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The Liberal Case for Humanitarian Intervention

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I. Introduction

In this article I argue that humanitarian intervention is morally justified in appropriate cases. The argument centrally rests on a standard assumption of liberal political philosophy: a major purpose of states and governments is to protect and secure human rights, that is, rights that all persons have by virtue of personhood alone.² Governments and others in power who seriously violate those rights undermine the one reason that justifies their political power, and thus should not be protected by international law. A corollary of the argument is that, to the extent that state sovereignty

¹ I am indebted to the authors of this volume for the comments and criticisms to earlier drafts. I especially thank Robert Keohane, Jeff Holzgrofe, Elizabeth Kiss, Allen Buchanan, and Guido Pincione. Copyright © Fernando R. Tesón 2001.

² I first made the argument in Fernando R. Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality* (Transnational Publishers, 2nd. edition, 1997) (hereinafter *Humanitarian Intervention*). In this article I try to expand and refine the argument.

is a value, it is an instrumental not an intrinsic value.³ Sovereignty serves valuable human ends; and those who grossly assault them should not be allowed to shield themselves behind the sovereignty principle.⁴ Tyranny and anarchy cause the moral collapse of sovereignty.⁵

I supplement this argument with further moral assumptions. The fact that persons are right-holders has normative consequences for others. We all have (1) the obligation to *respect* those rights; (2) the obligation to *promote* such respect for all persons; (3) depending on the circumstances, the obligation to *rescue* victims of tyranny or anarchy, if we can do so at a reasonable cost. The obligation in (3) analytically entails, under appropriate circumstances, the *right* to rescue such victims –the right of humanitarian

³ For an extended analysis of this idea, see Fernando R. Tesón, *A Philosophy of International Law*, (Westview Press, 1998), chapter 2.

⁴ Most proponents of humanitarian intervention endorse this claim. See Simon Caney, “Humanitarian Intervention and State Sovereignty”, in *Ethics in International Affairs*, edited by Andrew Valls (Rowman & Littlefield, 2000), p.117, 120-121), and authors cited therein. For a more guarded version of the same argument, see Michael Smith, “Humanitarian Intervention: An Overview of the Ethical Issues”, *Ethics and International Affairs* 12: 63, 75-79 (1998).

⁵ As San Augustine said: “In the absence of justice, what is sovereignty but organized brigandage? For what are bands of brigands but petty kingdoms”, *The City of God*, cited by Robert Phillips, “The Ethics of Humanitarian Intervention”, in Robert Phillips & Duane Cady, *Humanitarian Intervention* (Rowman & Littlefield, 1996), p. 1, 6.

intervention. Because human rights are rights held by individuals by virtue of their personhood, they are independent of history, culture, or national borders.

I define permissible humanitarian intervention as the *proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance, aimed at ending tyranny or anarchy, welcomed by the victims, and consistent with the doctrine of double effect.*

I present the argument in Section II. In subsequent sections I consider and reject possible objections: the relativist objection (Section III); the argument that humanitarian intervention violates communal integrity or some similar moral status of national borders (Section IV); the view that governments should refrain from intervening out of respect for international law (Section V); and the view that humanitarian intervention undermines global stability (Section V). Section VI addresses the difficult question of the moral status of acts and omissions. I discuss the conceptual structure of the liberal argument and respond to the objection that humanitarian intervention is wrong because it causes the deaths of innocent persons. I also evaluate the moral status of the failure to intervene and conclude that, depending on the circumstances, it can be morally culpable. In Section VIII I examine the internal legitimacy of humanitarian intervention. Section IX concludes with a few critical reflections about the non-intervention doctrine.

The liberal argument for humanitarian intervention has two components. The first is the quite obvious judgment that the exercise of governmental tyranny and the behavior that typically takes place in situations of extreme anarchy are serious forms of injustice toward persons. The second is the judgment that, subject to important constraints, external intervention is (at least) morally permissible to end that injustice. I suggest

below that the first part of the argument is uncontroversial. For the most part, critics of humanitarian intervention do not disagree with the judgment that the situations that (according to interventionists) call for intervention are morally abhorrent. The situations that trigger humanitarian intervention are acts such as crimes against humanity, serious crime wars, mass murder, genocide, widespread torture, and the Hobbesian state of nature (war of all against all) caused by the collapse of social order.⁶ Rather, the disagreement between supporters and opponents of humanitarian intervention concerns the second part of the argument: interventionists claim that foreigners may help stop the injustices; non-interventionist claim they may not. The related claims from political and moral philosophy that I make (that sovereignty is dependent on justice and that we have a right to assist victims of injustice) concern this second part of the argument. If a situation is morally abhorrent (as non-interventionists, I expect, will concede) then neither the sanctity of national borders nor a general prohibition against war should by themselves preclude humanitarian intervention.

This discussion concerns *forcible* intervention to protect human rights. I address here the use and the threat of military force (what I have elsewhere called hard intervention⁷) for humanitarian purposes. However, the justification for the international protection of human rights is best analyzed as part of a continuum of international behavior. Most of the reasons that justify humanitarian intervention are extensions of the

⁶ I believe that forcible intervention to restore democracy may be justified, not on general moral grounds, but on specific grounds such as agreement or the existence of regional norms to that effect –as is the case, I believe, in Europe and the Americas.

⁷ See my *Humanitarian Intervention*, at pp. 133-136.

general reasons that justify interference⁸ with agents in order to help victims of their unjust behavior. Interference and intervention in other societies to protect human rights are special cases of our duty to assist victims of injustice. However, many people disagree that humanitarian intervention is part of a continuum: they treat war as a special case of violence, as a unique case, and not simply as a more violent and destructive form of human behavior that can nonetheless be sometimes justified. They do not regard war as part of a continuum of state action; and do not agree with Clausewitz that war is the continuation of diplomacy by other means. Intuitively, there is something particularly terrible, or awesome, about war. It is the ultimate form of human violence. That is why many people who are committed to human rights nonetheless oppose humanitarian intervention. To them, war is a crime, the most hideous form of destruction of human life, and so it cannot be right to support war, even for the benign purpose of saving people's lives. Good liberals should not support war in any of its forms.

I am, of course, in sympathy with that view. Who wouldn't be? If there is an obvious proposition in international ethics, it has to be that war is a terrible thing. Yet the deeply ingrained view that war is always immoral regardless of cause is mistaken. Sometimes it is morally permissible to fight; occasionally, fighting is even mandatory. The uncritical opposition to all wars begs the question about the justification of violence

⁸ For terminological convenience, I use the term "intervention" to refer to forcible action. I refer to other forms of action to protect human rights, ranging from regular diplomacy to economic and other sanctions, as "interference."

generally.⁹ Proponents of humanitarian intervention simply argue that humanitarian intervention in some instances (rare ones, to be sure) is morally justified, while agreeing of course that war is generally a bad thing. But it is worth emphasizing here that critics of humanitarian intervention are *not* pacifists. They support the use of force in self-defense and (generally) in performance of actions duly authorized by the Security Council. So their hostility to humanitarian intervention cannot be grounded on a general rejection of war. Part of the task of this article is to examine those other reasons.

II. The Liberal Argument

As I indicated, the liberal defense of humanitarian intervention relies on principles of political and moral philosophy. Political philosophy addresses the justification of political power, and hence the justification of the state. Most liberal accounts of the state rely on social contract theory of some kind to explain and justify the state. Here I follow a Kantian account of the state. States are justified as institutions created by ethical agents, that is, by autonomous persons. The liberal state centrally includes a constitution that defines the powers of governments in a manner consistent with respect for individual autonomy. This Kantian conception of the state is the liberal solution to the dilemmas of anarchy and tyranny. Anarchy and tyranny are the two extremes in a continuum of

⁹ In fact, I believe that the only philosophically coherent (although counterintuitive) opposition to humanitarian intervention is the pacifist position, one that opposes all violence. For a spirited defense of that view, see Robert Holmes, *On War and Morality* (Princeton University Press, 1989)

political coercion. Anarchy is the complete absence of social order, which inevitably leads to a Hobbesian war of all against all. The exigencies of survival compel persons in the state of nature to lead a brutal existence marked by massive assaults on human dignity. This is a case of too little government, as it were. At the other extreme, the perpetration of tyranny¹⁰ is not simply an obvious assault on the dignity of persons: it is a betrayal of the very purpose for which government exists. It is a case of abuse of government -of too much government, as it were.

Humanitarian intervention is one tool to help move the quantum of political freedom in the continuum of political coercion to the Kantian center of that continuum away, on the one hand from the extreme lack of order (anarchy), and on the other from governmental suppression of individual freedom (tyranny.) Anarchical conditions prevent persons, by reason of the total collapse of social order, to conduct meaningful life in common or pursue individual plans of life. Tyrannical conditions (the misuse of social coercion) prevent the victims, by the overuse of state coercion, from pursuing their autonomous projects. If human beings are deprived of their capacity to pursue their autonomous projects, then others owe a duty of beneficence derived from the respect owed to rational persons.¹¹ The serious violation of human rights generates obligations on others. Outsiders (foreign persons, governments, international organizations) have a duty not only to respect those rights themselves but also to help ensure that governments

¹⁰ I use the term “tyranny” as shorthand for gross and widespread human rights abuses. I use the term “anarchy” as shorthand for massive breakup of social order.

¹¹ See the discussion in Nancy Sherman, “Empathy, Respect, and Humanitarian Intervention”, *Ethics and International Affairs* 12: 103 (1998).

respect them.¹² Like justified revolutions, interventions are sometimes needed to secure a modicum of individual autonomy and dignity. Persons trapped in such situations deserve to be rescued, and sometimes the rescue can only be accomplished by force. The right to intervene thus stems from a general duty to assist victims of grievous injustice. We have a general duty to assist persons in grave danger if we can do it at reasonable cost to ourselves. If this is true, we have, by definition, a *right* to do so. I do not think that the critic of humanitarian intervention necessarily disagrees with this in a general sense. Rather, his opposition to humanitarian intervention relies, then, on the supposed moral significance of state sovereignty and national borders.

There has been considerable debate about whether or not the concept of a legitimate state requires a thick liberal account. David Copp and John Rawls, among others, have argued that it does not.¹³ They claim, in only slightly different ways, that legitimacy is unrelated to the duty of obedience, and that liberals generally must respect non-liberal states that fulfill some minimal functions.¹⁴ They want to say that there is a layer of legitimacy (presumably banning foreign intervention) stemming from the fact

¹² See Thomas Pogge, “Cosmopolitanism and Sovereignty”, in *Political Restructuring in Europe: Ethical Perspectives*, ed. By Chris Brown (Routledge, 1994), p. 89; and Simon Caney, “Humanitarian Intervention and State Sovereignty”, *supra note* , p. 121.

¹³ See David Copp, “The Idea of a Legitimate State”, *Philosophy & Public Affairs* 28: 1 (1999); John Rawls, *The Law of Peoples* (Harvard University Press, 1999).

¹⁴ For Copp, a state is legitimate when it fulfils certain “societal needs”, *id.* pp. 36-45. For Rawls, states might be morally objectionable from a liberal standpoint but still legitimate because they are “decent.” See Rawls, *The Law of Peoples*, at 35-44; 59-82.

that the government in question fulfills certain minimal functions. This is true even if the government does not fare well under liberal principles and thus cannot legitimately command the citizens' allegiance.

That discussion, important as it is for other purposes, is largely irrelevant to the question discussed in this article.¹⁵ The argument in this article is concerned with the conditions for the legitimacy of forcible humanitarian intervention, not with the related but distinct question of which states and governments are members in good standing of the international community. These authors seem at times to conflate both issues. The collapse of state legitimacy is a necessary but not a sufficient condition of humanitarian intervention. The issue of the justification of humanitarian intervention, therefore, is narrower than the general issue of how liberal governments should treat non-liberal régimes. It is perfectly possible to say (*contra* Rawls and Copp) that a non-liberal government should *not* be treated as a member in good standing of the international community while acknowledging (with Rawls and Copp) that it would be wrong to intervene in those states to force liberal reforms. The situations that qualify for forcible intervention are best described as “beyond the pale” situations. Only outlaw regimes (to use Rawls's terminology) are morally vulnerable to humanitarian intervention. Because I differ with these writers on the question of legitimacy of non-liberal (but not “beyond the pale”) régimes, I believe that *non-forcible* interference to increase human rights

¹⁵ I believe that the account of international legitimacy offered by Rawls (and, for the same reasons, by Copp) is mistaken, for reasons I have explained elsewhere at length.

See my *Philosophy of International Law*, Chapter 4.

observance in those societies is morally justified –a view they reject.¹⁶ All states that are morally vulnerable to humanitarian intervention are of course illegitimate, but the reverse is not true. For many reasons, it may be wrong to intervene by force in many states that are objectionable from a liberal standpoint. Humanitarian intervention is reserved for the more serious cases –those that I have defined as tyranny and anarchy. Again, the illegitimacy of the government is a necessary, not a sufficient, condition for the permissibility of humanitarian intervention.¹⁷

But if this is correct, it does require amending my original argument. It is no longer possible to ground the legitimacy of humanitarian intervention *solely* on the question of the moral legitimacy of the state, because there are many cases where the collapse of state legitimacy will not be enough to justify intervention. Still, there are several consequences to the finding of illegitimacy: first, intervention against legitimate régimes is always banned. Second, it may well be that in a particular case it would be wrong to intervene, but the reason will never be the need to respect the *sovereignty* of the

¹⁶ In my view, non-liberal yet “within the pale” régimes should be treated as if they were “on probation” in their way either to joining the liberal alliance or to collapsing into extreme tyrannies. For a view of international legitimacy similar to the one I defend, see Allen Buchanan, “Recognitional Legitimacy and the State System”, *Philosophy and Public Affairs* 28: 46 (1999).

¹⁷ I should have made this point clearer in *Humanitarian Intervention*. I was concerned with refuting the non-interventionist argument from sovereignty, and paid thus little attention to other reasons that might bar humanitarian intervention against illegitimate régimes. In this article I attempt, among other things, to remedy that omission.

target state. Third, the liberal conception of state legitimacy will guide the correct behavior by the intervenor. He must abide by the general duty to promote, create, or restore institutions and practices under which the dignity of persons will be preserved.

I indicated that critics of humanitarian intervention are not pacifists. They object to *this kind* of war, a war to protect human rights. They do not object to wars, say, in defense of territory. This position is somewhat anomalous because it requires separate justifications for different kinds of wars. In contrast, the liberal argument offers a unified justification of war. War is justified if, and only if, it is in defense of persons and complies with the requirements of proportionality and the doctrine of double effect.¹⁸ Take the use of force in self-defense. What can possibly be its moral justification? Very plausibly, this: that the aggressor is assaulting the rights of persons in the state that is attacked. The government of the attacked state, then, has a right to muster the resources of the state to defend its citizens' lives and property against the aggressor. The defense of states is justified *qua* defense of persons. There is no defense of the *state* as such that is not parasitic on that general individualistic rationale. If this is correct, any moral distinction between self-defense and humanitarian intervention, that is, any judgment that self-defense is justified while humanitarian intervention is not, has to rely on something above and beyond the general rationale of defense of persons.

III. The Relativist Objection

¹⁸ See below for a discussion of the doctrine of double effect.

Some object to the very project of using liberal political theory to address humanitarian intervention –or indeed any international question. The argument goes something like this. The world is ideologically and culturally too diverse to apply any one philosophy to a problem that concerns all persons in the globe. Because many people reject liberal principles, attempts to use liberal philosophy are unduly biased. One would have to draw on different ethical traditions in order to analyze international problems. The outcome of liberal analysis might be good for someone who already accepts liberal principles, but not for those who do not. In other words, it might be necessary to do some comparative ethics before addressing these problems in order to identify which, if any, is the content of a global “overlapping consensus.”

I have a general answer and a specific answer for humanitarian intervention. I have never been able to see merit in relativism as a general philosophical view.¹⁹ If, say, our philosophical judgment that all persons have rights is sound, then it is universally sound. It doesn't really matter if the *historical origin* of that judgment is Western or something else. Those who object to liberal principles on the grounds that they are Western commit the genetic fallacy. They confuse the problem of the *origin* of a political theory with the problem of its *justification*. The truth (moral or empirical) of a proposition is logically independent of its origin. The liberal can concede that the views she defends are Western, and still maintain that they are the better views. Another way of putting this is that the effort to find a justification for the exercise of political power is not an effort to *describe* the way Westerners think. Philosophical analysis is critical and

¹⁹ See Fernando R. Tesón, “Human Rights and Cultural Relativism”, *Virginia Journal of International Law* 25: 869 (1985).

normative, not descriptive. Of course, liberal views may be right or wrong, but they cannot possibly be right for some and wrong for others. Conversely, if *illiberal* views of politics are correct, then that has to be shown by rational argument, not by merely recognizing that some people, or other people, or many people, believe in them. To be sure, any philosophical justification of political power relies on assumptions, and critics may challenge the liberal justification of political power by challenging the assumptions. But that, of course, is philosophical argument. Perhaps the illiberal assumptions are as plausible as the liberal ones, but that will not be because, say, many people in illiberal societies believe in them. If many persons endorse liberal assumptions and many other people endorse inconsistent illiberal assumptions, both sides cannot be right. Liberal analysis must assume that liberal assumptions (such as the importance of individual autonomy) are the better ones, universally. The liberal conception I defend is thus cosmopolitan, and as such rejects attempts at locating political morality in overlapping consensus, or other forms of majority validation. It rejects arguments *ad populum*.

Second, that objection does not seem to reach the first part of the argument –that the situations that warrant intervention, tyranny and anarchy, are morally abhorrent forms of political injustice. I believe that all reasonable religious and ethical theories converge in the judgment that those situations (mass murder, widespread torture, crimes against humanity, serious war crimes) are morally abhorrent. We are not dealing here with differences in conceptions of the good, or with various ways to realize human and collective excellence, or with the place of religion, civic deliberation, or free markets, in political life. We are confronting governments that perpetrate atrocities against people, and situations of anarchy and breakdown of social order of such magnitude that no

reasonable ethical or political theory could reasonably condone. And, of course, if there are political theories that condone those situations, too bad for them: they cease to be reasonable or plausible. I do not believe, however, that the critic of humanitarian intervention wants to rely on a moral theory that justifies grievous human rights violations. I hope that I do not need deep studies in comparative ethics and religion to say that under any religious or ethical system the kind of situation that warrants humanitarian intervention is morally intolerable. For example, I doubt that someone who endorses religious or political doctrines that advance communal values and reject liberal reliance on individual autonomy will treat the extreme examples of tyranny or anarchy that warrant humanitarian intervention as morally tolerable or justified.²⁰

On the other hand, the *second* part of the argument requires a reliance on conceptions about the justification of states, governments, and borders. As indicated above, I want to say that certain situations are morally abhorrent under any plausible ethical theory, *and* that those situations sometimes justify humanitarian intervention under a liberal conception of politics. As I indicated, someone may agree with the first proposition but not with the second. She might agree that the situations are morally abhorrent but maintain that humanitarian intervention is still not justified: it is not for foreigners to remedy those wrongs. These other theories might hold particular views about the sanctity of borders, or about the moral centrality of communities, or about the moral relevance of distinctions between nationals and foreigners. Here again, all I can do

²⁰ For the view that there is a considerable overlap on humanitarian intervention among different religious traditions, see Oliver Ramsbotham, "Islam, Christianity, and Forcible Humanitarian Intervention," *Ethics and International Affairs* 12: 81 (1998)

is offer arguments to reject those views in favor of a more cosmopolitan approach. My point is rather this: to the objection that supporting humanitarian intervention presupposes a (biased) liberal commitment to human rights, the liberal can respond: “but surely you’re not saying that under your (non-liberal) view these atrocities are justified. Whatever is that you value, it cannot be this.” The non-liberal critic can then make the following move: “I agree that this is morally abhorrent under my non-liberal principles as well, but those same principles, unlike yours, bar foreign interventions.” Thus, non-interventionist views of international ethics attempt to *sever* (unconvincingly, I will contend) domestic from international legitimacy. But if the non-liberal agrees that the situation is abhorrent, then the liberal interventionist cannot be biased because he thinks just that. The non-liberal needs reasons on top of her skepticism about rights and autonomy in order to question the legitimacy of humanitarian intervention in cases where she would agree with the liberal that the situation is morally abhorrent. She needs a theory of sovereignty under which foreigners are morally precluded from saving victims of extreme injustice.

IV. The Moral Relevance of National Borders: Communal Integrity

If the non-interventionist does not deny the moral abhorrence of tyranny and anarchy, she might resort to theses of international ethics that place decisive value on sovereignty and national borders. For consider this: no one, I assume, will object to government forces acting to stop massacres *within* a state. Say that the provincial government in a federal state is committing atrocities against an ethnic group. Assume

further that the provincial army is prepared to resist the federal army, so that a civil war will take place if the federal government tries to stop the massacre. Non-interventionists (like everyone else) will no doubt regret that a civil war will erupt, but surely will not object in principle to the *internal* intervention by federal troops aimed at stopping the massacre. In fact, they will likely praise the intervention as action needed to stop genocide.

Yet they will object if those same troops cross an *international* border to stop similar atrocities committed by a sovereign government in a neighboring state. For them, there is something about borders that mysteriously operates a *change in the description* of the act of humanitarian rescue: it is no longer humanitarian rescue, but war. (Why aren't human rights violations also called war, for example a war of the government against its people? Is it because usually part of the population is an accomplice in the perpetration?) The argument for this distinction has to rely on the moral significance of national borders as a necessary corollary of the principle of sovereignty. But national borders can hardly have moral significance *in this context*. For one thing, national borders are the random result of past aggressions and all other kinds of morally objectionable or irrelevant historical facts. More generally, I believe that a great deal of suffering and injustice in the world derive from the exaggerated importance that people assign to national borders. From ethnic cleansing to discrimination against immigrants, from prohibitions to speak foreign languages to trade protections that only benefit special interests, the ideas of nation, state, and borders have been consistently used to justify all kinds of harm to persons.

In spite of all that, there are surely *pro tanto* reasons for respecting national borders, at least as long as one believes that a world of separate states is a desirable thing.²¹ Those reasons are, in my view, two, and neither invalidates humanitarian intervention. The first and most important has to do with the legitimacy of the social contract, as it were. Kant famously wrote, “No state having an independent existence, whether it be small or great, may be acquired by another state through inheritance, exchange, purchase, or gift.”²² The idea here is that a state that is somehow the result of the free consent by autonomous individuals in civil society must be respected. Violating those borders would amount, then, to treating the state and its citizens “as things.”²³ This is the liberal premise defended here, that the sovereignty of the state and the inviolability of its borders are parasitic on the legitimacy of the social contract, and thus, sovereignty and borders, too, serve the liberal ends of respecting freedom and human rights. Where half the population of the state is murdering the other half, or where the government is committing massive atrocities against its own citizens, national borders have lost most of their moral strength.²⁴ At the very least, they are morally impotent to contain foreign acts aimed at stopping the massacres.

²¹ Separate states might be desirable in order to maximize freedom. See my *Philosophy of International Law*, pp. 17-19.

²² Immanuel Kant, “To Perpetual Peace: A Philosophical Sketch” [1795], in *Perpetual Peace and Other Essays* (Ted Humphrey trans. 1983), second preliminary article, p. 109.

²³ *Ibid.*

²⁴ They have not lost all their moral strength, though, because tyranny and anarchy do not mean open season for foreigners to invade at will. The guiding liberal principle here is

The best-known defense of the moral aptitude of national borders to ban humanitarian intervention is Michael Walzer's.²⁵ According to Walzer, there is a crucial distinction between domestic and international legitimacy. A government may be illegitimate internally, but that does not mean that foreign armies are entitled to intervene to restore legitimacy. Walzer claims that in most cases there is enough fit between people and government to make injustice a purely domestic matter from which foreigners are excluded. Only the citizens themselves may overthrow their tyrant. It is only when the lack of fit is *radically* apparent, says Walzer, that intervention can be allowed. That will only occur in cases of genocide, enslavement, or mass deportation. He supports this thesis by communal considerations: nations have histories and loyalties that define their political process, and that process should be protected as such, even if some of its outcomes are repulsive to liberal philosophers. Walzer calls this "communal integrity."

As a preliminary matter, Walzer (unlike other non-interventionists) allows humanitarian intervention in important classes of cases. Yet his rationale for not allowing the duty to respect persons. Tyranny and anarchy authorize foreigners to cross national borders to restore respect for persons, not for other purposes. But this will be true in the purely domestic example as well.

²⁵See Michael Walzer, "The Moral Standing of States: A Response to Four Critics", *Philosophy and Public Affairs* 9: 209-229. I criticize his argument at length in *Humanitarian Intervention*, pp. 92-99. See also the discussion (in basic agreement with the view in the text) in Caney, *supra* note, pp 122-123; and Jeff McMahan, "The Ethics of International Intervention", in *Ethics and International Relations*, edited by Anthony Ellis (Manchester University Press, 1986), pp. 36-49.

humanitarian intervention in other cases of tyranny and anarchy is, I believe, deeply wrong. By pointing out that dictators come from the society itself, from its families and neighborhoods, Walzer insinuates that tyranny and anarchy come naturally, as it were; that in some sense the victims are responsible for the horrors they suffer. It also presupposes that there is something morally valuable (“self-determination”) in the fortuitous balance of existing political forces in a society.²⁶ But political processes are not valuable per se. Their value depends on their being minimally consistent with the imperative to respect persons. It is even grotesque to describe the kinds of cases that warrant humanitarian intervention as “processes of self-determination” and suggest, as Walzer does, that unless there is genocide, there is a necessary fit between government and people. David Luban put it best: “The government fits the people the way the sole of a boot fits a human face: after a while the patterns of indentation fit with uncanny precision.”²⁷

Having said that, there is a seed of truth in a possible reading of Walzer’s argument, best put by John Stuart Mill.²⁸ Mill argued that humanitarian intervention is always wrong because freedom has no value unless the victims themselves fight for their liberation. People cannot really be free if foreigners do the fighting for them. While this

²⁶ See Gerald Doppelt, “Walzer’s Theory of Morality in International Relations”, *Philosophy & Public Affairs* 8: 3 (1978).

²⁷ David Luban, “The Romance of the Nation-State”, *Philosophy & Public Affairs* 9: 392, 395-96 (1980).

²⁸ See John Stuart Mill, “A Few Words on Non-Intervention”, in John Stuart Mill, *Dissertations and Discussions*, vol. 3, p. 153, 171-176 (1867).

argument is highly problematic (why isn't freedom valuable if someone else helps us achieve it?), it does make an important point. Citizens of the state ruled by a tyrant (or victimized by warlords in a failed state) have a responsibility to help put an end to their plight. The intervenor has a right to expect their reasonable cooperation in putting an end to tyranny, in shouldering the moral and material costs of intervention, and in building democratic institutions. It is their government, their society. Foreign efforts to help them depend on their cooperation and willingness to build or restore those institutions.

One corollary of Mill's point is the requirement that the victims of tyranny or anarchy welcome the intervention. Walzer and other critics of humanitarian intervention say that in most cases the victims don't really want to be liberated by foreigners, that they would rather put up with their tyrants than see their homeland invaded. This is a view influenced by communitarianism. Communitarians contend that persons not only have liberty interests: they also, and more importantly, have communal interests, those that define their membership in a group or community –their social identity. Indeed, for communitarians, liberty interests are parasitic on communal interests or values. On this view, the average citizen in any country (including those ruled by tyrannical régimes) will be wounded in her self-respect if foreigners intervene, even if it is for a good purpose, because such intervention strikes at the heart of her social identity. The corollary seems to be that the average citizen in an oppressive régime *prefers* to remain oppressed than to be freed by foreigners.

I believe that while this situation is empirically possible, it is highly unlikely to occur. For one thing, there is no valid community interest of the citizen who *collaborates*

with the abuses. In a society afflicted by tyranny there is a group (sometimes the minority, sometimes the majority) that benefits from the government=s persecution of others. These are the rent-seekers of the worst kind, those who capture the machine of horror for their own purposes. To describe this as “community interest” is simply grotesque. It is also wrong to presume *juris et de jure* that victims oppose liberating intervention. I would think that the evidence supports the opposite presumption: that victims of serious oppression will welcome rather than oppose outside help. This was seemingly the case in the interventions in Grenada, Haiti, Kosovo, and Rwanda, among others.

The only persons whose consent deserves consideration are those who oppose both the régime *and* foreign intervention for moral reasons. They might say that the régime is murderous but that foreign invasion of their homeland is unacceptable, even if undertaken for the purpose of ending the ongoing killings. Should their refusal be decisive? Should prospective intervenors treat the veto by political and civic leaders who oppose the régime as a decisive reason for not intervening? I do not think so, for the following reason: I very much doubt that you can cite *your* communal interests to validly oppose aid to *me*, when *I* am strapped to the torture chamber, even if you are not complicitous.²⁹ Only *I* (the torture victim) can waive my right to seek aid; only my consent counts for that purpose. So, to summarize: in a tyrannical régime the population

²⁹ In the same sense, see McMahan, “The Ethics of International Intervention”, *supra* note at 41. This is the appropriate response to relativist critics of the U.S-British efforts in Afghanistan aimed at liberating women. The male Muslim believer, even if innocent, has no standing to object to efforts aimed at saving others.

can be divided into the following groups: the victims, the accomplices and collaborators, and the bystanders. The last group can in turn be subdivided into those who support the régime and those who oppose it. Of these groups, only the first, the victims, have (arguably) a right to refuse aid. The accomplices and bystanders who support the régime are excluded for obvious reasons. Their opposition to intervention does not count. And the bystanders who oppose the régime cannot validly refuse foreign aid on behalf of the victims.

Democratic leaders must make sure before intervening that they have the support of the very persons they want to assist, the victims. Yet the view (suggested by Walzer and others) that a *majority* of the population must support the intervention is wrong, because the majority may be complicitous in the human rights violations. Suppose a state where there are two ethnic groups and the government unleashes a campaign of extermination of the minoritarian ethnic group. Let's further assume a history of animosity between these groups which leads the majority group to support the genocide. I believe that humanitarian intervention is justified even if the majority of the population of the state opposes it. An intervenor must abide by the duty to restore the rights of persons threatened by tyranny or anarchy. Whether or not these goals will be advanced cannot be decided by simply taking opinion polls in the population of the tyrannical or anarchical society.

The second reason to respect national borders is that they help secure the stability of social interaction, that is, the mutual expectations of individuals who interact within and across demarcations of political jurisdictions. The reasons to have national borders, then, are analogous to the reasons for respecting the demarcations of property rights.

Property owners should be allowed to exclude trespassers because that facilitates the internalization of externalities and thus maximizes the efficiency in the use of resources.³⁰ Similarly, allowing states to exclude foreigners from their domestic political processes may ideally facilitate the international division of labor presupposed by the division of the world into discrete states. These efficiency considerations re-emerge *after* the intervention. Intervenor, in contrast to internal victors, have little incentive to treat the target country as something that is theirs –they lack long-term property rights over the territory.³¹ Likewise, internal victors (such as the current ruling group in Afghanistan) in an intervention have a greater incentive to restore the political fabric of their society than do external victors. These reasons point to the need to assign *some* moral importance of national borders and counsel prudence on the part of the intervenor. Consequentialist considerations are also crucial for planning the post-intervention stage in order to achieve lasting success in terms of the moral values that justified the intervention.³²

However, these considerations do not help to exclude the legitimacy of the intervention itself, because the kinds of situations that warrant humanitarian intervention are of such gravity that they cannot possibly serve those efficiency purposes. The protection of national borders is necessary, under the argument here examined, to preserve the glue that binds international society together, and as such re-emerges in full

³⁰ See the classic discussion in Harold Demsetz, “Toward A Theory of Property Rights”, *American economic Review Papers & Proceedings* 57: 347 (1967).

³¹ See Robert Kehoane, written comment to an earlier draft of this article (on file with the author).

³² See Robert Kehoane, article in this collection.

power in the post-intervention phase. Yet allowing the atrocities to continue is a much worse dissolver of that glue than the infringement of borders.

I conclude, then, that the right to assist grievous victims of injustice is unaffected by the existence of national borders. They owe whatever importance they have to considerations of justice and efficiency. Both values are grossly assaulted by tyranny and anarchy, and so invoking the sanctity of borders to protect tyranny and anarchy is, on close analysis, self-defeating.

V. The Argument from International Law

This article is mostly concerned with the moral-political defense of humanitarian intervention. However, I want to consider a popular argument against humanitarian intervention offered mostly by international lawyers. Humanitarian intervention is morally defective, they claim, because states have an obligation to abide by international law. Since international law centrally bans the use of force, governments who intervene by force are violating a central tenet of the international legal system. The law supplies *pro tanto* reasons to act, so governments should refrain from intervening out of respect for international law, even if there are other moral reasons that would perhaps justify intervention in the absence of the legal prohibition. This argument of course locates the obligation to obey the law outside international law itself: there is a moral reason to

comply with international law even where doing so leads sometimes to undesirable or even immoral outcomes.³³

This argument is flawed, however. First, it rests on a highly dubious premise. The view that international law (conceived as anchored in the practice of states) prohibits humanitarian intervention depends upon a reading of state practice informed by state-oriented values. Critics of humanitarian intervention have complained that supporters of the doctrine engage in a subjective, value-oriented analysis of custom and treaty.³⁴ On their view, objective analysis yields instead an unequivocal verdict against humanitarian intervention. Again, this article is not the place for legal debates, but I will say this much: state practice is at the very least ambivalent on the question of humanitarian intervention, so any interpretation of that practice (for or against) has to rely on extra-legal values. There is no such thing as “state practice” staring at us and yielding more or less mechanically a legal rule; diplomatic history as such is indeterminate. Diplomatic history must be interpreted in the light of our moral and empirical assumptions about the purposes of international law and the international system. If this is correct, the positivist rejection of humanitarian intervention is far from being objective, notwithstanding the

³³ Another version of the argument has a prospective utilitarian rather than principled flavor: states should not intervene because doing so *undermines* compliance with international law in the long run. I answer this version together with my answer to the “global stability” objection.

³⁴ See, e.g., Ian Brownlie, “Thoughts on Kind-hearted Gunmen” in *Humanitarian Intervention and the United Nations*, edited by Richard Lillich (1973), p. 139.

international lawyers' claims to the contrary. It is informed by a set of values where the stability of governments and political regimes, on the one hand, and the preservation of the state system, on the other, play a central role. The contrast is not between "subjective" interventionist legal analysis and "objective" non-interventionist legal analysis, but between lawyers who rely on human values and lawyers who rely on state values. Non-interventionists delude themselves when they accuse interventionists of bias. They have their own bias. Part of their problem is the illusory belief that legal analysis is conceptually autonomous, that political philosophy has no place in legal reasoning. In reality, what many international lawyers do is smuggle their statist bias under the guise of "autonomous" legal analysis.³⁵ The critic of humanitarian intervention will fare much better if he deals with the applicable moral arguments for and against humanitarian intervention rather than hide behind the supposed conceptual autonomy of legal reasoning.

There is a second answer to the objection. No one disputes that international law prohibits the use of force generally. Yet the kinds of cases that warrant humanitarian intervention disclose *other* serious violations of international law: genocide, crimes against humanity, and so on. The typical situation where we consider intervening is not one where we are contemplating violating international law as opposed to not violating international law. These are cases where whatever we do we will end up tolerating a violation of *some* fundamental rule of international law. Either we intervene and put an end to the massacres, in which case we apparently violate the general prohibition of war,

³⁵ For a recent example of this kind of approach, see Simon Chesterman, *Just War or Just Peace?* (Oxford: Oxford University Press, 2001)

or we abstain from intervening, in which case we allow the massacres to continue and thus upset international law in this case also. The maxim “other things being equal, states must obey international law” can hardly mean “other things being equal, states must obey international law even if doing so allows a continuing and at least equally egregious violation of international law.” The *pro tanto* reason to abide by international law, then, does not help the non-interventionist. Her position now depends either on a dubious judgment that an international war is always worse than internal tyranny or anarchy, or on an equally dubious distinction between acts and omissions.³⁶

The decisive reason for solving this conflict of principles in favor of allowing humanitarian intervention in appropriate cases stems from the realization that the value of sovereignty is problematic unless it is understood as a *derivative* value, that is, as subservient to valuable human ends. The gross violation of human rights is not only an obvious assault on the dignity of persons, *but a betrayal of the principle of sovereignty itself*. The non-interventionist faces a dilemma here. Either she believes that state sovereignty has a value that is independent of human values, or she concedes that sovereignty is instrumental to human values. If the former, she has to say that the prohibition of intervention has nothing to do with respecting persons, in which case she is forced to invoke unappealing (and largely discredited) organicist conceptions of the state.³⁷ If the latter, she has to demonstrate that the human values served by sovereignty in the long term justify allowing the massacres to continue now – a daunting task.

³⁶ See the discussion below.

³⁷ I have called this view “The Hegelian Myth”, see my *Humanitarian Intervention*, chapter 3. See also Charles Beitz’s classical work, *Political Theory and International*

Readers unpersuaded by my jurisprudential stance will still claim that law and morality are separate and that a positivist reading of international law prohibits humanitarian intervention. Even so, this article may be of some use to them: they may take the argument here as a *de lege ferenda* proposal, that is, a proposal for reforming international law. Someone who thinks that a positivist reading of international law prohibits humanitarian intervention yet also thinks the moral argument in this article is correct, must conclude that international law is morally objectionable and should join in the effort to reform it.

A sovereign state is an institution created by men and women to protect themselves against injustice, and to facilitate mutually beneficial social cooperation. The non-interventionist cannot locate his priority of sovereignty in anything that is *internal* to the target state in these kinds of cases. Therefore, the argument against non-intervention must rely on the importance of sovereignty for ends that are *external* to the target state. To these arguments I now turn.

VI. The Objection from Global Stability

One important objection to humanitarian intervention relies on the need to preserve world order. The idea here is not that there is anything morally important *internally* about the sovereignty of the state. What is important instead is to preserve the

Relations (Princeton University Press, 1979), p. 69-71; and Simon Caney, *supra* note , at

stability of the *system of states* in the long run.³⁸ Humanitarian intervention undermines that stability both by the very act of intervening, and by creating a dangerous precedent that, if followed by even well intentioned governments, will result in universal chaos. Order is preferable to chaos, even if it means tolerating injustices. Those injustices should be remedied by means that do not undermine the stability of the state system, that is, by “peaceful” means. The avoidance of conflict is a pre-requisite for world order. A variation of this argument insists on the need to preserve international *law* in the long run. Allowing humanitarian intervention will result in undermining respect for a fundamental rule of international law, the one that prohibits the use of force.

This objection to humanitarian intervention is unconvincing. First, it is open to an important moral rejoinder. Assuming for the sake of argument that the state system is worth preserving, it is surely highly problematic to *use* the victims of tyranny and anarchy for that purpose. The non-interventionist argument has an unexpected theological flavor. It is analogous to response of the religious believer to the complaint that God allows things like the Holocaust to happen. The believer claims that God allows the Holocaust because He has a higher purpose that we, as finite beings, cannot possibly grasp. Similarly, the non-interventionist claims that there is a higher global purpose that justifies not interfering with tyranny and anarchy. In this case, however, that higher purpose is not inscrutable: we are told it is the preservation of the state system. I have never been convinced by the believer’s response (what higher end can an omnipotent

³⁸ See, e.g., Stanley Hoffman, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse University press, 1981), p. 58.

Being possibly have to allow the Holocaust?³⁹) Yet while I am willing to give God the benefit of the doubt, surely that benefit does not extend to academics. The claim seems to me morally perverse, because whatever the merits of the state system, its preservation cannot surely be achieved at that kind of human cost. It not even clear that “the preservation of the state system” is much more than an euphemism for the arch-conservative view that incumbent governments and the *statu quo* should be preserved regardless of their value to actual human beings.

The second answer to the argument is the same I gave in the discussion of the relevance of national borders. Tyranny and anarchy are at least as likely to generate instability and chaos as interventions -perhaps even computing into the equation the harm caused by non-humanitarian interventions.⁴⁰ The argument from the stability of world order ignores this crucial fact. The reason for this strange neglect is theoretical: statism treats states as the only relevant units in international relations and ignores what happens within states. This is the anthropomorphic view of the state that so much harm has caused to persons and so much has confused international thinking. As long as there is “order” within states, the non-interventionist thinks that he can safely ignore what happens within them. I do not need to cite here the overwhelming evidence about the causal relation

³⁹ Theological query: if God wants the Holocaust to happen for inscrutable reasons, should we or shouldn't we intervene to stop it?

⁴⁰ Have international wars caused more or less suffering than tyranny and anarchy? I do not know the answer. But what seems reasonably certain is that the harm caused by tyranny and anarchy in the world has been much greater than collateral harms caused by humanitarian interventions, even by those that failed.

between internal upheaval and international instability. In the face of that evidence, one who is concerned with long-term stability should rationally support a general prohibition of war *and* a system for protection of human rights that includes a properly limited right of humanitarian intervention.

Finally, the empirical assumption that humanitarian interventions trigger other interventions and thus threatens world order is implausible. The assumption can now be tested, because there have been a number of humanitarian interventions in the last twelve years or so. The non-interventionist prediction, as I understand it, is that allowing these humanitarian interventions will motivate governments and other international actors to over-intervene, often with spurious motives. Governments, it is argued, will find it easier to intervene for selfish motives because they can rely on precedent and offer self-serving humanitarian justifications. But this, quite simply, has not happened. It is true that the end of the Cold War has caused, alongside the spread of democracy and free markets, political instability in certain regions. Yet this had nothing to do with the occurrence of more humanitarian interventions, but rather with ethnic rivalries and other similar factors. (Perhaps if we had had a clearly defined and institutionalized rule allowing humanitarian intervention we might have been able to prevent, through deterrence, some of the horrific things that happened in those ethnic conflicts.) I do not think it can be seriously claimed that the interventions Rwanda, Haiti, Kosovo, and Somalia have shaken the world order beyond recognition. On the contrary, those interventions have improved things on the whole. And when interventions have failed, that means they have allowed tyranny and anarchy to continue, so things have not made worse. There is an obvious reason why humanitarian interventions are unlikely to produce the chaos that non-interventionists

fear: intervention is very costly, so governments have a permanent disincentive to undertake *any* intervention. Acting in Kosovo was hard, not easy. In addition, the right of humanitarian intervention can be suitably designed to prevent escalation, perhaps allowing intervention when such risk is minimal.⁴¹ Furthermore, if the system of states breaks down because there are many humanitarian interventions (by definition prompted by tyranny and anarchy) perhaps this breakdown is a desirable thing. Just as the surrender of sovereignty by individuals to states need not involve the elimination of their moral autonomy, so the surrender of sovereignty by states to an international *liberal* authority should not necessarily result in universal tyranny.⁴² The death of the state is not always a bad thing (think about the Soviet Union or East Germany.)

VII. Acts, Omissions, and the Rights of the Innocent

Tyranny or anarchy is a necessary but not a sufficient condition of the legitimacy of humanitarian intervention. As in all moral matters, we have competing reasons of various kinds to guide behavior. It might well be that in a particular case humanitarian intervention in a state would be wrong notwithstanding the fact that the government of that state has rendered itself guilty of serious human rights violations. Sometimes we cannot right the wrong even if it would be justified for us to do so. Sometimes intervening is unacceptably costly to us, the intervenor. And finally, sometimes righting a wrong entails harming persons in objectionable ways, or more extensively, that is, in

⁴¹ See Jeff McMahan, “The Ethics of International Intervention”, *supra* note 25, p. 24

⁴² *Ibid.*

ways and to an extent that would be at least as objectionable as the wrongs we are intending to remedy.

The moral dilemmas of intervention are not well captured by distinctions between deontological and utilitarian approaches to humanitarian intervention, for several reasons. First, our reasons for and against intervention may be deontological in their entirety, utilitarian in their entirety, or a mix of both. Deontological ethics need not neglect utilitarian concerns of various kinds; likewise, utilitarian ethics recognize deontological concerns. Second, military action, including humanitarian intervention, will almost always violate the rights of innocent persons, so under a strict deontological view the intervenor will presumably never be justified, even if his purpose is to protect human rights, and even if it is certain that such will be the result of the intervention. This is because the intervention will violate the rights of innocents. The objection, then, is that, even if successful, the humanitarian intervention would have used innocent persons as means –something prohibited by a strict deontological approach. There is an interesting paradox here: the liberal argument for humanitarian intervention is rights-based, and as such it has a strong deontological flavor. Yet at the same time the liberal interventionist is countenancing the deaths of innocents in apparent violation of deontological constraints.

The reply to this objection is that the strict deontological approach is misguided here. If it were sound, no war or revolution would ever be justified, because the just warriors almost always would have to kill innocents. For example, under that view the Allies would have had no justification to respond to Germany's aggression in Second World War, because such response would have resulted (as it did) in the deaths of many innocent persons (bystanders such as German children.) The strict deontological

approach leads to counterintuitive results -at least as far as international politics are concerned.

The liberal argument for humanitarian intervention has a somewhat different conceptual structure. Justified intervention has the aim to *maximize* human rights observance, but the intervenor is constrained by *the doctrine of double effect*. Thus, humanitarian intervention cannot be simply grounded in what Nozick has called “utilitarianism of rights,”⁴³ because this may conceivably allow the deliberate targeting of innocent persons if conducive to realizing the humanitarian objective. This is prohibited by the doctrine of double effect.⁴⁴ According to this doctrine, there is a moral distinction between, on the one hand, actions with foreseen *and* intended bad consequences, and, on the other, actions with foreseen yet unintended bad consequences. Only the first ones give rise to moral blameworthiness. The second ones may, depending on the circumstances, be excused. Thus proportionate collateral harm caused by a humanitarian intervention, where the goal is to rescue victims of tyranny or anarchy, may, depending on the circumstances,⁴⁵ be morally excusable. So on one hand, humanitarian intervention

⁴³ Robert Nozick, *Anarchy, State, and Utopia* (Harvard University Press, 1974)

⁴⁴ For an influential discussion of the doctrine of double effect, see Warren Quinn, “Actions, Intentions, and Consequences: The Doctrine of Double Effect”, *Philosophy & Public Affairs* 18:334 (1989). See also the excellent discussion in Horacio Spector, *Autonomy and Rights*, (Oxford University Press, 1992), pp. 101-151.

⁴⁵ I say “depending on the circumstances” because, as Horacio Spector, following Philippa Foot, shows, it is not the case that there is *always* a moral difference between causing an undesirable result with direct intention and causing it with oblique intention.

is not an action conceptually structured, from the standpoint of the agent, as deontologically pure behavior where the agent (the intervenor) is absolutely constrained to respect the rights of everybody. It is instead an action intended to *maximize* universal respect for human rights but morally constrained by the prohibition of *deliberately* targeting innocent persons. The proportionate *collateral* deaths of innocent persons, while indirectly caused by the intervenor, do not necessarily condemn the intervention as immoral. The argument for humanitarian intervention is located mid-way between strict deontological approaches and unconstrained utilitarian ones. The latter simply directs agents to intervene whenever they maximize the good in terms of the general welfare (maybe in terms of human lives.) The former would forbid intervention that would result in the violations of rights of innocents –even intervention that will certainly maximize universal rights observance. Instead, humanitarian intervention understood as a morally constrained form of help to others accepts that sometimes causing harm to innocent persons is justified as long as one does not *will* such harm in order to achieve, not a greater general welfare, but a goal that is normatively compelling under appropriate principles of morality. The doctrine rejects, as deontological doctrines do,

See Spector, *Autonomy and Rights* cit., pp 104-105 (citing Phillipa Foot, “The Problem of Abortion and the Doctrine of Double Effect”, in *Virtues and Vices and Other essays in Moral Philosophy* (Blackwell, 1978), p. 20). These discussions show the difficulty of identifying with any precision when and why the “foreseen-intended” distinction operates. I treat humanitarian intervention as a case where the distinction does operate, as the opposite conclusion leads to the counterintuitive result of morally banning all wars.

See full discussion in the text below.

undifferentiated calculations of costs and benefits where justice (as a goal of the intervention) would be just one indicator of good aggregate consequences among many others.

The goals of saving lives and restoring human rights and justice are compelling enough to authorize humanitarian intervention even at the cost of innocent lives.⁴⁶ It is

⁴⁶ It is tempting to think of the goal of *fighting evil* as an additional morally compelling goal of humanitarian intervention. However, human evil is present only in a subset of the class of cases that qualify for intervention. Many humanitarian disasters are caused by natural events and by simply incompetent or impotent rulers. In cases of tyranny, however, the moral urgency to defeat evil would be, I believe, an additional reason to act. Assuming equal risk, do citizens in liberal democracies have a more stringent duty to intervene to defeat a malevolent tyrant than to intervene to save victims of, say, an earthquake? On evil, see Immanuel Kant, *Religion Within the Limits of Reason Alone* (Green & Hudson transl. 1960), pp. 34-39. See also the discussion in Robert Sullivan, *Immanuel Kant's Moral Theory* (Cambridge: Cambridge University Press, 1989), pp. 124-126. We seem to lack a theory of evil. For Kant, radical evil is the natural tendency of human beings to follow inclination instead of duty; for Carlos Nino, radical evil is simply an evil of great magnitude, see Carlos S. Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1999) A more useful distinction, it seems to me, is between *opportunistic* evil and *principled* evil. The opportunistic agent causes evil to advance his self-interest; the principled agent causes evil by following an evil maxim. Which one of these is worse is a matter for debate. Some of the most horrific acts were caused by principled evildoers, persons committed to an evil cause (think about September 11,

not simply that the intervenor is improving the world in a general sense. In typical cases, the intervenor is not just saving lives –although this goal is, indeed, normatively compelling. He is helping to restore justice and rights, the purpose of all justified political institutions –most prominently the state. The goal of restoring human rights and justice thus is more than simply helping people, although of course if achieved people will be helped. Because rights and justice are so central to justified politics, the goal of restoring them stands out in a moral sense. The goal of restoring minimally just institutions and practices is *normatively privileged* regardless of the advancement of the general welfare. For example, humanitarian *aid* is of course desirable, but it only provides temporary relief of some the symptoms of anarchy and tyranny. Building and restoring democratic, rights-respecting institutions, if successful, not only means doing the right thing for that society: it also addresses a central cause of the problem.⁴⁷ In that sense the justification of humanitarian intervention is deontological rather than utilitarian.⁴⁸ That is why the loss of lives is not the only indicator of the legitimacy of humanitarian intervention.

2001), yet dictators who murder and torture just to stay in power, like Saddam Hussein, are capable of horrendous things as well.

⁴⁷ I leave aside here the issue of economic assistance and the building of economic institutions. I happen to believe that only effective mechanisms to protect human rights *and* the creation of free markets will help solve societal problems, especially in the developing world. See Fernando R. Tesón, “In Defense of Liberal Democracy for Africa”, *Cambridge Review of International Affairs* 13: 29 (1999).

⁴⁸ Of course, most successful humanitarian interventions will also benefit most persons in the state in the utilitarian sense. This need not always be so, though: think about a large

This conceptual understanding of humanitarian intervention as an action directed to maximizing respect for human rights yet constrained by the doctrine of double effect prompts the examination of two related issues. One is the permissibility of killing innocent persons in a (otherwise justified) humanitarian intervention. The other one is the moral status of the *failure* to intervene. Interventionists have to explain why the (inevitable) deaths of innocents that will occur in an act of humanitarian intervention are morally justified. After all, those persons have not give up their rights to life. Therefore, knowingly allowing their deaths is morally problematic, even for a benign purpose. Conversely, non-interventionists have to explain why the *failure* to intervene is justified in cases where a massacre or similar event is taking place and the potential intervenor can stop it at reasonable cost. The two issues are related, however. As a preliminary matter, the critic of humanitarian intervention needs to say more than that she condemns violence generally. If her opposition to humanitarian intervention is part of her general condemnation to political violence, then presumably she must weigh the moral costs of allowing the massacres against the moral cost of intervening. The scale may tip for or against intervention, but a flat non-interventionist position cannot be justified on a general abhorrence of violence, since the non-interventionist is taking a position that allows the consummation of the atrocities. It is hard to see why opponents to humanitarian intervention rarely mention *that* violence while invoking their general condemnation of war. To the charge that failure to intervene may be morally culpable,

majority committing atrocities against a small minority. Be that as it may, I here wish to avoid the larger issue of whether utilitarians can successfully recast deontological concerns into consequentialist language.

the non-interventionist replies making a moral distinction between acts and omissions. She claims that those who intervene will *cause* the bad results (death of innocents, destruction,) whereas those who do not intervene *do not cause* the atrocities (the tyrant does.) That position is part of a general view that killing is morally worse than letting die. The argument goes something like this: a government that fails to intervene to stop atrocities in another country (assuming it can do so at reasonable cost to himself) is simply *letting innocent people die*. If that government decides instead to intervene, it will *kill some innocent people* for sure. Because killing is morally worse than letting die, the argument goes, humanitarian intervention should be prohibited.

The question of the moral status of actions and omissions has been extensively discussed in the philosophical literature, but not to my knowledge in the international relations or international law literature. Some of the conclusions that can be drawn from this literature are relevant here. It seems that it is justified *sometimes* to cause the deaths of some persons in order to save a greater number, even if one rejects a purely utilitarian test.⁴⁹ In other words: killing some to save others does not always amount to *using* those

⁴⁹ This is known as “The Trolley Problem”. See Judith Jarvis Thomson, “Killing, Letting Die, and the Trolley Problem”, in *Ethics: Problems and Principles*, edited by J.M. Fischer and M. Ravizza (Harcourt, Brace, Jovanovich Publishers, 1991), p. 67. The literature on the Trolley problem and its variations is abundant. See, inter alia, Horacio Spector, *Autonomy and Rights*, cited supra; Francis Myrna Kamm, “Harming Some to Save Others”, *Philosophical Studies* 57: 229 (1989) and now Francis Myrna Kamm, *Morality, Mortality* (Oxford: Oxford University Press, 1996), vol. 2; Erick Mack, “On Transplants and Trolleys”, *Philosophy and Phenomenological Research* 53:163 (1993);

some in order to save the others. It seems that we need to know *how* persons are killed and saved, as well as ascertain the nature of the relationship between the greater good and the lesser evil.⁵⁰ One solution is along ideal consent lines: the action is justified if all of the persons involved in the event, that is, those who will be sacrificed and those who would be saved (not knowing whether or not they would have been one or the other) would have agreed in advance that the action would have been appropriate.⁵¹

Now let us recast the problem in terms of humanitarian intervention. The government that intervenes knows that (regrettably) some innocent persons will die if it intervenes to save the many victims of tyranny or anarchy. Let us

and Guido Pincione, *Negative Duties and Market Institutions* (unpublished, 2001) pp 5-35. Thomson herself restates the problem in Judith Thomson, *The Realm of Rights* (Harvard University Press, 1990).

⁵⁰For example, Frances Myrna Kamm has suggested the Principle of Permissible Harm, according to which the greater good *causing* the lesser evil is a *sufficient* condition for moral permissibility of the action. See Frances Myrna Kamm, *Morality, Mortality*, cited *supra*, vol. 2, p. 174. Is humanitarian intervention such a case? Does the benign intervenor *independently* cause the death of innocents? Or are those deaths instead “caused” by the restoration of justice and human rights? At any rate, the Principle of Permissible Harm lays down a sufficient, not a necessary, condition of moral permissibility.

⁵¹*Id.*

stipulate that intervention will indirectly⁵² cause one-fifth of the innocent⁵³ casualties that the tyrant will cause or has caused. I suggest that there is an additional factor in the humanitarian intervention that makes the case for the latter even *more compelling* than the cases discussed in the literature, namely that those who intervene to stop human rights abuses attempt to *remedy an injustice*.⁵⁴ In the examples discussed in the literature there is no ongoing injustice. Rather, the problem is how to reconcile (1) our intuition that we cannot kill an innocent person as a means to save five persons with (2) our intuition that sometimes we seem justified in doing so, and (3) our further acknowledgement that the explanation of (2) cannot simply be that it is always justified to kill some people to save more lives (as shown by compelling counterexamples.) But in the humanitarian intervention situation, it is not simply a question of saving more than those who are killed by the intervention: as we saw, the intervenor attempts to restore human rights and justice. So if we think that it is permissible to allow the death of innocent persons in cases where there no political injustice, *a fortiori* it should be permissible to allow (regrettably) the death of innocent persons in cases where the agent is attempting to put an end to injustice. As I indicated above, in the typical humanitarian intervention case the situation to be redressed is *normatively qualified* as gross

⁵² By “indirectly” I mean here that the intervenor does not *will* but simply *foresees* those deaths –the double-effect prescription.

⁵³ I ignore here the moral significance of killing non-innocent persons.

⁵⁴ I am grateful to Guido Pincione for having suggested this point.

injustice; it is not merely a question of numbers. A crucial related requirement, of course, is that the intervenor avoid as much as possible collateral deaths and damage, and that, where those collateral deaths are unavoidable, that the intervenor abide by the doctrine of double effect. Under these doctrines, the just warrior should never *intend* the deaths of innocents. He should centrally intend the restoration of human rights. If in doing so, he collaterally causes the reasonably proportionate deaths of some innocent persons, the warrior can, depending on the circumstances, be excused for having done so.

Plausibly, humanitarian intervention meets the test of ideal consent as well. Citizens of a state would ideally agree that humanitarian intervention should be allowed for those extreme cases of injustice even at the cost of the deaths of some innocents, and even if some of those citizens will inevitably be those persons. The parties might agree to humanitarian intervention either by application of the *maximin* principle or by a stronger assumption about the parties' public-spirited commitment to political justice and human rights, or by a combination of both. This test should not be confused with a similar test of hypothetical consent that we could employ to determine whether or not ideal *global* contractors would agree to an international legal *principle* allowing for humanitarian intervention.⁵⁵ I believe the result of that mental experiment is positive as well. In summary, rational persons *within a state* will agree, I believe, to allow humanitarian intervention not knowing what place they will

⁵⁵ See Fernando R. Tesón, "International Obligation and the Theory of Hypothetical Consent", *Yale Journal of International Law* 15: 84, 109-120 (1990).

have in that society. These parties know the state to which they belong. And rational *global* parties who *do not* know what state they will belong to will likewise agree to a general rule allowing humanitarian intervention in appropriate cases.⁵⁶ No rational person will agree to a blanket sovereignty principle banning intervention because they may end up trapped as victims of tyranny of anarchy.

What about the non-interventionist's claim that failure to intervene cannot be culpable? Even if correct, this would not be an argument against humanitarian intervention, but only in favor of the *permissibility of abstaining* from intervening. If the foregoing conclusions are correct, the supporter of humanitarian intervention has met the objection that intervention is wrong because it is a positive act that results in the deaths of innocents. At the very least, the foreigner who abides by the doctrine of double effect is not morally precluded from acting by the fact that his behavior may result in the deaths of innocent persons. He is morally permitted to act.

But more importantly, it is difficult to maintain a coherent and intuitively acceptable moral distinction between acts and omissions in many cases.⁵⁷ The foreigner who refrains from intervening to stop atrocities may be negligent or culpable in some cases. Whatever the philosophical differences between acts and omissions, the agent who refuses to intervene is responsible for not having done things he could have done to stop

⁵⁶ See Mark Wicclair, "Rawls and the Principle of Non-Intervention", in *John Rawls' Theory of Social Justice*, edited by G. Blocker & E.H. Smith (Ohio University Press, 1980) p. 89, and the discussion in *Humanitarian Intervention* cited, pp. 61-74.

⁵⁷ See generally works cite supra note 49.

the atrocities. Even if there is a valid distinction between act and omission, all that proves is that the actor who refuses to intervene to stop atrocities is not as morally blameworthy as the perpetrator himself. But this fact does not exonerate this actor from the quite distinct charge of having failed to help others.

Consider the genocide recently committed in Srebrenica. Bosnian Serb forces overran the Bosnian town in July 1995 before the eyes of 300 Dutch peacekeepers.⁵⁸ The Bosnian Serb forces captured between 7,000 and 8,000 defenseless males, men and children, and killed almost all of them.⁵⁹ The International Court for the Former Yugoslavia properly decided that this was genocide, and convicted the field commander, Radislav Krstic, to 46 years in prison. This is considered as one of the worst atrocities committed in any armed conflict since World War II.⁶⁰

The shock we felt in the face of such evil has perhaps obscured another shocking fact. The area was supposed to be a protected United Nations enclave. However, General Bernard Janvier of France, the overall United Nations commander for Bosnia at the time, ignored repeated warnings by the peacekeepers and vetoed, until the very last minute, NATO air strikes requested by them.⁶¹ He could have saved those 7,000 victims, but

⁵⁸ See Marlise Simons, "Tribunal Finds Bosnian Serb Guilty of Genocide," New York Times, August 3, 2001, Section A, Page 1, Col. 1

⁵⁹ Ibid.

⁶⁰ There are many competitors for that title, however: the events in Bangladesh in 1971, in Cambodia in the mid-seventies, and in Rwanda in 1994 are serious contenders.

⁶¹ Ibid. Observers have unanimously decried this omission. George Will calls it "criminal incompetence", The Washington Post, August 9, 2001, Page A19; The Los Angeles

chose not to act. Now let us assume that General Janvier is an educated officer of the French Army. Very likely he took international law classes as part of his instruction. If so, very likely he was told that humanitarian intervention is prohibited by international law, by the same people who argue for that proposition today in France and elsewhere. We can say that he is guilty of omission, because he could have acted, and he had the necessary authority and ability to understand the gravity of the situation. To borrow a famous phrase used in Nuremberg, he was capable of moral choice. General Janvier's blameworthiness is not the same as Krstic's, of course, but he is still morally culpable. Yet we must also blame, I believe, the moral poverty of the principle non-intervention. Sometimes, those who believe in wrong ideas can cause great harm when they implement them. General Janvier was implementing his belief in the principle of non-intervention. If interventionists have to explain Somalia, non-interventionists have to explain Srebrenica.

The condemnation of war is part of the condemnation of political violence generally, and thus it should include the condemnation of internal atrocities. The moral issue is *not*: are we prepared to fight a war, with all the bad consequences we know all wars cause? The question is: should we act to stop the internal atrocities, knowing that there will be serious moral costs? Simply put, the non-interventionist has the burden to explain why the killings that occur across borders are morally distinguishable from the killings that occur within them. As we saw, he has not met that burden.

VIII. The Internal Legitimacy of Humanitarian Intervention

Times referred to it as a blot in the West's record, a "sin of omission", August 6, 2001, Part 2, page 10.

There is a seldom-discussed yet centrally important aspect of humanitarian intervention: how can a liberal government justify humanitarian intervention *to its own citizens*?⁶² Under some liberal justifications of the state, humanitarian intervention is problematic. For example, a liberal might claim that the state is justified as a mere instrument for solving certain inefficiencies that occur in the state of nature (such as those created by private punishment of wrongs.) The state, on this view, would be a mere tool for advancing the citizens' interest. This is what Allen Buchanan calls the "discretionary association" view of the state.⁶³ Under this view, the government does not have authority to engage the collective resources of the state in a humanitarian intervention because it does not owe any duties to foreigners. The government would be violating its fiduciary duty. Buchanan, rightly in my view, rejects this position and argues for the existence of a natural duty to "contribute to the inclusion of all persons in just arrangements."⁶⁴ The discretionary association view endorses a world in which states act properly when they pay no attention of oppression elsewhere, as long as they discharge their fiduciary duty toward they own citizens (Buchanan calls this the "Swiss model.") Such world is undesirable, so, Buchanan concludes, states should properly be seen also as instruments

⁶²To my knowledge, the only treatment of this issue is by Allen Buchanan, "The Internal Legitimacy of Humanitarian Intervention", *The Journal of Political Philosophy*, 7: 71 (1999).

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⁶⁴ Id. p. 83.

of justice, and can and should be used to promote human rights in other societies as long as this is done at a reasonable cost.

Buchanan's argument is important because it removes a preliminary philosophical objection to cosmopolitan, pro-human rights, foreign policy. In order to assess the validity of humanitarian intervention, however, the argument needs to be supplemented by considerations related to the legitimacy of the use of *military* resources. Buchanan correctly shows that citizens and their governments have an obligation to *promote* human rights in a general way. For example, citizens must accept that their tax dollars be used to contribute to the organizations of free elections in foreign countries, or to foreign aid given for democratic purposes, or to the financing of international human rights courts and other liberal international institutions. They can accept –indeed demand- that their government adopt pro-human rights positions in international organizations. But this is consistent with the citizens' opposition to the government using *force* for humanitarian purposes. A state that promotes human rights generally yet refuses to use military force to stop atrocities departs from the Swiss model. Yet the issue of whether or not it is permissible or mandatory for a liberal government to send military forces to end anarchy or tyranny abroad remains intact.

To see this clearly, consider the arguments that libertarians give to oppose humanitarian intervention. According to them, governments do not have the right to force citizens to fight for the freedom of foreigners. This argument differs, on one hand from the one given by international lawyers and some Realists⁶⁵, and on the other from

⁶⁵ I am thinking of those Realists like Hedley Bull, for whom the principle of non-intervention is crucial to the preservation of the state system. See Hedley Bull, *The*

Buchanan's argument. Unlike lawyers and some Realists, libertarians do not believe in the principle of sovereignty and despise tyranny as much as the liberal interventionist. For libertarians (as for liberal interventionists), despotic régimes lack legitimacy and are thus not protected by any sovereignty principle. However, libertarians believe that a government cannot legitimately force *its own* citizens to fight for someone else's freedom. This argument has a strong and a weak version. The strong version is that the government can *never* coerce people into fighting wars, even wars in the defense of the person's own society. Persons retain an absolute control over their choices to use violence in self-defense. For libertarians, aggressive force is morally banned, and one legitimate function of the state is to control aggressive violence. But the use of force to repel aggression (defensive force) is not banned: it is morally permitted. If the use of force is morally permitted, not obligatory, then the victim of an attack retains the power to decide whether she will fight for her life, property, or freedom. Others (the government especially) cannot make those choices for her, and especially cannot coerce her into combat. If this is true with respect to force used in one's own defense, it is true *a fortiori* of coercion for the purpose of forcing someone to fight in defense of her fellow citizens, and even more *a fortiori* of coercion to force someone to defend foreigners. In short: the strong libertarian argument contends that a state is worth defending only if citizens rise

Anarchical Society: A Study of Order in World Politics (Columbia University Press, 1977). As Buchanan rightly points out, some Realists oppose humanitarian intervention with an argument similar to the "discretionary association view", that is, that the government owes duties only to its citizens. See Buchanan, pp. 77-79.

spontaneously against the aggressor. Those who choose not to fight are within their rights and should be left alone.

The weak version of the libertarian argument holds that coercion to force people to fight in defense of their own state, their fellow citizens (self-defense) is justified, but coercion to force people to fight in defense of the freedom of foreigners is not. This weaker version may rely on the public goods argument. National defense is a public good. If people are allowed to choose individually whether they should contribute to repelling an aggression they will be tempted to free ride on the defense efforts of others. There is market failure with respect to national defense: everyone wants to repel the aggressor, but they hope others will risk their lives to do so. Because everyone reasons in the same way, the public good (defense) is under-produced and the state succumbs to the aggressor. This version of the libertarian argument, then, accepts the government's role in defending the state. It rejects, however, the legitimacy of humanitarian intervention, perhaps because it does not regard foreigners as participants in a cooperative enterprise (as fellow citizens would be) and thus the public goods problem does not even arise. And the government in a libertarian state surely does not have a mandate to protect the rights of persons others than those who have elected it. Both versions of the libertarian critique of humanitarian intervention are consistent with accepting Buchanan's view: libertarians may consistently concede that the government has a *prima facie* obligation to peacefully promote universal human rights as part of their natural duty of justice, yet claim that the government may not force people *to fight* in order to save foreigners from tyranny.

Libertarians rightly draw our attention to the exaggerated claims that government makes on our freedoms and resources. It is easy for someone who thinks that "something

must be done” about, say, the victims in Kosovo, to send *others* to risk their lives to do it. Because of that, libertarians have given a powerful cautionary warning against conscription for fighting foreign wars. What was wrong with Vietnam, on that view, is not that it was an unjust war (an uncertain assertion, perhaps) but that the government was forcing unwilling persons to fight for the freedoms of others. This is an important question of political philosophy: what is the proper role of a liberal government with respect to military efforts? Under what conditions can a liberal government force citizens to fight? The answer to this question is totally independent of the answer to the question of the place of sovereignty as a bar to intervention. The question, however, should be addressed as an important question of democratic theory, and it has a direct bearing on humanitarian intervention. If libertarians are right, humanitarian intervention is wrong, not because dictators are or should be protected by international law, but because governments cannot validly force people to fight in foreign wars.

A possible reply to the libertarian argument is that the duty to assist victims of injustice in other societies raises (like self-defense does) problems of collective action.⁶⁶ Just as one can give a public goods argument to justify self-defense internally, one could conceivably give a public goods argument to justify humanitarian intervention internally. The argument would go as follows: humanitarian intervention is risky, so individuals in a liberal society who think it is right to intervene in a neighboring country to end tyranny or anarchy might nonetheless expect that others will make the effort. They free ride on the courage of others. Because enough people think that way, the public good (rescuing foreigners from tyranny or anarchy) is under-produced. Assuming the existence of a

⁶⁶ Robert Keohane suggested this possibility.

natural duty to justice, the power of the government to draft soldiers for humanitarian intervention is necessary in order to block opportunistic moves *ex post*.

I think that the public goods argument justifies humanitarian intervention with the important qualification that the government must send *voluntary soldiers* before resorting to conscription. This is because the public goods argument depends on the assumption that the good in question is demanded by a sufficient number of people. Because the demand for national defense is likely to be strong, conscription is needed to eliminate free riders. But, while humanitarian intervention is also a public good in the sense that allows for opportunistic moves *ex post* (people who would agree *ex ante* to intervene will refuse to fight once the veil of ignorance is lifted,) it is not certain that demand for humanitarian intervention will be as strong as demand for national defense. There will be genuine objectors who are not, by definition, opportunistic agents. Therefore, a liberal argument must balance respect for these genuine dissenters with the need to implement the natural duty of justice. In other words, the duty that liberal governments have to promote global human rights is not absolute: it must cohere with other important moral-political considerations, such as the need to respect non-opportunistic exercises of individual autonomy. A way to do this is to resort to voluntary armed forces.

The libertarian cannot oppose the use of a voluntary army. Voluntary soldiers have validly consented to fight in cases where the legitimate government believes there is (a morally) sufficient reason (apart from consent) to fight. The libertarian would have to say that the government is misreading the contract: perhaps the contract contains an implicit clause under which the person inducted into the armed forces only consented to fight in self-defense. I have not seen those contracts, but I doubt they can be reasonably

construed that way. Rather, the draftee has plausibly delegated to the government the right to choose for him whether a war is worth fighting.

Some people object to this view saying that consent is tainted, that draftees come from the poorer segments of society and cannot foresee the multifarious ways in which they can be used and manipulated by the powerful co-contractant, the government. But whatever the merits of this view, it cannot be held by a libertarian, who insists that revealed consent be honored even if the terms of the contract are otherwise objectionable. The unconscionability objection may be available to someone who objects to humanitarian intervention for other reasons, but not to the libertarian. I am skeptical about the merits of the unconscionability argument anyway, for a number of reasons. First, if one is going to uphold the validity of draft contracts it cannot plausibly read into them an implicit clause that devolves on the draftee the power to pick and choose among the wars he wants to fight. This would of course frustrate the very idea of voluntary draft, because the temptation not to fight when the occasion arises is too strong. But more important, I believe that the draftee can reasonably expect that he will be sent to fight for worthy causes, and whether or not a humanitarian intervention is a worthy cause is an open question to be decided on its merits, not on the dubious grounds that the draftee could not plausibly foresee that such occasion (the need to save foreigners from tyranny or anarchy) could arise. Another way of putting this is that the notion of unconscionability is parasitic on the merits of the intended enforcement of the contract. To say that forcing an enlisted member of the armed forces to fight to save Kosovars from genocide is unconscionable is to *decide* that it is outrageous, that the cause does not warrant fighting. But this is surely an independent question to be decided on its

merits. The doctrine of humanitarian intervention simply holds that sometimes such wars are justified. It seems natural to say that enlisted persons have agreed to let the government decide when those wars are justified.

I conclude the section by rejecting the libertarian position in so far as it overlooks the public good argument for humanitarian intervention. I accept, however, an amendment inspired in the libertarian insight: when a government decides to intervene for humanitarian reasons, governments must resort first to voluntary armies, then call for volunteers, and only as a last resort enact a general draft.

IX. Concluding Comment

Non-interventionism is a doctrine of the past. It feeds on illiberal intellectual traditions that are objectionable for various reasons and that, where implemented, have caused grievous harm to persons: relativism, communitarianism, nationalism, and statism. Neither the assumptions nor the consequences of non-interventionism are defensible from a liberal standpoint. The very structure of the non-interventionist argument belies the spurious pedigree of the doctrine. We are supposed to outlaw humanitarian intervention because that is what most governments say we should do. But of course, those who wield or seek power over their fellow citizens (incumbent governments and would-be rulers) have an obvious incentive to support non-intervention. We know that governments (even the better ones) will think about international law and institutions with their priorities in mind, that is, presupposing and affirming state values. But we like to think that we are not victims of such perverse structure of incentives. We

have the choice to think about international law and institutions with human values in mind. Non-interventionists deceptively present their doctrine as one that protects communal values and self-government, yet even a cursory look at history unmask non-intervention as the one doctrine whose origin, design, and effect is to protect established political power and render persons defenseless against the worst forms of human evil. The principle of non-intervention denies victims of tyranny and anarchy the possibility of appealing to instances higher than their tormentors. It condemns them to fight unaided or die. Rescuing others will always be onerous, but if we forego by law our right to do so, we deny, not only the centrality of justice in political affairs, but also the common humanity that binds us all.

Tempe, Arizona, September 2001