Just wars and unjust means ?
International humanitarian law after September 11th

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International Humanitarian Law after September 11th

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Israeli military operations in the Jenin refugee camp, U.S. bombing in Afghanistan, and the intervention of Russia's armed forces in Chechnya all have something in common: the fight against terrorist networks. They also share something else—the refusal to comply with humanitarian law.

Since September 11 and the collapse of the World Trade Center, the ideological face-off which created the Cold War balance of power has rematerialized in the form of a war on terrorism and the "Axis of Evil." The same rules apply, and were set out by G. W. Bush.
On September 20, the American president solemnly declared that this was a global war and that each country, each region, had to choose sides: either they were with the Americans or they were with the terrorists. He warned that any country that continued to harbor or support terrorists would be considered a hostile regime. He also warned that there was no room for neutrality in this conflict. But is there still room in this global conflict for respect for law?
By applying the arguments of a "just war," the President of the U.S. has dragged the world into a political and judicial regression whose theoretical stakes are still poorly understood, but whose practical consequences are already dramatic.
If every war the U.S. fights in the name of the war on terrorism has suddenly become just, what about the means being used?

The entire history of the codification of humanitarian law rests on the separation of *jus ad bellum*—the justification of the use of force— from *jus in bello*—the limits on the use of force. The international political and judicial consensus is now being threatened on both these fronts simultaneously.

Privatization of *jus ad bellum*?

In 1945 the UN charter gave the organization sole right to the use of military force, except in cases of legitimate self-defense. The fall of the Berlin Wall—and the end of the bipolar confrontation which had determined international relations and military strategies—initiated a decade of uncertainty and innovation with regard to doctrine on the the use of international military force. Several Security Council resolutions purposed to shape an international public order which could be defended or imposed by international armed forces and sanctioned by international courts.
During the 1990s, the Security Council concluded that serious violations of humanitarian law and suffering on the part of civilian populations in Iraq, Somalia, the former Yugoslavia and Rwanda constituted threats to peace and international security. On this basis it authorized the use of international force for military humanitarian interventions.

The military strategy chosen and entrusted to UN land forces was based on a doctrine of symbolic deterrence. That this doctrine has been subject to tragic failures is illustrated by the taking of UN soldiers as hostages by the Serbian army in Bosnia and by the massacre of Belgian peacekeepers in Rwanda, as well as by the massacre of Bosnian civilians in Srebrenica in the former Yugoslavia and the Tutsi genocide in Rwanda.

To go beyond these failures, the UN Security Council decided to set up two international ad hoc criminal courts charged with trying those responsible for genocide, war crimes, and crimes against humanity in the former Yugoslavia and Rwanda.

The 1999 military intervention in Kosovo marked a real turning point in the right to use force. NATO nations sidestepped UN authorization by choosing a doctrine of intervention based upon a new, very broad definition of "legitimate self-defense." This choice set a precedent whose consequences have spread well beyond the Balkans. In fact, while NATO was intervening in Kosovo, Russia launched its second war against Chechnya, confident there would be no interference by western military powers. The return to the principle of power blocs has come not from nuclear deterrence, but from security bartering. The U.S. reclaimed the right to wage war in the name of legitimate self-defense, national security, and the war on terrorism.

The "war on terrorism" concept, which has emerged from American discourse and government actions in the aftermath of September 11th, thus marks the return of the "just war" doctrine abolished in 1949 by the Geneva Conventions.

Starting from the principle that war is always just to those making it, humanitarian law clearly affirmed after World War II that the cause of a conflict has no bearing on the limitations to the means and methods of warfare. The Geneva Conventions forbid the use of terror as a means of combat, but they also consider that a war on terror is still a war, thus obligating those waging it to respect the rules established by the Conventions.
This assertion and its consequences for the application of humanitarian law to different forms of armed conflict represented a major advance, calling into question the old proverb about the ends justifying the means.
History has shown that such "just wars" most often turn into total war, in which the ends justify and legitimize the means. In this kind of conflict, the principle of righteousness of the ends replaces the principle of legality of the means: *any means is legal if it is efficient in reaching the righteous end.*
Thus it is not surprising to see legal experts at the highest levels of government working to avoid any application of the law of war to the war on terrorism. The "unsigning" of the ICC treaty by the US can also be seen as a desire to be free of a legal commitment to a precise and binding definition of what constitutes a war crime.

It is technically false to say that existing humanitarian law does not apply to the war on terrorism. History has shown that it is dangerous to entrust control over military activities solely to the democratic process of the countries involved in a conflict.

The conduct of the Vietnam War, the French army in Algeria and the Israeli army in the refugee camps of southern Lebanon prove that a country's democratic nature is no guarantee against abuses in the use of military force.

Weakening of *jus in bello*.

President Bush characterized the September 11 attack against the World Trade Center towers as an act of war. From this flows the question repeatedly asked, without satisfactory answer: Does humanitarian law apply to this kind of conflict?

The answer to this question has both practical and legal consequences not only for the status of detainees and the selection of legitimate military targets, but also for the nature of crimes committed in the use of force by both sides, and how such crimes should be judged.

The real problem facing us today is not the gaps or lack of precision in the law of war, but the political determination to prevent its application. While some lawyers will always argue in favor of the governing power by dissimulating the problem, they would be far more honorable in admitting that as a society we face a radical choice between total war and the law of war.

This is not a technical legal debate. The law of war also governs the legitimacy of political and military decisions on the use of police and military forces. Asking these questions leads us toward fundamental political and democratic choices, for which humanitarian law makes clear the stakes.

Those who reject the relevance and the application of humanitarian law to the present war on terrorism invoke the radically new nature of the conflict and exclude any possibility of reference to rules governing earlier conflicts. The fact that such acts of war could strike US territory is tragically new. But for the rest, for years humanitarian organizations in the field have witnessed conflicts in which the armed parties were non-state actors, acting from another state's territory, financed by illicit trade, and using terror against civilians as a tactic of war.

Clearly this is not the type of conflict that the 1949 Geneva Conventions sought to regulate. But too often we forget to mention that two protocols in 1977 updated the Conventions, taking into account a new type of war emerging through the de-colonization process and the civil wars that followed. The protocols address some of the problems created by this new method of warfare, including, among other things, the blurring of the line between combatant and civilian and the difficulty surrounding the definition of military objectives in such situations. They expanded the definition of combatants to include all those who directly participated in hostilities, whether or not they were members of the armed forces, wore uniforms, or respected humanitarian law. The protocols also set up mechanisms to determine and guarantee the status of civilians who might take some part in hostilities. They established a general framework of principles and mechanisms by which rules can be adapted to deal with new phenomena.

The fact that the US government has not ratified the protocols does not mean it has not accepted and given legal value to these rules. Indeed, many of these provisions have been incorporated into the US Army manual. These include provisions defining

combatants and dealing with the granting of status or guarantees for prisoners of war.
For many years, the diverse realities of wars against terrorism—in Chechnya, Palestine, Algeria, Sri Lanka, and elsewhere—have confronted humanitarian organizations such as MSF in the field. These are not new contexts for us. We had to learn how to work within so-called “rogue states” such as Somalia, and others. There we have faced the same excuses, which seek to deny people any legal protection, either as civilians or as combatants. Characterizing the enemy as “bandits” or “terrorists” is a political stand, while humanitarian law is concerned with “people having taken part in the hostilities.” Violent tactics and a lack of respect for humanitarian law are both justified under the guise of concern for efficiency and humanity. The interests of the population, it is said, are best served by a rapid resolution of the conflict, rather than by establishing protections that risk prolonging the conflict.
In all these countries we see that the intensity of the means is not correlated with efficiency or with a rapid return to peace. For example, after years of extreme and violent war in Chechnya, 75,000 Russian soldiers have not managed to impose order on the approximately 400,000 inhabitants left in the country. In Algeria, the lack of respect for humanitarian law has not allowed a more efficient or rapid military resolution of the war on terrorism, which has ravaged the country for so many years. The many bloody episodes in the struggle between the Israelis and Palestinians prove that it is not a limitation of military means that is endlessly delaying a solution to that conflict.

While the war on terrorism is an age-old phenomenon, since September 11 it has become global and respect for IHL has become a bargaining issue for building diplomatic coalitions. What is new in this context is that the refusal to commit to binding humanitarian law limitations and guarantees comes from democratic states or states pretending to respect the rule of law, while these same states condemn other countries for their violations. Paradoxically it has become more and more difficult for humanitarian organizations present in these conflict areas to to gain diplomatic support from democratic states, to implement relief actions based on the principles of limited war, and

It was not the Taliban, but the US Army that bombed the ICRC warehouses in Kabul. It was the US government that decided to hold prisoners of war in Guantanamo, outside any international or territorial legal framework. And while targeting civilians through suicide bombing or other forms of violence is a war crime, the Israeli government violates the rules concerning occupied territory when it transfers its own population into those settlements. It also violated those rules when it deemed the Jenin refugee camp a legitimate military objective and refused humanitarian access to the camps and evacuation of the wounded for eleven days.
If the problem with terrorism is the difficulty in distinguishing between civilians and combatants, what about US special forces who dress in civilian clothes in Afghanistan, thus camouflaging themselves as humanitarian relief workers?

Everyone knows that this war on terrorism will be long, and that its efficiency will not depend only on military means.

Legitimate compassion for the victims and public support does not constitute an adequate framework for the use of force. It is therefore essential that respect for humanitarian law be clearly placed at the heart of the fight against terrorism.

Throughout history, many European countries have had to deal with terrorism. They know that there is no simple military solution to terrorism.
The creation of the International Criminal Court offers the international community a new way to fight large-scale crimes and criminal policies, which menace the international public order. Its functioning, like the solution to our security problems, depends on the strengthening, not weakening, of links between the use of military force and respect for humanitarian law.

While the United States is very reticent about committing itself and organizing the fight against money laundering, suppressing crimes against humanity and wars crimes, and engaging in arms control, new military technology has made war seem cleaner, and an easier option. But increased defense budgets and reliance on military force will not be enough. While military force can destroy military targets, it does not ensure the maintenance or re-establishment of order. In the face of terrorism, military action alone will always give rise to more questions than it answers about what is a legitimate military target, and how to distinguish between civilians and combatants. It is no surprise that these two pillars of the law of war have already been altered.

Defining how to secure international relations requires more than just getting rid of legal constraints and hiding behind power, even be it a superpower.