilities. The first generation of empirical scholarship on the origins of war did not consider this dimension. Political scientists instead concentrated on features of the international system (for example, the distribution of power among states) and on the characteristics of states (for example, forms of domestic governance structures) as the key explanatory variables. Research agendas have broadened considerably, however, in the past fifteen years. In that period, "[s]everal studies have identified substantial differences in conflict behavior over different types of issues." The available evidence shows that states are significantly more inclined to fight over particular types of issues, even in the face of likely overall material and strategic losses. Studies have also illuminated possible causal explanations for these empirical patterns. Specifically,

62 See, e.g., id.; David Carment & Patrick James, Internal Constraints and Interstate Ethnic Conflict: Toward a Crisis-Based Assessment of Irredentism, 39 J. CONFLICT RESOL. 82 (1995). 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 INTERNATIONAL CONFLICT 147 (Paul F. Diehl ed., 1999); Hensel, supra note 61, at 73–74.
domestic (popular and elite) constituencies more readily support bellicose behavior by their
government when certain salient cultural or ideological issues are in contention. Particular
issue areas may also determine the expert communities that gain influence in governmental
circles—a development that can shape the hard-line or soft-line strategies adopted in the course
of the dispute. In short, domestic political organization and processes exert significant influ-
ence 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 pop-
ular database provided by the Correlates of War project. Four factors make the database and
associated studies especially relevant. First, some of the most innovative and useful studies con-
sider 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 (for example, state R and state D). In evaluating the pretext objection, dyadic
studies allow us to understand better the factors that make war between an aggressor and target
state more or less probable.

Second, the dataset takes into account the particular issues in contention. The dataset clas-
sifies three types of issues: (1) territorial claims (“territory”); (2) claims that involve a conflict
with the other state’s foreign policy behavior (“foreign policy”); and (3) claims with respect to
changing the other state’s government (“regime/government”). The last encompasses dis-
putes “pertaining to the type of government of another state or its current regime.” While
that category has some limitations, it is the one into which humanitarian interventions most
closely fit. Conflicts in this category involve the intrusion into the internal affairs of another

63 See infra text accompanying notes 94–95.
64 John A. Vasquez, The Probability of War, 1816–1992, Presidential Address to the International Studies Asso-
ciation, 48 INT’L STUD. Q. 1, 2–3 (2004); VASQUEZ, supra note 48; cf Peter M. Haas, Introduction: Epistemic
Communities and International Policy Coordination, 46 INT’L ORG. 1 (1992) (discussing studies demonstrating effect-
of international regimes in empowering groups with specialized knowledge, and the influence that those groups
exert on institutional processes and policy). For an important insider’s account by a former U.S. assistant secretary
of state for democracy, human rights, and labor, see JOHN SHATTUCK, FREEDOM ON FIRE: HUMAN RIGHTS
WARS AND AMERICA’S RESPONSE 164 (2003) (“Holbrooke understood that Bosnia was a human rights war, and
he supported my participation in the new American-led drive for peace when others sought to exclude me.”).
65 The Correlates of War (COW) dataset is used extensively in political science. See, e.g., <www.correlatesofwar.org/
COW_bibliographic_essay.htm> (“In research reported in fifteen . . . journals that focus on quantitative international
politics, COW was the most frequently cited data project in the period 1974 to 1986; COW accounted for thirty-one
percent of the citations of the eight leading data projects. Furthermore, in a survey conducted in 1984 among one hundred
and sixty-one specialists in international and comparative political research, thirty-nine percent found COW at the top
of the list of currently archived data sets that ‘should be designated national data resources for maintenance, improvement,
and expansion.’”). Meredith Reid Sarkees, Frank Whelon Wayman, & J. David Singer, Intra-state, Intra-state, and Extra-
more than three decades the [COW] Project’s database has served the research needs of most of the quantitative world
politics community, especially in identifying and trying to account for several classes of war . . . throughout the interna-
tional system since 1816.”).
66 John Vasquez & Christopher S. Leskiw, The Origins and War Proneness of Interstate Rivalries, 4 ANN. REV.
POL. SCI. 295, 298 (2001) (describing “consolidated shift” toward using dyadic analysis within origin-of-war stud-
ies); DANIEL S. GELLER & J. DAVID SINGER, NATIONS AT WAR: A SCIENTIFIC STUDY OF INTERNATIONAL
CONFLICT 22–24, 68 (1998) (describing theoretical importance of dyadic analysis); see also Stuart A. Bremer, Dan-
Notably, two-party conflicts represent the vast majority of all militarized interstate disputes in the past two centuries. See
GELLER & SINGER, supra at 22.
67 Jones et al., supra note 37, at 178.
68 Vasquez, supra note 64, at 10.
69 Cf. John A. Tures, Expanding the Issue Correlates of War (ICOW) Project: Regime-Based Claims, Disputes, and
ciation, Minneapolis, MN), at <http://garnet.acns.fsu.edu/~phensel/Research/utures98a.pdf>) (discussing more
comprehensively the coding methods and measurements for humanitarian interventions and other regime-based
conflicts for the ICOW database).
state—a salient characteristic of humanitarian interventions. Also, the category includes military efforts to effectuate "regime change"—an acute form of intervention that has become a primary concern for contemporary opponents of legalizing humanitarian intervention. In terms of coding procedures used for the dataset, these MIDs include: the U.S.-led intervention in Haiti in the early 1990s; the British, French, and U.S. no-fly zones in northern and southern Iraq; and the Nigerian/ECOMOG intervention in Sierra Leone.70

Third, the dataset has begun to include variables that identify the primary and secondary issues in dispute. These variables, which reflect the recognition that disputes often involve multiple issues, allow researchers to examine more carefully whether and how the probability of war correlates with primary and secondary issues in contention.

Fourth, the dataset determines the content of the issues based on the claims explicitly asserted by the revisionist state before the MID.71 This device is well suited for evaluating the pretext model. The coding procedures do not identify issues by trying to draw inferences concerning the actors' actual motivations or underlying interests. The coding procedures track the claims that the revisionist state openly asserts.72

Overall, these variables, coding rules, and associated studies serve us well in analyzing the pretext model and the issues placed on the agenda by the intervening state. Some studies examine the probability that a dispute will escalate into an MID, and others examine the probability that an MID will escalate into war. I discuss both areas of research at different points in the article.73

The available evidence suggests that if a revisionist state is encouraged to portray humanitarian concerns as the basis for escalating hostilities, the road to aggressive war may be diverted; militarized conflicts in which the revisionist state claims to seek 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 represent only a minority of MIDs, those MIDs produce the majority of wars.74 Across several studies of state dyads, the

70 The next closest cognate for humanitarian intervention is the foreign policy category. Indeed, researchers coded the Kosovo conflict primarily as a foreign policy MID with regime/government issues included in later phases of the hostilities. Those coding decisions may reflect that in building support for, and threatening the use of, force, NATO members articulated a rationale based on regional stability and alliance credibility. Notably, in many respects, the distinction between foreign policy MIDs and regime MIDs may not result in a significant empirical difference. As discussed below, the two classes of cases generally exhibit similar empirical patterns of escalation with respect to the issues explored in this article. Indeed, some studies merge regime and foreign policy MIDs into a comparison category for territorial MIDs. See supra note 61; infra note 78. This article relies on the available evidence to make empirically grounded theoretical claims. A research project that specifically measured humanitarian-based MIDs would allow these theoretical claims to be tested. The ICOW database promises to soon offer the means for conducting such analyses. See Tures, supra note 69, at 17; see also ICOW project description, at <http://garnet.acns.fsu.edu/~phensel/icow.html>.

71 John Vasquez & Marie T. Henehan, Territorial Disputes and the Probability of War, 1816–1992, 338 J. PEACE RES. 123, 125 (2001) ("Each dispute is coded in terms of the revision a disputant is trying to bring about.").

72 According to the COW coding procedures, a revisionist state must "openly attempt[] to challenge the pre-dispute condition" by expressly raising one of the three claims before the initiation of an MID. See Jones et al., supra note 37, at 178; cf. Paul D. Senese & John A. Vasquez, A Unified Explanation of Territorial Conflict: Testing the Impact of Sampling Bias, 1919–1992, 47 INT'L STUD. Q. 275, 287 (2003) ("Coding of the substantive content of the revisionist claims are based on objectives stated before the initiation of the MID. . . . In terms of territorial disputes, . . . explicit claims to territory [must have] preceded the MID. The same is true for regime changes . . . .") Notably, as discussed below, pretextual claims can also become internalized as true motivations. See infra subsection on the politics of justification.

73 In this article, I use the best available systematic analyses to analyze the pretext objection. These studies are not specifically tailored, however, to the pretext model. Accordingly, inferences drawn from their findings remain speculative. Another task for the academy is to test empirically the pretext model and its specific propositions. One goal of this article is to identify lines of inquiry worth pursuing further.

results are highly consistent: territorial MIDs have the greatest likelihood of escalating into war; regime MIDs and foreign policy MIDs are substantially less escalatory; and the likelihood attached to regime and foreign policy MIDs tends to be roughly equivalent.

Consider some of the studies that show these correlations. 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 into war within five years of initiation.\(^75\) 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.\(^76\) Another important study compares the probability of MIDs escalating into war against the overall base probability of war.\(^77\) That study finds “only territorial dyadic disputes . . . increase the probability of war . . . [and] both policy and regime [disputes] have a statistically significantly lower probability of going to war than expected by chance.”\(^78\) These patterns also generally adhere across dyads with different balances of power: disputes between major-major states,\(^79\) major-minor states,\(^80\) and minor-minor states.\(^81\) 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.\(^82\) The subsequent conflict also tends to occur sooner after the occurrence of a territorial MID, “with territorial issues producing almost two years less ‘stability’ before the outbreak of the next dispute than other types of issues.”\(^83\)

\(^75\) Senese & Vasquez, supra note 72, at 292–93. 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.

\(^76\) Id. at 285; see also id. (“This indicates that a research design that looks only at whether the current MID escalates into 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.”): cf. Paul D. Senese & John A. Vasquez, Assessing the Steps to War, 35 BRIT. J. POL. SCI. 607, 616 (2005) (explaining that “use of five-year window (or sometimes longer) has a long history in the field”). The authors also conduct an analysis to determine whether individual MIDs escalate into 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. Specifically, with no five-year window, 19.6 percent of territorial, .025 percent of regime, and .004 percent of foreign policy MIDs escalate into war. The difference between regime and foreign policy MIDs, however, is arguably less important 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).

\(^77\) Vasquez & Henehan, supra note 71, at 123.

\(^78\) 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, supra note 62, at 115, available at <http://garnet.acns.fsu.edu/~phensel/Research/chart98.pdf> (using aggregated dispute rather than dyadic model, but finding that “the odds of escalation into war over three times higher for disputes involving territorial issues than for disputes over other types of disputes”) (in subsequent citations to article, page numbers refer to online version); see also Paul D. Senese, Territory, Contiguity, and International Conflict: Assessing a New Joint Explanation, 49 AM. J. POL. SCI. 769 (2005) (tbls. 1b, 2, & 3) (finding that territorial MIDs, between both contiguous states and noncontiguous states, were significantly more likely to escalate into war than nonterritorial MIDs).

\(^79\) In disputes between two major states, territorial disputes show a much higher probability of escalating into war (.42), which is well above the base probability of war (.246). Foreign policy disputes (.177) are nontrivially higher than regime disputes (.056). Vasquez & Henehan, supra note 71, at 135. All variables are statistically significant.

\(^80\) In disputes between major and minor states, territorial disputes again show a much higher probability of escalating into 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.

\(^81\) In disputes between two minor states, territorial disputes retain the highest probability of escalating into war (.235)—again, well above the base probability (.147). Here, regime disputes (.133) are nontrivially higher than foreign policy disputes (.05). Id. However, the regime variable lacks statistical significance.

\(^82\) See Hensel, supra note 78, at 25. Hensel finds that these results persist when different types of resolutions to the initial MID—stalemate, decisive victory, or compromise—are taken into account. Id. at 26–27. Compromise outcomes, however, are not statistically significant. Id. at 27.

\(^83\) Id. at 26.
One might speculate that the issues that dominate disputes between two states—for example, if states have a long-standing dispute over territory—will swamp the effects of recasting a particular MID in humanitarian terms. Another recent study finds, however, that even when controlling for the issue that generally dominates disputes between two particular states, if a single incident involving the threat or use of force (an MID) is cast as reflecting a regime claim instead of a territorial or foreign policy claim, the likelihood that the dispute will escalate into war is significantly reduced. In particular, the probability that the MID will result in war is remarkably lower for regime issues (1.179) than for territorial (1.493) or foreign policy (1.544) issues.

Scholars who have studied the incendiary nature of territorial disputes generally attribute these findings to the cultural and ideological salience of territory within domestic politics, whether popular or elite. Some commentators, however, do not accept such cultural explanations. They assume that the salience of territory corresponds primarily to the state’s security and material interests. On this view, such interstate disputes accord well with realist expectations that territory constitutes a possession over which states fight to maximize absolute or relative power. Nevertheless, systematic analyses of these conflicts provide contrary evidence. Disputes frequently arise over territory of negligible strategic or material value. States take inordinate security risks in claiming materially unimportant territory. Among the most escalatory categories of territorial disputes are irredentist claims involving geographic areas of historical or cultural significance. Weak states frequently initiate territorial disputes with powerful states despite the risk of escalation. Some findings are so dramatic that scholars postulate that the explosive character of territorial MIDs may reflect the influence of innate human tendencies. That observation would suggest not that territorial disputes are inevitable or intractable, but 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. As Paul

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84 This part of the study examines a particular pattern—that is, when an 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.” See Vasquez, supra note 64, at 21.

85 Id. 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. When these additional variables are included, regime MIDs are still less likely to escalate into war (.686) than foreign policy (1.127) or territorial MIDs (1.533). Id. With the variables for arms races and enduring rivalries included, however, the variable for regime MIDs is no longer statistically significant.

86 See, e.g., GARY GOERTZ & PAUL F. DIEHL, TERRITORIAL CHANGES AND INTERNATIONAL POLITICS (1992) (discussing competing schools of thought); 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 realist assumption with respect to territory within, and contiguous to, national borders of a state).


88 See, e.g., HUTH, supra note 87, at 94, 188.


90 See, e.g., HUTH, supra note 87, at 182–83.

91 Senese & Vasquez, supra note 72, at 277; VASQUEZ, supra note 48, at 151–52.

92 Hensel, supra note 78, at 4; Paul K. Huth, Why Are Territorial Disputes Between States a Central Cause of International Conflict? in WHAT DO WE KNOW ABOUT WAR? supra note 59, at 85, 100; David Newman, Real Spaces, Symbolic Spaces: Interrelated Notions of Territory in the Arab-Israeli Conflict, in A ROAD MAP TO WAR, supra note 62, at 3, 16.
Hensel explains, “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 sentiments of pride and honor more rapidly and more intensely than any other type of issue.”

Regardless of whether human traits, nationalism, or other social institutions explain the importance of territory, it is notable that these explanations generally turn on popular or elite support for escalatory action. These theoretical insights are also remarkably consistent with studies that demonstrate the significance of domestic politics for leaders’ ability to deescalate or settle territorial disputes with other states.

To summarize the preceding discussion of issues leading governments to wage war, interstate conflicts framed around particular strategic and symbolically charged issues are especially prone to escalation. The MID studies include highly useful, though admittedly imperfect, proxies for understanding the consistency and magnitude of those empirical patterns. A remaining question is whether persuasive efforts undertaken by political leaders to justify the resort to force can shape popular and elite conceptions about the nature of the dispute.

In the following discussion, I argue that those results can, and should, be expected. I discuss how the official promulgation of pretextual rationales for escalating hostilities can frame—or reframe—shared beliefs and attitudes about a conflict, including the issues at stake. I also analyze how such efforts can, albeit unintentionally, constrain subsequent governmental action. Finally, I briefly discuss how the promotion of such rationales might, as a secondary effect, expand bargaining space for leaders who are interested in averting war.

The politics of justification. In the study of interstate war and crisis management, social scientists have identified a phenomenon alternatively called “blowback,” “propaganda boomerang,” or “strategic culture.” 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 constrain their actions at later stages. To be clear, a very different set of studies address cognitive frameworks that distort how actors perceive options, outcomes, and probabilities in interstate disputes. Those constraints on rational behavior generally inhere in individual psychology. By contrast, “blowback effects” inhere in political and sociological processes.

In some cases,

93 Hensel, supra note 78, at 4 (citation omitted).
94 See, e.g., HUTH, supra note 87, at 183 (“Domestic politics would often lead foreign policy leaders to maintain adversarial relations and to consider the option of diplomatic and military escalation, while calculations of relative military strength and assessments of strategic opportunities as well as constraints would either reinforce or moderate those incentives to act forcefully.”); Vasquez, supra note 74, at 389 (describing studies that show “the main reason disputes recur is that domestic hard-liners, usually for ethnic nationalist reasons, will not let decision makers compromise or defuse issues . . . even when one side faces strong international constraints against doing so”) (citing A. Bikash Roy, Intervention Across Bisecting Borders, 34 J. PEACE RES. 303 (1997)); Huth, supra note 92, at 100.
95 Simmons, supra note 38.
100 Cf. SNYDER, supra note 96, at 31 (distinguishing cognition-based explanations from 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”).
these effects can result from deliberate efforts by political opponents to use leaders’ own policy justifications and factual representations against them. 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 way the dispute is framed.

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 legal categories encourage leaders to make—can shape the content of political discourse.\(^1\)\(^2\) 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 incontrovertibly hostile and to represent unfolding events as an impending security threat. Popular or elite views that form on the basis of these images and associated justifications can restrict leaders’ freedom of action in later phases of the conflict (for example, the ability to make conciliatory gestures toward a rival).

Empirical studies have identified these effects across different 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 that through such appeals those norms and rules may “under some conditions influence[e] the type of policy a country pursues.”\(^2\)\(^3\) 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 George H. W. Bush’s assertion of the international norm of collective security to justify a U.S. military response to Iraq.\(^3\)\(^4\) “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.”\(^4\) At two important junctures, Congress later employed the collective security norm to compel the president to abandon a unilateral strategy and to seek, instead, a UN mandate: first, to enforce trade sanctions through a military blockade, and second, to drive Iraqi forces from Kuwait.\(^5\) Cortell and Davis 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.”\(^6\)

In *Myths of Empire: Domestic Politics and International Ambition*, Jack Snyder identifies deeper forms of socialization that may result from leaders’ efforts to justify the escalation of hostilities with another state. He hypothesizes and ultimately concludes that logrolling among domestic political coalitions explains incidents of self-defeating expansionism by powerful states. The empirical evidence compels Snyder to conclude that blowback effects have significant explanatory power.\(^7\) In several cases that Snyder studies, government officials and opinion leaders promulgated “strategic myths” to justify expansionist policies, and these images

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1. Cf. LEBOW, *supra* note 42, at 29, 34-35 (discussing states’ employing justifications that conform to internationally accepted standards); *supra* text accompanying notes 39-45.
3. Id. at 464-71.
4. Id. at 466.
5. Id. at 465.
6. Id. at 469.
7. See SNYDER, *supra* note 96, 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.
were internalized by members of the public, elites, and, at times, proponents of the rationalizations themselves.\textsuperscript{108} For example, in the Crimean War, members of the British ruling party promoted conceptions of Russian hostility and other security-based rationales to justify foreign military ventures.\textsuperscript{109} The same leaders later found themselves unable to rescind bellicose policies due to hardened public and elite opinions formed around the original myths.\textsuperscript{110} In a comparable effort to justify military ambitions, leaders of Wilhelmine Germany supported strategic myths about the aggressive intentions of potential adversaries (Britain and Russia), the definition of a favorable balance of power, the German nation’s relative strengths, and the prospects of success.\textsuperscript{111} The German leadership was subsequently unable to change course once powerful domestic actors internalized those conceptions. The domestic groups came to expect and demand aggressive behavior abroad and became increasingly unable to recognize flaws in contemporary policies.\textsuperscript{112} Notably, other scholars’ examinations of the historical cases largely support Snyder’s conclusions.\textsuperscript{113} In addition, Charles Kupchan extends these theoretical explanations to strategic myths used to justify self-defeating cooperative foreign policy agendas (not only self-defeating competitive agendas).\textsuperscript{114}

As these historical cases suggest, blowback effects may occur (with some variation) across different regime types—that is, across a range of domestic political systems. This point may appear surprising. One might suppose that illiberal states would be relatively unresponsive to public opinion and thus not susceptible to blowback effects. On this view, such regimes lack internal mechanisms of accountability to exert pressure on governmental leaders. Recent research on state behavior and military conflict, however, provides a more nuanced account. That research suggests the importance of disaggregating illiberal states and understanding internal constraints on political coalitions in nondemocracies.\textsuperscript{115} Specifically, Snyder finds that two types of regimes are highly prone to experiencing blowback: nondemocratic regimes

\textsuperscript{108} Id. at 310; see also id. at 41–42 (discussing blowback effects from justifications associated with a moral mission).

\textsuperscript{109} Id. at 154, 165–74.

\textsuperscript{110} See, e.g., id. at 179–80 ("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.").

\textsuperscript{111} Id. at 75–80, 84–91.

\textsuperscript{112} 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, at 261–66 (1984); GEOFF ELEY, RESHAPING THE GERMAN RIGHT: RADICAL NATIONALISM AND POLITICAL CHANGE AFTER 1894 (1990)). 104 ("Though the elite helps to 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.").

\textsuperscript{113} See, e.g., KUPCHAN, supra note 98, at 9, 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.")., 87–102; Stephen Van Evera, Why Cooperation Failed in 1914, 38 WORLD POL. 80, 83–99 (1985); Van Evera, supra note 96, at 18–20.

\textsuperscript{114} KUPCHAN, supra note 98, at 130–84, 213–67 (discussing British and French cooperative strategies in the European theater preceding World War II).

governed by cartels and democratic regimes with significant cartelization. He identifies two features that accentuate blowback effects in such cases. First, logrolling among cartels encourages the maintenance of strategic myths. Second, a free press and open political space—insti-
tutions that illiberal states lack—provide important checks on strategic mythmaking. Members of the cartelized groups internalize (or fail to distinguish strategic from genuine) discourse justifying military expansion; they can also become entrapped by justificatory discourse used to mobilize mass support for the military effort.

To help explain internalization, 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 loath to contest, and eager to substantiate, those commitments. Lebow calls this dynamic “cognitive closure.” Another scholar has appropriately redescribed the dynamic as sociological in nature, however, and has thus conceptualized the effect as “social closure.”

In a similar vein, Kupchan identifies institutional effects that produce 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.” As a result, members of the bureaucracy become less directed by “inference-based strategic pragmatism” or by “strategic conceptions informed by logic alone.” The originating rationales, along with associated beliefs about the conflict, shape 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. Second, the rationales that leaders 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

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116 Snyder, supra note 96, at 308–11; cf. Cortell & Davis, supra note 102, at 455 (organizing theoretical expectations according to regime types). Snyder concludes that democracies with weaker cartelization also succumb to blowback effects. Snyder, supra note 96, at 309–10. Although Snyder suggests that media freedom and open public debate should help to diminish those effects, id. at 310, a recent case study of the present Iraq conflict casts doubt on the strength of such democratic checks, see Chaim Kaufmann, Threat Inflation and the Failure of the Marketplace of Ideas: The Selling of the Iraq War, 29 INT’L SECURITY 5 (2004). Snyder postulates that individual dictatorships will succumb to blowback effects when the top leadership internalizes strategic myths. Snyder, supra note 96, at 18, 309.

117 Snyder, supra note 96, at 35–37; cf. Reitter & Stam, supra note 115, at 24–25 ("The reason that mixed regimes are most vulnerable is that their oligarchic system of governance makes them especially susceptible to log-
rolling coalitions. . . . Such systems are also more likely to fall prey to imperial mythmaking that makes expansion seem falsely appealing.").

118 Snyder, supra note 96, at 17, 31, 312–14.

19 Id. at 17, 41–42.

120 Lebow, supra note 42, at 153–54, 293.

121 Id. at 154.

121 Rasmussen, supra note 97; Snyder, supra note 96.

123 Kupchan, supra note 98, at 92.

124 Id. at 492–93.

125 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.
(through various causal pathways such as strategic manipulation by political actors, internalization by relevant members of society, and bureaucratic conformity) a new normative equilibrium and shared beliefs about the conflict, its aims, the interests at stake, and the attributes 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 military expansion, they can no longer diverge from it.” In short, these effects suggest the potential strength and durability of humanitarian justifications for escalating hostilities.

These insights can 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 promulgating different justifications. To sharpen this point, a skeptic might argue that the proper implication to draw from studies showing that territorial MID s escalate into war is that those states have an outstanding territorial problem driving them toward war—a situation that is 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. That said, this view relies on a narrow conceptual understanding of the origins of war. As one example, much scholarly attention has been given to “diversionary theories of war” as a path to interstate conflict. Various studies suggest that leaders who pursue aggressive foreign policies to deal with domestic political turmoil will create or accentuate international disputes. Foreign ambitions may also derive 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 more peaceful outcomes by opening avenues for other types of interstate claims to be raised.

Additionally, the skeptic’s view erroneously relies on a sense that wars result from a unitary cause or motivation. Instead, the initiation of a war frequently serves multiple foreign policy objectives and interests (for example, preserving a regional balance of power, global prestige, open sea lanes, alliance relations). Which objectives are emphasized by officials and which interests eventually define the principal framework of the dispute can be relatively flexible. Similarly, leading blowback studies show how foreign policy behaviors can result from the harmonization of diverse domestic interests (for example, logrolled coalitions among parochial groups), though not openly expressed as such; instead, public rationales are offered to legitimize policy, and numerous options exist for how these public representations might be strategically framed. Once again, a goal for international institutions is to encourage representations that avoid explosive, uncontrollable consequences.

Finally, it is incorrect to interpret the empirical studies of MID s as inconsistent with the insights presented here concerning the politics of justification. Indeed, some of the principal researchers speculate that highly plausible explanations of their findings include political

127 As I discuss below, this line of argument—that some paths to war will not be averted—would also discredit the pretext objection as a reason to reject legalizing UHI. See infra text accompanying note 134.
128 Jack S. Levy, The Causes of War and the Conditions of Peace, 1 ANN. REV. POL. SCI. 139, 151–57 (1998) (discussing the literature on “societal-level” explanations, especially including diversionary (such as scapegoating) theories of war).
129 See, e.g., HOLSTI, supra note 87, at 271–84.
130 See, e.g., SNYDER, supra note 96, at 76, 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.”).
opportunism in the initial framing of a dispute and subsequent blowback effects. Paul 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." Huth also suggests 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.132

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’ efforts to justify foreign ambitions on grounds that foster bellicose domestic attitudes:

[Leaders] 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 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 seems too costly.133

At this point, it is important to note how the plausibility of a humanitarian justification might determine its effectiveness. We should expect a humanitarian justification to gain political traction only if it is sufficiently credible. If a government promulgates a highly implausible reason for using force, the proffered rationale would not increase political support for the military initiative, nor would the rationale produce a blowback effect (since the justification would not have taken hold). What factors affect the plausibility of a humanitarian justification and what implications follow?

First, the plausibility of a humanitarian rationale will depend on the factual conditions in state D. A humanitarian justification will be perceived as plausible—and accordingly gain political traction—if grave human rights violations are being committed in state D. Importantly, this constraint narrows the cases in which the justification has practical significance. The relevant cases are those in which the factual conditions in state D fit (or approximate) the reason cited for using force. Blowback effects are unlikely to result from the promulgation of a humanitarian rationale in cases that fall outside those parameters, but the pretext objection is negated in those cases, too. Indeed, the same constraints exist with any legal exception to the prohibition on using force. That is, state R would not receive a political benefit from proffering a permissible basis for intervention that clearly fails to accord with actual events on the ground.

131 Huth, supra note 92, at 100.
132 Id. at 101 (citations omitted).
133 Senese & Vasquez, supra note 72, at 277–78 (citations omitted).
State R, for instance, would not obtain a political benefit in claiming the right to self-defense when state D exhibits zero threat of a military attack. In short, the politics of justification may be effective in garnering political support for the use of force—and in producing blowback effects—but only in cases in which the factual predicate is at least plausible. These factors limit the range of cases in which the humanitarian pretext is usable, and they can explain why the invocation of humanitarianism in certain cases will not produce meaningful political effects.

Second, the plausibility of a humanitarian justification may depend on how it is expressed in conjunction with other rationales for using force. According to a standard version of the pretext model, state R will employ a humanitarian exception to conceal its ulterior motives. On this view, the availability of an authorized humanitarian justification would suppress the articulation of other reasons for escalating hostilities. Similarly, state R would have difficulty in proclaiming humanitarianism as the reason for using force if the proclamation is superficially attached to existing objectives. A meager, formal reference to humanitarianism while military efforts are obviously pursued for other reasons should not obtain the political benefits of a publicly legitimated use of force. The important point is that state R will need to invest considerably in a humanitarian rationale—possibly to the relative exclusion of other (generally less justifiable) reasons. This factor may partially explain why past uses of a humanitarian rationale failed to gain meaningful political traction, even though the factual predicate was potentially meritorious (an issue that I explore later with respect to the United States’ 2003 invasion of Iraq).

Some of the points just discussed might cast doubt on whether a humanitarian rationale can alter the course of events if leaders have already embarked on different justifications; that is, preexisting public rationales may preclude leaders from reframing a dispute along humanitarian lines. This observation raises a legitimate concern but does not undermine the present analysis of UHI. First, to the extent that preexisting rationales foreclose the promulgation of alternative rationales, the pretext objection to legalizing UHI loses its force; that is, concerns about states’ abuse of a humanitarian exception are misplaced or exaggerated if leaders are unable to succeed with a justification after having espoused an earlier one.134 Second, such considerations regarding the impact of preexisting rationale should, if anything, add support to the project of fashioning institutions to take account of empirical patterns of state practice. The prospect of early lock-ins simply helps to establish the tasks for institutional design. Accordingly, in part III, I propose some institutional reforms to encourage the early and emphatic articulation of humanitarian purposes in interstate disputes. Third, recall that the studies on MIDs recognize that multiple issues might be at stake in a dispute. The question is: which issue becomes the principal claim raised by the revisionist state. A humanitarian claim need not completely replace or retire an earlier claim; in such cases, it is more a matter of emphasis.135

Finally, if the assertion of humanitarian claims only supplements—rather than displaces—other issues, a road to war may yet be averted. One means for defusing a crisis involves issue linkage. Accordingly, the introduction of humanitarian issues can facilitate conflict resolution by expanding bargaining opportunities for trade-offs with other issues in a dispute.136 Moreover, studies of international crises suggest that issue linkage is more likely to succeed when the

134 Indeed, the same may be said for the skeptic’s argument above. See supra text accompanying note 127.

135 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 maintenance of peace between the rivals. See supra text accompanying notes 84–85.

salience ascribed to an issue is different for the disputing parties—a situation we should expect to occur when the issue involves human rights conditions in one of the countries.

Another means for defusing a crisis is to facilitate face-saving compromises. As Senese and Vasquez posit, other disputed issues can propel leaders unwittingly to a point at which they have trouble "bail[ing] out." In this context, the addition of humanitarian issues might reduce the political costs of such a reversal. An "important finding related to crisis bargaining," according to a leading review of the literature by Paul Huth, is that the inclusion of secondary issues can allow leaders to take politically sensitive, pacifying steps that avert war:

[D]iplomatic 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. 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.

In Huth's own work on territorial disputes, he notes that humanitarian issues can provide these types of opportunities for deescalation:

[T]o induce the challenger to make concessions, the terms of a settlement need to be formulated so that leaders can counter charges of appeasement and capitulation. Thus, if claims to territory have to be withdrawn, some form of concessions by the target on policies within the disputed territory (e.g., treatment of ethnic minorities) may be critical to packaging a politically viable agreement.

For such a tactic to work, however, the secondary issue would presumably need to be perceived as a genuine part of the dispute.

Two conflicts—the Kosovo intervention and the recent Iraq war—will help to illustrate these claims. The above discussion analyzes consequences that may ensue when a revisionist state proffers foreign human rights violations as a casus belli. The Kosovo and Iraq conflicts each involved such framing efforts by revisionist states. Both cases therefore potentially illuminate some of the consequences that could ensue were states (legally) encouraged to set forth a humanitarian justification for using force in other disputes.

Consider first the Kosovo intervention. Although not a perfect fit, the conflict illustrates the opportunities for face-saving settlements in a multi-issue dispute. More specifically, the case indicates how a humanitarian rationale can prevent all-out war or deescalate an existing conflict. As I discuss shortly, having proffered a humanitarian justification for initiating force, NATO leaders were able to make politically difficult concessions and deescalate the conflict before it turned into full-scale, ground warfare. The Kosovo conflict thus showcases some of the mechanisms whereby humanitarian justifications could serve the interests of peace at these and other stages in a dispute.

139 HUTH, supra note 87, at 190–91.
The use of force by NATO led “only to a limited military intervention,” and the conflict deescalated once NATO (and Milošević) found political space to make significant concessions. The intervention served multiple interests: securing regional stability, maintaining the credibility of NATO, and protecting human rights. Notably, some commentators doubt whether the last of these rationales genuinely motivated NATO’s actions. We need not resolve that particular question here. It is worth noting, however, that if the official humanitarian justifications were disingenuous, the Kosovo intervention would serve our analytic purposes even better. Regardless of which motivations actually inspired them to act, when government leaders made the commitment to use force, they expected that Milošević would quickly capitulate. Once the conflict was under way, however, member states became increasingly concerned that NATO would have to escalate to ground warfare in order to obtain the concessions initially demanded of Milošević. Indeed, President Clinton and other leaders—especially in Germany and Italy—were reportedly searching for an opportunity to claim success and bring the conflict to an end. NATO ultimately obtained guarantees from Milošević for the protection of Kosovo Albanians but compromised on other significant demands. Political leaders secured an imperfect peace and claimed victory. Notably, some close observers of the conflict argued that NATO had abandoned some of the main objectives of the intervention. Champions of the intervention pointed to the achievements gained and the relatively low number of battle-related deaths. In short, the availability of a humanitarian rationale allowed NATO leaders, in Huth’s terms, “to package[e] a politically viable agreement” and “counter charges of appeasement and capitulation” while retreating from a major military

140 Jean-Marc Coicaud, Solidarity Versus Gestrategy: Kosovo and the Dilemmas of International Democratic Culture, in KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION, supra note 5, at 463, 469.
143 See, e.g., Adam Roberts, NATO’s “Humanitarian War” over Kosovo, 41 SURVIVAL 102, 111 (1999).
146 Michael Mandelbaum poignantly identified significant concessions on the part of NATO members:

[T]he terms on which the bombing ended . . . included important departures from Rambouillet that amount to concessions to the Serbs. The United Nations received ultimate authority for Kosovo, giving Russia, a country friendly to the Serbs, the power of veto. The Rambouillet document had called for a referendum after three years to decide Kosovo’s ultimate status, which would certainly have produced a large majority for independence; the terms on which the war ended made no mention of a referendum. And whereas Rambouillet gave NATO forces unimpeded access to all of Yugoslavia, including Serbia, the June settlement allowed the alliance free rein only in Kosovo.

. . .

. . . [W]hen the war ended, the political question at its heart remained unsettled. That question concerned the proper principle for determining sovereignty.

147 See, e.g., DAALDER & O’HANLON, supra note 144, at 192–94.
commitment and terminating the conflict. In other words, NATO leaders could “claim that [Milošević’s] concessions on certain issues were a major gain,” thereby “fend[ing] off domestic or foreign political adversaries who claim[ed] that the government of the would-be attacker state[s] . . . retreated under pressure.” As a more general lesson, these events indicate how a humanitarian justification in a multi-issue dispute can facilitate opportunities for leaders to bail out of militarized disputes that they do not want to escalate.

Leaders will not always seek opportunities to avert escalation, as the UK and U.S. actions in the recent Iraq war demonstrate. The question is, then, whether the Iraq conflict is a counterexample to the preceding analysis. In that case the U.S. government included humanitarian intervention as one of the potential grounds for invading Iraq, and the conflict nonetheless ended in war. A single contradictory (or consistent) case would not, of course, either repudiate or confirm an analysis of aggregate tendencies of state behavior. Nevertheless, it is helpful to examine the Iraq conflict as a salient case of a humanitarian justification used to promote war. As the following discussion demonstrates, the Iraq conflict does not serve as a counterexample; the case is, instead, consistent with points made above. The Iraq conflict illustrates, in particular, the importance of the politics of justification and the ineffectiveness of an implausible humanitarian rationale.

The political process leading up to the Iraq war shows the importance of justificatory strategies. Borrowing from Snyder’s analysis of strategic myths, Chaim Kaufmann’s case study of the war examines the theoretical significance of various rationales that the Bush administration promulgated for invading Iraq. Most importantly, the administration framed the conflict away from the previously dominant justification (Saddam Hussein’s threat to the region) to a new justification (Saddam Hussein’s direct threat to the U.S. homeland and citizenry). The latter required a concerted strategy of depicting a threat that linked Hussein to transnational terrorism and weapons of mass destruction (WMDs). While the earlier framework created a political consensus favoring military containment, the subsequent framework mobilized support for an attack. A useful supplement to Kaufmann’s analysis might be that the post-9/11 context uniquely amplified the political effect of the more recent framework. Independent of 9/11, however, it was this general justificatory campaign—concentrating on Hussein’s direct threat to U.S. security—that ultimately led to the war.

The Iraq war may illustrate the significance of security-oriented MIDs that dated back to the 1990s. Had the United States spent the previous years framing those hostilities principally around humanitarian conditions inside Iraq rather than around Iraq’s military threat to the region, it may have proven more difficult for the U.S. government to go to war in 2003. At the very least, the late invocation of humanitarian concerns as a justification for the 2003 Iraq war may have been less of a cause for the escalation of hostilities than were the MIDs in years prior. More significantly, the likelihood of war might have been lower had the legal regime encouraged the United States to promulgate humanitarian objectives as the driving force for interstate hostilities during that earlier period.

148 Huth, supra note 87, at 190–91.
149 Huth, supra note 138, at 38.
150 While I proceed with a discussion of the 2003 Iraq war, it deserves emphasis that one data point—one anecdote—would not independently suffice to discredit a systematic analysis of general tendencies and aggregate patterns.
153 See, e.g., id. at 9–13, 30–32.
The Iraq conflict also demonstrates how a humanitarian pretext will fail—either to empower or to constrain leaders—if it is considered implausible. That is, a humanitarian rationale can produce constraining (blowback) effects only if it creates the initial impression assumed by the pretext model: the justification must be both believed and accepted if it is to produce any meaningful social effects. As explained above, this point is straightforward. The political support that state R can achieve in employing a humanitarian pretext will depend on the plausibility of the justification. Plausibility turns, in significant part, on whether the facts of the case match the justificatory rationale. Half-heartedly using a humanitarian justification as a supplement to other reasons for war also undercuts the plausibility of the asserted humanitarian rationale. And if the rationale is unpersuasive, we should not expect its promotion to exert significant influence in building public support or, as a result, in constraining behavior through a blowback mechanism. The road to war will be determined on other grounds.

The humanitarian rationale for invading Iraq was generally not believed or accepted. The human rights conditions in Iraq were conspicuously unlike previous cases in which humanitarian intervention was considered appropriate. Indeed, former Deputy Secretary of Defense Paul Wolfowitz admitted that the administration "settled on the one issue that everyone could agree on which was weapons of mass destruction as the core reason"—rather than "the criminal treatment of the Iraqi people," which he believed was by itself "not a reason to put American kids' lives at risk." As Sean Murphy explains, the agreed "justification . . . reflected a public rejection of the argument for a U.S. invasion based solely on humanitarian grounds." Analyzing the rhetorical efforts preceding the war, Rodger Payne explains that the administration did not sell the war on the basis of a humanitarian justification but instead relied on national security threats. The administration's humanitarian rationale for the conflict came to the fore only after the military defeat of the Hussein regime and the realization that Iraq had no WMDs.

One might assume that even if only a small fraction of the public backed the war for humanitarian reasons, that support might have helped build a political base for military escalation. There is no evidence to conclude, however, that the humanitarian justification was important for any politically significant group; if anything, the administration eschewed promoting such a rationale precisely because the public did not accept it. The public overwhelmingly

156 Tom J. Farer, The Prospect for International Law and Order in the Wake of Iraq, 97 AJIL 621, 626 (2003) ("[I]n Kosovo . . . one could plausibly argue that NATO's attack was responsive to a genuine humanitarian emergency. In Iraq human rights violations were chronic and at the time of the invasion less severe than at various other moments in recent Iraqi history. In no instance in recent history has an intervention been widely perceived as humanitarian where the supposedly triggering violations were chronic.").
159 Rodger A. Payne, Deliberating Preventative War: The Strange Case of Iraq's Disappearing Nuclear Threat (2005) (paper presented at Ridgway Center, Working Group on Preventive and Preemptive Military Intervention, University of Pittsburgh), at <http://www.ridgway-pitt.edu/docs/working_papers/Payne.pdf> ("The primary rationale for the U.S. attack on Iraq was Saddam Hussein's alleged nuclear, chemical and biological weapons stockpiles and programs. Iraq's suspected connections to international terrorism also played an important role in justifying U.S. action. The attack was not sold as a humanitarian or democratizing mission, however; the war was not sold because Hussein was a horrible tyrant.").
160 Analyzing public opinion data, Kaufmann notes that a small fraction of the public favored invading Iraq to protect or liberate the Iraqi people. Kaufman does not indicate whether these individuals also supported the war on independent grounds (for example, to preempt Iraq's use of WMDs). If they did, their numbers would have been even less consequential. Kaufmann, supra note 116, at 31 ("The few polls that asked respondents whether they would favor invading Iraq for objectives such as saving the Iraqi people from Hussein, promoting democracy, or safeguarding oil showed only small minorities in favor.").
favored going to war—and overwhelmingly for national security reasons. In late 2002, “70–90 percent of the American public believed that Hussein would sooner or later attack the United States with weapons of mass destruction.”161 Matching the evolution of the administration’s public positions concerning WMDs and terrorism, public support for the war “rose gradually and more or less steadily to 66 percent in March 2003,”162 and exceeded 70 percent around the time of the invasion.163 Without the overriding belief in the evidence of Hussein’s threat and U.S. security interests, Kaufmann concludes, “the administration probably could not have made a persuasive case for war.”164 He notes that the war “was made possible partly by support from ‘liberal hawks’ who would not have supported a foreign military adventure proposed by a Republican president unless it appeared essential to national security.”165 The humanitarian pretext, in short, did not make a meaningful difference in the escalation of hostilities and should accordingly not be expected to have prevented the war.

Nevertheless, public or elite support for the war along humanitarian lines may have exerted some associated blowback effects. The modicum of acceptance of the humanitarian rationale may have stimulated limited institutional effects (such as bureaucratic closure or the empowerment of particular expert groups). In the Iraq context, those effects, however, overwhelmingly lost to war-promoting frameworks employed to prove that Iraq violated the relevant Security Council arms control resolutions. A lesson from Iraq may therefore be that had greater incentives been provided to revisionist states to frame their military pursuit with emphasis on a humanitarian rationale, the blowback effects might have been amplified.

Important allies also could not be convinced of a humanitarian basis for invasion. The British public, for example, was not moved by humanitarian justifications for invading Iraq.166 And in a secret memorandum to Prime Minister Tony Blair, the British attorney general concluded that the application of a humanitarian rationale to the case of Iraq was unconvincing: “I know of no reason why [the doctrine of humanitarian intervention] would be an appropriate basis for action in present circumstances.”167 Here, too, it appears that the humanitarian justification did not alter the outcome, because it did not gain sufficient traction as a ground for escalating hostilities.

More generally, the Iraq conflict suggests broader lessons for the structure of the international legal regime. The available grounds for lawful use of force encouraged the UK and U.S. governments to emphasize both the gravity of Iraq’s purported breaches of the cease-fire resolution and the imminence of Iraq’s threat to their homelands. The analysis of MIDs suggests that these justificatory strategies can escalate interstate violence. A broader question, not explored here, is whether the international legal regime has the effect of propelling states to take

161 Id. at 30.
162 Id. at 31.
163 See, for example, the survey conducted on behalf of the Pew Research Center for the People & the Press (March 20–22, 2003), at <http://www.pollingreport.com/iraq2.htm>.
164 Kaufmann, supra note 116, at 31.
166 David Chandler, Rhetoric Without Responsibility: The Attraction of “Ethical” Foreign Policy, 5 BRT. J. POL. & INT’L REL. 295, 300 (2003) (describing difficulty for governments in creating “an ‘ethical’ interventionist agenda” in the case of Iraq, since “[t]he British and US publics have never been as enthusiastic as their governments in pursuing conflict with Saddam Hussein. . . . For example, in July 2002 when George W. Bush and Tony Blair prepared the public for a possible military conquest of Iraq, polls showed that only a small, and declining, majority of American people were in favour.”).
such paths as they consider the use of force; it is an open question whether security-based exceptions to the use-of-force prohibition may actually promote war. At the very least, were UHI legal, justifications made in its name should not have such incendiary ramifications.

Summary and Assessment

The model of pretext wars recognizes the importance of institutional pressure on state behavior and the potential of international law to influence that pressure. The model attributes special significance to law in encouraging states to espouse particular justifications for escalating hostilities. The model fails to take into account, however, either the potential sociological effects of justificatory practices or how, in turn, those effects influence the processes that lead to war.

Blowback effects explain the process by which a humanitarian justification can shape popular and elite beliefs—and, ultimately, the decision to wage war. Three mechanisms are most significant: strategic political manipulation, social internalization, and bureaucratic politics. Notably, a standard version of the pretext model assumes that leaders will conceal other motives. In that event, the formal promulgation of a humanitarian justification should exert an even stronger influence across the three mechanisms.

It is not essential, however, for other motives or contested issues to be completely submerged. The argument that I have presented recognizes that states often act from mixed motives and that multiple issues might remain in contention. Indeed, pacifying effects should occur under a variety of conditions—for example, when humanitarian concerns receive the primary emphasis in a justification for war, when they disrupt the salience of alternative frameworks, and when they constitute a secondary issue in crisis bargaining.

The results of framing—or reframing—the escalation of hostilities as an exercise of humanitarian intervention should confound the standard objection to legalizing UHI. MIDs that are framed around a humanitarian objective are systematically less likely to result in war, whereas other MIDs are systematically more likely to spiral into such a military confrontation. Studies suggest that these divergent tendencies result from different popular or elite attitudes about the issues at stake. Particular issues may evoke different degrees of psychic and emotive investment. Additionally, elevating particular issues to serve officially as a casus belli should influence beliefs about the conflict, such as the perceived characteristics and threats posed by the prospective enemy.

Accordingly, significant support exists for both the strong and modest positions discussed earlier. The pretext objection holds that aggressive states will use the banner of humanitarianism to undertake military interventions pursued for ulterior motives. The strong position holds that legalizing UHI should, on balance, discourage aggressive wars between those revisionist states and their prospective targets. Existing studies help provide the foundation for that claim. That is, the research suggests that rationalizing the use of force as a humanitarian intervention should reduce—relative to the existing baseline—the projected level of wars between those states.

The modest position is easier to substantiate but has similar implications. The modest position holds that some wars of aggression that would be fought under the existing legal system would not be fought in a system that permits UHI. It remains possible, however, that on balance, more wars of aggression would be inspired than the number thwarted. Taken together, these dual possibilities undercut the pretext model, which assumes that the risk of aggressive war is unidirectional; that is, the model assumes that legalizing UHI risks only more aggressive wars. The evidence suggests, moreover, that the opposite will be true in many circumstances. Indeed, the number of aggressive wars might be greater in the status quo than in a legal regime
permitting UHI. Accordingly, even on the modest view, the pretext model cannot, by itself, provide a sufficient reason to oppose legalizing UHI.

III. ADDITIONAL CONSIDERATIONS AND COMPLICATIONS

Part I presented the conceptual model of pretext wars. Part II evaluated the plausibility of the model by analyzing the institutional processes that lead states to war. In this part, I consider potential criticisms and refinements of the preceding analysis.

Before addressing these additional considerations, I should clarify a couple of issues. First, it deserves emphasis that this article is intended to serve neither as a comprehensive analysis nor as an affirmative argument for legalizing UHI. Instead, the article considers and refutes a leading objection to legalization. As a consequence, I take no position on broader debates about how the transformation of existing international rules might be effectuated. That is, I do not advocate a particular means for legalizing UHI. Of course, some forms of legalization—such as unilateral violations of customary international law as a process for generating new rules—may have destabilizing effects on the broader use-of-force regime.168 Additionally, even if generally accepted by states, a gradual evolution of customary international law might also conceivably undermine that same regime. That is, state practice and opinio juris that substantially diverge from the UN Charter could perhaps breed disrespect for the overall system. To avoid those kinds of problems, regime architects might choose, instead, an approach that works within or closer to Charter norms. For example, the Security Council could, under Chapter VII, adopt a resolution that essentially preauthors UHI (and perhaps also delineates normative criteria and reporting requirements), or governments could consent to regional arrangements that permit intervention by other states in the event of a humanitarian catastrophe.169 It is important to recognize that such alternative forms of legal reform exist,170 though a comparative evaluation of them is beyond the scope of this project.171

Inducing Humanitarian Justifications

One issue raised above is that humanitarian justifications might not appear early or emphatically enough in a dispute to change the course of hostilities. As discussed previously, this concern

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170 See, e.g., DANISH INST. INT'L AFF., supra note 19, at 111–20 (discussing various “legal-political strategies on humanitarian intervention”).
171 A full evaluation would also have to compare such second-order effects of legal change against the existing baseline: the impact of ongoing practices on use-of-force prohibitions. The Independent International Commission on Kosovo report, supra note 24, at 186, suggested that UHI is, at least in some circles, currently considered “illegal, yet legitimate.” One would have to weigh the extent to which that continuing discrepancy erodes the use-of-force regime. See id. (“Allowing the gap between legality and legitimacy to persist . . . seriously erodes the prohibition on the use of force that the World Court and other authorities have deemed valid. Closely related to this effect, recourse to force without proper UN authorization tends to weaken the authority of, and respect for, the United Nations, especially the [Security Council], in the domain of international peace and security.”). Additionally, if states are discouraged from rescuing victims of mass atrocities due to the existing legal rules, the use-of-force regime may suffer greater disrespect than a system permitting UHL. Cf. id. (“It needs to be observed . . . that a failure to act on behalf of the Kosovars, or a repetition of the Bosnian or Rwandan experience of an insufficient UN mandate and capabilities, would have also weakened the United Nations, probably to a greater degree.”).
is, if anything, a reason to reject the pretext objection to legalizing UHI.\textsuperscript{172} Nevertheless, the empirical evidence reveals potential pacifying effects from inducing aggressive states to assert a humanitarian justification in the course of a dispute. That evidence might encourage us to contemplate additional ways to mobilize—early and often—the sociological forces that produce such results.

The most pertinent mechanisms identified in part II involve institutional dynamics within the domestic political process. Beyond the important step of legalizing UHI, the international legal system could attempt to enhance those effects even further. In terms of procedural rules, a robust notification system (similar to Article 51 of the UN Charter) could amplify the salience of officially promulgated justifications by requiring states to report measures taken in exercise of the right to humanitarian intervention. Within a reporting process, it would be useful to dedicate resources to focus especially on lower-level uses of force and threats to use force (that is, at the MID stage). As is apparent from the analysis presented in part II, this stage in the road to war is much more significant than typically assumed, and how states frame the issues in dispute at the earlier stages may strongly constrain subsequent developments.

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 revisionist state’s national bureaucracy in the process of justification. Reporting procedures could also attempt to promote links with specific national actors or agencies in order 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—to build and entrench humanitarian justifications—by increasing the salience of public representations and fostering bureaucratic politics.

\textit{Rational Learning by Governmental Leaders}

A critic might contend that the constraining dynamics, described in part II, would be self-defeating over time. In particular, the critic might assert that if the invocation of a humanitarian pretext tends to constrain leaders’ subsequent actions, rational leaders will learn not to make the initial invocation. This objection is unavailing. As an initial matter, the line of analysis lacks force with respect to the current project of evaluating the pretext objection; if the critic’s assertions are correct, they would simply provide another ground for rejecting the pretext objection to legalizing UHI. One could accept both that the analysis in part II shows that initial justifications subsequently constrain leaders’ actions and that leaders will learn over time not to promulgate those justifications. On this view, however, the blowback effects—rather than constraining leaders’ subsequent action—will constrain leaders’ \textit{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 this objection thus provides no reason to reject (or replace) 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 justifications that render it difficult to abandon self-defeating military behavior. Notably, many of these cases involve situations in which other states have already undergone a remarkably similar set of experiences. Hence, cross-national historical learning does not appear to be taking place under these circumstances.

\textsuperscript{172} See supra text accompanying note 134.
Second, rational learning might function properly if the leaders are repeat players. It is doubtful, however, that the leaders will have a sufficient set of "negative" experiences (unintentional constraints on their actions) from which to learn. Also, each occasion that they do experience such constraints helps minimize military aggression. More fundamentally, the evidence suggests that shared beliefs and preferences among governing elites may change as a result of blowback effects. In that event, leaders would not be "the same" after the intervening social change. The strength and scope of their interest in evading the constraints may not endure.

Third, leaders may have difficulty in avoiding the process of constraint even if they are aware of it ex ante. As mentioned in part I, the justification for resort to force may operate as a two-level game between international and 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 sphere. Moreover, the mechanism that operates on the international level may not translate into a cost-benefit calculation that can be weighed against 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—such "trade-offs" might be incommensurable in practice.

**Arbitrating Between the Strong and Modest Positions**

Although both the strong and modest positions provide reasons to reject the pretext objection, it is worth analyzing additional factors that could determine which position should prevail. At the very least, this exercise should illuminate future areas of research and inquiry. It may also suggest whether potential empirical arguments remain for salvaging a modified pretext objection. For expositional purposes, consider three categories of MIDs:

1. *Projected MIDs*: MIDs initiated by an aggressive state that will occur regardless of legalizing UHI
2. *Novel MIDs*: MIDs initiated by an aggressive state that will occur as a result of legalizing UHI
3. *Suppressed MIDs*: MIDs initiated by an aggressive state that fail to occur as a result of legalizing UHI

For now, consider more closely the first two categories, which have been the main concern for this article's analysis. In the case of projected MIDs, aggressive states may assert a humanitarian rationale to capture benefits that do not directly bear on the decision whether to initiate an MID. Indeed, even a state that has fully committed itself to war may still engage in such justificatory practices, for example, to reap a legitimacy windfall. As discussed in part II, these efforts—the formation or transformation of projected MIDs around humanitarian issues—should reduce the prevalence of wars.

In the case of novel MIDs, the assumption is that a humanitarian exception would lower the cost of using force and that aggressive states would, on that basis, initiate an MID on pretextual grounds. Simply put, legalizing UHI would render the use or threat of force easier. Even if that legal change was not decisive in the actions of most aggressive states, it could affect behavior that is on the margin. While novel MIDs would be among the least escalatory types—due to their arising under a humanitarian framework—each one would, nevertheless, introduce an

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173 See *supra* text accompanying note 47.

174 See, e.g., FINNEMORE, *supra* note 41; *supra* note 45 (discussing "felt need for justification" despite national security threats).
added risk of war. To minimize aggressive wars, it is obviously better to have no MID than to have one framed as humanitarian.

Given the above, and without knowing the distribution among the categories of cases, it is impossible to evaluate whether the overall number of wars would be lower in a legal system that permits UHI. Admittedly, legalizing UHI could have its most valuable effect in reducing the number of projected MIDs that end in war—especially in view of the baseline prevalence of MIDs: approximately 1,500 such disputes in the period from 1946 to 2001, with a higher than average rate occurring after the end of the Cold War.\footnote{See Hensel, supra note 61, at 64–65 (providing dataset as of 1992); Faten Ghoni & Scott Bennett, Codebook for the Dyadic Militarized Interstate Dispute Data, Version 3.0, at 1 (Oct. 10, 2003), at <http://cow2.la.psu.edu> (providing dataset as of 2001 and noting that approximately three hundred MIDs occurred from 1993 to 2001).} Nevertheless, the number of novel MIDs could, in theory, swamp those positive effects. That is, the impact of defusing projected MIDs could be offset by a large increase in novel ones.

There are three possible resolutions to this empirical quandary. If distributional effects are indeterminate, only the modest position remains compelling. If distributional effects are skewed in favor of defusing projected MIDs and thus lowering the overall base rate of war, the strong position would prevail. If the distributional effects are skewed toward increasing novel MIDs and thus raising the overall risk of war, neither the strong nor the modest position would remain viable. In that event, the pretext objection (or a modified version of it) would be sustained.

Several factors suggest that the distributional effects will be skewed toward defusing projected MIDs (thus lowering the overall rate of war). First, international legal rules will likely have a more direct effect on leaders’ decisions to proffer a particular justification (for using force) than on leaders’ decisions to employ force. This difference should be even more pronounced when dealing with aggressive states pursuing foreign military ambitions. Those states are probably among the least likely to curb their use of force in order to comply with international legal dictates. Such states, however, regularly assert legal justifications for using force. Indeed, states generally engage in such justificatory practices.\footnote{As Martha Finnemore explains, “[e]very intervention leaves a long trail of justification in its wake.” FINNEMORE, supra note 41, at 15. And as Oscar Schachter noted, “in virtually every case the use of force is sought to be justified by reference to the accepted Charter rules.” SCHACHTER, supra note 12, at 110. See also GRAY, supra note 25, at 27 (“with only a tiny number of exceptions [states] take care to offer a legal argument for their use of force”); supra text accompanying notes 39–45.} In sum, international law should exert its greatest and most direct influence on how aggressive states justify the resort to force, not whether they resort to force. The former applies to expected effects on projected MIDs; the latter applies to expected effects on novel MIDs.

Additionally, the dynamics identified in part II should also suppress the incidence of MIDs (the third category of cases). Two processes are important in this regard. The first involves events preceding the stage of militarized hostilities. The second involves positive-feedback effects from projected MIDs.

Consider the interactions preceding militarized hostilities—those at the “dispute-onset stage,” when intense, but nonmilitarized, claims are first raised. Here, suppression effects follow on the logic of novel MIDs. In the case of a novel MID, state R will presumably be encouraged to frame antecedent claims against state D in terms of humanitarian concerns. Such efforts would allow state R to obtain the benefit of legal justification in pursuit of its ulterior motives. Due to the same dynamics identified in part II, however, such initiatives should also generate considerable pacifying effects at an earlier point in the path to war.
Empirical studies suggest that the particular claims raised in an interstate political dispute may influence whether the dispute will escalate into an MID.\textsuperscript{177} That is, blowback effects and escalation effects that apply in the transition from MID to war also apply in the transition from dispute onset to MID. Specifically, many of the case studies identify blowback effects in the general construction of interstate hostilities and expansionism. Additionally, studies suggest that escalatory patterns associated with particular issues occur in the transition from dispute onset to MID. Senese and Vasquez, for example, demonstrate that the differential escalation patterns of territorial, foreign policy, and regime issues at the MID stage exhibit similar empirical patterns at the earlier (pre-MID) dispute-onset stage.\textsuperscript{178} Also, studies based on an independent dataset—which measures whether an intensely contested interstate claim will escalate into armed violence—"produce[] convergent findings" with studies based on the MID dataset.\textsuperscript{179} In sum, creating structural opportunities for states to frame pre-MID claims around humanitarian issues should also suppress the overall number of MIDs.

Changes in projected MIDs may also suppress the prevalence of MIDs through a feedback effect. As discussed in part II, territorial MIDs are nearly twice more likely than nonterritorial MIDs to be followed by a renewed conflict between the same adversaries in the future.\textsuperscript{180} The subsequent conflict also tends to occur in a shorter time period 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."\textsuperscript{181} In short, each MID that is successfully framed around regime issues should reduce the occurrence of subsequent MIDs.

Finally, it is important to consider objections to using evidence of escalation patterns from past MIDs to predict escalation patterns under a prospective legal system. In particular, a critic might question whether changes in the background rule—shifting from a legal prohibition on UHI to a legal endorsement of UHI—might affect the escalatory nature of regime MIDs. For instance, the low escalation of past regime MIDs may be explained, in part, because the default rule—Article 2(4) of the UN Charter—prohibits the use of force for regime change absent the right of self-defense. If the critic is correct, one implication is that, under an international system permitting UHI, novel MIDs could be more escalatory than otherwise predicted. Another implication is that projected MIDs framed by a humanitarian claim may also be more escalatory than otherwise suggested by data generated under a default rule proscribing UHI.

The leading studies should resolve these concerns. First, the data cover periods both preceding and following the establishment of the UN Charter. This feature of the research is important because a strong case could be made that UHI was lawful, or that a permissive legal environment governed UHI, during the pre-Charter period. Hence, the data include regime MIDs under alternative default rules.\textsuperscript{182} Second, a few studies include separate analyses of

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\textsuperscript{177} Paul R. Hensel, Contentious Issues and World Politics, 45 INT'L STUD. Q. 81 (2001); Senese & Vasquez, supra note 72, at 289–90; Vasquez, supra note 74, at 389–90.

\textsuperscript{178} Senese & Vasquez, supra note 72, at 289–90 (discussing findings across three issue areas and disproving selection bias); see also Senese, supra note 78, tbls. 1a, 2, & 3 (finding that territorial disputes, between both contiguous states and noncontiguous states, were significantly more likely than nonterritorial disputes to culminate in MIDs).

\textsuperscript{179} See Vasquez, supra note 74, at 389–90 (discussing Michael Brecher & Jonathan Wilkenfeld, A Study of Crisis (1997)).

\textsuperscript{180} See Hensel, supra note 78, at 25.

\textsuperscript{181} Id. at 26.

pre- and post-1945 periods. One study finds that the patterns of war escalation before the Charter were similar to, or even more pronounced than, some of the findings previously discussed. Indeed, "regime cases exhibit[ed] the lowest propensity for war prior to 1946." The results of another study complement these findings. Accordingly, the pre-Charter evidence does not suggest that we need to revisit or qualify the conclusions reached above.

CONCLUSION

The overarching purposes of this article have been, first, to identify core assumptions of the pretext objection to legalizing UHI, and second, to subject those assumptions to critical evaluation. One of the principal obstacles 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 doctrinal development of humanitarian intervention. Leading public international law scholars and the great majority of states—including states that have engaged in humanitarian intervention—refuse to endorse the legality of UHI for fear of its abuse as a pretext. If they were relieved of this apprehension, a more robust discussion of the legal rules and related institutions could begin to unfold.

Certainly, other objections exist to legalizing UHI, and I have accordingly not purported to offer a comprehensive defense of UHI. The ultimate conclusion of this article is not that UHI should be legalized, but only that the pretext objection should not remain an obstacle to such a development. That said, if we set aside the pretext objection, we might be in a better position to address other concerns about legalizing UHI. For example, one such concern relates to the ambiguity of standards for determining sufficient conditions for the right to intervene. Another is that even humanitarian-minded leaders will misapply the requirement that force be used only as a last resort. While various commentators have articulated principles and other definitional boundaries to regulate interventions and thereby address these concerns, intergovernmental institutions and politically important states have refrained from doing so. This reluctance appears to be substantially based on the view that such formal exercises would be tantamount to discussing the appropriate method of conducting an illegal act. If a leading concern about legalization—the pretext objection—were eliminated, those actors might be more willing to discuss, sharpen, or endorse a set of standards. Such a development could constitute a considerable improvement on a system in which states occasionally engage in de facto UHI—but in which there is no substantial political debate or articulation of formal standards to regulate the practice.

In sum, systematically examining the pretext model demonstrates that it does not sufficiently comprehend important properties of international society and the political foundations of war. Accordingly, this article substantially vindicates the proposed right of humanitarian intervention against what is widely considered its most significant detractor. At bottom, the concern that aggressive states would exploit a humanitarian exception to justify military aggression should not forestall the legalization of UHI. On the contrary, legalizing UHI could significantly inhibit recourse to war by such states.


184 In particular, "the odds of war escalation are 3.25 times higher for territorial disputes than for policy disputes and 7.7 times higher than . . . for regime disputes." Senese & Vasquez, supra note 76, at 622.

185 Id. at 628.

186 Vasquez & Henehan, supra note 71, at 134 (finding that prior to 1946, territorial MIDs exhibit a statistically significant, higher probability of going to war (.475) than foreign policy (.168) and regime (.149) MIDs).

187 See Stromseth, supra note 14, at 262–67; DANISH INST. INT’L AFFAIRS, supra note 19, at 105–06.