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## Global Justice and Transnational Politics

Essays on the Moral and Political Challenges of Globalization

edited by Pablo De Greiff and Ciaran Cronin

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## Intervention and Civilization: Some Unhappy Lessons of the Kosovo War

*David Luban*

Twenty years ago I published a paper on just-war theory, arguing that military intervention in foreign countries to defend basic human rights is just, even if it violates national sovereignty and therefore amounts in legal terms to aggression. I was, as I recall, rather proud of the paper.<sup>1</sup>

As the Kosovo War unfolded in 1999, I was more than once haunted by the ironic slogan, "Be careful what you wish for." The Kosovo War was a military intervention to defend basic human rights. The Kosovo War was also a near disaster, for reasons that go to the heart of its moral justification: legitimate political concerns led the NATO allies to wage war in a way that endangered the very people the war was supposed to defend. Understanding that these political concerns were legitimate is one unhappy lesson of the Kosovo War. The lesson, more generally, is that practical and political limitations on effective warfare can amount to moral limitations as well—and limitations on effective warfare can, in turn, weaken the humanitarian rationale for intervening in the first place.

I have nevertheless come to believe that the Kosovo intervention was, in the end, morally justified. It would have been shameful not to intervene, because the Kosovar Albanians were being treated in a way that is not civilized. As we shall see, this turns out to be an uncomfortably fragile basis for humanitarian intervention, because the distinction between civilized and barbaric behavior, drawn by all peoples at all times, nevertheless varies greatly among societies and

epochs. It is a distinction based in social sentiment rather than universal reason. Even the judgment that mass expulsion and ethnic cleansing are uncivilized is fundamentally sentimental. Yet, sentimental or not, the conclusion that gross human rights violations are an affront to civilized standards may well be the *only* basis for humanitarian intervention. Fighting for human rights proves to be far more precarious, both practically and philosophically, than friends of humanitarian intervention would like to believe. This is the second unhappy lesson of the Kosovo War.

### 1 Introduction: Circumspect Humanitarianism in Kosovo

The American-led NATO attack on Kosovo began on March 24, 1999. Within two days, it appeared that the immediate result was a humanitarian catastrophe of incredible proportions. As if the air attack was their cue, Serbian police and military units joined with Serb Kosovar militias and opportunistic thugs to drive Kosovar Albanians from their homes (a process that had been happening before, although on a much smaller scale). Tales of horror followed the hundreds of thousands of miserable refugees streaming to the borders. Their homes had been looted or burned, men were separated from women, and an unknown number of men (several thousand, it now appears) were murdered. Young women were gang-raped. The Serbian forces moved quickly but systematically to eradicate the Albanian presence from Kosovo. Hedging against the day the Albanians might return, the Serbs methodically destroyed birth records, deeds, auto registrations, and other documents that Albanians might use to prove that they had once existed in Kosovo and owned property there.

The NATO forces appeared helpless to stop the disaster. NATO had not prepared an expeditionary force of ground troops, having apparently concluded that bombings alone would cause Serbian President Milosevic to fold quickly. Indeed, President Bill Clinton had incautiously announced that America would never send ground troops. That left air power, but bad weather too often prevented NATO aircraft from bombing Serbian troops and armor without flying so low that they would be vulnerable to surface-to-air missiles.

NATO leaders proved unwilling to take the risk, and the astounding fact is that no NATO aircraft were shot down. Weeks later, when American Apache helicopters were brought in, they sat unused on the ground for similar reasons.

To those of us following the news from Kosovo aghast, it seemed that the NATO incursion had turned into an unmitigated disaster, ruining the very people it was supposed to help. It was hard not to share the sentiment of Noam Chomsky, who circulated a lengthy e-mail message during the first week of the bombing in which he assailed NATO for violating the fundamental Hippocratic principle that should govern all humanitarians: "First do no harm!"<sup>2</sup> Even though President Clinton and Secretary of State Madeline Albright assured us that the Serb campaign of ethnic cleansing would have unfolded in much the same way without the NATO attack, it appeared likely that it would not have happened so soon or so quickly—which means that it might have been blunted or even prevented.<sup>3</sup>

Soon NATO began to bomb Serbia proper in order to raise the stakes and bring the war home. Even so, American spokespersons declared that Milosevic's presidential palace was off limits because of its historical and cultural significance, including the Rembrandt on its first floor.<sup>4</sup> Like the refusal to take any military risks, this announcement appeared to signal a lack of seriousness on the part of NATO's political leaders—a determination to fight a war that in some sense was not a war, a politically correct war that would raise no objections on the home front.<sup>5</sup>

The Serbian surrender on June 3, 1999, was as unexpected as the ferocious Serb attack on the Albanians. It appeared to give bragging rights to President Clinton and the NATO leadership; the political commentator Hendrik Hertzberg, writing in *The New Yorker*, argued soon after that it proved the wisdom of Clinton's entire approach to the Kosovo crisis.<sup>6</sup>

Of course, it proved no such thing. NATO's cautious, low-risk-of-casualties, air-power-only approach may well have prolonged the war, inflicted needless suffering on the civilian population of Serbia, permitted additional atrocities to be visited on the Albanian Kosovars, and thereby provoked them to revenge-atrocities and reverse ethnic

cleansing when they returned, thereby prolonging the task of NATO peacekeepers and perhaps making it an impossible one. It also sent a message that could hardly be lost on the world: that Americans considered one American life to be worth thousands of Yugoslav lives—hardly a resounding endorsement of the doctrine of universal human rights.<sup>7</sup>

## 2 The Abiding Tension between Statism and Human Rights

The reply is that a more aggressive warfare strategy was politically impossible, both because America's NATO allies were unwilling to go along with it and—more importantly—because the American public (and, presumably, the publics in the other NATO nations) would be unwilling to accept very many casualties in a war justified in purely humanitarian terms.

This last point seems to me a philosophically important one. Throughout human history, wars have been fought mostly, perhaps exclusively, to advance the perceived interests of the states or rulers whose soldiers fought them. This is no less true in the United Nations era, even though the U.N. Charter prohibits wars motivated by the age-old quests for plunder, tribute, empire, colonies, and slaves, the traditional national interests advanced by war. The Charter reduces the permissible interests to self-defense and collective self-defense, but these remain national interests nonetheless. Significantly, President Clinton occasionally found it necessary to justify the intervention in explicitly antiauttruistic terms of American commercial interests in European stability. Ironically, perhaps, it seemed necessary for the president to position himself on the moral *low* ground to set minds at ease.<sup>8</sup>

The fact is that a war fought to protect human rights is deeply subversive as a matter of theory. International law and the international order are founded on the ultimacy of sovereign states. It is states that public international law regulates, states whose consent via treaties and customs creates the stuff of international norms, states whose interactions are the subject matter of diplomacy. International law also recognizes substate national groups, and the principle of national—that is, ethnic—self-determination is in notable tension

with the principle of state sovereignty. But even national self-determination is fundamentally state-centered: it is the claim that national minorities deserve states of their own. Within this state-centered order, individual human beings amount to little more than an ontological curiosity.

I do not mean that human rights are unimportant in public international law. That is plainly untrue. I mean instead to highlight the embarrassing fact that the coercive protection of human rights is profoundly subversive of the ultimate ground of the international order, state sovereignty.<sup>9</sup>

Nowhere is this more apparent than in the Nuremberg Charter, in some sense the foundational document of contemporary human rights law. In addition to traditional war crimes, Article 6 of the Charter introduced two novel crimes, crimes against peace (Article 6(a)) and crimes against humanity (Article 6(c)). The Charter also abolished the act of state defense (Article 7) and the defense of superior orders (Article 8). Abolishing these defenses displaces the sovereign as the sole lawgiver and denies that sovereign acts are above the law, so the Charter plainly seems like an anti-sovereignty, pro-human-rights document. Furthermore, crimes against humanity can be committed by a sovereign against his own subjects, so that Article 6(c) is likewise an encroachment on sovereignty. Finally, Nuremberg instituted a system of individual, not just state, responsibility for violations of international law—another innovation that undercuts the view that only states matter.

Yet all these achievements are nullified, at least in part, by Article 6(a), which the framers of the Nuremberg Charter regarded as their greatest accomplishment, because they imagined that it would bring war to an end. Crimes against peace are crimes that plan or execute an aggressive war. The Nuremberg Charter gave this clause of Article 6 priority over Article 6(c), by restricting crimes against humanity to persecutions committed in execution of crimes against peace and war crimes. In effect, the tribunal subordinated its cosmopolitan demands to the statist demand of Article 6(a), that all states must respect the sovereignty of other states.<sup>10</sup>

I am not implying that the Kosovo intervention violated international law. Lawyers will argue about this, but the question is not really

so important, because the actions of great powers are as much sources as subjects of international law.<sup>11</sup> The Kosovo intervention certainly violated whatever law the authors of the Nuremberg Charter thought they were framing; but the fact that heirs of the Nuremberg powers conducted the intervention may show that Nuremberg law has been superseded by something else. The important point is not that humanitarian intervention violates Nuremberg law, but that it violates the statist order that the Nuremberg Charter aimed to protect. Indeed, United Nations Secretary-General Kofi Annan, in a widely heralded address to the General Assembly, claims that “[s]tate sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation.”<sup>12</sup> Now, he believes, the aim of sovereignty is to protect human rights as well as the rights of states. It follows that a state that fails to protect human rights forfeits at least part of its sovereignty. On that basis, Annan defends humanitarian interventions, but he recognizes that doing so requires fundamentally recasting the basic terms of international law.

### 3 Unromantic Statism and the Requirement of Domestic Legitimacy

Some years ago, I argued that there is nothing regrettable about violating the statist order to protect human rights; the justice and injustice of war should be assessed along the dimension of human rights protection, not state sovereignty protection. The rights of government derive from the rights of the governed through the process of consent; because people do not consent to their own repression, human rights violation undercuts the very basis of sovereignty.<sup>13</sup>

This argument, which harmonizes with Annan’s address, subordinates states to individuals as a matter of what might rather grandly be called social ontology. However, while I continue to accept the argument, I now believe that it is incomplete and one-sided. The supremacy of states cannot be wished out of just-war theory. It takes an army to fight an army, and it will be states, not heroic little bands like the Abraham Lincoln Brigade, that carry out whatever humanitarian interventions ought to be carried out.<sup>14</sup> This is as it should be, not only because heroic little bands do not win wars but also because

no reasonable law of peoples can tolerate vigilante interventions. To say this is not to say that vigilantes act wrongly when they place their lives on the line in a foreign land to defend the basic rights of people dwelling there. It is that they are the wrong actors. When self-appointed saviors use force to pursue their own political aims, it gets hard in principle to distinguish Abraham Lincoln Brigades from Symbionese Liberation Armies, or, for that matter, from mafias.<sup>15</sup>

For anyone other than anarchists (who believe that states are themselves mafias), states or multilateral organizations of states must be the normal military actors. The focus remains on states rather than multilateral organizations, because, for the foreseeable future, multilateral organizations must rely on states to provide their military forces voluntarily, so that the individual state remains the gatekeeper of intervention. Equipping multilateral organizations like the U.N. with standing armies might alleviate this difficulty, but for just that reason the idea is unlikely to be adopted without states retaining the power to veto the use of their own troops in any given conflict. No state will tolerate the prospect of its own troops being ordered into combat against the wishes of its people or leadership, nor is it obvious that states should tolerate this prospect. Like it or not, the state remains the center of gravity for legitimate warfare abroad.

This, let me underline, is not the romantic defense of statism, which argues that the state simply is the nation or people in its political form. The qualified defense of statism I offer here is little more than a recognition that the anarchist “romance of the people militant” is just as dangerous as the “romance of the nation-state,” while the “romance of world government” (dangerous in its own way) is too utopian for the world we live in.

Once we acknowledge that it will be states that intervene, however, we must acknowledge as well that the domestic political process by which a state decides whether or not to commit its children and its fisc to war is relevant to just-war theory. The decision to intervene must be politically legitimate back home as well as morally legitimate abroad.<sup>16</sup> In a democracy, the political support of citizens is a morally necessary condition for humanitarian intervention, not just a regrettable fact of life.<sup>17</sup> If the folks back home reject the idea of altruistic wars, and think that wars should be fought only to promote a nation’s

own self-interest, rather narrowly conceived, then an otherwise-moral intervention may be politically illegitimate. If the folks back home will not tolerate even a single casualty in an altruistic war, then avoiding all casualties becomes a moral necessity. That is why President Clinton's low-casualty tactics and his arguments that flipped between morality and national self-interest were more than a concession of morality to politics. They represented the twin demands for international and domestic legitimacy.

#### 4 Altruism and National Interest: A False Dichotomy

What just-war theory must offer, then, is an argument within deliberative democracy—an argument addressed to citizens, not just governments, explaining why they should support an altruistic foreign intervention. To whet our intuitions, we may pose the question in melodramatic terms: what explanation can be offered to American soldiers and their parents about why the soldiers should stand ready to die (not to mention to kill) in defense of the rights of Kosovar Albanians? After all, the same liberal regard for the value of individual human lives that commends humanitarian intervention should make us justifiably reluctant to send young men and women into combat.

In one way, of course, the question is misleading. Nothing will ever justify a child's death to a parent. So the question is rather whether there is some explanation that can be offered that is as strong as the time-honored justifications based on national self-interest. Self-defense against foreign conquest offers the best example of a satisfactory explanation, one that only strict pacifists would reject.

However, most Americans probably accept a broader justification of military force than mere defense against foreign conquest, which indeed has never been a genuine risk in twentieth-century wars, including the world wars. The broader justification is that military force can be used in defense of America's vital strategic interests.<sup>18</sup>

Should an American soldier or his parents accept this as a justification for risking death in a far-off land? What is meant by "vital interests" for a country whose physical and political existence is not in any realistic sense imperiled? What were America's vital interests in

Grenada, Panama, Haiti, and Kuwait? In fact, the geopolitical interests of a superpower have changed little since the days of the Roman or Han empires. They are economic interests in securing trade routes, access to raw materials and markets, investment opportunities, and commercial advantages; buttressing allies; and discouraging challenges from potential economic rivals. These interests are not vital to national existence as such; they are vital only to the rather elevated standard of living that superpowers enjoy.

Now, it seems to me odd to tell someone that her son or daughter should risk death so that their neighbors should continue to be able to gas up their sport utility vehicles at a comfortable price. The idea is particularly jarring in a country like the United States, which exhibits a relatively weak commitment to institutions of social welfare. Why should people who resent having their taxes raised to support social welfare policies be expected to go into combat on behalf of their countrymen's luxuries?

I raise this question for two reasons. First, it suggests that there is nothing intuitive or straightforward about justifying wars fought in defense of national strategic interests—nothing, that is, to make the justification more plausible than altruistic reasons. Second, it calls into question the assumption that fighting on behalf of vital economic interests really *is* in the interest of the soldier, even in the extended sense in which defending his country's liberty against foreign invaders is in his moral if not material interest. Both points, I think, weaken the intuitive case for thinking that wars of national interest stand on a firmer and more common-sense ground than wars of altruism. They stand on the same plane, and if arguments of vital national interest are acceptable, there is no reason why arguments of humanitarian interest should not be.

#### 5 American Hegemony and Limiting Principles

The question then becomes what kind of altruistic reasons should properly move American citizens to support humanitarian intervention. To put it another way, which human rights violations rise to a level that demands a military response? If war in defense of basic rights is permissible, which permissible wars should be fought?

Before turning to this question, however, it will be useful to address some preliminary issues.

First, one might wonder why I am focusing exclusively on Americans. One answer is that these thoughts apply to citizens of other democracies as well, and I think this is true. But there is an important reason for focusing on America, a reason given in the title of Lea Brilmayer's book *American Hegemony*.<sup>19</sup> For the time being, at least, America is the world's reigning hegemon (or, since the word is awkward, let me say "superpower").

From the point of view of humanitarian intervention, American hegemony has profound consequences. First, it means that other potential interveners—I am thinking of the Europeans—are unlikely to move without America taking the lead, even when they are better situated to intervene and have more of a stake in doing so, as in the Balkan wars. Second, other potential interveners are likely to believe that America is economically, militarily, and diplomatically in the better position to intervene. Why should they absorb the costs when America can do it with less pain? For better or for worse—mostly for worse, I expect—humanitarian intervention will chiefly be American-led intervention.<sup>20</sup> This is good reason for focusing on the moral justifications for American citizens in particular to commit themselves to humanitarian intervention.

A third consequence of hegemony, however, is a problem of overcommitment. America simply cannot intervene everywhere that humanitarian debacles might warrant it, because humanitarian debacles are everywhere. During the 1990s, one could readily justify humanitarian interventions in Bosnia, Kosovo, Somalia, Rwanda, Burundi, Sierra Leone, Congo, Sudan—and these are only the headline catastrophes. Since the end of the Cold War, American military planning calls for the capacity to fight two regional campaigns simultaneously. That appears to be a lot, but it obviously does not begin to come near the need.

Even a superpower needs limiting principles, by which I mean principles for selecting among all the morally permissible humanitarian interventions those that are truly imperative. The issue here concerns which human rights violations demand a military response

and which do not; but this is not the only issue, and before turning to it I wish to say at least a few words about other principles that should guide decisions about where to intervene. Each of them represents a moral constraint on otherwise-permissible humanitarian intervention.

There is, first, Chomsky's Hippocratic principle: the intervention should not make matters worse for those it aims to help (of course, it will make matters worse for those it aims to hinder). This implies that the war should be winnable—winnable, moreover, without undue damage to its intended beneficiaries, and winnable without escalating into a regional or global conflict.<sup>21</sup>

Second, the intervention must be winnable without violating the just-war principle of proportionality: the enemy's interests count as well. One consequence of this condition is that only large-scale human rights violations are likely to call for intervention; otherwise, the intervention will probably be disproportionate to its aim. (Obviously, there can be exceptions to this rule of thumb: intervening against a small and weak human rights violator like Haiti might succeed with very few if any enemy casualties.)

Third, if the aftermath of intervention is anarchy or an unstable truce, the war should be waged only if the interveners are prepared for a lengthy occupation or an exercise in state building. This is a crucial point: no follow-through, no intervention. Otherwise, intervention is like tossing a life jacket to a shipwreck victim but then leaving the victim adrift in the middle of the ocean. One might respond that it is always acceptable to stop a murder in progress even if you do not know what your next move will be. But if the only way to stop the murder is by waging war, the burden of justification surely demands more than "we'll cross that bridge when we come to it."

Fourth, American hegemony notwithstanding, the United States should not intervene when another nation, or a multinational organization, is better situated or morally obligated to lead the intervention. The principle is analogous to the idea in tort theory that liability should lie with the party that can guard against accidents at lowest cost to itself: interventions, too, should be undertaken by the least-cost avoider. Of course, this will create a wrenching dilemma if



the least-cost avoider refuses to intervene, for then following the limiting principle will mean that the victims of catastrophe are left to their fates. Unfortunately, the alternative is always picking up the ball when someone else drops it, which heightens the problem of overcommitment, and creates a perverse incentive for nations to engage in a game of humanitarian chicken where each waits for another to take up the burden of intervention.

Even if all these principles are honored, it may well turn out that too many morally legitimate humanitarian interventions remain, so that triage is required. If so, then it appears permissible for an intervener to use its own national interests as a tiebreaker. Suppose that humanitarian intervention would be appropriate in two different countries, but that the intervener can commit the resources to at most one of the two. In that situation, it would be entirely reasonable to choose the country in which the intervener has interests of its own at stake—and using self-interest as a tiebreaker does not make the intervention any less humanitarian.

Recognizing these principles can help address a difficult issue that triage inevitably raises, namely the charge that the intervener picks and chooses among equally compelling cases for unprincipled and unworthy motives. Yes to intervention in Kosovo and Somalia; no to intervention in Bosnia and Rwanda. The Rwanda case is instructive because the American role in Rwanda was shameful—not merely failing to intervene, but frantically maneuvering to stop others from intervening as well.<sup>22</sup> As is now well understood, the Clinton administration was afraid of acknowledging the Rwanda genocide, which would have triggered the 1948 Genocide Convention's requirement to take action. Humiliated by failure in Somalia, the administration was willing to play the scoundrel's part to avoid humanitarian overcommitment. On the one hand, this repulsive episode underlines the problem of overcommitment; but it also confirms suspicions about selective intervention and hypocrisy. Limiting principles, publicly acknowledged, seem far superior.<sup>23</sup> In Rwanda, the moral burden of intervention arguably rested on France and Belgium, whose foreign and colonial policies were in large part responsible for Hutu-Tutsi hatreds.<sup>24</sup> (Instead, France engaged in what one observer calls "blatant complicity in the preparation and implementation of the

butchery,"<sup>25</sup> and France's ultimate intervention helped the *génocidaires* as much as their Tutsi victims.<sup>26</sup>)

Some readers may object that I have been implicitly writing as though the United States always aims to do the right thing. The history of American military intervention hardly inspires confidence in American altruism and humanitarianism, and critics might argue that a blanket rule against intervention would do far more good than a rule riddled with controversial and easy-to-manipulate humanitarian exceptions, which might do little more than provide a fig leaf for superpower realpolitik.<sup>27</sup> Yet even if American interventions have often been purely self-interested, there is no reason to doubt that the Kosovo intervention (like the intervention in Somalia) was fundamentally a humanitarian effort. It is not a given that American intervention is self-interested, and exploring the rationale and limits of good-faith humanitarian intervention makes no assumption one way or the other about which interventions are humanitarian.

The limiting principles I have mentioned are all based in common sense and require no elaborate philosophical argument. According to these limiting principles, what should we think of the Kosovo War? I regard it as a very close call. The interveners were the "right" countries—only Russia was a lesser cost-avoider than NATO, but Russia was backing Milosevic. Furthermore, the war was winnable with little risk of escalation. But, as I have suggested, it is far from obvious that it satisfied Chomsky's Hippocratic principle *given the tactics that the NATO publics were willing to back*. Moreover, it is too soon to tell whether the victorious countries are prepared for the potentially long-term occupation and protection mission that the international security force in Kosovo (KFOR) and the United Nations have assumed. A year after the war, it appears that they are not—the head of the U.N. civil administration has had to beg the reluctant NATO countries to pay their shares; American policymakers complain that policing Kosovo is "mission creep," even though custodial governance is the mission. These were all foreseeable problems, and if in hindsight the postwar reconstruction turns out well, that will be largely a matter of moral luck. If it does not, the failure may retroactively rob the war of whatever moral legitimacy it had.

## 6 Legitimacy or Morality?

One possible limiting principle that I have deliberately omitted from this untidy catalogue is one that would restrict interventions to cases in which the target is a regime lacking domestic legitimacy. In my own earlier work, I argued that regimes lacking the consent of the governed have no moral claim to military immunity, because a state maintained only by force cannot claim to represent the nation, that is, its people. The argument proceeds in three simple steps: no consent, no legitimacy; no legitimacy, no sovereignty; no sovereignty, no immunity to intervention. The converse of this argument might be used to defend a limiting principle based on state legitimacy: with consent comes legitimacy, with legitimacy comes sovereignty, and with sovereignty comes immunity.

I have now come to doubt this argument in both directions. The purpose of intervention is supposed to be protecting human rights; but the legitimacy argument makes no mention of human rights. Even a legitimate regime can engage in repulsive human rights violations, and the legitimacy argument would immunize it against humanitarian intervention.

One might object that a truly consent-based state will not engage in human rights violations. Regimes engage in repression as a substitute for consent, and so we can infer illegitimacy from brutality. This is an error, however. Even if consent is the ultimate basis of legitimacy, the fact remains that people can consent to hierarchical legitimization principles that authorize nonconsensual or even anti-consensual governments, including repressive ones. I do not mean that even the dissenters who are being repressed "really" consent to the government that represses them. The point is rather that in politics consent is never unanimous, and widespread support, which even repressive governments can enjoy, is all that can reasonably be required for consent-based legitimacy.<sup>28</sup> The post-1979 Iranian theocracy met the consent requirement, and even a regime as horrible as the Argentinian junta of the Dirty War enjoyed widespread support until the Falklands defeat.

This last example exposes the problem, for the Argentinian junta was one of the most atrocious and murderous regimes in the world.

It seems to me that the junta should have enjoyed no moral immunity from intervention: even if a murderous regime like the Argentinian junta was legitimate, that does not make it wrong for outsiders to halt its atrocities if they can. The point of limiting principles is to limit overcommitment to morally worthwhile causes. The point is emphatically *not* to replace moral concerns, grounded in human rights, with political concerns, grounded in the consensual basis of the state that is violating human rights. For that reason, I am now inclined to reject the focus on legitimacy. Legitimacy is no substitute for morality.

## 7 Why Universal Obligation Does Not Follow from the Concept of a Human Right

That leaves the democratic citizen with a question: Given that any war on behalf of basic human rights that satisfies the other limiting principles is morally permissible, which is morally compelling?

The worry is that human rights are so important that all wars on their behalf are morally required. In an earlier paper I wrote that a human right is "a right whose beneficiaries are all humans and whose obligors are all humans in a position to effect the right. . . . Human rights are the demands of all of humanity on all of humanity."<sup>29</sup> As a conceptual matter, rights correlate with obligations on others—obligations to respect the rights. Supposing this to be correct, it appears to follow that if a government is violating the human rights of its people, everyone else is duty bound to bring the violations to a halt.

But that conclusion is too quick. The right not to be tortured imposes a demand on all of humanity, and that conclusion follows from the bare acknowledgment that we have a *right* not to be tortured. But from the conceptual point alone all that follows is the negative demand that everyone must refrain from torture, not the positive requirement that anyone must intervene to stop others from torturing. To argue for humanitarian intervention, one needs a substantive moral argument to the citizens of the intervening powers about why they must guarantee the right against torture of people in other countries, perhaps at the cost of their own or their children's lives.<sup>30</sup>

This last point is important. Many philosophers argue for global economic obligations, that is, obligations to aid people in other countries based on global principles of distributive justice. Other theorists disagree. But even those of us who defend global obligations involving economic self-sacrifice will be hard-pressed to defend a strict, justice-based moral obligation to fight for the human rights of strangers, that is, to put one's life on the line for them. Distributive justice may require your money, but it cannot require your life.

Apart from distributive justice, the natural analogy to a duty to intervene is the "duty to rescue" embodied in so-called good Samaritan laws. Good Samaritan laws make it a punishable offense to stand idly by while another person perishes if the bystander could rescue the victim at no peril to himself. Such laws are controversial, and they have attracted a large philosophical and legal literature. But even proponents agree that "at no peril to himself" is a crucial condition for a valid good Samaritan law. Requiring one person to sacrifice his life for another's, or even to run substantial risk to life or limb for the sake of a stranger, would undermine the very physical security such laws aim to secure.

Put it more simply: If there was a genuine obligation to intervene militarily on behalf of the basic rights of foreigners, a people would have no right *not* to go to war when the basic rights of foreigners are imperiled. But a people always has the right not to go to war.

## 8 Why Human Rights Nevertheless Provide Reasons for Intervening

For those who favor humanitarian intervention, the challenge must be explaining why, even in the absence of a justice-based obligation to intervene, intervention may be morally vital.

The reason emerges when we ask why rights correlate with duties.<sup>31</sup> On one view, this correlation is a formal matter: To speak of a right *just is* to speak of a set of obligations on the part of others. This makes a certain amount of sense when one considers legal rights, because legal rights often take the form of obligations on others to do or

refrain from doing something. (The right to free speech in the American constitution reads "Congress shall make no law . . . abridging the freedom of speech.") The legal realists, who analyzed formal notions such as rights in everyday terms of who gets to do what to whom, encouraged this way of thinking.

But human rights are more than abbreviations for a set of obligations. Commonly, a commitment to human rights reflects a commitment to the substantive belief that every human being has a certain intrinsic worth (that all human beings are, in Kant's words, ends in themselves).<sup>32</sup> Without some such belief, it is hard to see why anyone would think that people have distinctively human rights, that is, rights possessed solely by virtue of being human.

To translate a human right into an equivalent set of obligations on others threatens to obscure this basic point by deflecting attention from the rights-bearer to the obligation-bearers. Translating human rights into correlative obligations replaces the claim that human beings are valuable with a supposedly equivalent set of claims—that *you* are obligated not to inflict certain harms on another human being, and *I* am similarly obligated, and so is everyone else. But something vital gets lost in the translation, namely that others are obligated not to violate us because of something about *us*—because we are valuable, and that value demands respect.

Once we grasp this simple point, we see that although the obligation to refrain from violating a right is one aspect of the fact that people are valuable, it is not the only aspect. The obligation does not capture the entire meaning of the right, because it does not exhaust all the reasons for action that respecting the value of other people generates. In addition to the obligation not to violate rights, we have (for example) a moral reason for helping other people in hard times; and a moral reason for trying to impede those who are violating human rights; and a moral reason for taking steps to forestall rights violations in advance; and a moral reason to support institutions that promote human rights; and so on.<sup>33</sup> These reasons need not rise to the level of obligations—after all, not every reason for doing something is an obligation to do it. But if I am right, to recognize the rights of others is necessarily to recognize a reason for acting when those rights are threatened.

### 9 Metaphysical Guilt and Bystander Shame

In the moral imaginations of most, I expect, the Holocaust looms large when we think of such matters. In Washington's Holocaust Museum, buttons are sold reading "Remember" and "Never Again," and America's turning its back on the Holocaust is now a familiar and bitter part of the story.<sup>34</sup> The impetus for intervening, many would say, is the guilt that accrues from standing idly by in the face of barbarism. Karl Jaspers, in his post-World War II masterpiece *The Question of German Guilt*, called this "metaphysical guilt," and described it in the following way:

There exists a solidarity among men as human beings that makes each co-responsible for every wrong and every injustice in the world, especially for crimes committed in his presence or with his knowledge. If I fail to do what ever I can to prevent them, I too am guilty. If I was present at the murder of others without risking my life to prevent it, I feel guilty in a way not adequately conceivable either legally, politically or morally. That I live after such a thing has happened weighs upon me as indelible guilt.<sup>35</sup>

To be sure, Jaspers's idea is hardly a model of analytic rigor, but that is not the problem. His lectures on German guilt were the first straight talk that had been heard in a German university in years; and their fearless, unaffected honesty would by itself require us to consider his idea seriously. The problem lies in understanding why Jaspers thinks there is such a thing as metaphysical guilt. In the discussion that follows, I will suggest some corrections to Jaspers's idea, but I have become convinced that it contains an important insight at its core.

Jaspers distinguishes between metaphysical and moral guilt, and he is careful to insist that people can be metaphysically guilty even if they have done nothing morally wrong. He clearly had in mind the guilt of Germans who had done nothing worse than passively acquiesce, perhaps out of terror, to the Nazi crimes being committed around them. It seems excessively moralistic to insist on an obligation to resist; but it seems inadequate to regard the passive Germans as merely blameless. That is the dilemma that leads Jaspers to introduce the notion of metaphysical guilt.<sup>36</sup>

Jaspers insists that theirs is metaphysical rather than moral guilt because no-one is morally required to throw his or her life away "without chance of success and therefore to no purpose," which he believes would have been the outcome of resistance under the conditions of totalitarian terror.<sup>37</sup> Repeatedly, he tells us that the only way a German could have escaped metaphysical guilt was by resisting the Nazis at the cost of his own life. This, he says, is "an indelible claim beyond morally meaningful duty."<sup>38</sup> At one point Jaspers speaks of "the capacity to live only together or not at all."<sup>39</sup>

Here, however, his focus on the situation of Germans under totalitarianism makes Jaspers run off the rails. All he sees is people who must choose between metaphysical guilt and heroic suicide, and that leads him to conclude that metaphysical guilt is guilt at the bare fact of remaining alive.<sup>40</sup> That, presumably, is what makes it metaphysical—too metaphysical, in my view. When Jaspers says "We are guilty of being alive," when he calls metaphysical guilt "something that is always present," and when he adds that without it we would be angels, he confirms the suspicion that by metaphysical guilt he means nothing less than original sin.<sup>41</sup>

The problem with this is not that it is an essentially theological concept. It is that there is something deeply wrong with the idea that the mere desire to live exhibits inadequate solidarity with the dead, and thus is sin. While I think I understand what Jaspers means, thoughts like this should be resisted. Perhaps with the murder of a human being something of incalculable value has been erased from the world; and perhaps the very idea of human rights requires us to regard the murder as, literally, intolerable, so that one feels ashamed to go on, as if going on is a falsehood, a denial of the fact of murder, a final betrayal of the victim.<sup>42</sup>

But isn't it also a splendid thing that the living bury the dead and then go on living? That the widow remarries? That at the same moment the hero breathes his last, teenagers are making out in a park nearby? George Steiner once praised Verdi and Shakespeare for writing dramas in which even in the midst of tragedy someone somewhere is throwing a party or seducing the maid. He contrasted Verdi's sensibility favorably with Wagner's, whose hero takes the

whole world with him when he goes. Jaspers is, in Steiner's terms, too Wagnerian.

Suppose, then, that we scrap the intimations of original sin. It still seems to me that Jaspers has identified an authentic moral phenomenon. It is the sense that I am besmirched by failing to take a stand against evil. If it is not metaphysical guilt, then call it bystander guilt or, more accurately, bystander shame. As Adam Roberts comments about the Kosovo War, "The main underlying explanation for the willingness of NATO's 19 members states to take action over Kosovo is not their interpretation of particular events. . . . Nor was it a shared vision as to what the future of the province should be. Rather, the NATO states were united by a sense of shame. . . ."<sup>43</sup>

According to Jaspers, the basis of bystander shame is that we have an ideal of unconditional human solidarity that our passivity betrays. This diagnosis is controversial; but I think there is something to it. It traces our passivity in the face of evil to the separateness of persons: the fact that I will not imperil *me* to prevent *you* from being murdered arises simply because you are not me. The separateness of persons is a deep fact about us, one that perhaps even deserves to be called "metaphysical". Liberals such as John Rawls and Robert Nozick celebrate the separateness of persons and invoke it to explain the limits of moral obligation. In this sense, Jaspers is also a liberal, because he too insists that no-one has a moral obligation to throw his or her life away because others are dying. But, unlike Rawls and Nozick, Jaspers recognizes that people find something curiously shameful about limiting our obligations through separateness.<sup>44</sup> When we fail to stand up against evil, we find ourselves saying "it wouldn't have done any good" or "it's too much to ask" or "what could I have done?" or even "it's none of my business"—and we recognize the defensiveness in all these responses, the telltale sign that we are ashamed.

The reason, I think, is this. Whether or not we have an ideal of unconditional human solidarity, the question of whether we should act in the face of evil assumes that we have *some* moral ideals and principles by which we recognize and condemn evil. If we do not, the question simply does not arise. Bystander shame is the sense that permitting horrors to be perpetrated without doing anything about

it reveals an overly weak commitment to these ideals and gives the lie to our claim that they matter very much to us. Oliver Wendell Holmes called ideals "fighting faiths," and, although Holmes was notoriously and excessively fond of military metaphors, in this case his label appears apt. We do distinguish between walking the walk and talking the talk; and bystander shame is our recognition that when we are not willing to back talk with action, the talk itself becomes cheap and in a way false. Even we ourselves can no longer be confident that evil bothers us sufficiently. Perhaps it does not—so long as it is happening to someone else.

Now we can see more clearly why bystander shame is not metaphysical guilt. Guilt is a response of self-accusation at wrongdoing; and metaphysical guilt at the separateness of persons identifies existing separately from others as a kind of wrongdoing: human plurality becomes original sin. This is the part of Jaspers's idea that we should reject.

But shame is different from guilt. Shame betokens inadequacy, not wrongdoing. We experience shame when we fail (and especially when we are seen by others to fail), and by failing reveal that we are less than we set ourselves up to be. We shame ourselves by not living up to important standards that we have advertised to others; even if failure is not culpable, it diminishes us. Professing to believe in the value of human beings, then refusing to protect them as they are murdered or driven from their homes, is paradigmatically shameful. Likewise, professing moral standards, then proving ourselves unwilling to react when others spit on them, is paradigmatically shameful.

These two shameful failures—failure to protect victims, and failure to react to perpetrators—correspond to two distinct but interlocking aspects of human rights: that human beings are valuable, and that violating human beings is evil. Focusing on the first directs our attention to the victims; focusing on the second, to the perpetrators. Jaspers focuses exclusively on solidarity with the victims of evil. In this sense, our shame at inaction is no different than the bystander shame we would experience if we failed to assist the victims of a hurricane. But Jaspers's account is incomplete, because human rights principles also take into account the conduct of the perpetrator. We should

(and do) feel bystander shame at allowing the perpetrator to work his will unhindered, because inactivity appears to condone the crime. In this sense, the purpose of intervention is not just saving the victims but frustrating the perpetrators and declaring their conduct off limits. If we do not do that, we should be ashamed of ourselves.<sup>45</sup>

To forestall misunderstanding: I am not suggesting that one's reason for intervening is shame avoidance, as though the point of acting well is merely being thought by others to act well, or thinking well of ourselves. That would be narcissism, not morality. Shame avoidance provides a political and psychological *motivation* for intervening, but the moral *reasons* for intervening are the two I have just set out: protecting the victims and frustrating the perpetrators. The experience of bystander shame should tip us off when the reasons are strong; but it is the reasons, not the shame, that matter.

Couching the issue of intervention as a matter of honoring our own principles perhaps sounds too insufferably high-minded for foreign policy. There is, however, a political dimension to bystander shame. Unlike guilt, shame is essentially a public rather than an inner or private phenomenon: to be shamed is to stand revealed as subpar along some dimension that matters. For that reason, shame undermines other people's confidence in the person or group that is shamed. I have argued that to stand idly by in the face of evil is a kind of performative contradiction of our claim that human rights matter a great deal to us—a contradiction that makes us uncertain how much human rights do matter to us. How, then, can a nation that throws up its hands in the face of massive human rights violations maintain a credible pro-human-rights foreign policy (let alone a leadership role in world affairs)? Indifference to human rights catastrophes abroad may even weaken a nation's domestic culture of human rights. After all, maintaining any legal culture requires citizens' mutual trust and mutual reassurance that others honor the fundamental values of the legal culture. When citizens show themselves unwilling to sacrifice for those values, their own neighbors are entitled to doubt whether the values matter to them.

Not every failure to intervene against human rights violations shames us. Human rights violations go on everywhere all the time, and no nation need be ashamed merely because its armies are not

like Batman and Superman, eternally on call to fight malefactors whenever they threaten the innocent. The question of intervention turns on the degree of evil we face, on what the human rights violations are that we confront. Let us turn to that question.

## 10 Conduct Unbecoming of Civilized People

Over the decades, the United Nations and other authoritative bodies have promulgated many lists of human rights, beginning with the 1948 United Nations Universal Declaration of Human Rights. To read them is to discover a compendium of liberal and democratic political ideals, rule-of-law principles, and the economic and cultural components of a decent human life. The lists are aspirational in a strong sense: much of the world comes nowhere near satisfying any of these rights, and few if any countries satisfy them all. The Universal Declaration includes the right to participate in the arts and sciences (Article 27), the right to universal suffrage with secret ballots (Article 21), and the right to comprehensive social security in the event of disability (Article 25). As a distillation of nearly four centuries of political thought and experience, these ideas deserve the utmost respect. Historically, they have all been fighting faiths, and for good reason. Yet long lists are wish lists, and it appears farfetched that any deviation from them requires a military response from outsiders.

Instead, I want to suggest a very old-fashioned answer to the question: "which human rights are worth going to war over?" The answer is: those human rights the violation of which is uncivilized, so that standing idly by while they are violated calls into question our very commitment to civilization over barbarism.

The distinction between civilized and barbaric behavior is not the same as the distinction between right and wrong. Eating stew with your hands is uncivilized but not wrong; tax fraud is wrong but not uncivilized. I am suggesting that the acts calling for military intervention are those that are not merely wrong but wrong to the point of being barbaric. Before considering in greater detail which rights those might be, it is important to understand what this suggestion means as a matter of theory.

I regard the distinction between civilized and uncivilized behavior as a kind of anthropological primitive, like the distinction between food that is fit and unfit for human consumption, or between the clean and the dirty, the wholesome and the disgusting, the pure and the impure. Every human culture draws lines like these, making them in that sense universal; and the various distinctions often have some nonconventional basis—for example, you can not simply declare poisons to be edible or excrement to be clean. But various cultures draw the lines in different places, so that the distinction between civilized and uncivilized is culturally relative and in that respect insusceptible to rational or philosophical argument.

Let me illustrate with a familiar human-rights example. All the Western European nations have for practical purposes abolished the death penalty; the United States has not. My impression is that contemporary European revulsion to America's death penalty rest very little on philosophical argument; instead, Europeans tend to regard the death penalty as uncivilized. Americans obviously do not.

The American philosopher Jeffrey Reiman has argued, convincingly to my mind, that there is no stronger argument against a fairly administered death penalty than the insistence that it is uncivilized.<sup>46</sup> Arguments about mistaken executions, tainted trials, and racial bias implicitly concede that if these problems could be remedied the death penalty would be acceptable; and philosophical arguments against the death penalty are inconclusive at best. The institution of criminal punishment, I am assuming, can be justified; it can best be justified on retributive grounds; and the permissible upper limit of retribution is the *lex talionis*, which would sanction executing murderers. That, in brief, is the case Reiman makes that the death penalty is just punishment for murder.

But there is another side to the story. Nothing requires administering the maximum justified punishment; and we have typically understood the move toward greater civilization as a move toward greater moderation in punishment. In Reiman's words, "*though the death penalty is a just punishment for murder, abolishing the death penalty is part of the civilizing mission of modern states.*"<sup>47</sup>

This is a historicist argument, not a philosophical one. After all, it is only a few decades since Europeans too saw nothing uncivilized

about capital punishment. Americans have likewise become noticeably more restrained in their outlook. Today, capital punishment for property offenses would horrify us; a hundred years ago we hung horse thieves. Today, we would be outraged at the spectacle of executions staged as public entertainments—but what Nietzsche rightly called "festivals of cruelty" were standard fare everywhere for most of human history. Dramatists in Shakespeare's time complained because executions emptied the theaters; as recently as the 1920s, American lynch mobs were proud to be photographed in action, and their members mailed picture postcards to their friends. The line between civilization and barbarism is a shifting divide, not a philosophical fixed point.

### 11 Universal Rights and Relative Civilization

To say this is not to endorse moral relativism which, as Stuart Hampshire notes, "has always rested on an under-estimate of universal human needs."<sup>48</sup> As Hampshire elaborates, "There is nothing . . . culture-bound in the great evils of human experience, re-affirmed in every age and in every written history and in every tragedy and fiction: murder and the destruction of life, imprisonment, enslavement, starvation, poverty, physical pain and torture, homelessness, friendlessness."<sup>49</sup> These great evils, universally recognized, form the basis of moral argument in every culture and every epoch, regardless of how much the cultures' positive ideals and conceptions of the good vary. There is no society, and I will venture to assert that there could be no society, in which gratuitous infliction of the great evils is tolerable.

The entry point for relativism lies instead in the fact that in all societies it is thought permissible under some circumstances to inflict great evils on people. At the very least, hard-core violent criminals must be isolated from society, even though imprisonment is one of the great evils. Once this is admitted, then the question of which evils may be inflicted under which justifications arises, and disagreements among societies blossom. In Singapore, unlike the United States, flogging is permissible to punish crimes; in Saudi Arabia, shari'a-based law permits punishment by amputation. Punishments like

these are thought barbaric in the United States, but apparently the death penalty is fine. So are savagely long prison sentences: the U.S. Supreme Court has upheld a life sentence for repeated petty frauds, and life without parole for a first-offense drug possession.<sup>50</sup> In the United States, favoring life without parole for murderers makes you a humanitarian. Elsewhere, people shake their heads at American practices of punishment.

It is hard to find a principled rationale for such distinctions. I am suggesting that there is none. Torture and mutilation are *per se* barbaric, uncivilized; imprisonment is not—and that's the end of the story. To repeat the basic point: there is nothing culturally relative about recognizing the great evils, which are the same everywhere and at all times. What is culturally relative is the recognition of which great evils are off limits for civilized people. Controversial practices such as capital punishment and female genital mutilation, which some cultures find morally revolting and others applaud, make visible the bedrock arbitrariness of the nevertheless necessary distinction between civilization and barbarism.

What about the commonplace idea that what makes practices uncivilized is that they violate human dignity? Isn't that a principled rationale for the distinction? Torture, mutilation, and similar atrocious acts involve an assault on the human body. Confinement at least leaves the inmate in possession of an undisturbed body and a free mind—for the Stoics, all that is necessary for a decent human life. Mutilation dishonors the body; torture overwhelms the mind with distraction. Both, like rape, coercive medical experiments, and other crimes against humanity (the legal term for uncivilized acts) humiliate and mock. These are all crimes against humanity because they are assaults on human dignity.

In the same way, one might argue that the notion of human dignity underlies the other principal category of crimes against humanity (the first category being acts like torture and mutilation that are *per se* atrocious<sup>51</sup>). These are persecutions on ethnic, racial, or religious grounds, including genocide.<sup>52</sup> Group persecutions visit evils on people regardless of anything they may have done. In this respect, group persecutions are very different from political repression and persecution which, abhorrent though it is, attacks people for choices

they have made or actions they have performed. Human dignity, which demands that people be treated as individuals, requires no less.

So, of the three major categories of serious human rights violations—atrocious acts, group persecutions, and political repressions—only the first two represent basic assaults on human dignity. Only they are uncivilized. Although no record remains of how the term “crimes against humanity” was chosen by the framers of the Nuremberg Charter, it seems clear that the term was intended to register the judgment that these crimes represent a basic boundary-crossing from civilization to barbarism.<sup>53</sup>

Now, I do not disagree that the special barbarism of crimes against humanity is their affront to human dignity, over and above the tangible evils they inflict. But the concept of human dignity is too abstract to provide a principled basis for distinguishing civilized from uncivilized behavior. Human dignity is not a self-explanatory and self-executing notion; neither is the famous Kantian formula of treating people as ends in themselves rather than means. Social meaning matters immensely in giving content to ideas like these; we will never be able to deduce from the Kantian formula alone that flogging violates human dignity while confinement does not. It is more plausible that our catalogue of crimes against humanity defines what we mean by violations of human dignity. In effect, then, we recognize offenses against human dignity because they are uncivilized, rather than the other way around.

## 12 Intervention and Civilization: Is the Argument Neocolonialist?

It is time to make explicit the connection between civilization and bystander shame. The hypothesis is that we should be ashamed to remain bystanders in the face of evil when evil rises to the level of barbarism. As democratic citizens, we should support intervention to stop human rights violations when they seem not just wrong but barbaric to us, because it is shameful to remain uninvolved.

This is a disquieting conclusion, because we also recognize that our distinction between the civilized and the barbaric is fluctuating and fraught with relativism. In other words, one of the gravest steps



we can take—going to war—rests on a judgment that has no philosophical foundation and that others may reasonably disagree with. It is a judgment, one might say, based largely on sentiment.<sup>54</sup> To some observers, it was simply soft-headed emotionalism to support the Kosovo intervention because the ethnic cleansing looked sufficiently Holocaust-like, with boxcars of refugees and tragic columns of displaced Albanians walking their trail of tears to the border. But on the view defended here, sentimental criteria like these are signs that civilization is under attack, and acting on them is not soft-headed at all. It is, I fear, the best reason NATO had for going into Kosovo.

I find these conclusions troubling for reasons that are obvious, including the ease with which sentiments can be manipulated; but I want to address explicitly one important objection that does not worry me.

The objection is that the proposal smacks of neocolonialism. America and countries that share its conception of human rights are supposed to invade Kosovo or Rwanda to plant the flag of civilization. Is this not just a newfangled version of taking up the white man's burden?

I believe that it is not, for two reasons. First, and most important, humanitarian intervention does not have as its aim the conquest of colonies, the installation of an exploitative foreign elite, or the exaction of tribute and plunder. Colonialists hope to stay in the driver's seat as long as possible, but contemporary interveners wish desperately to get out fast. Intervention simply is not colonialism. Second, the aim is not to force an alien vision of the good on reluctant people. Recall Hampshire's crucial distinction between pluralism of visions of the good—which is indisputable—and monism when it comes to recognizing the great evils—which is also indisputable. It is crucial that the aim of intervention is to stop the infliction of evils, not to convert the heathen to an alternative conception of the good. There is no reason to believe that Rwandans think murder is a central practice of their civilization, or that the Somalis think deliberate starvation is, or the Serbs think that mass expulsion is. To suppose otherwise is to suppose something truly grotesque about Orthodox or Islamic or sub-Saharan civilizations.

In addition, the protection of human rights has been agreed to, at least at the level of international agreements and political lip service, throughout the world. That fact by itself pulls much of the sting of the cultural imperialism argument.

### 13 Conclusion

The stance toward civilization I have been describing here resembles what Richard Rorty has called "liberal irony"—liberal, because it attaches primary importance to human rights and human dignity; irony, because coupled with liberalism is an ironic awareness that alternative stances are equally possible and, in an analytical sense, equally defensible. Civilization is worth fighting for; civilization is also culturally relative: Rorty's liberal ironist embraces both propositions.

But Rorty also understands that as a stance for democratic citizens deliberating about war, or for makers of military policy, irony is a little too precious and a little too anemic.<sup>55</sup> Ironists, according to Rorty, are "never quite able to take themselves seriously because [they are] always aware . . . of the contingency and fragility of their final vocabularies. . . ."<sup>56</sup> The ironist's stance nests withdrawal within commitment within withdrawal in an endless series of Chinese boxes. This is not true to our experience.

For, in an important sense, relativist hesitations make life more complicated than it actually is. As an intellectual matter, one can recognize that standards of civilized behavior vary greatly among times and places, and that no a priori argument is going to settle the question. When we witness barbaric evil in action, matters assume a different aspect. The perpetrators become incomprehensible to us; the victims' sufferings overwhelm our imaginations. At that point, the distinction between the civilized and the barbaric appears like a bright line inscribed in the world; relativistic doubts evaporate.

But of course the perpetrators of barbaric evil are no more incomprehensible than any of us. One unhappy lesson of Kosovo, Bosnia, and Rwanda is that getting people to murder and torment their neighbors is not hard; in some ways, it turns out to be ridiculously easy. Our neighbors could do it; so could we. Civilization, we realize, is a perilously thin membrane between us and the lord of

the flies.<sup>57</sup> All the more reason to be ashamed if we are not willing to defend it.

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### Notes

1. "Just War and Human Rights," *Philosophy & Public Affairs* 9 (1980): 160-181; revised version in Charles Beitz, Marshall Cohen, Thomas Scanlon, and A. John Simmons, eds., *International Ethics: A Philosophy & Public Affairs Reader* (Princeton: Princeton University Press, 1985). When I cite to "Just War and Human Rights," I use the later version, which corrects errors in the first. The paper also appears in Thomas Morawetz, ed., *Justice* (Aldershot, UK: Dartmouth Publishing, 1992), 329-350, and Micheline R. Ishay, ed., *The Human Rights Reader: Major Political Essays, Speeches, and Documents from the Bible to the Present* (London: Routledge, 1997), 368-377.
2. "A standard argument is that we had to do something; we could not simply stand by as atrocities continue. That is never true. One choice, always, is to follow the Hippocratic principle: 'First, do no harm.' If you can think of no way to adhere to that elementary principle, then do nothing. There are always ways that can be considered. Diplomacy and negotiations are never at an end." Noam Chomsky, "The Current Bombings: Behind the Rhetoric," e-mail, March 29, 1999. Subsequently, Chomsky expanded on his views in *The New Military Humanism: Lessons from Kosovo* (Monroe, ME: Common Courage Press, 1999).
3. See Adam Roberts, "NATO's 'Humanitarian War' over Kosovo," *Survival* 41 (1999), 113-114 (arguing that atrocities and expulsions have always been worse under cover of warfare).
4. Michael R. Gordon, "Crisis in the Balkans: The Overview: NATO Plans Weeks of Bombing to Break Grip of Serb Leader," *New York Times*, April 1, 1999, A1 (reporting on NATO guidelines on choice of bombing targets).
5. Although I seldom find myself agreeing with columnist Charles Krauthammer, he seemed to me largely correct when, in a series of angry articles during the war, he

excoriated the Clinton administration for the drastic disconnect between its chosen means and humanitarian ends in Kosovo. On the present point: "In and of themselves, pacifism, humanitarianism, even sentimentalism are not to be denigrated. People who hate war . . . deserve the highest respect. But they shouldn't be running wars . . . When will we know our leaders have become serious? When they are prepared to hit a Rembrandt." Charles Krauthammer, "Bombing Empty Buildings," *Washington Post*, April 8, 1999, A31. See also Krauthammer, "The Road To Hell: Clinton, Kosovo and Good Intentions," *Washington Post*, April 2, 1999, A29 ("Has there ever been a clearer case of foreign policy means and ends so mismatched . . .?"); Krauthammer, "Fighting to Feel Righteous," *Washington Post*, April 23, 1999, A37 ("This disconnection between means and ends is more than simply a military failure. It constitutes a colossal moral failure. . . . [I]f your ends are humanitarian, you are obliged to supply the means to save those you propose to save.") Krauthammer's well-taken admonitions were not entirely fair criticisms of the Clinton administration, however, because—as was widely reported at the time and subsequently confirmed—many of the restrictions on NATO tactics were at the insistence of other NATO members: France in particular exercised a veto power over targets. Dana Priest, "Bombing by Committee; France Balked at NATO Targets," *Washington Post*, September 20, 1999, A1.

6. Hendrik Hertzberg, "On Patrol in the Kosovo Precinct," *The New Yorker* 75, July 12, 1999: 21, 24.
  7. "What kind of humanitarianism is it that makes its highest objective ensuring that not one of our soldiers is harmed while the very people we were supposed to be saving are suffering thousands of dead and perhaps a million homeless?" Charles Krauthammer, "Fighting to Feel Righteous," *Washington Post*, April 23, 1999, A37. On the same point, see Paul Kahn, "War and Sacrifice in Kosovo," *Report from the Institute for Philosophy and Public Policy* 19, nos. 2-3 (Spring/Summer 1999): 1-6. Michael Ignatieff has elaborated this argument in *Virtual War: Kosovo and Beyond* (New York: Henry Holt, 2000): 62, 161-215.
  8. In a speech on Kosovo given just hours before the war began, Clinton referred to a "Europe that is safe, secure, free, united, a good partner with us for trading"; he also stated that "If we're going to have a strong economic relationship that includes our ability to sell around the world, Europe has got to be a key." Remarks at the Legislative Convention of the American Federation of State, County, and Municipal Employees, March 23, 1999, 35 Comp. Pres. Doc. 491. A week later, however, Clinton defended his policy on explicitly moral grounds: "If there's one pledge that binds the past and future generations, it is that we cannot allow people to be destroyed because of their ethnic or racial or religious groups when we do have the power to do something about it." Radio address, April 3, 1999, 35 Weekly Comp. Pres. Doc. 579. Most commonly, Clinton combined humanitarian arguments with nonaltruistic arguments based on the possibility of the Balkan wars escalating and igniting a tinderbox. See, e.g., the Letter from the President to the Speaker of the House and the President Pro Tempore of the Senate, March 26, 1999, 35 Weekly Comp. Doc. 527; Radio address, March 27, 1999, 35 Weekly Comp. Pres. Doc. 531.
- One frequently offered justification of the Kosovo campaign was that NATO's credibility was on the line. This sounds like an argument of interest rather than morality, but it is not: if NATO had not undertaken pro-human-rights policy commitments in the Balkans, the alliance's credibility would never have been on the line. Thus, I regard the appeal to NATO credibility as a worthwhile moral argument masquerading as an argument of self-interest—a perfect illustration of setting minds at ease by positioning oneself on the moral low ground.

9. Each of the three fundamental values of public international law—state sovereignty, national self-determination, and human rights—can be allied or opposed to the other two, both in theory and in practice. State sovereignty and national self-determination are alike in that both are anti-individualistic, and they subordinate the interest in human rights to national or political communities that they take to be ontologically prior to individual humans. Conversely, when an existing state engages in violent repression of ethnic separatist movements, human rights advocates will join with nationalists to condemn the state; implicitly, their condemnation places the state on a lower plane than either individual human beings or national groups. Finally, political liberals sometimes insist that political significance is to be found only in the interests of human individuals and the states they choose to govern them; nationalists who insist that ethnic identity is thicker than liberal political bonds will be regarded as tribalist fanatics. It is hardly surprising that the protection of human rights appears to garner the least political support of the three. States have the guns, and ethnicities have the numbers.

10. I have argued this interpretation at greater length in my essay, "The Legacies of Nuremberg," in David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994), 335–378.

11. For discussions of the legality of the intervention see, e.g., Roberts, "NATO's 'Humanitarian War' Over Kosovo," 103–108; Catherine Guicherd, "International Law and the War in Kosovo," *Survival* 41 (1999): 19–34.

12. "Secretary-General Presents His Annual Report to General Assembly," U.N. Press Release SG/SM7136, GA/9596, September 20, 1999.

13. "The Romance of the Nation-State," *Philosophy & Public Affairs* 9 (1980): 392–397; reprinted in *International Ethics: A Philosophy & Public Affairs Reader*.

14. As Stanley Hoffman objected to Charles Beitz's antistatist view, "it is blissfully unpolitical, since he keeps forgetting that it is the very states he distrusts that will have to carry out the principles of justice." Stanley Hoffman, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse: Syracuse University Press, 1980), 57.

15. The Kosovo Liberation Army (KLA) offers a case in point: the KLA was simultaneously a defender of human rights, a rebel force with political ambitions of its own, and (as Milosevic charged) a criminal enterprise engaged in smuggling, terrorism, and drug trafficking.

16. On this point, see Allen Buchanan, "The Internal Legitimacy of Humanitarian Intervention," *Journal of Political Philosophy* 7 (1999), 71–87.

17. One reason Kant favored a republican constitution was that it would remove the decision to go to war from bellicose princes to the ordinary citizens who actually bear the burdens of war and would therefore not consent. Kant, "Perpetual Peace," in Hans Reiss, ed., *Kant's Political Writings*, 2nd ed. (Cambridge: Cambridge University Press, 1991), 100.

18. For a strong defense of this view in the context of Kosovo, see David Fromkin, *Kosovo Crossing: American Ideals Meet Reality on the Balkan Battlefields* (New York: Free

Press, 1999), 168. Fromkin believes that interventions should be limited to regions where the United States has vital strategic interests at stake.

19. Lea Brilmayer, *American Hegemony: Political Morality in a One-Superpower World* (New Haven: Yale University Press, 1994).

20. Obviously there are exceptions, most recently the Australian intervention in East Timor.

21. In practice, it may often turn out that Fromkin's "vital interests" test provides a useful rough-and-ready proxy for winnability: regions where a nation has no vital interests are very likely regions that are logistically remote and hard to campaign in. But this was not the case in Kosovo.

22. Philip Kourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories From Rwanda* (New York: Picador, 1998), 149–154; Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1997), 274–275.

23. British Prime Minister Tony Blair has offered a slightly different list of five necessary conditions for humanitarian intervention: that the intervener is sure of the facts; that diplomacy has been exhausted; that the intervention is militarily feasible; that the intervener is ready for the long term and not simply seeking an exit strategy; and that national interests are involved. Speech, April 22, 1999, quoted in Roberts, 119. The Clinton administration's criteria for participating in United Nations peace-keeping operations is set out in Presidential Decision Directive 25 (May 1994).

24. Prunier, 1–41, 89n, 102–107.

25. Kourevitch, 155.

26. *Ibid.*, 154–161. For a slightly less hostile account by a participant in the French intervention, see Prunier, 277–311.

27. I examine this argument in David Luban, "Action and Reaction in International Law," *Proceedings of the American Society of International Law*, 1987 (1987): 420–426.

28. David Hume incisively objects to social contract theory that neither tacit nor explicit consent is ever tendered to governments, and that far from consent being the source of loyalty, consent possesses no more moral force than loyalty. Hume, "Of the Original Contract," in *Essays: Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis: Liberty Classics, 1985), 465–487. The view I present here acknowledges Hume's point; but unlike Hume, I regard loyalty and support for a government as the form consent assumes in politics.

29. "Just War and Human Rights," 209.

30. I was thus wrong when I wrote, "Such rights are worth fighting for . . . not only by those to whom they are denied but, if we take seriously the obligation which is indicated when we speak of human rights, by the rest of us as well (although how strictly this obligation is binding on 'neutrals' is open to dispute)." "Just War and

Human Rights," 210. The final parenthetical comment shows some awareness that the argument is not as simple as I was making it out to be.

31. The argument that follows closely follows the reasoning of Buchanan, "The Internal Legitimacy of Humanitarian Intervention," 84–85.

32. Most people who believe in human rights also believe that human beings are of equal intrinsic worth, but this is not essential. A caste-ridden or patriarchal society can still be committed to the idea that even unequal people are entitled to a certain basic level of decent treatment. Believing that human beings are ends in themselves does not by itself guarantee believing in human equality: some ends in themselves may be more valuable than others.

33. In his recent book *What We Owe to Each Other* (Harvard University Press, 1999, ch. 2), T. M. Scanlon argues that there is no way to read off from the bare claim that something is valuable the particular reasons for action that it generates. Artworks are valuable in a different way from friendship, and we honor the value of artworks differently than we honor the value of friendship; the value of art and friendship provide different reasons for action. For that reason, the proposition that something is valuable functions as something like a placeholder for a more specific set of reasons for action, and when we inquire what we should do to honor the value of something, the claim of value "passes the buck" to the reasons that it summarizes. If Scanlon is right, then my claim that the value of humans provides a reason for intervening against rights-violations begs the question by passing the buck back to the value of humans. Not every kind of value is honored by being actively promoted, so we cannot assume that human value provides reasons for promoting the rights of other people. However, it seems to me uncontroversial that the value of humans is honored by being actively promoted; and, even on Scanlon's view, once we recognize that some action is an appropriate way to respect a value, the value can still rightly be deemed the source of the reasons.

34. The standard source is David S. Wyman, *The Abandonment of the Jews: America and the Holocaust, 1941–1945* (New York: Pantheon, 1984).

35. Karl Jaspers, *The Question of German Guilt*, trans. E. B. Ashton (New York: Dial Press, 1947), 32.

36. One important interpretive question is whether Jaspers is talking about humanity-wide guilt or community-wide guilt. In his sense, are we coresponsible (as he says) for "every wrong and every injustice in the world," or only (as he also says) for crimes committed in our presence—by extension, crimes committed within our own community? One of Jaspers's most distinguished present-day exponents interprets metaphysical guilt along communitarian lines, as a kind of guilt for what others in my group have done—it is a guilt based on recognizing that group identity is founded on shared group attitudes, including attitudes like racism that led to the crimes. Larry May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1992), 152–155. If that is what Jaspers meant, his idea will not be of use in explaining the response of many people to the events in Bosnia, Rwanda, and Kosovo—that we are sullied if we stand by and allow atrocities to happen, even when the perpetrators and victims are all strangers in a strange land with whom we share very little.

But I don't think this gets at the core of Jaspers's idea. Remember that Jaspers was addressing fellow-Germans about their own guilt, and his theme naturally leads him to emphasize guilt within the community. Elsewhere in his book, however, Jaspers

expands his discussion to "the responsibility of the inactive bystander" outside of Germany, and speaks about "solidarity not only among fellow-citizens but also among Europeans and among mankind." Jaspers, 92. He adds: "We have the right to recall that the others, not under terrorism, also remained inactive—that they let pass . . . events which, as occurring in another country, they did not regard as their concern." *Ibid.*, 95; see also 96. When Jaspers writes that "[m]etaphysical guilt is the lack of absolute solidarity with the human being as such" (*ibid.*, 71), he plainly has humanity-wide guilt in mind. Moreover, even when he is speaking only of German metaphysical guilt, Jaspers is not referring to attitudes that ordinary Germans shared with the Nazis. He is referring to their failure to "go into the streets when our Jewish friends were led away; [to] scream until we too were destroyed." *Ibid.*, 72. He is talking about the guilt of cautious anti-Nazis, not unconscious Nazis.

37. Jaspers, 32, 71–73. It is important, however, that Jaspers *did* think that there was a moral obligation to take risks. "I may be morally bound to risk my life . . . but there is no moral obligation to sacrifice one's life in the sure knowledge that nothing will have been gained. Morally we have a duty to dare, not a duty to choose certain doom." *Ibid.*, 71.

38. *Ibid.*, 71.

39. *Ibid.*, 32.

40. "That I live after such a thing has happened weighs on me as indelible guilt." *Ibid.*, 32. Again: "I know from a voice within myself: I am guilty of being still alive." *Ibid.*, 71. Again: "We are guilty of being alive." *Ibid.*, 72.

41. *Ibid.*, 33.

42. Robert Nozick goes so far as to say that because of the Holocaust, "Humanity has lost its claim to continue." Robert Nozick, *The Examined Life: Philosophical Meditations* (New York: Simon and Schuster, 1989), 238. Setting to one side the bathos in Nozick's reflection, it appears to me that Nozick is framing the same intuition as Jaspers, that the Holocaust is a kind of stain on those who were not murdered. There is no bathos in Jaspers.

43. Roberts, 104. For a similar thought, see Ignatieff, *Virtual War*, 178.

44. There is an important difference between Jaspers's ideal of unconditional solidarity and the more individualist Kantian ideal of respect for human beings as ends in themselves. The Kantian ideal regards human beings as possessors and sources of value, whereas Jaspers's ideal of unconditional solidarity needs to assume nothing about the value of human beings. Even on the nihilistic assumption that human beings are without any value at all, we may nevertheless prize the ideal of solidarity: there can be solidarity among the damned (a theme touchingly explored in literature from Dante's *Inferno* to *Waiting for Godot*). Conversely, respect for individual human beings as ends in themselves need not—and, in many versions of liberalism, does not—require stronger forms of solidarity than mutual respect and tolerance. This difference may account in part for the difference between Jaspers and Kantian liberals such as Rawls and Nozick.

45. The importance of frustrating perpetrators over and above helping victims has overtones of general deterrence, that is, responding punitively to wrongdoing to

deter future wrongdoing by others. This raises delicate issues, however: if general deterrence were the main point of the Kosovo intervention, then it might be justified even if intervening made matters worse for both the Kosovar Serbs and Albanians. Thus, general deterrence cannot be the *only* point. Thanks to Neal Kayal for raising this issue.

46. Jeffrey Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy and Public Affairs* 14 (1985): 115–148.

47. *Ibid.*, 115.

48. Stuart Hampshire, *Innocence and Experience* (Cambridge: Harvard University Press, 1989), 90.

49. *Ibid.*

50. *Rummel v. Estelle*, 445 U.S. 263 (1980) (sustaining life sentence for repeated petty frauds totaling \$228); *Hutto v. Davis*, 454 U.S. 370 (1981) (sustaining 40-year sentence for possession of less than nine ounces of marijuana); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (sustaining life without parole for first-offense cocaine possession, and holding that although cruel, the sentence is not cruel and unusual).

51. Article 6(c) of the Nuremberg Charter includes as crimes against humanity "murder, extermination, enslavement, deportation and other inhumane acts, among which we might include deliberate starvation (such as the Somali warlords practice), enforced disappearance, the theft of children, and coercive medical experimentation. My list does not correspond exactly with the extension given by law to the concept "other inhumane acts." For details, see M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd ed. (The Hague: Kluwer, 1999), 330–368.

52. I take this language from Article 18 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, quoted in Bassiouni, 192. In international law, genocide and crimes against humanity are distinct offenses, but it makes conceptual sense to classify genocide together with lesser forms of group persecution as one distinct kind of crimes against humanity. By contrast, I deliberately treat the category of political persecution separately, even though it is lumped together with racial and religious persecution in all the legal definitions of crimes against humanity, because political persecutions seem different in kind from persecutions on the basis of membership in an ascriptive group.

Roughly speaking, my distinction between atrocious acts and group persecutions corresponds with the two conceptually distinct but overlapping types of crimes against humanity: treating people in atrocious ways, regardless of their group membership, and persecuting people because of their group membership, regardless of whether the persecution consists of atrocious acts.

53. According to Bassiouni, the term was chosen by Robert Jackson in consultation with Hersch Lauterpacht, and the choice to say virtually nothing about its origin grew at least in part out of something akin to bystander shame on the part of the Allies for having ignored the crimes against humanity during most of the war. Bassiouni, 17–18.

54. Richard Rorty has argued that the human rights culture is entirely the product of sentimental education. Richard Rorty, "Human Rights, Rationality, and Semi-

mentality," in Stephen Shute and Susan Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993). I would add: education backed by the possibility of force.

55. Richard Rorty, "Private Irony and Liberal Hope," in *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 85–88.

56. Rorty, *Contingency, Irony, and Solidarity*, 73–74.

57. Whether this turns out to be for reasons grounded in rational behavior, in social psychopathology, or in collective myths is an all-important question. For sophisticated examples of these three explanatory strategies see Russell Hardin, *One for All: The Logic of Group Conflict* (Princeton: Princeton University Press, 1995), 142–182 (rational choice explanation); Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge: Cambridge University Press, 1989) (social psychology); Julie A. Mertus, *Kosovo: How Myths and Truths Started a War* (Berkeley: University of California Press, 1999) (collective mythology).